

When is an exception not an exception? Two-dimensional reproductions of public art

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There are exceptions in the Australian Copyright Act which are mirages; they recede and disappear on closer examination.

An example is the provision which allows private copying of broadcasts.¹ Useful, one might be forgiven for thinking, for videotaping *The Secret Life of Us*. However, the exception covers only the copyright in the broadcast, and not the copyrights in the “underlying” material, and so is useful only if you are taping, for example, a live sports broadcast *with* the sound switched off, *and* your finger hovering over the “pause” button so you don’t record any ads or slow-motion replays. Even then, you might infringe copyright by copying artistic works such as logos on player apparel or on advertising around the field or grounds.² Another phantom exception was the original version of the provision allowing backup of computer software.³

Similar issues have arisen in a number of recent situations involving two-dimensional reproductions of public art, and also apply to reproductions of buildings.

Section 65 of the Copyright Act allows two-dimensional reproductions of public art (sculptures and works of artistic craftsmanship displayed in a public place):

- (1) This section applies to sculptures and to works of artistic craftsmanship of the kind referred to in paragraph (c) of the definition of *artistic work* in section 10.
- (2) The copyright in a work to which this section applies that is situated, otherwise than temporarily, in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work or by the inclusion of the work in a cinematograph film or in a television broadcast.

A similar provision (section 66) allows two-dimensional reproductions of buildings and models of buildings:

The copyright in a building or a model of a building is not infringed by the making of a painting, drawing, engraving or photograph of the building or model or by the inclusion of the building or model in a cinematograph film or in a television broadcast.

Neither section expressly allows the reproduction of “underlying” works such as design drawings or architectural plans. In contrast, section 73 (which relates to reconstruction of buildings and forms part of the same group of exceptions to infringement) expressly allows the reproduction of architectural drawings or plans as well as of the building itself.

The question addressed in this paper is whether sections 65 and 66 have limited application in practice, because the reproduction of public art and buildings will often indirectly reproduce underlying works.⁴

The issue arises because a person can infringe copyright, without direct access to a work, if they have had access to an intermediary object. For example, if there is sufficient objective similarity between a photograph of a sculpture and the design drawings for the sculpture, the photograph may infringe the drawings even though the photographer had no direct access to the drawings.

Position in the UK

Section 62 of the *Copyright, Designs and Patents Act 1988* (UK) is worded in a similar way to section 65 in the Australian legislation. The editors of *Laddie, Prescott and Vitoria* say the following about the UK provision:⁵

This provision has not really been thought out properly, and contains several anomalies.

Illustration An artist paints a picture of a new building in Trafalgar Square; because of s 62, he does not infringe the copyright in the *building*; but he does infringe the copyright in the architect's design drawings. Since most buildings are preceded by architects' drawings, this provision is almost entirely useless.

Similarly, the editors of *Copinger and Skone James on Copyright* state that the wording of the provision in the *Copyright, Designs and Patents Act 1988* (UK) has:⁶

the potential to limit the scope of this exception quite considerably. For example, someone who takes a photograph of a building might still infringe copyright in the architect's preliminary drawings or plans, since the words "in such a work" would seem to refer only to copyright in the building itself. However, whilst this conclusion may be inevitable given the wording of the Act, it should be noted that Parliament gave this section very little consideration during the passage of the Bill. The wording of this section therefore seems to be the result of the draftsman having paraphrased the wording of the 1956 Act which, it seems, was also not wide enough to cover copyright in the preliminary drawings and plans. Yet it is clear that Parliament intended the provisions in the 1956 Act to have the same effect as those in the 1911 Act and these latter provisions were not so limited.

The 1911 Act referred to in this extract was adopted in Australia in 1912,⁷ while the current Australian Act, when introduced, was closely modelled on the 1956 Act to which the editors of *Copinger and Skone James on Copyright* refer.

