

Part 3

Section 10

Obligations under international conventions and international discussion of reprographic reproduction

Obligations under international conventions

10.01 The question of the reprographic reproduction of works protected by copyright must be considered in the light of our existing and possible future international obligations. As previously stated in this Report, Australia is a party to both major multilateral copyright conventions, being party to the Brussels Act (1948) of the International Convention for the Protection of Literary and Artistic Works (Berne Convention), and the Universal Copyright Convention as concluded at Geneva in 1952.

10.02 There are no specific provisions in these two instruments which deal with the question of reprographic reproduction, nor does either instrument explicitly confer a general right of reproduction on the author. Article I of the Brussels Act of the Berne Convention provides that the countries to which the Convention applies constitute a Union for the protection of the rights of authors over their literary and artistic works. Article 8, and the succeeding Articles up to and including Article 14 his, contain the provisions constituting the *jus conventions* (minimum of protection). These are the right of translation, the right of authorizing the reproduction of works published in newspapers or periodicals, the right of authorizing the presentation and performance of dramatic, dramatico-musical and musical works, the right of authorising radiodiffusion, the right of authorizing public recitation, the right of authorizing adaptations, the 'mechanical rights' in relation to musical works, cinematographic rights and the 'droit de suite'. In the view of the Study Group which prepared the draft text of the Stockholm Revision of the Convention, it follows from this enumeration that the Convention does not establish a general right of reproduction. However, Articles 9, 10 and 10 bis deal with some aspects of reproduction, of which Articles 9 and 10 have a bearing on the question of reprographic reproduction. Article 9(1) states that serial novels, short stories and all other works, whether literary, scientific or artistic, whatever their purpose, and which are published in the newspapers or periodicals of one of the countries of the Union shall not be reproduced in the other countries without the consent of the authors. Paragraph 2 of that Article provides for an exception to this right: articles on current economic, political or religious topics can be reproduced by the press unless the reproduction is expressly reserved; nevertheless the source must be clearly indicated. Paragraph 3 provides that protection shall not apply to news of the day nor to miscellaneous information having the character of mere items of news.

10.03 Article 10(1) states that it shall be permissible in all countries of the Union

¹ Preparatory document S/1 'Berne Convention for the Protection of Literary and Artistic Works: Proposals for Revising the Substantive Copyright Provisions (Articles 1 to 20),' *Records of the Intellectual Property Conference of Stockholm (1967)* Vol. 1, WIPO, Geneva (1971), 71 at p 111.

to make short quotations from newspaper articles and periodicals, and Article 10(2) refers to the inclusion of excerpts from literary and artistic works in education and scientific publications or in chrestomathies in so far as this inclusion is justified by its purpose, and states that this shall be a matter for legislation in the countries of the Union.

10.04 The provision relevant to the question of reprographic reproduction in the Universal Copyright Convention is Article I which states that each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

10.05 Both the Berne and Universal Conventions have since been revised. Revisions of the Berne Convention took place at Stockholm in 1967 and Paris in 1971. Australia has not acceded to the general substantive provisions of the Stockholm Act which was closed to further ratifications or accessions on 10 October 1974. Thus the Paris Revision, which in fact incorporates the general substantive provisions of the Stockholm Act, is the only further Act of the Berne Convention to which it is at present open for Australia to accede.

10.06 The main relevant provision of the Paris Act is Article 9 which provides a general right of reproduction. The relevant parts of the Article provide:

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author,

10.7 The Main Committee at the Stockholm Conference which considered proposals for revising the general substantive provisions of the Berne Convention commented on the construction of Article 9(2) in its official report, as follows²,

The Committee also adopted a proposal by the Drafting Committee that the second condition should be placed before the first, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.

The general substantive provisions were not the subject of examination at the Paris Conference.

10.08 Article 10(1) provides:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

² Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention Articles 1 to 20),
Records of the Intellectual Property Conference of Stockholm (1967) Vol 11, WI PO, Geneva (1971), 1131 at p 1145.

Article 10(2) provides:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice.

10.09 The Universal Copyright Convention was also revised in 1971. Article I was retained in its original form but was augmented by Article IV bis which provides a general right of reproduction. The Article states that:

(1) The rights referred to in Article I shall include the basic rights ensuring the author's economic interests including the exclusive right to authorise reproduction by any means, public performance and broadcasting. The provisions of this Article shall extend to works protected under this Convention either in their original form or in any form recognizably derived from the original.

