

ARCHIVES AND COPYRIGHT

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This article is based on a paper prepared for a meeting of the Australian Council of Archives some years ago. At the time it was hoped that the Copyright Act might be amended to improve the copying provisions (from the point of view of custodians and users of archival material). However, the prospect of such improvement seems just as remote as ever.

All material in archival collections may be subject to copyright. Custodians of archival material must understand the nature of copyright. It is especially important for custodians of archival material to know what material they can copy and under what circumstances.

The author is grateful for the assistance of Ms Linda de Silva, a legal officer with the Australian Copyright Council.

Warning: The copyright laws in Australia are extremely complex. This article is intended as a guide only. No responsibility will be accepted for relying on any of the information given.

Legal advice may be sought, free of charge, from the Australian Copyright Council, Suite 3, 245 Chalmers Street, Redfern NSW 2016, Telephone (02) 318 1788, Toll Free (008) 22 6103.

In this article, the term *material* has been used to cover all manner of archival material that might be subject to copyright, including both works and subject matter other than works. The term *item* (or items) has been used to include both works and sound recordings and cinematographic films (but not television and sound broadcasts or published editions of works). See 3. *Material subject to copyright* below for a description of the various categories of material subject to copyright.

1. Copyright

Copyright is the exclusive right to deal with material in certain ways, including:

- reproducing or making a copy of material in a physical form;

- publishing material;
- performing material in public;
- broadcasting material or transmitting it through a diffusion service;
- make an adaptation of a work.

Using a part of a copyright work in any of these ways also infringes copyright if the part is a “substantial part”. Any important part of a work is likely to be “substantial”. The term “substantial part” is a general concept that applies to all uses of copyright material. It should not be confused with the term “reasonable portion” (see explanation of in 7. *Copying by users* below) which is used in some sections of the *Copyright Act 1968* dealing with particular library and educational exceptions to infringement.

Copyright is also the right to prevent any or all of the above or to licence others to do any of the above.

Copyright law does not prevent the copying of ideas, knowledge or information; patent law provides the appropriate protection for these. Copyright law is intended to protect a particular expression of an idea. Normally, this expression exists in a fixed physical form, but amendments to the Act in 1984 protect material held in invisible forms of storage, such as computer memory. Once a work, or a substantial portion thereof, is capable of being reproduced from that memory, it is subject to copyright.

2. Access to copyright material

Copyright is not an absolute right of privacy, i.e. the owner of copyright in material cannot prevent the owner or custodian of that material giving anyone access to that material unless the method of giving of access (such as publication) would infringe copyright. Generally it may be said that allowing access (whether by examination in a search room or by exhibition) to original archival material does not infringe copyright.

3. Material subject to copyright

The *Copyright Act 1968* (as amended) generally separates material that may be subject to copyright into two broad categories—“works” and “subject matter other than works”. These categories may be described as follows:

Works

LITERARY WORKS [including newspaper and journal articles, poems, short stories, books (whether fictional or not), rules for games, song lyrics, letters, diaries, computer programs, and all other forms of writing (except for trivial expressions such as titles and slogans)]

DRAMATIC WORKS [including plays, film scripts]

MUSICAL WORKS

ARTISTIC WORKS [including paintings, engravings, photographs, maps, plans, sculptures, models, drawings, craftworks]

Note: for some purposes, engravings and photographs (including negatives, prints and transparencies) are treated differently from other artistic works.

Subject Matter Other Than Works

SOUND RECORDINGS [including records, discs, tapes, cassettes]

CINEMATOGRAPHIC FILMS [including movie films, video-recordings, television programs]

Note: A film made before 1 May 1969 is not protected as a film but rather as a series of photographs and as a dramatic work. [ss. 221, 222].

TELEVISION AND SOUND BROADCASTS [including broadcast signals]

Note: Copyright (except as copyright in an original literary, musical, dramatic or artistic work) does not exist in television or sound broadcasts made before 1 May 1969 [s. 223].

PUBLISHED EDITIONS OF WORKS [the publisher's typesetting]

Note: Copyright (other than copyright in an original literary, musical, dramatic or artistic work) does not exist in published editions of works made before 1 May 1969 [s. 224].

