

‘THERE’S NOTHING WORSE THAN A MUDDLE IN ALL THE WORLD’: COPYRIGHT COMPLEXITY AND LAW REFORM IN AUSTRALIA

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I INTRODUCTION

Copyright is a legal doctrine under attack, and the perceived complexity, density and volume of the law are contributing to its increasingly negative reputation. In Australia the current statute, the *Copyright Act 1968* (Cth) (‘CA1968’), stands at nearly 700 pages.¹ The most recent major amendment to that law, the 221-page *Copyright Amendment Act 2006* (‘CAA2006’), added, among other provisions, new exceptions to infringement for ‘format-shifting’, ‘time-shifting’ and fair dealing for parody or satire; revised technological protection measure sections to satisfy Australia’s obligations under the *Australia–US Free Trade Agreement*; and a series of new criminal penalties for copyright infringement.²

During the passage of the CAA2006 one frustrated Labor parliamentarian, Duncan Kerr, remarked in the House of Representatives that:

I understand that this legislation will do nothing to improve the clarity, the ease of access or the capacity to understand copyright legislation. Copyright legislation now is a bugger’s muddle as far as the ordinary citizen is concerned. It is

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¹ As of 22 August 2011 the length of the CA1968 was 698 pages.

² *Australia–US Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005). See generally Melissa de Zwart, ‘The Copyright Amendment Act 2006: The New Copyright Exceptions’ (2007) 25 *Copyright Reporter* 4; Catherine Bond, Abi Paramaguru and Graham Greenleaf, ‘Advance Australia Fair? The Copyright Reform Process’ (2007) 10 *Journal of World Intellectual Property* 284; Kimberlee Weatherall, ‘Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia’s Recent Copyright Reforms’ (2007) 31 *Melbourne University Law Review* 967.

impossible to understand, dense and impenetrable. Some of that complexity is unavoidable. At a future date, one would hope we have the opportunity – if we are not too constrained by extra treaty legislation obligations that we accept – to run a bright line through all this and clarify it so that we can get back to simplified legislation that expresses the fundamental principles with less impenetrability and less complexity. That may be an idle dream ...³

Reform of this ‘muddle’ has been on government agendas for some time, but the undertaking of a comprehensive review has yet to be taken up by any federal government. The last major review was completed by the now-disbanded Copyright Law Review Committee in the late 1990s. In its 1998 and 1999 *Simplification of the Copyright Act 1968* reports, the Committee suggested drastic overhaul to the coverage of the 1968 statute,⁴ though these recommendations were not subsequently adopted. The 2005 ‘Fair Use’ review suggested that Australia might move to a more streamlined, though perhaps not simpler, ‘fair use’ exception approach, as espoused by the United States.⁵ However, the Howard Government introduced a further suite of statutory exceptions to infringement, rather than adopt the US model.⁶ Finally, in early 2011 the current Federal Attorney-General, Robert McLelland, announced that an Australian Law Reform Commission review will be undertaken of the digital copyright issues highlighted in the ongoing *Roadshow Films Pty Ltd v iiNet Ltd*⁷ litigation.⁸ Recent copyright reform agendas have therefore often focussed on specific issues arising under the current *CA1968* and how to plug a particular ‘gap’ in the law. In order to seal that ‘gap’, an additional section is added to the legislation. This in turn adds to the length and complexity of the law and the ‘muddle’ of copyright continues.

The muddled nature of copyright, however, is not a modern problem. *Routledge v Low*⁹ illustrates this issue, in both facts and obiter. In that case it was found that, where a work was first published in Great Britain, it would be

3 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2006, 39 (Duncan Kerr).

4 Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act 1968: Part 1 – Exceptions to the Exclusive Rights of Copyright Owners* (1998); Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act 1968: Part 2 – Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999).

5 See generally Attorney-General (Cth), ‘Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age’ (Issues Paper, Attorney-General’s Department, May 2005) <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseException-May2005>.

6 See, eg, *CA1968* ss 41A (‘Fair dealing for purpose of parody or satire’), 109A (‘Copying sound recordings for private and domestic use’), 110A (‘Copying cinematograph film in different format for private use’), 111 (‘Recording broadcasts for replaying at a more convenient time’).

7 *Roadshow Films Pty Ltd v iiNet Ltd* (No 3) (2010) 263 ALR 215; *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1.

8 Robert McLelland, ‘Address to the Blue Sky Conference on Future Directions in Copyright Law’ (Speech delivered at the Blue Sky: Future Directions in Copyright Law Conference, Sydney, 25 February 2011) <http://www.attorneygeneral.gov.au/www/ministers/mccllelland.nsf/Page/Speeches_2011_FirstQuarter_25February2011-AddresstotheBlueSkyConferenceonfuturedirectionsinCopyrightlaw>.

9 (1868) LR 3 HL 100 (‘*Routledge*’).

protected by copyright throughout the Empire; where it was first published outside Great Britain, the work would only be protected in that jurisdiction, and only if that jurisdiction had an applicable copyright law.¹⁰ The muddle was further compounded because, as Lord Cranworth noted:

It is remarkable that the modern statute, though it repeals all the former statutes, nowhere defines or declares what is to be understood by the word 'copyright.' It assumes copyright to be a well-known right, and legislates in respect to it accordingly.¹¹

That there was no central definition of the term 'copyright' and how it was to be interpreted was arguably reflected in the many British copyright statutes of the 18th and 19th centuries. The British laws were complex, lengthy, dense and were spread across '14 or 15 separate enactments', as a statute was passed in each separate subject area.¹² As was noted in an 1878 British Royal Commission report into British, colonial and international copyright, '[t]he law is not only arbitrary in some points, but it is incomplete and obscure in others.'¹³ This is despite the fact that, in many cases, those copyright laws had been discussed, debated and refined at length in Parliament.¹⁴ The provisions contained in these laws would arguably also not have been comprehended by the industries that the laws were intended to regulate.

