

Chapter 10

Majority View: Section 35(4) should be Repealed

10.01 The majority recommends that s. 35(4) of the Act be repealed. The majority's reasons for this conclusion are stated in the following paragraphs.

10.02 There are two matters of background that need to be mentioned first of all. These are:-

(a) In some of the submissions and here and there during the public hearings there are to be found statements suggesting that one side or the other concerned with the outcome of this reference carried something in the nature of an onus. Thus those seeking the retention of the provision, i.e. s. 35(4) of the Act, suggested that the publishers bore the onus of displacing a provision which, in one form or another, has been part of the law for over a century. In a sense it is not going too far to say that the provision is one which is entrenched in our law. On the other hand, there are suggestions by those seeking the repeal of the provision that those seeking its retention bore the onus of establishing reasons why print media journalists should be treated differently from all other employees, the general rule being that copyright material produced in the course of an employee's employment belongs to the employer and not to the employee who is the author of the work, s. 35(6). In the majority's view, no question of onus enters into the "matter. The terms of reference require the Committee to consider whether s. 35(4) of the Act should be modified or repealed. That is an objective question which requires determination without the overtones of any onus being cast upon any of the parties interested or concerned in the outcome.

(b) The majority wishes it to be clear that, in adopting the view which it has adopted, it is in no way to be taken as being critical of or undervaluing the important and skilful work which journalists do. The Committee did not need the inspections of the two newspapers it saw being prepared for publication to be persuaded that journalism is a profession which requires a great deal of skill. It requires a number of special qualities. These include (the list is illustrative rather than exhaustive) an ability to write clearly, concisely and relevantly; the capacity to make accurate precis or summaries of news material; an ability to write in such a way that the attention of the reader is maintained and, at the same time, the ability to meet editorial requirements relating to length of copy so that it can be incorporated into the newspaper which will contain news reports, articles of

various kinds, editorial comment and so on as well as a substantial amount of advertising material. The need for compression brings with it the need to cull and to compose without losing material important to the accurate reporting of news or the making of comment which is not based upon factual material. The sources which a journalist has available may be numerous and frequent judgments must be made to determine what sources are to be used and the extent to which particular sources will be drawn upon either directly or indirectly. Desirably journalists require a degree of flair; they need to bring to their writing an attractive and easy style but not one which is extravagant; yet they must maintain their accuracy and not lose the general thrust or purport of what is being reported or commented upon. At the same time they must be prepared to apply themselves assiduously to the understanding of various subjects upon which they write. On occasions this will involve long hours of hard, tedious work. Finally they must work to a deadline. Particularly is this so in the case of journalists who are employed by daily newspapers. The pressure of time is always upon them very often until late at night or the early hours of the morning. The majority has made these remarks, probably at unnecessary length, to emphasise to those reading this Report that the Committee does understand the many qualities, skills and talents which journalists bring to their work.

10.03 There is a question whether the proper consideration of this reference should begin with the general rule for which s. 35(6) provides or the particular rule enacted in s. 35(4). The majority recognises that the answer to the ultimate question may depend upon the selection of a starting point. The majority is conscious that this is so and believes that it has avoided falling into the error which might arise if care were not taken to guard against it. Nevertheless, the fact is that s. 35(6) of the Act does vest copyright in works produced by authors, who are employees, in their employers. The only exception to that general rule are the journalists specified in s. 35(4). Section 35(6) "lays down the normal rule. The Committee's terms of reference do not permit a recommendation that s. 35(6) itself be modified or repealed. A reference which raised that question for consideration would have very wide implications for the community generally and would require consultation with an enormous range of interests. There would be the need to take into account a range of economic, industrial, practical and moral and social questions. The premise upon which the Committee has been asked to proceed is that s. 35(6) is to remain as it is. That matter cannot be emphasised too strongly.

