

## *Part 2*

## *Section 1*

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### *Review of general considerations and of recommendations*

1.01 The past ten years has brought about a very considerable change in methods of reprographic reproduction of published material. Equipment for facsimile copying of high quality that enables copies to be made easily and cheaply is now widely available in libraries, schools, colleges, universities and offices. As a result, large numbers of people now have the facility to reproduce copyright material without having to resort to laborious methods such as copying by hand or typewriting, or by slow and expensive methods of copying using the photocopying machines of a decade ago. Those methods set their own quantitative limitations on the amount of material that might be copied.

1.02 Reprographic reproduction of copyright material is most used where the spread of information is desired, whether for education, private study or scientific research. It is therefore not surprising that educational establishments and libraries have been the focus of the controversy that has surrounded the photocopying of copyright material in Australia and elsewhere. There is, we believe, particularly in Australia, a very considerable public interest in ensuring a free flow of information in education and research, and the interests of individual copyright owners must be balanced against this element of public interest.

1.03 This problem is not, of course, peculiar to Australia. It is one that is engaging the attention of copyright experts and governments in many countries that have systems of copyright protection. It has been considered also by meetings of experts on an international level. Later in this Section of the Report <sup>1</sup> we will say something about the conclusions that have been reached at the international level. It is sufficient to say at this stage that no acceptable solution at an international level has so far been found.

1.04 We now turn to consider briefly the scope and nature of copyright protection in its historical and international setting.

1.05 The Copyright Law Review Committee which reported in 1959 on the Australian copyright law put the position as it saw it in paragraph 13 of its report as follows :

The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.

This passage emphasises both the purpose of copyright protection and the fact that at no time has it been an absolute right of the copyright owner.

1.06 At common law, an author had copyright only in his unpublished works. Once a work had been made available to the public by publication, the author had no control over its further reproduction. The development of the printing press made it possible to reproduce works easily and cheaply. From various motives, the Crown controlled the printing of works by a system of licensing in the sixteenth and seven-

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<sup>1</sup> See paragraph 1.34.

teenth centuries. One by-product of the licensing system was that it prevented the pirating of a published work by another publisher. The need to safeguard both author and publisher led to the first Copyright Act in 1709. For the first time, this Act gave an author a copyright in his published works. Through the rights given to the author it also made possible the protection of the investment of the publisher.

1.07 Subsequent statutory changes in copyright law reflected other advances in technological development. Perhaps the most noteworthy are the changes to ensure that an author or composer is able to control, and thus derive financial advantage from, the dissemination of his works by broadcasting, whether radio or television, phonograph records and the like.

1.08 The development of modern methods of reprography, which enable multiple copies of printed works and musical scores to be made easily and cheaply, represents another technological advance by means of which copyright works, especially literary, dramatic and musical works, may be made available more widely than before. At the same time, this increased availability has facilitated education and research. A tension has therefore developed between the expectations of many copyright owners that they should benefit from the greater availability of their works, on the one hand, and the needs of the community, on the other, for ready access to information and knowledge.

1.09 The rights of the copyright owner have never been absolute, in the sense that no dealing with his work could ever take place without his consent. This is the position under the international conventions relating to copyright and the domestic laws of the countries where copyright is protected. The most universal exception is the right to copy minor or insubstantial parts of works. There is also widespread exclusion from the rights given to authors of various rights of copying of a fair dealing or public benefit nature by libraries, educational bodies, research establishments and individuals. In other words, it has always been the policy of the law that the monopoly granted to the author is of a limited nature. Historically therefore the author is not in a position to maintain his claim with regard to copying of published works from a position of absolute right.

1.10 On the other hand, from the author's point of view, some of the 'public benefit' claims can appear unreasonable. Even in cases where copying is carried out in the pursuit of a socially desirable objective, it by no means follows that it should take place to the unreasonable prejudice of the economic or other legitimate interests of the author.

1.11 These questions raise the issue whether or not reprographic reproduction of a copyright work should be excluded from the rights that a copyright owner enjoys in respect of the reproduction of his work in a material form only where a greater public interest clearly requires such an exclusion or whether the proper balance of interest between owners of copyright and users of copyright material in respect of reprographic reproduction should be achieved on a broader basis.

1.12 We have not been able to achieve uniformity of outlook amongst ourselves on this issue.

1.13 In our approach to the problem of reprographic reproduction we have used the expression 'to the unreasonable prejudice of the economic or other legitimate interests of the author'. So far as concerns any economic prejudice the question arises whether reprographic reproduction should be restricted only if it is likely to cause the author loss of sales of published editions of his work or whether the matter should be viewed more broadly on the basis of a claim by the author to share in the benefits derived from new means of making his work more widely available as was the case with phonograph records, films and broadcasting.

1.14 There was some difference of opinion in the Committee on how this question should be answered. We regard reprographic reproduction as a modern technique for

‘reproduction in a material form’, that being one of the existing rights comprised in copyright under the *Copyright Act* 1968–1973 (section 31(1)).<sup>2</sup> We were not unanimous upon the question whether the main test to be applied in considering the economic aspect is the likely effect upon the sales of published editions of a work or whether a broader approach should be taken to the question.

1.15 For those who accept the proposition that the purpose of preventing photocopying is primarily to prevent the owner of the copyright being prejudicially affected, it follows that the area to be considered is basically the economic detriment to the owner. We received submissions that some photocopying affected sales adversely and others that some photocopying exposed authors and journals to a greater range of potential purchasers.

1.16 Generally speaking, we are satisfied that most photocopying of material in copyright which takes place is of material which might broadly be called material of an educational, scientific or technical nature. By this we mean material not produced for strictly literary, artistic or recreational purposes but material written for the purpose of conveying information. Into this category fall scientific journals, medical journals, books on educational subjects and a great amount of miscellaneous material.

1.17 We are satisfied that there is negligible copying from short stories, novels and other works of fiction and from biographies, histories and commentaries of a ‘popular’ nature.

1.18 We are also of the opinion that, of the technical material copied from journals, very little has been written by the author with the object of earning money directly from the publication. In most cases we are satisfied that the author wishes to disseminate his ideas as widely as possible and would not want to restrict copying, whether remunerated or not. In many fields it is necessary for persons, or organisations funding research, wishing to publish articles to pay a fee on a per page basis for publication to be made. However many technical books are, of course, written with a view to earning the author income from sales of the publication.

1.19 We cannot stress too strongly that the issues which we face cannot be disposed of purely by reference to notions of abstract justice and principles of copyright. Solutions can be formulated only after a thorough consideration of the practical circumstances in which reprographic reproduction is taking place in the community. This dichotomy between theory and practice has indeed proved to be one of the most formidable problems of the inquiry. It is particularly relevant when considering the question of methods of remuneration for authors from reprographic reproduction of their works.

1.20 Virtually the entire object underlying the authors’ claims for control over reprographic reproduction is to ensure increased remuneration from this use of their works. The view that ‘what is worth copying is worth protecting’ has been put before us emphatically and persuasively. However, what this usually means is ‘what is worth copying is worth paying for’. Very few authors want restrictions for their own sake but rather as a means of securing remuneration. If the view is taken that in particular circumstances remuneration may be warranted, the most profound problems arise when attempts are made to find practical, fair, and economic means of collecting and distributing royalty payments to the particular authors involved in Australia and throughout the world. These problems will be examined in detail later in this Report. Here a reference to some basic factors in the context of copying only within Australian universities will give some indication of the complexity of the problems:

. There are approximately 16.5 million acts of reprographic reproduction each

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<sup>2</sup>See Appendix E.

year on self-service machines in university libraries throughout Australia; and it appears probable that at least a comparable quantity of reprographic reproduction takes place on other machines in universities.

- The material copied includes books and journals in copyright, books and journals out of copyright, and material being the property of the copier such as lecture notes, personal notes and administrative material.
- A significant proportion of the material copied is under the present law legally permitted, being of small parts of the original or carried out under privileged circumstances such as 'fair dealing'.
- It was estimated that in a university library containing one million works some six hundred thousand authors could be represented, and this figure would be very greatly increased if individual authors of journal articles are taken into account.
- Individual books in the libraries could have been published up to 100 years ago and still remain in copyright.
- A very small percentage of the books in university libraries has been written by Australian authors and the remaining authors are scattered throughout the length and breadth of the world, although concentrated mainly in English-speaking countries.
- The actual photocopying is carried out by library staff, by students and researchers, and by academic and clerical staff within departments.

No one who ponders over these factors can be left in any doubt as to the magnitude of the practical problems which arise in attempting to devise an economic, fair and workable system for collection and distribution of royalties which would compensate individual authors in relation to the extent to which their works are copied beyond the limits permitted by law.

1.21 During the course of our inquiries, we have gathered a good deal of information about the extent of photocopying in Australia. We do not, however, have anything like a complete picture, for a number of reasons. There is no way of finding out what copying of copyright material takes place on privately-owned copying machines in offices and elsewhere in the private sphere and no such information was volunteered. Detailed records of copying on library self-service photocopying machines are not available and only very limited records are available of copying on other library machines. No comprehensive records are kept of the details of photocopying in educational establishments for the purposes of instruction or use of staff and students. Nevertheless, we believe a sufficient picture emerged from our inquiries to give some idea of the extent of photocopying and to show the complexity of attempting to regulate it.

1.22 The evidence we have shows that much of the photocopying that takes place is likely to be within the exceptions to the rights of the copyright owner established in the *Copyright Act*. It seems fairly clear that much of the copying done by individual students on self-service machines in the libraries of universities and elsewhere would be a 'fair dealing' within the terms of section 40 of the *Copyright Act*. In any event, a proportion of this copying is of the student's own lecture notes or of the notes of his fellow-students so that the figures for total copying on these machines, impressive as they are, give no reliable indication of the amount of copyright material copied without the consent of the owner of the rights involved.

1.23 We have however already drawn attention to the fact that traditional methods of copying imposed quantitative limitations on the amount of a work or the number of copies that might be reproduced within the permitted limits under the existing law. This leads to the question whether, having regard to what might be copied with the use of modern equipment, the present exceptions from the rights of the copyright owner should be continued, reduced or extended. The Australian Copyright Council

Ltd put forward proposals, which we discuss more fully in a later part of the Report<sup>3</sup>, to the effect that all photocopying of copyright works should be subject to a requirement of payment of royalty to the owners of the rights concerned on a per page per copy basis. There was no serious suggestion that no copying should take place without the permission of the copyright owner concerned.

1.24 Having thus set out in a preliminary way some of the basic issues with which this inquiry has been concerned, we now turn to a description of the scheme of the Report. This Section forms a summary which deals in a broad way with the major questions we have had to consider and which examines the Australian position against the background of the position in other countries. Other Sections of the Report will deal with the various issues in more detail. Sections of the Report deal specifically with the following topics:

- (a) Copying within the concept of fair dealing
- (b) Copying by a library for users
- (c) Copying by a library for other libraries
- (d) Copying of published or unpublished works for preservation and certain other purposes
- (e) Multiple copying in non-profit educational establishments
- (f) Copying in other circumstances
- (g) Crown copyright
- (h) Damages
- (i) Obligations under international conventions and international discussion of reprographic reproduction
- (j) Foreign legislation and developments

Part 4 of the Report consists of a summary of certain submissions presented to the Committee.

1.25 The present position under the Australian Copyright Act with regard to reprographic reproduction of copyright works may be summarised in a broad way as follows<sup>4</sup>:

- A copyright owner is given, subject to the exceptions provided in the Act, the exclusive right to reproduce his work in a material form—section 31 (1).
- A reproduction of an insubstantial part only of a work is not within the exclusive right—section 14(1)(a).
- A reproduction of a work or part of a work for the purpose of research or private study that is a 'fair dealing' with the work is not an infringement of copyright—section 40. In practice this seems to mean that a person can, for the specified purposes, make at least one copy of at least a reasonable part of a work and perhaps the whole of a work without infringing copyright.
- In certain circumstances and without remuneration to the copyright owner a librarian can copy an article in a periodical and up to a 'reasonable portion' of another published work, and supply the copy to a user—section 49; a librarian, for supply to another library, and again without remuneration to the copyright owner, can copy an article in a periodical and up to a reasonable portion of another published work and in some circumstances up to the whole of the work—section 50.
- A work may be copied for the purposes of a judicial proceeding—section 43.
- Unpublished works kept in libraries may be copied in certain circumstances—section 51.
- Subject to certain limitations a teacher or student may copy a work in the course of educational instruction so long as the copy is not made on 'an

<sup>3</sup>See Part 4, submission 1, and particularly paragraphs 2,26–2,31.

<sup>4</sup>The sections of the *Copyright Act* referred to are reproduced in Appendix E.

appliance adapted for the production of multiple copies' —section 200(1).

. Copies of a work may be made for the services of the Commonwealth or of a State subject to the giving of notice to the copyright owner and the payment of compensation—section 183.

1.26 This brief summary shows that reproduction of a copyright work without the permission of the owner of the copyright maybe made in a number of circumstances for educational instruction, private study and research and for library use. The evidence before the Committee showed, however, that there is a good deal of uncertainty about the limits of permitted copying due to the exceptions being stated in general terms such as 'fair dealing' and 'reasonable portion'. It also showed the virtual impossibility of copyright owners effectively policing the present limits of permitted copying and the understandable concern of some authors that the widespread use of copying machines may be making substantial inroads into their economic interests.

1.27 Any recommendations we make should, of course, be in accord with the relevant provisions of any international convention to which Australia is a party and we consider we should also bear in mind any revisions of these conventions to which Australia is not yet a party. Nor do we think we should make any recommendations that would make the position in Australia very different from what might be called 'world standards', especially since most of the copyright material in use in Australia comes originally from overseas, unless we are satisfied that the advantages of any such recommendations clearly outweigh any disadvantages or that we should do so for any other good reason. Copyright is a highly international form of property and general conformity with world standards is itself a desirable aim.

1.28 There are two important international conventions which are relevant, the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention. The Berne Convention was signed on 9 September 1886. Since that date it has been revised on several occasions, including the revisions at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971. Australia has acceded to the Brussels Revision of the Convention, but did not accede to the substantive provisions of the Stockholm Revision and has not yet acceded to the Paris Revision of the Convention. The other relevant international convention is the Universal Copyright Convention which was adopted in 1952, and revised in 1971. Australia acceded to the 1952 Convention in 1969 but has not yet acceded to the 1971 Revision.

1.29 The Brussels Act of the Berne Convention and the 1952 text of the Universal Copyright Convention do not specifically require the author to be granted the exclusive right to the reproduction of his work in a material form. This right is provided for by Article 9 of the Berne Convention as revised at Stockholm in 1967 and at Paris in 1971, and Article IV bis of the Universal Copyright Convention as revised in 1971. This latter Article appears to require a lesser degree of protection than does Article 9 of the Berne Convention.<sup>5</sup>

1.30 Under Article 9 of the Berne Convention free reproduction of a work maybe permitted by national legislation if the reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. We consider that the recommendations we make in this Report are in conformity with the terms of Article 9 of the Berne Convention as revised at Paris.

1.31 We have obtained information about the copyright laws of a number of other countries.<sup>6</sup> Generally speaking, it would seem that reprographic reproduction of copyright material within certain limits is permitted without the consent of the copyright owner being required and without any requirement for payment of royalty

<sup>5</sup> See paragraphs IO. 06–10, O9 as to the various provisions in the two Conventions

<sup>6</sup> See generally Part 3, Section 11,

to him or on his behalf.<sup>7</sup> The precise limits of permitted copying vary from country to country, and according to whether the copying is done by a person for his own use, by a library for users of the library or other libraries, or in an educational establishment or other 'public interest' situations. In no country that we are aware of is all reprographic reproduction within the exclusive right of the copyright owner or is he entitled to royalty for all such reproduction.

1.32 The limits are often very difficult to define but taking the position broadly what might be described as the world standard would permit, as a minimum, a person to make for his personal use a copy of an article in a periodical or some small part of another published work. In some countries, this freedom of limited copying is subsumed under the test of fair dealing whether as a result of statutory provisions or by judicial decision.

