

Chapter 7

international Approaches

Introduction

7.01 As noted in Chapter 6, the ownership of copyright by publishers and journalists outside Australia is not governed by any international agreements but by domestic laws which vary from country to country. However, the countries examined in this Report approach this issue, generally speaking, in one of three ways. There are those countries that confer no copyright at all on employed journalists (the non-copyright approach); and those that treat employed journalists as authors and confer copyright on them (the copyright approach) so that they have the ordinary rights which authors have in their works. In these countries there is no middle position as there is in Australia and was, until recently, in the United Kingdom. Potential problems which it may be thought would arise from such a situation are overcome by the readiness to infer the existence of a licence granted to the newspaper proprietor to publish the work of its employees. The third approach (the middle approach) is one adopted by a number of countries including Australia, Canada, New Zealand and some few European countries. That approach splits the copyright, granting the publisher so much of the copyright as is necessary for the purposes of the publication of the newspaper and reserving to the ‘journalist the balance of the rights which an author has.

Countries in which employee journalists do not retain copyright

United States of America

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7.02 The law in the United States has traditionally vested copyright ownership in works, made by employees, referred to as “works made for hire”, with employers. This was the position under the *Copyright Act 1909* and is still the position under the *Copyright Act 1976*.¹ As Dr Nimmer indicated as part of the, Combined Newspaper and Magazine Copyright Committee of Australia’s (CNMCCA) submission, the general rule in the United States that the hiring party rather than the employee owns copyright in works created in a contractual situation, is the corresponding rule to that contained in s. 35(6) of the Australian Act. However, whereas there are exceptions to this rule in the Australian Act, such as s. 35(4), there are no such exceptions in the American copyright law. Thus, American

¹ §26 of *Copyright Act 1909 (US)* (Reproduced in App. 6 of David Nimmer & Melville B Nimmer, *Nimmer on Copyright*, NY: Matthew Bender & Co, 1993). [Hereinafter “Nimmer”]; and see §9; as to the current (1976) provision, see 5201(b) *Copyright Act 1976 (US)*. (Reproduced in App. 2, *ibid*)

employee–journalists do not enjoy the same rights by statute that their Australian counterparts do.

Copyright Act 1909 (US)

7.03 The 1909 US Copyright Act provided, in §26, that “the word ‘author’ shall include an employer in the case of works made for hire.” However, that Act did not define “employer” or “works made for hire.” As Nimmer notes, this was a task which was left to the courts, mentioning that “employer” was held to be sufficiently wide as to include a “hiring party who had the right to control or supervise the artist’s **work.**”² Courts were willing to displace the presumption that a work was a work “made for hire” by referring to an oral or written agreement to the **contrary.**³

Copyright Act 1976 (US)

7.04 The current position in respect of copyright ownership of works made by employees is contained in §201(b) of the *Copyright Act 1976*⁴ and the definition of “work made for hire” in § 101.5 These provide:

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

A “collective work” is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A “work made for hire” is -

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, . . . as a compilation, . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered as a work made for hire

§ 201. Ownership of Copyright

² *Nimmer §5.0:[B][1][a][i]* esp n.22.

³ *Ibid.*

⁴ U.S.C. Title 17. §301(a) of the Act preempts the laws (including the common law) of States insofar as those laws grant rights equivalent with the Act. See *Nimmer, §2.02*

⁵ *The US Supreme Court has interpreted §201(b) in Community for Creative Non-Violence v. Reid 490 US 730 (1989).*

(b) Works made for Hire. - 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, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

7.05 The effect of §201(b) is that in respect of works made for hire the ‘employer’ or commissioner, in the case of a specially ordered work, is regarded as the author and owns all of the rights comprised in the copyright, unless there is an express written agreement between the parties that provides otherwise.⁶ In the employment context, the status of the work as one that is “made for hire” cannot be altered by agreement; Nimmer notes that an agreement between an employer and employee whereby works prepared by the employee not within the scope of employment are nevertheless deemed to be works made for hire will not of itself convert them into works covered by §201(b).⁷ In the circumstances, it may, however, amount to a simple transfer of copyrights. This is contrary to the practice adopted under the 1909 Act,⁹ and may have a number of procedural consequences, where, for example, independent contractors are used to create works.

7.06 The significance of the distinction between an employer owning a work by assignment and being the author pursuant to §201(b) is that the 1976 Act treats them differently in two respects relevant to the Committee’s Reference.¹⁰ Firstly, an author who has assigned rights in a work can terminate the grant after thirty-five years.¹¹ These provisions do not apply to works made for hire.

7.07 Secondly, the duration of copyright is different in the case of works made for hire. §302(a), which applies to works created after 1 January 1978,¹² complies with the minimum prescribed by Art. 7(1) of the Berne Convention: life of the author and fifty years after death. However, in the case of works “made for hire” the term is seventy-five years from the year of the work’s first publication or one hundred years from the year of the work’s creation (the date upon which the work is fixed in tangible form) whichever expires first.¹³

⁶ Harry G Henn, *Copyright Law A Practitioner’s Guide*, 2nd Ed., 1988, Practising Law Institute, p. 72.

