

INTELLECTUAL PROPERTY
AND THE
COPYRIGHT AMENDMENT ACT 2006

by

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1. This seminar concerns the *Copyright Amendment Act 2006 (No 158)* and the growing sphere of intellectual property rights under the rubric copyright.
2. That modest amendment comprising 215 pages with 12 schedules of amendment items was assented to on 11 December 2006. The amendment is accompanied by 3 explanatory memoranda (2 from Senate amendments) comprising collectively 144 pages.
3. It is clear that the *Copyright Act 1968* is intended to become as user friendly and enjoyable as the *Income Tax Assessment Act* introducing catchy new provisions such as s. 135ZZEA but I think my favourite is s. 153BAD.
4. By way of brief overview these amendments are intended to bring offences¹ in the *Copyright Act 1968* into harmony with the *Criminal Code* as well as expanding the sweep of pirating offences and creating an infringement notice scheme² to provide flexibility in addressing the seriousness of the alleged conduct. The offence amendments identify the physical elements and, where not strict offences, the fault element. In some offences the fault element of knowledge has been replaced by recklessly. The infringement notice scheme is contained in the *Copyright Regulations 1969*³. There are for the purpose of cost savings evidentiary presumption provisions⁴ including a presumption of originality for computer programs⁵.
5. The doubts about protection of digital files or downloads over the internet in the context of civil liability have been addressed by an amendment⁶ to the meaning

¹ See Schedule 1 Part 1

² s. 248SA and s. 133B

³ Part 6A introduced by the *Copyright Amendment Regulations No 1 2006 No 328*

⁴ See Schedule 2

⁵ s. 129A and 132AAA

⁶ See Schedule 3 as well as s. 132AA

of “article”. The powers of the court to grant relief⁷ and matters to be taken into account in civil proceedings have been expanded. There are customs Notice of Objection provisions⁸ similar to changes made to the *Trade Marks Act 1995*. There are new copyright exceptions⁹ including fair use¹⁰ in relation to format-shifting¹¹ and time-shifting¹² as well as new exceptions for key national cultural institutions¹³. There are amendments relating to browsing the internet and reforms as to use for educational purposes¹⁴ as well as amendments concerning broadcasts¹⁵, the Copyright Tribunal¹⁶ and to implement the *AUSTFA* obligations¹⁷.

6. Although I like to regard myself as a “free range advocate” or in copyright-speak “free-riding advocate” there may be some wondering what a salt encrusted maritime and whispering jurisdiction lawyer is doing venturing into the refined sphere of intellectual property.
7. Well, I want to set you all at ease immediately, because, but for this subject matter being addressed by Commonwealth laws through s. 51 *placitum* (xviii), and the consequential vesting of jurisdiction through s. 76(ii) in respect of matters arising under laws made by the Parliament defined and invested through s. 77 of the Constitution, I am convinced, based on Justice Storey’s approach to jurisdiction in *De Lovio v Boit*,¹⁸ that this area, specifically of copyright for the moment, would have been the subject of s. 76(iii) jurisdiction under our Constitution. In other words copyright disputes would be matters of Admiralty and maritime jurisdiction. For the sceptics, the overlap runs deeper than the ships found in authorship or craftsmanship, stronger than the overlap of articles (for those unfamiliar with matters maritime Articles of Indenture were signed by

⁷ See Schedule 4

⁸ See Schedule 5

⁹ See Schedule 6

¹⁰ As well as for parody and satire, s.103AA; non-conflicting with normal exploitation concerning libraries, archives, education and use by persons with disabilities, s. 200AB and see Schedule 6 Part 5; research and study Schedule 6 Part 4

¹¹ s. 43C, s. 47J, 109A and s.110AA

¹² s. 111

¹³ s. 51B, s.110BA and s. 112AA

¹⁴ See Schedule 8

¹⁵ See Schedule 9

¹⁶ See Schedule 10 and Schedule 11

¹⁷ See Schedule 12 which significantly expands technology protection measures

¹⁸ (1815) 7 F Cas 418

seafarers upon joining a vessel) and is more pervasive than our common overlap of piracy.

