

**Digital preservation:
the problems and issues involved in
publishing private records online:
the web publishing of the notebooks and
diaries of C.E.W. Bean**

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Abstract:

In 2003, the Australian War Memorial commenced a project to digitise the notebooks and diaries of C.E.W. Bean for preservation and with the intent to make the images publicly available via the website. The digitisation of the records was completed in 2004, but the project ground to a halt when the copyright of this material was examined more closely and the records were found to be a complex mixture of copyright rather than Commonwealth copyright. For the Memorial, this project represents our first venture into publishing a large complex collection of private records online and also our pilot for publishing orphan works using s200AB of the Copyright Act.

Digital preservation and web publishing

The Australian War Memorial is an experienced leader in digitisation for preservation and access. The Memorial has a digital preservation program that has now been in place for over a decade. We have digitised over two million pages of archival records to preservation level and for some time pursued a program of publishing these documents on our website. This serves to preserve the original documents and decreases the amount of staff resources required to service public enquiries for the most commonly used items.

Publication of such material on the web has had very positive stakeholder feedback and perhaps more importantly, has not attracted any contentious comments. Most of the material has been in open access for many years and has already been widely used. The digitisation program has served to raise the Memorial's national and international profile as a central archive of Australian military history.

This paper addresses the issue of making available online a collection of unpublished records of mixed copyright including orphaned works.

An orphan work is a work that is protected by copyright but whose owner cannot be identified and/or located. Copyright protection for unpublished works is perpetual. There are some exceptions to the Copyright Act for the publishing of old unpublished works held in libraries and archives (s.52). However, the exception only covers some of the vast proportion of orphan works held in our Cultural Institutions.

Cultural Institutions are required to comply with the Copyright Act and this often places them in direct conflict with their mandates to manage, preserve and provide access to collections using digital technologies. For example, the Memorial has provided web access to only those documents for which there is clear copyright ownership. This has skewed our digital preservation program towards official records or collections where the Memorial owns the copyright. Section 200AB has been introduced, in part, to address these conflicting requirements. Cultural Institutions now have more scope to broaden the ways in which copyright material can be used for socially beneficial purposes. (Copyright In Cultural Institutions, 2009 p.2)

The web publication of the notebooks and diaries of C.E.W. Bean was intended to be used as a model on which future publication of orphan works might be based. The Memorial holds vast private records collections that are orphan works. There is much that could be done with this material in the lead up to the First World War anniversaries.

Background to the collection

The notebooks, diaries and folders created by Charles Bean during and after the First World War have immense historic value and are considered to be one of the most important records created by a single Australian. The collection includes 286 volumes of diaries and historical notebooks recorded by Bean at the time and often at the front line. These offer a unique perspective of events of the First World War. Bean was an experienced investigator and interviewer who generally had broad access to all levels of command within the Australian Imperial Force (AIF) and he was also able to talk to the soldiers and move about between the front and back lines. He was employed to observe and report on events with the view also of

eventually writing the Official History of the First World War. (Condé, A and Piggott, M, 2008)

The records created by Charles Bean as Australia's official war correspondent and later as Official Historian are held in the official records series AWM38. These records are extremely important to any serious research on the First World War and are accessed frequently. The series is broken into a number of sub-series; sub-series 3DRL 606 consists of the diaries and notebooks Bean wrote during the First World War and which he annotated afterwards with a view to writing the Official History. The sub-series also includes 53 folders of correspondence created and compiled by Bean when he was Official Historian during the production of the Official History series. (AWM38 Series notes)

For their preservation and for security purposes, the Memorial had some access restrictions placed upon this sub-series of records. The collection is kept in secure storage and only issued with permission from the Curator of Official Records. This collection is housed as part of the Memorial's official records collections and the access restrictions were in direct conflict with the Archives Act 1983. Under the Archives Act, all official records are to be made available to the public after 30 years. The restrictions were imposed to safeguard the collection; however, they rarely stopped anyone from accessing the originals where there were no access copies available. The Memorial's legal obligation to make these records available to the public was regularly being met by issuing the original records. This valuable material, issued on a regular basis, was at great risk through constant handling and, over time, public access was inevitably leading to its deterioration.

In 2003-2004, the Australian War Memorial's Research Centre digitised these records for preservation and with the intent to make the images publicly available via the Memorial's website. The collection was to be displayed in a database and enhanced with linked information and further context. The original records are still restricted today, but with the copies available online access is much less of an issue.

