

Chapter 5

Historical Background

Introduction

5.01 Similar provisions to those of s. 35(4) have existed in the copyright laws of both the United Kingdom and Australia since at least the “*Copyright Act 1842 (UK)*.”¹ The United Kingdom Acts have provided the model for the various copyright statutes in Australia, notably the Australian Copyright Acts of 1905, 1912, and 1968. Although it is clear that s. 35(4) and its predecessors have had a long history, the underlying reason for the introduction of these provisions is not certain. Ms Ryan, in a report prepared as part of the Combined Newspaper and Magazine Copyright Committee of Australia’s (CNMCCA) submission, suggested that the early United Kingdom provisions appear to have been intended to provide protection to authors against the reproduction or separate publication of their works without their consent where they had been published as part of a larger work, such as a periodical, and to give them the right to publish their works in a separate form.² The Committee has not been able to verify the correctness of this claim.

Pre-Federation: Imperial and Colonial Acts

5.02 The colonies of Victoria, New South Wales, South Australia and Western Australia enacted their own copyright “Acts ‘during the late 1800s.’³ These Acts were supplementary to the Imperial Acts in force and only applied to works created in the colonies. They did not seek to affect the operation of the Imperial Acts in Australia. Some of the colonial enactments adopted provisions of the *Literary Copyright Act 1842 (UK)* which dealt with the ownership of copyright in collective and periodical works such as reviews, magazines and periodicals.⁴ Section 18 of this Act gave copyright protection to books, which by definition included periodicals such as newspapers, reviews, magazines and works published in a series “of books or parts. All articles, stories, and other literary contributions were similarly protected. While in most cases the publisher of a periodical work or newspaper was entitled to copyright where a person was employed to make contributions and was paid to do so, an exception existed for contributions in the nature of essays, articles, or works first published in

¹ *Literary Copyright Act 1842(5&6 Vict.c.45)*.

² Submission of the CNMCCA, Report 1, (Ms Margaret Ryan), p. 33. Ryan notes that Charles Dickens serialised several of his works, producing them in monthly parts: *ibid*, note 48.

³ *Copyright Act 1869 (Vic)*; *Copyright Act 1890 (Vic)*; *Copyright Act 1879 (NSW)*; *Copyright Act 1878 (SA)* and *Copyright Act 1895 (WA)*.

⁴ *Literary Copyright Act 1842 (5 & 6 Vict. c. 45)*.

reviews, magazines and other periodicals. Under the exception, the rights of the author and the proprietor were split, so that the proprietor could not publish the work in a separate form without the consent of the author for 28 years after first publication of the work. After 28 years, the right to publish in a separate form reverted to the author. In 1889, it was held by the English Court of Appeal that s. 18 provided for “two separate copyrights in the same work, a copyright in respect of the publication of the articles in the paper, and copyright in respect of their publication as a separate **book**”.⁵

After Federation: Copyright Act 1905, Australia

5.03 In 1905, the first Commonwealth Act dealing with copyright law was passed and the colonial Acts already in existence were stated not to apply to works in which copyright subsisted by virtue of the Commonwealth **Act**.⁶ Section 22 of the 1905 Act provided that the copyright in an article contributed for valuable consideration and published in a periodical (which by definition included reviews, magazines and newspapers) was split between the proprietor of the periodical and the author. The exclusive right of the publisher to publish the article or work was limited to one year, after which time the author was able to publish the work as **well**.⁷ If a work was contributed without valuable consideration the author retained copyright in the **work**.⁸ The Act did not distinguish between works created by employees of the publisher and those created by others, eg. free-lance journalists. The Act was based upon the findings of an Imperial Royal Commission into Copyright which had conducted its inquiry during 1875-78 and upon the 1910 report of a copyright Committee.⁹ Although UK bills had been drafted based on the 1878 report, they were not enacted until 1911.

⁵ *Trade Auxiliary Co. v Middlesborough and District Tradesmen's Protection Association (1889)*, 40 Ch. D. 425 (Cotton, Lindley, and Lopes LLJ); per Cotton LJ at pp. 434-5.