1.33 It is of some relevance to note that in the new copyright legislation now before the United States Congress the fair use of a copyright work, including reproduction by copying, for purposes such as criticism, comment, news reporting, teaching, scholarship or research would not be an infringement of copyright.<sup>8</sup>

1.34 The question whether there should be some international regulation of reprographic reproduction has been examined by the sub-committee on reprographic reproduction of the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) and the sub-committee on reprographic reproduction of the Intergovernmental Copyright Committee of the Universal Copyright Convention. At a joint meeting in June 1975 in Washington the two sub-committees passed a resolution set out in substance in paragraph 10.13. This resolution was subsequently adopted in December 1975 by a joint meeting of the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee of the Universal Copyright Convention. The December decision makes it clear that there is unlikely to be any international consensus for some time on what measures ought to be taken to regulate reprographic reproduction of copyright works.

1.35 The question is under examination in a number of countries at the present time. We refer in Section 11 of this Report to some details of the consideration being given to this matter elsewhere. The fact that there is no settled international position on the question makes it desirable in our view that Australia, having regard to its position as a substantial importer of copyright material, should be hesitant in adopting a radical solution to the problem of a kind that is unlikely to find widespread acceptance amongst member countries of the two international conventions.

1.36 On the information available to the Committee, schemes are operating in three countries where payments are being made in respect of certain photocopying but where this is being done, so far as can be ascertained, it appears to be accepted that it is not possible to distribute any such amounts to individual authors and the best that can be done is to pay the authors' share of any funds available to authors' societies for purposes which may be described as 'for authors generally'.<sup>9</sup>

1.37 In making our recommendations we have, however, also had regard to the facts that Australia is geographically isolated from the major centres of scientific and industrial research and that the vast area of the Australian continent raises special problems in relation to the dissemination of information, particularly in the remoter parts. We have also taken into account the relatively limited resources in Australia for subscribing to and maintaining large numbers of scientific and technical publications from overseas.

1.38 Reference has already been made to proposals put to the Committee by the

<sup>7</sup> See, in particular, paragraphs 11.02 and 11.03.

<sup>8</sup> See paragraphs 11.54 and 11.66.

<sup>9</sup> As to the Federal Republic of Germany, see paragraphs 11.08-11.14, as to the Netherlands, see paragraphs 11.19-11.26, as to Sweden, see paragraphs 11.33-11.42.

Australian Copyright Council Ltd. The Council sought the introduction of a system that would require payment to owners of copyright for all copies made, the payment to be on a per page per copy basis.<sup>10</sup> Payment would be made to the individual copyright owners and not, as in a scheme operating in Sweden in respect of the copying of works in educational establishments under a voluntary agreement, into a fund applied generally for the benefit of copyright owners. The Council proposed that central collecting agencies should be established to collect and distribute royalties payable under the scheme.

1.39 We do not know of any other proposal elsewhere that would require the payment of a royalty on all copies made, irrespective of the number of copies made and the purpose of the copying. We think that the scheme is quite impracticable insofar as it would relate to the making of single copies by individuals for their own use. We do not think it would be practicable or desirable to institute such a scheme in respect of the copying by libraries under sections 49 and 50 of the *Copyright Act*, either as those sections now stand or as we propose they should be amended. The burden, both administrative and financial, of maintaining the necessary records would be too great and out of all proportion to any royalty reasonably payable. Moreover, to impose a requirement to maintain detailed records from which royalties might be calculated and to pay royalties would be to cut down the facility that libraries now enjoy under the *Copyright Act* but without conferring any corresponding benefit of any substantial consequence on copyright owners.

1.40 It should be remembered that a copyright owner is under no obligation to identify himself or to let it be known where he can be found in order that his consent might be obtained to copying of his works or royalty be paid to him, This is particularly so with those articles in scientific and technical journals where the author is not the copyright owner and often it may be a difficult problem to decide who is the copyright owner. Stress has been laid by a number of witnesses before the Committee on the importance of the free flow of information for education and for scientific, technical and social development in Australia. The Australian Copyright Council Ltd, purporting to speak on behalf of copyright owners, rightly did not oppose this view. So far, however, copyright owners have done little to make it easy for those engaged in spreading or using knowledge embodied in copyright works to respect copyright,

1.41 In short, it has not been shown to the Committee that there is any practical way in which royalties for single copying in libraries or for copying by individuals on self-service machines could be collected and distributed. Nor are we satisfied that there should be any diminution of the area of presently permitted free copying in this respect. Rather as we explain later in the Report, we would somewhat enlarge these areas of permitted copying. It may be found practicable to set up some kind of scheme for the collection and distribution of royalties in respect of multiple copying in educational establishments and elsewhere, and we examine this matter in greater detail later in the Report. We have also considered schemes other than that proposed by the Australian Copyright Council Ltd.

1.42 As a possible solution to the problem of distribution to individual authors on the basis of copying of their works, we have considered whether royalties in respect of photocopying might be paid to an authors' society for the general benefit of the members of the society or of authors generally, without the need to identify the owners of copyright in the works copied or the amount of each work copied. We see, however, no community of interest between, for example, the author of a poem in Australia and the writer of an article in America in a journal on atomic physics or in Russia

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<sup>10</sup> See Part 4, submission 1 and paragraphs 2.26-2.31.

on an engineering problem in Russia, or in a South American country on an agricultural problem. particularly if one of these authors has written his paper for the purpose of obtaining a higher degree or in the hope of establishing his reputation in the field, or to disseminate the results of a government-funded project.

1.43 In addition in a great many cases only one or two copies may be made of an article in the whole of Australia and the cost of collection and distribution of any reasonable royalty must, we consider, exceed the amount which the author or copyright owner might be expected to receive.

1.44 The lack of any community of interest of authors is at present an obstacle and, even if it were possible to work out some scheme for the payment, not to individual authors nor to a single society but to various societies of authors in various fields it would be quite impossible in our view at present to apportion any fund, if it was available for distribution, between any such societies on the basis of the amount of copying of the works of the members of each society.

### **Review of recommendations**

1.45 In the application of the 'fair dealing' provisions of section 40 to reprographic reproduction it is our unanimous view that the section should be widened to allow such reproduction for the purpose of 'research or study' instead of 'research or private study'. In addition two of us would extend those purposes to 'purposes such as research, study, private or personal use'. This recommendation would apply whether the copying is done on a self-service machine or other machine and whether the machine is in a library or elsewhere. We appreciate the difficulty of ascertaining the limits of such permitted copying but we think that a limitation to what may be called 'fair dealing' is the best that can be done. We have made proposals in paragraph 2.60 which will assist in determining what is within 'fair dealing'. The limitation to 'fair dealing' ensures that no copying is permitted under this provision for any purposes that would unduly prejudice the interests of owners of copyright.

1.46 We also recommend that limited multiple copying of single articles in any periodical for use in the libraries of non-profit educational establishments be allowed without remuneration to copyright owners. A serious need for this facility has been demonstrated to us in our inspection of libraries at universities and institutes of technology in cases where a lecturer has included a particular periodical article in a reading list for a large class. In such cases it is quite impossible for students to have access to this material unless additional copies are available in the library. Because of the freedom lecturers enjoy in their choice of material we consider that it is not possible for a university library to subscribe for sufficient multiple copies of the many possibly relevant journals which exist and articles from any of which might be chosen in a reading list. We think that it should be permissible to make up to six copies of a single article in a periodical without infringement and without remuneration for use within such a library provided that the librarian making the copies intended that they would only be used in the library and would ultimately be destroyed. We are satisfied that the advantages to education of this recommendation are considerable and we think there would be no significant detriment to copyright owners.

1.47 Although it was clear to us that some publishers of journals for profit feared large scale photocopying, no specific complaint was made to us by an individual publisher of periodicals, nor by any individual writer of articles in periodicals expressing any concern about any photocopying that was taking place. We do not think we should recommend any reduction in the existing limits of permitted copying merely because that copying may make the publication of an existing journal uneconomic. We do not think that any such recommendation would be of practical value to authors. If the publication of a journal is for a commercial purpose the

publisher must be prepared to meet the commercial problems which always arise with changes in technology and in the habits of the community.

1.48 We noted the system which exists in relation to copying by commercial enterprises from certain scientific and technical periodicals in the Federal Republic of Germany<sup>11</sup>, but we received no submission indicating that such a scheme had been considered in Australia. No submission was made to us concerning any attempts in Australia to impose any contractual obligation on a purchaser limiting photocopying as a condition of purchase. We express no view on any legal problems that might arise in any such circumstances.

1.49 We recommend that certain requirements should exist with self-service machines in libraries, namely that notices, in a form prescribed by regulation, should be displayed drawing attention to the relevant provisions of the *Copyright Act* and, if this is done, the installation and use of self-service copying machines in a library should not of itself impose any liability upon the owner of the library for any copyright infringement committed by a user of a machine.

1.50 If multiple copies of more than an insubstantial part of a published work other than an article in a periodical are required in a library conducted by a non-profit educational establishment we recommend that it should be permissible for up to six copies of that work or part thereof to be made without remuneration in any case where the work has not been separately published, or if it has been separately published, it has been ascertained after reasonable inquiry that copies cannot be obtained within a reasonable time at a normal commercial price. This right should be subject to the condition that the librarian making the copies intended that they would only be used in the library and would ultimately be destroyed.

1.51 In adopting this view we have been influenced by the complaints we received as to unavailability of texts in Australia and the unreliability of delivery when texts are ordered from overseas. We feel that in this respect Australia is at a serious disadvantage compared with many other countries, and we believe that some responsibility rests upon copyright owners to meet demand in a practical way as a condition of unrestricted enjoyment of their rights. In the case of works not separately published, we feel that some justification exists for extension of copying rights for educational purposes.

1.52 We received sufficient evidence on the extent of multiple copying in educational establishments for us to conclude that it is likely some of the copying thus taking place is an infringement of copyright, under the existing law. We also think that the demand for such copying will increase. To the extent that there is a demand for multiple copying in educational establishments, we think the copyright law should accommodate this demand. However, in principle, we consider that multiple copying should not be carried out without remuneration to the copyright owner in any case where it represents a substantial use of his property or it could prejudice sales of his work, particularly if the work has been specifically written for use in schools.

1.53 We therefore recommend that the Act should be amended to provide for a statutory licence scheme permitting a non-profit educational establishment to make multiple copies of parts of a work and in some cases whole works, for classroom use or for distribution to students, subject to recording any copying taking place under the scheme and an obligation to pay an appropriate royalty if demanded by the copyright owner or his agent within a prescribed period of time (say three years). Details of the scheme are more fully set out in paragraphs 6.39 to 6.66 of this Report.

1.54 However the Committee recommends that the making of multiple copies in non-profit educational establishments of up to two pages or 1 per cent of the number of pages (whichever is the greater) in an edition of a work or of two or more works

<sup>11</sup> See paragraphs 11.08-11.14.

in any period of 14 days should be permitted without infringement of copyright and without remuneration to copyright owners, provided (except in the case of a diagram, map, chart or plan) the part copied does not comprise or include a separate work. This was a majority recommendation and the members recommending this provision considered it to be a desirable one for the benefit of education and in general would involve an amount of copying in respect of which' any royalty would be very small and probably uneconomic to collect.

1.55 We also recommend that a teacher or lecturer should be permitted to make, without remuneration and without infringement of copyright, by reprographic reproduction, up to three copies of a copyright work or part of a work for the purpose of classroom instruction within the limitations described in paragraph 6.68 of this Report. We have also made certain recommendations for non-profit educational establishments conducting educational courses by correspondence or on an external study basis, which are described in paragraph 6.73 of this Report.

1.56 We recommend some alterations to Part III Division 5 of the Act dealing with the copying of works in libraries and our detailed recommendations appear in Section 3.

1.57 We have also made certain recommendations to permit, without infringement of copyright, limited copying of published or unpublished works for preservation and other purposes and the making of one microfilm or microfiche copy of any work where it is the intention to destroy the original, as set out in Section 5.

1.58 In Section 4 we have considered the system of inter-library loans and we have made no recommendations which would interfere with that system.

1.59 The conclusions we have reached and the recommendations we have made in this Report are the result of a great deal of consideration and concern. They will find approval with some and not with others. Total consensus on these issues is not possible, but our views represent what we consider at the present time to be the most feasible and fair approach to the task set by our terms of reference of effecting 'a proper balance of interest between the owners of copyright and the users of copyright material in respect of reprographic reproduction'. However we are mindful of the fact that the rate of change in technology in the field of reprographic reproduction is great, and we therefore consider that it is desirable to examine the state of the law at regular intervals.

## Section 2

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### *Copying within the concept of fair dealing*

2.01 This Section concerns copying for private use, irrespective of the place where the copying is carried out, and includes copying on self-service machines, whether in libraries or not, but in general it does not include copying where the copy is made by or on behalf of a librarian pursuant to a specific request by a private user. The term 'self-service' machines wherever used, includes 'coin-operated' machines.

2.02 It has always been open to an individual user, for his own private purposes, to go to a library or otherwise obtain a copy of a literary work and to reproduce passages from the work by writing the passages out in long hand provided the copy was only used by the person who made it for his own research or private study. There was no suggestion seriously made that this copying was inappropriate or should be stopped. In recent years, with the development of equipment which is broadly called photocopying equipment, it has become possible to make precise copies of considerable parts of a literary work quickly and cheaply. In addition, the wide availability of these machines and their comparative cheapness has extended the opportunities for copying very greatly. This has raised the question whether or not a stage has been reached where some remuneration should be provided to the author even in cases where photocopying takes place within the concept of fair dealing.

2.03 It seems that almost every country permits a measure of photocopying without remuneration if the copying is for the purpose of research or private study. In a number of countries specific provision is made for this.<sup>1</sup> For example, Article 53 of the Copyright Act of the Federal Republic of Germany provides 'It shall be permissible to make single copies of a work for personal use'.<sup>2</sup> It also provides that such copies may be made by another person for the user. It also seems clear that the whole of the work may be copied under this article and that at least two or three and probably more copies may be made under it.

2.04 Another example is the position under the Japanese Act of 1970 which, in Article 30, provides that it shall be permissible for a user to reproduce by himself a copyright work for his personal use, family use or other similar-uses within a limited circle.<sup>3</sup>

2.05 In Sweden, it appears that paragraph 1 of section 11 of the Copyright Act provides that a few copies of a published work may be made for private use but these must not be used for other purposes. It seems that the concept of 'a few' copies depends on the type of work copied but that three copies would certainly be regarded as falling within the expression 'a few'.<sup>4</sup>

2.06 In the United Kingdom, Australia, Canada and New Zealand, by virtue of specific legislative provisions, certain copying for research or private study does not constitute an infringement of copyright. In general, the copying permitted is copying within the concept of fair dealing. Although so far no legislative provision of a similar nature exists in the United States of America, a similar concept has been developed by the courts, and is incorporated in a Bill now before Congress.<sup>5</sup>

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<sup>1</sup> Section 11 of this Report deals in some detail with the position in several countries.

<sup>2</sup> See also paragraph 11.08.

<sup>3</sup> See paragraph 11.16.

<sup>4</sup> See paragraph 11.29.

<sup>5</sup> See paragraphs 11.52-11.66.

2.07 In Australia, section 40 of the Act provides that a 'fair dealing' with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or private study, does not constitute an infringement of the copyright in the work.

2.08 Section 40, together with sections 41, 42 and 43, apparently applies to both published and unpublished works, in contra-distinction to section 44. which only applies to published works.<sup>6</sup>

2.09 The position under the Act is that copying of an insubstantial part of a work<sup>7</sup> does not constitute an infringement of the copyright in the work. Where a substantial part of a work is copied section 40 may, nevertheless, prevent that copying from being an infringement of the copyright in the work.

2.10 The combined effect of sections 13(1), 14(1)(a), 31(1)(a)(i), 36(1) and 40 of the Act may be summarised as follows: the copyright in a literary work is not infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, reproduces or authorises the reproduction of the work, or of a substantial part of the work, in a material form, if the reproduction is a 'fair dealing' with the work 'for the purpose of research or private study'.

### **The test of substantiality**

2.11 The question whether or not a substantial part has been copied depends more on the quality than on the quantity of what has been copied. <sup>8</sup>A number of submissions were made to us about the difficulty of ascertaining what was a substantial part of a work in the practical situations that arise. We are aware of these difficulties but, in our opinion, it is not possible to provide any satisfactory, precise test. The test of substantiality depends, as we think it should, more on quality than on quantity, so that it must involve a consideration of the nature of the material copied.

