Chapter 13 – After 1980: collecting societies and software copyright

After the Franki Report – the 1980 amendments

Release of the Franki Report

In August 1976, two months before publication of the Franki Report, the *Sydney Morning Herald* journalist Gavin Souter summarised the social importance and economic implications of photocopying in educational institutions. A “boon” to education, the “photocopying revolution” had, he wrote, created “a prodigious industry”. One visit to the copying room at any university library would persuade the sceptic that a large portion of the 16 million copies made in Australian universities were reproductions of copyright works.

According to Souter, the Copyright Agency Limited, authorised to collect copyright fees on behalf of 2000 authors, was already active in licensing copying. The Department of Humanities at the Footscray Institute of Technology agreed to pay CAL one cent for every page copied of a book on CAL’s schedule of 1000 works. CAL intended to distribute payments between authors and publishers in a ratio, in some cases, of 80/20 and in the case of certain textbooks, 50/50.

Souter’s article sheds revealing light on the views of the ACC as the Franki Committee finalised its work. Gus O’Donnell told Souter of a meeting between the ACC and the Australian Vice-Chancellors’ Committee. “Basically what we told them,” said O’Donnell, “was that we don’t think the Franki Report is going to get universities totally off the hook. They’re still going to have to come to terms with copyright owners, so they should start talking now.” Souter reported that the universities replied that “they would wait for Franki.”

O’Donnell correctly surmised that the Franki Committee intended to propose legislation to create liability for educational copying. At the same time, his language suggested awareness that the recommendations would prove more generous to universities than the ACC wished. The universities evidently felt hopeful that the Franki Committee would...
either dash the ACC’s ambitions or make recommendations that obliged them only to contract with authors and publishers individually.

When released in October 1976, the report attracted little public attention and neither the ACC nor the educational sector rushed to support or denounce its findings. Both factions seemed to batten down the hatches. Both knew that the proposed statutory licensing scheme would be difficult for CAL to administer, creating a significant administrative burden for universities and a significant policing burden for CAL. With the resources of both groups stretched, they could only work slowly towards accommodation, and hope to influence the politicians who framed the legislation creating the statutory licence.

The Liberal Coalition Government responded by asking for public submissions on the Report and consulting with the respondent interest groups. In June 1978, the Attorney General, Senator Durack announced that authors would be able to claim remuneration for photocopies of their work under legislation to be introduced in the following session of Parliament. The author’s fee would be negotiated by ‘representatives’ of the author and educational institutions. Legislation did not, however, appear in the succeeding four sessions of Parliament.

Statutory licence for educational copying

Only after the passage of two years, during which the opposed parties bent the ear of politicians, did the Government finally introduce legislation. Introduced by the Government in September 1980, a copyright bill embraced the Franki Committee’s recommendations. The ACC’s intensive lobbying efforts failed and the legislation provided for the introduction of a statutory licence that permitted educational establishments to copy works subject to maintaining copying records.

Ian Viner, the Minister for Employment and Youth Affairs, who introduced the amending bill, said the Government gave “close” attention to the ACC’s “alternative” proposals, which envisaged voluntary licensing and compulsory income collecting for authors by CAL. However, he said, the Government did not wish to place authors in a difficult position. They, or their representatives, were free to enter into voluntary licensing arrangements but the educational institutions could also choose to avail themselves of the statutory licence scheme established by the legislation.
Importantly, the amending bill introduced procedural improvements that refined the Franki Committee’s proposal for a statutory licence scheme. Records were to be kept in a form that allowed the copyright owner to inspect the records without having to examine the details of other copying. The legislation created an offence for failing to maintain records in the prescribed form. These improvements cured a major weakness of the Committee’s proposal, which failed to identify a method of distinguishing between copying under statutory licence and other copying provisions of the Act.

The Opposition Labor Party responded in an equivocal way. In the House of Representatives and the Senate, it moved voluminous technical amendments to the bill. But its MPs seemed divided over the effect of the legislation. Lionel Bowen, the Shadow Attorney General, noted that Australia was a net importer of copyright products and much of the income collected in Australia on behalf of owners would be sent overseas.

**Users and the little people**

Bowen observed that the Labor Party believed that “the users of copyright have been unjustifiably disadvantaged by this legislation.” The favouritism shown towards owners “will be at the expense of obtaining information and knowledge.” Additionally, while his party did not object to the statutory licence, it should apply only when the user copied more than a reasonable portion, or 10 per cent or one chapter of a book. Bowen decried the time-consuming and extensive procedural requirements adopted in the bill, such as the certification procedures for copying a part of a book not readily available in, or through, bookstores.

Bowen’s position did not repudiate outright Labor’s favoured doctrine of the little people, the authors and artists who depended on government favours for economic survival. But it suggested a radical forward step by his party in favour of users, hitherto seen by the Labor Party as only too willing to deprive the little people of their due reward by activities such as photocopying.

By contrast, Barry Jones, the MP for Lalor, expressed views firmly in favour of the little people. Perhaps with slight irony, he congratulated the Attorney General’s Department for “record despatch in dealing with a report of this magnitude”. Like Rex Connor 12 years previously, he quoted Marshall McLuhan who declared that the Xerox machine
made every man his own publisher. By making mass reproduction possible, photocopying menaced the little people. If authors were not protected, foreign authors would receive no return, and no publisher would import their works. Authors needed “the financial incentives which induce people to write”.

The tension between the views expressed by Bowen and Jones, which probably neither recognised, soon enough resolved in favour of the little people. The idea that every use of copyright material is remunerable, including, according to some, the act of reading a work, reasserted itself as a dogmatic truth in Labor’s cupboard of dogma.

Jones seemed oblivious to the fact that without photocopying royalties publishers and authors received returns from the sale of works. He did not bother to ask whether photocopying undermined the sale of works. Bowen stood up for the user but thereafter, the Labor Government, in office for 13 years from 1983, left users to wander in the wilderness created by government.

The copyright amendment bill eventually became law in 1981. Though considered to favour the educational establishments, it began the long ascendancy of the publishers over educational institutions in Australia. In his speech to Parliament in the 1980 copyright debate, Bowen quoted a telegram sent by the Law Institute of Victoria. The Institute asked for postponement of the copyright legislation. The telegram referred to the conclusions of the copyright reform committee led by Justice Whitford in the United Kingdom.

Those conclusions, according to the Institute, differed from those of the Franki Committee. The Whitford Committee favoured “strengthening the claims of a copyright owner rather than weakening.” The Committee also seemed to support the licensing, collection and distribution arrangements proposed by the ACC.

**Outcome of legislation**

In time, the ACC, through its own efforts and the agency of CAL, achieved all that it set out to secure at the start of the Franki inquiry. It perhaps achieved more than it sought. It did so by concerted effort and persuasiveness, and because governments, leaning always towards the

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1 Date of assent 19 September 1980, date of commencement sections 17–19 on 29 September 1980; remainder on 1 August 1981.
claims of property, favoured the interests of copyright owners and the little people. In achieving its aims, the ACC overthrew two key presumptions articulated by Viner in his second reading speech introducing the copyright bill.

The first is that most photocopying in educational institutions falls within the legislative definition of fair dealing or copying exception. The second is that the authors of works should be free to opt-out of any collecting scheme administered by a collecting agency such as CAL. The first presumption has not been definitively proved false because CAL does not permit effective external auditing of collected data.

The Franki Report, and the 1981 copyright amendments were seen to reinforce the “balance” of interests between copyright owners and users. Unlike later reports and amendments, they can be read to perhaps favour, certainly to strongly identify, the interests of users. Both placed the onus for identifying infringement and then proposing licensing rates on the copyright owner, or, specifically, CAL. However, though the principle of statutory licensing remains entrenched in Australian law, the ends contemplated in the Franki Report and the implementing legislation were not realised.