⁶ *Copyright Act 1905 (Cth)*, s. 8(1).

⁷ The following comments were made by Senator Keating (an Honorary Minister without portfolio who introduced the 1905 Bill into the Senate) during the debate “. . . where a person designs and prepares a certain scheme of publication and other people are commissioned for valuable consideration to assist him with the produce of their thought and research, it is obvious that the man who has commissioned the work is to some extent entitled to the material benefits of copyright in it. That is the principle upon which the law stands, and upon which this clause has been framed. The position at present is that an author in that case could not publish separately for a period of twenty eight years . . . The existing **law** is based upon this consideration - that where one commissions another to do work for money, and provides the particular means by which the work of the person who is so paid shall be submitted to the public, that proprietor of the publication is entitled to some of the material benefits of the copyright. Hitherto the period has been twenty-eight years. Now we propose to limit the proprietor's right of republishing to two years, and to say that he cannot publish in a separate form, but only in his magazine and in the form in which the article originally appeared.” Australia, Senate 1905, *Debates*, vol. 27, p. 2585.

⁸ *Copyright Act 1905*, s. 23

⁹ *Report of the Royal Commission and the Report of the Commissioners on Copyright, 1878; Report of the Committee on the Law of Copyright, 1910*, Cmnd 4976.

1911-12: Copyright Act 1911 (UK); Copyright Act 1912 (Australia)

5.04 In 1911, the United Kingdom enacted new copyright legislation drawing on the reports of 1878 and 1910.¹⁰ Part of the importance of the 1911 Act was that it was the first UK legislation to bring together in the one statute the law on copyright for musical, artistic, dramatic” and literary works. It repealed the numerous existing copyright laws which had developed in a piecemeal way and had separately given copyright protection to each type of work.¹¹ Like the 1905 Australian Act, the 1911 Act was based upon the draft bills that had been in existence since the late 1800s. Its enactment was also prompted by the United Kingdom’s accession to the Berne Convention for the Protection of Literary and Artistic Works and the subsequent revisions of the Convention in 1896 (**Paris**)¹² and 1908 (**Berlin**).¹³ As a signatory to this Convention, it was obliged to reform its domestic copyright legislation to meet the requirements of the **Convention**.¹⁴ Shortly after the enactment of the 1911 Act, the Commonwealth of Australia passed the *Copyright Act 1912* which stated that the 1911 UK Act applied in Australia from 1 July 1912.¹⁵ The 1905 Act was repealed by the new **Act**.¹⁶

5.05 Section 5(1)(b) of the Schedule to the *Copyright Act 1912* is the precursor to s. 35(4) of the current Australian Act (1968). It provided that the author of a work was to be the first owner of copyright in that work:

Where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

¹⁰ *Copyright Act 1911* (UK)..

¹¹ For a useful discussion of the effect of the *Copyright Act 1911* (UK) in the context of the development of Australian copyright law, see Staniforth Ricketson, *The Law of Intellectual Property*, Sydney Law Book Co., 1984, p. 73, paras. 4.40ff.

¹² The Paris Revision Conference; see Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, (London: Kluwer, 1987) at p.81f and p.929f.

¹³ The Berlin Revision Conference; see: Ricketson, *op.cit.*, n.12, at p.87ff, esp at p.93.

¹⁴ For a brief discussion of the history of the change of copyright laws during this period in the United Kingdom see, Andrew Brown and Anthony Grant, *The Law of Intellectual Property in New Zealand*, Wellington: Butterworths, 1989, p. 227, para. 4.4.

¹⁵ Section 8 of the *Copyright Act 1922* stated “The British Copyright Act, a copy of which is set out in the Schedule to this Act, shall, subject to any modifications provided by this Act, be in force in the Commonwealth, and shall be deemed to have been in force therein as from the first day of July, One thousand nine hundred and twelve.”

