

The Copyright Agency Limited

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Copyright Agency Limited is a copyright collecting society. Copyright collecting societies are organisations formed by copyright holders to act collectively when it is impracticable for the copyright holders to exercise their rights individually.

The development of mass media technology has led to the development of copyright collecting societies. Because that technology encourages the widespread and transient use of copyright material it is impossible for individual owners of the copyright in works to determine by whom, in what quantities and on what terms their works are being used. It is also impossible for each user of the material to secure a licence from each individual copyright owner to legally use their works.

A collective organisation representing copyright owners is able to:

- Streamline the administration of copyright, both for the copyright owner and the user of copyright; and
- Enhance the bargaining power of individual copyright owners.

In short, the existence of copyright collecting societies makes it possible for copyright owners to control and to receive remuneration for the mass exploitation of their works.

Copyright collecting societies first developed in the field of musical works due to the impact of technology such as phonograms and radio broadcasting on the ways in which musical works were used. For much of this century the position of the holders of copyright in literary and dramatic print works was, by comparison with that of rightsholders of musical works, extremely secure. The only ways in which print works could be reproduced was by the use of expensive printing technology or copying by hand. The restrictions on each of these methods of reproduction ensured that the control of reproduction of the works remained in the hands of the copyright owners. Until technology made it an imperative there was no need for rightsholders in print works to act collectively and as a consequence, no pressure for copyright societies to be formed.

In 1936 an American, Chester Carlson, determined to find a cheap way of reproducing documents, invented a machine which produced facsimile copies of print works. He called the process 'xerography' or 'shadow writing'. Society was slow to catch on to the potential of the new technology and it was only in 1949 that the first commercial photocopier went on sale.

In 1959 the first push button, plain paper copier went into production. This photocopying machine was called the 914 (because it took paper up to 9 x 14 inches). It was 4 feet tall, weighed 648 pounds and could make 7 copies a minute. It is now in the Smithsonian Museum hall of fame.

It was in the 1960s and 1970s that photocopying machines became widely used and photocopying became a real threat to the continued economic viability of many authors and publishers. The first to feel this pressure were music publishers, followed by publishers in education, science and technology.

Educators radically adjusted their teaching methods to take advantage of the new technology. Freed from relying on 'textbooks' educators increased their emphasis on other sources, both primary and secondary. Photocopying enabled the creation of customised textbooks by institutions and the viability of distance education. It is not an overstatement to say that the technology of photocopying completely changed the nature of education. It also changed the nature of educational publishing.

Previously when a work was set for a school or university syllabus

it meant increased sales for a publisher and royalties for an author. Now, copyright owners could identify up to a 40% decrease in sales, directly attributable to photocopying.

The negative effect of the technology was not confined to textbook publishing. Journal publishing also suffered. Libraries, and other institutions no longer needed to purchase multiple subscriptions to journals and could instead copy from their single subscription to meet demand. To compensate for the loss of sales, publishers increased their subscription prices.

The increased journal prices encouraged more people to photocopy rather than to subscribe and to maintain profitability publishers were required to increase the prices for their few remaining subscriptions.

As a direct consequence of the widespread use of photocopying machines, most non-fiction publishing in Australia became marginal. Publishers were no longer in control of the reproduction of their material, and they began to consider ways of halting the decline in book sales and journal subscriptions or at least, ways of compensating for the loss of income resulting from the lost sales.

In 1974, as a response to pressure from both user and owner groups the Copyright Law Committee on Reprographic Reproduction (the 'Franki Committee') was appointed. Its terms of reference were:

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 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. The term 'reprographic reproduction' includes any system or technique by which facsimile reproductions are made in any size or form.

In its deliberations the Franki Committee identified a tension between the needs of the community for access to information and the rights of creators to be remunerated for the increased use of their works.

