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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COPYRIGHT AMENDMENT BILL (NO. 2) 1979

EXPLANATORY MEMORANDUM

(Circulated by the Attorney-General

The Hon. P. Durack, Q.C.)

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OUTLINE OF THE PRINCIPAL MATTERS DEALT WITH

The Bill, seeks to amend the Copyright Act 1968.

The major amendments proposed relate to:

- (a) Extension and clarification of permitted copying as "fair dealing" under the Act;
- (b) Extension and clarification of permitted copying by libraries and archives for users and other libraries and archives;
- (c) Extension of permitted copying to enable preservation of works by libraries and archives;
- (d) A scheme permitting copying by non-profit educational institutions and teachers for educational purposes;
- (e) A scheme permitting copying for student use by non-profit institutions assisting handicapped readers;
- (f) Provision for remuneration of copyright owners in cases of the permitted copying in (d) and (e);
- (g) Extension and clarification of the provisions relating to Crown Copyright;
- (h) Increase of penalties for offences relating to importation of infringing copies;
- (j) Minor and consequential amendments.

2. Generally the Bill implements the proposals of the Franki Committee relating to the making of photocopies of copyright works. References to paragraphs in the Report

(Clause 1) of the Franki Committee are set out thus: (Franki 8.02)
Variations from the Franki Committee's Recommendations are explained in the body of this memorandum.

DETAILED PROVISIONS

Clause 2 - Commencement

3. The Act is to come into operation on a date to be proclaimed with the exception of Clauses 17 and 18 which will come into operation on the day the Act receives the Royal Assent. Regulations need to be prepared before the remaining provisions can come into effect.

Clauses 3 and 4 - Crown Copyright

4. These provisions amend section 8 and add a new section 8A in order to make it clear that the "fair dealing" and similar provisions apply to Crown copyright as they do to privately owned copyright. (Franki 8.06)

Clause 5 - Interpretation

5. This clause provides definitions for a number of expressions used in the Bill. Attention is directed in particular to the following definitions:

. "Archives" - is defined to include collections of material in the custody of the Australian archives and certain State collections. Other collections may be included by regulation. (Franki 3.34, 4.21).

. "Educational Institution" - is defined to include non-profit primary, secondary and tertiary educational institutions. Specialist schools such as trade schools may be included by regulation. The Franki Committee did not define educational institutions but the breadth of this definition accords with the range of establishments discussed in Section 6 of the Report.

(Clause 5)

. "Body Administering a library, archives or educational institution" - refers to the body or person (including the institution itself where incorporated) having ultimate responsibility for the administration of the library, archives or educational institution as for example the Crown in right of a State in respect of Government schools, or a University.

. "Officer-in-Charge" of a library or archives means the person having immediate care or control of the relevant collection. Obligations are imposed by the Bill on that person for acts relating to copying.

. "Custodian-in-Charge" of the copying records of an educational institution or an institution assisting handicapped readers refers to the person having the responsibility for the day to day administration of the institution.

. "Authorized Officer" means both an officer-in-charge or a person authorized by him to carry out certain acts relating to copying in libraries or archives.

. "Handicapped Reader" means those persons unable to read books because of visual or physical disability.

. "Institution Assisting Handicapped Readers" means those bodies assisting handicapped readers entitled to make copies pursuant to the scheme referred to in paragraph (e) of the Outline and provided for in Clause 14 (Section 53F)

. "Handicapped reader's copy" refers to both an original sound recording of a work made by an institution for a handicapped reader as well as a copy of a pre-existing sound recording. The definition similarly includes

(Clause 5) both an original and copy of a Braille version of a work.

. "Copy of a sound recording" and "records embodying a sound recording" - These expressions are defined separately to distinguish the making of a copy of an original sound recording from subsequent copies. In the Act at present the expression "record embodying a sound recording" may refer either to the original or a copy. These definitions and Part 1 of Schedule 1 are designed to remove this ambiguity.

. "Copying Records" refers to the records of copying and declarations to be retained pursuant to Section 203A(2). (See Clause 26).

. "Reprographic Reproduction" of a document or work refers to the making of a facsimile copy of any size or form. This definition accords with the terms of reference of the Franki Committee. (Franki I.01).

