



Australian Government



**Submission to the Attorney General's Department
on its Issues Paper Fair Use and Other Copyright
Exceptions: An examination of fair use, fair
dealing and other exceptions in the digital age**

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1. Executive Summary

The AFC supports the following reforms to the Copyright Act.

Recommendation 1: Reform of the library and archives provision

The primary recommendation made by the AFC is that the library and archive provisions be reformed. The AFC recommends that the Libraries and Archives provisions be:

1. consolidated into one section of the Copyright Act. Currently these provisions are found in Part III, Division 5 (ss48-53) for works and ss110A – 110C (subject-matter other than works);
2. reformed in order to create consistency for both works and subject-matter other than works (that is, consistent for all types of material held by the AFC);
3. clarified to allow archives (as currently defined within the Copyright Act) to undertake copying and communication as required to fulfil their statutory mandates of administration, storage, preservation and access. Briefly the AFC would consider these categories to cover the following:
 - a. administration – making copies and communicating material (eg: thumbnails) to ensure accurate records of collection items are maintained; to permit intra-archive communication of collection items or other relevant material regarding a collection item.
 - b. storage – making back-up copies or format shifting collection items to provide for efficient and effective storage and retrieval of collection item (eg. move VHS to digital records on a central easily accessible database thereby removing bulky VHS items from needing to be regularly accessed);
 - c. preservation – making copies prior to deterioration to allow for preservation of collection items (not simply where the collection items is a ‘first copy’ or has already started to deteriorate); and
 - d. access – allowing archives to implement mechanisms to facilitate access to their collection. This would be achieved via:
 - (i) confirming archives ability to make analogue and digital copies of collection items for the purposes of access;
 - (ii) providing for access via secure Internet protocols (WAN wide area access network, VPN – Virtual Private network) to material within the archive’s collection.
4. amended to allow archives to use ‘orphaned works’ (that is material whose creator is unidentifiable and unlocatable) for the functions of the archive on

payment of a statutory licence fee. The AFC proposes that Australia implement a statutory licence scheme.

Recommendation 2: General reform of 'Fair dealing'

Should the AFC's primary recommendation in relation to the library and archive provisions not be implemented, the AFC recommends that the current library and archive provisions are retained and that the 'fair dealing' provisions are reformed to allow archives to undertake activities not covered by the current provisions but are necessary to fulfil their statutory mandates of administration, storage, preservation.

This would be achieved by new categories of 'fair dealing' that specifically allow archives to undertake copying and communication of material within the archive's collection to facilitate archives':

- a. administration,
- b. storage; and
- c. preservation;

of material within the archive's collection.

It should be noted that if these amendments were made to the fair dealing provisions then the activities in relation to orphaned works referred to under the reform of the libraries and archives provisions would not be necessary.

Recommendation 3: Private dealing

The AFC supports the concept of an equitable and efficient system that returns lost income to copyright creators from private copying.

Recommendation 4: Fair Use

The AFC does not support replacing the current fair dealing provisions with a fair use provision. Should the government decide that the fair dealing provisions be replaced by a fair use provision and the AFC's libraries and archives recommendations not be accepted, then the AFC strongly recommends that its recommendations in relation to orphaned works and (if necessary) libraries and archives are included within the scope of the fair use provision.

2. Introduction

The Australian Film Commission (AFC) is an Australian Government agency, operating as part of the Commonwealth Film Program to ensure the creation, availability and preservation of Australian screen content. The AFC enriches Australia's national identity by fostering an internationally competitive audiovisual production industry, making Australia's audiovisual content and culture available to all, and developing and preserving a national collection of sound and moving image. As the major collector and analyser of data about the industry, the AFC leads opinion, outlook and policy about the audiovisual industries and screen content in Australia

The Australian Film Commission is a body corporate established by the *Australian Film Commission Act (Cth) 1975*. The AFC's enabling legislation provides that the purpose of the AFC is, among other things, to distribute programs and develop, preserve, maintain a national film and sound archive. The functions of the AFC are detailed in s.5: see Appendix A. Within the AFC, the National Film and Sound Archive ('NFSA') has direct responsibility for the AFC's archiving obligations.

The NFSA preserves and shares Australia's moving images and sound recordings. The NFSA makes this collection available for all Australians to share through exhibitions, screenings, the NFSA website¹, traveling shows, video and audio products, live presentations, education programs, and television and radio productions.

The AFC has a unique position within the Australian cultural landscape. It is responsible for enriching Australia's cultural identity by fostering an internationally competitive audiovisual production industry, developing and preserving the national collection of sound and moving image – making Australia's audiovisual heritage available to all.

The AFC fosters a competitive production industry by developing people, projects and the industry. The AFC strives to ensure that filmmakers and audiences throughout Australia have access to a variety of screen activities, and, the AFC is the Australian Government's development agency for screen content.

The AFC's mandate is to both assist the creation of copyright and to utilise copyright material. The AFC, supports filmmakers and encourages mechanisms to return to creators valuable income from the exploitation of copyright. Simultaneously, in order to fulfill its function of fostering access to copyright materials, the AFC must seek to provide access in circumstances where access is subject to overly complex and rigid regulation.

The AFC believes its mandate is compromised because of unintentional anomalies in the present copyright system.

In making its submission to the Fair Use and other Copyright Exceptions Issues Paper, the AFC does not consider it is appropriate to review exceptions within the Copyright Act in isolation. Rather, the AFC believes it is necessary to review all of

¹ <http://www.screensound.gov.au>

the exceptions simultaneously to ensure the delicate balance between owners and users is maintained.

The AFC has considered those exceptions specifically identified in the Review as well as other exceptions within the Copyright Act. The AFC has limited its comments to those matters on which it has authority to speak, but, would strongly encourage the Review to consider all exceptions within the Copyright Act to maintain an appropriate balance and allowing the symbiotic relationship between users and creators to flourish. This submission was drafted in consideration of that relationship.

