

**FIAF**

**Day 1**

**Session 3**

**Michael Loebenstein: Do the right thing!**

This session's title – *Politics and Ethics* – really could be the title for most of the presentations today and tomorrow. As I mentioned in my opening remarks earlier today dealings with intellectual property, and with rights holders are the bread and butter, and often the dread, of film archives. Striking a balance between the professional standards of the archive – articulated for example in FIAF's Code of Ethics -- and the requirements of the broader marketplace for cultural products

I'll avoid lecturing here about the numerous particular issues faced by the NFSA as the keeper and communicator of an audiovisual collection. My colleagues Bronwyn and Siobhan will provide numerous and better examples 'from the coalface' tomorrow. And you would have seen in the presentations earlier today from Nicola, Greg and Hope, Todd and Jan-Christopher and of course Rick's lecture that if there is a will there is a way to achieve results through negotiation, begging, borrowing.

However – and this is where the politics come into play – as previous presenters said the constant exception is not an acceptable solution, particularly for public service and government organisations. Neither is stealing. So how can we “do the right thing” by our diverse stakeholder groups?

Undoubtedly the biggest factor influencing legal and ethical debates in the last decade is the transformative power that – and it is all about language - the word *digitisation* has. Because it's not only about technical processes obviously, but it is also about a fundamental transformation about how we perceive cultural artefacts, creation, and works of art.

National audio-visual archives like the National Film and Sound Archive of Australia find themselves in a very odd position. On the one hand, and in a forum like this, we feel we need to explain very little about the uniqueness of our operations. Film archives – non-for-

profits and commercial entities alike I dare to say – operate under ‘special conditions’. Our holdings are uniquely complex, demand bespoke and hand-crafted solutions. Outside these walls I find myself arguing how we are “not like Google”; why we don’t “let Google do that digitisation thing for us”; and why “they” can do the “right thing” and ensure that a clip from a TV show from the 50s; a rare handmade 16mm film; .a home movie shot of the liberation of the concentration camps 1945 – is freely available in a convenient format and location. And we can’t.

Explaining the complexity of legal issues a film – and in our case sound and broadcast archive – faces in its mission to collect, preserve and share audiovisual heritage usually earns you incredulous looks (“really?!?”), glazed eyes, or worse ... indifference. With a few notable exceptions most of our audiences, users and constituents are blissfully unaware of the often arcane, outdated and prohibitive copyright framework we operate under in Australia.

The undoubtedly biggest statement FIAF has made in recent years about archives’ management of intellectual property is the FIAF Fair Access Declaration adopted by the FIAF General Assembly at the Paris Congress in 2008. It’s worthwhile at the beginning of this session to re-read key statements from the declaration again, even if some of us for legislative reasons cannot without conflict fully adhere to these principles.

The political process is one way of addressing the gap between reality and aspiration. A recent review by the Australian Law Reform Commission enabled the NFSA to comment on some of the blockages we face under current legislation, and operating in what is called the ‘digital economy’. I’ll briefly elaborate on two aspects of our archival work, and the amendments NFSA proposed in the course of the consultation.

### Preservation copying

NFSA supports the introduction of a new exception that permits cultural institutions to make copies of any copyright material for the purposes of preservation, without limits on format or number. Preservation of collections is fundamental to cultural institutions. Preservation of material by cultural institutions is in the best interests of the public and the copyright holder. Preservation benefits future generations, as their cultural history may otherwise become unavailable.

One of the possible amendments NFSA strongly opposed was that any new preservation copying exception should contain a requirement that it does not apply to copyright material that “can be commercially obtained within a reasonable time at an ordinary commercial price. “

Our objection was an in-principle objection: preservation activities by cultural institutions are for the benefit of the public and for copyright holders. Preservation of copyright material by a cultural institution is likely to increase the potential market or value of copyright material rather than adversely impact it.

Furthermore the current wording of the commercial availability test, restricting preservation of “copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price”. And I’m not even talking about the waste of time of staff paid by the taxpayer to undertake “availability tests”!

