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SUBMISSION TO THE INQUIRY INTO AUSTRALIA'S INTELLECTUAL PROPERTY
ARRANGEMENTS: *COPYRIGHT AND ACCESS TO ARCHIVAL MATERIAL*

I am an Australian intellectual property academic and served as a member of the Advisory Committee for the recent ALRC Copyright and the Digital Economy Inquiry. This submission does not seek to duplicate the work already conducted by the ALRC. It focuses entirely on sharing my experiences from the six months working as a researcher seeking to access archival materials held in public collections. The examples directly speak to the massive inefficiencies and unworkability of current copyright laws and practices implemented by libraries and archives seeking to comply with what they perceive to be their lawful obligations.

Example One: Accessing Unpublished Material by Third Parties

I sought to access business records concerning a company established in the nineteenth century that was acquired by a multinational publisher in the 1980s. The files I sought related to 1900-1920. The material was curated by a public university library and was subject to an access permission requirement made by the donor. The donor/publisher advised that due to business letters being unpublished works and still subject to copyright I would only be able to access their own letters (outgoing letters that originated from the company) but could not access the incoming letters. This was explained to me as necessary because unpublished material could contain confidential information, in which case there was no fair dealing right.

In other words, they believed that copyright law meant that they could only grant permission to access half the relevant correspondence, much of which would be missing context. They suggested I should contact each of the copyright holders of the individual letter writers for permission, but were unable to advise me who these parties were.

The library index was organised by subject matter and to some extent, by author, but had no details identifying the individual letters contained within files. Thus it would not be

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possible to locate the relevant third party copyright owners of letters, without looking first at the file contents. But it was not possible to look at the file contents without first obtaining permission from the third party letter writers or their estate managers.

When I pointed out this problem I was provided with reference to an American website that reputedly lists current copyright owners of significant copyright estates for literary works. It only contained details of one estate that was relevant to my inquiry, giving two different copyright owners. On contacting these parties I was told by one that they considered the material to be public domain and did not understand why they were continually being contacted to give permission. The other told me they had no interest in archival material as they only had a financial interest in licensing commercial works.

The bulk of the other material related to long defunct companies and there was no possibility of obtaining permission. It was not possible for the archivists to remove the third party letters from the files because this would risk the integrity of the collection. In some cases the correspondence was compiled in letter books (as was common business practice) where pages could not be extracted.

I was only aware of some of the content of this archive because some material was referred to (without citation) in a published work by another academic. It took numerous email exchanges between myself, the publisher and the library to convince the publisher that given the disclosure in this existing publication there would be little risk to them from my gaining access to the third party material, all of which pertained to business exchanges that were 90-100 years old, where the other entity no longer existed.

Example Two: Accessing Official Documents in Unrestricted Files

I sought to access an author's personal business files that were unrestricted, held in a State Library collection. This author died in 1969 and thus their literary works are still in copyright. The material I sought to copy included records of copyright and trade mark registrations. I was told that I needed permission of the copyright holder of the estate to make copies of this material. One reason I sought to make copies of the material from this particular file was to avoid having to finance a trip to the National Archives in Canberra or make an online order at \$27.90 per file, when the same material should be freely accessible in a public library in Sydney. At my insistence the desk staff called a more senior staff member who suggested that I needed to write to the estate holder for permission.

I wrote to the relevant estate holder who originally assumed that if I was writing seeking permission there must be some confidential information or other sensitivity related to the file. After several exchanges that clarified that the material could not be confidential given that the files were in an unrestricted section of a public library and the material concerned largely related to public records (material in which they did not own the copyright), I was given permission to make copies of the material. So, in following the instructions given to me, I obtained permission from an estate holder to copy material in which that estate holder had no copyright interest at all.

Example Three: Accessing old newspaper and trade magazine cuttings in Restricted Files

I sought to access the original research files underpinning publications by a leading historian. This material was donated subject to an access restriction related to non-commercial use of the files. I was given permission to access any of the files held by the archive gifted by the donor. Because of staffing issues it took a month to arrange for access.

As is usual for this kind of resource the files contained photocopies of newspaper and trade magazines. The material related to 1900-1935. Much of this material is more difficult to

access today than it was in the 1970s and 1980s (when the books were written) as libraries have rationalised their collections and hard copies have been duplicated on microfiche. In my experience microfiche copies are often illegible, with problems exacerbated as some libraries have retired their better readers and replaced them with machines designed for digital files that are inferior for reading the older formats. Microfiche is also much harder to search through than original formats. I was not sure that I would be able to obtain copies of this material from other sources.

I was denied permission to make copies of these newspaper articles because I was told that the institutional database noted that the donor was the “copyright owner” of the files. The fact that this was patently not the case with respect to the material I sought to copy, and that material was also clearly in the public domain, did not assist. The archival officer, who was not a junior staff member, told me he was obliged to follow institutional protocol and if the database said “X” was the copyright holder he was unable to look beyond that. There were several phone calls made to the institution’s rights clearance officer. I was allowed to transcribe by hand, but could only take a digital copy if the donor gave permission.

