## RELATIONSHIP BETWEEN THE COPYRIGHT ACT AND THE TRADE PRACTICES ACT

### General

35. Copyright is a form of property, but it is incorporeal in nature. It consists of a number of exclusive rights conferred on the owner or licensee. Without these exclusive rights, copyright owners would not be protected. Effectively, they would have no property in their work which would enter the public domain from the moment of publication. Because copyright confers a number of exclusive rights on the owner or the licensee of it, provision had to be made in that part (Part IV) of the Trade Practices Act 1974, which deals with restrictive trade practices, excluding conduct engaged in in relation to copyright material from the operation of some of its provisions. The purpose of this part of the report is to refer to the relevant provisions of the Trade Practices Act and to explain their effect in relation to the use of copyright material and the exploitation of copyright owners' rights. The matter is important because there is to be found in some submissions the suggestion that any abuse to which the importation provisions of the Copyright Act may give rise is capable of being overcome by resort to the Trade Practices Act. The ensuing discussion demonstrates that that is an erroneous view. If a reader of this Report is prepared to accept that conclusion at its face value, he may pass immediately to para. 54 where

the discussion of matters more germane to the issues to which the reference gives rise, continues.

36. The relevant restrictive trade practices are contracts, arrangements, or understandings restricting dealings or affecting competition (s. 45), contracts, arrangements or understandings in relation to prices (s. 45A), covenants affecting competition (s. 45B), covenants in relation to prices (s. 45C), misuse of market power (s. 46), exclusive dealing (s. 47), resale price maintenance (s. 48) and price discrimination (s. 49). Sub-section 51(3) of the Trade Practices Act provides a limited exemption for certain conditions of arrangements relating to copyright but it does not provide an exemption from s. 46 (misuse of market power) or s. 48 (resale price maintenance). So far as it relates to copyright, sub-see. 51(3) provides that a contravention of a provision of Part IV other than s. 46 or s. 48 shall not be taken to have been committed by reason of the imposition of, or giving effect to, a condition of a licence granted by the proprietor, licensee or owner of a copyright or an assignment of a copyright, "to the extent that" the condition relates to the work or other subject matter in which the copyright subsists. It is to be observed that sub-see. 51(3) of the Trade Practices Act does not exclude the operation of the Trade Practices Act from conditions of arrangements relating to copyright material in all situations. For example, there is no reason why other provisions of Part IV of the Trade Practices-Act should not apply to some restrictive trade

practices. Thus, ss. 45 and 45A of the Trade Practices Act would operate if a number of companies publishing books or manufacturing or distributing records combined to maintain the prices at which the books or records were sold by way of wholesale to retail stores.

37. The excepted conditions only apply to the holder of a copyright or a licensee thereof; hence a licence to reproduce copyright material not yet produced would not enjoy the exception, nor would assignments of future copyright. It would seem that the rights referred to in sub-see. 51(3) of the Trade Practices Act are limited to those conferred by Australian statutes. Subject to the operation which sub-.sec. 5(2) of the Trade Practices Act should be accorded, agreements relating to foreign rights will not enjoy any immunity uncle r the sub-section. Sub-section 5(2) applies, relevantly, only to resale price maintenance and extends the operation of s. 48, which prohibits it, to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia. The words "to the extent that" in sub-para. (a)(ii) of sub-see. S1(3) indicate that, if a condition relates to exempt and non-exempt matters, it will only be protected in relation to exempt matters. Thus the holder of an Australian copyright, or a person who has been granted a licence to reproduce under an Australian copyright, is entitled to use the protection provided by the importation provisions free from any restraints under the Trade

Practices Act other than those imposed by ss. 46 and 48. It should be mentioned that the view has been expressed that the exemption conferred, in relation to copyright, by sub-see. 51(3) is not nearly as extensive as the foregoing discussion has suggested. This is because of the use of the words in sub-paras. (a)(ii) and (v), "to the extent that the condition relates to . . . the work or other subject matter in which the copyright subsists". According to Mr. Staniforth Ricketson (The Law of Intellectual Property, 1984, The Law Book Company Limited, para. [54.36], p. 1054), the provision "becomes virtually meaningless as the only conditions to which it will apply are conditions relating to the first material embodiment of the work or other subject matter". Mr. Ricketson goes on to say that such conditions are unlikely to be of any importance, except where that first material embodiment is of great intrinsic value, such as a painting or manuscript. Other conditions, however, relating to the copyright itself or reproductions of the work or copies or records of films or recordings will remain subject to the provisions of Part IV of the Trade Practices Act. Thus, if Mr. Ricketson's view were right, ss. 45, 45A, 47 and 49 would, contrary to widely accepted views, apply to most dealings with copyright material, along with ss. 46 and 48. Whilst it might be that consideration should be given to amending sub-see. 51(3) of the Trade Practices Act to put the matter beyond doubt, the Committee considers that the better view is that the words, "the work or other subject matter", in sub-para. (a)(v) of the sub-section,

