

# Case Note

by Robyn Durie

**COPYRIGHT AGENCY LIMITED & ORS v HAINES & ANOR, a decision of McLelland J, delivered on 9 March 1982**

**This is the first judgment on the Copyright Amendment Act 1980. \***

It arose out of the issue of three memoranda to principals of NSW Government schools by the Director-General of Education.

The defendants were the Director-General for Education and Mr Haines, the nominee for the NSW Attorney-General.

The plaintiffs were:

(a) Copyright Agency Limited (CAL), a collecting agency which acted either as an exclusive licensee for the owners of copyright in a number of works, or as a sole agent of such copyright owners in respect of reprographic copying.

(b) Four publishers (Angus & Robertson, McGraw-Hill Book Company of Australia Pty Limited, Heinemann Educational Australia Pty Ltd and Jacaranda Wiley Limited), each of which sold a large number of educational books; and

(c) Three authors, Donald Horne, Thomas Kenneally and Les Murray.

Each of the publishers had books on at least one of the Higher School Certificate prescribed lists. One of the authors had previously had books on the English syllabus.

The plaintiffs claimed that by the issue of the memoranda, and in particular Memoranda 81248, the defendants had infringed or threatened to infringe the copyright in works owned by or licensed to one or more of the plaintiffs, or alternatively, such action by the defendants consisted of a threat to vicariously infringe their rights. In addition by the issue of the memoranda the defendants had injured or threatened to injure the plaintiffs' businesses.

Memoranda No 81248 dealt with, inter alia:

(a) the relation between Section 40 of the Copyright Act 1968 (fair dealing for research and study) and Section 53B (multiple copying in Educational Institutions)

(b) Section 39A (notices in libraries), inserted in the Act following the decision of the High Court in **University of New South Wales v Moorhouse** 133 CLR 1; and

(c) Section 203E - inspection provisions.

The plaintiffs claimed that by the issue of the memoranda, and, in particular memoranda No 81248, the defendant had infringed or threatened to infringe the copyright in works owned by or licensed to one or more of the plaintiffs, or alternatively, such action by the defendants consisted of a threat to vicariously infringe their rights and by the issue of memoranda the defendants had injured or threatened to injure the plaintiffs' businesses.

**The Judge held that:**

(a) Section 40 of the Copyright Act did not permit the same amount and type of photocopying as did Section 53B. In this regard he said that:

"the availability to schools of the right to make copies under section 53B upon compliance with conditions designed to provide 'equitable remuneration' to owners of copyright, must necessarily have an influence upon what amount and type of copying done in the school could properly be regarded as 'fair dealing' under Section 40."

The existence of Section 53B affected the value of the work within the meaning of Section 40(2)(d). Memoranda No 81248 had postulated a teacher acting as an agent for his students and using Section 40. The

Judge indicated that even if the teacher was appointed as the agent of all his students, a truly artificial situation, the copying of substantially the whole of certain works would not constitute fair dealing, whereas it could legitimately be carried out under Section 53B.

(b) There was no actual infringement of copyright, as no actual infringement was proved as required by decision of Kearney J in **RCA Corporation v John Fairfax & Son Limited** (1981) 1 NSWLR 251.

(c) There was no significant risk of copyright infringement in relation to Section 39A.

(d) There was no threatened injury to the business of the plaintiffs by unlawful means, as there was no intention of inflicting injury on the plaintiffs. (The argument on this point was based on the tort revealed in the decisions of **Carlin Music Corporation v Collins** 5 FSR 548 and **Beaudesert Shire Council v Smith** 120 CLR 145.) The Judge did not deny that there may be some generalised tort which in certain circumstances will provide relief against unlawful interference with economic activity. But, the unlawful means had to be a means forbidden by law and not merely invalid or ultra vires.

(e) Section 203E conferred the right of inspection of a library collection on copyright owners or their agents regardless of whether there were any records of copying under Section 50 or 51A in that library.

Copyright owners are able to investigate whether the library had made copies of their works in addition to inspecting any declarations made in relation to such copies.

(f) In respect of records of copying kept in educational institutions, a copyright owner or his agent was entitled to inspect all the records kept by that educational institution, and not just those relating to works of which he was the copyright owner, or the agent of the copyright owner, and the right of inspection carried with it an incidental right

to copy all such records.

The Judge granted two quia timet mandatory injunctions.

The first was in relation to the Section 40/Section 53B issue, on the basis that there was a significant prospect that the rights of a number of the plaintiffs might be infringed by the defendants or their employees if the relevant part of the memorandum was not withdrawn.

The second was in relation to Section 203E. The injunctions required the Attorney-General to issue a corrective memorandum. Declarations were made in relation to the meaning of Section 203E. The injunctions have been stayed pending the outcome of an Appeal, although the Director-General of Education is to write a letter to the recipients of Memorandum No 81248 giving notice of the judgment in relation to Section 53B/Section 40.

\* An Appeal was heard in June by the Full Federal Court. The Notice of Appeal canvasses practically all the copyright related points in **McLelland J's** judgment.

## ACLA Lunches

Two of the key figures in Australian communications today are the Hon. Neil Brown QC, MP, the new Minister for Communications, and Mr Bill Mansfield, Federal Secretary of the ATEA. Both will be guest speakers at forthcoming ACLA lunches.

**Bill Mansfield** will speak on "The role of the national telecommunications carrier in the coming information age" on **Wednesday 28 July**.

**Neil Brown** will speak on his new portfolio and "Communications in the 1980's" on **Thursday 2 September**.

ACLA members and visitors are welcome to attend both lunches. They will be held in the Menzies Hotel, Carrington St, Wynyard 2000. Members will receive a circular with details of the lunches. Non-members should contact Ms Elizabeth Lucas on (02) 406 5464 to arrange bookings.