Neither intended the creation of a copyright ascendancy. The strategy of the ACC in the 1970s and 1980s closely resembled that pursued by APRA in the 1930s. APRA vehemently resisted the creation of a copyright tribunal to determine licensing disputes. Possessing a nearly complete repertoire of known copyright musical works, and unconstrained by any legislative checks, it wished to be left alone to use its overwhelming bargaining power to force radio stations and others to accept its terms. Later, realising that a tribunal offered a more efficient means of achieving a roughly similar result, it endorsed the creation of the Australian Copyright Tribunal.

Similarly, the ACC saw that once legislation permitted a representative of owners to collect photocopying royalties on their behalf, owners would be placed in a position of negotiating strength. They had no need, in principle, to let a third party, such as the Copyright Tribunal, mediate between them and users. A direct bargain promised larger returns. Like APRA, the ACC came to see that the Tribunal could efficiently facilitate copying agreements that delivered attractive financial returns. Its activities, and those of CAL, reflect the intent to create, by degree, optimal conditions for determining and collecting fees.
Over a number of years, CAL persuaded government to legislate to revoke primary elements of the statutory scheme envisaged by the Franki Committee. A sampling system for estimating copying replaced the record-keeping system introduced in the 1981 legislation. Rates were determined by the Copyright Tribunal on a per page per copy basis. CAL became the exclusive Australian collecting representative of the entire collective of authors and publishers. The delicate balance sought by the Franki Committee – feasible or not – vanished into the air.

**The rise of CAL**

*The early days*

In hindsight, CAL's success seems inevitable. Its great rise from the days spent scratching in the dust for crumbs occurred over 25 years as if predestined. In reality, CAL fought hard, reliant on human effort and wiles, to secure its position of power and dominance, and sometimes without confidence of winning the battle.

In this respect, it did not resemble APRA, which began operations in 1926 backed by the resources of the British Performing Rights Society. By then, the PRS could look back on 12 years of existence in which it swept away domestic opposition to its claims. APRA could rely on the finances and advice of its British parent and could rely also on a priceless legal asset – the performing right.

CAL could not in the beginning claim, like APRA, to represent the vast majority of copyright holders in its field. It was yet to secure the authority to act exclusively on behalf of most copyright owners. Its officers were neophytes in the enterprise of collecting copyright fees. APRA, though in 1926 newly incorporated, could rely on the expertise and experience of British executives who, for over a decade, established the PRS’s business.

The advantages CAL could claim in 1981 were the determined backing of the ACC and its constituents, the author, publisher and journalist associations, and the existence of a new legal requirement for educational organisations to pay for photocopying. But the task ahead seemed daunting.

The Copyright Act placed the onus on copyright owners to obtain records of copying from educational bodies and create legally
sustainable payment claims from data that was likely to be piecemeal or defective in other ways. The educational sector, especially the universities, showed little inclination in the past to cooperate with authors, publishers or their representatives. The job of determining liabilities and then securing payment seemed complex and difficult.

Trying to give effect to the statutory licensing scheme, CAL confronted the educational institutions as an impecunious newcomer. From the beginning, however, it received moral support from some quarters of government. An explanatory document from 1974 recorded CAL’s gratitude for the “encouragement” received from Senator Doug McClelland, the Minister for Media, and his department. The Council for the Arts, a government agency which helped to finance the ACC, enthusiastically endorsed the creation of the new collecting society.

The founding of CAL realised, in one aspect, the Labor Government’s little people policy in favour of the arts generally, and writers specifically. The later criticism of the organisation as a vehicle serving primarily the interests of publishers lends depth to the separate criticism that Labor’s arts policy – foreshadowed in the speeches of Rex Connor and Gil Duthie in the 1968 parliamentary debate on copyright – falsely assumed that the creative interest could be advanced without reference to commercial imperatives. In the case of CAL, the commercial imperatives of publishers in due course swept aside the aspirations of many authors, and Gus O’Donnell himself.

Registered as a company in 1974, CAL presented its first submission Reproduction in Schools to the Australian Education Council in Hobart in February 1974. The submission proposed a voluntary licensing scheme for government schools’ copying in all States. A second submission, Reproduction in Universities, followed. In the early years, CAL’s board advocated voluntary licensing. Chaired by O’Donnell, the Board, which also consisted of representatives of the associations of architects, publishers, musicians and photographers, insisted on the author’s right to refuse permission to copy.

After the 1981 amendments to the Act, CAL adapted itself to the unwelcome reality of statutory licensing. Its board, and the ACC, saw presciently that the most effective way to achieve practical regulation of photocopying lay in tribunal arbitration. Accordingly, in 1983 CAL

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2 George Ferguson, Director of the Australian Book Publishers Association, a member of the Spicer Committee and a strong advocate before the Franki Committee of the publishers’ interests, represented Australian publishers.
launched the first of many proceedings in the Copyright Tribunal that, together with facilitating legislative amendments, helped the organisation achieve its astonishing success as a collecting society.

**Civil war**

In the two years between the amendments and CAL’s first case in the Tribunal, internal revolution transformed the agency. Frankly described in the official history of CAL’s first 30 years, civil war broke out between O’Donnell and members of the CAL board representing publishers. Partisans for O’Donnell might have said that the conduct of his opponents was reminiscent of that which raised the ire of Australian senators during the 1905 and 1912 copyright debates.

Alternatively, the ousting of O’Donnell from CAL’s board, and the rejection of his belief that CAL must above all serve the interests of authors, not publishers, can be seen as victories for economic realism. The publishers paid the bills, produced the books and distributed the book royalties. They had no intention of letting the ideology of authors’ rights upset the business of collecting photocopying fees.

CAL’s civil war confounded Labor’s doctrine of little people, a doctrine which played no small part, philosophically, in the founding of the agency. The corporate transformation of CAL attests to the power of industries in determining how the rights of copyright owners are deployed and exercised. It also exposes a strain of venality in the authors’ rights doctrine.

O’Donnell’s insistence on preference for authors subtracted from consideration the role of publishers in making authors’ works saleable. It also, by mental alchemy, transformed the legal right to remuneration to a moral right that brooked no limitation in any way disagreeable to authors or their representatives. O’Donnell’s approach became untenable. However much authors or governments demand preferment for artists, industries control rights and, pursuing profits, they sometimes subvert policies intended to deliver income or other benefits to creators. Publishers were hardly less mercenary than authors but they controlled the supply of money.

The warfare between O’Donnell and the publishers erupted in 1981. The four publishers who sat on the CAL board as members of the

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Australian Book Publishers’ Association became increasingly hostile to O’Donnell’s insistence that CAL must distribute photocopying fees direct to authors. They demanded that publishers, who produced and distributed the authors’ works, and were practised in distributing book royalties, should receive income collected and then make allocations to authors.

By 1982, CAL’s funding from miscellaneous sources evaporated, and the ABPA showed its hand. The Association refused to supply emergency funding and established its own collecting agency. The Australian Society of Authors, which until now supported O’Donnell, recognised that CAL could not continue without publisher support and, within months, caved in. Its management committee forced O’Donnell to resign from CAL and in 1983 APBA directors returned to CAL’s board.

The APBA and ASA agreed to joint funding of CAL but the balance of power now lay unequivocally with the publishers, victors on the battlefield and keepers of the purse. Shocked and confused, O’Donnell and his supporters retreated. Seemingly, the work of an era lay in tatters. The publishers and their allies swept aside the past leader of the ASA and ACC, the man most responsible for the creation of CAL. They proved, again, the truth of George Bernard’s Shaw’s statement in 1911 that in a contest between artists and industrialists, the artists “must go to the wall”.

Now began the ascent of CAL. Its board members saw that proceedings in the Copyright Tribunal promised the most efficient way of achieving their objectives and they resolved to apply to the Tribunal for the determination of rates for educational copying.

