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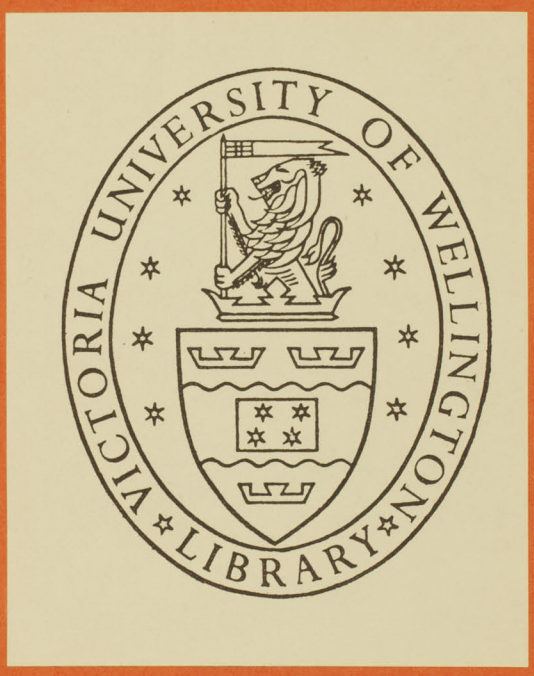
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Gary T.H. Koh

COPYRIGHT AMENDMENT ACT 1980 (AUSTRALIA) AND THE REPROGRAPHIC REPRODUCTION RIDDLE

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TABLE OF CONTENTS

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC ... RLBOOK

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION RIGHT

I. INTRODUCTION

This article deals mainly with the Australian copyright law in regard to the use of photocopying machines. New Zealand copyright law as it stands does not address itself to the problems arising out of mass-scale use of photocopying machines. But nevertheless New Zealand like Australia, is experiencing an increasing use and demand for photocopying machines. Sometime in the near future, New Zealand may wish to amend its copyright law in regard to the use of photocopying machines so as to deal with problems arising out of the increased use of photocopying machines. It is therefore proposed in this article to attempt, inter alia, a summary of the recent changes brought about by the Copyright Amendment Act 1980, in the copyright law in Australia. The new legislation introduces certain novel procedures in regard to photocopying and adopts the principle of payment according to use of copyright material, but to these matters we will advert later in the paper after surveying the existing law and the recommendations of the Franki Committee relating to the making of photocopies of copyright works.[1]

The making of facsimile copies of works by any system or technique is termed reprographic reproduction. Reprographic reproduction includes the use of photocopying machines, microcopying onto microfilm or microfiche, computers "writing" onto film and even the use of holographic lasers.[2] Because it is economical and accessible to the public in general, photocopying has become, one of

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the most widespread methods of reprographic reproduction. This has given rise to many problems that need to be resolved yet the law seems to provide few solutions and those that it does provide are not satisfactory.

A copyright owner of a work has an exclusive right in the reproduction of his work in a material form[3] subject to the well established exceptions of copying of an insubstantial portion[4] or the making of copies of a fair dealing nature.[5] The above right of reproduction of a work may have been satisfactory where traditional methods of copying were in use as there were quantitative limitations on the amount of a work or more importantly the number of copies that might be reproduced. Not so with the advent of photocopying machines being used on a wide scale, where substantial portions of a work and even multiple copies can be made cheaply and efficiently. In the light of what may be copied with the use of photocopying machines the question arises as to whether the rights of copyright owners should be preserved, reduced or extended.

Copyright owners are understandably concerned that the use of photocopying machines are making substantial inroads into their economic interests. As pointed out by the Franki Committee,[6] copyright owners are also concerned that the limits of permitted copying of their works are stated in very broad terms. In practice it is virtually impossible for copyright owners to police the present limits of permitted copying. In consideration of the above problems there is arguably a good case for amendments to be made of the copyright law.

KOH G.T.H. COPYRIGHT (AMENDMENT) ACT 1980 (AUST.) & THE REPROGRAPHIC ... RIGHT

Amendments of the copyright law must take into account not only the rights of copyright owners but also the countervailing public interest in a free flow of information in education and research. Apparently photocopying is more prevalent where the spread of information is desired i.e. education and research. This in turn means that educational institutions and libraries are the focus of the controversy. Therefore at a basic level any review of the Copyright Law must aim to effect a balance between the rights of copyright owners and the public interest in a free flow of information. It must also regulate the use of photocopying machines and give clear and comprehensive guidance as to the permissible limits of photocopying. In short it should attempt to provide satisfactory solutions to problems created and accentuated by the advent of photocopying and to which the pre-existing law was not designed to solve. If feasible, it should set up a scheme of remuneration for the owners of copyright whose works are extensively used as a result of the proliferation of photocopying machines.

