Comment

The Users' Perspective on Issues Arising in Proposals for the Reform of the Law of Copyright†

SIR ANTHONY MASON*

1. *The Constraints Affecting the Modern Library*

Today, throughout the world, libraries are contending with a variety of constraints upon their capacity to develop collections in an era where publications are expanding across an ever-widening landscape of subjects and forms. Those constraints range from endemic funding limitations and storage inadequacies to the increased cost of acquisitions and subscriptions due to the pricing structure of very large international publishing and information groups such as Elsevier N.V. These structures have been reinforced by the merger of very large publishers. This has lifted the price of books and particularly serials way beyond the rise in inflation. The future of serials is in the balance. Technology may result in the article displacing the journal as the unit of library currency.

The Report of the Association of American Universities Task Force on A National Strategy for Managing Scientific and Technical Information, 1994 stated: "There is ample evidence that scientific and technical journal pricing does not reflect a competitive economic marketplace."[1] The Report pointed out that the functions performed by publishers had migrated into the hands of a relatively few very large commercial publishers — a monopoly-like market place. The report goes on to say that, in the commercialisation of the scientific journal, the concept of the university as a supplier of scientific knowledge was lost. The report makes the point:

> This knowledge has too great a value for achieving national and global educational and research agendas for its ownership and control to be relinquished to enterprises with different goals.[2]

As things stand, it is the large publishers, not the authors, who make the profits from the distribution of scientific and academic journals, though it is the authors and the academic review process that create the basic value in them.

---

† This article is an amended version of a lecture delivered in the Faculty of Law, University of Sydney, on 4 July 1996.

* Chancellor, University of NSW; National Fellow, Research School of Social Sciences, ANU; Chairman, National Library of Australia.

1 Association of American Universities, *Report of the AAU Task Force on a National Strategy for Managing Scientific and Technical Information* (1994) Association of American Universities, Washington DC, at 67.

2 Id at 69.

The emergence of networking as a means of disseminating and retrieving information requires libraries to offer computer-based facilities in addition to maintaining infrastructure for print materials. The purchase of equipment with a relatively short life span for information technologies places another burden on the stretched budgets of libraries. As library services become more complex and technologies change, greater investment in staff training becomes necessary.

2. *Deficiencies of Copyright and the Advent of the New Technology*

A. *Existing Copyright Law*

The existing law of copyright is abstract, complex and technical and it was not framed with a view to comprehending electronic transmission of literary work. But even without the pressure of external forces, such as technological change, there is a strong case for reform of copyright. The existing law of copyright maintains a balance between the economic interests of copyright owners and the strong public interest in allowing user access to works in which copyright subsists. The *Copyright Act* 1968 (Cth) contains a very large number of provisions which allow access by users in circumstances in which the use does not constitute an infringement. Some fair dealing provisions[3] permit dealings with copyright material without the permission of the copyright owner and without payment. Some other fair dealing provisions[4] allow access without permission and without payment, but require compliance with conditions as to the making of declarations. Other provisions[5] creating statutory licences authorise the use of copyright material without permission in consideration of the payment of equitable remuneration to be determined by the Copyright Tribunal in default of agreement. Statutory licences may be subject to conditions as to the keeping of records.

Sections 49 and 50 are important to libraries, researchers and students. These sections permit access for the purpose of supplying copies to readers and libraries. They permit dealings with copyright works for specified purposes so long as the use is fair. Research and study is a specified purpose.[6] The making of a single copy by a library of an article in a periodical publication or of a reasonable portion of a literary work other than such an article at the request of a person engaged in research or study is protected.[7] What is "a reasonable portion" of a literary work remains uncertain.

Section 50 permits a library to make a copy of such a work at the request of another library for certain purposes without infringing copyright, subject to certain conditions. One such purpose is to enable the requesting library to include the copy in its collection. Another is to enable the requesting library to satisfy a section 49 request.

---

3 *Copyright Act* 1968 (Cth) ss40–3, 103A, 103B.
4 Id. ss49, 50 which permit document supply and inter-library loans.
5 Id ss135ZJ, 135ZK, 135ZL.
6 Id s40.
7 Id, see s49(5).