These problematic statutes later provided the basis for the various pieces of colonial copyright legislation enacted in Australia. However, when those laws were 'transported' and introduced into the various colonies, there was little explanation with respect to the provisions that were included and, in turn, why certain sections were amended for the colonial context. Given this overarching historical background, it is perhaps not surprising that Australian copyright law today remains dense, lengthy and complex.

This article uses an analysis of some of the more unconventional provisions that appear in Australian copyright law as the basis for a broader consideration of how the current 'muddle' that the law is in might be resolved. In each case, either the provision itself or the decision-making behind the provision was complex and confusing, with each responsible legislature generally creating a greater copyright 'muddle' than the problem they were seeking to solve. However, while *prima facie* each of the individual sections is a 'muddle', when viewed together the provisions highlight a number of the deeper problems inherent in Australian copyright law, both historically and today. These issues go beyond length and complexity and the current 'one specific exception at a time'¹⁵ approach taken by

10 Ibid 113.

11 Ibid 112.

12 Staniforth Ricketson, *The Law of Intellectual Property* (Law Book, 1984) 77–8 [4.51].

13 Great Britain, Lord John James Robert Manners, *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights*, C 2036 (1878) viii [12].

14 See generally Catherine Seville, *Literary Copyright Reform in Early Victorian England* (Cambridge University Press, 1999).

15 Kimberlee Weatherall, *Building the Case for Fair Use in Australia – One Specific Exception at a Time* (1 March 2011) LawFont.com (<<http://www.lawfont.com/2011/03/01/building-the-case-for-fair-use-in-australia-one-specific-exception-at-a-time/>>).

the parliament to dealing with new copyright challenges. Rather, the provisions highlight the historical lack of and current need for a clearer, more principled rationale underpinning copyright law and policy in Australia; a consideration of what is the ‘distinctively Australian element’¹⁶ in this national law; and a determination of *who* the current audience for the *CA1968* is.¹⁷ In relation to the latter point, while previously copyright laws were arguably directed towards the ‘culture industries’, today the inclusion of provisions facilitating private and domestic use of copyright goods on the one hand, and the use of documents by competitor pharmaceutical companies on the other, indicates that there needs to be a reconsideration of *who* Australia’s national copyright legislation should speak to.¹⁸

This article proceeds as follows. It first evaluates section 36 of the *Copyright Act 1869* (Vic) 33 Vict no 350 (1869, Vic) (*‘CA1869’*) under which the Victorian legislature drastically reduced the period of protection available to what modern copyright terms ‘artistic works’, without explaining its decision to do so. Second, section 6 of the *Copyright Act 1905* (*‘CA1905’*) is considered; although this provision was vigorously debated in federal Parliament, it was arguably a public health provision masquerading as a copyright section, but with the opposite effect of what the government intended. Third, the article examines how *CA1968* section 109A, the format-shifting exception, originally did not legalise the type of infringing behaviour that the federal Government intended to permit. Fourth, section 44BA and its legislative and judicial history are examined, providing another example of a public health exception in a copyright statute, with the government again choosing to introduce another narrow exception into the *CA1968*. The conclusion to this article evaluates what can be drawn from the legal and practical context of these provisions and how these can inform modern copyright in Australia.¹⁹

II TERMS OF PROTECTION FOR ARTISTIC WORKS UNDER THE COLONIAL COPYRIGHT STATUTES

This examination of ‘copyright muddles’ commences with a provision from the first copyright statutes passed in what would eventually become ‘Australia’. By Federation, four colonies – Victoria,²⁰ South Australia,²¹ New South Wales²²

16 See Kathy Bowrey, Michael Handler and Dianne Nicol, *Australian Intellectual Property: Commentary, Law and Practice* (Oxford University Press, 2010) 5.

17 In the United States context, Pamela Samuelson has highlighted the need to reconsider current US copyright law and policy in light of the broader audience of the law today: ‘Preliminary Thoughts on Copyright Reform’ (2007) 3 *Utah Law Review* 551, 555.

18 Samuelson notes that, ‘today, copyright law applies to all of us’: *ibid*.

19 Unsurprisingly, this is not a complete listing of the unusual provisions that have appeared in Australian copyright statutes. However, the sections considered in this article provide a useful illustration of how the ‘muddle’ inherent in copyright law has developed since the first colonial copyright statute.

20 *CA1869*, as repealed by *Copyright Act 1890* (Vic) 54 Vict 1076 (1890, Vict) (*‘Copyright Act 1890’*).

21 *Copyright Act 1878* (SA) 41 & 42 Vict 95 (1878, SA) (*‘Copyright Act 1878 (SA)’*).

and Western Australia²³ – had introduced comprehensive copyright statutes, while another two – Queensland²⁴ and Tasmania²⁵ – had enacted modified versions. Although the copyright statutes introduced in the various colonies in the latter part of the 19th century were often streamlined into one statute, as opposed to their numerous British counterparts, problems with their drafting remained. Such a claim is particularly well-illustrated by the provision considered in this section, which began as section 36 of the Victorian *CA1869* and was then adopted in subsequent colonial copyright statutes.²⁶ Section 36, which provided for the subsistence of copyright in ‘every new and original painting drawing work of sculpture engraving and photograph’ previously or prospectively made in the colony of Victoria, ran for a total of 30 lines without a full stop and only sparse use of punctuation. In defence of the Victorian colonial legislature, it adopted that provision from the 29-line equivalent in the British *Fine Arts Copyright Act 1862*, 25 & 26 Vict, c 68 (*‘Fine Arts Copyright Act 1862’*);²⁷ yet the colonial legislature also changed some of the details of that provision, and it is in relation to those details that this examination of ‘muddled’ copyright sections begins.

Pursuant to section 36 of *CA1869*, the term of copyright protection depended on the type of work. In the case of paintings, drawings, works of sculpture, engraving and the designs contained in those engravings, copyright subsisted for 14 years. In contrast, photographs and their accompanying negatives were protected for a term of three years. The term of copyright commenced upon the making of the work.

