

Chapter 2

Recommendations and Summary of Reasons

Introduction

2.01 The Committee has not reached a unanimous decision concerning whether any change is necessary to s. 35(4) of the *Copyright Act* 1968. A majority of those members of the Committee taking part in the Reference (the Chairman, Ms Cattermole, Ms Luck, Professor Pearce, and Mr Rodgers) recommends that s. 35(4) be repealed. A minority (Mr Creswell, Mr Fielding, and Mr Gallagher) recommends that the section be retained but modified.

2.02 The recommendations of both the majority and minority of the Committee and a summary of the reasons for their views are contained in this Chapter. A full discussion of the reasons of both the majority and minority is to be found in Chapters 10 and 11.

Majority view

Recommendations

2.03 The majority recommends that s. 35(4) be repealed.

2.04 The majority also recommends that the following consequential amendments be made to the remaining provisions of s. 35:

- (a) The words “The operation of any of the next three succeeding subsections” ins. 35(3) be deleted and the words “The operation of either of the next two succeeding subsections” be substituted.
- (b) The words ins. 35(5) “Subject to the last preceding subsection” be deleted.
- (c) The words in s. 35(6) “to which neither of the last two preceding subsections applies” be deleted and the words “to which the last preceding subsection does not apply” substituted.

Summary of reasons

2.05 The reasons for the Majority’s view that s. 35(4) should be repealed are developed in chapter 10. In summary, they are as follows:

(a) Journalists ought not be treated differently from other employed authors. The general rule provided for in s. 35(6) is that copyright in a work created by an employee is owned by the employer. That should apply to journalists also.

(b) Some members of the majority have the additional view that the problem is an industrial one, not a copyright one, and that that itself supports the repeal of the provisions.

(c) Because of the language used in the subsection and recent and likely future developments in technology there is likely to be encountered difficulty in its application to numbers of situations. These will largely stem from the use of the **expression** “publication in a newspaper” in para. (a) of the subsection or, if the subsection be amended as contemplated in this Report, “publication or reproduction in a newspaper.”

(d) Entitlement to the benefit of copyright for secondary uses of journalists’ work **will** give rise to numerous practical problems because of the difficulty of identifying the person or persons entitled to the benefit of the rights which are conferred by the section. For reasons which have been developed, the by-line provides an unsatisfactory guide in many cases to the identity of the author of a particular work. To treat the name in the by-line as determinative of the question will in many cases be productive of capriciousness and lead to unfairness to numerous employees who have contributed to the ultimate form of the material which is published. That will not be the case if the problem is treated as an industrial one.

(e) The employers provide all facilities required by employed journalists to do their work. These include proper workplaces and proper equipment, including the use of expensive technical and electronic equipment, required for the carrying out of their work.

(f) The present state of technology has enabled uses, and will enable uses in the future, of newspapers and magazines not foreseen when s. 35(4) and its predecessors were enacted. Clearly new means of publishing newspapers are at hand. The operation is an integrated one. It is now, and will in the future, be increasingly difficult logically to distinguish between primary and secondary uses of journalists’ work. The position will be far better catered for **by** appropriate agreements from time to time determined with **all** possible uses of material taken into account. In that way it will also be possible to value, or **fix** appropriate rates of salary for, the work which has been done by the variety of people whose collaborative effort goes into the publication of a newspaper or magazine.

(g) **The employers take all risks associated** with the work of their employed journalists. Whether the newspaper or magazine is successful or not, whether the journalist’s work is well thought of by readers, whether it is used or not and so on are **all** risks borne by the employer. Additionally, employees are not exposed to financial risks in relation to defamation actions which may be

brought against them. Subject to their contracts, freelance journalists are in a very different position.

(h) There are suggestions in the Media Entertainment and Art Alliance's (MEAA) submission that the retention of the status quo, that is, the retention of the split in the ownership of copyright for which s. 35(4) provides, is in the public interest because it tends to place some limitation on the concentration of media ownership and media power which currently exists in Australia. The majority expresses no view on the question whether there is an undue concentration of media ownership in Australia. In its opinion neither the repeal or the retention of s. 35(4) will have any bearing on that matter. If there is an undue concentration of ownership and if the consequence of that state of affairs is contrary to the public interest, the position will be the same irrespective of the outcome of this Reference. That is because, whatever happens, the publishers will continue to have copyright in the work of employed journalists for the principal purpose for which their work is created, namely the publication of the material in newspapers or magazines. If there is a harmful effect because of an undue concentration of ownership or control, that harmful effect will flow from the publication and distribution of newspapers, not from any subsequent publication of material in some other form, the storage of it in a database or the distribution of it by press clipping services.

(i) Whether or not s. 35(6) of the Act, which vests copyright in works created by employees in their employers, is in breach of Australia's obligations under the Berne Convention, is not a matter that relevantly arises for consideration under the Committee's terms of reference. Furthermore, it has never been suggested by those responsible for the administration of the Convention that Australia is in breach of its international obligations in this respect

In conclusion the majority wishes to emphasise one point. Whatever the fate of s. 35(4) may eventually be, the parties directly concerned with the outcome of this Reference, the publishers and the journalists, will have to settle this dispute at the bargaining table. If s. 35(4) remains, the provisions of s. 35(3) which contemplate the making of agreements containing terms different from those provided for in ss. 35(4),(5) and (6) will have to be invoked. If s. 35(4) is repealed, the matter will plainly be an industrial or conditions of employment one. Again the parties' differences will have to be resolved by agreement. The majority would hope that there will soon be sensible and constructive discussion between the parties which will be productive of an accord between them. Otherwise, as technology takes hold, there will be increasing uncertainty. This will lead to increasing disputation the result of which will be likely disruption of businesses and employment and ultimately a most adverse effect on the public interest because of interruptions to the supply of information which is so essential to a modern community.