**Tribunal proceedings**

CAL’s 1983 application to the Tribunal to determine a per page rate for photocopying resulted in lengthy proceedings that only ended in March

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4 Shaw protested to *The Times* about the proposed compulsory licence for recordings in the British Copyright Bill. He said: “An injustice has to be done either to us artists or the manufacturers. We, being artists, are poor and politically insignificant. They, being industrialists, are rich and can bully Governments. I suppose we must go to the wall but I do not see why we should do so without politely informing the public and the Government that we thoroughly understand what is happening to us …”
1985. In *Copyright Agency Ltd v Department of Education of NSW*, Justice Sheppard, settling on a rough median between the rates proposed by the parties, ruled that the State educational departments and various tertiary institutions were liable to pay a rate of 2 cents per page of copyright works copied.

In doing so he fulfilled the prediction of the *Sydney Morning Herald* journalist Michele Field, who in 1983 wrote, “the tribunal will decide on something between 2 cents and 3 cents a page – too low to make authors and publishers happy, too high to be easily absorbed by school budgets.” She went on to say that nobody would “be satisfied and that perhaps is a definition of fairness in determining compensation.”

Field also predicted with flawless accuracy the process of reasoning adopted by Sheppard. As she said, the Tribunal “will probably be guided in its determination of a fair price by looking at the costs of previous permissions … Then it must say that these value levels are to be discounted for a number of reasons.” Her most salient point followed: the Tribunal “will have to go through a set of motions and by something that looks like a process of deduction arrive at a pretty arbitrary figure.”

Justice Sheppard determined the per page rate almost exactly as Field predicted. As she anticipated, he arrived at the figure of 2 cents by “a set of motions” that camouflaged an arbitrary method of reasoning. He also established the base rate for future adjustments by the Tribunal and the standard for future calculations of the value of copyright material.

His approach is readily justified. Sheppard adopted the classic arbitral method of determining the value of goods or services. First he looked for evidence of previous bargains between the parties or bargains between other parties that established comparable industry norms. Then he took into account factors that might affect the bargain. In the 1930s, Justice Owen and Attorney General Latham expected that an arbitrator would use similar methods to determine the performance fees payable to APRA by radio stations. The arbitrator who determined the ABC’s liability to APRA in 1939 employed this conventional approach to valuation.

Sheppard, though, seemed not to appreciate the novel aspects of the proceedings before him. The parties had not tried to negotiate a price.

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5 [1985] ACopyT1.
Nor did the prospective payer derive a commercial benefit from the remunerable activity. Properly construed, Sheppard’s task involved pure valuation and called more for abstraction than consideration of hypothetical bargains determined by reference to the economic needs of the parties.

**Valuation**

What intrinsic value could be attributed to the page of a work considered discretely? The question seemed unanswerable. A more meaningful approach asked what value could be attributed to the exercise of the right to photocopy works. Framed in this way, the inquiry yields the answer that the attributable value of copying individual pages is negligible. The direct financial benefit to users of non-commercial copying is nil while the direct financial losses caused by photocopying seemed also, in most cases, to be nugatory.

Sheppard did not canvass such abstractions. Had he done so, he might have settled on a rate much closer to the 2 cents proposed by the educational sector. In the midst of Sheppard’s “motions” the glaring truth went unnoticed: if copying did not deliver pecuniary profit to the copier or financial detriment to the owner, the presumption must be that the monetary value of copies made, or the thing copied, being indeterminate, must be low rather than high. In logical terms, the idea of fixing a per page rate for copies that applied uniformly to different works and different categories of work could not be justified.

Justice Sheppard recognised the illogic inherent in the exercise he performed, but he pressed ahead, as he had to. The unfortunate consequence of his findings, which were perhaps inevitable – given the common understanding that he must create a notional bargain – is that ever since his decision, the copyright community has embraced a falsehood about the value of copying. This is that copies possess value in themselves and though the value cannot be precisely determined, the parties disputing value are merely bargaining over the price of goods and services.

However they are not. The bargain is over the value of a page copied. Self-evidently, a copier attaches utility value to a page copied but the value is not, by any measure, accurately quantifiable. More importantly, the most meaningful measures – pecuniary benefit to copier and detriment to owner – indicate that the value attributed to a copied page should be negligible. The proposition that copying is of itself
remunerable, that every copy of a page must be remunerated, departs from the idea that copyright subsists in the entire work. It leads straight to the Gomorrah of copyright functioning solely as a device to raise revenue for owners.

Be this as it may, Justice Sheppard’s decision in 1985 marked the beginning of CAL’s climb up copyright’s emerald mountain to the heights of prosperity and influence. Its receipts for educational copying in the first year after the decision amounted to a little over $14,000. Two decades later it recorded total annual revenue in excess of $100 million. Annual licensing income grew progressively over the years, aided by favourable decisions of the Copyright Tribunal setting rates. CAL’s future revenue prospects may be gauged from the fact that 60 per cent of total revenue growth occurred in a four year period after 2001.

**Success of CAL**

CAL’s achievement is remarkable. Facing a hostile or indifferent academic establishment, its officers undertook the tortuous work of examining the photocopying records of universities and schools, meeting with officials to complain about non-compliance with statutory record-keeping requirements, despatching invoices and waiting for results. In the early period, the agency employed one full time collections officer and a pair of administrative assistants.

Yet little by little their persistence paid dividends. The organisation pushed for administrative reforms to achieve the ACC’s vision of mixed voluntary and statutory licensing, with copying quantities determined by sampling surveys, not the arduous process of record-keeping. Underlying all these efforts, the per page copying rate, reviewable at intervals by the Copyright Tribunal, constituted the bedrock which enabled CAL to quantify copying and verify invoices.

A breakthrough came in 1989. The Labor Government passed legislation amending the Copyright Act to permit voluntary licensing and institute sampling as the approved method for determining the quantum of copying. Licensed to act on behalf of more and more Australian authors and benefiting from reciprocal arrangements with sister organisations throughout the world, CAL also found itself in a position to collect for a growing army of authors and publishers.

The agency cemented its position by persuading the Government to amend the Act to provide that only one collecting society could
administer either the educational or government statutory licences for copying. On application, CAL was declared the sole collecting society for educational and government copying. Parallel with the statutory licences, CAL embarked on an ambitious scheme to issue voluntary licences for commercial photocopying but by far the greatest part of its income poured in from the educational sector.

Like APRA decades earlier, CAL pursued a pragmatic strategy of optimising returns by shooting sitting ducks. In the 1930s, APRA concentrated on negotiating licences with the ABC, which, as a government corporation, considered itself bound to honour the statutory obligation to pay performance fees. In the 1990s and beyond, the educational and government sectors similarly accepted statutory obligations that most commercial entities ignored.

CAL only paid serious attention to copying by Commonwealth, State and Territory governments from about 2002 onwards. In the preceding 15 years, it concentrated the greatest part of its efforts on educational establishments, and in 1999 obtained a ruling from Justice Burchett in the Copyright Tribunal which increased the per page copying rate to 4 cents.\(^6\) Revenue from educational institutions totalled about 90 per cent of total CAL income.

**Digital and government copying**

From the mid 1990s CAL also consistently lobbied the federal Government to implement, on favourable terms, the relevant terms of the 1996 WIPO Copyright Treaty. The WIPO Copyright Treaty obliges contracting parties, including Australia, to give effect to obligations concerning the distribution, rental and communication of copyright material and the enforcement of these rights. Australia implemented the Treaty by passing the *Copyright Amendment (Digital Agenda) Act 2000*, which created the new exclusive right of communication to the public.

The new communication right allowed copyright owners to control the transmission of digitised copyright material over the internet. The creation of the right accomplished for authors and publishers the objective sought by CAL for a decade: control over digital transactions involving copyright material. Owners gained the right to profit in cyberspace and CAL a new mission that guaranteed its future influence.