II. THE LAW BEFORE THE AMENDMENT (COPYRIGHT ACT 1968 (AUST))

A. Authorisation

Section 36(1) makes the doing or authorising of any act comprised in the copyright of a work an infringement. The case of University of New South Wales v. Moorhouse and Anor.[7] involving the use of a coin-operated photocopying machine in the library building of the University of New South Wales made it clear that s.36(1) was of relevance to the use of photocopying machines. The court held

KOH C.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION RIDGE

that the University of New South Wales was responsible for authorising the infringement of copyright by providing photocopying machines without appropriate notices to indicate to the individual users the legitimate limits of the machine's use. It is submitted that section 36(1) as it stands, without qualification or exception for the provision of photocopying machines in educational institutions and libraries, is anachronistic, in view of the demand for, and great accessibility of, such machines in these places.

B. Fair Dealing

Section 40 states that a fair dealing with a work or with an adaptation of it for the purpose of research or private study does not constitute an infringement. The main problem with this provision lies in the conceptual uncertainty of the words 'fair dealing'. Lord Denning in Hubbard v. Vosper said: 'It is impossible to define what is "fair dealing"'.[8] Not surprisingly the Copyright Act itself provides no definition. This conceptual uncertainty may have rather unfortunate practical implications. The historical basis of fair dealing is to facilitate certain useful purposes (without damage to authors) by allowing parts of their work to be reproduced. However the balance between the promotion of useful purposes and the preservation of copyright owners' rights sought by the concept of 'fair dealing' does not appear to be reflected in the words of section 40. There are no qualitative or quantitative guidelines in this or any other section of the Act as to what a fair dealing is in relation to a given work or works. This in practice spells uncertainty in regard to the photocopying of works. On the one hand a copyright

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.): THE REPROGRAPHIC REPRODUCTION RIDDLE

owner cannot tell with certainty whether his work is being infringed and on the other the user cannot tell with certainty whether he infringes the copyright in a work each time he photocopies some material.

The present position in regard to fair dealing is clearly unsatisfactory bearing in mind that fair dealing is in practice private use copying without institutional supervision. Multiple copying may often occur under the heading of fair dealing and this represents a potential threat to the economic returns of copyright owners.

Section 40 permits fair dealing for the purposes of research or private study. But what do the words 'private study' mean? Is it confined to photocopying by individual students for their own research or does it extend to include photocopying by teachers and educational institutions for classroom instruction. Section 40 should be amended to indicate whether teachers and educational institutions are permitted to photocopy materials for classroom instruction under the umbrella of protection afforded by the concept of fair dealing. It is to be noted that there is no provision for remunerating copyright owners under the exception of fair dealing.

C. Copying by Libraries for Users

Section 49 permits librarians to photocopy articles and published works for persons for the purpose of research or private study. However this provision is unsatisfactory in two respects

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION RIGHT

(i) sub-section (4) limits the photocopying of articles by librarians to not more than one article in the same periodical publication unlesss the articles relate to the same subject matter. This requirement imposes an onerous task on the part of librarians in deciding what materials are of the same subject matter. (ii) sub-section (5) limits the photocopying of published works to a reasonable portion of the work. The Act nowhere explains what 'reasonable portion' means. Section 49 leaves considerable room for discretion on the part of librarians in determining what can be photocopied. It is submitted that it will make the librarian's task easier if some guidelines are provided in this regard.

D. Multiple Copying by non-profit educational institutions[9]

By far the more controversial and more intricate issues of reprographic reproduction centre around multiple-copying by non-profit educational institutions. It is to be noted that the Act makes no general exception from liability for the use of copyright material for educational purposes.

The only provision in the Act which addresses itself to multiple copying for educational purposes is section 200(1). It states that "copyright in a ... work is not infringed by reason only that the work is reproduced ... (a) in the course of educational instruction, where the work is reproduced ... by a teacher or student otherwise than by the use of an appliance adapted for the production of multiple copies, or (b) as part of the questions to be answered in an examination, or in an answer to such a question."