in the context in which they appear, do embrace reproductions as well as works using that expression in its strict sense.

Resale Price Maintenance

38. Section 48 of the Trade Practices Act prohibits resale price maintenance. There were submissions from some record shop proprietors made in confidence to the Committee which claimed that s. 48 was being infringed by some of the record companies. Because of the need to respect the confidentiality of the submissions, the Committee was unable to refer the submissions to the record companies. Furthermore, the submissions were general in character and contained a number of assertions rather than particulars of alleged breaches of s. 48. The Committee has not made any judgment on these allegations because it is not in a position to do so. In any event, s. 48 applies to copyright material. There has been no submission that it should not do so. If it is being infringed, either the Trade Practices Commission, or those adversely affected by the infringement, are entitled, and will remain entitled, to take proceedings to restrain the infringement or, in the case of individuals affected, to recover damages. It is unnecessary, therefore, to say more of s. 48 except to note that in 1972 the Trade Practices Tribunal considered an application by a publisher of books for the exemption of books from provisions of the Restrictive Trade Practices Act 1971 which then prohibited resale price maintenance unless an

exemption were obtained; Re Books (1972) 20 F.L.R. 256. The application was refused. The Tribunal distinguished a United Kingdom decision dealing with the same subject matter; In re Net Book Agreement, 1957 (1962) L.R. 3 R.P. 246.

Abuse of Market Power

39. Section 46 of the Trade Practices Act deals with misuse or abuse of market power. Amendments passed in May 1986 and which came into force on 1 June 1986 (see the Trade Practices Revision Act 1986, s. 17), have lowered the degree of market power required before the section will operate. The essence of the new section is found in sub-see. (1) which is as follows:-

> "(l) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
> ( b ) preventing the entry of a person into that or any other market; or
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

40. The section is expected to have a greater reach than the previous section which related to situations where a corporation was "in a position substantially to control a market". In contrast the criterion is now whether the corporation has "a substantial degree of power in a market". The Trade Practices Commission's view of the new

section is explained in its annual report for the year ending 30 June 1986; see paras. 2.38 - 2.58, pp. 11-14. Reference is made particularly to para. 2.40 which is as follows:-

> "2.40 Section 46 was formerly directed at corporations which were in a position 'substantially to control a market'; the section now relates to corporations that have 'a substantial degree of power in a market'. Typically, the Commission would expect that the section will now reach the proscribed activities of oligopolies whereas formerly it would most likely have reached only such activities of companies approaching the position of monopoly. This of course will ultimately have to be tested in the Court, along with the very contentious issues concerned with the facts of the particular case, to distinguish between the nature of what is proscribed and conduct which may be regarded as legitimate commercial conduct."

41. In applying the amended s. 46 the first task is to determine what is the relevant market. Guidance in how this task is to be performed is given in the decision of the Trade Practices Tribunal in Re Queensland Co-operative Milling Association Limited; Re Defiance Holdings Limited (1976) 25 F.L.R. 169 where the Tribunal said (pp. 190 - 191):-

> "Before giving our reasons we should explain our understanding of the market concept, and of the relationship between 'markets' and 'sub-markets'. We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market.) Within the bounds of a market there is

substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.

It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, i.e. a relatively high cross-elasticity of demand or cross-elasticity of supply?

The distinction between markets and sub-markets can be merely one of degree. Sub-markets are the more narrowly defined, typically registering some discontinuity in substitution possibilities. Where the defining feature of a market is the existence of close substitutes (whether in demand or supply), the defining feature of a sub-market is the existence of still closer and more immediate substitutes. Sub-markets may be especially useful in registering the short-run effects of change; but they may be misleading if used uncritically to assess long run competitive effects."

