Chapter 12 – Developments in Australia after 1968

A new supremacy

The changing world order

The copyright world’s American age begins in 1976 when the United States passed a new Copyright Act that embraced neighbouring rights and created copyright in computer programs. The gargantuan growth of the software industry in the United States, the emergence of Apple and Microsoft corporations as exemplars of the new industry, and the flood of exports from Silicon Valley soon demonstrated the unequivocal domination by the US of the world’s digital economy.

In the last two decades of the 20th century, personal computers running proprietary US software across the globe suggested more than the economic power of the US. Their ubiquitousness symbolised the ascendancy, in most spheres of life, granted to those possessing property rights. Like the recording, film and broadcasting industries before it, the software industry came into the world unprotected by copyright law, and grew healthy, strong and intelligent – intelligent enough for its leaders to tread the path of opportunity to a magic door labelled “copyright”. The end of this journey rushes into view as if predestined. Like the leaders of the older industries who walked the same well-worn path long before them, the representatives of the new software corporations saw the magic portal open onto the pathway to riches. Thereafter, they did not rest until they persuaded the legislature to recognise property in computer programs.

Following the US example, Australia amended the Copyright Act in 1984 to recognise computer programs as literary works. Other countries did the same – Britain in 1985. The extension of copyright protection to software in advanced economies entrenched the great advantage enjoyed by the US industries in the development, production and export of digital products. On a broader level, it illustrated a new reality. The United States polity now increasingly worked as one with its industries exporting copyright products across the globe. The US
identified national trade interests with the specific needs outlined by the recording, film, broadcasting and software industries.

Driven by the trade prerogatives of the United States, international institutions forged a new copyright architecture that incorporated the gains made over a century by the Berne Union and the proponents of neighbouring rights. Acting through the machinery of trade negotiations, treaties, and the World Trade Organization, the US created itself the new hegemon of international copyright law, effectively supplanting in influence the Berne Union and Rome Convention. Australia, obedient to the Berne Union and its legislative amanuensis, the United Kingdom, accepted the new master unquestioningly.

The shape of the new world made for the benefit of the US copyright industries only became apparent in the 1990s. The polarity between trade advantages demanded by the United States and those accruing to the importers of copyright products, demonstrated the transformation of copyright law into an instrument for enlarging and enforcing comparative economic advantage. Yet none of the framers of the Australian Copyright Act in 1968 could have imagined the new worldwide legislative machinery that guaranteed profits eternal to the conglomerates and start-ups of California.

Some at least must have felt presentiments about the role to be played by Australia in future developments. Only two years before the passage of the Australian Copyright Act, the Australian Prime Minister promised the visiting US President that wherever he went, Australia would follow. And when the American imperium governing through international copyright law came into being, Australia enthusiastically accepted its edicts.

**Domestic developments**

The Australian scene for 30 years after the enactment of Australia’s copyright legislation is dominated by the rise of a new collecting society to rival APRA in influence and effectiveness as well as its perceived brutal invasiveness. Founded in 1974, the Copyright Agency Limited, by litigation or the threat of litigation, and grinding determination, forced educational institutions to pay licence fees for the photocopying of copyright works.

Backed by the compulsory licence for educational copying, which required universities and schools to pay equitable remuneration for
copying on their premises, CAL collected ever-increasing payments from the mid-1980s. In 1998, the organisation’s lobbying efforts secured another coup. The Government authorised CAL under the copyright legislation to collect fees under the statutory licence for government copying.

CAL, like APRA, did not avoid the criticism that it functioned as the satrap for foreign masters, channelling receipts to publishers in Britain and the United States. Whatever the merits of the criticism, one fact is undeniable. Despite the existence of some native copyright industries, Australia is an outpost of the American copyright empire, enforcing copyright laws that benefit the United States, and remitting across the Pacific sales income, licence fees and other revenue collected.

The problem of photocopying

Reprography

Reprography is the reproduction of graphics by mechanical or electrical means, including photocopying. Until the 1950s, authors and industries busy arguing for copyright protection paid scant the various processes of reprography. Then photocopying, invented in 1938 by Chester Carlson, a night student at New York University Law School, revolutionised the field. The Haloid Company, renamed Xerox Corporation in 1961, produced the first Xerox photocopier in 1950. In 1959, the company began manufacturing the Xerox 914, a commercial document copier that could make 100,000 paper copies of documents per month.

Japanese companies, including Ricoh Company and Fuji Xerox, quickly entered the photocopier market. According to evidence before a Committee of the US House of Representatives in 1965, in the preceding year copying machines in the US produced 9.5 billion copies of document pages. By the time Australia passed its new Copyright Act in 1968, photocopiers were omnipresent in all sectors of the economies of developed nations. According to one report in 1973, 600,000 machines throughout the world produced 30 billion pages annually in libraries and offices.¹

Statistics published by Sydney’s two largest universities suggested that their photocopiers produced about 2 million pages in 1969.2 Though no parliamentarians debating the Copyright Bill raised questions about the legitimacy of photocopying, legal debate over the practice began as soon as the new legislation commenced in 1969. Organisations representing authors and publishers pressed universities for more information about their copying practices. The Australian Vice-Chancellors’ Committee, relying on legal advice that university libraries could rely on the fair dealing provisions in the Copyright Act, thumbed its nose at the publishers.

**First salvos over photocopying**

The Australian Copyright Council, a collective of copyright creator interests3 formed in January 1968, fired its first salvo in July 1969, sending a letter to the country’s directors of education, vice-chancellors, principals of colleges and secondary schools, and librarians. The letter attached the advice of a leading Sydney QC. Couched in temperate formal language, the letter summarised the advice, explaining the narrow parameters of permitted photocopying.