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION RIDDLE

Section 200(1) is, to say the least, quaint and outmoded in that while it does not prohibit the making of multiple copies, it imposes a test of infringement of copyright which is dependent on the type of machine used to make the reproductions. The term appliance for the production of multiple copies' would seem to include the common photocopying machine. The provision clearly needs to be amended if its effect is to make the use of photocopying machines for multiple copying unlawful. Also as the law stands there is nothing to prevent a teacher from typing out multiple copies without infringing copyright.

The Act is unsatisfactory in another respect in regard to multiple copying by non-profit educational institutions. Section 38(1) reads: "The copyright in a ... work is infringed by a person who, ... without the licence of the owner of the copyright - (a) sells, lets for hire, ... an article; or (b) by way of trade exhibits an article in public, where, to his knowledge, the making of an article constituted an infringement of the copyright ..." Section 38(2) reads: "For the purposes of the last preceding sub-section, the distribution of any articles - (a) for the purpose of trade; or (b) for any other purpose to an extent that affects prejudicially the owner of the copyright concerned shall be taken to be the sale of those articles". The section thus seems to make the apparently innocuous distribution of photocopied materials by educational institutions an act of infringement.

KOH G.T.H. COPYRIGHT (AMENDMENT) ACT 1988 (AUST.) & THE REPROGRAPHIC ... RIEQUE

The Franki committee had evidence before it suggesting that photocopying for educational purposes take place on a substantial scale.[10] The use of photocopying machines is likely to increase as modern teaching techniques emphasise the study of materials from a variety of sources rather than the use of a single prescribed test.[11] It is therefore clear that reforms to the existing law should occur. In particular such reforms should consider the question of what limits are to be imposed on multiple copying in educational institutions. It should also consider whether some provision for payment of remuneration to copyright owners be enacted.

III. RECOMMENDATIONS OF THE FRANKI COMMITTEE

The inadequacy of the Copyright Act 1968 in dealing with the problems referred to above resulted in the appointment of the Committee of Reprographic Reproduction in 1974 under the chairmanship of The Honourable Mr. Justice Franki which tabled its report in Parliament on 9 December 1976.

The terms of reference of the Franki Committee were "To examine the question of reprographic reproduction of works protected by copyright in Australia and to recommend any other measures the committee may consider necessary to effect a proper balance of interest between owners of copyright and the users of copyright material in respect of reprographic reproduction."[12] The main recommendations of the Committee are summarised below.

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION REPORT

A. Authorisation

The Committee recommended that the Act should be amended to make it clear that the installation and use of self-service copying machines in libraries does not of itself impose any liability for infringement upon the librarian or librarian's employer provided notices in a form prescribed by the Copyright Regulations are displayed drawing the user's attention to the relevant provisions of the Act.[13]

B. Fair Dealing

The Committee categorically stated that no words could be used to precisely define the expression 'fair dealing' so as to be of any assistance to a user in determining whether he is protected by section 40. The Committee nevertheless made an innovative and apparently laudable attempt in providing qualitative and quantitative guidelines in determining what a fair dealing meant in respect of reprographic reproduction. Among other things the qualitative guidelines provide for the consideration of such factors as the purpose and character of the dealing, nature of the work and whether the work can be obtained within a reasonable time at a normal commercial price.[14] The Committee seemed to think that it would be useful to add the above qualitative guidelines to section 40, but the question arises as to whom it is going to be of use. Does the Committee suggest that it would be useful to the copyright user and owner? Are copyright users and owners competent to judge on the basis of the qualitative guidelines what would amount to a fair dealing? It is respectfully submitted

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC REPRODUCTION RIDGE

that it is quite unrealistic to expect the qualitative guidelines to be of much help to copyright owners and users in determining what is a 'fair dealing' in relation to the reprographic reproduction of a work. Perhaps the Committee intended the qualitative guidelines to be more of a help to the courts in determining what is a 'fair dealing' rather than as a help to copyright users and owners.

Having determined that the qualitative guidelines are perhaps not too instructive for the average copyright user and owner, there are then the quantitative guidelines proposed by the Committee. These guidelines provide that copying of one article or more than one article. if related to the same subject matter from a periodical publication and copying from an edition of a work, of not more than one chapter or 10 percent of the number of pages in that edition, whichever is the greater, is a fair dealing with the work. This provision should increase the certainty of copyright users and in particular students who will know the maximum amount they can legitimately copy. It is to be noted that if a user copies more than the maximum amount it may still be held to be a 'fair dealing' by a court after considering the factors provided by the quantitative guidelines. There is yet another difficulty with the guidelines provided. The quantitative guidelines provide what is the maximum amount that can be copied under section 40 but in practice will it successfully inhibit users from photocopying more? Once the maximum quantity proposed by the quantitative guidelines is exceeded, then the copyright user and owner is once again into an area of uncertainty.

