

Chapter 6

Australia's International Obligations

introduction

6.01 Australia is a signatory to both the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and the Universal Copyright Convention (UCC) and is therefore obliged to implement the requirements of these international agreements in its domestic laws.¹ The obligations imposed upon countries which are members of the Berne Union are generally recognised to be more onerous and specific than those required by the UCC, and since Australia is a member of the Berne Union it is required to implement the higher standards of that Convention, while also meeting the requirements of the UCC. For this reason, this chapter will concentrate on Australia's obligations as a result of its membership of the Berne Union. In addition, the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPs) annexed to the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) requires that GATT members comply with the relevant provisions of the Berne **Convention**.²

The Berne Convention

6.02 The Berne Convention has undergone a number of revisions since its first formulation in 1886, and Australia is now bound by the Paris Act of 1971, the most recent version of the Convention. Australia acceded to this text on 1 March 1978 and it came into effect in Australia on 28 February 1978. The Berne Union comprises those countries who are signatories to the Convention. At present there are 105 countries that are members of the Union including the United States of America which joined in 1989. Given that membership includes countries that have both a common law and civil law background, the Convention can only aim to contain rules upon which there is general agreement among member countries. In addition, union members retain some latitude in relation to the implementation of the Convention rules. For certain rules, implementation is optional. As Professor Ricketson notes,

¹ The Committee also notes the comments of the Media Entertainment & Arts Alliance that the principles in the Berne Convention and the UCC are also reflected in the Universal Declaration of Human Rights, Article 27, para. 2 which states as follows "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

² Art. 9(1) TRIPs.

During its lifetime, the Berne Convention has sought to embody the minimum statement of rights that each country could agree upon as constituting the central core of rights to be accorded to authors claiming under the **Convention**.³

In fact, the motivation to ensure both a minimum level of protection for authors and flexibility for Berne members in implementing the minimum requirements is partly embodied in the Convention by the principle of national treatment. Article 5(1) has the effect that an Australian author's work in a member country other than Australia will be entitled to the level of protection granted to authors in that other country. Similarly a national of another country will receive the same level of protection for his or her works in Australia as that provided to an Australian **author**.⁴ However, authors will not be treated in identical ways from country to country, since, as explained above, Berne members are free to implement the requirements of the Berne Convention however they choose. Nevertheless, authors must enjoy a minimum of protection in all member countries.

6.03 The aim of the Union, expressed in Article 1 of the Convention is the protection of the rights of authors of literary and artistic works. Also, for the purposes of this Reference, it is important to note, however, that the Convention does not specifically provide for the rights of employed or commissioned authors of literary and artistic works.

Protection of literary and artistic works

6.04 The Convention by reference in Article 1 to the expression "literary and artistic works" intends to confer protection on these classes of works. Article 2(1) defines these works to include:

... every production in the literary, scientific and artistic domain, whatever may be the mode or form of **its** expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works . . . works of drawing, painting, architecture, sculpture, engraving and lithography⁵

6.05 The category of works encompassed by the phrase, in Art. 2(1), "literary, scientific and artistic", is wide and greater than those embraced by the expressions "literary work" and "artistic work" as used and defined by the *Copyright Act 1968 (the Act)*.⁶ From the examples

³ Sam RickettsOn, *The Beme Convention for the Protection of Literary and Artistic Works: 1886-1986*, London: **Kluwer**, 1987, p. 367, para. 8.5. [Hereinafter, RickettsOn, **Berne**.]

⁴ The relevant Australian provisions are in the *Copyright (International Protection) Regulations 1969 (Cth)*, *rr. 4,9*, and 11.

⁵ Beme Convention, Article 2 (1).

⁶ See Appendix F of this report where the definitions contained ins. 10(1) of the *Copyright Act 1968* of "literary" and "artistic" are reproduced.

of types of works listed in the definition in Art. 2(1) (which are illustrative rather than definitive or **exhaustive**)⁷ it is clear that musical, dramatic and cinematographic works are all to be given protection by the generic description “literary and artistic” **works**.⁸ This is achieved by the separate treatment of literary, dramatic, musical, and artistic works and the treatment of **films** as subject matters other than works under Part IV of the Act.