The ACC was rarely so circumspect again. Increasingly, the debate with the educational sector turned into a battle in which both sides staked definite positions from which neither would in principle resile. The domestic battle led to an official inquiry and then the introduction of statutory licensing schemes for educational and government copying. These developments, however, lay in the future. In 1969, the ACC felt its way cautiously, mindful that international copyright committees were yet to produce definite opinions on the legal status of photocopying, and inter-governmental agreement on the topic remained far off.

Yet the question of photocopying occupied the minds of publishers from the moment that Xerox 914 swept the world. As millions of photocopiers produced billions of copies they stood by, desolate, as the world tolerated copying without recompense. Brooding on the usurpations of the copiers, they looked jealously on the magic of the

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2 In 1968, Sydney University reported that its machines produced 873,780 copies. The University of New South Wales reported that in one 21 week period in 1969, students and staff made 325,100 copies.

3 Though partly funded by government, receiving grants from the Australian Council for the Arts, an agency of the Department of the Prime Minister.
new machines. Like Caliban, envious and fearful, they plotted to regain their island from Prospero. How, they asked themselves, to subvert the magic and restore harmony to a universe in which nothing is for free?

The International Publishers Association took up cudgels throughout the 1960s, taking part in all international copyright meetings convened by government or professional organisations. It dolefully reported in 1973 that while photocopying “can be a valuable aid in specific, strictly defined cases, it can likewise be an evil making continually greater inroads.” The following year, the Australian Society of Authors declared that “a way must be found of allowing the creators of copyright to share with the users of copyright the benefits of the new techniques.”

**International developments**

Governments responded promptly to the many similar expressions of concern and the promptings of international library organisations. As early as 1961, UNESCO’s Intergovernmental Copyright Committee and the Executive Committee of the Berne Union examined, in the words of a jointly appointed Committee of Experts, “copyright problems raised by the reproduction of protected works by photography or by processes analogous to photography and to formulate recommendations for possible solutions.”

After 1961, UNESCO and the Berne Union discussed the question of photocopying biannually well into the 1970s. The two organisations determined in Paris in 1973 that the time “is not yet ripe for taking a definite stand”, and instructed the Committee of Experts and a joint working group to continue work on policy recommendations. In Australia, the ACC gave up hopes for the international consensus that would force the Government to regulate photocopying in universities, schools and government.

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5 International Federation for Documentation and International Federation of Library Associations.

6 The Intergovernmental Committee of the Universal Copyright Convention.

Role of the ACC

Working closely with the Australian Council for the Arts, the ACC pressed successive governments for action after sending its letter to educational heads in 1969. Led by Gustaf O’Donnell, a man of bomb-proof self-righteousness in the cause of authors, the ACC proved itself by far the most formidable lobbyist on the Australian copyright scene. Chairman also of the Australian Society of Authors, O’Donnell pressed the cause of authors and publishers with indefatigable zeal and bombast.

Beside him stood David Catterns and Peter Banki, legal officers at the ACC. Quietly, they researched the law, followed international developments and presented submissions on the need for regulation. Little by little, and then in strides, this triumvirate of advocates made the case for a wide-reaching official examination of photocopying practices.

Banki and Catterns were beginning long careers of mostly unbroken success arguing the position of copyright owners in the Copyright Tribunal and elsewhere. Over 20 years later, Banki founded one of Sydney’s leading intellectual property law firms while Catterns, appointed Queens Counsel, led a string of cases in the Tribunal.

They put an unequivocal position to government: the owners of copyright works must be paid for the copying of works by any technological means regardless of the purpose of the copying. The fair dealing provisions in the Act applied to restricted types of copying but the bulk of copying ought to be remunerated. The triumvirate did not argue strongly that photocopying deprived authors of income, insisting instead that copying signified the remunerable value of works. To fairly recompense creators, let the owner and copier quantify the value and agree terms of payment.

The ACC found an ally in the Labor Government. After coming to power in 1972, the Prime Minister Gough Whitlam enthusiastically implemented a cultural policy that embraced the doctrine of the little people enunciated by Gil Duthie during the 1968 copyright debate. Duthie demanded that the little people, the artists and creators, receive their due. O’Donnell, an ALP member, Whitlam devotee and unshakeable ally of little people everywhere, could hardly fail to win an audience in Canberra.
He received ardent support from Senator Doug McClelland, who in 1968 predicted that new technologies would, within five years, consign the new Copyright Act to history. The Attorney General, Lionel Murphy, a libertarian like O’Donnell, showed more interest in social reform than the plight of the little people, but his department steered him in the direction mapped by the ACC.

After the failure of photocopying talks in Paris in 1973, officers concluded that Australia would have to find its own solution to the question of photocopying. In December 1973, a departmental spokesman told the media that arguments over photocopying ‘should be examined by an expert committee’.8 On 20 June 1974, Murphy announced the appointment of a committee to examine photocopying practices in Australia.

The ACC and its constituency of owners’ groups, universities, libraries and the various representatives of copyright users now embarked on the process that led ultimately to statutory licensing.

The Third World and copyright access

A European convention

When in 1886 the Berne Union breathed life into its creation, an observer of the new world created by authors’ rights might yet have seen small specks in the cloudless skies overhead. Over the next 85 years, the specks became proliferating dark smudges producing deluges and storms that might have washed away the aggrandising dreams of the creator faction. In the end, the reciprocity of greed created understanding, and authors and industries alike annexed the expanding universe of abstract property rights.

One blemish remained on the mirrored surface of this world, and efforts to remove the stain seemed to avail nothing. First Latin American countries, joined by the United States, and later, countries of the Third World, stood outside the Berne Union, and, if they joined the Union, manifested attitudes considered unbecoming to signatories to the Convention – the Berne Convention, after all, reflected the aspirations of European writers and publishers supplying developed markets.

