
COPYRIGHT EXCEPTIONS

BEYOND THE *COPYRIGHT ACT 1968* (CTH)

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I INTRODUCTION

Exceptions are an important part of the Australian copyright law landscape due to the role they play in delineating the extent of the rights held by copyright owners and, correspondingly, the permitted activities of users of copyright materials. The nature and scope of copyright exceptions has been examined in several reviews of copyright law¹ and are again being considered by the Australian Law Reform Commission (ALRC) as part of the ‘Copyright and the Digital Economy’ review which is currently underway. The ALRC’s terms of reference require it to examine, inter alia, ‘whether the exceptions and statutory licences in the *Copyright Act 1968* are adequate and appropriate in the digital environment.’² While the ALRC inquiry focuses on exceptions provided under the *Copyright Act 1968* (Cth) (*Copyright Act*), there are several copyright exceptions in other Commonwealth statutes which are of relevance and which should not be overlooked.

II COPYRIGHT EXCEPTIONS

The best-known of the copyright exceptions are the fair dealing provisions in the *Copyright Act*. They provide that a fair dealing with a Part III work or adaptation, or a Part IV audio-visual item (sound recording, film, sound broadcast or television broadcast), will not infringe copyright if it is done for the following purposes:

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¹ See for e.g. Copyright Law Review Committee (CLRC), *Simplification of the Copyright Act: Part I – Exceptions to the Exclusive Rights of Copyright Owners* (1998); CLRC, *Copyright and Contract* (2002); CLRC, *Crown Copyright* (2005); Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, Issues Paper (2005).

² Australian Law Reform Commission, ‘Copyright and the Digital Economy: Terms of Reference’, at <http://www.alrc.gov.au/inquiries/copyright/terms-reference> (accessed on 26 February 2013).

- research or study (ss 40 and 103C);
- criticism or review (ss 41 and 103A);
- parody or satire (ss 41A and 103AA);
- reporting of news (ss 42 and 103B); or
- judicial proceedings or the giving of professional legal advice (ss 43 and 104).

The *Copyright Act* also contains numerous specific exceptions to infringement, such as s 182A which permits one copy of a statutory instrument to be made by ‘reprographic reproduction’. Relatively recent additions to the *Copyright Act* are the format-shifting exceptions, which allow the owner of an article embodying copyright material (e.g. a book, photograph or film) to make a copy of the material in a different form for private and domestic use³ and s 200AB which permits libraries, archives and educational institutions to use copyright materials in limited circumstances not covered by other specific exceptions.

Copyright exceptions outside the *Copyright Act*

A point that has not been raised in the ALRC’s terms of reference, the *Issues Paper* and the submissions to the inquiry is that, in addition to the exceptions contained in the *Copyright Act*, there are also copyright exceptions provided for in other Commonwealth statutes. Four examples of such copyright exceptions are discussed in this paper.

Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)

The *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)* sets up a system for regulating petroleum exploration and recovery, and the injection and storage of greenhouse gas substances in offshore areas. Section 720 is a copyright exception which permits documents and reports containing information relating to petroleum to be used in administering the system. It provides that:

The copyright in a literary or artistic work contained in an applicable document is not infringed by anything done:

- (a) by, or with the authority of, the Titles Administrator or the responsible Commonwealth Minister; and
- (b) for the purpose of the exercise of any of the powers of the Titles Administrator or Minister under this Part.

‘Applicable document’ is defined as including a document accompanying an application made to the Titles Administrator under Chapter 2 (which regulates matters such as petroleum exploration permits, petroleum retention leases, petroleum production licences).⁴ Section 743 of the Act provides an identical copyright exception for information relating to greenhouse gas.

³ *Copyright Act 1968 (Cth)*, ss 43C, 47J, 110AA.

⁴ *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)*, s 711.