UK law pre-1911

Prior to the *British Copyright Act 1911*, copyright law in the UK consisted

partly of the provisions of fourteen Acts of Parliament, which relate in whole or in part to different branches of the subject, and partly of common law principles, nowhere stated in any definitive or authoritative way, but implied in a considerable number of reported cases scattered over the law reports.⁸

The editors of the twelfth edition of *Copinger and Skone James on Copyright* state that, prior to the 1911 British Act, "there was some doubt" as to whether a work reproduced in a different dimension could infringe copyright.⁹ The 1878 report of a Royal Commission, appointed to report to Her Majesty on "the Laws and Regulations relating to Home, Colonial, and International Copyright"¹⁰ would seem to indicate that at least in relation to sculpture, there was little doubt in the minds of the Commissioners that a work reproduced in a different dimension would *not* infringe.¹¹

For example, the Commissioners commented as follows in relation to sculpture:¹²

... we have had to consider by what acts the sculptor's copyright ought to be deemed to have been infringed. Sculpture may be copied in various ways, not only by sculpture and casting, but by engraving, drawing and photography; and since the rise of photography the copying of sculpture by that means has become a considerable business. The question has therefore been brought before us whether copying by other means than sculpture or casting ought not to be considered piracy.

A material item in the consideration of this question is the injury likely to be inflicted on the sculptor. ... there is the question whether a sculptor ought not to be entitled to any profit to be made by allowing his works to be photographed or otherwise copied.

The Commissioners reported that they were "disposed to think that every form of copy, whether by sculpture, modelling, photography, drawing, engraving, or otherwise, should be included in the protection of copyright".¹³ In expressing themselves in the way they did, the 1878 Commissioners appear to have been expressing their opinion as to what *should* be the law, but confirming that they understood that not every type of copying would be an infringement.¹⁴

After recommending that sculptors be given rights over two-dimensional "copies" of their work, the Commissioners expressed an opinion that two exceptions to such rights should be allowed:¹⁵

It might be provided that the copying of a scene in which a piece of sculpture happened to form an object should not be deemed an infringement, unless the sculpture should be the principal object, or unless the chief purpose of the picture should be to exhibit the sculpture.

The Commissioners' recommendations – both in relation to the extension of the rights of sculptors and in relation to any exceptions – were, however, ignored in the United Kingdom, and it was left to another committee – the Gorrell Committee of 1909 – to deal with the issues when it was appointed to make recommendations about changes to copyright laws in light of the 1908 Berlin Revision of the Berne Convention.

While ignored in the United Kingdom, it appears that the recommendations of the 1878 Commissioners were either acted on in at least some of the colonies, or that, around the same time as the Commissioners were making their recommendations, the colonies were alive to the issues discussed in the 1878 report.

Early Australian legislation

The Parliament of the Colony of New South Wales passed its own Copyright Act in 1879, which, as indicated, either took into account some of the recommendations from the 1878 Royal Commission, or was at least alive to the issues discussed by the Commission.

The NSW Act contained provisions relating to copyright in "fine arts" (including "works of sculpture") and "designs" (which would include many items that we would now classify as "works of artistic craftsmanship").¹⁶ The provisions were very broadly expressed. Owners of copyright in "fine arts" were given:

the sole and exclusive right of copying photographing engraving reproducing and multiplying such painting drawing work of sculpture engraving and the design thereof or such photograph and the negative thereof by any means and of any size ...

Interestingly, the colonial legislation contains no exceptions along the lines suggested by the 1878 Commission.¹⁷

The wording of the Australian Commonwealth Parliament's first Copyright Act, in 1905, is similarly broad. Owners of copyright in artistic works were given: "the exclusive right ... to reproduce or authorize another person to reproduce the artistic work, or any material part of it, in any manner, form, or size, in any material, or by any process, or for any purpose".¹⁸ As with the 1879 NSW legislation which it displaced, the Commonwealth did not find it necessary to provide for any exceptions at all for owners of copyright in artistic works,¹⁹

The 1905 Act, however, was soon replaced by the adoption in Australia, in 1912, of the 1911 UK Act.

