THE INTRODUCTION OF COPYRIGHT LAW IN PAPUA NEW GUINEA

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In February 1989, a newspaper article captioned: 'The Pirates Who Plunder PNG's Creative Arts' written by a person in the music industry depicted and explained the piracy of musical works in Papua New Guinea.[1] It expressed concern in the absence of a copyright law in the country alleging that this was resulted in the piracy of Papua New Guinean musical works.[2] This was neither the first time[3] nor was that writer the only one who voiced this concern. The Papua New Guinea Writers Union expressed similar concerns on the matter as well and reported at one time[4] that it was consulting with Australian copyright authorities and the World Intellectual Property Organisation (WIPO) to assist Papua New Guinea to introduce a copyright law. The Papua New Guinea movie theatre industry first expressed the same concern. With the increase in Papua New Guineans owning videos, the video tape hire industry has complained of the sale and hire of video tapes in the country reproduced without authorisation.[5]

There has also been concern and pressure exerted from outside the country. This has come mainly from foreign owners of copyright works and international organisations responsible for the provision and administration of international copyright protection like WIPO. The latter international body responsible also for industrial as well as intellectual property law has been attempting to get Pacific Island states to enact copyright legislation.[6]

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1. The *Post Courier*, 16 Feb. 1989, p. 11.

2. The consequences of piracy are: the pirates benefit at the expense and detriment of record companies and performing artists; the pirates fail to pay the recording costs incurred by the record company and they steal the profits which might otherwise go to the record company; detriment to the results from inferior quality recordings manufactured by the pirates and from the non-payment of artist royalties to the professional musician'. *Ibid.*

3. The concern has been expressed on numerous occasions, some as early as immediately after Papua New Guinea's independence. For example, a letter to the editor in The *Post Courier*, PNG, 5 May 1976 stated:

   > PNG has a growing number of playwrights, poets, musicians, etc who are producing original work. These persons deserve not only protection from plagiarism but also royalties, if their works are performed or sold in other countries. At present they have no such rights or protection, nor does anyone else who publishes original work in this country. Papua New Guinea stands to lose much prestige if well respected groups, such as the Summer Institute of Linguistics are forced to publish their works outside this country for similar reasons.

4. The *PNG Writer*, (May 1986) 2(1), preface page.

5. It was also evident that some video tape rental companies hiring out video tapes made from Australian television broadcasts. In Australia, this would be a breach of copyright to copy without authorisation and offer them for sale or hire.

6. A number of seminars and workshops have been held for the Pacific Island countries on this subject in the last few years. The latest one was hosted jointly by WIPO and the office of the

The calls made from within the country for the introduction of a copyright law have been increasing.[7] The government to date has not responded to these calls. Soon after independence, the then Deputy Prime Minister, Sir Ebia Olewale stated the government policy at that time in a policy statement that Papua New Guinea was not ready for a copyright law.[8] The minister left the matter open for any future change of policy. A Copyright Committee comprising of individuals from a number of government departments and persons from outside the government was later set up under the direction of the National Executive Council to consider whether copyright legislation should be introduced and if so to determine the type or form of legislation suitable for Papua New Guinea. This Committee later recommended to the Minister for Foreign Affairs that a copyright law modelled on the copyright legislation of Kenya and Malaysia should be introduced in the country.[9] The government acting on the recommendations of the Committee, approved on 27 January 1977:

> (a) the drafting of copyright legislation ... (b) the inclusion of legislation of compulsory deposits as a requirement for the obtaining of copyright of all works by Papua New Guinea nationals in Papua New Guinea; (c) the making of the National Library, University of Papua New Guinea and University of Technology depositories where appropriate under the legislation ...[10]

Legislation was drafted along the guide-lines given by the Cabinet. The *Copyright Act 1978* was passed by Parliament.[11] This Act has however not been brought into force because the mandatory requirement that `A work shall not be eligible for copyright unless deposit has been made in terms of the *Statutory Deposit Act 1978*'[12] could not be fulfilled as a *Statutory Deposit Act* was not passed.[13]

This paper is intended to address two main issues: first, whether there is a copyright law or a similar right exists in Papua New Guinea not under the 1978 Act but under the common law by virtue of the adoption by the *Constitution* of the principles and rules of common law; and second, regardless of whether or not there is such a right under the common law, Papua New Guinea should adopt modern copyright legislation. The first issue will necessarily involve an examination of the historical development of copyright law in England and a discussion of the common law and equity reception provisions of the *Constitution*. The latter will require a survey of the arguements for and against adopting copyright legislation particularly from the perspective of developing countries

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Australian Attorney-General in Canberra in August, 1989 where model Copyright legislation that Pacific Island states could adopt were discussed.

7. For example, see the *Times of PNG*, weekly, 21 Feb. 1989, p. 14. The subject was also discussed at the 1988 Waigani Seminar, University of Papua New Guinea.

8. National Executive Council Decision No. 11/75.

9. Report of the Copyright Committee to the Minister for Foreign Affairs and Trade, 1976.

10. National Executive Council Decision No. 18/77.

11. The provisions of the Act have been discussed by A. Laurent `Development of Copyright in Papua New Guinea: The Copy Right Act 1978', (1978) 6 *M.L.J.*, 104.

