

THE REPROGRAPHIC CRISIS: TOWARDS AN INTERNATIONAL SOLUTION?

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I INTRODUCTION

The widespread uptake of the modern, affordable and easy-to-use photocopier in the 1950s and 60s transformed document copying around the world. Suddenly, copyright owners were confronted with a technology that enabled people to make copies in hundreds and thousands of offices, schools, libraries and businesses outside of anyone's right or control.¹ The fact that photocopiers were disparate, remote and difficult to control created a real dilemma for copyright owners. The decentralisation of copying practices created by the photocopier meant that copyright owners were unable to monitor and control where and how their works were used. While they might have been able to identify the occasional infringer, it was practically impossible and economically unfeasible to pursue all infringers.² As the new copying machines spread, so too did the concerns of copyright owners about photocopying and the negative impact that it was having on their livelihood.

Given the longstanding role that multilateral treaties have played in copyright law, it is not surprising that it did not take long for the problems created by the photocopier to be raised at the international level. As neither the *Berne Convention* (Brussels Act of 1948) nor the 1952 Geneva text of the *Universal Copyright Convention* ('UCC') dealt directly with reprography, one of the questions considered in the postwar period was whether there needed to be a third international treaty that specifically dealt with reprography. The question of whether or not and, if so, how international copyright law should respond to the 'reprography problem' dominated discussion at the international level during the 1960s and 70s. Indeed as Marks wrote in 1981, there

is probably no subject which has preoccupied the international copyright community over the last decade more than reprographic reproduction. It appears regularly on the agendas of international meetings, copyright literature abounds in articles by eminent scholars, and most developed

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1 Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Hill and Wang, 1994) 81.

2 It 'is difficult to detect, and unprofitable to sue, copyright infringers who make only single copies or a small number of copies for their own use', Melville B Nimmer, 'Project — New Technology and the Law of Copyright: Reprography and Computers' (1968) 15(3) *University of California Los Angeles Law Review* 939, 950.

countries of the world have been involved in internal debate at the national level on the subject.³

Notwithstanding the amount of time and effort devoted to the proposed treaty, the push for an international treaty ultimately failed. Despite this, however, the failed attempt to develop an international solution to the problems created by the photocopier, which is the focus of this article, is still an important and rewarding topic that deserves our attention today.

In some sense this might seem odd given that the history of copyright law is typically written either about disputes and their resolution and the way that this adds to copyright jurisprudence, or about the successful initiation, negotiation and completion of some legislative reform or international treaty. In this Whig history, there is little time for those policy initiatives, plans, Bills, or treaties that failed; for those efforts that were sidetracked by the illness of a Prime Minister, by the outbreak of war, or the successful lobbying by opponents. In part, this is because these failures do not become part of 'the law'. To the extent that copyright history is written from the perspective of someone advising a client about the state of the law at a particular point of time, this is understandable. However, if a history of copyright law is written from a different perspective, there are many reasons why we should expand our focus of attention to include the failures and wrong-turns that have occurred over time. And this is particularly the case with the failed attempt to introduce a sui generis international treaty to regulate photocopying.

There are a number of reasons for this. As well as being an interesting topic in its own right, the attempt to develop an international photocopying treaty is also important because it tells us a lot about the aspirations for copyright and how these have changed over time. A study of this nature is also important because while a new treaty may not have eventuated, nonetheless the process of attempting to develop an international solution to the reprography problem saw conceptual problems resolved, doctrinal solutions developed, policy clarified, and ideas shared. One of the most important being that it resolved the uncertainty that existed at the time about whether reprographic copying was an infringement of a copyright owner's rights. An examination of the efforts to develop a reprographic treaty is also important because this was a period of history which saw a number of important changes in copyright law; including the politicisation of copyright and the formation of new alliances and factions. While these changes may not have been a direct product of the international negotiations, nonetheless they were clearly exemplified in the negotiations.

An historical examination of the attempt to develop an international treaty to deal with the reprography problem also offers insights into some of the problems currently confronting copyright law and policy. This is because the international efforts to deal with the transitory, decentralised and ephemeral nature of the photocopy offer important lessons for current debates: particularly in terms of

3 Colin B Marks, 'Reprographic Reproduction: The Australian Solution' (1981) XV(3) *Copyright Bulletin* 12.

how the law should respond to the proliferation of digital technology amongst consumers and the subsequent explosion of unauthorised file sharing. This is the case in relation to the discussions about agency and authorisation for the purposes of copyright infringement, the relative advantages and disadvantages of using taxes and levies to police copying, and the bureaucratisation of copyright and the role that this might play in dealing with decentralised copying. The fact that workable solutions were developed at the national level — in spite of the international vacuum — also offers some important lessons for contemporary copyright law; particularly in light of the current impasse at WIPO and the WTO. An understanding of the way that copyright law attempted to deal with photocopying at the international level also puts us in a better position to deal with the problems that we will inevitably face in the future.

It is the aim of this article to explore the attempts to develop a legal response to photocopying at the international level in the 1960s and 1970s. In outlining the impetus for and the ultimate decline of the proposed treaty, the article also aims to highlight some of the changes instigated by these efforts and the lessons they offer us today. While the detail, complexity and length of the international efforts mean that it is not possible to look at many important features in detail, nonetheless it still offers insights into a rich and largely neglected area of copyright history that is deserving of further attention.