2.12 We considered whether we should recommend an alternative to section 14 along the lines that up to a certain percentage of a work should always be regarded as an insubstantial part or some other provision delineating the quantity that could be taken. However, since this section is applicable to all purposes including commercial reproduction for sale we do not consider this would be fair to copyright owners because in some instances a very small amount of a work may be a critically important part of that work. Just as it would be impossible to provide a set of tests to determine with precision whether a person had been negligent in, for example, driving a motor car, we consider it is equally impractical to attempt to lay down any tests to determine what is an insubstantial part of a work. The difficulty in applying an objective quantitative test to a musical or artistic work is self-evident. We think it is appropriate to point out that a close examination of decided cases points clearly to the fact that in many circumstances a very small amount in quantity of a work may constitute a substantial part of that work.

### **Copying on self-service machines**

2.13 Self-service photocopying machines are found in libraries associated with universities, colleges of advanced education, schools and other educational establishments. Many municipal libraries have them, but generally they are not to be found in the major public libraries such as the National Library of Australia or the Library of New South Wales. A considerable amount of the photocopying of copy-

<sup>6</sup> See generally *Hubbard and Anor v Vosper and Anor* [1972] 2 Q.B. 84; [1972] 2 W.L. R. 389.

<sup>7</sup> See generally sections 14 and 31 of the Act which are set out in Appendix E.

<sup>8</sup> *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 W. L. R. 273.

right works done on all these machines by individuals is for the purpose of research or private study.

2.14 The Australian Vice-Chancellors' Committee estimated that the average number of sheets per student copied in 1974 by students on self-service machines in university libraries was 120. In some cases the material copied was not in copyright or was the student's own material, and in some other cases, it may be that only an insubstantial part of it was copied. It seems probable that most of the other copying involved on self-service machines would be for research or private study and would be permitted under section 40 of the Act if a fair dealing.

2.15 Litigation has recently taken place in relation to copying on a coin-operated self-service photocopying machine in a university library: *University of New South Wales v. Moorhouse and Anor* (6 A. L. R. 193). On the facts of that case it was held that the University had authorised the act of which complaint was made. Particular attention was drawn to the fact that no appropriate notices were posted in the library. A Mr Brennan twice photocopied a story ten pages in length from a book of short stories. This copying was performed in an effort to commence a test case. However it is difficult to see that this case provides an authority for any proposition other than that the placing of coin-operated self-service machines in a library without adequate notices at least drawing users' attention to relevant provisions of the Copyright Act constitutes an authorisation within section 36. Jacobs J. said, at p. 210: 'If it was intended to be in some way a test case then it is unfortunate that the occasion of testing was one where this University had inadvertently failed to qualify in any material way the invitation which it extended to make use of the photocopying machines to copy material in the University library'. Gibbs J. said, at p. 199:

The copies were not made in circumstances that would give rise to the protection of s. 40; there was no evidence that Mr Brennan made them for the purpose of research or private study but it appears to have been common ground that they were made simply to provide evidence in proceedings intended to be commenced against the University. It is accordingly unnecessary to discuss the meaning and scope of the expression 'fair dealing' in s. 40. The only question that remains is whether the University authorised the act done by Mr Brennan that infringed the respondents' copyright, namely, the making of the photocopies.

2.16 It will be seen that this case throws no light on what is 'fair dealing' for the purpose of research or private study within section 40. It is quite clear that this question did not arise because of the complete absence of any evidence that the copies were made for the purpose of research or private study.<sup>9</sup>

### **Remuneration for copying on self-service machines**

2.17 The Australian Copyright Council Ltd, in general, has not sought to suggest that any restrictions should be placed on copying but has submitted that all copying should be remunerated upon the basis that the authors should receive a royalty in respect of each copy page made of any work within copyright.<sup>10</sup>

2.18 However we are satisfied that as a matter of principle a measure of photocopying should be permitted without remuneration, for purposes such as private study, to an extent which at least falls within the present limits of 'fair dealing'. Even if this view is not accepted, we consider there are insuperable practical difficulties in obtaining permission from, and in paying remuneration to, the copyright owners for copying in these circumstances. It is necessary to bear in mind the vast

<sup>9</sup>As for the consideration in this case of the question of authorisation see paragraph 2.51

<sup>10</sup>See Part 4. submission 1.

diversity of material copied and the problems of locating individual copyright owners. 2.19 We have evidence of the number of volumes in a great many libraries in Australia and estimates of the number of authors. For example, the Library Association of Australia submitted statistics which showed that the total number of volumes in university libraries in 1973 was of the order of 8000000. We were also told that in one university library there were in excess of 1 800000 volumes and in each of six others in excess of 600000 volumes.<sup>11</sup> The National Union Catalogue of Monographs housed in the National Library gives locations for an estimated 3000000 works.<sup>12</sup> We received a copy of a list prepared by the National Library in 1975 to mark the foundation of the Australian National Scientific and Technological Library (ANSTEL) entitled, *List of Scientific and Technological Serials* and it contains the names of over 20000 serial titles<sup>13</sup> then held by ANSTEL. Dr Coogan, of the CSIRO, said that the total number of scientific journals was now estimated at between 45000 and 50000.<sup>14</sup> We received an estimate that there were 10 to 12 million authors currently engaged in writing works throughout the world and we were told that the author index of *Chemical Abstracts*, which lists new information in the chemical field, now includes something like 200000 authors per annum in one subject.<sup>15</sup>

2.20 Dr Coogan said that it has been estimated that in the last ten years 2000000 papers per annum were published in the scientific field<sup>16</sup> and there is often more than one author of a paper. Mr Pearce, on behalf of the Australian Vice-Chancellors' Committee, estimated that something in the order of 2500000 journal articles came to Australia annually.<sup>17</sup> In addition, back numbers of an overseas journal usually cannot be obtained unless sought within a few months of the date of issue.<sup>18</sup>

2.21 Despite the fact that most photocopying is likely to be of comparatively recent works, it is almost always quite impractical for a person who wishes to copy part of a work for, for example, his private study to seek permission from any author legally able to grant permission. It is also usually equally impractical for a person to seek permission from the publisher because in many instances the right to grant a licence to copy may not reside in the publisher.<sup>19</sup> In any event, even if the publisher be in Australia, the cost and difficulty of communicating with him would, in most cases, greatly exceed the value of the copying sought to be made to the person wishing to copy. It would also, in most cases, greatly exceed the amount which could reasonably be sought in respect of an appropriate royalty for the copying sought to be done.

2.22 It is, of course, almost impossible in the case of works which were published, say, 50 years ago, to ascertain whether copyright subsists because the duration of copyright in a literary, dramatic or musical work or in an artistic work other than a photograph is for the life of the author and 50 years thereafter.<sup>20</sup>

2.23 If the work has not been published before the death of the author copyright subsists until the expiration of 50 years after the expiration of the calendar year in which the work is first published.<sup>21</sup>

2.24 Even if it can be determined when the work was published and when the author died, in most cases, with works published years ago, it is usually impossible from a

<sup>11</sup> See Part 4, submission 11.

<sup>12</sup> See Part 4, submission 11.

<sup>13</sup> *List of Scientific and Technological Serials*. National Library of Australia, Canberra, 1975. See also part 4, submission 11.

<sup>14</sup> See Part 4, submission 36.

<sup>15</sup> See Part 4, submission 11.

<sup>16</sup> See Part 4, submission 36.

<sup>17</sup> See Part 4, submission 24.

<sup>18</sup> See Part 4, submissions 21, 22 and 23.

<sup>19</sup> See evidence as to journals, in particular, Part 4, submissions 24 and 38.

<sup>20</sup> Section 33 (2) of the *Copyright Act 1968-1973*.

<sup>21</sup> Section 33 (3) of the *Copyright Act 1968-1973*.

practical point of view to determine in whom the copyright is currently vested or in whom the right to license copying resides. Even if the disposal of copyright is dealt with specifically under a person's will it is usually quite impractical, except in the most extraordinary case, to ascertain the contents of the will of a person dying outside Australia and, to a lesser extent, in Australia, and even more difficulty exists in endeavoring to trace the title to copyright or the right to license copying.

2.25 We were also greatly impressed by the evidence of a number of witnesses who stressed the problems that arose because some books were unavailable when ordered, or were out of print<sup>22</sup>, and because back issues of periodicals were difficult or impossible to purchase even a few months after the date of issue. 23

2.26 A system of licensing for 'public interest' copying, including that on self-service machines in universities and school libraries, was put forward by the Australian Copyright Council Ltd<sup>24</sup> which was broadly described as 'a voluntary blanket licensing scheme, supplemented by statutory licenses'. It was said that this scheme would avoid the difficulty of the individual user having to deal with the individual copyright owner in respect of the copying of his works. The Council rejected any method of payment other than an amount calculated on the basis of a per copy per page amount for each copyright owner. That is to say, it sought that each owner be remunerated by way of an amount based on the number of pages copied and the number of copies made.

2.27 The details of the Council's proposal are more fully set out in Part 4 of this Report. Even if it were practical to record each copying instance by a private individual to which section 40 applied and by some method to enforce payment from him to a central collecting agency, we are quite satisfied that in most, if not substantially all, of the copying instances great difficulty and expense would be involved in paying royalties of a small amount to copyright owners (and in particular the authors) and the cost of collection and distribution must exceed any reasonable royalty which the individual copier would be likely to pay or, indeed, a Government could reasonably be expected to provide, if it wished to fund some forms of copying by an individual on, for example, a self-service machine in a university library.

2.28 The Council's proposals involved one or more copyright agencies being able to agree with, for example, an educational body in relation to the amount to be paid and the limits to be allowed for copying under its scheme. Our experience in this inquiry leads us to believe that it is unlikely in most cases that agreement would be reached upon the terms of remuneration and the limits of copying permitted and the issues would fall to be determined by a tribunal, particularly since the Council's proposals covered copying by individuals on self-service machines.

2.29 The major attraction for an educational body which would arise from the introduction of legislation along the lines proposed by the Council<sup>25</sup> appears to be that the educational body would receive a statutory licence to copy, within certain imprecise limits and without remuneration, works of persons not represented by the agency and who had not given notice to remain outside the licence.

2.30 Indeed, we see so little advantage in this scheme to most copyright owners whose works are likely to be copied because of the practical difficulties in distributing any substantial amount of royalty to individual copyright owners, that we do not think that any significant number of them on a world wide basis would join a copyright agency. The material before us did not suggest a contrary conclusion. In saying this we consider that the proposal may be more attractive to publishers than to authors. However it is basic to the Council's proposals that individual authors

<sup>22</sup> See part 4, submissions 31 and 34.

<sup>23</sup> See part 4, submissions 21, 22 and 23.

<sup>24</sup> See Part 4, submission 1.

<sup>25</sup> See Part 4, submission 1.

should ultimately benefit directly from the operation of the Council's scheme for the copying of their works on a per copy per page basis.

2.31 We note the following paragraph from the official report of the joint meeting of the sub-committee on reprographic reproduction of the Intergovernmental Copyright Committee of the Universal Copyright Convention and the sub-committee on reprographic reproduction of the Executive Committee of the Berne Union in June 1975<sup>26</sup>, 'An observer of the International Publishers Association (IPA) pointed out that some of the discussion on distribution had been based on the assumption that all authors would belong to a society or union. In the United States, only 10% of the 20 000 authors published by one particular company were members of any such organisation. Few scientific, technical or educational writers belonged to associations'.

2.32 During our hearings, the Australian Copyright Council Ltd and some other parties, in support of the claim that a collecting agency could operate as an effective means of distributing royalties to copyright owners in Australia and throughout the world, referred to the Australasian Performing Right Association Ltd (APRA) as a successful example of such an agency.

2.33 APRA controls the rights of public performance and broadcasting of music on behalf of composers and publishers who are its own members in Australia or members of its affiliated societies in many other countries. Although we had no direct evidence about its activities, it appears that APRA does operate successfully as a medium for issuing licences to users of music, collecting royalties from the issue of those licences, and distributing the revenue thus received to authors and publishers throughout the world. In carrying out these activities it seems that APRA controls a high proportion of musical works in current use, irrespective of the country of origin, and that it effectively distributes a large revenue to many authors and publishers in Australia and elsewhere, its overseas distributions being made through its affiliated societies in other countries.

2.34 We understand that distributions to authors and publishers are made by APRA on the basis of detailed returns of music usage which it obtains from some of its licensees such as radio and television stations, in combination with certain statistically based sampling techniques.

2.35 In view of the emphasis placed upon the activities of APRA, we feel some comments should be made upon its relevance to our inquiry.

2.36 APRA is part of an established world-wide movement of performing right societies which operate in practically every country in the western world as well as in the USSR, Japan, and some African and Asian countries. The organisation of these societies started in France and the United Kingdom over sixty years ago. Undoubtedly the movement owes its rapid development and wide representation of authors and publishers to certain basic factors inherent in the music industry, namely the existence at the time of its development of relatively few music publishing houses, coupled with the fact that nearly all composers of music had close links with music publishers. Even so, many years passed before an effective and widely representative organisation was developed.

2.37 The problem of distribution of royalties in an equitable manner by APRA is greatly facilitated by the ephemeral nature of popular music of the kind which it mainly controls. This means that at any given time only a small range of musical works is in active commercial use in relation to the whole repertoire of music, and sampling techniques can be employed with a reasonable degree of accuracy.

2.38 It seems crucial to the effective operation of APRA that it is able to restrict its dealings with copyright owners in overseas countries to similar national affiliated

<sup>26</sup> See paragraphs 10.12-1015.

organisations from whom it receives its rights under blanket agreements and to whom it accounts for royalties earned in Australia. It does not need to deal directly with individual publishers or authors in overseas countries.

2.39 After considering these various aspects of the operation of APRA and the performing right movement generally, it is our view that a collecting agency for reprographic reproduction based upon the same model could not hope to operate as effectively in the foreseeable future, particularly in relation to overseas copyright owners.

2.40 The Australian Copyright Council Ltd also sought to rely on a sampling system. The Council arranged for some evidence of a statistical nature.<sup>27</sup> This evidence was not directed to copying in the libraries of universities or colleges of advanced education and we are quite satisfied that any system of sampling in university or college libraries of copying on self-service machines would not produce any worthwhile results in view of the absence of any significant pattern of material copied. We direct attention to the evidence of Mr Matthews, Legal Officer of the University of Queensland, on behalf of the Australian Vice-Chancellors' Committee as to the extremely wide range of publications likely to be involved. Mr Matthews produced some tables showing recommended books in certain courses in several universities and there were examples where, of the eight to fifteen recommended books for one first year subject on the list of one university, only one or two appear on any corresponding list of three or four other universities. We were also provided with a similar analysis which was compiled from reading lists in the handbooks of 15 colleges of advanced education and teachers colleges in New South Wales with regard to compulsory and elective education strands of three-year courses for primary and lower primary teachers. Of the 546 titles listed, 428 or 78.4 per cent were listed by one college only, 83 were listed by two colleges only and only two by more than five of the colleges. We are satisfied that even in universities and colleges of advanced education if each student was required to fill in a card relating to photocopying to be processed by a computer it would be necessary to provide a substantial measure of supervision at each machine if the records were to be of any value. This is particularly so since the records would be the basis for the distribution of monies.

2.41 Mr Matthews said that if all self-service machines in the University of Queensland were to be supervised and even if those in the main library were collected into one room, a further 23 staff members would be required, involving a direct labour cost, calculated for the year 1974, of at least \$115000.<sup>28</sup> To this all the usual overheads were to be added. Mr Matthews put the cost of direct labour for all Australian universities at something over \$1 million in 1974, to which overheads had to be added. He said that upon the basis of copying 16.5 million sheets this cost worked out at about 7 cents a sheet for direct labour costs alone.<sup>29</sup>

2.42 An estimate was made by the Australian Department of Education that in 1974, to provide a clerical assistant in each of the 1400 secondary schools in Australia at a salary of say, \$5000 per year, to monitor photocopying, would involve an annual cost of about \$7 million, to which must be added all the usual overheads.<sup>30</sup>

2.43 It is clear from this evidence that the cost of providing accurate records of individual copying is out of all proportion to any royalties that might be payable to copyright owners, and that a satisfactory sampling system that would take the place of the keeping of detailed records cannot be devised.<sup>31</sup>

2.44 Although it might be possible theoretically, if cost were no object, to supervise

<sup>27</sup> see part 4, Statistical Evidence.

<sup>18</sup> See Part 4, submission 24.

<sup>29</sup> See Part 4, submission 24.

<sup>30</sup> See Part 4, submission 25.