⁷ This was also the intention stated in the Register of Copyright’s *Supplementary Report on the General Revision of the US Copyright Law*, May 1965, at p.66ff [Nimmer, App. 15, at 15-93f].

⁸ See Nimmer, §5.03[B][1][b][ii]; see also §5.03[B][1][b][i].

⁹ *Op.cit.*, [b][ii], notes 100-104.

¹⁰ See Nimmer, §5.03[A].

¹¹ *Copyright Act 1976 (US)*, § 203(a)(3). Certain time limits apply after the expiry of 35 years: §§ 203(a)(3) and (4). Under the *Copyright Act 1909 (US)* the author was automatically granted a reversion of rights after 28 years. *Copyright Act 1909 (US)* §24; see, also the discussion of earlier provisions concerning “renewal terms” in note 38, Appendix 6, of Nimmer. One reason for this provision is given in the Register of Copyright’s 1961 Report, at p.53f [Reproduced in Nimmer, App. 14, at 14-74f].

¹² The date being the effective date of the *Copyright Act 1976 (US)*.

¹³ *Copyright Act 1976 (US)*, § 302(c). The duration of copyright for anonymous works or pseudonymous works is the same. This exceeds the requirement in Art.7(3) of the Berne Convention.

7.08 Background to the Copyright Act 1976. The 1976 Act was the product of much deliberation by the American legislature. ¹⁴ Its form was in great part due to a report of the Register of Copyrights in 1961¹⁵ and a report of the House of Representatives Committee on the Judiciary, following the introduction of the Bill into the **Senate**.¹⁶

7.09 These reports discussed the option of dividing rights between the author and the employer, along the lines that presently exist in s. 35(4), and rejected that option. The 1961 Register's Report, from which Dr Nimmer quoted in the CNMCCA's submission, is more expansive on this issue than the 1976 House Report and the reasoning adopted in that report is reproduced below. Prior to these reports however, a 1958 study, authored by Borge Varmer summarised the competing viewpoints on the issue of who should own copyright in works made for hire. Referring to the 1909 Act he said:

Under the present law the employer of a work made for hire is deemed to be the author, and is thereby the initial owner of the work. This rule may be said to have in its favour simplicity and definiteness in result, once an employment relationship is established. It may also be argued that the present law has worked satisfactorily in practice; that employee-authors are compensated for their work; that the product of employment should ordinarily belong to the employer; that the present law is in accord with the result that would usually be brought about by contract or trade custom; and that in unusual cases employees may reserve rights to themselves in their contracts with their employers.

On the other hand, it may be argued that the concept of designating the employer as the author of art intellectual creation of another person is artificial; that the actual creator is intended to be the primary beneficiary of copyright; that since copyright works maybe used commercially in a number of ways beyond their use in the employer's business, the employee-creator should ordinarily be the beneficiary of such other uses; and that the burden of contracting otherwise should be placed on the employer.

As long as copyright ownership as between employer and employee can be provided for by contract, it may make little practical difference in most situations whether one or the other is considered to be the initial copyright owner in the absence of a contract.. It could be argued, however, that the burden of contracting, ie., deviating by contract from the statutory rule, should be placed on the shoulders of the party who is ordinarily in a better position to carry this burden. This party would seem to be the employer, by

¹⁴ Harry G Henn, *Copyright Law A Practitioner's Guide*, 2nd Ed., 1988, Practising Law Institute, para. C, p. 8.

¹⁵ *Report of the Register of Copyrights on the General Revision of the US Copyright Law, issued by Judiciary Committee 10 July 1961* [reproduced in App.14 of *Nimmer on Copyright*]. As to works for hire, see at p.85f [*Nimmer, App.14-112f*].

¹⁶ H. of Rep., Report # 94-1476, submitted by Mr Kastenmeier, Committee on the Judiciary, 94th Cong., 2d Sess. [3 Sep 1976]. Reproduced as App.4 of *Nimmer on Copyright*. For the Senate Report (of 20 Nov 1975), see *op.cit.*, App.4A. In an effort to resolve remaining differences (none of which are directly relevant to the Reference presently before this Committee) both Houses met in Conference; *q v*: Conference Report, H. of Rep., Report # 94-1733, submitted by Mr Kastenmeier, committee of conference., 94th Cong., 2d Sess. [29 Sep 1976]. [Reproduced as App.5 of *Nimmer on Copyright*].

reason of his stronger bargaining position and more convenient recourse to expert legal advice. On the other hand, it could be argued that the burden of contracting should be so placed that the need for a contract would arise infrequently. It seems likely that if the statute did not vest copyright in the employer, he would commonly insist upon an assignment of copyright to **him**.¹⁷

7.10 However, the learned author did not make any recommendations as to the appropriate balance that should be struck by statute, but commented on the split copyright provision which prevailed in the 1956 United Kingdom Act and on a Bill that had been put forward in the United States in 1924 with a similar proposal (referred to **as the first Dalinger Bill**).¹⁸ He said,