Observers from other continents, which depended on a cheap supply of books, did not automatically share the desire for authors to exert control over production and distribution. The United States – a publishing outlaw pirating British works throughout the 19th century – and various Latin American countries entered into several multilateral conventions that loosely imitated the Berne Convention. But they declined to accept the prescriptive requirements of the European convention.

**Special needs and special rights**

After the Second World War, UNESCO sponsored conferences that led to the creation, in 1952 of the Universal Copyright Convention. The obligations of signatory nations were general not specific: member States were to provide “adequate and effective protection” of copyright works. Unlike the Berne Convention, the UCC required signatories to comply with simple formalities before they could take advantage of protection under the Convention. Owners were required to affix to works the © symbol, specify the copyright holder’s name and state the year of first publication.

Signatories to the UCC included the US, a large number of Berne Union members, and nearly 30 South American, Asian and African countries not affiliated to the Union. The UCC offered to the less developed nations the benefit of less stringent protection standards. More importantly, it suggested to developing nations that were members of the Berne Union the possibility of demanding special rights that recognised their developmental needs.

For the first time, international copyright forums began to recognise the existence of a generalised, transnational “user” interest. Policymakers began to recognise the common interests of the different “users” of copyright material: ordinary individuals, institutions and organisations, and, at the broadest level, nations. Each category of user sought access to copyright material. At the close of the 1950s, the UCC Intergovernmental Committee began considering the access needs of Third World members. In 1960, UNESCO resolved ways to examine ways to cheaply deliver educational books to underdeveloped countries.

**Brazzaville**

These developments informed the Intergovernmental Copyright Committee’s examination of photocopying practices. Then came the
bombshell that threatened to blow asunder the Berne Union. At Brazzaville in 1963, African countries at a copyright legislative policy meeting organised by UNESCO and the Berne Union declared a manifesto of special needs. Chief among their requirements were acceptance of a reduced period of copyright protection and the free use of works for educational and school purposes.

For the first time, the copyright idol rocked on its Swiss pedestal. For half a century, the religion of authors’ rights withstood the challenges posed by the industries, adapting to become a hybrid faith accepted throughout the developed world. Refinements and demands for protection resulted in a process of accretion, not derogation. Rights, once created, were sacred. None among the adherents dared to breathe profane thoughts about weakening protection.

Until now. The Third World neophytes shaking the gates of the copyright temple began to frighten the older religionists of the Berne Union. By the time of the Union’s Stockholm Revision Conference in 1967, the recommendations of a committee of governmental experts caused more fear and trembling, not to mention anger among authors’ and publishers’ groups.

Governments considered the legitimacy of the Berne Union to be at stake. If the less developed nations, led by India, were unable to secure exemptions from the stringent requirements of the Convention, they might leave the Union. Their departure, in an age grappling with the after-effects of colonialism, would confirm suspicions that the Convention functioned to protect and advance the economic interests of Western countries.

**Third World copyright rejected**

The committee of experts proposed that developing countries be permitted to apply to make reservations to the Convention on the grounds of economic, scientific, social and cultural needs. Reservations, applicable for a fixed period, could include the right to use works freely for scholastic purposes. The Stockholm Conference adopted a Protocol to the Convention that permitted Third World nations to adopt a posthumous term for foreign works of 25 years.

Additionally, subject to conditions, countries could permit the compulsory translation and publication of untranslated foreign works. Worst of all, from the perspective of the developed nations, the less
developed countries could institute compulsory licences for copying literary and artistic works for teaching, study and research purposes.

Naturally, such outrageous defilements of the divine credo revealed in 1886 could not go unpunished. Shock at the outcome of the Stockholm Conference turned to anger, and the governments of developed countries lost any fear of causing offence to former colonies. Encouraged by the publishers and authors’ associations, the advanced nations, led by Britain, struck back. Knock-kneed Scandinavians were despatched to the rear of the vanguard, and the British informed the world that their country would not ratify the Stockholm Protocol. The United States helpfully reinforced the message: widespread acceptance of the Protocol, it said, would prevent it from joining the Berne Union.

Together, the Berne Union and UNESCO hammered out the solution demanded by the publishers and authors of the developed nations. At their 1971 joint revision conference in Paris they agreed to amendments to the two Conventions that guaranteed the developing countries limited freedoms to translate and copy foreign works under compulsory licence. But the restricted possibilities now open to these countries were not enticing and few established licensing arrangements.

The possibility of Third World copyright vanished. The prestige of the Berne Convention grew rather than diminished. The decade or so of controversy over special copying rights for less developed countries not only sharpened understanding of the concept of a “user interest”, it awoke policy makers to the idea of special needs that warranted qualification to, or derogation from, the exclusive rights.

**Common law developments**

**ACC challenges university copying**

The Australian Copyright Council, dominated by the publisher and authors’ associations, doubtless exulted at the tidal wave of self-interest that swept away the copyright aspirations of Third World nations. When the Labor Party came to power in 1972, the ACC could rejoice in concert with a Government eager to uplift the little people even at cost to the poor and uneducated of other continents.

Even so, the activities of one category of domestic user, the educational institutions, eroded the general happiness. In the universities and schools, students continued to freely copy the pages of texts. Educators
freely used photocopiers to replicate extracts they made available to students. To the frustration of publishers and authors, UNESCO and the World Intellectual Property Organization\(^9\) seemed unable to issue clear edicts demanding that users pay for photocopying.

Two months before Murphy announced the Government’s copyright photocopying inquiry, O’Donnell and his lieutenants took action. They began a test case in the Supreme Court of NSW seeking a declaration that the University of NSW infringed copyright by failing to properly regulate photocopying on its premises.