Ensuring access to Australia's cultural heritage falls within Australia's international obligations regarding cultural rights – as identified in both the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and the International Covenant on Civil and Political Rights 1996 (ICCPR). As described in Article 15 of ICESCR it is a substantive right to “take part in cultural life” as well as to “benefit from intellectual property interests of authorship of scientific, literary or artistic productions”. Australia is a member of both these treaties and Australia's Fourth Report under ICESCR is due on 30 June 2005. The AFC notes that in Australia's last report it was stated that Australia was “... committed to creating a copyright regime which balances the rights of copyright owners and creators....” The AFC strongly recommends on-going commitment to this balance.

Throughout this submission, the AFC has referred to its collection or collections held within archives. It should be understood that this does not refer to all material owned or held by the AFC (or another archive) but has been used to refer to the body of material called the National Collection within the AFC's founding legislation which has been assessed as having unique cultural and historical value to Australians.

The Issues Paper asked whether the Copyright Act should be amended to include any other exceptions. Essentially, the AFC seeks certainty and clarification in relation to copyright law in order that it can properly fulfil its statutory functions.

The AFC is aware that there is a lack of case law involving archives. This may have led to a presumption that archives do not face difficulties with the Copyright Act. However, this is not the experience. In the AFC's opinion, the lack of litigation is indicative of a risk adverse position adopted by archives, which cannot afford potential litigation. This has resulted in a lessening of case law but it also results in a lessening of access and use of the rich heritage found within the walls of archives such as the AFC.

The AFC has assessed its recommended solutions against the “Three Step Test.” The AFC understands this to mean that to accord with the Berne treaty, any recommended amendments to the Copyright Act need to comply with the following steps:

- (1) that the reproduction is only allowed “in certain special cases”;

(2) it should “not conflict with a normal exploitation of the work”; and

(3) it should “not unreasonably prejudice the legitimate interests of the author.”

The AFC acknowledges the work of commentators such as Prof. Ricketson² for the Centre for Copyright Studies (part of the Australian Copyright Council that represents copyright owners). However, the AFC also recognises the work of commentators such as David Brennan who caution against an overly narrow interpretation of the Three Step Test.³

3. What is the AFC’s role in copyright?

The AFC’s dual role of fostering an independent internationally competitive audiovisual production industry and developing, preserving and providing access to Australia’s national collection of sound and moving image ensures that it supports the entire life-cycle of films.

The AFC does not wish to detract from copyright owners’ markets, but seeks legal mechanisms that support the interests of owners and promotes the government’s cultural objectives.

4. What sections of the Copyright Act are relevant to the AFC?

4.1 The AFC financially benefits as a copyright owner.

The AFC invests in both the development and the production of short, feature, documentary and animated films as well as new media projects. The AFC takes a copyright interest in all films in that it invests in proportion to its total investment.

4.2 The AFC uses copyright materials to fulfil its functions

Most of the material in the AFC’s collection is protected by copyright owned by a party other than the AFC. This results in the AFC being a significant user of copyright material.

As a specialist film and sound archive the AFC’s collection includes films, sound recording, movie posters, scripts, and scores. The AFC collection includes cinematograph films (both published and unpublished) protected under s86 as well as cinematograph film created prior to 1969, protected as a series of photographs, or, as a dramatic work: ss 204 & 222. In addition to copyright protection for the film itself there may be separate copyright protections for

² See Ricketson, ‘The three-step test, deemed quantities, libraries and closed exceptions’, the Centre for Copyright Studies, 2002.

³ Heide, T. ‘the Berne three-step test and the proposed Copyright Directive’ EIPR 1999, 21(3), 105-109. Also see Brennan D. ‘The three step test frenzy – why the TRIPs panel decision might be considered per incuriam’ IPQ, 2002 (2) 212-225.

underlying scripts (as a dramatic work), music (as a musical work) and individual images comprising the film (as photographs).⁴

The Collection includes footage of live events, cinema and television advertisements, animation, documentaries feature films, home movies, newsreels, shorts, silent films, television news and programs, video games; a recorded sound collection including, oral history interviews, radio programs, radio serials, unpublished, commercial and live sound recordings, and a documentation collection including artefacts such as costumes, props, audiovisual equipment, costumes, lobby cards, manuscripts, photographs, posters, scrapbooks and film stills.

Most of the material in the AFC's collection is protected by copyright owned by a party other than the AFC. This results in the AFC being a significant user of copyright material. Therefore, archives such as the AFC "constantly risk infringing copyright through acts that are necessary to fulfil their missions".⁵ This is the case even though the activities of institutions such as the AFC 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.*⁶

The copyright provisions that apply to the AFC in performing its functions are complex, contain a multitude of anomalies, and are unclear, making the AFC's ability to fulfil its statutory mandate difficult.

There are a number of issues faced by the AFC not adequately addressed by the current Copyright Act, and which create significant administrative burdens and also impede the AFC from fulfilling its public interest functions. These issues relate to administration, preservation, storage, access and use of orphaned works.

The AFC has attached a Summary of these issues and recommended amendments in Appendix B.

The AFC falls within the definition of an 'archive' and therefore is able to utilise the 'libraries and archives' provisions of the Copyright Act: ss 48-53 and ss 110A-

⁴ Examples of "works" that the AFC has in its collection include: Advertisements on Glass Slides; Animation Cells; Artifacts (costumes, props, audiovisual equipment); Lobby Cards; Memorabilia (awards, medals, merchandise); Manuscripts (personal papers/letters /diaries); Organisational papers, budget reports; Posters; Photographs; Publicity including press kits, media releases, promotional flyers; postcards, and study guides; Scrapbooks; Scripts (Film, TV and Radio); Sheet Music; Song lyrics; Transcripts (oral history (OH) interviews, research notes). Examples of "subject matter other than works" include Cinema/TV Advertisements; Animation; Documentaries; Feature Films; Newsreels; Home Movies; Silent Films; TV News; Video Games; Oral History Interviews; Commercial, Unpublished and Live Sound Recordings.

⁵ Kenyon AT and Hudson E, *Copyright, Digitisation and Cultural Institutions*, The University of Melbourne Faculty of Law, Legal Studies Research Paper No 101, 2004 at p4.

⁶ Ibid at p7.

