

University of New South Wales v Moorhouse [1975] HCA 26

HIGH COURT OF AUSTRALIA

MCTIERNAN ACJ, GIBBS AND JACOBS JJ

MCTIERNAN ACJ:

I have had the advantage of reading the reasons for judgment of my brother Jacobs. I agree in the reasons and in the conclusions which he has reached. I agree that the orders which his Honour proposes should be made.

GIBBS J:

Mr. Frank Moorhouse (the first respondent) is the author of a number of short stories which were originally published at various times in different magazines and are now published together in the form of a book, under the title "The Americans, Baby". There are twenty stories in the book, and some of them are connected either in theme, or because the characters in one reappear in another. By a memorandum of agreement executed on 11th November 1971 Mr. Moorhouse granted to the second respondent which is a publisher, the right (exclusive in Australia) to print, publish and sell that work on payment of royalties, together with certain additional rights. The present proceedings were commenced by the respondents in the Supreme Court of New South Wales. The proceedings appear to have been instigated, or at least supported, by the Australian Copyright Council, which is naturally concerned to protect the copyright of its members from infringement. In the belief that some of the copying of copyright material which is done within university libraries, by the use of photocopying machines, amounts to an infringement of the copyright, it was decided to commence a test case against a university, and for this purpose it was arranged that one Paul Brennan, a graduate of the University of New South Wales, should make an infringing copy of a literary work by the use of a photocopying machine in the library of the University of New South Wales. Accordingly on 28th September 1973 Mr. Brennan attended at the library of the University of New South Wales, obtained two books from the shelves, and made two photocopies of one chapter or story, of about ten pages, from each of those books, one of which was "The Americans, Baby". Mr. Brennan was not called as a witness and it was not established exactly what part of "The Americans, Baby" was copied. The other work copied was a book called "Happy Times" but no evidence was given that that work was subject to copyright. Mr. Moorhouse did not know beforehand that it was proposed to make a copy of part of his book but was later informed what

had been done and agreed to join in bringing the present proceedings against the present appellant, the University of New South Wales ("the University").

By the respondents' statement of claim (which was amended and re-amended) it was alleged that the respondents are the owners of the copyright in the book, and in each of the stories that comprise the book. This allegation was not admitted but it does not seem to have been seriously disputed and the learned trial judge accepted its correctness. No argument was advanced before us as to the true nature and effect of the memorandum of agreement executed on 11th November 1971, and in particular no attention was directed to the questions whether the memorandum operated as a partial assignment of the copyright, whether if so the copying by Mr. Brennan of part of the book was an infringement only of the rights of the second respondent and not of those of Mr. Moorhouse and whether in these circumstances Mr. Moorhouse was entitled to sue. It is therefore unnecessary to consider those matters, and it will be convenient hereafter to speak of the respondents' copyright without thereby intending to express any opinion as to the respective rights of the two respondents. On this appeal the second respondent consented to any order that the Court might make and withdrew from the proceedings.

The statement of claim went on to allege that the University has infringed the respondents' copyright by reproducing or authorizing the reproduction of part of the book in a material form without the consent of the respondents. The particulars of this allegation set out that the University had established in its library a number of photocopying machines operated by tokens or coins, that it exercised no supervision or control over what books were photocopied or what photocopying of any particular book occurred in the said library and was indifferent whether persons making use of the facilities infringed the respondents' copyright, and that it made the library and the photocopying facilities available to all students, staff and graduates of the University and to any persons desirous of using the same. However, the only infringement of which particulars were given was that which was said to have occurred on 28th September 1973 when Mr. Brennan made the photocopies of one of the stories from the book. The statement of claim further alleged that the University intends to continue providing the said photocopying facilities and to repeat such infringements of the respondents' copyright. The respondents claimed a declaration that the University had infringed their copyright. Further, they claimed declarations that by providing any coin-operated photostating machine in its library for use by users of the library the University authorizes within s. 36 of the *Copyright Act 1968 Cth* ("the Act") any infringement of the respondents' copyright which may occur as a

result of the use by such a user of the said machine; these declarations were sought either absolutely, in the terms just stated, or unless certain conditions were satisfied. The respondents also sought an injunction.