In *Moorhouse v University of New South Wales*,\(^{10}\) the Court heard that, at the behest of the ACC, a graduate of UNSW went to the university library and photocopied a story from *The Americans, Baby*, a book of 20 short stories written by Frank Moorhouse. Moorhouse, joined by his publisher Angus and Robertson, then agreed for proceedings to be launched in his name.

Justice Hutley gave an equivocal ruling, finding that the copier breached copyright but that university did not authorise the breach. On appeal and cross-appeal, the High Court determined that the university authorised the copyright infringement by failing to adequately warn copiers of infringement liability or to supervise copying.\(^{11}\)

The ACC greeted the ultimate result of the *Moorhouse* case with qualified enthusiasm. The case located the onus for restraining copyright infringement by the users of photocopiers firmly within the ambit of university responsibilities. In this respect it clarified in Australia a principle that the ACC previously hoped to see promulgated by international copyright bodies.

The High Court’s ruling, however, could be viewed two ways. Justices Gibbs and Jacobs (joined by Justice McTiernan) clearly did not think that they enunciated any startling principle of copyright law. Their judgments make clear their view that omissions rather than intent lay behind UNSW’s permissiveness. By placing appropriately worded warning notices near photocopiers and adequately policing photocopying rooms, universities would avoid authorisation liability.

Many contemporary observers failed to see significant implications in the judgment. When the Government’s inquiry into photocopying

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\(^9\) Now the body administering the Berne Convention.

\(^{10}\) (1974) 23 FLR 112.

\(^{11}\) *University of NSW v Moorhouse* (1975) 133 CLR 1.
concluded a year after the High Court’s ruling, it reported that “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.”

Time soon revealed the importance of the High Court’s decision to copyright owners. The result in Moorhouse galvanised the ACC, and sparked life in the newly created Copyright Agency Limited, established to collect photocopying fees. Above all, it stood as authority for a proposition that owners took for granted but which governments were yet to state definitively: copyright owners were entitled to control the mass photocopying of their works in institutional venues such as universities.

**Williams and Wilkins Co v United States**

In the United States, meanwhile, a case first heard in 1973 and resolved by the Supreme Court in 1975 reached conclusions less palatable to owners. In *Williams and Wilkins Co v United States*, the plaintiff, a publisher of medical journals asserted that two government libraries infringed its copyright by photocopying articles from its journals. A Commissioner of the US Court of Claims agreed. On appeal, however, the full court found that the libraries’ photocopying constituted ‘fair use’ of the articles.

The court ruled that medicine and medical research would be hurt by prohibition of copying and the plaintiff failed to show that it was, or would be, harmed by the copying. Significantly, the court stated that Congress, not the courts, should determine the legal status of photocopying. According to the Court, the 1909 US Copyright Act and the doctrine of fair use provided no adequate guidance on how to approach the question. The main judgment stated that “the courts are now precluded, both by the Act and by the nature of the judicial process, from contriving pragmatic or compromise solutions which would reflect the legislature’s choices of policy and its mediation among the competing interests.”

The Supreme Court responded cryptically to the publishers’ appeal. The eight justices hearing the appeal split evenly on the question of fair use.

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12 (1973) 487 F2d 1375 (Ct Cl) and (1975) 420 US 376 (USC).
use and dismissed the appeal, issuing no reasons for their decision. Technically, the split decision constituted affirmation of the view expressed by the inferior court that Congress should determine the legal implications of photocopying. Congress then supplied some guidance – it codified the fair use doctrine in 1976, specifying in new copyright legislation the factors that determine when the fair use defence can be raised.13

**Implications**

The *Williams and Wilkins* case aroused strong emotions. Copyright owners regarded the decision of the Court of Claims as transgressive, unjustly undermining, or more accurately, usurping, property rights. Some dissidents from copyright orthodoxy hailed the dawn of a new era in which the legislature and courts would place special emphasis on the social and educational needs of different types of users. The dawn they saw glimmering on the horizon, however, proved to be a false one.

The Australian Government’s inquiry into photocopying paid some attention to *Williams and Wilkins* and the inquiry committee, after considering US legislative proposals prepared after the case, declared that Australia should not place “undue” restrictions of the dissemination of technical and scientific information. Given its limited effect on policy formation in Australia, the case is important as an historical signifier, reminding observers of a period in copyright legal history when lawmakers contemplated the possibility that photocopying ought not to be regarded as an unacceptable interference with property rights.

The case is significant for another reason. The reactions it evoked typified the strain of histrionic self-justification that infected the discourse of copyright proponents from the first days of publishers demanding perpetual rights. Stripped of surface glitter, the discourse often reveals something ugly: covetousness and presumption masquerading as moral right.

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13 1. The purpose and character of the use. 2. The nature of the copyright work. 3. The amount and substantiality of the portion used. 4. The effect of the use on the potential market for, or value of, the copyright work.
Copyright narcissism

In *Williams and Wilkins*, the Chief Judge of the Court of Claims, Arnold Wilson Cowen said in his dissenting judgment that the court was “making the Dred Scott decision of copyright law”. Copyright supporters enthusiastically repeated the reference to Dred Scott, a Missouri slave. No-one noticed the grotesqueness of this parallel, which clothed copyright owners in the threadbare apparel of the truly downtrodden.

Dred Scott, a slave in Missouri, sued for freedom in the 1840s, and through a long process of appeals, his case wound its way to the Supreme Court. By a 7–2 majority America’s highest court declared in 1856 that Scott must remain a slave. The Court held that Negroes could not become citizens of the United States and that the Constitution permitted slavery in all the States of the Union. The Negro had “no rights which the white man was bound to respect, and … the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic, whenever profit could be made by it.”