Copyright – official or private records?

Publishing this collection on the Memorial's website raised some issues regarding copyright. Charles Bean's concern about public access to the diaries and the Memorial respecting his wishes has had a long-term effect on how the Memorial has treated the collection and has also had a bearing upon the copyright. The personal diaries and notebooks were accessioned into the Official Records collection during Bean's lifetime. However, the collection has always been treated by the Memorial, for copyright and access purposes, as a private record collection.

Bean regarded the notebooks and diaries as his own private papers, and in 1942 he gifted them to the Memorial laying down the conditions of their use. Under the conditions of the donation, many were lent back to him at his request during his lifetime. (AWM38 B56/3)

When Bean donated these records to the Australian War Memorial, he placed strict caveats on their use. He did not want material that he had written at the heat of the moment to be taken out of context. He also wrote detailed comments about individuals and was worried that these comments would cause upset to those

people. As a condition of the donation, he requested that the Memorial attach a caveat to the front of every diary and notebook stating:

These writings represent only what at the moment of making them I believed to be true. The diaries were jotted down almost daily with the object of recording what was then in the writer's mind. Often he wrote them when very tired and half asleep: also, not infrequently, what he believed to be true was not so – but it does not follow that he always discovered this, or remembered to correct the mistakes when discovered. Indeed, he could not always remember that he had written them.

These records should, therefore, be used with great caution, as relating only what their author, at the time of writing, believed. Further, he cannot, of course, vouch for the accuracy of statements made to him by others and here recorded. But he did try to ensure such accuracy by consulting, as far as possible, those who had seen or otherwise taken part in the events. The constant falsity of second-hand evidence (on which a large proportion of war stories are founded) was impressed upon him by the second or third day of the Gallipoli campaign, notwithstanding that those who passed on such stories usually themselves believed them to be true. All second-hand evidence herein should be read with this in mind. (AWM38 B56/3)

Out of the concerns expressed in the caveat, Bean requested that public access to this collection was to be subject to his approval during his lifetime. After his death, the responsibility for the records was to lie with the Director of the Australian War Memorial. Bean wrote that the notebooks and diaries “may be inspected, or studied or used for publication by leave of the Director” (AWM38 B56/3). The letter has historically caused much confusion with regard to copyright and access to the collection, but appears to grant the Director the powers to provide permission for publication and for access.

Bean varied the conditions governing the gift in 1948 and in 1952. In 1948 he extended access to the notebooks and diaries to several people, giving them unlimited access and use. In 1952 he asked the Memorial to close the records for a further 30 years after his death. In the letter of 1952 Bean notes that he realises “that this letter is, legally, a mere request”. Following his death the Memorial closed the collection as requested in Bean’s letter of 1952, perhaps limiting the use of the collection well beyond what he would ever have intended. (AWM315 419/008/001 03)

The records created by Bean when he was the official war correspondent fall into a grey area between being official records of Commonwealth copyright and unpublished private records. The confusion about the official status of the records is not only due to how Bean and the Memorial have historically treated the records but also due to the nature of Bean’s employment as an official war correspondent. Although Bean’s title was “official war correspondent,” he was not in every respect a Commonwealth employee. He wore an unofficial uniform that looked similar to an officer’s uniform, and was given a nominal rank as Captain. He has an AIF personal service record and a military pay book but was classed by the AIF as a civilian, and his pay book indicates that his salary was paid for by the AIF then recovered from the Associated Press. (AWM38 B56/3)

Bean's position with the military forces gave him broad access to people whose frank conversations and opinions he recorded. Press correspondents were generally kept away from the front line. Official correspondents, however, were allowed to move about as they liked. Bean built up a confidence and a trust within the Australian Imperial Forces (AIF) that he won but also because he had the official status. Other correspondents without the Commonwealth backing would most likely not have succeeded in winning the AIF's confidence as Bean did. However, whether the AIF leaders accepted and confided in Bean on account of his status was not considered enough grounds for regarding the notebooks and diaries as official documents. (AWM38 B56/3)

While at certain times in the history of this collection the Memorial has regarded these records as official documents, the Memorial has always concluded that the copyright to the notebooks and diaries resided with Bean's family. In August 2008, the Memorial contacted the family and heirs of Bean for permission to publish the diaries on the website. The family granted permission and noted in their correspondence that they felt very strongly that "Dr Bean would have wished his records to be readily available to both researchers and the public, and would be pleased that modern technology will allow that to occur in the manner proposed."