¹⁶ *Copyright Act 1912* (Cth), s. 4.

5.06 *Sun Newspapers Limited v Whippie* (1928) 28 SR (NSW) 473 concerned the use by the defendant on slippers of a drawing of “Ginger Meggs” (a comic-strip character appearing in the plaintiffs newspaper and drawn pursuant to a contract of service). Harvey CJ (in Eq.) was called upon to consider the effect of s. 5(1)(b)¹⁷. His Honour said:

I “think the right which is reserved to the author when under contract of service to a newspaper is the narrow limited right mentioned in the section; it is only a right to prevent publication, not a right to publish. It is a mere right of veto . . . The author cannot publish at all. ¹⁸

As concerns the proprietor publisher he said:

The original proviso gives the newspaper proprietor the copyright; . . . It recognises the employer’s right to publish not only in his newspaper but in any newspaper or periodical. In other words it assumes that the employer is the only person with a right to publish by reason of the first proviso and it then limits that right to this extent that if he wishes to publish anywhere but in a newspaper magazine or periodical he has to come to terms with the author who has a right of veto.¹⁹

1951-52: Gregory Committee (UK)

5.07 The 1912 Australian Act remained in force until 1968, and the 1911 UK Act until 1956. However, it was not until 1951 that the issue of copyright in works published in newspapers, magazines and periodicals was again the subject of a governmental inquiry. That year, the Gregory Committee was appointed to inquire into what changes maybe desirable to copyright law of the United Kingdom having particular regard to technological developments. The Committee presented its report in 1952.²⁰

5.08 The Gregory Committee discussed the issue of ownership of copyright in Part XI of its Report, commenting on s. 5(1) of the 1911 Act. It recommended “that the fundamental principle should be maintained that the author or originator of a work is the first owner of the copyright except in specified circumstances”.²¹ It also recommended that

in the absence of an express contract to the contrary, the copyright in a work which has been created . . . in the course of the employment of the author should vest . . . in the employer.²²

17 The meaning and effect of a similar provision in the Canadian *Copyright Act 1921* was discussed by the **Ilsey Commission**. See Chapter 7, **paragraph 7.26**.

18 *Sun Newspapers Limited v Whippie* (1928) 28 SR (NSW) 473 at 478.

19 *Ibid.*

20 [*Report of the Copyright Committee*, Board of Trade, 1952, **Cmnd 8662**, Under the Chairmanship of H S Gregory], [Hereinafter, “Gregory Committee Report”].

21 Gregory Committee **Report, para. 269**.

22 Gregory Committee **Report, para. 271**.

5.09 As to the employee–journalists’ right of veto provided by s. 5(1)(b), the Committee was not prepared to extend the rights of such authors beyond a right of veto, but they recommended the retention of this section while recognizing that, “in general a full-time employee would expect that all rights in what he produces in the course of that employment should belong to his **employer.**”²³

Copyright Act 1956 (UK)

5.10 The United Kingdom enacted a new Copyright Act in 1956. Although the Gregory Committee had recommended no change to the position under the 1911 **Act**, that is, that employee-journalists retain **the** right of veto, ownership of copyright was split between the author of the work and the **employer–publisher**; s. 4(2). While the 1956 UK Act did not apply in Australia, that section is the model for s. 35(4). It provided:

Where a literary, dramatic or artistic work is made by the author in the course 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 said proprietor shall be entitled to the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical, or to reproduction of the work for the **purpose** of its being so published; but in all other **respects** the author shall be entitled to any copyright subsisting in the work by virtue of this Part of this Act.

5.11 Although critical comments were made by members of the Opposition in the House of Lords concerning the general position of employed authors under the proposed Act, no specific attention was directed to the position of employed journalists, or, in particular, why they were treated “differently in the **Bill.**”²⁴

1958-59: Spicer Committee, Australia

5.12 Between 1958 and 1959, the Spicer Committee, under the Chairmanship of Sir John Spicer, was appointed to:

[E]xamine the copyright **law** of Australia, and to advise which of the amendments recently made in the law of copyright in the United Kingdom [1956] should be

²³ Gregory Committee **Report**, paras. 273. The Committee also commented on the use of **the** phrase “contract of **service**” and **said** that it had proved difficult to apply because of the uncertainty of its meaning. (para. 268).