. "Reasonable Portion." Without limiting the meaning of the expression, the copying of not more than 10 per cent of the number of pages or one chapter of a literary, dramatic or musical work is to be taken to be a reasonable portion of that work. (Refer to comment under Clause 7).

. "The Crown" Amendments are included to give effect to the recent change of status of the Northern Territory. (Northern Territory (Self Government) Act 1978).

Clause 6 - Installation of photocopiers

6. The Franki Committee considered that legislation was necessary to overcome difficulties arising from the decision of the High Court in University of New South Wales v. Moorhouse & another (1974-5) 6 ALR 193. The Court held that installing a photocopying machine and allowing persons

(Clause 6) to use it may amount to authorization of infringing copying. The Committee considered that a person should not be liable for infringements by reason only of having installed a machine and allowed persons to use it provided an appropriate notice warning users was displayed. (Frank: 2.53).

Clause 7 - Fair Dealing

7. The Franki Committee considered that a fair dealing with a work for the purpose of study should not be restricted by inclusion of the word 'private' (Franki: 2.18, 2.64, 2.68). The making of a single copy of an article from a periodical for research or study is to be taken to be a fair dealing.

8. For the purpose of determining whether a dealing for research or study is fair, the Clause provides that the following factors are to be taken into account:

- (i) The purpose and character of the dealing;
- (ii) The nature of the work or adaptation;
- (iii) The possibility of obtaining the work or adaptation within a reasonable time at a normal commercial price;
- (iv) The effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (v) The proportion and substantiality of the part of the work or adaptation that is copied in relation to the whole. (Franki:2.60)

The Court may also have regard to such other factors as are considered relevant to the dealing.

9. Although the Franki Committee's recommendations were

(Clause 7) confined by the terms of reference to dealings by way of reprographic reproduction, the Committee's reasoning appears applicable to any mode of reproduction. Accordingly, the Clause is not confined to reprographic reproduction.

10. The effect of this clause and the extended definition of reasonable portion is to assist copiers by giving clearer guidelines as to what is fair.

Clause 8

11. See Clause 15 below (paragraph 47)

Clauses 9 and 10 - Copying by Libraries and Archives

12. Clauses 9 and 10 extend the operation of section 49 and 5 to archives. The term "officer in charge" of a library or archives in those sections would replace the term "librarian".

13. Section 49 presently enables a librarian to make copies at the request of library users where he is satisfied that the copy is required for the purpose of research or private study and that it has not been previously supplied to that user, and, in the case of a Member of Parliament, the copy is required for his parliamentary duties. As recommended by the Franki Committee, the Clause provides that an officer in charge is now to be entitled to rely as to these matters upon a signed statement by a person requesting the copy.

14. A charge may be made not exceeding the cost of making and supplying the copy. At present the charge may not be less than the cost of making the copy. The Committee thought that a library should not make a profit in these circumstances. (Franki: 3.24).

(Clause 10) 15. A general regulation making power is provided to exclude the exemptions mentioned above in particular cases. Although no regulations were made under the equivalent sub-section of section 49, the power to make regulations has been retained and can be used to limit any abuse of copying power which might emerge.

16. The effect of Clause 9 is to allow a librarian or archivist to make a copy for a user in circumstances which would amount to a fair dealing if the user made the copy himself. (Franki: 3.19, 3.21, 3.24, 3.26, 3.34).

Inter Library Copying

17. Clause 10 brings section 50 into line with section 49 (see preceding clause) as proposed to be amended by Clause 9. It enables the supply of copies by one library to another in circumstances where a user is entitled to request a copy under section 49 or where the requesting library requires a copy for its own collection. As with section 49, the supplying library is now entitled to rely upon the documentation furnished by the requesting library as establishing the basis for the request.

18. A copy may also be made for a library's collection where the documentation establishes either that there has been no previous copy supplied or that such copy has been lost, damaged or destroyed. Restrictions on the application of the section previously contained in regulation 4 of the Copyright Regulations, are now included in the section itself. (Franki: 4.09, 4.15 to 4.21).