II TOWARDS AN INTERNATIONAL PHOTOCOPYING TREATY

Photocopying was first recognised as a problem at the international level in 1961 at a joint meeting of the Intergovernmental Copyright Committee (which was established by UNESCO to look at copyright-related matters) and its *Berne* equivalent: the Executive Committee of the Berne Union.⁴ As a first step in resolving the ‘reprography problem’ (as it came to be known), the Joint Committee commissioned a study of the way that photocopying was regulated in Member States.⁵ The resulting report revealed differences in terms of the *amount* that could be copied, *when* the copying could be undertaken, the *types* of works that could be copied, and the *purpose* of the copying (including fair dealing, fair use, copying for personal, private, non-profit or non-commercial uses, and for conservation of collections, replacement of loss pages and the furnishing of photocopies to users).⁶ In some instances, the defences did not apply to photocopying at all. For example, Brazil only allowed ‘the handmaking of a copy’,⁷ Japan only allowed

4 Intergovernmental Copyright Committee, *Photoduplication of Copyrighted Material by or for Libraries, Documentation Centres and Scientific Institutions*, 6th sess, Agenda Item 7.1, UN Docs IGC/VI/8 and WS/0761.96 (28 July 1961) [1].

5 Gerhard J Dahlmanns, ‘Reprography and Copyright: The Joint Meeting of the Committees of the Universal and Berne Copyright Conventions’ (1974) 2 *International Journal of Law Libraries* 55, 57.

6 Intergovernmental Copyright Committee, *The Photographic Reproduction of Protected Works by or on Behalf of Libraries, Documentation Centres, Scientific Institutions*, 7th sess, Agenda Item 6.3, UN Docs IGC/VII/6 and WS/0963.76 (10 December 1963), published as ‘Photographic Reproduction and Copyright’ (1964) XVII *Copyright Bulletin* 29.

7 *Civil Code of Brazil* 1916, art 666.

copying by other than ‘mechanical or chemical methods’,⁸ Korea limited the right of reproduction to methods other than ‘mechanical or chemical methods’,⁹ while Turkey drew a distinction between reproduction by users (which was allowed) and reproductions by a third person on order (which had to be in longhand or by typewriter).¹⁰

The Report was presented to the Joint Meeting of the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union in 1963.¹¹ While the different approaches adopted at the national level meant that the task of developing an international treaty was going to be very difficult, nonetheless the Joint Meeting decided that it was still useful to ‘elaborate an international instrument concerning photoduplication which would state certain general principles for regulation in this field’.¹² There was also agreement that it would be useful ‘to elaborate an international instrument which would state certain general principles for regulation in this field’.¹³

In 1965, the Joint Meeting recommended that the Directors of UNESCO and the Berne Union should convene a Committee of Experts to formulate recommendations on a substantial international instrument to deal with photocopying.¹⁴ The Joint Meeting noted that it would be very difficult ‘to find intermediate terms capable of bringing national laws, which at present are widely divergent, completely into line’ and to ensure ‘strict and effective control over the application of the ... principles, particularly with regard to certain commercial undertakings specializing in photographic reproduction’.¹⁵ While this did not prevent the Committee from making a number of recommendations, the Committee did highlight a problem that was to bedevil and ultimately undermine the push for an international solution to the problems created by the photocopier.

The implementation of the recommendations of the 1965 Meeting was delayed as efforts focused on the revision of the *Berne Convention*, which was finalised in Stockholm in July 1967. While the Stockholm revision conference did not directly deal with reprography, it did make changes that had important consequences for photocopying. One of the most important was that it introduced, for the first time, a general right of reproduction into international copyright law. This is found in art 9(1), which provides that ‘[a]uthors of literary and artistic works protected by

8 *Copyright Law of Japan 1899*, art 30(1), quoted in *The Law of Copyright of Japan*, UN Doc UNESCO/D.A/5 JAPAN (20 May 1949) 9.

9 *Copyright Law of Republic of Korea 1957*, art 64(1).

10 *Law on Intellectual and Artistic Works* [Law No 5846 of 5 December 1951] (Turkey) art 38.

11 Intergovernmental Copyright Committee, *Resolutions*, ICC Res 4/47(VII), 7th sess, UN Docs IGC/VII/14, CP/XI/15 and WS/0164.94(CUA) (31 January 1964).

12 *Ibid* 7–8 [3].

13 *Ibid*. This may have been a product of the disquiet building at the time, primarily as result of the actions of developing countries, which led to the so-called crisis in international copyright. See Ronald Barker, *International Copyright: The Search for a Formula for the Seventies* (Publishers Association, 1969).

14 Intergovernmental Copyright Committee, *The Photographic Reproduction of Protected Works by or on Behalf of Libraries, Documentation Centres and Scientific Institutions*, 8th sess, Agenda Item 7.1, UN Docs IGC/VIII/5, CP/XII/5 and CS/0965.9/CUA.28(WS) (15 October 1965) 1–2 [2].