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\(^6\) Justice Burchett set the per page rate for coursepacks at 5 cents, for page copies of artistic works and print music at 15 cents and for an artwork copied onto a slide at $1 per slide.
The benefits for owners were not absolute. To CAL’s dismay, the Government extended copying exceptions applicable to print copying to the copying of digital material. From the commencement of the Government’s amending legislation in 2001, CAL argued repeatedly in public for restrictions on fair dealings in the digital environment, limitations on the decryption of software intended to prevent unauthorised access to copyright material, and extension of the posthumous term.

Simultaneously, the agency advocated a new method for educational institutions and others, to secure access to digital copyright material. Under the scheme proposed, users could browse a virtual library of registered works and, for a fee, download selected works from the CAL website. All the while, as CAL participated in public debate and examined new ways of collecting online copying fees, its revenues grew.

Government represented a second source of secure revenue to CAL. Once apprised of the existence of the statutory licence – and CAL’s status as the declared collecting society for authors and publishers – government departments across the country did not cavil at the obligation to pay for copying. A photocopying agreement signed in 1994 expired at the beginning of the new century and CAL began desultory negotiations for new contracts. By 2004, CAL’s demands had increased. It wanted government – and the educational sector – to pay fees for all digital copying and communication of works.

The collecting society also demanded that government pay for copying survey maps and plans, hitherto assumed to have been created “by or under the direction or control” of government – and, therefore, owned by government under section 176 of the Copyright Act. To secure remuneration for plan copying, CAL pursued the strategy that had won it success after success since 1985 – litigation in the Copyright Tribunal.

A setback

In 2003, CAL asked the Tribunal to determine “equitable remuneration” (that is, fix fees) for the copying by NSW government of survey maps and plans. According to CAL, surveyors owned copyright in the registered plans, hitherto assumed to have been created “by or under the direction or control” of government, and, therefore, owned by government under section 176 of the Copyright Act. To secure remuneration for plan copying, CAL pursued the strategy that had won it success after success since 1985 – litigation in the Copyright Tribunal.

The State of New South Wales, adopting propositions suggested by a Queensland academic, Dr Anne Fitzgerald, argued that detailed
instructions issued by government specifying how survey plans were to be prepared, manifested governmental direction or control. In the alternative, the State argued that a royalty-free licence to copy maps and plans could be implied from the language of statutes and regulations governing plan registration. The systematic integration of plans in the government’s digital cadastral database – to help regulate State-wide property annexation, acquisition and disposal – demonstrated the non-commercial public utility of the plans.

In 2006, the Tribunal referred findings of fact to the Full Federal Court for determination of 11 questions of law. The Full Court, consisting of Justices Emmett, Lindgren and Finkelstein, each a judge of the Tribunal, heard arguments in March 2007 and delivered its judgment three months later. In Copyright Agency Limited v State of New South Wales, their Honours ruled that copyright in maps and plans vested in the surveyors who created them but they also found that the statutory and regulatory framework for registration licensed the State to copy the maps and plans without remunerating surveyors.

In judging the meaning of the phrase “direction or control”, Justices Emmett and Lindgren concentrated on the element of compulsion implied in the nouns. The State, they pointed out, could not compel surveyors to draw plans, it could only specify the way in which registrable plans must be prepared. Justice Finkelstein similarly found that “direction” referred to the “power” of the Crown to “require” the creation of a work and “control” to the “dominion” of the Crown over the “execution” of the work. Plans were made in fulfilment of private contracts and not under the State’s direction or control. For this reason, plan copyright vested in the surveyor (or the surveyor’s assignee, a point not discussed in the judgment).

The Full Court declared that the legal scheme for registration licensed the State “to do everything that … the State is obliged or authorised to do with or in relation to registered plans.” The registration scheme existed for one reason: to create or affect legal rights in relation to land. Survey plans were created to enable the State to compile and maintain its cadastre and thus regulate real property transactions. The judgment of Justice Emmett, joined by Justice Lindgren, did not elaborate on the State purposes that necessitated an implied licence. Instead, the judgment seemed to treat as self-evident the inference that the terms of

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7 [2007] FCAFC 80.
the statutory and regulatory scheme for registration manifested Parliament’s intent to create an implied licence. Their Honours said:

_The whole purpose and object of the preparation and lodgement with LPI of the Relevant Plans was to obtain registration of them so as to become registered plans, with the intention of creating or affecting legal rights in, or with respect to, the land to which they relate, or to create or affect the capacity to create or affect legal rights in respect of that land. The purpose was that lots in the Relevant Plans, whether a plan of subdivision or a strata plan, would become separate and discrete parcels in the register of landholdings of the State. These lots or parcels would themselves become part of the cadastre of the State, by the infrastructure and mechanisms provided for under the Real Property Act, the Conveyancing Act, the Strata Freehold Act, the Strata Leasehold Act and the Community Land Act. The surveyors who prepared each of the Relevant Plans must be taken to have authorised the State to do, in relation to the Relevant Plans, everything that the State is obliged to do in consequence of their registration, quite apart from the coincidental effect of s 183(1)._

In summary, the Federal Court construed section 176 of the Copyright Act narrowly and recognised authorial copyright in survey plans. To this extent, CAL’s arguments succeeded before the Court. But on the fundamental question of remuneration, CAL failed, and the Court’s implication of an unrestricted government licence to use survey plans for public purposes (as set out in the statutory registration scheme) may mean that _Copyright Agency Limited v State of New South Wales_ comes to be regarded as a seminal case in the development of Australian copyright law.8 If the High Court hears an appeal against the Full Court’s decision, its judgment may confirm the putative principle that use of copyright material is remunerable, or perhaps point alternatively to a new principle that use does not confer an automatic right to remuneration.

**Revenue gains**

Despite this setback in the Federal Court, CAL’s revenue prospects surely gladdened the hearts of its board members. The problems of recording and reporting digital copying, and the communication of copies, as well as valuing these transactions, perplexed owners and users alike. But in the print domain, CAL continued to register rapid rises in annual revenue, thanks to increases to per page copying rates for educational institutions. In 1996 it recorded annual revenue of over

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8 See also Chapter 4 ‘Copyright’ in B. Fitzgerald, A. Fitzgerald, T. Beale, G. Middleton, and YF Lim, _Internet and E-Commerce Law and Policy_, Thomson, 2007.
$18 million. Within five years, annual income more than doubled. In the following five years, income rose by nearly 60 per cent to over $100 million, while expenditure remained below 15 per cent of revenue.

In the financial year ending 2006, educational institutions contributed $77.5 million to CAL’s coffers and the government sector $6.8 million. The agency could declare decades of remarkable achievement, and did so in 2004, publishing a celebratory history of its first 30 years. The real work of collection and distribution took place in the years after 1986, and only after 1996, when income poured out of universities and schools, did CAL truly entrench itself in public consciousness as a collecting society equivalent in status and influence to APRA.

The copyright gospel

In the two decades from 1986, one figure seemed to personify the agency and its philosophy. Michael Fraser joined CAL in 1985 and carried out the protracted and difficult task of inspecting records of copying at schools and tertiary institutions, collating data and preparing invoices. He wrote the agency’s first business plan, and his ideas about how CAL should develop shaped the organisation’s future. Although not bellicose like Gus O’Donnell, he shared the latter’s partisanship for copyright owners.

As CAL’s chief executive for 20 years, he became O’Donnell’s spiritual heir, ardently performing the duty identified long before by CAL’s first chairman as a sacred necessity – collecting taxes for photocopying. Unlike O’Donnell, however, he did not prefer the interests of authors over those of publishers, and concentrated on the accretion of revenue, a pragmatic strategy favoured by publishing houses.

Fraser is perhaps the most remarkable figure to appear in contemporary Australian copyright politics. An ambling, softly spoken, seemingly unworldly figure, he impressed his views on government committees and officials with consistent, persuasive force, becoming identified, like no other person, with the cause of copyright owners. Fraser guided CAL to extraordinary income growth but his chief contribution did not lie in business planning. He is likely to be remembered, above all, as a singularly effective proselytiser for the cause of copyright protection.