8. The communication equipment and technology on our vessels at sea are today, a concentrated mirror of that found on our great land mass. From the naval architect's drawings for the *Queen Mary 2*, through to the ship's computers, DVD and CD burners, photocopiers, video and sound recording systems (analogue and digital), broadcasts of free-to-air, Pay TV, pod-casting/web-casting, radio, cinematograph theatres, as well as performing art theatres and with the mass of technological equipment carried by the passengers from mobile phone recording, internet access, recoding devices to the shop vendors on board, there is ample for an array of potential copyright issues to arise in the maritime environment, whereby the disputed copyright infringement or offence might happily be characterised as a matter within Admiralty and maritime jurisdiction.
9. Indeed, if maritime type methods of punishment from keelhauling to the lash were used, the copyright pirate might face a more effective discouragement.
10. Maybe, if the draftsmen of the *Copyright Amendment Act 2006* had in mind matters within the Admiralty and maritime jurisdiction, the geographic application provision introduced by s. 132AB¹⁹, which inserted nine new subdivisions, might not have limited the offences created under subdivisions B, C, D, E and F to "acts done in Australia". This gives rise to the first interesting issue as to the meaning of "acts done in Australia" whereas if one had turned to Division 14 standard geographical jurisdiction found in the *Criminal Code 1995* which is expressly excluded, it refers to conduct constituting the alleged offence occurring wholly or partly in Australia or more relevantly, and here comes the maritime connection, wholly or partly on board an Australian ship (or an Australian Aircraft). A contrast might also be made with the language of conduct found in s. 172 and s.173 of the *Copyright Act*.
11. There is also an extended operation in relation to what are called primary offences and ancillary offences in Division 14 which is obscured by the meaning of what constitutes "acts done in" Australia. "Australia" of course and appropriately includes the coastal sea as defined by s. 15B of the *Acts*

¹⁹ See also s. 248P

Interpretation Act 1901. We have accordingly lost the breadth of meaning of conduct found in the *Criminal Code*, “omission” is lost and whether less than all “acts” must be done in Australia is doubtful.

12. Another interesting question arises as to what extent Division 15 of the *Criminal Code 1995* might have application of the extended geographical jurisdiction assuming one was to find intention for application of the *Criminal Code* in s. 9A of the *Copyright Act 1968* which picks up Chapter 2 of the *Criminal Code* and whether this s. 9A falls within the criteria under Division 15, which of course also applies to an Australian ship (as well as an Australian aircraft). These references to “Australian ship” and “Australian aircraft” are of course, terms defined in the dictionary to the *Criminal Code*. I should also mention the application of the substantive criminal law of Jervis Bay Territory through s. 6 of the *Crimes at Sea Act 2000* in relation to criminal acts on Australian ships, by Australian citizens and on foreign ships. A legal advisor in this area would also want to take into account, if an Australian in a foreign country, the work done in applying the criminal laws of the Jervis Bay Territory through ss. 3A and 4 of the *Crimes (Overseas) Act 1964 (Cth)*.
13. Returning to the *Copyright Amendment Act 2006*, it is on my rough count the 56th amendment to the *Copyright Act 1968* providing a healthy average of more than one amendment a year. For those regularly plying these intellectual property waters there is a similar average of almost one amendment a year in relation to the *Patents Act 1990* which has since been amended 16 times²⁰. The *Trade Marks Act 1995* reflects a similar statistic having been amended 11 times²¹. The *Designs Act 2003* isn’t quite keeping pace as a matter of amendment tuning with its siblings in this area of intellectual property and the *Circuit Layouts Act 1989* seems to have stagnated²². What we need to keep in mind in this amendment tuning statistic is that the average of one amendment a year is only half that of the *Broadcasting Services Act 1992* which has been amended some 49 times, creating an average of at least two amendments a year. These are not idle statistics but rather are of moment and importance in

²⁰ Most recently amended including other Acts here mentioned by the *Intellectual Property Laws Amendment Act 2006, No 106*

²¹ Most recently by *Trade Marks Amendment Act 2006 No 114*

²² Statistic enthusiasts might also want to look at the *Olympic Insignia Protection Act 1987, Plant Breeder’s Rights Act 1994*

discerning legislative purpose, upon which I will expand in the discussion of some recent copyright cases.