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC REPRODUCTION ISSUE

The Committee considered that photocopying was of a considerable assistance in enabling teachers and students in preparing materials for classroom use. It therefore proposed to widen section 40 to include 'research or study' instead of 'research and private study'. While this proposal will be welcomed by educational institutions and students alike it will certainly create inroads into the economic returns of copyright owners.

The Committee concluded that no remuneration be made to copyright owners for fair dealing of copyright material as the administrative cost of providing accurate records of individual copying will be out of all proportion to any royalties that might be payable to copyright owners.

C. Copying By Libraries For Users

The Committee recommended that the words 'reasonable portion' in section 49(5) be retained but a new provision was to be added to help determine what a 'reasonable portion' is. The new provision should state that in the case of copying from an edition of a work up to one chapter or 10 percent of the number of pages in that edition, whichever is the greater, shall be a 'reasonable portion'.

The Committee also recommended "permitting the copying in a library of an entire work or more than a reasonable portion of it where the work forms part of a collection in the library, if the librarian has first determined, on the basis of a reasonable investigation, that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price and makes a declaration to this effect ... "[15]

KOH C.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC REPRODUCTION RIGHT

It is submitted that the above recommendation is objectionable both from the standpoint of the librarian who performs the copying and the copyright owner. A librarian has to make some difficult determinations such as what material would be obtainable within a reasonable time at a normal commercial price and make certain declarations which amounts to a complex and time-consuming process. Added on to the above the librarian may be subject to an infringement action if he fails to adequately comply with the above procedures. The recommendation is also harsh on the copyright owner for it demands that works be kept in print and be readily available, failing which they may be copied in full without compensation.[16]

D. Multiple Copying By Non-Profit Educational Institutions

The Committee thought that multiple copying should not occur without remuneration to the copyright owner where there is substantial use of his property to the prejudice of sales of his work, especially if the work had been specifically written for use in schools. There was a clear and urgent need for a special arrangement that provided educators with reasonable freedom in the area of multiple copying and copyright owners a reasonable and practicable opportunity to obtain recompense.[17]

The Committee's most significant recommendation is in regard to a statutory licence scheme. The proposed scheme would permit non-profit educational establishments[18] to make multiple copies of parts of a work for classroom use or for distribution to students. The right to make multiple copies is subject to the

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION GUIDE

requirement of recording any copying taking place under the scheme and an obligation to pay an appropriate royalty if demanded by the copyright owner or his agent within a prescribed period of time.[19] Under the scheme there will be no infringement if a record of the copying is kept in a prescribed manner and form and any copyright owner or collecting agency can search the records to ascertain any renumeration to be paid to copyright owners.

The proposed scheme is in effect a compulsory licensing scheme as the Committee specifically rejected any voluntary schemes on the ground that no collecting agency could be representative of authors of works available in Australia. The Committee rejected the possibility of copyright owners staying out of the statutory licence scheme on the grounds that it is too difficult to provide practical machinery to cater for such owners.[20] But unfortunately the Committee did not provide detailed reasoning as to the nature of the difficulty involved if copyright owners are to be allowed to stay out of the statutory licence scheme and why such difficulty if it existed, cannot be resolved.

The Committee was divided as to the manner in which an appropriate royalty was to be fixed; it could be a general rate universally applicable or one which copyright owners or agencies and educational bodies may agree upon. The scheme would not prevent the negotiation of either blanket or individual licences to copy more than what could be copied under the statutory scheme.

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KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION ISSUE

It appears from the submissions and the evidence before the Committee that a statutory licence scheme of a compulsory nature does not find favour with either copyright owners or users. A copyright owner's bargaining power may be significantly reduced because a compulsory scheme would remove his exclusive right to make multiple copies of his work. He can only participate in negotiations by proxy as part of a collective group, and perhaps a weak collective group as such, which is ultimately dependent on the decisions of the copyright tribunal. Also the copyright will become dependent on the form and method of recording, inspection and access to documents, matters which are not under his control.

Although the proposed statutory licence scheme places some limitations on the rights of copyright owners it is nevertheless a bold step in the direction of remunerating copyright owners and is to be welcomed.

