

Making and Sale of Collections of Readings by Educational Institutions in Australia

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Abstract

This article is the study of a test case instituted by the Copyright Agency Limited (CAL), and twelve other applicants against the respondent, Victoria University of Technology (VUT), alleging that the respondent has breached its licence by compiling photocopies of parts of books into anthologies for sale to students. The principal objections and court's decision in this case have been given.

1. INTRODUCTION

The Federal Court's recent decision in *Copyright Agency Limited and Others Vs Victoria University of Technology* has assured universities and other educational institutions in Australia that the practice of anthologising (which refers to the common practice of academics at tertiary institutions of producing reading material for students by compiling 'study guides' containing extracts from relevant textbooks and periodicals) or compilation and sale of course material to students does not amount to infringement under the statutory scheme established by the Copyright Act 1968 (Cth).

This case concerned the construction and operation of certain provisions of Part VB

(SS. 135ZB to 135ZZH) of the Copyright Act 1968 (Cth). Part VB is headed 'Copying of Works etc. by Educational and Other Institutions.'¹ The judgement was handed down by Gummow J of the Federal Court of Australia (as he then was) on 30 September 1994 (see (1994) 29 I.P.R. 263 [hereinafter referred to as *CAL Vs VUT*]). An appeal to the full Federal Court of Australia was dismissed on 28 February 1995 (see (1995) 30 I.P.R. 140 (Beaumont, Burchett and Hill JJJ)).

The case is also useful in that it recognises the importance of education and the value of photocopying as an educational tool that the compulsory licensing scheme is designed to accomplish.

This was a test case instituted by the Copyright Agency Limited (CAL), and twelve other applicants who are the owners or exclusive licensees of 14 literary works in which

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¹ It should be noted that the immunity from primary infringement under S. 36 is given by S. 135ZL(1) which stipulates that only a 'reasonable portion' of the relevant work may be copied (see S. 135ZL(2) and S. 10(2) of the Act). Further, the educational institution should comply with two requirements: (i) marking and record keeping and giving of a remuneration notice (see SS. 135ZU-135ZZA which deal with equitable remuneration and establish a system of remuneration notices given to collecting societies); and (ii) copies should be made solely for the educational purpose of the institution'A lengthy definition of 'educational institution' is contained in S. 10(1) of the Act'.

copyright subsisted pursuant to the Act. against the respondent, Victoria University of Technology, alleging that the respondent had breached its license by compiling photocopies of parts of books into anthologies for sale to students. CAL was incorporated in 1974 to act as a copyright collecting society representing authors and publishers. CAL is applicants' agent for various purposes including claiming payments of remunerations under Part VB of the Act. In June 1990, CAL was declared under S. 135ZZB(1) of the Copyright Act 1968 (Cth) as the collecting society for the purposes of Part VB of the Act for each owner of copyright in a work, other than a work included in a sound recording or a cinematographic film. Activities of collecting societies (of which CAL is one) are controlled by the Attorney General pursuant to SS. 135ZZB-135ZZE.

The two principal objections that the applicants took were:

(i) that the respondent's actions amounted to a breach of section 135ZL of the Act because the relevant works had not been copied solely for its educational purposes. (Section 135ZL provides that in certain circumstances copyright in certain works is not infringed by making of multiple copies of works by educational institutions. It relevantly provides:

135ZL (1) .. the copyright in a literary work ... is not infringed by making of one or more copies of the whole or a part of the work by, or on behalf of, a body administering an educational institution if the copy is made solely for the educational purposes of the institution) and,

(ii) that the copied material was sold for a financial profit in contravention of section 135ZZH of the Act? Section 135ZZH is concerned with the unauthorised use of copies in circumstances which then result in removal of

the immunity from infringement otherwise provided by prescribed provisions.

Section 135ZL is a prescribed provision for the purposes of S. 135ZZH. It relevantly provides:

135ZZH (1) Where a copy ... of a work ... being a copy ... referred to in a prescribed provision of this Part:

(a) is sold or otherwise supplied for a financial profit;

(b) is used for a purpose other than the purpose specified in the prescribed provision ...with the consent of the administering body by whom or on whose behalf, it is made, the prescribed provision does not apply ... to the making of the copy.