10.04 It is important to stress that s. 35(4) does not apply to all journalists or even to all print media journalists. It has no application to the many journalists employed by radio and television stations nor to those employed by the many news agencies which there are, for example, Australian Associated press, Reuters, Agence France-Presse and many others. Yet these

journalists perform much the same sort of work as journalists employed by newspapers. Much of what has been written about journalists in paragraph 10.02 applies equally to journalists employed by the news agencies. And there are those employed by newspapers, and also by magazines and periodicals who compose, or assist in the composition of, original work who, nevertheless, are not customarily (the existing practice may be wrong in this respect because there may be numerous cases of joint authorship) treated as journalists for whose benefit s. 35(4) exists. These are principally some members of the editorial staff - sub-editors in particular - who not infrequently make substantial changes to copy provided by reporters. Their task, like that of the journalist in the field, is also a skilled one, albeit that their work may at times be the subject of much criticism, by no means all of it justified. The Media Entertainment and Arts Alliance (MEAA) acknowledged that there seemed to be no logical reason why the distinction which s. 35(4) makes should exist. But its response was to say that the provisions of s. 35(4) should be amended so as to afford the same benefits to all journalists. This would result in journalists employed by news agencies and by radio and television stations being treated similarly to those employed by newspapers, magazines and periodicals. An initial difficulty about this suggestion is that there is no historical basis for the suggested change. To make it now might well upset established relationships and practices which exist in relation to the conduct of news agencies and of radio and television stations. The Committee has not made an investigation of what the implications would be if the MEAA suggestion were adopted. In the majority's opinion, it was unnecessary for it to do so because there are fundamental reasons why s. 35(4) should be repealed.

10.05 The reason why s. 35(4) is worded in the way that it is is historical. As mentioned earlier in this Report, its origins lie in the state of affairs which existed in the last century. Print journalists were the only journalists. The majority is uncertain of the extent to which news agencies then existed. If they did exist, they would have been much more limited organisations than they are now. Technology, or the absence of it, would have provided the reason for this. All that has now changed. The Committee cannot be sure of the precise reasons for the enactment both in England and in other countries, including Australia, of provisions such as s. 35(4). The most likely explanation seems to have been an intention to preserve to journalists the right to publish material written by them other than in the newspaper, magazine or periodical which employed them. A balance was struck which ensured that the publisher was the owner of the copyright insofar as the material was published in the newspaper or other publication for which it was written; otherwise the journalist owned the copyright. Journalists' work could be published by them in other publications, usually books, containing collections of their work or perhaps of the work of a number of journalists. Probably the protection was designed to protect some of the more notable writers of the time whose work first appeared in newspapers or, more usually, in some of the well-known literary magazines of the day.

10.06 If journalists were now concerned about their ability to publish their own work in this way, there would probably not have been any need for this reference. That is not a matter of moment to the publishers. The Committee's impression is that at bottom publishers have a good deal of pride in the work of their journalists and are quite content for them to publish collections of their work. That would be so whether s. 35(4) of the Act goes or stays. That, however, is not the nub of the problem. It is concerned with comparatively new uses which are being made of journalists' work. Press clipping services, storage in databases and the likelihood of electronic publishing soon being with us have opened up a vista of possibilities for reproduction of journalists' work. These uses do not involve journalists needing to do more. Their work is done. Understandably enough, what they want is a share in the proceeds, the money, which will be, or, in their eyes, ought to be generated as a consequence of these and other impending developments. The publishers resist their claim because, in their view, it goes to the heart of their ability to control the uses to which their publications, newspapers, magazines and periodicals, may be put. To them the problem is an industrial one. If the journalists receive proper remuneration for their work, that, so far as any further reward to the journalists is concerned, is the end of the matter.

