

## WHOSE CONFLICT? COPYRIGHT, CREATORS AND CULTURAL INSTITUTIONS

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### I INTRODUCTION<sup>1</sup>

Copyright can easily be seen through a lens of conflict. When considering histories of copyright legislation,<sup>2</sup> observations such as that by Eva Hemmungs Wirtén ring true: polarised arguments propel the copyright wars.<sup>3</sup> They are wars of ‘sound and fury’<sup>4</sup> in which analytical reviews of policy options may carry very little weight in law reform.<sup>5</sup> Academic analyses set out varied and often nuanced positions on copyright; some have highlighted concerns about copyright owners

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1 This article arises from a research project supported by the Australian Research Council (Kenyon and Christie, LP0669566) through its Linkage Projects scheme jointly with the University of Melbourne and research partners from across the cultural institution and creator sectors: Arts Law Centre of Australia, Australian Centre for the Moving Image, Museum Victoria, Museums Australia, National and State Libraries Australasia Consortium, National Film and Sound Archive, National Gallery of Victoria, National Library of Australia, National Museum of Australia, Powerhouse Museum, Screen Australia, State Library of Victoria. Thanks to Andrew Christie for assistance in conducting the interviews described in Part III. As Andrew Kenyon has previously sat on the boards of management of two of the research partner organisations – the Arts Law Centre of Australia and Museums Australia – it is worth noting that the views set out here are those of the authors, not necessarily of any partner organisations.

2 The US literature on legislative reform is probably the richest; while the peculiarities of the US legislative process may well be unique, the wider tendencies described there appear unlikely to be so unusual; see, eg, Jessica Litman, *Digital Copyright: Protecting Intellectual Property on the Internet* (Prometheus Books, 2001).

3 See Eva Hemmungs Wirtén, ‘Out of Sight and Out of Mind: On the Cultural Hegemony of Intellectual Property (Critique)’ (2006) 20 *Cultural Studies* 282; see also Eva Hemmungs Wirtén, *Terms of Use: Negotiating the Jungle of the Intellectual Commons* (University of Toronto Press, 1<sup>st</sup> ed, 2008).

4 Kimberlee Weatherall, ‘Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia’s Recent Copyright Reforms’ (2007) 31 *Melbourne University Law Review* 967, 968.

5 See, eg, the collective statement by numerous copyright academics, initially drafted by Martin Kretschmer: ‘Creativity Stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings’ (2008) 30 *European Intellectual Property Review* 341.

controlling access to material through digital communications,<sup>6</sup> others have doubted that digital developments have such significance, holding to a different view of copyright's promotion of public interests.<sup>7</sup> The future, present and history of copyright are highly political matters.<sup>8</sup> As far as subtle analysis exists in the academic literature, it is less evident within law reform. There, claims can be made in blunter, more clearly strategic, terms. Metaphors, especially related to property and piracy,<sup>9</sup> are routinely deployed in attempts to generate politically persuasive claims for reform. As Matthew Rimmer has recounted, the conflict extends to public demonstrations such as those over *MGM Studios Inc v Grokster Ltd.*<sup>10</sup>

Awaiting judgment, competing protestors squared off against one another on the steps of the Supreme Court ... On one side consumer activists marched with placards warning ... 'Hands off my iPod' ... Similarly, supporters of technology developers and entrepreneurs held up banners, proclaiming 'Don't Stop Innovation' ... On the other side, the supporters of copyright industries held up opposing placards ... 'Thou Shalt Not Steal – God' ... 'Feed a Musician Today – Download Legally'.<sup>11</sup>

One could well see how debates might 'degenerate into name-calling'<sup>12</sup> or form 'hostile camps'.<sup>13</sup> This article explores one instance of disagreement about copyright, while attempting to avoid that fate. In Part II, it analyses the views of cultural institutions and creators as seen in Australian law reform. In Part III it compares those positions with fieldwork into the views of copyright held within cultural institutions and creative sectors. The research suggests that some copyright creators understand their interests differently from those generally seen in law reform debates. They appear to support some uses by public cultural or collecting institutions – archives, galleries, libraries and museums – that go beyond the limitations and exceptions of existing copyright law. Although that claim should not be especially surprising, it is to a large degree absent from existing law reform. While not all creators hold this view of cultural institutions,

6 See, eg, Pamela Samuelson, 'Toward a "New Deal" for Copyright in the Information Age' (2002) 100 *Michigan Law Review* 1488.

7 See, eg, Jane C Ginsburg, 'Copyright and Control Over New Technologies of Dissemination' (2001) 101 *Columbia Law Review* 1613.

8 For an overview of contemporary debates about copyright history, see Kathy Bowrey and Natalie Fowell, 'Digging Up Fragments and Building IP Franchises' (2009) 31 *Sydney Law Review* 185. As the authors suggest, varied scholarly analyses of copyright and its 'public character' can usefully be viewed through differing responses to neo-liberalism: at 208.

9 As to the use of metaphor in intellectual property, see, eg, Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (University of Chicago Press, 2009) (especially on the 'intellectual property defense industry': at 506–7); William Patry, 'Metaphors and Moral Panics in Copyright' [2008] 1 *Intellectual Property Quarterly* 1; Patricia Loughlan, 'Pirates, Parasites, Reapers, Sowers, Fruits, Foxes ... The Metaphors of Intellectual Property' (2006) 28 *Sydney Law Review* 211; Jessica Litman, 'War Stories' (2002) 20 *Cardozo Arts & Entertainment Law Journal* 337.

10 *MGM Studios Inc v Grokster Ltd*, 545 US 913 (2005).

11 Matthew Rimmer, *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007) 1–2.

12 William Patry, *Moral Panics and the Copyright Wars* (Oxford University Press, 2009) xviii.

13 Jane C Ginsburg, 'How Copyright Got a Bad Name for Itself' (2002) 26 *Columbia Journal of Law and the Arts* 61, 71.

some clearly do. As explored in Part IV, this article suggests there would be value in mechanisms to facilitate greater use of copyright material by cultural institutions. While options could include further law reform and the continued development of voluntary collective licensing, options also include direct agreement with creators, at least for institutions' future collection activities.

## II LAW REFORM: A CONFLICT OUTLINED?

Imagine if a copyright law reform process examined possible new exceptions to facilitate digital collections being made publicly accessible by cultural institutions. In that reform process one could expect to see a difference in positions between institutions and creators. Cultural institutions might suggest that they need to be able to undertake such new uses of copyright material, without payment, in order to fulfil their missions – missions of stewardship that are imbued with goals that they see in educative and civilising terms. Creators, however, could suggest they are only seeking to protect their own longstanding rights. They might argue that no additional copyright exceptions should be enacted because the context has changed with digital communications and new markets could develop if their rights are preserved.

