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CULTURAL INSTITUTIONS, DIGITISATION AND COPYRIGHT REFORM

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While digital technology can enhance the way in which cultural institutions manage and provide access to their collections, its utilisation is constrained by copyright law. This article considers the way in which copyright law should be reformed so as to permit cultural institutions to take advantage of the opportunities provided by digital technology. It begins by explaining the digitisation practices undertaken by cultural institutions, and the relevance of copyright law to these practices. Then, the purpose of granting exclusive rights under copyright law, the types of exceptions from infringement that copyright law typically provides, and the rationales for those exceptions are considered. Next, cultural institutions are categorised by the way in which they will seek to take advantage of digitisation technologies. Finally, the likely reform options for each type of cultural institution are considered, and the appropriate means for implementation of those reforms are identified.

Introduction

In a recent empirical study of 64 cultural institutions[1] in Australia, the United Kingdom and the United States, it was found that almost all institutions

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[1] The term 'cultural institution' will be used throughout this article to refer to institutions such as museums, galleries, libraries and archives which are in the public domain.

had undertaken digitisation of items in their collection.[2] Used in this sense, 'digitisation' means the making of a reproduction in digital form of an item that itself is in non-digital form. Typical acts of digitisation are the scanning of a manuscript item, and the digital photographing of a three-dimensional object.

The reason for the digitisation of a cultural institution's collection items is, of course, to create a representation of the item that can be stored and accessed via a computer system. This representation may be made accessible only to the staff of cultural institution. In that case, the purpose of the digitisation is to assist in the internal administration and management of the institution. Alternatively, the representation may be made available more widely – either to a specific class of users of the institution, or to the public more generally. In this case, the purpose of the digitisation is to facilitate public access to the item.

In both cases, where the digitised item is a subject matter in which copyright subsists, the digitisation of the item will constitute a *prima facie* act of infringement of copyright. This is because the creation of the digital representation of the item constitutes reproducing in a material form, or copying, the item, and reproduction and copying are acts within exclusive right of the

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[2] Emily Hudson and Andrew T Kenyon, 'Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives' (2007) 30 (1) *University of New South Wales Law Journal* (in press), at Section III.

owner of copyright in the item.[3] Where the digital representation of the item is made available to the public by a computer network, this will also be a *prima facie* act of infringement of copyright. This is because the making available online of the item constitutes communicating the item to the public, which is an act within the exclusive right of the owner of copyright in the item.[4]

Whether the digitisation, and any subsequent making available of the digitised representation, of a collection item protected by copyright is in fact an infringement of copyright depends primarily on whether the copyright legislation provides an exception for the doing of that act. While most copyright enactments do provide exceptions from infringement for various acts done by cultural institutions, these are usually very specific.[5] As a result, the exceptions do not cover the full range of digitisation activities that cultural institutions may wish to undertake.[6] The consequence is that reform of copyright law, and in particular of

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[3] *Copyright Act 1968* (Cth), ss 31(1), 85(1), 86, 87 and 88.

[4] *Copyright Act 1968* (Cth), ss 31(1), 85(1), 86, 87 and 88. The legislation defines ‘communicate’ to mean “make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise)”: *Copyright Act 1968* (Cth), s. 10(1).

[5] See, e.g., *Copyright Act 1968* (Cth), Division V of Part III, and ss 110A and 110B.

[6] On this, see E Hudson and A Kenyon, n 2, at Part VI.

the exceptions to copyright infringement, will be required if cultural institutions are to take full advantage of the opportunities offered by digital technology.

The question that arises, and which this article seeks to answer, is in what way should the necessary copyright reforms be implemented? To answer that question, it is necessary to understand the rationales for copyright protection and for exceptions to copyright protection. The immediately following section of this article explores these matters. It is also necessary to recognise that cultural institutions will undertake digitisation for different purposes, with the consequence that different legislative reforms will be required for the different types of institutions. The different purposes for digitisation, and the different reforms that are required, are considered in the subsequent section of this article. The final section of the article contains concluding comments on the issue of how any new copyright exceptions for cultural institutions should be implemented.

Copyright Law and its Exceptions

The purpose of copyright

It is important to remind oneself that copyright protection is the exception, not the rule. Copyright law was not handed down from the mountain on five hundred and twenty-nine stone tablets, inscribed with one hundred and fifty

thousand words.[7] Rather, it has been created over time by humankind, to do a specific task for society – namely, the enhancement of social welfare.[8] In particular, copyright was created to maximise the economic and non-economic benefits to society of cultural and information products (hereafter "works").