14. You will all no doubt recall that the *US Free Trade Agreement Implementation Act 2004* introduced some fairly substantial changes to the *Copyright Act 1968* addressing in particular live performances and sound recordings of live performances, as well as group performances and material introducing a new Part IX moral rights of authors, of literary, dramatic, musical or artistic works and cinematograph films (earlier the subject of legislative recognition by Australia in 2000). The myriad of amendments to the *Copyright Act* are as I have said of real significance in application of statutory rules of interpretation. If I may digress we should hope that these free trade agreements will be entered into with all our geographical and major trading neighbours.
15. The first series of provisions addressed by Schedule 1 Part 1 that commenced on 1 January 2007 create offences to address, the evil doings of librarians and archivists, in relation to the making of declarations for the purposes of ss. 49, 50, 51A or 110B, which are false or misleading in material particular, now proscribed by reason of s. 203F. The wickedness of these individuals, has also been anticipated by an offence created under s. 203G, preventing the destruction of these declarations, under the sections I referred to, which declarations must be kept for prescribed period. Fortunately the amendment leaves scope for excitement as to the meaning of who is the person ultimately responsible for administering a library or archives or identifying the lucky officer in charge of the library or archives (wisely expanded by s.51A(6) to include intermeddling volunteers). These offenders are exposed to the richly deserved criminal offence as to failure to keep the declaration in the records of the library or archives, dealt with by s. 203A.
16. The villainy of these librarians and archivists, has been dealt another blow by s. 203D, creating a most heinous offence of failing to ensure the declarations are arranged in chronological order in accordance with the date on which they are made. I anticipate this provision will provoke much excitement as to the correct sequencing of declarations made throughout the day which minute by minute sequence, in my opinion, would not matter a fig so long as collectively recorded in a date order at the end of the day.

17. These evil librarians and archivists might, through the kindness and grace of Parliament, in dealing with anti-chronological offenders, avail themselves of a defence if able to prove, the onus being on them that they took all reasonable precautions and exercised due diligence either to ensure the declaration was kept in the appropriate records or to ensure that the declarations were in chronological order. This dual criteria as to personal precautions and diligence conjures up a need for sound systems, continuing education, supervision, reporting and reviewing if the head librarian or archivist wishes to delegate the arduous physical labour of personal recording and sequencing. This defence is of very small comfort for these notorious villains. You will obviously all be heartened to know that these offences under ss. 203A and 203D are ones of strict liability.
18. I personally have some difficulty in the concept that an inappropriate chronological arrangement is capable of giving rise to a criminal offence. The explanatory memorandum speaks of changes to avoid undermining the credibility of the Act and I must say this seems an excellent example. I am certain addresses by a counsel would meet the late and great Honourable Peter Hely's standards of brevity if under the *Legal Profession Act 2004* such an offence were introduced and valid. It must be pushing the boundaries of validity as to whether such an offence is a law reasonably adapted, proportionate and referable to the head of legislative power. Anti-chronological offences of this kind bring the law into disrepute and one marvels at what rational justification exists for imposing a criminal offence for filing sequence errors.
19. I also note that Australian juries and those versed in s. 80 of the Constitution will be extremely excited by the indictable offences introduced by Schedule 1 Part 1, which as I said commenced on 1 January 2007.
20. The cunning draftsman has exercised his or her own copyright in replicating culpable conduct proscribed as an indictable offence in substantially identical terms as a summary offence. to enrich the captivated reader there is a further repetition or at least a substantial reproduction of the work describing the conduct of the indictable and summary offences, less the fault element, as being offences of strict liability.