Copyright Act 1911 (UK)

As noted above, in 1909, a parliamentary committee (the Gorell Committee) was appointed to report on British copyright legislation in light of the 1908 amendments to the Berne Convention in the International Copyright Convention signed at Berlin.²⁰

Evidence which clarifies the understanding of the law at the time was given to the Committee by a Mr Reynolds-Stephens, who stated as follows on behalf of the Society of British Sculpture:²¹

Speaking generally, the Sculpture Act [1814 legislation giving copyright rights to sculptors] is a good law for us, and points which it leaves rather vague have been established in favour of sculptors by undisputed professional custom extending over nearly one hundred years. On one point only has the sculptor's interpretation of the law been challenged, and on that point I believe there has not been any definite pronouncement of the Courts; in this I may be wrong. I refer to the reproduction of sculpture by processes in the flat such as photography, drawing, painting and the like – possibly also tableau – it is claimed that the law is not intended to give us copyright in such reproductions. [Mr Reynolds-Stephens then referred to the 1878 Report] That Commission reported in effect that if the Act does not give sculptors this right they considered that any new law should do so, that if there is any money value in photos of sculpture the sculptor should certainly be the person to reap the benefit. ... Article 8 of the Berlin Convention seems undoubtedly intended to give us rights of this kind. If such 'infringements' are said not to be 'reproductions' covered by article 2, then certainly they must be 'translations', Article 8, or 'indirect appropriation', Article 12.

The Committee's report, however, did not include any comment on the issue.

The British Parliament subsequently passed the *Copyright Act 1911 (UK)*. The wording of this Act appeared to include two-dimensional reproductions of three-dimensional works in the scope of copyright (that this was the case was borne out by subsequent case law).²²

In addition, the Act contained an exception relating to the reproduction of public art – section 2(1)(iii) – drafted in wider terms than had been recommended by the report of 1878:

2(1) ... the following acts shall not constitute an infringement of copyright:-

...

(iii) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situated in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art: ...

As noted earlier, Australia “acquired” the same provision when it adopted the Imperial legislation as its own in the Australian *Copyright Act 1912*.

The *Copyright Act 1956 (UK)* and the *Copyright Act 1968 (Cth)*

The United Kingdom revised its copyright law mid-century, and replaced the 1911 Act with the *Copyright Act 1956 (UK)*. Australia subsequently replaced its copyright law (that is, the Imperial 1911 Act) with the *Copyright Act 1968 (Cth)*.

The passing of the United Kingdom’s 1956 Act was preceded by a report from the Gregory Committee.²³ In Australia, the Spicer Committee was appointed in 1958 to advise on “which of the amendments recently made to the law of copyright in the United Kingdom should be incorporated into Australian copyright law and what other alterations or additions, if any, should be made to the copyright law of Australia”.²⁴

Both committees discussed the issue of underlying copyright in plans when damaged buildings are rebuilt, but neither committee directly addressed the issue of underlying copyright in relation to “flat” reproductions when sculptures, works of artistic craftsmanship or “works of architecture” are photographed, painted or drawn.²⁵

Under the 1956 British Act, the exceptions in the 1911 Act were replaced with sections 9(3) and (4), which read as follows:

(3) The copyright in a work to which this subsection applies which is permanently situated in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast.

This subsection applies to sculptures, and to such works of artistic craftsmanship as are mentioned in paragraph (c) of subsection (1) of section three of this Act.

(4) The copyright in a work of architecture is not infringed by the making of a painting, drawing, engraving or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast.

The wording of the relevant exceptions in the 1968 Australian Act – quoted above – is substantially similar.²⁶

There is a major difference in the way the provision in the 1911 Act was expressed, compared with the 1956 and 1988 UK provisions and the 1968 Australian provision.

The 1911 Act provided that it was not an infringement to do certain things, but did not specify the work or works in which copyright would not be infringed. On the other hand, the wording of the provisions in the 1956 and 1988 UK Acts and in the 1968 Australian Act limit the exception to specific types of artworks (namely, sculptures, works of artistic craftsmanship and buildings).

As suggested by the editors of *Copinger and Skone James on Copyright*, it may well be that the more limited effect of the later provisions was unintended.

Case law

There is not much in the way of judicial guidance to the scope of sections 65 and 66. Section 65 was, however, raised as a likely defence in a recent case.

At the end of 1999, Channel Nine applied for an injunction to stop the ABC televising the coming New Year fireworks display in Sydney. Channel Nine's claim referred to the drawings of the "bridge face" and the "bridge word", which were structures on the Sydney Harbour Bridge which were to be lit up at appropriate moments during the display.²⁷ In discussing the subject matter in which Nine claimed copyright, his Honour noted that "the lighted face may be a manifestation of the original drawing" and perhaps if the matter had gone through to a final hearing the issues raised in this article may have received an airing, as the ABC raised both sections 65 and 66 as part of its defence.²⁸

Hill J declined to grant an interim injunction, and no damages claim was brought by Nine after the event.