110C. However, the AFC has found several difficulties with relying on these provisions, including:

- a. a general lack of clarity about what the AFC is permitted to do under these provisions. Particularly arising from the use of terms such as ‘first copy’ or ‘first record’ (ss 48-53, ss110A-110C) without any definition;
- b. inconsistency between what may occur in relation to works (ss48-53) and what may be undertaken in relation to audiovisual material (ss110A-110C). For example, copying and communication for ‘administrative purposes’ (s51A) is only permitted in relation to works and not audiovisual material;
- c. inconsistency between the treatment of ‘published material’ and ‘unpublished material’. For example the AFC is permitted to copy and communicate published works for the purposes of research or study via ss49(1), (2A) but may only copy and communicate specific unpublished material - ‘manuscript or thesis’ (s51(2)) or the ‘first copy’ of a film or the first record of a sound recording (ss110B(1)(a), 110C(2)(a));
- d. extraneous handling of collection items – for example the AFC must destroy digital copies it makes to fulfil requests from researchers (s49(7A)). This results in excessive handling of the original material to make repeated digital copies leading to unnecessary deterioration of the original work and an increase in workload;
- e. inherent inconsistencies within the provisions – for example s52 permits a publication to incorporate unpublished material 50 years after the death of the author provided the identity of the author is unknown. However it is impossible to know the date of the author’s death if their identity is unknown;

Arguably the AFC might rely on s183, under which copying for the purposes of services of the government is permitted. However, the AFC does not consider this a valid option as the scope of s183 is unclear and the AFC has not been able to obtain consistent legal advice as to whether – in fulfilling its statutory mandate to facilitate access to its collection – it would fall within this provision.

5. Recommendation 1: Reform of library and archives provision

The primary recommendation made by the AFC is that the library and archive provisions be reformed. There are several parts to this recommendation as follows.

6. Recommendation 1.1: Consolidation into one section

The AFC recommends that all provisions related to libraries and archives be consolidated into a new part of the Copyright Act, for example as Part VB1 following on from the provisions allowing for copying and communication by

educational institutions. Currently these provisions are found in ss48-53 (for works) and ss110A –110C (subject-matter other than works).

Consolidation would greatly assist in simplifying the copyright regime as it applies to libraries and archives and would allow for greater clarity.

7. Recommendation 1.2: Reformed for consistency across works and subject-matter other than works

The AFC strongly recommends that the new provisions do not discriminate between works and subject-matter other than works. The material within the AFC's collection spans works and subject-matter other than works. Clients of the AFC frequently seek access to material on a 'topic' involving all types of material. It is unnecessarily administratively burdensome and confusing for clients if the AFC has to treat this material differently. Further, much audiovisual material incorporates both works and subject-matter other than works, further complicating handling of this material by AFC staff.

The AFC notes the provisions relating to copying and communication by education institutions excludes computer programs: ss135ZE. The AFC would support this exclusion from the new provisions subject to the caveat that this refers to computer programs other than those computer programs forming part of the archive's collection. Thus the AFC would not support excluding new media or multi-media works on the basis that they contain a computer program. In the opinion of the AFC, a blanket exclusion of computer programs would prevent the new provisions from being technology neutral and recognising the growing prevalence of digital technology within audiovisual works.

Additionally, the AFC does not see any rationale for retaining a distinction between published and unpublished works provided these provisions retain a general limitation requiring an institution to re-purchase a collection item where possible and appropriate.

The AFC has approximately 1.7 million items in its collection. This is fairly evenly split between audiovisual and documentary. Approximately 10 per cent of its audiovisual material is unpublished, however, over 50 per cent of its documentary material is unpublished. The AFC does not believe that the Australian public should be prevented from accessing material simply because it has never been published.

8. Recommendation 1.3(a): Administration provisions

The AFC strongly recommends that the administration provisions (ss 51A(2), (3)) be clarified and expanded to cover all material within an archive's collection.

The AFC suggests that 'administrative purposes' be clarified to include allowing format shifting and digitisation for the purposes of facilitating storage or facilitating access by the archive to its collection items as well as making copies and communicating material to ensure accurate records of collection items are maintained.

Relationship of Recommendation 1.3(a)'s to Three Step Test

(1) That the reproduction is only allowed “in certain special cases”;

In the opinion of the AFC, the first step is fulfilled by virtue of the acts being undertaken by an archive (which is defined) for administrative internal purposes, and, ‘special’ in that this provision is narrow in scope and reach is only accessible by archives and only for a limited purpose.

(2) It should “not conflict with a normal exploitation of the work”;

In the opinion of the AFC, copying and communication by archives for administrative purposes which are essentially internal in nature does not conflict with those uses and potential uses of a work that are important to a copyright owner. That is, this use does not enter into any economic competition with the creator.

(3) It should “not unreasonably prejudice the legitimate interests of the author.”

While the AFC recognises that this involves both economic and moral rights the AFC does not believe that these uses pose any substantive or material prejudice to the copyright owner’s interests.

9. Recommendation 1.3(b) & (c): Storage and preservation

There are currently several Copyright Act provisions that provide for archives to undertake copying and communication for preservation purposes (s51A(1)(a), 51A(1)(b), (c) and ss110B(1)(a) & 110C(2)(a)). Some of the difficulties for the AFC utilising these provisions are:

1. *the provisions are inherently confusing*: Section 110B is inherently illogical because copies of audiovisual material can only be provided to clients onsite but not communicated onsite, whereas audiovisual material can be communicated to another archive for the purpose of access by their clients for research and study. Similarly, there are major limitations on rights for an archive to digitise and communicate "works" onsite on a dumb terminal. Only original "works" obtained in electronic form (i.e., born digital works) can be communicated onsite for users on a dumb terminal: s 49(5A). Section 51A(3A) only permits preservation copies of artistic works; i.e. works which are unstable and cannot be displayed without significant risk of deterioration, to be digitised and communicated online;
2. *there are different requirements for different types of material*: that is, the difference between those clauses applying to works and subject matter other than works;
3. *the difference between published and unpublished material*: particularly the requirement that published work may only be preserved if it is not able to be re-purchased. This presumes that purchasing the material in the same format is an adequate solution (not the case with format

obsolescence) or that a new format of the same material is an appropriate substitution (this is not appropriate if the new version has been re-mastered etc);⁸

4. *references to 'first copy' or 'first record'*: not only are these terms not defined but it is inappropriate to limit preservation to only the first copy as this denies the value of other copies that may be in very limited supply and or does not allow the AFC to undertake on-going migration to avoid media and hardware obsolescence.