Quite apart from the public interest purposes served by the large number of provisions which permit the use of copyright works in circumstances which would otherwise amount to an infringement of copyright, the concept of copyright has been fashioned in such a way as to achieve a balance between the private interests of copyright owners and the public interest in the free flow of ideas and information. It is well settled that copyright subsists in the expression of ideas; it does not subsist in ideas or in facts. This proposition has recently been affirmed by the Supreme Court of the United States.[8] Further, copyright protects only "original" creations; there must be "a mental operation deserving the character of an original work".[9] An expansion in the concept of copyright would therefore prima facie prejudice the public interest.

B. *The New Technology and Its Impact on Libraries and Users*

The new technology revolution has altered the dynamics of transferring and providing access to documents and information. Electronic transmission of documents in various forms may take place through fax and computer networks and other means. These new technologies have very considerable potential for libraries, particularly university libraries. To give an idea of the potential advantages, I shall identify some of them.

(i) Storage is an enormous problem for libraries, particularly the National Library, which is a library of deposit. Most libraries have no realistic prospect of acquiring in the future the additional space necessary to house an ever-expanding print collection. Electronic storage may provide a solution, subject to considerations of cost and the permanence of digitisation which is uncertain. The electronic or digital library is seriously discussed as a future possibility. In other words, a library's print collection would be digitised.

(ii) Once a print article or a book is digitised or reproduced electronically, it can be made available on computer screen and it can be seen simultaneously on all screens — available to or linked to the library. Whereas only one user at a time could obtain access to the library's single print copy of the journal article or a book, the only limit to the number of simultaneous uses that can be made of the electronic copy is the number of linked computer screens. Apart from the advantage in serving a large number of users offered by the electronic format, it offers economic advantages to the library. The library no longer needs to employ staff in the time-consuming recording of requests for use of or access to the single copy. Further, the journal is accessible electronically on an article basis rather than a journal basis, thus increasing the number of potential users.

(iii) It is convenient now to mention a practical application of digitising journal articles, already used by university libraries, which has given

---

8 *Harper & Row Publishers, Inc. v Nation Enterprises* (1984) 471 US 539 at 547 ("no author may copyright facts or ideas"); see also *Feist Publications Inc. v Rural Telephone Services* (1991) 499 US 340 at 359.

9 *Wilkins v Aikin* (1810) 17 Ves. 422 at 426; *University of London Press Ltd v University Tutorial Press Ltd* (1916) 2 Ch. 601.

rise to a dispute between the Australian Vice-Chancellors' Committee ("the AVCC") and Copyright Agency Ltd ("CAL"), the company which acts for and represents the copyright owners. The university libraries have digitised the journals or journal articles which are most commonly sought so that they can be made available on computer screens in the library. They refer to these materials as having been placed in "Electronic Reserve".

3. *The Provisions of the Copyright Act Relevant to Electronic Reserve*

Section 135ZJ provides a statutory licence for multiple copying of periodical articles by educational institutions provided that a remuneration notice given by the institution to the collecting society is in force, the copy is made solely for the educational purposes of an institution and the institution complies with section 135ZX (1) or (3), as the case may be, in relation to the copy. The section does not apply in relation to copies of, or of parts of, two or more articles contained in the same periodical publication unless the articles relate to the same subject matter. By a remuneration notice under section 135ZU, the institution undertakes to pay equitable compensation for licensed copies made by it while the notice is in force. The notice may specify that assessment is to be made on a records or sampling basis. Remuneration is to be arrived at by agreement and in default by the Copyright Tribunal. Section 135ZX prescribes what records are to be kept.

There is a question whether the process of digitisation involves an infringement of the owner's literary copyright. It has been argued that the copying into the random access memory of a computer for the purpose of electronic transmission is an ephemeral copying only and that, accordingly, it does not constitute a copying for the purpose of infringement. That argument has been rejected by a court in the United States.[10] There is no relevant court decision in Australia.

The universities, in their negotiations with CAL, claim that, on the assumption that copying into the random access memory of a computer is an infringement of copyright, they are entitled to a statutory licence to take the print journal or article into the electronic reserve and that, if a fee is payable, then it is a fee payable for making that one copy. It is to their interest to treat all subsequent access by students to computer screens as use, if it is relevantly a use that would otherwise constitute an infringement, that falls within s. 40 for the purpose of study or research and is non-compensable under s. 49. But the first question is whether calling up the article on a screen is making a copy.