Conclusions

Quite properly, exceptions are construed narrowly by courts, and it may be that courts would take a narrow view of the scope of section 65 and hold that these exceptions do not apply where a reproduction of a piece of three-dimensional public art is substantially similar to underlying two-dimensional works, such as plans, drawings or sketches.

In my view, however, the wider issue is whether section 65 should continue as an exception at all. The matters raised in 1878 by the Royal Commissioners and by Mr Reynolds-Stephens before the Gorrell Committee in 1909 still beg to be addressed. As noted in 1878, "since the rise of photography the copying of sculpture [and other types of artistic work] ... has become a considerable business"; Certainly, the Copyright Law Review Committee in Australia has recommended the repeal of section 65, noting that it appears there is "a considerable amount of commercial exploitation occurring" as a result of the provision.²⁹ In practical terms, the repeal should not impose undue hardship on people exploiting section 65 – other than that they will have to refer to copyright owners for permission. At the practical level, however, the existence of VISCOPY means it is now much easier to get clearances for the reproduction of artistic works, and thereby enable artists to benefit from the commercial exploitation of their work.

Endnotes

- 1 Section 111.
- 2 There is an argument, however, that section 67 applies to the logos and other artistic works. That section provides that copyright in an artistic work is not infringed by its inclusion in a cinematograph film or a television broadcast if its inclusion is incidental to the principal matters represented. It's arguable that recording artworks while recording a live broadcast is including the artworks in a film. Section 67 would not apply, in my view, however, to the recording of a pre-recorded television program.
- 3 It has since been amended twice – first by the *Copyright Amendment (Computer Software Act) 1999* to implement recommendations of the Copyright Law Review Committee in its 1995 report on computer software, and subsequently by the *Copyright Amendment (Digital Agenda) Act 2000*, to cover associated data.
- 4 My focus in this paper, however, is the development of the exceptions allowing certain reproductions of public art.
- 5 Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, 2nd edition (Butterworths, London, 1995) at para 3.92.
- 6 *Copinger and Skone James on Copyright*, 14th edition (Sweet & Maxwell, London, 1999) at para 9-90.
- 7 The Copyright Act 1911 (UK) formed a Schedule to the Australian Act.
- 8 Copyright Commission, *The Royal Commissions and the Report of the Commissioners: Presented to both Houses of Parliament by Command of Her Majesty* (HMSO, London, 1878) at iii. The Report was accompanied by a “Digest of the Law of Copyright”, summarising the state of the law at that time, by Sir James Stephen. The Report (*ibid.*, at viii), recommended that the law be “reduced to an intelligible and systematic form”, commenting on the existing state of law in terms reminiscent of the CLRC’s comments on the *Copyright Act 1968* (as amended): “the law is wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it”: *loc. cit.*
- 9 *Copinger and Skone James on Copyright*, 12th edition (Sweet & Maxwell, London, 1980) at 227 (\$558). The editors refer to *Hanfstaegl v Empire Palace* [1894] 2 Ch 1, in which *tableaux vivants* were held not to infringe copyright in pictures; cf, however, the United States case of *Bracken v Rosenthal* (1907) 151 Fed R 136, noted in *MacG Copyright Cases 1905–1910* at 205, in which making and publishing photographs of statuary was an infringement.
- 10 *Ibid.*, at vii.
- 11 Cf below the evidence of a Mr Reynolds-Stephens to the 1909 Gorrell Committee.
- 12 *Ibid.*, at xviii.
- 13 *Ibid.*, at xix.
- 14 *Copinger and Skone James on Copyright*, 12th ed (Sweet & Maxwell, London, 1980) at 227 (\$558).
- 15 It is arguable, from the way in which the Commissioners phrased this sentence, that they imagined that the effect of these exceptions would not substantially limit the operation of the extended right which they had just recommended.
- 16 Works of architecture were not protected under this Act. It is clear from the Report of the Commissioners that architectural works were not at this time themselves regarded as being capable of being protected by copyright, and the Commissioners recommended against any such any such protection. The Commissioners nonetheless noted that under the *Fine Arts Act 1862*, plans for works of architecture were considered “drawings”, and thus protectible.
- 17 See also the State of *Victoria’s Copyright Act 1890*, which appears almost identical to the NSW Act.
- 18 Section 34; the definition of “pirated artistic work” is similarly broadly expressed (“a reproduction of an artistic work made in any manner without the authority of the owner of the copyright in the artistic work”), but may have been understood more narrowly at the time.
- 19 By way of comparison, literary, dramatic and artistic works *were* subject to various exceptions: it was not under the Act an infringement to make a private abridgement or translation; or to make “fair extracts” for the purpose of a new work; or for the purposes of “criticism, review, or refutation”; or in the ordinary course of reporting scientific information: section 28.
- 20 House of Commons Standing Committee A, *Report from Standing Committee A on the Copyright Bill* (HMSO, London, 1911).
- 21 *Ibid.*, at para 2279. See also 2206 and 2285.
- 22 I am not aware that this matter was addressed in debate as the legislation passed through Parliament. Cases on the 1911 Act certainly interpreted the Act as clarifying that reproduction in a different dimension was within the scope of an owner of copyright’s rights: in 1916, a case held that a *tableau vivant* taken from a cartoon in *Punch* infringed copyright: *Bradbury, Agnew v Day* (1916) 23 TLR 349. See also *King Features Syndicate Inc v Kleeman Ltd*, which involved brooches, mechanical toys and plaster toys based on “Popeye the Sailor”: [1940] AC 523 (first instance); upheld on further appeal to the House of Lords ([1941] AC 417) after reversal by the Court of Appeal. Section 48(1) of the *Copyright Act 1956* (UK) gave this statutory confirmation: cf section 21(3) of the Australian Copyright Act.