6.06 The protection of newspaper and magazine articles under the Berne Convention arises from their categorization as either literary or artistic works. The example given in Art. 2(1) of “books, pamphlets and other writings” being appropriate productions capable of protection supports the assumption that the work of print journalists is intended to be protected by the Convention. Ricketson confirms this and explains that the types of works encompassed could be, “letters, newspaper articles, directories of information, technical and scientific books, catalogues, commercial documents, and advertisements, just as much as works of ‘high’ **literature**”.⁹ The World Intellectual Property Organization *Guide to the Berne Convention* (WIPO Guide) ¹⁰ emphasises that such works will be protected,

irrespective of their contents, their length, their purpose (entertainment, education, information, discussion, advertisement, propaganda, etc.) and their form (manuscript, typescript, **printing**).¹¹

6.07 In passing it may be observed that Art. 2(8) provides that, “. . . news of the day or... miscellaneous facts having the character of mere items of press information” are not protected by the Convention. This exception was introduced by the Stockholm Revision; prior to that it appeared in Art. 9(3).¹² The WIPO Guide explains the rationale for this provision as follows;

. . . the Convention does not set out to protect mere news or miscellaneous facts because such material does not possess the qualifications necessary for it to be considered a work.

In contrast, as already mentioned,

⁷ As to the subtle effect of enumeration, see **Ricketson, *Berne***, chap 6, esp. at paras. 6.7-6.10 (“the enumeration of article 2(1) and its effect”).

⁸ For a useful discussion, see generally **Ricketson, *Berne***, chap. 6.

⁹ **Ricketson, *Berne***, para. 6.12.

¹⁰ ***Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)***, Geneva WIPO, 1978 [Hereinafter **WIPO Guide**].

¹¹ **WIPO Guide**, p.14.

¹² **Ricketson, *Berne***, para. 6.72; noting that “the purpose of this provision is uncertain.”

... words used by reporters and other journalists reporting or commenting on the news are protected to the extent that they carry sufficient intellectual effort for them to be considered as literary and artistic **works**.¹³

This principle is given effect to in Australian copyright law by the requirement that a work be original. ¹⁴ Originality, described simply, is the requirement that a work emanate from the author as a product of his/her intellectual labour. It is not work copied **from** the work of another; if it were, it would lack originality.

The author

6.08 The Convention does not define the word author. The WIPO Guide explains that this is because the national laws of countries which are members of the Union diverge widely in their definitions of the term "author". ¹⁵ The absence of a definition in the Convention is more fully accounted for by Professor Ricketson. He notes that while it is possible to determine the meaning of the word "author" from the context of the Convention as "a person who has made a work, or an intellectual creation," Union countries differ in their approaches to the resolution of: (a) the degree of intellectual creation required to create a work that is entitled to protection and (b) whether an author must be a natural person. On this latter point, Professor Ricketson says, after commenting on the position in some European member countries,

In other jurisdictions, particularly those derived from British law, . . . it is possible for other legal entities to be authors (or 'makers') of certain kinds of works . . . In addition, under many national laws, the personal role of the author is diminished by provisions that enable corporate entities to be the first owner of copyright in works in particular circumstances (usually those of employment or contracts of **commission**).¹⁶

6.09 Professor Ricketson says that "author", where used in the Convention, is intended to be a reference to a natural **person**.¹⁷ The consequence for Australia of this view is that a provision such as s. 35(4) which gives ownership of part of the rights comprised in the copyright of literary, dramatic and artistic works created during the course of employment to the employer (the newspaper proprietor), who may not be a natural person, but rather a corporate entity, would not fulfil Australia's obligations as a signatory to the Convention, since Australia would not be protecting the rights of authors as natural persons. Similarly,

¹³ WIPO Guide, pp. 22-23, para. 2.26. See, also, **Ricketson, Berne**, paras. 6.72ff. This view is the one advanced by Main Committee I in its Report to the Stockholm Conference; see, Ricketson, para. 6.74.

¹⁴ Section 32(1) of the Copyright **Act 1968** provides, "Subject to this **Act**, copyright subsists in an *original* literary, dramatic, musical or artistic work that is unpublished..."

¹⁵ WIPO Guide, p. 11, **para.** 1,16.

