

## Chapter 9

# Miscellaneous Matters

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### Press-clipping Agencies

#### Introduction

**9.01** In chapter. 1 of this Report, the Committee drew attention to the context in which this inquiry has arisen and the need it sees to consider the wider implications of any recommendations it makes for persons and organisations, other than newspaper and magazine proprietors and journalists. Press-clipping agencies (or media monitors as they are also referred to) are one such group. Recognizing the significant interests of these businesses in the outcome of this inquiry, the Committee examines briefly in the first part of this Chapter the business operations of media monitors and the substance of the submissions they made to this Committee, the Federal court decision in *De Garis v Neville Jeffress Pidler (1990)* 37 FCR 99; 95 ALR 625 (De *Garis*) and the implications for media monitors of the implementation of either the majority or minority recommendations in this report.

**9.02** The Committee received a number of written submissions from press-clipping organisations, which have been extremely helpful in outlining the operations and concerns of this group of businesses. The “submission made by the Australian Media Research Industry Group (AMRIG) was made, on behalf of a number of independent press-clipping agencies including MarkeTrak Pty Ltd and Media Insight Pty Ltd.<sup>1</sup> Media Monitors Australia Pty Ltd, formerly known as Neville Jeffress/Pidler Pty Ltd, also provided a lengthy submission to the Committee and invited the Committee to tour its premises, as did MarkeTrak Pty Ltd.

#### Business operations

**9.03** In Australia, at present, there a number of private commercial organisations who provide a press-clipping or media monitoring service to other private commercial businesses.<sup>2</sup> The clients of the press-clipping agencies may require information concerning the advertising methods and trends of their competitors or information on a particular subject, such as the mining industry. To meet these requirements the press-clipping agencies employ “readers” who are skilled in reading newspapers bearing in mind the requirements of a number of clients. During the process of scanning the newspapers the reader clips from

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<sup>1</sup> These organisations also made their own brief submissions.

<sup>2</sup> The Committee distinguishes the **press-clipping** activity in the private sphere from the practice Occurnng in the **Commonwealth** Government, where photocopies of press clippings are also distributed.

relevant articles or advertisements and in so doing destroys the original copy of the newspaper or magazine. In general, the clips will then be photocopied and distributed to the client.

**9.04** The press-clipping agencies asserted that they **are** paid by their clients for the expert and efficient reading service that they provide. Media Monitors said that in their view press-clipping agencies did not sell information or newspapers **and** the Australian Media Research Industry Group described the activities of press research bureaux as assessing, retrieving and analysing public information published in the print **media**.<sup>3</sup> Their description focused on the role of the press bureau as a research tool of **government**, business and corporations and as a part of the “cycle of public **information**”.<sup>4</sup>

**9.05** With respect to the practice of the agencies of making photocopies of clippings the reasons given were, that it is easier to handle and file photocopies rather than newsprint originals, that clients prefer photocopies and that photocopies have a longer lifespan than newsprint. Mention was also made of the difficulty in recycling newsprint in contrast to ordinary paper. The Committee is aware that this practice may have altered, as a result of the decision in *De Garis*, and that some media monitors are now distributing original clips rather than photocopies of **clips**.<sup>5</sup> Some media monitors also indicated that they **are** in the process of developing alternative methods of delivery to their clients other than paper-based services. For instance, the AMRIG referred to the release by Xerox of a new photocopying machine, “**Docutech**”, which has the ability to scan a document, store it in computer memory and then electronically transfer it to a distant location for printing. The advantages for press-clipping agencies of machines of this nature and other technologies that would enable the electronic transmission of material would obviously include savings **in** time and resources for both the agencies and their clients.

### **Press-clipping agencies and copyright**

**9.06** The Committee was advised by the press-clipping agencies that press research businesses have existed in some form in Australia for over ninety years and that during the

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<sup>3</sup> Submission of the Australian Media Research Industry Group (AMRIG), p. 3, para. (a).

<sup>4</sup> Submission of the AMRIG, p. 3, para (c) and (d).

