

Copyright and cultural heritage: preservation and access to works in a digital world, edited by Estelle Derclaye, Cheltenham, Edward Elgar, 2010, 264 pp., UK £65.00 (hardback), ISBN 978-1-84980-004-4

Although the idea of a meaningful relationship between traditional museums on the one hand and digital copyright policy on the other may appear somewhat incongruous to many, in reality, museums and other cultural heritage institutions have adopted digital technology with alacrity. This book, an edited collection of 2009 conference papers, provides a broad and thought-provoking account of many of the legal, practical and ethical issues that are inherent in the digital reproduction of their collections by cultural heritage institutions. Although this practice is becoming prevalent internationally, it is apparent that the laws required to support digitisation are either inadequate or non-existent. In particular, the permitted exemptions in copyright law that are intended to support the preservation and archiving of cultural heritage are unsuitable in a digital environment, despite recent amendments to copyright law intended to facilitate the use of digital technologies for these activities. In part, this is because the broader purposes of digitisation are misconceived. In the main, cultural heritage institutions digitise their collections because they wish to provide accessibility to a wider audience. Conversely, the exemptions provided in copyright law for cultural heritage institutions have been drafted from the view that the sole purpose of digitisation is to preserve copies of those items in collections that are in danger of deterioration.

The focus of the book is firmly on analysis and critique of copyright law and its failure to provide suitable exemptions for the digitisation activities of cultural heritage institutions. This focus provides plenty of material, but it should not be forgotten that there are potentially other areas of law to be considered. For example, trademark law and patent law might present barriers to the archiving and online accessibility of some cultural heritage, particularly 'born digital' items (see Corbett, 2007). The interrelationship between contract law and copyright law is another area highly relevant to the activities of cultural heritage institutions.

Part I (*The European Perspective*) begins with Tanya Aplin's proposal that a global digital register of cultural heritage be created. Aplin examines this proposal in the context of two different areas of cultural heritage: legal deposit schemes and 'orphan' copyright works. She begins with an account of the history of legal deposit and its recent extension in several jurisdictions to include digital works. In contrast to analogue works, which were the traditional subjects of legal deposit laws, the unique characteristics of digital works require that they be copied by a deposit institution in order to be preserved. Without the consent of the copyright owner, or a relevant exemption from liability for infringement, the depositing institution that makes a copy of a digital work is liable for infringement of copyright. It appears, however, that the legal deposit laws of many countries, including the UK, do not create special exemption clauses from copyright infringement for deposit libraries.¹ Aplin alludes briefly to the selection policies of legal deposit institutions and perhaps misses an opportunity to comment on the desirability of state institutions continuing to impose their self-regulated criteria on the concept of 'culture' in a digital era, and whether this is somewhat incongruous given the opportunities for the more inclusive 'democratisation of culture' provided by the internet.

Aplin next turns briefly to the problem of orphan works (works protected by copyright but whose copyright owners cannot be traced). This is indeed a significant problem for cultural heritage institutions seeking to digitise their collections. She describes the two US bills that proposed setting up voluntary registers of copyright works and their owners. Because of opposition from copyright owners, neither has come into force. The European Commission has proposed a diversity of solutions, none as yet enshrined in formal legislation. As Aplin explains, the question of legal ownership and control of a global digital register is problematic. In copyright law, such a register is likely to meet the definition of a database and be protected by copyright. In addition to copyright protection, in Europe, the controversial Database Directive is also likely to protect the contents of a global digital register and would provide a controlling body with rather more legal control than is likely to be acceptable to a global audience.

Aplin's discussion of orphan works is extended by Caroline Colin in the following chapter. Colin also proposes the creation of registers and suggests that there will need to be two kinds: one containing details of all copyright works believed to be true orphan works, and one with the objective of preventing further copyright works from becoming orphan works. As she correctly points out, however, registration of copyright owners in the second category of register must be on a voluntary basis in order to comply with the provision of the Berne Convention (Article 5(2)) that copyright protection may not be made subject to formalities by its member states. Without the ability to enforce registration, it is debatable whether many copyright owners would participate and hence it is likely that a number of copyright works will eventually be categorised as orphans. Colin's suggestion (p.47) that collecting societies could play a role in promoting the register to copyright owners and facilitating their 'voluntary' registration is controversial. The collecting societies have been the focus of criticism, particularly in Europe and the UK. In particular, the costs of their participation are likely to be passed on to copyright owners and this may not be conducive to encouraging amateur creators of copyright works to register. Colin's final suggestions are to encourage all authors to affix copyright notices to their analogue works, particularly photographs that often have no author/photographer identification whatsoever, and to integrate the rights management information in their digital works. Again, such a proposal is superficially attractive, but has flaws. In particular, tracing the whereabouts of named individuals can be very difficult and becomes more so as time goes by (see the three case studies in Corbett, 2010).

