

Flexible exceptions

Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

The extent to which the current flexible exceptions apply to unpublished works will be a factor in whether additional exceptions are required.

The current exception regarding 'research and study' refers to 'text or printed music from a hard copy edition of 10 or more pages' and the exception is 10% of the number of pages; or one chapter. This does not generally describe the unpublished works within the Memorial's manuscript and private records collections.

The Memorial currently has to rely on Section 51 for unpublished manuscripts and private records, and has taken a risk management approach to the provision of this material for research and study if the creator of the work has been dead for more than 50 years.

The upcoming changes as a result of the Copyright (Disabilities and Other Measures) Act passed June 2017 will mean that if a work hasn't been previously published, then copyright will expire 70 years after the death of the creator. This will improve the Memorial's ability to provide copies. Some clarification, however, around the terms 'made public' and 'published' is needed as both terms are used within this exception, without the meaning being clear.

The other exception that the Memorial currently uses is 200AB where 'maintaining or operating the archive, including to provide services of a kind usually provided in relation to the collection' is allowable for libraries, archives, galleries or museums; with additional requirements, one being 'The circumstances of the use amount to a special case'. This can be difficult to substantiate when providing copies of unpublished material to individuals for their varied uses.

Therefore the Memorial would support either an expansion of current fair dealing or the introduction of fair use to include a clearly defined use of unpublished works specifically. One idea might be based around exceptions available to public institutions (libraries, archives, galleries or museums) related to the length of time a collection has been in its custody and publically available.

Any exception that requires a cultural institution to weigh up the fairness will result in the exception not being used. Cultural institutions are risk averse and time and resources poor. Ultimately the best change is the limiting of the duration of copyright for unpublished works for everyone - cultural institutions and end users alike.

Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.

Compliance with Section 200AB imposes a drain on resources as it is generally used by the Memorial for orphan works and its use requires a diligent search for the copyright holder. The Memorial has an internally agreed process for the use of 200AB in relation to orphan works and there is some risk management as part of this process. The use of this exception can consume considerable resources for any project involving the digitisation of private records.

200AB is also limited in that it allows the Memorial to publish the material online but not how the material can be used by the public who would be accessing it from the website. For the public, the material is still copyright, 200AB does not apply to public use. 200AB does not, for example, allow a member of the public to publish a quote from this material. The public will need to seek permissions from the copyright holder. The start of this process is to contact the Memorial for any details - this in itself is a considerable drain on staff resources in dealing with the public enquiry as to its use.

The 2017 Bill is a step in the right direction and has already been of great benefit especially for the publishing of official records. However, much of it will not come into effect until January 2019 and so we do not have a full understanding of its permutations. The Memorial is anticipating the Bill for future digitisation projects related to private records - material that falls within the exception will be targeted for digitisation. This will significantly reduce staff time perhaps to the extent of a full position as well as save time in ongoing enquiries as already described. The problem with doing this is that it skews the digitisation program towards these collections rather than perhaps a collection more deserving of digitisation and broader public access.

Contracting out of exceptions

Question 3

Which current and proposed copyright exceptions should be protected against contracting out?

Some Private Records collections have had donor restrictions placed on them in the past. It seems that 'Making unenforceable contracting out of all copyright exceptions' would allow permissible uses under the Copyright Act take precedence over the wishes of the donor. This would be an advantage where the donor has placed a copying restriction on the collection many years ago and contact with the donor has since been lost. The Copyright Act would still give at least 50 years of protection which seems very reasonable.

Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- all copyright exceptions?

As around 50% of all Private Record collections were created during the First World War, many of the original creators (and hence copyright holders) are now deceased. In the case of unpublished

material, copyright usually passes down through families, and over a relatively short number of decades copyright may have become distributed amongst many descendants. Discovering descendants and investigating the bequests or wills of each descendant makes the task of identifying legitimate copyright holders difficult. Clearer guidelines regarding the 'share' of copyright through the generations and the requirements regarding permissions from the unknown number of 'shareholders' are needed. 'Diligent search' also needs to be better defined. Perhaps the declaration of 'orphaned works' could be linked to the number of generations removed the likely copyright holders are, to the original creator.

Access to orphan works

Question 5

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above.

The Memorial supports a statutory exception for cultural institutions for orphan works as well as a limitation on remedies for the use of orphan works. The Memorial has a legislative obligation to make accessible this material and requires greater flexibility within the copyright Act to do so. Storing, cataloguing and preserving this material for posterity is a significant cost to any cultural institution - ultimately broad public accessibility must be part of the return on the investment.

Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

Restricted liability should be no more than a negotiated solution on taking the item down from the web. This material is of little commercial value and therefore not in conflict with normal exploitation of the material and therefore not likely to prejudice the interests of the copyright holder. Using 200AB for the use of orphan works following a reasonable diligent search should offer protection against liability - although it has not been tested yet.

Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

Exceptions can be specific to collecting and cultural institutions as the issues faced by these institutions are fairly unique to the cultural sector.

The Copyright Act tends to work against a cultural institution's ability to digitally preserve its collections and make them available. The issues faced by cultural institutions are different to most other organisations. The mandate being to make collections available in the broadest means possible, not for profit and also preserve them for posterity. The bulk of the collections held within most cultural institutions will be orphan works - in the Memorial's case - donated by the creator or family in the post war period from the 1920s to the 1970s. The intention was for the material to be used for research purposes and as a means of remembering the serviceman or women's experience. No amount of searching will generally find the copyright holder and the material was not originally donated for commercial use. The Memorial has lost contact with the descendants who in most cases would be unaware of being the owners of the copyright. Often there is no direct family. In addition many large private records collections include third party copyright in the form of correspondence with the main creator. When digitising these collections, there is a strong argument for publishing the entire collection including the third party copyright. The private correspondence belonging to third parties within a larger collection form only a small proportion of the entire collection. While it would be possible to remove the pages it would greatly diminish the integrity, context and research value of the whole collection. Researchers not confident that they were viewing the complete sub-series online would inevitably request the original papers - defeating the purpose of producing a digitised copy.