The learned judge who tried the action found that Mr. Brennan had committed a breach of copyright but that it had not been shown that the breach was authorized by the University. He did not find that any other infringement of the respondents' copyright in "The Americans, Baby" had occurred, and there was not the slightest evidence upon which such a finding could have been made. Nevertheless, the learned trial judge held that the respondents were entitled to relief and he granted them a declaration in the following terms:

"Between the date when the book "The Americans, Baby" by Frank Moorhouse "was entered in the" defendant's "library and the hearing" of this summons the defendant "authorized such breaches of copyright as occurred by the photocopying of the whole or part of the library copy of" the said book "by the use of the photocopying machines where such photocopying was not a fair dealing within the terms of s. 40 of the *Copyright Act 1968* and where such breaches were in any way due to reliance upon any library guides issued by the defendant in the years 1970, 1971, 1972 and 1973 or the notices appearing upon the self-service photocopying machines in the" said "library or by the lack of supervision of the use of such machines or any combination thereof."¹

The University brought the present appeal from this decision. The respondents did not file a notice of cross-appeal within the time allowed by the rules but in the course of argument before us sought leave to cross-appeal on the ground that the learned trial judge should have held that the breach found to have been committed by Mr. Brennan was authorized by the appellant and on the further ground that declarations should in any case have been made in a more general form. This leave was granted.

The declaration of which the University now complains was in my opinion wrongly made. The power which is now vested in the Supreme Court of New South Wales to make declaratory orders is a beneficial one. I have already remarked upon the width of the discretion possessed by a judge who is called upon to exercise that power: *Forster v. Jododex Australia Pty. Ltd.*² However the power, although wide, is not unlimited. In *Forster v. Jododex Australia Pty. Ltd.*,³

¹ (1974) 23 F.L.R. 112, at p. 128.

² (1972) 127 C.L.R. 421, at pp. 435-438.

³ (1972) 127 C.L.R., at p. 437.

I expressed the opinion that the Scottish rules summarized by Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*⁴ should in general be satisfied before the discretion is exercised in favour of making a declaration. The first of those conditions is that "the question must be a real and not a theoretical question". As a general rule, the power to make a declaration will not be exercised when the court is called upon to answer a question that is purely hypothetical: see *In re Barnato (decd.)*; *Joel v. Sanges*.⁵ In accordance with that principle, the Court of Appeal in *Odhams Press Ltd. v. London and Provincial Sporting News Agency (1929) Ltd.*⁶ refused to make a declaration that the plaintiffs, who were unable to prove any specific infringement of copyright, were joint owners of the copyright in compilations of starting prices or betting odds made by their representatives. Lord Wright M.R. said:⁷

As to any further compilations of the same character which may come into existence, it would be most improper for this Court to make any general declaration as to whether they would or would not be the proper subjects of copyright. In order to bring such an issue before the Court there must be specific documents, the character of which can be established, so that the Court can determine whether or not they are the subjects of literary copyright, and appropriate evidence should be given to show that there has been an infringement of that copyright.

Many other examples may be found in the books of cases in which a declaration has been refused because it was claimed in relation to circumstances that had not occurred and might never happen. There is no doubt that a declaration may be an appropriate remedy in an action brought by an owner of copyright to assert his rights, but a declaration will as a general rule not be made for that purpose unless it is established either that an actual infringement has occurred or that the defendant intends to take action that will amount to an infringement.

The declaration made in the present case rested purely on the basis of hypothesis. There was no evidence that any infringement of the respondents' copyright had occurred at the University library, other than that allegedly committed by Mr. Brennan — and the learned trial judge held that the University had not authorized that infringement. Moreover, the declaration is objectionable in form. It would be impossible to apply it to any alleged infringement that might

⁴ [1921] 2 A.C. 438, at p. 448.

⁵ [1949] Ch. 258, at p. 270.

⁶ [1936] Ch. 357.

⁷ [1936] Ch., at pp. 363-364.

come to light without first determining the questions whether the photocopying had been a fair dealing and whether the breaches had been in any way due to reliance upon any library guide issued by the University in the years 1970, 1971, 1972 and 1973 or upon the notices appearing upon the photocopying machines or had been caused by lack of supervision of the use of the machines. Those questions involve a wide field of controversy, and in any case cannot be dissociated from the question whether the University authorized the breach, since all the circumstances in which the copy was made have to be considered in deciding whether what was done was within the limits of any authorization given by the University. For these reasons, in my opinion the declaration was wrongly made and the appeal should be allowed.