The rationale of this rule would seem to be the appropriateness of limiting copyright ownership of the employer to the extent to which exploitation of the work comes within his normal business activities for which the work was created . . . However, unless specific kinds of works and uses were enumerated, many doubtful questions would probably arise in applying such a general principle to a variety of **situations**—questions regarding the purposes of the employment, the scope of the employer’s regular business, the competitive nature of **various** uses, **etc.**¹⁹

7.11 1961 Report. The **1961** Report of the Register of Copyrights commented:

a. Ownership of Rights

The rule has long been established, both under the common law and under the statute, that the rights in a work produced by an employee in the course of his employment are vested in the employer. This rule has been based on several grounds: (1) the work is produced on behalf **of the** employer and under his direction; (2) the employee is paid for the work; and (3) the employer, since he pays all the costs and bears all the risks, should reap any gain.

Some commentators have urged **that** this rule be changed for the benefit of **employee**-authors. They propose that the employer be given the exclusive right to use the work in his regular business activities, but that the employee should have the rights in other non competitive uses. To illustrate how this proposal would work

- In the case of **a** story written for a magazine publisher by an employee, the publisher **would** have the exclusive right to publish the story in any periodical; but the employee would have the exclusive right to use the story in a book, motion picture, broadcast, or any other medium not competitive with the magazine.

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¹⁷ *Studies on Copyright-Arthur Fisher Memorial Edition, 1963*, (Reprint), **Borge Varner**, “Works Made for Hire and on Commission”, 1958, p. 731-2.

¹⁸ **H.R. 8177, 68th Cong., 1st Sess., § 45(b)**.

¹⁹ *Studies on Copyright-Arthur Fisher Memorial Edition, 1963*, (Reprint), **Borge Varner**, “Works Made for Hire and on Commission”, 1958, p. 733.

We believe that in some situations there is considerable merit in the argument that an employee-author should share in any commercial value his work may have beyond its use in the employer's business. But we see many practical difficulties in the proposal to divide the rights between employers and employees by a statutory formula:

- Controversial issues would frequently arise **as** to the scope of the employer's business, and as to the degree of competition between his business and particular uses of the work. No definite rules could be laid down to resolve these issues in the great variety of situations involved.
- The proposal would be unworkable in the common situation where work is the composite product of many employees.
- It would often be difficult for potential users to know whom to deal with.

It is more practical, we believe, to continue the present rule that all rights vest in the employer. Where employees are in a position to do so, they may bargain — **as** some have done — for a share of the revenue derived by the employer from subsidiary uses of the work. Most employees are not in this position, but they would probably gain little or nothing from having rights which their employers could require them to assign. In any event, we do not believe that the great variety of situations involved — in which the employment relations, the nature of the works, and their potential uses differ widely — can be fitted into a general statutory formula for the division of **rights**.²⁰

7.12 1976 Report. Again in 1976 the view was expressed that the work for hire doctrine was well established in the United States and that any amendment to it was not supported. The House of Representatives Report said in respect to the ownership of copyright provisions in the proposed Bill:

Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner” of copyright unless there has been an agreement otherwise. The subsection also requires that any agreement under which the employee is to own rights be in writing and signed by the parties.

The work-made-for-hire provisions of this bill represent a carefully balanced compromise, and as such they do not incorporate the amendments proposed by screenwriters and composers for motion pictures. Their proposal was for the recognition of something similar to the “shop right” doctrine of patent law: with some exceptions, the employer would acquire the right to use the employee's work to the extent needed for purposes of his regular business, but the employee would retain **all** other rights as long as he or she refrained from the authorizing of competing uses. However, while this change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural, **The** presumption that initial ownership rights vest in the

²⁰ *Report of the Register of Copyrights, op.cit.*, note 15 above, at **pp.85–6**. [reproduced in App. 14 of *Nimmer on Copyright*] [*Nimmer, App.14-112f*],

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employer for hire is well established in American copyright law, and to exchange that for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other **issues**.²¹

7.13 It is clear from the views quoted above that **there** is little support in the United States for the policy of dividing ownership of copyright. As Dr **Nimmer** indicated, as part of the **CNCCMA's** submission, the policy emphasis in the United States has been on certainty in statutory law rather than the accommodation of opposing interests.

7.14 The Committee has been advised by the MEAA that agreements have been reached between the journalists' union **in** the United States, the Newspaper Guild, and some publishers that provide that if a publisher sells a work to another party to be used by that party then the journalist will receive an **agreed** proportion of the proceeds of that sale. The **MEAA** has provided an example of such an agreement that exists between the Newspaper Guild and Time Magazine which provides that the employee will receive 50 percent of the receipts from a sale. In addition, the *Australian Financial Review* reported, on 20 December 1993, that ten freelance writers have filed a federal suit against major news organisations over the reproduction of their work in electronic media and on microfilm, suggests that agreement between publishers and journalists may also arise independently of the statutory provision.²²

United Kingdom

7.15 The prevailing position in the United Kingdom has already been examined in Chapter 5 of this Report. In summary, the relevant reforms of copyright law brought about by the *Copyright, Designs and Patents Act 1988* were made without regard to earlier government reports and recommendations on this issue. The position regarding ownership of copyright is now the same as that existing in the **United** States — the employer owns all copyright in works made during the course of employment, subject to any agreement to the contrary.