For Cowen, iniquity marched in the footsteps of those who denied remuneration to copyright owners. Like Dred Scott, he seemed to say, copyright holders fought a battle of cosmic dimensions against the forces of oppression and human abasement. If photocopying went unremunerated, they would find themselves abandoned in Babylon mourning the loss of the copyright kingdom. This outlandish conflation of the demands of copyright holders with the emancipation struggle of slaves and abolitionists in America aroused no skerrick of shame in the copyright movement.

The moral distance between those demanding more rents and the slaves and emancipists demanding freedom hardly needs elaboration. Yet copyright observers readily accepted Cowen’s identification of copyright owners with the tragic history of the slave population of the United States, and the hopelessness and helplessness felt by the toiling inhabitants of southern estates.

Such is the power of delusion. The supporters of more and greater rights for copyright owners never wanted for reasons to identify owners with the ragged army of the forsaken – but what possible parallel could Cowen have seen between the position of copyright holders, the owners of property, and Dred Scott, a slave?
Once exposed, the identifications concealed in his analogy reveal the narcissism of the copyright advocates who demand to control every use of copyright works as a right, human, natural or divine. In the passion play enacted in their minds, the owner is always a victim, crucified by the hostile public and the inaction of legislators. Their narrative of suffering supports fantastic comparisons, and reading Cowen’s judgment, some aggrieved owners might readily have cast themselves metaphorically in the role of Dred Scott and other slaves.

Had they not felt vicariously the slaver’s lash in legislative hedging and qualifications? Could they, the victims of a million violations by heedless copiers, not understand the slaves’ pain? The agony of flesh shredded by double-headed whips equalled their own torment as government delayed justice. Were not they victims also of a cruel mistress, the law? Were they not forced to watch helplessly as the indifferent public, like slave owners, consumed – stole – the fruits of their labour?

If he insisted on the slave analogy, Cowen could more accurately have identified copyright owners with the enemies of Dred Scott. Some slave owners owned great plantations. Some small. Some owned thousands of slaves, some only one. But all were owners, possessing the person of the slave like a dumb thing. All appropriated in total. Most demanded more appropriations, more uses. Few could imagine that they did not own by divine or natural ordinance. That their slaves might have uses, or wishes, or pursuits beyond their command they would not admit.

Copyright owners too accepted no limitation on their ambition. They believed passionately, if they believed at all, that nature or divinity decreed their right to control the universe of known ways to replicate copyright works and the embodiments of works. Thus photocopying, even if it deprived them of none of the income supplied by the sale of books, must be brought within their control, and, God or nature willing, every copy of every page of every work known to the world, must be paid for.

**Use demands recompense**

Arguments for photocopying remuneration represented a shift in copyright thinking. In the 19th century the laws allowed British publishers to control the supply of books in the British Empire, to prosecute pirates and shut down illicit book presses. The enactment of exclusive rights in the early 20th century extended the author’s control
over the uses of works. But no-one in either period said that copyright owners were entitled to income for non-commercial use.

In the 19th century, copyright prohibitions related solely to commercial activities, namely piracy and the unauthorised importing of books. The parliamentary and press debates on copyright legislation in 1905, 1911 and 1912 show that politicians did not intend legislation to grant an absolute right to remuneration. The purpose of use mattered. Legislators expected owners to exercise the exclusive rights to control commercial processes like the production of books or commercial activities like the public performance of music.

None betrayed an obvious wish for owners to secure payment from entities, like libraries, that did not use copyright material for commercial gain. Nothing in their public statements indicated that they would have shared Gus O’Donnell’s angry belief that universities were morally obliged to pay for photocopying. The war for photocopying payment grew out of a new sense of entitlement, a belief, unknown in 1911, that use always demanded recompense.

**The Franki Committee**

The Attorney General, Lionel Murphy, appointed the Copyright Law Committee on Reprographic Reproduction in 1974 with the following reference:

> To examine the question of reprographic reproduction of works protected by copyright in Australia and to recommend any alterations to the Australian copyright law and any other measures the Committee may consider necessary to effect a proper balance of interests between owners of copyright and the users of copyright material in respect of reprographic reproduction. The term ‘reprographic reproduction’ includes any system or technique by which facsimile reproductions are made in any size or form.

Justice Robert Franki of the Australian Industrial Court, a man with extensive experience in the practice of intellectual property law, chaired the Committee. The other members were Joyce Shewcroft, the legal adviser to the ABC, Colin Marks, a Sydney solicitor with extensive experience in the practice of copyright law, and Murray Haddrick, a senior officer in the federal Attorney General’s Department.

In May 1975, Lindsay Curtis, heavily involved in the 1968 Copyright Bill, and now First Assistant Secretary at the Attorney General’s Department, replaced Haddrick. John Gilchrist, a young officer of the Attorney General’s Department, later an academic and expert member
of the last Copyright Law Review Committee inquiry (into Crown copyright), acted as secretary.\textsuperscript{14}

\textbf{Questions of statutory licensing}

Though viewed as the originator of Australia’s modern system of educational and government copying by statutory licence, the Franki Committee actually expressed equivocal views about the benefits of statutory licensing. It recommended the introduction of a statutory licence for educational copying as the action most likely to achieve a balance between the interests of owners and users. But none of its members harboured any illusions about the problems involved in instituting a system that appropriately remunerated authors.

Contemporary readers of the Franki Report might be tempted to decide that history has disproved many of the Committee’s conclusions. The report disparaged the statistical sampling system now used to estimate the number and type of photocopies made in libraries and other localities. It rejected the idea of calculating remuneration by reference to per page rates for photocopies. It discounted the possibility of Australia instituting an effective collective rights administration scheme for the collection and distribution of photocopying fees. It stated that a collecting agency for photocopying “could not hope to operate” effectively in Australia for the foreseeable future.