On the other hand, it is to the interest of CAL to claim that they should receive compensation on the basis of the use made by students. Copyright owners — their interests may be identified with those of the large commercial publishers in the world of academic journals — want to charge each time ma-

---

10 *MAI Systems Corp. v Peak Computer Inc.* (1993) 991 F 2d 511 (9th Cir); see also *NLFC Inc. v Devcom Mid-America Inc.* (1995) 45 F 3d 231.

terial is thrown up on a screen, whether a copy is made or not. Moreover, copyright owners fear that students will print out copies without a record being kept of the making of such copies.

The response of the libraries is to say that reading or browsing on a screen does not amount to an infringement of copyright. Reading or browsing a book does not amount to infringement of literary copyright for the simple reason that no copy is made. As for the risk of students making a copy, libraries say that it is possible to maintain dedicated "reading only" terminals where no copying will be possible.

What has galvanised the AVCC and the libraries is the cost to the universities of the fee claimed by CAL. In the case of UNSW, according to an estimate made in respect of one of the alternative bases of claim, the cost could be $2 800 000. The overall cost to the universities could be very high indeed. It could constitute another significant cost burden at a time when the universities face very serious funding cuts.

This unresolved problem between CAL and the universities, which almost certainly will result in a determination pursuant to the *Copyright Act*, illustrates some of the problems of existing copyright law in the context of the new technologies. In addition, there are policy questions of a different order. The commercial publishers say that the availability of electronic transmission will reduce the market for the publication in terms of sales and subscriptions so that, in order to compensate copyright owners, the concept of copyright should be extended to cover use of the kind that I have discussed.

4. *The Publishers' Reform Agenda*

The reform agenda of the copyright owners, that is the large commercial publishers, has been strongly supported by the United States Government. It appears that a small group of live-wire intellectual property lawyers in the United States persuaded the US Government that extension and enforcement on an international and trans-national basis of intellectual property rights would greatly assist the United States, adverse overseas balance of trade. To that end, the United States instead of moving in the usual intellectual property bodies, such as WIPO, decided to seek international agreement in GATT and it did so under the banner of liberalisation of world trade. The primary object of this campaign was to "free up" world trade by securing greater access to world markets, including the EC and Japan. Greater intellectual property protection, which in many ways is the converse of "freeing up" world trade, was linked to the campaign for free world trade.

In effect, the United States succeeded in this initiative and secured the support of most developing countries to a combined regime of lowering trade barriers and greater intellectual property protection. Developing countries were prepared to agree to the latter in order to buy American support for greater market access for primary products, notwithstanding that greater intellectual property protection, particularly for pharmaceutical products in which the United States especially and Europe are very strong, would cost them dearly.

Australia, for substantially the same reason, supported the United States initiative. Australia had been a key player in the Uruguay Round, a group of nations seeking fair and equal access for primary products in world markets.

By subscribing to the American initiative which resulted in the 1994 GATT and TRIPS agreements at Marrakesh in 1994, Australia, without the matter being raised for domestic debate in this country, sacrificed increased intellectual property protection for the prospect — which may be as elusive as a mirage — of increased access to world trade markets. What the profits and losses of this transaction will amount to we do not know. What we do know is that the advantages, if any, went to the primary producing sector, subject only to the benefit received by intellectual property owners in Australia who obtained greater protection and a more effective enforcement regime.

TRIPS ("the Trade Related Aspects of Intellectual Property Rights") strengthens intellectual property around the world by raising the level of protection and reinforcing its strict enforcement. By acceding to TRIPS, Australia agreed to increase the life of patents, including current patents, from 16 to 20 years. The net cost to Australia of this extension, it has been suggested, could amount to over $1 billion. A very considerable proportion of this cost would be attributable to the windfall gain of existing patent owners. A very high proportion of Australian patent owners are non-resident. It is obvious that the 1994 TRIPS agreement, judged *solely* from the viewpoint of Australia's situation as a strong net importer of intellectual property, was ill-advised. Even if one is to assume that Australia becomes a relatively larger owner and exploiter of intellectual property — an assumption which appears to be quite speculative, the more so in view of the Australian government's 1996 Budget withdrawal or reduction of support for expenditure on research and development — any reasonable increase in intellectual property ownership would not make a significant impact on the deficit. Later, I shall refer specifically to the trade deficit as it relates to copyright material.