(2) However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights mentioned in paragraph 1 of this Article. Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.

International discussion of reprographic reproduction

10.10 The question of the reprographic reproduction of works protected by copyright has been discussed frequently at an international level since 1961. While joint meetings of the Permanent (later Executive) Committee of the Berne Union and the Intergovernmental Copyright Committee of the Universal Copyright Convention undertook surveys of national legislation and other preparatory work on the question, it was not until 1968, in response to the view of the two Committees and as a result of a resolution of the Fourteenth General Conference of Unesco, that a Committee of Experts was convened to consider some resolution to the problem. The Committee of Experts recommended that a number of principles should be taken into account in maintaining a fair balance between the interests of copyright owners and the users of copyright material, but considered that it was for national law to lay down conditions for reprographic reproduction to effect this balance.

10.11 The report of the Committee of Experts was not considered by the joint meetings of the two Committees until 1971 and they resolved that, in view of the revisions of the two multilateral copyright conventions, the work of the Committee of Experts should be brought up to date, and that the secretariats of Unesco and WIPO should formulate proposals in the first half of 1973 for an international recommendation which would act as a guide to national legislation. A similar resolution was adopted at the Seventeenth General Conference of Unesco. As a result the Working Group on Reprographic Reproduction was formed for the purpose of assisting the Secretariats, and in May 1973 this Working Group reported that an international instrument in the form of a recommendation to States was both feasible and desirable.

10.12 However, at the joint meeting of the Committees in December 1973 it was decided that the question was still not ready for international regulation on the ground that, as the problem was being studied in a number of countries, it would have been premature to formulate any principles on an international level until some solution had been reached on a national level. The Committees resolved that the matter should be further studied by sub-committees, and that the results of this examination should be submitted to a joint meeting of both Committees. The meeting of the sub-committees was held in Washington in June 1975.

10.13 At this meeting a draft resolution was adopted which provided, *inter alia*, in substance that each State should resolve the problem of reprographic reproduction

by adopting any appropriate measures which, respecting the provisions of the two Conventions, establish whatever is best adapted to their educational, cultural, social and economic development, and that to that end it rested with each State to decide whether and to what extent the various solutions put forward at the meeting could be applied in order to assure authors the protection of their economic interests offered by the Conventions. It also provided that in those States where the use of the processes of reprographic reproduction is widespread, such States could consider, amongst other measures, encouraging the establishment of collective systems to exercise and administer the right to remuneration.

10.14 In our view, the report of these sub-committees is a very useful document. We note that no delegation could point to any existing system for the remuneration of individual authors, and those supporting the encouragement of collective agreements (for example, the Federal Republic of Germany) did not think the remuneration of individual authors was practical. We also note that the so-called 'BONUS' agreement, which has been operating in Sweden in relation to schools, did not appear to have been entirely successful and the meeting was told that there was dissatisfaction both amongst the school authorities and authors and there was doubt whether the present agreement would be extended beyond its three-year period, but that no decision had been made concerning the nature of any alternative system

10.15 The only method suggested of attempting to provide any remuneration in respect of personal copying by an individual for his own private use was by some type of tax, perhaps equivalent to a sales tax on photocopying machines

10.16 Following the meeting of the sub-committees, the matter was put to a further joint meeting of the Committees of the Berne and Universal Copyright Conventions and at that meeting, held in December 1975, the resolution adopted by the sub-committees was approved. In view of the nature of the resolution, the Committees decided not to pursue study of the matter for the present and agreed with a proposal that it was preferable for it not to be considered by the governing bodies of Unesco and WIPO in the near future.

Section 11

Foreign legislation and developments

Introduction

11.01 There is always some difficulty in ascertaining with precision the effect of foreign laws. In the following paragraphs dealing with the laws in other countries we have tried to present an accurate but not necessarily the complete picture. We have had to rely on material from a number of sources the accuracy of which we had to assess. The following presents our understanding of the position based on the information available to us on 3 September 1976.

Summary of foreign legislation

11.02 Virtually all countries of the world which have enacted copyright legislation have legislative provisions which permit, within certain limits, reprographic reproduction of copyright works without the need to obtain the copyright owner's permission, or to provide him with remuneration. The extent of this permitted use is normally limited both as to purpose and amount.