15 *Ibid* annex A, 27; see also Intergovernmental Copyright Committee, *Reports*, 8th sess, UN Doc IGC/VIII/16 and CS/1265.44/CUA.28 (WS) (14 January 1966).

this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form'. The revision conference also introduced art 9(2), which contains the three-step test for defences.¹⁶

With the Stockholm revisions concluded, work recommenced on the proposed international instrument. Following the recommendations of the 1965 Joint Meeting, a Committee of Experts was formed in 1968 to develop solutions to the problems posed by the photocopier. While the Committee of Experts did not consider whether there should be an international instrument (although it was implicit in their remit that there was to be an international response of some sort) they did say that that 'it was for national law and legislation to lay down conditions for the photographic reproduction of works protected by copyright and in so doing to aim a fair balance between the interests concerned'.¹⁷ Guided by these general principles, the Committee of Experts provided a series of principles that they believed national laws should take into account when dealing with reprography. Specifically the Committee of Experts said that national laws should allow photographic reproductions to be made for the personal use of the reproducer; that non-profit making libraries should be able to provide one copy free for each user (limited to a single article, no more than a reasonable proportion of a book); and that it should be possible to make reproductions for teaching purposes in educational and training enterprises with a non-commercial aim.¹⁸

In April 1969, the report of the Committee of Experts was forwarded to Member States for comment. Member States were also asked if they wished the General Council of UNESCO to adopt an international instrument. While there was in principle support for an international regulation, the countries surveyed were 'by no means unanimous regarding the advisability of adopting a specific instrument'.¹⁹ The clearest support for an international treaty came from Kenya, Chile, Cyprus, Finland and Nigeria who believed that international regulation was necessary to ensure a uniform approach.²⁰ In contrast, the Belgian government suggested that while 'the adoption of any such instrument [was] out of the question in the present state of the preparatory work', if one was to be adopted, it should be incorporated in the *Berne Convention*. Bulgaria noted that the recommendations made by the 1968 Committee of Experts could be accommodated within the general terms of art 9(2) of the Stockholm revision. The British government also argued that it was not possible to provide anything more specific than the vague language of art 9(2). As the British response said:

16 Svante Bergstrom, Report on the Work of Main Committee I (Substantive Provisions of the *Berne Convention: Articles 1 to 20*) in *Records of the Intellectual Property Conference of Stockholm (1967)*, (World Intellectual Property Organization, 1971) vol 2, 1131, [85] (photocopying was used as an example of a situation where the three-step test might be satisfied).

17 The 1968 Committee of Experts (and its recommendations) are attached to Intergovernmental Copyright Committee, *Photographic Reproduction of Copyrighted Works*, 11th sess, Agenda Items 9.1 and 6.1, UN Docs IGC/XI/5, BEC/ES/3, LA-71/CONF.4/5 and 16C/20 (31 August 1971) annex II.

18 *Ibid* annex II, 8 (Appendix).

19 *Ibid* 6 [20].

20 *Ibid*.

the whole question of photographic reproduction is one of the most intractable problems calling for solution not only nationally but internationally. British experience of the Stockholm Conference for revision of the *Berne Convention* suggests that it would be impossible to agree on binding treaty obligations on this subject except in broad terms, such as for example Article 9, paragraph 2, of the Stockholm text.²¹

In December 1969, the findings of the Committee of Experts were presented to the Joint Meeting of the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union.²² At this meeting, the Chair said that despite the substantial progress that had been made, the situation had not advanced enough for the Committees to make a decision.²³ The 16th Session of the General Conference of UNESCO (1970), which had been asked to consider formulating ‘an international regulation concerning the photographic reproduction of copyright works’, reached a similar conclusion when it decided to postpone discussions of the desirability of adopting an international regulation concerning the photographic reproduction of copyright works.²⁴

While the 16th Session of the General Conference of UNESCO followed the pattern of wait-and-see that was becoming so familiar at the time, it provided some insights into the issues that were underpinning the discussions about a possible international treaty. This is because it included a report by Professor Henri Desbois (from the University of Paris II) on the ‘technical and legal aspects of photographic reproduction of copyrighted works’, which provided a sustained account of the pros and cons of a possible international instrument.²⁵ Desbois said it was important that the solutions differed as little as possible between countries. He also added that as ‘cultural needs now transcend the boundaries of national sovereignty, it may seem desirable that ... the basic principles to be followed by contracting States should be embodied in an International instrument’.²⁶ In so doing, Desbois questioned the recommendation of the 1968 Committee of Experts that national legislatures should be given free reign in how they responded to the photocopier. As he said:

[T]he question arises whether States will retain unfettered freedom of action, allowing them to formulate such regulations in purely national terms, or whether, on the contrary, they will be obliged to confirm

21 Ibid.

22 Intergovernmental Copyright Committee, *Photographic Reproduction of Copyright Works*, 10th sess, UN Docs IGC/X/18 and CP/XIV/17 (1969), reproduced in (1970) IV *Copyright Bulletin* 12.

23 Ibid 20.

24 *Records of the General Conference: Resolutions*, UNESCO Res 5.132, 16th sess, UN Doc CFS.71/VI.16/A (12 October – 14 November 1970) 65; see also, Intergovernmental Copyright Committee, *Advisability of Adopting an International Instrument Concerning the Photographic Reproduction of Copyright Works*, 16th sess, Agenda Item 22, UN Doc 16C/20 (31 August 1970).

25 *Preliminary Study of the Technical and Legal Aspects of the Photographic Reproduction of Copyright Works*, UN Docs IGC/XI/5, BEC/ES/3, LA-71/CONF.4/5 and 16C/20, annex II.