<sup>31</sup> See generally Part 4, Statistical Evidence.

self-service machines in, for example, university or college libraries, to the extent that adequate records of each page copied were made, we think it would be quite impossible to require records of the photocopying to be made in respect of photocopying on private machines. We have been told that even now it is possible for a person to purchase a machine cheaply which will provide satisfactory photocopies. 2.45 With photocopying machines in places where institutional supervision is not possible or practical we think that few, if any, individual persons would be sufficiently familiar with the Act or sufficiently concerned to make a record of the copying done even if someone other than the copier was required to provide any remuneration in respect of that copying.

2.46 It is interesting to note that at the joint meeting of the sub-committees on reprographic reproduction in Washington in June 1975, the delegation from the Federal Republic of Germany expressed the view that any solution to the problem of reprographic reproduction requiring libraries to supply lists showing the title and the individual author would be doomed from the start.

2.47 We did not receive many submissions from individual persons concerning the making of copies for research or private study, but those who did make submissions were unhappy with the delay and inconvenience of filling in forms where this practice was adopted.<sup>32</sup>

2.48 It has been suggested that it might be possible to provide some fund in respect of all private copying by placing a sales tax on copying machines or by placing a sales tax on copying paper. Whilst certainly it would be possible to provide a fund by placing a tax on copying machines or, indeed, perhaps requiring an annual licence fee in respect of each machine, there is, in our view, no practicable way by which any such fund could be distributed to provide remuneration to the copyright owners whose work was copied on a per page basis or on any other basis which would be broadly equitable. In saying this, we have in mind the difficulty of tracing the individual author or if the author is dead, the person or persons entitled to any royalty. The fact that the author may be situated anywhere in the world, the fact that only a page or two of a particular author's work, or even, for example, 30 pages, might be copied on any one machine in a year, the fact that the work copied may not be still in copyright, all support the conclusion that a reasonable amount of unremunerated copying by a person, at least for research or study, should be allowed. Even if one disregards the approach of the Australian Copyright Council Ltd and considers that it would be appropriate to distribute any such fund to an organisation of authors for the benefit of authors generally who were members of that organisation, we can see no possible practical means of achieving any appropriate distribution even in Australia at the present time. Apart from the problem of distribution of monies collected, taxing or licensing machines would create gross inequities where a machine is scarcely used at all for reproducing published copyright material, for example, as in many business offices.

2.49 We also point out that, subject to any relevant provisions of the *Trade Practices Act 1974-1976*, there is no legal reason why one or more copyright agencies should not, as the law stands at present, enter into agreements with any person or persons in relation to licensing photocopying not permitted by the *Copyright Act*.

2.50 While the resolution adopted by the sub-committees on reprographic reproduction of the Intergovernmental Copyright Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union in June 1975 envisaged States encouraging the establishment of collective systems to exercise and administer the right of remuneration, the majority of us consider that it is unlikely that a collecting agency or agencies will be established in Australia representative of all or a

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<sup>32</sup> See Part 4, submission 41

substantial percentage of the owners of copyright in works likely to be copied. If such an agency were to develop within the framework of the present law its activities should be brought under the supervision of the Copyright Tribunal in the same manner as the activities of bodies for licensing the public performances of copyright works are dealt with under Part VI of the Act.

### Authorizing infringement of copyright

**2.51** We have already mentioned the judgment of the High Court in *The University of New South Wales v. Moorhouse and Anor*<sup>33</sup> where it was held the University had authorised and was therefore legally responsible for the act of which the complaint was made and we now deal in more detail with the question of authorisation.

**2.52** Jacobs J., with whom McTiernan A.C.J. agreed, said in relation to the person who had carried out the photocopying which had taken place:

There was no express permission given to him but the real question is whether there was, in the circumstances, an invitation to be implied that he, in common with other users of the library, might make such use of the photocopying facilities as he thought fit.

His Honour went on to say:

The invitation to use is on the face of it an unlimited invitation. Authorisation is given to use the copying machine to copy library books.

His Honour, after pointing out that the University had not qualified its invitation to users of the library to use its machines and that the only form of notice which was posted was inappropriate, said:

The particular form of notice on the machines is a negative factor in that it did not in any relevant way limit the invitation which was implicitly extended to make use of the machines for photocopying as the user thought fit.

Gibbs J., said:

It seems to me to follow from these statements of principle that a person who has under his control the means by which an infringement of copyright may be committed—such as a photocopying machine—and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use.

His Honour then went on to consider the steps which the University had taken to limit the use of the machine to legitimate purposes and, after observing that the University had the power to control both the use of the books and the use of the machines, said that various measures adopted by the University had not amounted to reasonable or effective precautions against an infringement of copyright by the use of the photocopying machines.

His Honour also said:

However, the fatal weakness in the case for the University is the fact that no adequate notice was placed on the machines for the purpose of informing users that the machines were not to be used in a manner that would constitute an infringement of copyright. It is unnecessary to consider what the position would have been in the present case if the notices on the machines had been sufficient.

**2.53** We consider both on the grounds of principle and on practicality that the Act should allow copying on self-service machines without remuneration in university or other libraries where the copying is a fair dealing for the purpose of research or study, and two of us would extend the limitation to 'for purposes such as research, study, private or personal use'. We recommend that the Act should be amended to

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<sup>33</sup> See paragraph 2.15

make it clear that the installation and use of self-service machines in libraries does not of itself impose any liability for copyright infringement upon the librarian or the librarian's employer provided notices in a form prescribed by regulation are displayed drawing users' attention to the relevant provisions of the Act.

### Consideration and recommendations concerning 'fair dealing' and section 40 of the Act

2.54 We pass now to consider in more detail the provisions of section 40 of the Act. For the purposes of this examination of the section, no consideration will be given to the question of copying by a librarian, different aspects of which are considered in Sections 3, 4 and 5 of this Report.

2.55 Although the concept of 'fair dealing' was attacked by the Australian Copyright Council Ltd on the basis that, *inter alia*, 'it gives no certainty to users', it appears that under the Council's proposals 'fair dealing' would still be retained in cases where notice had been given and in cases of copying not being within the category of 'public interest copying'.<sup>34</sup>

2.56 The Australian Book Publishers Association was in favour of retaining 'fair dealing'.<sup>35</sup>

2.57 We have had many submissions directed to us about the unsatisfactory nature of such an indefinite test as that embraced by the words 'fair dealing'. However, we are satisfied that for the purposes of section 40 it would be most unwise to attempt any exclusive definition of the words 'fair dealing' and we believe this concept should be retained.

2.58 The question of 'fair dealing' was recently examined by the Court of Appeal in *Hubbard v. Vesper, supra*<sup>36</sup>, in relation to the section of the United Kingdom Copyright Act 1956, equivalent to section 41, but what was said as to the words 'fair dealing' appears equally applicable to those words in section 40. Lord Denning M.R. at 94 said, *inter alia*: 'It is impossible to define what is "fair dealing". It must be a question of degree . . .'. Megaw L. J. at 98 said in relation to the words 'fair dealing', *inter alia*: 'It may well be that it does not prevent the quotation of a work from being within the fair dealing sub-section, even though the quotation may be of every single word of the work'. This was said in reference to an example of the copying of the epitaph on a tombstone.

2.59 We see section 40 as being a section mainly directed to the acts of an individual, and there are so many factors which may have to be considered in deciding whether a particular instance of copying is 'fair dealing', that we think it is quite impracticable to attempt to remove entirely from the Court the duty of deciding the question whether or not a particular instance constitutes 'fair dealing'. We are also unable to think of any words which would precisely define the expression 'fair dealing' so as to be of any assistance to a person trying to decide whether the making of a copy of a substantial part of a work would be protected by section 40 or not. This is particularly so when one looks at the position with, for example, poems and music, each of which may be a separate work, even though found in a collection bound together, as for example, in a book.

2.60 We think, however, that it would be useful to add a provision to section 40 so far as it applies to reprographic reproduction along the following lines:

- (a) In determining whether a dealing with a work in any particular case is a fair dealing the factors to be considered shall include:
1. The purpose and character of the dealing;

<sup>34</sup> See Part 4, submission 1.

<sup>35</sup> See Part 4, submission 3.

<sup>36</sup> [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389

2. The nature of the work;
  3. The amount and substantiality of the portion taken in relation to the whole work;
  4. Whether the work can be obtained within a reasonable time at a normal commercial price;
  5. The effect of the dealing upon the potential market for or value of the work; and
- (b) Without restricting the meaning of the expression 'fair dealing' the making of one copy for (research or study) :<sup>37</sup>
1. in the case of copying from a periodical publication, of not more than a single article or, where more than one article relates to the same subject matter, those articles; or
  2. in the case of copying from an edition of a work, of not more than one chapter or 10 per cent of the number of pages in that edition, whichever is the greater, is a fair dealing with the work.

2.61 We think that a person coming within the general provisions of section 40 may be entitled to make more than one copy of a substantial part of a work for research or study if, for example, he is engaged on a research project which requires him to assemble for his own use part of a work under different headings or, for example, where he wishes to mark certain references on one copy and certain comment or criticism on another. We do not consider this would be outside our recommendations or that any special provision is necessary to cover it.

2.62 We had a number of submissions put to us concerning problems associated with the phrase 'for the purpose of research or private study'. We note that the Australian Vice-Chancellors' Committee suggested the deletion in section 40 of the word 'private'.

2.63 We considered whether we should recommend, so far as concerns reprographic reproduction, that section 40 of the Act be amended to provide that a fair dealing with a work for 'purposes such as research, study, private or personal use' should not be an infringement of copyright.

2.64 We are of the view that 'study' should not be limited by the word 'private'. Whilst it is difficult to understand the scope of what is comprehended by the term 'private study', the limitation seems to have been intended to distinguish use of copyright material for private study from use for classroom instruction. We think the distinction is, in many respects, an artificial one. We note that the Copyright Bill now before the United States Congress would permit fair dealing with a copyright work for purposes which, *inter alia*, include teaching and scholarship, which clearly covers classroom use. It is clear that the photocopying of material is of considerable assistance in enabling teachers and students to prepare material for classroom use, and that it is difficult to maintain a distinction between private study and other educational purposes. So long as the photocopying of material for educational use is qualified, for the purposes of section 40, by the requirement of fair dealing, we think that the removal of the limitation to private study will not prejudice owners of copyright.

2.65 On the other hand, two of us have considerable reservations about an extension of section 40 to permit fair dealing by way of reprographic reproduction for private or personal purposes. Whilst there may be a good deal of photocopying of limited amounts of copyright works for purposes that may be described as private or personal, and either the owners of copyright in that material have no means of knowing what is being copied or do not consider it worthwhile to take action against those who do the copying, two of us do not believe that it is necessarily appropriate to make this copying legitimate. That copyright owners are either unable or unprepared to enforce their rights does not seem to those of us who hold this view to be a sufficient reason for limiting those rights. Those two are concerned that such an

<sup>37</sup> The words in brackets should correspond with the words used in section 40.

extension would lead to further erosion of copyright in the public mind and that further changes in technology may extend the capacity of private individuals to make photocopies in ways that we do not now foresee.

2.66 Notwithstanding these considerations, the other two members of the Committee are firmly of the view that section 40 should be extended to permit reprographic reproduction of copyright works, within the scope of fair dealing, for private or personal purposes. They believe that this extension would not make Australian law out of line with what might be broadly described as world standards. They consider that the interests of copyright owners would remain sufficiently safeguarded by the requirement of 'fair dealing' and if the extension they propose be adopted, that this extension would be desirable in the interests of the general public.

2.67 They also consider that there are a number of cases which are impossible to foresee but of which an example may be given where copying, provided it is fair dealing, should be allowed. Suppose, for example, a ratepayer receives a letter from a municipal council under circumstances which do not require him to treat the letter as confidential and he wishes to discuss the contents of that letter with some other ratepayers who live some distance away. Or he may merely wish to make a copy for filing in a particular way or for preservation. Under the law as it stands at present making such a copy would be an infringement of copyright, unless it can be said to be for the purpose of 'research or private study', or for the purpose of 'criticism or review' or unless a licence is implied.

2.68 While we are therefore unanimously agreed that the limitation of 'private' before 'study' should be removed we are unable to reach agreement on any further extension of the scope of section 40, so far as reprographic reproduction is concerned. We would emphasise that we have not, of course, considered the operation of section 40 in relation to use of copyright material by means other than reprographic reproduction.

#### **Other recommendations**

2.69 We also recommend that the Act should be clarified to make it clear that sections 40, 41 and 43 may be applied to copying by a library or archives if that copying is not otherwise permitted and also that the provisions of Divisions 3 and 5 of Part III apply to published editions of works dealt with in section 88.

2.70 We do not think any further amendment to section 41, which concerns fair dealing for the purpose of criticism or review, or any amendment to section 42, which concerns fair dealing for the purpose of reporting news, has been shown to be necessary or desirable in relation to problems arising as a result of the use of reprographic reproduction.

## *Section 3*

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### *Copying by a library for users*

3.01 This Section concerns copying by libraries for users and for Members of Parliament which is presently dealt with in section 49 of the Act. It does not include copying on self-service machines and it deals only with cases where the librarian or person acting on behalf of a librarian is performing the copying. It is also not concerned with copying for preservation or of out-of-print material or of unpublished works or the preparation of multiple copies for use in the libraries of educational establishments or for distribution to students.

3.02 We consider that the position with regard to copying by librarians or persons on their behalf must be examined as a separate problem whatever conclusion is reached concerning personal copying by an individual himself on a machine.

3.03 We consider that the present Australian legal position is not substantially inconsistent with what might be called the world standard. There is no doubt that it is desirable that for certain purposes a user should be able to obtain a copy of an article in a journal and a reasonable part of a published work.

3.04 It was not in fact put to the Committee that librarians should not be permitted to make photocopies of copyright material in their libraries. What has been in issue is whether royalties should be payable in respect of this copying. A library often finds it inconvenient or impractical, especially in the case of a journal, to permit a work to be borrowed. A library user will often want to have his own copy of a journal article or part of another published work. Even if he is prepared to buy the journal or the whole work, he will often find that it is not available. Libraries are, in our view, properly regarded as information resource centres. The need for copying library material by or for users of a library would not normally be satisfied by the library purchasing additional copies of the works. Quite apart from the severe financial burden this would place on libraries, we are satisfied that it is not possible to predict user demand for particular works in advance in most cases. In any event, the needs of the user, who may want to make notes on the copy or assemble it with other material, would not be met merely by the library having additional copies.

3.05 In Section 2 of this Report we have already recommended the retention of the fair dealing concept for copying by individual persons without provision for remuneration to the copyright owner. It is our view that copying by librarians is analogous to copying by individual persons under the fair dealing concept although in the case of copying by librarians it is considered desirable to have a separate provision rather than to allow the matter to rest on the general provisions of 'fair dealing'. For this reason we do not recommend that any provision should be made for remuneration in this class of copying.

3.06 Even if it were considered that remuneration should be paid for copying by librarians there would still be practical difficulties in the way of a feasible scheme for the payment of such remuneration.

3.07 The evidence shows that written requests for photocopies now received by librarians there would still be practical difficulties in the way of a feasible scheme for royalties might be based to be derived from them. To extract this information however would involve additional costs which might often exceed any royalties reasonably payable.

3.08 We received information concerning the nature of material photocopied in a number of libraries, for example, the National Library of Australia, the Library of the Western Australian Institute of Technology, the State Reference Library of Western Australia, and the Library of New South Wales. We also received the views of a number of persons based on their experience. Apart from libraries attached to schools, it seems clear that by far the greatest amount of photocopying performed by librarians is in relation to articles from journals and again, by far the greater number of the articles copied is from journals which were not published in Australia.