11.03 Provisions relating to copying by individuals in foreign legislation are most frequently couched in the concept of 'personal use' or 'private use', although a number of countries have provisions similar in scope to section 40 of the Australian Copyright Act. Many of the countries which have adopted the concept of 'personal use' or 'private use' expressly permit a complete copy of a copyright work to be made for that purpose, and a few, such as the Federal Republic of Germany and Sweden, permit the making of more than one complete copy of a work without infringing copyright in the work. Further, a number of countries also permit copying of protected works in these circumstances by a third party, whether this is provided expressly as in the Federal Republic of Germany, or by implication.

11.04 Many foreign copyright laws also make some provision for the reproduction of copyright works for educational purposes without remuneration to the copyright owner. However, the scope of these provisions varies considerably.

11.05 Most countries also provide carefully defined rights of reproduction to libraries and similar bodies without remuneration to copyright owners. The kind of institution entitled to rely upon these provisions varies, but archives, non-commercial documentation centres and scientific institutions maybe included in this area. Special provisions often cover to a varying extent activities such as conserving collections, providing reproductions for users or for other libraries, and reproducing out-of-print or unavailable works. The laws of a few countries also contain other provisions for various purposes, for example, for the completion of collections, and for the use of the disabled.

11.06 The dividing line between the area of permitted use and of the infringement of copyright is normally drawn between the non-commercial and commercial use of copyright works and/or the copying on a scale which does not unduly prejudice the legitimate interests of authors. It is to be noted that in, for example, Holland and the Federal Republic of Germany, limited reprographic reproduction of copyright works in commercial enterprises is permitted but in such cases equitable remuneration is payable to the author.

Discussion of laws and developments in various countries

11.07 In the following paragraphs of this Section of the Report we have outlined the major developments in other countries in relation to reprographic reproduction. We have also set out some provisions of the copyright laws of a number of comparable countries to provide the reader with more precise information on where the balance of interest is drawn between owners of copyright and the users of copyright material in respect of reprographic reproduction.

Federal Republic of Germany

11.08 The German Copyright Act passed in 1965 and as amended to 10 November 1972 permits, under Article 53, reproduction for personal use by a person or his agent of 'single copies of a work' without payment of remuneration. This right to copy extends not only to complete copies of articles from newspapers and periodicals but also to complete books. Article 54 of the German law also permits a person or his agent to make single copies of a work without remuneration for his own scientific use if and to the extent that such reproduction is necessary for the purpose, and also for incorporation in internal files if and to the extent that the reproduction is necessary for this purpose and provided the copies are made from the person's own copy of the work.

11.09 The same Article also provides for making single copies for internal use of out-of-print works, provided the copyright owner cannot be traced, and of small parts of published works or single articles which have been published in newspapers and periodicals.

11.10 In all the above cases only 'single copies' maybe made but it seems generally accepted that 'single copies' means 'a few' or up to five reproductions. Compensation need only be paid in respect of copying under Article 54 if the copying is for commercial purposes. That is, a commercial enterprise may reproduce, for example, small parts of published works or single articles from periodicals for its own purposes under Article 54 provided it pays equitable remuneration for such reproduction. The obligation of remuneration is presently implemented chiefly by means of a collection society which concludes general contracts on behalf of authors and publishers (who in practice handle the compensation claims for the authors) with the Federal Association of German Industry.

11.11 The society restricts itself to the handling of claims which arise from the reproduction of scientific and technical periodicals with which commercial enterprises are mainly concerned, and then only those periodicals which are published by a publishing firm domiciled in the Federal Republic of Germany. The effect of this is that the collection society deals with some 300 publishers who publish in all some 1200 different publications.

11.12 The method of collection of compensation is by a stamp obtained from the centre which is pasted on to each page reproduced, or by way of an additional annual fee of 30 per cent of the annual subscription price in respect of the periodicals subscribed to by the individual commercial enterprise from which, on the basis of its experience, it will make reproductions during the year, or by an additional fee amounting to 20 per cent of the annual subscription price for all periodicals to which the enterprise regularly subscribes. If the subscription covers more than one copy of a periodical the additional fee only applies to the first copy. The enterprise may choose between any one of those methods of payment.

11.13 Compensation by the society is normally given on the basis that author and publisher are entitled to one-half each of the net proceeds and it is accepted that direct distribution of the author's share among the authors is not possible. The author's

share is thus paid to his respective author's association which is under an obligation to spend money so received on the social security of its members.