Like all archives, the AFC has considerable storage pressures and financial challenges regarding increasing operational costs. For these reasons it is necessary to shift/migrate collection material into formats that facilitate cost effective and efficient storage and retrieval.

The AFC has over a million items in its collection.⁹ A fraction of this (several hundred) is available in the exhibition spaces of its premises. This means that over 99 per cent of the AFC's collection is in "storage" – in a number of purpose-equipped, environmentally controlled and monitored repositories.

The AFC is committed to the principle of the preservation of original material. There is curatorial value in preserving material in its original format is also a part of our cultural history, as well because the format as the content of the material. A fundamental archival principle is the preservation of the original format of content delivery and the capacity to provide continued access in that original format. However, this principle must be balanced against the cost of providing access in original formats and the damage to fragile analogue material, which would be sustained by continued access to originals.

Older analogue recordings suffer from format obsolescence and media decomposition. They incur significant costs for the AFC in terms of providing additional storage space, and require carefully controlled environmental conditions. Audio, images, text and other data content must be copied onto newer media and formats in order to:

- a. preserve that content beyond the lifespan of the physical media;
- b. preserve that content beyond the working life of the replay systems required to reproduce them;
- c. ensure survival in case of damage; and
- d. minimise other risks such as wear and damage.

Analogue audio and video systems are no longer manufactured, and spare parts are increasingly difficult to obtain. Analogue copying introduces noise, distortion

⁸ Arguably 50 years after the date of creation the AFC could copy unpublished audio-visual material by virtue of s110A, however, this does not fulfil the 'gaps' created by s110B with respect to the AFC's copying for preservation and storage requirements.

⁹ See page 12 for collection specifics under paragraph, "The AFC has approximately 1.7 million items in its collection."

and losses in fidelity at each generation. Digital copies provide the only viable solution for preservation of analogue content, particularly audio, images and text.

Not first copy/record

The nature of audiovisual material means that the copy or version within the AFC's collection may be unique, rare and valuable but may still not be the first copy or first record. However the location of the first copy/first record may be unknown, may be inaccessible or in a location where there is no guarantee that preservation will occur.

Why can the AFC never be sure it has the first copy of a film? In its very early days the NFSA was part of the National Library. Much of its collection was formed from donations from people who may have had films in their possession – cinemas closing down, filmmakers, studios, or the children of those who had access to films. In all but a few instances the provenance of the film was murky. Generally TV production studios keep originals. Because of the need for film to be copied (or what is termed the plasticity of film), many and varied copies are produced from one set of negatives and it is not possible to be absolutely sure where the AFC's copy has originated. Even if the AFC holds negatives they are more likely to be dupe (duplicate) negatives than final cut negatives. Dupe negatives are about three or so steps down from final cut negatives but still are part of the process of the creation of the print that is part of the original process. The process of making a film is quite long and the AFC could obtain elements from that chain at any stage or multiple stages. For instance, the AFC might receive 16mm A & B rolls which the AFC can't duplicate or copy from unless the AFC holds the optical effects reel(s) that tell it what optical effects go where – so the AFC might use a print to copy from instead. The issue of what is 'original' in film is therefore almost impossible to define and irrelevant to an archive context.

Format obsolescence

Traditional formats such as audiotape reels, wax cylinders, and old analog videotapes were recorded roughly 30 to over 100 years ago on machines, which are no longer in production.¹⁰ Even if the recorded material survives, the content cannot be extracted without the necessary machinery.

This content must be copied onto newer media before the old replay systems become unserviceable. No new analogue formats have been introduced since the early 1970s for audio, and the late 1980s for video; all are regarded as obsolete, and cannot be used for recording older content. The AFC holds some of the last surviving machines to support most of these formats, and employs specialised engineers to maintain them. The supply of spare parts for most machines is now coming to an end and collection material on these formats must be migrated to digital formats if on-going access is to be maintained.

¹⁰ Examples include: 2 inch Quadruplex; 1 inch type-C, and Betacam™ analogue video; ¼ -inch, ½ -inch, 1-inch and 2-inch analogue audio.

It should also not be presumed that content that is 'born digital' does not need to also be copied and communicated for preservation and access. For example, most of the current video and audio material acquired for the National Collection is already in digital form. Dedicated audio and video formats such as DVCPro, Betacam-SX™, DAT, CD_R, DTRS etc. which are converted into files for ingest & storage. Where possible live feeds and streams from cable and satellite are captured and converted into files for ingest & storage.

Digital files on data storage media are copied into the AFC's storage network, however, some non-standard formats may also be transcoded into a standard, sustainable file format. The original data format may not be retained after a bit-faithful clone is preserved.

Digital files have a much longer lifespan than the individual formats and media on which they are stored, but must be backed up, and 'refreshed' or migrated onto newer media and formats periodically.

Media decomposition

Most of the materials used to record sound, images and text have limited lifespan, ranging from a few years to over a century. Examples include:

- a. magnetic tape coatings react with airborne humidity and pollutants which cause shedding and stickiness;
- b. cellulose Nitrate-based film suffers from acidic decomposition which bleaches the image layer, and converts the base into a stick mush, then a brown powder; and
- c. cellulose Acetate-based film decomposes to form acetic acid which bleaches the image layer, and converts the base into a stick mush, then a brown powder. Some of the AFC's collection items are already over 100 years old.

Some of the AFC's copyright difficulties are illustrated by this example. The AFC receives old film from a donor who warrants that they own the film. The film is in good condition, but to pre-empt inevitable deterioration, the AFC seeks to format-shift the film by digitisation. The donor is no longer locatable, and it appears in any event that the donor may not have been the correct copyright owner, but an employee. The AFC wants to preserve the film by format shifting, but the uncertainty of its copyright obligations means that the AFC will avoid the risk and wait until the film has begun to deteriorate. Even when the AFC does digitise the film, it is unclear if the AFC can back up that digitised copy, leaving the preserved copy vulnerable to computer malfunction or other damage.

Storage requirements

Many of the older formats are recorded on bulky, low-density magnetic tape and disc materials. Even though these original materials may be retained for long periods of time storage limitations require high-density digital backup copies are made.