Veterans' Entitlements Act 1968 (Cth)

The *Veterans' Entitlements Act 1968* (Cth), which provides for the provision of pension payments, medical treatment and other benefits to veterans, establishes the Repatriation Medical Authority and Specialist Medical Review Council and their respective powers of investigation. Sections 196H(1) and 196ZC(1) of the Act respectively provide that these bodies are not the owner of any copyright material which is submitted to it for the purposes of investigations.⁵ However, subsection 2 of each provision also states that:

In spite of the *Copyright Act 1968*, the Authority [or Review Council] does not infringe any copyright subsisting in submitted material if, in performing its functions or exercising its powers, the Authority [or Council] does an act comprised in the copyright without the licence of the owner of the copyright.⁶

These provisions are phrased in very broad terms, allowing the Authority to do 'an act compromised in the copyright', that is, exercise any one of the copyright owner's exclusive rights. The only limitation appears to be that the act must be part of the performance of the Authority's functions or exercise of its powers.

Commonwealth Electoral Act 1918 (Cth) and Referendum (Machinery Provisions) Act 1984 (Cth)

The *Commonwealth Electoral Act 1918* (Cth)⁷ and the *Referendum (Machinery Provisions) Act 1984* (Cth)⁸ respectively authorise the reproduction of application forms for a postal vote. Both contain identical provisions which provide that 'for the purposes of the *Copyright Act 1968*, if a person other than the owner of the copyright in the application form for a postal vote reproduces the application form, the person is not taken to have infringed the copyright in the application form'.

Patents Act 1990 (Cth)

The *Patents Act 1990* (Cth) contains a copyright exception relating to patent specifications which are submitted to IP Australia and made available for public inspection. Prior to 2012, s 226 of the *Patents Act 1990* (Cth) provided that 'the reproduction in 2 dimensions of the whole or part of a provisional or complete specification that is open to public inspection does not constitute an infringement of any copyright subsisting under the *Copyright Act 1968* (Cth) in any literary or artistic work'.⁹ The exception merely authorised the two dimensional 'reproduction' of a patent specification, but did not permit the document to be communicated to the public.

Given that patent specifications are meant to be open to public inspection¹⁰ and that communication through the online medium is the most instantaneous and efficient way to convey patent specifications, this provision was clearly in need of revision. In 2012, the

⁵ *Veterans' Entitlements Act 1968* (Cth), ss 196H(1), 196ZC(1).

⁶ *Veterans' Entitlements Act 1968* (Cth), ss 196H(2), 196ZC(2).

⁷ *Commonwealth Electoral Act 1918* (Cth), s 184AA(2).

⁸ *Referendum (Machinery Provisions) Act 1984* (Cth), s 56(2).

⁹ *Patents Act 1990* (Cth) (Act No. 83 of 1990 as amended), s 226.

¹⁰ See *Patents Act 1990* (Cth), s 55.

exception was amended to permit ‘communicating (within the meaning of the [Copyright] Act) the document to the public’.¹¹ As explained in the Explanatory Memorandum, this amendment would allow IP Australia to make most documents in patent application case files available to the public on the internet.¹²

III RECOMMENDATIONS FOR REVIEW

A preliminary investigation reveals the existence of several copyright exceptions in statutes other than the *Copyright Act*.¹³ A notable characteristic of many of these exceptions is that they relate to government. A typical example is where a third party submits copyright material to a government body as part of an application for a privilege (for instance a licence or entitlement of some description) and the relevant Act specifies how this material can be dealt with once it has been submitted. These exceptions relate to matters of public administration, where use of this information is essential for the functioning of government and the performance of its responsibilities to the public.

The ALRC and the Government should have regard to these exceptions and consider how they could be better utilised. We suggest that, first, effort needs to be invested in identifying these exceptions and listing them in a catalogue. Secondly, these exceptions should be reviewed, and if necessary, updated to ensure that they remain relevant in the digital age. Thirdly, the individual exceptions could be consolidated within a broader exception under the *Copyright Act*. Some recommendations are made at the end of this paper about the form such a broader exception could take.