²⁴ See for instance: United Kingdom, House of Lords 1955, *Debates*, vol. 194, pp. 510-512 (Lord Lucas of Chilworth), p. 542 (**Earl Jowitt**) and pp. 551-552 (Lord **Mancroft**).

incorporated into Australian copyright law and what other alterations or additions, if any, should be made to the copyright law of **Australia**.²⁵

The Committee was assisted in its task by reports of the committees of inquiry of the United Kingdom, Canada and New **Zealand**.²⁶

5.13 The **Spicer** Committee's discussion of ownership of copyright occurs in Part VIII of its report.²⁷ In agreement with the sentiments expressed by the Gregory Committee, the **Spicer** Committee first approved the basic principle that the author of a work should be the **first** owner of **copyright**²⁸ and then recommended the enactment of a provision in Australia to the same effect as s. 4(2) of the 1956 UK Act. In making this recommendation, the **Spicer** Committee observed that journalists would be in a better position than under the existing 1912 Act and that in comparison with other employees they would be in a "uniquely favorable **position**"²⁹. However, the Committee's reason for recommending a legislative split in ownership of copyright for print journalists was based on its comments in regard to commissioned works, which **were** as follows:

We recommend, therefore, that a person who commissions a work for valuable consideration should, in the absence of agreement to the contrary, be the owner of copyright in the work insofar as it relates to the purpose for which he commissioned it, provided that his purpose was communicated to the author before the work was made. In all other respects copyright should remain in the **author**.³⁰

The Committee noted that this principle, though supported by the Gregory Committee, had not been implemented in regard to commissioned works in the 1956 UK Act. However, it had been effected by s. 4(2) of that Act and so the Committee was able to recommend that the section be duplicated in Australia. The Committee did not recommend that the employer–publisher and employee–journalist have joint copyright in works created during the course of employment, as submitted to them by the Australian Journalists' Association, because they foresaw that employment contracts would generally make

²⁵ *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*, Melbourne, 1959 [Under the Chairmanship of Hon Sir John **Spicer**] (Hereinafter "**Spicer** Committee Report").

²⁶ Gregory Committee **Report**; *The Report on Copyright of the Canadian Royal Commission on Patents, Copyright and Trade Marks and Industrial Designs*, [Under the Chairmanship the Right Hon. J. L. **Ilsley**], Ottawa, 1957; *The Report of the Copyright Committee*, [Under the Chairmanship of D. J. **DalGLISH**], Wellington, 1959, New Zealand

²⁷ **Spicer** Committee Report, paras. 79-91, esp paras. **86–90** ("Publications in Newspapers and Periodicals").

²⁸ **Spicer** Committee **Report**, para 79.

²⁹ **Spicer** Committee Report, para. 90.

³⁰ **Spicer** Committee **Report**, para 85.

provisions to the contrary **and**, in any **event**, the Committee felt that such an issue was more relevant to conditions of employment than copyright law.³¹

5.14 The views expressed by the Spicer Committee highlight the underlying tensions between the rights of authors and investors where works are created pursuant to a commission or in the course of an employment. One of these **is** that because the commissioner or employer makes a financial investment in the creation of a work, they are entitled to some part of the copyright in the work in addition to having ownership of the physical object itself. Another is **that**, although the commissioner or employer **is** entitled to some right of ownership, **it** does not follow that they should have the exclusive rights to exploit the work **however** they see **fit**, **unless** this has been agreed **with** the author prior to the work **being** made.³² It is apparent to this Committee, as it no doubt has been **apparent** to all others who have considered this issue, that how these and other tensions are resolved involves the adoption of a preferred view. No solution will in absolute terms be correct; and none will adequately accommodate the entirety of the claims of the range of interests which are in play. Any solution will be an arbitrary one. The Committee wishes that it could have expressed a common view. The fact that it has not been able to do so is but a reflection of the difficulty of reaching a satisfactory conclusion.