The terms of protection for these categories of artistic works do not seem noteworthy until the periods granted are compared with the *Fine Arts Copyright Act 1862* and other British legislation upon which these provisions were based, as illustrated in Table A below. The first column identifies the relevant type of artistic work; the second column states the term of protection as provided in the colonial copyright statutes; and the third column illustrates the contrasting period of protection available to works made in the UK.

22 *Copyright Act 1879* (NSW) 22 Vict 20 (1879, NSW) (*‘Copyright Act 1879 (NSW)’*).

23 *Copyright Act 1895* (WA) 59 Vict 24 (1895, WA) (*‘Copyright Act 1895 (WA)’*).

24 *Copyright Registration Act 1887* (Qld) 51 Vict 2 (1887, Qld); *Copyright (Fine Arts) Registration Act 1892* (Qld) 56 Vict 6 (1892, Qld); *Copyright Registration Act 1898* (Qld) 62 Vict 13 (1898, Qld).

25 *Newspaper Copyright Act 1891* (Tas) 55 Vict 49 (1891, Tas).

26 *CA1869* s 36; *Copyright Act 1878* (SA) s 34; *Copyright Act 1879* (NSW) s 25; *Copyright Act 1890* (Vic) s 37; *The Copyright Act 1895* (WA) s 35(1).

27 *Fine Arts Copyright Act 1862* s 1. As will be discussed in greater detail, however, this statute only provided protection for paintings, drawings and photographs.

Table A: Comparison of Statutory Terms of Protection for Various Artistic Works in the Colonies and the United Kingdom

Type of Artistic Work	Statutory Term of Protection in the Colonies	Statutory Term of Protection in the United Kingdom
Paintings	14 years	Life + 7 years ²⁸
Drawings	14 years	Life + 7 years ²⁹
Engravings	14 years	28 years ³⁰
Sculptures	14 years	14 + 14 years ³¹
Photographs	3 years	Life + 7 years ³²

Copyright in these types of artistic works therefore ran for a significantly shorter period in the colonies than for equivalent works made in the United Kingdom. The Victorian colonial legislature made the decision to reduce the length of protection for such works. The muddle that arises in this instance is, therefore, *why* the Victorian Parliament, the first legislature to introduce the 14-year and three-year lengths of protection, chose to deviate from British copyright legislation on the issue of the length of protection for paintings, drawings, photographs, etc that were made in the colony of Victoria. There was some precedent for a reduced length in the English statutes, albeit solely in relation to engravings and sculptures. However, as illustrated in the table above, those terms of protection were also modified by the introduction of the Victorian *CA1869*.³³

The muddle is compounded by the fact that no reason was given for this amendment by the Victorian legislature. Parliamentary debate during the passing of the 1869 statute fails to shed light on this issue. The Attorney-General, Mr G Paton Smith, stated at the second reading of the Copyright Protection Bill, ‘that the period to which copyright in England extends is considerably reduced in this Bill, so that I don’t think the operation of the measure will affect injuriously the interests of the general community.’³⁴ The way that this comment is phrased is

28 See *Fine Arts Copyright Act 1862* s 1.

29 Ibid.

30 Originally, under *Engraving Copyright Act 1735*, 8 Geo 2, c 13, s 1, copyright in engravings ran for 14 years from first publication. This was extended to 28 years under *Engraving Copyright Act 1766*, 7 Geo 3, c 38, s 7.

31 *Sculptures Act 1814*, 54 Geo 3, c 56, ss 2, 6. The additional 14 years was provided if the author was still alive at the expiration of the first 14-year period.

32 See *Fine Arts Copyright Act 1862*, 25 & 26 Vict, c 68, s 1.

33 Pursuant to *Engraving Copyright Act 1735*, 8 Geo 2, c 13, s 1, proprietary rights in engravings ran for 14 years. However, by *Engraving Copyright Act 1766*, 7 Geo 3, c 38, s 7, which preceded the *CA1869* by just over 100 years, this period had already been extended to 28 years. In a similar vein, under *Sculptures Act 1814*, 54 Geo 3, c 56, s 6, a period of 14 years’ protection applied to sculptures. However, it was also provided that if the maker of the sculpture was still living after that initial period then copyright would extend for another 14 years, although there were exceptions to this rule.

34 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 1869, 1837 (G Paton Smith).

particularly interesting: did the Attorney-General believe that this provision would not ‘affect injuriously’ the general community as *authors*, or the public more broadly? However, the context of this discussion makes it difficult to ascertain whether he was explicitly referring to the reduction in length of protection for artistic works. The issue was also not analysed in any subsequent commentary,³⁵ case law³⁶ or the 1878 British parliamentary review into copyright mentioned above, beyond a general observation on the problems of having different periods of protection for works of fine art.³⁷

Without any firm evidence, it is only possible to hypothesise as to why the Victorian Parliament reduced these terms of protection. Perhaps, at that time in the colonies, the cultural practices of painting, drawing and photography were not as developed as in the United Kingdom. The Victorian Parliament may have considered that these types of practices did not warrant the same length of protection as books. Yet many of Australia’s great artists were prolific during this period, including Frederick McCubbin, Tom Roberts, and Arthur Streeton, suggesting that artistic culture in Australia grew steadily in the latter part of the 19th century.

In the alternative, the Victorian Parliament perhaps believed that there was not as great a demand for these types of creations; or, given that such works were valuable aside from their copyright protection, artistic works did not justify as an extensive period of protection as books. Such a proposition is in part illustrated by the fact that, although copyright subsisted in every artistic work that ‘shall be or shall have been made in’ Victoria, thus applying retrospectively, copyright did not subsist in works that had been sold prior to the commencement of the Act. The Parliament may have believed that such works had already been of financial benefit to the author, and subsequently copyright protection was not justified.

Another possibility is what may be termed as the ‘art-as-information’ theory. Bonyhady suggests that colonial artists had two motivations when creating paintings of ‘wilderness subjects’: the expression of information about this subject through the artistic work.³⁸ He argues that colonial artists ‘balanced their romantic vision of the landscape with a desire to produce useful documents regarding topography, objects of scientific interest and potential places of residence or tourism.’³⁹ The Victorian Parliament may have believed that, by introducing a shorter period of protection, such works would enter the public

35 See Acland Giles, ‘Literary and Artistic Copyright in the Commonwealth – Part I’ (1906) 3 *Commonwealth Law Review* 107, 112–13, where it was noted that the South Australian period of protection for these works differed from the UK term, although there was no analysis of why this was the case.