1 *Identify and Catalogue other Exceptions*

These copyright exceptions, though of operational significance for the government agencies whose activities they regulate, are located in relatively obscure provisions in various Commonwealth Acts that regulate areas of activity which are not typically associated with copyright law. As a consequence, their existence is not particularly obvious to legal practitioners, government officers and the general public.

Further research is needed to identify similar provisions in other Commonwealth legislation and to catalogue them in a central location or repository. Cataloguing these provisions would provide a clearer picture of the purpose/s they serve and the rationale for their enactment. In the process, we should consider whether to introduce an exception in the *Copyright Act* which covers the activities exempted from copyright infringement under these miscellaneous

¹¹ See *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth), No. 35, 2012, Schedule 6, item 87.

¹² Explanatory Memorandum, *Intellectual Property Laws Amendment (Raising the Bar) Bill 2011* (Cth), 140.

¹³ Note that in addition to the exceptions discussed, there are other miscellaneous exceptions relating, for example, to electronic transactions, Freedom of Information publication schemes and insignia: see *Electronic Transactions Act 1999* (Cth), s 11(6); *Freedom of Information Act 1982* (Cth), s 90; *Olympic Insignia Protection Act 1987* (Cth), s 5(2)(b). See also two repealed Acts, *Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005* (Cth), s 11; *Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Cth).

legislative provisions (this is discussed further below under ‘(3) Consolidate miscellaneous exceptions’.

2 Update Copyright Exceptions

Certain exceptions may now be outdated in the internet age and require revision. An example of a copyright exception that has been updated to reflect technological change is s 226 of the *Patents Act 1990* (Cth), which has recently been extended to authorise the communication of patent specifications online. Enabling government registries or authorities to publish certain material online brings about efficiency/productivity gains. They are able to save the time and resource costs of both the public who need to request the information and the authority which has to deal with such requests.¹⁴

3 Consolidate Miscellaneous Exceptions

Currently, these miscellaneous copyright exceptions are scattered across the entire statute book. In order to update these provisions, it would be necessary to locate and amend each individual Act (as has occurred with the *Patents Act*). Consolidation of these various provisions would mean that only one provision in the *Copyright Act*, as opposed to a multitude of exceptions in a range of Acts, would have to be amended. Such an approach would be more efficient for legislators and would enhance consistency across federal legislation. The forms in which a consolidating provision could take, ranging from a relatively specific exception to the introduction of a broader fair use exception, are discussed below.

(a) Material on public registers

A seemingly straightforward step would be to introduce an exception into the Australian *Copyright Act* to permit the reproduction and communication to the public of information that has been entered into a government register.¹⁵ In the United Kingdom, s 47 of the *Copyright, Designs and Patents Act 1988* (UK) (*UK Act*) provides an exception for material open to public inspection or on an official register (under the ‘Public Administration’ part of the Act). New Zealand has introduced a similar exception in s 61 of the *Copyright Act 1994* (NZ).

Section 47 of the UK Act provides:

(1)Where material is open to public inspection pursuant to a statutory requirement, or is on a statutory register, any copyright in the material as a literary work is not infringed by the copying of so much of the material as contains factual information of any description, by or with the authority of the appropriate person, for a purpose which does not involve the issuing of copies to the public.

(2)Where material is open to public inspection pursuant to a statutory requirement, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of enabling the material to be

¹⁴ See UK Intellectual Property Office (IPO), *Use of works for public administration and reporting* (Impact Assessment (IA) No. BIS0309), 3-5, available at <http://www.ipo.gov.uk/consult-ia-bis0309.pdf> (accessed on 23 April 2012).

¹⁵ See John S Gilchrist, ‘The Government as Proprietor, Preserver and User of Copyright Material under the *Copyright Act 1968* (Cth), PhD thesis, Queensland University of Technology, 2012.

inspected at a more convenient time or place or otherwise facilitating the exercise of any right for the purpose of which the requirement is imposed.