10.07 It needs to be emphasised that employed journalists are not the only employees in the community who are the authors of works which do not come into existence without the application of a great deal of skill, time and effort on the part of their authors. Many instances of this can be given, a few will suffice. The list is not in the order of any particular priority whether as to significance or otherwise. It includes:—

- (a) writers of copy or scripts and illustrators and cartoonists employed by advertising agencies;
- (b) script writers employed by radio or television companies or by film or television production companies;
- (c) school teachers and academic staff of universities and colleges who, in the course of their employment, compile notes of their lessons or lectures, write papers or articles for professional or academic journals, or who are the authors of text books. The fact that many universities allow employed staff to have the benefit of the copyright in their work is not to the point. That is something which is expressly or tacitly agreed upon. The situation is covered by s. 35(3) of the Act which permits the exclusion or modification by agreement of the parties of the operation of any of the provisions of subsecs.(4), (5) and (6) of s. 35. Furthermore, not all universities adopt a generous attitude in relation to the copyright in works prepared by staff in the course of their employment. Some, as they are entitled to do, claim copyright

in them;

- (d) employed computer programmers. It is probably unnecessary to emphasise what a highly skilled occupation this is;
- (e) employed architects, engineers, design draftsmen and others who draw architectural plans, engineering plans and other **plans** and drawings and who prepare complex contracts and **specifications** for various projects often involving extremely large building and engineering **works**;
- (f) those who, although not employees, **are** authors of work in respect of which the Crown has copyright. Notable examples **are** the speeches prepared by members of Parliament (and their speech writers) and the judgments prepared by judges;
- (g) the vast array of employees in countless walks of life who write **intricate** and complex reports dealing, for instance, with **all** kinds of scientific, technological and engineering questions, the likely pathological condition of patients who have undergone a series of complicated tests, accounting questions of numerous kinds some of vital importance to the welfare and future of the company or organisation — perhaps a **Government** department — which employs them. For the most part these employees will be highly skilled professionals who have well recognised and respected formal qualifications.

It is to be **stressed** that each of the categories of persons mentioned in these paragraphs may be a party to an agreement which provides expressly or by implication for who is to be the owner of the copyright in their work. Reference is again made to s. 35(3).

10.08 Journalists do not suggest that there are not a great many employed authors of great skill and ability in the community the copyright in whose works belongs entirely to their employers. What they say is that, so far as the work which journalists are employed to do is concerned, they are in precisely the same position as **all** other employed authors. They are employed as journalists by newspapers, magazines or periodicals. They write **primarily** for the purposes of that employment. Their work appears **in** the publication which employs them. Copyright in the publication which includes their work belongs to the proprietor. They do not seek any change in the subsection in this or any other respect. So far as they are concerned that situation will remain. What they want — they would say **all they want** — **is to retain copyright in their work** for the limited purpose of enabling them to be able to control the use of it for other purposes, in particular where it is used by press clipping services and in databases. They wish

to benefit financially if uses such as these are made of their work. The majority agrees that whether they should be able to do so or not is the critical question which this reference raises for decision.

10.09 The **MEAA** advanced three **reasons** why journalists should be treated differently from other employees. Firstly, they have been treated differently historically. Secondly, journalists' work was **different from** the work of any other employees in that it was open to multiple uses beyond the use contemplated by their employment **as** journalists. Thirdly, the rate of pay for journalists was claimed to be calculated on the value of their work for its primary use. The current award rates did not compensate journalists for secondary or additional uses of their work.

10.10 In the majority's view, whilst the past is relevant to a consideration of the matter, it cannot be determinative of the outcome. That is particularly so when **there** is taken into account the substantial technological changes which have come about in recent times. These are still occurring and are likely to go on occurring for some years to come. In paragraph 10.07 the majority has instanced work done by other skilled employed authors in various fields not connected with journalism. The majority is unable to accept the submission by the **MEAA** that journalists' work is different from the work of all other employees who are the authors of works which are produced in the course of their employment. In relation to the various examples given in paragraph 10.07, it is clear that much of the work that is done may be the subject of secondary uses. The work of scriptwriters is not infrequently published in manuscript form. Lecture notes are often published and **distributed** and sold by schools and universities or placed on electronic databases. The distribution of a successful computer program will take many forms and may involve its publication and reproduction in countless countries. Speeches made in parliament and judgments delivered by judges are published in Hansard or the law reports. These are now, or soon will be, on databases whether on-line or on CD-ROM. They are **analysed** and commented on by many sections of the community including journalists themselves. Other examples could be given. So far as journalists' rates of pay are concerned, the reason why their rate of pay is not now calculated on the value of their work for secondary uses of it is no doubt because of the provisions of s. 35(4). If the section is repealed, their work will have to be looked **at**, whether at the bargaining table or by an appropriate industrial tribunal, on a different basis. The fact that their work may be made the subject of secondary uses will be a matter which will need to be taken account of in the **fixation** of their remuneration.

