Librarians and copyright law

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This article describes copyright law as it applies to librarians, including a librarian's responsibility to copyright owners for photocopying on library machines. It concludes with an analysis of the landmark case in Moorhouse *decided by the High Court of Australia. Because* Moorhouse *was the first, and so far the only, copyright infringement case against a library, it plays a significant role in the growing debate in New Zealand between publishers and librarians on the future of library photocopying. In this paper (originally delivered to the New Zealand Library Conference* Information Path to the Future — 1987, *Wellington 9-12 February 1987), it is argued that librarians in New Zealand may be held liable for copyright infringement if they continue to remain indifferent to the extent of photocopying taking place on library machines, and suggested that librarians should modify their existing photocopying procedures by displaying appropriate notices to shield themselves from liability for any infringing use of photocopying machines located on library premises.*

One of the puzzling problems facing copyright today is reprography.[1] Twenty or thirty years ago facsimile copies of printed matter or of sound or film recordings could not be made so simply and inexpensively.[2] Students, teachers, researchers, business people and civil servants have for centuries benefitted from reading the printed matter. Depending upon the subject-matter and the individual calibre and needs, they have retained it in their brains and if necessary copied it by hand.[3] It is hard to imagine how

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1 By reprography is meant a system or technique for the making of any visually perceptible facsimile copy in any size or form. It includes both light and non-light techniques. Photographic copying or photocopying is the most common example of the former and it is in this sense that the expression is used here, viz., practice of copying documents by photography, xerography, etc. Non-light techniques include laser techniques and systems of holographic reproduction. Microform copying and facsimile transmission systems are further forms of reprographic reproduction.

2 Rt. Hon. Mr Geoffrey Palmer, M.P., Deputy Prime Minister commented that "technological developments appear to have rendered the Act unsatisfactory in some respects. The appearance of sophisticated photocopying machines has made the production of multiple copies of works cheap and easy." *Reform of the Copyright Act 1962: A Discussion Paper* (1985, Department of Justice, Wellington) 5 [hereinafter *"Reform of the Copyright Act 1962"*]. See further, *A Discussion Paper on Intellectual Property Protection — A Business Perspective* (1987, Department of Trade & Industry, Wellington).

3 See *Report of the Copyright Committee* New Zealand Parliament, House of Representatives, Appendix to the journals, vol.4, 1959, H.46 para. 88. See generally, K. Puri "Fair Dealing with Copyright Material in Australia and New Zealand" (1983) 13 V.U.W.L.R. 277, 288.

the society functioned without the modern devices of reprographic reproduction, e.g. photocopying machines. Maybe the pace of research was too slow in the past or maybe we have become so indolent now that we do not wish to copy matters by hand and/or carry them in our brains! Be that as it may, the owners of this very noble proprietary right called "copyright" feel utter contempt for these "overworked" copy-makers. They consider them as a new breed of pirates determined to make their own reproductions of copyrighted works, instead of purchasing them.[4]

People often consider photocopiers or xerox machines to be similar to commonplace vending machines, say, cigarette vending machines or tea or coffee making machines. You put the coin in and get the article. But the two transactions are poles apart. Undoubtedly, the buyer is the absolute owner of the cigarette pack or the hot drink. But the ownership in the facsimile copy cannot be likened to the ownership in the consumable article.[5] To start with, no payment has been made to the owner of copyright. More importantly, although the copier owns the paper on which the matter is reproduced, he or she cannot claim to be the author of the matter and if he or she does, that will be plagiarism. The copier may argue that no piracy has been committed in the traditional sense because the reproduction is not going to be marketed in an unauthorised manner. But the fact remains, the copier has in his or her possession somebody else's property for which no payment has been made or licence obtained. By reproducing the work, the copier has done something which the law declares to be exclusive privilege of the copyright owner.[6]

4 Publishers claim that there is a substantial and ever-increasing amount of photocopying taking place in libraries. No statistics are available for New Zealand. In the United States 95.4 million copies were made by libraries in 1981: Heller "Report to the Copyright Office by the American Association of Law Libraries" (1982) 75 Law Library J. 438. See also McDowell "College 'Copy Mills' Grind Quickly, So Publishers Sue" *New York Times,* 19 December 1982, 18 (quoting Parker Ladd, Director, Association of American Publishers, College Division: "[T]he problem on campus has greatly worsened in the last five years .... The effect is to deprive both publishers and authors of payment to which they are entitled.") In New Zealand, the Book Publishers Association, P.E.N. and the Copyright Council of New Zealand (all the three bodies created, inter alia, to safeguard the interests of copyright owners) have expressed strong reservations to the present photocopying practices adopted by libraries. See *Analysis of Submissions in response to the Discussion Paper issued by the Department of Justice* (1986, Copyright Council of New Zealand) paras. 2 A14, 2A16 and 2A25. But the New Zealand Library Association disagrees that copying affects the sales of an author greatly. The Library Association argues that copying of unlimited quantity of materials should be permitted as long as it is for a private use (ibid. para.2A5).

5 "All the knowledge which can be acquired from the contents of a book is free for every man's use: if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if, by reading an epic poem, a man learns to make an epic poem of his own, — he is at liberty .... The book conveys knowledge, instruction, or entertainment; but multiplying copies in print is a quite distinct thing from all the book communicates .... And there is no incongruity to reserve that right, and yet convey the free use of all the book teaches." *Millar* v. *Taylor* (1769) 4 Burr. 2303, 2331 (per Willes J.).

6 Copyright Act 1962, ss 6 and 7. Plagiarism, piracy, and infringement are often loosely used as interchangeable terms. There is, however, a distinction. See P. Wittenberg *The Protection of Literary Property* (Rev. ed., The Writer Inc., Boston, 1978) ch.5.