Countries in which employee journalists retain copyright

New Zealand

7.16 The history of New Zealand's copyright legislation is very similar to that of Australia's, Until the enactment of the *Copyright Act 1962 (NZ)*, the laws applying in New

²¹ 1976 House **Report**, *op.tit*, note 16 above, at **p.121**. [iWnmer,App.4,at4-114].

²² *Australian Financial Review*, 20 December 1993, p. 22. The Committee appreciates that **§201(b)** may have no application to **freelance** writers.

Zealand were a combination of United Kingdom²³ and New Zealand Acts.²⁴ The *Copyright Act 1913 (NZ)* was a substantial re-enactment of the 1911 UK Act.

Copyright Act 1962 (NZ)

7.17 Section 9(2) of the 1962 NZ Act is identical to s. 4(2) of the 1956 UK Act, except that it grants to the publisher the right to broadcast the work as does s. 35(4) of the Australian Act.²⁵ Commenting on the right to broadcast included in the Act, Brown and Grant note that:

The addition to the New Zealand Act was made late in the passage of the legislation through Parliament on the basis that it was reasonable that the proprietor should also hold the broadcast copyright.²⁶

In all other respects, the New Zealand Act currently provides for the same split in ownership of copyright between journalists and publishers as exists in Australia.

7.18 Background to the Copyright Act 1962 (NZ). In 1957, a Committee was appointed to consider and report on what changes should be made to the 1913 Act, having particular regard to social, economic and technical changes and development since its passage. Known as the Dalglish Committee, its Report was presented to the Minister of Justice in 1959.²⁷ It represented the first consideration given to the issue of copyright by New Zealand, independently of the United Kingdom. The recommendations of the Dalglish Committee were implemented in most part by 1962 Act. However, the Committee did not discuss the issue of ownership of copyright or make any recommendations concerning this issue.

7.19 Since the enactment of the 1962 Act, two discussion papers have been prepared concerning its reform; the first in April 1985, and the second in 1989.²⁸ These discussion

²³ British Acts applying in New Zealand see Brown and Grant, *The Law of Intellectual Property in New Zealand*, 1989, para. 4.3, p. 226.

²⁴ New Zealand enactments included: *Ordinance 1842, Fine Arts Copyright Act 1877, Photographic Copyright Act 1896, Dramatic Copyright Act 1903, Copyright Act 1908.*

²⁵ *Copyright Act 1962 (NZ)*, s. 9(2) provides: 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 or to broadcasting the work; 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. *Television New Zealand v Newsmonitor Services Ltd (1993)* 27 IPR 441 is a recent New Zealand case with respect to this provision.

²⁶ Andrew Brown and Anthony Grant, *The Law of Intellectual Property in New Zealand*, Wellington: Butterworths, 1989, para. 4.43, p. 276. The broadcast right in s. 35(4) (Australia) is also discussed in Chapter 5 at para. 5.16. The minority also comments at para. 12.35 and following on this right.

²⁷ *Report of the Copyright Committee, 1959, Vol IV*, Appendix to the Journals of the House of Representatives of New Zealand, Session 1959, H.46.

²⁸ *Discussion Paper, 'Reform of the Copyright Act 1962'*, April 1985 (Justice Department); *White Paper (?) 'The Copyright Act 1962 Options for Reform'*, 1989 (Justice Department).

papers considered other possible areas of **reform** of the **Act**, but neither of them addressed the position under s. 9(2) of the Act. Furthermore, the *Copyright Amendment Act 1985*, which followed the 1985 discussion paper, did not make any change to the provisions affecting journalists and **publishers**. The Committee is not aware of any other legislative developments in New Zealand pertinent to this issue.

Canada

7.20 Canada has the same legislative heritage as that of Australia and New Zealand. The present 1921 Act came into effect on 1 January 1924.²⁹ It was closely **modelled** on the 1911 UK Act. Major amendments have been made to the Canadian Act since then, but there has not been any change to journalists' copyright, although there have been government reports that have considered the **issue**³⁰. The Commonwealth **Attorney** y-General's Department was made aware in October 1992 that the Canadian Department of Consumer and Corporate Affairs was in the process of undertaking a complete review of the *Copyright Act 1921* but that no change was proposed for s. 13(3) of the Act at that time.

Copyright Act 1921 (Can.)

7.21 Section 13(3) of the *Copyright Act 1921* provides that:

Where the author of a work 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.** (Emphasis added).

7.22 This provision is in similar terms to that contained in the 1911 UK Act (and thus the 1912 Australian Act). It **preserved** to the author of the work a right of veto only. The extent of this right as it formerly existed in Australia is discussed in paragraph 5.06 of this Report.

