

CONCLUDING COMMENTS: THE COPYRIGHT ACT 1968 FORTY YEARS ON

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It seems such a short time, but, in the forty years since it came into operation, the *Copyright Act 1968* has moved from being a rather peripheral enactment which was really only known to the few initiated in its mysteries to a sizable² piece of legislation that lies at the centre of so much of our daily economic, social and cultural life. Ignored, reviled, admired or sanctified (it all depends where one is standing), it is a legislative achievement whose mid-life anniversary is well worth celebrating today.

Indeed, real life and architectural analogies readily come to mind when one considers the *Copyright Act 1968* in all its present day, much-amended, glory. Take real life first. If one remembers that it began its life as a relatively sleek and well muscled Act (although still more fully developed than its even slimmer 1911 and 1905 ancestors), it remained thus for well over a decade, but then gained steady accretions of muscle and flesh, with some nine substantive sets of amendments since 1980 that have now turned it into a bloated and blurred version of its original self.

Middle age is not treating the Act kindly, particularly when one considers the lateral extensions that have occurred, with the journey between some provisions that were previously simply numerical now requiring a clamber, several times over, through all the letters of the alphabet (just try going now from ss 131 to 133, and finding some 46

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² The adjective “monster” came first to mind, but this would be to ignore the far greater claims of our taxation, social security and corporations legislation to such a descriptor.

pages of intervening provisions from s 131A to s 132C; the trip from s 135 to s 136 is even more demanding, with some 102 pages of intervening text, beginning at s 135AA and ending at s 135ZZZE). Middle aged sag assumes a rather disconcerting image when one sees these alphabetical folds of legislative fat flowing over a now invisible waistline down to the ground.

The metaphor should not be taken too far. It is all too easy to point to complex and wordy provisions, and rush to judgment as to their utility. Very often, however, they do mean something quite precise from the perspective of particular addressees, and represent delicate compromises that have been made between competing interests and policies (this is certainly true of the educational provisions in Parts VA and VB). Furthermore, some valiant attempts at slimming down have been made, although the difficulties involved should not be underestimated. In this regard, the simplification proposals of the former Copyright Law Review Committee (the “CLRC”) should be remembered.

These embodied a new and original scheme of classification of subject matter and rights,³ as well as an extensive streamlining of exceptions and limitations.⁴ The difficulty, of course, lies in proposing such a radical weight loss program, when so many other issues, such as the internet and the digital agenda, were also clamouring for attention. Legislators and policymakers, perhaps, may be forgiven for not taking up the reformist programme offered them by the CLRC. A good piece of management advice might be, “never let the immediate crowd out the important”, but this is a nostrum that is usually impossible to act upon when developments occur at such a frantic pace, and appear to call for urgent and immediate attention.

Architectural metaphors, however, may offer a more rewarding insight into the 1968 Act and its achievements. The UK Whitford Committee in 1977 offered such a view when it described the development of UK copyright laws up to the time of the *Copyright Act 1956* (UK) in the following terms:

15. The first Copyright Act was enacted in 1710 (8 Anne c 19) and dealt only with books. This Act may be likened to a modest Queen Anne house to which there has since been Georgian, Victorian, Edwardian and finally Elizabethan additions, each adding embellishments in the style of the times ...⁵

³ Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (February 1999)

⁴ Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (September 1998).

⁵ *Copyright and Designs Law: Report of the Committee to consider the Law on Copyright and Damages* (Cmd 6732, HMSO 1977) (“Whitford Committee”), paras 15 and 16.

In the case of the 1968 Act, one may not want to pause too long in contemplating the exterior (a very bland 60's glass and concrete construction), or the internal fittings (the language and terminology of the legislative draftspersons is frequently dark and obscure). However, the layout of rooms is not without some coherence, even elegance. It is certainly instructive. Consider the following:

- The ante-rooms and reception rooms: a rather cluttered cloakroom area (full of definitions and interpretations in Part II), leading to more spacious galleries with clearly defined sections for works and their exclusive rights, connecting factors, term of protection, and provisions on infringement (Part III, Divisions 1 and 2). The first time visitor can stroll through these and gain a reasonable understanding of what is contained in the rest of the building.
- A parallel set of smaller reception rooms running along on the side for subject-matter other than works, with clearly defined alcoves for each specific subject-matter (Part IV, Divisions 2 to 6). The rooms likewise are reasonably accessible to the first time visitor.
- Smaller rooms running off the side of each of the larger reception rooms: this, however, is where things start to become confusing. Some of the rooms are crowded, but still relatively accessible and possible to navigate, at least in some parts (for example, the fair dealing provisions in Part III, Division 3, and Part IV, Division 6, and the artistic work exceptions in Part III, Division 7); others are lined with further series of compartments that are nonetheless reasonably easy to locate and are relatively self-contained (for example, the computer program exceptions in Part III, Division 4A); others again have some rather timeworn but familiar items of furniture where the “industry players” will have little difficulty (such as the provisions dealing with the recording of musical works in Part III, Division 6). But there are some rooms that are really quite dangerous to enter, either because they are so crowded that one needs an expert guide to find one’s way through (such as the library and archives provisions in Part III, Division 5) or because they have some nasty hidden traps that no amount of amending legislation has ever quite managed to remove (for example, the designs/copyright overlap provisions in Part III, Division 8). None of these rooms, however, are very comfortable for the first time entrant.
- The large entertaining rooms that adjoin the reception areas, once reasonably welcoming, have also become steadily more cluttered:
 - The remedies hall (Part V), once clearly laid out and easy to walk through, has now had some complicated extensions made to it, for example, the technological circumvention measures, electronic rights management and safe harbour annexes (Divisions 2AA and

2A), to say nothing of the particularly hazardous and bristling basement area under the hall, where the criminal offence and penalty provisions (Division 5) are now filed away neatly for ready deployment.

- The statutory licence halls (Parts VA,-VC), while complex in their appointments, are more readily justifiable, in that few will enter here unless they (a) are one of the affected parties, such as an educational institution or a collecting society, and (b) will almost invariably be accompanied by a skilled guide (in-house counsel, legal adviser, and the like). The same is true of the rambling Division 6 passageway which deals with the Copyright Tribunal. There is really no need for any member of the general public to wander down these halls and passage ways, although clearer signs, such as “Administration – only authorised personnel to enter”, might be helpful here.
- There are some discreet (and discrete) rear rooms where entry will only be required for very specific purposes, such as Crown use (Part VII), or where the only appreciative audience will be lawyers and no one else will ever need to enter (I refer here to the transitional and miscellaneous sections in Divisions X and XI).
- Finally, there are some large structures that really sit to the rear or side of the building, although there are some narrow connecting doors, often hard to find, that provide a linkage back to the main structure: moral rights (of two distinct kinds in Division IX) and performers’ rights (Part XIA). It might be tempting to liken these to conservatories, and the plants to be found inside are certainly exotic, at least so far as Australian copyright law traditions are concerned. They are fragile and delicately framed, and readily cut down.

It is all too easy to flog a metaphor too far, but the above serves to illustrate the large and sprawling structure and scope of the *Copyright Act 1968*. To return to our earlier metaphor, the Act is a complex organism, but is not an invertebrate: there is still an identifiable and recognizable spine running through it and providing it with a semblance of sense and organisation. The above metaphors also enable the making of some larger points:

1. Simplification, while desirable at one level, is not a goal in itself: so long as the relevant provisions are accessible and meaningful to those who must deal with them, it is of little consequence that they are not comprehensible to the rest of us (if we never have to use them). There are horses for courses: it may be defensible for the provisions of Parts VA and VB to rejoice in their present complexity if they nonetheless provide clear pathways for the relevant parties to track their way through and to achieve some acceptable resolution. Complexity, on the other

hand, may be unforgivable in the case of sections of more general application: for example, do we need over 40 pages of text to give effect to moral rights provisions that are comprehended within a few lines of text in the relevant international conventions?⁶

2. Some complexity is also understandable (and hence forgivable) as an index of human failing. The parallel importation provisions, for example, reflect the deep public policy divisions that have arisen, and continue to arise, over this difficult question, particularly in relation to books. Complex procedures and timelines simply embody the results of the uneasy compromises that have been reached here, and reflect the lack of resolution applying at the policy level.
3. Nowhere is this complexity and policy division more exposed than in the case of exceptions and limitations: the proliferation and dissemination of these throughout the Act underlines sharply the need for some kind of simplification or streamlining, even perhaps the adoption of a single, flexible, open-ended, omnibus fair use provision, as suggested by the CLRC over a decade ago. But while this might reduce the Act significantly in length, would it really achieve its goals of clarity and simplicity, other than to displace the work of negotiation and compromise on the part of legislators, lobbyists and officials to the courts? In the long term, this may well mean more expense and time, and less comprehensive solutions. Matters that are unlitigated may simply lead to holes in protection where no one benefits.
4. Some of the causes of the more recent legislative bloat in the 1968 Act come from external sources, rather than being the direct fault of our legislators and policy makers. While we have sought diligently, perhaps too much so in the case of performers' moral rights, to give effect to our international obligations under the *Berne Convention*, the *WCT* and the *WPPT*, we have had some other things forced upon us in the form of the *Australia-US Free Trade Agreement*, with its bewildering series of provisions that seek to transplant and replicate US legislative provisions Down Under. Such deals are always fraught with difficulty, even where there might be the expectation of longer term benefits in other areas that have nothing to do with copyright, such as beef and primary products. So far as the *Copyright Act 1968* is concerned, this has recently added significantly to its bulk and complexity.
5. For all its defects, the 1968 Act has still had its admirers in other places, for example, in Singapore⁷ and Malaysia⁸ where it has provided a model for local law