Copyright thus protects a very broad range of material. It was developed to protect and reward creativity and intellectual effort. Under the *Copyright Act 1968*, protection is automatic and material is protected from the moment it is captured in a fixed form, such as writing or magnetic impulses on a tape or disk. Copyright comes into existence regardless of whether the author wants its protection or not.

The number of separate items held by archives in Australia that would be subject to copyright would run into billions, when you consider that each individual letter, memo, report etc. is a separate literary work and each photograph and drawing is a separate artistic work. Because most archival material is in the form of unpublished literary works, the vast bulk of material (from the smallest laundry list to the undiscovered manuscript of "the great Australian novel") in archival holdings is therefore subject to copyright. The only exceptions would be those items (probably less than one percent of archival holdings) where copyright has expired (see Appendix A, Duration of Copyright).

4. Ownership of copyright

Generally copyright is vested in the author or maker of material, and his/her heirs or assignees. There are three major exceptions to this:

(a) copyright in material created *in the course of employment* is vested

- in the *employer* (except in the case of journalists, where the employer owns rights only relating to newspaper and magazine publishing and to broadcasting, the journalist retaining other rights) [s. 35(40)];
- (b) copyright in *photographs, portraits, engravings, sound recordings, and films* that were *commissioned* from the author is vested in the person or body that commissioned the material, provided that there is “valuable consideration” (such as a fee) [ss. 35(5), 97, 98]; and
- (c) copyright in materials created under the direction or control of the Crown or first published by the Crown is owned by the Crown [ss. 176, 177].

Both the general rule and the exceptions can be varied by agreement.

The *author* is the person who created the work. The “author” is always a natural person and might not be the owner of the copyright (if, for example, the work was created in the course of employment).

The copyright owner may sell or otherwise dispose of his/her rights, either absolutely or for a period. The copyright owner can also licence particular uses of the work to others. An exclusive licence means that only the licensee can use the work in the specified ways.

Transfer of ownership in material *does not* include transfer of the copyright unless this is specifically stated in writing. Thus the gift or sale of material does not include the copyright, unless specifically stated.

Where a copyright owner (who died after 30 April 1969) specifically bequeaths unpublished material by will, it is assumed that the specific bequest includes the copyright [s. 198]. Where an author died before 1 May 1969, ownership, acquired under the will of the author, of an unpublished manuscript is evidence (but not necessarily proof) of ownership of the copyright in that manuscript [s. 240].

The heirs (and their heirs, and so on *ad infinitum*) of authors of unpublished archival material will continue to own the copyright in that material until the copyright expires (see Appendix A, Duration of Copyright).

If your archives or institution owns the copyright, you may make a copy without infringing copyright. (This assumes that your archives has authority to permit acts involving copyright, or that you can easily obtain such permission from the relevant authority within your institution.)

5. Publication

It is important to understand the distinction between published and unpublished material, as the length of copyright protection depends upon whether a work is published and because the archive copying provisions also vary according to the status of the work. Published works can be copied more readily although the amount that can be copied is more limited.

Generally, it may be said that material has been published if (and only if) reproductions of the material have been supplied to the public, whether by sale or otherwise.

In determining whether material is published or unpublished, you have to disregard:

- any publication not authorised by the copyright owner or licensee;
- any publication not in accordance with the provisions governing the publication of unpublished works (see 8. *Copying and Publishing Unpublished Works* below).

You should also note that the following do not constitute publication:

- performance of a literary, dramatic or musical work;
- supplying (by sale or otherwise) to the public of recordings of a literary, dramatic or musical work;
- exhibition of a work.

6. Duration of copyright

Copyright subsists for varying periods depending upon the nature of the copyright material and whether it has been published. The table at Appendix A sets out the duration of copyright for different types of material, both published and unpublished.

Material that is not still subject to copyright can, of course, be copied, published or otherwise dealt without infringing copyright.

7. Copying by users

Because of the unique and fragile nature of most archival material, it is generally accepted practice amongst archives not to permit users to make their own copies from the original document. However, where archives users have access to the original material or to a copy of the original material (which has been made under the archives copying provisions), the *Copyright Act* permits an archives user to make a copy in certain situations.

Section 40 permits the copying of works while section 103C is a companion provision permitting copying of audiovisual items. In both cases the dealing must be “fair” and the copying must be for the purpose of research or study.