Copyright law is justified both on economic and non-economic grounds. The economic justification for copyright law is that it solves a "market failure" – namely, a sub-optimal level of creation of works. Works are intangible and, as a result, are both non-rivalrous and non-excludable. A work is said to be non-

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[7] The consolidated version of the Australian copyright legislation, the *Copyright Act 1968* (Cth), that was compiled on 30 March 2006 contains 149,641 words across 529 A4-sized pages. The copyright legislation of other common law countries is similarly voluminous. For a discussion of the complexity of the Australian copyright legislation (and a proposal for simplifying it), see A Christie 'Simplifying Australian Copyright Law - the Why and the How', (2000) 11 *Australian Intellectual Property Journal* 40.

[8] For instance, the United States Constitution gives the United States Congress the power to enact the Copyright Act so as "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries": *United States Constitution* Article I, section 8, clause 8. See Edward C. Walterscheid, 'To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution' (1994) 2 *Journal of Intellectual Property* 1.

rivalrous when the consumption of the work – the reading of a book, or the hearing of a musical performance, for example – by one person does not deprive other persons of consuming it. A work is said to be non-excludable when it is not possible to prevent persons from consuming the work unless proprietary rights are given in relation to it.

Without the grant of proprietary rights in relation to a work, it is likely the work will be subject to "free-riding" by a third party – for example, an unauthorized reproduction or dissemination of the work by a person who did not bear the cost of the its creation – with the result that the creator of the work is unable to appropriate its full economic value. This, in turn, would reduce the incentive for the creator to create works, with the result that there would be under-production of works and hence a "deadweight loss" to society. Copyright avoids this deadweight loss by granting proprietary rights in relation to the work. These proprietary rights include the right to determine whether a work can be copied and whether it can be disseminated to the public.[9] Giving proprietary rights to the creator of a work provides creators with an incentive to create works.

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[9] The economic right of reproduction derives from Article 9 of the *Berne Convention for the Protection of Literary and Artistic Works* of 9 September 1886, as amended (hereafter '*Berne Convention*'). The various economic rights of dissemination derive from Articles 11, 11*bis* and 11*ter* of the *Berne Convention*, and have been extended into the digital era by Articles 6 and 8 of the *WIPO Copyright Treaty* of 20 December 1996. For the implementation of these

The grant of proprietary rights to a creator of a work not only solves the economic problem of market failure, it also provides a means by which society can show respect to the creator of the work. A creator of a work often has a non-economic (i.e. a personal or moral) interest, in addition to an economic interest, in the work created. For example, a creator might justifiably wish to preclude certain uses of a work, on the basis that those uses prejudice the reputation of the creator. The proprietary non-economic rights granted by copyright include the moral right to prevent such prejudicial uses of a work.[10] The moral rights of copyright provide a non-economic justification for copyright's existence.

In conclusion, therefore, it can be seen that copyright is the exception, not the rule. The rule is no proprietary rights for intangible subject matter, with the exception of limited proprietary rights for those intangible subject matters that constitute copyright works. The exception to the rule is justified on the grounds that proprietary rights are needed to provide creators with an incentive to create works and a means to control inappropriate uses of their works.

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economic rights in Australian copyright law, see s. 31 and ss 85-88 of the *Copyright Act 1968* (Cth).

[10] The various moral rights derive from Article 6*bis* of the *Berne Convention*. For the implementation of these moral rights in Australian law, see *Copyright Act 1968* (Cth), Part IX.

Limitations on copyright

Although copyright's proprietary rights are justifiable on both economic and non-economic grounds, the justifications are not absolute. As a result, the proprietary rights themselves are qualified. For example, the proprietary rights are not of unlimited duration. Rather, they (usually[11]) last only for set period – generally, for 70 years after the death of the author.[12] Also, the proprietary rights are not unlimited in their scope. Rather, the rights are limited through the operation of a range of provisions that exempt certain activities from copyright infringement. Examples of these provisions are the exceptions for fair dealing or

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[11] In some jurisdictions, the limitation on duration does not apply to unpublished works; in those cases, protection remains indefinite for so long as a work remains unpublished: see, e.g., *Copyright Act 1968* (Cth), sections 33, 93 and 94.