In spreading the good news of the copyright gospel he won over Parliamentary and government inquiry committees and numerous politicians and government officials. Only the hint of unctuousness blemished the perfection of his formal manner. The other advocates of
copyright, usually less tranquil in their presentation, were not so successful in drawing immediately favourable responses from interrogators. Politicians reflexively accept the theorem that property rights may expand but do not contract, and to varying degrees, are inclined to favour the arguments of copyright advocates. Even so, Fraser’s gift for something like hypnotic persuasion advanced the interests of copyright owners generally in a way that cannot be overestimated.

Possibly, his mesmeric intensity in discourse, combined with his seeming detachment from proceedings, derived from his reputed attachment to Buddhist practice. In public hearings, his calm presence among fraught gatherings of politicians and lobbyists suggested a Tibetan Buddhist tableau, in which the enlightened figure floats far above the angry demons who contend in the infernal realms below.

He was not free from delusion. He wholeheartedly embraced the simple message proclaimed by Gus O’Donnell and the copyright movement at large, that a work, in any manifestation, is property, the use of which demands remuneration. Advocates of this view have marched in step for a century to make the idea that every use is remunerable a legal reality. Taken to its logical conclusion, the theory demands that the act of reading a work be taxed. Yet even if theory is realised in law, it may still be contradicted by logic, commonsense or natural justice.

Under Michael Fraser, CAL achieved staggering success in revenue collection, and came to represent a maximalist view of copyright in public debate. In this respect, the agency embodied the American zeitgeist that demanded more control, and more and more revenue to feed the copyright machine. But neither Fraser, nor his allies, have ever satisfactorily explained their demands for more and greater entitlements for copyright owners.

They reversed Proudhon’s 19th century aphorism that property is theft. In their eyes, the thieves were those who declared the right to use property without payment. Whether or not something should be declared property, or whether a user should pay for use were questions they would not debate. If the law declared subject matter property then the legislative rationale, or the politics leading to legislation, or any philosophical consideration, were irrelevant.

Quod scripsi scripsi: the law justified itself. On this basis the great copyright caravan headed into the West to create a new world, and at
the wild frontiers of this world, outlaws were hunted down. But one
truth remained: the proponents of copyright never showed by what
right, or reason, other than legislative fiat, they could turn users into
renegades and drive them from the scene.

Fraser departed CAL in May 2007, his work faintly praised by the
agency’s chairman Brian Johns. Johns thanked Fraser for his “long and
successful service to CAL” and added that “we wish him well in his
future endeavours.” Like his predecessor Gus O’Donnell, he departed
seemingly unwept, unhonoured and unsung. Fraser’s persuasive gifts
perhaps no longer suited the requirements of a major company
intending to efficiently secure revenue from sources outside the
educational and government sectors. But his long tenure worked greatly
to CAL’s advantage, his zeal helping to secure many advantages
decreed by government and tribunal.

A reversal for CAL and possible consequences

A few weeks after Fraser’s resignation, the unanimous decision of the
Full Federal Court in *Copyright Agency Limited v State of New South Wales*
dismayed CAL’s executive. While the agency swiftly applied for leave to
appeal the decision, the case threatened to disturb CAL’s confident
march into the rose-coloured dawn of a new era. The Full Court’s
findings undermined the assumption that copyright unfailingly
conferred a right of remuneration. Its judgment struck at a cherished
article of the copyright faith. Since 1968, copyright proponents and
policymakers in Australia took for granted the copyright owner’s
automatic entitlement to economic reward.

The Franki Report accepted unquestioningly the owner’s right to exact
fees for per page copying in educational institutions and the statutory
licence for educational copying implicitly assumed that the law
demanded remuneration for page photocopying. Cases in the Copyright
Tribunal fixed equitable remuneration for page copying and neither
parties nor judges questioned the legal justification (outside the
statutory licensing schemes) for collecting fees for the non-commercial
copying of fractions of a work. CAL enjoyed success after success as
the Tribunal determined fees, and increases to fees, for educational and
government copying.

Now, for the first time in its history, the agency tasted the bitter
fruits of unequivocal legal defeat. For the first time, a court listened
to arguments that attacked the premise that made possible
CAL’s ascendancy – the idea that all copying outside the statutory exceptions is remunerable. The Court found that NSW government could, by implied licence, copy and communicate registered survey plans without paying royalties to surveyors. CAL found itself denied the right to collect fees under a statutory licence. The 3-0 margin of decision and the award of costs against the agency underlined the extent of its setback.

CAL applied to the High Court for special leave to appeal the Full Court’s judgment on the principal ground that the statutory licence for government copying, conferred by section 183 of the Copyright Act, precludes any other licence for government copying and communication. According to CAL’s application, the section 183 licence created a comprehensive scheme for government copying that enjoined remuneration. The legislature intended the licence to govern total government use of copyright material. Considered in isolation or the context of an appeal to the High Court, the Full Court’s decision invites consideration of related questions ignored or dismissed over decades – whether the purpose of a copyright use ought to determine whether the use is remunerable, or be considered a primary factor in determining scales of remuneration.

Consideration of purpose leads directly to examination of both legislative and administrative intent – what Parliament intended when passing copyright laws, and what policy the executive adopted when interpreting rights. Such an exercise is not precluded by the treaty obligation to limit exceptions to the exclusive rights and could lead to radical conclusions, including the proposition that if copyright does not of itself confer a right to remuneration, the right is circumstantial.

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9 At the time of publication, the High Court had not heard CAL’s application for special leave to appeal, lodged on 30 July 2007.

10 Article 9(2) of the Berne Convention, adopted in Article 13 of the TRIPS Agreement, requires signatories to restrict limitations and exceptions to the exclusive rights to “certain special cases” which “do not conflict with the normal exploitation” of copyright works and “do not unreasonably prejudice the legitimate interests of the rights holder.” The Canadian scholar Daniel Gervais argued that the “three step test” for determining whether an exception satisfied treaty requirements should be reversed so that more weight is given to consideration of questions of economic prejudice and exploitability. He proposed an “effects-based” test that focused on the effect of a use rather than the nature of the use. Private uses that do not directly harm the owner’s economic interests ought usually to be allowed for practical and public interest reasons. See Daniel J. Gervais, “Towards a New Core
In what circumstances might the right not apply? It is doubtful that legislators in Britain and Australia in 1911 and 1912 intended for copyright owners to claim remuneration for non-commercial uses of copyright material. Nor is it clear that their successors in 1956 and 1968 in any way envisaged the compensation schemes effected by the statutory licences for educational and government copying. The Spicer Committee proposed that the Crown pay just compensation to copyright owners for the compulsory use of their copyright material, but neither the Committee nor any other official body considered criteria for determining compensation, and, by association, any grounds for denying compensation.

Copyright Agency Limited v State of New South Wales has made possible meaningful debate over questions previously ignored. What is the commercial detriment to copyright owners of educational or government uses of copyright material? Should a non-commercial purpose, or a use that is not directed towards competition or advantage in a market, be subject to copyright fees? If the answer is yes, should the fees be discounted to allow for the purpose of use?

These questions, if posed by the Copyright Tribunal, might lead to reduction of fees fixed for remuneration under statutory schemes. Posed by policymakers, they might conceivably result in initiatives to declare, for instance, government use of copyright material for categorically non-commercial public purposes exempt from fees or protected by restrictions on fees.

The copyright collecting societies

The question of distributions

At the beginning of the new century, APRA and CAL constituted the vanguard of copyright collecting societies in Australia. By this stage, over 10 collecting societies operated in Australia and New Zealand, evidencing what could only be guessed at when APRA commenced operations in the 1920s: a significant function of contemporary

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International Copyright Norm: The Reverse Three Step Test”, Marquette Intellectual Property Law Review, Vol 9, Spring 2005. Gervais tied effect to purpose. “The author has a right in respect of any commercially significant use; use that would normally be the subject of a commercial transaction. Any situation not covered by this right would be one that is not subject to normal commercial exploitation and is justified by a valid public interest purpose.”

