

Archives and Copyright: Reconciling the traditional with the digital

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Seminar Outline

Part 1. Susan Corbett

New Zealand copyright law and archivists – the issues and gaps

- What's happening overseas? Can international developments inform NZ copyright law changes?

Part 2. Jhonny Pabon Cadavid

Closing the gaps - further solutions

- Technology, law and risk management

Why does copyright law matter to archivists?

The **objectives** of an archive require **copying** for

- Preservation
- Increased accessibility
- Collections management



Digitisation- the obvious choice for an archivist

- Perfect reproductions
- Storage online – less physical space required.
- Accessibility to wider public & increased search capability
- Interactive digital displays
- Allows 'repatriation' to source community

The typical archival collection includes:

1. Public domain items (copyright term expired)

2. Copyright items – 4 categories

- a) copyright **assigned** to the archive
- b) copyright **licensed** to the archive for certain purposes
- c) copyright owner known and traceable
- d) **orphan** works- copyright owner is unknown and/or untraceable

1. **Public domain** – no copyright issues (but indigenous cultural items – potential **ethical issues**)

2(a). **Copyright owned by the archive** - no copyright issues (but potential **moral rights issues**)

2(b). **Copyright owner known and traceable** -owner may agree to license some uses (but potential issue of **contract override of the archiving exceptions**)

2(c). **Orphans** – totally reliant on the archiving exceptions

So what are “the archiving exceptions”?

The provisions in the Copyright Act that **permit certain activities** with copyright-protected works in an archival collection **without requiring consent** from the copyright owner.

Copyright Act 1994, ss 55, 56, 56A, 56B

Issue 1.

Archiving exceptions apply **only** to an “archive” as defined in s 50

State bodies- Archives New Zealand, the National Library, Radio NZ sound archive, & the film archives of TVNZ & the NZ Film Archive

&

any collection of **documents** (very broad- includes digital -as defined in the OIA) **of historical significance or public interest** maintained by a body, whether incorporated or unincorporated, that does **not keep and maintain the collection for the purpose of deriving a profit;**

Issue 1. The definition of “archive” – prescriptive & complex

the UK Copyright Designs and Patents Act 1988 (CDPA) does **not** define “an archive”.

Any UK archive may use the “archiving exceptions” in the CDPA

(Although the **purposes** of the use may be limited e.g. must be “not-for-profit” or “for private study and research”)

A private archive of
early digital games

Do the archiving
exceptions apply to
enable preservation?



Issue 2 The replacement provision (s 55)

- An archive can make **one non-digital copy** for preservation or replacement (provided it's not reasonably practicable to purchase another copy)
 - The analogue copy and the original can **both be publicly accessible**
- An archive can make **one digital copy** of items at risk of loss, damage, or destruction - but the **original must be removed from public access**

Issue 2: s 55 is overly complex

- Irrational differences between regulation of analogue and digital copies
- Uncertainty around a copyright owner's right to override the provision by contract

CDPA equivalent provision –

No distinction between analogue and digital copying

Explicitly **disallows contract override**

Issue 3: Copying of unpublished works (s 56)

- One copy (**digital or analogue**) permitted for research or private study
- Explicitly subject to contract over-ride by copyright owner
- For digital copies only - archivist must provide a written notice setting out terms of use & must destroy any additional copy made in the process of digitising

Issue 3: digital copying of unpublished works

- Excessive cost imposed on the archive- why not make more than one copy and retain for other applicants?
- Irrational distinction between analogue and digital copies
- **CDPA-** no distinction between analogue and digital copies; but also permits the contract over-ride

Issue 4 Communication of digital copies (s 56A)

An archive may communicate 1 **lawfully obtained digital copy** in **protected format** to an authenticated user
but the **number of users at any one time** is limited

(no more than the aggregate number of the archive's lawfully obtained digital copies)

and the user must be **WARNED** about copyright misuse.

Issue 4: communication limitations

Ambiguity - how does an archive “lawfully obtain **a copy**” ?

CDPA – archive can **communicate** a work to the public **or make it available** to the public by means of a dedicated terminal **on its premises**

study Communicated to individuals for **research or private**

Can be overridden by contract (“licence”) terms

No limit on numbers of users at any one time

Issue 5 The archiving exceptions- NZ and internationally

- focus on **preservation** of items at risk of deterioration and allowing limited **access**.
- but archives also use digitisation for **collections management**

Best practice digital archiving- requires multiple copying (migration to new platforms, back-up etc)

Issue 6 Moral rights

Not addressed in the NZ or UK archiving exceptions
(typical internationally)

The National Library of Canada :

“.. converting an electronic publication to a standard format to preserve the quality of the original and to ensure long-term access does **not infringe on the author's right of integrity**. However, this assumption has **not** been tested in court.”

Copyright Act 1994, s 67 anonymous works - limited provision for certain orphans?

Clears any use of a literary, dramatic, musical, or artistic work when:

the **identity of the author** cannot be ascertained by **reasonable inquiry** *and* it is **reasonable to assume**

- that copyright has **expired**

or

- that the **author died 50 years** or more before the beginning of the calendar year in which the act is done

Might US **fair use** be helpful for NZ archivists?

Not really- archivists need **certainty**

US archivists also complain about the **limiting archiving provisions (s 108)** in their copyright law

The US statute also permits archivists to use “fair use”.

But not clear- how does **fair use** interact with **s 108** ?

No court rulings - no guidance- too risky!

The end of Part 1.

Now over to Jhonny!