In all of these judgments, the Committee appears to have been mistaken. Educational institutions and government now commonly accept sampling as an appropriate method for determining copying volumes. Remuneration is calculated according to a formula that depends on agreed rates for copying pages of different works. The Copyright Agency Limited (CAL) has operated in Australia with great success for over 20 years. Few people involved in policy debate seriously question the feasibility of collectively administering the rights of the owners of copyright in works.

On the other hand, the reasons given by the Committee for its scepticism remain powerfully relevant. The Committee emphasised the difficulty of accurately estimating, by sampling, the number of copies

\textsuperscript{14} John Gilchrist wrote additional comments to the CLRC’s \textit{Crown Copyright} report in 2005 proposing ways to make its recommendations more effective, including directly stating in legislation that government is authorised to use copyright material for statutory purposes.
made of works attributable to a specific author, and the concomitant problem of apportioning and distributing income accurately to authors. This difficulty continues to cast doubt on the efficacy of the collective rights administration of works.

**Distributions**

While the income from CAL’s collections from educational institutions has, over about 15 years, risen exponentially, the question remains whether individual authors really benefit from collections, or indeed whether collections on behalf of so diffuse a population could ever benefit anyone other than a concentrated minority of writers whose works remain consistently in demand for educational or other purposes. The problem is compounded by another – the maddening opaqueness of CAL’s collection and distribution process, and its unwillingness to disclose meaningful information about distributions.

Lenin’s question “who, whom?” springs to mind whenever the question of distributions is discussed. Who reaps the benefits? Among whom are the spoils divided? In this respect, CAL follows exactly in the tradition of APRA, which attracted public opprobrium in the 1920s and 1930s for its refusal to divulge details of how it distributed licence fees. Then, as now, critics argued that the collecting society functioned as the stooge of publishers, not the benefactor of authors.

Statisticians employed by CAL argue that sampling allows for the efficient determination of copies made because the snapshot of copying taken over the period of several weeks predicts future patterns. The total number of copies made in different categories such as “books” “newspapers” and “journals” is unlikely to vary significantly between significant sample periods. The question that remains unanswered,

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15 See *Report of the Copyright Law Committee on Reprographic Reproduction* (1976), para 2.27, p24: “Even if it were practical to record each copying instance of a private individual to which section 40 applied and by some method to enforce payment by 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 costs 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.”
however, is how allocations to the individual authors within categories are made, and the actual share of total income distributed to them.

**Record keeping**

The Franki Committee essayed the problems of accurately determining volumes copies and the amount copied of different authors’ works and came to an unpalatable decision. It adopted the principle of record-keeping, which holds that the only way to establish largely accurate statistics on volumes and types of copying is to institute a rigorously policed system of record-keeping. When copies are made, copiers record the details of works copied and supervisors patrolling photocopying areas ensure compliance.

On this point the Committee was uncompromising, though it allowed one departure from the general principle. Universities were not required to police the keeping of records. Instead, under the Committee’s proposal, the Act would be amended to require universities to keep records of copying in the prescribed format (title, author, publisher, pages copied, number of copies made etc). Copyright owners would be entitled to inspect records on demand.

**ACC proposals and the Committee’s conclusions**

The ACC greeted the Franki Committee’s recommendation for the institution of an educational statutory licensing scheme with faint praise. Peter Banki, one architect of the ACC’s policy, and the author of a detailed submission to the Committee by the Australian Council for the Arts,16 argued strongly for a voluntary licensing scheme supplemented by statutory licences. Banki, and Gus O’Donnell, considered statutory licensing a denial of a fundamental right of property: the right to refuse. Why, they asked, should owners be forced to allow others to copy their work?

The ACC, having argued cogently for per page remuneration fixed according to category of work copied, found itself further disappointed by the Committee’s approach to remuneration. The Committee rejected the principle of fixed per page rates with the parties or the Tribunal determining the particular rates. According to the Franki Report, the difficulties of such a scheme were too great. However, the Committee offered no deeply thought-out alternative. The Report provided simply

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16 Drafted as a Special Research Project supported by groups of consultants.
that the user must pay a royalty for copying if the owner demanded one within the prescribed period.

Equally disappointing for the ACC, its proposal for the institution of a sampling system for determining levels of institutional copying went unheeded. The Franki Report, when it appeared in October 1976, appeared to give the ACC’s constituency of publishers, authors and others much less than they hoped. The ACC’s chief officers, and in particular Banki, who laboured intensively to produce the very lengthy submission by the Council for the Arts, may have looked on the Report with some bitterness.

Of the interest groups, only the ACC attended all the public hearings held by the Franki Committee in different capital cities of Australia. It pressed the case for copyright owners more fluently, compellingly, passionately, and sometimes aggressively, than any comparable representative group. But at the end of 1976, its grand vision of universities and government paying for photocopying by an orderly process mediated by the Copyright Tribunal seemed in doubt.

In the end, the seemingly bitter pill of the Franki Report proved palatable. The recommendation for statutory licensing incontrovertibly established the principle, hitherto uncertain, that all photocopying, subject to limited exemptions, must be paid for. Together with the High Court’s judgment in Moorhouse, the Franki Report handed the advantage in the looming battles over remuneration to copyright owners.

To the ACC in 1976, this truth may not have been apparent. Its creation, CAL, would struggle for a few years to persuade educational institutions that the law applied the user-pays principle to photocopying. When the legislature amended the Act in 1980 to introduce a compulsory licensing scheme on the lines recommended by the Franki Committee, the onus remained on copyright owners to police the record-keeping of institutions and to propose methods of remuneration.