Copyright is a natural right[7] which is now wholly regulated by statute.[8] The right is analogous to the rights of ownership in other personal property. The concept of property is based on the fundamental principle of labour. What persons create by their own labour, out of their own materials, is theirs to enjoy to the exclusion of all others. It matters not whether the labour be of the body or of the mind. In other words, a production of mind is the author's property in every essential sense in which a production of the hands is the producer's property.[9]

However, there is an important dividing line between property which emanates from manual and that which emanates from intellectual labour. The former is the physical work; the latter, without material substance. Copyright property is not in the physical work, but in the intellectual creation, which is composed of ideas, conceptions, sentiments and thoughts. The physical work, say a book, is simply a channel of a vehicle of conveyance, for the creation of the mind. The author impliedly says to the buyer of the book: "I grant you the perpetual privilege of using my literary production in return for a small sum of money, but on condition that you do not injure it and render it worthless, as a source of profit to me, by multiplying and circulating copies. I will provide you with a copy of the book to enable you to read and enjoy the work. This copy is yours to keep forever, or to dispose of as you please; but in the intellectual content of the work you have simply a right of use in common with thousands of others. This property and the right of multiplying it, I reserve to myself. It is worth $20,000; but I allow you a common use of it for $50."

The exclusive right of using and transferring property is a necessary consequence of the recognition of the right of property itself. It is the peculiarity of copyright that only by the reproduction can it have any value to its owner. By publication alone can the authors secure the reward of their labour. Without this, their toil is without fruit, their property without value. Since the authors give to the readers the means of intellectual improvement and/or enjoyment, it is just that they should reap the pecuniary benefits of their ingenuity and labour. They make no gain, if, the moment after their works see daylight, the works may be pirated and often upon worse paper, and in worse print, and in cheaper volumes. The authors may not only be deprived of any profits, but lose the expenses they have incurred. This view of the law was well expressed more than two centuries ago in one of the grandest judgments in English judicial literature by these words by Mr Justice Aston in *Millar* v. *Taylor*:[10]

7 See E.S. Drone *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (Little, Brown, and Co., Boston, 1879) at 26: "Literary property, like all property, has its origin in natural law, and not in legislation; it is, therefore, a natural and not an artificial right."

8 "[N]o copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.": Copyright Act 1962, s.5(1).

9 For a discussion of origin and nature of literary property, see Drone, supra n.7, 2-53.

10 (1769) 4 Burr. 2303, at 2354.

> [U]pon the whole, I conclude, that upon every principle of reason, natural justice, morality, and common law; upon the evidence of the long-received opinion of this property appearing in . . . law cases . . . the right of author to the copy of his work appears to be well founded . . . And I hope the learned and industrious will be permitted from henceforth . . . to reap . . . the profits of their ingenious labours without interruptions, to the honour and advantage of themselves and their families.

It is against this background that the historic litigation[11] which arose in Australia in the case of *Moorhouse and Angus & Robertson (Publishers) Ltd.* v. *University of New South Wales*[12] must be examined. The story was: Frank Moorhouse, author of a number of short stories which had been published separately in various magazines, compiled them in the form of a book entitled *The Americans, Baby*. The book contained 20 stories. Moorhouse was the owner of the copyright in the book. Incidentally, it may be

11 Because it was the first, and so far the only, copyright infringement case in Australasia against a university, it plays a significant role in the growing debate in New Zealand between publishers and universities on the legality of university photocopying practices. For an interesting account of the divergent views, see *Analysis of Submissions in response to the Discussion Paper issued by the Department of Justice,* supra n.4, paras. 2A1-2A 35, 2B1-2B27 and 2C1-2C32. See also *Reform of the Copyright Act 1962,* supra n.2, pp. 7-14, where some possible solutions to existing problems have been canvassed.

In the United States, the first and so far the only case which involved library photocopying was *Williams & Wilkins Co.* v. *United States* (1973) 487 F. 2d 1345. There the Court of Claims examined the copyright infringement claims brought by a publisher of medical journals against the United States for the copying of millions of pages of copyrighted materials. Two federal libraries — the library of the National Institute of Health and the National Library of Medicine performed the copying. These libraries regularly provided researchers, scientists, and physicians with photocopies of articles from medical journals. Each library copied approximately 100,000 articles and a million pages each year. The Court of Claims held by a majority (4:3, affirmed by an equally divided Supreme Court (1975) 420 U.S. 376) that the libraries had not infringed copyright. The photocopying was requested and performed for the purpose of scientific research, untainted by commercial interests. Despite the large amount of photocopying done, the *Williams & Wilkins* court was not persuaded that the copyright owner had been harmed by photocopying.

Another potentially significant development in the United States in the area of university photocopying has been the recent case in *Addison-Wesley Publishing* v. *New York University* settled out of court in 1983. For an excellent analysis of this case, see Eric D. Brandfonbrener "Fair Use and University Photocopying: *Addison-Wesley Publishing* v. *New York University*" (1986) 19 Journal of Law Reform 669. In this case, nine publishers alleged that New York University, nine faculty members and a photocopying store had infringed copyrights owned by the publishers. The publishers claimed that the faculty members wrongfully produced photocopies of copyrighted works and used them in their classes. The case marked the first time a university and its faculty were sued for copyright infringement under the Copyright Act 1976 (U.S.). The result of the settlement between the publishers and the university and the faculty was that New York University agreed to abide by a new photocopying policy which, according to one commentator, not only threatens "to restrict the benefits — such as an increased flow of information — made possible by inexpensive photocopying, but it also is contrary to the copyright laws.": Brandfonbrener, ibid., at 675. See also, C. Risher "Publishers Withdraw Lawsuit Against NYU" (1983) 57 Wilson Libr. Bull. 813; W. Patry *The Fair Use Privilege in Copyright Law* (BNA, Washington, 1985) 184-186. The settlement agreement is reproduced in *Corporate Copyright & Information Practices* (1983) 167-178.