[12] Both the *Berne Convention* and the *Agreement on Trade-related Aspects of Intellectual Property Rights 1994* mandate a minimum period of protection of 50 years after the death of the author of a work: Articles 7(1) and 12, respectively. Australia – along with a number of other countries, including the United States and the members of the European Community – has chosen to go beyond this minimum, and provide protection until 70 years after the author's death: *Copyright Act 1968* (Cth), ss 33, 93 and 94.

fair use,[13] the exceptions for certain activities by libraries and archives,[14] as well as the reasonableness defence to moral rights infringement.[15]

Just as copyright is not absolute, society's ability to limit the operation of copyright is not unconstrained. Most countries are bound by a number of international treaties concerning copyright, with the overall framework for multilateral copyright protection based on the *Berne Convention* and the *TRIPS Agreement*.[16] The *TRIPS Agreement* mandates the type of protection that each

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[13] Fair dealing exceptions are contained in the copyright legislation of Australia and the UK: *Copyright Act 1968* (Cth), ss 40-42, 43(2), 103A-103; *Copyright, Designs and Patents Act 1988* (UK), ss 29 and 30. The copyright legislation of the US contains an exception for fair use: *Copyright Act 1976* (US), 17 USC §107.

[14] See, e.g., *Copyright Act 1968* (Cth), ss. 48–53, 110A, 110B; *Copyright, Designs and Patents Act 1988* (UK), ss 37-44A.

[15] *Copyright Act 1968* (Cth), ss 195AR, 195AS; *Copyright, Designs and Patents Act 1988* (UK), s. 205E.

[16] The *TRIPS Agreement* is the short name for the *Agreement on Trade-related Aspects of Intellectual Property Rights 1994*, which is Annex 1C to the *Agreement Establishing the World Trade Organization 1994*. Most WTO members are also parties to the earlier *Berne Convention.* Article 9.1 of the *TRIPS Agreement* obliges members to comply with Articles 1-21 of the *Berne Convention* (with the exception of Article 6*bis*, pertaining to moral rights).

country's copyright law must provide, the duration of that protection, and the scope each country has for introducing exceptions to that protection.[17]

According to Article 13 of the *TRIPS Agreement*:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

In addition to requiring that copyright exceptions be confined to certain special cases, the Article requires that exceptions not conflict with a normal exploitation of a work and not unreasonably prejudice the legitimate interests of the right holder. These last two requirements reflect the rationale for having copyright in the first place – namely, to respect creators' economic and non-economic interests in their works. It would be inappropriate to have an exception to copyright that conflicts with the normal exploitation of the work, given that one of the reasons for having copyright is to create a market in which the copyright owner can exploit the work. Likewise, it would be inappropriate to have an exception to copyright that unreasonably prejudices the legitimate interests of the creator, given that the other reason for having copyright is to allow the creator to control prejudicial uses of the work.[18]

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[17] *TRIPS Agreement*, Articles 9, 11 and 14 (exclusive rights), Article 12 (duration) and Article 13 (limitations).

[18] For further discussion of Article 13 of the *TRIPS Agreement* and its scope, see the interpretation adopted by the WTO dispute resolution panel in the first case

Types of copyright exceptions

The various types of exceptions found in copyright law[19] may be categorized by way of two qualities: whether they are specific or general; and whether they are remunerated or unremunerated. An exception may be specific in one of a number of respects: it may apply only to a specific type of work; it may apply only to a specific type of user; or it may apply only to a specific type of use. An exception is general if it is not specific in some respect. A remunerated exception is one that permits an act to be done in relation to a work but nevertheless requires the owner to be financially compensated for the doing of that act. By contrast, an unremunerated exception is one that permits an act to be

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brought under the Article: *United States - Section 110(5) of the US Copyright Act* WT/DS160/R (15 June 2000).

[19] See generally P B Hugenholtz 'Fierce Creatures: Copyright Exemptions: Towards Extinction?' (Paper presented at the Rights, Limitations and Exceptions: Striking a Proper Balance, IFLA/IMPRIMATUR Conference, Amsterdam, 30-31 October 1997) <http://www.ivir.nl/publications/hugenholtz/PBH-FierceCreatures.doc> at 7 June 2007. For a European-based perspective on the exemptions in the digital era, see Council of Europe, Steering Committee on the Mass Media, Group of Specialists on the Protection of Rights Holders in the Media Sector, 'Discussion Paper on the Question of Exemptions to and Limitations on Copyright in the Digital Era' (Strasbourg, October 1998) MM-S-PR (98) 7.

done in relation to a work without a concomitant obligation to compensate the owner for the doing of it.