By way of background, it should be stated that in 1981, the Australian government introduced a statutory scheme to allow multiple copying in education,² enabling all educational institutions in Australia to make multiple copies of up to 10% of all print works (except articles) provided the copies are made for educational purposes. Here the concept of 'reasonable portion' is used to provide a fixed maximum volume of copying that may be done under the statutory licence without infringing copyright. In the case of articles, one or more articles in each issue of a periodical publication may be copied that relate to the same specific subject matter (S. 135ZJ). Note that if the work being copied is a book, 10% or one chapter, whichever is greater, may be copied. (For the definition of the expression 'reasonable portion', see S. 10(2) of the Act). The institutions are able to take advantage of the statutory scheme by entering into licensing agreements with CAL as the recognised representative of copyright owners.

In the past, educational institutions needed to keep full records of all copying, and authors

² The provisions dealing with the compulsory licensing scheme have had a chequered history, see CAL Vs VUT, note 1 at 268-269. Briefly, the Copyright Amendment Act 1980 (Cth) introduced Divisions 5A and 5B of Part III of the Act (SS. 53A-53D). However, these were replaced by a new set of provisions by the Copyright Amendment Act 1989 (Cth) which, in turn, were struck down as unconstitutional by the High Court in *Australian Tape Manufacturers Association Ltd. Vs The Commonwealth* (1993) 176 C.L.R. 480. The Government then re-enacted the relevant provisions minus those dealing with blank tape royalty (*Copyright Amendment (Re-enactment) Act 1993*).

and publishers were entitled to inspect those records and receive royalty payments. This proved to be cumbersome and unworkable and consequently a 'Licence Agreement' was entered into between the Australian Vice-Chancellors' Committee (AVCC) and CAL. Under the agreement, while similar limits to copying apply, a levy reflecting the number of pages copied is paid per student. The payment payable each year to CAL is calculated on the basis of a formula that includes an estimate of the amount of copying undertaken. This estimate is based on the sampling review of photocopying undertaken each year in a selected number of universities. The Licence Agreement has legal effect largely outside Part VB, but this is permitted by S. 135ZZF(1). However, the provisions of Part VB remain important to the operation of the voluntary arrangement because the acts that do not infringe because they are covered by the 'statutory licence' also fall within the 'Licence Agreement'. In the present case, the applicants contended that the activities of the respondent fell outside the statutory licence and so outside the Licence Agreement.³

The present dispute involved preparation and distribution of five booklets containing course materials produced by two academics employed by the respondent. The collections were prepared because there was no single textbook available in those subjects. Accordingly, a series of articles and extracts from textbooks were collected and bound in the form of a book for sale to students enrolled in those courses. These anthologies were said to contain photocopied chapters of works copyright in which was held by the members of CAL. The anthologies were then sold by the respondent's book shops after marking them up by 30% of the cost of printed materials in order

to recover the overheads (e.g., salaries for staff, telephone and insurance costs).

While it was clear that the respondent could legitimately make multiple copies of 'reasonable portion' of copyright works for educational purposes under the AVCC-CAL's 'licence Agreement'⁴, the central issue in the case was whether the licence extended to putting those copies together in a 'fresh work' for sale. Although, the percentages of the works copied were within the limits, the prices charged, it was contended by the applicants, appeared to be significantly higher than that could be justified on a cost recovery basis. Moreover, the argument ran, the practice of 'anthologising' copyright materials from text books and journals, in a way that replaced legitimate publishing, was not permitted by the Licence Agreement. Finally, it was argued that the respondent's activities amounted to carrying on a business of quasi-publishing and book selling.

2. Copies Made Solely for Educational Purposes

The threshold issue was whether the copies were made solely for the educational purposes of the respondent within the meaning of section 135ZL(1)(b). Referring to the question posed by the expression 'educational purposes',⁵ viz., whether the copies were made for use in connection with a particular course of instruction provided by the respondent, Gummow J stated:

The copies were so made and, in my view, were made only or exclusively, with the objective that they be used in connection with the particular courses of instruction suggested by the statements on the covers of [course booklets]. Section 135ZL(1)(b) operated to confer immunity from infringement. But did S.

³ For a short account of the 'Licence Agreement' and its effect, see *CAL Vs VUT*, above, note 1 at 267-268.