Clause 11 - Copying of Unpublished Works in Libraries or Archives

19. Sub-Clauses (a) and (b) substitute the expression

- (Clause 11) "the collection of a library or archives" for the expression "a library or other place", in section 51. The proposed amendment is a consequence of the extension of the section to cover "Archives". The words "that library or other place" are to be replaced by "that collection" in order to focus the operation of the section on the library or archive collection rather than the institution administering the library or archive.
20. Sub-Clause (c) deletes the word "private" from the expression "private study" in the section. This will bring the section into line with the Committee's recommendations regarding fair dealing for the purpose of "research or study".
21. Sub-Clause (d) provides that copyright in an unpublished work in a library or archives will not be infringed by the making of a copy by or on behalf of the officer in charge of that library or archives for a person who satisfies that officer that he requires the copy for research or study with a view to publication and that he will not use it for any other purpose.
22. Sub-Clause (e) substitutes the term "officer in charge" for the term "librarian" (Compare clause 9 above)(Franki: 5.14, 5.15.).

Clause 12 - Copying for Preservation

23. This enables copies of works in the collection of a library or archives to be made for the purposes of preservation or replacement of lost or damaged works. This provision only extends to an unpublished manuscript or a published work which is unavailable at its ordinary commercial price.
24. A single microform copy of a work may be made by a

(Clause 12) library or archives for its collection provided the work is destroyed as soon as practicable after the microform copy is made.

25. The making of a copy of an unpublished work will not constitute publication. This protects the author's rights, particularly in relation to the duration of his copyright. (Franki: 5.04, 5.10, 5.12, 5.13).

26. This provision would allow destruction of bulky records or files kept in documentary form. Reduction of such records to microform would permit considerable savings in storage space without loss of data which may be of value in the future.

Clause 13 - Application of this Provision to Illustrations
Accompanying Article and Other Works

27. This makes amendments to section 53 consequential upon the provisions introduced by Clauses 10 and 11. It would extend the protection of those provisions to illustrations accompanying works.

Clause 14 - Division 5A and 5B

28. Two new Divisions are introduced: Division 5A which contains provisions dealing with copying in educational institutions and Division 5B which establishes a statutory licensing scheme for the assistance of handicapped readers.

Division 5A - Copying of Works in Educational Institutions

(a) Multiple Copying for Library Purposes

29. Section 53A permits the officer in charge of the library of an educational establishment to make up to 6 partial or complete copies of a work for inclusion in that library without infringing copyright (subsection (1) and (2)).

(Clause 14) 30. The provision is so worded that different parts may be copied on different occasions, and a given part may be copied on more than one occasion, so long as no part of the work (whether alone or within a larger part) is copied more than 6 times in total (subsections (5) and (6)).

31. Two other restrictions are imposed:

- (a) Not more than one article may be copied from a periodical unless the articles copied related to the same subject matter (subsection (3)).
- (b) If the aggregate of the part being copied and any different parts which have been previously copied would exceed a reasonable portion of the work, an authorised officer is required to make a declaration stating that he is satisfied, after reasonable investigation, that a new copy of the work cannot be obtained within a reasonable time at an ordinary commercial price (subsection (4)).

32. After 5 years from the time such copies were made the copyright owner may, in writing, request the officer in charge to destroy them or surrender them to him. A penalty of \$500 is provided should the officer fail or refuse to comply with such request. (Subsections (7) and (8)).

(b) Multiple Copying of Insubstantial Portions of Works

33. Section 53B permits copying on the premises of an educational institution of up to two pages or 1% (whichever is the greater) of a literary or dramatic work without

(Clause 14) remuneration to the copyright owner. (Franki: 6.67).

The Franki Committee recommended that the provision should not be employed more than once in any 14 day period and this limitation has been included. The provision does not accord with the recommendation in that musical works have been excluded. Such works are often no more than two pages in length and almost invariably copying in reliance on this provision would have amounted to copying a substantial portion of such works.

(c) Copying by Teachers for Classroom Use

34. Section 53C permits a person teaching a course of instruction provided by an educational institution to make, on the premises of that institution, without infringing copyright, up to 3 complete or partial copies of a work for the purpose of classroom instruction in connexion with his teaching of that course. The provision is so worded that different parts may be copied on different occasions, and a given part may be copied on more than one occasion, so long as no part of the work (whether alone or within a larger part) is copied more than 3 times in total (subsections (1), (3) and (4)).