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copyright legislation is to efficiently regulate the transfer of income from the army of copyright users to copyright owners, or, put another way, to facilitate the taxation of copyright use.

In 2006, APRA and CAL each collected more than $100 million annually from their licensees. The other main societies lagged far behind in income returns but most collected multiple millions of dollars each year. The final destination of money collected remains largely unknown. Collecting societies jealously guard the details of distributions and outsiders, including major licensees such as government agencies, cannot ascertain to whom, and in what amount, licence fees are distributed.

A fog has covered distributions since the 1920s. APRA’s articles of association contained a secrecy clause and nowadays CAL flatly refuses, on confidentiality grounds, to disclose distribution details. APRA’s first licensees, music hall owners, radio stations and so on, declared that they were willing to pay public performance fees to the authors of music, but did not want fees distributed to music publishers. APRA, however, resisted their requests for full disclosure of distributions.

Secrecy breeds suspicion and critics continue to impugn the silence of collecting societies on distributions. The main suspicion has not altered since the 1920s. Collecting societies, say critics, are primarily conduits for the transfer of bulk receipts to music and literary publishers and a handful of recording, film and media corporations. Societies respond to criticisms by pointing to their constitutions and policies, which sometimes require that authors’ representatives occupy 50 per cent of board seats, or that authors receive the majority of income collected.

Secrecy prompts a second, less commonly articulated, concern. If – in the case of APRA and CAL – the bulk of money collected finds its way in royalty payments to authors, do their royalties justify the massive income transfer from users to owners? If justice to authors is measured in monetary returns, does the collecting system deliver justice to authors? If, for the sake of argument, CAL distributes to Australian authors an average annual royalty payment of $100, does this return justify the cost of collection, including the cost of contract negotiation?

One thing is certain. The refusal of collecting societies to disclose at least rudimentary statistics about distributions precludes meaningful debate about the merits of the collecting system. Another fact is undeniable. The copyright industries are intimately connected with the major collecting societies, and though it cannot be said definitely that
they represent the collecting arms of the industries, the societies and industries are entwined in relationships of mutual benefit.

**Sources of income**

In 2006, a number of important societies operated in parallel to APRA and CAL. They included Screenrights (the Audiovisual Copyright Society Ltd), the Australian Mechanical Copyright Owners’ Society Ltd (AMCOS), the Phonographic Performance Company of Australia Ltd (PPCA) and the Visual Arts Copyright Collecting Agency (Viscopy).

Formed in 1990, Screenrights is declared under the Copyright Act as the collecting society for copying by educational institutions of material broadcast on TV and radio. AMCOS collects, on behalf of the music publishers and composers royalties for recordings of performances of musical works. Its origins can be traced to 1956 (though the company website states the date of incorporation as 1979). The PPCA, founded in 1969, collects, on behalf of record companies, fees for the public performance and broadcasting of sound recordings and music videos. Viscopy, established in 1995, collects royalties for the publication of visual art.

The greater number of Australian collecting societies collect fees for the exercise of the mechanical and performing rights applying to musical works, sound recordings and films. Their licensees are usually, though not invariably, commercial users of copyright material. The great bulk of income collected by CAL and Screenrights, however, is derived from the non-commercial sector. Following in the path of APRA, which for years derived the largest portion of its revenue from the ABC, they secured from the educational and government sectors lucrative and certain sources of income.

Further questions thus demand consideration. If justice for authors means the payment of royalties for copying, why has CAL neglected to sweep through the world of commerce to ensure that authors are remunerated for the millions of copies of works made by businesses each year? Why is Screenrights constituted to collect primarily from educational institutions? Why did governments legislate to ensure that the educational sector and government paid photocopying royalties while allowing business to thumb its nose at authors?

One answer is that on the great plains annexed by the copyright pioneers and their successors, the educational and government bodies move thoughtlessly like herds of wildebeest, easy prey for predators
seeking sustenance. The commercial world, symbolised best by trampling elephants, represents a more fearsome challenge. If they dare to confront the trumpeting herd, the predators soon scatter, lest they be crushed.

Copyright in software

A new imperium

In June 1984, Australia amended the Copyright Act to protect computer programs as literary works. In doing so, it followed the United States, which in 1976 recognised copyright in software, and preceded Britain, which recognised software copyright in 1985. Japan, the Federal Republic of Germany and France also passed software copyright legislation in 1985. More than any other event, the recognition of software copyright in countries such as Australia and Britain signified the coming dominance of the United States in world copyright affairs.

The US copyright imperium, directed by the magnates of software, film, television, music, publishing and internet industries, first began to truly exercise its might in the 1980s. The importunities of industry leaders, intensely stated on Capitol Hill and in the Office of the United States Trade Representative, created an energy that radiated through the world’s copyright decision-making bodies and the world’s legislatures.

The Australian software legislation in 1984 marked the starting point of US domination in Australian copyright law-making. Afterwards, Australia amended the Copyright Act in conformity with the prescripts of the US industries as these were mediated by Congress, the USTR and world copyright organisations.

The 1984 amendments also established a template for the process of future revisions. As in 1984, government determines the shape of amendments by reference to one or all of the same constellation of interlinked factors: international copyright law or practice, trade prerogatives of the United States and the demands of industry. Then follows the preparation of draft legislation (or a plan of legislation), domestic consultation, and finally the passage of legislation that satisfies the needs of owners while recognising the exceptions and fair dealing principles in the Copyright Act.
From 1984, most significant modifications to Australian copyright law were determined by the wishes of the United States and domestic consultation only marginally altered the substance of amendments. The old imperium that dominated Australian copyright thinking, constituted in no particular order by the Berne Convention and Britain, vanished as a determining entity. The Berne Convention continued in force but new international forums and instruments, functioning to satisfy the export requirements of the US copyright industries, dictated the pattern of legislative revision.

**The United States recognises copyright in software**

The story of software copyright protection begins in the United States. In 1964, the US Copyright Office registered two computer programs, one recorded on paper, the other on magnetic tape. The Copyright Office determined that the sequences on punched cards, the storage medium for computer programs, expressed data that could be understood by a person. A computer program, whether expressed on paper or a tape, yielded functional meanings and, subject to the requirements of originality, intelligibility and publication, could be protected, according to the Office, as a literary work.

For a decade after 1974, WIPO, at the instigation of the United Nations, examined possibilities for “sui generis”, or stand-alone, copyright protection that the UN hoped might facilitate Third World access to software. WIPO presented model provisions for international consideration, and proposed the option of owners depositing source code with a registration office. When copyright expired, the code would be released to the public. The international computer industry did not support the model provisions and the proposals lapsed.

In 1976, the new US Copyright Act defined ‘literary works’ as works “expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.” The House of Representatives Report explaining the Act said that the literary works included computer databases and programs “to the extent that they incorporate authorship in the programmer’s expression of original ideas”.

The definition of literary works in the Act, however, did not clearly identify the scope of copyright protection of software. To cure this defect, amendments passed in 1980, introduced a definition of
computer programs and specified types of non-infringing copying or adaptation of programs. The amendments were only partly successful. Over the next 15 years and beyond, courts in the US, Britain and Australia were asked to interpret definitions of computer programs and the boundaries of legitimate copying.

**Doubts over object code**

In the United States, the courts soon confirmed that copyright protected source and object code and then turned to articulating methods to determine whether protection extended to the non-literal elements of a program. The scope of software protection increased steadily over the years. In Australia, the first significant litigation on software copyright turned on whether copyright protection extended to object code, which converts source code into machine-readable form. In *Apple Computer Inc v Computer Edge Pty Ltd*, the judge at first instance found that copyright protected only source code. The full court of the Federal Court swiftly reversed his finding, but, to eliminate doubt, the Government in 1984 amended the Copyright Act to establish that copyright vested in both forms of code.