The first question for decision on the cross-appeal is whether the copyright of Mr. Moorhouse was infringed by the University when Mr. Brennan made the two copies of part of "The Americans, Baby" on 28th September 1973. The combined effect of ss. 13 (1), 14 (1) (a), 31 (1) (a) (i), 36 (1) and 40 of the Act, so far as they are material to the present case, may be summarized as follows: the copyright in a literary work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, reproduces or authorizes the reproduction of the work, or of a substantial part of the work, in a material form, unless the reproduction is "a fair dealing" with the work "for the purpose of research or private study". In the circumstances of the present case it is impossible to hold that the University itself did the act of photocopying which was alleged to have infringed the copyright. Mr. Brennan was not the servant or agent of the University for the purpose of making the copies. Similarly it is impossible to hold that Mr. Brennan made the copies on behalf of the librarian of the University, and for that reason s. 49, which provides that copyright is not infringed by the making of a copy by or on behalf of a librarian under the conditions stated in that section, has no application to the facts of the present case. The University can only be liable if it authorized the doing of the act of photocopying by Mr. Brennan and if that act amounted to an infringement of copyright. In relation to the latter question no serious issue arises. The evidence that one chapter or story of the book was copied was not challenged and if the copyright was in the book as a whole, rather than in each separate story, each of the stories would have constituted a substantial part of the book, since although they formed part of what was called "a discontinuous narrative" each was a complete short story in itself. The copies were not made in circumstances that would give rise to the protection of s. 40; there was no evidence that Mr. Brennan made them for the purpose of research or private study but it appears to have been common ground that they were made simply to provide evidence in

proceedings intended to be commenced against the University. It is accordingly unnecessary to discuss the meaning and scope of the expression "fair dealing" in s. 40. The only question that remains is whether the University authorized the act done by Mr. Brennan that infringed the respondents' copyright, namely, the making of the photocopies.

It will be seen that the present appeal, although intended to be a test case, is of limited significance. No doubt many librarians, as well as authors, would welcome a clear definition of the circumstances in which literary copyright is infringed by the making of photocopies in a library — a definition capable of practical application in the daily activities of those called upon to supervise the work of libraries. Photocopying machines are now extensively used in the libraries of universities and other educational institutions. The use of those machines may be regarded by some as a convenient — indeed almost indispensable — facility for the use of students and teachers, but by others as gravely damaging to the value of literary copyright. The Act in its present form does not lay down precise and detailed rules for the guidance of librarians who use or provide photocopying machines, or for the protection of authors whose works are photocopied. The Act has no provisions particularly directed to the situation where the library provides the machines and the user, and not the librarian, makes the copies. The principles laid down by the Act are broadly stated, by reference to such abstract concepts as "fair dealing" (s. 40) and "reasonable portion" (s. 49) and it is left to the courts to apply those principles after a detailed consideration of all the circumstances of a particular case. In the same way the question whether one person authorizes another to commit an infringement depends upon all the facts of the case so that a decision on a particular set of circumstances may be of no assistance in other cases.

The word "authorize", in legislation of similar intendment to s. 36 of the Act, has been held judicially to have its dictionary meaning of "sanction, approve, countenance": *Falcon v. Famous Players Film Co.*;⁸ *Adelaide Corporation v. Australasian Performing Right Association Ltd.*⁹ It can also mean "permit", and in *Adelaide Corporation v. Australasian Performing Right Association Ltd.*¹⁰ "authorize" and "permit" appear to have been treated as synonymous. A person cannot be said to authorize an infringement of copyright unless he has some power to prevent it: *Adelaide Corporation v. Australasian Performing Right Association Ltd.*¹¹ Express or formal permission or sanction, or active conduct indicating approval, is not essential to constitute an authorization;

⁸ [1926] 2 K.B. 474, at p. 491.

⁹ (1928) 40 C.L.R. 481, at pp. 489, 497.

¹⁰ (1928) 40 C.L.R. 481.

¹¹ (1928) 40 C.L.R., at pp. 497-498, 503.

"Inactivity or "indifference, exhibited by acts of commission or omission, may reach a degree from which an authorization or permission may be inferred" ": Adelaide Corporation v. Australasian Performing Right Association Ltd..¹² However, the word "authorize" connotes a mental element and it could not be inferred that a person had, by mere inactivity, authorized something to be done if he neither knew nor had reason to suspect that the act might be done. Knox C.J. and Isaacs J. referred to this mental element in their dissenting judgments in Adelaide Corporation v. Australasian Performing Right Association Ltd. Knox C.J.¹³ held that indifference or omission is "permission" where the party charged (amongst other things) "knows or has reason to anticipate or suspect that the particular act is to be or is likely to be done". Isaacs J. apparently considered that it is enough if the person sought to be made liable "knows or has reason to know or believe" that the particular act of infringement "will or may" be done.¹⁴ This latter statement may be too widely expressed: cf. Sweet v. Parsley.¹⁵ It seems to me to follow from these statements of principle that a person who has under his control the means by which an infringement of copyright may be committed — such as a photocopying machine — and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement that resulted from its use. Cases such as *Mellor v. Australian Broadcasting Commission*¹⁶ and *Winstone v. Wurlitzer Automatic Phonograph Company of Australia Pty. Ltd.*¹⁷ are consistent with this view. Although in some of the authorities it is said that the person who authorizes an infringement must have knowledge or reason to suspect that the particular act of infringement is likely to be done, it is clearly sufficient if there is knowledge or reason to suspect that any one of a number of particular acts is likely to be done, as for example, where the proprietor of a shop installs a gramophone and supplies a number of records any one of which may be played on it: *Winstone v. Wurlitzer Automatic Phonograph Company of Australia Pty. Ltd.*¹⁸

In the present case the University made available to a section of the public the books in its library — at least those in the open shelves — and provided in the library the machines by which copies of those books could be made. It seems to me that the University must have

¹² (1928) 40 C.L.R., at p. 504.