21. The constitutional lawyers will also be excited by the assertion that specific offences with exposure up to 2 years imprisonment remains a summary offence despite s. 4G of the *Crimes Act 1914*. I for one have some difficulty in accepting that s. 80 of the Constitution can be mocked in the way these amendments purport to do so.
22. But I digress from the subject matter of these offences. Section 132AC addresses an infringement or infringements which occur on a commercial scale. The unhelpful definition of commercial scale as requiring the taking into account of volume, value and any other relevant matter, sits extremely uncomfortably with the concept of a single infringement which is required to have “a substantial prejudicial impact” on the owner of the copyright.
23. In this instance the summary offence is meaningfully distinguished by requiring the elements of substantial prejudicial impact and the infringement or infringements occurrence on a commercial scale to be one in respect of which the person is said to be negligent as to that fact. Whether there is or is not a careless commercial scale infringer will no doubt vex the prosecution in seeking to make out an offence under s. 132AC(1) as well as those seeking to identify the objective standard to be applied and whether or not varied by reference to an impecunious or excessively vulnerable owner of the copyright.
24. The boundaries of substantial prejudicial impact, are also open to argument, given the content of volume and value taken into account in the element of occurrence on a commercial scale.
25. Section 132AD has the trilogy of indictable summary and strict offences in relation to the making of an article which infringes copyright in relation to selling, letting for hire, or obtaining a commercial advantage for profit. The strict liability limb substitutes “in preparation for or in the course of” for the element of intention required by this summary and indictable offences. I note that the elements of the summary offence in relation to making an infringing copy commercially incorporates as a fault element a negligent standard.
26. Section 132AF addresses offering infringing copies for sale or hire and again has a trilogy of offences.

27. Section 132AG deals with exhibiting infringing copy in public commercially, again with a trilogy of offences and both importing and distributing infringing copies are addressed by a trilogy of offences by s. 132AH and s. 132AI.
28. Section 132AJ creates a trilogy of offences concerning possessing infringing copy for commerce and the category for doing things for commercial advantage or profit, trade, distribution or exhibition as well as sale or letting are of broad compass.
29. Section 132AK adds an aggravated offence to specifically identified indictable offences involving the converting of a work or other subject matter from hard copy or analogue into digital or other electronic machine readable form.
30. Section 132AL is most likely to attract attention, not so much because of the offences in relation to making a device intended to be used for making an infringing copy, but rather in the context of the offences created in respect of a person possessing a device. If intended to be used for making an infringing copy, it is an indictable offence.
31. On the other hand if it is to be used for copying a work or other subject matter and the person is negligent at the time of making the device as to the subsistence of copyright in the work or other subject matter, it is a summary offence. But there is a further summary offence created in relation to possessing a device that is used for copying a work or other subject matter and again, this curious concept of negligence linked to the subsistence of copyright at the time of possession. Further, recklessness (as a substitute for actual or constructive knowledge) will satisfy part of the elements in the context of the device being used for copying a work or other subject matter. Those who have been reckless enough to leave their mobile phones on during the course of this seminar which might record the copyright that I might have in this performance may be committing an offence and happily there is also a strict offence in relation to a device made by a person and used for copying a work or other subject matter.
32. Section 132AM creates a summary offence in relation to an advertisement for the supply in Australia of a copy that is or will be an infringing copy. There is also a curious subsection as to what constitutes the supply of a copy which appears inapposite to the relevant summary offence.

33. Section 132AN creates an indictable offence in relation to performance in public at a place of public entertainment of a literary, dramatic or musical work that infringes copyright in work, as well as a summary offence which again includes the curious concept of negligence as to the fact that the performance infringes copyright in the work.
34. Section 132AO creates an indictable offence in relation to a sound recording, images or sound from a cinematograph film to be heard or seen as applicable in public at a place of public entertainment, where causing the hearing or seeing infringes copyright in the recording or film. Again there is a summary offence of the same nature picking up negligence as to the fact of causing the hearing or seeing which infringes copyright. There was a further strict liability offence in relation to causing the hearing or seeing which infringes copyright in the recording or film.
35. Section 132AQ creates an indictable offence in relation to removing any electronic rights management information relating to a work or other subject matter in which copyright subsists, without permission where the removal or alteration will induce, enable, facilitate or conceal an infringement of the copyright. The latter element will no doubt be somewhat difficult to establish. There is again a similar summary offence which, again, involves an element of negligence in relation to the result of the removal, as well as a strict offence in relation to the removal or alteration.
36. Section 132AR is a complementary indictable offence where a person distributes a copy of a work or subject matter with the intention of trading or obtaining a commercial advantage or profit or imports the same with such an intention or communicates the same to the public, without permission and in respect of which the electronic rights management information has been removed or altered together with knowledge as to such removal or alteration and a consequence which will induce, enable, facilitate or conceal an infringement of the copyright.
37. Distributing or importing electronic rights management information without permission for the purpose of commercial advantage or profit is dealt with by a trilogy of offences in s. 132AS.