12. Section 8(4).

13. It appears that there were disagreements on whether the deposit obligations should apply to foreign works as well for these to attract copyright in Papua New Guinea.

in general and Papua New Guinea in particular. In this connexion, the paper adopts the position on the question whether Papua New Guinea should or should not adopt legislation on the subject, that this must ultimately depend on a cost-benefit analysis of having or not having copyright law. The paper does not offer this cost-benefit analysis nor does it offer an answer. What it will attempt to do is to outline the relevant considerations, both policy and otherwise, that need to be addressed for an informed decision on the issue. The paper starts with a statement of the general principles of copyright law in modern legislation in other countries followed by a section on the particular issues that developing countries face and looks at the attempts that have been made by the latter to address these issues. The third section discusses the arguments for and against the introduction of copyright legislation, while the final section preceding the conclusion examines the existence in Papua New Guinea of copyright under the common law.

1. COPYRIGHT LAW: GENERAL PRINCIPLES

Copyright is a branch of intellectual and industrial property law which includes patents, trademarks and names, registered designs and confidence.[14] The law of copyright is 'concerned with the negative right of preventing the copying of physical material existing in the field of literature and arts'.[15] Copyright law in addition to protecting musical, artistic, dramatic and literary works, extends by legislation in countries with copyright laws, to include the advancing computer software and programme industry. Copyright gives a negative right; the owner has the exclusive right to make copies and any copying made without his or her authority constitutes an infringement of that right. The types of works that attract copyright and the acts that constitute infringement depend on provisions of local copyright legislation in force in a particular country.

The protection accorded by copyright law is in the expressed work whether it be in literature or in other artistic forms. It is what has been reduced to permanent physical form which gives this proprietary right to the owner. Copyright law does not give rights to ideas. A common example used to illustrate the distinction is a photograph of a landscape. The photograph will attract copyright in most countries with copyright laws because it is an 'artistic work'. The owner of the photograph therefore will have copyright in it and there will be an infringement of the right for any person to reproduce it in any form without the former's authority. It will not be an infringement however for another person to take a photograph of the same landscape, at the same angle, that may look very similar to the former's print. In other words, it is the photograph that attracts copyright and not the landscape.

The basic principle underlying copyright law is that while ideas are free, authors of literary works, artists of artistic works and composers of musical works have property rights over the way in which they express the idea. The usual requirements for the protection of such expression of idea in jurisdictions with copyright laws are that the expression of the idea must be in a permanent form and that permanent expression is original in the sense that it must not be copied from another.[16]

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14. Papua New Guinea does not have legislation on patents and designs. There is in force legislation on trade marks - the *Trade Marks Act* (No. 39 of 1978) and *Trade Marks Regulations* (No.4 of 1979) and the law of confidence being part of the common law applies in the country by virtue of the adoption by the *Constitution* of the principles of common law and equity.

15. Copinger, *Copyright*, 3.

16. 'The word "original" does not in this connection mean that the work must be the expression of original or inventive thought ...[copyright law] does not require that the expressions must be in an original or novel form, but that the work must not be copied from another work - that it should

The types of works that may attract copyright in most countries with copyright laws could be divided into two broad categories. The first are works for which the authors themselves have copyright. These include literary works covering

> work which is expressed in print or writing irrespective of the question whether the quality or style is high. The word literary seems to be used in a sense somewhat similar to the use of the word `literature' in political or electioneering literature, and refers to written or printed material.[17]

Literary works also cover secondary work in existing work which involve some skill, labour and judgement, for instance in translations and compilations. The second type are dramatic works which cover choreographic works or entertainment in dumb shows if reduced to writing, and finally musical works. In relation to the latter

> where works are set to music, the two remain distinct works for copyright purposes: the one may attract literary copyright stemming from the lyric writers creation, the other carries musical copyright from the act of composition.[18]

The second class of works attracting copyright are works for which copyright is given not to the author who created the work but extended to persons who organise the reduction of the material into permanent form; or who have what has been referred by continental Europe as having `neighbouring rights'. These include sound recordings, cinematograph films, television and sound broadcasts, and typographical arrangements.

The exclusive right against copying are given for limited periods in national copyright laws. The terms differ from country to country and each in turn differ from the different types of work. National copyright laws of individual countries protect copyright owners against copying by individuals within their national boundaries. Copyright infringement or `piracy' of copyright works by persons outside the national boundaries can only be controlled by individual countries becoming members of international conventions. To ensure effective protection of national copyright works and for obtaining maximum benefit, membership by individual countries for international protection is necessary especially where the national population for the consumption of copyright material is small and there is demand outside it for copyright materials produced by its nationals.

There are two major conventions on this: the *Berne Copyright Union*[19] and the *Universal Copyright Convention* (UCC)[20]. Under the *Berne Union* founded in 1886, member countries undertake to grant reciprocal protection to each others works. There are no formalities to be complied with to get protection. The UCC was established in 1952 at

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originate from the author' *University of London Press v. University Tutorial Press* (1916) 2 Ch.601, 609.

17. *Id.* 608, per Patterson J.

18. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, (London: Sweet Maxwell), 237.

19. The *Berne Convention* was signed by member countries in September, 1886. It has been administered by the International Bureau, the Secretariat of the World Intellectual Property Organisation (WIPO), in Geneva. On 17 December, 1974, WIPO became a specialised Agency of the United Nations.