11.14 An Act dealing with the administration of copyright and related rights deals with various aspects of the activities of collecting societies including:

- (a) the authorisation of a collecting society to conduct business;
- (b) rights and duties of a collecting society;
- (c) supervision of collecting societies; and
- (d) various other matters.

Japan

11.15 A complete revision of Japanese copyright law was enacted by the Japanese Diet in 1970 following recommendations by the Government Copyright Council.

11.16 Article 30 of the Copyright Act of 1970 permits a user to reproduce by himself a copyright work for the purpose of his personal use, family use or other similar uses within a limited circle, without compensation to the copyright owner.

11.17 Article 35 of the Act also provides that without remuneration:

A person who is in charge of teaching in a school or other educational institutions established not for profit-making may reproduce a work already made public if and to the extent deemed necessary for the purpose of use in the course of teaching, provided that such reproduction does not unreasonably prejudice the interests of the copyright owner in the light of the nature and the purpose of the work as well as the number of copies and the character of reproduction.

11.18 Article 31 of the Act provides in substance that the reproduction of a work included in library materials (which is defined to mean books, documents and other materials held in the collections of libraries) within the scope of the non-profit making activities of libraries is permissible without remuneration where, *inter alia*, the reproduction is necessary for preserving library materials or where, at the request of a user of the library, for the purpose of his own investigation or research, the user is furnished with a single copy of a part of a published work or the whole of an article in a periodical which has been published for a considerable period of time. This article also provides for a copy of library materials which are rarely available through normal trade channels, because the materials are out of print or for other similar reasons, to be supplied without remuneration to other libraries.

The Netherlands

11.19 The Netherlands Copyright Act was recently amended with effect from 7 January 1973. Article 16 b of the Act provides that it shall not be deemed to be an infringement of the copyright in a literary, scientific or artistic work to reproduce it in a limited number of copies provided such reproduction is effected for 'the sole purpose of the personal practice, study or use' of the person who makes the copies, or orders the copies to be made exclusively for himself. However, in the case of books, pamphlets, newspapers, periodicals and all other writings' including scores or parts of musical works, it appears that the reproduction must be confined to a 'small portion' of the work, and the reproduction of the entire work is permitted only in the case of works that are out of print or of short articles published in newspapers or periodicals. Reproduction in the above circumstances is made without remuneration.

11.20 It also appears that under Article 17 of the Act copying on behalf of an enterprise, organisation or other establishment of articles in periodicals or in daily or weekly newspapers or small portions of books or pamphlets is permissible, provided that they are scientific works and that the number of copies made does not exceed that which the enterprise, organisation or establishment may reasonably need for the purposes of its internal activities. In addition, copies may only be transmitted to persons employed by the enterprise, organisation or establishment and any person

who makes copies or orders the making of copies shall pay equitable remuneration to the author of the work thus reproduced or to his successors in title.

11.21 In pursuance of power conferred under Articles 16 b and 17 of the Copyright Act, a Decree was promulgated which created a scheme relating to copying by public authorities, libraries, educational establishments and other institutions 'serving the public interest'. Article 2 of the Decree provides that without prejudice to the acts authorised under Article 16 b of the Copyright Act, the manufacture, by or on behalf of the public authorities, of reproductions of writings intended for members of their staff, or for third parties contributing to the performance of their tasks, shall not be considered to be an infringement of copyright in so far as the number of reproductions does not exceed the number required for the proper performance of the public service activities of the authorities. 'Writings' is defined to mean small parts of books, pamphlets, newspapers, periodicals and all other writings, including the score or parts of a musical work, to such complete works to the extent that it may reasonably be expected that no new copies thereof will be made available to third parties against payment in any form and to articles, news, or other texts appearing in a daily newspaper, journal, weekly magazine or other periodical.

11.22 Article 3 provides that without prejudice to acts already authorised under Article 16 b of the Copyright Act, the manufacture by libraries, or on their behalf, of reproductions of complete books, pamphlets, newspapers, periodicals and all other writings, including the score or parts of a musical work, where it may reasonably be expected that no new copies thereof will be made available to third parties against payment in any form, and of articles, news or other texts appearing in a daily newspaper, journal, weekly magazine or other periodical, shall not be considered an infringement of copyright if done for certain specified purposes. These purposes include the prevention of loss or damage to the original through loan of the work. Libraries are defined in the Decree to mean non-profit-making libraries that are concerned to a large extent with providing a public service and other libraries only in so far as they are engaged in a lending activity with these libraries.