For example, one hour of video on a 2-inch wide Quadruplex tape (a broadcast television format used from 1956 until the early 1980s) requires approximately 7.5x35x35cm, or 6.5 litres of shelf space, which is carefully controlled at 16°C and 35 per cent relative humidity. The same one hour of video stored on LTO Ultrium-3 data tape, uncompressed would occupy 0.06 litres, or less than one-hundredth of the volume.

Space savings for audio on 78rpm discs are up to 1400 times the volume occupied by digital files on data tapes.

Therefore even if the original is retained within the AFC's repository, the space required and the cost of commercial real estate mean repositories are located other than at the AFC's offices and the fragile nature of the original format and the condition required to preserve it mean continual and on-going access can not be provided.

Media costs

The last available analogue audiotapes cost over \$44 per hour, compared to 60c per hour for high-resolution digital audio, or 20c per hour for CD quality. Uncompressed video tapes cost over \$100 per hour, compared to \$30 per hour for data media, while compressed video formats (DVCPPro or Betacam-SX) are subject to similar cost savings: \$20-30 for video tape, vs \$2.50 to \$6 on data tape. It is therefore largely cost prohibitive to copy collection items onto their original format.

What is involved in preservation copying?

The process of preservation is often a complex process that involves more than simply making one copy. It is important that preservation copying occur as a systematic process within an archive's general procedures. To wait until material has deteriorated is generally too late. Preservation must be a proactive activity intended to prevent deterioration (particularly deterioration that results from numerous copies being made from the original) and its financial cost must be planned and spread across several years operating budgets. For this reason the AFC requires the right to implement on-going programs of preservation and format shifting and can not wait to 'preserve' material that has already started to deteriorate.

For example, to preserve a film you must isolate the original material from being used as a master for future copying and store and monitor it appropriately. There is a need to not just copy the original but to create a copy which is in sympathy to the original in all areas i.e., colour, density, framing and contrast in both the image and sound. In order to satisfy these requirements, particularly when working in the area of motion picture film, the archivist creates a number of copies on different stocks.

With film, two copies are made from the original negative. The first to create a positive that is then copied to create a new negative.

In order to confirm that the laboratory technicians and the archivists have been successful in capturing the original work in this new negative a print must be created - this makes three copies in the image alone. If the new negative is not sufficiently in sympathy to the original work part or the whole process will have to be repeated. The sound components are also copied to ensure that the original is left intact and under no pressure from being copied to create future prints.

Recommendations

In light of the above difficulties, the AFC recommends that ss51A(1) 110B(1), and 110C(2) be combined into a single provision that provides for an archive to undertake copying and communication of a work or subject-matter other than a work within the archive's collection for the purposes of:

1. storage within the archive;
2. preservation in an accessible format;¹¹
3. preservation to prevent deterioration or loss; or to provide access in the event of deterioration or loss;
4. replacing a damaged, lost or stolen item within the archive's collection.

The AFC believes that these provisions should still be subject to a general limitation that where an item is a published and the copying or communication is for the purposes of:

1. preservation to prevent deterioration or loss; or
2. replacing a damaged, lost or stolen item within the archive's collection;

that the archive may only undertake the copying or communication where an appropriate replacement copy of the item (not being second hand) cannot be purchased at an ordinary commercial price within a reasonable time.

An appropriate replacement copy is a copy that fulfils the role of the original collection item. For example, the AFC should be able to preserve a film poster as part of a director's collection (and therefore handled and marked by that director) rather than purchase a copy of the poster if available.

Relationship of Recommendation 1.3(b) and (c) to Three Step Test

(1) That the reproduction is only allowed "in certain special cases";

In the opinion of the AFC, this requirement is satisfied as the instances where the copying and communication may be done are narrowly confined by the requirements that the copying and communication be done by archives fulfilling

¹¹ The AFC understands that format-shifting is being considered as part of private copying but feels that format shifting by archives must be addressed separately due to the specialised nature and needs of archives.

their statutory functions, and, for the purposes of preserving and storing archives' collection material.

(2) It should “not conflict with a normal exploitation of the work”; and

In the opinion of the AFC, storage and preservation activities do not conflict with those uses of the material that are important for economic exploitation by a creator. Further, these activities will not enter into any economic competition with the copyright owner as the archive is undertaking such activities to preserve an irreplaceable item, or, to move the material into a format other than that which the material was provided to the archive.

(3) It should “not unreasonably prejudice the legitimate interests of the author.”

In the opinion of the AFC, the legitimate interests (both economic and moral) are not unreasonably prejudiced by activities for preservation and storage as there is no derogation from a creator's moral rights or economic rights. Further, any minimal impact on a creator's economic rights is outweighed by the benefit to a creator of having their material stored in archival quality storage and therefore accessible for future commercial exploitation, and the public interest of efficient and effective archives.

10. Recommendation 1.3(d): Access

Over the past 5-10 years, governments have actively encouraged libraries and archives to move beyond the role of passive repositories of the nation's cultural heritage to that of actively facilitating access to culture and information, particularly via digital means allowing access to constituents around Australia.

Material such as films and old sound recordings are relatively inaccessible in their original formats. Much of the machinery needed to access original formats is not available to industry clients or individuals. Increasingly, access and client services must be provided through digital files and streams, instead of using physical copies that wear out or suffer from decomposition. Traditional access copies on physical media might be replicated up to six times for each state offices and access centres.

Clients who access the AFC's collection generally initiate their search for material via the Merged Audio-Visual Information System (MAVIS), to retrieve descriptive information about items in the collection. Where available, low-resolution browsing copies can be viewed and audited within secure internal network in Canberra, Sydney and Melbourne offices, simply by clicking on a link in MAVIS. This is just as secure as clients viewing and auditioning analog VHS and audiocassettes, or using physical copies on CD or DVD, and provides the same business functionality more efficiently.

Where copyright is cleared, and permissions obtained from rights holders, external clients outside the firewall may access browsing copies linked to the MAVIS On-Line Catalogue via the Web-server.¹²

Generally any access copy provided to a client of the AFC will need to be copied and communicated from an outdated format to allow the client to access the material. For example, clients no longer have:

- a. telecine machines for transferring film to video;
- b. 2", 1", ¾" and other older analog video machines;
- c. turntables to play vinyl LPs, 45s and 78-rpm audio discs; and
- d. ¼-inch analogue audiotape reproducers.