There is precedent for more appropriate commercial availability tests in international preservation exceptions. For example, UK copyright law restricts replacement copying “to cases where it is not practicable to purchase a copy to fulfil that purpose” Also in Canadian copyright law the exception for libraries, archives and museums to copy for management and maintenance of collections does not apply where an “appropriate copy is commercially available in a medium and of a quality that is appropriate”. Just because a film is available in a HD telecine commercially will not impact our ability to perform photochemical duplication, or to scan it in 2K or 4K.

#### Access

NFSA recommends the introduction of a specific copyright exception to guarantee the provision of onsite access to collections, regardless of the format. Cultural institutions would still consider donor and rights holder wishes, including Indigenous Cultural and Intellectual Property holders and may restrict access accordingly.

*[I will explain a little bit about Indigenous Cultural and Intellectual Property and its significance in Australia]*

Most collection material in Australia’s other national cultural institutions – museums, galleries etc -- can be displayed in public without requiring copyright permission or a licence, for example displaying an artwork or object. However the very nature of

audiovisual material, where in order to display the object (e.g. the film, the sound recording, the website) it must be screened, performed or communicated to be displayed. Moreover, depending on the original material, the item must often be copied to a different format, in order for it to be used. Screening, performing and communicating audiovisual material in Australia is generally subject to seeking permissions or paying licence fees to either distributors or collecting agencies, or in many instances both. This means the NFSA is almost always required to undertake expensive research and clearance or pay for licences simply to show its collection to Australian taxpayers.

The NFSA f.e. operates an Access Centre – if you want an audiovisual reading / viewing room – called ‘The Australian Mediatheque’ at ACMI (The Australian Centre of the Moving Image) in Melbourne, and I’m very happy to see my friend and colleague Katrina Sedgwick, ACMI’s new director, here with us at this congress. We only include material in the Australian Mediatheque where a license is available, which many rights holders have been happy to provide. If a rights holder cannot be contacted, or if for whatever reason, does not agree, the item is not included (except in the rare case that they may be a low risk orphan).

This limits the amount and variety of material that can be accessed in the spirit of the NFSA’s enabling legislation.

There are a number of exceptions in New Zealand’s Copyright Act 1994 that allow film, television and radio archives to publically play collection material without infringing copyright, subject to the availability of a license, including section 57 ‘Playing or showing sound recordings or films’. The New Zealand Film Archive website states that the institution can present material publically without copyright clearance if presented by a Film Archive staff member.

The NFSA considers that an exception like this for the NFSA to use items from the National Audiovisual Collection and related materials would be appropriate. This would extend to the showing in the NFSA’s Arc Cinema and at other locations arranged by the NFSA. It would increase our risk appetite, to challenge the notion of what “on-site” actually is. The Mediatheque currently consists of video screens and a server playback system that is a fixed installation. But what about another model – for example a ‘walled garden’ WIFI network, and tablets – where the Mediatheque extends out into ACMI’s foyer? Or ‘pop-up’ access centres, WIFI or Bluetooth-based which can be set up anywhere, and operate

under a 'bring your own device' policy? I remind you of the Fair Access declaration, paragraph 10 and its provision for "exhibition on a FIAF affiliate's premises".

Last but not least we of course believe that certain external uses should also be quarantined to make cultural collections discoverable without the burden of licensing; again, copyright owners benefit from their material being known as held by cultural institutions. A large range of external uses may need to be subject to fair dealing or fair use assessment and licensing but only where use by the cultural institution directly competes with the existing or anticipated uses by the copyright owner.

Participating in the political process might be the longer road, and 'quick fixes' – 'generous' licenses offered by collecting societies or workarounds, even breaches of legislation – might look like doing the right thing. However: if we agree to disagree with a situation where a government agency cannot pursue its program to its full extent, an extent that is actually agreed in an Act passed by Parliament to collect, to preserve, and to make available significant Australian cultural heritage the long track is one worth taking. Not the only one – we'll hear more about others long-term solutions, including industry consultation from our colleagues now. Thank you.