20. The *Universal Copyright Convention* established in 1948 by a resolution of the General Conference on UNESCO is administered by the Copyright Division of UNESCO.

the initiative of UNESCO for those countries which either because their national legislation did not conform to Berne standards, or because of fundamental differences between their systems of protection and that of the *Berne Union*, did not accede to the *Berne Convention*. Copyright protection under this convention is given to those works of member countries that have an encircled C, the name of the copyright proprietor and the year of first publication on the copyright material. In addition to these formalities, the other main difference in these two conventions is that the UCC has less stringent conditions about the terms of protection given. It does not for example recognise any moral rights.

The United States which was not a party to the *Berne Convention* joined the less stringent UCC. Australia[21], New Zealand and the United Kingdom ratified both the *Berne Convention* and UCC. Of the Pacific island states, only Fiji has ratified the UCC. The other Island nations including Papua New Guinea and Vanuatu are not parties to these conventions.

2. COPYRIGHT IMPLICATIONS FOR DEVELOPING COUNTRIES

Many developing countries found that the provisions of the two conventions did not take account of their specific needs. It was realised for instance that developing countries on the one hand needed to protect their local works and on the other they needed to have access to foreign copyright materials especially textbooks for educational purposes. In balancing the need for having a copyright law to protect their few but growing copyright works and the economic costs to them of having a copyright law requiring respect for foreign copyright works; the benefits in economic terms of not having copyright laws tended to outweigh considerations for having national copyright laws. However, the danger of not having copyright laws realised was the possibility of publishers preventing badly needed educational materials getting into developing countries.

With these considerations in mind, developing countries argued for special considerations from other copyright countries. During revisions of the *Berne Convention* and the UCC in Stockholm and Paris, developing countries took up the matter for discussion. There were several concessions made to developing countries included in a Protocol to the *Berne Convention* at the Stockholm Revision in 1967. The concessions included proposals contained in the Protocol Regarding Developing Countries which would allow developing countries to reduce the terms of copyright in their national law; to allow for translations into their national languages, to authorise publishing for educational and cultural purposes and to exclude from the scope of infringement, reproduction of copyright works for teaching, study or research; and to limit the scope of the right to broadcast. These proposals were considered far reaching by traditional copyright countries including the United Kingdom, and were rejected.

A further revision conference was called in Paris in 1971. The new revisions reduced the earlier suggestions to two limitations which developing countries could include in their national legislation. The first concession was for a competent authority established in the developing country with powers to licence a national to translate a printed work into a national language and have it published once three years have elapsed since first publication of that original material or work. This was restricted to use for the purposes

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21. Australia was bound by the *Berne Convention* since its inception as a result of its ratification by the United Kingdom. Australia became a member itself on 14 April, 1928. Australia acceded to the *Universal Copyright Convention* on 1 May 1969. The Territory of Papua (British New Guinea) would also have been bound by the *Berne Convention* on its annexation by Britain in 1888. Papua New Guinea was bound by both the *Berne Union* and the *Universal Copyright Convention* after 1969 until its independence by virtue of Australia's accession to these Conventions; see footnote 26.

of teaching or research only. It was in addition to an already existing provision in the *Berne Convention*[22] which allowed for translations to be made of a work if the copyright owner did not do the translation within ten years of its first publication. The second concession was for compulsory licensing for publication of the work itself by the competent authority to any national of a developing country if the copyright owner or an associate did not do so within a specified period. The specified period would vary depending on the type of work. In the case of scientific and technological works for instance, the period was three years from first publication. Both concessions were however subject to the conditions that any copies of works published must be confined to the national market and the licences in each case were to be upon terms of just compensation, judged by the standard of usual royalty rates between the two countries. These conventions were included as an appendix to the *Berne Convention*.

The revised proposals were far from the Stockholm Protocol and far from what the developing countries were demanding. The main argument against any or further preferential treatment was that developing countries do not receive preferential treatment on other western goods and technology imported into their countries. They pay the market price for them and copyright work should be treated on the same footing as it involves the same effort and investment. The argument proceeded: `why should a person who invests time and effort in writing a book give concessions to developing countries while the man who manufactures goods or other technology reaps full benefits'. Developing countries however continue to press for `a better deal'. However, with the sort of reception given so far, the task will be difficult and may take time and require more pressure before any real concessions are made.

Many developing countries are resisting pressure especially from outside their countries to introduce copyright laws. Some have introduced copyright laws as a result of international pressure. These include countries like Singapore, Thailand and Malaysia. In the South Pacific region, Papua New Guinea has no modern legislation on copyright. Fiji has had a copyright law for some time[23], Kiribati has a copyright Act[24] and Solomon Islands has recently passed a Copyright Act[25]. Other Pacific island countries like Cook Islands and Western Samoa have copyright laws by extension from New Zealand. Vanuatu does not have a copyright law. In the case of Papua New Guinea, the Australian *Copyright Act 1968* (Com.) that applied in the territory ceased to apply on independence[26] and with the 1978 Act not in force, the question is whether copyright legislation in the form of the 1978 Act or in any other form should be introduced.

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22. Art. 5.

23. The *Copyright Act 1956* (UK) applies by extension. It has been modified later by the *Copyright (Fiji) Order in Council 1961* and the *Copyright (Broadcasting of Gramophone Records) Act 1972*.

24. The *Copyright Act* Chapter 16 is modelled on the earlier United Kingdom Act.

25. *Copyright Act 1987*.