It may be significant that art. 9 (2) of TRIPS provides "[c]opyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

You will note that "facts" are not included in the list of what is excluded from copyright.

5. *Moves for Reform of Copyright*

In August 1994, on a reference from the Minister for Justice, the Copyright Convergence Group made some recommendations for reform of the *Copyright Act*. One such recommendation was for the introduction of a broad-based right to authorise electronic transmissions to the public and that such a right be given to all copyright owners, including owners of copyright in sound recordings and broadcasts. Entitlement to such a right would enable a copyright owner to sue for infringement, unless the Act provided a defence. The Convergence Group recommended against the introduction of a definition of the expression "the public". It is a term that is difficult to define. However, the Group also recommended that a new provision should be inserted in the Act to the effect that transmissions of copyright material by electronic or similar means which are made for a commercial purpose should be deemed to be transmissions to the public. Hence transmissions, if made for a commercial purpose, would be an infringement of copyright, but not if they were made for a non-commercial purpose. The significance of that recommendation is that most electronic transmissions by libraries would not be for a commercial purpose.

However, as we shall see, the proposals for copyright reform published by the Minister for Justice do not give effect to the last recommendation of the Group to which I have referred.

6. *The Copyright Law Review Committee*

The Australian Government recognised the need for reform of the existing law by asking the Copyright Law Review Committee (CLRC) to undertake a wide-ranging enquiry into the *Copyright Act* 1968 (Cth). Submissions have been made to the Committee by interested parties, notably by ACLIS, by universities including the University of New South Wales, by the Office of Regulation Review ("the ORR") and by the Treasury. The points made in these submissions are fundamental to the free flow of knowledge, ideas and information in this country, a matter vital to the political, intellectual, economic and social life, as well as the education, of all Australians.

In February this year the CLRC published a paper, which is an issues paper, "Copyright Reform: a consideration of rationales, interests and objectives". The document leaves me with a profound sense of unease. It states: "Ultimately the most important factor determining the theoretical shape of copyright is the public interest."[11]

It goes on to say: "Supporting the public interest requires balancing the interests of [the copyright interest groups]. The question of what is ultimately in the public interest is open to serious debate."

It is necessary, of course, to achieve a balance between the interests of stakeholders. But the document fails to give adequate prominence to the paramount Australian public interest in the free flow of knowledge, ideas and information. The document also fails to acknowledge that the value of Australia's imports of copyright material far outweighs the value of its exports of such material and that extension of copyright protection will, in all probability, aggravate that marked imbalance. In its submission to CLRC, *which preceded the CLRC document*, the ORR made this telling point:

> Australia has a substantial and consistent net deficit in royalty transactions related to copyright ... the difference between inflows and outflows — the annual net flow — has been around $1.2 billion in recent years. In 1993–94, payments of royalties to overseas holders of copyright totalled $1732 million, while royalties earned from overseas totalled $380 million.[12]

Yet the CLRC document simply says, among other unpersuasive comments:

> Australia is currently a net importer of copyright material. Our copyright regime may change this through its effects on the production of local product or by its inhibiting effect on the relative attractiveness of imported products.[13]

---

11 Copyright Law Review Committee, *Copyright Reform: A Consideration of Rationales, Interests and Objectives* (1996) Office of Legal Information and Publishers, Canberra, at 14.

12 Office of Regulation Review, *An Economic Analysis of Copyright Reform. A Submission to the Copyright Law Review Committee's Review of the Copyright Act* (Cth) 1968 (1995) at 39.

13 Above n11 at 19.

Given the marked annual trade imbalance of well over $1 billion, a new copyright regime of extended protection would need to have magical properties to bring about the result suggested by CLRC. The likely reality is that such a regime would then aggravate the imbalance. Indeed, the ORR stated in its submission that "a general extension of copyright protection ... would have few (if any) tangible benefits and holds the risk of substantial costs".[14] The CLRC document blithely omits any reference to this argument.