⁶ *Berne Convention for the Protection of Literary and Artistic Works*, art 6bis, and the *WIPO Performances and Phonograms Treaty*, art 5.

⁷ *Copyright Act 1987* (Singapore), Chap 63.

making. This may suggest that the floor layout still remain usable, even if there is too much furniture cluttering up some of the rooms and annexes. In terms of legislative export, we should seek to build upon this experience and improve the product.

The speakers in the present session have each provided fascinating insights into the history and development of this significant piece of private legislation.

Ben Atkinson has highlighted some of the important pre-history, going back to the 1911 Act and the even more interesting legislative predecessor, the *Copyright Act 1905* which was the first truly national copyright enactment in Australia.

Two other speakers, Leslie Zines and John Gilchrist, have drawn attention to two particularly important stages in the early life of the 1968 Act: its beginnings and the work of the Spicer Committee, and the first significant response to technological development, in the form of photocopying and the Franki Committee review.

Each of these inquiries was considerably more reflective and extensive than anything we have seen in more recent history. Spicer, indeed, was pre-computers and long before the advent of the networked environment; copyright in those days was seen as rather peripheral, of concern only to those involved in the “soft areas” of the arts: music, theatre, and publishing. Nonetheless, there were significant commercial interests involved, in particular those of broadcasters and sound recording companies, while the concerns of educationalists and libraries were also beginning to be voiced. Nonetheless, nearly nine years elapsed before the 1968 Act was finally passed (although Adrian Sterling tells a revealing story of some of the lobbying on the part of the record industry that preceded this).

Once passed, however, the new Act seemed to slumber in its slips for a decade or so, while the importance of one particular new form of technology – the photocopier – was pursued in the courts,⁹ and then ultimately became the focus of the next significant review by the Franki Committee. After this, the floodgates of regular review and amendment were opened up, and this has remained a continuous torrent. Copyright in this latter period moved much more to the centre of things, although perhaps without the time, care and resources that were possible in the case of the Spicer and Franki reports.

Sara Bannerman and Susy Frankel provide interesting perspectives from the outside. Both Canada and New Zealand, despite their common colonial backgrounds with

⁸ *Copyright Act 1987* ((Malaysia)).

⁹ See, in particular, *UNSW v Moorhouse* (1975) 133 CLR 1, and see further S Ricketson and D Catterns, “Of vice-chancellors and authors: *UNSW v Moorhouse*” in Andrew T Kenyon, Megan Richardson and Sam Ricketson (eds), *Landmarks in Australian Intellectual Property Law*, Cambridge University Press, Melbourne, 2009, pp 97–109.

Australia, have different copyright histories, marked by a measure of independent initiative not present in our own. Even at an early stage, Canada was unhappy with the application of the Berne Convention to it (Bannerman's account of the visit of the Canadian premier, Sir John Thomson's visit to Windsor to seek permission to denounce it is similar to the much later, and successful, effort by the Australian prime minister, James Scullin, to secure the appointment of Sir Isaac Isaacs as the first Australian-born governor general), and the notion of Canada as a developing country and "copyright middle power" is an appealing one for Australia to aspire to, in seeking to establish its own international copyright identity.

Susy Frankel, in the case of New Zealand, points to one particular instance of decisive independence, in the case of parallel importation prohibitions. There are others: for example, the recommendations of the Dalglish Committee in relation to the question of term (New Zealand, unlike Australia, saw little advantage for it in the adoption of the 50 year *post auctorem* term of protection).¹⁰

In all, this has been a fascinating and event-filled forty years of copyright history in Australia, and one that will clearly merit further investigation of its internal workings by historians such as Ben Atkinson. The onset of early middle age suggests that some weight loss may be in order, but the relevance and centrality of the Act to our national economic, social and cultural life can be doubted no longer.

¹⁰ *The Report of the Copyright Committee* (NZ, 1959), par 41. Note also similar reservations that were expressed by the equivalent Canadian inquiry: *The Report on Copyright of the Canadian Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs* (1957). See further Ricketson and Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Thomson LBC, 3rd ed 2006, [6.75].