26. Section 4 of the 1968 Act extended its application `to any external Territory'. The *Copyright Act 1911* (UK) applied to Australia and British New Guinea (s.25(1)) as an Imperial Act until 1912 when Australia passed the *Copyright Act 1912* which by s.8 made the 1911 Act a Commonwealth Act enabling it to operate of its own force. The *Copyright Act 1911* (Imp.) continued to apply in Papua as an Imperial Act until Papua New Guinea's independence.

3. COPYRIGHT LEGISLATION FOR PAPUA NEW GUINEA

Modern legislation on copyright in other countries are based on the principle that an artist, musician or author of literary or other creative work has a proprietary right in his or her work in the same way as a person in the manufacturing or other industry having proprietary rights in the goods or services he or she produces. The producer of goods for example can exercise exclusive control over the goods produced by either consuming them or by offering them for sale. Other persons can of course produce the same goods (if there are no patent rights existing in them) but they must incur the same input in effort and investment. The principle however remains that the producer of the goods remains the owner with exclusive control over their use or disposition. For an artist, musician or author, the product of his or her effort and investment in the production of his or her work is not similar to `goods' that would enable him or her to exercise exclusive control and use for example for its sale without state assistance. This is because, it is easy for others without the same investment to copy the work. Hence, the enactment of copyright legislation by the state is aimed primarily at according to the musician, artist or author proprietary rights of ownership in their work for the exclusive use of the works either in their consumption or in their economic exploitation.

The assistance given by the state in promulgating legislation for the recognition and protection of copyright in musical, artistic or literary works is not done solely out of a desire to protect the rights and further the welfare of its citizens. There are broader objectives underlying the state's intervention. Many countries maintaining or introducing copyright legislation see copyright as necessary for the promotion of musical, artistic and publishing industries. These industries create employment opportunities for a whole range of professional people and can be a source of income not only for the author of the copyright work but also for the country in generating foreign exchange where a work of a national is marketed outside the country. In the music industry for example, in addition to the person actually writing the lyrics (who would have copyright in literary work), there may be another person setting the lyric to music (the musician), another in producing the music (the producer) and still another in marketing the product. In literary or other artistic work, in addition to the author or artist, there may be others involved in the publishing of the book in the case of literary works and the marketing of the published book or other artistic work.

The income that is generated in industries the subjects of copyright protection is enormous. The musical and literary industry are among the highest money-spinning industries in the world. The existence of copyright laws in a country achieves two things in this connexion. First, the existence of a copyright law ensures that the musician, artist, author or other person involved in the production of copyright works can reap the benefits of his or her work by preventing other persons `pirating' the work or causing the musician, artist or author to take his or her work out of the country and use it overseas. A Papua New Guinean writer or musician can for example publish his or her work in Australia or New Zealand and can derive copyright protection not only in those jurisdictions but also in other countries that are members of the international conventions to which Australia or New Zealand are members, as Australia and New Zealand copyright laws extend copyright protection to works first published in their jurisdictions.[27] This would no doubt have the effect of depriving Papua New Guinea of earning foreign exchange by the sale of the copyright work. The country may also loose on the other linkage benefits such as employment generation and the prestige of being associated with the work.

27. The *Australian Copyright Act 1968-76* (Com.) for example provides under s. 32 that `where an original literary, dramatic, musical or artistic work has been published ... copyright subsists ...[if] the first publication of the work took place in Australia'.

Second, the existence of a copyright law provides an incentive to the musician, artist or author to be more creative and to produce more. Where there is no copyright protection, not only can it stifle creativity but it can also mean the `pirating' of locally produced works by others and used for economic gain either locally or on the international market. It has for example been claimed that some Papua New Guinean musicians and writers have not released their work in fear of the works being used by others.

The incentive for greater activity in copyright works can bring other benefits as well. In countries like Papua New Guinea where there is still in existence different but rich indigenous cultures, the reduction of these in permanent form for example in literary, musical or other artistic forms can be beneficial in that they will be preserved. Although such things as traditional folklore cannot attract copyright protection as copyright does not protect ideas, their reduction in literature or music forms can, and in that form ensure their permanent preservation.

Just as there are advantages in having copyright laws, there are advantages also in not having it. In particular, for developing countries that rely mostly on imported products from food and other capital equipment to copyright material, the economic costs in having a copyright law can be high. This can increase the costs of providing essential services and affect the long term developmental objectives of a developing country. The obvious and the most important sector directly affected in this respect is education. Almost all textbooks in developing countries in secondary and tertiary educational institutions are foreign. Foreign publishers owners of copyright in these works are known to produce expensive hard cover books with limited cheap editions not sufficient to be made available to developing country consumers. Although, most copyright laws allow for limited copying (eg., photocopying only of up to 10 or 20 pages) for private study, this exception does not cater for the great demand by educational institutions for the use of the whole or a big part of a textbook by students. As most of these books are sold at exorbitant prices making it expensive for students in developing countries to purchase, the existence of a copyright law with international membership in international conventions can be a burden. Many developing countries, where it is common to find their educational institutions making copies of textbooks to make available to students, have resisted international pressure to introduce copyright laws for this reason. It has been seen that the efforts of developing countries at obtaining concessions from developed countries in these areas have not been successful.