26 Ibid [18].

to directives set out in an international instrument adhered to by their respective governments.²⁷

For Desbois, the first approach, which is effectively what the 1968 Committee of Experts recommended,

might turn out to be no more than a pious aspiration, since States will be free to follow or to disregard such advice as may be given to them and, if some of them do decide to follow it, this ... may give rise to disparities between the different national regulations.²⁸

While Desbois offered a number of arguments in support of an international convention, he also discussed the advantages of a less binding response. In particular, he suggested that consideration should be given to something less formal than a binding international instrument; possibly something like the Model Copyright Laws which had been created for developing countries, or the adoption of general principles of the type adopted by General Council of UNESCO. As he said, the belief that it was necessary to

maintain the national legislator's sovereignty in this field unimpaired while at the same time promoting the observance of a certain number of guiding principles would seem, as things are at present, to argue in favour of a solution by recommendation rather than convention, owing to the considerably greater degree of flexibility accorded by the first of these two methods.²⁹

This led Desbois to suggest that it was important not to overlook the possibility of solving the problem of the photographic reprographic of copyrighted works by a recommendation, as distinct from binding treaty obligations.³⁰ The chief advantage of a non-binding international instrument was that it would have left

each state entirely free to implement their provisions in the manner best suited to its particular circumstances. They would appear to provide a suitable method of regulating unusually complex questions which do not lend themselves to a uniform solution in every country.³¹

Another reason why there was no need for a separate treaty was that the Stockholm revision conference had 'laid the foundation stone'³² for national legislation. As Desbois argued, accommodating the needs of users might count among the special cases that individual countries use to limit the exclusive rights of reproduction in art 9(1). The difficulty lay in the choice of method, given the abstract wording of the Stockholm text.

27 Ibid.

28 Ibid.

29 Ibid [19].

30 Ibid.

31 Ibid.

32 Ibid.

Reprography was next discussed at the international level at the 1971 Joint Meeting of the Committee of the Berne Union and the Intergovernmental Copyright Committee.³³ While the Joint Committee felt that it was not in a position to make any final decisions,³⁴ it did say that the international response should take the form of non-binding recommendations that could serve as a guideline for national legislation, rather than a formal treaty.³⁵ Following this, the Joint Meeting said that the UNESCO and WIPO secretariats should formulate specific proposals for international recommendations, which would act as a guide to national legislation. While the Joint Committee praised the work of the 1968 Committee of Experts, it said that the work needed to be updated (particularly in light of the revisions in the *Berne Convention* and the *UCC* that had taken place in 1971).

The shift away from an international treaty towards non-binding recommendations that began with the 1971 Joint Meeting was given further impetus when the 17th Session of General Council of UNESCO (1972) resolved that it would be desirable to prepare an international instrument on the question of copyright and photographic reproduction, and that ‘such an instrument should take the form of a recommendation to Member States’. The clear indication by the Joint Committee in 1971 and the General Council of UNESCO in 1972 that an international response should take the form of non-binding recommendations marked an important change in the international debates about reprographic copying. While there had never been a clear consensus in favour of a separate international treaty, it had always been treated as a serious option. By the end of 1972, however, it was no longer considered a viable way of responding to the problems created by reprography. Instead, it was decided that the international response should take the form of recommendations to help Member States when responding at the national level. With this decision made, attention shifted to determining the content and detail of these recommendations.

To this end, a Working Group on Reprographic Reproduction of Works Protected by Copyright was established by UNESCO and WIPO.³⁶ The Working Group consisted of seven delegates from international non-governmental organisations representing authors, publishers, and users of reprographic equipment. In addition, four specialists in the ‘reprographic problem’, as well as three specialists from developing countries were appointed as consultants.³⁷ The Working Group was asked to look at the findings of the 1968 Committee of Experts, particularly in

33 The *Berne Convention* and the *UCC* were revised in 1971, however neither of the final texts expressly dealt with reprography. *Conference for Revision of the Universal Copyright Convention: Introductory Report*, UN Docs INLA/UCC/4 and INLA/CONF.11/5 (21 May 1971) 4 [25].

34 As reported in: General Conference of UNESCO, *Resolution Concerning Photoreproduction: Advisability of Adopting an International Instrument Concerning the Photographic Reproduction of Copyright Works* (1973) 7(2–3) *Copyright Bulletin* 24, 34 [51].

35 *Ibid* [53]. See World Intellectual Property Organization, *Report of the Working Group on Reprographic Reproduction of Works Protected by Copyright*, UN Doc UNESCO/WIPO/RP.2/6 (21 September 1973) [4].

36 World Intellectual Property Organization, *Report of the Working Group on Reprographic Reproduction of Works Protected by Copyright*, UN Doc UNESCO/WIPO/RP.2/6 (21 September 1973).

37 *Ibid* [5].

light of the 1971 revisions in the multilateral copyright conventions. They were also asked to look at industrial and commercial copying.

In opening the May 1973 meeting of the Working Group, Barbara Ringer, who was Director of the Copyright Division of UNESCO and soon to be Register of Copyright in the United States of America, noted that it was five years since the Committee of Experts had provided its report and that ‘despite the lack of any progress in finding international solutions to the problem in the intervening period, there has been an enormous increase in the number of photocopying machines in use’.³⁸ Continuing previous practice, the members of the Working Group exchanged information about recent developments at the national level, such as the agreement recently signed between the Swedish Government and organisations representing authors and publishers in relation to the reprographic reproduction of copyright works in schools.³⁹