<sup>5</sup> The Committee understands that while the practice of distributing original clips maybe more expensive and less practical than **photocopying** the original clip, it will not involve a “reproduction” of the work and will therefore not require the press-clipping agencies to negotiate with **the** owner of copyright in the work. Given that both the journalists’ and the publishers are making a claim to ownership of **copyright**, this solution has been the most practical for the **press-clipping** agencies to adopt and has enabled them to continue their operations while this Committee conducts its inquiry. In support of their claim that the **Copyright Act** 1968 should be amended to take account of their use of copyright works, the **press-clipping** agencies were at pains in their submissions to make the point that they make a copy of the original work which **replaces** that original, once the original is destroyed, and that therefore this activity should not be regarded as an infringement of copyright.

greater part of that time they have not been required by any owners of copyright to negotiate for the use of copyright works. Indeed, in their submissions, the press-clipping agencies explained that they were of the opinion that copyright resided with the publishers and that no copyright issues arose in the context of their operations. The AMRIG stated that among press-clipping agencies there was an understanding that there was, “an informal, unwritten agreement with the media publishers or proprietors that copyright had been upheld if proper acknowledgment of the source of the article. . . is included in the **service**”.<sup>6</sup>

**9.07 As** a consequence of the commencement of the *De Garis* litigation in 1988 and the outcome of that litigation, the use by press-clipping agencies’ of copyright works from newspapers and magazines use ‘is no longer covered by an unwritten “gentlemen’s agreement”. Since 1988 these businesses have been on notice that journalists’, represented by the Media Entertainment and Arts Alliance, (MEAA, formerly the Australian Journalists’ Association), and newspaper and magazine proprietors claim ownership of copyright in the works which they duplicate in the course of their business.

### **Prevailing legal position<sup>7</sup>**

**9.08** The current legal position is governed by the decision in *De Garis* which, as far as the Committee is aware, has not been the subject of any further significant consideration. For the benefit of those not fully conversant with the case, the facts in brief were that two authors, Mr Brian Kelvin de Garis and Mr Matthew Moore, wrote articles that were published by the *West Australian* and the *Sydney Morning Herald* newspapers respectively. Mr de Garis supplied his article as a freelance writer, while Mr Moore wrote his article during the course of his employment as an employee with the *Sydney Morning Herald*. Both authors. claimed that their work had been reproduced without their licence by the respondents, Neville Jeffress Pidler. Neville Jeffress Pidler had photocopied these articles for the purpose of distributing them to subscribers to the press-clipping service they operated and in Mr Moore’s case via NJP News Express (a similar service).

**9.09** Justice Beaumont concluded that Mr de Garis, the freelance writer, owned all copyright in the literary work which he had written and that therefore under the *Copyright Act 1968* (the Act) had the exclusive right to reproduce the work in a material form. In relation to Mr Moore, a full-time employee with the *Sydney Morning Herald*, the Judge held that s. 35(4) was applicable and that Mr Moore, like Mr de Garis, was the owner of copyright in respect of the act of reproduction by press-clipping agencies. The Judge distinguished the activity of reproducing a work for the purpose of publishing it in a newspaper or magazine

<sup>6</sup> Submission of the AMRIG, **Appendix I(a)**, p. 25.

<sup>7</sup> The Committee refers readers of this chapter to Chapter 4 of this report entitled “**Current Australian Law**” which provides a complete discussion of **the legal** principles of s. 35(4) and the consequences of its operation.

from the activity of distributing photocopies of selected newspaper articles and found that the latter activity did not constitute the former. The Judge was then able to conclude, based on this distinction, that journalist-authors, like Mr Moore, would own copyright in relation to reproduction of their works by press-dipping agencies, since these agencies were not reproducing works for the purpose of publishing a newspaper or magazine. Normally, the newspaper proprietor would own **copyright** where a work was reproduced for the purpose of its being published in a newspaper or magazine (s. 35(4)(c)). In the course of his **judgement**, Justice Beaumont discussed the various fair dealing statutory **defences** that **Neville Jeffress Pidler** had raised and concluded that they were unable to rely on any of **them**.<sup>8</sup>

**9.10** One of the consequences of the *De Garis* decision is that whether or not journalists are employees or freelance writers they will retain the right comprised in the copyright of a work to authorise **the use** of their work by **press-clipping** agencies. As a result of **this**, **press-clipping** agencies who reproduce copyright works in the course of their business must obtain the permission of the copyright owners, the journalist-authors to reproduce these works.

