

29 May 2008

PANEL OF EXPERTS:

Mr Michael Crayford Assistant Director, Collections and Exhibitions, Australian National Maritime Museum

Mr Gary Dufour Chief Curator & Deputy Director, Art Gallery of Western Australia

Professor Graham Durant Director, Questacon National Science and Technology Centre

Ms Genevieve Fahey Manager, Scienceworks Museum

Ms Carol Henry CEO, Art Exhibitions Australia

Ms Susan Sedgwick Manager, Exhibitions & Publication, Historic Houses Trust of New South Wales

PART D. EXHIBITIONS

CHAPTER 18. PERMISSIONS AND ACKNOWLEDGEMENTS

18.1 Copyright permissions

Every exhibition uses material that is protected by copyright and moral rights. This is so even when the exhibition is of material that is either long out of copyright or in which copyright never subsisted. Exhibitions are always accompanied by vast amounts of contemporary and copyright work: photographs, essays, labels, illustrations, audio recordings, background music, catalogue design, lighting design, exhibition design, press releases, signage, merchandising materials and so on. Accordingly, every exhibition requires a plethora of copyright-related permissions and acknowledgements.

These are frequently not complex legal documents. They are often achieved by a simple exchange of letters or emails whereby one party tells the other what they want to do and the rights owner gives permission. Most exhibiting institutions have pro forma documentation that they ask the party giving permission to complete and sign.

For example, copyright permission must be obtained from the copyright owner for the following uses:

- to reproduce an image on the cover of the catalogue (this is certainly not covered by fair dealing exceptions);
- to reproduce an image within the catalogue (unless it is for the purposes of criticism or review – something that is quite rare unless it is a catalogue raisonné);

- to reproduce an image on any poster, postcard, invitation, flyer, sign, label related to the exhibition whether the use is commercial in nature or not;
- to make a video recording of the work, whether on its own or as part of the exhibition, whether or not it is for non-commercial purposes (such as education or the promotion of the exhibition) or for commercial purposes (such as producing and selling a video or DVD of the exhibition);
- to reproduce educational audio recordings for use by exhibition viewers (assuming that the content is not absolutely owned by the museum).

It is also prudent to obtain any relevant moral rights consents. The principal moral rights for these purposes are (i) the right of attribution (to be acknowledged as the author of the work), and (ii) the right of integrity (to prevent any alteration to the work by the museum or its agents).

No copyright work may be reproduced for exhibition purposes unless the right to do so has been acquired. Assuming that the exhibiting institution is not the owner of the relevant copyright, it will have to get permission.¹ Strange as it may seem, this is not always straightforward. Often if you ask contributors whether they are the owner of copyright, they will respond confidently, affirmatively and erroneously. Many people have no idea of the principles of copyright and make potentially expensive assumptions that are quite wrong.² Beliefs constructed on erroneous assumptions may be firmly held and confidently expressed, but are no less wrong for that.

Accordingly, it is important to have a method by which the person has to explain the basis upon which he or she is the copyright owner. This is most easily done in the permission or licence form.

18.2 Moral rights permissions

A moral rights claim by an author can arise against a person who publishes, exhibits, reproduces or communicates to the public an artistic work,³ or publishes, reproduces or adapts a written work. For example, you are obliged by the moral rights provisions of copyright law, to give the author proper attribution.⁴ To do this, the exhibition organiser must be able to identify the author and the author's role.

¹ Also referred to as a 'licence'.

² One former director of a State gallery, now thankfully retired, would forcefully assert, fist hammering on the desk, that if the museum owned the work, it also owned the copyright, notwithstanding the Copyright Act (which he viewed as an unwarranted centralist interference with his rights.)

³ Artistic work is (relevantly) defined in the Act as a painting, sculpture, drawing, engraving or photograph or a building or a model of a building, whether of artistic quality or not.

⁴ Author means the individual person or joint authors who created the project. The term is not defined relevantly in the *Copyright (Moral Rights) Act 2000* (Cth), but in most cases, such as for a written work, the meaning is the ordinary meaning. However, in a more complex task such as a building, for example, it is generally accepted to be those who contributed creative effort.

If the person providing a copyright work is not the sole author of it, or a person who has the consent of the author(s) to be attributed as the author, they should be asked to provide as much information as they can to enable the museum to find the author(s).

For these purposes it is important to bear in mind that only individual persons can have moral rights, not businesses or other organisations.