The Working Group set out to develop a series of recommendations that would represent the ‘principles which the participants in the Working Group had agreed should be considered in elaborating national law.’⁴⁰ One of the features of the Working Group’s discussion about the content of the recommendations was the active role played by publishers and authors’ groups. While the findings of the 1968 Committee of Experts had proceeded in a fairly non-partisan fashion, the meeting of the Working Group was characterised by a series of hostile exchanges, primarily between copyright owners — such as the International Confederation of Societies of Authors and Composers (‘CISAC’) and the International Publishers Association — and user groups. For example, the representative from CISAC criticised the Working Group because it was operating on the basis that copyright was an obstacle to the diffusion of culture. In contrast, the CISAC representative believed that ‘when it came to photocopying there had never been a single instance in which this had been the case. On the contrary, he felt it was true to say that photocopying constitutes an obstacle to the legitimate exercise of copyright.’⁴¹ Copyright owners attempted to discredit the findings of the 1968 Committee of Experts, arguing that their recommendations had ‘not been adopted on a systematic basis and did not in themselves represent a definitive document.’⁴² As the representative from CISAC said, the Working Group appeared to have been called on ‘to legalize certain usages that, while currently illicit under copyright legislation, are in fact being carried out on a large scale.’⁴³ Adopting an argument that would reappear again and again, he said that ‘once certain usages were accepted in the name of dissemination of culture, they would be likely to proliferate in quantity and expand in scope.’⁴⁴

38 Ibid [6].

39 Ibid [9]–[16].

40 Ibid [93].

41 Ibid [48].

42 Ibid [19].

43 Ibid [20].

44 Ibid.

While the 1968 Committee of Experts had been able to reach agreement on a range of issues, the active interest taken by copyright owners in the reform process changed the dynamic of the Working Group. The nature of the change is captured in the fact that in an attempt to progress discussions, the Chair of the Committee (Justice Torwald Hesser of the Supreme Court of Sweden) put forward what he thought was a non-controversial proposition that ‘photocopying for personal use is free for all purposes and in all countries.’⁴⁵ While this had been accepted by the 1968 Committee of Experts, it was rejected outright by the International Publishers Association, who rebuked the Chair’s proposition that one copy of an article from a journal or a reasonable part of a book could be made free of charge for personal use, saying that it would ‘soon result in many books never being published.’⁴⁶ Publishers defended themselves against the idea that there was no harm in copying a single article, by arguing that it was only possible to publish a particular article because of the publication of the other articles.

As well as highlighting the now familiar partisan nature of copyright debates, the discussions of the Working Group also exemplify important rhetorical shifts that happened in the 1970s, which ultimately played an important role in shaping the way that many Member States responded to the reprographic problem. As part of the discussions about the extent to which users should be able to make non-infringing photocopies, user groups noted that they had ‘always spoken of reasonable parts, and had never claimed the right to make reproductions of the full text of a book.’⁴⁷ To support this argument, users said that

documentation is required to guarantee a free flow of information, which is one of the basic principles of Unesco. To foster the progress of research and development, it is important that researchers be allowed to make single copies of journal articles in their field, and that this privilege be extended to libraries serving them.⁴⁸

That is, in order to justify the making of non-infringing copies, user groups highlighted the important role that photocopying plays in enhancing access and dissemination of information.

Faced with the attempt by user groups to gain the moral high ground, the International Publishers Association responded saying that they were ‘absolutely in favour of the free flow of information’.⁴⁹ Where they differed from user groups, however, was in terms of how this was to be achieved. In particular, publishers argued that while a decision to allow users to make free copies of articles and parts of books might promote the flow of information in the short term, it would ultimately undermine it. This was because photocopying threatened ‘the very existence of publishers who [were] responsible for the dissemination of

45 Ibid [25].

46 Ibid [31].

47 Ibid [32].

48 Ibid [33].

49 Ibid [34].

information in the first place.’⁵⁰ This meant that if exceptions were promulgated that allowed users to copy articles or part of books, it would undermine the financial viability of publishing which would eventually lead to the reduction in the number of articles and books that were able to be published. By responding in this way, copyright owners effectively countered the arguments that had been made by users of reprography. They also helped to shift the focus of debate away from the important role that photocopying played in the dissemination of information — which was agreed upon — to the question of how it was to be paid for. This is reflected in the comment by the International Publishers Association that ‘if photocopying was essential for free communications and if researchers needed photocopies, it was up to the government and not the publishers to bear the costs.’⁵¹ While the Working Group did not and clearly could not reach consensus on this issue, the exchanges at this meeting highlighted the way reprography would be approached for the remainder of the century.⁵²

Despite the differences, the 1973 Working Group was still able to develop a series of recommendations. The Working Group thought that an ‘international instrument in the form of a recommendation to States was feasible and desirable’.⁵³ While the Working Group continued to recognise the positive role that reprographic reproduction was able to play in ‘scientific and cultural development of mankind’, it also stressed — no doubt at the insistence of the owner groups — that the overarching principle was that the ‘legitimate interests of authors require that fair remuneration be paid for the reprographic reproduction of their copyright’.⁵⁴ The remainder of the recommendations outlined situations where countries may wish to create exceptions to this general principle. These non-obligatory ‘special cases’ included the making of single copies for personal use, copying by a library or documentation centre on behalf of an individual, and copying for educational use.⁵⁵

The meeting of the Working Group was followed in December 1973 by a Joint Meeting of the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union.⁵⁶ Given the experience of the Working Group, it is not surprising that the discussions at the 1973 Joint Meeting were longwinded and circular.⁵⁷ It was clear from the discussions that many Member States were uncertain both about the state of their domestic law and also about what the law ought to be. While it was accepted that the international response should consist of a series of recommendations, there was disagreement about the form that these should take. There was limited support from Denmark, Sweden and (to

50 Ibid.

51 Ibid. See also Gert Kolle, ‘Reprography and Copyright Law: A Comparative Law Study Concerning the Role of Copyright Law in the Age of Information’ (1975) 6 *International Review of Industrial Property and Copyright Law* 382, 413.