36 In *In re Martin; Ex parte The Equitable Life Assurance Society of the USA* (1884) 10 VLR (L) 196, 198, footnote a, Holroyd J noted that ‘[t]he copyright given by sec. 36 of “*The Copyright Act 1869*” lasts for a term of years, and not for the life of the author and seven years afterwards, as in England under se 1 of 25 & 26 Vic c 68.’ (emphasis in original).

37 Manners, above n 13, 8–9 [91].

38 Tim Bonyhady, *Images in Opposition: Australian Landscape Painting 1801-1890* (Oxford University Press, 1985) 87.

39 Ibid.

domain sooner and the colonial government would therefore have a repository of artistic works that could be reproduced for educational, tourism and development purposes.⁴⁰ As Bonyhady further opines:

The success of paintings in informing city dwellers of the appearance of distant parts of the colonies was probably slight, due to the small size of the audience which viewed these works. Yet through the combination of paintings, prints and engraved newspaper illustrations, it seems clear that these artists helped to educate a wide cross-section of the colonists about the appearance of their new home.⁴¹

Such artistic works therefore held this additional informative and, consequently, commercial value.

Thus, the distinctly Australian copyright ‘muddle’ in this sense was caused not by the provision itself – the reduction in the term of protection for paintings, drawings, sculptures, engravings and photographs – but the decision-making process behind the introduction of this provision. No evidence was given for why this reduction occurred. In contrast, in the next three examples, very clear reasons are given for the inclusion of a particular provision in a copyright statute, although as will be discussed below, the underlying copyright rationales adopted by the parliament in their introduction differ greatly. The next ‘muddle’ is a well-intentioned provision that arguably had unintended consequences.

III ‘BLASPHEMOUS, INDECENT, SEDITIONOUS, OR LIBELLOUS’ WORKS AND THE *COPYRIGHT ACT 1905*

Following Federation, the *Patents Act 1903* (Cth), *CA1905*, *Trade Marks Act 1905* (Cth) and *Designs Act 1906* (Cth) were all introduced in quick succession by the Commonwealth Parliament. The *CA1905* was a thoroughly debated statute and its drafters took pride in their belief that the legislation had been created using clear, plain language. Indeed, during the passing of the successor to the 1905 statute, the *Copyright Act 1912* (Cth), Senator Keating, responsible for the bulk of the drafting of *CA1905*, stated with pride that:

40 *CA1869* s 56 also contained a section that provided it was not an infringement of copyright to copy any painting held in the ‘Museum of Industry and Art the National Gallery or the Melbourne Library’; Lionel Bently, ‘The “Extraordinary Multiplicity” of Intellectual Property Laws in the British Colonies in the Nineteenth Century’ (2011) 12 *Theoretical Inquiries in Law* 161, 179; Kathy Bowrey, ‘“The World Daguerreotyped – What a Spectacle!” Copyright Law, Photography and the Importance of a Public Visual Space’ (Paper presented at the Third International Society for the History and Theory of Intellectual Property Workshop, Griffith University, 5–6 July 2011) 18–9 (copy on file with author).

41 Bonyhady, above n 38, 95. See also Anne-Marie Willis, *Picturing Australia: A History of Photography* (Angus & Robertson, 1988) 74.

If one takes the trouble to look through the digest of the *Commonwealth Law Reports* in connexion with the copyright law of Australia, it will be found that very few cases have arisen under it [the *CA1905*]. The language of the law is perfectly clear. It is lucid. It has been acted upon. There has been no difficulty.⁴²

Such a statement is difficult to believe given that many of the provisions of the *CA1905* were pulled together from a plethora of different sources, including the Berne Convention,⁴³ which by 1905 had already undergone its first revision, and two English Bills introduced into the House of Commons and House of Lords in 1900, aimed at consolidating the existing laws on literary and artistic copyright respectively.⁴⁴ However, while Senator Keating's belief concerning the clarity of the language of the *CA1905* is arguably correct, the inclusion of certain provisions in the statute is confusing. This is perhaps best illustrated with respect to section 6 of the *CA1905*, which parliamentary debates indicate emanated from the UK Bill on literary copyright: 'No copyright, performing right or lecturing right shall subsist under this Act in any blasphemous, indecent, seditious, or libellous work or matter.'⁴⁵

Previously, similar provisions were contained in customs statutes of both the UK and colony of Victoria, where, for example, '[b]laspheous indecent or obscene prints paintings books cards lithographic or other blasphemous indecent or obscene articles' had to be forfeited and would be subsequently destroyed by the relevant authorities.⁴⁶ Similarly, a number of UK courts had either refused to enforce copyright or grant certain remedies on the basis that the work in question was considered immoral or obscene.⁴⁷ However, this was the first provision of its type to be included in a copyright statute and, as no similar section was included

42 Commonwealth, *Parliamentary Debates*, Senate, 23 October 1912, 4512 (John Keating). But see *Finn v Pugliese* (1918) 18 SR (NSW) 530.

43 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886 (entered into force 12 May 1887). See also *Additional Act Amendment Articles 2,3,5,7,12, and 20, of the Berne Convention of September 9, 1886, and Numbers 1 and 4 of the Final Protocol Indexed Thereto of May 4, 1896*.

44 See Explanatory Memorandum, Copyright Bill 1905 (Cth) <<http://www.aph.gov.au/library/pubs/explanmem/docs/1905CopyrightSen.pdf>>. According to this memorandum, the two UK Bills were the 'Copyright Bill (House of Commons, no 295, vol 1, 1900) to amend and consolidate the Law relating to Literary Copyright' and the '1900 Copyright (Artistic) Bill (House of Lords, Bill 192, vol 4, 1900) to amend and consolidate the Law relating to Artistic Copyright.' Further inspiration came from the *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights* (see Manners, above n 13) and *The Copyright Act*, RSC 1886, c 62. See also Robert Burrell, 'Copyright Reform in the Early Twentieth Century: The View from Australia' (2006) 27 *Journal of Legal History* 239, 249.