35. If the work has been separately published, and if the aggregate of the part being copied and any different parts which have been previously copied would exceed a reasonable portion of the work, the immunity from infringement would not apply unless the teacher is satisfied, after reasonable investigation, that a new copy of the work cannot be obtained within a reasonable time at an ordinary commercial price (subsection (2)).

36. For this provision, 'course of instruction' would mean

(Clause 14) a course provided by a teacher during a period of not more than 1 year for students in a particular class. (Subsection (5)).

(d) Multiple Copying under Statutory Licence by Educational Institutions

37. Section 53D, in accordance with the Committee's recommendations, provides that it would not be an infringement of copyright to copy the whole or part of a work by or on behalf of the body administering an educational institution for the teaching purposes of that institution subject to the payment of remuneration and the following conditions:

- . Where the work has been separately published, more than a reasonable portion may not be copied unless the person making the copy is satisfied that copies of the work cannot be obtained within a reasonable time at an ordinary commercial price.
- . A written record of the copying must be made before or as soon as practicable after the copies are made. The record must be in the prescribed form and set out the title or description of the work, the author's name, the publisher's name, the number of pages copied, the date, the number of copies made and any other particulars that may be prescribed.

(Franki: 6.39, 6.52, 6.58 and 6.73).

38. The copyright owner may in writing request the body administering the institution to pay equitable remuneration in respect of most copying undertaken in reliance on this

(Clause 14) provision (see below). In default of agreement either party may apply to the Copyright Tribunal for a determination. Such remuneration may be recovered as a civil debt.

39. This provision does not prevent a copyright owner granting a licence to copy on his own account, subject to such terms and conditions as may be agreed. Such a licence may modify or dispense with the provisions relating to the statutory licence.

40. In limited circumstances, copying under this provision is to be unremunerated (subsections (4) and (5)). Educational institutions will be permitted to copy the whole or part of an article in a periodical or a reasonable portion of other works for distribution to correspondence or external studies students (Franki: 6.73). To be unremunerated the fact that copying was of this character must be stated in the copying record. This exception from the requirement to pay remuneration does not extend to material reproduced as part of lecture notes.

(e) Illustrations Accompanying Articles and Other Works

41. Section 53E, as recommended by the Committee, provides that where an artistic work or works accompany an article in a periodical or other literary, dramatic or musical work for the purpose of illustrating or explaining that article or work the provisions of Division 5A will apply to allow copying of those artistic works within the limits of those provisions. (Franki: 6.59)

Multiple Copying under Statutory Licence by
Institutions Assisting Handicapped Readers

42. Section 53F creates a statutory licence enabling

(Clause 14) institutions assisting handicapped readers to make records and braille versions of published works available to a handicapped reader for his research or study without the permission of the copyright owner subject to the payment of remuneration.

43. The statutory licence would be subject to compliance with the following conditions:

- . the work to be copied has been published;
- . the work is not separately available as a record or braille version in a reasonable time at an ordinary commercial price;
- . a copying record is made stating the title of the work, author's name, publisher's name, page numbers, date, form (i.e. braille or recording), person for whom made and other particulars as prescribed.

44. The copyright owner may make a written request that the body administering the institution pay equitable remuneration for the making of a handicapped reader's copy of all or part of his work. If agreement cannot be reached either party may apply to the Copyright Tribunal for a determination. The remuneration so determined may be recovered as a civil debt.

45. The maker of a handicapped reader's copy of a work does not, by reason of his making that copy, acquire any copyright in that version of the work.

46. A copyright owner or his agent would not be prevented from granting on his own account, a licence to make sound recordings or braille versions of his work, subject to such terms and conditions may be agreed. Such

(Clause 14) a licence may modify or dispense with the provisions relating to the statutory licence specified in the Bill.

Clause 15 - Acts done for the purpose of judicial proceeding

47. At present copyright is not infringed by anything done for the purpose of a judicial proceeding or report of a judicial proceeding. This Clause extends that protection to anything done for the purpose of professional advice by a legal practitioner or a patent attorney. (Franki: 7.16).

Clause 16 - Reproductions of Editions of Works

48. This Clause provides that the publisher's copyright in a particular edition of a work, conferred by section 88 of the Act, is not to be infringed by dealings which do not infringe copyright in the work itself either by virtue of the fair dealing provisions or of the provisions relating to libraries or education. (Franki: 2.69, 2.70, 3.36).