52 World Intellectual Property Organization, *Report of the Working Group on Reprographic Reproduction of Works Protected by Copyright: Report*, UN Doc UNESCO/WIPO/RP.2/6 (21 September 1973).

53 Ibid annex A, recommendation 8.

54 Ibid annex A, recommendation 1.

55 Ibid annex A, recommendations 2–6.

56 Intergovernmental Copyright Committee, *Report Submitted by the Secretariat and Adopted by the Committee*, 12th sess, UN Doc IGC/VII/17 (15 February 1974).

57 Dahlmans, above n 5, 58.

a lesser extent) Japan for the recommendations of the 1973 Working Group. As Sweden argued (no doubt prompted by the fact that the licence system allowed for photocopying in schools), ‘to wait for the individual states to adopt solutions on the national level and then to try to find a common denominator would mean that the cart [was] put before the horse.’⁵⁸ The International Publisher’s Association and CISAC were strongly in favour of the meeting making a decision. They argued that three general principles could be agreed on, namely: that reprographic reproduction is reproduction; that equitable remuneration was necessary; and that general, freely negotiated agreements were needed.⁵⁹ While library organisations and documentation centres did not agree with these principles, they did express a desire for further work to ensure that any recommendations made would not be outdated before they were adopted.⁶⁰

By contrast, a second group of countries that had the majority of support (including Brazil, Tunisia, Canada, Austria, Kenya, Australia, Mexico Spain, Portugal, and India) argued that it was premature to adopt any recommendations at that point in time. This was because the recommendations would necessarily have been very general and as such would not have offered much assistance to states in drafting legislation. There was also a fear that if the recommendations of the Working Group were adopted, they would unduly restrict individual countries’ course of action.⁶¹ A third group which consisted of developing countries (Algeria, Brazil, India, Mexico and Senegal) with ‘others sympathizing’ said that ‘the problem of reprography was of no interest to developing countries and therefore the preparation of the recommendation was not of interest to them.’⁶² Given this, they asked that if recommendations were developed that they should not apply to developing countries.

Given the different views of the Member States as to the form that the international recommendations should take, it was clear that the recommendations of the Working Group were not going to be adopted. It also seemed unlikely that any solution would be reached. To resolve this impasse France (with the support of Italy, Switzerland, Hungary and Sweden) suggested that the Committee should adopt a general recommendation based on the principle of equitable remuneration, with the implementation of this principle being left to individual countries to decide. Ultimately, the Joint Committee took the safe option and recommended that the matter should be postponed until the next meeting.⁶³

Any remaining hope there might have been of there being an international solution to the reprographic crisis was quashed at the meeting of the Sub-Committees

58 Ibid 58–9.

59 Intergovernmental Copyright Committee, *Report Submitted by the Secretariat and Adopted by the Committee*, 12th sess, UN Doc IGC/VII/17 (15 February 1974) 9 [43].

60 Ibid [45].

61 Dahlmans, above n 5, 59.

62 Ibid.

63 Intergovernmental Copyright Committee, *Report Submitted by the Secretariat and Adopted by the Committee*, 12th sess, UN Doc IGC/VII/17 (15 February 1974) annex A, ‘Reprographic Reproduction of Works Protected by Copyright: Resolution 64 (XII)’ (agreed that there should be further detailed discussions). For discussion see Kolle, above n 51, 414–5.

held in Washington in June 1975. The views of the Canadian delegation to the Sub-Committee reflected the views of many countries at the meeting when they said that studies undertaken in Canada had reinforced the view of Canadian authorities on the difficulty of resolving the question of reprographic copying internationally. The Canadian Government was:

concerned with the extent to which a recommendation would influence the freedom of States to implement the international copyright Conventions. Moreover, the Canadian delegation was not in favour of detailed recommendations as it was for national legislation to achieve the necessary balance; and it would be necessary to have regard to many factors including the economic status of the country concerned.⁶⁴

The American delegation also argued against an international response primarily on the basis of the uncertainty created by the US Supreme Court decision of *Williams & Wilkins Co v United States*.⁶⁵ As the American delegation said, the

case not only ended without a definitive judicial ruling, but its outcome also deprived the Court of Claims decision of precedential value. Judicially the situation in the United States of America therefore seemed likely to remain unclear.⁶⁶

Similar sentiments were echoed by delegates from Germany, France, Australia, and by the Director General of WIPO.

The 1975 Joint Meeting of the Sub-Committees agreed that the onus was on each State to resolve the problems created by reprographic reproduction ‘by adopting any appropriate measures which, respecting the provisions of the [*Berne Convention and UCC*], establish whatever is best adapted to their educational, cultural, social and economic development’.⁶⁷ It was also agreed that the onus was on each State to decide whether and to what extent the various solutions put forward at the meeting could ‘be applied, in order to assure authors the protection of their economic interests offered by the Conventions.’⁶⁸ The Sub-Committee also recommended that States where reprographic reproduction was widespread

64 Sub-Committee of the Intergovernmental Copyright Committee on Reprographic Reproduction of Works Protected by Copyright, UNESCO, ‘Report’ (1975) 9 (2–3) *Copyright Bulletin* 18, 21 [17].

65 487 F 2d 1345 (1973). The question in the case was whether library practice of supplying single copies of journal articles to physicians was an infringement. The copyright owners succeeded at trial, but narrowly lost on appeal to the Court of Claims. The matter went to the Supreme Court, but after voluntary disqualification of one of the Justices, the Supreme Court was equally divided. Thus, the decision of the Court of Claims was affirmed.