38. Time and the excitement of these offences²³ stops me from detailing in further depth the work done by this amendment and to add to the stimulation of this evening I turn to some of the recent cases. The purpose of this distraction is to touch upon the statutory interpretation issues that arise in relation to our amendment No.158 of 2006.
39. The High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*²⁴ explored the impact of some of the provisions introduced by the *Copyright Amendment (Digital Agenda) 2000* specifically in the context of the proper construction of the circumvention device and in particular the meaning of technology protection measure in the Act. The Court emphasised the importance of the need for close attention to the text and structure, and statutory interpretation touching upon earlier statutory rules of interpretation from the mischief rule, golden rule, literal rule to the purposive rule.
40. Significantly, the High Court rejected the theory of picking a winner by reference to purpose in the context of this legislation which was the outcome of what was said to be an inarticulate compromise particularly taking into account legislative amendment tuning. The purposive rule was inapt because “the substratum of legislation is constantly changing technologies”. It is also of some moment in that regard that the exposure to potential for criminal offences was cited as a reason for caution in accepting any loose, albeit practical construction, of the relevant provisions.
41. No doubt juries dealing with indictable offences will welcome the observation that this copyright legislation gives rise to difficult questions of construction and will be warmly cajoled by defence counsel pointing out that the provisions have what has been described as a “maddeningly casual prolixity and imprecision”. I

²³ There are a number of other offences introduced by Schedule 1 being offences by witness, s.172; offences in relation to the Tribunal, s.173; unauthorised recording of a performance during protection period, s.248PA and s.248PB as well as unauthorised communication and playing of a performance to the public during 20 year protection, s.248PC and s.248PD; possessing equipment to make unauthorised recording of a performance or sound recording thereof, s.248PE and s.248QB; copying unauthorised recording and exempt recording, sound recording of a performance s.248PF, s. 248PG, s.248PH, 248QC, as well as selling, distributing, commercial possession or import of unauthorised recording of a performance or sound recording thereof. s.248PI to 248PK, s.248QD-248QF; exhibiting, importing for exhibition a recording of a performance s. 248PL, s.248PM or sound recording of a performance s. 248QG and s.248QH. There are also offences introduced by Schedule 9 and Schedule 12.

²⁴ [2005] HCA 58

like to think of this text and structure approach in the context of the subject matter of this seminar as the “Material Rule” of statutory interpretation.

42. One also then has the High Court’s decision in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*²⁵ which touched upon whether broadcast copyright had been infringed. The statutory construction rule employed appears to be what I would call the “Context Rule”, namely the taking into account of the legal and historical context in particular issue of statutory construction together with what is described as a close consideration of the text of various provisions (in my view the Material Rule).
43. The most recent decision of the High Court is that in *Concrete Pty Limited v Parramatta Design & Developments Pty Ltd*²⁶. The Court found the existence of a sublicense binding the copyright owner by application of s. 15 unconfined to the sole principles of contractual consideration and privity. Importantly for intellectual property aficionados the Court was willing to draw upon analogies from the sphere of patent law as Stephen J had done in *Interstate Parcel Express Co v Time-Life International*²⁷. The decision contains some useful observations as to the obligations of joint venturers and also the principles concerning bias.
44. In *Phonographic Performance Company of Australia Ltd v Federation of Australian Commercial Television Stations*²⁸, the High Court considered the extent to which a sound recording copyright could subsist in the context of a broadcast by a commercial television station of the cinematograph film and sound track so as not to constitute infringement of copyright in the sound recording. The interesting aspect I would like to mention was the view expressed by the majority that the *Rome Convention* covered minimum obligations and provided no guidance as to the construction issues.
45. In *Data Access Corp v Powerflex Services Pty Ltd*²⁹ the High Court dealt with an issue of whether copyright as original literary works subsisted in commands in Data Flex Computer language contained in a computer program. That

