ARCHIVISTS, USERS, AND THE COPYRIGHT ACT, 1968

by Michael Saclier

I

In this journal in 1966[1] and again in 1971[2] Professor Geoffrey Sawer commented on the matter of "Copyright in letters not published at the author's death". In the first of these short articles Professor Sawer ran through the basic provisions of the copyright law then in force and predicted that the situation would remain essentially the same after the enactment of the new legislation. In the second article he examined the provisions of the *Copyright Act* 1968[3] in relation to this type of material. Professor Sawer's earlier article did include some tentative suggestions as to how the law could be changed and it is those suggestions which provided the original impetus for a series of events, the latest of which is the writing of this article.

At the meeting of the Australian Advisory Council on Bibliographical Services in August 1974 it was mentioned that the committee of enquiry set up by the Australian Government to inquire into reprography in its effects on copyright (the Franki Committee) was prepared to receive submissions on any aspect of the copyright law. I therefore drew the Council's attention to Professor Sawer's articles and suggested that this would be a good opportunity to make a submission on the subject.

The Standing Committee of A.A.C.O.B.S. at its meeting on 3rd October, 1974 placed the ball right back in my court by inviting me to convene a sub-committee consisting of Mrs P. Fanning of the National Library, Mr R. F. Doust of the Library of N.S.W. and Mr R. C. Sharman of this journal and the State Library of S.A. to prepare a submission. Agreeing to do so I contacted the other members and — in my innocence — offered to prepare a draft for discussion. This I eventually did and with some modifications made at their suggestion this has gone forward to the Franki Committee from A.A.C.O.B.S. "as a statement of the position prepared by an expert committee",[4] and the Committee was invited to use the report as a resource document.

What I had not bargained on in offering to write a draft was the complexity and variety of implications of the *Copyright Act* for archivists and manuscript librarians and the users of their collections. These implications are so significant that I feel they should receive wider publicity amongst the profession than they may otherwise get — hence this article. Sections III to VI inclusive are largely the submission as it went forward to the Franki Committee.

II

In talking to archivists and academics about copyright I have found that some misconceptions are widespread and that an even more general vagueness exists. I think, therefore, it might be advisable to begin with a brief comment on some aspects of copyright. To those who are better informed I apologise in advance and invite them to skip this section.

First, copyright *is concerned with* the form of words used in a document (or "work" to use the term employed ubiquitously in the Act and literature) and not with the content. A paraphrase, therefore, may constitute an infringement of copyright if it is too close to the original, whereas a statement of the content of (say) a letter, which bears no recognizable similarity to the form of words used in the original will not.

Second, copyright (as embodied in the Act) *is* the exclusive right to do certain things in relation to a work, most importantly to publish or to license another to publish the work — s. 31(1). This extends to the publication of a "substantial" part of a work [s. 14(1)(a)] and of course carries the corollary of the right to forbid the publication of the work.

Third, because s. 50 and s. 51 detail the circumstances under which it is *not* an infringement of copyright to make copies of published and unpublished works (whether manually or mechanically) the Act makes it an infringement to make such copies under other circumstances. Thus, although we tend to think of copyright in the traditional sense of a system governing publication, the Act in fact extends it far beyond this. Bearing these points in mind, let us now look at the way copyright affects the keeper and the user of unpublished works or, if you prefer, archives and manuscripts.

III

It would probably be an acceptable generalisation to say that copyright is intended to ensure that the pecuniary value of the production of a creative mind is not lessened by the uncontrolled multiplication of copies of the work to the detriment of the author or his heirs and assigns. For this reason both the *Copyright Act* 1968 and international agreements to which Australia is a party[5] concentrate upon works written for the purpose of publication.

There is, however, another class of material which, although treated under the Act and its associated body of case law in exactly the same way as a novel, play or poem, is in fact of a completely different nature. This class includes letters, memoranda, diaries or journals, minutes of meetings of groups and organizations, reports and other documents prepared for the internal purposes of an organization, and financial and other business records of organizations.

All the members of this class (referred to hereafter as "non-literary manuscripts") share one characteristic — a very clear presumption in the absence of evidence to the contrary that they were *not* written with publication in view. In general they share a second characteristic which is that they possess little or no value in terms of the rights comprising copyright, particularly the "exclusive right . . . to publish the work".

The exceptions to this rule — for example the collection of letters or the diary which, because of the identity of the author or the contents forms a viable publishing property — will be dealt with later. It need only be remarked here that, *economically,* even these exceptions, because of their limited commercial appeal, cannot be placed in the same class as a novel or play.