**9.11** The press-clipping organisations have submitted to the Committee that one of either of two solutions be adopted to ensure that media monitoring organisations be able to continue on their businesses. Their **preferred** solution is that the reproduction of press clippings not be subject to negotiating a **licence** with either publishers or journalists, but that an amendment be made to the Act to introduce a statutory exemption for reproductions made for the purpose of providing press-clippings. It was also suggested that such a right to reproduce could be limited to a period of 30 days from the date of the original publication of the article. Alternatively, Media Monitors **Australia** sought a statutory **licence** scheme, which would also involve an amendment to the Act. Finally, there was support from some media monitors for repeal of s. 35(4). As MarkeTrak indicated, this would mean that media monitors only had one copyright owner to deal with.

**9.12** The Committee has not considered in any detail the suggestions of the **press-clipping** agencies for the introduction of a statutory **licence** scheme or a statutory exemption for their activities. The recommendations of the majority of this Committee, if adopted, will give effect to their second preference. The repeal of s. 35(4) as recommended by the majority will mean that in respect of works produced by employee-journalists, there will be only one relevant copyright owner, the publisher-proprietor with whom they have to deal. However, freelance journalists will still **retain copyright**, subject to any agreements to the contrary, and press-clipping agencies will have to obtain their permission to reproduce their works.

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<sup>8</sup> These statutory **defences** mean that it is not an infringement of copyright if a “fair dealing\*” is made of copyright work. They are well established exceptions under the Act that allow a person to copy a part or a whole of a work if **this** is done for the purpose of research or study (s. 40(1)), criticism or review (s. 41), for the purpose of reporting the news (s. 42(1)) or for the purpose of judicial proceedings or professional advice (s. 43(1)).

Overall, the adoption of the majority view does not in **reality** change the position of **press-clipping** agencies, who currently have to negotiate with one group of copyright owners or their representative, the Copyright Agency Limited (CAL). If the views of the minority are implemented then the position of press-clipping agencies will not alter either though some formal **licence** arrangements with journalists and their **representatives** maybe finalised.

### ***Collecting Societies***

9.13 In the course of its deliberations, the Committee has considered the potential role of collecting societies in this **area**. These maybe necessary to facilitate the payment to copyright owners of royalties or other remuneration to which they **are** entitled for the reproduction of their work in which they retain copyright. There is a question whether, if ownership of copyright produced **by** print media journalists continues to be **split**, one or more collecting societies will be able effectively to collect and distribute royalties both to journalists and publishers. The same concern may arise if the section be repealed and proprietors of newspapers, magazines and periodicals become the owners of the entirety of copyright. In those circumstances the proprietors may wish to enter into arrangements with an appropriate collecting society to collect revenue due to them. It is possible, however, that the proprietors may not wish to deal **with** collecting societies either because they prefer to collect any revenue due to them for other uses themselves or because they will not be prepared to make the newspapers or magazines, or parts of them, available to press clipping services or for storage in data bases not owned and controlled by them. If collecting societies are to have a part in what has happened, they must be able to demonstrate that they can identify owners of copyright and dish-ibute royalties to them **correctly**. There is also concern whether the **amount** of royalties or other remuneration which will be **collected** will justify the administrative expense of collecting societies. The return to many copyright owners may be quite small and yet the collection costs comparatively large. What is involved is a question of practicality. The principal questions which arise concern the means available to an organisation to detect the use of works which are the subject of copyright, to negotiate with the users of that copyright for a proper return, to collect payment for such use and to distribute it fairly and accurately. As CAL itself states in its submission to the Committee:

The Committee's considerations will involve an assessment of the practicality of the distribution of copyright fees collected from media monitors, Government and others that copy newspaper articles?

