

CHAPTER SEVEN: DIGITISATION OF THE COLLECTION

1. Introduction¹

Digital technology now makes it possible for all types of information (including images and sounds) to be reduced to a complex but easily transmittable pattern of ones and zeros. Application software that achieves this is both available and cheap.

Combined with the right equipment, complete interactivity is possible – that is, one is now able to de-materialise (up-load), access, view or listen to and download that image or information. Once downloaded, this material may be reproduced perfectly in its original form – that is, perfect quality reproductions.

In addition, digital technology provides a simple and seamless method of manipulating those digitised images and materials – by adding material to them, by simply sampling specific parts of them and incorporating those parts into new images or in combination with samples from other original artworks, or by simply re-arranging or cropping the subject matter of the image itself. All things are possible – and with great speed and quality.

In other words, this same technology also permits:

- the extraction or sample of certain parts of the material;
- the manipulation or adding to the material or parts of it; and
- the seamless integration of any sampled parts of the original material.

The technology continues to develop quickly. Both the public and most collecting institutions have become active users. Collecting institutions have become important creators, providers and distributors of digital content and their digitisation programs have become a core means of providing access to their collections. Institutions are able to make a vast range of material accessible for viewing at any one time – unlimited by the amount of physical exhibition space available. Similarly, the digitised collection material can be used to enhance the experience and the value of an individual exhibition for it can be used to present additional educational materials and allow public visitors to ‘browse’ through other works related to the exhibition but not actually exhibited due to lack of space.

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With digitisation, the collection material and its associated educational and merchandising products become dissociated from the physical museum and its geographical location. Digitisation is not just a technological issue. It is that. But it is also a financial, legal, administrative and philosophical issue.

2. What are digital rights?

The law does not have a particular category of rights called “digital rights”. Rather, the digitisation of copyright material is merely one application of the usual rights of copyright, applied in a specific technological medium.² In practice, however, what we might refer to as ‘digital rights’ include:

- reproducing material in digital form;
- storing and archiving in a database;
- permitting the public to access and retrieve through a computer, smartphone, tablet or other digital device; and
- transmitting, distributing or otherwise making available (such as via the internet, an intranet, a USB or a CD-ROM).

Technology permits all of this. Whether one is authorised to do it is another matter. Essentially, there are three core elements to the right to digitise.

Do you have access to the item? Without physical access to an item, the ability to digitise it is limited. You do not have to own it: mere possession (for example, as a borrower) will do.

What is the copyright status of the item? This is no hurdle where the material is not the kind of material in which copyright subsists, or is so old that copyright either never subsisted in it,³ or has expired.⁴ If there is no copyright, the only issue is access. Similarly, if the institution owns the copyright outright, it also has the digital rights. However, where the institution has only been granted limited rights of copyright, or where the item is merely on loan, it may or may not have the digital rights. This usually depends on the wording of the documentation, though the exceptions to copyright infringement may permit some digitisation.

Are there any contractual limitations on digitising the item? It can sometimes be the case that an institution has physical possession of any item and there are no copyright impediments to digitising but contractual obligations will prevent digitisation taking place. This may particularly be the case where an item is on loan – and particularly when it is on loan for short-term exhibition. Digitising the item may not infringe any copyright rights, but may well result in a breach of contract, for which the other party may take action.

The warning for museums is that they must review all copyright licences, purchase agreements, donation and other contracts (whether obtained in the pre-digital era or later) to work out what they can do in digital formats and in the digital environment.

3. Managing digital rights and digitisation

Modern collecting organisations are in the business of rights management. The ability to manage this new ‘resource’ or ‘asset’ is of growing importance and requires a sound knowledge and understanding of:

- the technology;
- the material held in the collection;

² In the early 2000s, the Centre for Media at the University of Melbourne and the Intellectual Property Research Institute of Australia, with Museums Australia, undertook a two-year project examining copyright issues in cultural institutions, delivering guidelines for digitisation of collections and survey museum digitisation practices: see <http://www.austlii.edu.au/au/journals/UNSWLawJl/2007/2.html>.