This tension is peculiar to the reproduction of literary works. In discussions of the effect of mass media technology on the rights of music and other copyright owners, the focus has been on how best to compensate the rightsholders for the increased uses of their works and not on the right of the public to access those works in the most convenient way. For example, home taping of compact discs presents an enormous threat to the rights of music copyright owners and the economic benefits they receive from the use of their works. There appears to be little public interest in defending the rights of individuals to make copies of musical works for their own use, and therefore the debate has centred on the best means of compensation for the rightsholders, not on the question of whether compensation is appropriate.

The Report of the Franki Committee was published in February 1976. The Franki Committee made a number of recommendations on amendments to the *Copyright Act* to take account of reprographic reproduction technology. Among their recommendations was the introduction of a statutory licence for multiple copying in education.

Copyright owner submissions to the Franki Committee had canvassed the possibility of introducing a collective administration system for copying rights organised by the rightsholders themselves through a collecting society. The submissions from education had focused on the needs of educators to have quick and easy access to copyright material, preferably without payment.

Although the Franki Committee recognised that by introducing a statutory licence they were providing the right for educational institutions to copy without providing a streamlined means for copyright owners to collect remuneration for the use of their work's they also felt that the needs of education could not wait for a voluntary licence scheme to be established.

The Committee left open the possibility that an organisation such as Copyright Agency Limited would be formed to collectively administer the rights of authors and publishers copied in education and that blanket agreements outside the statutory licence could be entered into between such a body and peak educational authorities.

After much public debate, a statutory licence for education was introduced into the *Copyright Act* in 1981. The licence required every educational institution in Australia to keep detailed records of all copying for teaching purposes from print copyright works. The records were to be kept in author alphabetical order. This was required on the basis that authors and publishers would visit the institutions and claim payment for the use of their works.

Quite soon after its introduction it became apparent that the licence did not work satisfactorily from the perspective of either the user or the owner of copyright. Copyright owners found it difficult to visit each of the educational institutions in Australia (estimated at 15,000) to claim a fee and educational institutions found it impossible to keep the detailed records required by the legislation.

However, the statutory licence had a number of valuable effects. It recognised that payment must be made for copying in education (this had been disputed by educators on the basis of the public interest in free access to materials), established a trigger for determining what that payment should be (by referral to the Copyright Tribunal) and left open the possibility that rightsholders could appoint an agent to administer the licence on their behalf.

The Franki Committee had also recommended that the legislation clearly state the quantitative limits to the photocopying allowed under the licence.

Broadly, the limits recommended were incorporated into the Act and are as follows:

- 10% of the number of pages in an edition or one chapter of the edition whichever is the greater.
- One or more articles in a periodical publication if the articles relate to the same subject matter.
- Where a work appears in a collection of works and the work is not separately published, the whole of the work may be copied.
- Where copies of a work cannot be obtained within a reasonable time at an ordinary commercial price the whole of a separately published work may be copied.

These copying limits were amended in 1989. A summary of the most recent copying limits contained in the *Copyright Act* in the statutory licence for educational institutions can be obtained from CAL.

The existence of the licence encouraged the development of the Copyright Agency Limited and the participation by owners in the voluntary licensing of their works. In countries without such statutory mechanism, comprehensive copyright licensing has generally been slower to develop.

The Australian statutory licence required the copyright owner and the educational institution to agree on the equitable remuneration for photocopying of works under the licence. If agreement could not be reached the Copyright Act provided that the question could be referred to the Copyright Tribunal for determination.

In 1985, following inconclusive negotiations the Copyright Agency Limited referred certain specific instances of copying at schools, universities and TAFE colleges to the Tribunal for consideration and determination. It was agreed by the parties that the application would be treated as a test case and the rate determined by the Tribunal applied generally to copying under the statutory licence.

The parties asked the Tribunal to set the same rate for all materials and on the basis of a fee per copy page. The purpose of this was to

reduce the costs of both the record keeping and payment by the educational institutions and the collection and distribution of the remuneration to copyright owners by CAL.