11.23 Article 4 provides that without prejudice to acts already authorised under Article 16 b of the Copyright Act, the manufacture, by or on behalf of educational establishments, of reproductions of writings, where such reproductions are made for those receiving instruction or intending to undergo an examination, shall not be considered an infringement of copyright in so far as the reproduction is an essential complement to the textbooks required or recommended in the syllabuses or lecture programs. The number of reproductions must not be greater than the number of pupils or students requiring them for the purpose either of receiving the instruction or of preparing for an examination. The definition of 'writings' is provided in paragraph 11.21 above.

11.24 Article 5(1) provides that where more specific rules are not provided in Articles 3 and 4 of the Decree, Article 2 shall apply by analogy to libraries and educational establishments. Article 5(2) provides that Article 2 shall apply by analogy to other institutions serving the public interest.

11.25 Article 7 of the Decree provides for remuneration to owners of copyright in respect of copying under the above-mentioned Articles of the Decree. The amount of remuneration is 'O. 10 florins per page copied' effective from 1 January 1975, for reproductions made under Articles 2 and 3, under Article 4 in the case of higher educational establishments and Article 5. Lower remuneration is provided in respect of copying in educational establishments other than higher educational establishments.

11.26 An agency called Reprorecht has apparently been established to collect fees and distribute them to the relevant copyright owners but the Committee has no further information on the procedures it has adopted, except it appears that copyright

owners have to make claims in respect of copying and that they must do so within three years from the time of the reproduction of their work in respect of which remuneration is claimed.

New Zealand

11.27 The New Zealand Copyright Act 1962, as amended to 8 December 1971, contains a number of provisions permitting the reproduction of copyright works without remuneration which are in many instances similar in scope to existing Australian provisions. However the Act also provides in section 21 considerable freedom to users of copyright works to reproduce works in certain educational situations. The section provides:

The copyright in a published literary, dramatic or musical work, . . . or in a published artistic work, is not infringed by making or supplying a copy of the work . . . , if the copy is made or supplied by or on behalf of a teacher at any University or school, or the librarian . . . of the library maintained by any Government Department, local authority, public body, University or school, or of a library of any other prescribed class, not being a library conducted for profit, subject to the following conditions . . .

- (a) The copies in question shall be supplied only to persons satisfying the teacher or librarian or a person acting on his behalf that they require them for the purposes of research or private study and will not use them for any other purpose.
- (b) Except in the case of an artistic work, no copy shall extend to more than a reasonable proportion of the work . . . or to more than one article in a periodical publication, unless two or more articles in the same publication relate to the one subject matter,
- (c) No person shall be furnished with more than one copy of the same artistic work, or the same article, or the same part of any other work . . .

11.28 The section also provides that the copyright in a literary, dramatic, musical or artistic work is not infringed by reason only that the work is reproduced,

In the course of instruction, whether at a University or school or elsewhere or by correspondence, where the reproduction is made by a teacher or student. . . .

This provision enables, for example, the issuing to students of correspondence schools of photocopied material in respect of assignments.

Sweden

11.29 The prevailing law—the Copyright Act of 1960 as amended to 25 May 1973 and the Act concerning the Protection of Photographs of 1960 as amended to 25 May 1973—includes no special provisions about copying for educational purposes, and it appeared reliance had been placed by teachers on section 11 of the Copyright Act and a corresponding provision of the Photography Act in respect of copying done to aid instruction in schools. Section 11 of the Copyright Act provides that ‘A disseminated work may be reproduced in single copies for private use. Such copies may not be used for other purposes.’ According to Swedish authorities, the general understanding of this section was that it permitted the making of ‘a few copies’ for individual use. It appears that ‘a few copies’ was interpreted in a broad sense and the number of copies which could be made depended at least to some extent on the nature of the material copied, although in general it appears that three or four copies would normally be considered to fall within the scope of the words. While the operation of the section related specifically to some of the work of teachers it was considered this was generally too limited in scope to cover their needs.