¹⁶ Ricketson, pp. 158-159, **para.** 5.2.

¹⁷ Ricketson, p. 159, **para.** 5.2.

s.35(6) **would** also be in* breach of Australia's obligations. The Committee notes that Australia is not alone in having domestic copyright provisions such as ss. **35(4)** and **(6)**.

6.10 In their submission to this Committee, the Australian Copyright Council (**ACC**) raised a similar point. Namely, that it is the view of some commentators that it is not consistent with the rules of the Conventions that copyright be **first** owned by someone other than the author and **that**,

. . . the fact that there may not have been any official complaint . . . that countries which provide that copyright is in some cases **first** owned by someone other than the author are in breach of their treaty obligations, does not answer the argument that the Beme Convention may require first **ownership** of copyright to vest in the **author**¹⁸.

The validity of the ACC'S argument depends upon whether the reference to "author" in the Convention is a reference to natural persons.

6.11 This issue was addressed by the Whitford Committee in 1977.¹⁹ The Committee commented in its Report that, given the wording of Article 1 in the Beme Convention, it is the author who should enjoy the rights in his **works**.²⁰ It expressed its concerns by stating that,

Some members of the Committee feel that it is not altogether easy to reconcile a provision vesting copyright initially in persons other than the authors (as for example in the case of commissioned works or employee's works) with our Convention **commitments**.²¹

The Committee went, on to note that some Convention countries had provisions similar to those found in the 1911 and 1956 UK Acts and that there had never been any suggestion that such provisions failed to observe the requirements of the **Convention**.²²

6.12 It is not clear from the context of the Whitford Committee's comments whether or not it was referring to legislative provisions, such as s. 35(4), where a split in ownership of copyright occurs. It maybe the case that the Committee's comments were made in respect of legislative provisions such ass. **35(6)** of the Act which vest copyright ownership completely with the employer.

¹⁸ Submission of the Australian Copyright **Council**, para. 5.

¹⁹ As both Britain and Australia are parties to the Beme Convention the comments of the Whitford Committee in respect to the position of the United Kingdom apply equally to Australia.

²⁰ *Report of the Committee to Consider the Law on Copyright and Designs*, [Under the Chairmanship of Hon Mr Justice Whitford], 1977, Cmnd 6732, para. 548. (Hereinafter the "Whitford Committee Report").

²¹ **Whitford Committee Report**, para. 549.

²² **Whitford Committee Report**, para. 549.

6.13 This Committee believes that it is not within its terms of reference to attempt to determine whether Australia has complied with its obligations under the **Berne** Convention in this respect. Such a determination would, of necessity, involve a consideration of the operation of s. 35(6) which is the general provision vesting copyright in works in employers notwithstanding that their employees are the authors of those works. It would not be appropriate to express any conclusion about this matter without notifying the community generally of the Committee's intentions and seeking submissions from a great variety of interests. In paragraph 1.03, the Committee emphasised that it has confined itself, as it was bound to do, to its terms of reference. They require consideration only of the question whether s. 35(4) of the Act should be modified or repealed. For the purposes of this Reference, the **Committee** proposes to assume that there is no problem about Australia's compliance with the **Berne** convention insofar as ss. 35(4) and (6) are concerned.

6.14 Two further matters should be mentioned. Firstly, the Committee is not aware of the matters which it has discussed ever having arisen for consideration or resolution as an independent question. If it were to do so, attention would need to be concentrated upon s. 35(6). Any resulting change to s. 35(4) of the Act would simply be consequential upon the outcome as it affected s. 35(6). Secondly, if this matter were to be considered, attention may need to be directed to the operation of provisions such as §201(b) of the **Copyright Act 1976 (US)**, which *deems* that an employer is the author of the work where works are made during the course of employment, unless, of course, alternative arrangements have been **agreed**.²³ This is in contrast to provisions such as s. 35(6) which by their statutory effect vest ownership of copyright in the employer, immediately upon the creation of a work. It may also be relevant to any inquiry to consider Art. 2(6) of the Berne Convention which provides that

The works mentioned in this **Article** shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

The wording of the second sentence of this Article lends support for the views expressed by the Whitford Committee and the ACC. The Article expressly refers to protection being afforded for the benefit of the *author* and successors in title. It appears to assume that the author will be the **first** owner of the copyright.