9.14 The owner of copyright in a work has a bundle of rights comprised in that copyright which may be exploited in a number of ways, With respect to literary, dramatic, musical and artistic works, these include the right to reproduce and publish the work. As far as authors

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<sup>9</sup> Submission of the Copyright Agency **Limited** (CAL), **p.1, para.** (a)

and owners of literary and artistic works are concerned these rights may be the most important to control in order to **generate** income from the use of their work. However, due to the increasing availability of complex forms of communication and reproductive technology, it is becoming more difficult for copyright owners, as individuals, to ensure that their works are not being used without their permission and either to combat unauthorised use or collect payment for it. On the other hand, for the users of copyright works there can be a degree of difficulty in identifying and tracing the whereabouts of a particular owner or owners of copyright in order to obtain permission to use a work and pay any **licence** fee. A collecting society's purpose is to address both of these dilemmas. Appointed as the agent for a copyright owner, 'a collecting society is the **first** contact point for potential users and is also bound to act in the interests of copyright owners. A collecting society can provide administrative back-up for copyright owners, encourage increased use of copyright works and, arguably, provide copyright works to the public at a reduced cost.

9.15 CAL was established in 1974 to collect royalties for copyright owners where work was copied by educational institutions. CAL is particularly concerned with collecting remuneration for the mechanical reproduction of literary works, commonly by the photocopying of such works. The establishment of this non-profit organisation was in response to the perceived threat, of photocopying in educational institutions, to the work of authors and the businesses of book publishers. **As** a body authorised by the Attorney-General under the Act to act as a collecting society, CAL is required to comply with strict reporting and accounting procedures laid down in the Act in respect of copying for educational purposes. It may be wise to make the provisions of ss. 135ZZB, and following, of the Act applicable to any collecting societies retained by journalists or publishers to act in relation to the use of copyright material included in newspapers, magazines and periodicals.

9.16 CAL currently represents both authors and publishers. It represents many journalists either as individuals or as members of the Media Entertainment and Arts Alliance (**MEAA**). Publishers may be represented in the same way. Its Articles of Association provide that all relevant copyright owners are entitled to become members of CAL. Unlike some other collecting societies, of which the Australasian Performing Right Association is an example, CAL does not require an assignment of copyright from its members — it is only appointed a copyright owner's agent for certain specified **purposes**.<sup>10</sup>

### **General issues**

9.17 The Committee notes that concerns have been expressed in the general community and in Federal Parliament about whether funds that are collected **are** actually distributed to

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<sup>10</sup> Cf para. 14.11. Copyright Law Review Committee, *Draft Report on Computer Software Protection*, Canberra, AGPS, June 1993.

individual authors who retain copyright ownership. The concern is that because of the chain of distribution from user to owner through a collecting society, authors may not receive the remuneration to which they are entitled. The concern is greater in the case of journalists because reliance is placed on the by-line in order to determine authorship of a work. The **majority is** concerned that the by-line is not invariably a true guide to authorship. Concern has also been expressed about the administrative costs of collecting societies, which are paid for out of the funds collected by those societies. The Committee is aware that the **Government** has commenced a review of the role and accountability of collecting societies, including CAL.<sup>11</sup> The Committee understands that this review will address these concerns.

9.18 The Committee has also **been** assured in its discussions with CAL that with advances in technology the ability to distribute funds accurately will be greater and that where **electrocopying** is involved, tollgates will be used to track usage of works. Greater accuracy in record keeping and ease in distribution of payments is made possible by the use of this technology.

9.19 Based upon the material which it has, the Committee is not able to express any concluded view about the ability of CAL or any other collecting society satisfactorily to represent copyright owners in respect of the collection of remuneration for the use of copyright material appearing in newspapers, magazines and periodicals. Undoubtedly CAL has an extensive experience in a number of areas and is, so far as the Committee is aware, extremely well regarded in the copyright community. But the Committee considers that this area is one which has particular difficulties and may need some special attention. The Committee would add that it is grateful to CAL for the most helpful submissions it has received from it and for the opportunity it provided to **inspect** its premises and its operations. In passing the Chairman wishes also to record **his** thanks to the staff of the American Society of Composers, Authors and Publishers (ASCAP) in New York and also the staff of VG Wort (**Verwertungsgesellschaft Wort**), in Munich, for their assistance when he was in the United States and Germany last year. The inspections and discussions he had have given him a further insight into the way in which very large collecting societies — one concerned with the performing right in relation to music and the other with the reproduction right in respect of a vast range of literary works - operate, and of the difficulties which they encounter in ensuring, so far as possible, that revenue **collected** is properly applied for the purposes for which it is recovered.