Eventually the difficulties vanished. In time, legislative amendment delivered what the ACC sought: a licensing system for educational and government copying, with users obliged to pay specified rates for pages copied, and to submit to sampling surveys to determine the amounts copied. And, as the ACC wanted, the Copyright Tribunal determined disputes over rates and the terms of licensing.
Committee’s orthodoxy

On one level, the ACC, the Australian Society of Authors and the other groups who demanded regulation of photocopying were justified to feel disappointed by the Franki Report. The Committee acknowledged plainly that a reader of the Report could judge where its sympathies lay:

*We are aware that the proposal [for statutory licensing] … might seem to favour the interests of education 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 the copyright owners with the practical problem of collecting the royalties due to them under the proposal.*

The Committee reached a conclusion that nowadays would evoke angry reactions from the copyright owner groups. “The evidence we have,” said the Report, “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.” The Committee went on to note that “much” student photocopying constituted “fair-dealing” under section 40 of the Act. It also pointed out that Australia’s geographical isolation and its vastness necessitated policy sensitive to the needs of a population especially dependent on the effective dissemination of information.17

Undoubtedly, for the members of the Franki Committee, education, and the need for dissemination of information took precedence over the demands of copyright owners. The Committee took, however, an orthodox approach to its assessment of owners’ rights. It could hardly have done otherwise. Its members were experienced copyright lawyers disposed to favour the consolidation and refinement of property rights.

Its report articulated the following premise for the Committee’s inquiry:

*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.*

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17 A point raised at least twice in the Franki Report. See, e.g. paragraph 1.02, page 9: “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.”
The Committee adopted the principle in Article 9 of the Berne Convention, which permits legislatures to permit the reproduction of works in 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.

Applying the principle of remuneration, together with the so-called “three step test” in Article 9, the Franki Committee could not fail to reach the conclusion that owners must be remunerated for photocopying. The Committee nonetheless recognised that the owners’ frequent references to moral and natural rights, disguised, unintentionally or otherwise, a simple, insistent demand for payment. As the Report wryly noted:

\textit{Virtually the entire object underlying the authors’ claims for control over reprographic reproduction is to ensure increased remuneration for 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.}

\textbf{The right to photocopying remuneration}

Given its membership of intellectual property lawyers, it is hardly surprising that the Committee never canvassed the relevant philosophical question – is recognition of an owner’s right to remuneration for photocopying consistent with whatever purposes can be discerned in the legislative grants of reproductive rights to copyright owners?

The question is not redundant. The Copyright Tribunal when determining disputes over equitable remuneration for copying could also have asked how a categorical value could be assigned to pages copied. On what basis can a single page of a work of fiction be said to be worth, for example, 2 cents, and that of a page of poetry 4 cents?

Would legislators who passed laws giving publishers control over the production and supply of books have agreed that the law could be interpreted to allow publishers to exact tolls for copying the individual pages of a work? Would they even have agreed that a value could be assigned to a page separated from the whole work? Was it any part of their intention that law first designed to control piracy should in the future authorise something unforeseen, like the mass taxation of photocopies?
Because a principle of law can be flexibly applied to circumstances unforeseen at the time of the law’s making does not, of itself, justify the new application of principle. The purpose of the principle is relevant to its application. In the 1920s, radio stations argued that legislators did not intend that the public performance right should extend to the playing of music over radio. Why, they said, should copyright owners profit from the invention of broadcasting? Why should a technological advance to which they contributed nothing benefit them?

It can certainly be said that the early legislators never intended that a group of industries should benefit from copyright protection. Principles of reproductive and distributive control developed by the Berne Union and early legislators were intended to benefit authors (though legislators accepted that authors could assign copyright to publishers). It is quite possible that early legislators would have welcomed a world in which copyright owners exacted rent from photocopying. But it is difficult to see, in principle, how they would have supported exactions that treated an indivisible thing – the copyright work – as something divisible.

In short, they may not have agreed that the copyright holder should control the use of disaggregated parts of a work – embodied in the pages of a book – as distinct from the work as whole. The Franki Committee did not engage in considered historical analysis. Its lack of interest in copyright history is not surprising. Policymakers tend to make assumptions about the original purpose of copyright law based on the folklore of anecdote, supposition and half-remembered history. But the folklore is deceiving.

For instance, the theory that parliaments designed copyright law to create a balance between the interests of owners and users is a fiction. The law actually arose according to the compound plan of different human agents seeking advantage for their own faction. No legislators could foresee, and not all would have approved of, what the law became.

**Justifying the photocopying royalty**

In the case of photocopying, the burning, unanswered question is how the owner, who is entitled to control uses of the *work*, justifies control over pages, and the payment of royalties for copying of pages. How does the copying of pages harm the owner? The cost of book piracy is roughly, or sometimes exactly, quantifiable. Piracy imposes a cost
affecting tangible production. But what economic harm to the owner is done by the copying of pages?

The Franki Committee asked this question of respondents to the inquiry.\(^\text{18}\) Peter Banki, in his submission for the Council for the Arts, said that, “too many variable factors exist, preventing simple statistics on income loss.” Banki’s reply spoke for the position of owners as a whole:

> If one sees copyright as a device to prevent monopoly, and if one admits that users have a vested interest in the continuation of profitable publishing, then the measure of damages is not only invalid as a tool by which to assess the position — it is a handicap. In any case, it is fruitless to attempt any calculations of damage — no measure of damages can accurately assess the claims of authors and publishers.

This statement, which would doubtless win the approval of copyright proponents and many neutral observers, flatly stymied the Franki Committee’s request for information on economic damage.