7.23 1954 Royal Commission. In 1954, the **Ilsley** Royal Commission conducted an inquiry into **whether**:

Federal legislation relating in any way to . . . copyright . . . affords reasonable incentive to . . . the development of literary and artistic talents, to creativeness, and to making available to the Canadian public . . . literary and artistic creations . . . in a manner and on

²⁹ *Copyright Act 1921*, Latest reprint *Copyright Act, RSC, 1985, c-C42*, Cite as: Copyright Act. **RS.,c. C-30**, S.1.

³⁰ Amendments were made to the *Copyright Act 1921* in 1985, 1988, 1990, 1992 and 1993 in relation to such matters as detentions in the Act and the introduction of **moral** rights, (1988) among others.

terms adequately safeguarding the paramount public **interest**, [keeping in mind] any relevant international convention to which Canada is a **party**³¹.

7.24 The Commission dealt briefly in its Report with the issue of ownership of copyright in works under the right of veto provision. It expressed the view that the special treatment of newspaper staff in this provision should not be extended to other employees and that in fact that there should be no special qualification in **favour** of employee contributors to periodicals. It did not elaborate on the reasons for this view but it endorsed the principle that, “. . . copyright in a work made in the course of an author’s employment by another person should vest in that person unless there is **an** agreement to the contrary.. .”³²

7.25 1971 Economic Council of Canada Report. In 1971, the Economic Council of Canada issued a Report which examined the prevailing copyright law as well as design, patent and trade mark **law**.³³ The report enunciated general copyright guidelines to assist **in** the formulation of policy but did not make any specific recommendations for amendments to the 1921 Act. Two of the suggested guidelines for copyright policy are relevant to this Committee’s inquiry. The first is that both authors and others who contribute to the dissemination of their work to the public should be appropriately compensated in proportion to the extent to which their work is used with each user paying a fair **share**.³⁴ The second is that the alteration of distribution of remuneration between the various participants in the innovative process, such as authors and publishers, is not best achieved through statutory change, although this is quite often sought by interest groups. The Council explained the point this way:

... a desire is often expressed to make the copyright law operate relatively more to the benefit of authors and relatively less to that of publishers and other more “commercial” participants in information-processing. here may indeed be a good case at times for alterations of this type, but they are often likely to be most effectively accomplished, not by changing the copyright law itself (for example, by adding new “neighboring rights” or other statutory rights), but by making changes in other relevant circumstances. The basic reason for this is that whatever may be the initial allocation of rights under the copyright law, a large part of them must be contractually assigned to others in order for them to be “activated” and rendered capable of returning significant streams of income to their original **holders**.³⁵

31 *Royal Commission on Patents, Copyright, Trade Marks and Industrial Design, Report on Copyright, 1957*, p. 7. (Hereinafter “**the Ilsley Report**”).

32 *The Ilsley Report*, p. 46.

33 Economic Council of **Canada, Report on Intellectual and Industrial Property, 1971**. (Hereinafter “the Council Report”).

34 *The Council Report*, p.141.

35 *The Council Report*, p. 145.

7.26 1977: Keyes Report. In 1977, the Department of Consumer and Corporate Affairs issued a Report (known as the **Keyes Report**)³⁶ which again considered the issue of ownership of copyright in the context of employment and recommended that the principle that the employer **is** the frost owner of the copyright in works made by employees in the course of their employment be **retained**.³⁷ The Report also noted that if the Act did not contain a statutory presumption in favour of employers there would arise numerous contracts and collective agreements, incorporating clauses to the opposite **effect**.³⁸ It also recommended that the 1921 Act clarify the right of a publisher to publish contributions to newspapers, magazines and periodicals, so that:

... where a contribution to a particular periodical is ordered by a **proprietor**:

(i) the proprietor be entitled to the copyright **only** insofar as it relates to publication in *that periodical*;

(ii) the author be entitled to the copyright in all other **respects**.³⁹
(Emphasis added)

7.27 1984 Revision. In 1984, proposals were made for the revision of the 1921 Act, in the light of technological developments and the fact that it had not been revised for over 60 years. This revision was to be conducted jointly by the Department of Consumer and Corporate Affairs and the Department of Communications.

7.28 The 1984 White Paper, jointly prepared by these two Departments, outlined the divergent opinions of employers and employees on the question of ownership of copyright in the context of **employment**.⁴⁰ However, the White Paper did not make any recommendations on this issue but invited **further public** comment. From the outline of the arguments made by each group it is clear that they were no different in substance from those raised before this Committee. Employers argued that the payment of a salary was intended to be the reward for the creation of a particular type of work having market value and that if employees retained copyright then employers would have to pay twice for the same work. They also maintained that entering into written agreements to the contrary would create unnecessary paperwork and records would have to be kept for the term of copyright protection, that is for the life of the author and the further period of 50 years after death. Employees based their arguments on basic principles of copyright law and claimed that the statutory exception to the author **first**

³⁶ A A Keyes and C Brunet, *Copyright in Canada : Proposals for a Revision of the Law, Consumer and Corporate Affairs Canada, Ottawa, 1977*. (Hereinafter “the Keyes Report”).