45 For example, in a discussion of whether the word 'indecent' should be substituted with the term 'immoral', Senator Keating stated that, '[i]t will be convenient to adhere to the words of the Copyright Bill as passed by the House of Lords as far as possible, so that in the event of the Imperial Parliament hereafter passing this legislation, our measure will be uniform with theirs.': Commonwealth, *Parliamentary Debates*, Senate, 13 September 1905, 2155 (John Keating).

46 *Customs Act 1890* (Vic) 54 Vict 1081 s 49. See also *Customs Consolidation Act 1853*, 16 & 17 Vict, c 107, s 44; *Customs Consolidation Act 1876*, 39 & 40 Vict, c 36, s 42. The term 'blasphemous' only appears in the Victorian version of this provision.

47 See generally David Saunders, 'Copyright, Obscenity and Literary History' (1990) 57 *English Literary History* 431.

in the later *Copyright Act 1911* (Imp), 1 & 2 Geo 5, c 46, Australia holds the dubious honour of being the only jurisdiction to enshrine such a provision in statute.

The effect of section 6 was that any work that was ‘blasphemous, indecent, seditious, or libellous’ was not entitled to copyright protection, as opposed to the material being forfeited and subsequently destroyed, although a threshold question arises as to how and when this would have been evaluated.⁴⁸ Thus, from the outset this provision can be considered somewhat self-defeating; these works would automatically enter the public domain by virtue of non-subsistence of copyright and there would have been no legal restriction on their reproduction, therefore allowing their allegedly undesirable content to spread.

It is arguably not difficult to understand why such works would have been singled out for negative treatment in a copyright statute, given that, to the state, these works would not have warranted the same ‘incentive’ for creation as other works. The Parliament may also have wished to be seen as discouraging the development of a profitable market for such creations within Australia. Such issues were confirmed in the course of parliamentary debate, where Senator Symon noted that:

I do not think, for instance, that anyone would wish to give the advantage of copyright to books like *The Fruits of Philosophy*. There may be a demand for books of that character greater than for other books which could be mentioned. What we want to stop is the making of such books a profitable property in the hands of their authors. For myself, I say at once that such a book as *The Fruits of Philosophy* should not have the advantage of copyright. That is what we ought to stop.⁴⁹

This statement is evidence of copyright being used for the purposes of censorship, albeit by denying protection in order to dissuade authors from writing such works and publishers from printing them.

Further, although this provision was adopted from the UK Bill, there were very local reasons for including it in an Australian statute – specifically to do with public health. In this respect, it is interesting that *The Fruits of Philosophy* was identified by Senator Symon as one of the texts that should not enjoy the ‘advantage of copyright’. *The Fruits of Philosophy* was a pamphlet written by Charles Knowlton in the 19th century advising married couples on taboo subjects such as contraception, home remedies for sexual arousal, and the female orgasm. The publishers of the pamphlet were tried in the UK for its production.⁵⁰ Although parliamentary debates do not refer to it, the introduction of section 6

48 Such an issue would arguably only have arisen in the course of the registration of the work (see Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1905, 7251–3) or in legal proceedings where the defendant may have argued this provision as a part of their defence (see Commonwealth, *Parliamentary Debates*, Senate, 13 September 1905, 2158 (John Keating).

49 Commonwealth, *Parliamentary Debates*, Senate, 13 September 1905, 2156 (Sir Josiah Symon).

50 See generally Sripati Chandrasekhar, “A Dirty Filthy Book”: *The Writings of Charles Knowlton and Annie Besant on Reproductive Physiology and Birth Control and an Account of the Bradlaugh–Besant Trial* (University of California Press, 1981); Peter Coleman, *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia* (Angus & Robertson, revised ed, 1974) 49–52.

followed the 1904 report of the Royal Commission on the Decline of the Birth-Rate and on the Mortality of Infants in New South Wales, which noted that there had been a decline in the birth rate in New South Wales of over 20 per cent in the 1891–1900 period⁵¹ and admonished the increase in advertisements and other publications that advised on the avoidance of procreation.⁵² Although *The Fruits of Philosophy* was not explicitly referred to in the 1904 report, the publishers of the text, Charles Braudlaugh and Annie Besant, were named as proponents of ‘propaganda of limitation of families’.⁵³

Thus, as noted by Senator Symon, *The Fruits of Philosophy* was clearly one of the works to which, in light of its subject matter and arguably the declining birth rate, the federal Parliament intended that section 6 would apply. Unfortunately for the Parliament, multiple Australian editions were produced by pre- and post-Federation publishers; one edition was printed in 1905.⁵⁴ Popular colonial publisher George Robertson & Co also published a set of lectures delivered in Australia by publisher Annie Besant on the controversial issue of theosophy⁵⁵ – and none of these publications appeared to attract the ire of authorities.

This may have been due to the 1888 decision *Ex parte Collins*,⁵⁶ where it was held that materials of this nature were not ‘obscene’ under law. In that case, Darley CJ, Windeyer and Stephens JJ were asked to overturn a writ against the sale of the Annie Besant publication ‘The Law of Population: Its Consequences and its Bearing upon Human Conduct and Morals’ on the basis that it was not an obscene publication.⁵⁷ Although Darley CJ dissented, Windeyer and Stephens JJ held that the matter was not obscene. As Windeyer J noted, ‘[t]he fact that a book may excite prurient thoughts if used for that purpose by the low-minded and the young does not make it obscene.’⁵⁸

Thus, in light of the continued publication of such material and the fact that the judiciary had previously held that such material was not ‘obscene’, the intention of the Parliament in introducing section 6 appears to have backfired. The intended effect of section 6 may have been to restrict the publication and proliferation of such ‘obscene’ literature, indicating that in this instance a copyright provision was introduced partly in an attempt to solve a bigger

51 New South Wales, Royal Commission on the Decline of the Birth-Rate and on the Mortality of Infants in New South Wales, *Report, Together with Copies of Commissions, Diagrams, Statistical Evidence, and Statistical Exhibition, &c* (1904) vol 1, 6 [13].