12 [1976] R.P.C. 151; (1975) 133 C.L.R.1 (H.C.) (hereinafter "*Moorhouse*")

mentioned here that the general rule under the copyright law is that the author of a work is the owner of any copyright subsisting in the work.[13] In 1971, Angus & Robertson (Publishers) Ltd. published this book under licence in Australia. The library of the University of New South Wales acquired a copy of this book in August 1972. The book was not prescribed as a textbook or reference book, although in 1974 it did appear in a reading list issued to students in Political Science I. The book was not in great demand at the library; it appears to have been borrowed on only three occasions between the date of its acquisition in August 1972 and the date of the trial in April 1974. Apparently, it was not a book of a kind which students would be likely to find it necessary to copy for the purpose of study.

The proceedings were instigated (and supported) by the Australian Copyright Council. The Council had for some time asserted that "unlawful and undesirable practices" were commonplace within the universities and had claimed that some of the copying done in university libraries amounted to a clear infringement of copyright in the work which was reproduced. The Council soon decided to commence a test case against a university and for this purpose it was arranged that one Paul Brennan (a graduate of the University of New South Wales) should make an infringing copy of a literary work by the use of a photocopy machine in the library of the University of New South Wales.

Accordingly on 28 September 1973 Brennan went to the library, picked up two books from the open shelves and made two photocopies of one chapter or story of about 10 pages from each of those books, one of which was *The Americans, Baby*. The other book copied was called *Happy Times* but it appears that that work was out of copyright. It may be noted at this point that as a general rule, the duration of copyright is the author's lifetime plus fifty years.[14] In the case of films, records, television and sound broadcasts

13 Copyright Act 1962, s.9(1). See generally, *Copinger and Skone James on Copyright* (12 ed., Sweet & Maxwell, London, 1980) ch. 9; (hereinafter "Copinger and Skone James") Laddie, Prescott and Vitoria *The Modern Law of Copyright* (Butterworths, London, 1980) ch.6 (hereinafter "Laddie, Prescott and Vitoria"); J.C. Lahore *Intellectual Property in Australia: Copyright* (Butterworths, Sydney, 1977) ch.8 (hereinafter "Lahore"); S. Ricketson *The Law of Intellectual Property* (Law Book Co., Sydney, 1984) ch.13 (hereinafter "Ricketson").

14 Copyright Act 1962, s.8(1)(a). If before the death of the author, the work had not been published or performed in public or broadcast, nor had records of the work been offered for sale to the public, copyright continues to subsist until the end of the period of 75 years from the end of the calendar year in which the author died, and shall then expire: s.8(1)(b). But doing of any of the above-mentioned acts after the death of the author would give either the 50 year copyright period from the occurrence of the first of these events, or the 75 years period from the end of the calendar year in which the author died, whichever period is the shorter (s.8(1)(b) proviso). It should be noted that the New Zealand provision is a little different from its equivalent provisions in the Copyright Act 1956 (U.K.) and the Copyright Act 1968 (Australia), s.2(4) and s.33(5), respectively. See also *Re Dickens* [1935] Ch.267 (the copyright in unpublished and unperformed works may last indefinitely). See generally, Laddie, Prescott and Vitoria, supra n.13, 234; Ricketson, supra n.13, 155-157; Copinger and Skone James, supra n.13, ch.8. See also, Sterling and Hart *Copyright Law in Australia* (Legal Books Pty Ltd., Sydney, 1981) ch.3.

and photographs, the term of protection is fifty years only.[15] After the expiry of copyright term, the work falls within public domain.[16]

Brennan made two copies of one story; each story had an independent copyright. The exception of fair dealing did not apply. The copies were not made for research or private study; they were made simply to provide evidence in proceedings intended to be commenced. There was no doubt that Brennan infringed the copyright in the story. He copied the whole story. In the circumstances this was a substantial portion of the work. Interestingly enough, Moorhouse did not know beforehand that the library was going to be framed up to vindicate Australian Copyright Council's claim that some of the copying within university libraries by the use of photocopying machines amounted to an infringement of copyright and the libraries had a legal duty to stop it or minimise it. Moorhouse was later informed of what had been done and he agreed to join in suing the university.[17]

Moorhouse alleged that the library had infringed his copyright by *authorising*[18] the reproduction of part of the book in a material form without his consent. There were

15 See s.8(2) (photographs), s.13(3) (sound recordings), s.14(3) (cinematograph films) s.15(2) (television and sound broadcasts). In the case of published editions, the protection lasts for 25 years only (s.17(2)). Where an original literary, dramatic or musical work, or an artistic work in which copyright would not otherwise subsist, is made by or under the direction or control of Her Majesty or a Government Department, the Crown is entitled to copyright in that work (s.52(2)). Crown copyright lasts for 50 years whether the work is unpublished or published (s.52(3)). See generally, K. Puri "Writers and the Law of Copyright" (1985) 15 V.U.W.L.R. 93 at 96, where the author has submitted that the term of protection is too long and should be reviewed. Copyright protection is much longer than that for designs and patents. For a discussion, see K. Puri *Industrial Design Law in Australia and New Zealand* (Butterworths, Sydney, 1986) paras. 803-805 and 823.

16 The full period of protection is available and is not lost merely because the work remained out of print and obsolete for any number of years: *Weldon* v. *Dicks* (1878) 10 Ch.D.247. The owner may, however, dedicate or abandon his or her copyright before the time when the term would expire. See *Romesh Chowdhry* v. *Ali Mohamad Nowsheri* [1965] All India Reporter Jammu & Kashmir 101.

17 *Moorhouse*, supra n.12, at 155.

