

## COPYRIGHT

This paper explains copyright as it is relevant to museums and their administrators. Topics covered include licensing rights, permissible use of copyright material, special statutory provisions for museums and libraries. Also included is a list of frequently asked questions (and answers!) on these topics.

Museums not only holders of large quantities of copyright material, they are, themselves, great users and creators of copyright material. Thus, it is important for museum personnel to understand the basic principles of copyright, so that they may better utilise and protect the museum's resources.

Copyright protection is accorded to two classes of things. Museums contain or utilise all of these:

- \* "works" (including the artistic, musical, literary and dramatic);
- \* "other subject matter" ( in particular, sound recordings and published editions).

### (i) What Is Copyright?

Copyright protection in Australia is wholly statutory. It is provided by the Copyright Act 1968. This Act provides automatic protection. No formalities are necessary. As soon as a thing capable of protection is given a "material form", copyright exists. (Note that the position in the United States is different: There, the work must be formally registered before full protection can be enjoyed).

Copyright is a bundle of rights. It includes the right to:

- (a) reproduce the work;
- (b) publish the work;
- (c) include the work in a television broadcast(or transmit it by cable services);
- (d) make an adaptation of the work.

(a) **Reproduction** may take many forms. Although it is most usually used as a synonym for "copy" it really has a wider meaning in copyright law for the copy does not have to exact: It need not be in the same dimension, (for example, a photograph of a musical instrument). It need not be in the same form, (for example, the film of a book). It need not be a copy of the whole work, merely a "substantial portion" of it.

(b) **Publication** is given a special meaning by the Copyright Act. It is defined as meaning the supply to the public (whether by sale or otherwise) of reproductions of the work. For a musical composition this may be by means of sheet music or records; for an artistic work this may be by the making and selling of limited edition prints or by reproducing it in a catalogue. Few museums are aware that in order to reproduce copyright works

even in an exhibition catalogue, the permission of the copyright owner must first be obtained. Because of the inconvenience of this, the registrar of the collection would be well advised to ensure that the acquisition documents state:

- (i) whether or not the work is copyright;
- (ii) if so, when the copyright expires;
- (iii) who is the owner of copyright;
- (iv) and if the owner is the donor/vendor of the work, whether that person gives the museum a licence to reproduce the work for, say, non-commercial use within the museum and the right to publish it in catalogues (which presumably will be for sale).

It must be noted that **exhibition** has nothing to do with copyright. Mere exhibition has nothing to do with reproduction, publication, or the other aspects of copyright.

## (ii) **Who Owns The Copyright?**

### (a) **Artistic Works**

The term "artistic works" includes not only those works usually thought of as being artistic, such as paintings, sculptures, drawings, lithographs, photographs and the like. It also includes a category referred to in the Act as "works of artistic craftsmanship".

There is no statutory definition of "artistic craftsmanship" but the cases provide some guidance. The "artistic" quality of the work is gauged by looking at the intention of the author in creating the work and asking whether the main object of creating the work, albeit utilitarian, was that it should have a substantial appeal to the taste of those who observe it. Thus the emphasis is on the intention of the author rather than the reaction of the viewer. (Note that this artistic quality is only relevant to works of craftsmanship. It is totally irrelevant to paintings, photographs, sculptures and the like.)

Thus a dress, chair, vase, table, door knocker, and brooch would all probably be works of artistic craftsmanship and therefore subject to copyright protection as "artistic works".

#### (i) **General Rule**

As a general rule the author of the work is the owner of the copyright. The Act does not define "author" (except with regards photographs) but the cases show that the "author" is the person who gives form to the creative idea. It is not necessarily the person who first had the idea.

#### (ii) **Photographs taken prior to 1 May 1969**

The copyright in such works vests in the person who owned the material on which the photograph was taken (s.208). Establishing who did own the material is usually impracticable for busy museum personnel unless that information is sought at the time of acquisition of the work.

(iii) Photographs taken after 1 May 1969

The copyright in these vests in the person who took the image.