These formats must be copied onto modern digital media, or delivered as digital files via satellite or broadband networks.

The AFC supports the possibility of access to some of the collection outside of AFC on State Library premises with appropriate technological protection measures (which prevent a user making subsequent copies).

Currently the AFC utilises techniques such as:

- a. provision of low resolution material;
- b. use of an Australasian Performing Rights Association (APRA) approved streaming technology within its online catalogue; and
- c. as part of the terms and conditions of its access agreement the AFC requires all clients to clear copyright with the copyright owner before the AFC provides access to any items in copyright.

Many online rights are already provided by ss49(5A), 51A(2), 51A(3), 110B(2A), 110(2B) however their coverage is inconsistent; for example, by virtue of s110(2B) an institution to which the AFC has supplied a copy of its collection item may display the copy of the collection item on-line within its premises, however, there is no mechanism to allow the AFC to display the copy of the item in this manner.

The AFC seeks the ability to facilitate access to collection material, being analogue as well as digital access via secure Internet protocols (WAN wide area access network, VPN – Virtual Private network) to material within the archive's collection.

The AFC recommends that archives be given the right to copy and communicate material held within the archive's collection for the purposes of:

¹² It should be noted that thumbnail pictures have been held to be an example of fair use in the USA. See *Kelly v. Arriba-Soft*, 03 C.D.O.S 5888 (9th Circuit. 2003)

- a. facilitating access, being analogue as well as digital access via secure Internet protocols (WAN – wide area access network, VPN – Virtual Private network) to material within the archive’s collection; (currently inconsistently provided for under, ss49(5A)), 51(3A),(3B) 110(2A), and 110(1));
- b. providing a copy of the material to other institutions:
 - i. to be provided to persons for the purposes of fair dealing (currently inconsistently provided for, see the example of research and study as provided for under ss49, 50, 51(2), 51A, 110B, 110C); or
 - ii. for use by the other institution as explanatory/supporting material in relation to material held within that archive’s collection.

The AFC does not believe that these rights of copying should discriminate between the format of the copy. Therefore the AFC should be permitted to provide a copy of material within its collection for the above purposes in whatever format (digital or analogue) that is most appropriate in the circumstances.

The AFC believes that another archive should only be able to use a copy of material in a first archive’s collection (as proposed by ii) with the express permission of the first archive.

Relationship of Recommendation 1.3(d) to Three Step Test

(1) That the reproduction is only allowed “in certain special cases”;

The AFC believes these exceptions are only applicable to specific instances as they are only relevant to material within an archive’s collection.

(2) It should “not conflict with a normal exploitation of the work”;

Achieving consistent internal access does not conflict with those uses of the material that are important to a copyright owner.

(3) It should “not unreasonably prejudice the legitimate interests of the author.”

In the opinion of the AFC, the value of archives to the Australian community and the value of access to archival holding means that should any prejudice arise from this provision it would be reasonable.

Under the AFC’s recommendations, the copyright owner’s moral rights remain unaffected and therefore are not unreasonably prejudiced.

11. Recommendation 1.4: Orphaned works

“Orphaned works” are those works whose authors are not locatable or not identifiable. This is an important and difficult issue for the AFC, as the AFC cannot obtain a licence to allow access to or use of a work without the copyright owner’s permission. The AFC holds tens of thousands of orphaned works. Further, the AFC

receives between two to five requests per week to use such material for both commercial and non-commercial purposes. Orphaned works are a particular problem in the area of film because “there is a strong interest in using old films in new documentaries and for enthusiasts, but it is not uncommon that the owner is unidentifiable.”²¹

Orphaned works arise in two ways.

- a. Despite the best efforts of the AFC at the time of donation, the AFC may not be able to identify the correct copyright owner. In this instance the AFC makes the decision to bring the material into its collection, hoping to either locate the copyright owner later, or, because it assesses the material as being valuable to Australia’s audiovisual history and therefore worth preserving even if it can not be accessed during its copyright term.

For example: Currently, the AFC requests clients sign an access agreement indemnifying the AFC, however, this indemnity may be of limited legal use and is intimidating for the AFC’s clients. For example, Musee du quai Branly²² approached the AFC to use material in the AFC’s archives within an exhibition. This was an excellent opportunity to build links with a cultural institution that specialises in the arts of the Asian region. Despite numerous attempts to identify the copyright owner it proved impossible and the AFC provided a copy of the material with a release from the client.

Some material is an extremely valuable resource but it is very difficult to identify the owners. For example, the ATOM awards (the Australian Teachers Of Media (ATOM) Film, Television and Multimedia Awards recognise achievements of Australian and New Zealand professionals, educators and students) are a valuable history of independent and student filmmaking within Australia and New Zealand. However, copyright details are often missing, or details are out of date. A recent example is *Untitled 2002*. The AFC has contacted the school and tried to locate the student, but has not been successful – this work cannot now be included in an exhibition of ATOM award-winning films.

- b. Even where the AFC has details of a copyright owner these details may become out of date if the copyright is sold or licensed.

For example, “Pets” was a compilation made at a time when TV shows about animals and pets were very popular (e.g. *Harry’s Practice*, *Pets Behaving Badly*, segments on *Funniest Home Videos*) and it relied primarily on home movie footage. A particular segment was selected from a home movie collection and a letter sent to the donor detailed in the AFC’s records but returned with no forwarding address. The footage was not able to be used because there is no way of following up the original donor.

²¹ Weatherall, K: *Fair use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia*, Intellectual Property Research Institute of Australia, Occasional paper No 3/05, May 2005 at p14.

²² Musee du quai Branly is a new museum situated in Paris that is dedicated to the arts and civilization from Africa, Asia, Oceania and the Americas.

The original owner may be a corporate entity that has been bought and sold, such as Eric Porter Productions. Neither the AFC nor Channel 7 are certain about who now owns particular Eric Porter Productions. Some works are thought to be owned by his widow and some may be owned by Channel 7 (who purchased the Eric Porter Studio) however no party is certain.

