

Chapter 4

Current Legal Position in Australia: Section 35(4)

Introduction: Section 35

4.01 Section 35 of the *Copyright Act* 1968 (the Act) provides:

35. (1) This section has effect subject to Parts VII and X.

(2) Subject to this section, the author of a literary, dramatic, musical or artistic work is the owner of any copyright subsisting in the work by virtue of this Part.

(3) The operation of any of the next three succeeding subsections in relation to copyright in a particular work maybe excluded or modified by agreement.

(4) Where a literary, dramatic or artistic work is made by the author in pursuance of the terms of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the proprietor is the owner of any copyright subsisting in the work by virtue of this Part in so far as the copyright relates to:

- (a) publication of the work in any newspaper, magazine or similar periodical;
- (b) broadcasting the work or
- (c) reproduction of the work for the purpose of its being so published or broadcast;

but not otherwise.

(5) Subject to the last preceding subsection, where:

- (a) a person makes, for valuable consideration, an agreement with another person for the taking of a photograph, the painting or drawing of a portrait or the making of an engraving by the other person; and
- (b) the work is made in pursuance of the agreement;

the first-mentioned person is the owner of any copyright subsisting in the work by virtue of this Part, but, if at the time the agreement was made that person made known, expressly or by implication, to the author of the work the purpose for which the work was required, the author is entitled to restrain the doing, otherwise than for that purpose, of any act comprised in the copyright in the work.

(6) Where a literary, dramatic or artistic work to which neither of the last two preceding subsections applies, or a musical work, is made by the author in pursuance of the terms of his employment by another person under a contract of service or apprenticeship, that other person is the owner of any copyright subsisting in the work by virtue of this Part.

4.02 Section 35(4) is the central provision in question in this reference. However, it must be read in the context of the section as a whole. Section 35 (which appears in Part III of the Act) provides for the ownership of copyright in original literary, dramatic, musical and artistic works. Section 35(1) provides that the section has effect subject to Parts VII and X of the Act which deal respectively with Crown copyright and a number of miscellaneous matters. Section 35(2) expresses the fundamental principle of copyright law that the author of a work is the owner of the copyright subsisting in that work. However, the sub-section operates subject to the succeeding sub-sections of s. 35 which make some qualifications of and exceptions to the normal rule for which s. 35(2) provides. Section 35(3) provides that the operation of ss. 35(4), (5) and (6) can be excluded or modified by agreement. Section 35(5) concerns commissioned photographs, paintings, drawn portraits and engravings and states that, unless otherwise agreed, the commissioner of any of these types of works is the owner of the copyright in the commissioned work. As mentioned, s. 35(6) provides that where a person is employed all copyright in work produced in the course of that employment is owned by the employer.

4.03 Section 35(4) operates as an exception to the rights of an employer provided by s. 35(6) and as an exception to the rights of the author contained in s. 35(2). The effect of s. 35(4) is to split the ownership of copyright in literary, dramatic or artistic works made by an author whilst an employee of the proprietor of a newspaper, magazine or periodical between the employee and the proprietor/publisher. The proprietor, by the operation of s. 35(4) is given ownership of the copyright in respect of certain uses of the work. All other rights of ownership comprised in the copyright of the work remain with the author of the work.

Limited application of section 35(4)

Exclusion or modification by agreement: section 35(3)

4.04 The applicability of s. 35(4) to employment situations is limited by s. 35(3) which states that the operation of ss. 35(4), (5) and (6) can be excluded or modified by agreement.

Musical works

4.05 Another limitation of s. 35(4) is that, because it refers only to literary, dramatic and artistic works made in the course of employment with a proprietor of a newspaper, magazine

or periodical, the section does not apply to musical works created during such employment.¹ Thus the employer would be the owner of copyright in musical works unless there were an agreement to the contrary. However, because s. 35(4) contemplates employment in the print media, it is unlikely that the composer of a musical work would be employed in such circumstances. The exclusion of musical works from the section would appear therefore to have been based upon practical considerations.