The other sector that may take advantage of the non-existence of copyright law is the public who are consumers of foreign musical works. It was common for example to find low priced music cassette tapes copied in Hongkong or Singapore before the introduction of copyright legislation in those countries, sold in Papua New Guinea shops. The same was true in the sale and hire of video tapes. This may not really be a benefit to the consumer. Often these unauthorised copies (or `pirated' works) are of substandard quality and distributed by persons other than the lawful manufacturers to whom it may be difficult to have legal recourse by consumers in cases where products are defective. Further, with unauthorised distributors, it is common to find that they deal only in presently popular musical works and may not have other works that consumers may desire. Hence, the `benefit' in this connexion in the absence of a copyright law may not be a benefit at all for the consumer.

It is also true that some of the perceived advantages of having a copyright law are based on various assumptions. The economic benefits to the author or the country in earning royalties or foreign exchange are based on the assumption that the work has the appeal to compete in foreign markets. For developing countries with small markets, copyright protection must extend to the international market where the real economic benefits are, through membership of international conventions. This of course means that works of other countries including those countries producing essential works like textbooks would be accorded the same protection under the convention.

The preparation and passing of the *Copyright Act 1978* by the Papua New Guinea Parliament was done after weighing these considerations. The Minister for Foreign Affairs and Trade in his submission to the National Executive Council seeking approval[28] for the 1978 Act stated:

> Failure to recognize copyright will mean that we shall not be able to foster our national creative writers, composers and artists. They will not produce original works because if they do and if they are financially successful, other people will be able to use them without permission. In the circumstances our national creative people will produce their good quality work in a country which offers protection ....
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> The Government will also suffer to some extent if there is no copyright law. The Education Department, the Office of Information and the National Broadcasting Commission for example produce a lot of work. Other people would be able to use this work without advising the body concerned and without paying for it.

The minister at the same time pointed out the disadvantages of adopting a copyright law:

> The introduction of copyright laws must however be considered with care. Papua New Guinea is a developing country and has therefore as one of its highest priorities the education of the people to the greatest extent possible. Copyright laws which are too stringent would interfere unduly with the availability of educational material. For the foreseeable future nearly all educational material, and particularly that of a technical nature or for tertiary levels, will be written by overseas authors. Sometimes there are not sufficient copies of these books readily available. On other occasions teachers may only need to use a part of a book and not the whole of it. Thus it is necessary to produce certain material. With stringent copyright laws, this activity could result in the payment of large sums as royalties. There is a need to balance [the] desire to protect authors in order to promote national intellectual creation against the recognition that, because of the obligations imposed by international conventions, excessive protection runs the risk of translating itself into a large drain on foreign exchange.

After taking these considerations into account, the National Executive Council approved the submission for the preparation of the 1978 Act in the form it took with a depository requirement and `authorised the Minister for Foreign Affairs to accede to the *Universal Copyright Convention* for and on behalf of Papua New Guinea'.[29] The *Universal Convention* was chosen over the *Berne Convention* because the former `would allow the compulsory deposit of a work with specified bodies as a condition to the obtaining of copyright [and] the *Berne Convention* would not allow it'[30] although both conventions would not allow the reproduction of copyright works for educational purposes in developing countries except limited copying for private study.

There are two reasons why the 1978 Act has not been brought into force. First, the *Statutory Deposit Act* that was to make provision for the depositing of works to attract copyright was not enacted. This is said to have been due to disagreement among

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28. Cabinet submission by A. M. Kiki, Minister for Foreign Affairs and Trade, annexed to Cabinet Decision No. 18/77.

29. National Executive Council Decision No:18/77.

30. *Ibid.*

draftsman as to whether the deposit requirement should also apply to foreign works as well as works of nationals.[31] Obviously, if Papua New Guinea was to accede to the *Universal Copyright Convention*, although this *Convention* would allow for depositing of national works to obtain copyright, this requirement would not apply to foreign works of member countries. Under Article III(1) of the *Convention*, the deposit requirement would not apply to works of persons other than works of Papua New Guinea nationals first published outside the country. The deposit requirement of works of nationals of other *Convention* member countries will be presumed by the Convention to have been met by the use of the copyright notice symbol - the encircled C in the work.

The second reason the legislation was not brought into force appears to be because of the burden it would impose on the educational institutions. It is no secret that tertiary institutions in the country rely on reproduced materials in their instructions. Some of the textbooks are not easily accessible either because they are out of print and therefore not available in the country or they cannot be obtained easily with publishers and distributors stationed overseas. The main reason however is the high costs involved. A textbook may be required for only a few pages of it. A copyright law would not allow the reproduction of the relevant part without payment or the permission of the copyright owner. The exception for copying for private study would not apply where the copies needed are more than the legally required limit or even where it is within the limit, more than one copy is required. Further, it would be too costly for Papua New Guinea to invoke the `concessions' given to developing countries to print editions after payment of `reasonable' royalties.

The administration of the deposit system would also have required additional administrative costs. Although, the National Library and the libraries of the University of Papua New Guinea and the University of Technology which were to be the depositories, already have facilities for the collection and storage of Papua New Guinea materials and in a way it would have been to the benefit of the libraries to require compulsory deposit, there would have been additional expenses involved in adjusting their facilities to ensure the proper administration of the Act. There would also have been problems in according protection to unpublished works; whether every memoranda or other literary work should be deposited to obtain copyright thus leaving the libraries open to be flooded with materials that may not be worth holding copies.