10.11 There are a number of particular matters which need to be mentioned. It was submitted by the publishers that the work practices and procedures used for publishing a newspaper required a team effort from individual journalists, sub-editors, chiefs of staff and editors, and that a finished article was in many cases the result of the input of a number of people. It was

claimed that such a work could not be regarded as the result of any one person's skill and **labour**. The work was not the work of one person or author; it was the work of many. In one case mentioned to the Committee, eight people had contributed to the development of a particular story. Plainly journalists work in the knowledge that their work maybe substantially rewritten or cut for a variety of reasons, for instance, space requirements, a change in the direction of the story decided upon by a **sub-editor**, or a fresh development in the news which is being reported. The majority is in general agreement with the proposition that very often news reports and other material published in **newspapers are the result** of a collaborative effort. The by-line which usually appears often provides no reliable guide to authorship. That will not be the invariable position. There are many instances where the work of particular journalists is published without alteration. This is more likely to be the case where the material has been written by an experienced senior journalist. But that is not the position in a significant number of cases. No relevant statistical analysis has been done, but the majority's impression is that the by-line is a doubtful guide to authorship in a majority of cases. In saying what it has, the majority is not unmindful of a statement in the MEAA's submissions that 83.2 per cent of a particular sample of material contained by-lines. The majority does not question this figure. But the point is not the number of by-lines that **appear**; rather it is the extent to which a by-line is a satisfactory guide to authorship.

10.12 The fact that, in many cases, attempts to identify who in reality is the author of a published article or story will be either problematical or impossible has consequences for the assignment of any copyright interest by the author, the commencement of proceedings for infringement of copyright, and the distribution of royalties for the exploitation of **works** in which copyright is not "held by the publisher. Each of these acts necessarily depends on identifying the author of the work. The majority is of the opinion that any system which is designed to compensate an author for use of his or her work must strive to compensate actual authors, not authors' representatives or persons who **are** mistakenly identified as authors. To do so would be contrary to fundamental principles of copyright law.

10.13 In its written submission, the MEAA expressed the view that the problems of defining authorship and ownership would not be overcome by the removal of s. 35(4) of the **Act**. The MEAA contended that the publishers would still have to identify authors who were freelance journalists and who would continue to own their copyright. They would also have to identify employed journalists whose contracts provided that the journalists retained copyright either wholly or partly in their work. The MEAA submitted **that**, because of this, an analysis would have to be **carried** out by publishers of all authors of works published and, "... therefore the proposed amendment to the Act **would** not overcome the complexities inherent in the payment of copyright to individuals." ¹ In responding to this claim the Combined Newspaper and

¹ Submission of the Media **Entertainment** and **Arts Alliance**, p. 49.

Magazines Copyright Committee of Australia (**CNMCCA**) said that the size of the problem would be greatly diminished and therefore administration of copyright payments would be easier if s. 35(4) were removed. The majority accepts this **argument**. Furthermore, the work of freelance journalists and journalists who have special contracts is much less likely to be the work of numerous authors. The majority does not say that this will not **occur**; but it is unlikely to happen very often. It is much more likely that **the** work will be published in the form in which it is submitted. No **difficulty in identifying** the author of the material and thus the owner of the copyright will arise. The **presence** or absence of a by-line will not be the determining factor. There will be other means whereby the author can be **identified** without a great deal of difficulty.