11.30 Section 12 of the Copyright Act and section 6 of the Act concerning the Protection of Photographs provide that the King in Council may make provisions permitting reproduction of works and photographs by archives and libraries for the purposes of their activities.

11.31 By a Royal Decree of 2 June 1961 certain libraries, for example the National

Library, the National Archives and certain other libraries, without the consent of the author and without remuneration, may produce photographically, for the needs of their activities, copies of literary and artistic works or photographic pictures in certain circumstances. These circumstances include national defence, conservation of their collections, copying for loaning purposes of books or certain documents because of the fragility or rarity of a book or document, replacement to some extent of missing parts of a work and missing volumes or separate issues of periodicals where they cannot be furnished by a bookstore or by the distributor or by the publisher.

11.32 In addition the making of a single copy of an article appearing in a work of a composite character or in a newspaper or periodical, or of parts extracted from other published works, for borrowers engaged in studies or scientific research, rather than lending the original volume, is also permitted by the Decree.

11.33 On 1 July 1973, an amendment came into force between the Swedish Government and about 17 organisations, for example, the Association of Swedish Authors, the Association of Swedish Authors of Text Books, the Swedish Publishers Association and the Swedish Newspapers Association, in respect of photocopying in any compulsory comprehensive school run by the Government, or a municipality or county council and certain other educational establishments under the supervision of the National Swedish Board of Education.

11.34 We set out hereunder, in broad terms, our understanding of the agreement.

11.35 The agreement was devised in an attempt to resolve the unsatisfactory position of both teachers and copyright owners that had developed in the face of considerable copying of copyright materials within the educational system in Sweden. It does not extend to universities, nor in fact does it extend to private educational activities and certain other educational bodies. The agreement applies to every published literary or artistic work and to every published photograph where the person entitled to grant the right to photocopying has authorised a contracting organisation to grant that right on his behalf.

11.36 The basis of the agreement is that the various organisations would act in effect as collecting agents for members and obtain the power to grant the right to photocopying of their works, and the parties would proceed on the basis that all the organisations would take steps to ensure that all copyright owners whose works were likely to be copied would give one or other of the organisations the authority to act on his behalf in respect of the licensing of photocopying. In particular, in substance the agreement proceeds on the basis that the various organisations could be expected to represent 95 per cent of the copyright owners whose works were likely to be copied in schools. In the light of this, the relevant State authorities have considered themselves able to count on almost all the relevant copyright owners being represented by one or other of the organisations party to the agreement.

11.37 The agreement also contemplates that payments will be made in respect of copying of works in which the copyright was vested in persons who had not given an organisation the requisite authority. In this regard, the organisation undertook to make payments to persons falling outside the agreement, upon request, in respect of the photocopying of their work in the educational establishment falling within the scheme.

11.38 The agreement is not intended to deprive teachers of their right to copy in accordance with the existing law but the State undertook to get the teachers to make photocopies only in accordance with the agreement. However even if the existing law was resorted to for photocopying, the State undertook to treat this as photocopying done in accordance with the agreement.

11.39 Under the agreement every teacher has the right, subject to certain guidelines, to make photocopies that he needs for his own teaching activities. It appears that the agreement provides some limit on photocopying, for example, where a work is

available a teacher may not normally copy for the same pupils more than half of a work or more than 20 pages of that work. Remuneration is not payable where not more than three copies of a work are made. However in cases where this limit is exceeded, the State pays for all the copying (including the prescribed minimum amount) at an amount roughly equal to 0.01 of a Swedish crown per copy page. Slightly higher rates are paid in respect of the copying of newspapers, musical scores and slides. The above amount is broadly equal to one-third of an Australian cent per copy page.

11.40 The amount of photocopying is estimated as a result of certain sampling, based on statistics compiled every third year and covering a six months period from about 10 per cent of the schools involved. The amounts paid in respect of copying are paid to an organisation called BONUS formed by the contracting organisations. The agreement does not specify the ends for which the remuneration paid out by the State is to be used but we understand it is divided between the contracting organisations and used in the main for collective ends and, generally, not distributed to individuals.

