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THE FRANKI COMMITTEE (1976 REPORT) AND STATUTORY LICENSING

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INTRODUCTION

The Franki Committee reported in 1976 on a new technological means of disseminating information. It was tasked:

> To examine the question of the reprographic reproduction of works protected by copyright in Australia and to recommend any alterations to the Australian copyright law and any other measures it may consider necessary to effect a proper balance of interest between owners of copyright and users of copyright material in respect of reprographic reproduction. The term 'reprographic reproduction' includes any system or technique by which facsimile reproductions are made in any size or form.[2]

The Committee made over 30 recommendations for reform of the *Copyright Act*. I propose to concentrate on the two most significant ones. Both recommendations raise 21st century issues and illustrate the perennial problem in finding an equitable balance of interests in the law between owners of copyright and users of copyright material in response to technological change.

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[2] Australia. *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) Introduction 1.01.

THEMES OF THE REPORT

The Report of the Committee contains a number of themes which still resonate as copyright policy concerns today.

- One was the Committee's concern for the free flow of information. To quote from Section 1 of the Report "Australia is geographically isolated from the major centres of scientific and industrial research and the vast area of the Australian continent raises special problems in relation to the dissemination of information, particularly in the remoter parts".[3]

  There are a quite a number of references in the Report to the public interest in ensuring the free flow of information for education and research and for the scientific, technical and social development in Australia.[4]

- The second concern was that Australia was (and still is) a substantial importer of copyright material and it should be hesitant in adopting a radical solution to the problem of a kind that is unlikely to find widespread acceptance amongst member countries of the multi-lateral copyright conventions.[5]

- The third concern of the Committee was that its recommendations should be consistent with Australia's international convention obligations and not divorced from what might be called "world standards" so far as the balance of the rights of the copyright owner and interests of the user were concerned.[6]

- And finally it was not only concerned with the question to what extent should copyright owners benefit from the use of the new technology (reprography) on the grounds of principle, but to what extent it was practical for them to do so.[7]

The concern about the free flow of information was and is a concern to Australia and has gained momentum worldwide. Over the last decade it has gained momentum and we now use the term "access to information" to describe it. At the time of the Franki Committee's deliberations there was a strong public criticism about the effect of the British Publishers Marketing Agreement, which was to carve up most of the English speaking world between British and American publishers, with the result that countries like Australia were deprived of access to cheaper American editions of

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[3] Ibid, 1.37.

[4] Ibid, 1.02, 1.40, 1.51, 4.06, 6.40, 7.07.

[5] Ibid, 1.35,

[6] Ibid, 1.27.

[7] Ibid, 1.19–20, 1.35–37, 2.53.

works. This problem was also aggravated by the slowness of British publishers in producing cheaper paperback editions of works in comparison with their American counterparts.

While action initiated by the US Justice Department in 1976 led to a consent decree that prohibited American publishers from engaging in market allocation with British publishers,[8] this issue has resonated until the present day despite changes in publisher practice and some changes to the *Copyright Act* relaxing commercial import barriers. These concerns about difficulties of access swayed the Franki Committee. Within the Report there were a number of recommendations that sought to respond to complaints about the unavailability of texts in Australia and the unreliability of delivery when ordered from overseas. In a number of their recommendations the Committee provided for wider copying rights using the formula "where a work cannot be obtained within a reasonable time at a normal commercial price".[9]

I now turn to the two most significant recommendations of the Franki Committee – the clarification of the fair dealing provision (s 40) and the statutory licence scheme for the multiple copying of copyright works which became s 53B of the *Copyright Act* and is now embodied in Division 2 of Part VB of the Act (s 135ZJ and 135ZL).

THE FRANKI COMMITTEE RECOMMENDATIONS

A Clarification of fair dealing for private use (s 40)

The Australian Copyright Council Ltd had made submissions to the Franki Committee that all copying should be remunerated upon the basis that authors should receive a royalty for each copy page made of any work within copyright. In Britain the Whitford Committee also reached a similar view by concluding that all reprography be remunerated and that fair dealing be confined to hand or typewritten copies.[10] The Franki Committee took the view that as a matter of principle a measure of copying – by reprographic or other means – should be permitted without remuneration. It did so after examining the laws of other countries – to examine using their term 'world standards' – and the requirements of the copyright conventions.

At one stage in the Committee's deliberations it appeared that the fair dealing provision for research or private study would undergo only very modest reform,

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[8] *United States v Addison-Wesley Publishing Co* CCH 1976–2, Trade Cases 70.640.

[9] *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) 2.60, 3.19, 4.20, 6.58.

[10] United Kingdom. *Report of the Committee to consider the Law on Copyright and Designs* (the Whitford Committee) Cmnd 6732 (1977) [291].

despite widely expressed criticism from many who made submissions – from copyright owners to users – that the provision was too vague and uncertain in practice.

The Committee recommended clarifying the section by inserting a list of factors to be taken into account in determining what constitutes a fair dealing, which was derived from a similar list in the then US Copyright Bill's provision of fair use. But this was hardly a radical step since the factors listed were supported by case law.

The further step was to recommend a deeming provision. That is, certain copying for research or study was deemed to be a fair dealing, namely the making of a single copy of a periodical article or a reasonable portion (10% or one chapter, whichever was the greater) of another published work.[11]

I did not have a vote on the Committee but was encouraged by the Chairman to participate in discussions and I had a hand in persuading the Committee to suggest a reform that would respond to a widely held view about the vagueness of the provision in its practical operation. When confronted by a clear problem, it seemed important not to shy away from its resolution. The clarification of section 40 still stands, and I am pleased to say has since been enhanced to deal with other media.