¹³ (1928) 40 C.L.R., at p. 487.

¹⁴ (1928) 40 C.L.R., at pp. 490-491.

¹⁵ [1970] A.C. 132, at p. 165.

¹⁶ [1940] A.C. 491.

¹⁷ [1946] V.L.R. 338.

¹⁸ [1946] V.L.R. 338.

known that it was likely that a person entitled to use the library might make a copy of a substantial part of any of those books. It is true that the machines were not used exclusively for the purpose of copying books; they were extensively used to copy lecture notes and other private documents. Moreover, not all of the books which might be copied were subject to copyright. However, in the nature of things it was likely that some of the books which were subject to copyright and which were in the open shelves might be copied by use of the machines in a manner that would constitute an infringement of copyright unless some means were adopted to prevent that from being done. It could not be assumed that persons making copies of works in which copyright existed would do so only in circumstances which amounted to a fair dealing for the purpose of research or private study, at least in the absence of any effective measures to ensure that any other copying of copyright works was forbidden. The University was aware of the assertions of the Australian Copyright Council that "unlawful and undesirable practices are commonplace within the universities", and although it may have regarded these claims as exaggerated, it had been given enough information to raise the suspicion that some infringing copies were likely to be made. In fact the Vice-Chancellor of the University wrote on 17th July 1972 to the Australian Copyright Council, in reply to a letter which claimed that some of the copying done in university libraries amounted to a clear infringement of the copyright in the work which was reproduced, saying that "there seems no reason to doubt that most photocopying in university libraries is within the spirit and meaning of the law"; the implication of course was that some photocopying at least amounted to an infringement. The learned trial judge went so far as to find that much photocopying of copyright material which was not a fair dealing for the purpose of research or private study was taking place in the library of the University, and that this, if not positively known by the University, was suspected. He said that he was assisted to the finding that many infringements were taking place by the fact that the University had failed to attach to the machines notices in a form prepared at the request of the Australian Vice-Chancellor's Committee and sent to the University in October 1969. The form set out an interpretation of fair dealing that had been accepted by the Australian Society of Authors and the Australian Book Publishers Association. This form may or may not have afforded useful practical guidance, but it certainly did not state the law as it stands. The failure of the University to use this form of notice was no evidence that infringements were taking place. I have considered carefully the whole of the material, and have come to the conclusion that this finding is insupportable. However, as I have said, the University had reasonable grounds to suspect that some infringements would be made if adequate precautions were not taken. The University had the power to control both the use of the books and the use of the

machines. In the circumstances, if a person who was allowed to use the library made a copy of a substantial part of a book taken from the open shelves of the library, and did so otherwise than by way of fair dealing for the purpose of research or private study, it can be inferred that the University authorized him to do so, unless the University had taken reasonable steps to prevent an infringing copy of that kind from being made.

The University adopted a number of measures with a view to preventing the machines from being used to commit infringements. Each year it issued library guides and it was found by the learned trial judge that most, if not all, students commencing at the University would receive a library guide for the year of commencement and a lesser number of students would receive library guides later in their courses. It thus appears that it was unlikely that all users of the library would have received any particular current library guide, and still less likely that all would have carefully read it. I find it unnecessary to consider the contents of the library guides issued in the years before 1973. The library guide for 1973 was published in a loose-leaf form and contained a bookmark on one side of which there appears, under the heading "Copyright", the following notice:

Reader [sic] have a responsibility to obey the law under the *Copyright Act 1968*.

A copy of the Act is available in the Photocopying Room and there is an extract of relevant sections on each machine.

Photocopying may be done for the purpose of research or for private study and when a copy of the item to be copied has not previously been supplied to the person making the photocopy.