(iv) Commissioned works

Even with commissioned works, the general rule applies and the author of the work is the owner of the copyright. There are three exceptions:

(a) photographs

(b) portraits

(c) engravings

If someone commissions one of these, the copyright is owned by the commissioner. (It should be noted that "commissions" is not synonymous with "requested". It is more accurate to describe it as "done on request for a fee"). Thus upon acquisition, the vendor or donor of such artistic works should be asked whether or not the pieces were commissioned. Not only is this an important curatorial detail, it may also may later become vital should the museum later wish to reproduce the work.

(v) Employees-where work was made prior to 1 May 1969

Unless there is a term in that individual's contract of employment to the contrary, (whether explicit or implied), the position is simple: the employer owns everything.

In the case of employees of journals and newspapers, the employee can restrain the employer from using the work in any way unrelated to newspapers and magazines. This can be important for a museum for when it enquires as to who owns the copyright of such works, and quite correctly gets the response that it is the newspaper proprietor, the registrar should be aware that the proprietor does not have the unrestricted right to authorise the work's reuse. Although the author does not own copyright, he or she can restrain the owner from using the work in any way other than by publication in a journal, newspaper or similar periodical.

(vi) Employees-where work was made after 1 May 1969

As above, the general rule is that the employer owns the copyright.

The position of artists who work for newspapers and the like is now much more simple. The proprietor of the newspaper or journal owns the copyright for all purposes relating to reproduction in newspapers and the like, while the artist retains all other rights. Thus if a museum wished to reproduce such a work in its magazine it would need the permission of the publisher. But if it wished to include it in a video or reproduce it on a poster, it would need the permission of the artist.

**(b) Musical Works**

Again, the general rule is that the "author" is the owner of copyright. The author of the music is of course the composer. If the composer is commissioned to write the music he or she still retains the copyright. However where composers are actually employed to write songs (such as in the "Tin Pan Alley" composers) the employer owns the copyright.

Care should be given to distinguishing between the author of the music and the author of the lyrics (if any). The lyrics are protected as literary works and the music as a musical work and if their authors are different, separate permissions will have to be obtained.

**(c) Literary Works**

The basic rules concerning the ownership of copyright in literary works are the same as those relating to artistic works: The owner is the author, even where the work is commissioned. Similarly, if a person writes something in the course of employment, the employer will own the copyright. (The situation of employees of newspapers, magazines and the like is as set out above for artistic works).

As a consequence of this, museum personnel who write learned books and articles should clarify with their employers, exactly who is to control the copyright of their works. This is a potential industrial relations landmine for most writers of academic material would be horrified to think that their employer may have the right to claim the copyright in their work.

**(d) Recordings**

The maker of a sound recording is usually the owner of the copyright in it. As the maker of the sound recording is almost always a record company it is usually reasonably simple to track them down. On the other hand, as many small record companies go broke every year, it can become extraordinarily difficult to get clearances for some.

If a company is commissioned to make a recording (and this is increasingly common in the industry) the copyright will be owned by the commissioner. The most useful test is to ask who paid for the making of the recording. That will be the person or company from whom any permissions will have to be sought.

(e) **Published Editions**

The copyright in a published edition of a literary, musical, dramatic or musical work, is the publisher of the edition. Thus, if two museums decided to co-operate in the mounting of an exhibition and a curator from one is asked to write an article for the catalogue whilst the other institution agrees to arrange and pay for the publication of the catalogue, the first museum will own the copyright in the article and the second will own the copyright in the published edition.

(iii) **Duration of Copyright**

(a) **General Rule**

For most artistic, literary and musical works, the copyright lasts for the life of the author plus fifty years. The fifty year period runs from the end of the year in which the author died.

(b) **Photographs**

For photographs taken before 1 May 1969 the copyright runs for fifty years from the end of the calendar year **in which the photograph was taken** .

For photographs taken after 1 May 1969, the copyright runs for fifty years from the end of the calendar year **in which the photograph was first published**.

In such cases the death of the author is irrelevant to the calculation of the copyright period. Thus, where a photograph is never published the copyright will subsist indefinitely.