As a result, Eric Porter's works may languish and not be used or shown – not through lack of interest but lack of clarity on copyright.

Orphaned works present an unacceptable risk of litigation to the AFC. Therefore, they are often un-used in the AFC's exhibitions and public programs or not supplied to other potential users. This results in a distortion of Australia's audiovisual heritage and a failure of the AFC to fulfil its mandate of facilitating access to Australia's cultural history. The purpose of preservation is negated if the preserved works can never be legally accessed.

The AFC recommends that orphaned works be addressed via a model similar to that utilised in Scandinavia.²³ In this model, collecting societies are deemed to represent all rights holders in a group for the purposes of a licensing scheme, provided that the society represents a substantial proportion of the relevant group. A copyright holder has an option to notify the collecting society that they do not want to be represented by the collecting society.²⁴

Australia has collecting societies that could represent owners of orphaned literary works (CAL), orphaned musical works (APRA/AMCOS), orphaned sound recordings (PPCA), orphaned artistic works (VISCOPY/CAL), and, orphaned television and radio programs (AVCS/Screenrights), however, there is currently no collecting societies representing owners of computer programs or film. The AFC recommends that AVCS/Screenrights be deemed the responsible collecting society in relation to orphaned films.

The AFC considers that the rate for using orphaned works should be fixed by the Copyright Tribunal as it currently does with other licences and should reflect the public interest in providing access to orphaned material. The AFC strongly recommends that the rate for using orphaned works reflect the purpose (eg. commercial or non-commercial) of the use.

The AFC accepts that use of orphaned works via a statutory licence should only occur after an archive has taken reasonable steps to locate the copyright owner. The AFC strongly recommends that these steps be contained within the regulations to the Copyright Act.

²³ The AFC notes that the CLRC's Simplification Report recommended that the Government consider whether a scheme similar to the Scandinavian model would be feasible in Australia.

²⁴ An overview of the extended collective licence scheme that includes use of orphan works is available from the following link:

http://www.kopinor.org/content/download/2124/15407/file/k25_henry_olsson.p An example of legislation that provides for a collection licence scheme is available from the following link to Sweden's legislation – Copyright in Literary and Artistic Works 1960.
www.wipo.int/clea/docs_new/en/se/se052en.html

To assist the Review the AFC has provided at Appendix C a list of the current steps it takes to locate a copyright owner. The AFC believes these reflect general industry practice.

The AFC notes that while a limited ‘reasonable inquiries’ mechanism has recently been introduced into the Copyright Act by the *United States Free Trade Agreement Implementation Act 2004*, (for use of published sound recordings when not all owners can be found, s 113C *Copyright Act 1968*²⁵) the AFC does not believe this model is appropriate as:

- a. it does not detail the appropriate steps;
- b. it is limited to published material;
- c. it may only be accessed by other copyright owners (in contrast to copyright users generally).

The AFC does not support archives being obliged to provide a ‘prescribed notice’ (such as that provided for under s 52 whereby notice must be published in the Gazette between two to three months before the date of the publication of the new work) as the AFC believes this would:

- i. introduce unnecessary cost and delay to the archives; and
- ii. duplicate the actions of the collecting society who would be in a far better position to seek to locate lost authors via public notices.

The AFC supports collecting societies holding funds from orphaned works being obliged to locate authors via public notices.

Relationship of Recommendation 1.4 to the Three Step Test

(1) That the reproduction is only allowed “in certain special cases”;

In the opinion of the AFC, this requirement would be satisfied as orphaned material would only be able to be used by archives and only after taking prescribed steps to ensure the material falls within the definition of orphaned. Therefore the combination of who may rely on the provision and the circumstances under which the provision may be relied upon, combine to ensure only a specified narrow number of instances fall within this provision.

(2) It should “not conflict with a normal exploitation of the work”; and

This use does not conflict with the normal moral rights. Therefore, if the author is known but unable to be located it is still necessary to ensure that they are attributed and their reputation is not damaged by the use of the work. Economic interests are protected via payment of the statutory licence fee.

(3) It should “not unreasonably prejudice the legitimate interests of the author.”

²⁵ This section requires that remuneration be held in trust for four years in the event that the unlocatable owner is subsequently found.

In the opinion of the AFC this does not prejudice the legitimate interests of a copyright owner or author as moral rights are unaffected and statutory remuneration is paid.

12. Summary of Recommendation 1

In summary, the primary recommendation made by the AFC is that the library and archive provisions are reformed. There are several parts to this recommendation as follows.

Recommendation 1.1: The AFC recommends that the Libraries and Archives provisions be consolidated into one section of the Copyright Act. Currently these provisions are found in ss48-53 (for works) and ss110A –110C (subject-matter other than works);

Recommendation 1.2: The AFC recommends that the Libraries and Archives provisions be reformed in order to create consistency for both works and subject-matter other than works (that is, consistent for all types of material held by the AFC);

Recommendation 1.3: The AFC recommends that the Libraries and Archives provisions be clarified to allow archives (as currently defined within the Copyright Act) to undertake copying (including format and time-shifting), and communication as required to fulfil their statutory mandates of administration, storage, preservation and access. Currently an archive is permitted to undertake some but not all the activities necessary to fulfil their mandates. Briefly the AFC would consider these categories to cover the following:

- (a) administration – making copies and communicating material (eg: thumbnails) to ensure accurate records of collection items are maintained; to permit intra-archive communication of collection items or other relevant material regarding a collection item;
- (b) storage – making back-up copies or format shifting collection items to provide for efficient and effective storage and retrieval of collection item (eg. move VHS to digital records on a central easily accessible database thereby removing bulky VHS items from needing to be regularly accessed);
- (c) preservation – making copies prior to deterioration to allow for preservation of collection items (not simply where the collection items is a ‘first copy’ or has already started to deteriorate); and
- (d) access – allowing archives to implement mechanisms to facilitate equality of access to their collection. This would be achieved via:
 - (i) confirming archive’s ability to make analogue and digital copies of collection items for the purposes of access;

- (ii) providing for access via secure Internet protocols (WAN wide area access network, VPN – Virtual Private network) to material within the archive’s collection;

Recommendation 1.4: The AFC recommends that the Libraries and Archives provisions be amended to allow archives to use ‘*orphaned works*’ (that is material whose creator is unidentifiable or unlocatable) for the functions of the archive on payment of a statutory licence fee. The AFC proposes that Australia implement a scheme similar to the Scandinavian model.