42. What the Tribunal there said has been applied by Full

Courts of the Federal Court; see Outboard Marine Australia Pty Limited v. Hecar Investments No. 6 Pty Limited (1982) 44 A.L.R. 667 and O'Brien Glass Industries Limited v. Cool & Sons Pty Limited (1983) 48 A.L.R. 625. Reference should also be made to s. 4E of the Trade Practices Act which provides that, for the purposes of the Trade Practices Act, 'market" means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services. As was said by Mr. P.G. McGonigal, the then Assistant Secretary - Trade Practices, Department of Business and Consumer Affairs, the section does little more than acknowledge the traditional economic concept of the product market, and does not purport to be a full definition of "the concept. Accordingly, the product market must still be determined by ascertaining what other goods are interchangeable with the goods in question, having regard to the degree of cross-elasticity of demand or supply; see Copyright and Anti-Trust Aspects of Parallel Imports Under Australian Law, Professor W.R. Cornish and Mr. P.G. McGonigal, International Review of Industrial Property and Copyright Law, Vol. 11 (1980) p. 731 at p. 738.

43. Once the market has been identified, it is necessary to ascertain whether the corporation has a substantial degree of power in that market, and finally whether it has taken

advantage of that power for one of the stated purposes. Determination of the question of whether a corporation had the requisite purpose has been a difficulty in the past, but in the future its resolution may be assisted by the new sub-section (7) of s. 46 which states:-

> "Without in any" way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in sub-section (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances ."

In the light of the fact that in all areas investigated by the Committee there are substantial numbers of companies selling copyright material, it seems difficult to think that there will be much room for the operation of s. 46. However, it should not be forgotten that, if for example, a number of publishing companies or record companies combined to maintain the prices at which their products would be sold to wholesalers, there may be a breach of s. 45 or s. 45A of the Act which, as earlier said would, in such a case, apply. In the confidential submissions received from record shops earlier referred to, there is a suggestion of conduct of that kind. Again, however, the allegations were not specific. More importantly, as was the case in relation to resale price maintenance, there is nothing in the law to prevent either the Trade Practices

Commission or persons adversely affected by such conduct from bringing legal proceedings to restrain it. No submission was received by the Committee that the law in this respect should be altered. The Committee does not recommend that there be any such change in the law.

44. Before coming to conclusions about the operation of the Trade Practices Act in relation to copyright material, it is proposed to say something of aspects of the submissions which are particularly relevant to the book and record markets. The submissions in relation to books tended to separate them into categories; for instance, fiction, non-fiction and educational books were referred to. Within the category of fiction, and to a lesser extent within the other categories, there was a further division into hardback and paperback books. The various book publishers do not have a homogeneous output. For example, some concentrate on fiction; some have their strength in the educational field. Whether the market is books or whether there is a separate market for say, educational books, is not easily resolved.

45. An interesting problem was raised by the material submitted by an importer who specialises in the supply of textbooks for primary, secondary and tertiary teaching of a particular foreign language. When the importer imported books for which another company was the exclusive licensee and distributor in Australia, he said he was threatened with legal 'proceedings under the Copyright Act. Whether

the exclusive licensee has 'a substantial degree of power in a market', would depend on a number of factors one of which would be whether it could be established that there is a market in Australia for educational books published in particular foreign languages. The standard test for the boundary of the market, namely whether there is a marked break in the chain of substitution may be satisfied in this case; a book published in one language is not a substitute for an educational text published in another. If it could be established that there is such a market and that the exclusive licensee had the requisite degree of market power, it would then only be necessary to establish the purpose of the action taken against the importer. The Committee did not find it necessary to make a full investigation of the importers' complaints and expresses no view about their validity. It has mentioned the matter only as an example of how s. 46 of the Trade Practices Act in its new form might operate. But the submission acutely raises the question of what will be regarded as a market or sub-market in this area.

46. The structure of the record industry is that the six major companies have 95 per cent of the total record market. Three of these companies are somewhat larger than the other three. The product mix of the companies is different. Polygram is relatively stronger in classical music, while Festival aims at the youth market. Three of the major companies have plants for pressing records for themselves and on a sub-contract basis for others. For

the three larger record companies a combination of a market share of, say, 20 per cent or more and a degree of specialization in product could be argued to constitute a substantial degree of market power for the purposes of s. 46 of the Trade Practices Act. But as will be seen in a moment, that is only one of the matters which needs to be considered.