### ***Print-disabled Persons***

**9.20 The** Committee received submissions from the following organisations who represent the interests of **“print-disabled”** persons: The Royal Victorian Institute for the Blind, Talking

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<sup>11</sup> The Government has engaged a **consultant, Mr Shane** Simpson, to conduct the initial review.

Book Library, the “Hear–a–Book” service in Tasmania, the Christian Blind Mission International, the Queensland Braille Writing Association and the Royal Blind Society. Each of these organisations provides some form of assistance to persons who are blind or suffer some impairment of their sight or have a physical handicap which prevents them from handling, and manipulating printed materials. It was estimated in the submissions made to the Committee that there are 600,000 people in **Australia**<sup>12</sup> or 13 percent of the **population**<sup>13</sup> who suffer from disabilities of this kind.

9.21 These organisations make printed materials available, to their members or public libraries, in alternative formats in order to assist those who cannot read normal printed matter. This includes making audio recordings, braille versions, large print transcriptions and computer disks of printed materials, whether these be books, magazines or newspapers. This service for print disabled readers has been in existence for some time, as is illustrated by the case of the “Hear a Book” service which has been operating since 1972.

**9.22** As the Committee understands it, these organisations currently reproduce literary works from recent magazines, newspapers and books with the permission of the copyright owners. No charge is made for this use of copyright material. The copyright owners from whom the organisations normally seek permission are the publishers and editors of these works. The Committee is not certain about the matter, but it may be that a blanket permission has been given to each organisation to reproduce the work of certain publishers thus avoiding the need to make requests on an individual basis.

**9.23** The main submission outlining the concerns of these organisations was made by the Royal Victorian Institute for the Blind (**RVIB**) and was supported by the other organisations. The RVIB submitted that no change should be made to s. 35(4) which would result in these organisations having to obtain from each individual copyright owner, that is the author of the work, permission to reproduce the work. The RVIB said that the likely administrative costs involved and the delay caused by such a procedure would mean that the service provided by them and similar organisations would in all likelihood cease.

**9.24** The Committee has noted these concerns in making its recommendations. If the recommendations of the majority of the Committee are adopted, then the Committee anticipates that there would be no significant change in the practices of such organisations in obtaining copyright clearances. The publishers, as copyright owners, would need to be approached either directly or through a relevant copyright collecting society for one–off permission or to grant a permanent **licence** to reproduce works. In **fact**, this would clarify the position of the print disabled service providers since reproduction of a work for any purpose

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<sup>12</sup> Submission of the Hear a Book Service, p. 1.

<sup>13</sup> Letter dated 6 May 1993 from **Wm C Byrne, Director**, Library Services, the Royal Blind Society.

could be licensed by the publishers. If, on the other hand, the recommendations of the minority of the Committee are adopted, the publishers will be unlikely to be able to license reproductions of works in newspapers published by them. This is because the reproduction will not be for the purposes of the publication of the material in a newspaper, magazine, or periodical. In that **event**, it will be essential for the various organisations to be able to deal with a body such as a collecting society. Otherwise, the task of identifying each particular author will plainly be beyond them.

**9.25 The** Committee notes that the Act presently contains a statutory **licence** scheme in ss. 135ZN–135ZT which, in certain cases, **permit** the copying of literary and dramatic works and published editions of works’ by a body which administers an institution that **assists** handicapped readers. Under this scheme a sound recording, a braille version, a large-print version and a photographic version of a literary or dramatic work can be made without infringement of copyright. However, records of such copying are required to be kept. Procedures for the payment of equitable remuneration to the relevant collecting society are also provided for. For this scheme to apply to any organisation, it must be declared by the Attorney-General to be an institution assisting handicapped readers pursuant to s. 10A of the Act. A similar statutory **licence** scheme is available for institutions which assist intellectually handicapped persons and for print handicapped radio stations which may broadcast published literary and dramatic **works**.<sup>14</sup> The Committee believes that such schemes may overcome the problem in some cases but not in all., In the circumstances it seems undesirable to embark upon a lengthy discussion of this part of the Act particularly as the Committee is not in possession of ‘all relevant facts., It would seem more appropriate for the organisations which are affected to make further submissions about the matter directly to the Minister of Justice. It may be that it will be preferable to await the Government’s decision on what if any action is to be taken in relation to s. 35(4) of the Act before these submissions are made. The submissions will then be able to take account of what the likely form of the subsection will be and thus be able to explain **more** effectively what the problems are. The Committee does, however, express the opinion that this matter is of substantial importance. It is imperative that the various organisations be permitted to continue providing the important service which is presently available to the handicapped persons whom they **serve**.