52 Ibid 16 [81].

53 Ibid 17 [85].

54 See Charles Knowlton, *Fruits of Philosophy: The Private Companion for Young Married People – With Complete Illustrated List of Preventive and Surgical Appliances* (Will Andrade, 1905).

55 Annie Besant, *Australian lectures 1908, Delivered at Cities in the Australian Commonwealth During Her Tour in the Winter of 1908* (George Robertson & Co, 1908).

56 (1888) 9 LR (NSW) 497.

57 Ibid 499.

58 Ibid 515. See also G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press, 2002) 389–90. According to Woods, both Windeyer J and his wife were influenced by *The Fruits of Philosophy*, believing ‘that contraception and family planning were fundamental to the removal of [the] disadvantage’ that affected women in the colonies: at 390.

problem: the decline of the birth rate and increased use of contraception. Yet denying copyright and deeming such works to enter the public domain does not appear to have hindered their publication, success, or the publication of related works. The Parliament simply created a ‘muddle’ that defeated its control over the works it intended to censor, using this provision.

IV THE IPOD EXCEPTION AND THE *COPYRIGHT AMENDMENT ACT 2006*

As this article examines, Australian copyright law has generally always been plagued by muddles, but occasionally it is the silence of the *CA1968* with respect to a particular issue that results in a muddle. This is perhaps best illustrated by the lack of permission contained in the *CA1968* for ‘time-shifting’ and ‘format-shifting’, at a time when both practices were prevalent in this country. Indeed, ‘time-shifting’ – the copying of a television broadcast onto a videotape or DVD, using either a VCR or DVD burner – had been a cultural norm for a significant period of time. This section will discuss the format-shifting introduced under the *CAA2006* and the difficulty the legislature had in crafting this ‘iPod exception’.

In 2005 the Federal Attorney-General’s Department undertook a ‘fair use review’, seeking opinions on whether Australia should introduce a broad ‘fair use’-style exemption or additional exceptions to infringement. As noted in the Issues Paper accompanying the review, an investigation into the inclusion of such a provision was part of a 2004 election pledge made by the Howard Government, although the review was also timely given the passing of the *Australia–US Free Trade Agreement 2004*.⁵⁹ That agreement required broad changes to Australian copyright, enacted as part of the *US Free Trade Agreement Implementation Act 2004* (Cth) and *CAA2006*, that ‘strengthen the ambit of copyright protection without also adopting an open-ended fair use exception which provides a balancing element for users in the United States.’⁶⁰ As part of that review, the deficiencies of the current law with respect to modern technologies and usages of copyright subject matter were noted and format-shifting was recognised as one of the uses that needed to be legitimised under Australian copyright.⁶¹

The ‘fair use’ model was abandoned in favour of a series of specific exceptions, with format-shifting identified as one of these potential new exceptions.⁶² Yet in creating these new exceptions, as opposed to a broader defence that could cover a variety of non-infringing conduct, the government created a bigger muddle than the problem it intended to solve.

In his second reading speech for the Copyright Amendment Bill 2006 (Cth), Attorney-General Philip Ruddock noted that the purpose of the proposed format-shifting exception, section 109A, was so ‘that people can transfer music from

59 Attorney-General (Cth), above n 5, 4 [1.2].

60 Ibid 14 [6.2].

61 Ibid 27–8 [11.8]–[11.15].

62 See above n 6.

CDs they already own onto their iPods or other music players. Millions of consumers will no longer be breaching the law when they record their favourite TV program or copy CDs they own in a different format.’⁶³ Yet in the same speech the Attorney-General recognised the already apparent inadequacies of this provision – specifically the fact that section 109A as drafted would not legalise the shifting of music from a CD onto an iPod.⁶⁴ The act of ‘shifting’ a song from a CD to an iPod involves two stages – transferring the song from the CD to iTunes, then transferring the song from iTunes to the iPod. In both cases a copy of the song is made and both copies require a permanent format.⁶⁵ However, section 109A, in its original form, only allowed a ‘temporary’ copy of the song to be made when the CD version was being transferred to an iPod; given that iTunes, as the intermediary software, requires a permanent copy of the song as part of the process of transfer, this would not be possible.

The Senate Standing Committee on Legal and Constitutional Affairs, responsible for the parliamentary scrutiny of the Copyright Amendment Bill 2006 (Cth), also highlighted the issue after numerous submissions noted the deficiency of the proposed provision with respect to iPods and other MP3 copies.⁶⁶ The Committee ultimately recommended that section 109A be revised ‘with respect to format-shifting to specifically recognise and render legitimate the ordinary use by consumers of digital music players’⁶⁷ – that is, to be revised to achieve the intended effect of the provision.

The government took heed of these comments and revised section 109A. The provision now states:

- (1) This section applies if:
 - (a) the owner of a copy (the *earlier copy*) of a sound recording makes another copy (the *later copy*) of the sound recording using the earlier copy; and
 - (b) the sole purpose of making the later copy is the owner’s private and domestic use of the later copy with a device that:
 - (i) is a device that can be used to cause sound recordings to be heard; and
 - (ii) he or she owns; and
 - (c) the earlier copy was not made by downloading over the internet a digital recording of a radio broadcast or similar program; and

63 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006, 1 (Philip Ruddock).

64 Ibid.

65 Kimberlee Weatherall, Submission No 54 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Copyright Amendment Bill 2006*, October 2006, 3.

66 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Copyright Amendment Bill 2006 [Provisions]* (2006) 22–4 [3.49]–[3.57].

67 Ibid 42–3 [3.148].

- (d) the earlier copy is not an infringing copy of the sound recording, a broadcast or a literary, dramatic or musical work included in the sound recording.
- (2) The making of the later copy does not infringe copyright in the sound recording, or in a literary, dramatic or musical work or other subject-matter included in the sound recording.

