

Chapter 1

Terms of Reference

1.01 On 20 August 1992, the then Attorney-General, Mr. Michael Duffy, referred to the Committee the question whether s. 35(4) of the *Copyright Act 1968 (the Act)* should be modified or repealed. The Committee's terms of reference are:

Whether or not s. 35(4) of the *Copyright Act 1968*, which deals with copyright in works created by journalists in the course of their employment by publishers of newspapers, magazines and similar periodicals, should be modified or repealed. In its inquiry, the Committee is asked to have regard, amongst other things, to —

- technological developments since the enactment of the provision in 1968, and likely to occur in the foreseeable future, affecting the production, dissemination and use of newspapers, magazines and similar periodicals; and
- international conventions and laws in other countries dealing with ownership of copyright in works of journalists employed by publishers of newspapers, magazines and similar periodicals.

1.02 Subject to any agreement to the contrary, an employed author is not entitled to copyright in his or her work: s. 35(6). “In essence, this Reference raises for consideration the question whether journalists employed by publishers of newspapers and magazines who are the authors of material which is published therein, should be treated similarly to all other employed authors or continue to retain copyright in their work to the extent provided for in s. 35(4) of the Act.

1.03 The Committee, though called upon in a number of submissions to consider recommending substantive changes to other provisions of the Act, has confined itself to its terms of reference. In other words, it has concentrated upon the question which it has been asked, namely, whether s. 35(4) of the Act should be modified or repealed. In some submissions, modifications were sought to s. 35(5) which deals with copyright ownership in engravings, photographs and paintings; s. 35(6) which deals with works created in the course of employment in all cases other than those provided for in s. 35(4) and s. 35(5) and s. 88, s. 96, and s. 100 which deal with copyright in published editions of works. The Committee has taken the view that it is not within its terms of reference to make recommendations concerning those provisions of the Act.

1.04 In order that the context of the Committee's reference may be understood, it is desirable to make brief reference to the events which led the Attorney-General to refer the matter to the Committee. For many years, Commonwealth Government departments and agencies have been disseminating press clippings or photocopies of clippings to their employees and others interested in the work of the departments or agencies. There is thus a large number of reproductions of portions of what is contained in newspapers and other periodicals. Much of the material which is copied consists of articles and news items written by employed journalists. Until recently this situation gave rise to no controversy. This may have been due in part to the fact that the use of the material was for the purposes of the Crown in right of the Commonwealth and could be reproduced without the consent of the copyright owner: s. 183 of the Act. That did not however, mean that the owners of the copyright in the material which had been reproduced without consent were without remedy. Failing agreement, they were entitled to apply to the Copyright Tribunal for the determination of reasonable remuneration for the copying which had taken place: s. 183(1) and s. 183(5).

1.05 Eventually matters came to a head when the Copyright Agency Limited acting on behalf of large numbers of employed journalists and the Media Entertainment and Arts Alliance entered into an agreement with the Commonwealth for the payment of sums of money intended to represent reasonable remuneration for the copying which was being done. The newspaper publishers protested to the Government about what had happened. They claimed to be the owners of the copyright in the material which had been reproduced but acknowledged that this contention might be in conflict with the decision of the Federal Court (Beaumont J) in *De Garb v Neville Jeffress Pidler Pty Limited* (1990) 37 FCR 99; 95 ALR 625. For this reason, they sought the repeal of s. 35(4) of the Act.

1.06 The matter has wider application than Crown copying of newspaper articles for the purpose of distributing copies of press clippings to Crown employees and others. Firstly, it emerged that the Crown was not the only body in the community providing press clipping services. A number of private organisations perform this service for large numbers of people and organisations who have particular interests in a great variety of subjects. Secondly, at the time the matter came to the Committee, it had under consideration the Computer Software Reference in respect of which it published a Draft Report in June 1993.¹ Amongst the many issues it was considering were issues concerning databases. Submissions which it had received from newspaper publishers and others in relation to databases also raised the question whether s. 35(4) of the Act should be repealed or modified. The considerations relevant to that question so far as it affects databases were similar to those applicable to the

¹ Australia. Attorney-General's Department Copyright Law Review Committee, *Draft Report on Computer Software Protection*, Canberra, AGPS, June 1993, [Hereinafter *Draft Report on Computer Software Protection*]. The Committee is currently preparing its final report on this reference.

problem created by press-clipping services. For that reason, the Committee decided to transfer from the Computer Software Reference so much of the database issues as related to the inclusion in databases of newspaper and similar **material**.²

1.07 Thus the area covered by the present Reference is a broad one. The outcome will affect the operations of press-clipping services whether conducted by the Crown or by private organisations, because it will determine who are the copyright owners of the material which they use and thus the persons with whom they must deal before they are entitled to provide the services which they presently do. The outcome of this Reference will also affect the inclusion in databases of newspaper material where that material has been taken from newspapers or periodicals. It also has implications for the future, bearing in mind the rapid technological advances taking place.

² *Draft Report on Computer Software Protection*, paras. 14.45-14.56 esp at para. 14.56.