The notice did not mention that copying for the purpose of research or private study was only permissible if it amounted to a fair dealing with the work, although to have said that and no more would not have proved enlightening to most users of the library. In fact a copy of the Act was available in the photocopying room but to provide a copy of a statute whose meaning would be obscure to the layman would not be an effective way of conveying to the users of the library advice as to how they should act to obey the law of copyright. There was, however, a notice on each machine. To place a clearly worded and accurate notice on each machine in a position where it could not be overlooked would be one measure which might be expected to have some value in informing users of the library of the limits which the University imposed on the permission which it gave them to use the machines. However, the notices in fact placed on the machines were ill adapted to that purpose. They merely set out the provisions of s. 49 of the Act. Those provisions, as I have said, apply only where a copy is made by or on behalf of a librarian: they have no application where a person using the library makes a copy for

himself. The notices placed on the machines were irrelevant to the position of those persons to whose attention they were intended to be directed. A further step taken by the University was to appoint attendants whose duties included the supervision of the use of the machines. The University librarian was asked to tell the Court what instructions he had given to these attendants, and he replied that he had circulated the relevant provisions of the Act to all members of the staff. He continued: "I had asked those people to supervise the machines, to within their competence, in which it was with the Act, see that it was observed. In particular I asked them to watch out for people who were using the machine for an excessive time or who appeared to be copying old books." No attendant was called to give evidence as to the manner in which these duties were carried out. However, Miss Stockman, a student who had been at the University for about three years, gave evidence of her own experience in making photocopies: the only functions which she had ever observed performed by an attendant related to the maintenance of the machines. The learned trial judge found that the photocopying machines "were unsupervised in any practical and useful sense, with the knowledge of the University librarian". This finding seems to have been based in part on the fact that over a period of about four and a half years no supervisor had ever reported having observed any breach of copyright. The fact that no breaches were reported did not mean that the supervision was inadequate unless breaches had in fact been committed, and except in the case of Mr. Brennan this was not proved. However, on the evidence to which I have referred it is not possible to hold that the supervision was of an effective kind.

There appeared on each machine, in addition to the notice already mentioned, a further notice in the following terms:

Use of Photocopying Machines

Occasionally users monopolise photocopying machines. Once 10 copies have been made the next person in the line should be given access to the machine and the mass copier must join the end of the queue.

The learned trial judge said that "the necessity for such a notice gives a clear indication that the University was fully aware that there were persons interested in copying large quantities of material". That statement is true but it does not follow that a person making ten copies is acting in breach of copyright. It is hardly necessary to say that a person who uses a machine to make ten copies does not necessarily make ten copies of the one publication; he may be making single copies of ten different publications. Further, it is s. 49, not s. 40, that expressly limits the number of copies that may be made if an infringement is to be avoided; more than one copy

might be made without committing an infringement if, in all the circumstances, it was a fair dealing for the purpose of research or private study to make more than one copy. Nothing directly turns upon this aspect of the matter in the present case but I have thought it necessary to mention it because of the continuing confusion that appears to have existed between the provisions of s. 40 and those of s. 49.

The various measures adopted by the University, even when considered cumulatively, do not appear to me to have amounted to reasonable or effective precautions against an infringement of copyright by the use of the photocopying machines. The library guide might not have come to the attention of all persons using the machines and in any case the statement in it that an extract of the relevant sections was on each machine was erroneous. I am not satisfied that the attendants effectively supervised the use of the machines, at least for the purpose of preventing infringements of copyright. However, the fatal weakness in the case for the University is the fact that no adequate notice was placed on the machines for the purpose of informing users that the machines were not to be used in a manner that would constitute an infringement of copyright. It is unnecessary to consider what the position would have been in the present case if the notices on the machines had been sufficient. The fact is that the notices actually placed on the machines, which set out s. 49, were completely ineffective for the purpose for which they were apparently intended.

For these reasons I hold that the University did not adopt measures reasonably sufficient for the purpose of preventing infringements taking place. It follows that in these circumstances when Mr. Brennan used the means provided by the University to make an infringing copy he was authorized by the University to do what he did. Of course, the University did not intend that anyone should use its facilities for the purpose of obtaining evidence against it, but what Mr. Brennan did was nevertheless within the general authority given to all persons entitled to use the library.

In these circumstances I hold that the University authorized the act of Mr. Brennan in making the copies in question which, as I have held, were infringing copies. A declaration to that effect can be made but the wider declarations which the respondents sought cannot be granted. There was no evidence that there was any likelihood that infringements of the respondents' copyright might take place at the University library in the future. Mr. Moorhouse's book was not prescribed as a textbook or reference book although in 1974 it did appear in a reading list issued to students in Political Science I. There was no evidence that it was in great demand at the library; it appears to have been borrowed on only three occasions between the date of its acquisition in August 1972 and the date of the trial in April 1974. It is not a book of a kind which students would be likely to find it necessary to copy for the purpose of study. In fact it appears rather unlikely that anyone would use the photocopying machines in the library to make an infringing copy of the book. There is no ground for making a declaration on the assumption that the respondents' copyright might be infringed in

the future. I have already indicated that a declaration should not be made on the hypothesis that infringements have occurred in the past. In these circumstances, although I would allow the cross-appeal, the respondents' success is so limited that it should not carry costs.