The important issue now is whether Papua New Guinea should introduce a copyright law by either bringing the 1978 Act into force or by adopting similar legislation. This is a policy matter. The decision must depend solely on a cost-benefit analysis of having or not having a copyright law; that is, the costs and benefits to the country.[32] Is the calls for the introduction of a copyright law by Papua New Guineans evidence of change in public opinion and the gains that can be made would outweigh the costs? The music industry in Papua New Guinea in particular has developed since independence and since the 1978 Act was passed. There is also evidence of an increase in literary works in the country. With the introduction of television in the country coupled with legislative requirements for the use of programmes with local content, copyright may be essential to protect these industries. There is also the film-making and advertising industries. Is there a case for a change in policy?

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31. Laurent, *op.cit.*, 107.

32. There are people particularly in the developed countries who argue that developing countries should adopt copyright laws for moral reasons as well, that the encouragement of copying of copyright material by countries without copyright laws is immoral. This argument is not credible. Developing countries are well aware of the economic exploitation on massive scales by developed countries of developing countries without any regard at all for morality.

Were a copyright legislation to be introduced in Papua New Guinea, the education sector would be the most adversely affected. Foreign textbooks are still used heavily in educational institutions and they will continue to be used for some time. The benefits to be gained in other industries are minimal. In the video and television industries, most foreign copyright materials are already protected by contractual obligations between foreign copyright owners and national distributors preventing the latter from copying or allowing others to copy copyright work. In the cassette tape industry, the influx of cheap products from Hong Kong and Singapore has decreased as a consequence of the introduction of copyright legislation in those countries although there is still evidence of the sale and hire of pre-recorded video and music cassette tapes reproduced locally. In any case, the sale of pirated copies of copyright works which are of substandard quality are detrimental to consumers and the existence of a copyright law may in this connection serve as a consumer protection measure. The ultimate decision on the issue must therefore depend on weighing the costs to the education sector of introducing copyright legislation on the one hand and the gains that can be made in the music, literary, television and other industries. It may be possible, if copyright legislation is introduced, to make arrangements for one industry to subsidise the other.

4. COPYRIGHT AT COMMON LAW

The earliest source of modern legislation on copyright in common law countries was the English Imperial Act - the *Copyright Act 1911* (1 & 2 Geo V c.46). Prior to the 1911 Act, there were a number of other old statutes that conferred rights similar to copyright to printers or publishers first and later to authors. The growth of copyright started under the common law.

Under the common law historically, an author or any person claiming under him had a right to prevent the publication of an unpublished literary, artistic or musical work.[33] This right was a proprietary right at common law and it subsisted in perpetuity. The right ended when it was abandoned or when the work was published with the consent of the author. The word `copyright' was later used to refer to this right against copying created by statute. The existence of this proprietary right in *unpublished* works under the common law was accepted as early as 1769:

> It is certain every man has a right to keep his own sentiments if he so pleases: he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state, the manuscript is, in every sense, his peculiar property; and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication.[34]

It has been difficult however to determine whether a similar right at common law existed in *published* works. This was due to the historical development of the printing industry in England. Starting in 1474 when the first press was established in England, all printing was under State censorship and control through grants by the Crown under royal prerogative of patents and privileges to the early stationers companies Chartered by Queen Mary in 1556 for the printing of specified books. These stationers (the forefathers of today's publishers) organised a licensing system with registers registering lawfully printed books. Only those publications that were registered attracted protection against

33. For a detailed historical account, see J. Lahore, *Intellectual Property Law in Australia: Copyright*, (Sydney: Butterworth, 1977), 17-27.

34. *Miller v. Taylor* (1769) 4 Burr 2303 at 2379-80.

copying - the copyright. The copyright in published works under this system was not really vested in the author of the literary work but it was in the stationers company. This meant that any publication outside of the registration system controlled by the licensed stationers companies was unlawful and acquired no protection against subsequent publication by others. Hence, the two reasons why the question whether a common law proprietary right existed at common law did not arise were: one, the copyright in published work was in the stationers companies and two, as publication of literary work outside the registration system was illegal no rights could be recognised in works published unlawfully.

The issue whether a common law proprietary right existed in published works arose as a result of the first statute on copyright in England - the statute of Anne of 1709 (8 Anne c.19). This statute for the first time vested copyright directly in the author. The copyright existed for a fixed period of 28 years for works published prior to the statute and 14 years for subsequent works. It provided:

> That from and after the tenth day of April, 1710, the author of any book or books already printed, who hath not transferred to any other the copy or copies ... [or any person who hath purchased a copy for printing] shall have the sole right and liberty of printing such book and books for a term of one and twenty years from the said tenth day of April, and no longer; and that the author of any book or books already composed, and not printed and published, or that thereafter be composed, and his assignee and assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence form the day of first publishing the same, and no longer.[35]

The question arose after 10 April 1731 when the 21 year statutory copyright protection accorded to published works expired whether a right at common law existed to prevent copying of the same work after the period without the permission of the author. Opinion on the issue was divided and so the question become controversial. The issue first came before the Court of Kings Bench in 1767 in *Millar v. Taylor*. In this case, the plaintiff's copyright conferred by the statute of Anne in a published work expired in 1758 and the defendant printed the same work in 1763 without the formers permission. The Court by majority[36] held that a perpetual right against copying existed at common law and that it had not been taken away by the statute. Lord Mansfield who always maintained the existence of a proprietary right at common law of authors of both unpublished and published works, stated:

> From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication?
>
> From this argument - because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions; with other reasonings of the same effect.

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35. Cl. 1.

36. The dissenting view held by Yates J. was based on the argument that when a work was published - ie., when the author made his ideas public, they become public property and therefore the author no longer had any private property to be protected.