### ***Moral Rights***

**9.26 The** Committee has noted that in Appendix 2 of the **MEAA’s** submission a number of examples of international collective copyright agreements are included, among them the International Federation of Journalists’ ***Model Copyright Provisions for Collective Agreements for Journalists in the Print Media***. Clause 1 of that model provides for a number

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<sup>14</sup> ***Copyright Act 1968, ss.135ZR - 135ZT; s.47A.***

of moral rights for journalists in respect of editorial matter. The separate model memorandum of agreement also transfers to the employer all of the journalist's economic rights, apart from any excepted, but not the journalist's moral rights. The submission made by the Communications Law **Centre** said that, "arty discussion of economic rights for journalists leads to consideration of moral **rights**".<sup>15</sup> It submitted that moral rights for journalists should be added to the economic rights already conferred by s. 35(4). It also commented that the 1988 UK Act did not provide adequate moral rights for journalists, despite the fact that this Act introduced moral rights for authors for the **first** time in the United Kingdom. <sup>16</sup>

**9.27** Apart **from** noting these comments, the Committee has not considered the issue of moral rights for journalists in this inquiry. This was the subject of separate consideration by this **Committee** in its **report** on moral rights; see particularly paragraphs. 136-142 which are to be found in that part of the **report** dealing with the minority's recommendations that moral rights be introduced into **Australia**.<sup>17</sup> The general issue of moral rights for all authors of copyright works is presently under consideration by the Federal Government. A discussion paper is being prepared for circulation that outlines a proposed legislative scheme for the introduction of moral rights in Australia. Without making any recommendations on this issue, the Committee recognises that moral rights may be of relevance to a consideration of the ownership of copyright by journalists and publishers. It follows that any legislative change to s. 35(4) (which deals only with economic rights) should be made taking account of any issues raised by the discussion paper or by the ultimate introduction of moral rights legislation in Australia. The minority of the Committee pointed out in the moral rights report that there is **no** reason in principle why authors who are employees should not have moral rights in respect of their work **albeit** that s. 35(6) denies them economic rights in respect thereof. There may, however, be practical problems in affording them a right to attribution and a right of integrity in some cases. Journalism is a case in point.

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<sup>15</sup> Submission of the Communications Law **Centre (CLC)**, p.14.

<sup>16</sup> Submission of **the CLC**, pp. 14-15. The relevant provisions of the *Copyright Designs and Patents Act 1988 (UK) (CDP Act)* are contained in Chapter IV of the CDP Act. The right to be identified as the author of a work, provided by s. 77(1) does not apply where copyright in a work originally vested in the author's employer by **virtue** of s. 11(2)-(s. 79(3)(a)). Sections 79(5) and 79(6) also provide that this right has no application to works made for **the reporting of the news or to works published in newspapers, magazines or similar periodicals**. The right to object to derogatory treatment of a work conferred by s. 80(1), **is also** stated not to apply to works made for reporting the news or works published in newspapers and magazines. However, by virtue of s. 82(1) **this right** would be available to employees, **apart** from journalists, whose employers have copyright in their works-s. 82(1). The remedy available for derogatory treatment of a work **can** be an injunction, but it is also possible for a disclaimer to be made disassociating the author from the modification of the work (s. 103(2)). The CLC identified this as one of the inadequacies of the moral rights provisions in the United Kingdom.

<sup>17</sup> Australia. **Attorney-General's Department**, Copyright Law Review Committee, *Report on Moral Rights*, Canberra, AGPS, 1988. See also **paras.** 180-185.