(c) **Engravings**

If the engraving was published during the lifetime of the author, the usual period (author's life plus fifty years) applies. But if the work is first published posthumously, the copyright period will last for fifty years from the end of the calendar year in which the work was first published. Thus, if the work is never published, the copyright will continue to exist in perpetuity.

(d) **Anonymous or pseudonymous works**

The copyright in these (except for photographs) subsists for fifty years after the end of the calendar year in which the work was first published. However, if the author's identity is generally known or could be ascertained by reasonable inquiry, the general rule applies.

(e) **Works of joint authorship**

Again, whether or not the work has been published is significant. Where it has been, the 50 year period runs from the end of the calendar year in which the last remaining author dies. However,

where the work is posthumously published, the period runs for fifty years from the end of the calendar year in which the work was first published.

Where **one or some** (but not all) of the joint authors uses a pseudonym, the fifty year period runs from the end of the year in which the last author, whose identity has been revealed, dies.

Similarly, where **all** of them use pseudonyms, if at any time within fifty years of publication the identity of one of the authors is or could be ascertained, the period runs from the end of the year in which the author, whose identity has been revealed, dies.

**(f) Published editions**

There was no copyright in published editions before 1 May 1969. Editions published after that date enjoy copyright protection for 25 years from that date of its first publication .

**(g) Musical works**

The general rule is that the copyright in musical compositions lasts for fifty years from the end of the year in which the composer died.

However, if the work was not published (say as sheet music), publicly performed, broadcast, or sold in the form of records, during the composer's lifetime, the copyright period starts running from the end of the calendar year in which the first of those events occurs.

**(h) Recordings**

Copyright in recordings made prior to 1 May 1969, last for fifty years from the end of the year in which the recording was made. For recordings made after 1 May 1969, the copyright period of fifty years starts to run from the end of the year in which the recording is first published. Basically this means the year of its release to the public. Thus if a master recording is made but the record company decides for whatever reason not to release the disc, the company will retain indefinite control of the recording, for the fifty year period will never start to run .

**(iv) Dealing With Copyright Material**

The statutory provisions as to the ownership of copyright are all

subject to variation by contract. Most commonly, this is done by assignment of the copyright, or by licensing the rights.

**(a) The assignment of copyright.**

Assignment is essentially a transfer of rights, (for example by means of sale and purchase). Thus, one should always beware of assigning one's rights as it means losing all control over them.

In the past, institutions dealing with copyright have tended to adopt a rather heavy hand in this regard and have used their considerable power to acquire assignments of copyright. After all if the museum owns the copyright the administration does not have to think twice about reproducing a work or allowing others to use it, let alone have to go through the tedious process of asking permission of the "author".

Thus for many years it was common museum practice for all contracts relating to the purchase of works to contain a clause by which the vendor was required to assign the copyright at the same time as the traditional property right. It was not that the museum had need of the extra rights, it was simply administratively easier.

Two things have changed: First, authors have become more aware of their rights, and in particular the value of their copyrights. In this the age of merchandising, the subsidiary rights have become often more valuable than the traditional property rights. Secondly, the skill and professionalism of administrators has improved. The registrars of collections are employed for their administrative expertise and not for any less honourable or more esoteric reason. It is not beyond the skill of these people (assisted by computer technology) to develop systems which readily disclose the copyright status of any particular work in the collection.

These two changes have meant that authors are more resistant to parting with all control of their copyright and that museums are quite capable of fulfilling their needs by means of **licences**.

## (b) Licensing the Rights

When a copyright owner grants a licence, it permits another to use the right but retains ownership and thus a certain control over that right. Licences allow the usage to be limited to the real needs of the licensee. This is done by asking a number of questions:

- (i) Should the licence be exclusive or non-exclusive? In other words does it really matter if other people also have the right to use the same material. Only exclusive licences have to be in writing.
- (ii) For how long does the museum need the rights? If the museum wants to reproduce a design on T-shirts to publicise a particular exhibition, it will not need the right to reproduce the design after the exhibition has closed.
- (iii) For which mediums of the use must the licence be granted? If the permission sought is, say, reproduction on T-shirts, the licence will usually be restricted to that. If the licensee

also wishes to put the image on posters, glasses and biscuit tin lids then the licence should reflect the wider use.