3.09 For example, it was said that in a test period in the Library of the Western Australian Institute of Technology only 17.8 per cent of the material copied was Australian published material and only 13.8 per cent was Australian material subject to copyright.<sup>1</sup> During a test period in the State Reference Library of Western Australia 46 per cent of the copy instances were in respect of periodicals and serials, 29 per cent in relation to books and only 8 per cent of the books from which any pages were copied were books published in Australia and in print. It was estimated that the probable number of pages copied from each book in this sample was three.<sup>2</sup>

3.10 Witnesses from the CSIRO estimated that about 324000 photocopy pages were made per year in the CSIRO libraries and of these, about 90 per cent were from journals of which most were published overseas.<sup>3</sup>

3.11 The witnesses with a technical or scientific background, for example, Professor Angus-Leppan<sup>4</sup>, those from the CSIRO and Dr Sheridan, who represented the Institution of Engineers, Australia were all in favour of a continuation of the law permitting single articles in journals to be copied by librarians for users and their views were unanimous that in substantially no case was any author of an article in a scientific journal paid any royalty or indeed paid any fee in respect of the article. It was forcibly put that such articles were written for the purpose of disseminating information, for the purpose of the author achieving status in his profession or a higher degree or to present the results of some funded research. Indeed it is sometimes the practice overseas to pay a considerable sum, up to, so we were told, \$100 a page, to get papers published in particular journals.<sup>6</sup>

3.12 We were told that most writers of scientific or technical articles in journals were pleased if their articles were copied and, indeed, the Institution of Engineers pointed out that it would be a much more economical way of disseminating the information which it was endeavoring to put out through its journals if libraries, at no cost to it, would provide copies of articles appearing in its journals.

3.13 We feel that, so far as concerns articles of a technical and scientific nature, there is a great public need for copies to be available without undue restriction.

3.14 In view of the vast number of authors in the scientific and technical field<sup>7</sup> we do not consider that it would be practical or appropriate to distribute any fund, which might be obtained as a royalty in relation to the copying of journal articles or reasonable parts of a book, to societies of authors or groups of authors in various countries of the world, if for no other reason than that in general the relevant authors are not members of any such society.

#### **Consideration and recommendations concerning section 49**

**3.15** We proceed now to consider section 49 of the *Copyright Act* in detail.

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<sup>1</sup> See Part 4, submission 22.

<sup>2</sup> See Part 4, submission 15.

<sup>3</sup> See Part 4, submission 36.

<sup>4</sup> See Part 4, submission 37.

<sup>5</sup> See Part 4, submission 38.

<sup>6</sup> See Part 4, submissions 36.

<sup>7</sup> See generally Part 4, submissions 11 and 36.

3.16 This section deals with the making of a copy of an article or part of an article contained in a periodical publication by or on behalf of the librarian of a library that is not established or conducted for profit, and also the making of a copy of part of a work by or on behalf of a librarian of such a library where the copy 'contains only a reasonable portion of the work'. The combined effect of sections 48, 49 and 53<sup>6</sup> is that although section 49, partly as a result of the definition of 'article' in section 48, does not extend to artistic works, section 53 protects the copying of artistic works used in certain illustrations in an article or part of a work copied under the provisions of section 49.

3.17 From the submissions we have received it seems that the degree of copying permitted under section 49 is considered appropriate by most librarians, but considerable dissatisfaction was expressed by librarians and by users about the requirements of sub-section (3) of section 49 and also librarians in general pointed out that what was 'a reasonable portion' was very difficult to determine.

3.18 We are not able to formulate any more satisfactory expression than 'reasonable portion', but it seems desirable to add a provision that in the case of copying from an edition of a work up to one chapter or 10 per cent of the number of pages in that edition, whichever is the greater, shall be deemed to fall within the words 'a reasonable portion', although 'a reasonable portion' might in some instances be a greater amount than this and the librarian would be protected if a Court so found.

3.19 We also recommend an addition to the Act somewhat along the lines of section 108(e) of the United States Bill S.22<sup>9</sup> permitting the copying in a library of an entire work or more than a reasonable portion of it where that work forms part of a collection in the library if the librarian has first determined on the basis of a reasonable investigation that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price and makes a declaration to this effect, and provided a declaration is also made by the user of the library that the copy is required 'for the purpose of research or study'. It should also be provided that the declarations are to be open for inspection upon reasonable notice and are to be retained by the library for a period of 12 months. In the United States Bill the words 'fair price' are used but we prefer the words 'normal commercial price' which indicate the test is not whether the normal commercial price is fair but whether the price at which the work can be obtained is the normal commercial price. Two of us would extend the permitted copying to copying 'for purposes such as research, study, private or personal use'. In any case the words in this section should correspond with those adopted in section 40.

3.20 In general, if a library wishes to provide the service of copying by a member of the library staff rather than permit a person requiring the copy to make it on a self-service machine, it does not seem unreasonable to require that person to make out a form containing a signed statement relating to any requirements which might be provided in any amended section 49.

3.21 At present, sub-section (3) of section 49 requires that the librarian must be satisfied, unless the person is a Member of Parliament, that 'he requires the copy for the purpose of research or private study and that he will not use it for any other purpose'. It will be necessary for the words 'for the purpose of research or private study' to be amended to correspond with the words adopted for section 40. In addition, before the protection of the section operates, the person to whom the copy is supplied must not have been supplied previously by the librarian or person acting on behalf of the librarian, with a copy of the same article or of the same part of the work and where the copy is supplied to a person other than to a Member of Parliament, the person is required to pay for the copy an amount not less than the cost of making the copy.

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<sup>6</sup>Set out in Appendix E

<sup>9</sup>See paragraph 11 .60.

3.22 We have considered whether the section should continue to require a payment to be made by the person requiring the copy, particularly since we have been told in some cases, where the article is required by a research worker carrying out funded research, that the cost of the copying is charged to the cost of the research and that the cost of making the charge often exceeds the cost recovered against the research project for the making of the copy.

3.23 The amount charged in respect of copying seems to vary considerably and, where a copy is made by or on behalf of a librarian, the charge appears to run from 5 cents to 15 cents a copy. It is to be noted that the requirement for payment does not apparently apply to copies made on a machine not operated by the librarian, or a person acting on behalf of the librarian. We doubt whether the requirement for payment serves any useful purpose, and we think the general practice is for most libraries to seek to cover at least the cost of paper and the machine, even if not all the labour costs. We feel that in the ordinary library situation it would not be possible to fix with any precision 'the cost of making the copy'.

3.24 We doubt whether there would be any serious disadvantage to copyright owners if a library were permitted to supply copies within the limits of section 49 as proposed to be amended without having to require payment for the copies. On the other hand, a library should not be permitted to make a profit from supplying copies under this section, or under section 50. We therefore consider that the Act should prohibit any charge in excess of the direct and indirect costs of making the copy but should not require any charge to be made.

3.25 We think it is not unreasonable to limit the protection of the section for the librarian to cases where the user declares that no previous copy has been supplied to him by the librarian or person acting on behalf of the librarian of that library.

3.26 We also consider that rather than requiring the librarian to be satisfied as to the purpose for which the copy is required, it should be sufficient, as in the United Kingdom, to provide that the condition is fulfilled if the librarian or person acting on behalf of the librarian receives in good faith a signed statement by the person requesting the copy, declaring that the purpose for which the copy is required falls within the words of the section and that he will not use the copy for any other purpose. We think it would be appropriate that the legislation provide a penalty where the user of the library makes a false declaration.

3.27 We have also been concerned to consider the development of the systematic reproduction of single copies of single articles from journals in libraries. An example of the development we have in mind is illustrated by ANSTEL.<sup>10</sup>

3.28 This problem has arisen in a fairly acute form in the United States of America and litigation ending in the Supreme Court took place in *The Williams and Wilkins Company v. The United States*. This was an action by the Williams and Wilkins Company, a medical publisher, against the Department of Health, Education and Welfare of the United States of America, alleging infringement of copyright by the National Institute of Health and the National Library of Medicine arising from large-scale photocopying of articles from periodicals published by the plaintiff. The plaintiff was successful before the trial judge but the United States Court of Claims upheld an appeal by a four to three majority.<sup>11</sup> The Supreme Court of the United States heard an appeal but the Judges were evenly divided and so the appeal was dismissed. The Judges of the Supreme Court gave no reasons for their judgments.

3.29 We have considered the proposal in section 108(g) of United States Bill S.22 and in particular the further recommendations of a sub-committee of the House Judiciary Committee.<sup>12</sup> After very careful consideration we think that in Australia

<sup>10</sup> See Part 4, submission 1 i.

<sup>11</sup> Reported in Federal Reporter 2nd Series (1973) 487 F.2nd 375

<sup>12</sup> See paragraphs 11.63 and 11.66(c).

any such provision *inter alia* would impose undue restrictions on the dissemination of technical and scientific information. As we have said, we feel that if any systematic reproduction of copies is undertaken by libraries it will be mostly in the scientific and technical fields.

3.30 In coming to our conclusion we have considered a number of possible approaches in relation to a library engaged in systematic reproduction. One would be to apply some restrictions in respect of journals other than those in the scientific and technical fields, using those words in their widest meaning. Another approach would be to define the works that may be copied by prescribing the class of persons for whom they were written, for example, scholars and researchers. We do not find these approaches attractive. A further approach would be to require the keeping of records and where more than, say, six copies of an article were prepared over a given period, a fee would be available to an owner making a claim within a prescribed time in respect of that copying. Whether or not this last approach would be practical in other fields, we reject it in this case as impractical and of no significant benefit to the authors involved.

3.31 We were also told that it takes up to five months for journals to arrive in Australia by surface mail. The National Library of Australia pointed out that it often received requests for photocopies of important articles from a copy of a journal which it has received by air mail. It is obvious that users in general cannot enjoy the luxury of the cost of receiving all journals by air mail.

3.32 In all the circumstances we have come to the conclusion that we do not wish to recommend any special restrictions to deal with this kind of development. However, we consider it necessary to keep this matter under review.

3.33 We note that section 18 provides that, for the purposes of the Act, a library shall not be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on business for profit.

3.34 We consider that the provisions of section 49 should also extend to archives which should be suitably defined.

#### **Other recommendations**

3.35 We also note that sections 40 and 41 provide certain exceptions in relation to fair dealing and any amendment to section 49 should not restrict any possible application of sections 40, 41 and 43 to copying by libraries,<sup>13</sup>

3.36 We also recommend that section 112 dealing with reproduction by libraries of published editions of works should be amended to conform with the recommendations we have made with respect to section 49.

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<sup>13</sup> see paragraphs 2.69 and 2.70.

## Section 4

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### *Copying by a library for other libraries*

4.01 This Section concerns copying by libraries for other libraries or what is commonly called copying for inter-library loans. The term 'inter-library loan' is used to include the case where one library supplies to a second library at the request of the latter library a photocopy of a work or part of a work held in the collection of the former library.

4.02 Photocopying for the purpose of 'inter-library loan' is to replace in appropriate cases the loan of a book or periodical which, particularly in a country of large area, becomes impractical for many reasons, including the time taken to transmit the work itself to the place where it is required and the cost of postage or airfreight.

4.03 We consider that it is desirable to facilitate inter-library loans particularly in a country which, as is the case with Australia, is situated at a great distance from many of the centres of publication, and which is so large as to make it obviously impossible to provide elaborate library facilities in the widely separated towns which exist.

4.04 A good illustration of the need for inter-library loans appears in the State of Western Australia where the State Library Board is responsible for the operations of the whole of the State Library system. <sup>1</sup> At the time submissions were made to us there were 145 public libraries in Western Australia, of which 33 were in the metropolitan area. It is clear that it would be quite impossible to provide in each of these libraries all the monographs and periodicals which might reasonably be required by a reader in the area. This is more particularly so in the scientific and technical field. Another illustration of the need exists in the CSIRO which at the time submissions were made, had a total staff of about 7200, of whom about one-third were research scientists located in more than 100 laboratories throughout Australia. Although the CSIRO library network comprised about 40 libraries, each attached to a scientific laboratory, there were in addition about 20 field stations holding books which provide some support for research staff located at isolated stations. <sup>2</sup>

4.05 The need for inter-library loans in the scientific and technical field is also clearly illustrated in the STISEC Report. <sup>3</sup> This report highlights the necessity for making readily available the great quantity of scientific and technical information, 98 per cent of which, it is estimated, is produced outside Australia. It is pointed out in the report that the combination of geographical isolation and low population density puts Australia at an industrial disadvantage and requires a greater effort to ensure good communication with the rest of the world than is needed in most other industrialised countries.

4.06 It is quite clear to us that if information is not readily available in Australia, the progress of the country will be seriously impeded and this must ultimately react on the general standard of living in the community. The STISEC Report also points out that inter-library loans satisfied byway of photocopying are necessary, since Australia could not afford to store multiple copies of little-used or unused journals on library

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<sup>1</sup> See Part 4, submission 15.

<sup>2</sup> See Part 4, submission 36.

<sup>3</sup> See Part 4, The STISEC Report. (Following submission 11.)

shelves around the country, but the report envisages that every library would have what copies it needed of those journals most useful to its clientele.<sup>4</sup>

4.07 We were also told by an officer of the Library Association of Australia that, even if the subscription to a journal is \$20 per annum, the total cost of purchasing and maintaining it on a library shelf is about \$85 per annum. One factor restricting undue reliance by a library on inter-library loans is the cost. It was estimated by officers of the National Library of Australia that the cost to that library of satisfying an inter-library loan was \$6-\$8 and to this must be added the cost incurred by the library requesting the loan.<sup>5</sup>

#### **Remuneration for copying for inter-library loans**

4.08 As we have said, we consider that most of the photocopying which is likely to take place in respect of inter-library loans will be in the technical and scientific field. In this situation we think that no special legislative provision at present is required to restrict the supply of copies of articles on a systematic basis through the inter-library loan scheme, but the situation should be kept under review.

4.09 There does not appear to be much demand for the copying for inter-library loans of works other than technical or scientific works. In addition, as we have said, apart from the cost of photocopying itself, the cost of handling an inter-library loan is substantial and in the field of general literature we consider it is very unlikely that any copying for inter-library loan would take place which would be detrimental to the interests of the author. We do not therefore think that it would be practical or appropriate to recommend any system of royalty or other remuneration in respect of inter-library loans falling within the provisions of the section of the Act dealing with copying by libraries for other libraries which is now section 50.<sup>6</sup>

#### **Consideration and recommendations concerning section 50**

4.10 We proceed now to consider section 50 of the Act in detail.

4.11 The provisions of this section are subject to Regulation 4 of the Copyright Regulations (No. 58 of 1969) which limits its application to copying for another library not established or conducted for profit and to the provision of not more than one copy unless the librarian of the library supplying the copy is satisfied that the copy previously supplied has been lost, destroyed or damaged.

4.12 The section is applicable to the copying of an article in a periodical publication or the copying of a literary, dramatic or musical work or part of a work by or on behalf of a librarian of a library. The section is subject, however, to the requirements that the copy is supplied only to the librarian of another library and, where more than 'a reasonable portion' of the work is copied, the librarian by whom or on whose behalf it is made does not know the name and address of any person entitled to authorise the making of the copy and could not by reasonable inquiry ascertain the name and address of such person. The copy must not be supplied to a library established or conducted for profit-regulation 4.

4.13 It is noted that the section does not specifically deal with the use to which the copy supplied may be put. It therefore seems open to the librarian of the library

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<sup>4</sup>See Part 4, The STISEC Report.

<sup>5</sup>See Part 4, submission 11. The Library Association of Australia also submitted to the Committee a copy of an Inter-Library Loan Code produced by the Australian Advisory Council on Bibliographical Services in 1966, with the assistance of the Association. The Code consisted of recommendations which were intended to improve efficiency in inter-library lending and obviate abuse of the inter-library loan privilege and dealt specifically with the question of photocopying of material for loans.

<sup>6</sup>See Appendix E.

supplied with the copy to make the copy available to any person whether that person desires to use it for the purpose of research or private study or not. Sub-section (3) of section 50 permits regulations to be made excluding the operation of the section where the copy is supplied to a person by the library receiving it otherwise than in accordance with the regulations, but no such regulations have been made.

4.14 We think these provisions are unsatisfactory. There is, in our view, insufficient reason why a person who wishes to have a copy of an article in a periodical publication or no more than a reasonable part of another work for the purposes specified in section 49 (as proposed to be amended) should not be able to obtain a copy through the inter-library loan system without the library that obtains the copy for him being subject to the penalty that another copy cannot subsequently be supplied to it.

4.15 It is because of regulation 4 and not of section 50 that the protection of section 50 does not apply where the supplying library has previously supplied a copy of the work to the requesting library unless the librarian of the supplying library is satisfied the copy so previously supplied has been lost, destroyed or damaged. We consider that the protection to the supplying librarian should not depend on whether the requesting librarian complies with the section or upon the acts of the person to whom the copy is supplied by the requesting librarian. We recommend that the restriction in regulation 4 on the supply of a second copy unless the first copy has been lost, destroyed or damaged should be eliminated except in the case where the requesting librarian requires the copy only for the shelves of his library.