The purposes of this article are, first, to examine the law as it stands at present in relation to non-literary manuscripts and to point out its shortcomings and, second, to suggest ways in which these shortcomings and the problems which arise from them may be remedied while still protecting legitimate interest.

IV

Let us begin by considering the relevant provisions of the Act in terms of their literal meaning which is, of course, the only way a court can consider them and the way in which they should be observed by archivists, manuscript librarians and the users of records.

Section 51(1) forbids a librarian to make a copy of a letter[6] (or, given the tenor of s.14, any "substantial part" of a letter) for a scholar unless certain criteria of time are met. It also forbids the scholar to make such a copy for himself. The time factors involved are (a) that the letter must have been written more than seventy-five years ago *and* (b) that the writer must have been dead for more than fifty years. Unless the permission of the owner of the copyright has been obtained, this provision means that a scholar visiting (say) the National Library of Australia on Monday, 1st December, 1975 cannot effectively use any letter written by a living person or one who died subsequent to 31st December, 1923.[7] Nor may he effectively use any letter written after 30th November, 1900, even if written by a person who died before 31st December, 1923.

The word "effectively" should be emphasised since, to allow a scholar to read but not to copy (whether by hand or mechanically) for later study and comparison, is in reality to deny him worthwhile access to the document.

There is a further aspect of this sub-section which is perhaps of a more debateable nature. That is, how far is the librarian or archivist to be held responsible for ensuring that the reader does not make a copy of a document, the copying of which is forbidden? It has been put to me that some librarians have in the past considered the question and have concluded that while they cannot make copies of such documents for readers or facilitate the reader's doing so by providing public copying machines, they were not required to police the Act by supervising or checking on the note-taking of the reader, even if this were practicable.

This is a difficult point and, like many others in the Act, one which will continue in doubt until some case reaches and is decided in the courts. Yet, to me, the argument in favour of a responsibility resting on the librarian and archivist is more compelling.

One of the certainties of the Act is that there is no difference in law between copying by hand and copying by machine. It is, therefore,

I believe possible to draw some guidance from the judgement in the case *Moorhouse* v. *University of New South Wales*[8] in which it was held that "Authorization of breach of copyright for purposes of s. 36(1) of the *Copyright Act* 1968 (Cth) does not necessarily have to be an express authorization . . . 'Authorizes' for the purpose of s. 36(1) is to be understood in its ordinary dictionary sense of sanction, approve, or countenance, these being alternative and not cumulative descriptions. Each of these terms stands on its own. 'Countenance', being the widest term and the most appropriate to describe any liability of the defendant, can occur by reason of inactivity . . . The university could authorize breach of copyright not only by what its controlling bodies did but by the way in which it, through its organs, acted towards users of the library".[9]

Even more specifically, "The Court found that the use of the machines was not supervised in any practical and useful sense, with the knowledge of the librarian, *and that the university's responsibility of seeing that students did not infringe the copyright laws was not performed in a genuine manner*".[10]

In the light of these two passages I think it is highly possible that the courts would find a similar liability in a case relating to manuscript material in a library or archives which had been copied by hand in contravention of s. 51(1). Certainly I think it would be unwise to assume that by turning a blind eye to the activities of their readers librarians and archivists can wash their hands of the matter.[11]

Returning to our example, let us suppose that our hypothetical scholar in the National Library wishes to consult the papers of a former Prime Minister (A) who died in October 1920 and whose personal papers (letters received, copies of letters sent, diaries, etc.) form the A Collection. If he is about to embark on a major piece of research on A the scholar will have obtained, in advance, the permission of A's heirs to have full access to the papers so that, in relation to the papers actually written by A between 1st December 1900 and his death, there will be no problem. "Full access" should of course be understood to include permission to make copies of these documents, for without such permission access is effectively denied.

Supposing, however, that our scholar wishes merely to obtain a copy of a letter or a passage from a diary within the restricted period for purposes of illustrating a lecture to students on (say) the political philosophy of the great man. He must still obtain the same permission to have the copy from the copyright owner or owners as he would were he researching a major biography. When the problem is multiplied by the number of different great men whose thoughts he may wish to quote, the nuisance value of the Act's requirement may outweigh the benefits to be obtained from the copies and he may well forego the effort even though his teaching may as a result be less valuable than it would otherwise be.