- (iv) To what geographical area should the licence apply? How often does an Australian museum truly need world rights? It may need world rights for the reproduction of a work in a book that is to be sold world-wide. But in that case it would only require non-exclusive book rights. Acquiring those would allow the museum to do what it needs and yet still allow the copyright owner to exploit the work in other ways.

(c) **Structuring the Fee**

Copyright is a valuable thing. It has to be paid for. There are three basic ways that this is structured:

- (i) an outright fee;
- (ii) a royalty;
- (iii) a fee and a royalty.

The outright fee is the easiest but has its drawbacks. The biggest disadvantage of the straight fee is that no-one can really know at the outset of a transaction how much the rights are worth. For example, the value of the right to reproduce photographs in a book will vary wildly depending on the likely sales of the book. On the other hand, when dealing with people who are perhaps unknown quantities or whose intended use will be hard to audit, it may be better to adopt an outright fee rather than take the risk of getting a percentage of nothing.

A royalty is a common method of profit participation. If one makes money, both make money. However it works only so long as the person doing the arithmetic can be trusted and/or the arithmetic can be checked. Thus, T-shirt distributors are notorious for their rubbery sums whereas most large publishing companies have accountants who can add up and have methods of accounting that are easily subjected to audit.

Increasingly common, is the payment of a fee plus a royalty. In this way the copyright owner gets an upfront fee for the usage and a royalty on the proceeds. Here, the questions are two-fold: first, is the fee **returnable** under any circumstances? (It should not be). Secondly, is the fee **recoupable**? (In other words, is it merely an advance against future royalties?) There is nothing wrong with this, but the answer is important for the purpose of working out whether or not the deal is a fair one.

It need hardly be said that when dealing with royalties one should always calculate on gross figures and never nett. The point is commercial rather than legal but many people have gone

broke on fifty per cent of nett when they would have made a fortune out of twelve per cent of gross.

(v) **Permissible Uses of Copyright**

The Copyright Act provides for a number of situations in which reproduction of a work will not constitute an infringement of copyright. Some of these are essential for the operation of a museum. Indeed, some of them are restricted to archives, libraries and museums.

(a) **The taking of photographs in the museum by the public**

Most museums forbid the taking of photographs inside the museum. Besides the conservation problems caused by flash bulbs, the photographer runs the risk of falling foul of the copyright laws. Each time the photographer shoots a copyright work the odds are that copyright will be infringed.

The most important (and misunderstood) exception to this is that works of "artistic craftsmanship" or sculpture, **permanently situated in a public place**, may be photographed, sketched, painted, or engraved without infringing copyright. This exception does not extend to other works or objects. This leads to the ridiculous situation in which a photographer may shoot a sculpture that is permanently situated in a public place, but may not photograph an adjacent sculpture by the same artist that is merely temporarily positioned nor the working drawing for the sculpture hanging nearby. With distinctions like this to be made, it is little wonder that wise museum administrations ban the taking of photographs except under the most careful supervision.

(b) **Incidental use for film or television**

No infringement occurs if an artistic work is reproduced on film or television if that reproduction "is only incidental to the principal matters represented in the film or broadcast". As to what is "incidental", that is a matter of fact and degree and will differ in each case.

For example, there is usually no copyright problem in allowing a film crew to use museum premises as a set. It may of course be different if the film was "The Picture of Dorian Gray" and that portrait was held in the museum collection.

Similarly, the filming of interviews in front of copyright works usually holds no problems for this is usually either only an incidental use or would be covered by other exceptions (see later).

(c) **Fair Dealing**

This covers the use of artistic literary and musical works for the following purposes:

- (i) research or study;

- (ii) criticism or review (although sufficient acknowledgment must be made); and
- (iii) reporting news in a newspaper, magazine, film or television broadcast (although in the case of the print media, sufficient acknowledgment must be made).

Museums cannot rely on "fair dealing" for the purpose of including copyright material in advertising, the annual report, brochures, catalogues.