11.41 The agreement was to apply for a period of three years from 1 July 1973. Although the system proceeds on the basis that there may be some copying of works of foreign authors in schools, it seems that no payments are made to organisations representing foreign authors or to any individual foreign author. It was estimated that the cost of the sampling of the copying done in schools in the second half of 1973 would be between 150000 and 200000 Swedish crowns and the Committee understands that the return to authors and publishers in respect of this period was about 900000 Swedish crowns. The joint meeting of 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 Washington in June 1975 was told that 'Some dissatisfaction had been expressed regarding the Swedish scheme: on the part of the authors there was criticism of the sample on which remuneration was based, while the school authorities were dissatisfied because of the resistance of teachers to logging reproduction even on a sample basis. There were doubts whether the present agreement would be extended beyond its initial three year term. The Swedish Government was considering whether to introduce a simplified system which would still provide some kind of remuneration, although no decision had been made as to the form such remuneration would take.'

11.42 The meeting was also informed that the BONUS organisation had concluded an agreement with a group of commercial enterprises, including several major companies, for remuneration on a copy page basis.

Switzerland

11.43 The Swiss Copyright Act (as amended up to 24 June 1955) provides certain limitations on the exclusive rights given by the Act. A relevant limitation is Article 22 which provides that, except for the construction of works of architecture, the reproduction of a work shall be lawful when the reproduction is destined exclusively for the personal and private use of the person reproducing it. Such reproduction however, 'shall not be utilised with gainful intent'.

11.44 In addition, Article 32 provides, that in the case of public performance of musical works with words, the reproduction of the words and distribution, whether gratuitous or otherwise, of copies of such reproduction to the audience shall be lawful in the case of published literary works of limited extent, or of extracts from a published literary work. The provision does not, however, apply to the libretti of operas or to other literary works destined, by their nature, to be set to music.

11.45 Articles 25, 26 and 27 provide certain rights of quotation of published works including the right in Article 27 to reproduce textually in collections published for teaching and expressly designated as scholastic manuals, other published works,

provided that they are of limited extent or that the reproduction is restricted to isolated portions. These rights are subject to an acknowledgment of source and author. Articles 26 and 27 also state that 'manifestly abusive reproduction shall not be permitted'.

11.46 The Swiss Act contains both civil and in some cases penal provisions for infringement of these rights. It is also of interest to note that by Article 23, the provisions of the Act do not apply to laws, ordinances and other decrees, to discussions, decisions and reports of public authorities, to reports of public administrations, or to the specifications of patents.

11.47 Another Swiss Statute and regulations made thereunder deals with the collection of royalties in respect of certain public performance rights and in particular collecting societies are required to be authorised to do so, and to be subject to the supervision of the Bureau of Intellectual Property.

11.48 Draft legislation was prepared in 1974 by an expert committee for the reform of the Swiss Copyright Act. It seems that it was proposed that a person may copy a work for himself without remuneration but not have a copy made on his behalf by a third party except in cases where copies of articles from periodicals, short extracts from writings, or musical works are made.

11.49 On the other hand, it was proposed that the author would have a claim to equitable remuneration in respect of the making of copies of articles from periodicals and short extracts from works, under a form of compulsory licence. The compulsory licence would extend to scientific institutions, firms or public administrations copying for the information of their staff, educational establishments copying for use by the teaching staff or by students, and libraries accessible to the public, copying for documentation purposes.

11.50 We are not aware of the precise details of any method by which it is proposed the remuneration should be collected and the Committee apparently considered that it should be left to interested parties to find a practicable solution. It appears the establishment of an organisation along the lines of a collecting society is envisaged. We have no information on how such a body would function and in particular whether the income derived from the proposed scheme would be distributed or used for a cultural or social fund.

United Kingdom

11.51 The Australian Copyright Act 1968 was based on the United Kingdom Act 1956. In general the provisions are similar although there are a number of differences. Because of the general similarity we do not propose to deal in detail with the provisions of this Act. A Committee under the Chairmanship of Mr Justice Whitford, a High Court Judge of the Chancery Division, is presently considering whether any changes are desirable in the law relating to copyright. We understand that this inquiry includes an examination of the problems arising from reprographic reproduction.

United States of America

11.52 Efforts have been made over a number of years to amend the law of copyright in the United States of America and in early 1976 a Bill S.22 was passed by the Senate and this Bill is now before a Committee of the House of Representatives. The Bill makes no provision for any changes to the law which would introduce a system of statutory licensing coupled with remuneration in respect of photocopying, but seeks to provide rules to keep the degree of photocopying within what the framers of the Bill thought were reasonable and practical limits.

