

CASE NOTES

UNIVERSITY OF NEW SOUTH WALES v. MOORHOUSE AND ANGUS & ROBERTSON (PUBLISHERS) PTY LTD¹

Copyright law — Reprographic reproduction — Photocopying machines in university library — Copyright Act 1968-1973 (Cth) s. 36 — Declaration that university had “authorized” the infringement of copyright.

The recent dramatic advance in techniques of reprography² has created a problem for the legal systems of all countries which have copyright legislation: how to reconcile the rights of authors and the interests of the community. While it is generally accepted that a proper balance ought to exist between the author's right to reproduce his work and to be remunerated for his effort and the community's interest in having ready access to information and knowledge, existing legislation appears incapable of securing such a balance. The rights given to authors by the Copyright Act 1968-1973 (Cth), and by similar legislation in other countries, are being seriously threatened by the availability of sophisticated reprographic techniques. Large numbers of photocopies of works continue to be made in commercial and educational institutions throughout the world without the consent of the author and, just as importantly, without any payment being received by him. And photocopying provides, of course, just one example of the problem—unauthorised copies of works are also being produced in large numbers with the help of tape recorders, videotapes, microfilms and computers.

The problem of reprographic reproduction has been the subject of discussion at an international level since 1961 at meetings of the Joint Committees of the Berne and Universal Copyright Conventions,³ and most recently at a meeting of Sub-Committees held in Washington in June 1975. No solution, however, is likely to be found at an international level. It was decided at the Washington meeting that, in view of the different conditions that exist from one country to the next, the problem would more appropriately be dealt with at a national level. *Moorhouse and Angus & Robertson (Publishers) Pty Ltd v. University of New South Wales* may be seen as an attempt, at least in relation to photocopying in university libraries, to do just that. It was commenced as a test case⁴ to give a court the opportunity of clarifying the legal

¹ (1975) 6 A.L.R. 193. High Court of Australia; McTiernan A-C.J., Gibbs and Jacobs JJ.

² The term covers facsimile reproduction by photocopying or equivalent processes.

³ The matter has also been considered by a Committee of Experts convened in accordance with the views of the Joint Committees and as a result of a resolution of the Fourteenth General Conference of UNESCO, and by a Working Group on reprographic reproduction formed to assist the Secretariats of UNESCO and the World Intellectual Property Organization (WIPO).

⁴ (1974) 3 A.L.R. 1. The proceedings were initiated by the Australian Copyright Council as a result of its concern that large numbers of copyright infringements were taking place in universities and schools.

obligations of an institution which makes available both copyright works and the means of reproducing them. As a test case, however, it can hardly be said to have been a great success, the ultimate decision of the High Court⁵ offering little assistance to the copyright owner and providing little more than negative guidelines for the copyright user.

The action was commenced in the Supreme Court of New South Wales by Frank Moorhouse, the author of a literary work entitled *The Americans, Baby*, and Angus & Robertson (Publishers) Pty Ltd, who had a licence to publish the work. They alleged that the University of New South Wales had infringed copyright in the work by reproducing, or authorising the reproduction of, the work without the consent of the copyright owner. The particular reproduction complained of was carried out by a graduate of the University on a coin-operated photocopying machine situated in the University library.

No serious question arose as to the existence of copyright in the work and the trial judge, Hutley J., found that Mr Moorhouse had, at all relevant times, copyright in the book and in the individual stories therein, and Angus & Robertson had a licence to publish the book. He further found that a breach of copyright had occurred but that it had not been authorised by the University since the University could only have authorised the breach if its acts or omissions were factors contributing to the commission of the breach and that there was no evidence to establish that this was the case. He nevertheless granted a declaration in the following terms:

between the date when the subject book was entered in the library and the hearing the University has authorized such breaches of copyright as have occurred by the photocopying of the whole or part of the library copy of *The Americans, Baby* by use of the photocopying machines where such photocopying was not a fair dealing within the terms of s. 40 of the Copyright Act 1968 and where such breaches were in any way due to reliance upon any library guides issued by the University in the years 1970, 1971, 1972 and 1973 or the notices appearing upon the self service photocopying machines in the University library or by the lack of supervision of the use of such machines or any combination thereof.⁶

The University appealed against this declaration and the plaintiffs cross-appealed on the ground that the University had authorised the infringement and that declarations should have been made in a more general form. Thus, as a result of the cross-appeal, the basic question of what amounts to an authorisation of infringement of copyright was again raised, this time for the High Court to decide.

Although the question of what constitutes authorisation of a copyright infringement had previously occupied the courts, it had not before been considered in relation to a precisely analogous situation. In

⁵ (1975) 6 A.L.R. 193.