To consider the issue in the Australian context, one could also examine the documentary record from past reform. In 2005, there was significant debate about copyright law reform. Copyright exceptions were considered in light of the Australia-US Free Trade Agreement,<sup>14</sup> and the Attorney-General released an issues paper on fair use.<sup>15</sup> The debate, in part, focused on whether Australia should introduce an open ended fair use exception similar to that contained in US copyright law.<sup>16</sup> Concerns were raised about the lack of any provision in Australian legislation to allow the personal use of copyright material in ways such as shifting music from compact discs to portable digital devices or recording television broadcasts for later viewing.<sup>17</sup> The issues paper dealt mainly with exceptions for such personal use of copyright material through time and format shifting. However, the reform process generated wider debate around copyright exceptions, including what uses should be considered fair, appropriate

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14 *Australia-United States Free Trade Agreement*, Australia-United States, opened for signature 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ('AUSFTA'); see also *US Free Trade Agreement Implementation Act 2004* (Cth); Christopher Arup, 'The United States-Australia Free Trade Agreement: The Intellectual Property Chapter' (2004) 15 *Australian Intellectual Property Journal* 205.

15 Australia, Attorney-General, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*, Issues Paper (2005). For critical analyses of the wider context that preceded the *Copyright Amendment Act 2006* (Cth), including other law reform reviews and parliamentary hearings that are relevant to the reforms, see, eg, Weatherall, above n 4; Matthew Rimmer, 'Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement' (2006) 11(3) *First Monday*.

16 *Copyright Act*, 17 USC § 107 (1976).

17 See, eg, Attorney-General, above n 15, 2.

remuneration for copyright owners, changing digital uses of copyright material and the activities of cultural institutions.

The position of cultural institutions and their publics sat uneasily with the review's overall focus on private use. As the National Archives of Australia commented at the time, some proposals from the cultural institutions sector might be 'viewed as inapplicable in the commercial context of copyright', but they should be understood within 'the specific context of public policy in regard to publicly funded organisations and the dissemination of copyright material for non-commercial purposes by those institutions in accordance with their public mandate'.<sup>18</sup> In any event, relevant points can be drawn from submissions responding to the fair use issues paper from representatives of copyright creators and owners and representatives of copyright users.<sup>19</sup> Submissions made extensive comments about possible copyright exceptions for the private use of copyright material and about methods that could be introduced, such as licences or levies, to provide economic returns to copyright owners for such uses. But they also addressed the position of cultural institutions.

Submissions from groups generally allied with creators or copyright owners opposed the introduction of a fair use provision, including submissions by the Australasian Performing Right Association/Australasian Mechanical Copyright Owners Society ('APRA/AMCOS'),<sup>20</sup> the Arts Law Centre of Australia ('Arts Law Centre'),<sup>21</sup> the Australian Copyright Council ('ACC'),<sup>22</sup> the Copyright Agency Limited,<sup>23</sup> the Musicians' Union of Australia,<sup>24</sup> the National Association

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18 National Archives of Australia, Submission to Attorney-General's Department, *Fair Use Review*, July 2005, 18.

19 Submissions are available via Australian Government, Attorney-General's Department, *Copyright – Review of Fair Use Exception – May 2005* (4 September 2009) <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_Copyright-ReviewofFairUseException-May2005](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseException-May2005)>.

20 APRA represents songwriters and music publishers and licences rights of public performance and communication to the public in their musical works. AMCOS is a mechanical copyright collecting society with membership of music publishers and unpublished songwriters, created to administer the statutory licence in the *Copyright Act 1968* (Cth) pt III, div 6.

21 The Arts Law Centre is the national community legal centre for the arts. It is funded primarily by the Australia Council for the Arts and state governments, while also receiving substantial volunteer support from the legal sector. The Arts Law Centre provides legal advice, education, publications and advocacy for the sector in Australia, including creators across all art forms and arts and entertainment organisations. It has long played a role in law reform relevant to creators. See <<http://www.artslaw.com.au>>.

22 The ACC is a non-profit entity, with which more than 20 copyright owner organisations are affiliated, including Australian Institute of Architects, Australian Institute of Professional Photography, Australian Publishers Association, Australian Record Industry Association and Australian Society of Authors. As well as raising funds through training services, publications, consultancies and affiliation fees, it receives funding from the Australia Council for the Arts. See <<http://www.copyright.org.au>>.

23 The Copyright Agency Limited is a copyright collecting society representing print publishers, authors, journalists, visual artists, surveyors and photographers. It licenses reproduction rights to a wide range of users under statutory and voluntary licences. See <<http://www.copyright.com.au>>.

24 The Musicians' Union of Australia negotiates agreements related to conditions and remuneration and represents performing musicians to government and industries. It is funded by its members. See <<http://www.musicians.asn.au>>.

for the Visual Arts ('NAVA')<sup>25</sup> and Viscopy.<sup>26</sup> For present purposes, there are two uses such a fair use provision might allow. First, fair use could allow greater unremunerated copying for *private use*. Second, it could allow more flexibility in uses by *cultural institutions* for their own administrative purposes, for preservation of collection material and for promoting public access to their collections. In general, the above submissions did not see private use as justifiable without payment, and suggested that particular exceptions directed at cultural institutions, rather than a general exception such as fair use, would sufficiently address some elements of the second type of use. NAVA, for example, stated:

Copyright royalties provide an ongoing income stream ... for the artist. This income provision should not be jeopardised by arguments about access to knowledge by potential users who may have a financial interest themselves. We believe the current listed purposes under fair dealing exceptions are adequate.<sup>27</sup>

Instead of an unremunerated fair use provision, these copyright owner- and creator-related submissions favoured various systems of payment for private use and, in some instances, new exceptions for cultural institutions and things such as preservation.<sup>28</sup> For example, the ACC saw such private copying as being done 'for convenience' and did not believe it 'produces social benefits that justify a free exemption'.<sup>29</sup> Instead, the ACC supported the private copying of television programs, recorded music and audiovisual material, subject to remuneration and certain other conditions – such as the copy being made on private premises, for the private use of its maker and not later being lent, given away or used for any other purpose.<sup>30</sup> In relation to the second type of use, the ACC stated:

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- 25 NAVA is a peak body for the Australian visual arts and crafts sector, funded primarily by the Australia Council for the Arts and state and territory governments. Its remit includes policy advocacy, professional development and representation for the sector, and its constituency includes creators and curators, educators and administrators. See <<http://www.visualarts.net.au>>.
- 26 Viscopy is a copyright collecting society for visual artists that aims to promote their interests in relation to copyright and moral rights. Representing more than 7,000 artists, it licences reproduction, publication and communication of copyright in artistic works. See <<http://www.viscopy.com>>.
- 27 NAVA, Submission to Attorney-General's Department, *Fair Use Review*, June 2005, 4. NAVA also noted the academic evidence about artists' low incomes: 'More than one third of all artistic creators are earning below the poverty level ... This means that even a comparatively small amount of income can be of great significance.': at 2.
- 28 See, eg, APRA/AMCOS, Submission to Attorney-General's Department, *Fair Use Review*, July 2005; Copyright Agency Limited, Submission to Attorney-General's Department, *Fair Use Review*, July 2005 (although it did not support time or format shifting); Musicians' Union of Australia, Submission to Attorney-General's Department, *Fair Use Review*, July 2005; Viscopy, Submission to Attorney-General's Department, *Fair Use Review*, July 2005.
- 29 ACC, *Response to Issues Paper on Fair Use* (June 2005) 3.
- 30 Ibid, 5–6. The ACC position was directly supported by some other submissions from the sector, including: Viscopy, above n 28; NAVA, above n 27; and for private time and format shifting, the Arts Law Centre, Submission to Attorney-General's Department, *Fair Use Review*, July 2005.

Libraries have asked for [a] solution which will allow them to make a preservation copy of a rare published version of a work. The *Copyright Act* currently only allows preservation copies of manuscripts ... In our view, issues such as this should be addressed by a specific exception applying only to libraries, not a 'catch-all' fair use provision.<sup>31</sup>

Similarly, the Arts Law Centre supported sector specific exceptions in this context:

Back-up copies for the purposes of preservation and internal record management by libraries, museums and galleries should be provided for in a specific exception, rather than left to falling within a general fair use provision.<sup>32</sup>

Beyond the possibility of exceptions for uses such as preservation, these submissions appeared to support payment for all publicly accessible uses by cultural institutions. In some submissions, this is implied from the discussion of remunerated private use. But at times the point was addressed directly. The Arts Law Centre, for example, acknowledged that public benefits flow from public cultural institutions and supported them drawing on digital technology for their goals. However, where these institutions make material publicly available online, the Arts Law Centre submitted that there should be remuneration:

Whilst there is a public benefit in increasing the dissemination of copyright protected material held by our public institutions, it should not be at the expense of Australia's artists and other creators. A statutory licence system could be put in place to provide effective remuneration to copyright owners for these uses.<sup>33</sup>

Elsewhere in its submission, the Arts Law Centre similarly noted that backup copies made by cultural institutions for preservation and internal record management should not be made publicly available without remunerating copyright owners.<sup>34</sup> The visual arts copyright collecting agency, Viscopy, also supported remuneration for publicly accessible uses by institutions, which it saw as being achieved through wider adoption of its licences by the sector. It also recommended a statutory scheme to pay creators for private use<sup>35</sup> and the introduction of a levy on recorded media.<sup>36</sup>

Overall, these submissions argued for no or little unremunerated private use beyond the existing purpose based fair dealing provisions – although some suggested the purposes could be widened in relation to parody and satire.<sup>37</sup> And the submissions' arguments would seem to support payment to creators or copyright owners being required for publicly accessible uses by cultural

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31 ACC, above n 29, 5.

32 Arts Law Centre, above n 30, 6.

33 Ibid 9.

34 Ibid 6.

35 Viscopy, above n 28, 40.

36 Ibid 32–3. The idea of levies gained support in multiple submissions; see, eg, ACC, Viscopy, Musicians' Union of Australia, APRA/AMCOS and the Arts Law Centre. Copyright Agency Limited did not support unremunerated private use at all, but concerns were also expressed that this solution had not been effective in other countries due to the very wide range of devices that now allow digital reproduction: Australian Record Industry Association, Submission to Attorney-General's Department, *Fair Use Review*, July 2005, 4.

37 See, eg, Arts Law Centre, above n 30, 7–8.

institutions. It is also notable that several of these submissions emphasised difficulties facing creators in pursuing legal action about copyright, primarily due to limited financial resources.<sup>38</sup>

The submissions from cultural institutions, however, suggested quite a different landscape. Three points are worth highlighting. First, these submissions emphasised how copyright law was in partial conflict with their missions for providing access to and preserving cultural heritage material – missions generally mandated by statute. Digital access and the preservation on which it depends implicate copyright differently than analogue access, and are contrary to institutional goals. For example, the Australian Digital Alliance said:

[P]roblems with the current fair dealing exceptions ... do not concern private citizens alone, but extend to the core functions of public institutions that effectively act as ‘agents’ for private citizens in conserving and facilitating access to the nation’s cultural heritage and learning resources.<sup>39</sup>

Similarly, the Australian War Memorial suggested that ‘the prohibition of these activities by cultural institutions to fulfil their statutory functions is at odds with the public interest’.<sup>40</sup> Further, the Copyright in Cultural Institutions submission stated:

Due to copyright limitations, particularly in respect of the limited rights available under the library and archive copying provisions to digitise and communicate all collection material, some Cultural Institutions are prevented from effectively fulfilling their statutory mandates of storing, administering, preserving and providing access to their collections.<sup>41</sup>

Second, the submissions called for new unpaid exceptions, by which cultural institutions could make material publicly available. The Australian Digital Alliance, for example, called for unremunerated time and format shifting for private use *and* for such exceptions also to be available to public institutions for purposes including seminars, classes and presentations.<sup>42</sup> Submissions also

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38 See, eg, NAVA, above n 27, 2: ‘Because artists are usually financially disadvantaged, they are not able to pursue the enforcement of the copyright protection to which they are entitled’; see, eg, Musicians’ Union of Australia, above n 24; Viscopy, above n 27.

39 Australian Digital Alliance (‘ADA’), Submission to Attorney-General’s Department, *Fair Use Review*, July 2005, 15 (footnote omitted). The ADA is a ‘nonprofit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate’ with wide-ranging membership across the educational, cultural, technological, consumer and research sectors: at 4. See <<http://www.digital.org.au>>.

40 Australian War Memorial, Submission to Attorney-General’s Department, *Fair Use Review*, July 2005, 4. The AWM is a museum with an extensive collection related to Australian experience of war, and an archive of military records. See <<http://www.awm.gov.au>>.

41 Copyright in Cultural Institutions, Submission to Attorney-General’s Department, *Fair Use Review*, July 2005, 3. Copyright in Cultural Institutions is a working group of the IP and copyright managers of cultural institutions, primarily national bodies located in Canberra: at 2. See <[http://www.nma.gov.au/about\\_us/copyright\\_and\\_reproductions/cici/](http://www.nma.gov.au/about_us/copyright_and_reproductions/cici/)>.

