Copyright Norms and Flexibilities and the Digitisation Practices of Cultural Heritage Institutions

by

Susan Corbett

(Victoria University of Wellington)

Abstract

The current trend for cultural heritage institutions to digitise their collections is the subject of much scholarly writing. The discussion thus far has tended to focus on doctrinal copyright law: the inadequacies of the archiving exceptions in copyright law, the potential revival of copyright protection for public domain entities as a result of their digitisation, and the failure of copyright law to address the growing numbers of cultural heritage orphan works. In addition to copyright issues, the practice of digitising 'public domain' traditional cultural heritage is criticised for ignoring cultural sensitivities of indigenous peoples.

The paper summarises earlier work and takes the debate a step further. It examines the practices of cultural heritage institutions when permitting public access to their analogue and digitised collections. These practices highlight the familiar conflict between copyright law and contractual provisions. Nevertheless, seemingly oblivious to the legal nuances of this conflict, cultural heritage institutions' practices reveal a developing normative approach. Thus, access to an institution's physical collection is often permitted under contractual conditions that do not differentiate between items protected by copyright and items in the public domain. Similarly, institutions claim ownership of copyright in their digitised collections, but their contractual provisions for access frequently override copyright's permitted exceptions. In effect, cultural heritage institutions take a flexible approach to the obligations inherent in copyright law. Although many copyright rights theorists have asserted the need for copyright to be more flexible in order to foster a 'just and attractive culture', [1] to facilitate civil society's participation in democratic dialogue [2] and to encourage, rather than stifle, dialogic practices [3], the flexible approach adopted by cultural heritage institutions has, potentially, an adverse societal effect. The public good rationales for both copyright and cultural heritage are undermined by the legal flexibilities espoused by cultural heritage institutions.