Copyright Act 1968 (Australia)

5.15 The current Australian Act came into effect on 1 May 1969. During its passage through the House and the Senate no specific comments were made by speakers concerning s. 35(4) or, the policy reasons for its enactment. In the Second Reading Speech, it was mentioned that the Bill made similar provision to the 1956 UK Act in respect of ownership of copyright. A brief outline of the effect of the exceptions to the general rule of employer ownership of works was given, but **there** was no further elaboration.

5.16 As noted above, s. 35(4) is substantially similar to s. 4(2) of the 1956 UK Act. The only dissimilarity is that in Australia the publisher is given an additional right to broadcast the work. Professor **Lahore**, in his text, offers this explanation:

No doubt the inclusion of the broadcasting right is due to the situation in Australia where newspaper proprietors are often involved in the ownership of television and radio broadcasting **stations**.³³

³¹ Spicer Committee Report, para. 90.

³² The Committee's views accord with those expressed by Senator Keating. Refer to footnote 7.

³³ James **Lahore**, *Intellectual Property in Australia-Copyright Law Service*, Butterworths, October 1993, p. 5161.2, para. 3.8.50.

5.17 The **CNMCCA** has suggested that Australia followed the example set by New Zealand, which had included this right when the *Copyright Act 1962 (NZ)* was **passed**.³⁴ In New Zealand, it was done by way of a late amendment to the **Act**. The Attorney-General explained thus:

I wish to give notice now of an amendment to clause 9(2). This **will** extend the copyright of a newspaper proprietor to the broadcasting rights in any literary, **dramatic**, or artistic work made by a newspaper employee in the course of his employment. When this Bill was reported back from the Statutes Revision Committee the newspaper proprietors discovered that if they had an employee who produced some work in the course of his employment, that work could be broadcast later, and the copyright of the work would still be owned by the employee. **The** Government has thought it reasonable that if the employee created that article in the course of his employment, for which he was paid, the copyright should belong to the newspaper **concerned**.³⁵

Apart from these observations the Committee is unaware of any other reason why the right to broadcast was included in the Act in **Australia**.³⁶

1977: Whitford Committee (UK)

5.18 In 1977, the Whitford Committee was asked to consider what changes may be desirable in the 1956 UK **Act**.³⁷ Its deliberations included ownership of copyright generally, including the provisions affecting the employed authors of newspapers, magazines, and periodicals.

5.19 Chapter 11 of that Committee's Report was devoted to a discussion of ownership of **copyright**.³⁸ After commenting on the various submissions made to it on this matter and the divergence of opinion on the **correct** and most equitable position, it said,

Plainly the simplest solution to the question of ownership is to leave copyright under the Act where it naturally lies, **that** is with the creator of the work, and to leave everything else to **contract**.³⁹

5.20 The Committee felt that this solution would not disadvantage employees whose unions could represent and protect employee interests to ensure that their ownership of copyright was not lost entirely by contractual agreements that contained provisions to the

³⁴ Submission of the **CNMCCA**, Report 1, p. 39.

³⁵ New **Zealand**, *Parliamentary Debates*, 15 November 1962, vol 332, p. 2677

³⁶ **The** inclusion of the broadcast right in **the Copyright Act 1962 (NZ)** is briefly referred to in Chapter 7 of this report, **para.** 7.17. In addition see **the** comments of the minority.

³⁷ *Report of the Committee to consider the Law on Copyright and Designs, [Under the Chairmanship of the Hon Mr Justice Whitford]*, London: 1977 (Cmnd 6732). (Hereinafter "**Whitford Committee Report**"). Terms of Reference at para. 1.

³⁸ **Whitford Committee Report**, paras. 539-609.