42 Australian Digital Alliance, above n 39, 5–6. The Copyright in Cultural Institutions submission was similar, supporting private time shifting for non-commercial purposes and the extension of that to public institutions: Copyright in Cultural Institutions, above n 41, 17–9.

argued for the unremunerated public use of ‘thumbnail’ or lower resolution images online.<sup>43</sup> On this point, Museums Australia said:

It is essential that public museums are able to reproduce, without fear of prosecution, in thumbnail form or larger, reference copies of items in their collections for the purposes of facilitating public access and education – as required by the various government legislations under which museums operate – through means such as the internet and on-site public access tools.<sup>44</sup>

This aim of allowing cultural institutions to make some unremunerated public uses was often seen in these submissions as being best pursued through the addition of a more flexible fair dealing exception or fair use provision to Australian law.<sup>45</sup> While this position was probably influenced by the framing of the inquiry, it is a notable difference from the creator linked submissions, which suggested adding at most new exceptions that were limited to specific uses by the cultural institution sector.

Third, underlying many of these institutional submissions was a concern to delineate commercial and non-commercial uses. The Copyright in Cultural Institutions submission, for example, stated that where material has commercial value institutions

remunerate owners for commercial activities such as producing and distributing merchandise and publications ... [it is] only in respect of non-commercial use of collection material that Cultural Institutions make claims against the terms of reference for this submission.<sup>46</sup>

Similarly, the National Archives of Australia called for copyright legislation to differentiate between commercial and non-commercial contexts.<sup>47</sup> The types of uses seen as being non-commercial under such an approach included public display and in some situations promotion, as well as administration and preservation. The Copyright in Cultural Institutions submission, for example, said:

The *Act* should be amended to permit libraries and archives to make facsimile reproduction, or to otherwise copy, communicate or publicly perform in replicate form both works and subject matter other than works for display in not-for-profit exhibitions, or for the purposes of non-commercial promotion of exhibitions.<sup>48</sup>

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43 See, eg, Australian Digital Alliance, above n 39, 9; Copyright in Cultural Institutions, above n 41, 35–7. For US case law on fair use and thumbnail images outside a cultural institution context, see *Kelly v Arriba Soft*, 280 F 3d 934 (9<sup>th</sup> Cir, 2002); *Perfect 10 v Google Inc*, 416 F Supp 2d 828 (CD Cal, 2006) and on appeal *Perfect 10 v Amazon Inc*, 508 F 3d 1146 (9<sup>th</sup> Cir, 2007).

44 Museums Australia, *Fair Use Review*, 1. Museums Australia is a national association for the museums sector, including public art galleries, university museums and corporate or government-owned collections that are publicly accessible. It is funded primarily by membership fees from museums and those who work in the sector. See <<http://www.museumsaustralia.org.au>>.

45 See, eg, Australian Digital Alliance, above n 39, 16–23 (at least in terms of a flexible provision drawing on the Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1 Exceptions to the Exclusive Rights of Copyright Owners* (September 1998) and on the US fair use exception); Copyright in Cultural Institutions, above n 41, 8–13; National Archives of Australia, above n 18, 11–2.

46 Copyright in Cultural Institutions, above n 41, 4.

47 National Archives of Australia, above n 18, 9, 18.

48 Copyright in Cultural Institutions, above n 41, 6.

After these submissions, and many others from outside the sector, the fair use inquiry resulted in significant amendments to Australian law in 2006.<sup>49</sup> Unremunerated exceptions now allow private time and format shifting of some material,<sup>50</sup> and fair dealing has been expanded to include the purpose of parody and satire.<sup>51</sup> In addition, new exceptions allow ‘key cultural institutions’ to reproduce ‘significant’ works in their collections, in an attempt to deal with some of the difficulties with the existing preservation copying provisions.<sup>52</sup>

A new ‘flexible extended dealing exception’ has also been introduced, to allow a limited number of specified users, one of which is a body administering a library or archives,<sup>53</sup> to use copyright material for ‘certain purposes’ in limited situations.<sup>54</sup> This unremunerated exception may only be exercised if the use being undertaken is ‘not made partly for the purpose of the body obtaining a commercial advantage or profit’.<sup>55</sup> The provision is worded so as to import into domestic law the three step test from international copyright treaties.<sup>56</sup> With no Australian legal precedent for the interpretation of such a provision, uncertainty remains concerning its scope,<sup>57</sup> although Kim Weatherall has outlined the section’s likely bureaucratic effect.<sup>58</sup>

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49 *Copyright Amendment Act 2006* (Cth).

50 See, eg, *Copyright Act 1968* (Cth) ss 109A, 110AA.

51 *Copyright Act 1968* (Cth) s 41A; on the new fair dealing provision, see Conal Condren et al, ‘Defining Parody and Satire: Australian Copyright Law and Its New Exception’ (2008) 13 *Media & Arts Law Review* 273 (pt 1); (2008) 13 *Media & Arts Law Review* 401 (pt 2).

52 *Copyright Act 1968* (Cth) ss 51B, 110BA, 112AA; see, eg, Emily Hudson and Andrew T Kenyon, ‘Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives’ (2007) 30(1) *University of New South Wales Law Journal* 12, 49–50; Weatherall, above n 4, 996.

53 *Copyright Act 1968* (Cth) s 10(4) (definition of ‘archive’).

54 *Copyright Act 1968* (Cth) s 200AB; Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 10.

55 *Copyright Act 1968* (Cth) s 200AB(2)(c).

56 See, eg, *Berne Convention for the Protection of Literary and Artistic Works*, Paris revision, opened for signature 24 July 1971, 1161 UNTS 3 (entered into force 1 March 1978) art 9(2); *Agreement on Trade-Related Aspects of Intellectual Property*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) arts 13, 17, 26(2), 30 (‘TRIPS’).

57 However, several guides to the application of s 200AB have appeared from the cultural, educational and copyright owner sectors: see Australian Digital Alliance, Australian Libraries Copyright Committee, *A User’s Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions* (2008); Ministerial Council on Education, Employment, Training and Youth Affairs (‘MCEETYA’), Schools Resourcing Taskforce, Copyright Advisory Group, ‘Flexible Dealing – The New Flexible Dealings Exception: What Am I Allowed to Do?’ in *Smartcopying: The Official Guide to Copyright Issues for Australian Schools and TAFE*, <<http://www.smartcopying.edu.au/scw/Jahia/lang/en/scw/go/pid/542>>; ACC, *Special Case Exception – Education, Libraries, Collections: A Practical Guide* (2007).

