



**SUBMISSION TO THE
ATTORNEY GENERAL'S DEPARTMENT AND PHILLIPS FOX**

**DIGITAL AGENDA REVIEW 2003
LIBRARIES, ARCHIVES AND EDUCATIONAL COPYING
ISSUES PAPER**

SEPTEMBER 2003

Introduction

The AFC is the Commonwealth's primary agency for supporting the development of film, television and interactive media projects and their creators. One of the AFC's key objectives is to support activities and events that provide the wider Australian community, including regional Australia, with access to Australian audiovisual product. As of 1 July 2003, ScreenSound Australia – The National Screen and Sound Archive (“the Archive”) was integrated into the AFC. The Archive is responsible for preserving, documenting and interpreting the Australian experience in audiovisual media.

Comments have only been provided against the issues that directly affect the digital operations of the Archive.

Issues

Issue 4

4.1 Do any of the provisions in sections 49 or 50 create any additional costs of create any artificial barriers to the provision or circulation of works or information, without adequately protecting the rights of the owners?

4.2 Does any aspect of Division 5 of the Act require clarification or amendment, to remove any uncertainties to better express or meet the objectives of the Digital Agenda Act?

4.3 In relation to libraries and archives community function as disseminators of information in digital form, the Review also seeks your views...about whether the provisions of Division 5 are likely to:

- ***Significantly reduce or remove the incentive to create works or other subject matter that is protected;***
- ***Lead to creating or reducing opportunities for rent seeking or otherwise create or offset additional social costs;***
- ***Promote widespread use of the material and increase markets;***
- ***Impede or encourage material to eventually be available as part of the public domain.***

It is the AFC's opinion that the requirement for any electronic copy of a work made by a library under s. 49 or s. 50 to be destroyed after the copy is communicated to the person requesting it is administratively inefficient. This in turn affects a copyright owner's potential for revenue.

A typical scenario involves a publisher's request for a still photograph. Under the current legislation a low-resolution electronic copy is sent, and then must be destroyed, (unless it was originally acquired in digital format or we have specific permission from the copyright owner to retain the file). The following day, another client asks for a copy of the same photograph. If the legislation is

adhered to, the low-resolution digital file will have been destroyed and must be re-requested, using already stretched internal copying resources.

Presumably the requirement was included to prevent libraries from developing a digital database of protected works that could form the basis of a digital supply service, competing with copyright owners' markets. The administrative and financial impediments are such that implementation of such a service would not be feasible. Additionally, this assumes that libraries and archives would consider implementing such potentially illegal practices.

It is not the view of the AFC that the provisions of Division 5 have had any effect in reducing incentives for the creation for works, but rather that the selected release of information in low-resolution digital form (especially content that is not readily commercially available) is promoting its use and consumption in accordance with copyright owner interests.

In the area of still photographs, there is no evidence to suggest that the availability of low-resolution images has any commercial value. Similarly, clients auditioning selected low quality unrestored digitised audio content onsite have asked whether this content can be purchased commercially. These clients have been directed to relevant Record Companies who own the publishing rights to encourage re-release of such content. Feedback indicates that they are unsuccessful in their requests. Finally, those copyright owners not directly represented by Record Companies or the Australasian Performing Right Association (APRA) have been delighted with the increased exposure to their works and the Archive has offered to stock their (independently produced) works in the Archive's Shop to assist sales.

Issue 5

5.1: Is first digitisation of unpublished works by libraries and archives occurring to any (or any significant) extent? If so, is there any systemic or widespread failure to include electronic rights information?

5.2 Are there any adverse effects as a result of the lack of any positive obligation to include electronic rights management information on any electronic copy or communication that may be made of a work or other subject matter? If so, what are they?

The AFC acknowledges the concerns of owners regarding the first digitisation of unpublished works. The Archive digitises unpublished works for preservation purposes, targeting at-risk original items. The types of unpublished printed works held by the Archive are obscure and of interest to only a small sector of the academic research community. This material is unlikely to be of commercial interest to publishers. The Archive does not release any digitised content to project partners or clients for the purposes of external (offsite) research without seeking and receiving the permission of a known copyright owner. Accordingly, the AFC believes that the Archive's ability to digitise these works does not impact upon the copyright owners' rights to digitise subsequently. On the contrary, digitising these works can

only promote the use and access of such otherwise relatively inaccessible primary source material.

The AFC does not believe that any lack of requirement in providing electronic rights information adversely impacts upon copyright owners' rights or markets. It must be noted that the word 'failure' (5.1) implies that electronic rights information is compulsory, which is not indicated by the Act. Watermarking or technological encryption is expensive and not always appropriate. The AFC is fully aware of the status of 'copyright-in-perpetuity' enjoyed by unpublished works, and is required by internal guidelines to attach information that identifies the work and its creator or copyright owner when reproducing their material. Indeed this has been the practice of the Archive long before the introduction of Moral Rights legislation.

Issue 6

The Review seeks your views...in particular:

6.1 Does the format neutral approach to media in the Act have an adverse effect on the ability of libraries and archives to discharge their community functions as disseminators of information in digital form?

6.2 Would amending the Act to distinguish between different media have an adverse effect on:

- ***The technology neutrality of the legislation***
- ***The rights and interests of owners, users, or libraries and archives.***

The AFC supports the tailoring of an approach for non-literary or non-text based formats on the basis that the library and archive exceptions relating to film and sound recordings are far more limited than those relating to (text) works. Most of the exceptions that allow access to text works do not have film or sound recording equivalents. The emphasis in the library and archive use provisions appears to be solely on text-based media where access to these formats can be to the whole or part of the work. The Fair Dealing exceptions of the 'Ten per cent rule' or 'Reasonable Portion Test' are simply not appropriate for non-text based works such as still photographs. Likewise, ten per cent of a sound recording may not comprise a meaningful excerpt in a three minute 'older' composition, which may contain a minute of orchestral introduction before the performer begins the first verse.

The AFC therefore seeks different treatment of non-text media formats for the library and archive use provisions. This view on copyright exceptions and format, does not impact upon the AFC's commitment to the concept of technological neutrality in the context of free trade agreements where content does not lose its cultural characteristics because of the means by which it is traded.

Issues 7 – 11

As the AFC does not enjoy the status of an educational institution we provide no comment on these issues.