I allow them sufficient to shew `it is agreeable to the principles of right and wrong, the fitness of things, convenience and policy, and therefore to the common law, to protect the copy before publication.'

But the same reasons hold, after the author has published. He can reap no pecuniary profit, if the next moment after his work comes out, it may be pirated upon worse paper and in worse print and in a cheaper volume.

The 8th of Queen Anne is no answer. We are considering the common law, upon principles before and independent of that Act.

The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He cannot retract errors. He can not amend, or cancel a faulty edition. Any one may print, pirate and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons to whom his works shall be published.

For these and many reasons, it seems to me just and fit, `to protect the copy after publication'.[37]

A decade later the question again come before the House of Lords in *Donaldson v. Beckett*[38] on an appeal from the decree of the Court of Chancery, involving the same work the subject of litigation in *Miller v. Taylor*. The decision on the latter case was made after the death of the plaintiff Miller and his executors sold a copy of the work to Beckett. Beckett sought an injunction to restrain the defendant Donaldson who had printed a version of the work. The House of Lords called in the 12 judges of the three common law courts to give their opinion on five questions. The questions and the answers given to them[39], all of which are relevant here, are as follows:

(1) Whether at common law, an author had the exclusive right to print and publish work for sale and to bring an action against unauthorised printing or publication? By a majority of 10 to 1, it was held that the author did have such a right.

(2) If the author had such a right, did the right extinguish upon the publication or printing of the work with the consequence that any person can later print or publish it without his consent? A majority of 7 to 4 answered this question in the negative.

(3) If an action could be brought under the common law, did the statute of 8 Anne abolish such action and remedies and replace it with the statutory action? This question was answered 6 to 5 that the remedy would have to be under the statute.

(4) Whether an owner, or his assigns of any literary composition had the sole right at common law to print and publish the work in perpetuity? By 7 to 4, this question was answered in the affirmative.

37. At 2398-9.

38. (1174) 4 Burr 2303.

39. Lahore, *op.cit.*, 25-26.

(5) Whether the common law right was impeached, restrained or taken away by statute 8 Anne? Six judges decided that the right was taken away by the statute.

On the issue as to whether the common law recognised a proprietary right in published works, the majority opinion in response to question (2) had the effect of supporting the proposition that the common law did recognise such a right although under question (4) it was thought by the majority that this right was taken away and replaced by the right under the statute 8 Anne. This then meant that a proprietary right against printing and publishing - or a right against copying of both unpublished and published work did exist at common law. In England, this common law copyright was replaced by statute starting with the 1911 Act. The issue for Papua New Guinea is whether the principles and rules of common law on copyright were adopted by the *Constitution*?

The *Constitution* adopted `the principles and rules that formed, immediately before Independence Day, the principles and rules of common law and equity in England' that were consistent with the statutory law and that were not `inapplicable or inappropriate to the circumstances of the country from time to time'.[40] The date of Papua New Guinea's independence was chosen as the `cut-off' date for decisions of English courts. Although there is authority supporting the proposition that decisions of superior English courts like the House of Lords declaring a principle of common law or equity as opposed to the modification of an existing rule, form part of the received common law and equity principles[41] the better view is that:

> rules of the common law in England enunciated for the first time in decisions of English courts handed down after Independence are not adopted as part of the underlying law[42].

In respect of the statutory modifications of any common law and equity principles, schedule 2.2(3) provides that

> the rules and principles of common law and equity are adopted ... notwithstanding any revision of them by any statute of England

that has not been specifically adopted under schedule 2.6. This provision no doubt was intended to remove the difficulties encountered in *Booth v. Booth*[43] in connexion with the meaning of the `common law'.[44] However, the use of the word `notwithstanding' in the provision had given rise to similar difficulties as those addressed in *Booth v. Both.*

The question as to whether or not statutory modifications to the common law were part of the received principles has now been settled in *The Ship `Federal Huron' v. Ok Tedi Mining Limited.*[45] In its ananimous decision, the Supreme Court *inter alia* held that the

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40. *Constitution*, schedule 2.2.

41. *State v. Bisket Urangue Pokia* (1980) (Unreported) N248; *Whagi Savings and Loans Society v. Bank of South Pacific* (1980) (Unreported) SC 185.

42. *State v. Allan Woila* [1978] PNGLR 98, 103; see also D. Srivastava and D. Roebuck, `The Reception of the Common Law and Equity in Papua New Guinea: The Problem of the Cut-Off Date' (1985) 34 *I.C.L.Q.* 850.

43. (1934-35) 53 C.L.R. 1.

44. see R.S. O'Regan, *The Common Law in Papua New Guinea*, 1971.