58 Weatherall, above n 4, 997–8, who describes the 2006 reforms overall as ‘a series of piecemeal amendments, not informed by any common theories, or public policy objectives, and which are at times inconsistent in their approach – if not contradictory’: 987.

### III CULTURAL PRACTITIONERS: A CONFLICT REVISED?

Clearly, the law reform submissions have a certain rhetorical slant, being created and used with particular changes in mind. To some degree, that may underline the differences observed between those documents and more recent fieldwork with creators and cultural institutions in Australia. However, the differences still suggest a reconsideration of cultural institutions using copyright material and the remuneration of creators and copyright owners. Here, we raise two matters. First, not *all* creators want payment for all public uses by this sector. Some creators appear to see cultural institutions – at least in relation to some institutional actions – differently than, say, commercial entertainment companies that might use creators' material. Second, the point that appeared to distinguish whether payment was seen as being necessary or not, for many of our respondents from both the creator and institutional sectors, was the concept of commercial use. Neither of these issues – about payment or commercial use – appear so clearly in many policy analyses or law reform positions. The second, however, is closely allied to what is a key focus for the three step test in international copyright law; namely, the ideas of normal exploitation of a work and the legitimate interests of the copyright owner.

Between October 2007 and February 2008 project researchers conducted 10 group interviews in Melbourne, Canberra and Sydney, five with creators and five with representatives of cultural institutions.<sup>59</sup> The interviews, which sought to identify and explore copyright issues facing interviewees in the digital environment, involved a total of 55 participants including staff from public cultural institutions and creators working in visual art, new media, film, music or sound and writing. Most creators were involved in visual art or new media, making their views on the institutions particularly interesting.<sup>60</sup> Creators were invited to participate through information disseminated by research partners and other peak bodies. The aim of the interviews was to identify key copyright concerns for Australian digital collections and creators. In conjunction with the Arts Law Centre, surveys were also distributed to Indigenous community art centres to assess the attitudes of Aboriginal and Torres Strait Islander visual artists to the reproduction of their artworks by cultural institutions.<sup>61</sup> This survey material is also drawn from in the analysis below.

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59 The group interviews were led by Robin Wright, Andrew Kenyon and Andrew Christie, with at least two of the researchers conducting each interview. Participants are thanked for being so generous with their time and contributions.

60 Creator interviewees included those with works held by major public collections, such as state art galleries, and wider experience of a range of cultural institutions and relevant associations, such as NAVA or the Arts Law Centre.

61 The surveys were designed in conjunction with the Arts Law Centre, which has extensive experience with Indigenous artists and community arts centres: see, eg, information about Arts Law's 'Artists in the Black' project, available via <<http://artslaw.com.au/Indigenous>>. The survey achieved a 20 per cent response rate, with responses representing more than 500 Indigenous artists, primarily from remote locations, with some responses from centres in rural or urban locations.

The first issue arising from the interviews was that not all creators appeared to want payment for all public uses of their material by this sector. Payment was not wanted by some creators who suggested that, at times, they derived other benefits. As one creator commented, 'I think [if there is] a benefit to ... the artist, the filmmaker ... I think it [the use] is fine'. Benefits could include preservation and promotion or publicity. In relation to preservation, some creators saw this in itself as a benefit: 'I think that as a culture it's a good thing that [institutions] would want to ... preserve your stuff ... It's stewardship ... for someone to husband these works and keep them in some sort of preserved state.'

It was also notable that, for *some* creators, the use of their copyright material in promoting or publicising events and exhibitions appeared not to deserve payment. Benefits could flow to them from such uses, even without payment. A creator commented: 'If [institutions are] using it just to publicise events ... well acknowledgment [of the creator] obviously, consultation, but maybe no payment.' Similarly, in another group of creators, it was suggested that where material is used for promotion, creators benefit. While this might mean no payment should be required, creators in this group wanted to be consulted beforehand. This understanding of the value of promotion was, not surprisingly, also raised by institutions. For example, in relation to creators, copyright owners and representatives, it was suggested: 'most of them are open to as many press opportunities and promotional opportunities that they can get ... We have excellent relationships with lots of the dealers and even international copyright agencies.'

It was clear, however, that not all institutional uses would benefit creators, and many creators emphasised their limited financial resources and concerns with subsidising institutions. In one creator group interview it was stated, with some exasperation, that bureaucrats from cultural institutions who receive comparatively secure salaries expect artists to feel privileged that their work is getting shown. But those bureaucrats 'don't understand' – or do not sufficiently appreciate – that the institution is also getting a benefit. Or, as another creator commented, 'even if they do say it's going to be helping you, a lot of the time it's ... not, you're kind of helping them and they're getting paid and you're not.' There were also concerns that subsequent unauthorised commercial use by others could be facilitated by institutions' actions.

Another suggestion weighing against payment was the way in which creators themselves use cultural institutions' digitised collections. The role of use in further creation – perhaps copyright's key 'feedback loop'<sup>62</sup> – was raised in multiple creator group interviews. Creators noted how they benefit through accessing others' work when institutions have made it available digitally. Interviewees recognised how they are both creators and users: 'I really like to have access to these images because I find them quite inspiring ... I wouldn't re-use them for profit, but I'm really grateful that some cultural institution has catalogued these works and made them available.'

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62 Bowrey and Fowell, above n 8, 190.

The dual position of creators – as both owners and users of copyright – was clear:

There's a conflict ... any creator has the conflict too, because there's a conflict of being a creator vis-à-vis a consumer. If you're a creator in the back of Woop Woop [that is, a very remote location] you also want to consume and you want to see what's being shown in Sydney or Melbourne or wherever. So there's this constant conflict between the two.

The second issue that distinguished payment and non-payment for many interviewees was the concept of commercial use. In this regard, creators did not generally support a distinction based on whether the institution as a whole was profit seeking or not. An argument that the institutions' activities in general were 'for the public good' was insufficient: 'Why should artists foot the bill if something's being used for educational [or] scholarly purposes ... Education isn't free.'

Rather than institutions' profit or non-profit character, creators were concerned with whether income would be generated by the use in question: 'Whether they're a profit making body or not, it seems to me immaterial'. If it is being sold, it is seen as commercial. As one interviewee noted, however, 'there's a whole grey area' as to what amounts to 'selling' or obtaining a profit, an issue to which we return below. Similarly, another creator group interview suggested that 'not-for-profit' use was acceptable without payment. Again, to the reference was to specific use without profit arising from it, rather than any use by non-profit institutions. For these creators, any revenue appeared to equal 'profit', which in turn should give rise to payment. As a creator who was comfortable with unremunerated promotional uses by institutions added:

If they're using it to develop an income stream for themselves, there should be ... at least a token payment to the artist for their contribution ... If they're using it ... to publicise events ... well ... maybe no payment. But if they're making money, absolutely.