³⁹ **Whitford Committee Report**, **para.** 560.

contrary. In **fact**, the Committee acknowledged that, if anything, the solution would work adversely to the interests of employers. However, despite the apparent simplicity of the solution, the Committee, during the course of their discussion, raised the following objections to vesting ownership in the creator of a work:

- This solution would not remove all uncertainties, because disputes could still arise where an employer might argue, for instance, that they had an implied **licence** to use a work or that they had a beneficial interest in a work.
- Problems might arise because of the need to record and maintain details of authorship where large number of authors were employed by one employer.
- A heavy burden would be cast on the employer of obtaining consent to use a work in every case.
- There may difficulties involved in actions for infringement if this solution was adopted.

5.21 Upon concluding that the “simple solution” would not resolve the problem as simply as would be preferred, the Committee continued,

So far as employee’s works are concerned, we take the view that, as a matter of principle, if a person is employed to do a job of work and paid for his services according to **the** nature of those services, the product of his **labour** should, subject to any agreement to the contrary, belong to his employer, whether it be the production of a non-copyright object such as a loaf of bread or the production of a copyright object, for example, a specification produced in an architect’s **office**.⁴⁰

5.22 In the end, the **Committee** recommended to replace the “journalists” exception in s. 4 (2) of the *Copyright Act 1956 (UK)*, •

... that if a work produced by an employee is exploited (**by** the employer or someone else with his permission) in a way that was not within the contemplation of employer and employee at the time of making the work the employee should have a statutory right to an award from his employer which, if not agreed, should be settled by arbitration by a tribunal. *This provision, which would be subject to agreement **to** the contrary, would replace the ‘journalists’ exception in Section 4(2) of the 1956 Act, as well as the general employee exception in Section 4(4). [Emphasis supplied].*⁴¹

⁴⁰ Whitford Committee **Report**, para 571.

⁴¹ Whitford Committee **Report**, para. 574. Formal recommendation: para 609(ii).

5.23 The Committee's recommendation was based on the two following reasons, First, that,

a solution along the lines of giving an employer ownership in that part only of the copyright in a work produced by an employee required by the employer for his business would be satisfactory.

Second, **that,**

“as a matter of principle, . . . it is generally undesirable to separate the ownership of rights comprised in copyright, and that this should be left to agreement between the **parties** in those cases where it is **appropriate.**”⁴²

5.24 The Committee also recommended that the phrases “contract of service” and “contract of apprenticeship” should be removed from any new legislation and instead reference should be made to “works made by employees in the course of **employment.**”⁴³.

1980s: Green Paper, 1981; White Paper, 1986, (UK)

5.25 During the 1980s, reform of intellectual property laws, including the law of copyright, was again considered in the United Kingdom. In 1981, the Government released a **Green Paper**,⁴⁴ and in 1986 a **White Paper**.⁴⁵ Chapter 10 of the Green Paper contains a fairly brief discussion of **the** principles of ownership in s. 4 of the 1956 UK Act. Reference is made to the Whitford Report and the findings of that Committee, discussed above. In the Green Paper an alternative is suggested to, s. 4(2) of the 1956 Act, namely that, “copyright should vest in the employer for the purposes of his business, but the author should have the right to restrain the use of his work for any other **purposes.**”⁴⁶ This suggestion if it had been adopted would have marked a partial return to the position that had **prevailed** until the enactment of the 1956 Act. The opinion was also stated in **the Green Paper**, that as regards the exceptions in the Act of which s. 4 (2) was one, “there is much to be said for the view that they should remain as they are in the **1956 Act.**”⁴⁷

⁴² Whitford Committee **Report, *ibid.***

⁴³ Whitford Committee **Report**, paras. 568 and 575. A summary of the recommendations of the Committee concerning ownership appears at para 609.

⁴⁴ United Kingdom, Department of Trade, *Reform of the Law relating to Copyright, Designs and Performers' Protection: A Consultative Document*, London: HMSO, July 1981 (**Cmnd 8302**). (Hereinafter “Green Paper”).