In substance, Banki seemed almost to say, “As the case for the photocopying royalty is self-evident, the Committee should dispense with the trifling and irrelevant matter of demonstrating the harm caused by royalty-free photocopying.” The history of copyright policy debate has seen many other equally bold statements made and accepted. Outside the world of misbehaving monopolists, it is difficult to imagine a supplicant to government alleging harm, demanding compensating rights, then declining to substantiate the allegation of harm.

The reason for the difficulty explained by Banki is twofold. First, unless photocopying amounts in fact to piracy – the copying of whole works, or substantial parts, for commercial purposes – it does not significantly affect sales of books. In this case, royalty-free photocopying represents a lost opportunity for securing revenue. Secondly, even allowing for the possibility that copying causes economic damage to owners, if copiers copy the works of a multiplicity of authors, then quantifiable economic losses, when disaggregated, are likely to be small. By contrast, if the

\(^\text{18}\) The question posed in a discussion document: “What is the actual effect of copying on sales and on the financial rewards to authors and/or publishers? Can precise quantitative illustrations be given of the detrimental effect, if any? If copying had not taken place would the number of copies sold have been increased and, if so, what would be the measure of financial advantage to authors and/or publishers?”
numbers of authors habitually copied is small then publishers should be able to quantify their losses.

Banki’s unwillingness to put forward estimates of loss, and the silence of copyright owners on the question of economic harm, pointed to one conclusion. Many owners were not deeply troubled by economic losses caused by photocopying. What most upset them was that they could as yet find no entry to the pathway to profit represented by photocopying levies.

One of the most cogent submissions to the Franki Committee on the question of the economic harm caused by photocopying came from Leonard Jolley, the chief librarian of the University of Western Australia. Concentrating on the copying of articles in academic journals, Jolley asserted that “it is impossible to see how making several copies is more injurious to any author or publisher than making one.”

According to Jolley, articles could not realistically be called commodities. The print runs of journals were usually very limited, and the period in which they sold to the public very short. No university student would profit from making several copies of an article and offering them for sale. Given the diffuse, fragmented demand for academic journals, with the audience for most periodicals usually small, academic publishers depended on the subscriptions of libraries to sustain production.

Although Jolley did not make the point explicitly, his message seemed clear. Why did publishers protest so much about photocopying? Not because copying undermined the often meagre profits of academic publishers but rather because photocopying royalties promised a new source of income. Jolley came to the crux of his argument, insisting that royalties should only be awarded as compensation for economic loss:

The only proposal “capable of implementation in a practical manner” would appear to be to grant free permission to copy to any non-profit making institution except where demonstrable harm is caused to either authors in or publishers of learned journals. It is quite certain that no demonstrable harm is caused to either authors in or publishers of learned journals. It is pretty certain that no demonstrable harm is caused to publishers of other journals and newspapers since the sale of these is almost entirely restricted to a very brief period.19

19 Jolley acknowledged that “What is quite demonstrably harmful to publishers and authors is the practice of certain education authorities which will in effect create their own textbooks by making several hundred copies of different chapters from
The Franki Committee made 35 proposals for legislative amendments or procedural innovations. The report grouped the recommendations in subject categories – fair dealing, copying by libraries, copying for preservation purposes, multiple copying, copying in other circumstances and Crown copyright. The most important changes proposed related to fair dealing, library copying and multiple copying.

First, the Committee proposed amendment to the Act to clarify the liability of libraries for photocopying by users of the library. If the library displayed notices in the prescribed form drawing users attention to the relevant provisions in the Act, the library could not be said to have authorised illegal copying.

The Committee recommended that section 40 of the Act be augmented to specify the criteria to be considered when determining whether an instance of photocopying constituted a fair dealing. The relevant factors included the purpose and character of the dealing, the nature of the work, the amount and substantiality of copying, the temporal and commercial availability of the work and the effect of the dealing on the potential market for the work.

The Committee also recommended that the Act be amended to deem that a single photocopy of a single article, or articles on the same topic in the same journal, or the chapter of a work, or 10 per cent of the work (whichever portion was the greater), constituted a fair dealing.

The Committee’s recommendations concerning library copying also involved the application of existing principles to photocopying, and slight amplification of those principles. Under the scheme envisaged by the Committee, the photocopying of a chapter of a work, or 10 per cent of the work, constituted a “reasonable portion” for the purposes of section 49.

Subject to procedural requirements, a library would be permitted to photocopy a whole work or large portion of the work if the work could not be obtained within a reasonable time at a normal commercial price. However, libraries would not be permitted to make a profit from supplying copies. The Committee also specified that library books on the same subject and circulate them within their educational system.” Later, CAL collected fees for copying to create such “coursepacks”.

20 See Appendix 4.
copying for these purposes was “to remain without remuneration to the copyright owner.”

By far the most significant changes proposed by the Committee concerned multiple copying by libraries and the users of libraries. Libraries were, subject to procedural requirements, to be allowed to make up to six copies of a single journal article for library use. Libraries could, subject to the same conditions, make up to six copies of a substantial portion of a work (other than article) that was not reasonably available at a normal commercial price.

The Committee proposed the introduction of a statutory licensing scheme that permitted the photocopying of copyright material for educational purposes by universities and schools subject to the keeping of records specifying the titles of works copied, the number of pages copied, the number of copies made and the name of the author and publisher of each work copied. Requirements applicable to ordinary library copying of works would apply – thus, subject to the relevant conditions, whole works or substantial portions of works could be copied, as could single articles in journals or articles on the same topic.

The report provided that copying under the statutory licence would be remunerable. Educational institutions must keep records of copying and “pay an appropriate royalty if demanded by the copyright owner or his agent within a prescribed period of time (say three years).”