³⁷ **The Keyes Report**, Recommendation 4., p. 71.

³⁸ **The Keyes Report**, p. 71.

³⁹ **The Keyes Report, Recommendation 5.**, p. 71.

⁴⁰ Consumer and Corporate Affairs Canada and Department of Communications, *From Gutenberg to Telidon - A White Paper on Copyright - Proposals for the Revision of the Canadian Copyright Act*, Ottawa, 1984, Appendix II. (Hereinafter “the White Paper”).

owning copyright was a significant departure **from** principle. They also submitted that while they received a salary for their work it might attain a greater value or be exploited in ways not contemplated at the time when it was made, due to its popularity or the use of new technologies. Employees also expressed their concern that employers **might**, because of their ownership of copyright, attempt to suppress exploitation of a work, particularly where it might compete with a work already **published**.⁴¹

7.29 While the White Paper did not make recommendations, it did advance two possible solutions aimed at striking an intermediate position between the extreme views of each groups. The solutions suggested were **that**:

(a) copyright remain with the author, but the employer have a **licence** to use the work in the **course** of his or her business; or

(b) copyright vest with the employer who may publish or otherwise deal with the work, but the employee/author may restrain any assignment or **licence** of the copyright to a third **party**.

7.30 As far as the Committee is aware, neither of these solutions has been implemented, and the review of the 1921 Act is continuing.

Member countries of the European Union

7.31 As far as the Committee is aware, there is no harmonisation of the laws of European Union (**EU**) countries, by way of any Directives or Regulations, concerning the copyright ownership of journalists' work. It remains, therefore, within the scope of member states to legislate as they see fit.

7.32 The twelve member states of the **EU**⁴² in order of their date of union are Belgium, France, Italy, Luxembourg, The Netherlands, Germany (then West Germany) (which together formed the Community in 1951), Denmark, Ireland, United Kingdom, (which joined in 1973), Greece (1981), and Portugal and Spain (1986). The Committee has not examined in detail the laws of each of these countries, apart from the United Kingdom. However, relying on information supplied by the Australian Copyright Council and the MEAA, the Committee has compiled the table below which outlines the position in each of these countries.

⁴¹ The Committee notes that this particular concern has not been expressed to **it**, although the submission made by the Communications Law **Centre** does refer to the suppression of material for different reasons.

⁴² Established by the Treaty of Rome, 1957.

Table 1 — EU Members⁴³

COUNTRY AND LEGISLATION	EMPLOYER PUBLISHERS	EMPLOYEE JOURNALIST
Belgium <i>Copyright Act 1886</i>	Employer can acquire rights by transfer. Unclear whether needs to be explicit or whether arises from the existence of the employment contract.	*As the creator of the work copyright is owned by journalist. #Collective agreements govern journalists.
France <i>Law on Literary and Artistic Property 1957</i>	Employers acquire economic rights to the work within the limits of the needs of their ordinary business activity.	The author of a work made for the press retains the right to exploit the work in any form provided that the exploitation does not compete with the particular newspaper for which the work is made. Authors have exclusive right to make and publish collections of their work. ,
Italy <i>Law for the Protection of Copyright 1941</i>	Employer must acquire rights by contract. The interpretation applied to these contracts means that the employer will only acquire specific rights related to the employment. Consent to publish can be implicit in handing over work to employer.	*As the creator of the work copyright is owned by journalist. Author can reserve the right to reproduce items of an economic, political or religious nature published in magazines or newspapers. If the right is not reserved then the author is considered to have given the work a public purpose.
Luxembourg <i>Copyright Law 1972</i>	[No provision in Act]	*As the creator of the work copyright is owned by journalist.
Netherlands <i>Copyright Act 1961</i>	Employer is treated as the author of works made in the course of employment under its plan, guidance and supervision/direction .	Author can reserve the right to reproduce. If not reserved then newspapers, periodicals can reproduce current articles on political, economic and religious topics if they indicate source and author's name.
Germany <i>Federal Copyright, Act 1965</i>	Employers must acquire rights by contract. However a rebuttable presumption applies that an employee grants a licence to the employer for the purposes of its business	*As the creator of the work copyright is owned by journalist. Reproduction in newspapers or radio broadcasts of single newspaper articles and radio commentaries relating to current political, economic or religious questions that appeared in another newspaper or periodical is allowed if no rights were reserved. Remuneration must be paid for reproduction and for copying of works for commercial purposes . #Collective agreements govern journalists.
D e n m a r k <i>Copyright Statute 1961</i>	Employer must acquire rights by contract and only acquires rights specified. Case law indicates that employer is considered to have been transferred copyright to the extent that is necessary for the usual functions of the employer's business.	*As the creator of the work copyright is owned by journalist. #Collective agreements govern broadcast journalists.