Despite the amendments, the defendant company appealed to Australia’s highest court. In 1986, in *Computer Edge Pty Ltd v Apple Computer Inc*, the High Court found that while source code – in this case evidenced by writing on paper – is a literary work within the meaning of the definition in the Copyright Act, object code is not. The majority decided that object code stored in the circuitry of computers sold by the appellant did not adapt or reproduce source code.

In reaching its conclusions, the Court interpreted the copyright legislation in force at the time of the alleged infringements, not the legislation as amended in 1984. The judges focused on the question of infringement by reproduction, and determined that infringement required substantial literal reproduction – electrical impulses processing source code were not literal. The Court’s decision received a mixed reception and before long the weight of US jurisprudence and industry pressure demanded a shift in judicial attitude. A new consensus became clear in 1992, when three judges of the High Court emphasised that

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the definition of computer program in the amended Act extended to object code.\textsuperscript{13}

In the early 1980s, the main computer producers were unvarying in their position on the copyright status of both object and source code. In Australia, US computer giants, such as Apple, never flagged in proclaiming the message that copyright subsists in object code. Their Australian subsidiaries informed the federal Government that without copyright in both types of code, the computer industry would perish, the victim of Taiwanese and other offshore pirates.

The 1984 amendments reflected the Government’s wholehearted acceptance of the argument that continued investment demanded property rights. They also embodied the Government’s direct response to the Federal Court finding that copyright did not subsist in object code.

\textbf{The Apple case}

Proceedings in the Apple case, as the trio of court battles waged between the Apple corporation and Computer Edge became known, began in 1983. Apple sued Computer Edge, a Melbourne computer retailer in the Federal Court. Apple alleged infringement of copyright and trade practices legislation and sought damages and injunctions preventing the company from selling personal computers.

The owner of Computer Edge, Michael Suss, fell out with Apple before 1983, when the latter cancelled his licence to sell its computers. Contravening Apple’s instructions, Suss sold the computers with non-proprietary disk drives because, he said, the American disk drives were too expensive. After losing his dealership, Suss turned to selling Taiwanese computers, badging them as Wombat computers.

Apple mounted an uncomplicated case against Suss. According to the company, the Taiwanese manufacturers of Wombat computers copied on six machine microchips object code from the Apple programs Applesoft and Applestart. By importing and selling the allegedly infringing machines, Suss, and his company, said the statement of claim, broke the law. The object code in each chip constituted a literary work within the meaning given to that term in the Copyright Act, and reproductions of the code therefore infringed Apple’s copyright.

\textsuperscript{13} Chief Justice Mason and Justices Brennan and Deane in \textit{Autodesk Inc v Martin Dyason \& Ors} (1992) 173 CLR 330.
Bolstered by legislative trends in the United States, and a recent victory in a similar matter heard by the US Court of Appeals, Apple approached the case confidently. The validity of its arguments seemed, in the eyes of executives, self-evident. To general consternation, however, the company’s arguments found no favour with the trial judge. In December 1983, Justice Brian Beaumont declared object code etched onto the microchips to be purely functional, with no original expressive elements. The code did no more than control a sequence of operations in the computer. Minus the key element of originality, object code could not be called a literary work.

Politicians, no less than industry executives, were stunned. The Attorney General, Gareth Evans, the Minister for Trade and Industry, John Button, and Barry Jones, the Minister for Science and Technology – all partisans for investment in local industry – swiftly huddled with representatives of companies and industry associations. After a fortnight, they announced that the Government would legislate to “ensure software is adequately protected”. In a press release, they indicated that legislation might amend the Copyright Act but stated a preference for protecting software under patents legislation.

**Appeal to the Full Court**

In the meantime, Apple launched an immediate appeal, throwing its full weight behind the court action, heard in February 1984. According to a contemporary report in the *Sydney Morning Herald*, the company “poured a lot of resources into the effort, which at times has assumed the dimensions of a Holy Crusade – against the infidel company and its boss.” Suss struck back by denouncing the Government for “pandering to the whim of the multinationals.”

By the Herald’s reckoning, the Australian computer industry considered Suss a “traitor to the cause”, a purveyor of “rotten Apples”. Apple’s national marketing manager put Apple’s position simply. “We believe,” he said, “that property rights should be protected.” To run the appeal, Apple retained the services of Michael McHugh QC, then only five years away from appointment to the High Court bench.

Not everyone agreed that software should be called property. Alfred Langer, the spokesman of Software Liberation, announced in the *Herald* in early 1984 that “copyright laws are an artificial restraint on trade,

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intended to preserve monopolies over products that would otherwise have their prices pushed down by free competition.” Suss argued that software development depended on copying and adaptation. Apple’s leaders, he said, “encourage other people to write programs for the Apple and there are now many thousands of programs available. Why shouldn’t there be other machines available which can run those programs?”

The appeal to the full bench of the Federal Court resulted in a swift reversal of Beaumont’s decision and the award of full costs against Suss. On the question of software infringement, the majority ruled that object code fell within the definition of the legislative definition of ‘literary work’. Justice Fox said:

There is no necessity for a literary work to be a work of any literary quality. It is accepted that the term includes mathematical tables, codes, and in general alphanumerical works. One limit, doubtless, is that it needs to be a work and to have had some skill, even if small, applied to its preparation. There is no doubt that a great deal of skill went into the preparation of what was written, and that what was written could be read and understood by suitably trained people.

In his dissent, Justice Sheppard noted that translation of source code into object code, which involves the generation of electrical impulses, could not be seen by the human eye. Only the machine could understand or see the object code. In short, a human could not make sense of the code – a printout of object code displays digital notations on paper, which, taken together, cannot be literally understood. Invisible, and, in literal form inexplicable, object code in computer chips could not be classified as a literary work.

Suss, cast by the press as David confronting Goliath, boldly pressed on, appealing the decision to the High Court. He found vindication two years later, but the High Court’s decision in his favour came too late. By then the Government had corralled the bolting horse and shut the stable door.

16 The 1984 amendments attracted the criticism that they did not amend the section in the Act explaining the meaning of ‘reproduction’ to encompass the ways in which a computer digitally stores information. Some software proprietors considered that courts and legislation took a restrictive view of copying that opened doors to infringement.
The Government’s response

The Government’s amending legislation changed the Act’s definition of ‘literary work’ to include a ‘computer program’, defined as “an expression” of “instructions” to a computer in “any language, code or notation”. The bill also defined ‘adaptation’ of a computer program to clearly establish that the term applied to the translation of computer languages for purposes such as compiling or assembling programs. The bill made clear that the definition of ‘infringing copy’ applied to copies of adaptations of works. It also defined the term ‘material form’ to apply to non-visible forms of storage from which or work or adaptation could be reproduced, including in disks, integrated circuits and computer memory.

From an historical perspective, the Government’s response to the first Apple decision is interesting not principally because of the content of its legislative amendments but the way in which they were prepared and implemented. The Attorney General Gareth Evans, abetted by his ministerial colleagues John Button and Barry Jones, who were responsible for the Government’s industrial and scientific policy, never wavered in the belief that Justice Beaumont’s decision threatened an industry.

Each minister emphasised the need to protect the Australian software industry and each characterised software piracy as a potentially catastrophic threat to the industry’s survival. Arguments about the creative benefit of restricting proprietary software rights cut no ice. What mattered was that local programmers and suppliers, working for (or in concert with) US manufacturers, expressed alarm about the increasing penetration of the Australian market by Taiwanese manufacturers.