In relation to print material, section 40 deems a certain amount of copying to be “fair”:

- the whole or part of an article in a periodical publication;
- more than one article in that periodical but only if they relate to the “same subject-matter” (which is not defined in the Act);
- up to a “reasonable portion” of a literary, dramatic or musical work.

A “reasonable portion” in relation to a literary, dramatic or musical

work published in an edition of 10 or more pages is defined as:

- 10% of the number of pages in that edition; or
- up to one chapter (even if more than 10%) where the work is divided into chapters.

A “reasonable portion” is not defined in relation to a work in an edition of less than 10 pages.

Beyond these limits, and in all cases for artistic works and audiovisual items, the dealing may still be “fair”. To determine this, the criteria set out in sections 40(2) and 103C(2) need to be considered. These are:

- (a) the purpose and character of the dealing;
- (b) the nature of the work, adaptation or audiovisual item;
- (c) the possibility of obtaining the work, adaptation or audiovisual item within a reasonable time at an ordinary commercial price;
- (d) the effect of the dealing upon the potential market for, or value of, the work, adaptation or audiovisual item; and
- (e) in the case where part only of the work, adaptation or audiovisual item is copied—the amount and substantiality of the part copied taken in relation to the whole work, adaptation or item.

If, for making copies, users are allowed to use a copying machine provided by the archives, the archives must display the prescribed notice near the machine. The form of this notice, which must be on A4 size paper, is at Appendix C. Failure to display this notice leaves the archives open to liability for infringement of copyright.

8. Copying by archives

An archives might wish to copy material in its custody for a variety of reasons (for example, as mentioned above, archives do not usually permit users to make their own copies of archival material because of the fragility of such material). Before proceeding to make a copy, the archives should first determine whether making the copy will infringe copyright. This will depend on the purpose for which the copy is made.

8.1 Copying for the purpose of preserving unpublished material or replacing published material

If a *published* item is held in the collection but has been damaged or has deteriorated or if a *published* item has been lost or stolen, a single copy may be made providing a copy cannot be obtained within a reasonable time at an ordinary commercial price and a declaration to this effect is made by an authorised officer of the archives—see Appendix D for the form of this declaration. [ss. 51A, 110B]

If the item is *unpublished*, a single copy may be made if it is held in manuscript (i.e. original) form or if it is an original artistic work,

or if it is a first copy of a sound recording or a cinematographic film. [ss. 51A, 110B]

s. 51AA permits the Australian Archives (but no other archives) to make a single working copy plus a single reference copy for its central office and a single reference copy for each regional office of works (published or unpublished) that are in its collection and available for public inspection.

8.2 Copying for the purpose of research that is being (or is to be) carried on by the archives or by another archives

A single copy of an item may be made if:

the item is a *published* work, or a *published* form of a sound recording or a cinematographic film, and a copy cannot be obtained within a reasonable time at an ordinary commercial price and a declaration to this effect is made by authorised officer of the archives—see Appendix D for the form of this declaration. [ss. 51A, 110B]

the item is held in manuscript form, or is an original artistic work, or is a first copy of a sound recording or cinematographic film. [ss. 51A, 110B]

8.3 Copying for the purpose of supplying the copy to another archives either for inclusion in its collection or because that archives has been requested by a person to obtain a copy for him/her

If the work is *published*, a single copy of the permitted portion (see below) of the work may be made provided an authorised officer of the archives requesting the copy makes a declaration setting out the particulars of the request—see Appendix E for the form of the declaration. [s. 50]

If the work is *unpublished*, a copy cannot be made without infringing copyright.

The *permitted portion* of a work can be described as—

- one or more articles (or part thereof) in the same periodical publication, but only if the articles relate to the same subject matter;
- 10% of the number of pages or one chapter (whichever is the greater) of a published edition of a literary, dramatic or musical work;
- more than above and including the whole of a published literary, dramatic or musical work, provided that the work forms part of the archives' collection, and an authorised officer of the archives is satisfied (after a reasonable investigation) that a copy (not being a second-hand copy) cannot be obtained within a reasonable time at an ordinary commercial price.