10.14 The majority is persuaded by the case made by the **publishers** that **investment**, coupled with their acceptance of the risk associated with publishing newspapers and magazines, entitles them to reap the benefits of that investment. It is the responsibility of the newspaper publisher successfully to produce and present their publications. The success of a newspaper or magazine depends largely on the decisions made by the management of the newspaper in respect of publicity, circulation and the selection of items included in them. Apart from a few members of the journalists' profession who have built up a reputation and are deliberately sought out by readers for their comments in regular columns, the sales and circulation of journalists' work is in large part a result of the work of the publishers in developing and maintaining the "masthead" of the newspaper. The flow-on effects and income which the publishers may derive from their exploitation of newspapers should be theirs because of their efforts and responsibility in the creation of the publication. They have also accepted the risk that the publication may have no commercial value at all. Journalists stand to benefit from the inclusion of their work in a particular publication which may give it prestige and enable its resale, but they have no responsibility for the **final** publication apart from responsibility for the individual **contributions** which they make.

10.15 Furthermore, it is the publishers who provide the equipment, research facilities and training for their journalists. Journalists could not function without them. The **CNMCCA** referred particularly to communications equipment, including fixed or portable computer **terminals**, bureau facilities interstate and at Parliament House in **Canberra**, and international databases, library and research facilities. Thus, so they say, the publishers provide the "wherewithal" to enable journalists to do their work. The majority is reminded of the comments of the then Minister (without portfolio), Senator **Keating**, who introduced the bill for the Copyright **Act 1905** into the Australian Parliament. He said **that**, because of the **expenditure** and effort on the part of publishers, **there** was an expectation that the publishers would be entitled to some material benefit in their publications. The majority agrees with the CNMCCA that the matters to which they have **referred** need to be given weight in the consideration of the matter.

10.16 The **CNMCCA**, in its submission, characterised the relationship that exists between the **publishers** and their employed journalists as a bargain with certain elements and outcomes freed for each party, but which also had uncertain outcomes for the **publishers**. The freed elements of the bargain were the salaries paid to employees and the provision by them of their services to the publishers. The publishers do not buy the work of employed journalists as they do that of freelance journalists. On the other hand, **publishers**, in exploiting or attempting to exploit their work, have no certainty of a successful outcome. The work of particular employees may prove worthless or extremely valuable. This will depend to a substantial extent on the editorial policy which a **particular** newspaper has adopted. Thus, so the publishers claim, the risk taken by them and the remuneration which they pay to the employed journalists entitle them to exploit the work however they choose. It is the publishers who take the risk of success or failure. In support of its submission, the **CNMCCA said:—**

... the journalist receives a salary and has all on-costs of his work met by the publisher, he is fully compensated for loss of work by retrenchment. He is also indemnified against personal legal liability that may arise as a result of his work (under, for example, defamation proceedings). The rights of the employee are fixed, they are not qualified in any way by the value of his contribution to the employer's business or the success of that business, The bargain can be seen as one in which the employee sells his or her services and fidelity for certain benefits in contrast to one where he sells only a specific work for its value. The **latter** is the bargain struck by the **freelancer**.²

The majority considers that there is great force in all these considerations. **Furthermore**, it is always open to a journalist who wishes to be independent to engage in freelancing. Many successful journalists do. **But** this will carry with it risks not unlike those assumed by the publishers. A freelance journalist maybe most successful or may be quite unsuccessful. That is no doubt why the practice is to permit the freelance journalists to retain the copyright in their work except to the extent that it is necessary for the publishers to acquire it for the purpose of including it in their newspapers.