There is of course tension within this statement because promotional activities using creators' work could publicise events that generate income for institutions. However, the overall impression was that at least some public activities by cultural institutions did not require payment in the view of some creators. Of course, adding specificity to that is difficult without wider fieldwork, but the simple point is that it appears incorrect to state that creators want payment for all uses that currently lie outside the unremunerated exceptions and limitations of copyright law. Creators had differing views, which is useful to note in itself, given the position of creators as those who, perhaps rhetorically more than in any substantial sense, are a central trope in debates about copyright law. But the varied responses suggested doubt as to whether a majority of creators whose work relates to contemporary collecting institutions would want such payment.

One approach to the question of commercial activities, which was evident from some creators, was that commercial use deserved payment and that activities in which revenue was obtained amounted to commercial use. It was unclear whether this extended to all such activities, but the production of merchandising items to be sold by institutions, whether on a cost recovery basis

or not, was given by interviewees as an instance of commercial activity warranting payment. Similar views were presented in other group interviews with creators. For example, that artists should be paid for work to be reproduced in a catalogue – ‘the printer gets paid, so should the artist’; and that payment was warranted where money was ‘coming in’ to the institution or where patrons could ‘take away’ a reproduction of the copyright material. As one creator emphasised:

If others are making money out of your creation ... yes fine, it’s great that the world can see it, but who’s feeding off the back of my work? And there are an awful lot of bureaucrats in this country who are doing that ... [T]hat’s why the creators get so edgy. Because they’re dealing with bureaucrats who are on salaries and they’re not.

In another creators’ group, payment was not seen as necessary for catalogues that accompanied a specific exhibition. However, ‘if they’re using it as a general catalogue to promote the gallery or if it’s a fundraising exercise [that] is a different story, they’re using someone’s intellectual property for perceived gain’.

The point at which a use became commercial appeared to differ between creators and also between institutions. Institutions might view catalogues, for example, as non-commercial, or at least not warranting payment: in one institutional interview it was suggested: ‘are catalogues commercial? In some cases fees are paid to artists for catalogues, but generally the institution can’t afford this’. Other institutions, however, saw such publications as being situated on the cusp of commercial use:

[I see the uses we make as] largely non-commercial. Anything educational would be non-commercial, anything curatorial would be non-commercial, but a publication is very interesting because it ... is a commercial venture, but also it’s a curatorial [venture] and a record of the exhibition ... [F]or anything in a publication, we don’t treat [the use] as falling under review and crit[icism], even if the work may be discussed critically in the text we’d still license it because we’re selling a product.

It is interesting that the idea of *selling a product* seen in this institutional statement could be an echo of creators’ comments.

Online use of creators’ work by institutions also drew varied responses. Within one group interview, for example, a small number of creators said all online use should generate payment. However, the view was also clearly put by other creators in that group that if institutions had purchased physical works, they should be able to place images online without any further payment. Others in the group suggested online use should be negotiated when institutions buy works. Similarly, in another creator interview it was suggested that online catalogues extend the life of works or exhibitions and creators benefit from such digital representation. Thus, payment should not be required for such use, but institutions should seek creators’ consent.

Notably, the online availability of lower resolution images, without payment, was seen as acceptable in multiple creator interviews. This appeared to be because the use was seen as non-commercial. ‘All the ones online are low [resolution]. I think that’s a great idea because then they can’t do anything commercial with them.’

Some creators, however, took a stronger position on commerciality: ‘Whatever people get ... Linden dollars or whatever, I want a cut.’ The reference to virtual worlds within that quote – Linden dollars being the currency used in *Second Life*<sup>63</sup> – well illustrates a concern about future revenue possibilities being lost to creators. As put in another creator interview: ‘Further on many artists are wondering if archival institutions are going to make money out of the use of this material’ and:

A lot of people who make work make a distinction between your intellectual property being used for profit and for non-profit. Like I think a lot of people who are used to making work and ... granting licences are going to be perfectly happy if [a major public gallery] buys an island on *Second Life*, doesn’t have any advertising on the island or other things that it makes money from, but uses it to re-transmit my work. I think most creative people would be comfortable with that. But when the [same public gallery] starts charging admission for the island or selling advertising on the island then that’s where it starts to become a problem.

This returns us to the concept of artistic creators subsidising the cultural sector and, as one creator commented, ‘[t]here is this feeling that because we do such interesting work we don’t need to feed ourselves’.

The survey of Indigenous community arts centres also raised the distinction between commercial and non-commercial use. As one respondent commented, ‘if the use does not generate money for the user then we don’t request a fee’. Similarly, unremunerated on-site digital reproduction and display of works in their collections by public cultural institutions was supported by nearly three quarters of respondents.<sup>64</sup> In some situations, such a use might come within the unremunerated exception in the *Copyright Act 1968* (Cth) that allows original artistic works to be reproduced and displayed on-site via ‘dumb terminals’ where the work has been lost or deteriorated or become ‘so unstable that it cannot be displayed without risk of significant deterioration’.<sup>65</sup> But most situations where such unremunerated use was endorsed by respondents would not fall within the narrow statutory requirements.

Even so, the overall picture from the survey differed from the interviews in four respects, the latter three being matters only of degree. First, respondents indicated their need to be able to prevent institutions making reproductions in particular situations; for example, where creators were deceased or where works depicted sensitive, secret or sacred subject matter. Second, reproducing artwork without payment to publicise the institution or specific exhibitions drew varied responses, as in interviews, but survey responses were less supportive of this option than interviewed creators. A slight majority of survey responses stated payment should be made for any use in publicity. Third, attitudes varied with regard to online reproduction. Half the responses supported online reproduction without payment where work had been purchased by public cultural institutions;

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63 See *Second Life*, <<http://secondlife.com>> and see, eg, Melissa de Zwart, ‘Virtual Worlds and Social Networking’ [2008] *New Zealand Law Journal* 229.

64 Subject to more general concerns about retaining control over reproduction, as noted in the following paragraph.

65 *Copyright Act 1968* (Cth) ss 51A(3A), (3B).

the balance was divided between responses agreeing an extra fee should be paid by institutions and those saying no online reproduction should be allowed. Fourth, any reproduction in physical items that institutions could sell was seen by all survey responses as commercial and warranting payment. Thus, catalogues would always be viewed as merchandising, unlike the perception of some non-Indigenous interviewed creators.