⁶ (1974) 3 A.L.R. 1, 17.

Adelaide Corporation v. Australasian Performing Right Association Ltd,⁷ the question of authorisation arose in relation to the unauthorised performance of musical works. In that case, however, the proprietor of the Adelaide Town Hall, where the performance was to take place, had no direct control over the performer or his programme. The only action that the proprietor of the hall could have taken to ensure that an infringement did not occur would have been to terminate the contract—an action that was thought by the Court not to be reasonable in the circumstances. In *Winstone v. Wurlitzer Automatic Phonograph Co. of Australia Pty Ltd*,⁸ a situation much closer to that of a library providing photocopying machines was considered by the Supreme Court of Victoria. It was held by that Court that the Wurlitzer Co., which had installed a juke box in a milk bar, had authorised the copyright infringement that resulted from the playing of a particular record. As all records in the machine had been selected and supplied by the Company, the Company had a “real measure of control” over the content of the performances that resulted from the operation of the juke box.⁹ In the light of this decision it was apparent that a librarian who permitted coin-operated photocopying machines to be used for the purposes of photocopying copyright works could be said to be authorising any resulting infringements of copyright. It was for the Court in the *Moorhouse* case to decide the question, and it was unanimous in its decision that, on the facts of the case, the University had authorised an infringement of copyright. Little difficulty was found in establishing that an infringement had occurred. It was not contested that photocopying of the work had taken place in circumstances that could not give rise to the protection afforded by section 40 of the Copyright Act, it being common ground that the copies in question were made for the sole purpose of providing evidence in proceedings intended to be commenced against the University. The Court was, therefore, not called upon to discuss the meaning and scope of “fair dealing” in section 40, and it directed its attention instead to the meaning and scope of the word “authorize” in section 36(1) which provides as follows:

Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

Both Gibbs and Jacobs JJ.¹⁰ reviewed the authorities¹¹ for assistance as to the meaning that should be given to the word “authorize” in this

⁷ (1928) 40 C.L.R. 481.

⁸ [1946] V.L.R. 338.

⁹ *Id.* 354.

¹⁰ (1975) 6 A.L.R. 193, 200-201 *per* Gibbs J., 207-208 *per* Jacobs J.

¹¹ In particular, *Falcon v. Famous Players Film Company* [1926] 2 K.B. 474; *Adelaide Corporation v. Australasian Performing Right Association Ltd* (1928) 40 C.L.R. 481; *Winstone v. Wurlitzer Automatic Phonograph Co. of Australia Pty Ltd* [1946] V.L.R. 338.

section and concluded that it would apply both to express permission or invitation and to situations in which permission could be implied. In the words of Gibbs J.:

a person who has under his control the means by which an infringement of copyright may be committed—such as a photocopying machine—and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement that resulted from its use. . . . Although in some of the authorities it is said that the person who authorizes an infringement must have knowledge or reason to suspect that the particular act of infringement is likely to be done, it is clearly sufficient if there is knowledge or reason to suspect that any one of a number of particular acts is likely to be done, as for example, where the proprietor of a shop installs a gramophone and supplies a number of records any one of which may be played on it: *Winstone v. Wurlitzer Automatic Phonograph Co. of Australia Pty Ltd.*¹²

Having thus established the meaning of the word “authorize”, it remained to ascertain whether or not, in the situation before the Court, the invitation to users of the machines had been limited so as to relieve the University of any responsibility for infringements that might occur. From a practical point of view, this part of the case holds greatest interest for librarians and others who have coin-operated photocopying machines in their control.

The University of New South Wales had taken certain steps to ensure that the machines it provided were not used for the purpose of producing infringing copies. It was for the Court to decide the adequacy of these steps. In 1973 the University had issued a library guide which contained a bookmark on which was printed the following notice:

Reader [*sic*] have a responsibility to obey the law under the Copyright Act 1968.

A copy of the Act is available in the Photocopying Room and there is an extract of relevant sections on each machine.

Photocopying may be done for the purpose of research or for private study and when a copy of the item to be copied has not previously been supplied to the person making the photocopy.

On each machine there was a notice setting out the provisions of section 49 of the Act,¹³ and attendants were employed to supervise the use of the machines. The Court considered each of these measures to be inadequate. The notice on the bookmark made no reference to the fact that copying for the purpose of research or private study was permitted only if it amounted to a fair dealing with the work—although, as was pointed out, “to have said that and no more would not have proved enlightening to most users of the library”.¹⁴ Furthermore, the notice

¹² (1975) 6 A.L.R. 193, 200-201.

¹³ The section relates to copying done “by or on behalf of” librarians for students and members of Parliament.