8.4 Copying for the purpose of supplying the copy to a person or user

See Appendix B which sets out the conditions under which a copy may be made without infringing copyright.

Note that in the case of *published* works, the appropriate declarations must be made by the person requesting the copy and by an authorised officer of the archives—see Appendix F for the form of these declarations.

8.5 Copying for the purpose of publication

An unpublished literary, dramatic or musical work or an unpublished photograph or engraving may be copied with a view to publication if—

- 50 years have expired after the end of the year in which the author died, AND
- 75 years have expired after the work was first made, AND
- the work is kept in the collection of the archives and is available for public inspection. [s. 51]

Any such work may also be published if—

- the identity of the owner of the copyright is not known, AND
- the prescribed notice of intention to publish is given (this requires notification of intention to publish to be made in the Government Gazette not less than two months and not more than three months before the intended publication). [s. 52]

Note that these provisions do not apply to subject matter other than works, such as sound recordings and cinematographic films.

8.6 Copying for the purpose of microfilming the material in order to save space

A *single* microfilm or microfiche copy of a work may be made, provided—

- the work or works are held in the archives' collection, AND
- the work or those works are destroyed as soon as practicable after the microfilm copy has been made (this is not necessary, of course, if the work is unpublished and the copy has been made for preservation purposes, see 7.3.1 above). [s. 51A]

9. Obtaining copying rights

Persons and organisations depositing material with archives should be consulted about copyright at the time of deposit. Obviously, if the depositors agree to licence the archives to make copies for users (or for other purposes), the restrictions imposed by the *Copyright Act* can be overcome, insofar as the depositors own the copyright in the material deposited. Depositors might also agree to license the archives to perform other copy-

right acts, such as publication, or might agree to transfer copyright to the archives. Any such agreement will override the statutory provisions.

Depositors can, of course, only deal with such copyrights as they own. Depositors will not, for example, usually own copyright in letters written to them by other people and cannot license copying of such letters—that can only be done by the author (or subsequent copyright owner).

APPENDIX A

DURATION OF COPYRIGHT

PUBLISHED WORKS

UNPUBLISHED WORKS

Literary, Dramatic and Musical Works

50 years after the end of the year in which the author died*. [s. 33(2)]

50 years after the end of the year in which the work was first published.** [s. 33(3)]

Photographs taken before 1 May 1969

50 years after the end of the year in which the photograph was first taken. [s. 212]

50 years after the end of the year in which the photograph was first taken. [s. 212]

Photographs taken after 30 April 1969

50 years after the end of the year in which the photograph was first published. [s. 33(6)]

50 years after the end of the year in which the photograph was first published.** [s. 33(6)]

Engravings

50 years after the end of the year in which the author died*. [s. 33(2)]

50 years after the end of the year in which the engraving was first published.** [s. 33(5)]

Artistic Works other than Photographs or Engravings

50 years after the end of the year in which the author died***. [s. 33(2)]

50 years after the end of the year in which the author died***. [s. 33(2)]

Sound Recordings made before 1 May 1969

50 years after the end of the year in which the recording was made. [s. 220(3)]

50 years after the end of the year in which the recording was made. [s. 220(3)]

Sound Recording made after 30 April 1969

50 years after the end of the year in which the recording was first published. [s. 93]

50 years after the end of the year in which the recording was first published.** [s. 93]

Cinematographic Films made after 30 April 1969

50 years after the end of the year in which the film was first published. [s. 94]

50 years after the end of the year in which the film was first published.** [s. 94]

Television and Sound Broadcasts made after 30 April 1969

50 years after the end of the year in which the broadcast was first made. [s. 95]

[Not applicable]

Published Editions of Works made after 30 April 1969

25 years after the end of the year in which the edition was first published. [s. 96]

[Not applicable]

* Crown copyright expires 50 years from the year of first publication.