Much of the argument for and against expansion of copyright is based on economic considerations. The commercial publishers argue that increased protection will encourage creativity and provide just rewards — justice will be done to the impoverished and tubercular artist struggling to survive in a Parisian garret. They also draw on natural law to support the view that authors should capture the maximum benefit from their endeavours. The Treasury counters these arguments with the economic rationale approach according to which intellectual property rights are justified only to the extent that they overcome market failure. On that approach, seeking the maximum total welfare of the community will benefit both consumers and producers of intellectual property; producers have an interest in continuing to create and exploit copyrightable material, while consumers have an interest in ensuring that there is enough incentive for producers to continue to create new works and that they have access to copyright material on fair and reasonable terms.[15]

The application of these arguments leads Treasury to suggest that, in some instances at least, the period of copyright protection (life of the author plus 50 years) should be reduced instead of being extended to the life of the author and 70 years, as it has been recently in Europe and as is proposed in legislation before Congress in the United States.[16]

The Treasury also points to the potential anti-competitive element in copyright protection, a possibility acknowledged in art. 40 (1) of TRIPS. In this respect, section 51 (3) of the *Trade Practices Act* excepts copyright licence conditions and assignment conditions from sections 45, 47 and 50 of that Act where the conditions "relate to" the copyright work. The Hilmer Report (the Report of the National Competition Policy Review) expressed concern about section 51 (3) and suggested it and other exceptions should be reviewed. Treasury went further and suggested that section 51 (3) be removed.[17]

In the end, Treasury supported the approach advocated by the ORR, namely that a narrow approach to copyright reform protection be adopted — expanding the categories of works protected to cope with the new technologies, but tightly defining these categories. By adopting this approach, the duration and rights attaching to copyright can be tailored to particular material. This would facilitate the creation of a copyright regime that targets as its priority the correction of market failure and the maximisation of community welfare, rather than just maximising private welfare.

14 Above n13 at 5.

15 Commonwealth Department of Treasury, *The Economic Role of Copyright* (Autumn 1996) *Economic Roundup* 8, at 8-11.

16 Id at 6.

17 Id at 8-11.

The Treasury submission made this point:

> There appears to be a push by owners of intellectual property to charge for use of their intellectual property (reading a book, browsing a database etc.). The incorporation of a usage right in the Act would be a dramatic change — from a prohibition on copying — that would have the potential to further limit the dissemination of copyrightable material. ... the *Act* should not restrict usage unless such a right can be economically justified as enhancing community welfare. Given the increasing use of technology to monitor and control access to, and usage of, works in digital form, it is not clear that there is a market failure that needs correcting. The onus should be upon those seeking a usage right to demonstrate a compelling need for such a right.[18]

The two aspects of Australian public and national interest I have mentioned — access to knowledge, ideas and information and the financial cost to Australia — are critical considerations. Once this is recognized, we have much to lose from an expansion in copyright protection. It will suit copyright owners and large commercial interests in the United States and Europe but disadvantage Australia as well as the developing nations and poorer peoples of the world. We have already compromised our interests by our hasty endorsement of the 1994 TRIPS agreement. It would be foolish indeed if we were to go further down that track.

My concern was not dispelled by the exposure draft of proposed amendments to the *Copyright Act* released by the then Federal Minister for Justice. That draft proposes "[a] new broad right of electronic transmission to the public", to give effect to the recommendation of the Copyright Convergence Group. A transmission for which a fee is payable to the maker of the transmission, that is, the person who is responsible for determining the content of the transmission, is expressed to be a transmission to the public. There will be many circumstances in which a library is the person responsible for determining the content of the transmission and it will ordinarily charge a fee. But the fee charged by a non-profit library is simply a recompense for its service in making and delivering the copy; the fee contains no component for the information itself. Why should the making of a non-commercial transmission, e.g. for research or study, for such a fee, amount to an infringement of copyright? Yet that may be what the exposure draft proposes. It is significant that the exposure draft, in section 25 (1), goes further than the recommendation of the Copyright Convergence Group that transmissions of copyright material "which are made for a commercial purpose should be deemed to be transmissions to the public".[19] Why has the change been made? Libraries should be exempted from any transmission right, the effect of which might otherwise be to exclude them from supplying single copies of a periodical publication or a reasonable portion of a literary work, not being a periodical publication, for non-commercial purposes or at least for research or study.