18 See Copyright Act 1962, s.6(1) and (2); Copyright Act 1968 (Australia), s.36(1). Doing and authorising are separate acts of infringement. For a discussion on this point, see Ricketson, supra n.13, 228-232; Copinger and Skone James, supra n.13, 252-255; Laddie, Prescott and Vitoria, supra n.13, 403-405. This so-called authorisation tort has been held to cover cases where someone "sanctions, approves or countenances" an infringement committed by another: *Evans* v. *E. Hulton & Co.* (1924) 40 T.L.R. 489, 492. See also *Falcon* v. *Famous Players Film Co.* [1926] 2 K.B. 474; *Winstone* v. *Wurlitzer Automatic Phonogram Co. Ltd.* [1946] V.L.R. 339. In a New Zealand case, the proprietor of a coffee bar was held liable because the house band played a copyrighted Beatles' song: *Australasian Performing Rights Association Ltd.* v. *Koolman* [1969] N.Z.L.R. 273. In *A & M Records Inc.* v. *Audio Magnetics (U.K.) Ltd.* [1979] F.S.R.1 (Ch.D.), the court gave a narrow meaning to "authorisation" by holding that the plaintiff must plead specific authorisation of an actual breach of copyright affecting him. See further, R. Gelski "Authorising Breaches of Copyright" (1976) 4 Aust. Bus. L. Rev. 192.

several self-service coin operated photocopy machines installed in the library but the library exercised no supervision or control over what books were photocopied or what photocopying of any particular book occurred in the library. It was further alleged that the library was indifferent whether persons making use of the machines infringed his copyright. Moorhouse claimed, inter alia, a declaration that the university had infringed his copyright.[19]

The Supreme Court of New South Wales held that there was no proof that the university had authorised Brennan's breach of copyright[20] but on appeal to the High Court of Australia the university was held guilty of infringement. The main question before the court was whether the library in supplying the book and in providing a photocopying machine, which enabled copies to be made, authorised the infringement. The answer depended on the meaning of the word "authorise" in section 36 of the Australian Copyright Act 1968 (equivalent to section 6 of the New Zealand Copyright Act 1962), and the circumstances in which the copying was done. Section 36, in effect, states that the copyright in a work is infringed by any person who does or *authorises* another person to do any of the restricted acts specified in section 31 (equivalent to section 7 (N.Z.)). One of the restricted acts included in section 31(1)(a)(i) (equivalent to section 7(3)(a), Copyright Act 1962 (N.Z.)) is "to reproduce the work in a material form." It was clear that the library itself did not do the photocopying which was alleged to have infringed the copyright. Nor was Brennan an employee or agent of the library for the purpose of making copies on behalf of the librarian of the university. For these reasons section 49 (equivalent to N.Z. section 21) had no application to the dispute.[21]

It should be noted from the outset that there is no provision in the Act directed to the situation where the library provides the photocopying facility and the reader and not the librarian makes the copies. The principles laid down by the Act which do deal with reproduction of works by librarians and users are stated very imprecisely by reference to such abstract concepts as "fair dealing" (sections 19 and 20 of the New Zealand Act) and "reasonable proportion" (section 21) and it is left to the courts to apply those principles after a detailed consideration of all the circumstances of a particular case.[22]

19 A university may be held vicariously liable as a contributory infringer for causing or merely permitting its library to infringe copyrights. See *Sony Corp. of America* v. *Universal City Studios* (1984) 464 U.S. 417, 434-442; *Shapiro, Bernstein & Co.* v. *H.L. Green Co.* (1963) 316 F. 2d 304 (2d Cir.); Conley "Copyright and Contributory Infringement" (1983) 23 Idea 185.

20 *Moorhouse and Angus & Robertson (Publishers) Pty. Ltd.* v. *University of N.S.W.* [1975] R.P.C. 454.

21 Copyright Act 1968 (Aust.), s.49 is concerned with the copying of works in libraries and archives for users. This provision was substantially amended in 1980. Copyright Act 1962 (N.Z.), s.21 provides for certain exceptions relating to use of copyright works for educational and library purposes. For a discussion of s.21, see K. Puri "Fair Dealing with Copyright Material in Australia and New Zealand" (1983) 13 V.U.W.L.R. 277, 286-287.

22 The provisions to which the *Moorhouse* court referred to are (New Zealand sections are shown in parentheses): s.13(1) [s.5(1)], s.14(1)(a) [s.3(1)]. s.31(1)(a)(i) [s.7(3)(a)], s.36(1)[s.6(1) and (2)] and s.40 [s.19]. The combined effect of the above-mentioned provisions was summarised by Gibbs J. as follows: "[T]he copyright in a literary work is infringed by a person who, not

It will be useful at this juncture to consider the meaning of "copyright" and then to look briefly at the provisions which are applicable to libraries, even though none of these provisions is concerned with the use of self-service coin operated copying machines.

In simple terms, copyright denotes conferring of a legal exclusive right on the author or his/her transferee to do certain acts (called in the New Zealand Act as the "acts restricted")[23] (e.g. to print, reprint, publish, copy, perform, broadcast, make an adaptation and sell)[24] in regard to certain types of works (there are eight listed in the Act, viz., literary, dramatic, musical, artistic,[25] records,[26] films,[27] television and radio broadcasts[28] and published editions of works)[29] for a fairly long period (as a general rule, the duration of copyright is the author's lifetime plus 50 years).[30] Copyright is automatic and subsists from the moment the work is created or produced. Copyright confers a limited monopoly in the sense that it only prohibits copying; it does not prohibit independent creation by others.[31] The moral basis for copyright protection is said to be found in the Eighth Commandment: "Thou shalt not steal".[32]

There is an important limitation placed on copyright. It is subject to the right of all persons into whose possession the work comes, to make a fair dealing of it. The concept of fair dealing permits the reproduction, for legitimate purposes, of material taken from a copyright work to a limited extent that will not cut into the copyright owner's potential market for the sale of copies.[33] Thus sections 19 and 20 of the Act of 1962 limit copyright owner's rights where a literary, dramatic, musical or an artistic work is dealt with for purposes of research or private study. Section 21 contains special exemptions for libraries, universities and schools. Library uses of copyright works involve the intricate problem of balancing the needs of libraries and their users against the claims of copyright owners for remuneration.

being the owner of the copyright, and without the licence of the owner of the copyright, reproduces or authorises the reproduction of the work, or of a substantial part of the work, in a material form, unless the reproduction is 'a fair dealing' with the work 'for the purpose of research or private study'.": *Moorhouse,* supra n.12, at 157.