66 Sub-Committee of the Intergovernmental Copyright Committee on Reprographic Reproduction of Works Protected by Copyright, above n 64, 22 [21]. See also Sub-Committees of the Executive Committee of the International Union for the Protection of Literary and Artistic Works on Reprographic Reproduction and The Intergovernmental Copyright Committee, *The Reprography of Works Protected by Copyright*, UN Doc IGC/SC.2/5 (7 May 1975).

67 Sub-Committee of the Intergovernmental Copyright Committee on Reprographic Reproduction of Works Protected by Copyright, above n 64, annex, 44, Resolution 1.

68 *Ibid* 44 [1].

could consider ‘encouraging the establishment of collective systems to exercise and administer the right to remuneration.’⁶⁹

The draft resolution of the Sub-Committee, which effectively shifted the forum in which the solution to the reprographic problem was to be resolved from the international domain to the national level, was adopted without any real discussion by the Joint Meeting of the Intergovernmental Copyright Committee and the Executive Committee of the Berne Union held in December 1975.⁷⁰ The Joint Committee also decided that it would no longer consider the question of reprographic copying. The Tunisian delegation summed up the mood of the Joint Committee when they said that ‘it was preferable for the matter not to be reconsidered by the governing bodies of UNESCO and WIPO in the near future.’⁷¹ Following these sentiments, the Committee ended the discussion that had begun in 1960 about the possibility of there being an international solution to the problems created by the photocopier.

III IS PHOTOCOPYING A ‘REPRODUCTION’?

While commentators have blamed the lack of action at the international level on developing countries,⁷² this was only one of a range of factors that contributed to the impasse that led the 1975 Joint Committee to abandon the search for an international solution to the photocopy problem. The starting point for this change of direction was the decision to shift away from an international treaty towards the more anodyne ‘recommendations’ that occurred in 1971.⁷³ A key factor that led to this change of direction was the clarification that reprographic copying was an infringement of the copyright owner’s rights. While it may come as a surprise today, one of the notable features of the discussions about photocopying during the 1960s was that it was not clear whether reprographic copying was a ‘reproduction’ and thus an infringement of copyright. As a commentator noted, the ‘law relating to the reprographic reproduction of copyright material [was] remarkably unclear. In most countries it [was] either undefined or in a state of flux.’⁷⁴ Three factors combined to create this confusion.

The first reason for the uncertainty about whether photocopying was a ‘reproduction’ can be traced to the way that the new(ish) technology was seen. More specifically, this was because when reprography was first considered at the international level, it was looked at on the basis that it was a method of reproduction

69 Ibid [2].

70 Intergovernmental Copyright Committee, *Report Submitted by the Secretariat and Adopted by the Committee*, 1st extraordinary sess, UN Doc IGC/XR.1/1971/17 (1 March 1976) 4 [26].

71 Ibid 6 [38].

72 See, eg, Barker, above n 13.

73 See text at above nn 34–6.

74 Dahlmans, above n 5, 57.

analogous to photography.⁷⁵ This followed the language of the Brussels text of the *Berne Convention* which spoke (in a different context) of ‘photographic works and works produced by a process analogous to photography.’⁷⁶ While there is no suggestion that this had a direct impact on the way that reprography as reproduction was seen, it is indicative of the uncertainty that existed about the new copying technologies.

The second factor that contributed to the uncertainty about whether photocopying was a form of reproduction was that when discussions about reprography began in the early 1960s, neither of the existing multilateral copyright treaties — namely the *UCC* (as settled in Geneva in 1952) nor the *Berne Convention* (Brussels Act of 1948) — expressly dealt with reprographic reproduction. As the Rapporteur to the Stockholm revision of *Berne* noted, while arts 9, 10 and 10*bis* of the Brussels text dealt with aspects of the author’s right of reproduction, ‘a general right of reproduction [was] not explicitly conferred on the author under the [Brussels’ text of the Convention].’⁷⁷

The third reason for the uncertainty over whether reprography was a form of reproduction flowed from the uncertainty that existed at the national level about the scope of the law. This was made clear in reports published in 1965 and 1970 which revealed the different approaches taken to ‘reproduction’, as well as the level of uncertainty about how ‘photocopying’ was to be dealt with under national copyright law. For example, of the 49 countries examined in the 1965 report, only four countries — Finland, the Federal Republic of Germany, Sweden and the United Kingdom — expressly mentioned reproduction by an ‘analogous process’. That is, they regulated photocopying on the basis that it was analogous to photography. While copyright law in a number of countries referred to ‘similar methods of reproduction’ (Finland, Sweden, Mexico, Norway, Rumania and Venezuela), a third group of countries only mentioned ‘photographic reproduction’ (Denmark, Finland, Federal Republic of Germany, Norway and Sweden) or ‘reproduction’ (including Czechoslovakia, France, Netherlands, USSR, Austria, Denmark, New Zealand, Pakistan and the United Kingdom). While the position had improved by the time the 1970 report was completed, there was still a degree of uncertainty as to whether or not, and also the extent to which, domestic copyright law covered photocopying.

While the Joint Committee of the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union attempted to resolve the uncertainty about whether photocopying was a form of reproduction for the purposes of copyright law on a number of occasions (even going so far as to recommend that it should be made clear that ‘reproduction should be regarded

75 See, eg, *Report Adopted by the Intergovernmental Copyright Committee and the Permanent Committee of the International Union for the Protection of Literary and Artistic Works*, UN Docs IGC/VII/13 and CP/XI/14 (31 January 1964) annex, ‘Resolution concerning the Photographic Reproduction of Copyrighted Works No 4/47 (VII)’. Reproduced as *Records: Intergovernmental Copyright Committee Seventh Session, New Delhi* (1964) XVII *Copyright Bulletin* 10, 23.