To determine whether or not a dealing is "fair", regard is had to several factors:

- (i) the purpose and the character of the dealing;
- (ii) the nature of the work;
- (iii) the possibility of obtaining the work within a reasonable time at an ordinary price;
- (iv) the effect of the dealing on the value of or market for the work; and
- (v) where only a part of the work is copied, the amount and substantiality of the portion copied, taken in relation to the whole.

**(d) Use of an insubstantial portion**

To be an infringement, the use must be a reproduction of a substantial portion of the work. Of course what is substantial is a question of fact and degree in every case. There are no valid rules of thumb although one often hears glib and reassuring little phrases such as " You can use up to 14 bars of music", or "Single pages are O.K.". None of these are true. It will vary in each case.

In the case of published editions (of more than ten pages) of literary, dramatic or musical works the Act provides that a "reasonable portion" is :

- (i) less than 10% of the number of pages in the edition, or
- (ii) where the edition is divided into chapters, more than 10% of the whole book, but no more than one entire chapter.

(e) **Special Statutory Provisions For Libraries, Archives and Museums**

(i) Scope

Division 5 of Part III of the Copyright Act contains special provisions relating to the copying of works by libraries and archives. Although the Act does not specifically refer to museums, they are by inference included: "Archives" are defined in the Act as "...a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purpose of conserving and preserving those documents or other material..." (s.10(4)). Collections in the hands of individuals are excluded but those controlled by local historical societies, statutory corporations, as well as the major governmental collections, are included.

(ii) Copying By Users

If the institution has a photocopying machine available for the public to use, it will not be responsible for any breaches of copyright committed by users so long as it displays near the machine, the prescribed warning sign.

(iii) Copying For Users

Copies may be provided to members of the public so long as the following conditions are met:

- (a) The request must be in writing and accompany the piece to be copied;
- (b) It must contain a declaration stating that the person
  - (I) requires the copy for the purposes of research or study and will not use it for any other purpose;
  - (II) has not previously been supplied with a copy of the same material by an authorised officer of the institution.

Where this request and declaration is made, the officer in charge may supply the requested copy. There are only a few restrictions on this:

- (a) the charge made must not exceed the cost of making and supplying the copy;
- (b) a copy may not be made of two or more articles (or parts of articles) for the same periodical publication unless the articles relate to the same subject matter;

- (c) if the request is for a copy of the whole (or more than a "reasonable portion") of a literary, dramatic or literary work (other than an article in a periodical) the authorised officer must sign a declaration that the work cannot be purchased new within a reasonable time at an ordinary commercial price;
- (d) the copy must be supplied to the person who is making the request.

**(iv) Copying By Institutions For Other Libraries Or Archives**

Such requests must be made by, or with the authorisation of, the officer in charge of one institution to the officer in charge of the other. The permitted purposes of such requests include:

- (a) including the copy in the collection of the library making the request;
- (b) supplying the copy to a person who has made a request for a copy.

If the institution has previously asked for a copy for the purpose of including the work or article in the collection, upon making the request, the authorised officer must make a declaration stating that the copy so supplied has been lost, destroyed or damaged.

If the request is for a copy of the whole (or more than a "reasonable portion") of a literary, dramatic or literary work (other than an article in a periodical), upon making the request, the authorised officer must sign a declaration that the work cannot be purchased new within a reasonable time at an ordinary commercial price.

The requested copy must be made by an authorised officer and the charge must not exceed the cost of making and supplying the copy.

**(v) Unpublished Works**

The Act provides for two situations in which the authorised officer can copy unpublished works without breaching copyright.

**(a) Theses and Manuscripts**

A thesis or manuscript that has not been published and is kept in the library of an institution such as a university or an archive, may be copied if the officer is satisfied that the person requesting it, is doing so for the purpose of research or study.

**(b) Expiration of time**

With other unpublished literary, dramatic, or musical works, or unpublished photographs and engravings, copies may be made if

- (a) the author has been dead more than 50 years;
- (b) the work was executed more than 75 years ago;
- (c) the work is available for public inspection in the collection (subject to the governing regulations);
- (d) the officer is satisfied that the copy is sought only for the purposes of research or study or with a view to publication.