45. [1986] PNGLR 5.

received common law does not include statutory modifications to it made by English statutes not specifically adopted in Papua New Guinea for

> it was not the intention of the Constituent Assembly to introduce statute law into this country by means of modification thereby to the principles of common law and equity.[46]

The Court arrived at this conclusion after holding that the word `notwithstanding' in schedule 2.2(3) means `irrespective' and not `in spite of' or `despite'.[47]

The effect of the *The Ship `Federal Huron'* decision is that the base rules of common law and equity were received as unaffected by any statutory modification, however ancient the modification may be. It would therefore mean in respect of the common law copyright that they have been brought into Papua New Guinea `irrespective' of their modification by the statute of 8 Anne or other statutes on the subject enacted later by the British Parliament. It may have been thought that such ancient statutes as 8 Anne have become part of the common law but the Supreme Court was adamant that these pre-1828 statute modifications of the common law were not part of the received common law and equity rules. The third of the ten reasons given by the Court for its decision on this aspect leaves little room for further argument:

> At the time of Independence specific ancient statutes of the United Kingdom were repealed but parts thereof were re-enacted. It may well be thought that the repealed Acts had long since become part of the ordinary common law and the fact that they were specifically brought back into operation by the House of Assembly on Independence day seems to indicate a conviction that any statutes which had affected the common law were not re-introduced under sch. 2.2(3). We find for example, 14 Geo III Ch 48 and Ch 78, 11 Geo II Ch.19, 4 Anne Ch 16, 32 Henry VIII Ch 34, and 24 Geo II Ch 23 were specifically re-enacted, in part, in the *Imperial Laws Replacement Act* (No.39 of 1975). Whilst George I and George II as well as Queen Anne reigned collectively for a good part of the 18th Century, we are decidedly going back into ancient history with Henry VIII (1509-1547). One would have thought that the part of the law dealing with landlord and tenant under Ch 34 of Henry's reign would have since disappeared into the common law itself in the minds of most people. Why then if the old statutes which affected the common law even as far back as Henry VIII were included by the term `notwithstanding' in Sch 2.3 were these old statutes specifically adopted. A further specific repeal of pre-1828 Imperial statutes was made by the Courts and Laws Adopting Act (Nos 38 and 41 of 1975). Our point is that the further you go back into the earlier period of common law, the more difficult it is to separate out the common law itself from the statutory changes caused to it. Yet here we see an attempt by the legislature to emphasis that these pre-1828 statutes are not to have effect in the newly independent nation.[48]

If a copyright at common law exists in Papua New Guinea as part of the common law and equity principles, what is the extent of this right and can this common law right be availed to by persons in the country? Two observations may be made in this respect. First, the common law proprietary right or copyright must neither be inconsistent with

46. *Id.*, 19.

47. *Id.*, 5.

48. *Id.* 20-21.

any statutory law nor be inapplicable or inappropriate to the circumstances of the country. The *Copyright Act 1978* provided that

> No copyright, or right in the nature of copyright, shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.[49]

But since this Act is not in force, and there are no other inconsistent legislation on this matter, this is no obstacle. The important question that would need to be decided by a court if called upon, would be to consider whether the common law right is applicable and appropriate to the circumstances of the country. In this connexion, the arguments for and against having a copyright law and public opinion on the question would be relevant. The decision of the National Executive Council approving the preparation of legislation for a copyright law and the passing of the 1978 Act by Parliament would for example point to the appropriateness of such a right to exist in Papua New Guinea whilst the fact that the Act has not been put into force would weigh against it.

Second, the right recognised at common law was a proprietary right - the sole right of an owner of a copyright work to its printing or publication. It was first recognised in literary works but it included musical and other artistic works. Other areas are now covered today in copyright legislation including films, the television and computer software industries, that were not covered under the common law right as these works were not then in existence. It is nevertheless suggested that, if the proprietary right in literary works is found to be applicable and appropriate to the circumstances of the country, a court could extend this right if only under Part 3 of the schedule of the *Constitution* in developing an underlying law to cover these new areas for the purpose of giving copyright protection.

5. CONCLUSION

There is in Papua New Guinea a copyright law under the common law. This right first developed in respect of musical, artistic and literary works can be extended to other works now attracting copyright in other countries with copyright legislation. The main question for consideration is whether the common law right can pass the constitutional tests under schedule 2.2 of the *Constitution*. It is suggested that there are no circumstances in the country that make the recognition and enforcement of the right `inappropriate or inapplicable'. The 1978 Act was not brought into force because of the costs that educational institutions would bear if foreign copyright works were to be protected. The recognition and enforcement in Papua New Guinea of a copyright under the common law will not mean that copyright protection will be accorded to foreign works. There would need to be international obligations on Papua New Guinea through membership of the international conventions for such a consequence. In other words, the right under the common law can be restricted to locally produced works and enforced within the country.

The common law right however would not enable the protection of Papua New Guinea works or works by Papua New Guineans against copying by persons outside the country. To obtain such protection, Papua New Guinea must become a member of the international conventions. This would require the enactment of legislation. The 1978 Act may not be appropriate. The requirement for the depositing of works would only have the effect of catching works produced in the country and those works produced by Papua New Guinea nationals but published outside. Even the more liberal *Universal Copyright Convention* would not allow for the depositing of foreign works. Hence, the deposit of works as a pre-condition to copyright protection may be omitted in future legislation. Separate legislation requiring deposit requirements for Papua New Guinea

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49. S.2.

works can be enacted. Such legislation already exist in other countries without tying this to copyright.

It has not been possible here to offer the cost - benefit analysis that is required for deciding whether copyright legislation should be introduced in the country. This is a task that needs to be undertaken by the government and the music, literary and other artistic industries to research and determine. It is hoped that the policy considerations involved in the debate have been highlighted. In the meantime, Papua New Guineans having works with international appeal may individually wish to take advantage of protections accorded by copyright legislation of neighbouring countries like the Solomon Islands, Australia and New Zealand, by first publishing their work in these jurisdictions. Protection against `pirating' of Papua New Guinea works inside the country is possible under the common law.