Works made prior to May 1969

4.06 Section 35(4) does not apply to works made before the commencement of the Act (1 May 1969): s. 213(1). Section 213 governs the ownership of copyright in works made prior to this time. Section 213(7) relevantly provides:

Where the work is a literary, dramatic or artistic work that was made by the author in pursuance of the terms of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship and was so made for the purpose of publication in a newspaper, magazine or similar periodical, the author is entitled to restrain the publication of the work otherwise than in a newspaper, magazine or similar periodical”.

This preserves the position that existed under s. 5(1)(b) of the *Copyright Act 1912* (Cth).²

Interpretation of section 35(4)

The meaning of “newspaper”

4.07 The first of the more significant limitations contained in s. 35(4) is that an author must be employed “by the “proprietor of a newspaper, magazine or similar periodical”. The Act does not define any part of this phrase, but some guidance has been provided by the courts as to what constitutes a newspaper. The effect of the various, though not numerous, decisions of courts in this area is that what is regarded as a newspaper, magazine or periodical is predominantly a question of fact that is to be determined by reference to popular usage of these words. Lately the courts have referred to the need to be aware of the recent

¹ The definitions in s. 10(1) of the Act of literary, dramatic and artistic works are reproduced in Appendix F of this Report. The Act does not provide a definition of musical work.

² See Chapter 5 of this report for a discussion of the *Copyright Act 1912*.

³ See these cases: *Attorney General v Bradbury & Evans* (1851) 7 Ex 97; 155 ER 872 esp at 875 per Martin B; *Re Bradshaw’s Guide*; *Ex parte Stillwell* (1903) 29 VLR 415 esp at 417-418 per Hood J; *Deputy Commissioner of Taxation v Rotary Offset Press Pty Ltd* (1971) 45 ALJR 518 esp at 522 per Gibbs J; *Downland Publications Ltd v Deputy Commissioner of Taxation* (1983) 47 ALR 777; *John Fairfax & Sons Ltd v Deputy Commissioner of Taxation* (1988) 15 NSWLR 620 esp at 626 and 631-632 per Kirby P; *De Garis and Another v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; 95 ALR 625 esp at 639 per Beaumont J.

changes in production methods of these types of publications and in defining what constitutes a newspaper, magazine or periodical, not be limited by traditional **definitions**.⁴

4.08 In 1851, whilst considering whether “The Household Narrative of Current Events” was liable to stamp duty as a “newspaper,” Baron Martin provided what is still regarded as a satisfactory touchstone. His Lordship said,

... the ordinary understanding of the word ‘newspaper’ is, a publication containing a narrative of recent events and occurrences, published regularly at short intervals from time to **time**;...⁵

4.09 Since 1851, the meaning given to the word “newspaper” has expanded so that now, advertisements in newspapers, supplements and inserts to newspapers are also regarded by the courts as forming part of a **newspaper**.⁶ The meaning of “newspaper” has not been interpreted in a restrictive way so as to limit it to a publication containing just news.

The meaning of “magazine” and “periodical”

4.10 There has been even less judicial exposition concerning the meaning of “magazine” and “periodical”; the courts relying on popular **meanings**.⁷ By referring to both the *Oxford English Dictionary* and the *Macquarie Dictionary* definitions, it is possible to arrive at a popular meaning of “magazine” –

a periodical publication containing a miscellaneous collection of articles generally by a number of different writers and containing other material such as illustrations.

Similarly with “periodical” –

a magazine, journal or miscellany the successive issues of which are published at regularly recurring intervals but longer than a day, such as weekly or monthly.

The overlap in meaning of magazine and periodical is evident from these dictionary definitions. It is clear that, if reliance is placed on the popular meaning of the words “magazine” and “periodical”, publications falling within the ambit of s. **35(4)** will not be confined to those that bring together only news articles. However, it is not clear whether

⁴ See, for example, Kirby P’s comments in *John Fairfax & Sons Ltd v Deputy Commissioner of Taxation* (1988) 15 NSWLR 620 at 626.

⁵ *Attorney-General v Bradbury & Evans* (1851) 7 Ex. 97 (Per Martin B., at 103)(155 ER 872, at 875). His Lordship’s comments were *obiter*. *the statute* specified that a publication with a frequency of less than 26 days was not a newspaper. As to the distinction between ‘news’ and ‘history,’ see, also, Platt B, at 111; Pollock C. B., at 122f. Baron Parke dissented (at 116f).