Ironically, the legislative reforms seemed to stultify rather than encourage the development of a native Australian programming industry, and they consolidated the hold of US manufacturers on the domestic market. The most interesting fact about Evans’s approach to reform is that his analysis – and that of his department –

17 The complete definition referred also to conversion to another language and reproduction in another material form for the purpose of causing a computer to perform a particular function. The Government amended the Act in 2000 to substitute a simpler, definition which stated that ‘computer program’ means “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.”
relied heavily on the premise that investment by copyright proprietors (or putative proprietors) demands legal protection. The Spicer Committee introduced to Australian copyright thinking the simple proposition that investment deserves legal protection and Evans entrenched it as the unyielding theme of future policy makers.

While the idea of government protecting legitimate investment from unfair competition is hardly controversial, Evans and his colleagues pre-judged the question of fair competition. They rejected Justice Beaumont’s decision not for reasons of principle but because they believed, with good reason, that Australia could not afford to ignore the wishes of the US computer industry. The needs of Apple and the larger US software community lay behind Evans’s rush to legislation, though he referred in communiqués to the need to secure the Australian industry’s future.

Contemporary press reporting suggested divided opinions among Australian software programmers and suppliers in the six months between Beaumont’s decision and the Government’s amendments. Some programmers argued that copyright protection would concentrate proprietary rights in the hands of large manufacturers and stifle innovation. The suppliers of US software argued that without protection local software producers would lose incentive to create programs, while US companies would lose incentive to export to Australia.

**Debate and consultation**

They argued that Beaumont’s decision threatened the local packaged software market, which before his decision they expected to grow at a rate of 100 per cent per annum. The Australian Computer Services Association, chaired by Jodee Rich, later a controversial figure in the telecommunications industry, led the protests. Rich declared that in the six months after Beaumont’s judgment, Imagineering, his packaged software supply company, lost 30 per cent of sales to supplies of imported copied software.

The Government responded unequivocally in favour of Apple and groups like ACSA represented by Rich. Its approach prefigured that of the United Kingdom Parliament, which a year later passed private member’s bill to amend the copyright legislation to recognise copyright in computer programs. The passage of the UK bill owed a great deal to
the campaigning of the British Federation Against Software Theft. In both Australia and Britain, Government listened to an uncomplicated message about investment and revenue, and blocked out voices spreading alternative arguments.

It made a straightforward choice to accept a natural hegemony created by the explosive growth of the US software industry and its spread across the globe. Embracing the prerogatives of the US industry made sense commercially and politically. Once accepted, the argument that Australian industry depended on US investment precluded considerations of principle.

Thus even if arguments that Taiwanese computer chips did not infringe copyright laws were sustainable in principle, necessity demanded that the law must change. Concerns about the possibility of copyright law facilitating price and distribution control by software companies were irrelevant. Even the radical suggestion that new laws would spell the end of a genuinely independent local industry, and enforce the total control of US manufacturers, made no impression on the Government.

Evans explained the Government’s philosophy in his second reading speech for the amendments, delivered on 4 June 1984. When he announced the decision to legislate two weeks after Beaumont’s judgement:

My department had already consulted with industry regarding international software developments on the legal status of computerised software, computerised data banks and computer-created works and some issues had been raised in the current review of audiovisual copyright laws. Officers had also participated in studies of these matters at the international level.

He outlined to his listeners the process of consultation managed by the Attorney General’s Department prior to the drafting of legislation. In January, the department wrote to “industry and user” groups supplying a short options paper and inviting submissions on “the manner in which the Copyright Act might be amended”.

The department received almost 100 responses and in March 1984 held a National Symposium on Legal Protection of Computer Software “to consider both domestic and international policies for Australia and

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18 In 1984, FAST estimated the cost to the computer industry of piracy at £150 million per annum. The Department of Trade and Industry reported that in the same period the annual turnover of the British software industry was about £1 billion.
also to cover other computer-related copyright issues, such as the protection to be accorded to works stored in, or created with the aid of, computers.”

In April, the Government invited WIPO to convene a working group to consider technical questions related to the legal protection of software. By the time amendments were drafted, Evans’s department had heard from a range of local and international technical and legal experts, as well as the representatives of libraries, universities, consumer groups, government agencies, the legal profession, patent attorneys, the press and the computer industry.

How much a consensus emerged to shape the Government’s views, or the Government discerned a consensus that satisfied its objectives, can only be guessed. At any rate, its stated intention to legislate to overcome the effect of Justice Beaumont’s decision found realisation a mere six months after the decision, in June 1984. The consultative approach adopted by Evans’s department, and the reasons he gave for legislation, created the essential pattern for future copyright legislative amendments.

**The need for legislation**

According to Evans, consultation confirmed the vital need for legislation:

> From the consultations it was clear that the absence of legal protection and continued uncertainty as to the state of the law would jeopardise the local software industry and that it was urgently necessary for there to be some legal protection.

The reason he gave for urgency was that free riders could easily duplicate software developed at great expense. One silent exclamation cements the arguments in Evans’s speech: “investment!” For the first time in Australian copyright history, a speech introducing copyright legislation concentrated fundamentally on economic utility as the rationale for protection.

Evans gave complete expression to the utilitarian philosophy enunciated by the Spicer Committee, which believed that the fact of large-scale productive investment justified granting copyright protection. He outlined with due reverence the balance theory of copyright balance and explained that the utility of computer software made protection necessary:
In practice, the relative economic importance of the different rights comprising a copyright depends very much on the nature of the protected material and on the technology available for its exploitation. Thus, in achieving an optimum balance between the interests of creators and users of copyright materials, it is necessary to have regard to technological factors.

The technology in question, computer software, demanded that the interests of the computer industry be given full weight. Evans did not speak of the US computer industry, which stood behind developments on the local scene, and instead gave rein to suppositions about local industry development that were probably suggested to his department by John Button and Barry Jones. Through their portfolios, Button and Jones promoted the development of national industry and scientific research, fuelling visions of indigenous technology development that next found expression in plans to create a native defence industry.

Speaking in a new vernacular popularised by government economists, Evans linked recognition of copyright in software with efficiency and national competitiveness:

*It follows that the efficiency and competitiveness of Australian industry and commerce are in part dependent upon the availability of appropriate computer systems. Australia can best ensure this by fostering a strong capability for systems development. This capability needs to be able effectively to integrate locally developed (as well as imported) hardware and software to provide systems best suited to our requirements and which have the potential to be marketed overseas. A strong local software industry is an integral part of this capability.*

*We are fortunate to have such an industry. Indeed the Australian computer software industry is internationally competitive and there are a growing number of organisations in this country whose main activities are software research and development. The industry is important in its own right and is capable of making a valuable contribution to the Government’s industrial development objectives.*

Evans wasted no time on the thorny issue of recognising computer code that might have no literal expression as a literary work. The possibilities for Australia created by investment, innovation and industry development, catchcries of a progressive new Government, supplied sufficient reason for action. If anyone thought otherwise, or argued against protection of software, said Evans, “the onus lay heavily upon those so contending to demonstrate why software should be treated differently from other technological developments.”
The opponents of the reforms, said Evans, failed to make their case. “The Government,” he declared, “has concluded that the onus was not met.” Nothing, it seemed, could justify throwing away the opportunity to support the creation of a booming Australian software industry:

Copyright protection will stimulate innovation and further growth of Australia’s software industry and, to the extent international copyright conventions apply, ensure protection for exported software.

Protection also has important consequences for users. There are risks of withdrawal or limitation on the availability of imported software in the absence of copyright protection. Such a limitation would seriously jeopardise the viability of most local computer manufacturers since many obtain their systems’ software under licence from overseas’ suppliers.

Evans’s last sentence supplied an unintended clue to Australia’s prospects as an internationally-recognised producer and exporter of software. Since the proprietary software used in Australia as the basis for “innovation and further growth”, and local adaptations, belonged to US licensors, Australian industry could only hope to play the role of creative subordinate to the giants of US software production.

Whether the Australian computer industry fulfilled the hopes of Evans, Button or Jones is a matter for conjecture. What is certain is that his reforms made the Australian commercial environment safer for American business and presaged the new era of American dominance in Australian, and world, copyright affairs.