** i.e. copyright in unpublished works, sound recordings and films may be perpetual.

*** Crown copyright expires 50 years after the end of the year the work was made.

APPENDIX B

COPYING BY AN ARCHIVES for the purpose of supplying a copy to a user

PUBLISHED WORKS

UNPUBLISHED WORKS

*Literary, Dramatic and Musical Works**
Photographs taken after 30 April 1969
Engravings

A copy of the permitted portion** may be made, providing the person requesting the copy provides a declaration stating that:

(a) the copy is required for the purpose of research or study, and will not be used for any other purpose, AND

A copy may be made only if:

(a) 50 years have expired after the end of the year in which the author dies, AND

(b) 75 years have expired after the work was made, AND

(c) the work is available for public inspection:

(b) he/she has not previously been supplied with a copy. [s. 49]

(OR the work is a thesis or similar literary work held in a university library or similar institution) AND the officer in charge is satisfied that the copy is required for the purpose of research or study or with a view the publication and will not be used for any other purpose. [s. 51]

*Photographs taken before 1 May 1969
Other Artistic Works*

A copy of the permitted portion** may be made, providing the person requesting the copy provides a declaration stating that:

- (a) the copy is required for the purpose of research or study, and will not be used for any other purpose, AND
- (b) he/she has not previously been supplied with a copy. [s. 49]

A copy may be made only if 50 years have expired after the end of the year in which:

- (a) the photograph was taken (in the case of a photograph), or
- (b) the author died (in the case of other artistic works), (copyright having expired).

Sound Recordings and Cinematographic Films

A copy may be made only if all copyrights (including, as appropriate, copyright in the script, the music, and the individual photographs) have expired.

- A copy may be made only if:
- (a) 50 years have expired after the end of the year in which the recording or film was made, AND
 - (b) the recording or film is available for public access, AND
 - (c) the officer in charge of the archives is satisfied that the copy is required for the purpose of research or study or with a view to publication and will not be used for any other purpose. [s. 110A]

* Including accompanying artistic works that explain or illustrate the text [s. 53]

** See definition of "permitted portion" in 8.3 above.

APPENDIX C

*Form of notice for display near self-service copying machines
(Failure to display this notice may incur liability for prosecution)*

WARNING

A copyright owner is entitled to take legal action against a person who infringes his copyright. Unless otherwise permitted by the Copyright Act 1968, unauthorized copying of a work in which copyright subsists may infringe the copyright in that work.

Where making a copy of a work is a fair dealing under section 40 of the Copyright Act 1968, making that copy is not an infringement of the copyright in the work.

It is a fair dealing to make a copy, for the purpose of research or study, of one or more articles on the same subject matter in a periodical publication or, in the case of any other work, of a reasonable portion of a work. In the case of a published work that is not less than 10 pages and is not an artistic work, 10% of the total number of pages, or one chapter, is a reasonable portion.

More extensive copying may constitute fair dealing for the purpose of research or study. To determine whether it does, it is necessary to have regard to the criteria set out in sub-section 40(2) of the Copyright Act 1968.

APPENDIX D*Declaration by Authorised Officer*

When copying a published work for the purpose of:

- *preserving or replacing the work; or*
- *research by the archives or by another archives.*

DECLARATION BY AUTHORISED OFFICER

Description of the work:

I declare that, after reasonable investigation, I am satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

Signed: _____
(Authorised Officer)

Date: _____

APPENDIX E

Declaration by Authorised Officer

When requesting a copy of a published work for the purpose of:

- *including the copy in the archives' collection; or*
- *supply to a person who has requested the copy.*

DECLARATION BY AUTHORISED OFFICER

Description of the work:

Purpose of the request:

inclusion in the collection*

supply to person requesting the copy*

*strike out whichever does not apply.

I declare that the previously supplied copy has been lost/damaged/destroyed.

[strike out if inapplicable]

I declare that, after reasonable investigation, I am satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

[strike out if only a reasonable portion of the work is requested]

Signed: _____

(Authorised Officer)

Date: _____

APPENDIX F

Declarations

By person requesting a copy of a published work for the purpose of research and study, and

By authorised officer where more than a reasonable portion of a published work has been requested.

DECLARATION BY PERSON REQUESTING

To the Officer in Charge:

I request a copy of:

I declare that I require the copy for the purpose of research or study and I will not use it for any other purpose, and that I have not previously been supplied with a copy of the same material by an authorised officer of the archives.

Signed: _____
(Authorised Officer)

Date: _____

DECLARATION BY AUTHORISED OFFICER

I declare that, after a reasonable investigation, I am satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

Signed: _____
(Authorised Officer)

Date: _____