10.17 As regards the secondary use of works, the majority makes the following comments. The first is that the distinction between primary and secondary uses of works is likely to become less well defined in the future. If publishers do publish by electronic means, it is likely that the terms of employment of journalists will be **altered** to reflect this. The assertion that electronic publishing will involve a secondary use of journalists' work is **difficult**, if not impossible, to sustain. Newspapers or news information delivered electronically rather than in hard copy such as a newspaper, are nevertheless published. No more is involved than the adoption of another more convenient and contemporary method of publishing. The majority

² Submission of the Combined Newspaper and Magazines Copyright Committee of Australia, Committee's Submission, p. 26.

does not believe that electronic delivery is to be regarded as outside the meaning of “publication” of a work where **presently** used ins. 35(4). “Publication” means the making of material available to the public for the **first** time. The means by which this is done are **irrelevant** so long as what occurs **is** in truth publication. On this question the majority refers to the discussion of the meaning of “publication” in Chapter 4. The majority acknowledges, however, that its views cannot be tested until a case arises in the courts raising the matter for decision. This is unlikely to occur very quickly. In the meantime, despite the majority’s views, there will remain a degree of uncertainty about the matter.

10.18 The publishers have submitted to the Committee that s. 35(4) of the Act fails to provide them with the rights which they legitimately require **to carry** on their business operations. They say that, if the purpose of s. 35(4) was to provide publishers with copyright in their employees’ work to **the** extent necessary for the purposes of their business, then it no longer achieves that object and should be repealed or amended. As mentioned more than once, the **CNMCCA** claim that the decision of the High Court in *Avel Pty Limited v Multicoin Amusements Pty Limited (1990) 171 CLR 88* has the potential to prevent their **current** practice of syndicating journalists’ work. As explained to the Committee, it is common for publishers to syndicate works or themselves to publish works which have been syndicated elsewhere. It appears to the majority that this practice has been tacitly accepted by journalists and their representatives and that it is not a major source of contention between the parties. Moreover, this particular problem, as has been earlier pointed out in Chapter 4, can be overcome by appropriate amendments to s. 35(4) to include reproduction as well as publication or to define “publication” especially for the purposes of s. 35(4).

10.19 But that is not the only problem which the publishers say they will have. A broad interpretation of the existing wording of s. 35(4) would be required if the creation by newspapers of databases containing the whole or parts of newspapers or magazines electronically are to be said to fall within the business of publishing a newspaper or magazine. The majority agrees that it is far from certain that the provision would receive such an interpretation. Certainly storage of newspapers in databases would involve reproduction, not publication. Furthermore it is unlikely to be found, directly or indirectly, to be part of the act of publishing a newspaper.

10.20 At this point it should be emphasised that it is important to distinguish between databases created by newspapers or magazines themselves and those created by others. For instance, **press** clipping agencies may well operate in this way in the **nearfuture** and the text or part of the text of newspapers and magazines may also be stored in databases by a variety of organizations in the public and private sectors, not for sale to others, but for internal use. That type of use would certainly not be part of the publication of a newspaper. Yet news or other material published in newspapers or magazines may be distributed to customers or other users

have great **significance** simply because of the different ways in which the matter has been approached overseas. Nevertheless, it is important to emphasise one thing. A comparison of the two extreme positions illustrates **that**, in countries where employed journalists are entitled to **copyright, there** is at least certainty. Everyone knows where they stand and, particularly in the Continental countries and to a degree in the others, both sides recognise the need to negotiate and agree on the way in which copyright material maybe used and the payment which is to be received for it. Subject to the **current** position in the United Kingdom about which the majority is uncertain, the available evidence seems to suggest that sensible arrangements **are** in place in **all** these countries. **This** has been achieved by publishers and, either trade unions or collecting societies acting on behalf of journalists (and many other authors in a vast **range** of copyright areas), having been able to reach fair and **practical** accord. In each of these countries the system appears to work without any **significant** discord or disruption. That is perhaps the lesson and the only lesson to be derived from the overseas material.

10.24 In Chapter 6 mention is made of the Beme Convention to which Australia is a party and to the possibility that Australia may not comply with its provisions because boths. 35(4) and s. 35(6), but particularly the latter subsection, may deprive authors of copyright in their work contrary to the Convention. The majority (the Committee appears to be at one on this question) takes the view that this is not a matter which can be dealt within this Reference. If it **were** to be dealt with and, as a **result**, it were concluded that Australia was in breach,s. 35(6) which has a much wider and more significant operation than s. 35(4) would need to be repealed. This would bring about a fundamental change in this country's copyright law. It is to be observed that provisions such as s. 35(6) of the Act have been in force in this and many other British Commonwealth countries for decades. So far as the majority is aware, it has never been seriously suggested by those responsible for the administration of the Convention that Australia, or any other country whose law contains a similar provision, is in breach of its obligations under the Convention or requiring or suggesting the repeal of provisions such as S. 35(6).