In chapter three, Andreas Rahmatian discusses the potential renewal of copyright protection for cultural heritage items in the public domain that can occur when such items are restored or digitised. In the case of physical restoration of a deteriorating public domain item, the newly restored or reconstructed item itself may satisfy the originality threshold for copyright protection. This is likely to be true not only in the UK, where the threshold for originality is low, requiring only evidence of 'sweat of the brow', but also in 'author's rights countries', such as France, Germany and Italy, where the threshold for originality sufficient to achieve copyright protection is notably higher than in the UK (pp.64–66). The copyright in such cases would be likely to be owned by the cultural heritage institution employing or commissioning the person(s) who carried out the restoration process. There are many potential technical difficulties for courts in limiting copyright protection to only those parts of a work that have been restored or reconstructed (p.71). Rahmatian describes a

continuum of levels of restoration, including pure preservation, reconstruction in the spirit of the original, combination of fragments of an original, and transformative uses of existing public domain works (which he warns may infringe perpetual moral rights in some countries). He concludes, 'the more there is a "creative"/independent input by the restorer, the more this is likely to be copyright protected, but the less this is likely to be a scholarly or aesthetically acceptable reconstruction or restoration' (p.58).

Rahmatian next questions the practice of cultural heritage institutions claiming copyright ownership of digitised public domain items in their collections (p.73). This part of the chapter is somewhat brief and confined mainly to the digitisation of musical works. It would have benefited from expansion in order to explore more fully the analogies with the renewal of copyright protection by digitisation more generally in cultural heritage institutions and the physical restoration of public domain items.

Historical context is provided by Ronan Deazley's account of the 1859 project undertaken by the South Kensington Museum (now the Victoria and Albert Museum) to photograph its institutional collection. Deazley explains that the underlying purpose of the project was to further the educational policies of the government by providing increased access to the collections at affordable prices (p.80). Professional photographers were opposed to the scheme, complaining that 'if there was to be a government monopoly in supplying cheap photographs to the public for the purposes of an art education, then why not do the same for 'cheap bread, meat and clothing?' (p.87). The project foundered for financial reasons and, although revived on a more commercial basis, the numbers of photographs sold dropped considerably (p.92). Deazley also discusses the controversy surrounding the extension of copyright protection to photographs. Those who were opposed to providing copyright protection for photographs argued that a photograph was the product of a mechanical process and hence must fail the originality requirement of copyright law (p.95). Furthermore, although copyright protection for photographs that are deemed to be 'original' has been part of copyright law for many years, the debate has been extended to the question of whether a photograph of an art work can be protected by copyright and similarly, if that art work is in the public domain, whether the photograph can serve as a vehicle to revive copyright protection. Deazley explains that despite the important US decision (*Bridgeman Art Library v Corel* (25 F. Supp. 2d 421 (SDNY 1998) and 36 F.Supp.2d 191 (SDNY 1999)) that affirmed there could not be copyright protection for photographs of public domain works of art, cultural heritage institutions in the US and the UK continue to claim ownership of copyright in their photographs of public domain paintings (pp.104–105). He concludes by describing recent initiatives of the European Commission to digitise European cultural heritage and 'make it more relevant and accessible to the Web 2.0 generation' (p.106). One of the recommendations from the Commission is that 'public domain material in the analogue world should remain public domain in the digital environment' (p.107). Both the initiative and recommendation, as Deazley reminds us, reflect the goals and principles of the South Kensington experiment in 1859 (p.107).

In chapter five, Paul Torremans discusses the 'archiving exception' in the Copyright, Designs and Patents Act 1988, s 42. As Torremans explains, this provision does not, in fact, mention archiving. Rather, s 42 specifically permits librarians and archivists of prescribed libraries and archives to make a 'replacement copy' of a

copyright work in their collections, if certain conditions are complied with. In particular, a replacement copy may be made only where it is not practicable to purchase a copy of the item in question (s 42 (2)). Section 42 applies specifically to literary, dramatic and musical works and any illustrations accompanying such works. Torremans describes the inadequacies of the provision in a digital environment and explains that the recommendation made in the *Gowers Review* (HM Treasury, 2006), to bring other categories of copyright works within the ambit of s 42, is only a small part of what is needed (p.113). He then provides a thorough and detailed analysis of what actually is needed. For example, he warns that s 42 does not allow for format shifting to preserve and archive items on early technological platforms, such as films in 8 mm format, which are in imminent danger of physical deterioration. He notes that digitisation in practical terms requires that multiple copies be made and recommends that s 42 be amended accordingly, and also reminds us that accessibility to digitised copies is a feature that is expected in today's online world. Hence, Torremans argues that 'a modern archiving exception can only work in a context where users have effective access to the archive' (p.114), and that the legislation must acknowledge that the days when users would consult at the physical premises of an institution are gone.