³ For example, where the material came into existence prior to the copyright laws or where those copyright laws that were around at the time didn’t protect that type of material and where subsequent laws didn’t extend protection to pre-existing material.

⁴ For further information, see the information sheet entitled ‘Duration of Copyright’ on the Australian Copyright Council’s website at www.copyright.org.au.

- the purpose for which digitisation is undertaken;
- the extent of the rights enjoyed by the museum;
- the ability to clearly identify the digital object; and
- relevant business principles.

3.1 Designing access

Contemporary digital technology is not just about digitisation; it is also about access and further distribution (including via social media). If you are going to give clients access to digital copies (including by giving access over the internet to your databases or by uploading images to websites (including social media), you will have to review your existing protocols.

In doing so, however, you should never lose sight of the following fundamental questions:

1. What level of access do you want to provide to third parties? (For example, will you limit access to particular categories of material?)
2. What use do you want people to be able to make of the data obtained from this access? (For example, will you actively encourage people to comment on or respond to works – including by asking for additional information people might be able to provide⁵ – and
3. What design factors need to be built in to promote your aims and minimise any attendant dangers? (For example, will you only upload at low pixel resolutions or at high definition? Will you encourage people to share or remix material, or will you take steps to make the material available to view or hear but not download?
4. What hardware and software systems can be built in? (For example, will you only make the material available onsite or will it be available generally online?)

3.2 Digital Object Identification

It is crucially important that the owner of the digital object that is to be used or licensed is able to precisely identify the digital object. It must also be able to attach digital information to that object so that the digital object carries with it, as part of its very being, information that identifies the owner of the rights in it and the terms upon which it can be used or traded. It is like an invisible, digital barcode – an alphanumeric string assigned to uniquely identify an object, ideally tied to metadata describing the object as well as a digital location (for example, a URL), where details about the object may be accessed.

The best known is perhaps the Digital Object Identifier (DOI),⁶ which now appears almost exclusively to be used to identify scholarly journals and articles. There are other systems that have been developed to perform similar functions in relation to different types of material: for example, ISAN for audio-visual material⁷.

The development of such a system has been touted as a hugely important development for it is thought that such a system would be part of the mosaic of enablers that would allow digital rights to be identified, described, communicated, traded and audited. Each digital object will have its own DOI. Material that is made up of an assemblage of works (such as a page of a text book that contains several licensed paragraphs of text and various charts, illustrations and photographs) will have a DOI for each of its constituent parts and for the page itself. The bonus of DOI is that it allows a great degree of 'granularity': you can license the book, the chapter, the page, the paragraph, the sentence – provided each has its own DOI.

⁵ For example, a number of institutions with photographic collections have asked the public to contribute information about images so as to provide a more information-rich resource: see, for example, the Powerhouse Museum's participation in "The Commons Project", under which members of the public are encouraged to tag photos with information (<https://www.powerhousemuseum.com/flickr/>).

⁶ See www.doi.org/.

⁷ See www.isan.org/.

It is important to note that DOI is just one of the available systems that provide this functionality. For example, the National Library of Australia devised its own scheme of Persistent Identifiers (with the project successfully completed in 2011).⁸

3.3 Maintenance and training

When you go digital the administration doubles. Now you must also know:

- what material you have in your digital library;
- where to find it;
- what rights you have to that material, and
- how you can exploit the digital material.

The planning of this information architecture so that it is easy to navigate and retrieve is essential to efficient digitisation. It is often forgotten that many of the apparent cost savings in digitising collection material is eaten up with the additional costs of administering the new resource.

One of those costs is the on-going training for employees – both those who establish and maintain the digital repository and those who need to use it. Another cost is the migration of digitised material as hardware and software becomes obsolete or is upgraded (and no longer supports earlier versions).

3.4 Planning

It is of fundamental importance to plan early and to implement effective and easily maintained rights management systems for material that might be or is to be digitised.