Clause 16 - Preservation of Films and Recordings

49. Proposed section 112A permits films and sound recordings to be copied for preservation against, or replacement after, loss or deterioration. (Compare Clause 12 - Section 51A).

Clause 17 - Offences and Prosecutions

50. This Clause allows prosecutions for offences under section 132 to be brought in the Federal Court of Australia or in any court of competent jurisdiction.

Clause 18 - Penalties

51. The proposed amendment would have the following effects:

- . the penalty for a first conviction for an

(Clause 18)

offence of importation of or a trade dealing with an infringing copy of a work (section 132), to be increased from a maximum of \$10 to a maximum of \$150;

for subsequent convictions for such offences the maximum fine would be increased from \$10 to \$150 and the maximum period imprisonment from two months to six months;

the present sub-section 133(2) is to be deleted and a new sub-section 133(2) substituted which limits the total fine imposed upon a person by virtue of the foregoing provisions as follows:

- (i) if the person were prosecuted before the Federal Court of Australia: an amount not exceeding \$10,000 in total in regard of articles comprised in the same operation or transaction; and
- (ii) if the person were prosecuted before any other Court: a total fine not exceeding \$1,500 in a like regard;

the maximum fine for an offence of possessing a plate used for making infringing copies or wilfully infringing copyright by performing a work in public (section 132), is to be increased from \$200 to \$1,500 for a first offence;

for subsequent convictions against those offences, the maximum fine is to be increased from \$200 to \$1,500 and the maximum period

(Clause 18)

of imprisonment is to be increased from two months to six months;

sub-section 133(4) of the Act is to be amended to provide that a Court may also order destruction or delivery up to the copyright owner of recording equipment used to make infringing copies.

Clause 20 - Applications to the Tribunal regarding remuneration of copyright owners for copies made under statutory licence

52. The parties to an application to the Copyright Tribunal for determination of equitable remuneration payable to a copyright owner in respect of copying under statutory licence would be the owner and the body responsible for the copying. Either party may apply, both are entitled to be heard, and the Tribunal must make an order.

Clause 21 - Suspension of Statutory Licence

53. Where an educational institution or its custodian in charge has been twice convicted of failing to properly keep copying records, the Attorney-General may apply to the Copyright Tribunal for an order suspending that institution's right to rely on the statutory licence under section 53D. The Clause provides that the Tribunal shall not so order if it is satisfied that all reasonable steps have been taken to ensure that the records will be properly kept in future. The licence may be restored if and when the Tribunal is satisfied that the institution has made proper arrangements for record keeping.

(Clause 22) Clause 22 - Application to the Tribunal by the Agent of the Copyright Owner

54. This provision allows an agent of a copyright owner (or of two or more copyright owners proceeding against the same person or body) to make application to the Tribunal. It is anticipated that copyright owners may wish to use the services of specialized agencies to search records of copying by institutions pursuant to the statutory licence and to collect the remuneration payable.

Clause 23 - Copyright and statutory instruments, judgments, etc.

55. Crown copyright will not be infringed by photocopying Commonwealth and State legislation and subordinate legislation, judgments, orders and awards of Courts and Tribunals, and reasons for decisions.

Clause 24 - Use of Copyright material for the services of the Crown

56. The Committee recommended that the Crown should not be permitted to rely on section 183 for copying works for use in Government schools (Franki 7.11). Accordingly, the clause provides that the copying of a work for the teaching purposes of a Commonwealth or State educational institution is not deemed to be an act for the services of the Commonwealth or a State. The statutory licence provisions will therefore apply to such institutions.

Clause 25 - Use of Works for Educational Purposes

57. This Clause is to repeal Section 200(1)(a) which presently permits the reproduction of a work in the course of educational instruction other than by an appliance adapted for the production of multiple copies. The

(Clause 25) Committee regarded that provision as unsatisfactory.

(Franki: 6.07).

Clause 26 - Retention of Copying Records

58. A new section (section 203A) is introduced creating a number of offences for failure to properly retain records and/or declarations relating to copying permitted by the Act subject to the making of records.