10.25 One further matter needs to be mentioned before the majority comes to its **reasons** for its conclusion. Whether or not s. 35(4) of the Act is repealed, the problem which led to this reference will not go away. If the provision stays, there will need to be sensible agreement between the parties to resolve the problem. Otherwise there is likely to be an ongoing series of disputes that will be disruptive of publishers' businesses and journalists' employment. Advantage of technological developments may not be able to be taken either at all or as quickly as it should be. There are likely to be benefits, not only for publishers, but also for journalists in new technology. Failure to implement it or delay in implementing it may have a long term effect on journalists' employment because it will impinge upon their ability to function as efficiently and as competently as they should be able to do. This may have the consequence of

reducing the publishers' ability to compete with rival sources of news and other material, eg news provided by news agencies. Ifs. 35(4) is repealed, the matter will plainly become an industrial one. It is probably true that secondary uses of journalists' work is **presently** not taken into account in the valuation or the **fixation** of their **salaries**. The provisions of s. 35(4) of the Act **provide** the reason for **this**. If it **is** repealed, that **reason** will no longer exist. It would seem to the majority that the same sort of bargaining exercise as has been foreshadowed if s. 35(4) remains part of the Act **will** then need to occur. An added advantage for the parties, if repeal be the course which is adopted, is that both will have access to the appropriate industrial tribunal which, if there is no **agreement**, will have power **firstly** to assist the parties by conciliation or mediation, and, if that fails, by arbitration. That is not **something** which will be available if the provision is not repealed.

10.26 In some of the submissions and at the public hearings it was suggested that the whole problem to which this gives rise was indeed an industrial one, not a copyright one. Some members of the majority take the view that it is an industrial one and agree with these suggestions. That, coupled with the fact that the general rule is that employed authors do not own copyright in work created by them in the course of their **employment**, provides the principal reason why the provision should be repealed. Others of the majority do not find assistance in considering the question whether the problem is an **industrial** one or a copyright one. They **are** prepared to give full weight to the fact that the journalists in question are authors of literary works and **are** entitled to the consideration and respect which authorship carries with it. They are persuaded that the provision should be repealed by the fact that the general rule in this country, which the Committee's **terms** of reference oblige the whole Committee to, accept **as** correct, is that employed authors do not, unless there is a contrary **agreement**, own any part of the copyright in their work.

10.27 Without in any way casting any onus on the journalists, the question these members of the majority have asked themselves is whether the material before the Committee leads to the conclusion that, looking at the matter as part of a very broad spectrum, employed journalists, because of the nature of their work, are in a different or special position which should lead them to be treated differently from all other employed authors. The position must be looked at now in a modern setting, not as it was in the last century or the early part of **this** one. All members of the majority are satisfied that, if this is done, the only sensible conclusion to be drawn is that s. 35(4) of the Act should be repealed.

10.28 Whilst the majority's principal reason for its conclusion is stated in the last paragraph, its conclusion is based not **only** upon that one matter but also upon an accumulation of matters which have been referred to in this Chapter. In summary these **are**—

- (a) Journalists ought not be treated differently from other employed authors. The

general rule provided for ins. 35(6) is that copyright in a work created by an employee is owned by the employer (s.35(6)). That should apply to journalists also.