⁴ The arrangements made between CAL and AVCC were discussed at length in the recent decision of the Federal Court of Australia in *Nationwide News Pty. Ltd. Vs Copyright Agency Limited* (1995) 30 I.P.R. 159 at 163-165. See generally, J Lahore, *Intellectual Property in Australia: Copyright Law* (Butterworths' loose-leaf service) at para. 4.13.150 et seq. and K. Puri, 'Copyright in journalists' creations in Australia' (1995), 4, *Australian Studies in Journalism*, 200.

⁵ 'Educational purposes' is defined in S. 10(1A) of the *Copyright Act 1968*.

135ZZH then operate to remove that immunity?⁶

His Honour found no evidence to suggest that the course materials that were supplied to students were used for a purpose other than in connection with the relevant courses of instruction provided to them by the respondent. 'It follows that S. 135ZZH(l)(b) has no application to them.'⁷ It is noteworthy that on appeal, the full Federal Court, whilst endorsing Gummow J's reasoning, added that the respondent's conduct in marking up the materials by 30% was 'not inconsistent with the respondent's having the sole educational purpose required by S. 135ZL(l)(b).'⁸

3. TRAP PURCHASE

Since the applicants had arranged a "trap purchase" to a person other than a student, it was argued that the sale was a use for a purpose not in connection with the relevant courses of instruction. Therefore, the applicants submitted, there was at least in those instances an operation of section 135ZZH(l)(b) so as to remove the immunity that would otherwise apply to the making of the relevant copies.

Gummow J held that the trap order was not of any significance for present purposes.⁹ His Honour advanced the following reasons in support of his conclusion that there was 'a degree of artificiality' in that argument:¹⁰

(i) the trap purchase was an unusual form of dealing because the purpose of the transaction was not immediately brought home to the respondent;

(ii) the use to which the impugned material was being put was a use by the applicants themselves, not by the respondent; and

(iii) 'where what is said to be a use within the meaning of S. 135ZZH(l)(b) [sic-s. 135ZL(l)(b)] is a sale or other supply, the structure of the subsection directs one not to para (b) but to para (a)' of section 135ZZH(l).¹¹ His Honour explained this further by observing:

The issue in this case is whether the sale was made by the respondent for a financial profit. If it was not, then the threat posed by the subsection [section 135ZZH(1)] to the immunity otherwise conferred by S. 135ZL is removed. It is not renewed by going on to ask whether, whilst the sale was not made for a financial profit, the sale nevertheless was a use for a purpose outside that specified in S. 135ZL.¹²

It is respectfully submitted that Gummow J appears to give a very narrow construction of the relationship between paras (a) and (b) of section 135ZZH(l). As I understand his Honour's reasoning, a use for a purpose other than specified in the prescribed provision, say use for purpose not connected with a particular course of instruction provided by the institution (and hence lying outside the confines of section 135ZL(l)(b)), will be immune from infringement if the sale was found to be not for a financial profit. In my view, paras (a), (b) and (c) of section 135ZZH(l) are independent of each other and an immunity to infringement conferred by section 135ZL would be lost even if the sale was not for a financial profit. Be that as it may, nothing turned upon this because, as Gummow J's factual findings individual, the relevant course materials were made only or

⁶ CAL Vs VUT, above, note 1 at 276.

⁷ Ibid.

⁸ Copyright Agency Ltd. and Others Vs Victoria University of Technology (1995) 30 I.P.R. 140 at 145.

⁹ Although this argument was not pressed in the oral argument in the appellate court, the full Federal Court expressed agreement with Gummow J's conclusion (ibid).

¹⁰ CAL Vs VUT, note 1 at 276.

¹¹ Ibid.

¹² Ibid.

exclusively with the objective that they be used in connection with the particular courses of instructions provided by the respondent.¹³

4. SOLD OR OTHERWISE SUPPLIED FOR A FINANCIAL PROFIT

The applicants argued that the respondent lost the immunity to infringement because the anthologies, even if the material contained therein had been copied under the Licence Agreement, had been sold 'for a financial profit' within section 135ZZH(l)(b). This was so, the argument ran, because the respondent was admittedly recovering more than its direct print room costs; its aim being to make a gross or incremental profit, and that was a sale 'for a financial profit'. Moreover, the respondent's intention to engage in an activity which made a contribution to general university overheads was incompatible with section 135ZZH(l)(b). The applicants also contended that the court should take into account the gross profit in preference to net profit because only the former could be readily ascertained at the time the act was done.