⁴³ In Table 1, the symbol * denotes the general principle applying in the country; the symbol # denotes a country in which a collective agreement is in place with the relevant Union.

<p>Ireland <i>Copyright Act 1963</i></p>	<p>Employers own copyright in work made in the course of employment.</p>	<p>Where works are made by employees of newspapers and periodicals the employer publisher only owns copyright for the purpose of publication in newspapers and periodicals.</p>
<p>United Kingdom <i>Copyright, Designs and Patents Act 1988</i></p>	<p>Employer owns copyright in works made in the course of employment unless otherwise agreed.</p>	<p>[No provision in Act]</p>
<p>Greece <i>Copyright Act 1920</i></p>	<p>Employer can acquire rights by contract.</p>	<p>*As the creator of the work copyright is owned by journalist.</p>
<p>Portugal <i>Code of Copyright and Related Rights 1985</i></p>	<p>Employer can acquire rights by agreement. Where there is no agreement the creator owns copyright. Employee entitled to additional special remuneration in certain cases</p>	<p>If there is no agreement, as the creator of the work copyright is owned by journalist. . Unless otherwise agreed the author . cannot publish an article from a periodical until 3 months after its publication.</p>
<p>Spain <i>Copyright Act 1960</i></p>	<p>Where there is no agreement to the contrary the employee is presumed to have transferred economic rights necessary for employer's customary activity. Employer cannot use work for any different purpose than that specified by agreement in writing or presumed</p>	<p>In respect to works for the press and in the absence of agreement to the contrary, authors retain the right to use their works in any form that does not prejudice the normal exploitation of the publication. All publication rights revert to the author if an article has not been reproduced within one month after dispatch or acceptance Author retains right to publish a collection of his works.</p>

7.33 Table 1 reveals that in most member countries of the EU the journalist will retain ownership of copyright in principle but employers can acquire copyright by agreement with the journalist. It is only in the Netherlands, Ireland and the United Kingdom that the employer will automatically own copyright in works created in the course of employment as a journalist. In France and Germany, while the employer acquires some rights in the copyright of a work these are limited to the use of the work for the purposes of the business of the employer.

7.34 There are moves within the EU to harmonise laws on copyright **generally**.⁴⁴ It is possible that the matter in question here may arise for consideration in the future. But this cannot be certain given the comments of the EC in its Green Paper in 1988 and the reluctance it indicated to provide community rules on **all** subject matters. The Commission said:

Community legislation should be restricted to what is **needed** to carry out the tasks of the Community. Many issues of copyright law, do not need to be subject of action at Community level Many of the differences that remain have no significant impact on the functioning of the internal market or the Community's economic competitiveness . . . The Community approach should therefore be marked by a need to

⁴⁴ For example: *Amended Proposal for a Council Directive on the Legal Protection of Databases*, COM (93) 464 final — SYN 393,4 October 1993.

address Community problems. Any temptation to engage in law reform for its own sake should be **resisted**.⁴⁵

However, the Green Paper did recognise the general principle that creators should enjoy due respect for their work and should receive remuneration that adequately compensates them for **the** use of their **work**.⁴⁶

7.35 The Commission, whilst discussing the authorship and ownership of copyright in computer software, said,

In the field of **authorship, software** produced by employees or on commission poses problems similar to those in other **fields** where collective works are common, such as advertising . . . Standardization of the legal starting point throughout the Community would be the ideal solution but it cannot be said to be essential since, as regards economic rights, matters can be satisfactorily regulated by agreement . . . Contractual solutions are, however, facilitated if there is at least a clear legal starting point in the jurisdiction in question . . . It would accordingly be desirable for all Member States to ensure that their law at least establishes clearly who is the right holder in the absence of any agreement to the contrary . . . A minimum provision of this kind, . . . has been laid down in the Council Directive on the legal protection of semiconductor topographies?’

7.36 The 1986 Council Directive on the Legal Protection of Topographies of Semiconductor Products makes provision for circumstances in which the creators of topographies are **employed**.⁴⁸ Article 3 provides the model which the EC recommends Members should **adopt**.⁴⁹ This model accords the employer ownership of any topographies created during the course of employment. It provides an indication of the attitude of the Community to the issue of **ownership** where a work has been created by a group and there is difficulty in ascertaining the identity of all members of the group and each member’s contribution to the creation of the work.

⁴⁵ Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology - Copyright Issues requiring immediate action*, 1988, para. 1.4.5. (Referred to from here as the Green Paper).

⁴⁶ Green Paper, **para.** 1.4.5.

⁴⁷ Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action*, 1988, p. 196, para. 5.6.24.

⁴⁸ *Council Directive of December 16 1986, on the Legal Protection of Topographies of Semiconductor Products (87/54/EEC)*.

⁴⁹ *Article 3(2)* provides as follows: “Member States may provide **that**, (a) where a **topography** is **created in** the course of the creator’s **employment**, the right to protection shall apply in **favour** of the creator’s employer unless the terms of employment provide to the contrary (b) where a topography is created under a contract other than a contract of employment the right to protection shall apply in **favour** of a party to the contract by whom the topography has been commissioned, unless the contract provides to the contrary”.