This sub-series also includes a large quantity of official records created by Bean in his capacity as Official Historian. In July 1919, Bean began an official appointment to work on Australia's official history. Unpublished correspondence within AWM38 3DRL606 written to and by Bean in the capacity of service to the Commonwealth and in his capacity as Official Historian falls under Commonwealth Copyright. The unpublished works that fall under Commonwealth copyright in this category were generally produced in the period after 1 July, 1919, when Bean was made Official Historian.

Copyright for most of the AWM38 sub-series falls within Commonwealth copyright or resides with the Bean family. However, also scattered throughout this collection is a selection of unpublished personal correspondence written to Bean by individuals. The collection also includes cuttings from newspapers and journals. The published material was generally produced pre-1955 and in most cases is out of copyright or orphan works. Copyright for the unpublished personal correspondence produced pre July 1919, while Bean was official correspondent, was the most problematic for the Memorial, as copyright for unpublished works is passed on to the heirs of its authors in perpetuity. There was very little chance that the Memorial would be able to locate the copyright holders of this material.

Most of the material received by Bean and kept as part of the diaries was provided to him in his "official" capacity. However, as it can be argued that Bean was not employed by the Commonwealth prior to 1 July 1919, the unpublished correspondence written during this time is not Commonwealth copyright and is controlled by the heirs of its authors, though in most instances they would be unaware that they are the copyright holders. Some examples of unpublished correspondence found within this sub-series include:

- A letter of condolence to the family of L. Rinoldi of the 28th Battalion written August 1916 by E. Powell
- Witness statement by Private Conarty of the 4th Battalion

- Letter from Florence Hobson regarding her son's death at Ypres
- Ten pages of Sgt de Vine's personal diary (4 Battalion AIF) can be found transcribed in Bean's 1916 diary

The unpublished third party materials written before 1 July, 1919 are generally "orphaned works". Some of the letters in this collection contain no information to indicate who the author is, the only clue being an unintelligible signature. For other correspondence, the identity of the author can be determined, but the identity of the current copyright owner cannot be ascertained. No donor files exist for these works; they were not donated to the Memorial by the authors or their heirs.

Efforts to determine current copyright owners would be extremely resource intensive and in most cases would prove unsuccessful. The Memorial, therefore, was faced with some choice regarding publishing the sub-series:

1. Not publish the collection.
2. Remove the in copyright material that the Memorial does not have permission to publish and let the public know that these items have been removed due to copyright restrictions via a target inserted into the electronic document.
3. Publish the entire sub-series, including the material that is in copyright, testing the flexible dealing provision s200AB under the Copyright Act

There is a strong argument for publishing the entire sub-series including the in copyright material produced by third parties. The private correspondence found within Bean's notebooks and diaries form only a small portion of the entire sub-series. It would have been possible to remove them from public display when we published the sub-series. However, this would have greatly diminished the integrity and research value of this collection. The private letters form part of a complete file and removing them would destroy the context of the document as a whole.

Researchers not confident that they were viewing the complete sub-series online would inevitably request to view the whole files, and under the *Archives Act* the Memorial would be obliged to provide access to them. By not displaying the complete sub-series, we would be defeating the purpose of producing a digital preservation copy for public access.

The Memorial decided that this collection would be a good pilot to test the possibilities of the flexible dealing provision of the *Copyright Act Section 200AB*. The explanatory Memorandum to the Copyright Amendment Bill 2006 set out that the purpose of this new exception (s200AB) is to "...provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties." This exception is of relevance, in particular, to orphan works.

Section 200AB of the *Copyright Act* allows use by a body administering a library or an archive and only applies if:

- the use is not covered by another special provision in the Copyright Act
- the copying is not made for commercial advantage or profit;
- the use is a special case;

- the use does not conflict with a normal exploitation of the work; and
- the use does not unreasonably prejudice the legitimate interests of the owner of the copyright. (Australian Copyright Council, 2009)

The Memorial felt that publishing the entire sub-series online complied with s200AB. Under s200AB, a library can “use” copyright material for the purpose of maintaining or operating the library or archive including the “provision of services of a kind usually provided by a library or archives”. Digital preservation and the provision of a web access copy is a regular service offered by libraries and archives. The Memorial has used digital technologies in the management, preservation and provision of access to its collections for over a decade. The unresolved copyright of the orphan works within this particular Bean collection had halted this project and the Memorial’s ability to preserve this collection through its digitisation program.