4.16 We recommend that section 50 of the Act should be amended so that it is an infringement of copyright for the requesting library to supply to a person the copy obtained from the supplying library otherwise than in a case where the librarian of the requesting library or the person acting on his behalf receives in good faith a signed statement by the person requesting the copy declaring that the purposes for which the copy is required fall within the same purposes as we recommend for section 49 and further that he will not use the copy for any other purpose. We recommend that the librarian of the supplying library should be protected by section 50 provided he is informed that the declaration has been obtained in the requesting library. We further recommend that a penalty be provided for a false declaration.

4.17 This leaves for consideration the situation where a librarian requests through the inter-library loan system a copy of an article or other work or of part of an article or other work for its own collection. In this case we recommend that the making of such a copy should not be protected by section 50 unless, if a copy has previously been supplied by the librarian of the supplying library to the requesting library, the librarian of the requesting library is satisfied the copy previously supplied has been lost, destroyed or damaged and so informs the supplying library.

4.18 We note that in any case the librarian of the requesting library receiving the copy can copy it for a user of the library provided in so doing the provisions of section 49 are satisfied.

4.19 The same provisions as we have recommended for section 49<sup>7</sup> should be incorporated in section 50 with regard to the words 'a reasonable portion'. Accordingly we recommend that in the case of copying from an edition of a work up to one chapter or 10 per cent of the number of pages in that edition, whichever is the greater, shall be deemed to fall within the words 'a reasonable portion' although 'a reasonable portion' might in some instances be a greater amount than this percentage and the librarian would be protected if the Court so found.

4.20 We consider that the requirement that before more than 'a reasonable portion' of the work may be copied the librarian by whom or on whose behalf the copy is made must not know the name and address of any person entitled to authorise the

<sup>7</sup>See paragraph 3.18

making of the copy and could not by reasonable inquiry ascertain the name and address of such person should be replaced by a provision that the librarian has first determined on the basis of a reasonable investigation that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price and makes a declaration to this effect. It should also be provided that the declaration is to be open for inspection upon reasonable notice and is to be retained for a period of 12 months. This is consistent with the recommendation we have made for copying by a librarian for a user of the library. We recommend this change because we are satisfied that there is very often great difficulty in communicating with the person entitled to authorise the making of a copy and that frequently communications are not answered.

4.21 We also consider that section 50 of the Act should extend to archives, which should be suitably defined.

#### **Other matters**

4.22 We direct attention to paragraph 3.35 concerning libraries and sections 40, 41 and 43, and also to our recommendation in relation to unpublished works set out in Section 5 of this Report.

## Section 5

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### *Copying of published or unpublished works for preservation and certain other purposes*

5.01 This Section mainly concerns copying by libraries or archives of material in the library or archives for preservation or, in certain instances, replacement. We have been greatly impressed by the need, which the present Act does not fulfil, for provisions permitting, without infringement of copyright, copying for preservation purposes. Submissions were made by the National Library of Australia, the Library of New South Wales, the Australian Archives, the Australian Advisory Council on Bibliographical Services and others that great difficulty exists with certain published and unpublished material.<sup>1</sup>

5.02 It is not unusual for the papers of a public figure to be deposited either under his will or by his beneficiaries with a major public library or archives. Many of these papers consist of letters which have been written to him and in which the copyright does not pass with the gift of the papers, because the copyright resides in the writer of the letters. In many instances it proves quite impossible to seek permission to copy because it is not possible to find the person or persons in whom the copyright resides. The legal position then appears to be that even if there is no practical reason a copy should not be made of, for example, a letter, and that letter is freely open to the public for inspection in the library, no copy can legally be made under section 51 until more than 50 years after the death of the author and more than 75 years after the letter was written.

5.03 We were told that very often letters and other unpublished documents of valuable historical interest are written on paper which will deteriorate in the course of time, even without undue handling, and if they are made available to researchers they will deteriorate more rapidly with consequential loss to the nation.

5.04 We are quite satisfied that no reason exists why a library or archives should not be able to reproduce an unpublished work solely for the purpose of preservation or security. It may be desirable for an unpublished work to be copied to prevent unnecessary handling of the original. Sometimes an unpublished work may be wanted for examination in another library by a research worker and it is very often quite impractical for the research worker to travel to the library where the document is and also undesirable to risk sending the document to a library convenient to the researcher. We therefore recommend that an unpublished work maybe copied for preservation or security or for research use in that or another library or archives but provision should be made to ensure that this does not cause the work to become a published work.

5.05 Archival bodies have expressed the view that the Act should permit, without infringement. of copyright, the copying of unpublished works held in a library or archives by the librarian or archivist, or a person acting on his behalf, for a person who makes a declaration that he requires the copy for the purpose of research or study only and that he has not previously been supplied with a copy of that work. This view was put on the basis that scholarship and research would be facilitated by such a provision.

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<sup>1</sup>See in particular, Part 4, submissions, 11, 12, 13, 14, 15, 16 and 17.

5.06 The Committee has considered whether this privilege of copying might be given and whether, if given, it should be confined, as is the case with copying under section 49, to reasonable parts of works. Much of the material held in archival collections consists, however, of short works such as letters and other personal documents. It would not be practicable in many cases to confine copying to parts only of these works.

**5.07** The Committee does not, however, make any recommendation that would specifically permit the making of a copy of an unpublished work by a librarian or archivist for a student or research worker to take away. We point out that any right to copy within the concept of fair dealing would not be affected.

5.08 We might here mention that the limited copying which we propose shall be permitted from unpublished works has no bearing upon any question of confidentiality of the material copied. Whether unpublished material in its original form can be made available to researchers or the general public will depend upon the circumstances of the deposit in the library or archives, and persons depositing such material may still of course impose restrictions on its disclosure.

5.09 We have also received evidence of problems with respect to published material which has been damaged and which cannot be replaced.<sup>2</sup>

5.10 We consider that where a published work held by a library or archives is damaged, deteriorating, lost or stolen, the library or archives should be permitted to make a replacement copy if after a reasonable investigation the librarian has determined that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price and makes a declaration to this effect. The declaration is to be open for inspection upon reasonable notice and is to be retained by the library or archives for a period of 12 months.

5.11 We therefore recommend that a new section along the following lines be inserted in the Act:

It is not an infringement of copyright, for a library or archives, or any of its employees acting within the scope of their employment, to copy a work which is in the library or archives if:

- (a) the work is an unpublished work copied solely for the purpose of preservation or security or for research use in that or another library or archives; or
- (b) the work is a published work copied solely for the purpose of replacement of a copy that is damaged, deteriorating, lost or stolen where the library or archives has, after reasonable inquiry, determined that an unused copy cannot be obtained within a reasonable time at a normal commercial price.

5.12 We have been impressed by the cost and difficulty of storage of little-used books and journals and we consider that where a library or archives wishes to retain a work rather than discard it but wishes to save shelf space the library or archives should be able to make a microfilm or microfiche copy and destroy its original.

**5.13** Therefore we recommend that it should not be an infringement of copyright to make one microfilm or microfiche copy of any work in the collection of the library or archives where it is intended to destroy the original.

5.14 We also recommend that, in conformity with the recommendations we have made, the words 'for the purpose of research or private study' in section 51 (1)(d) be replaced with respect to reprographic reproduction by the words 'for the purpose of research or study'. Two of us would further extend the words to 'purposes such as research, study, private or personal use.'

5.15 We note that section 51(2) permits the copying without breach of copyright of a manuscript, or a copy, of a thesis or other similar literary work that has not been published and is kept in a library of a university or other similar institution by a

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<sup>2</sup>See in particular Part 4, submissions 15 and 16

librarian of the library for supplying to a person who satisfies the librarian, or a person acting on behalf of the librarian, that he requires the copy for the purpose of research or private study and that he will not use it for any other purpose. We recommend that so far as concerns reprographic reproduction the words 'for the purpose of research or private study' be replaced by the words 'for the purpose of research or study'. Two of us would further extend the words to 'for purposes such as research, study, private or personal use'.

## *Section 6*

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### *Multiple copying in non-profit educational establishments*

6.01 This Section deals with multiple copying in non-profit educational establishments, including the provision of multiple copies for a library of a non-profit educational establishment. Copying by an individual student or an individual teacher falls under the heading of copying within the concept of fair dealing, and is dealt with in Section 2 of this Report. Copying by a librarian for a user, including a student or a teacher, is dealt with in Section 3 of the Report. Copying for an inter-library loan is discussed in Section 4 of the Report.

6.02 We have already recommended a provision which would permit the making of up to six copies of articles in periodicals on a temporary basis for use by students in the library of an educational establishment in paragraph 1.46. We have also recommended in the case of other published works, required in a library conducted by a non-profit educational establishment, that up to six copies of that work or part of it may be made without remuneration in any case where the work has not been separately published, or if it has been separately published, it has been ascertained after reasonable inquiry that copies cannot be obtained within a reasonable time at a normal commercial price.<sup>1</sup>

6.03 The remaining question is whether there should be some general provision for the making of multiple copies of the whole or parts of a work in educational establishments for classroom use or for distribution to students. If there is to be some such provision then consideration must also be given to any limitations to be imposed and to whether there is to be provision for remuneration to authors.

6.04 Broadly speaking, the making of multiple copies would not be permissible under the various categories of copying which we have previously considered except in relation to our recommendations referred to in paragraph 6.02. It is also possible that under our recommendations on the fair dealing concept considered in Section 2 of this Report some limited multiple copying could be permissible in appropriate circumstances.

6.05 Section 200 of the Act<sup>2</sup> makes special provision for the reproduction of a work in the course of educational instruction where the work is reproduced 'by a teacher or student otherwise than by the use of an appliance adapted for the production of multiple copies, or as part of the questions to be answered in an examination or in an answer to such a question'.

6.06 It may be noted that this provision extends to copying of the whole of any work, and no provision is made for any compensation to be paid to authors.

6.07 In our view section 200 as it stands is unsatisfactory in relation to the reprographic reproduction of copyright works. Whilst not prohibiting the making of multiple copies, the prohibition on use of 'an appliance adapted for the production of multiple copies' imposes a test as to what is authorised which depends upon the type of machine used to make reproductions. In our view technical changes in photo-

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<sup>1</sup>See paragraph 1.50.

<sup>2</sup>See Appendix E.

copying machines have made quite unsatisfactory a distinction between infringement and non-infringement based on the kind of machine used to make a reproduction.

6.08 The term 'appliance adapted for the production of multiple copies' would seem to include many types of modern photocopying machines, which are capable, once the machine has been set, of making large numbers of copies without further intervention by the operator. These machines are available in many educational establishments. It would appear that the making on a modern photocopying machine of a single copy for the purposes of educational instruction would not be exempt from infringement under the section, whereas the making of a number of copies on the older type of machine would be exempt. It seems probable that section 200 represented, when it was first enacted, a practical compromise between the need for some reproduction of copyright material in the classroom situation and the interests of copyright owners. Apart from obvious illustrations of that need, such as the copying out of copyright material on a blackboard or the making of a slide for an epidiascope, considerations of time and cost would limit, in a practical way, the making of multiple copies of material if machines adapted for the making of multiple copies could not lawfully be used. Again, these considerations do not seem to be sufficient reason to deny the teacher the right to use a modern photocopying machine to make a single copy of a work, or even a few copies, for use for the purpose of classroom instruction when he might, by virtue of section 200 for example, type out the same number of copies without infringing copyright.

6.09 The section is unsatisfactory in another respect. A person who sells or distributes copies of a work made under the protection of section 200(1) may nevertheless be held to infringe the copyright in the work under section 38. Thus a school might not be able lawfully to sell to its pupils copies made under the protection of section 200, even though the price charged was no more than enough to cover costs, or even to give the copies to its pupils if by so doing the copyright owner could demonstrate prejudice. But it may be able lawfully to lend those copies and recover them back afterwards, even though the practical result is the same in terms of economic detriment to the copyright owner.

6.10 We therefore think that apart from the recommendation we make in paragraph 6.69, section 200, so far as it relates to the reprographic reproduction of a work or an adaption of a work, no longer serves a useful purpose, and should be superseded by the provisions we recommend in this Section of the Report.

6.11 In considering what recommendations we should make in relation to multiple copying in educational establishments, we have felt it necessary to consider in turn:

- (a) is there a significant need for such a facility?
- (b) should there be provision for this facility, and if so, what limitations should imposed, for example, as to the number of copies permitted to be made, as to whether the whole or some part of the original may be copied, as to the nature of the original material which may be copied?
- (c) should there be some provision for payment of remuneration to authors, and, if so, in what manner?

6.12 We have also given detailed consideration to the position in other countries, particularly in relation to possible methods of remuneration for authors.

### **Extent of, and need for, multiple copying**

6.13 With regard to the extent of multiple copying in non-profit educational establishments in Australia, such evidence as was available to the Committee showed that both the extent of multiple copying and the need for it to be done varied considerably according to the nature of the institution involved.

6.14 Evidence of the position in universities was given in the written submission of

the Australian Vice-Chancellors' Committee.<sup>3</sup> From this it appeared that the extent to which multiple copies of works or parts of works are made for distribution to students varies from one university to another and from one faculty to another. The submission sought, however, to have multiple copying for distribution to students allowed without infringing copyright. Other evidence showed that there is a significant support for multiple copying facilities, although educational authorities do not all agree that this is desirable from an educational standpoint. We feel however that the educational issue is not for us to determine.

6.15 In a submission made on behalf of Colleges of Advanced Education and similar bodies in New South Wales<sup>4</sup>, it was said that the nature of the courses offered in colleges of advanced education and the high proportion of part-time students at these institutions made it necessary for photocopies of works or parts of works to be available for distribution to students. Multiple copying is apparently often practised on a wide scale in many colleges of advanced education.

6.16 Only limited evidence of the extent of multiple copying in schools was placed before the Committee.

6.17 An estimate provided on behalf of the South Australian Institute of Teachers<sup>5</sup> in relation to primary schools was that photocopying would probably not exceed a total of ten pages per pupil per year, and most of this would be of a single page.

6.18 The Australian Department of Education told the Committee<sup>6</sup> that, in both primary and high schools in the Australian Capital Territory, the bulk of copying consisted of multiple copying of a single page, or of a few pages for distribution to classes, but there was some, though not a great deal of, copying of whole chapters of books.

6.19 In the absence of evidence of the nature of the material contained in the pages of works being copied for distribution in schools, the Committee was unable to form any opinion whether or not the amounts being copied formed more than an insubstantial part of the works involved.

6.20 We were provided with information contained in a report by the Council for Education Technology and the Publishers' Association in the United Kingdom dated January 1975. We have set out some of the details in relation to this in Part 4 of this Report<sup>7</sup> and it appears that each pupil in every primary or secondary school in the United Kingdom in a year receives no more than about 40 pages of material which could possibly be in infringement of copyright.

6.21 We also received some information about photocopying in schools in Denmark in the submissions of Mr Banki<sup>8</sup> but we were unable to draw any significant conclusions from this material.

6.22 In Australia it appears that in some cases copies are made for classroom use because the original work is out of print, or because works ordered did not arrive within a reasonable time.

6.23 The Committee did not seek to carry out or request any surveys of copying in schools in Australia. It is clear that the Committee had no power to extend any legal privilege in respect of evidence derived from a survey and it did not feel justified in pressing for a survey not voluntarily offered where the result of the survey would not be privileged.

6.24 The Committee is satisfied that some multiple copying is taking place in educational establishments, particularly at the tertiary level, that equipment for this

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<sup>3</sup> See Part 4, submission 24.

<sup>4</sup> See Part 4, submission 28.

<sup>5</sup> See Part 4, submission 31.

<sup>6</sup> See Part 4, submission 25.

<sup>7</sup> See Part 4, submission 3.

<sup>8</sup> See Part 4, submission 2.

reproduction is widely available in one form or another, and that there is an increasing demand for its use. There is evidence that copying for educational purposes takes place on a substantial scale in other countries. We have no reason to believe that the situation is radically different in Australia particularly having regard to the difficulties in obtaining copies of books and additional copies of journals. In these circumstances we think it likely that some of the copying thus taking place is an infringement of copyright under the existing law, and we also think it likely that the demand for copying of this kind will increase because of modern educational techniques which place more emphasis on the study of materials from a variety of sources than upon the use of a single prescribed text.

6.25 A special problem for copyright owners seems to be the photocopying of sheet music, part songs and poems for use in educational establishments and elsewhere. These works are usually relatively short so that copying of the entire work or of a large part of the work is quite practicable and economical.