59. Specific recommendations were made by the Committee concerning the keeping of declarations (Franki: 3.19, 4.20). In substance the clause will give effect to those recommendations. The Committee made no specific recommendation concerning the keeping of records. However it envisaged that the records required to be made by educational institutions should form the basis of claims for remuneration and that such claims could be made for a period of three years.

60. The copyright owners ability to enforce his rights (including a claim for remuneration) depends upon copying records being retained and being made available to him.

61. It would be an offence for a person to make a record or declaration which is false or misleading (subsection (1)).

62. It would be an offence to fail to retain a record and/or declaration for the prescribed period after the making of the copy to which they respectively relate. Both the body administering the relevant establishment and the officer or custodian in charge may be guilty of the offence. (Subsection (2)).

63. It would be a defence for the officer or custodian in charge to satisfy the court that the contravention was due to the act or default of another person or to other circumstances beyond his control and also that either the

(Clause 26) contravention occurred while he was not the officer or custodian or that he exercised all due diligence and took all reasonable precautions to avoid the contravention (sub-section (4)).

64. For the purpose of this section the "officer in charge" of a library or archives is specifically defined to mean the person having formal and direct responsibility for the care and control of the establishment's collection. Thus the person formally responsible, not a person casually performing some of his duties, would be liable. (Subsection 8).

65. It would be an offence by both the administering body and the officer or custodian in charge if the copying records and/or declarations are not kept in such a way that a copyright owner can inspect the documents relating to the copying of his works without having to inspect other documents. (Sub-section (5)).

66. The proposed penalty for each of the abovementioned offences is a maximum fine of \$500. The penalty for the offence of wilful disposal of copying records and/or declarations is a maximum fine of \$1000 or six months' imprisonment. (Sub-section (6)).

67. In proceedings against a body administering or an officer or custodian in charge for failing to retain records for the prescribed period, proof that -

- (a) a copy of the work bears notation in accordance with section 203C(see below) stating it has been made in reliance on the appropriate section permitting copying and
- (b) the copyright owner or his agent has not found the relevant copying record in an inspection of the records,

(Clause 26) shall be prima facie evidence that the copying record has not been kept. In order to establish the offence of failing to retain records the prosecution would, apart from this provision, have to establish that the relevant record had been made. This provision is necessary since the making of a record would normally be a matter exclusively within the knowledge of the defendant.

Inspection of Copying Records (Section 203B)

68. If the copyright owner or his agent has given written notice to the keeper of relevant records or declarations, he may inspect all of them, or just such as relate to the works of a specified author, on a specified day. He may also, if appropriate, inspect on that day the collection of the library, archives or institution (Franki 3.19, 4.20) in order to check that not more than the permitted number of copies has been made for the collection. To ensure that such inspections are not impeded it is to be an offence for the officer or custodian in charge to refuse or fail, without reasonable excuse, to provide the person with access, or to obstruct or hinder the person on such an inspection. Penalty: \$500.

Notation of Copies - Section 203C

69. This new section provides that a defendant to infringement proceedings may not rely on the new provisions such as those which permit copying by libraries or for educational purposes, unless, at the time that the copy was made, the defendant made the prescribed notation on the copy stating:

- . that the copy was made in reliance on the appropriate section:
- . the date on which the copy was made;

(Clause 26) . the name of the person who made it;
 . the name of the body or person on whose
 behalf it was made, if and where appropriate.

70. Thus, if a person makes a copy in reliance upon one of the new provisions of the Act which curtail copyright owner's rights, he will be obliged to note the copy to that effect at the time of making it. Failure to note it will prevent the maker from relying on any of the provisions mentioned if infringement proceedings are taken in respect of the copy. This provision is necessary to enable the Copyright owner to protect his rights in view of the increased number of categories of permitted copying for which the Bill provides.

71. In proceedings for infringement or for an offence under the Act the production of a copy bearing a notation shall be proof that the copy was made as stated in the notation.

72. There are similar provisions in respect of braille versions or sound recordings. In the case of sound recordings a warning must be inserted at the beginning of the record to the effect that the work contained in the sound recording is subject to copyright.

Clause 27 - Formal Amendments

73. The language of the Act is brought into line with current drafting practices by the amendments in the second part of the first schedule.