It is worth pointing out here that, should our scholar obtain permission to copy the pasage or letter, he must not without permission make further copies to distribute to his students for that would, of course, constitute publication. Whether he has a duty to ensure that his students do not make copies of the document by transcription

during his lecture (as I have suggested above to be the duty of librarians and archivists) is a question which I would prefer to ignore.

So far we have considered soluble problems. The would-be biographer may obtain the necessary permission or choose another subject. The lecturer can seek permission to copy or he can give his lecture without the material. These examples relate, however, to the relatively small number of notable men whose descendants are known and, more importantly, where it is known which of those descendants owns the copyright in the great man's writings. It would be safe to say, however, that the greater part of the holdings of libraries and archives do not fall within this category. Rather they were written by people whose date of death is unknown and, practically speaking, unknowable, to say nothing of their heirs.

To take another hypothetical example from the A Collection, let us say that in August 1916 Smith (who is a solicitor in a country town in Victoria) writes to A concerning conscription, the effects of the war, the attitudes of his fellow townspeople and so on. Smith had written several other letters to A, the earliest of them in July 1898 on the attitudes of his friends to Federation. The 1916 letter is of course unavailable under the Act until 1991, even if it is known that Smith has been dead for fifty years. But, Smith's later history is unknown. A conscientious search is made of the available resources, but no real information can be gained about Smith except that a chance reference indicates that he was born in 1870. Since no date of death is known, the scrupulous and conscientious librarian will reason that it is unsafe to assume death before 1970 and consequently neither the 1898 nor the 1916 letters will be copied for the reader before 1st January, 2021, nor will the reader (legally) be able to use them effectively until after that date.

It might be prudent at this point to remark that in such a case as the above it is not necessarily impossible to trace the death of the writer. It is, however, impossible in terms of the time and money which would have to be devoted to the task and the number of times it would have to be repeated. It might also be remarked that whereas there is provision in s. 52 for breaking the bind of not knowing who owns the copyright in a document (by advertisement before publication) the requirements of s. 51(1) are absolute.

It may be argued of course that s. 51(1) merely regulates copying and does not prevent a user from making a note of the substance which is not a copy or a paraphrase so close as to be tantamount to it. This argument however ignores the reality of research technique, since it is rarely that a document containing information which the scholar wants can be satisfactorily noted without some quotation or reconstructable paraphrase. It also ignores the problem of the librarian or archivist who, if held to possess a custodial responsibility under the sub-section, must examine every note as the reader is leaving to ensure that he has not copied any part of the document. This last suggestion, though ludicrous in its impracticability, seems an inescapable corollary of the provision as it stands. The only completely safe course for the prudent archivist or librarian would seem to be, therefore, to restrict such material entirely.

Speaking of the fair dealing provision in the 1911 Act, the Gregory Committee Report (para. 43) observed that:

> there can be no doubt that for generations individual students by virtue of this proviso or the Common Law, have had protection in making transcripts and extracts from copyright works. Their extracts until quite recently have necessarily been made by the process of hand-copying, the laborious nature of which has been an effective barrier to any gross infringement of the copyright owner's rights or to any material decrease in the expectation of return from his published work . . . Librarians are concerned that what comes within the "fair dealing" exemption if done by the student himself (*and in this respect no alteration is proposed*) would not necessarily be covered if done by the librarian.[12]

The Committee went on to recommend in para. 53 that the copying of manuscripts in libraries should be allowed on similar conditions to those adopted in s. 49 of the *Copyright Act* 1968 in relation to published works "but only if the manuscript is at least 100 years old *or* 50 years after the death of the writer, whichever is the later, subject to the need to observe conditions laid down by depositors".

Quite apart from the fact that their later recommendation does appear to effect an alteration in the practice of fair-dealing copying, it is regrettable to note that the committee's very stringent recommendations on time were taken by both the British and Australian draftsmen and made even more restrictive by linking the two time scales (reducing, in the Australian case, the 100 year period to 75 years) by "and" instead of "or". This has had the effect, as already indicated, of making research into the history of the country after 1850 impossible were the law to be scrupulously observed. The provision overrides the fair-dealing provision of s. 40 which, it seems, can have no valid application to the kind of document in question.

Another area in which s. 51(1) has caused and will continue to cause problems is that of libraries and archives wishing to obtain copies of the holdings of another similar institution. It should be unnecessary to remind readers that not only do letters from "unknown" private persons form the bulk of manuscript collections in libraries but they also comprise a considerable proportion of the records to be found in government archives, State and Federal and in terms of numbers such documents would far outweigh those addressed to private persons in libraries.