⁶ See particularly Kirby P’s comments in *John Fairfax & Sons Ltd v Deputy Commissioner of Taxation* (1988) 15 NSWLR 620 at 626, 631-632; *De Garis and Another v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; 95 ALR 625 at 639 per Beaumont J.

⁷ See *R v Bacon* [1973] NSWLR 87 at 97; *De Garis and Another v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; 95 ALR 625 at 639.

scientific, trade or **professional** periodicals would be included. Consistently with the approach taken by the courts, the Committee is of the opinion that such periodicals are within the provision.

The meaning of “proprietor”

4.11 The word “proprietor” is not the subject of difficulty. It refers to the person, whether company, partnership, or individual, that publishes the newspaper, magazine, or periodical.

Journalists not employed by “proprietors”.

4.12 Journalists and writers who are **not** employed by the proprietors of newspapers, magazines and periodicals fall outside the provisions of s. 35(4). Instead, they are covered by **s.35(6)** which vests copyright in a work produced by an employee in an employer. Journalists whose employers retain **all** copyright in their works include those involved in broadcasting and the provision of news by wire or cable because they are not employed by the proprietors of newspapers, magazines and periodicals. Thus, authors and journalists employed by Australian Associated Press, for example, are covered by s. 35(6), rather than s. 35(4) because AAP is not a proprietor of a newspaper, magazine or periodical. In its submission to the Committee, AAP submitted that because of the nature of its business and **the** work performed by the journalists it employs, they are appropriately covered by s. 35(6).⁸ The contrary position was put to the Committee by the Australian Copyright Council, arguing that these journalists should be covered **by s. 35(4).**⁵

Terms of employment

4.13 Section 35(4) is also limited in **its** application by the requirement that the author of the work must be employed under a contract of service or apprenticeship. The Act does not define “contract of service” or “apprenticeship”, but these phrases refer to general common law principles regarding employment contracts. ¹⁰

The meaning of “contract of service” and “contract for services”

4.14 A contract of service refers to the relationship that normally exists between employer and employee. In contrast, a contract **for services** describes the relationship between a principal or employer and an independent contractor. Given the reference in s. 35(4) specifically to contracts **of** service the scope of the section does not include persons who are employed on other **terms**, such as contracts **for service**. Journalists or authors who are loosely

⁸ Submission of Australian Associated Press, para. 1.

⁹ Submission of the Australian Copyright Council, p. 4, para. 4 (b); and comments made at public hearings.

¹⁰ James Lahore, *Intellectual Property in Australia, Copyright Law*, Sydney: Butterworths, 1988, paras. 3.8.40 and 3.8.95.

referred to as “freelancers” and those who may be employed under special contractual arrangements are not affected by the operation of s. 35(4) or s. 35(6).¹¹ Subject to contract, they own the entirety of the copyright in their works.

4.15 Despite these reasonably obvious exclusions of certain authors, the determination of if and when a contract of service exists is not necessarily an easy one to make. The courts have had to develop and apply a variety of tests in order to ascertain when a contract of service **exists**.¹²

4.16 **Common law tests.** The predominant test in this area, referred to as “the control test”, focuses on the degree of control either exercised by the employer over the employee or available to be exercised by the employer. The greater the degree of control exercised by an employer, the greater the likelihood that **the** worker is an employee performing their duties under a contract of **service**. Another test formulated to deal with the problem of professional workers and workers who use a high degree of skill in their work asks whether the worker has been employed, as a part of the business so that the work performed by that person is an integral part of the business. If the answer to this question is “yes”, then the person is held to be employed under a contract of **service**.¹³ Other relevant factors that are commonly taken into account in applying these tests include: the manner of payment of the person - whether on a fixed pay period system or whether according to the work performed (perhaps on a rate per item basis) and also whether certain benefits **form** part of the contract such as recreation leave, sick leave and long service leave. Whether or not superannuation benefits are paid may also help to identify the nature of the employment relationship.

