

# Free Speech and

# Media Law

# Notes

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# Copyright

What is it?

- The right of the author or maker of a ‘work’ to do or authorise others to do certain acts with works protected by copyright
- Effectively gives owner of copyright work, the right to **stop** the dissemination of that work or a substantial part of the work while that work remains in copyright
- Significant impact on free speech

## Sources of law

- Derived from s51 Constitution – makes it a Commonwealth power
- Federal Statute: Copyright Act 1968 (as extensively amended)
- International Treaties and Standards – Berne Convention 1886, TRIPS Agreement 1994, US-Australia Free Trade Agreement 2004  
Adhere to conventions
- Case law  
Starting point is legis but there is a huge amt of case law on it
- US and UK Copyright Law

## Rationales

- Freedom of speech: a number of rationales eg: effective for functioning of democratic process; general public needs access to wide array of views and information
- Copyright:
  - Common law countries (au, uk, usa, economic right): incentivise creation leading to widespread dissemination of works
  - Civil law countries (france?): protection of the integrity of the author and his/her right to express artistic self

## Copyright and Free Speech

- Rationales suggest can co-exist? Yes, both promoting freedom of expression.
- David Lindsay: “copyright protects freedom of expression by providing an incentive for the production of expression that might otherwise not be produced and by ensuring the integrity of published expression” (page 69 of Chapter)  
Author knows pub is protected

## Copyright and Free Speech: the Courts

- US Courts: copyright can co-exist with First Amendment (which protects free speech)
  - Copyright acts as “engine of free expression”
  - Copyright contains “internal safeguards” such as idea-expression dichotomy and “fair use” exception  
Protects the expression but not the idea.
- UK Courts: rare circumstances where freedom of expression will come into conflict with copyright – because of exceptions and idea-expression dichotomy
  - Freedom of expression should not normally carry with it the right to make free use of another's work

## Structure of the Copyright law – as it affects free speech

- Is the work protected by copyright? What is the threshold? What can be done with it?  
If you establish copyright, owner can ask for injunction, remedy for copyright can stop free speech

- Does the work fall into a category of protected work; if so:
- Does the author or maker meet the thresholds to qualify for protection; if so
- Has copyright expired?
- Does the “exercise of free speech” infringe copyright?
  - Does it reproduce a substantial part of the copyright work; if so:
  - Are any exceptions or defences available so that the use is not infringing?

### Is the work protected by copyright?

#### -Categories of Work

- Literary works (journal articles, novels, screenplays, poems, song lyrics, reports, computer programs) Doesn't give exhaustive definition. INCLUSIVE definition.  
Can injunction on people trying to pre release HP books as JK Rowling is copyright owner
- Artistic works (paintings, drawings, cartoons, photographs, plans, maps). Is a statement of what that term means, different from literary, doesn't need to be artistic merit, just need to fall in these categories! If not then its not protected.)  
EG: Monkey take selfie.
- Musical works  
No definition
- Dramatic works  
includes:
  - (a) a choreographic show or other dumb show; and
  - (b) a scenario or script for a cinematograph film;
 but does not include a cinematograph film as distinct from the scenario or script for a cinematograph film. Not an exhaustive definition.
- Films, typographical arrangements  
Assassination of president Kennedy. Media bid for rights to air the film, and Zapruder withheld rights to footage of the shot cause too distressing
- Broadcast
- Sound recordings – two other versions of Leonard Cohen Hallelujah, two separate sound recording copyright using the same material

#### Parameters of Protection: Categories of Work

- So must fall within a category of work
  - Computer games
    - No specific category in the legislation
    - Software, film, artistic works, sound recordings and music, literary works (and other intellectual property rights)
    - Have to rely of number of categories
  - TV Format rights (reality tv)
    - No specific category in the legislation
    - Claim for protection as a literary work, dramatic work (and other elements might be protected too: music, broadcast, sound recording etc)
    - They claim protection by a number of category
    - EG: the voice, dramatic work, literary or confidential info/trademarks

#### How long does it last?

Doesn't last forever. Only lasts while protection last.

- Not entirely straightforward
- Has increased over time
- Depends on type of work and whether published or not

- Currently (for published works):
  - Literary, artistic, dramatic, musical works: life of the author plus 70 years. Charles Dickens etc lost copyright alr.
  - Sound Recordings and films: 70 years from end of year first published

### **Eldred v Ashcroft**

Considered whether extension to 70 years was incompatible with first amendment in free speech. Majority thinks it didn't infringe free speech first amendment idea. Decide copyright creates incentive for new expression. Fair use defense meant that free speech is looked after.

### **Parameters of Copyright: Infringement**

- Rights of the owner depend on the type of work
- Owner has the right to do or authorise others to do certain acts with the work but main acts are (in relation to literary, dramatic, musical works):
  - (i) to reproduce the work in a material form;
  - (ii) to publish the work;
  - (iii) to perform the work in public;
  - (iv) to communicate the work to the public;
  - (vi) to make an adaptation of the work;
- In relation to artistic work: only (i), (ii) and (iv) apply (see s31 PM). No right to do adaptation. Only can stop someone from doing that.
- See PM for other acts in relation to sound recordings and films
- Person infringes if does those acts in relation to the whole or substantial part of the work without consent (and no defence/exception)

### **Infringement**

- Must have (i) *copying* of a (ii) *substantial part*
  - *No infringement if not a substantial part*
  - *No infringement if not copying – independent creation*
- Larrikin Music v EMI (2011)
  - Must be copying: actual or inferred because of the similarity and opportunity. If you look at ur neighbours' and copy down.
    - Not a note for note comparison
    - Fact and degree
  - Substantial: quality of what is taken not quantity: the "vital" "essential" part
  - Free speech? – Judge recognised the use of two lines of Kookaburra as a "tribute" to that song.

### **Exceptions/Defences**

- Copyright work exists, still in copyright, substantial part taken.
- But defences/exceptions in legislation allow the copyright work to be dealt with in a particular way
- Fair Dealing and (possible) public interest