After considering arguments by both parties as to the appropriate rate per page the Tribunal established that the appropriate payment was \$0.02 per page. The per page rate in CAL's current licences with universities is based on this rate, increased in accordance with the Consumer Price Index.

Although operating on a part-time basis for some years, in 1986 the Copyright Agency Limited commenced full-time operations. At that time its activities were centred on obtaining compliance with the statutory licence by educational institutions, and with developing an alternative to the onerous records keeping required of institutions by the statutory licence.

Copyright Agency Limited is a non profit company, limited by guarantee. It is appointed by its membership (including most Australian publishers and authors and members of the Australian Journalists Association) as their agent to collectively administer the photocopying of their works.

CAL's Board of Directors has seven members, three author directors, three publisher directors and one 'independent' director. Two of the author directors are appointed by the Australian Society of Authors and one is elected by author members at the Annual General Meeting. Two of the publisher directors are appointed by the Australian Book Publishers Association and one is elected by the publisher members at the Annual General Meeting. The independent director is elected by the other directors.

CAL deducts its operating costs from its collections and makes an Annual Distribution of the fees collected to those authors and publishers whose works are copied.

As the works of Australian authors and publishers may be copied overseas, and foreign works may be copied in Australia, CAL has entered reciprocal agreements with collecting societies in other countries.

Through these agreements CAL also represents, in Australia, authors and publishers from countries such as the UK, Canada, USA and Germany.

The members of CAL are represented in other countries by the foreign collecting societies in the same way as those societies represent the interests of their own members.

Even with a single agent of copyright owners administering the statutory licence for education it was clear that complete record keeping was not a feasible option, particularly for large institutions such as universities. It was impossible for a university to adequately supervise and enforce the standard of record keeping by its staff and more importantly the institution was only indemnified for copying from those works for which records had actually been made. CAL began an aggressive policy of policing institutions and initiating litigation on the infringements it discovered.

Therefore, in 1988, the Copyright Agency Limited entered into blanket agreements with the Australian Vice-Chancellors Committee (the 'AVCC') and the Australian Committee of Directors and Principals (the 'ACDP').

The statutory licence allows copyright owners to contract out of the statutory licence and to enter voluntary agreements with educational institutions. CAL's agreements with the AVCC and the ACDP were voluntary licences outside the terms of the statutory licence. The voluntary licence provided for a single annual fee payment from each university and an indemnity for all copying by the university within the statutory copying limits. The licence also provided that records of copying need only to be kept when the university is participating in a statistical sample of copying which is estimated will take place once in every five years. The statistical sample of copying has two purposes:

- (a) to estimate the volume of copyright material copied per student per year (This is used as the basis for calculating the annual fee per student); and
- (b) to use the records of copying kept during the sample to

distribute the fees paid by the institutions to the authors and publishers whose works have been copied.

The sample is designed, conducted and audited by an independent firm of statisticians appointed by both parties. The design of the sample is agreed between the statistician, CAL (acting on behalf of the copyright owners) and the AVCC (on behalf of universities). In order to obtain a reliable estimate of copying, the sample is designed to operate over the whole of each year, therefore taking account of the various highs and lows in copying levels. For example, a sample of copying conducted only at the beginning of an academic year would dramatically overestimate the level of copying. A sample conducted only over the final exam period would severely underestimate copying levels.

The first statistical sample of copying in universities took place in 1988. At that time, it was decided that the universities participating in the sample would take part for six months each. The first sample survey was split into two parts. One institution kept records to estimate volumes of copying and was used to calculate the annual fee. The other institution kept records to use as the basis for distributing the fees collected. In later samples these two functions have been combined.

In 1988, the University of Technology in Sydney and the University of NSW were the nominated sample institutions. The results of the sample were far from satisfactory. Although other universities were freed from keeping any records of copying, the six month period of record keeping was found to be too onerous for the sampled university.

In 1989, the sample structure for universities and the then colleges of advanced education was revised. It was proposed that three universities and three pre-1988 colleges of advanced education would take part in the sample each year on a rotating basis.