Conclusions on Effect of Trade Practices Act on Relevant Provisions of Copyright Act

47. Despite the wider reach of the new s. 46 of the Trade Practices Act, the Committee is of opinion that it is unlikely to have a substantial effect on the operation of ss. 37, 38, 102 and 103 of the Copyright Act. One reason for this is that the Trade Practices Tribunal and the Federal Court have tended to give the expression "market" the wide meaning indicated in the Queensland Milling case. It is unlikely that there would be many cases in which there would be held to be a particular market for a single work or record or for the works of a particular author or composer or for the recordings of a particular artiste or group of artistes. The concept of substitution of one article or item for another would make this unlikely except perhaps in a case such as that of the importer of textbooks in a foreign language earlier mentioned. To some this may seem strange; particularly would this be so if the works required were those of C.P. Snow or Frederick Forsythe or the recordings of the Beatles or Joan Sutherland-and one were asked instead to take the works of

other authors or performers. Obviously the Committee can express no concluded view on such a matter, but the likelihood is that the market will be viewed much more widely with the consequence that it will not often be found that a particular undertaking has a substantial degree of market power. For reasons given above, this may not be so in the case of some record companies but, usually, there will be too many others in the market selling products which will be regarded as appropriate substitutes.

48. More fundamentally, it is unlikely that a person relying on rights conferred on him by the Copyright Act will often be found to be taking advantage of his market power for the purposes of, for example, preventing the entry of a person into a market or deterring or preventing a person from engaging in competitive conduct in a market, if all he is doing is exercising rights conferred upon him by the Copyright Act. Copyright is itself a monopoly or "near monopoly" as it is described in Ricketson (op. cit para. [54.31 p. 1039). It is expected that the owner of it will exercise monopoly power. In those circumstances it will, in the majority of cases, be difficult to establish that a person, who is seeking to restrain the reproduction of a work in which he is the owner of the copyright, is taking advantage of his market power for any of the purposes specified in s. 46 of the Trade Practices Act. Nevertheless, there may be cases where this will be able to be shown. Instances are provided by Ricketson (op.

cit. para. [54.6], p. 1041) **in the following passage from his work:-**

> **"Quite apart from their essential monopolistic nature, intellectual property rights may be exploited in ways which are not strictly related to the subject matter of those rights. There are three main ways in which this may happen: through collective action, the use of these rights as ' import barriers' and the imposition of restrictive conditions in licences and assignments of those rights."**

49. **Mr. Ricketson goes on to deal** (para. [54.7]) **with "collective action". He says that this occurs where owners of intellectual property rights join together and agree to use their rights in particular ways. In the course of the discussion which follows, he refers to the British Publishers Marketing Agreement under which British publishers formerIy operated. Mr. Ricketson says that the effect of this agreement was to deprive Australian consumers of access to cheaper American editions.** Uncle r **the Agreement, British publishers agreed that when they negotiated to obtain publishing rights in relation to books, they would only enter into agreements that gave them exclusive publishing rights for the whole of the traditional British market, i.e. those countries of the former British Empire. This, so he says, was acquiesced in by American publishers and had the effect of carving up the market for books in the English speaking world between British and American publishers. In many instances it meant that books would be unavailable in Australia for**

some time after their publication in America; it also had the effect that Australian publishers were often unable to obtain Australian publication rights for overseas works. The Agreement came to an end after the United States Government took anti-trust action against a number of United States publishers who had entered into market-sharing agreements with British publishers; United States v. Addison-Wesley Publishing CO. (1976) 40 C.O. Bull. 1234. The end of the Agreement may not, however, prevent such market-sharing arrangements in fact existing. Sections 37 and 102 of the Copyright Act remain available to enable exclusive licensees to prohibit unlicensed imports. It will only be where there is an abuse of market power (s. 46 of the Trade Practices Act) that an exclusive licensee may lose the protection which s. 37 otherwise affords. On this topic reference may also be made to Current Developments in the Law of Copyright, by J-S. Gilchrist, pp. 2/21-2/25 in Intellectual Property and Industrial Property Lectures (1977), Monash University.