#### IV CONCLUSION: OPTIONS FOR DEVELOPMENT

In the law reform submissions, creator- and owner-related submissions argued for no or little unremunerated private use beyond existing fair dealing (perhaps widened in relation to parody and satire). They also called for cultural institutions to pay for any public use of digital collection material, except possibly where that related to certain forms of preservation. Cultural institution submissions, however, suggested that copyright law conflicted with their institutional missions for preservation and access. They also saw social benefits in having some unremunerated public uses, beyond existing copyright limitation and exceptions, including thumbnail or lower resolution images. In addition, they were concerned to distinguish between commercial and non-commercial uses, with non-commercial uses seen as including forms of public display online and possibly some forms of promotion.

The fieldwork conducted with creators offered support for the issues raised in the creator and copyright owner-related submissions. Interestingly, however, it also suggested areas of possible agreement with the institutional submissions. In particular, not all creators appeared to want payment for all public uses, and at least some raised lower resolution or thumbnail images as an example of what they saw as non-commercial use that could be permitted without payment. In addition, some promotional activities were suggested as being acceptable without payment. And there was some commonality between the groups over commerciality arising where money 'comes in' to the institution or products are sold. However, catalogues were less clearly commercial or non-commercial, for institutions as well as creators. In relation to Indigenous artists, not all expected payment for all public uses of works owned by public collections, some considered online reproduction without payment appropriate for such works, and some saw promotional uses as acceptable without payment. However, catalogues were understood as being commercial by survey respondents.

Before considering avenues for further research suggested by this research, it is worth noting the ways in which existing Australian copyright law does not permit cultural institutions to use material in many of the ways raised in the fieldwork. In general terms, the uses discussed in interviews related to institutional administration, exhibition and publicity. Provisions already exist in the *Copyright Act 1968* (Cth) to deal with some aspects of administration,<sup>66</sup> but

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66 See, eg, the issue of preservation, below n 83.

less so as regards exhibition and publicity. For example, as noted above, unremunerated exceptions allowing original artistic works to be displayed onsite via ‘dumb terminals’ are limited to situations of lost, deteriorated or unstable works.<sup>67</sup> This is far narrower than uses suggested as acceptable by the Indigenous survey. Equally, using lower resolution images online does not come within any express provision of the *Copyright Act 1968* (Cth). Arguments might be mounted that sometimes such use would fall within the new ‘flexible extended dealing exception’,<sup>68</sup> the success of which could well hinge on just what *are* commercial and non-commercial activities in relation to the category of copyright material in question. That is, at least some non-commercial activity might not be in ‘conflict with normal exploitation’, nor ‘unreasonably prejudice the legitimate interests of the copyright owner’.<sup>69</sup> The section, however, does not provide a clear path for such use, especially not for risk averse institutions, or for providing collection wide access.<sup>70</sup> Even less would the section appear to allow general promotional use of copyright material by institutions.

Several avenues could be pursued from this point, individually or in combination. As has been noted in earlier research into cultural institutions and copyright:

the range of collection material and uses of it, and the variety of economic and non-economic interests of creators ... suggest that it may be useful to consider multiple reforms, including specific and general unremunerated exceptions, as well as statutory licensing schemes ... [T]ypes of collection material and interests of those who have created that material differ in very substantial ways across the cultural institution sector.<sup>71</sup>

One avenue would be revisiting options for law reform specifically relevant to the cultural and creative sectors. As we have suggested in Part II above, this issue was touched on but not really directly addressed in the process preceding the 2006 amendments. As well as benefitting from a fuller examination of the views of creators and institutions than our samples, it could warrant a careful consideration of the effects of the 2006 reforms – effects that, in practice, are yet to become clear. It is worth noting, however, that there are various options for such statutory reforms. They can be analysed in terms of specific or general exceptions, remunerated or unremunerated. Andrew Christie, for example, has set out an analysis that would support the introduction of a statutory licence to facilitate a ‘21<sup>st</sup> Century-Style [cultural] Institution’, one that could provide full

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67 See above n 65 and accompanying text.

68 *Copyright Act 1968* (Cth) s 200AB; see above n 53–8 and accompanying text.

69 Within the structure of s 200AB, these appear to be taken as the more important factors: see, eg, Australian Digital Alliance and Australian Libraries Copyright Committee, above n 57; ACC, above n 57.

70 Australian cultural institutions have been notably risk averse: see, eg, Hudson and Kenyon, above n 52. Changing expectations of their audiences may change that, but see Steve Cleary, ‘Speech Recordings at the British Library: Digitization and Access’ (2010) 16 *Convergence* 53, 55 who notes that, internet notwithstanding, ‘legal obligations to copyright must be followed to the letter if institutional integrity is not to be compromised’.

71 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*, (Edward Elgar, 2007) vol 6, 241, 266.

online access to its collection.<sup>72</sup> Guy Pessach has also suggested the development of statutory licensing to underpin widely accessible digital archives.<sup>73</sup> The matter was also raised in some of the Australian law reform submissions.<sup>74</sup> The varied responses from our fieldwork suggest any such licence would still need careful consideration. There would certainly be value in the comprehensive digital archives that such a licence could support. As Sally McCausland has noted: ‘The sense of history which comes with access to the whole, or a substantial part, of an archive, is of much greater cultural value than a small selection curated through the random prism of copyright clearance.’<sup>75</sup>

And previous Australian research suggests that the digital collections of cultural institutions do suffer from that sort of random copyright prism.<sup>76</sup> But pursuing an avenue of specific or general copyright exceptions would necessitate a return to copyright law reform, which does not appear particularly likely to occur soon in Australia.

Collective avenues remain worthy of further consideration. The time staff expend in clearing rights is significant,<sup>77</sup> and the value of voluntary collective licensing in addressing this could be high,<sup>78</sup> as some existing institutional practices suggest.<sup>79</sup> To date, there are options that appear viable for certain categories of work and use, but there are limitations:

In some areas, the rights-holders are so diverse a group that only limited mandates for voluntary collective licensing have been achieved to date; as in the visual arts. In some areas, there is no collective rights management at all, and unlikely that any will emerge in the near future. Examples include the licensing of archival footage controlled by ... documentary makers. In other cases, the membership of the collecting society is not universal and does not cover all rights-holders. This

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72 Andrew F Christie, ‘Cultural Institutions, Digitisation and Copyright Reform’ (2007) 12 *Media & Arts Law Review* 279. See also Stevan Gompel and P Bernt Hugenholtz, ‘The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It’ (2010) 8 *Popular Communication* 61.

73 Guy Pessach, ‘[Networked] Memory Institutions: Social Remembering, Privatization and its Discontents’ (2008) 26 *Cardozo Arts & Entertainment Law Journal* 71, 133–4. He also suggests that, to deal with possible market substitution where institutions made new works available digitally, a ‘compulsory licensing scheme could include a differential scale of royalties for the making accessible of newly released copyrighted works’: at 134.