3.5 Getting the right information at time of accession

At the very least, accurate cataloguing and records will be crucial. These must include details of:

- the creator's name;
- the circumstances of creation (for example, whether the material commissioned or created by an employee, and so on);
- copyright status;
- whether it has been published (in the copyright sense) and where (relevant to establishing duration);
- the copyright owner;
- any rights or licences acquired by the institution;
- whether there is any licensee or agent from whom copyright permissions must be obtained;⁹
- the duration or term of any licences;
- any specific restrictions on use or access;
- renewal dates or triggers for extending the term of any licence(s); and
- whether there are any licence fees or royalties payable (and if so, to whom, by whom and how frequently).

We are used to these requirements in an atom-based environment. Most collections now routinely maintain such records. Those that don't capture this essential information when accessioning material are falling far short of professional best practice: not only are they exposing their institution to legal liability, they are restricting the use that the collecting institution will forever be able to make of the accessioned item.

⁸ See nla.gov.au/initiatives/persistence.html.

⁹ For example, Copyright Agency Limited | Viscopy.

3.6 How to acquire digital rights

In many cases, you can get where you need to go with digitisation under the *Copyright Act*.¹⁰

If copyright law doesn't extend as far as you want for the ways you want to use copyright material, there are two ways to acquire a licence of digital rights:

- identify the rights owner and obtain a direct licence; or
- get a licence from the collecting society that represents the digital rights owners.

For example, if the work is literary (for example, newspaper and magazine articles or books) or artistic (for example, paintings, drawings, survey and architectural plans), the first stop would be Copyright Agency Limited | Viscopy;¹¹ for audio-visual material such as films and television programs, the relevant production company; for compositions, APRA/AMCOS;¹² for sound recordings, it will either be PPCA¹³ or the individual record company owners.

Where you are seeking to license collective or multi-media works such as a website (which may contain thousands of individual pieces of copyright material in various media) there is no single collecting society or joint venture of collecting societies that can assist.

Unless the institution can rely on a 'fair-dealing' or 'library and archives' provision of the *Copyright Act 1968* (Cth), the process is going to be long and painstaking. Each piece of material will need to be broken down into its component parts; each component will need to be described, each owner will need to be identified, the extent of their rights determined, the licence sought, the purpose of the licence explained, and, after all that, the licence granted (or refused). Then the licence and its details must be recorded and administered.

The process must be meticulously repeated for each copyright component. And now for the good news.

3.7 Digitising orphan works

Orphan works are works that are still in copyright but the copyright owner cannot be found.

This is a particularly difficult problem with some collection material (such as manuscripts) where the copyright period does not start running until the work has been 'published'. For example, say you have in the collection, a diary written in 1910 in The Kimberley. You know the name of the author but can find no other information on her. You have no idea as to who her heirs were. In some cases, the information could possibly be uncovered – but only at the cost of an amount of time and resources that would make seeking a licence completely impractical. In others, no matter how much you expended, you couldn't unearth the identity of the current owner of the rights.

Many collections have large holdings of orphan works and all want to be able to digitise and reproduce this material. After all, not knowing the identity of the rights owner does not affect the importance of the material.

Management has two choices:

- do nothing with it; or
- use the material in accordance with a risk management strategy (including an assessment of the extent to which the institution may be able to rely on section 200AB of the *Copyright Act* – the 'flexible dealing' or 'special case' exception).

The first option is undoubtedly the safest – but at what cost? You have saved the organisation any danger of having to pay legal costs and damages, but in doing so have lost the opportunity to further the public interest aims of the collection.

¹⁰ For detailed information, see our chapter on this topic.

¹¹ See www.copyright.com.au.

¹² See www.apraamcos.com.au.

¹³ See www.pcca.com.au.

The second option is commonly (and sensibly) used in Australian collecting organisations. For example, the National Library digitised all sheet music published prior to 1940, except where there was known to be an active musical estate.¹⁴ This approach enabled the digitisation of some 40 000 items for the National Library's well-known and highly used Music Australia service. Despite getting something like two million page views per annum, no copyright owner has emerged with a complaint of unauthorised breach of copyright through the Library having digitised its sheet music collections. (If they did, the Library would presumably either take down the material in question while it negotiated an agreement with the claimant or assess whether section 200AB may apply.)