Torremans next turns to article 5 of the European Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Directive 2001/29/EC). Article 5 provides optional provisions for member states to implement and hence extend, albeit to a limited extent, the archiving exceptions in their domestic copyright laws. If implemented in the UK, this could extend the reproduction of copyright works by libraries and archives as necessary for the preservation and archiving of works in the collection. Torremans provides a clear and insightful analysis and critique of the application of the 'the three-step test' in article 5(5) of the Directive in the well-known *Infopaq* decision on the copyright implications of an online newspaper cuttings archive. The three-step test in the Directive (similarly to the Berne Convention and TRIPS) provides that 'The exceptions and limitations ... shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder' (p.118). Torremans concludes by providing a thought-provoking and persuasive alternative approach to the application of the three-step test which, he argues, should be viewed as an enabling tool to permit a court to interpret an exception to copyright flexibly 'in the light of new technologies, the evolution of society and the way in which we use copyright materials' (p.125).

Part II of the book provides a US perspective and is led by Laura Gasaway's informative study of archiving and preservation in US law. Similarly to the copyright provisions on other jurisdictions, the archiving exceptions in US copyright law that are intended to facilitate digital preservation are inadequate. The Digital Millennium Copyright Act 1998 (DMCA) made some changes to s 108 of the Copyright Act 1976, but these are limited in scope. The archiving provision, for example, allows libraries, archives and museums (LAMs) to make up to three copies of a work for preservation, and allows format shifting as a rationale for making preservation copies. Gasaway warns that this situation is unlikely to change until copyright owners support the necessary changes. Perhaps it is this last statement that encapsulates the most significant difference between US copyright policy and copyright policy elsewhere; that is, the powerful influence exerted

by lobby groups of copyright owners on US copyright policy. Nevertheless, the needs of LAMs are the subject of a report (United States Copyright Office/Library of Congress, 2008) issued by a Study Group appointed by the Copyright Office. The report recommended certain changes to s 108 of the Copyright Act 1976, the archiving provision, in order to permit digitisation and digital archiving of collections. Similarly to other jurisdictions, there is a need for additional copies to be made, and for digital copies to be accessible outside the institution. Gasaway explains that the common practice of LAMs outsourcing some of their archiving functions also needs to be addressed by legislation because, technically, activities performed outside the institution cannot claim to be protected by the permitted exception in the Copyright Act (p.142). The report also proposed specific criteria that should be required in order for LAMs to make use of a preservation-only exception to copyright, and recommended that smaller institutions, with more limited resources for archiving, should be subject to less onerous criteria. Gasaway also explains the report's findings regarding the question of access to preserved copies (inconclusive) and the public performance and display of preserved copies. She notes that some institutions rely upon the fair use provision in US copyright law to authorise their digital preservation projects, but warns that the legality of this is uncertain. Finally, she analyses the exemptions of the anti-circumvention provision of the DMCA, which may relate to digital preservation. Overall, Gasaway's chapter is one of the most thorough and useful of the collection. Although it is most relevant to US cultural heritage institutions, there are many analogies to be drawn with the copyright-related problems experienced by institutions in other jurisdictions.

In chapter 7, Steven Hetcher proposes the creation of a central register of copyrightable works. The register should be international in scope and include both copyright protected and public domain works from as many countries as possible, its goal being to maximise access to, and preservation of, all included works. Hetcher examines the Google Book Project (since overtaken) as an example of a private version that is contentious because it provides full digital copies of works without necessarily having the permission of the copyright owners. Hetcher does not consider the term 'central' necessarily to equate to geographical centrality, but as a metaphorical concept – servers for the register might be located in various parts of the world. Nevertheless, he concedes that the legality of the register must necessarily depend upon in which jurisdiction(s) both individual users and servers are located. Hetcher suggests that the differences between moral rights copyright regimes (as in Europe) and economic rights copyright regimes (as in the US) might be overcome in his central register by imposing a Berne-compatible normative framework. Most controversially, Hetcher proposes that the Berne provision that no formalities may be required in order to receive copyright protection may be inappropriate in a digital age. Furthermore, an opt-out process would be the most appropriate regime for the register because it would permit the comprehensive registration of all works, including 'orphan works' (an opt-out regime is, of course, precisely the objection raised by many to the Google Book Project). Hetcher discusses the history of the US copyright register, but suggests it is not a suitable model for his central register because it does not contain orphan works or user-generated content. He concludes that a central register should, if possible, draw upon the Google digitisation project (in order to minimise costs). He touches on the theory that a private not-for-profit register might be more widely acceptable than Google but, disappointingly, does not expand upon this possibility.