I would allow both the appeal and the cross-appeal.

JACOBS J:

The first-named respondent is the author of a book entitled "The Americans, Baby". The book consists of a number of stories which had been previously published separately and are now collected and published in the volume so entitled. There can be no doubt and there is no real dispute that he is the owner of the copyright in the work, although this was not admitted in the pleadings. The second-named respondent had a licence to publish the book.

By the statement of claim as finally amended the respondents claimed that the appellant had infringed the copyright of the first-named respondent by reproducing or authorizing the reproduction of part of this book in a material form without consent. Particulars were given of the manner in which it was claimed that the appellant had infringed or authorized the infringement of the copyright.

Hutley J.A. found that one Paul Brennan on 28th September 1973 twice photocopied one story, ten pages in length, from "The Americans, Baby". He used a machine in the library building of the appellant in the grounds of the University. The machine was one of a number of coin or token operated machines provided by the appellant in a room close to the library. There is no finding that Brennan used a copy of the book from the appellant's library for the purpose of making these photocopies but it appears to have been assumed that this was so. His Honour found that "In relation to the prevention of the use of the [photocopying] machines for breach of copyright there were supervisors but no supervision they were unsupervised in any practical and useful sense, with the knowledge of the University librarian". He also found that library guides, particularly those issued by the appellant for the years 1970, 1971 and 1972, "were not calculated to draw attention of students to the fact that the use of photocopying machines might involve them in breaches of the law of copyright", and that the 1973 guide might "under certain circumstances lead a student to commit a breach of copyright". It was also found that the notices attached to the machines, to which reference was made in the various library guides, were inadequate and misleading. The notices set out s. 49 of the Act but, as his Honour rightly observed, that section is not concerned with the use of self-service coin operated copying

machines. The notices made no mention of ss. 14 (1) (a), 36 and 40, the sections immediately relevant in the circumstances.

A number of declarations were sought as well as an injunction restraining further breach. The first declaration sought was that the appellant had infringed the respondents' copyright. Then declarations were sought in a more or less general form unrelated to the particular infringement which was alleged in relation to Brennan.

Hutley J.A. did not make a declaration in any of the terms sought in the statement of claim. A declaration specifically finding an authorizing by the appellant of a breach of copyright by Brennan in respect of the particular incident alleged in the statement of claim and proved was refused upon the ground that "There is no proof that Mr. Brennan was induced to do what he did by a study of the library guides, the careful consideration of the notices attached to the machines, or was influenced by the atmosphere of disregard for authors' rights which the University has encouraged".

Although his Honour concluded that there was no proof that the appellant had authorized Brennan's breach of copyright he appears to have formed the conclusion that there must have been some other breaches of copyright of the first respondent's work because a declaration was made in the following terms:

Between the date when the book "The Americans, Baby" by Frank Moorhouse was entered in the defendant's library and the hearing of this summons the defendant authorised such breaches of copyright as occurred by the photocopying of the whole or part of the library copy of the said book by the use of the photocopying machines where such photocopying was not a fair dealing within the terms of s. 40 of the *Copyright Act 1968* and where such breaches were in any way due to reliance upon any library guides issued by the defendant in the years 1970, 1971, 1972 and 1973 or the notices appearing upon the self-service photocopying machines in the said library or by the lack of supervision of the use of such machines or any combination thereof.

The declaration was made in these terms as a result of the view formed by Hutley J.A. of the effect of the language used in the library guides and of the notices appearing on the self-service photocopying machines and of the evidence of a lack of a supervision of the use of the machines calculated to prevent or minimize the chance of the machines being used in a way which involved a breach of copyright in material copied.

The appellant appeals upon a number of grounds. Among them are the following:

5. That there was no evidence that any breaches of copyright by photocopying the whole or part of the library copy of "The Americans, Baby" occurred between the date

when the said book was entered in the library of the appellant and the hearing of this suit.

6. That there was no evidence that any breaches of copyright by photocopying the whole or part of the library copy of "The Americans, Baby" occurred between the date when the said book was entered in the library of the appellant and the hearing of this suit other than by one Paul Brennan on the 28th day of September 1973 being a breach of copyright which the learned Judge found was not authorised by the appellant.

7. That there was no evidence that any breach of copyright in relation to the whole or any part of the book "The Americans, Baby" during the period aforesaid was authorised by the appellant.

During the hearing of this appeal leave was given to the first-named respondent to lodge a cross appeal out of time. By the cross appeal that respondent seeks to have reversed the finding of Hutley J.A. that the breach of copyright committed by Brennan was not authorized by the appellant. He seeks a declaration that it was so authorized and also seeks declarations in general terms describing the conditions from which it may be concluded that the appellant infringes or authorizes the infringement of the first-named respondent's copyright. It is convenient first to deal with the cross appeal.