74 See, eg, Arts Law Centre, above n 30 and accompanying text.

75 Sally McCausland, ‘Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old (But in Copyright) Cultural Material for Digital Use’ (2009) 14 *Media & Arts Law Review* 142, 160.

76 See Hudson and Kenyon, above n 52; see, eg, Copyright in Cultural Institutions, above n 41, 2–3.

77 McCausland, above n 75.

78 The same general point underlies the current the UK exploration of a Digital Rights Agency, raised in the Department for Culture, Media and Sport and Department for Business, Enterprise and Regulatory Reform, *Digital Britain: The Interim Report* (Cm 7548, January 2009); <[http://www.culture.gov.uk/what\\_we\\_do/broadcasting/5631.aspx](http://www.culture.gov.uk/what_we_do/broadcasting/5631.aspx)>. See also the UK Intellectual Property Office (with Department Innovation, Universities and Skills; Department for Business Enterprise and Regulatory Reform; and Department for Culture Media and Sport), *Copyright in a Digital World: What Role for a Digital Rights Agency?* (March 2009) <<http://www.ipo.gov.uk/digitalbritain.pdf>>, which suggests that a Digital Rights Agency would aim to facilitate ‘negotiation and rights clearance and discussion around standards’: at 6.

79 See, eg, Hudson and Kenyon, above n 52, 23–5, 42–3.

means that the repertoire of the collecting society must be checked on each occasion and, in some cases, particularly in relation to international copyright material, complex inquiries must be undertaken.<sup>80</sup>

As Shane Simpson commented in the 1990s in his analysis of collective administration, control of digital rights 'is one of the great conundrums' for collecting societies.<sup>81</sup>

A third avenue could deal more directly with the varied views we found about unremunerated non-commercial uses. Direct agreement, perhaps facilitated by model terms developed across the sector, could allow greater digital access to material collected by institutions in the future. While this avenue is currently being explored,<sup>82</sup> some initial comments can be made here about such a possibility.

First, the scope of potential copyright works and subject matter that could be dealt with is vast. Our fieldwork focussed on creators from many art forms. However, cultural institutions also collect substantial amounts of material where the copyright author is not a creator in the same way as our interviewees or survey respondents. Thus, while institutions may acquire a short audiovisual work from a contemporary digital artist, equally a photograph documenting the photographer's experience of 1970s immigration to Australia may be donated by a photographer who is otherwise unknown. It seems unlikely that many of these copyright authors would want less digital accessibility than the relatively unrestricted approach to non-commercial use of some interviewed creators. However, finding a single set of model terms that could adequately deal with this variety of creators could be challenging.<sup>83</sup> Second, the variety suggests that current and future developments in collective voluntary licensing will be unable to address the full scope of cultural material at issue. In addition, the way in which direct agreement could interact with collective practices in relation to different rights would also warrant consideration.

Third, leaving aside both those matters, it appears that the following are among the unremunerated activities to which some creators and institutions

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80 McCausland, above n 75 (footnotes omitted).

81 Shane Simpson, *Review of Australian Copyright Collecting Societies* (1995) 13.

82 The use of the phrase 'model terms' rather than, eg, 'model contract' is deliberate, as it is not yet clear whether contractual licensing is the only form of agreement that might be pursued. The ideas are being developed primarily with the Arts Law Centre and the Collections Council of Australia (before the closure of its secretariat on 30 April 2010), along with wider involvement from the research partners and, it is expected, other key bodies in the sector. The *National Standards for Australian Museums and Galleries* (September 2008), produced by NAVA jointly with the Collections Council of Australia, Museums Australia and a number of peak cultural institutions, offer a useful basis but they remain at a high level of generality, setting out various principles, standards and benchmarks. For example, Standard C1.5 reads: 'The museum makes its collection accessible in digital formats and in online environments, as resources permit', and the related Benchmark C1.5.3 reads: 'Legal requirements are addressed, along with ethical and other protocols, before any digitisation process begins' and notes that this includes 'adhering to the laws of ... copyright': at 59–60.

83 There would also appear to be an important role for more developed risk management practices within cultural institutions, particularly in relation to material such as the social history photograph described above. On risk management in the sector, see, eg, Hudson and Kenyon, above n 52, 39–41.

would agree: administrative purposes of the institution, for example, where there are doubts that the specific provisions of the *Copyright Act 1968* (Cth) cover standard or developing practices;<sup>84</sup> public exhibition on site, where that involves the exercise of copyright rights; inclusion of a lower resolution image online, such as in a publicly accessible online catalogue of the institution's collection or as part of an online exhibition; inclusion in a printed exhibition catalogue; and use for publicity purposes of the institution. That is, the fieldwork suggests agreement can be possible in relation to administration, exhibition and publicity. If model terms were developed, they may provide for several options being made available for creators to choose from, given that the fieldwork suggests creators will differ in what they see as acceptable use. From both the fieldwork and general approaches to copyright, it seems that any other use, such as merchandising, would require separate agreement.

In a context of rapidly changing practices of cultural engagement and uses of communications technology, it may well be challenging for cultural institutions, creators and copyright owners to find useful answers to the copyright questions they face. While public archives, galleries, libraries and museums can be seen as 'public-oriented memory institutions',<sup>85</sup> with important 'non-market-based aspirations' centred on promoting access,<sup>86</sup> occupying 'a linchpin position in the circulation of information and knowledge',<sup>87</sup> creators also can be seen as pivotal within cultural life. Copyright conflicts should not obscure either of those claims.

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84 See, eg, the preservation copying provision in *Copyright Act 1968* (Cth) s 51B, which allows, under certain circumstances, only three reproductions to be made, and discussion of the section's limitations in Weatherall, above n 4, 996; see also Hudson and Kenyon, above n 52, 49–50.

85 Pessach, above n 73, 75. The phrase 'memory institutions' has usage in the sector of cultural and information professionals: see, eg, William Kilbride, 'Remembering the Cluster: Cultural Memory Institutions and the JISC Learning and Teaching Programme' (2005) 35 *VINE: The Journal of Information and Knowledge Management Systems* 11; Helen Forde, 'Access and the Social Contract in Memory Institutions' in G E Gorman and Sydney J Shep (eds), *Preservation Management for Libraries, Archives and Museums* (Facet, 2006) 166.

86 Rebecca Tushnet, 'My Library: Copyright and the Role of Institutions in a Peer-to-Peer World' (2006) 53 *University of California Los Angeles Law Review* 977, 1029.

87 Hemmungs Wirtén, above n 3, 111.