If libraries and archives are to fulfil their cultural role in an effective manner it is vital that they should be able to disseminate material as freely as possible. Section 51(1) seriously limits this ability. Section 50 deals with copying by libraries for other libraries yet it deals only with published works, and it is a measure of the lack of perspicacity on the part of the draftsmen of the 1968 Act that the copying of manuscripts by libraries for other libraries receives no attention in the Act.

Quite apart from the somewhat excessive time limit when applied to non-literary manuscripts, there is the important point that even where a document may be copied for a person "for purposes of research and private study", a copy made for another library can only be made legally by stretching the section fairly strenuously.

If the provisions of s. 51(1) were not (in theory) an effective preventative of historical research, s. 52 would go far to make the

publication of that research difficult. In the writing of certain types of history, particularly but not exclusively, biography and social history, the necessity of quoting from the documents with which the writer is working is too obvious to need a great deal of stress. Yet by placing a 200 word letter, never intended for publication, on exactly the same footing as the manuscript of a 100,000 word novel, and by repeating the creation-death double time scale of the preceding section, s. 52 makes this almost impossible to do legally.

The writer working in the post-1850 period can forget about quoting altogether, except from the few collections of papers where it is known who owns the copyright. Even if he can get or make illegal copies of his documents he cannot even make use of the advertising provisions of s. 52. But consider the sad case of the writer who, working in the "safe" period 1825-50 produces a work of historical scholarship. In this work, in order to capture the flavour of the period and to illustrate his generalisations about attitudes and conditions, he has included quotations from (say) fifty letters written by twelve people and extracts from two diaries and an unpublished memoir. He is thus faced with the legal requirement of obtaining the permission of fifteen copyright holders or groups of copyright holders to include the "old works" in the "new work".

To simplify matters let us say that the diaries and memoir were willed to the Mitchell Library and the National Library of Australia. Under s. 198 the copyright in these documents now vests in the Councils of the Library of N.S.W. and the National Library of Australia respectively — provided, of course, that the testator was the owner of the copyright.

But the fifty letters are another matter. They were written by people who were utterly unaware of copyright and they certainly did not mention in their wills these letters which they had probably forgotten they ever wrote. The copyright has, therefore, in the ensuing 125 to 150 years passed under the residual provisions of as many as five generations of wills or through the operations of the the law on intestate estates, to an unknown number of people. So complex would be the task of tracing these estates and their beneficiaries that the unfortunate writer must attempt to satisfy the requirements of s. 52(1).

First he must advertise in accordance with Regulation 5 of the *Copyright Regulations*[13] his intention of publishing the "old works" in the "new work". It is estimated that, at the current rate for *Australian Gazette* advertisements[14] this will cost him from $75 to $150 depending upon whether one or fifty advertisements have to be inserted. The expenditure may not seem large in this fairly conservative example although it could quite easily be considerably larger in connection with a work of broad scope. It is large enough, however, to make a considerable impact on the economics of the book from the author's point of view.

A typical edition of a book of this type is 1,000 to 1,500 copies and on the usual contract the author will receive 10% of the retail value of the book. Such a book will retail at (say) $8 to $10. Our author can expect, then, to receive between $800 and $1,500 if all copies are sold — not an exorbitant return it must be admitted on

perhaps three or four years' research and writing. Yet, of this modest sum he is required to divest himself of between 5% and 12½% in order to satisfy the law. And ironically, unless the advertisement proves to be pointless (by no claimant appearing for the copyright in any of the letters quoted) the author stands in real danger not only of receiving nothing for his work but of being ruined financially.

Regulation 5 provides that "the prescribed notice . . . is a notice given by advertisement published in the *Gazette* not earlier than three months, and not later than two months, before the date of publication . . .". At three months before publication the entire work would already be set and in page proof stage and, economically speaking, it is not possible to alter the text to any extent at this point. Some allowance would need to be made for unforeseen delays to publication (such as a dock strike) to stay within the terms of the regulation. So, even supposing that the claimant or claimants act immediately, it is hard to see how any claim could be received until the book was printed and in the process of being bound.

A copyright holder under s. 31(1)(a)(ii) has the exclusive right to publish the work. A claimant may, therefore, forbid the inclusion of the "old work" in the "new work" or claim such an extravagant fee for allowing it to be printed as to amount to the same thing. Here we come to Catch 22 in the shape of s. 126. In any action under Part V of the Act, s. 126 provides, unless the defendant puts in issue the subsistence of copyright and/or ownership of the copyright by the plaintiff, copyright shall be presumed to subsist and the plaintiff presumed to be the owner.