²³ **Copyright Act 1976 (US)**, § 201(b) provides, "In the case of a work made for hire, the employer or other person for whom the work was prepared is *considered the author* for purposes of this title . . .". This provision is extensively discussed in Chapter 7.

The rights protected

6.15 The Convention contains a number of **specific** rights to be accorded to the author of a work that qualifies for protection. Of relevance to this inquiry is the right to authorise the reproduction of a work in any manner or form provided for in Art. 9(1). This right was **first** introduced into the Convention by the Stockholm revision in 1967. Professor Ricketson describes how this right is put into effect in a variety of ways in domestic laws. He notes the distinction between countries (such as Germany and France) where the author is granted a broad general right followed by specific instances of that **right**, for example the right to exploit a work (the broad right) and the right to reproduce or perform the work (examples of **specific** rights) and common law countries such as the United Kingdom and Australia where rights are listed specifically and exhaustively. Professor **Ricketson** concludes that authors enjoy, in general, in all countries that are members of the Union two basic rights - the right to reproduce the work in a material form and the right publicly to disseminate the work.²⁴

6.16 Australia complies with its obligations under the Convention by s. 31 (1) of the Act which specifies the rights comprised in the copyright of literary, dramatic and artistic works, including the right to reproduce a work in material form, the right to publish the work, and the right to broadcast the work. Section 31(1) thereby gives effect to Art. 9(1) of the Convention, which ensures that authors of literary and artistic works shall have the exclusive right of authorizing the reproduction of their works, in any manner or form. In the WIPO Guide, it is explained that the words, “in any manner or form” cover all methods of reproduction including printing, photocopying, recording by disc, cassette or microfilm and processes yet to **be devised**.²⁵ It also **fulfils** Australia’s obligations under Art. 1 ibis(1) concerning broadcasting of a work.

6.17 The rights of publication **and** distribution of works are not mentioned in the Convention. The WIPO Guide explains that the acts of publication and distribution of works occur in practice as a result of the exercise of the right to reproduce works, and that therefore these rights have not been included, though with the advent of new means of distributing works, such as cable television, there may be a need for a right of distribution to be added to the **Convention**²⁶. This explanation is supported by s. 29 of the Act, which provides that publication is deemed to have occurred when *reproductions* of a work have been made available to the public.

²⁴ Ricketson, *Berne*, p. 367, para. 8.4.

²⁵ WIPO Guide, p. 54, para. 9.2.

²⁶ More recent discussions at meetings of the Committee of Experts Concerning a Possible Protocol to the Berne Convention have considered other technological advancements such as on-line **delivery** of works, sound recordings and films in digital **form**.

The Universal Copyright Convention

6.18 The **UCC** was brought into existence as a result of an international copyright conference in 1952, conducted under the auspices of UNESCO. The **UCC** was signed for the **first** time in 1952, and was subsequently revised at the same time as the **Berne** Convention in 1971. In brief, the distinctive differences between the **Berne** and the **UCC** are that the latter though providing that protection will be afforded by member States to literary, scientific and artistic works, does not contain as long a descriptive list as the **Berne** Convention of the types of works encompassed by these expressions and, until its revision in 1971, only required contracting States to provide, "... for the adequate and effective protection of the rights of authors and other copyright proprietors . . .".²⁷ After the introduction of Article IV *bis* (1) in 1971, the two Conventions resembled each other far more in the nature of rights each protected. Article IV *bis* (1) provides,

[that] . . . the rights referred to in Article 1 shall include the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting. However, there is still an option available to member States to opt out of the protection of certain rights, by making exceptions in their domestic legislation, "... that do not conflict with the spirit and provisions of this Convention (but) . . . shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been **made**."²⁸

The term of protection of works under the **UCC** is the life of the author plus **twenty-five** years which is less than the minimum term required by the **Berne** Convention. Article 7(1) provides for a term of protection which is for the life of the author and fifty years after his/her death.

²⁷ The Universal Copyright Convention as revised at Paris and **Protocols** annexed thereto, 1971, **Article** 1.
²⁸ Article IV *bis* (2).