Infringement by reproduction is not dependent upon the technology used to make the copy. Transcribing by hand is, as a matter by law, no different to a digital reproduction where the entire document is transcribed. Further, the existing fair dealing right would support making copies of much of the material, clippings from newspapers, here. However today archival institutions appear to rely upon the inconvenience and inefficiency of transcription by hand as an informal mechanism to support what they believe is copyright compliance, irrespective of the law or the facts. I have come across this requirement in numerous public archives. Hand transcription is always permitted. Digital copying is automatically considered as problematic and leads to significant challenges.

In the twenty-first century transcription by hand is poor research practice. There is the risk of transcription error. It is also highly inefficient because it is so time-consuming. In this particular case, it would have required several day’s additional travel and accommodation costs (plus the cost of my labour), as opposed to one day’s work copying with a camera.

On this occasion the donor, who knew of me, could be contacted by phone that day. Permission was given for making digital copies of material. But again, there was a very stressful run-around involving numerous people’s time and energy in order to provide for copyright permission for public domain material in which, as with the previous example, this donor had absolutely no copyright interest as the material was clearly in the public domain.

If permission had not been granted I would have documented every article then lodged an Inter-Library Loan request at my university for each snippet, whereby the university staff would try to locate and scan copies of the files for me. This service would have been paid for either from my research funds or, if it was possible to cost-shift, by my university as subject to an exchange agreement with other public libraries. It is unlikely that they would have been able to locate all the relevant material and asking them to pursue this would have been a very poor use of their stretched resources.

The Public Interest in Spending Public Money Wisely

I am a senior researcher employed by a publicly funded university. My research is funded by public funds, an Australian Research Council Discovery grant, where such is the competition for funds that the success rate this year was 18%. One would hope that once awarded, these funds would be used prudently and efficiently.

The design of my research project took into account copyright restrictions from the outset. The methodology and research questions were tailored toward material that I knew was already in the public domain. Where access restrictions could come into play, contact was made prior to submitting the proposal for assessment. However, to my great frustration, I have still spent a considerable amount of time and energy dealing with access issues related to this public domain material.

I decided not to employ a research assistant for much of the archival work (eg. a PhD student), to locate material, and in the process also provide research training to them as encouraged by the Australian Research Council, because I felt that a more junior person would be unable to stand up to institutional gatekeepers and negotiate for access to material that is, according to the law, in the public domain. Though a Professor I personally find the process intimidating and am concerned that my insisting on my legal right to access material will lead to me facing problems with access in the future. However my research into historical business and legal practices could not proceed without this source material.

The institutions that curate and make available research material are all publicly funded. These institutions are also increasingly working in a restricted funding environment, often leading to long delays in arranging access to material held in their collections.

I have always found the staff concerned, without exception, highly professional, polite and supportive within the bounds that they consider possible. However material in their collections was not originally indexed to facilitate copyright clearance. Databases are ostensibly designed to facilitate use by patrons. It would be too expensive to address this information gap now as, in all likelihood, every file contains material with multiple potential copyright owners. There are not the resources to index what they currently hold in page-by-page detail and much of this material will be public domain, or though unpublished, be orphan works and of little commercial value.

In my experience, donors to public institutions enthusiastically support their material being used by other researchers for non-commercial use. This is the logic behind the original donation. There is often also an appreciation that any value in remaining commercial assets subject to copyright is assisted by the work of academics in bringing new perspectives to light on relevant history.

The current laws and practices have created a large and unwieldy infrastructure that prioritises a public performance of “compliance” with copyright law, based on absurd and clearly wrong readings of the law. The copyright culture of our public institutions defends an imaginary world of non-existent copyright owners, fetishizes the need for permission and presumes the user as dangerous without ever being able to nominate what the danger here is. This culture is shackling the productive use of our libraries and archives, leading to considerable wasted public resources.

The ALRC recommended numerous reforms specifically addressing libraries and archives and orphan works. These, on their own, would not necessarily address all the problems referred to above. There are clearly also problems with perpetual copyright in unpublished material (a problem only exacerbated with copyright term extension without the costs to research being considered) and with institutions confusing donor restrictions with copyright ones.

Reform is needed to assist institutions in reconsidering the compliance structures that are currently in place. Private owners and donors do not, in my experience, seek to exercise

their rights to frustrate access and are being unnecessarily bothered over matters that are not copyright issues and rarely relate to confidentiality once the material is housed in the public collection. The larger problem is a cultural one. Policy attention and priority is now so skewed toward perceived infringement problems that these are routinely imagined and defensive structures are set in place by public actors, that impedes public research making it more costly to conduct, when there are no risks of infringement.

In crafting reforms there is an urgent need to consider the reality of current institutional practices and the public cost of compliance culture today. These costs need to be considered broadly and as cascading, because the financial impacts ripple across archives, libraries, universities and impact on the efficacy of higher education research funding awards. All budgets are impacted by the resource implications of work-around strategies that come into play when access to public domain material is blocked.

Significant reform is needed to signal to public officials that it is ok to serve the public interest and that this is not a very dangerous thing to do. The current system and compliance culture in our public institutions is simply awful. It is inefficient, illogical and impedes the progress of publicly funded research at a time when this can be least afforded.

Yours sincerely

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