There can be no doubt that Brennan infringed the copyright in the story photocopied by him from "The Americans, Baby". He copied the whole story and in the circumstances this was a substantial portion of the work and he did not do this copying by way of a fair dealing for purposes of research or private study. The question is whether in the circumstances of the case the appellant in supplying the book from its library and in providing a machine at the library which would enable copies to be made authorized the infringement. The answer depends upon the meaning of the word "authorize" in s. 36 (1) of the *Copyright Act 1968* and on a conclusion of fact once the meaning of the word is ascertained. Section 36 (1) provides:

Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

It is established that the word is not limited to the authorizing of an agent by a principal. Where there is such an authority the act of the agent is the act of the principal and thus the principal himself may be said to do the act comprised in the copyright. But authorization is wider than authority. It has, in relation to a similar use in previous copyright legislation, been given the meaning, taken from the Oxford Dictionary, of "sanction, approve, countenance". See *Falcon*

*v. Famous Players Film Co.*¹⁹ which was approved in *Adelaide Corporation v. Australasian Performing Right Association Ltd.*²⁰ I have no doubt that the word is used in the same sense in s. 36 (1). It is a wide meaning which in cases of permission or invitation is apt to apply both where an express permission or invitation is extended to do the act comprised in the copyright and where such a permission or invitation may be implied. Where a general permission or invitation may be implied it is clearly unnecessary that the authorizing party have knowledge that a particular act comprised in the copyright will be done.

The acts and omissions of the alleged authorizing party must be looked at in the circumstances in which the act comprised in the copyright is done. The circumstances will include the likelihood that such an act will be done. " [t]he Court may infer an authorization or permission from acts which fall short of being direct and positive; indifference, exhibited by acts of commission or omission, may reach a degree from which authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized " (per Bankes L.J. in *Performing Right Society Ltd. v. Caryl Theatrical Syndicate Ltd.*²¹).

The question then is whether in the circumstances of this case the appellant authorized Brennan's doing of the act comprised in the first respondent's copyright. There was no express permission given to him but the real question is whether there was in the circumstances an invitation to be implied that he, in common with other users of the library, might make such use of the photocopying facilities as he thought fit. The question may be examined by assuming first a library open to all persons either freely or on payment of a fee. Assume that the owner places copying machines in the library which can be operated on payment of a fee whereby a profit accrues to the owner of the library. Is this not an invitation to any user to make such use of the machines as he sees fit and therefore an invitation which extends to the doing of acts comprised in the copyright of authors whose books are on the library shelves? And is not such an invitation an authorizing of acts done in response to the invitation? I would certainly answer "Yes". The invitation to use is on the face of it an unlimited invitation. Authorization is given

¹⁹ [1926] 2 K.B. 474.

²⁰ (1928) 40 C.L.R. 481.

²¹ [1924] 1 K.B. 1, at p. 9.

to use the copying machine to copy library books. It can hardly be said that the authorization is limited to the copying only of those books or parts of books which in the particular circumstances may be copied without infringement of copyright. In such a case knowledge of the prior doing of acts comprised in the copyright would not need to be proved nor would other positive or particular acts of invitation or authorization need to be shown.

How then, in the case of the Brennan infringement, are the facts relevantly different from those which I have taken in the example? First, the appellant's library was not a library open to all comers. It was a University library. But there can be no assumption that thereby its only use was for purposes of research and private study. Surely, common knowledge of what a University is and ought to be enables one to conclude that members of the University will read for their private recreation and edification as well as for the purposes of their research and private study. Let us hope so, anyway. And if they do so, surely it is an open inference that they will use their University library and its facilities. I can see no relevant difference in this respect from the case of a library open to the public generally though the quantity of research and private study may be greater in the case of a University library than in the case of a public library.

Secondly, the fees payable for the use of the copying machines did not, or were not intended to, bring a profit to the appellant. But I do not think that this difference is critical. A purpose of profit is unrelated to any invitation implied from the presence of the machines and the supply of books and printed matter suitable for copying on the machines. Therefore I can see no relevant difference arising from the circumstances that this was a University library and in my opinion the unqualified supply of the books and the machines amounted to an invitation to users of the library to make such use of the machines by photocopying of the books or substantial portions thereof as they saw fit.