### **Remuneration for multiple copying**

6.26 To the extent that there is a demand for the making of multiple copies of works or substantial parts of works for use in educational establishments, the Committee is of the view that the copyright law should accommodate this demand. In principle we consider that multiple copying should not be carried out without remuneration to the copyright owner in any case where it represents a substantial use of his property or it could prejudice sales of his work, particularly if the work has been specifically written for use in schools.

6.27 However there are considerable practical difficulties in devising a workable scheme for payment of remuneration. Although we are proposing some means of facilitating payment we have reached the conclusion that, whether or not these proposals are feasible, some limited right of making multiple copies should be given to educational establishments.

6.28 Under the present law it is of course open to individual educational establishments to seek prior permission from the individual copyright owner concerned before making copies of his work or part of his work, and to pay whatever royalty may be required by the owner as a condition of such permission. Subject to any relevant provisions of the *Trade Practices Act 1974-1976* it is also open to any agent acting on behalf of a significant number of copyright owners to offer a licence to copy the works of these owners to any prospective licensee or licensees.

6.29 We consider that it is not practicable at the present time in most cases to obtain specific permission in advance from individual copyright owners to make copies. Even if the name and address of the person who could give permission were known, the delay in obtaining permission, often from overseas, would be likely to be so great that the material would be no longer needed by the time permission was received. Very often the administrative costs involved in seeking permission would be out of all proportion to the royalties reasonably payable in respect of the reproduction of the work. So far as we are aware publishers of books and journals have not made any significant efforts in Australia to provide copies of articles or parts of works for purchase by educational establishments.

6.30 Accordingly we are of the view that some special arrangements are desirable if, on the one hand, educators are to have reasonable freedom in the area of multiple copying, and on the other hand, copyright owners are to have a reasonable and practical opportunity of obtaining recompense. The formulation of suitable arrangements has proved to be one of the most difficult tasks we have faced.

6.31 We have considered the problem broadly on three different bases.

- (a) Voluntary or contractual schemes derived from negotiations between rep-

representatives of educational bodies on the one hand and copyright owners on the other. Such schemes would not necessarily require any special legislative provisions.

(b) Schemes which depend upon special legislative provisions for their operation.

(c) Schemes which are a combination of (a) and (b).

6.32 In three countries, schemes have been proposed or have been put into operation, under which multiple copying of copyright works would be permitted in educational establishments without permission having to be asked for in each case and under which royalties are payable, or are payable if claimed, either to the copyright owners or to organisations acting on their behalf.

6.33 In Sweden such a scheme resulted from voluntary agreement between the government and representatives of copyright owners.<sup>9</sup> Theoretically there is no step embodied in the Swedish agreement which could not be adopted in Australia or a part of Australia by voluntary agreement without amendment to the copyright law. It appears that legislation has been enacted in the Netherlands, under its Copyright Act, giving educational authorities the right to make multiple copies of copyright works subject to payment of royalties to an organisation set up for the purpose of collecting those royalties and distributing them to or on behalf of the owners of the copyright in the works the subject of the photocopying.<sup>10</sup> We have no information on how this is working in practice.

6.34 The matter is also under consideration in other countries. The position overseas is more fully discussed in Section 11 of this Report.

6.35 In considering any arrangements which might be made for payment to or on behalf of copyright owners in an English-speaking country such as Australia, regard must be given to the fact that it would be much more difficult for any collecting agency to be as broadly representative of authors as would be the case, for example, in Sweden because of the widespread use in Australia of books and periodicals from other English-speaking countries around the world. In our view in Australia an agency which cannot offer broad international representation is less likely to provide a feasible basis for a voluntary licensing scheme, because of the lack of comprehensive protection which it could offer to educators.

6.36 The Committee was informed that the Australian Copyright Council Ltd had set up a company, Copyright Agency Ltd, which was intended to act as a collecting agency on behalf of authors, to enter into agreements for the photocopying of works and to receive and distribute royalties.

6.37 We doubt whether a substantial percentage of authors whose works would be likely to be copied would join such a scheme, at least in the foreseeable future. We do not think that the needs of education, particularly as presented to us by those who gave evidence on behalf of the universities and colleges of advanced education, should be postponed until a viable voluntary licensing agency that is broadly representative of the relevant copyright owners has been established.

6.38 Given the great diversity of material that may be photocopied for use in universities, colleges and schools in Australia, and the large numbers of authors involved, including a significant proportion of overseas authors, the Committee does not think it would be practicable, at least at the present time, to establish a scheme in respect of multiple copying under which any royalties will be collected on a per page per copy basis and distributed to the individual owners of copyright involved. The Committee thinks it very probable that the administrative costs involved in doing so would be likely to be much in excess of royalties that would reasonably be payable. We think it would be inequitable to require the payment of royalties of an amount

<sup>9</sup> See paragraphs 11.34-11.42.

<sup>10</sup> See paragraphs 11.19-11.26.

sufficient to ensure that a surplus was available for distribution after covering the administrative overheads involved, no matter how high were these overheads.

### **Recommendations for a statutory licence scheme**

6.39 After considering the issues involved we have decided to recommend, in addition to our recommendations in paragraph 6.02, a scheme which would provide in effect a statutory licence permitting a non-profit educational establishment to make multiple copies of parts of a work and in some cases of whole works subject to recording any copying taking place under the scheme and an obligation to pay an appropriate royalty if demanded by the copyright owner within a prescribed period of time (say three years).

6.40 We are conscious that the idea of a statutory licence for the multiple copying of copyright works for educational purposes will not appeal to some copyright owners, who will regard it as a derogation from their rights under the Copyright Act. We note that Mr Ferguson, for the Australian Book Publishers Association, said that in England certain publishers of school books are not in favour of licensing of copying. The Australian Book Publishers Association has raised a particular objection to any form of statutory licence. Nevertheless, we believe that the very considerable element of public interest in education, together with the special difficulties that teachers and others face in Australia in obtaining copies of works needed for educational instruction, justifies the institution of a system of statutory licences in non-profit educational establishments. Although this is not the position in most countries, as explained above, legislative effect has been given to a licensing scheme in the Netherlands<sup>11</sup> and a Swiss expert Committee has proposed, in a working paper, that a similar scheme should be instituted by legislation in Switzerland.<sup>12</sup>

6.41 We are also satisfied that legislation to give effect to the scheme we propose would not contravene the provisions of Article 9 of the the Berne Convention as revised at Paris in 1971.

6.42 The members of the Committee are not in agreement upon the best method of implementing its recommendation with regard to this scheme of copyright licence.

6.43 The Committee considered in particular two possible methods by which a royalty could be determined. The first method is to fix a rate of royalty which would apply generally in a way similar to that provided for the recording by a manufacturer of a musical work in Division 6 of Part IV of the *Copyright Act*. The rate, whilst a general rate based on the actual amount of copying, could nevertheless be weighted in favour of certain works, e.g. poems or music. The second method is to allow the parties, e.g. the copyright agency or copyright owner and an educational body to endeavour to reach agreement as to the appropriate royalty to operate as between these parties only and to provide, if no agreement is reached, that the Copyright Tribunal should arbitrate.

6.44 Two Committee members consider that the legislation should provide for a royalty rate fixed either by regulation or by the Copyright Tribunal after an appropriate inquiry. The members holding this view would prefer provisions for an inquiry by the Copyright Tribunal which would fix a rate for royalty payments. These members consider, on balance, that the Copyright Tribunal should be empowered to fix the rate of royalty rather than make a recommendation to the Attorney-General as is now provided by sections 58 and 148 of the *Copyright Act*. This course of having a rate of royalty fixed by statute, or in some other way, so that it becomes the standard rate of royalty is that adopted in the Netherlands although, as we have said, we have

<sup>11</sup> See paragraphs 11.19-11.26.

<sup>12</sup> See paragraphs 11.43-11.50.

no information about how the scheme is working there. A rate based on a per page per copy basis in excess of a minimum is envisaged. It is suggested that provision should be made for subsequent reviews of the royalty by the Copyright Tribunal if it is requested to do so by the Attorney-General.

6.45 Periodically the copyright owner or collecting agency would bill the educational establishment in respect of copying for which it had a right to claim and a copyright agency would deal with the money recovered as previously directed by the copyright owners. No payment would be made by the educational body unless a claim was made to it.

6.46 The members holding this view consider that to leave an educational body in the position where, if it made use of the licence, it was incurring an obligation to reach agreement upon a rate of royalty or alternatively to have the matter determined by the Copyright Tribunal might well deter that body from making use of the licence. The members holding this view also feel that this proposal would be less likely to give rise to any possible difficulty under any trade practices legislation. In addition, members holding this view are in favour of regulations under the Act dealing, so far as is practicable, with the precise obligation of an educational establishment using the scheme so that the area of disagreement between a copyright owner or agency and an educational body would be reduced as much as practicable.

6.47 On the other hand, two members of the Committee who prefer the second method for determining royalties, do not think it practicable or appropriate to establish by legislation a scheme providing for all the details involved in the collection and distribution of royalties payable by educational establishments or authorities availing themselves of the proposed statutory licence. They think that the details of the means by which these payments should be collected and distributed ought to be left to negotiation between the parties concerned. If legislative sanction were thought necessary for a scheme of collection and distribution, then it should be authorised under the Act only after it has been approved by the Copyright Tribunal. They consider that in the event of failure by the educational authorities and copyright owners to come to a satisfactory agreement, the Copyright Tribunal might be given the function of arbitrating between them.

6.48 The purpose of the scheme we propose would be to permit non-profit educational establishments, subject to certain defined limitations, to make such number of copies of parts of copyright works or of the whole of such works as they considered necessary for classroom use or for distribution to students without prior approval of the copyright owners concerned. On the other hand, it would give a copyright owner or a person or body authorised by him an entitlement to claim a royalty for the photocopies thus made of his work. The only practical alternative we see to such a scheme is some extension of permitted unremunerated copying.

6.49 Under the scheme proposed the making of the copies would be immune from infringement action if a record of the copying is kept in a prescribed manner and form. There would be a statutory obligation to pay royalties ascertained by whatever manner is prescribed. In addition there would be a statutory duty to allow reasonable access to records of copying by any copyright owner or his representative.

6.50 Any copyright owner or collecting agency could search the educational establishment's records to ascertain what copying had taken place to enable a claim for remuneration to be made. The right to make such a claim would lapse after a period of, say, three years. The royalty envisaged would not be in respect of a fresh right, but it **would** be in respect of the general right of reproduction conferred by section 31(1).

6.51 It might be thought desirable that regulations should provide certain statutory requirements compliance with which would free the educational establishment of any further responsibility other than to pay a royalty if claimed. For example an edu-

ational establishment could act on a declaration purporting to come from the owner of the copyright, or his agent resident in Australia, that the claimant is the owner of the copyright in Australia or the owner's agent in Australia and that copyright subsists in Australia and that the agent undertakes that it will distribute the royalty payment as previously agreed by the copyright owner. The regulations could provide that the establishment could pay over the royalty to the claimant if it was satisfied that the claim met the statutory requirements. A statutory declaration could be required or a penalty could be provided for any wilfully false declaration. If any dispute arose it could be determined by a court according to law.

6.52 The records to be kept in respect of multiple copying should show, as a minimum:

- . the title of the work copied,
- . the number of pages copied,
- . the number of copies made,
- the author of the work (where known),
- . the publisher of the work.

6.53 It might be convenient for the necessary particulars to be specified in regulations made under the *Copyright Act*, rather than in the Act itself. If experience showed that other particulars were required, or that not all of the particulars we have suggested were necessary, then the regulations could be amended more easily than the Act. Moreover, we envisage that the Copyright Regulations might specify the form in which the records should be kept, so that records kept by different educational establishments would be maintained in a common form.

6.54 The Committee circulated a letter in August 1975 to those persons and organisations who made representations to it and who appeared likely to be interested, which set out details of a proposed scheme for multiple copying of limited parts of books in non-profit educational establishments. The proposal involved the recording by the educational establishments of the details of copying on a card suitable for use in a computer or alternatively on a docket, a duplicate of which could be retained by the educational authority, and these records would be submitted periodically to a central authority. This authority, it was proposed, would bill the educational establishment when a claim had been made to it within a specified period by the copyright owner or his agent in Australia. Interested parties were asked to comment on whether it would be practicable to obtain the records envisaged without undue cost, and to give their views on the scheme as a whole.

6.55 Most of the education authorities responsible for the running of primary, secondary and tertiary educational establishments and other persons and bodies in the educational sphere from whom replies were received, expressed serious reservations about the practicality of the scheme as proposed, and in particular the costs they envisaged to be involved in the production of accurate records.

6.56 We have taken account of these objections that it would not be practicable, or that it would be an unduly onerous burden to keep records of photocopies made. We accept that this would be the case where the making of single copies is involved. The making of multiple copies in educational establishments will, however, normally be done on a systematic basis. Very often it will be done not by the teaching or lecturing staff but by ancillary clerical staff. Notwithstanding the views expressed in the preceding paragraph, we consider the time and cost in making and maintaining records, which would be disproportionate to any royalty reasonably payable in respect of the making of single copies, should not properly be regarded as an undue burden when done in respect of the making of multiple copies, if it is desired to take advantage of the statutory licensing scheme.

6.57 Under our proposals an educational establishment availing itself of the statutory licence would be required to pay to the owners of the copyright involved or

their representative the appropriate royalty if it was claimed within a time to be prescribed by regulation. It would be within the scheme for owners to authorise an agency not to distribute royalties to individual authors or publishers, but to use the royalties in some agreed fashion for the collective benefit of the copyright owners concerned.

6.58 The proposed statutory licensing scheme should extend to the making of copies of published literary, dramatic or musical works in the following circumstances:

- (a) where the work concerned is not separately published—the whole of that work may be copied;
- (b) where the work concerned has been separately published, but copies cannot be obtained within a reasonable time at a normal commercial price—the whole of that work may be copied;
- (c) not more than one article in the same periodical publication may be copied unless the articles relate to the same subject matter;
- (d) in any other case, not more than a reasonable portion of the work may be copied.

6.59 Where a work or part of a work that maybe copied under the proposed scheme contains an artistic work by way of illustration or explanation, then the making of the copy is not to be an infringement of the copyright in the artistic work.<sup>13</sup>

6.60 We recommend the legislation should provide that up to 10 per cent of the number of pages in an edition of a work or one chapter, whichever is the greater, should always be regarded as a reasonable portion.<sup>14</sup>

6.61 It is appreciated that an author might desire to remain out of any statutory licensing scheme, as envisaged in the scheme proposed by the Australian Copyright Council Ltd<sup>15</sup> but since it would be very difficult to provide practical machinery to give effect to this desire, it is considered that any statutory scheme should extend to all literary, dramatic and musical works. We do not consider that the suggestion of a copyright owner giving a notice or advertising in the gazette if he wished to remain outside any licensing scheme would be at all practical.

6.62 Our proposals do not therefore envisage any statutory obligation on an educational establishment to keep records or to make payment. But the keeping of records of multiple copying would provide a means by which the educational establishment could make multiple copies of up to the specified amount of a literary, dramatic or musical work without being concerned about an infringement action.

6.63 We are aware that the proposal set out in the paragraphs above might seem to favour the interests of education as against the interests of copyright owners. It would entitle copies to be made of a work or part of a work without the permission of the copyright owner, whilst leaving copyright owners with the practical problem of collecting the royalties due to them under the proposal. To that criticism, we would make the following answers:

- (a) We have already expressed the view that the needs of education cannot await the establishment of a comprehensive voluntary licensing scheme.
- (b) The proposal places what we regard as reasonable limits on the amount that can be copied.
- (c) The proposal embodies a specific recognition of the principle that this use of a copyright work should be paid for if the copyright owner, or an agent acting on his behalf, claims payment.
- (d) The regulations prescribing the form and manner in which records of copying are to be kept under the scheme should effect the best possible balance between

<sup>13</sup> Compare with section 53 of the Act.

<sup>14</sup> Compare recommendations for library copying in 3.18 and 4.19.

<sup>15</sup> See Part 4, submission 1.

