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;
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”)

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

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