

A toolbox for handling copyright issues in museums and galleries



ABOVE: Ian McDonald.

RIGHT: Wrestling with copyright. *The wrestlers*. Photographer: R. H. Trueman. 1905, Canada. Copyright expired. British Library reference: HS85/10/15767.



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Of all the legal issues that affect museums and galleries across Australia, one of the most intimidating can be how the *Copyright Act 1968* (Cth) (the Act) applies to material in the collections.

First up, we need to recognise that copyright law is complex because it has to manage and promote different social benefits. On the one hand, it ensures that society benefits from copyright owners being adequately rewarded and ‘incentivised’ to create and distribute copyright material; on the other, it has to make sure that access to that material for various other socially beneficial purposes is not unduly inhibited or made subject to a copyright owner’s control.

With a little knowledge, however, anyone working in a museum or gallery can gain competence in how copyright applies to them.

In this article, I focus particularly on how copyright law applies to using images:

- a. on a museum or gallery’s website;
- b. for exhibitions, including:
 - i. those on the institution’s website;
 - ii. other online exhibitions (including via social media); and
 - iii. those not hosted on your institution’s website but by other organisations;
- c. for television and other audio-visual productions involving or relating to the museum or the material;
- d. in report writing;

1. In some cases, reliance on these provisions is subject to various procedures being followed (such as keeping records of copying). Detailed information on these requirements is available from industry bodies and also from bodies such as the Australian Copyright Council.

2. As far as I am aware, this exception is not routinely relied upon by galleries or museums in Australia, so I do not address this further in the present article.

- e. for research and study;
- f. in museum and gallery publications (such as catalogues and newsletters);
- g. for educational purposes; and
- h. for archival purposes (including preservation and cataloguing).

Fortunately, for purposes such as research and study and for core functions of a museum or gallery such as archival activities, the Act permits a great deal. But before getting into the detail of how the Act applies to each of these situations, let's look at what provisions are available in our 'tool box' for when you need to deal with situations such as these.

1. Overview of available provisions

The first thing to note is that there is no 'catch all' provision that allows museums or galleries to use copyright material without permission.

Rather, there is a range of provisions in the Act that permit 'libraries' and 'archives' to use copyright material without permission for particular purposes or in particular circumstances. Subsection 10(4) of the Act clarifies that a museum or gallery will fall within the definition of 'archives' for the purposes of the Act, provided the institution does not maintain its archival collection for profit but 'for the purpose of conserving and preserving' the relevant material.

The principal provisions relevant to use of photographs by museums and galleries will therefore be:

- a. the 'fair dealing' provisions, for purposes that include:
 - i. 'research or study';
 - ii. 'criticism or review'; and
 - iii. 'reporting news';
- b. the library and archive provisions, which enable uses such as copying and supply for:
 - i. researchers and students;
 - ii. administrative purposes;
 - iii. preservation purposes;
 - iv. onsite digital display (where the original is fragile or unstable);^[1]
- c. section 200AB — the 'flexible dealing provision' that may be relied upon if no other provision is available and in cases where the use of the material:
 - i. does not conflict with a 'normal exploitation' of the material;
 - ii. the use is a 'special case'; and
 - iii. the use does not 'unreasonably prejudice' the legitimate interests of the copyright owner.
- d. the 'incidental filming' provision;
- e. a provision — which I'll refer to as the 'permanent display exception' — which permits the photographing and filming of sculptures and 'works of artistic craftsmanship' (such as carving or leadlight windows) that are on public display 'other than temporarily';
- f. the provisions for educational use of text and images in Part VB of the Act; and
- g. the government use provision (section 183) that may be available for museums and galleries set up under Commonwealth, State or Territory legislation and where the institution is 'government' for the purposes of the Act.^[2]

If no exception applies, a permission will be needed from the relevant copyright owner.

2. The museum's own website

2.1 Fair dealing provisions

Generally, a museum or gallery may post images of works in its collection if it does so in the context of 'criticism or review' or 'reporting news'. The second of these exceptions will generally only be available for short periods of time, but the first will permit longer-term — even permanent — posting of images to a museum or gallery's website.

The relevant image must, however, be accompanied by a reasonable amount of critique or analysis. This might be comment, critique or analysis, for example, of the photographic techniques or the ideas in the photograph or by way of comparison of these with other works or the work of other creators, and so on.

2.2 The 'permanent display' exception

A museum or gallery will always be permitted to post images of sculptures and 'works of artistic craftsmanship' to its website where those images are produced under the 'permanent display exception'. Note, however, that this provision applies only to sculptures and craftworks, not to other artworks such as paintings or murals.