Therefore, section 109A today provides a defence to infringing behaviour that, although prevalent a little under 10 years ago, is today becoming increasingly outdated. Before its introduction, its absence provided a muddle, as it was unclear why such a common practice that did not affect the interests of a copyright owner should not be legitimate under the *CA1968*. In its first iteration its drafting was muddled, unable to capture the behaviour that it sought to legitimise. Today, five years after its inclusion, the provision is decreasing in usefulness for consumers, as content is increasingly made available for download online. Within 10 years of its introduction, it will arguably be a muddle as to why the government chose to introduce such a narrow exception, rather than a broader style provision that will accommodate changed consumer behaviours.

V PRODUCT INFORMATION FOR PRESCRIPTION MEDICINE AND THE *THERAPEUTIC GOODS LEGISLATION AMENDMENT (COPYRIGHT) ACT 2011 (CTH)*

The most recent amendment to the *CA1968* involved the introduction of a new and somewhat unusual statutory exception in section 44BA. That provision provides in part:

- (2) The following acts are not an infringement of any copyright subsisting under this Part in a work that is product information approved under section 25AA of the *Therapeutic Goods Act 1989* in relation to medicine:
 - (a) supplying, in Australia, some or all of any product information that is approved under that section in relation to medicine;
 - (b) reproducing, in Australia, some or all of the information referred to in paragraph (a);
 - (c) publishing, in Australia, some or all of the information referred to in paragraph (a);
 - (d) communicating, in Australia, some or all of the information referred to in paragraph (a);
 - (e) adapting, in Australia, some or all of the information referred to in paragraph (a);
- to the extent that the supply, reproduction, publication, communication or adaptation is for a purpose related to the safe and effective use of the medicine referred to in paragraph (a).

As noted in the parliamentary debate accompanying the introduction of the amending statute, section 44BA of the *Therapeutic Goods Legislation Amendment (Copyright) Act 2011* (Cth) allows companies producing generic medications to reproduce the product information that accompanied the original medication, for the purpose of satisfying the requirements of the *Therapeutic Goods Act 1989* (Cth).⁶⁸ In doing so, and adding a single provision of this nature, the Labor Government arguably further contributed to the ‘copyright muddle’ previously identified by former member Duncan Kerr.

Defences to copyright infringement are generally designed to allow greater access to and re-use of cultural and educational creations, as noted above with respect to section 109A. A provision ensuring that the reproduction, publication or adaptation of medical product information will not constitute an infringement of copyright is therefore somewhat unusual,⁶⁹ though its ‘public health’ objective is clearer than with respect to section 6 of the *CA1905*. However, section 44BA was introduced as a ‘result’ of a case that was actually decided after the new exception was introduced, finding that the reproduction of product information would constitute an infringement of copyright.

In October 2008 pharmaceutical company Sanofi-Aventis Australia was awarded an interlocutory injunction against fellow pharmaceutical manufacturer Apotex, preventing Apotex from reproducing and supplying any product information that accompanied the Arava medication developed by Sanofi-Aventis or the proposed Apotex generic medication.⁷⁰ Previously, in July 2008, Apotex had applied to and been granted registration for generic versions of the Arava medication under the Australian Register of Therapeutic Goods.⁷¹ As part of that process Apotex was required to submit product information with its proposed medication; in creating that product information, Apotex had ‘copied a document identified as Arava product information dated 12 February 2007’ but it argued that this either did not constitute an infringement of copyright or in the alternative that it possessed an ‘implied licence’ to undertake such a reproduction.⁷²

In seeking to establish that it did not infringe copyright in the Arava document, Apotex, while admitting that the document was both a literary work and that ‘it copied a substantial part,’⁷³ sought to rely upon recent High Court and Full Federal Court reasoning with respect to the originality and authorship requirements of literary works. On the basis of *IceTV Pty Ltd v Nine Network Australia Pty Ltd*⁷⁴ and *Telstra Corporation Ltd v Phone Directories Company*

68 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1363 (Catherine King).

69 But see *CA1968* s 44B.

70 *Sanofi-Aventis Australia Pty Ltd v Apotex Pty Ltd (No 3)* [2011] FCA 846 (29 July 2011) [284] (‘*Sanofi-Aventis (No 3)*’).

71 *Ibid* [6].

72 *Ibid* [8]. The case also addressed issues pertaining to patent law and misleading and deceptive conduct, though these will not be considered in this article.

73 *Ibid* [291].

74 239 CLR 458 (‘*IceTV*’).

*Pty Ltd*⁷⁵ Apotex argued that Sanofi-Aventis needed to identify all authors of its product information in order for the works to qualify as ‘original literary works’ and that any preparatory work that was not directly related to the reduction of the work to a material form could not be considered.⁷⁶ Thus, ‘only a small part of what is reproduced is itself original’ and therefore could not be considered a substantial part.⁷⁷

Justice Jagot examined the extensive nature of the work involved in creating the various versions of the Arava product information and subsequently rejected the arguments of the defendant.⁷⁸ His Honour held that the works under consideration in *IceTV* (a television schedule) and *Phone Directories* (a telephone directory) were distinct from the product information documents.⁷⁹ His Honour distinguished *IceTV*, where there was a limitation on the way that time and title information of television shows could be expressed, and the product information developed by the plaintiff, opining that:

While the Regulatory Guidelines prescribe the general structure of PIs, it is plain from the evidence that the way in which the information if [sic] presented – that is, the particular form of expression used to convey the information – is very much at large. Moreover, it is plain that the information selected to be part of PIs (within the very general confines established by the Regulatory Guidelines), and the form in which that information is expressed, is the result of significant intellectual effort on the part of the authors of such documents. Apotex’s submission that what was involved in the production of the Arava works was merely a ‘cut and paste’ job from other documents is untenable.⁸⁰

His Honour also rejected Apotex’s arguments that each author be identified and that the preparatory work undertaken by Sanofi-Aventis employees did not go to the creation of the product information documents.⁸¹ Infringement was subsequently established.⁸²

Justice Jagot also dismissed the suggestion that an ‘implied licence’ in favour of manufacturers of later generic versions of medicines to reproduce or make a ‘close copy’ of the product information created by the original inventor existed.⁸³ Justice Jagot noted that approval under the *Therapeutic Goods Act 1989* (Cth) ‘[did] not require [product information] for a generic or later version of a drug to be identical to the PI for the original drug.’⁸⁴ His Honour also found that there was no public policy basis on which to ground such a licence, holding that:

There are many circumstances in which it might be said that a particular statutory monopoly, on reflection, is contrary to the public interest. The legal consequence of that is not that the statutory monopoly simply ceases to exist on recognition of the inconsistency with public policy. It becomes a matter for the legislature to

75 (2010) 194 FCR 142 (*‘Phone Directories’*).