11.53 The Bill S.22 provides two principal sections which limit the exclusive rights of the copyright owner in relation to reprographic reproduction.

11.54 In section 107 the Bill provides that, '... the fair use of a copyrighted work,

including such use by reproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use
- (2) the nature of the copyrighted work
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.'

The definition section of the Bill, section 101, contains a provision that the terms 'including' and 'such as' are illustrative and not limitative.

11.55 Section 108(a) of the Bill provides that it is not an infringement for a library or archives or any of its employees acting within the scope of their employment to reproduce no more than one copy of a work or to distribute such copy under the conditions specified in section 108, if the reproduction is made without any purpose of direct or indirect commercial advantage, the reproduction or distribution of the work includes a notice of copyright, and the collections of the library or archives are open to the public or are available, not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialised field. This section also makes provision for copying of copyrighted works by persons on non-supervised equipment within those bodies.

11.56 Section 108(b) to section 108(h) set out the reproduction permitted pursuant to section 108(a).

11.57 Section 108(b) permits the duplication in facsimile form of an unpublished work from the collection of a library or archives where the duplication is solely for the purposes of preservation and security or for deposit for research use in another qualified library or archives.

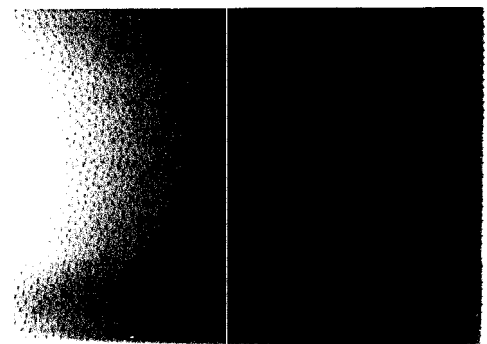
11.58 Section 108(c) permits reproduction solely for the purpose of replacement of a copy damaged, deteriorating, lost or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

11.59 Section 108(d) permits the making of a copy from the collection of a library or archives for a user of that library or archives or of another library or archives of one article in, or other contribution to, a periodical or copyrighted collection, or a small part of any other copyrighted work, if the copy becomes the property of the user and the library has no notice that it would be used for any purpose other than private study, scholarship or research and subject to certain provisions about notices warning of copyright.

11.60 Section 108(e) permits the making of a copy of an entire work or a substantial part of it from the collection of a library or archives, where the user makes his request from that or another library or archives, if the library or archives has first determined on the basis of a reasonable investigation that a copy of the copyrighted work cannot be obtained at a fair price and if the copy becomes the property of the user and the library or archives has no notice that the copy would be used for any purpose other than private study, scholarship or research and subject to certain provisions about notices warning of copyright.

11.63 Section 108(f)(1) provides that the section shall not be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises, provided that such equipment displays a notice that the making of a copy may be subject to the copyright law.

11.62 Section 108(f)(3) provides nothing in section 108 affects the right of fair use



provided by section 107 or any contractual obligations assumed at any time by the library or archives when it obtained a copy of a work.

11.63 Section 108(g) provides (subject to section 108(f)(3)) that the rights of reproduction and distribution in section 108 extend to the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions but do not extend to cases where the library or archives or its employees:

- 1) is aware or has substantial reason to believe it is engaging in the related or concerted reproduction or distribution of multiple copies of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
- 2) engages in the systematic reproduction or distribution of single or multiple copies . . . of material described in subsection (d).

11.64 Apart from the rights given under section 108(b) and (c) the section does not apply to a musical work, a pictorial, graphic or sculptural work.

11.65 On 6 August 1976 a Subcommittee of the House Judiciary Committee recommended certain amendments of the Bill to the House Judiciary Committee.

11.66 Included in these recommendations are the following:

- (a) That the words in section 107, '. . . for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not an infringement of copyright' to be amended to '. . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright'.
- (b) The words in section 107 setting out the factors included in those to be considered in determining whether the use of a work in a particular case is a fair use be amended in the following way: 'The purpose and character of the use' be amended to become 'The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes', and 'The amount and substantiality of the portion used in relation to the copyrighted work as a whole' be amended by deleting the words 'as a whole'.
- (c) That the very controversial section 108(g)(2) be amended by adding the following proviso: 'Provided, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work'.
- (d) A new subsection (i) be added after 108(h) as follows, 'Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen and present legislative or other recommendations, if warranted.'