76 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 26 June 1948, 331 UNTS 217 (entered into force 1 August 1951) art 2(1).

77 Bergstrom, above n 16, 1142 [64].

as covering both photography and processes analogous to photography'),⁷⁸ ultimately the issue was only resolved when in 1967 the Stockholm revision of *Berne* introduced the general right of reproduction in art 9(1). Similar provisions were introduced in the Paris revision of the *UCC* in 1971. While there had been considerable uncertainty about whether reprographic copying was a reproduction for the purposes of copyright law, as Barbara Ringer said in 1975, there was now no doubt that art IVbis of the *UCC* and art 9(1) of the *Berne Convention* applied to reprographic reproduction.⁷⁹

One of the consequences of the introduction of art 9(1) was that it ended the uncertainty about whether copying by photocopier was a reproduction. It also played an indirect role in the decision to abandon the efforts to introduce a sui generis reprographic treaty. The reason for this was that with the clarification that reprographic reproduction was a form of reproduction, commentators began to argue that there was no need to develop a separate treaty. As the observer of the International Writers Guild suggested, '[t]here was no need to interfere with the Conventions or to establish a new instrument: this could lead to the idea that the Conventions did not cover reprography.'⁸⁰ A similar sentiment was raised by the Senegalese delegation at the 1975 Joint Committee meeting who said that 'since reprography was only a form of reproduction, it should be treated as such.'⁸¹

The clarification that photocopying was a form of reproduction marked an important turning point in the international copyright discussions. In particular, it saw the focus of attention shift to a new question: how were authors to be compensated when their works were copied? While discussions about the proper state of exceptions — which was the first substantive issue to be discussed in any detail — continued in the background, the main focus of attention was on the mechanisms that might be used to compensate authors. The resulting discussions and sharing of national solutions about how authors might be compensated for photocopying — which ranged from discussions about taxation and machine levies through to inquiries about collective administration — provide an important insight into the bureaucratisation of copyright and the myriad of forms that this has taken. These discussions (which are beyond the scope of this article) also show that the particular mechanisms developed to compensate authors are closely linked to pre-existing fiscal, constitutional, institutional and cultural arrangements and expectations of individual countries.

78 Intergovernmental Copyright Committee, *The Photographic Reproduction of Protected Works by or on Behalf of Libraries, Documentation Centres and Scientific Institutions*, 8th sess, UN Docs IGC/VIII/5 and CP/XII/5 (15 October 1965) annex A, 26 [1].

79 Sub-Committee of the Intergovernmental Copyright Committee on Reprographic Reproduction of Works Protected by Copyright, above n 64, 28 [46].

80 *Ibid* 25 [31].

81 *Ibid* 20 [15].

IV CONCLUSION

Despite over 15 years of contracted and lengthy discussions, the attempt to develop an international solution to the photocopy problem was a failure. Faced with the realisation that it was highly unlikely that an international solution would be developed, the international authorities effectively abrogated responsibility for finding solutions to the problems created by reprography to the national level. One of the consequences of this was that countries were relatively free in how they responded to photocopying at the national level. As the 1977 Whitford Committee Report on Copyright noted, the

international conventions allow a fair amount of discretion as regards national exceptions to the requirements that copyright works should be protected against unauthorised reproduction. There is no likelihood of international measures to deal with the reprography problem being agreed in the near future.⁸²

While the push for an international solution to the reprography problem failed, nonetheless since the mid-1980s there have been relatively few complaints either from copyright owners (about rampant piracy) or users (regarding the uncertainty about how much they can legitimately copy). While this can be attributed in part to the fact that copyright owners and users have had new (digital) problems to contend with, it is also a product of the success of the regimes that were developed at the national level. The fact that Member States were able to resolve the reprography problem in this international vacuum tells us something about the relationship of national and international law. It should also make us less nervous about the impasse that is currently bedeviling international copyright law.

While the only substantive legacy of the 15 year push to establish an international solution to the reprographic crisis was a vague recommendation that Member States should consider adopting some form of collective administration, it is still important insofar as it tells us something about the way that copyright law responded to and interacted with the photocopier. Indeed, if we shift away from the discussion about the form that the international response should take, we can see that the discussions at the international level occurred in three stages which were largely replicated at the national level. The first considered whether the existing defences could and should apply to machine-based copying. This discussion was underpinned by a desire to ensure that the potential of the new technologies to improve access to information was not unnecessarily hindered by copyright law. While it might be logical to assume that this was a secondary question that only needed to be addressed once preliminary questions were resolved, it was the first issue that was discussed at the international level. This was followed by discussions about whether or not photocopying was an infringing reproduction. While this was not discussed in any real detail, and was incidentally resolved by the Stockholm revision of *Berne*, nonetheless it was an important stepping

82 Whitford Committee, *The Whitford Committee Report on Copyright and Designs Law*, Cmnd 6732 (1977), 78 [24].

stone in the normalisation of photocopying in copyright law. With this answered, attention then shifted to determining how copyright owners were going to be compensated for photocopying. While there may not have been an international solution to the reprography problem, the sharing of ideas and potential solutions that occurred in the international fora played an important role in helping to answer this question. In this sense, while the push for a sui generis photocopying treaty may not have eventuated, nonetheless it still forms an important part of the development of 20th century copyright law.