The Committee also recommended that "[the] making of multiple copies in any non-profit educational establishment of up to two pages or 1 percent of the number of pages (whichever is the greater) in an edition of a work or of two or more works in any period of 14 days be permitted without remuneration and without infringement of copyright ..."[21]

The Committee attempted to justify the above recommendation on the basis that it was desirable for the benefit of education and that it would only permit an amount of copying in respect of which any royalty would be very small and probably uneconomical to collect.[22] It is submitted that the Committee's opinion that any royalty may be very small and uneconomical to collect in respect of the permissible

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC REPRODUCTION RIGHT

unremunerated photocopying is not well founded. Multiple copying of small parts of works can be a significant detriment to copyright owners if it goes on unremunerated. Take for example the copying of 50 copies of one percent of a 200 page book which is 100 copy pages. Does the Committee consider the royalty arising out of such an amount of copying as unecomomical to collect?

It is significant that although the Committee focused much attention on the area of multiple copying in educational establishments it did not make it clear whether 'fair dealing' was to apply to such copying. It is submitted that if educationists believe that they can rely on fair dealing in respect of multiple copying than there will remain an area of uncertainty whether multiple copying need be recorded and paid for?

In summary, the Franki Committee appeared to have made some valuable recommendations that attempted ' ... to bring the copyright law into accord with technological realities.'[23]

IV. THE COPYRIGHT AMENDMENT ACT 1980 (AUST.)

The recommendations of the Franki Committee relating to 'fair dealing' and copying by a library for users have been adopted in the Copyright Amendment Act 1980 and therefore no further comment is necessary. In respect of multiple copying in educational institutions however, substantial changes have been introduced.

Comprehensive provisions relating to multiple copying of works under the statutory licence by educational institutions are the

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION REGIME

cornerstone of the 1980 Act. The key provision is section 53B which permits multiple copying under statutory licence by educational institutions.

A. Section 53B

This section permits multiple copies of works to be made for teaching purposes of an educational institution. Sub-section (3) provides guidance as to what 'teaching purposes of an institution' can include. Teaching purposes can include copies of works made in connection with a particular course of instruction provided by that educational institution or for inclusion in the library collection of that institution. Copies of works can be made by or on behalf of the body administering an educational institution.[24]

Both articles and works can be copied but if copying is for more than a reasonable portion of a separately published work, the copier must be satisfied, after reasonable investigation that copies of the work cannot be obtained within a reasonable time at an ordinary commercial price. No declarations are required but a notation must be made on each copy of a work stating that the copy was made on behalf of the relevant institution and the date on which it was made. Section 53B is no defence to an infringement action if no notation is made.

A record of the copying must be made setting out the particulars required by sub-section (6) for articles and section (7) for works. Sub-sections (9) and (11) permit the distribution of free copies of not more than a "reasonable portion" of a work to

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC REPRODUCTION RIGHT

correspondence students provided they are not part of the lecture notes for the course. Records must be kept at either the educational institution concerned or a central records authority[26] i.e. a body corporated or unincorporated which is established for the purpose of holding records that are deposited with it.[27] These records are indexed according to authors' names to facilitate speedy and systematic inspection by the copyright owner and his/her agent.

A copyright owner (or his/her agent) can claim an equitable remuneration from the body administering an educational institution upon written request within the prescribed period for copies made of the work. The copyright owner and the body administering the educational institution shall determine by agreement what is an equitable remuneration, in default of such agreement the Copyright Tribunal shall on the application of either party determine the amount payable.

Sub-section (13) safeguards the copy-right owner's right to grant a voluntary licence authorizing the body administering an educational institution to make copies of his work without infringement. Several new offences, punishable upon conviction by a fine not exceeding $500 for failure to comply with certain requirements of the Act have been introduced. The Attorney General may apply to the Copyright Tribunal for suspension of the statutory scheme under section 53(B).

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC REPRODUCTION RIGHT

B. Conclusion

The 1980 Act is prima facie a comprehensive, detailed and systematic piece of legislation and in particular s.53B is a welcome change for copyright owners and educational institutions, who in search of guidance found only cold comfort in the pre-existing law. It is submitted that with the compulsory and systematic retention of records, much of the uncertainty that accompanied multiple copying will be settled. Educational institutions have to keep systematic records or send them to records authorities and both are aware of the penalties that befall on them on default of their duties. Copyright owners on the other hand, will at least, have a reasonable opportunity of obtaining payments, if their works are copied, and their concern for policing multiple copying is largely reduced. To the above extent, the 1980 Act appears to provide some solutions to the riddle posed by the advent of reprographic reproduction for the Copyright Law. But of necessity the 1980 Act creates certain new issues.