2.3 Section 200AB

Where a 'fair dealing' exception is not available, section 200AB may permit a museum or gallery to post images of works in the collection, though there are different views on this.^[3]

3. The Australian Copyright Council (for example) has a different view from the view of the ALCC and ADA: see page 25 of its publication *Special case exception: education, libraries, collections B130v02* (September 2008). As there has not yet been any court case on how section 200AB is to be interpreted or applied, definitive advice on this is difficult to provide and the matter will largely devolve to an institution's appetite for risk, with many institutions (including, for example, the Museum of Applied Arts & Sciences and the State Library of New South Wales) taking a less risk-averse position than others.

Guidance on many copyright questions for the museums and galleries sector

The more robust approach adopted by organisations such as the Australian Digital Alliance (the ADA) and the Australian Libraries Copyright Committee (the ALCC) is that posting images of works in a collection is covered by section 200AB provided the images posted are thumbnails only.

The ADA and ALCC argue that:

- a. making collection material available to the public (including online) is a core operation of a gallery or museum;
- b. licence fees for thumbnails are not yet a normal way in which copyright holders obtain revenue;
- c. posting images as thumbnails is a way of minimising prejudice to relevant copyright owners; and
- d. the use is a 'special case' as it is socially beneficial for a museum or gallery to promote and make available materials within its collections, while the use of low-resolution images appropriately limits the scope of the use.

See, generally, <http://libcopyright.org.au/sites/libcopyright.org.au/files/documents/FlexibleDealingHandbookfinal.pdf> (2008) at pages 29-30.

3. Exhibitions

A museum or gallery may freely exhibit physical items such as photographs, and no copyright issues will arise unless or until the relevant image is, for example, scanned or otherwise reproduced and/or posted online.

Generally, the reasoning of the ADA and the ALCC in relation to section 200AB outlined above would likely apply or be available whichever medium of online exhibition is chosen and whether or not the exhibition is hosted by the museum or gallery that owns the physical item or by another museum or gallery (for example, one which is borrowing the physical object).

Similarly, any organisation may host images of photographs or other copyright material if their use is one of 'fair dealing' (including for 'criticism or review', as discussed above).

4. Television and audio-visual productions

Generally, including an image of a copyright material such as a painting, photograph or other image in a film or in a television program is permitted without a licence from the copyright owner if:

- a. the use is a 'fair dealing' (for example, for

'criticism or review' or 'reporting news', as discussed above); or

- b. the inclusion is only 'incidental' to the principal matters discussed (for example, where it is merely included in footage that is not principally about that particular image); or
- c. the work is a sculpture or a work of 'artistic craftsmanship' and located 'other than temporarily' in a public place or place open to the public (for example, in a museum or gallery's grounds or galleries).

5. Report writing

Depending on the nature of the report, a copyright image such as of a photograph may be reproduced in a report if the use is one of 'fair dealing' (for example, for 'criticism or review' or 'reporting news', as discussed above).

In some cases, the use of an image in a report may also be covered by section 200AB, though this would usually depend on the copyright owner not usually licensing the type of use contemplated.

6. Research and study

The 'fair dealing' exception for research or study will enable individuals to copy images protected by copyright for their research or study purposes.

Whether or not a museum or gallery could rely on the library or archive provisions to provide a copy of an image to a client for research or study purposes (or indeed, to another institution) would depend on whether or not copies of the image are commercially available. In such cases, however, providing the client with direct access to make their own copy (for example, by taking a photograph of the work or by photocopying it) would resolve any need to check for commercial availability or to contact the copyright owner.

7. Educational purposes


Museums and galleries may always supply images of copyright material such as photographs to schools and universities, as these types of educational institution are able to rely on extensive educational use provisions in the Act (set out in Part VB of the Act and administered by the Copyright Agency).

Other educational institutions (such as community colleges and so on) may also be entitled to rely on

these provisions. However, before supplying copies of images in a collection to these other types of organisation, a museum or gallery should first ask whether that organisation is an educational institution for the purposes of the Act and whether it has made the relevant arrangements with the Copyright Agency to rely on the relevant provisions in the Act.

Otherwise, museums and galleries that operate extensive educational programs may wish to explore whether or not they will declare themselves 'educational institutions' and enter into a remuneration agreement with the Copyright Agency to cover copying for educational purposes (including copying photographs and other textual material and images in their collections).

8. Archival purposes (including cataloguing)

The library and archive provisions in the Act (and particularly the provisions relating to preservation copying and copying for administrative purposes) will cover copying of images (including their digitisation) for archival and administrative purposes. Usually, however, except where giving a researcher or student online access on the premises, these provisions extend only to uses that are internal to the relevant museum or gallery.^[4] 

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4. Again, more detailed information on the scope of these provisions is available from industry bodies and from the Australian Copyright Council. <www.copyright.org.au/>.