²⁵ (2004) 218 CLR 273; [2004] HCA 14

²⁶ [2006] HCA 55 (6 December 2006)

²⁷ (1977) 138 CLR 534 at 549

²⁸ (1998) 195 CLR 158; [1998] HCA 39

²⁹ (1999) 202 CLR 1; [1999] HCA 49

decision picks up some discussion of the binary logic underlying a computer program and the central processing unit including the discussion of Gibbs CJ as to computer science from *Computer Edge Pty Ltd v Apple Computer Inc*³⁰. The Court touched upon the distinction between expression and ideas in comparing copyright concepts of a work being original³¹ which was said by Mason CJ in *Autodesk Inc v Dyason (No 2)*³² to be a fundamental principle confirmed by *Autodesk Inc v Dyason (No 1)*³³. In this case, the explanatory memorandum was called in aid of the construction adopted and adopted a fresh approach to substantiality contrary to the majority in *Autodesk No 1* and *Autodesk No 2*. the decision also dealt with the meaning of that adaptation again finding assistance in the explanatory memorandum.

46. Of much greater excitement for those of you with MP3 players is the Full Federal Court's decision in *Cooper v Universal Music Australia Pty Ltd*³⁴ in which an operator and host of a website that engaged in copyright infringements in relation to sound recordings, as well as the director of the host but not an employee. Another interesting decision from the Full Federal Court in the field of pirated DVDs and adult films is *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd*³⁵.
47. In summary I note that the structure of the *Copyright Act* as it now exists contains 16 parts, which without understating their potential importance, one might categorise as the parts dealing with matters preliminary, interpretation, the Crown, operation of the Act, miscellaneous, transitional and regulations, and a part dealing with the Copyright Tribunal, whilst the more meaty parts are:
- (a) Part III Copyright in original literary, dramatic, musical and artistic works;
 - (b) Part IV Copyright in subject-matter other than works;
 - (c) Part V Remedies and offences;
 - (d) Part VAA Unauthorised access to encoded broadcasts;

³⁰ (1986) 161 CLR 171 at 178-179

³¹ *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49

³² (1993) 176 CLR 300

³³ (1992) 173 CLR 330

³⁴ [2006] FCAFC 187

³⁵ [2006] FCAFC 188

- (e) Part VA Copying and communication of broadcasts by educational and other institutions
 - (f) Part VB Reproducing and communicating works etc, by educational and other institutions
 - (g) Part VC Retransmission of free-to-air broadcasts;
 - (h) Part IX Moral rights of authors of literary, dramatic, musical or artistic works and cinematograph films;
 - (i) Part XIA Performers' protection.
48. The meaty parts have divisions and in some instances subdivisions and in applying what I have labelled as the Material Rule of structure and text for interpretation of this statute, you will have to attach the meaty parts to which I have referred to the skeleton, being the interpretation and definitions found in some divisions and subdivisions, as well as the spinal column of interpretation found in Part II. The Context Rule will be of maddening assistance surpassed only by the clarity of purpose hidden in the brief explanatory memorandums. I will let each of you bring to life your own Frankenstein version of the *Copyright Act* as otherwise this seminar would not conclude.
49. It is for the same reasons that I don't propose to labour through the *Paris Convention, Berne Convention, Universal Copyright Convention, WIPO Treaties Hague Agreement, TRIPS Agreement, AUSTFA* or the wonderful reports, reviews and works of various committees, either here, the United Kingdom, NZ or elsewhere or our continuing struggle to adapt by amendment our law to the civil law systems. Suffice to say that this lost relic of copyright law is flotsam that could have been part of Admiralty and maritime jurisdiction and remains, partly because of the incessant legislative tuning and partly because of ever growing incentives for technological funambulists, a most healthy diet for the legal profession and in particular the voracious advocates of the Bar.

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22 February 2007³⁶

³⁶ Revised 1 March 2007