The first issue arises from the large area of discretion on the part of educational institutions in determining what can be copied for teaching purposes. Would this mean the encouragement of greater copying? If there is greater multiple copying under section 53B, then the copyright owner's economic returns may become more dependent on the viability of the statutory licence scheme than on the sales of the work/s in the market.

In the case of copying of more than a reasonable portion of a work, difficult determinations still remain. The copier will firstly have to determine if what is copied is a reasonable portion within the minima,[28] if it is not then the copier must make a reasonable investigation

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC REPRODUCTION RIDDLE

that the work is unavailable at a normal commercial price. It will not be convenient for a copier to make such determinations and since no declarations need be made there is no effective check on such copying by copyright owners and their agents.

The 1980 Act also requires considerable expenditure on the part of educational institutions in setting up records and complying with other procedures outlined in the Act. Such added costs may well be transmitted down to the copyright user through higher charges for the use of photocopying machines. This can in a sense be seen as effecting a better balance between copyright owners and users. In another sense it may be seen to cause economic hardship to copyright users, especially students.

To safeguard the right of remuneration of copyright owners criminal offences have been created by the 1980 Act. It is possible to argue that the imposition of offences on bodies administering educational institutions and on employees of those institutions for non-compliance with purely administrative procedures represent a heavy and perhaps unjustifiable burden.

Bearing in mind the amount of free copying permissible under the heads of fair-dealing and copying of insubstantial portions of works[29] the 1980 Act permits a generous amount of copying of works. It therefore appears that the free-flow of information will be facilitated. Concurrently it guarantees copyright owners a modest remuneration and greater security against wide scale infringement of their works.

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC REPRODUCTION RIGHT

The new Act notwithstanding its prolixity, is a purposeful piece of legislation responding to the challenge of modern technology and is a precedent of its own right in the Commonwealth. Although it is too early to assess the full impact of the new Act it is respectfully submitted that it may not be too early for the New Zealand legislature to consider a review of the copyright law in regard to reprographic reproduction .

KOH C.T.H. COPYRIGHT AMENDMENT ACT 1980 (Aust.) & THE REPROGRAPHIC REPRODUCTION RIGHT

FOOTNOTES

[1] Copyright Law Committee on Reprographic Reproduction (October 1976, A.G.P.S., Canberra) (Hereafter referred to as the "Franki Committee Report").

[2] Whitford Committee — Report of the Committee to consider the Law on Copyright and Designs (1977; Cmnd. 6732) 55.

[3] The Copyright Act 1968 (Aust.) s.31(1).

[4] Section 14 (1)(a).

[5] Section 40.

[6] Franki Committee Report, para. 1.26.

[7] (1975) 6 A.L.R. 193.

[8] [1972] 2 Q.B. 84,94.

[9] For the definition of 'educational institution', see s.5(d) of the Copyright Amendment Act 1980 (Aust.).

[10] Franki Committee Report, para. 6.24.

[11] Idem.

[12] Franki Committee Report, para. 1.01.

[13] Ibid. para. 2.53.

[14] Ibid. para. 2.60.

[15] Ibid. para. 3.19.

[16] Australian Copyright Council Bulletin (No. 23 of 26 February 1977) 11.

KOH C.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION REPORT

[17]Franki Committee Report, para. 6.30.

[18]"Educational establishment" is substituted by "educational institution" in s.5(d) of the Copyright Amendment Act 1980 (Aust.).

[19]Franki Committee Report, para. 6.39.

[20]Australian Copyright Council Bulletin, op. cit. 4.

[21]Franki Committee Report, para. 6.67.

[22]Idem.

[23]Australian Copyright Council Bulletin, op. cit. 26.

[24]Section 5(3) of the Copyright Amendment Act 1980 (Aust.).

[25]Ibid. s.203H.

[26]Ibid. s.5(c).

[27]Ibid. ss.203B and 203G.

[28]Ibid. s.5(2).

[29]Ibid. s.53(A).

KOH G.T.H. COPYRIGHT AMENDMENT ACT 1980 (AUST.) & THE REPROGRAPHIC REPRODUCTION CLAUSE

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