Since it will be recalled that the reason for advertising in the first place was the impossibility of determining who the copyright owner *is*, it follows that the author (potential defendant) is in no position to place the matter in issue for he is no more able to prove that the claimant (potential plaintiff) is *not* the owner. He must, it seems, therefore, (a) pay what the claimant demands; or (b) publish and take the risk of having to pay costs and damages (it is hard to know which is the more formidable) which may be awarded against him in a civil action; or (c) decide not to publish the already printed book, in which case his publisher will presumably take him to court for breach of contract to recover the capital outlay on the books now sitting in his store or bindery. A daunting prospect indeed!

V

In what has so far been written, this article has dealt with the effects of the Copyright Act as they would appear if the Act were rigorously enforced and observed. In practice the situation has been quite different.

As regards s. 51(1) the palpable impossibility of enforcing the letter of the law and still maintaining some semblance of normal functioning in archives and libraries leads to the conclusion that, since libraries and archives are still functioning normally, the section is not being enforced with rigour. Whether this results from a failure to recognize the implications of the provision at the operative level and above, or

from a Nelsonian reaction to the whole nasty business, is a matter for discussion within each institution.

Certainly in some institutions discrete groups of records clearly falling within the sub-section are being restricted. But it is also certain that the implications of the sub-section in relation to documents written by persons whose history is unknown and dating from well back into the last century have not been recognized or, if recognized, have never been consistently acted upon.

In respect of archives it is probably fair to say that little thought has been given to the matter. The facts that Crown copyright subsists in a very large proportion of the holdings of a State Archives Office and that an express legal sanction exists for the publication of State archives[15] or that such a sanction is assumed to exist, have somewhat overshadowed the fact that copyright in letters etc. written by members of the public to a government department or authority vests in the writers and their heirs and not in the Crown.

In the case of records created by public servants in the course of their employment, copyright vests in the Crown under s. 35(6) and s. 51(1) presumably has no effect. It would be extremely difficult to enforce s. 51(1) in relation to correspondence files in which not only do Crown copyright documents alternate[16] with those in which copyright vests in the writer or his heirs, but from the earliest times minuting on letters received is in fact written on the documents themselves, thus producing a document in which copyright is vested in two places depending on which part one is looking at.[17]

The power given to the State Archives Offices whether administratively or by legislation to make Crown records available to the public has always been assumed to include all classes of record whatever their origin and the *Copyright Act* 1968 has not changed that assumption or the practice of the various State Archives Offices.

The Australian Archives is understood to follow the same practice. Since the records held by that institution to which most scholarly attention is given tend to be far less directly involved with the public, it is likely that the problem there is far less pressing, even though its actual holdings *in toto* probably contain more letters from the public than all the State Archives Offices put together. It is probably unnecessary to point out that of course all such letters (except in the material taken over from the States at Federation) have hitherto been within the 75 year period and so, regardless of when the author died, should have been unavailable. Perhaps it is sufficient to say in conclusion on this point that of all the complaints heard against the access policy of the Australian Archives none has ever been heard about access being denied because of s. 51(1).

As regards the copying by libraries and archives of unpublished non-literary manuscripts for other institutions, comment has already been made that the provisions of the Act relating to published works (s. 50) relate *only* to published works and that s. 51(1) can be utilised in this respect only by the use of a somewhat strained construction. After all, para. (b) of the sub-section sets out that copyright is not infringed by the making of a copy for "a person who satisfies the person in charge that *he requires the copy for the purpose of research*

or private study . . . and that he will not use it for any other purpose". The only way the sub-section could be used would be to argue that by supplying a copy to another library one was supplying a "person" in another library with a copy for research and private study, but this is hardly the sense of the provision.

I have been given to understand that the Library of N.S.W. has felt it necessary to decline to provide microfilm copies of certain collections to other libraries because the documents were less than 75 years old. One swallow maketh not the summer, however, and the far more common practice has been for libraries to provide copies to other libraries with due respect for the requirements of donors but without considering the double time scale of s. 51(1) and particularly without considering the question of the unknown death date and its fifty year aftermath.