- the labour and cost involved in keeping the records on the one hand, and on the other, that involved in inspecting and searching records.
- (e) It is open to a collecting agency that is representative of a sufficient number of copyright owners to come to an agreement with an educational authority, such as a State Department of Education, or a body representing a number of institutions, that it would accept a blanket fee in lieu of the keeping of detailed records of the copying of works of authors represented by it.
  - (f) We think the proposed scheme is justified even if it is not used sufficiently to provide funds for copyright owners to collect and distribute the royalties available. If there is no demand for its use it will not operate. If, on the other hand, there is a considerable demand for its use, then it may flourish. We appreciate that a great deal of work may be involved in searching the records of the various educational establishments and it may be that any reasonable royalties would not cover the costs of searching. At one stage of this inquiry we considered requiring the records of multiple copying in educational establishments to be sent to a registry under government control or requiring the copying to be advertised, but after further examination we do not find either of these proposals attractive.

6.64 It should also be noted that the proposed scheme would not prevent the negotiation of either blanket or individual licences to copy more than might be copied under the statutory licence.

6.65 We express no view on whether or not copying in government schools might be considered to be Crown use under the Act as it exists at present. We draw attention, however, to the recommendation we have made in paragraph 7.11 that section 183 of the Act should not extend to the use of copyright works in government schools.

6.66 The entitlement of an educational establishment to make multiple copies of a work under this scheme would, of course, be in addition to whatever might be done under the fair dealing provision. It should be noted in this connection that we have recommended that, in section 40 of the Act, 'private study' should be replaced by 'study'. It would also be in addition to what could be done under the recommendations to which we refer in paragraph 6.02.

#### **Copying of small parts of works**

6.67 Three of us consider that in non-profit educational establishments provision should be made permitting multiple copying of very limited amounts of works without remuneration. Whether or not in any particular case two pages of a work constitute an insubstantial part of a work for the purpose of section 14 of the Act, these members consider that the making of multiple copies in any non-profit educational establishment of up to two pages or 1 per cent of the number of pages (whichever is the greater) in an edition of a work or of two or more works in any period of 14 days should not constitute an infringement of copyright provided (except in the case of a diagram, map, chart or plan) that the part copied does not comprise or include a separate work. These members recommend this provision which they consider to be desirable for the benefit of education and in general it would permit only an amount of copying in respect of which any royalty would be very small and probably uneconomic to collect. The other member does not support this proposal.

#### **Provision of copies for classroom instruction and for examinations**

6.68 We think it likely that there will be occasions when a teacher will find it convenient or necessary to make a few copies of a copyright work for the purpose of classroom instruction. This would be a Facility that he would have under the existing

section 200, so long as he did not use a machine adapted for the production of multiple copies in order to make the copies he needed. We think that special provision should be made for a teacher or lecturer without remuneration to the copyright owner, to make a limited number of copies by reprographic reproduction for use in classroom instruction and that it should not matter on what kind of machine or by what means he makes those copies. Accordingly, we recommend that the Act should permit a teacher or lecturer to make by reprographic reproduction up to three copies of a copyright work or part of a work for the purpose of classroom instruction. The limitations in paragraph 6.58 above should apply in such a case. This would be in addition to whatever copies he might make under the fair dealing provisions that we have proposed elsewhere in this Report, and any provision that might be adopted to give effect to the matters raised in paragraph 6.67.

6.69 We also consider that the provisions of section 200 which provide that copyright in a literary, dramatic, musical or artistic work is not infringed by the reproduction of the work as part of the questions to be answered in an examination, or in an answer to such a question, should continue to permit any reprographic reproduction of such a work for those purposes.

6.70 So far as a non-profit educational establishment is concerned, the practical effect in relation to multiple copies of what we propose is as follows:

There would be no infringement of copyright if the making of copies is a fair dealing with the work within the provisions of section 40, as we propose it should be amended, or section 41. There would be no infringement, if the recommendation set out in paragraph 6.67 is accepted, by making copies of up to two pages or 1 per cent of the number of pages (whichever is the greater) in an edition of a work or of two or more works in any period of 14 days provided (except in the case of a diagram, map, chart or plan) that the part copied does not comprise or include a separate work. There would be no infringement if no more than six copies were made within the limits referred to in paragraph 6.02. There would be no infringement if no more than three copies of a copyright work or part of a work within the limits specified in paragraph 6.58 are made for classroom instruction. There would be no infringement if more than three copies of a work or part of a work were made within the limits specified in paragraph 6.58 and the prescribed records were kept, but there would be an obligation to pay on demand, to the order of the copyright owner, a royalty as determined by one of the methods discussed in paragraphs 6.42 to 6.47. Of course, anything done with the consent of the copyright owner would not constitute an infringement of copyright.

### **Correspondence schools**

6.71 We recognise that there are special problems associated with correspondence schools and the conduct of external courses by universities and colleges of advanced education. In Sydney, we inspected a correspondence school which prepares lessons for distribution to students who are unable to attend school because of distance or for other reasons. Mr Penny, the Supervisor of Media Services at Mr Lawley Teachers College, also mentioned the problem with regard to external students 'scattered all over Western Australia' doing an external studies course in aboriginal teacher education.<sup>16</sup>

6.72 We think it reasonable to place students doing courses by correspondence or external study in much the same position as they would be in if they could visit a library and obtain a copy of an article in a journal or a reasonable portion of a work under the provisions of section 49 of the Act.

<sup>16</sup> See Part 4, submission 32.

6.73 We recommend that a non-profit educational establishment conducting educational courses by correspondence or on an external study basis for students should be allowed to prepare, without requests from students, such copies as may be appropriate for the students of journal articles or reasonable portions of works to the same extent as a librarian could provide copies for a person on request made under section 49. This should not extend to material reproduced as part of lecture notes.

6.74 We draw attention to the copying privileges which will be available to correspondence schools and external studies departments and their libraries if our recommendations for libraries and educational establishments are adopted. These recommendations are set out in Section 3 paragraphs 3.16–3.26 and as extended by paragraph 6.73 dealing with copying by a library; paragraph 6.67, in respect of multiple copying of small parts of works for educational purposes without payment of remuneration to the copyright owner; paragraph 6.58 for the granting of extended multiple copying privileges for educational purposes, subject to liability to compensate the copyright owner. In addition, the general ‘fair dealing’ privilege will be available in appropriate circumstances—see section 40 and section 41 of the Act and paragraphs 3.35 and 6.04.

## *Section 7*

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### *Copying in other circumstances*

7.0 I This Section includes copying

(i) in the business sector

(ii) in the Government sector, (for the service of the Crown)

(iii) for the purposes of a judicial proceeding or for providing professional advice.

7.02 The Committee received very little comment on copying in the business, professional and government sectors. However, we are satisfied that the immense number of articles and books in existence and coming into existence each year, the great diversity of interests throughout the Government, professional and business community, the difficulty and cost of attempting any recording of copying and the impracticability of policing it, together with the practical impossibility of distributing any amounts to authors entitled in almost all cases, would make the introduction of any statutory licensing system in these sectors quite impractical. We are also of the view that copying which falls within the general exceptions to infringement of copyright recommended in other parts of this Report should not be excluded from the benefit of those exceptions only because it falls within the classes of copying dealt with in this Section of the Report.

7.03 We proceed to deal separately with copying in respect of each of the three areas specified above.

#### **Copying in the business sector**

7.04 Copying for the purpose of dealing with scientific, medical, technical and other problems is important to these sectors and useful in maintaining and improving the standard of living in Australia.

7.05 We note the provision in section 18 of the Act that libraries are not to be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on business for profit.

7.06 We gave very careful consideration to recommending an extension of the permitted copying by commercial and industrial enterprises for what is often called internal use. Since we could see no prospect of the satisfactory operation of any statutory licensing scheme which would provide remuneration to copyright owners, including authors, in respect of copying within this category, we were faced only with the option of recommending an extension of unremunerated copying.

7.07 Although we appreciated the importance to the community of not inhibiting the free flow of information we felt, on balance, that we should not recommend any specific concessions in respect of unremunerated copying in the business sector.

#### **Copying in the Government sector (for the service of the Crown)**

7.08 We take the same view of the importance of copying in this sector as we do in relation to the business and professional sectors.

7.09 Section 183 of the *Copyright Act* permits the Crown, whether in the right of the Commonwealth or a State, or a person authorised in writing by the Commonwealth or a State to make, for the services of the Crown, reprographic reproduction of a

of a copyright work without having to seek permission from the owner of the copyright. The reproduction might be of the whole of a work, and might extend to the making of any number of copies of the work. If the reproduction falls within the exclusive rights given by the Act to the copyright owner, the copyright owner must be informed, by a procedure laid down under the Act, of the copying. The terms for the copying in such a case are to be such as are agreed or, in default of agreement, as are fixed by the High Court.

7.10 We think that the Crown, or a person authorised by the Crown, should be entitled to copy a work in circumstances where a private individual would be entitled to copy it without obligation to the copyright owners. If it be accepted that this is the result presently achieved by section 183, no change in the Act would be required.

7.11 We think, however, that the Crown should not be permitted to rely on section “ 183 for the making of multiple copies of works for use in Government schools, and that our recommendations in Section 6 of this Report should apply to Government and non-Government educational establishments alike.

7.12 We also mention that it is open for trade associations, individual business concerns and Government bodies and instrumentalities to enter into limited voluntary arrangements similar to the system which exists in the Federal Republic of Germany in relation to limited scientific publications of a West German origin. <sup>1</sup> It may be that such an arrangement would be attractive to these bodies.

7.13 We note that although some steps have been taken to arrange for a collecting agency in respect of the copying for commercial purposes from certain journals it seems to have been accepted in West Germany that distribution of any proceeds to individual authors is not practical.<sup>2</sup>

#### **Copying for the purposes of a judicial proceeding or for providing professional advice**

7.14 Section 10 defines ‘judicial proceeding’ as meaning ‘a proceeding before a court, tribunal or person having by law power to hear, receive and examine evidence on oath’.

7.15 Section 43 of the *Copyright Act* provides that the copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceeding or a report of a judicial proceeding.

7.16 People are assumed to know the law and they are entitled to know their legal rights and obligations. We feel that this should be facilitated and we recommend the following addition to section 43<sup>3</sup>:

or by a fair dealing with such a work for the purpose of or in the course of the provision of professional advice by a legal practitioner or patent attorney as to the legal rights or obligations of a person.

Two of us would omit the words ‘as to the legal rights or obligations of a person’ This recommendation would meet some of the problems mentioned by the Law Society of New South Wales<sup>4</sup> and the Institute of Patent Attorneys of Australia Inc. <sup>5</sup>

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<sup>1</sup> See paragraphs 11.08- 11.14.

<sup>2</sup> See paragraph 11.13.

<sup>3</sup> As to the position regarding Crown copyright, see Section 8 of this Report

<sup>4</sup> See Part 4, Submission 39.

<sup>5</sup> See Part 4. submission 40.

## Section 8

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### *Crown copyright*

8.01 Submissions have been made to us in relation to problems which may exist regarding what may loosely be described as Crown copyright, either in the right of the Commonwealth or of a State. Submissions in this regard were made by the Law Society of New South Wales <sup>1</sup>, by the Institute of Patent Attorneys of Australia Inc. <sup>2</sup> and the Australian Law Librarians' Group of the Library Association of Australia.

8.02 The Law Society pointed out that quite often current Acts, reprinted Acts, current Rules and reprinted Rules are unavailable from official sources for a considerable period and that it is also often desirable to copy other documents such as extracts from the Gazettes or certificates of birth, death, valuation, etc. The Society suggested that because every man is deemed to know the law everything possible should be done to enable his legal position to be ascertained by him and his advisers. The Society also suggested that judgments and particularly unpublished judgments should be available more freely than at present. The Australian Law Librarians' Group submitted that legislative instruments and judgments (except headnotes and editorial notes) should be exempted from photocopying restrictions.

8.03 The Institute of Patent Attorneys explained the need for patent attorneys to copy, for example, Australian and foreign specifications, for the purposes of adequately advising clients about their legal position under the *Patents Act* and other Acts relating to industrial property and for providing evidence for consideration by, for example, the Commissioner of Patents in considering an opposition to the grant of a patent. Mr D. W. Perry, a Patent Officer with an Australian company, drew attention to his desire to be able to make multiple copies of abstracts of specifications from *The Australian Official Journal of Patents, Trade Marks, and Designs* for circulation to various officers in the company and in subsidiary companies.

8.04 There are two aspects to these problems. The first concerns the reproduction of works which fall within one of the prerogative rights of the Crown which are expressly preserved by the words of sub-section (2) of section 8 of the *Copyright Act* which provides 'This Act does not affect any prerogative right or privilege of the Crown'. The second concerns the reproduction of works in which copyright is vested in the Commonwealth or a State by Part VII of the present Act or otherwise.

8.05 The nature of the prerogative right of the Crown was considered in *The Attorney-General for New South Wales v. Butterworth and Co (Australia) Ltd*<sup>3</sup>. The question of what is loosely called Crown copyright is also discussed in *Copinger and Skone James on Copyright* 11th Edition, pp 350–356, 702–703.<sup>4</sup> It is convenient to speak of the relevant rights of the Crown preserved by section 8 of the Act as 'prerogative copyright' although it may be doubted whether it is strictly correct to designate these rights as copyright.

8.06 We consider that the Act should make it clear that any act that is excluded from

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<sup>1</sup> See Part 4, submission 39.

<sup>2</sup> See Part 4, submission 40.

<sup>3</sup> 38 S.R. 195.

<sup>4</sup> E P. Skone James (ed.), *Copinger and Skone James on Copyright* 11th edn., Sweet and Maxwell. London. 1971

infringement of copyright under that Act should equally not be an infringement of any 'prerogative copyright' of the Crown.

8.07 The Act should also be amended to make it clear that a person is entitled to make reprographic reproductions of a statute or an instrument made under the authority of a statute, an order, judgment or award of a court or other tribunal, or of the reasons for decision of a court or other tribunal. The sale of a copy so made should not be permitted, except that this should not prevent the cost of making the copy being recovered from a person to whom the copy is supplied. A provision to this effect would enable an organisation to make copies for distribution to its members. We do not consider any special provision should be made with respect to *The Australian Official Journal of Patents, Trade Marks, and Designs*.

## Section 9

### Damages

9.01 We have considered the question of damages in infringement actions. We have given consideration to whether any special provision should be available in respect of infringement by reprographic reproduction and we note that the concept of statutory damages finds a place in the United States Bill S.22, but on balance, by a majority, we do not recommend any similar provision. Sub-section (4) of section 115 of the Act provides for additional damages in certain cases and reads as follows:

Where, in an action under this section—

- (a) an infringement of copyright is established; and
  - (b) the court is satisfied that it is proper to do so, having regard to—
    - (i) the flagrancy of the infringement;
    - (ii) any benefit shown to have accrued to the defendant by reason of the infringement; and
    - (iii) all other relevant matters,
- the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances.<sup>1</sup>

9.02 This sub-section is based on sub-section (3) of section 17 of the United Kingdom Copyright Act. The effect of the United Kingdom sub-section is dealt with in *Halsbury's Laws of England*, 4th edition, Volume 12, para 1189. The Australian sub-section differs from the United Kingdom sub-section in particular by the omission of the words 'is satisfied that effective relief would not otherwise be available to the plaintiff'. The United Kingdom sub-section was dealt with recently in *Beloff v. Presdrum Ltd.*<sup>2</sup> Great care must be exercised in examining the English decisions because *Rookes v. Barnard*<sup>3</sup> in so far as it relates to the question of exemplary damages, has not been accepted as the law in Australia.<sup>4</sup> The effect of this must be carefully borne in mind when considering *Cassel and Co. Ltd v. Broome*.<sup>5</sup>

9.03 It seems, however, that this sub-section empowers the Court to award what may be called exemplary damages. This power enables a Court broadly, if it considers that the sum to which the plaintiff is entitled as ordinary damages is insufficient to punish the defendant, to award an additional sum which, taken together with the amount awarded for compensation, is considered sufficient to deter the defendant from repeating his conduct. We do not wish to express any firm view on the construction of sub-section (4) of section 115 and bearing in mind that our terms of reference only extend to considering one form of infringement we do not consider it appropriate to make any specific recommendation in relation to damages.

<sup>1</sup> The whole of the section is set out in Appendix E.

<sup>2</sup> [1973] 1 All E.R.241 at 264-273. [1973] R.P.C. 765.788-798

<sup>3</sup> [1964] A.C.1129.

<sup>4</sup> See *Australian Consolidated Press Ltd v Uren* [1969] 1 A.C.590, 117 C.L.R. 221 and 117 C. L.R.185.

<sup>5</sup> [1972] A.C. 1027.