**(vi) Copying Works For Preservation Purposes**

In certain circumstances, the officer in charge of the library or archive may order a copy of a copyright work to be made if the work is in danger of loss or deterioration:

- (a) if the work is in **manuscript** form or is an **artistic work** the copy can be made for the purposes of preserving the work or for the purposes of research within a library or archive;
- (b) if the work is in **published form** it may be copied for the purpose of replacing the work. Published works that are being replaced because they have been damaged, have deteriorated or have been stolen, can only be replaced by copying, if the authorised officer signs a declaration that the work cannot be purchased new within a reasonable time at an ordinary commercial price.

**(vii) Microfilming Material That Is Impracticable To Retain**

A microfilm may be made of any work held in the collection, even if it does not come within the above categories, so long as the work that copied in this way is destroyed as soon as practicable thereafter.

**(viii) Disclaimers**

It is often very difficult to obtain the permission of the copyright owner. They change address, die, and do all sorts of things designed to make the registrar's life a misery. If the copyright owner cannot be traced or refuses to reply to one's requests, it is no defence to include a statement saying that all reasonable efforts were made to obtain the copyright permissions.

**(ix) Copyright Questions Commonly Posed By Museums**

**(a) Can the museum photograph all material as it is accessioned, for record purposes?**

Strictly speaking, this will be a breach of copyright if the material is copyright material. In many cases the copyright will have expired, either through the passage of time or because it is something that should have been registered under the Designs Act, but wasn't. If the reproduction is only for record purposes it is unlikely that anyone will sue because the cost of taking legal action would never be outweighed by the nominal damages that might be awarded.

Nevertheless, there is a point that museums should seek to have changed by amendment to the Act.

- (b) **Can the Museum take photographs to give to persons who need illustrations for articles, books, or unpublished research?**

If the reproduction comes within the defences of "fair dealing", "private research", or "criticism or review", there is no problem. Officers giving such permissions should satisfy themselves that the purpose of the reproduction is lawful and get the person making the request to sign a suitably worded form setting out the purpose for the reproduction, limiting the use to that specified purpose, and demanding an acknowledgment that the subject is held in the museum's collection.

- (c) **Can the museum reproduce collection material for postcards that will be sold in the museum bookshop, the profits of which will go to the acquisitions fund? What about catalogues?**

If the work is protected by copyright, this reproduction would be a breach of copyright and could cost the museum dearly. Permission must be sought. It is arguable that reproduction in the exhibition catalogue may be permitted under the criticism or review aspect of "fair dealing". However it is always best to obtain a licence to reproduce the work in exhibition catalogues at the time of accession.

- (d) **Is it true that "as far as sculpture and craft items are concerned, there is no infringement of copyright if they are reproduced in a two dimensional format"?**

As with so many rules of thumb, this is more wrong than right and therefore more dangerous than useful. It is safer to think of this the other way round: generally, one can breach copyright in a work if one reproduces it in the same or a different dimension.

If the subject is a work of artistic craftsmanship (and remember that has a wider meaning than "craft item") or a sculpture, the Act says that the reproduction will not be a breach if it would not appear to a "person, not an expert in relation to objects of that kind, to be a reproduction of the artistic work". Thus, the photograph of a vase, a necklace, or hand-made chair would be a breach, but the two dimensional plan of a mechanical device would probably not. Similarly one might not be able to make a drawing of a hand crafted guitar but may be able to do a plan of the mechanism of a hand-made harpsichord.

If a sculpture or work of artistic craftsmanship is permanently situated in a public place or places open to the public, copyright will not be infringed by the making of two-dimensional versions of it. Doing models or selling miniatures of the work is not lawful without the usual permission.

Do not forget to consider the possibility that the work involved might have been eligible for registration under the Designs Act. If so, the rights may already be in the public domain either because the work wasn't registered when it should have been, or because the 16 year protection accorded to a registered design has expired, (for example, Matchbox Toys produced in the 1950's and 1960's, the designs on a Liberty fabric or china painting designs produced on blanks up to the 1970's).