Within the sample universities, departments within Academic Organisational Units (AOU) are selected to participate so that the composition of the sample reflects the overall proportions of students by AOU in the university system as a whole. No university participates in the sample for a period longer than twelve weeks at a time, and because the sample is operating all year, although in different universities, periods of high copying levels and low copying levels are compensated for and do not distort the sample.

It was agreed that complete records of all copying, audited by meter readings would continue to be made, as the meter reading provides an independent check on the accuracy of the recording by universities.

The current sample cycle will end in 1994. By then departments in every university in Australia will have participated in a sample at least once, and those universities which comprise a number of pre-1988 institutions, may have been involved more than once.

So far the levels of copying per student established by the sample are remarkably constant from year to year. The proportion of each type of material copied (book, journal, newspaper, etc) also remains fairly constant. It is too early to draw many conclusions from the figures. However, once the first cycle is completed in 1994 some interesting statistics as to photocopying practices in universities will be available to the Australian-Vice Chancellors Committee, the universities and CAL.

In 1989, further amendments were made to the statutory licence in the Copyright Act and the statutory licence now operates either on full record keeping or on a statistical sample basis, at the election of the institution concerned. The amendments also provide for the declaration by the Attorney General of an approved collecting society to administer the statutory licence. CAL has been declared by the Attorney General as the statutory collecting society for print copyright owners.

However, due to the success of the co-operative Agreements between CAL and the universities and satisfaction with the sample design, all universities have continued to operate under their voluntary licences.

The 1989 Agreements covered those university students enrolled in award courses and for which enrolments were reported to DEET. As

the education activities of universities diversified, this single Agreement no longer provided adequate cover for the universities.

In 1992, CAL, the AVCC and those universities which conduct Continuing Education Courses entered a further voluntary agreement to cover copying by the university for students enrolled in those courses. Continuing Education Courses are defined in the Agreement as courses which do not lead to a degree or other award of the university.

As a consequence of the two agreements most copying within the terms of the statutory licence in the Copyright Act by universities, is licensed. From time to time during the licence, issues regarding certain types of copying have been raised between CAL and the AVCC.

One of these disputes was in relation to payment for copying from academic journals. At the time of entering the 1989 licence, CAL and the AVCC were unable to agree on a rate of payment for copying from academic journals. The AVCC took the view that the payment rate for academic journals should be less than for other copyright material (which at that time was around 2c per page). Academic journals were defined in the Agreement as 'a periodical publication in which a reasonable proportion of contributors are employed by the institutions'.

In 1990, Copyright Agency Limited made an application to the Copyright Tribunal requesting a determination on the rate to be paid for photocopying from academic journals in universities.

CAL based its application on specific instances of copying from journals during 1989. The journals were characterised as academic by the university and when CAL invoiced the various universities for the copying payment was refused.

Once the specific instances of copying were examined it was clear that many were not academic journals within the above definition and the universities conceded that this was the case and paid for copying from those particular journals. However, they refused payment for certain other journals.

The AVCC said that the conditions governing the publication of academic journals are so different from that surrounding the publication of commercial material that the rate for payment for copying from academic journals should be nil or substantially less than the normal rate.

The AVCC maintained that publication in academic journals is a condition of the employment of academics by universities. It was said that the salaries of academics include payment for time spent on producing material to be published. Therefore the employers of academics should not have to pay an academic for the copying of material written during the course of his/her employment.

The AVCC also raised questions as to the copyright ownership of the articles written by academics. Further, the AVCC argued that as academics write for purposes other than financial gain, namely for recognition and status in their field of expertise they neither expect nor wish to receive payment for copying as copying and the distribution of the copies further extends their reputation.

CAL's position was that there is no recognisable category for academic journals, indeed if there was any category of academic journals it is those journals published by scientific, technical and medical publishers.

CAL also took the view that many of the works appearing in academic journals are not written by academics but by other professionals and scientists and that the AVCC's arguments could not hold with respect to those contributors.

