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THE SPICER COMMITTEE (1958)

Professor Leslie Zines [1]

INTRODUCTION BY PROFESSOR BRIAN FITZGERALD

Most people here know Professor Leslie Zines as probably Australia's most famous constitutional law professor, having been at ANU for over 30 years. A real genius in the constitutional law area. Many people don't know that he also played an interesting role as a new recruit to the Attorney General's Department in the mid 50s with the Spicer Committee. What we asked him to do, although he was a little apprehensive about this, was to come to the conference and talk a little bit about that time and about his reflections about copyright. So over to you.

PROFESSOR ZINES

As was just said, when I was first asked to attend the conference, I refused on the ground that although I had been heavily involved in the reform of copyright law 50 years ago, I have had nothing to do with it for several decades. As a result of a change in my career, my work and my interests led me into other fields.

I explained that when it came to issues at the cutting edge of copyright, such as the internet and information technology and digital copyright, I am an ignoramus. But it was made clear to me that my presence was not desired because it was thought I could contribute anything intellectually to your discussions, but rather as an historical relic who, moreover, should be invited soon, while he was still around. I must say, having regard to the way I feel at the moment, it wasn't a moment too soon.

The writer, LP Hartley, famously said, "The past is a foreign country, they do things differently there" and that was certainly true of Australia in the late 1950s.

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It seems to me that the most striking feature of the establishment and work of the Copyright Law Review Committee under Sir John Spicer was the pervasive force of what I would call the British Connection, which has been touched upon in relation to earlier periods by the previous speaker. It was, in fact, I believe, an important element still, despite General MacArthur's role in much of Australia's social life at the time, and was to remain that way, with decreasing emphasis perhaps, over the next decade or so.

The Attorney General, Neil O'Sullivan, who was very shortly replaced by Sir Garfield Barwick, and the Secretary of the Attorney General's Department and Solicitor General, Sir Kenneth Bailey, were anxious that the Copyright Law Review Committee should not undertake a lengthy fundamental examination of the social, economic and legal aspects of copyright. That was because it was thought it had already been undertaken by the Gregory Committee in the United Kingdom which led to the enactment of the Copyright Act 1956 of that country.

The first and major term of reference, therefore, was to advise which of the amendments recently made to the law of copyright in the United Kingdom should be incorporated into Australian law. Then, rather incidentally, the Committee was asked to consider what other alterations should be made. The Committee did not feel irked, or hampered, or hemmed-in in any way by the terms of reference. On the contrary, it considered that the approach adopted was desirable. They gave reasons why one should not depart unduly from the British precedent, reasons which would not be regarded as very cogent today.

Emphasis was given to the close connection between the law of the two countries for many years. Also, where a person wished to maintain rights in the United Kingdom, as well as in Australia, in the same work, there was, as the Committee said, "great advantage in being able to rely on legal provisions that were substantially the same in each country."

The Committee also had the view that there was an advantage in being able to rely on the decisions of English courts in order to help interpret our law. Furthermore, it was said, and probably rightly for that period, that text books and articles on copyright would appear more frequently in Britain than in Australia.

It reminds me of an occasion where two years earlier, when I was a post-graduate student at Harvard, I was discussing with my Administrative Law Professor, Louis Jaffe, a topic for a research paper. He suggested I look into Australian and American law relating to jurisdictional and non-jurisdictional issues. I told him that in respect of Australia at that time, most of the law was English. He looked at me with great surprise and said "I had no idea colonialism was so all pervasive".

Ben Atkinson in his history of copyright law, I'm sorry, in his true history of copyright law, (which presumably distinguishes it from the pack of lies that we get elsewhere),

has suggested that this desire to follow Britain led the Committee to neglect Australia's national interest in respect of its lack of consideration of the posthumous term of copyright and of the import provisions.

As to the term, the Committee didn't examine the question as a matter of economic self-interest, as the Canadian and New Zealand bodies had done in 1957 and 1959, respectively. For the Spicer Committee, the requirements of the Berne Convention incorporated into British law were of overwhelming importance. The economic interests of Australia as primarily a copyright user, were shortly dismissed in favour of what was described as "justice to the overseas authors".

One of the Committee members, the Reverend Dr Percy Jones, Vice Director of the Conservatory of Music at the University of Melbourne, and Organ Master at St Patrick's Cathedral, was most vigorous on this issue. When I wrote in the report that factors other than the balance of payments were involved, such as justice to overseas authors, those words were largely taken from him. I thought then, and think now, that it was a very simplistic view of justice, and I remember saying I didn't think natural law laid down the life of the author of 50 years as the most just period of copyright, and there was no question of the balancing of conflicting interests.