Figure 1 is a 2 x 2 matrix, which gives an example of each type of exception within this categorization. The provision in the UK copyright legislation that permits a library or archive to engage in copying for preservation or replacement purposes[20] is an example of an exception that is specific and unremunerated. The Australian legislation contains exceptions that are specific and remunerated; one example is the statutory licence for copying by educational institutions.[21] The Canadian copyright legislation provides an example of an exception that is general and remunerated: the scheme for dealing with 'orphan works'.[22] Perhaps the best-known example of an exception that is general and unremunerated is the 'fair use' provision in US copyright law, under which any use by anyone for any purpose that is 'fair' (when judged against certain factors) is permitted and no fee need be paid.[23]

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[20] *Copyright, Designs and Patents Act 1988* (UK), s 42.

[21] *Copyright Act 1968* (Cth), Part VB.

[22] *Copyright Act 1985* (Can), R.S.C., ch. C–42, s 77.

[23] *Copyright Act 1976* (US), 17 U.S.C. §107.

	Specific	**General**
Unremunerated (Free)	Preservation/ Replacement Copying by Libs & Archives (UK)	Fair Use (US)
Remunerated (Paid)	Educ. Copying - Part VB (AU)	Orphan Works (CA)

Figure 1: Examples of different types of copyright exceptions

Justifications for copyright exceptions

The classification of exceptions within the 2 x 2 matrix of Figure 1 can be linked to the different justifications for copyright exceptions discussed above. In general terms, an *unremunerated* exception is justified on normative grounds – namely, that the copyright owner's entitlements simply should not extend into the particular sphere bounded by the permitted act. The types of acts that are permitted by an unremunerated exception occur within a market sphere that is not the copyright owner's 'normal' market. Because the permitted acts are not within the normal market, they should be able to be undertaken by third parties without

the need to obtain the copyright owner's consent and without the need to compensate the copyright owner.[24]

One example is the exception for preservation copying. It may be argued that a reasonable copyright owner would not think: "If I create a work and then sell it, in due course it's going to crumble, and I'll be able to sell another one to the original buyer".[25] Thus, it may be argued that the act of preservation is an act that is not within the copyright owner's normal market, and so should be freely permitted. Another example is the exception for a 'fair use'. A use that is a 'fair

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[24] This is not a view that is shared by all commentators. David Lindsay, for example, considers that an exception should be unremunerated if the cost of implementing the exception as a remunerated exception (such as in the form of a statutory licence) outweighs the social benefits obtained by the exception: D Lindsay, 'Fair Use and Other Copyright exceptions: Overview of Issues' (2005) 23(1) *Copyright Reporter* 4 at 6. It is implicit in Lindsay's view that all exceptions should be remunerated unless the costs of doing so outweigh the advantages – in which case the exception should be unremunerated.

[25] See Emily Hudson, Andrew T Kenyon and Andrew F Christie, 'Modelling Copyright Exceptions: Law and Practice Australian Cultural Institutions' in Fiona Macmillan (ed), *New Directions in Copyright Law* (Volume 4) (2007) *in press*.

use' may be considered to be one that is outside the copyright owner's rightful control – and, therefore, is a use that should be freely permitted.[26]

The justification for a *remunerated* exception is different. The typical situation of a remunerated exception is where the copyright owner's rights do indeed extend into the particular sphere of the act permitted by the exception but, due to some particular characteristic of the 'market place' in which the work is consumed, it is not feasible for the work to be exploited in the 'normal' way, such as by the copyright owner voluntarily granting a licence to an end-user of the work. The infeasibility of normal exploitation may arise for a number of reasons.

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[26] This view may be disputed by Wendy Gordon, who considers that the 'fair use' exception results from a type of market failure, not necessarily the fact the copyright owner's right should not preclude such uses: W J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors' (1982) 82 *Columbia Law Review* 1600. More recently, Gordon has extended and refined her view to categorise 'fair use' as due to two types of market failure: 'market malfunction' and the 'inherent limitation' of the market. These are discussed in the context of rationales of 'excuse' and 'justification' applied to any three levels of action by a defendant, namely 'behaviour', 'permission' and 'compensation': W Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives' in Elkin-Koren and Netanel (eds), *The Commodification of Information* (2002) 149. See also Lydia P Loren 'Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems' (1997) 5 *Journal of Intellectual Property Law* 1.