The meaning of “contract of apprenticeship”

4.17 A contract of apprenticeship is a contract whereby a person agrees to serve and to learn from a master who agrees to **employ** and to teach.¹⁴ The Committee assumes that contracts of apprenticeship are referred to because cadet journalists may be employed under contracts of apprenticeship or may have been in the past.

¹¹ The use of the term “freelance” refers to someone who is not permanently employed by any one employer, but rather is free to supply their **labour** or talent to a variety of employers. The *Macquarie Dictionary* in its definition of **freelance** specifically refers to journalists, commercial artists and editors as persons who do not work on a regular salaried basis for any one employer. Relevantly, the *Oxford English Dictionary* defines “free lance” as a someone working for **himself** and not for an employer.

¹² The Whitford Committee was aware of this problem and suggested in its report that both phrases be removed see paras. 568 and 575, cited in [5.24] below.

¹³ With respect to “the control test” see *Simmons v Health Laundry Co* [1910] 1 KB 543; *Re Beeton & Co Ltd* [1913] 2 Ch 279; *Sun Newspapers Ltd v Whippie* (1928) 28 SR (NSW) 473; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561; *Beloff v Pressdram Ltd* [1973] 1 All ER 241; With respect to “the integral to the business test” see: *Denning LJ in Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101; *Stevens Brodrigg Sawmilling Company Pty Ltd* (1986) 160 CLR 16; and for general commentary in this **area**, *The Australian Labour Law Reporter*, CCH Australia Limited, 1993.

Commonwealth employees and apprentices

4.18 By the operation of s. 17 of the Act, persons employed under a law of the Commonwealth or a State are treated as if they were employed under a contract of service and apprentices employed under a law of the Commonwealth or of a State are treated as if they were employed under a contract of apprenticeship.

Freelance journalists, subeditors, and artists

4.19 As noted above, freelance journalists do not fall within the scope of s. 35(4). However, perhaps due to a misunderstanding of **the** provisions of s. 35(4), the Committee received a number of submissions from freelance artists and cartoonists who expressed concern that any changes to **the** Act and in particular to s. 35(4) might **undermine** their rights. Neither s. 35(4) nor s. 35(6) has any application to the employment of these persons, who, if they are truly freelance writers or artists, are not employed under a contract of service or apprenticeship. Therefore, s. 35(4) will not apply to works which they create and publish in newspapers or magazines. Subject to any agreement to the contrary, these authors will be the owners of the first copyright in works which they produce. Consequently any change to s. 35(4) will not affect the ownership of copyright by them. The sub-section has never applied to them. They enjoy the full rights of ownership conferred by s. 35(2).

Work must be created pursuant to the terms of employment

4.20 For a work to be governed by s. 35(4) it must have been made by the author in pursuance of the **terms** of his/her employment. The terms of employment may dictate the type of work to be performed or the duties to be carried out. If work is produced outside the scope of the employment, **the author** of the work will be the copyright owner, subject to any agreement to the contrary. The case of *Byrne v Statist Co* [1914] 1 KB 622 illustrates this. The plaintiff was a permanent **member** of the editorial staff of the *Financial Times*. He was asked by its advertising manager to translate a financial announcement of the **Bahian** Government into English for its preparation as a paid advertisement. **Bailhache J** found this to be a task that was not ordinarily a part of his duties and therefore he was the owner of copyright and entitled to damages from its reproduction in the defendant's **newspaper**.¹⁵ Other cases on this point have concerned the position of academics and teachers in

¹⁴ **Lahore**, note 10 **above**, para. 3.8.125.