We considered that the provision of these unpublished works online did not unreasonably prejudice the legitimate interests of the owner of the copyright. Access that the Memorial would provide would be for research purposes only. The files, formatted as low-resolution pdf, have very few commercial applications and the records would be available free of charge on the Memorial’s website. The individual copyright owners generally only hold the copyright to one or two papers out of the entire collection. Without the context of the Bean papers, these letters in isolation hold little meaning and are therefore of limited value on their own for commercial exploitation. The low-resolution production does not conflict with “normal exploitation of the material”, as commercial reproduction would involve a higher-resolution better quality image.

There were no specifications or requirements detailed under the exception as to how to comply with the condition of the “special case”. The Memorial decided that as publishing the subseries without the orphan works defeated the purpose of publishing at all that this qualified the project as a special case. The exception was not being applied broadly but to a specific collection for a specific purpose. Recent guidelines produced within the Cultural Sector outline that if all the other conditions are met than a project should comply with the special case condition. (Copyright In Cultural Institutions, 2009)

There are no clear guidelines within the flexible dealing exception (200AB) setting out how long an institution should keep searching for the copyright holder before determining whether a collection item is an “orphaned work”. The Memorial was unable to carry out an extensive search for the owners of these works. It was considered that it would be a waste of public resources to attempt to locate individuals on the bases of the little information contained about them in the correspondence. It is highly unlikely that the Memorial would be able to locate all the collateral branches of the families involved.

There are no requirements set out under Section 200AB to advertise in the Commonwealth Gazette as part of a “diligent search”. The Memorial chose not take out an advertisement setting out the names or information about the unpublished correspondence in the Gazette. We felt that if we were testing the provision we should use it appropriately and not confuse it with other provisions under the *Copyright Act*. We decided to place a copyright statement regarding the published orphan works on our website and felt that this would be the most likely place where

an individual who comes across this material, and who may hold the copyright, will seek to find information about it. We also notify people in the statement that we published these papers under s200AB of the *Copyright Act*. This is not a requirement of the Act but we thought that it would be useful for public information.

The copyright statement displayed on the Memorial's website is our main method of notifying copyright holders and provides contact information if members of the public have enquiries about copyright and these records.

When the Memorial decided to use s200AB in March 2009, we were unaware of any other cultural institutions that had published material of this nature using the flexible exception. There are some precedents where libraries and archives have published orphan works using a risk management approach.

The National Library and the State libraries in the joint Music Australia project published a broad selection of orphan works using a risk management approach. They selected works that were unlikely to result in a claim and set procedures in place to respond to claimants.

The National Library of Australia digitised and published on their website the papers of Alfred Deakin and Andrew Barton. The NLA took a risk management approach to the publication of this material. These were made available online before the s200AB amendment was established in 2006. The collection includes many orphaned works. The National Library used a risk management strategy by placing a notice in the Gazette and within the notice listed the names of the authors of the orphaned works within the papers of Alfred Deakin and Andrew Barton. There is also a notice regarding the copyright restrictions to this material on the National Libraries website. To date, the NLA claim to have had no responses from the public regarding these orphan works.

The Memorial has also devised procedures to deal with any claims regarding this material. We have established a point of contact for claimants and procedures to manage the material while a claim is in place. We have a takedown policy for any item in dispute and, where required, can remove an item permanently and in its place put a target.

Charles Bean was instrumental in establishing an Official Historian for the Second World War. It is of interest that Bean insisted that Gavin Long's contract as General Editor stipulated that "all notes, documents and diaries" collected by him were to become a property of the Commonwealth" Gavin Long went back and forth to the front, staying at different headquarters and interviewed participants from past and present campaigns. He produced more than one hundred notebooks and diaries. This treasure trove of information about Australia and Australians during the Second World War is thankfully Commonwealth copyright.

The Bean records were made available on the Memorial's website as part of the Remembrance Day anniversary on 11 November 2009. This project was always planned to be the model to further investigate placing a selection of orphan works in the private records collection on the website, especially in relation to the upcoming First World War anniversaries.

Sources

The advice and assistance of the Copyright in Cultural Institutions 200AB subgroup, and Paul Dalglish (NAA) and Margy Burn (NLA) is gratefully acknowledged.

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