There may be, for example, too many copyright owners or too many copyright users, and the owners or the users can't or won't act collectively. Or, the copyright owner or the copyright user can't be identified or located. In these situations, it is just too difficult for the owners and the users to get together to agree terms of use – and so the usual copyright approach of leaving it to the market place to work out the transaction for exploiting the work will not succeed. In these circumstances, the legislation intervenes to correct this particular type of market failure. It does so by providing a means by which a user is permitted to use the work in return for payment, such as through a statutory licence.

That the justification for remunerated exceptions is indeed the inability of the copyright owner to engage in normal licensing of the work can be seen from the example of the statutory licence under Part VB of the Australian copyright legislation. This part of the Act permits educational institutions to make multiple copies of copyright works for educational purposes, so long as they keep appropriate records of their copying and pay an agreed amount to a collecting society acting on behalf of copyright owners.[27] Without this statutory licence, an educational institution engaging in multiple copying would need to obtain a licence from the copyright owner of every work copied – something that is, self-evidently, infeasible. A similar justification applies in respect of the Canadian provision on 'orphan works', whereby the Copyright Board is empowered to grant a royalty-bearing licence to use a work to one who has been unable to locate the

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[27] *Copyright Act 1968* (Cth), Part VB.

owner of copyright in the work despite making reasonable efforts to do so.[28] By definition, this licence applies where it is not possible for the user to take a licence granted voluntarily by the copyright owner.

Just as the rationales for remunerated and unremunerated exceptions are different, so are the rationales for specific and general exceptions. At the simplest level, the reason for having an exception that applies only specifically is that a more general application of that exception would not justified. That is to say, whether an exception should be specific or general depends on whether the exception can be justified in wide application or only in narrow application. This, in turn, depends on the particular justification for the exception – something that is specific to each exception. Nevertheless, the following general observation may be made: a specific exception will tend to be drafted as a 'rule' whereas a general exception will tend to be drafted as a 'standard'.

Put simply, a 'rule' establishes a 'bright line' test for distinguishing permissible from impermissible behaviour, whereas a 'standard' sets more flexible criteria for determining whether conduct is permissible or impermissible.[29] Rules and standards differ in the ease, and hence the cost, of their creation by the legislator, in their application by the judicature, and in their interpretation by actors and their legal advisors. Because of their greater specificity, rules are preferable to standards where it is relatively easy to identify

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[28] *Copyright Act 1985* (Can), R.S.C., ch. C-42, s. 77.

[29] See, for example, D Lindsay, n 24, at 8.

the appropriate content of the law. In contrast, standards are preferable to rules where it is relatively difficult to identify the appropriate content of the law.[30] It follows that, in general terms, a copyright exception will be drafted as a *specific* exception where it is relatively easy to identify the precise circumstances of the uses that should be permitted. Where, however, it is relatively difficult to identify the precise circumstances of the uses that should be permitted, a copyright exception is likely to be drafted as a *general* exception.

Cultural Institutions and Copyright Reform

Cultural institutions in the digital era

It seems indisputable that the objectives of a cultural institution include at least the following: to be a custodian of, and a provider of access to, items of cultural heritage.[31] For example, the National Library of Australia views its role as "to ensure that documentary resources of national significance relating to Australia and the Australian people … are collected, preserved and made

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[30] D Lindsay, n 24, at 8-9.

[31] No doubt arguments can be made that there are other, equally important, objectives – such as, for example, the objective of providing an understanding or interpretation of cultural heritage items.

accessible",[32] and Museum Victoria states that it is "responsible for the care of the state's collections, conducting research, and providing public access".[33] It is clear that these objectives are pursued for the public benefit – that is, they are pursued because they enhance social welfare. These objectives transcend technological evolution.

Traditionally, the common characteristics of most, if not all, cultural institutions are that the institution is a *physical* presence that houses *tangible* items. As a result, the traditional way in which cultural institutions provide public access to items is in analogue form,[34] from a physical site. This access will, naturally, be time-restricted – for example, from 9:00am-5:00pm, Tuesdays to Sundays. This traditional type of cultural institution will be stereotyped herein as the "19th Century-Style Institution".