Part III comprises a single chapter on the topic of *domaine public payant*, which is an alternative way to preserve and access cultural heritage. In chapter 8, Delia Lipszyc and Carlos Alberto Villalba describe Argentina's experience with this mode, which involves an obligation to pay a fee or tax to the state for the use of works that are in the public domain because their copyright has expired. A comprehensive fee scale (which appears to cover all conceivable uses to which public domain works might be put) is provided (p.186). The monies collected are used for various purposes linked with promotion of the arts and preservation of cultural heritage in Argentina. The chapter is interesting, although somewhat confusing in parts – perhaps because it attempts to describe what is essentially a broad topic within narrow parameters.

Part IV is somewhat clumsily entitled 'The cultural sector institution's perspective' and consists of a single chapter by Tim Padfield, who works at the British National Archives. Padfield describes the cultural heritage sector as the 'middlemen of the cultural heritage world' – neither creators nor end-users, but caught between protecting the rights of the copyright owners and fulfilling the desires of copyright users. He reinforces the claims of, particularly, Torremans and Gasaway in previous chapters, regarding copyright legislation. The right to make more copies for preservation is essential, but even more important, according to Padfield, is an expansion of the scope of the archiving exception in UK copyright law. For example, copies of illustrations may, under current law, be provided only where they are found within, and illustrative of, text. The surrounding text must also be copied. Similarly, the exception does not include film, sound recordings and broadcasts. Padfield also reminds us that the UK archiving exception does not, in fact, apply to museums or galleries (this anomaly has been imported into both Australian and New Zealand copyright law). Padfield then describes the problem of orphan works, particularly photographs and unpublished works, and proposes that a register of some kind might be a useful partial solution. In particular, Padfield explains, there is a large quantity of orphan unpublished works that has significant cultural value, but minimal commercial and creative value. He briefly mentions the issues, both legal and ethical, surrounding the common practice of institutional fund raising by claiming copyright protection for images of public domain works. The overall message of Padfield's insightful chapter can perhaps best be summarised by the plea, 'Public sector institutions wish to act properly, but it is far easier to do so if unnecessary obstacles are cleared out of their way' (p.204).

The final part of the book, Part V, is described as the cultural heritage specialist's perspective. Chapter 10, by Lucky Belder, provides an intriguing study of the relationship between the tasks of cultural heritage institutions and copyright. Belder argues there are two contrasting approaches to this relationship and supports her arguments with a logical analysis of the fundamental principles that underpin cultural heritage protection on the one hand, and copyright protection on the other. She draws these themes together when describing the international legal frameworks for the protection of cultural heritage, and notes the conflict between international cultural heritage conventions and domestic laws. In particular, Belder criticises the influence of collective rights organisations, whose focus appears to be exclusively on the protection of the economic interests of copyright owners in cultural property. She argues that this is to the detriment of cultural heritage institutions and the requisite expansion of cultural property laws.

Estelle Derclaye concludes by proposing that more consideration needs to be given to the possibility of a global online database of cultural works as suggested by Steven Hetcher, but warns that the jurisdictional issues, the appropriate ownership structure, and the regulatory framework for such a database will require more work.

So, is the book useful and informative? Indubitably – although its appeal will be mainly to those who are already active in the field or researching in the area. I suspect the depth and technicality of the subject matter will not tempt the casual reader, but I still believe the collection will be a valuable addition to academic and law libraries.

Notes

1. It should be noted that, conversely to Aplin's claim (p.15), the legal deposit law in New Zealand (contained in the National Library Act 2003, as amended by the National Library Requirement (Electronic Documents) Notice 2006) now includes a specific copyright exemption (s 34) intended to facilitate the preservation of copies of digital publications, including websites, by the National Library, the authorised legal deposit library (see Corbett, 2007, p.64) Nevertheless, the exemption may be insufficient for the multiple copying that is required for best practice digital archiving.

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The master switch: the rise and fall of information empires, by Tim Wu, London, Atlantic Books, 2010, 366 pp., UK£19.99, ISBN 9781848879843

The net delusion: how not to liberate the world, by Evgeny Morozov, London, Allen Lane, London, 2011, xvii + 408 pp., UK£14.99, ISBN 9781846143533

Wu's philosophy is that, in order to understand how the use of current information technologies is likely to develop – in particular, the internet – it is necessary to understand the historical patterns of development of previous technologies, and the reasons behind such patterns. We need to understand the past if we are to anticipate what may happen in the future.

At the centre of his analysis is what he calls the 'Cycle' – and how it has developed, mainly in the United States. At the early stages, when inventors begin