76 *Sanofi-Aventis (No 3)* [2011] FCA 846 (29 July 2011) [326]–[331].

77 *Ibid* [328].

78 *Ibid* [293]–[315].

79 *Ibid* [348].

80 *Ibid*.

81 *Ibid* [351]–[358].

82 *Ibid* [360].

83 *Ibid* [365].

84 *Ibid* [373].

determine whether the monopoly should continue or be modified. In the present case, the legislature has made its determination and has passed the amendment Act.⁸⁵

That amending legislation, the *Therapeutic Goods Legislation Amendment (Copyright) Act 2011* (Cth), was introduced into Parliament in February 2011 and passed a little over a month before the decision of Jagot J was handed down. The amending provision, section 44BA, was introduced to specifically deal with the problems addressed by the *Sanofi-Aventis (No 3)* litigation,⁸⁶ but the legislature did not wait until the decision had been announced to pass the relevant legislation. This arguably indicates that the Parliament believed that the arguments of Apotex could not be supported under the current law. Yet the fact that the government has added such a provision to the *CA1968*, in its current state, has not escaped comment. As noted in an informal context by Weatherall:

This strikes me as perhaps one of the clearest arguments I've seen in a while for a fair use exception or other flexible exception in Australia. The very idea that someone has had to draft, and now the legislature has to pass, legislation to add this specific exception in is a clear indication that there just isn't enough flexibility in the legislation.⁸⁷

While there are strong public health reasons behind this decision – though, as noted by Jagot J, there is no requirement under the *Therapeutic Goods Act 1989* (Cth) that producers of generic medications use identical or substantially similar product information – the comments made by Weatherall highlight the fact that, at a time when copyright is already long and dense, adding a provision of this nature does nothing to instil greater public confidence in copyright law. It simply further contributes to the existing ‘muddle’ of copyright, and past experience shows that Australian governments prefer to add to copyright one provision at a time, rather than undertake a comprehensive review and reform. On that basis, this article will conclude with lessons for reform that can be drawn from the four sections considered above.

VI CONCLUSION: LESSONS FOR REFORMING AUSTRALIAN COPYRIGHT LAW

This paper has considered four provisions and decisions unique to Australian copyright law. When viewed separately, each section is an intriguing example of copyright doctrine. Taken together, these sections hint at the bigger problems underlying Australian copyright today. This conclusion will briefly consider one of the themes emerging from such a consideration, highlighted in the introduction to this article, with a view to reforming the current copyright system.

Debates about copyright, and what this doctrine is intended to achieve, are arguably as old as the statutory basis for the law. The provisions in this article

85 Ibid [375].

86 Explanatory Memorandum, *Therapeutic Goods Legislation Amendment (Copyright) Bill 2011* (Cth) 1.

87 Weatherall, above n 15.

highlight both the previous and current need for a clearer approach to copyright law and policy in Australia, with greater emphasis on the ‘fundamental principles’ that Kerr mentioned in the House of Representatives, extracted above. The comment of Lord Cranworth in *Routledge*, extracted above in the introduction, indicates that the historical statutes failed to ‘define or declare’ what the term ‘copyright’ meant. When the federal Parliament sought to pass the *CA1905* it discussed the concept of ‘copyright’ in greater detail. The speech by Senator Symon, extracted above with respect to section 6 of *CA1905*, highlighted what the federal Parliament, at least, sought to achieve with the law: copyright was seen as an ‘advantage’, a ‘profitable property’, to be conveyed upon authors. Yet that reasoning was not reflected in the copyright legislation of the colonies. If copyright was intended to be an ‘advantage’ or ‘profitable property’, why did the Victorian colonial legislature choose to limit the term of copyright quite drastically for all manner of artistic works? Reducing the term of copyright would limit the ‘advantage’ in such circumstances. Further, as noted above, the Attorney-General spoke about the ‘disadvantage’ that the ‘general community’ might experience as a result of this term revision, rather than the artists that, under the new statute, would be affected detrimentally by the lower duration of protection.

Problems in relation to what copyright should achieve remain today. If copyright is meant to bestow an advantage on an author, it is questionable why, in the case of the *Therapeutic Goods Legislation Amendment (Copyright) Act 2011* (Cth), an exception was created for the use of whole product information documents, when a Federal Court judge would later emphasise the ‘significant intellectual effort’ inherent in such works. Copyright seeks to bestow an ‘advantage’ on an author regardless of the content of the work. However, in this example, the interests of public health trumped copyright protection and a specific, whole-of-document exception was introduced to remedy that challenge. Is this the purpose that copyright is intended to serve?

It may be that a fair use-style provision, as discussed at earlier points in this paper, would not have provided any increased surety for the use of product information, or for the transfer of music onto an iPod, as now contained in section 109A. However, with a clearer view of what copyright is intended to achieve, more permissive provisions could be introduced into the *CA1968*, to provide the flexibility to a statute that is today rarely described as anything other than long, dense and complex.

Copyright in Australia has arguably always been a ‘muddle’. A more reasoned approach to determining what should appear in current copyright legislation would assist in dissipating that muddle. Thus, the next copyright law review should arguably be directed towards a discussion of the principles that should ideally underpin Australian copyright law and policy, rather than the previous, one-challenge-at-a-time approach that has becoming increasingly prevalent and decreasingly useful for effective law reform.