- 23 Board of Trade, *Report of the Copyright Committee*, (HMSO, London, 1952) (“the Gregory Committee”).
- 24 *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (Government of the Commonwealth of Australia, Canberra, 1959) at 7. As can be seen from the date, the report gathered dust for a number of years before the Australian Parliament repealed and replaced the 1911 Imperial Act with the *Copyright Act 1968*.
- 25 Gregory Committee, *op. cit.*, at para 314; Spicer Committee, *op. cit.* Also, the Spicer Committee’s comments in relation to the exceptions for sculptures, works of artistic craftsmanship and works of architecture is followed immediately by a discussion of the reproduction of a statuette from design sketches, and of the Gregory Committee’s view that such a reproduction may be a reproduction within the scope of copyright, subject to the requirement that “a reproduction, to infringe, must at least be a visible copy of the work obvious to the layman”: Spicer Committee, *op. cit.*, at para 221; cf Gregory committee, *op. cit.*, at para 258.
- 26 Section 62 of the current British legislation (the *Copyright, Designs and Patents Act 1988*) is in broadly similar terms
- 27 *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (2000) 48 IPR 333.
- 28 Another case of tangential interest in the current context is *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1992) 24 IPR 461. The case dealt with infringement of copyright in slurry pumps and, needless to say, did not discuss sections 65 or 66. Nonetheless, it is of some interest, as it demonstrates the approach of a court where an exception applies in relation to doing certain acts to a particular class of work, but where an additional underlying copyright (in this case, in engineering drawings) also exists. (The relevant provisions have been amended several times over the years, and the court in *Warman* had to consider whether the respondents had a defence under the 1912 wording of the defence, as well as under each amended provision.)
- The case is principally concerned with the application of various versions of the sections that now constitute Division 8 of Part III of the Act, which deals with the overlap between copyright and design law. In one part of his judgement, Wilcox J had to examine the design/copyright overlap provisions, both before and after the *Copyright Amendment Act 1989* came into operation. Wilcox J found that in each case, plan-to-plan copying was not included within the scope of the exception, as the exception applied only to certain actions in relation to an “article” as defined in the Designs Act, and an “article” under that Act does not include “a sheet of paper whose only function is to carry the design”: (1992) 24 IPR 461 at 474-475.
- 29 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1, Exceptions to the Exclusive Rights of Copyright Owners*, (AusInfo, Canberra, 1998) at 153. The recommendation was made in the context that some current reliance on those provisions might still be “fair” under a revised “fair dealing” provision.