¹⁵ See, esp., at pp. 624 and 627. **The** defendant newspaper, the *Statist*, had obtained the permission of the **Bahian Government**, and received payment from **it**, for the placement of an advertisement in its own paper of the same Portuguese announcement. Its main **defence** was the Plaintiff's title to sue, **pleading** s. 5(1)(b) of the **Copyright Act 1911 (UK)**.

educational institutions where the courts have upheld the right of academics to copyright in work produced in their spare time, such as articles and **textbooks**.¹⁶

Work must be made for the purpose of publication

4.21 The fact that the work must be made pursuant to the terms of employment is emphasised ins. 35(4) by the fact that the work must be made **for the purpose of publication** in the newspaper, magazine or periodical for which the author is employed to write. Work that is produced by an employee for an employer which is not intended for publication would not be covered by s. 35(4). If the work is done by **the** employee in the course of **employment**, the employer, i.e. the publisher, will be entitled to the entirety of the **copyright**; s. 35(6).¹⁷

Ownership of copyright by the proprietor

4.22 The rights of the proprietor publisher who acquires copyright by reason of the employment of the author= limited to:

- the right to publish the work in any newspaper, magazine or periodical;
- the right to broadcast the work; and
- the right to reproduce the work for either of those purposes.

Exclusive right to publish work in arty newspaper, magazine or similar periodical

4.23 By virtue of s. **35(4)** the proprietor of the newspaper, magazine or periodical is the owner of the copyright in a work insofar as the copyright relates to the publication of the work in the newspaper, magazine or periodical. Section 29(1)(a) provides:

Subject to this section, for the **purposes** of this **Act**:

- (a) a literary, dramatic, musical or artistic work, or an edition of such a work, shall be deemed to have been published if, but only if, reproductions of the work or edition have been supplied (whether by sale or otherwise) to the public;

¹⁶ See, eg, *Stephenson Jordan & Harrison Ltd v Macdonald & Evans (1951)* 69 RPC 10 at 18 (Court of Appeal, Evershead MR, Denning, and Morris LJJ); *Noah v Shuba* [1991] FSR 14 (*). See, also, *Antocks Lairn Ltd v I Bloohn Ltd* [1972] RPC 219 (Ch.D, Graham J), where the managing director of a furniture company made drawings of certain chairs and this was held not to be within his normal management functions.

¹⁷ Thus, on the facts in *Byrne v Statist*, *supra*, if the plaintiff employee was asked by the advertising manager to prepare a precis of the **announcement** for the newspaper's own files, he would have had no title to sue. Note **15**, *supra*.

4.24 On 2 July 1984, this Committee reported to the Attorney-General upon the meaning of “Publication” in the Act.¹⁸ The Committee said **that**, in its opinion, no amendment to the Act was necessary in order to make it clear that the right to publish conferred by s.31 of the Act was the right to publish for the **first time**.¹⁹ In *Avel Pty Ltd v Multicoïn Amusements Pty Ltd* (1990) 171 CLR 88, the High Court of Australia concluded **that**,

The words to ‘publish’ ins. 31(1) should be read as meaning to make public that which has not previously been made public in the copyright territory.²⁰

4.25 Accordingly, the right **conferred** by s. 31 **of** the Act to publish a work is the right to publish the work for the **first time in** Australia. **That**, in view of the High Court’s decision, is **settled** law.

4.26 In its submission, the **CNMCCA** points out a number of reasons why this meaning of publish would be inappropriate in the case of s. 35(4). Significantly, it refers to the current practice of syndication whereby a newspaper or magazine article may be republished in a number of newspapers both within and outside Australia and referred to the fact that the United Kingdom Parliament in 1956 and the Spicer Committee in ‘Australia in their discussion of s. 35(4) assumed that the right to publish included the right to syndicate a published **work**.’²¹ Syndication is said to be a common print media industry practice which has been well known since 1968 and has been accepted by the journalists’ union, which, so it is said, has assumed that s. 35(4) gave this right to the **publisher**.²²

4.27 The problem is that, **if** a work has already been published by a newspaper or magazine proprietor, its reproduction in a rival newspaper would not be a publication of the work (that is, it will not **be** “a **first** publication) and would not infringe the copyright of the **first** publisher, who therefore could not take any legal action to prevent the re-use of the **work**.²³ This is because of the **language** of para. (a) of s. 35(4) which refers only to

¹⁸ Report of the CLRC dated 2 July 1984 on reference concerning the meaning of “publication” in the Copyright Act 1968. This report is reproduced in Appendix C to the Committee’s Report on the *Importation Provisions of the Copyright Act 1968*, Canberra: AGPS, September 1988.