In the circumstances it was of little importance whether or not the University authorities knew in fact that users of the machines were doing acts comprised in the authors' copyrights. This knowledge or lack of it would not change the terms of the invitation extended by the supply of books and machines. Knowledge could become important if the invitation were qualified in such a way as to make it clear that the invitation did not extend to the doing of acts comprised in copyright and if nevertheless it were known that the qualification to the invitation was being ignored and yet the University allowed that state of things to continue. Then it might be found

as a fact that the University authorized the continued state of things, the continued use of its machines to do acts comprised in authors' copyrights, and thus to infringe those copyrights. But in this case the University did not qualify its invitation to users of the library to use its machines. It posted notices setting out s. 49 of the *Copyright Act* but this section related to copies made by or on behalf of the librarian, not to copies made by users on their own behalf. It published library guides of which those for the years 1971, 1972 and 1973 warned students that they had a responsibility to obey the law under the *Copyright Act 1968* and stated that a copy of the Act was available in the photocopying room, but this could not be regarded as a limitation on the invitation apparently extended. The guides also stated that there was an extract from relevant sections on each machine but, as I have stated, this was in fact not so. It is clear to me that this failure was due to inadvertence and confusion on the part of the University authorities but on the facts of the present case it is an important factor. It might be said that the University was entitled to assume that users would obey the law, including the law of copyright, but such an assumption on its part would not qualify the invitation which it extended.

Brennan, then, was a user of the library on the occasion in question. He apparently had sufficient right to be there to make him at least a licensee of the library's facilities. He was a graduate of the University and the library was not exclusively an undergraduate or student library. He went there and used the library book or books and the library copying machine in terms of the invitation apparently extended to him. In my opinion the appropriate finding in these circumstances is that the University authorized his acts. It was not necessary, as the learned trial judge thought, to find that he had studied the library guides or the notices attached to the machines or had been influenced by a lack of any supervision intended to prevent or deter breaches of copyright. I find no special relevance, in respect of Brennan's breach and of the question whether the appellant authorized it, in the contents of the library guides. The particular form of notice on the machines is a negative factor in that it did not in any relevant way limit the invitation which was implicitly extended to make use of the machines for photocopying as the user thought fit. The lack of supervision is also a negative factor in that there was no limit expressed by such a supervisor on the use of the machines to which the invitation extended. Brennan by his conduct accepted the invitation which had no relevant qualification to use the book "The Americans, Baby" and the copying machine. The unqualified nature of the invitation sufficiently caused him to do the acts which he did and which were comprised in the copyright of the respondent. It cannot be assumed that if the invitation had been qualified he would have made an unauthorized use of the machine. I am therefore of the

opinion that the cross appeal should be allowed and that a declaration should be made that the appellant authorized the doing by Brennan of the act of reproducing the literary work "The Americans, Baby" in a material form and thereby infringed the respondents' copyright in the said work. I do not think that any declaration in a more general form can be made. Proof of an authorizing of a breach of copyright in certain circumstances does not entitle a plaintiff to a declaration that in other circumstances an authorizing of breach had occurred or would occur in the future. This case was frequently described by counsel for the first-named respondent as a test case but it could only be so described in relation to the circumstances proved in evidence. If it was intended to be in some way a test case then it is unfortunate that the occasion of testing was one where this University had inadvertently failed to qualify in any material way the invitation which it extended to make use of the photocopying machines to copy material in the University library.

I turn now to the appeal. I find the declaration made in the Supreme Court of New South Wales insupportable. It was not founded on particular breaches of copyright proved to have occurred. It assumed for the purposes of the declaration that acts in breach of the respondents' copyright had occurred (other than the infringement by Brennan to which the terms of the declaration were inapplicable). It was then declared that by certain acts and omissions the appellant authorized such breaches of copyright as had occurred. But once the meaning of the word "authorized" in s. 36 of the *Copyright Act* is ascertained the question whether by certain acts or omissions a breach of copyright is authorized is a question of fact to be determined in all the circumstances of the case. A declaration of right based on facts found in the particular case can certainly be made but it is not permissible to make a declaration of right which amounts to a conclusion of fact from a hypothetical or assumed state of facts and thereby to enunciate or declare a rule of apparently general application as though it were a declaration of applicable law. A declaration of right based on hypothetical or assumed facts may be made when the assumed facts can be certainly and exhaustively stated and when the conclusion flowing therefrom is truly a conclusion of law but not when it is itself a conclusion of fact. In the declaration made in the present case the Court has attempted an apparently exhaustive enunciation of the factual circumstances from which an authorizing of breach of copyright should be held to have occurred but this is an attempt to generalize on a factual situation the circumstances of which have not been proved. This cannot be done. I would therefore allow the appeal with costs and set aside the declaration. I would allow the cross appeal and make a

declaration in the terms which I have stated above. I would make no order on the costs of the cross appeal as it was only lodged towards the conclusion of the hearing of the appeal.

In view of the course which the matter has taken there should be no order for costs in the proceedings in the Supreme Court.