23 Copyright Act 1962, s.6(1).

24 Copyright Act 1962, s.7(3) and (4).

25 Copyright Act 1962, s.7.

26 Copyright Act 1962, s.13.

27 Copyright Act 1962, s.14.

28 Copyright Act 1962, s.15.

29 Copyright Act 1962, s.17.

30 See supra n.14.

31 See H.G. Fox *The Canadian Law of Copyright and Industrial Designs* (2 ed., Carswell, Toronto, 1967) 41-42 (hereinafter "Fox"); W.R. Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (Sweet & Maxwell, London, 1981) 332-333; Laddie, Prescott and Vitoria, supra n.13, 1-2. See generally, *University of London Press Ltd.* v. *University Tutorial Press Ltd.* [1916] 2 Ch. 601.

32 *Macmillan & Co.* v. *K. & J. Cooper* (1923) 40 T.L.R. 186, 187.

33 For a discussion on the doctrine of fair dealing, see K. Puri "Fair Dealing with Copyright Material in Australia and New Zealand" (1983) 13 V.U.W.L.R. 277, and the authorities cited there. See generally, Copinger and Skone James, supra n.13, 204-210; Fox, supra n.31,

Three aspects of library photocopying which may be considered here are:

(i) the liability of individual users who photocopy materials on the self-service coin operated machines provided in libraries;
(ii) the liability of libraries that photocopy for their own purposes or for their users; and
(iii) the liability of libraries for photocopying by individual users.

The first aspect is governed by sections 19 and 20 and the second by section 21 but, as stated earlier, no provision is to be found in the Act concening the third aspect, viz., the liability of libraries for the use of self-service coin operated machines by individual users.

As far as the liability of individual users is concerned, it has to be determined whether the copying is for one of the specified purposes (viz., research, private study, criticism, review or for reporting current events) and whether the dealing is fair. The exemptions under sections 19 and 20 seem to relate to such dealings where users are making copies for their personal perusal and not where copies are made, say, by a teacher, for the purpose of imparting instructions in the classroom or by a librarian to provide a copy of an article in a journal. So, what comes within the fair dealing exemption if done by the users themselves may not necessarily be covered if done by teachers or librarians.[34]

Section 21 provides (inter alia) for copying done by librarians for users. This right of librarians to provide photocopies of copyrighted materials to users is, however, qualified in four ways. Firstly, the librarian must be satisfied that the copy is required for the purpose of research or private study only.[35] It is not clear what the words "satisfying the... librarian" mean? In the United Kingdom and Australia, the cognate provision is understood to require a written declaration from the users as to their

419-424; Ricketson, supra n.13, 242-247. The American equivalent of fair dealing is "fair use", see Copyright Act 1976 (U.S.), s.107. For an instructive recent writing, see E.D. Brandfonbrener "Fair Use and University Photocopying: *Addison-Wesley Publishing* v. *New York University* (1986) 19 Journal of Law Reform 669. For a leading case on fair use, see *Sony Corp. of America* v. *Universal City Studios, Inc.* (1984) 464 U.S. 417. In *Sony,* copyright owners of audio-visual material, including motion pictures, had filed an action for damages and injunctions against the manufacturer of the "Betamax" VCR machine (Sony Corp), four retail outlets and one individual who had used his Betamax VCR to record the plaintiff's broadcast materials. The Supreme Court, by a vote of five to four, held Sony not liable for contributory infringement. The majority reasoned that the private, noncommercial copying of complete television programmes with VCRs for time-shifting purposes constituted a fair use under Copyright Act 1976, s.107. See further B.A. Leete, "Betamax and Sound Recordings: Is Copyright in Trouble?" (1986) 23 Am.Bus.Law J. 551; Nimmer *Nimmer on Copyright* (Mathew Bender, 1986) vol. 3, sec. 13.05.

34 *Report of the Copyright Committee* (1952, Cmnd. 8662, H.M.S.O., London.) para. 43.

35 For the meaning of "private study", see K. Puri "Fair Dealing with Copyright Material in Australia and New Zealand" (1983) 13 V.U.W.L.R. 277, 283-284. See generally, *Report of the Copyright Law Committee on Reprographic Reproduction* (1976 A.G.P.S., Canberra.) paras. 2.63-2.65.

purpose before supplying the copies.[36] Secondly, only a reasonable proportion of the work may be photocopied and supplied.[37] In the case of articles in periodical publications, no more than one article may be supplied, but more articles may be photocopied if they relate to the same subject matter. Thirdly, the librarian must supply only one copy of the material. The fourth qualification is that the librarian must not charge a higher payment for the copies than the cost attributable to their production.

In contrast with the foregoing provision, a librarian has ample powers to copy materials (including the whole work) and supply them to another librarian.[38] This would cover interlibrary loan requests where a copy of a work, rather than the work itself, is supplied, especially where the work is out of print or is required by users of the supplying library too. One important restriction regarding the exercise of this wide power is that at the time of making a copy, the supplying librarian must not know the name and address of any person entitled to authorise reproduction, and could not by reasonable inquiry ascertain the name and address of such a person.[39] This restriction does not, however, apply to articles contained in periodical publications.