¹⁹ *Op.cit.*, para.11.

²⁰ *Avel Pty Ltd v Multicoïn Amusements Pty Ltd* (1990) 171 CLR 88 at 93; 18 IPR 443 at 445.

²¹ Submission of the **CNMCCA**, Report 1, pp. 47ff. See, also, Susan Bridge, “Journalists as copyright owners”, *Copyright Bulletin*, (1989) Vol XXIII No 3, p. 13; Bridge describes syndication as **the practice** of “including the work in any newspaper or periodical any number of times”; *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in The Copyright Law of the Commonwealth [Under the Chairmanship of Hon Sir J A Spicer]*, Canberra: Commonwealth Government Printer, 1959. (Hereinafter “**Spicer Committee Report**”).

²² **Spicer Committee Report**, para. 88: ‘The Journalists’ Association asks for **joint** ownership of copyright with the employer of works created in **the** course of employment] . . . insofar as copyright relates to publication in any newspaper, . . . [etc] . . . on **the** ground that overseas sales and extensive syndication ‘provide a huge and profitable **field** for **the** exploitation of material out of all proportion to **the** wage which is the employee’s sole claim, under the present law, to profit from exceptional work’’. The Committee doubted **the** efficacy of such a provision: pars. 89.

²³ Submission of the **CNMCCA**, Report 1, p. 51.

publication, does not mention reproduction. The Committee has noted this consequence and accepts the argument of the **CNMCCA** that this result was probably not intended by Parliament when the Act was passed. If the majority's recommendation for the repeal of s. 35(4) is accepted, there is, of course, no problem. On the other hand, if the minority's recommendations are adopted, s. 35(4) will require amendment. Two courses are open. "Publication where used in the section could be the subject of a definition the application of which would be limited to the provision. Alternatively, the words "or reproduction," could be added after the word "publication" in s. 35(4)(a) so that it would read "publication or reproduction in any newspaper" If the definition of "publication" is to be amended, it could read, "(a) reference to the act of publication or the word 'publication'" in this Section is not limited to the **first** act of publishing the work."

Exclusive right to broadcast work

4.28 The publisher is given the right to broadcast the work. The Act defines "broadcast" in s. 10 as meaning "transmit by wireless telegraphy to the public". The Act then defines "wireless telegraphy" as, "the emitting or receiving, otherwise than over a path that is provided by a material substance, of electromagnetic energy". By these definitions, the Act distinguishes broadcasting; that is transmissions over the air waves, from transmission by means of cable or wires. The definition of "wireless telegraphy" also excludes wireless transmissions that are not made to the public. Section 25(1) states that "broadcasting" includes sound broadcasting and broadcasting by television. Accordingly, a publisher has the right to broadcast news by radio and television. Section 22 of the Act extends this to include broadcasts made by **satellite**.²⁴

Exclusive right to reproduce work to publish or broadcast

4.29 The right to **reproduce** includes" **the** right to reproduce a work by any means whether it be by photocopying, reprinting a work or making a sound recording or **film of** a work. The rights of the publisher to reproduce a work are limited, however, by the fact that any reproduction of the work must be made for the purpose of publication or broadcast

²⁴ **The reason** for the inclusion of the broadcasting right in the **Copyright Act** 1968 is discussed in Chapter 5 at **para.** 5.16. The MEAA and the Australian Copyright Council have both submitted that **this** right should be removed from the Act on the basis that it was not recommended by the **Spicer** Committee, it was not included in the **Copyright Act** 2956 (UK) and the only reason advanced for its inclusion was that in 1968 the pattern of **media** ownership was such that most private television stations in Australia were owned by newspaper proprietors. Thus the same material could be used in print and on television. Because of the changes in the pattern of **media** ownership which have come **about, the** Copyright Council contends that there is no valid reason for the retention of the provision. The only comment the Committee would make about this submission is that desirably the provisions of the Act should be appropriate for all situations. The position may revert to what it was in the early years of television; it may stay as it is now, or it may be different from either of these situations. **The** real question is whether the broadcasting right should be owned by the employees who are the authors of the works in question or the publisher of the newspaper which employs them.