Before leaving this matter of copying by one institution for another, one instructive example may be cited. Of all the developments which in the post-war years have eased the task of the Australian historian none has been more important than the Australian Joint Copying Project of the National Library of Australia and the Library of N.S.W. The major value of this project as well as constituting the larger part of it has been the filming of material in the Public Record Office, London. In particular, the Colonial Office records relating to the Australian and Pacific Colonies have revolutionised the study and teaching of Australian history.

Yet a glance at Part 2 of the *Handbook* to the Project, the *Class and Piece List* of Colonial Office records filmed, will clearly show that a considerable volume of material has been included the copies of which, since the British and Australian provisions are virtually identical, are certainly infringing copies. Class CO 418, for instance, Australia (General) Original Correspondence covers the period 1889 to 1922. For each year from 1900 to 1922 there is a section of letters from "Individuals", that is, from private citizens, some in Britain, some in Australia, writing to the Colonial Office. Some of these writers are probably alive and living in Australia, relatively few of them have been dead for fifty years and only a few of the letters they wrote are more than seventy-five years old. The only question seems to be, under which Act — British or Australian, or both — has the infringement taken place? Presumably the restrictions on copying of such works will extend to the infringing copies in the (at least) five Australian libraries holding the microfilm, so in theory (if my argument above about the custodial responsibility of the librarian is accepted) the unfortunate librarians will also have to examine the notes of every reader using the microfilm of this and quite a large number of other series.

In respect of s. 52, the time available for the preparation of this paper did not permit a search to be made of the public advertisement section of the *Australian Government Gazette* since 1969 to determine the actual number of advertisements under Reg. 5. Enquiry amongst academics in the social sciences and of the editor of the Australian National University Press[18] has indicated, however, that if the regulation has been observed at all it has been a rare occurrence.

It is possible of course that one factor in this rarity of advertisement is a conscious decision on the part of writers aware of the implications of s. 52 to avoid quotation wherever possible. No evidence has been found of this, however, and the fairly general ignorance of the Act amongst historians and others seems to suggest that lack of appreciation of the provisions of the Act together with a tendency to compression in some forms of writing leading to an avoidance of quotation are the main reasons.

As a final point on this section it is worth pointing out that, if there is a scarcity of persons observing the provisions of the Act in this area there is also a notable absence of actions by outraged individuals for breach of copyright. This, it is submitted, is explicable by the fact (borne out by every man's personal experience) that, whatever the law says, the individual does not regard the letters he writes as being copyright material, let alone those written by his ancestors.

VI

What position should be achieved? Broadly, the desirable objective in relation to posthumous works of all kinds is a situation in which works with a realisable commercial potential — the kind of works envisaged by all copyright legislation — are protected for the benefit of the copyright owners while allowing writers in literary, historical and other fields freedom to quote from manuscripts to the extent that their work demands and their style dictates, without fear of being in effect held to ransom as is the case with the present law. The law should also operate to maximise the ability of libraries and archives to carry out their functions as disseminators of cultural material where such a function does not deprive a copyright holder of his rights.

In my view (and that view eventually was passed to the Franki Committee as the recommendation of the sub-committee)[19] the law should be amended in the following respects, in order to achieve the above objectives.

1. *The Act should be amended to distinguish between works written with publication in view and those which were, prima facie, not so written.*
2. *That such a distinction having been drawn between literary and non-literary manuscripts, the latter should be excluded from copyright except for a proviso that, where a document (such as a diary) or a group of documents (such as a collection of letters from the same hand) is judged to be a publishable proposition in its own right (as evidenced by a publisher being willing to publish) either as it stands or with some editing and annotation, then copyright shall be deemed to subsist in it and the owners of the copyright entitled to share in a reasonable degree in the proceeds of publication.*
3. *Section 51(1) should be amended by removing from it the 75 year/ 50 year time scales.*
4. *Specific provision should be made to permit archives and libraries to make copies of unpublished manuscripts for other libraries and archives where such copying does not constitute a publishing venture.*

5. *Where a case arises covered by the proviso to (2) above and the owner of the copyright is not known, the intention to publish may be advertised, but with the following differences from the existing s. 52 and Reg. 5:*
   (a) *That the advertisement should take place not more than 12 months before the expected publication date.*[20]
   (b) *That claimants should be required to notify the advertiser of their claims within three months of the advertisement.*
   (c) *That where no claim is made within three months copyright shall be deemed not to subsist in the work.*
6. *Because of the potential inequity of s. 126 as dealt with above, provision should be made that, where a person who is not the author of the document, claims to be the owner of the copyright,*
   (a) *the onus of proving that he or she is the owner of the copyright rests on the claimant; and*
   (b) *the claimant is bound, on demand, to provide the advertiser with details of the facts on which the claimant relies to prove his or her ownership of the copyright.*

A number of explanatory points can profitably be made about these recommendations and I shall deal with them in turn under their respective paragraph numbers.