After examining extensive evidence, Gummow J stated that the proper construction of the relevant provisions must be "approached on a broader footing"?¹⁴

His Honour held that a sale or supply 'for a financial profit' contemplated a transaction with the object or purpose of that profit; and that that criterion should be distinguished from a provision which contemplated a sale or supply at a profit.

Under the latter criterion, the inquiry would be directed at the actual, rather than the

intended, result of the transaction. His Honour went on to add:

The phrase in S. 135ZZH(1)(a) in terms does not ask the question which would be appropriate on the taking of an account of profits, namely whether the copy was sold or otherwise supplied at a financial profit. Rather, it asks whether the copy was sold or otherwise supplied for a financial profit. This directs the attention to the state of affairs at the time of sale or supply and to the object or purpose with which the sale or supply was effected.¹⁵

Gummow J found that the respondent's object or purpose was not to make a profit; the aim was to provide copies to students at minimum cost to them. It was not part to the respondent's objective to attempt to maximise sales. Rather, the objective was to ensure that students could obtain copies of the materials at a price which covered costs, both direct and, in some cases, indirect.¹⁶ Furthermore, the court rejected the applicants' argument that section 135ZZH referred to gross profits, although the reasons for the rejection are far from clear.¹⁷

Apropos the applicants' argument that the respondent's activities amounted to carrying on a business of quasi-publishing and book selling, Gummow J refused to characterise the activities of the respondent in that way.¹⁸

5. CONCLUSION

In sum, Gummow J held that all the relevant copying was within the terms of the Licence Agreement and hence the applicants' suit was dismissed with costs.

Furthermore, the court granted the declaratory relief sought by the respondent to

¹³ Ibid.

¹⁴ CAL Vs VUT, note 1 at 274.

¹⁵ Ibid. at 275 (emphasis supplied). See Lahore, above, note 12 at para 4.13.168.

¹⁶ Ibid. It should be noted that the appellate court, whilst agreeing with Gummow J's approach, elucidated this point further by stating: 'It did not follow from the respondent's decision to implement a 'user pays' policy and to mark up the product as it did, that the respondent's object was to make a financial profit. Its aim remained that mentioned, namely the provision of materials to its students for use in its courses.'(Above, note 16 at 145)

¹⁷ See CAL Vs VUT, note 1 at 274.

¹⁸ Ibid. at 273

the effect that the making of the anthologies was covered by Licence Agreement entered into between CAL and the AVCC. The decision of Gummow J, which was subsequently affirmed by the Full Federal Court, sanctions the making and sale of collections of readings by institutions as long as the materials are not sold for a profit or used for purposes other than educational purposes of the institution.

While this case was between CAL and Victoria University of Technology, it had broader implications for the whole university system in Australia. Almost every university follows the practice of collating collections of readings to provide to students as a single set rather than on a progressive basis during their tertiary study. Students are generally asked to pay for these 'course materials' by the universities.

The definition of 'educational purposes' in section 10(1A) does not at present specifically include the compilation of collections of copyright works within its ambit. This prompted

CAL to contend that the practice of making collections of materials does not fall within the scope of the statutory licence in Part VB of the Copyright Act for copying by educational institutions.¹⁹ Considering that a decision in CAL's favour would have led either to a higher rate of payment to CAL or to radical changes in the way instructions are imparted at educational institutions in Australia, the judgement is a significant victory not only for the respondent but also for AVCC, which had underwritten this prolonged litigation.²⁰

6. ACKNOWLEDGEMENT

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¹⁹ Interestingly, universities and colleges in the UK have, under a new agreement with the Copyright Licensing Agency (UK), agreed to pay a special fee for using copyright material in students' 'study packs' on top of ordinary photocopying licence fees, see *Times Higher Education Supplement* (7 May 1993).

²⁰ The present author's membership of the AVCC Committee on Copyright and Intellectual Property during the relevant period heightened his interest in this court battle. Apparently, CAL's motivation was to induce AVCC to pay a higher rate for 'anthologising' the copied materials.