

Drafting Copyright Exceptions

How should copyright exceptions be drafted? This question is of ongoing interest to scholarly and law reform debates, and often turns on claims regarding the respective merits of ‘flexible’ and ‘specific’ provisions. This book assesses drafting options using insights from the standards and rules literature, and a case study on the cultural institution sector in Australia, Canada, the United Kingdom and the United States. Drawing from thousands of hours of fieldwork conducted over fourteen years, it describes how staff engage with and interpret exceptions. It argues that sometimes practices are guided heavily by the ‘law in books’, but on other occasions are influenced by a variety of factors, ranging from ethical views and risk assessment through to prosaic matters in relation to copyright management. It discusses why practices change – sometimes dramatically. The book uses this detailed account of interpretative practices and the ‘law in action’ to draw lessons for the drafting of copyright exceptions.

EMILY HUDSON is Reader in Law at King’s College London and has previously held posts at the Melbourne Law School, University of Queensland and University of Oxford. Her PhD at the University of Melbourne – from which this book derives – won the Harold Luntz Graduate Thesis Prize 2012 and the Chancellor’s Prize for Excellence in the PhD Thesis 2013.

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Drafting Copyright Exceptions

From the Law in Books to the Law in Action

Emily Hudson

King's College London



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Orator; Publisher; Spycatcher
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Preface

The genesis of this book can be traced back to a research project conducted between 2003 and 2005 at the University of Melbourne, supported by the Australian Research Council (ARC) and six leading cultural institutions.¹ The aim of the project was to gain an understanding of the digitisation practices of Australian museums, galleries, libraries and archives, and to consider the ways in which copyright was handled by institutions and how it impacted on their practices. The research methodology included fieldwork at a range of cultural institutions and other bodies.

Since that time I have retained an ongoing research interest in the copyright experiences of the cultural institution sector, including through my doctoral research, which formed part of a second ARC Linkage Project supported by twelve partner organisations.² Much of this later work has focused on unremunerated ‘exceptions’ to copyright infringement: provisions that permit uses of copyright works without the consent of, or payment of money to, the copyright owner. Despite such provisions being the subject of much scholarly analysis, there has been far less systematic analysis of how exceptions are used on a day-to-day basis. One aim of my work has been to consider what the interpretative practices of institutional users means for the drafting of copyright exceptions, including ongoing calls for ‘flexible drafting’ and the introduction of a US-style fair use defence in other countries. However, my research also

¹ Kenyon and Christie, LP0348534. Industry partners: Art Gallery of New South Wales, Australian Centre for the Moving Image, Australian War Memorial, Museum Victoria, National Museum of Australia and State Library of Victoria.

² Kenyon and Christie, LP0669566. Partner organisations: Arts Law Centre of Australia, Australian Centre for the Moving Image, Museum Victoria, Museums Australia, National Film & Sound Archive, National Gallery of Victoria, National Library of Australia, National Museum of Australia, National and State Libraries Australasia, Powerhouse Museum, Screen Australia and State Library of Victoria. My doctoral work was conducted independently from other aspects of this project, and the opinions and conclusions presented in this book are strictly my own.

connects to broader themes in relation to legal drafting, the law in action and its relationship with the law in books.

Many people have contributed to the intellectual development of this project. I would like to thank my doctoral supervisors, Andrew Kenyon and David Brennan, and my colleagues from my time as a research fellow and PhD candidate at the University of Melbourne, especially Jason Bosland, Andrew Christie, David Lindsay, Megan Richardson and Kimberlee Weatherall. I have benefited enormously from the thoughts and feedback of numerous members of the intellectual property community, including Graeme Austin, Barton Beebe, James Bennett, Lionel Bently, Pascale Chapdelaine, Kenny Crews, Pina D'Agostino, Melissa de Zwart, Dev Gangjee, Daniel Gervais, Jonathan Griffiths, Michael Handler, Peter Hirtle, Marta Iljadica, Yin Harn Lee, Chris Morrison, Wee Loon Ng-Loy, James Parish, Graham Reynolds, Sam Ricketson, Jane Secker, Martin Sentfleben, Brad Sherman, Janice van de Velde and David Vaver. I would also like to acknowledge the input of my former colleagues at Oxford, Timothy Endicott and Peter Kail, in relation to philosophical aspects of this book; Caoimhe Ring for her research assistance; and everyone at Cambridge University Press who worked on this book, in particular Matt Galloway, Joshua Penney, Vinithan Sethumadhavan and Elizabeth Stone (at Bouchier).

The empirical work in this book would not have been possible without the input of hundreds of people from the cultural institution sector in Australia, Canada, the United Kingdom and the United States. The individuals who participated in these interviews were extremely generous with their time, and I thank them for agreeing to contribute to this work.

Finally, I would like to thank Tanya Aplin, Robert Burrell, Graeme Dinwoodie, Sam Hudson and Tim Roman for their particular support and encouragement.

The law in this book is up to date to 31 July 2019.

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