Minority view

Recommendations

2.06 The minority recommends that s. 35(4) be modified, to achieve the outcomes outlined below. However, the minority has not endeavored to propose the exact wording of any amendments to s. 35(4), given that there may be more than one way of realising the objectives identified, but has merely made suggestions for such amendments, which are contained in Chapter 12 of this report.

The proprietor

2.07 Section **35(4)** should continue to provide that the proprietor of a newspaper, magazine or similar periodical is the owner of certain of the rights comprised in the copyright of works created by the proprietor's employees during the course of their employment. In respect of such works, the proprietor should continue to be the owner of the right to broadcast the work, reproduce the work for the purpose of broadcast, publish the work in a newspaper, magazine or similar periodical and reproduce the work for the purpose of such publication. However, the minority recommends that the section be modified so that

- the right of the publisher to publish an employee's article in a newspaper or magazine should
 - clearly extend to republication in a newspaper or magazine, ie, it should not be confined to first publication;
 - extend to publication by way of delivery of the newspaper or magazine in electronic form - to the extent that that does not constitute transmission to subscribers to a diffusion service;
- the publisher should have the right to transmit the article to subscribers to a diffusion service when done as part of so transmitting the newspaper or magazine; and
- the right of the publisher to reproduce the work for the purpose of publishing or broadcasting it should clearly extend to the making of a copy for archival purposes.

The minority intends that, through the proposed conflation of the right to establish an archival database (paper or electronic), the publisher will be able to provide a public access service for research. However, the requirement that this right be contained within the existing reproduction right in aid of publication or broadcasting is intended to deny the publisher the right, without the author's permission, to make copies or authorise copying from the database to setup another database or for any other purpose.

The author

2.08 The minority is of the view that s. 35(4) should continue to provide that the author of a literary, dramatic or artistic work made during the course of employment with the proprietor of a newspaper, magazine or similar periodical is the owner of any rights comprised in the copyright of the work apart from those allocated by the section to the proprietor. The minority does not recommend listing the acts comprised in copyright over which the author is owner, although the rights in literary, dramatic and musical works are exhaustively stated in s. 31(1) of the Act. However, as a consequence of the limitation proposed in the last paragraph on the rights of ownership of the proprietor, it is the minority's **firm** intention that the author should be the owner of any copyright in so far as that relates to the reproduction of a work for its inclusion in an information storage and retrieval system, not being a database created in the course of publication of the proprietor's newspaper or periodical or for archival purposes.

Wording of the section

2.09 The minority also recommends that the wording of the section, in general, be examined in the course of any legislative redrafting with the aim of making the section easier to read and understand.

Summary of reasons

2.10 The distribution of news and information to the public by proprietors of newspapers and magazines by a means that involves the use of electronic technology, such as electronic delivery to subscribers via their personal computers, is regarded by the minority as an activity that does fall within **the realms** of the business activities of such proprietors. Central to this view are the minority's conclusions that it is an act of "publication" to deliver a newspaper, magazine or similar periodical by **electronic** means and that what is being so published **on-**line can still be characterised as a newspaper or magazine.

2.11 The minority has formed the view that the creation databases of articles in newspapers and magazines where those databases are not created by the proprietors in the course of electronic delivery of newspapers **and** magazines is not an activity which can be regarded as part of the publication of news and information. It should properly be regarded as a separate field of activity. As such the right should remain with the authors of the articles under the existing terms of s. 35(4), along with the other residual rights enjoyed by them by virtue of the section.

2.12 As to the more general reasons put forward for the transfer of all copyright rights from employee-journalists to the publishers of newspapers and magazines, the minority acknowledges that s. 35(4) can be characterised as an exception to the general rule, in

s. 35(6), that the employer owns the copyright in works created by employees in the course of their work. However, there is a long history to provision for such treatment of employed journalists, so that s. 35(4) is no quirk or aberration in the *Copyright Act* 1968. The minority is conscious that there are other instances in the Act of special treatment of classes of authors or other copyright creators, so that arguments for the repeal of s. 35(4) on the basis of consistency are not well supported by the Act overall.

2.13 The minority is not persuaded that the difficulty of identifying the authors of some articles is a reason for repealing s. 35(4). The identification of the authors of works other than newspaper articles can be equally **difficult**, eg, where a person who helped the author of a work claims to be a joint author. In any case, the technology which is said to supply a reason for giving sole copyright to newspaper and magazine publishers can also be called in aid to help identify authors of articles. More fundamentally, ease of identification of authors of works should not be the basis for allocating copyright rights in the works.

2.14 The minority is not persuaded by the argument that repeal of s. 35(4) would facilitate resolution of disputes between publishers and their employees over the conditions of their employment. Whatever else it did, repeal of the section would weaken the bargaining position of the journalists for no apparently stronger reasons than that their present possession of residual copyright in their articles is an inconvenience to proprietors of apparently profitable businesses. As to the impression sought to be given in submissions that publishers deserve to be given sole copyright because they face the risks of business while giving security of employment to their employees, the minority feels that against that must be balanced the fact, that having the full time resource of an employee is an advantage over the less reliable availability of independent contractors, and employees can, of course, be dismissed.

2.15 The minority is at one with the majority in believing that the conflicts between publishers and employed journalists over exercise of rights in the works of the latter can best be resolved by negotiation which, as noted by the majority, can be accomplished under the Act as it stands, by virtue of s. 35(3).

2.16 The minority has not made any recommendations in respect of the broadcasting right of publishers in s. 35(4) or the extension of s. 35(4) to include journalists working in broadcasting media, because the minority has not **formed** a view on whether any change is necessary to the section with respect to these issues.