It is, of course, the case that digital technology enables institutions to act in ways different from the traditional. In particular, digital technology empowers an institution to provide public access to digital representations of at least some of its items. This access may be from the physical site of the institution, in which case

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[32] National Library of Australia, Library Welcome < http://www.nla.gov.au/library/welcome.html> at 5 June 2007.

[33] Museum Victoria, About Museum Victoria < http://www.mov.vic.gov.au/about/index.asp> at 5 June 2007.

[34] The phrase "analogue form" is used here to mean the actual tangible item itself, not some (digital) representation of it.

it will be time-restricted. This type of cultural institution will be called the "20th Century-Style Institution". However, digital technology also makes it possible for the public to access digital representations of a cultural institution's items from a virtual site – that is, from the institution's Internet website – in which case the access will be '24/7/365'. This type of cultural institution will be identified as a "21st Century-Style Institution".

For completeness, it can be postulated that technology may evolve so as to permit teleportation[35] of cultural institutions' items to users at distributed locations. In that case, the public access will be in analogue form, from a virtual site, on a non time-restricted basis. This type of cultural institution could be called the "22nd Century-Style Institution". Given that such a style of institution does not currently exist, it will not be the subject of further discussion in this article.

The four types of institution, and their characteristics, are represented in the 2 x 2 matrix in Figure 2.

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[35] The *American Heritage Dictionary of the English Language - Fourth Edition* (2000) defines "teleportation" as "a hypothetical method of transportation in which matter or information is dematerialized, usually instantaneously, at one point and recreated at another".

	Access in *analog* form only	**Access in *digital* form also**
Access from *physical* location only	"19th C Institution"	"20th C Institution"
Access from *virtual* location also	"22nd C Institution"	"21st C Institution"

Figure 2: Types of cultural institutions

Reform of copyright as it applies to cultural institutions

The need for, and the preferred approach to, reform of copyright law as it applies to cultural institutions in the digital era varies across the different types of cultural institutions. For the *19th Century-Style Institution*, digital technology is likely to be used primarily, if not exclusively, for internal purposes. If this style of cultural institution digitises its collection, it is done to assist in the management of the collection; it is not done for the purpose of permitting public access to the digitized item. It follows that only small-scale reform of copyright law is likely to be needed for the 19th Century-Style Institution. In particular, there would need to be a clear exception that permits cultural institutions to make reproductions of all types of copyright subject matter for internal, non-commercial, administrative purposes; and there would need to be a comprehensive exception for preservation copying.

The Australian position is instructive of how such reform could be achieved. The Australian copyright legislation has had for some time an unremunerated exception that permits the reproduction of literary, dramatic, musical and artistic works – but not audio and audio-visual material – for "administrative purposes",[36] and an unremunerated exception permitting preservation copying of certain works.[37] Recent amendments have added a more flexible provision that applies to all copyright material and permits any use of a work that is "made for the purpose of maintaining or operating the library or archives" (so long as it satisfies the requirements of Article 13 of the *TRIPS Agreement* discussed earlier),[38] and two new provisions that fill the subject matter gaps in the preservation copying

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[36] *Copyright Act 1968* (Cth), s. 51A(2). The phrase "administrative purposes" is defined to mean "purposes directly related to the care or control of the collection": s. 51A(6).

[37] *Copyright Act 1968* (Cth), ss 51A(1) and 110B. Under these provisions, preservation copying is permitted in respect of all literary, dramatic, musical and artistic works, but only in respect of sound recordings and films that are "in the form of a first record" and "in the form of a first copy".

[38] *Copyright Amendment Act 2006* (Cth), Schedule 6, s. 10 (inserting new ss 200AB(1) and (2)). This new exception is not without difficulties. As Emily Hudson and Andrew Kenyon point out, the inclusion of the *TRIPS Agreement* three-step test in the wording of the exception may result in substantial compliance obligations being imposed on those cultural institutions seeking to rely on it: E Hudson and A T Kenyon, n 2, at Section VIII C 1.

exception (for works that are of historical or cultural significance).[39] It can be seen, therefore, that the reforms required by the 19th Century-Style Institution can be achieved within the existing structure of copyright law, by way of specific, unremunerated exceptions.

What about the *20th Century-Style Institution*? This type of institution operates from a physical site, but allows visitors to that site to access digital representations of collection items. It will, therefore, seek to use digital technology for on-site electronic access by the public (as well as for the internal, administrative purposes described above). The reform needs of this type of institution are of a bigger scale than those of the 19th Century-Style Institution, but are still relatively modest. In particular, there would need to be an exception that permits the making, and the on-site displaying, of a digital representation of collection items.