- (b) Some members of the majority have the additional view that the problem is an industrial one, not a copyright one, and that that itself supports the repeal of the provisions.
- (c) Because of the language used in the subsection and recent and likely future developments in technology **there** is likely to be encountered difficulty in its application to numbers of situations. These will largely stem from the use of the expression "publication in a newspaper" in **para.** (a) of the subsection or, if the subsection be amended as contemplated in this Report, "publication or reproduction in a newspaper."
- (d) Entitlement to the benefit of copyright for secondary uses of journalists' work will give rise to numerous practical problems because **of** the difficulty of identifying the person or persons entitled to the benefit of the rights which are conferred by the section. For reasons which have been developed, the by-line provides an unsatisfactory guide in many cases to the identity of the author of a particular work. To treat the name in the by-line as determinative of the question will in many cases be productive of capriciousness and lead to unfairness to numerous employees who have contributed to the ultimate form of the material which is published. That will not be the case if the problem is treated as an industrial one.
- (e) The employers provide **all** facilities required by employed journalists to do their work. These include proper workplaces and proper equipment, including the use of expensive technical and electronic equipment, required for the carrying out of their work.
- (f) The present state of technology has enabled uses and will enable uses in the future, of newspapers and magazines not foreseen when s. 35(4) and its predecessors were enacted. Clearly new means of publishing newspapers **are** at hand. The operation is an integrated one. It is now, and will in the future, be increasingly difficult logically to distinguish between primary and secondary uses of journalists' work. The position will be far better catered for by appropriate agreements from time to time determined with all possible uses of material taken into account. In that way it will also be possible to

value, or fix appropriate rates of salary for, the work which has been done by the variety of people whose collaborative effort goes into the publication of a newspaper or magazine.

- (g) The employers take **all** risks associated with the work of their employed journalists. Whether the newspaper or magazine is successful or **not**, whether the journalist's work is well thought of by readers, whether it is used or not and so on are **all** risks borne by the employer. Additionally, employees are not exposed to financial **risks** in relation to defamation actions which maybe brought against them. Subject to their contracts, freelance journalists are in a very different position.
- (h) There are suggestions in the MEAA's submission that the retention **of** the status quo, that is, the retention of the split in the ownership of copyright for which s. 35(4) provides, is in the public interest because it tends to place some limitation on the concentration of media ownership and **media** power which currently exists in Australia. The majority expresses no view on the question whether there is an undue concentration of media ownership in Australia. In its opinion neither the **repeal** or the retention of s. 35(4) will have any bearing on that matter. If there is an undue concentration of ownership and if the consequence of that state of affairs is contrary to the public interest, the position will be the same irrespective of the outcome of this Reference. That is because, whatever happens, the publishers will **continue** to have copyright in the work of employed journalists for the principal purpose for which their work is created, namely the publication of the material in newspapers or magazines. If there is a harmful effect because of an undue concentration of ownership or control, that harmful effect will flow from the publication and distribution of newspapers, not from any subsequent publication of material in some other form, the storage of it in a database or the distribution of it by press clipping services.
- (i) Whether or not s. 35(6) of the Act, which vests copyright in works created by employees in their employers, is in breach of Australia's obligations under the Berne Convention, is not a matter that relevantly arises for consideration under the Committee's terms of reference. Furthermore, it has never been suggested by those responsible for the administration of the Convention that Australia is in breach of its international obligations in this respect.

In conclusion the majority wishes to emphasise one point. Whatever the fate of

s. 35(4) may eventually be, the parties directly concerned with the outcome of this Reference, the publishers and the journalists, will have to settle this dispute at the bargaining table. If s. 35(4) remains the provisions of s. 35(3) which contemplate the making of agreements containing terms different from those provided for in **ss.35(4),(5)** and (6) will have to be invoked. If s. 35(4) is repealed, the matter will plainly be an industrial or conditions of employment one. Again the parties' differences will have to be resolved by **agreement**. The majority would hope that there will soon be sensible and constructive discussion between the parties which will be productive of an accord between them. Otherwise, as technology takes hold, there will be increasing uncertainty. This will lead to increasing disputation the result of which will be likely disruption of businesses and employment and ultimately a most adverse effect on the public interest because of **interruptions** to the supply of information which is so essential to a modern community.