In addition to the above, librarians have been given wide powers to reproduce unpublished works and supply copies either to users or to other librarians.[40] Where the recipient is a user, the librarian must be satisfied that the copy will be used for the purpose of research or private study.[41] There is, however, one important qualification to this provision. Section 58 provides that when an unpublished work is deposited at a library subject to any conditions prohibiting, restricting, or regulating publication of

36 In the U.K. see Copyright (Libraries) Regulation 1957, S.I. 1957/868, Reg.4 read with Third Schedule. In Australia, the relevant provision (Copyright Act 1968, s.49) does not require the librarian to satisfy himself or herself that the user requires copies for "research or study" purposes, provided the user supplies a written declaration. For a good discussion, see Ricketson, supra n.13, 254-257.

37 This is not defined in the Act. By contrast, the Australian Copyright Act 1968 is more specific as to the meaning of "reasonable portion". Thus s.10(2) provides:
Without limiting the meaning of the expression "reasonable portion" in this Act, where a literary, dramatic or musical work is contained in a published edition of that work, being an edition of not less than 10 pages, a copy of part of that work, as it appears in that edition, shall be taken to contain only a reasonable portion of that work if the pages that are copied in the edition —
(a) do not exceed, in the aggregate, 10% of the number of pages in that edition; or
(b) in a case where the work is divided into chapters — exceed, in the aggregate, 10% of the number of pages in that edition but contain only the whole or part of a single chapter of the work.
See generally, James Lahore *Photocopying: A Guide to the 1980 Amendments to the Copyright Act* (Butterworths, Melbourne, 1980).

38 Copyright Act 1962, s.21(2).

39 If the copyright owner is known, then the librarian must seek permission to copy. "If refused, there is no provision entitling the library to make a copy": Laddie, Prescott & Vitoria, supra n.13, 450.

40 Copyright Act 1962, s.21(3).

41 Supra n.35.

that work, then any publication of the work in breach of such a condition will amount to an infringement, notwithstanding that the copyright in the work may have expired.

Photocopying machines are now extensively used in libraries. The use of these machines is regarded by users as a convenient — indeed almost indispensable —facility. The copyright owners however consider them as gravely damaging to the value of their proprietary rights.[42] Where the copying is done by a user and a breach of copyright occurs, the question arises whether in addition to the user, the library could also be held liable on the ground that by supplying the machine it authorised the doing of the act of photocopying. In *Moorhouse,* the library denied any liability and advanced these arguments:

(1) The machines were not used exclusively for the purpose of copying books; they were extensively used to copy lecture notes and other private documents. Furthermore, not all of the books which might be copied were subject to copyright.

(2) The Library had adopted a number of measures with a view to preventing the machines from being used to commit infringements. Each year it had issued library guides which contained a notice regarding copyright infringement. A copy of the Act was also kept in the photocopying room. In addition, notices were affixed on or near the machines.

(3) The library had appointed attendants whose duties included the supervision of the use of the machines. The university librarian had asked the attendants to

42 Problems raised by new technologies such as photocopying machines have provided much of the impetus for revising copyright laws in Australia and the United States. Australia dealt with these problems by enacting the Copyright Amendment Act 1980. For the background to the new photocopying procedures, see *Report of the Copyright Law Committee on Reprographic Reproduction* (A.G.P.S., Canberra, 1976). Likewise, the United States Congress dealt with these problems by creating the National Commission on New Technological Uses of Copyright Works (CONTU). CONTU was established to "assist... in developing a national policy for both protecting the rights of copyright owners and ensuring public access to copyrighted works when they are used in computer and machine duplication systems," *National Commission on New Technological Uses of Copyright Works, Final Report* (1978) 3, 105. See further, Brandfonbrener, supra n.33, 679-680. "Congress paid considerable attention to the copyright issues presented by university photocopying throughout the twelve years of congressional debate on section 107" (ibid. at 682, footnote reference has been omitted). See further, W. Patry *The Fair Use Privilege in Copyright Law* (BNA Washington, 1985).

In New Zealand, however, no legislative action has taken place as yet and the matter is still being debated. See *Reform of the Copyright Act 1962,* supra n.2. and *Analysis of Submissions in response to the Discussion Paper issued by the Department of Justice,* supra n.4. In the U.K., see *Intellectual Property and Innovation* (1986; Cmnd. 9712). Previous U.K. reports, relevant to this topic, are: *Report of the Committee to consider the Law on Copyright and Designs* (1977, Cmnd. 6732); *Reform of the Law relating to Copyright, Designs and Performers' Protection* (1981, Cmnd. 8302); *Report of the Committee to consider Intellectual Property Rights and Innovation* (1983, Cmnd. 9117).

watch out for people who were using the machine for an excessive time or who appeared to be copying old books.

(4) The library did not intend that anyone should use its facilities for the purpose of obtaining evidence against it.

(5) The library was not a library open to all comers. It was a university library.

(6) The copying machines were not intended to bring a profit to the library.