Companies providing copyright material

Where a company provides the material,⁵ the moral rights consent must be from the individual who performed the work for the company. So, to ensure that there is compliance with moral rights law, those claiming to be the author must be either:

- the true author; or
- joint authors (all of them); or
- authorised to make the attribution of authorship by freely given written consents given them by the true individual author(s).⁶

In firms that are in the business of creating and delivering copyright material⁷, it is becoming standard practice to obtain standing consents from their staff. Such firms will usually include such consents in their standard agreements with all employees and consultants. The clause should have three limbs. It will:

1. Expressly assign all copyright in the work to the firm;
2. Authorise the firm itself to claim authorship of the work; and
3. Authorise the firm to exercise the moral rights of the author.

If the provider of the material is the copyright owner and has already obtained moral consents from the author(s), it has the right to pass the benefit of that consent on to third parties such as the exhibiting institution. If the provider of the materials does not have those consents already, you must require that it obtains them or at least tell you from whom they should be sought.

Accordingly, where any copyright work is provided for use by the collecting institution, it is prudent to require:

- a written undertaking by the person(s) or organisation that claims to be the author(s) that they are the author(s); or
- a written undertaking that it holds a valid consent to be attributed as the author(s); or

⁵ For example a design company commissioned to produce the catalogue or commissioned to design the exhibition itself.

⁶ This means all of the people in the firm that were involved in the creative process, whether they are the firm's partners, directors, employees, subcontractors or consultants.

⁷ Such as architects, designers and engineers.

- the identity of the author so that the museum can seek the necessary consents.

18.3 Example of copyright permissions

Copyright permissions are relevant to exhibition organisers in two quite different sets of relationships: First, they are essential in the contracts that they have with all of the consultants that are retained to work on an exhibition. Second, they must be obtained from the owners of any copyright in the exhibition material.

Copyright and exhibition consultants

Given that the general rule under the *Copyright Act 1968* (Cth) is that the author owns the copyright in his or her work, it is essential that the institution commissioning the work from a consultant or freelancer includes in the consultancy agreement a clause dealing specifically with the copyright in the deliverables.

8.0 GRANT OF RIGHTS

- 8.1 All rights (including copyright) in any Deliverables or Material created in the course of the providing the Consultant's services shall, upon delivery of that Deliverable or Material to the Museum, become the property of the Museum.
- 8.2 This assignment applies to all present and future rights of copyright, for the full period of copyright including all reversions and extensions, and to all media and technologies, whether now known or yet to be invented.
- 8.3 The Consultant shall not use any Deliverables for any purpose other than specified in this agreement, without the prior written consent of the Museum.
- 8.4 Without limiting the effect of clause 8.1, the Museum shall be entitled to make use of the Deliverables:
- 8.5 in such manner as the Museum shall in its sole discretion think fit including (but not by way of limitation) the right to make changes, substitutions and additions thereto, deletions therefrom and adaptations and rearrangements thereof and translations into any and all languages; and by means of all technologies and all media, whether now known or yet to be invented.
- 8.6 Early termination will not affect the Museum's rights under this clause 8.

18.4 Example of moral rights permissions

1. MORAL RIGHTS

- 1.1 Except to the extent specified in this agreement, the Museum will comply with the Museum of XYZ Moral Rights Policy (as amended from time to time).
- 1.2 The Museum will make best endeavours to ensure that the Consultant is acknowledged as the author of any Materials, consistent with industry custom and practice but any inadvertent breach of this provision shall not be a breach of this agreement.

- 1.3 The Consultant consent to the Museum, its licensees or assigns:
- (a) adapting, modifying, deleting or contextually placing the Material so that the Material may be exploited in any and all media (whether now known or yet to be invented) including without limitation CD-Rom, DVD, on-line, classified, directors-cut, video, in-flight, prequels, sequels, spin-offs, documentaries, 'making of' or other versions of the Material, print media, and merchandising;
 - (b) incorporating advertising into the Material or using the Material in advertising or promotions for the Museum, the Material, the Services or a third party;
 - (c) to make foreign language versions of the Material including dubbing, translating and subtitling; and
 - (d) any material alteration required by any agreement between the Museum and any third party.
- 1.4 The Museum also specifically retains the right to withdraw the whole or any part of the Materials, the Deliverables, from public view (whether by public exhibition, broadcast or any other means or medium of access).
- 1.5 If the Consultant does not agree with any such action by the Museum, the Consultant's sole right shall be to request the Museum not to attribute the Consultant as the author. The Museum shall make reasonable efforts to comply with this request but it shall not be obliged to vary any materials already printed and/or distributed.