Two members of the Committee recommended that the fair dealing provision should be extended to cover private and personal use (following the laws of many civil law countries) rather than limit the provision to the rather more scholarly pursuits of research and study.[12] This recommendation was not adopted by the Government, although in practice I did not see this as a dramatic change to the operation of the provision, simply because the recommendation was still limited by the notion of fair dealing, which did not govern the concept of personal or private use adopted in civil law countries.

What the legislative reform of section 40 of the *Copyright Act* did was to clarify the rights of users of copyright material and recognise in particular the practical needs of users of informational literature, particularly periodicals.

B Statutory licence scheme for the multiple copying of copyright works by educational establishments.

The second significant recommendation – the major reform of the Franki Committee – was the legislative enactment of a licence scheme for the multiple copying of copyright works.

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[11] Australia. *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) 2.60.

[12] Ibid, 2.67.

The scheme provided for a statutory licence permitting an educational establishment to make multiple copies of parts of a work and in some cases of whole works for distribution to students, subject to recording the copying taking place under the scheme and an obligation to pay an appropriate royalty if demanded by the copyright owner or the owner's agent within a prescribed time.

The Committee said it was conscious that the idea of a statutory licence would not appeal to some copyright owners who would regard it as a derogation from their rights under the *Copyright Act* but felt the public interest in education and need for access to works in educational establishments justified this approach. It did not consider it would breach the provisions of the Berne Convention and Article 9 dealing with the right of reproduction.

1. Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
2. It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
3. Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.[13]

The Committee considered a total coverage of copyright owners in the scheme was practically important for users but that ultimately voluntary licensing by owners may provide a more attractive option to educational establishments. That of course has come about. The Copyright Agency Ltd has a well-established voluntary sampling system outside the operation of the statutory scheme.

When the Franki Committee made its recommendations there were only three schemes operating or proposed in the world. All in non-English speaking countries.[14] Legislative effect had been given to a licensing scheme in the Netherlands and the Swiss were proposing a similar scheme. The Swedish scheme was a voluntary agreement between the Swedish Government and 17 Swedish organisations including

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[13] Australia. *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) 10.06 and at World Intellectual Property Organisation, *Berne Convention for the Protection of Literary and Artistic Works* (1886 as revised) www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html at 12 August 2009, and *Berne Convention (Paris text 1971)* www.law.cornell.edu/treaties/berne/overview.html at 12 August 2009.

[14] Australia. *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) 6.33

the Association of Swedish Authors and the Swedish Publishers Association and was limited to government schools.

In particular the substance of the agreement proceeded on the basis that the various organizations could be expected to represent 95% of the copyright owners whose works were likely to be copied.[15] These were works in the Swedish language. At the time in Australia no voluntary arrangement could have guaranteed that level of coverage security for users.

REFLECTION AND CONCLUSION

The Copyright Amendment Act 1980 (No 154 of 1980) embodied the Government's response to the Franki Committee's Report. It was not a complete legislative implementation of its recommendations. The recommendations have been characterised accurately as tending to favour the interests of users of copyright material as against the interests of copyright owners. But the Government did not adopt some unremunerated copying recommendations. One example is that the Committee recommended that a library of a non-profit educational establishment be permitted to make up to 6 temporary or ephemeral copies of a copyright work provided it had not been separately published or if it had been, copies of it could not be obtained within a reasonable time at a normal commercial price. That would have legitimised the so-called 'reserve stack' copying which had been a practice of those libraries for some time.

The Franki Committee took the view that the entitlement of an educational establishment to make multiple copies of a work under its statutory licence scheme was to be addition to whatever might be done under its recommendations on fair dealing and "reserve stack" copying. Case law since the *Copyright Amendment Act 1980* came into force suggests that the multiple copying licence has reduced reliance on fair dealing in so far as copying could be said to fall within the "teaching purposes" (now "educational purposes") of the statutory licence (*Re Haines and Director General of Education of New South Wales v Copyright Agency Ltd*[16] and *Copyright Agency Ltd v Charles Sturt University (No 2)*.[17]

Overall the Committees recommendations constituted a response to what was perceived to be a strong public interest in accessing works particularly in the informational category. They were however mindful of the fact that the rate of change

[15] Ibid, 11.29–42.

[16] [1982] FCA 137 (22 July 1982).

[17] [2001] FCA 1145 (24 August 2001).

in technology was great and thought it desirable to examine the state of the law at regular intervals.

The Franki Committee's recommendations were expanded to include institutions assisting handicapped readers and the scheme established by the *Copyright Amendment Act 1980* was among the first in the English speaking world. Statutory licensing was since been further expanded under Part VB of the *Copyright Act*. One significant change adopted in the *Copyright Amendment Act 1980* was the introduction of a host of offence provisions to ensure adherence to the statutory scheme. This was a significant step in the use of criminal sanctions to underpin this private property right. On reflection I consider there were too many.

The use of offence provisions to outlaw commercial activities in breach of copyright is defensible in most circumstances, but questionable when the criminal sanctions are aimed at the recording and retention of records by public institutions fulfilling an educational need and aimed at both individuals and the institutions which employ them. Another option may have been to give legislative power to enable a court to award additional damages (punitive or aggravated) for infringement of copyright in circumstances of some breaches such as the making of a record that is false or misleading in a material particular. As a matter of policy criminal offence provisions should be used cautiously in the underpinning of personal property rights.