7.37 In the 1991 Council Directive on the Legal Protection of Computer **Programs**⁵⁰ and in the recent Amended Proposal for a Council Directive on the Legal Protection of **Databases**,⁵¹ the approach has also been implemented. Article 2(3) of the Council Directive on computer programs provides:

- (3) Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise **all** economic rights in the program so **created**, unless otherwise provided by **contract**.

The Amended Database Proposal also contains an article in similar terms; Art**3**.⁵²

Other European countries

7.38 The Committee was provided with information regarding other European countries outside the EU. The Committee has not independently verified this information, but has included it as a general guide to the position prevailing in Europe generally; table 2. It is apparent from the Table that in other European countries the relative positions of employers and employees is very much the same as in the EU.

⁵⁰ *Council Directive of 14 May 1991 on the Legal Protection of computer programs (91/250/EEC).*

⁵¹ *Amended Proposal for a Council Directive on the Legal Protection of Databases*, COM (93) 464 final — **SYN** 393,4 October 1993. See, also, Simon **Chalton**, "The Amended Database Directive Proposal: A **Comentary** and Synopsis", [1994] 3 EIPR 94, esp at **96f**.

⁵² COM (93) 464 final - **SYN** 393,4 October 1993.

Table 2 — Other European Countries⁵³

COUNTRY AND LEGISLATION	EMPLOYER PUBLISHERS	EMPLOYEE JOURNALISTS
Austria <i>Federal Act on Copyright 1936</i>	Employer can acquire rights by contract but there is a presumption that employer only acquires rights required to fulfil the purpose of the agreement.	The author of an article accepted for publication in a newspaper or periodical retains the right to use the work for any other purpose unless there is an express or implied agreement that the publisher is granted the exclusive right to first publish elsewhere as well. #Collective agreements govern journalists.
Finland <i>Copyright Act 1961</i>	[No provision in the Act]	*As the creator of the work copyright is retained by the journalist.
Iceland <i>Copyright Act 1972</i>	Employer can acquire rights by contract.	*As the creator of the work copyright is retained by the journalist.
Norway <i>Copyright Act 1961</i>	Employer can acquire rights by transfer but is limited to those rights explicitly stated.	*As the creator of the work copyright is retained by the journalist. #Collective agreements govern journalists.
Sweden <i>Copyright Act 1960</i>	Employer acquires rights to use works created under the scope of employment within the employer's field of customary activities. The employer can only use the work for purposes foreseen at the time the work was created and only to fulfil the purpose behind the work's creation	*As the creator of the work copyright is retained by the journalist. #Collective agreements govern journalists .
Switzerland <i>Federal Act concerning Copyright in Literary and Artistic Works 1922</i>	The terms of the employment contract will determine what rights if any are acquired by the employer. There is a presumption of exclusivity in the transfer of any rights, Rights will only be those for the purpose of the contract.	*As the creator of the work copyright is retained by the journalist. #Collective agreements govern journalists .

7.39 The Committee has also received information from the MEAA regarding collective agreements that have been negotiated between newspaper publishers and journalists in various countries. These agreements between employers and employees govern the use of journalists' work. The MEAA has submitted to the Committee that these agreements should be considered together with the legislative solutions provided for in various countries. Their submission is that these agreements supplement or are the alternative to legislative solutions of this **issue**.⁵⁴ Countries in which such agreements are in place are indicated Tables 1 and 2 above by the use of the # symbol.

⁵³ In Table 2, the **symbol** * denotes the general principle applying in the **country**; the symbol # denotes a country in which a collective agreement is in **place** with the relevant Union.

⁵⁴ Submission of the **MEAA**, p. 22, **para.** 3.4.1.

WIPO - Draft Model Provisions for Legislation in the Field of Copyright

7.40 Some comment should be made regarding the position taken by the World Intellectual Property Organisation (**WIPO**) on the rights of employed authors. In its Draft Model Provisions for Legislation in the Field of **Copyright**, WIPO put forward two alternatives dealing with the ownership of copyright in works created in the course of employments. The proposals were as follows:

Section 37: Ownership of Rights in Works Created Under Employment Contract

In the case of a work created by an author for a physical person or legal entity (hereinafter referred to as "employer") under employment contract and in the course of his **employment**,

Alternative A the first owner of moral and economic rights shall be the author, unless provided otherwise in contract, but the economic rights in such work shall be deemed to have been transferred to the employer to the extent necessary for the customary activities of the employer at the time of the creation of the work.

Alternative B: the first owner of the economic rights shall be the employer, the author being entitled to the moral rights.

7.41 However, as far as the Committee is aware, since 1990 these model provisions have not been the subject of any **further** discussion.

55 Draft Model Revisions for Legislation in **the** Field of Copyright, Memorandum prepared by **the** International Bureau of the World Intellectual Property Organisation, **CE/MPC/1/2-I**, 1989.