¹⁴ (1975) 6 A.L.R. 193, 202 *per* Gibbs J.

directed the reader to a copy of the Act available in the photocopying room and to "an extract of the relevant sections on each machine". It was pointed out¹⁵ that the extracts placed on the machines were inadequate in that they did not in fact contain the relevant provisions of the Act but referred only to section 49 which has no application where a person using the library makes a copy for himself. The provision of a copy of the Act was, likewise, held to be an ineffective way of limiting the invitation the University extended to users of the photocopying machines, and there was no evidence to establish that the attendants effectively supervised the use to which the machines were put, or took any steps at all to prevent infringements of copyright from taking place.

It was therefore not necessary for the Court to decide what the effect of a sufficient notice on the machines would have been—nor, unfortunately, was it necessary for the Court to give any indication as to what would amount to a sufficient notice. Gibbs J. indicated that:

To place a clearly worded and accurate notice on each machine in a position where it could not be overlooked would be one measure which might be expected to have some value in informing users of the library of the limits which the University imposed on the permission which it gave them to use the machines.¹⁶

It was, however, suggested by Jacobs J. that even if a university had effectively qualified its invitation to use the machines, it may still be held to authorise infringements if it had known that the qualification was being ignored and had allowed that state of things to continue.¹⁷ Such comments, of course, are obiter and no great weight can be placed upon them. However, to librarians and others in a similar position the case offers no more positive guidelines.

The second major issue that arose for decision resulted from the declaration that had been granted by the trial judge. Although Hutley J. had found that the breach of copyright in question had not been authorised by the University, he nevertheless granted to the plaintiffs the declaration already quoted. The High Court was unanimous that such a declaration was wrongly made since it was based on hypothesis, not on fact; and it was accepted that, in general, a declaration should only be made in response to a question of fact.¹⁸ There was no evidence of any infringement of the respondent's copyright other than that committed by Mr Brennan and the trial judge had found that that particular infringement was not authorised by the University. Gibbs J. summarised the situation as follows:

There is no doubt that a declaration may be an appropriate remedy in an action brought by an owner of copyright to assert his rights, but a declaration will as a general rule not be made for that purpose unless it is established either that an actual infringement

¹⁵ *Id.* 203 *per* Gibbs J., 209 *per* Jacobs J.

¹⁶ *Id.* 203.

¹⁷ *Id.* 209.

¹⁸ *In re Barnato, decd; Joel v. Sanges* [1949] Ch. 258, 270; *Odhams Press Ltd v. London & Provincial Sporting News Agency (1929) Ltd* [1936] Ch. 357; *Forster v. Jododex Australia Pty Ltd* (1972) 127 C.L.R. 421.

has occurred or that the defendant intends to take action that will amount to an infringement. The declaration made in the present case rested purely on the basis of hypothesis.¹⁹

He further indicated that the declaration would, in any case, have been objectionable in form since

It would be impossible to apply it to any alleged infringement that might come to light without first determining the questions whether the photocopying had been a fair dealing and whether the breaches had been in any way due to reliance upon any library guide issued by the University in the years 1970, 1971, 1972 and 1973 or upon the notices appearing upon the photocopying machines or had been caused by lack of supervision of the use of the machines.²⁰

The Court held that a declaration could be made in no more general form than to the effect that the University had authorised this particular reproduction of the copyright work, thereby infringing the respondents' copyright. Thus, although the respondents were successful, their success was so restricted by the facts of the case as to be of little value.

This decision of the High Court has done little to clarify the copyright implications of reprographic reproduction, and it now seems unlikely that any further clarification in this area will come from the Courts. The situation would appear to be one more appropriately dealt with by legislative amendment²¹ and, hopefully, that may be achieved in this country as a result of work currently being done by the Copyright Law Committee on Reprographic Reproduction. The Committee was appointed in 1974 by the then Attorney-General, Senator the Honourable L. K. Murphy Q.C., to examine the question of the reprographic reproduction of copyright works in Australia and to recommend any alterations to copyright law that it might consider necessary. The Report of the Committee is expected to be submitted within the next few months and it may be that a satisfactory solution to the problem posed by reprographic reproduction will then be able to be found.

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¹⁹ (1975) 6 A.L.R. 193, 198.

²⁰ *Ibid.*

²¹ This view has also been expressed in the U.S.A. In 1973, the Court of Claims, in the case of *Williams & Wilkins Co. v. U.S.* (1973) 487 F. 2d. 1345, held that the Department of Health, Education & Welfare had not infringed copyright in medical journals by making unauthorised copies of articles from those journals. The Court considered the harm that would be done to medical science if such copying were held to be an infringement and was of the opinion that it was for Congress, not for the Courts, to decide the extent to which and the situations in which photocopying should be permitted.

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