With respect to the suggested expansion of copyright to cover browsing of documents shown electronically on a screen, the commentary in the CLRC document is disturbing. The commentary states:

---

18 Id at 17.

19 Copyright Amendment Bill 1996, (Cth) Exposure Draft, at para 1.3.3.

> It has been suggested that because technology now exists to monitor *all* uses made in the electronic environment, it is now appropriate to allow copyright owners to charge for those uses, even where these uses have not traditionally amounted to infringement of copyright. Thus, "browsing" through a database might attract a charge.[20]

As already pointed out, browsing or reading print material does not constitute an infringement of copyright. The user should have an opportunity to decide whether the document is of value to him. And that means that a user should have reasonable access to a document on screen in order to determine whether he wants a copy. Browsing, or even reading, on a screen is unlikely to operate as a substitute for acquisition of, or subscription for, the original work. Neither browsing nor reading amounts to making a reproduction or copy or to infringement and should not become so.

A further question arises in relation to the scanning of print material into an electronic or digital reserve only for the purpose of enabling a user to browse or read what appears on the screen. If a library can hold a hard copy on its shelves and readers may consult it without a fee, why should the new technology of scanning the same material into an electronic reserve only for the purpose of allowing browsing, or even reading, on screen lead to a charge? Why should a change in the technology of delivery, something not ordinarily associated with copyright, overthrow the historic approach?

Behind the move towards expanding the concept of copyright is a broad notion that copyright should extend to information and ideas. Historically, copyright subsists in the form of expression. The law has consistently denied, for very sound reasons, that there can be copyright in facts or ideas. That fundamental legal doctrine, based on good sense and the public interest, has been obscured by the argument advanced on behalf of large commercial publishers that those who provide information should have the protection of copyright. Some commentators who urge the expansion of copyright have sought to suggest that the distinction between the protection of expression on the one hand, and facts and ideas on the other, is difficult to maintain. It is a distinction that has prevailed for a very long time. The fact that it may not be easy to apply in some particular cases is a flimsy reason for abandoning it.

If there is to be a change in the concept of copyright, there should be an insistence on a stronger element of originality. In Anglo-Australian copyright law, the threshold requirement for originality is low. Equally important is the continued need to insist on the requirement that reproducing or copying a *substantial part* of copyright work is the core element of infringement.

There should be no weakening of the exception in favour of fair dealing. The "fair dealing" exception to infringement of copyright is and always has been squarely based on recognition of the paramount public interest in the copying or reproduction of copyright material for certain purposes such as research and study, criticism or review, news reporting, court proceedings and the provision of legal advice. If the "fair dealing" exception is to be changed, it should be extended along the lines of the flexible American "fair

---

20 Above n11 at 22.

use" exception. That would permit the use of copyright material for important public purposes.

The concerns which I have expressed have already been raised in the United States in consequence of the Clinton Administration's proposed legislation to give effect to the recommendations in the White Paper on Intellectual Property and the National Information Infrastructure. The White Paper's recommendations significantly extend both the concept of copyright and limit public interest exceptions. The United States and the European Community are already seeking to secure international acceptance of an expansion of copyright or some new form of intellectual property protection to cover databases not now protected in some countries by copyright because they are considered to lack adequate originality.

7. *Other Adverse Consequences of Expansion of Copyright*

In addition to the costs already mentioned, the intellectual consequences to Australians of increased copyright protection are obvious. The more we pay for overseas materials, the less we will be able to afford with possible detrimental consequences for school and university students. And this at a time when Australian universities, research and educational institutions, including libraries, are already facing the possibility of large reductions in government funding. Those reductions could affect Australia's present capacity to generate the $1.7 billion overseas revenue which it presently generates from providing education for foreign students. Increased copyright royalties can only reinforce that unwelcome possibility. Apart from the education and the library sector, there will be the costs to business, government, the entertainment industry, and individuals, not least Australian students.

The issues which arise for consideration in the copyright debate are of vital importance to Australia and Australians. It is essential that the public interest and the national interest of Australians be fully recognised in a debate which so far has been unbalanced.