50. Reference to the British Publishers Marketing Agreement is to be found in some of the material which was provided to the Committee when it first embarked upon the Reference. It is the Committee's understanding, as Mr. Ricketson has said, that the Agreement has come to an end. More importantly, there has not been presented to the Committee any evidence which would establish that there presently exists any practice which is affecting the Australian book market in 'the way that Mr. Ricketson suggests. Mr.

Ricketson refers, in the passage earlier quoted from his work (para. 42) to intellectual property rights being used as "import barriers". Of this he later says (ibid para. [54.9] p. 1042) that the owner of an Australian copyright may be able to use this right to ensure that the only copies of his work entering the country are those that do so with his approval. This is to do no more than state the general problem which confronts the Committee on this Reference. It is the relationship between ss. 37 and 102 of the Copyright Act on the one hand and s. 46 of the Trade Practices Act on the other, which has to be considered. Unless s. 46 operates, what Mr. Ricketson has said must be correct. This is in effect the same point as that made in the previous paragraph. The Committee has been informed by Professor Grant that the Trade Practices Commission has no evidence that there is presently in existence any agreement similar in effect to the British Publishers Agreement nor any restrictive practice of such "a kind. Nevertheless, it is the Committee's understanding that in practice rights relating to most books imported into Australia are controlled in the United Kingdom.

51. The presence of s. 46, particularly in its amended form, and s. 48, in the Trade Practices Act and their applicability to copyright material, provide some safeguards against abuse of market power by companies supplying the Australian market, whether the book market or other markets in which copyright material is sold. But the Committee's conclusion is that the presence of the two

sections is not at the moment likely to improve the availability of copyright material or the prices at which it is sold. At best they have a deterring effect on those who may consider engaging in conduct which amounts to an abuse of market power or constitutes resale price maintenance.

52. It remains to say something of Mr. Ricketson's mention (op. cit. para. [54.18], p. 1045) of the judgment of Murphy J. in the Time-Life case. His Honour expressed the view that the trial judge should have insisted, as a condition of relief, that the plaintiff, "demonstrate that the Trade Practices Act was not being breached, that the public interest was not being injured and that the enforcement of copyright by the relief sought would not be used to breach the Act or injure the public interest" (138 C.L.R. at pp. 561-2). As Mr. Ricketson remarks (para. [54.18], p. 1045), this view has not been subsequently followed by any other Australian Court. That is understandable. The onus of establishing a breach of the Trade Practices Act is upon the person alleging the breach. Furthermore, engaging in any of the restrictive trade practices made unlawful by the sections in Part IV of the Trade Practices Act attracts a penalty. Except in cases to which s. 155 of the Trade Practices Act applies (the section empowers the Commission to serve a notice upon a person seeking information or the production of documents) the courts have been vigilant to see that persons who may be in breach of the sections are not

required, against their will, to make admissions or do other acts which expose them to such penalties.

53. Be that as it may, what Murphy J. said in the Time-Life case serves to indicate that the Trade Practices Act sections, ss. 46 and 48, which do apply in relation to dealings in copyright material, will not often avail either the community or specific interests therein against abuses which may exist as a result of the operation of the importation provisions of the Copyright Act. A major difficulty is the obtaining of evidence that breaches of the Act have occurred or are being threatened. For that reason the sections have a negative rather than a positive effect on the conduct of owners and licensees of copyright material. Furthermore, there is a question concerning the extent to which s. 46 in its new form will really be effective in overcoming abuses. Particularly is this so because of the fact that the copyright owner and his assignees or licensees are given monopoly, or near monopoly, rights by the Copyright Act itself. The Committee concludes that, although the Trade Practices Act has some effect on the operation of the sections which are under consideration, the effect is not at the moment likely to be marked and certainly does not obviate the need to consider whether the sections of the Copyright Act should not themselves be repealed or relaxed in some way.

54. It is now proposed to take each of the copyright areas in respect of 'which submissions have been received, i.e.

books, sound recordings, films, computer software and product labelling and reach conclusions upon what, if any, recommendations should be made for the amendment of the sections as they affect each of these categories. In the course of the discussion 'which follows more detailed reference will be made to some of the submissions which the Committee received. The Committee observes that there were a number of areas in respect of which no submissions were received. These areas will be discussed after the consideration of the areas in respect of which submissions were made. The first such area to be dealt with is that of books.