The High Court of Australia unanimously rejected all the above arguments.[43] The court held that the library did not adopt measures reasonably sufficient to prevent infringements. Therefore, when Brennan made the infringing copies, he was authorised to do what he did. The court thought that the fatal weakness in the case of the library was that no adequate notice was placed on the machines for the purpose of informing users that the machines were not to be used in a manner that would constitute an infringement of copyright.[44]

The court stated that it was likely that some of the books which were subject to copyright and which were in the open shelves might be copied by use of the machines in a manner that would constitute an infringement of copyright unless some means were adopted to prevent that from happening. It could not be assumed that users would make copies in circumstances which amounted to a fair dealing for the purpose of research or private study, at least in the absence of any effective measures to ensure that any other copying of copyright works was forbidden. The sort of measures which the library had adopted to prevent copyright infringements were found by the Court to be either inadequate or misplaced. The library guide, the Court observed, would not have been received by all users and it was very unlikely that all users would have carefully read it. The guide contained the following text dealing with "copyright":

> 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 [sic — only one section (section 49) was cited. This section was in any case irrelevant to the position of those persons to whose attention it was intended to be directed].
>
> 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.[45]

In fact a copy of the Act was available in the photocopying room, but that by itself was found insufficient. The court said that to provide a copy of a statute whose meaning would be obscure to the layperson would not be an effective way of conveying to the users of the library advice as to how they should act to observe the law of copyright.[46] Again, a notice was placed on each machine, but it was inadequate, ill-adapted and

43 The Bench consisted of McTiernan, A.C.J., Gibbs and Jacobs, JJ.
44 *Moorhouse*, supra n.12, at 162.
45 Ibid., at 160.
46 Idem.

misleading. The notice set out section 49 of the Australian Act[47] which deals with copying by libraries and archives for users. That section is not concerned with the use of self-service coin operated copying machines by users of libraries. The notice made no mention of sections 31, 36 and 40,[48] the provisions immediately relevant to the circumstances. The court further found that the attendants who had been supposedly appointed to supervise the use of the machines did not supervise in any practical and useful sense, and that this was known by the librarian.[49]

Other arguments advanced by the library were similarly rejected. In sum, the various measures adopted by the library, even when considered cumulatively, did not appear to have amounted to reasonable or effective precautions against an infringement of copyright by the use of the photocopying machines.

The decision of the court thus rested on one final point, viz., the meaning of the word "authorise" in section 36 of the Copyright Act 1968.[50] The court gave a wide dictionary meaning to this word, viz., "sanction, approve, countenance, permit".[51] The Court held that the library had under its control the means by which infringements may occur, namely the photocopying machines — and it made them available to users knowing, *or having reason to suspect,* that they were likely to lead to infringements.[52] Furthermore, the library omitted to take reasonable steps to limit their use to legitimate purposes: the degree of indifference was too blatant to shield the library from liability. It thereby did authorise the infringement that resulted from Brennan's use.

47 Equivalent to Copyright Act 1962, s.21.

48 Equivalent to Copyright Act 1962, ss. 6, 7, 19 and 20.

49 *Moorhouse,* supra n.12, at 161.

50 Equivalent to Copyright Act 1962, s.6. See the authorities cited in n.18, supra.

51 *Moorhouse,* supra n.12, at 158 per Gibbs J. "The word 'Authorise', . . . can also mean 'permit', and in *Adelaide Corporation* v. *Australasian Performing Right Association Ltd.* 'authorise' and 'permit' appear to have been treated as synonymous." And Jacobs J. (ibid. at 165) pronounced: "[A]uthorisation is wider than authority . . . . It is a wide meaning which, in cases of permission or invitation, is apt to apply both where an express permission or invitation is extended to do the act comprised in the copyright and where such a permission or invitation may be implied. Where a general permission or invitation may be implied it is clearly unnecessary that the authorising party have knowledge that a particular act comprised in the copyright will be done." But see, Laddie, Prescott & Vitoria, supra n.13, at 404 n.2: "In *Moorhouse* v. *University of New South Wales* . . . a very wide scope was given to authorising. It is suggested however that the judge [sic] erred in equating authorising with permitting; see s.1(1) and s.5(5)." See generally, R. Gelski "Authorising Breaches of Copyright" (1976) 4 Aust.Bus.L.Rev. 192; Tettenborn "Recordings, Reproductions and Authorizing Infringement Yet Again: Time for a Change?" (1986) 2 Intellectual Property Journal 227.

52 *Moorhouse,* supra n.12, at 158-159 (Gibbs J.) and at 165 (Jacobs J.). For a useful discussion of the decision, see Ricketson, supra n.13, 230-233.

Infringement constituted by authorisation does not take place, unless the actual infringing act is done: *R.C.A. Corpn.* v. *John Fairfax & Sons Ltd.* [1981] 1 N.S.W.L.R.251. See also Copinger & Skone James, supra n.13, 203; Blakeney & McKeough *Intellectual Property: Commentary and Materials* (Law Book Co., Sydney, 1987) 205.

The outcome of the *Moorhouse* decision seems to be that libraries must take reasonable steps to prevent infringements to escape legal liability. As the court stated:[53]

> 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 machine.

The court did not, however, lay down any concrete guidelines, the observance of which will ensure that libraries would be absolved from any legal liability. This uncertainty in the law was removed (at least in Australia) by an amendment of the Copyright Act 1968 in 1980. A new section was introduced prescribing a form of notice, which, upon being affixed to, or in close proximity to, each machine, in a place readily visible to users, would absolve libraries from any liability for infringement of copyright.[54] This provision recognizes that libraries provide a splendid service by making the machines available, which they are not obliged to provide, and if they do, they should not be harassed when the real culprits are the actual users of the machines.[55]

Drawing the moral from *Moorhouse,* librarians in New Zealand need to be wary of indiscriminate and unsupervised use of photocopying machines in libraries. It is suggested that all machines installed in libraries should display the attached notices[56] in

53 Ibid., at 160. Simply providing the means of reproducing copyrighted materials will not normally amount to "authorisation": *Copyright Agency Ltd.* v. *Haines* (1982) 40 A.L.R.264.

54 Copyright Act 1968 (Aust.) s.39A provides:

Where —

(a) a person makes an infringing copy of, or of part of, a work on a machine for the making, by reprographic reproduction, of copies of documents, being a machine installed by or with the approval of the body administering a library or archives on the premises of the library or archives, or outside those premises for the convenience of persons using the library or archives; and

(b) there is affixed to, or in close proximity to, the machine, in a place readily visible to persons using the machine, a notice of the prescribed dimensions and in accordance with the prescribed form,

neither the body administering the library or archives nor the officer in charge of the library or archives shall be taken to have authorized the making of the infringing copy by reason only that the copy was made on that machine.