(3) Where material which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register, contains information about matters of general scientific, technical, commercial or economic interest, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of disseminating that information.¹⁶

By contrast with the specific exception in the Australian *Patents Act 1990*, the public register exceptions in the UK and NZ legislation apply generally and are not limited in their operation to a particular register or subject matter.

In enacting similar provisions into the *Copyright Act* it would be necessary to ensure that they are drafted in terms that are sufficiently broad to reflect the realities of the administration of public registers in the ‘Government 2.0’ era. In the UK, it has been suggested that, whereas the s 47 exceptions permit the making and distribution of physical copies of material on public registers, they do not extend to material available on the internet.¹⁷ The limited applicability of the s 47 exceptions has been acknowledged by the UK Intellectual Property Office which has observed that the ‘current exceptions applying to public bodies unduly restrict activity that would be beneficial to society and could be widened without negative impact on copyright owners.’¹⁸

(b) ‘Catch all’ exception for acts done under statutory authority

Another approach would be to introduce a ‘catch all’ exception for ‘acts done under statutory authority’. Again, this approach is found in the United Kingdom and New Zealand Copyright Acts, both of which contain a provision exempting from copyright infringement acts that are done pursuant to a specific statutory authorisation.¹⁹ The UK Act states:

(1) Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright.

Incorporating a broader provision of this kind into the Australian *Copyright Act* would have the advantage of excluding other government activities from copyright infringement which go beyond the use of material on public registers, but are nevertheless necessary for public administration.

¹⁶ See also s 47(6) of the UK Act, which states that ‘In this section—
“appropriate person” means the person required to make the material open to public inspection or, as the case may be, the person maintaining the register...’

¹⁷ See HM Government (UK), Intellectual Property Office, *Consultation on Copyright* (2011) 108: ‘These exceptions cover uses by Parliament or the Courts, by Royal Commissions and statutory inquiries, for public records, official registers, and other public business. In general they only relate to the making of copies and distributing physical copies, and do not permit the making available of materials on the internet’, available at <http://www.ipo.gov.uk/consult-2011-copyright.pdf> (accessed on 8 March 2013).

¹⁸ UK Intellectual Property Office (IPO), *Use of works for public administration and reporting* (Impact Assessment (IA) No. BIS0309), 3, available at <http://www.ipo.gov.uk/consult-ia-bis0309.pdf> (accessed on 8 March 2013).

¹⁹ *Copyright, Designs and Patents Act 1988* (UK), s 50; *Copyright Act 1994* (NZ), s 66.

(c) *Fair use*

A question which inevitably arises when the scope of exceptions is discussed is whether the various statutory exceptions outside the *Copyright Act* would more appropriately be dealt with under an ‘open ended’ model of fair dealing that more closely approximates the fair use provisions of US Copyright law.²⁰ The fair use doctrine has the potential to flexibly accommodate novel situations which may arise in the future. The need to constantly review the miscellaneous copyright exceptions (including the limited categories of the fair dealing exceptions) could perhaps be avoided. Therefore, the government and the ALRC should consider the positive impact an open-ended fair use exception may have on consolidating the various exceptions that exist in legislative provisions outside the *Copyright Act*.

IV CONCLUSION

The legislative copyright exceptions outside the *Copyright Act* identified and discussed in this paper should not be regarded as exhaustive, and further research is likely to reveal additional miscellaneous exceptions of this kind. Nevertheless, this exercise has served to highlight the fact that there are significant, though generally overlooked, copyright exceptions existing outside the *Copyright Act*. The key role of these exceptions in facilitating government administration – and even more so in the digital era – requires that they be taken into account in the current copyright law review and reform process. In the ‘Copyright and the Digital Economy’ review, the ALRC and the Australian Government have an opportunity to understand the role of these exceptions and consider their consolidation in provisions of the *Copyright Act* which ensure their continued relevance. When viewed in the context of the current review’s overarching objectives of further shaping Australian copyright law for the digital economy, this is an important step and one which should now be taken.



²⁰ See 17 USC § 107. Note that the Copyright Law Review Committee recommended an open-ended model: CLRC, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [2.03].