Had the Library not taken this approach, it would have digitised very little of this material, and expended a huge amount of staff resource in the probably fruitless search for copyright owners who might be approached for permission for digitisation. The risks with this material were low: the works were old catalogue; they did not involve active estates; if there is a claim the material will be readily removed until the claim is sorted; and the potential financial liability for breach of copyright is minuscule.

3.8 Digitising under section 200AB

Partly because of the difficulties faced by collecting institutions in clearing rights, an important amendment was made to the *Copyright Act* in 2006 – the introduction of an open-ended exception that, to the maximum extent permitted under Australia's international treaty obligations, allows collecting institutions to deal with copyright material without permission from a copyright owner when maintaining or operating their collections.

The section – section 200AB – is not an easy section to analyse, but it is extremely useful and much under-utilised.

We deal with the section in detail in our copyright chapter, but it is worth noting here that a library, museum, public gallery or archives will, among other things, can rely on the section to digitise and otherwise deal with its collection materials if its use of the material:

- does not conflict with a normal exploitation of the material by its owner; and
- does not unreasonably prejudice the legitimate interests of the owner of the copyright; and
- is made by or on behalf of the body administering a library or archive; and
- is made for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives); and
- is not made partly for the purpose of the body obtaining a commercial advantage or profit.

The provision therefore allows collecting organisations to deal with their collections in ways not specifically addressed in other sections of the Act (such as in the provisions dealing with preservation copying and copying for “administrative” purposes), and may in certain cases extend to digitising collections for public access and retrieval, exhibitions and even education programs – both internal and external. It is a provision that may also extend (at least for some categories of material, such as some types of orphan works) to posting digital copies to an institution's website.

Each of the conditions listed above must be fulfilled, however. Consequently, it is important to consider the desired use against each of the requirements.

For example, because of the requirement that the reproduction not conflict with the normal exploitation of the rights by the owner, it may often be the case that, except where copyright owners licence such reproductions, any reproduction put onto the website could only be in very low resolution; people visiting the site and wanting to use the image commercially will need a high-resolution image and will not be able to use the web version for their commercial purpose. They will need to go back to the rights owner and obtain a licence in the normal way.

¹⁴ Such as that of the composer Jack O'Hagan, who was particularly active in the early decades of the twentieth century, but only died in 1987. Where the estate is active, the works are not 'orphan works' because the rights owners are easily identified.

4. How to realise the potential of your digital rights

Where you own the digital rights, you do not maximise their value merely by selling them to Mr Microsoft or making them available to Dr Google. You must make the new media an integral part of the delivery of museum services. Digitisation provides another means of delivering the museum experience and services to your public. At the very least, it creates new messaging channels that will reach new 'customers'. As such, it can be an effective and cost-effective tool to increase public awareness of your museum and your collections – especially to the younger members of the public (for they are very active users of this technology). This in turn has the potential of leading to:

- membership increase;
- visitors increase;
- business and commercial opportunities;
- educational opportunities; and
- enhanced visitor experiences.

The challenge is not merely how to embrace the technology. Rather, it is how to use this communication medium to further the public interest purposes and policies of the museum.¹⁵

Further reading

See generally the various materials collected on the website of the Council of Australian Libraries;¹⁶ work by Dr Emily Hudson, Dr Andrew Kenyon and Dr Andrew Christie in this field;¹⁷ and the excellent paper delivered by Dr Timothy Hart entitled 'Digitisation: An Australian Museums' Perspective', Collections Council of Australia, Digital Collections Summit, 17 August 2006.¹⁸

¹⁵ See our later extensive discussion on licensing collection material.

¹⁶ See <http://www.caul.edu.au/caul-programs/publishing/digitisation/digitisation-best-practice>.

¹⁷ See, for example, the references at <https://law.uq.edu.au/profile/1137/emily-hudson>.

¹⁸ See http://nma.gov.au/research/understanding-museums/THart_MHallett_2011.html.