The use of the words "by reason only" in the concluding sentence of the provision (above) ensures that where the librarian has knowledge of an infringement and does not take steps to prevent it, he or she would still be liable as having authorised the infringement. See Ricketson, supra n.13, 233.

For the form of the prescribed notice, see Copyright Regulations 1969, S.R. 1969/58, Third Schedule.

55 Section 39A shields a library (or an archive) from liability for any infringing use of photocopy machines located on an institution's premises or in the vicinity of such an institution so long as its unsupervised photocopying equipment displays the prescribed notice. In essence, the notice states that the individual user is subject to the copyright law and may be liable for any infringement. Therefore, even if a library prohibits from photocopying a copyrighted work, an individual user is not prevented from exercising his or her judgment as to fair dealing.

56 See Appendices 1 and 2. The notice in Appendix 1 has been adapted from the form prescribed in the Copyright Regulations 1969 (C/wlth). Reg. 4B requires that such a notice be printed on A4 size paper.

a conspicuous place in close proximity to the machines. It is believed that if infringing copies are made on machines in spite of these notices, neither the body administering the library nor the librarian would be taken to have authorised the making of the infringing copy. Hence, they will avoid legal liability.

APPENDIX 1

Copyright Act 1962

WARNING

Copyright owners are entitled to take legal action against persons who infringe their copyright. Unless otherwise permitted by the *Copyright Act 1962,* unauthorised copying of a work in which copyright subsists may infringe the copyright in that work.

Where making a copy of a work is a fair dealing under sections 19 and 20 of the *Copyright Act 1962,* making that copy is not an infringement of the copyright in the work.

It is a fair dealing to make a copy, for the purpose of research or private study, of one or more articles on the same subject matter in a periodical publication or, in the case of any other work, of a reasonable proportion of a work. In the case of a published work that is of not less than 10 pages and is not an artistic work, 10% of the total number of pages, or one chapter, is a reasonable proportion.

More extensive copying may constitute fair dealing for the purpose of research or private study. To determine whether it does, reference should be made to the *Copyright Act 1962,* a copy of which is available with the Librarian.

APPENDIX 2

Copyright Act 1962

WARNING

Copyright owners are entitled to take legal action against persons who infringe their copyright. Unless permitted by the Copyright Act 1962 unauthorised copying of work in which copyright subsists may infringe the copyright in that work.

THE UNIVERSITY ABSOLUTELY FORBIDS THE USE OF THIS MACHINE FOR A PURPOSE WHICH CONSTITUTES AN INFRINGEMENT OF COPYRIGHT.

MULTIPLE COPYING **NOT** PERMITTED ON THIS MACHINE

COPYING PERMITTED ON THIS MACHINE

Number of Copies Permitted	Purpose of Copying	Amount that can be copied
SINGLE COPIES under "Fair Dealing" provisions of the Copyright Act 1962 (sections 19 and 20).	For research or private study, as part of "Fair Dealing" provisions.	FROM A PERIODICAL (excluding artistic work): The whole or part of one article in an issue; or the whole or part of two or more articles in an issue, if the articles relate to the same subject matter. FROM OTHER LITERARY, DRAMATIC OR MUSICAL WORKS MORE THAN TEN PAGES IN LENGTH: Either: an aggregate of no more than 10% of the number of pages in an edition or: if the work is divided into chapters,

the whole or part of a single chapter, even though the number of pages thus copied might exceed 10% of the number of pages in the edition.

ARTISTIC WORKS OR WORKS OF TEN PAGES OR LESS IN LENGTH:
The decision as to what is 'fair' must be made under the qualitative criteria for deciding whether copying is fair dealing. 'Artistic Works' includes maps, diagrams, illustrations, photographs, etc.

NOTE:
In no case may the whole of a work be copied. In determining whether copying is fair dealing, matters to which regard shall be had include:[57]

(a) the purpose and character of the dealing;
(b) the nature of the work or adaptation;
(c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
(d) the effect of the dealing upon the potential market for, or value of the work or adaptation; and
(e) in a case where part only of the work or adaptation is copied — the amount and substantiality of the part taken in relation to the whole work or adaptation.

MISUSE — IF YOU DO NOT OBSERVE THE ABOVE RULES YOU RISK INFRINGING COPYRIGHT FOR WHICH AN ACTION FOR INFRINGEMENT WOULD LIE AGAINST YOU PERSONALLY. NON-OBSERVANCE WILL CONSTITUTE MISCONDUCT FOR UNIVERSITY PURPOSES.

57 The list of five factors to consider in determining whether a use of a copyrighted work is fair, is not exhaustive. These factors have their origin in the fair dealing doctrine developed at Common Law. The Americans were the first to recognise expressly the Common Law doctrine when they introduced section 107 in the Copyright Act 1976 containing a codification of the fair dealing concept. "While codifying the common law fair use doctrine, Congress intended neither to alter the doctrine nor to freeze its continued development by the courts. Instead, section 107 was intended to restate the fair use doctrine as developed by the courts up to 1976 and to permit further judicial development." Brandfonbrener, supra n.33, at 681. The Australians followed suit in 1980 when they inserted these factors in the new Copyright Act 1968, s.40(2).

For an excellent analysis of the fair dealing factors, see W. Patry *The Fair Use Privilege in Copyright Law* (B.N.A., Washington, 1985) ch.17. See further, Brandfonbrener, ibid. at 688-703; K. Puri "Fair Dealing with Copyright Material in Australia and New Zealand" (1983) 13 V.U.W.L.R. 277, 290-295.