The report also refers to the United Kingdom as one of the main users of Australian copyright material, and states that Australian authors should receive the same copyright protection as British authors. The assumption is, throughout, that the predominant overseas market for Australian works would be Britain.

The report does not enquire into arguments against the import monopoly provisions which were so prominent, as Ben has told us, in the parliamentary debates of the 1905 Act. I was probably remiss here, I did as I will explain shortly, an enormous amount of background work for this Committee, but one thing I didn't do was to go to the Hansard in relation to the 1905 Act. If I had, and I had placed that material before the Committee, it is quite possible that they would have considered it to a greater extent, although whether it would have changed their view is another question. But I do not recall that anyone noted the provisions, or any strong submissions were made to the Committee on the matter.

It may be that some more consideration would have been given to it had the Committee known of the recent misfortune of Sir Kenneth Bailey. He returned from a conference in New York with a record of the latest New York musical hit, *My Fair Lady*. To his great embarrassment and confusion, he discovered that he had smuggled in a prohibited import. He told a small group of us. I rang my colleague, the Director General of Customs and told him the full story. "What should I do?" he asked. His colleague, apparently, told him to do nothing, but to go away and sin no more. I think actually, he said he would get in touch with the copyright owners, who no doubt said much the same thing.

One issue which Australia had no need to worry about for more than 40 years was constitutional power. Before 1968, Australian copyright law was governed by the Imperial Copyright Act of 1911. It operated throughout the Empire but in the case of the self governing dominions, it applied only if each dominion Parliament decided it should apply with or without modifications. Nevertheless, once applied, it applied as imperial law.

In adopting the 1912 Act, the Parliament was not applying its constitutional powers, it was applied by virtue of a provision of the 1911 Act. So, the issue of what is the extent of the copyright power, or any other power didn't arise because the Act applied by virtue of paramount force. So it's not true to say, as I think Ben said in his overheads, that the 1912 Act incorporated the British provisions. It "applied" the British provisions and applied them as British or imperial law.

But once, of course, Australia decided to bring its own Act, or to change that law, then the question of constitutional power of course arises.

The orthodox view is that the words of the Constitution have the meaning that they had when the Constitution was enacted, a view which has been very strongly opposed by the gentlemen sitting in the front there.[2] This raised questions whether copyrights under section 51(18) covered the rights in gramophone records and in TV broadcasts looking back to 1900. The particular problem with the broadcast was that unlike copyrights existing in 1900, it was not in any permanent form, but was a fleeting image. The Committee, sensibly enough, decided not to explore those questions. They did point out that broadcasting power could perhaps be of assistance.

Nevertheless, lack of constitutional power was given as a reason, and sometimes "the" reason, for not recommending protected rights in certain areas. It was the reason for denying protection to an artist's moral right, although I think most of the Committee thought of this as a rather strange continental motion, and to the performer's right, and similarly in relation to the protection of sporting spectacles, apart from the offence created by the Broadcasting Act.

The wider scope given today to the external affairs power, and other powers, and the somewhat broader approach to constitutional interpretation, with Justice Heydon dissenting, would be relevant if the Committee were inquiring today.

Another feature of the 1950s, as far as I was concerned, was that there seemed to be no people around who had any deep knowledge of copyright law, or any interest in the theory of copyright law. That applied to all members of the Committee and to its Secretary. Nobody was teaching copyright law, or, indeed, any intellectual property law. When I was informed by Sir Kenneth Bailey that I was to be Secretary of the

[2] A reference to the Hon Michael Kirby, whose opinions on constitutional power, expressed in judgments, were not identical to those of Professor Zines.

Committee, I spent the next two or three weeks reading Copinger and Skone James on Copyright – I think the 9th Edition – from cover to cover. I then started on the minutes of the international conferences beginning with that of the Berne Convention, armed with my knowledge of high school French and a French/English dictionary.

None of the Committee members had any greater knowledge of the subject. Whether there were any copyright experts in Australia then, or academics in the subject, they did not, if I remember rightly, bring themselves to our attention, or make submissions.

One is only to look at the size and vitality of this gathering to realise how much Australia totally differs from that foreign country 50 years ago.

Thank you.