(2) The suggested abolition of copyright in relation to non-literary manuscripts with a provisional copyright coming into being with the commencement of the publishing process would have the effect of protecting real copyright interests while allowing scholars working with documents adequate freedom to work with and, if needed, to quote from, their sources, subject of course to the requirements imposed by document owners and the laws regarding confidence, defamation and so on.

Considering the central nature of (2) above, it is worth considering the derivation of the existing situation. In para. 30 of its report, the Gregory Committee, after listing the various classes which may come under the heading of posthumous works observes that the Brussells revision of the Berne Convention requires [Art. 7(5)] that protection be given for a period of 50 years after the death of the author.

A consideration of the international agreements to which Australia has become a party will indicate that the intention is to protect the rights of authors and their heirs and assigns in works written for publication. Thus, the preamble to the *Universal Copyright Convention* states that the contracting states being "Convinced that a system of copyright protection appropriate to all nations of the world . . . will ensure respect for the rights of the individual and *encourage the development of literature, the sciences and the arts.* Persuaded that such a universal copyright system will *facilitate a wider dissemination of works of the human mind* and increase international understanding", they have agreed to the convention. Similarly, the definition in Art. 2 of both the Brussells and Stockholm Acts of the *Berne Convention* states that "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and

other writings; lectures, addresses, sermons and other works of the same nature . . .".

It is submitted that it is perverse of the British and Australian laws, under pretence of abiding by international agreements for the protection of the fruits of the creative mind and the dissemination of culture, to place on exactly the same footing, an epic poem and a coal merchant's ledger, a seminal work in mathematical physics and a farm journal, or an opera and a convict's petition for a ticket of leave, when, by so doing, as has been demonstrated above, not only are the interests purportedly protected non-existent, but the effect is to hinder scholarly writing or turn scholars, archivists and librarians into law breakers.

(3) The existing provision, as I shall argue below, derives mainly from a desire to protect privacy and seems to serve no useful purpose in relation to copyright. If recommendation (2) is accepted and put into effect, non-literary manuscripts would no longer be involved and the provision would, if maintained, merely serve to make critical and historical writings more difficult in relation to literary manuscripts without any good result.

As regards the rationale of the double time scale, paragraphs 30 to 35 inclusive of the Gregory Report address themselves to the dual problems of copyright in the kind of documents under discussion and of the effect of publication on the right to privacy of both the owners of the documents and of the owners of the copyright (and other descendants of the authors), where the documents have been placed in libraries.

The relevant provisions of s. 7 of the British Act of 1956 were based upon an amended version of this section of the report and s. 51(1) and s. 52(1) of the *Copyright Act* 1968 were based directly (with the one substantive change from 100 years to 75 years) on the British provisions. Attention has already been drawn to the pernicious effect of altering the Committee's recommendation in para. 35 where the time scale is expressed as "100 years after the date of the manuscript or 50 years after the death of the author, whichever period expires last". Attention has also been drawn to the fact that the way the provisions were drafted curtailed drastically the freedom of scholars to quote from unpublished copyright works and to obtain copies of them.

It is submitted, however, that the Gregory Commitee, for all the attention given in its report to these matters, was faulty in its reasoning, since copyright legislation by its nature can only protect privacy by preventing publication of words arranged in a particular way but cannot control the use of information contained in a document available for public inspection.

For this reason, I believe that the concept of the protection of privacy should be altogether dissociated from copyright considerations, leaving the former to be dealt with by agreements between libraries and depositors, the operation of existing law, and projected legislation for the protection of privacy.

(4) Where copying did represent a publishing venture the case would come within the ambit of recommendations (5) and (6). Further consideration has prompted the thought that care would need to be

taken to ensure that co-operative ventures of the Joint Copying Project type were not hampered.