⁴⁵ United Kingdom, Department of Trade, *Intellectual Property and Innovation*, London: HMSO, 1986 (**Cmnd 9712**). (Hereinafter “White Paper”).

⁴⁶ Green Paper, Chap 10, para. 13.

⁴⁷ Green Paper, Chapter 10, **para.** 9.

5.26 In the White Paper (1986), the United Kingdom Government announced its view that, “it is unnecessary and undesirable to amend either the basic ownership provision or the existing **specific** exceptions.” The basis on which this conclusion was reached was that,

- the suggested changes would not result in greater convenience or **natural** justice and moreover they could not be expressed in clear and unambiguous terms;
- there was little evidence to suggest that the existing specific provisions have caused much difficulty in **practice**; and
- to alter them would affect existing arrangements in relation to ownership of **copyright**.⁴⁸

Copyright, Designs and Patents Act 1988 (UK)

5.27 None of the recommendations pertinent to the journalists’ copyright exception contained in the report of the Whitford Committee, the Government’s Green Paper, or the White Paper were followed when the United Kingdom enacted the Copyright, *Designs and Patents Act 1988*. This Act brought about a departure from the legislative tradition that had prevailed in Britain for the previous 150 years concerning the ownership of copyright of commissioned works and works of employed journalists. Now commissioned authors and print journalists no longer retain any copyright ownership of their work, unless it is provided for by contract. Section 11(2) of the Act provides **that**:

Where a literary, dramatic, musical or artistic work is made by an employee in the course of his **employment**, his employer is the first owner of any copyright in the work subject to any agreement to the **contrary**.

5.28 When the Copyright, Designs and Patents Bill was introduced into Parliament by the Government it contained cl. 11(3) **which** preserved the existing position for print journalists and created an exception to cl. 11(2), which provided for ownership of copyright to vest in employers. Clause 11(3) of the Bill read as follows,

In the case of such a work made by an employee in the course of employment by the proprietor of, a newspaper, magazine or similar periodical for the purposes of publication in a newspaper, magazine or similar periodical, subsection (2) applies only so far **as** relates to publication or to its copying for the purpose of being so published.

5.29 When the Bill **returned** to the House of Commons after amendment in the House of Lords, it no longer contained cl. 11 (3). Strong comments were made by speakers in the Commons regarding the lobbying of publishers and the associations of members of the House

⁴⁸ White Paper, **para.** 16.3.

of Lords with that **lobby**.⁴⁹ There was also concern expressed about the haste with which the Bill had to be considered because of the late stage when it was introduced into Parliament. Mr Mitchell, a member of the Opposition, proposed that the Bill be amended again, after its return from the House of Lords, to preserve the position introduced by the 1956 Act. He said,

The amendment is about the balance of power between working journalists and the proprietors of newspapers. We believe that with the unamended clause 11 the Government are shifting that balance of power unjustifiably towards the proprietor s... The journalists work is creative and should be the intellectual property of the creator. It should not be liable to wholesale exploitation without reward for or acknowledgment of the journalist who created it in the first place. In the act of creation, he brings his **skills** and abilities to bear and his name is **used, all** to enhance the sales and revenues for the proprietor. To take away **from** such people their rights over what they have created robs them of their reputation, skills and efforts and dedicates them all to the greater glory and income of the proprietors . . . We are advocating the preservation of the status quo . . . We propose to redress the balance in a relationship that is inevitably dependent to give journalists a platform on which to stand by having rights within that relationship over their intellectual **property**.⁵⁰

Another member of the opposition, Mr Wilson, said:

This is a press baron's clause . . . It is an appalling example of special pleading and lobbying by an interest group that the clause should have left the House of Lords thus altered, and that the privilege of sitting in that place should have been used by press barons to improve their position in relation to journalists, who are not by and large Members of the House of **Lords**.⁵¹

Mr Churchill, **re-emphasised** this:

Regrettably, **Ministers** in another place surrendered on these points to the powerful lobby of publishers which is to be found in their Lordships' House. Indeed, there are no more powerful lobbyists than **those** cloaked in ermine and bedecked with coronets. One must wonder if the time has come for the establishment of a register of Lordships' interests, just as there is a Register of Members **Interests**.⁵²

5.30 The Media Entertainment and Arts Alliance (**MEAA**) submitted that remarks such as this indicated that the original purpose of the legislation (which did not remove the "journalists' **exception**"), "was distorted in a disgraceful display of vested interest and corrupt political **procedure**".⁵³

49 Submission of the **MEAA**; pp. 33-35 **contains** a summary of the **Debates**.
50 United Kingdom, House of Commons 1988, *Debates*, 25 July 1988, pp. 115-117.
51 United Kingdom, House of Commons 1988, *Debates*, 25 July 1988, p. 118.
52 United Kingdom, House of Commons 1988, *Debates*, 28 April 1988, p. 568.
53 Submission of the **MEAA**, **para.** 4.1.3.

5.31 Despite the strong objections to the House of Lords amendment to the Bill, the House of Commons voted 221 to 117 in favour of retaining the amendment and removing the journalists' exception. The Under Secretary for Education, Mr Butcher, in support of the amendment made the following statements:

That it is right that an employer should own the **fruits** of his employee's **labour** seems to me to be a **self-evident** truth. If I employ a man to use his skills to make a product and provide all the resources that he needs to do **it**, it is only right that I should own what he has made in my time and at my expense. Opposition Members who tabled the amendment **fully** accept that basic principle . . . One question remains: why single out employed journalists for special treatment? Why should an employee of a **newspaper** be better placed than, say, the 'employee of an advertising agency, a software house or a book publisher? There are numerous industries in which people are employed for the **purpose** of creating copyright works for their employees [sic], yet it is not suggested that the employee should own copyright. **The** anomaly is most starkly presented in the case of an employed journalist. If he is employed by a newspaper, he is to own a part of the copyright in his work. If he is employed by a television company, his employer owns **all** the copyright . . . it must be admitted that the anomaly has been around for 70 years or more. Why do away with it now? The answer is that it is not an **innocuous** anomaly. First, it seems to be wrong in principle to say to newspapers, "You, and you alone of all the many employers of the authors of copyright works, are not to receive the full benefit of your investment in your work force." Secondly, there are practical effects that harm newspapers . . . different branches of the media are not competing on a [sic] equal footing, and that is wrong. The anomalous treatment of newspapers also hinders the development and exploitation of **databases**...a newspaper would have to obtain copyright clearance from **its** own employees to put the works that they have produced on to a database. Back issues of a newspaper cannot be transferred to microfiche or other more convenient forms of storage, as that involves the consent of the employee. It maybe that the employee would **consent**, but he could seek a high price. Why should **the employer** pay again for work that he has already paid for? . . . An exception to favour newspaper employees may have been justifiable 30 years ago, but it is not so today, in an age when **the** boundaries between sectors of the media are not clear cut and special treatment can act as an obstacle to the dissemination of **information**.⁵⁴

The **CNMCCA** referred, in its submission, to the statements made by Mr Butcher in the House of Commons debate **on** the Bill and endorsed those comments as being applicable to the Australian print media **industry**.⁵⁵

Comment

5.32 The Committee has quoted these parts of the MEAA's and the **CNMCCA's** submissions to show the strength of feeling that there is about this matter. In the end,

⁵⁴ United Kingdom, House of Commons 1988, Debates, 25 July 1988, pp. 123-124.

⁵⁵ Submission of the Combined Newspaper and Magazine Copyright Committee of **Australia**, Report 1, pp. 40-41.

however, extravagant language will not assist the outcome. Objectivity and calm reflection will yield the best guidelines and enable those whose task it is to make a decision to take account of all relevant considerations. Some will support one conclusion; others will support the opposite conclusion. **As** earlier indicated, the exercise involves balancing a number of competing claims and interests.