Further, much of the copying at Australian universities is from journals published overseas particularly in the UK and USA. In both these countries, contributors to journals routinely assign copyright to the publishers of the journal. In this circumstance the journal publisher certainly has an economic interest in receiving payment for the copying of their publications.

CAL argued that owners of copyright in academic journals are as concerned as other copyright owners to receive payment for the use of their work. This applies regardless of whether the owner of

copyright is the author or the publisher.

Further, the definition of academic journal, together with the requirement that it be used as a classification by the copier, inevitably leads to a judgement being made at the point of copying on the basis of factors such as the title of the journal to determine whether the material is an academic journal. This would result in inequities in the characterisation of the material, as had clearly happened with those journals which were the subject of the case.

The case was settled early in 1991, with the AVCC agreeing to phase in payment for copying from academic journals at the same per page rate as copying from other copyright materials.

It is interesting to note that the same arguments raised by the AVCC in the academic journals dispute were also raised by Texaco in a recent case in the United States, *American Geophysical Union v Texaco*. This case concerned the photocopying of journal articles in the course of their employment by scientists employed at Texaco. As a justification for uncompensated copying from the journal, Texaco argued that the authors of journal articles are not paid and they themselves favour widespread copying of their works. This argument was given little weight by the judge. He stated:

It is misleading to characterise the authors as unpaid. Although it is true that Academic Press and similar publishers do not pay authors money to publish their articles, the authors derive benefit from the publication of their works far more important than any small royalty the traffic might bear. Authors of such scientific and technical material have a substantial economic motivation as well as other interests in having their studies published in prestigious journals. Such publication enhances the professional reputations in a manner that translates itself into remuneration. The remuneration is achieved through growth of prestige and a consequent ability to command greater salaries or more prestigious and powerful positions. It is by their choice that authors publish in such journals, notwithstanding the absence of payment....

... Authors recognise that publishers have little incentive to assume the financial risks of publishing, unless the publisher is protected from copying. Accordingly it is commonplace for authors to assign their rights of authorship to publishers for at least some agreed time on whatever terms may be available. Having made such assignment the author can not continue to control the benefits of the copyright.

The point is well made that regardless of the copyright ownership of the material in an academic journal, both the author and publisher

have an economic interest in the payment for copying from the journal, even if for the author it is not a direct fee payment.

Both the publisher and the author make a contribution to the success of any publication, including academic journals. Publishers make the economic investment in publishing, and the authors invest their time in writing the articles. Both parties receive benefits from the publication, and both should be entitled to share in the remuneration for their product.

In the past, Australian publishers were not interested in obtaining a copyright assignment from authors because it was of no immediate economic benefit. The only right they needed was the first Australian serial publication right. Today, when annual photocopying payments from CAL are substantial and with the possibilities presented by electronic publishing, publishers are consequently more interested in the copyright ownership of articles published in their journals.

Australian publishers are increasingly requiring an assignment of copyright in the articles they publish from the author or alternatively including a condition in the terms under which articles are accepted that photocopying royalties are to be paid to the publisher or to be shared between the author and the publisher.

Important precedents are being set, and both authors and publishers must consider the issues now, to be in a position to arrive at equitable terms.

A current issue between CAL and the Australian Vice-Chancellors Committee concerns the 'publication' of anthologies of course readings by universities.

Authors and publishers view this practice as an erosion of their market, and that photocopy anthologies being sold to students are replacing the books from which the copies were made. Another concern is that these anthologies are sold through commercial outlets and are available to non-students of the university.

CAL, on behalf of its members, has taken action against a Victorian University and is monitoring the practice of anthology compilation and sale at other universities. It is hoped that the present case will establish guidelines for the use of materials by universities.

The primary value of the licences for photocopying in education is that educators can get on with the business of educating and authors and publishers can continue to produce materials directed at the educational market. The Copyright Agency Limited acts as a link between these two groups, to balance their sometimes conflicting interests. CAL's university licences demonstrate that a balance can be achieved.