The AFC notes that exceptions for libraries and archives are considered to fall within the Three Step Test and included in most jurisdictions copyright legislation. For example, article 5(2)(c) of the European Directive 2001/29/EC (copyright in the information society) states:

“Article 5 Exceptions and limitations

2. Member states may provide for exceptions or limitations to the reproduction right provided in Article 2 if the following cases:

...

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not direct or indirect economic or commercial advantage;

13. Recommendation 2: General reform of ‘Fair dealing’

Should the AFC’s primary proposal in relation to the library and archive provisions, above, not be implemented the AFC proposes that the current library and archive provisions are retained and that the ‘fair dealing’ provisions are reformed to allow archives to undertake activities not covered by the current provisions but necessary to fulfil their statutory mandates of administration, storage, preservation.

This would be achieved by new categories of ‘fair dealing’ that specifically allow archives to undertake copying and communication of material within the archive’s collection to facilitate archives’:

- a. administration,
- b. storage; and
- c. preservation;

of material within the archive’s collection (as described);

As any activity undertaken under a ‘fair dealing’ provisions must also be ‘fair in all the circumstances’ the AFC recommends that activities undertaken to fulfil the function of a public archive should be deemed to be ‘fair’ for the purposes of the ‘fair dealing’ provisions. These provisions would only benefit institutions that fell

within the definition of archive and would only be able to be relied upon in instances where the archives' are undertaking activities that fulfilled their functions.

It should be noted that if these amendments were made to the fair dealing provisions then the activities in relation to orphaned works referred to under the reform of the libraries and archives provisions would not be necessary.

14. Recommendation 3: Private dealing

The AFC supports the concept of an equitable and efficient system that returns lost income to copyright creators from private copying.

The AFC supports consideration being given to a statutory licence for private copying, however, the AFC believes it is too early to support any particular model and recommends further discussion and consultation on the issue.

15. Recommendation 4: Fair Use

In general, the Issues Paper is presenting the option of amending the categories of 'fair dealing' or replacing the categories of fair dealing with a general exemption that permits 'fair use'.

The AFC does not support replacing the current fair dealing provisions with a fair use provision. The AFC believes that replacing the current fair dealing provisions with a fair use provision would introduce uncertainty into the copyright law with the threat of legal action acting as a disincentive for particular uses unspecified in the Act. Further the AFC believes that a fair use provision is more suited to the US with its long history of free speech and copyright jurisprudence.

The AFC supports retaining and consolidating the fair dealing provisions along the lines described by the Copyright Law Review Committee's Simplification Report.

As discussed above, the AFC believes that some of the additional exceptions should be achieved via amendment to the Libraries and Archives section of the Copyright Act. However, if these provisions are not amended then the AFC must rely on amendments to fair dealing to allow it to fulfil its statutory mandate.

Should the government decide that the fair dealing provisions be replaced by a fair use provision and the AFC's libraries and archives recommendations not be accepted, then the AFC strongly recommends that its recommendations in relation to orphaned works and (if necessary) libraries and archives are included within the scope of the fair use provision.

16. Conclusion

It is the opinion of the AFC that vibrant and effective archives support creators and communities. The AFC believes that currently its role as an archive is being unnecessarily hampered by the current 'library and archive' provisions that focus

on text-based material and are drafted around an out-dated understanding of the role and responsibilities of libraries and archives.

This Review is an opportunity to appreciate and support technological developments (such as computer graphics and digital networks) that have allowed archives to dramatically reinvent the structures and patterns of exhibitions and methods of heritage protection and information communication.

Overall the AFC supports a reform of the 'library and archive' provisions that recognise the critical role of archives and ensures that the library and archive provisions are:

- a. Clear and preferably consolidated into one section;
- b. Consistent across both works and subject matter other than works;
- c. Clarified to allow archives to fulfil their functions by copying and communicating material for the purposes of administration, storage and preservation, as well, as allowing archives to facilitate access to their collections;
- d. Reformed to allow archives use 'orphaned works'.

Appendix A – Section 5 of the Australian Film Commission Act, 1976

i. The functions of the Commission are:

1. to encourage, whether by the provision of financial assistance or otherwise, the making, promotion, distribution and broadcasting of Australian programs; and
2. to promote and distribute any programs; and
3. subject to the approval of the Minister, to provide financial assistance to a State or an authority of a State for the purchase by it of:
 - a. Australian programs that are of an educational nature and of national interest or importance; and
 - b. rights in respect of any such programs; and (d) to encourage, whether by the provision of financial assistance or otherwise, the proper keeping of recordings in archives in Australia; and
4. to encourage, whether by the provision of financial assistance or otherwise, the proper keeping or recordings in archives in Australia; and
5. to develop, maintain and preserve a national collection; and
6. to exhibit, or to make available for exhibition by others, items in the national collection; and
7. to make items in the national collection available to such persons and institutions, and in such manner and subject to such conditions, as the Commission determines.

(1A) In the performance of its functions, the commission shall give special attention to the encouragement of:

- i. the making of experimental programs and programs of a high degree of creativeness; and

the making and appreciation of Australian programs and other programs as an art form.

(1B) The commission must use every endeavour to make the most advantageous use of the national collection in the national interest.

- ii. The functions of the Commission specified in paragraphs (1)(a) and (b) may be performed either within or outside Australia.

- iii. The commission may carry out a matter within the functions specified in paragraph (1)(b) by commissioning a person to undertake that matter.
- iv. The Commission may perform its functions to the extent only that they are not in excess of the functions that may be conferred on the Commission by virtue of any of the legislative powers of the Parliament, and, in particular, may perform its functions:
 - 1. by way of expenditure of moneys that are available for the purposes of the Commission in accordance with an appropriation made by the Parliament;
 - 2. by way of, or in relation to, trade and commerce with other countries, among the States, between Territories or between a Territory and a State;
 - 3. for purposes related to broadcasting services;
 - 4. so far as they relate to the collection of statistics;
 - 5. for purposes related to external affairs; and
 - 6. for purposes in relation to a Territory.