Again, the Australian legislative approach is instructive of how such reform could be achieved. The Australian copyright legislation already permits, without charge, a library or archive to provide public access to a deteriorating or unstable artistic work by way of an on-site computer terminal that cannot be used by a person accessing the work to make an electronic copy or a hardcopy of the work,

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[39] *Copyright Amendment Act 2006* (Cth), Schedule 6, ss 26 and 27 (inserting new ss 51B and 110BA). This amendment, too, is not without difficulties – questions remain concerning the meaning of 'historical or cultural significance': E Hudson and A T Kenyon, n 2, at Section VIII C 2.

or to communicate the work.[40] It would not require major legislative change to extend this provision to other digitised preservation copies – or, indeed, to all digitised copies – of items in the institution's collection. Although there is currently no consensus on whether viewing a digitised representation of a copyright work on an on-site computer terminal is a use of the work that is within the copyright owner's 'normal market',[41] it is submitted that the better view is that such a use of a work is *not* within the copyright owner's normal market. If this view is accepted, then the reform required by the 20th Century-Style Institution may be achieved by way of a specific, unremunerated exception.

For the *21st Century-Style Institution*, which seeks to be on-line and open around the clock, the scale of copyright law reform required to permit this is quite substantial. The access that this type of institution provides – namely, simultaneous access by multiple users from multiple locations – differs significantly from the access provided by the 19th Century-Style and the 20th

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[40] *Copyright Act 1968* (Cth), s. 51A.

[41] Anthony Mason, for example, argues that such a use of a work is merely the electronic version of browsing – which, in the analogue environment, has always been permitted without the need to obtain the consent of, or make payment to, the copyright owner: A Mason, 'The Users' Perspective on Issues Arising in Proposals for the Reform of the Law of Copyright', (1997) 19 *Sydney Law Review* 65 at 74. For a contrary view, see Australian Copyright Council, 'Submission to Digital Agenda Review' (September 2003), available via www.copyright.org.au/policy-research/policy/submissions.htm.

Century-Style institutions. Accordingly, it can be argued that the uses made of a copyright work to provide such access may well be within the copyright owner's 'normal market' for that work.[42]

If this view is accepted, then it follows that the reforms required by the 21st Century-Style Institution would be by way of a remunerated exception. It should be relatively easy to identify the circumstances in which the exception applies, which suggests that the exception could be drafted as a rule – that is, as a specific exception. An exception that is remunerated and specific would typically be implemented in the form of a *statutory licence*.

Concluding Comments

There can be no doubt about the fact that cultural institutions are special. Policy makers have recognised the special nature of cultural institutions when enacting copyright laws. This can be seen in the fact that copyright legislation around the world contain numerous provisions applicable specifically to cultural institutions, especially as regards exceptions and limitations to infringement. Cultural institutions deserve these privileges because, like the copyright laws themselves, they have a social welfare-enhancing mission.

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[42] See, e.g., Australian Copyright Council, 'Submission to Digital Agenda Review' (September 2003), available via www.copyright.org.au/policy-research/policy/submissions.htm.

The welfare-enhancing mission of cultural institutions continues in the digital era. Accordingly, cultural institutions' entitlement to special treatment within copyright law should also continue in the digital era. It should, therefore, be considered perfectly acceptable for the cultural institution sector to say to the government: "Hey, technology-wise things have moved on recently, and for us to continue to achieve our valuable mission for society we need some more changes to the law, so that we can take advantage of the opportunities provided by digitisation".

The issue should not be whether cultural institutions are entitled to have their special privileges, in the form of copyright exceptions and limitations, extended in the digital environment; rather, the issue should be how these privileges are implemented. To resolve the latter issue requires an understanding of the different types of copyright exceptions, and the different justification for each type of exception. More importantly, the resolution of that issue requires an analysis of whether the proposed permitted use of the copyright work is a use that is within the copyright owner's 'normal market'. Where it is not, there should be an exception and this exception should be unremunerated. Where, however, the use is within the copyright owner's normal market, there should only be an exception if, due to some particular characteristic of the market place in which the work is normally consumed, it is not feasible for the work to be exploited in the normal way. Where there is some characteristic that makes normal exploitation of the work infeasible, it is appropriate for the copyright legislation to intervene to permit that use, but only so long as payment is made to the copyright owner in return.

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