VII

Before concluding there are four further points which I would like to mention. The first is simply to record my appreciation for the assistance I have received from a number of people. Professor Geoffrey Sawer spent a good deal of time discussing the matter with me and read both the original draft submission and some additional material included in this article and I am greatly indebted to him for explaining a number of points to me and generally trying to ensure that my layman's interest did not outrun my legal knowledge. To the other members of the sub-committee and especially Mrs Fanning my thanks are also due for their constructive comments on the original draft. I hope they will excuse me for not specifically acknowledging their contributions in all cases. Quite apart from the embarrassment of recording my errors in order to acknowledge correction, I am only too well aware that my style is somewhat tortuous and the fewer the complicating factors the better. Finally, my thanks to Mrs Margaret Crago, our departmental secretary who, having typed the substance of this article two or three times is the best informed secretary in Australia on the implications of the *Copyright Act* 1968 for archives and libraries.

I need hardly add, I suppose, that despite these acknowledgements I am solely responsible for any errors or omissions which may hereafter be found in my argument.

My second point is one raised by Mrs Fanning, namely the need to recognize that, if the recommendations above were implemented there could be some inhibiting effect on donors of collections in regard to making them available to libraries or, having made them available, making the donation conditional upon restrictions on access or copying for quite long periods. Most institutions, however, including State Archives Offices (in their relations with public offices) already hold records on such conditions and I think most of my colleagues will agree that an increase in the number of such conditional deposits is a bearable price to pay for unravelling the Gordian knot which at present suspends the Damoclean sword of the *Copyright Act* over our heads — to indulge in my favourite sport of metaphor mixing.

My third point is that I disclaim any illusions of having plumbed the depths of the Act. I know that I have left two matters (see the eleventh paragraph of section IV and note 17) undiscussed in detail. No doubt there are others. Should the Franki Committee decide to recommend alterations to the law and the Government to accept those recommendations, it is to be hoped that the amendments will be closer to the tenor of the recommendations than was the case with the Gregory Report. It is also to be hoped that the proposed amendments will be circulated for comment to the institutions and the professionals who will have to live with them, before they are enacted.

Finally, I have been considerably exercised as to whether or not I should draw attention to an intolerable situation when it is possible

that by so doing I may prompt some institutions to begin applying the letter of the law to their collections. On balance, however, I concluded that even if this did happen the roar of outrage which would emanate from Australian scholars would reach the seats of power and prompt a rapid amendment of the law. I hope, however, that merely by publicising the situation, and trusting to the good sense of Parliament, we may yet see a sane amendment to the law to replace the present unholy mess.

NOTES

1. *Archives & Manuscripts,* v. 3, no. 3, November 1966, pp. 27-9.
2. *Ibid,* v. 4, no. 5, November 1971, pp. 1-3.
3. *Copyright Act* (No. 63 of 1968).
4. Minutes of 57th Meeting of Standing Committee, 9th December, 1974, resolution SC65/75(a).
5. The *Universal Copyright Convention* and the Brussels, Stockholm and Paris Acts of the *Berne Convention.*
6. The Act, of course, says "work", but I use the more specific term because letters are the most common form in archives and libraries and because their normal brevity is in such marked contrast to the kind of "work" which the draftsmen obviously had in mind.
7. For the sake of precision it should be pointed out that the period prescribed is fifty years from the expiration of the year in which the author died.
8. (1974) 3 A.L.R. 1. Note that special leave to appeal was granted by the High Court on 7th June 1974.
9. (1974) A.L.M.D. 2285.
10. *Ibid.* My emphasis.
11. Lest I be criticised for lack of balance it should be said on the other side that the note quoted also contains the following aside: "Per *Hutley,* J. A.—The decision in *Adelaide Corporation* v. *Australian Performing Right Association* (1928) 40 C.L.R. 481, may mean that provided the university was neutral it did not authorize breaches even though it provided facilities that could and almost certainly would be used for printing literary works". The problem would lie in proving *neutrality,* which I am given to understand by Professor Sawer might be rather difficult.
12. My emphasis.
13. No. 58 of 1969.
14. $1.00 for the first six lines, 15c for each additional line.
15. E.g., Tas. *Archives Act* 1965, s. 6(2)(c); N.S.W. Archives Act 1960, s. 21(1)(e).
16. At least since the general introduction of the typewriter.
17. I resisted without difficulty the temptation to relate this fact to the provisions of the Act dealing with "works of joint authorship"—enough is enough.
18. To whom I am indebed for her advice on the mechanics of publishing as well as its customs and pitfalls.
19. Though not, be it noted, the firm recommendation of A.A.C.O.B.S. A curious point, though not one about which I feel strongly.
20. From what has been said above on the impossibility of abiding by the existing s. 52 and Reg. 5 it should be clear that no minimum time limit is necessary or desirable.