

Chapter 11

Minority View: Section 35(4) should be Modified

11.01 The minority recommends that the rights of journalist-authors and newspaper and magazine publishers in s. 35(4) be clarified, and modified to take account of present and future changes in technology, so that the business operations of newspaper publishers can expand from those currently contemplated by the section and so that the underlying policy objectives of copyright law implemented in s. 35(4) can be maintained. In particular, the minority has made its recommendations in order to balance the rights and interests of both authors and publishers in what it regards as the process of collaboration between the two groups in the production of newspapers and magazines.

Electronic publication of the news¹

Evidence of the publishers

11.02 The Committee received evidence, principally from the Combined Newspaper and Magazine Copyright Committee of Australia (CNMCCA), concerning likely change in the methods of publication of information and news in the future and the effect on newspaper publishers of this change. In summary, the CNMCCA's projection for the future, based on trends at present, is that, increasingly, the consumer will be able to access news and information through a combination of electronic methods, rather than relying on the delivery of the printed newspaper or magazine to the front door. The CNMCCA referred to the installation of new technologies in the home, such as personal computers linked to outside modems and television sets, units that have the facility to play video CDs on television, satellite receiving dishes and decoding equipment and high speed printers. In addition, the CNMCCA asserted that because of the convenience of this form of delivery of the news, home and business consumers will be prepared to pay for and utilise this method of delivery in preference to and to the detriment of print-based publications. The CNMCCA also asserted that over time there has been an increasing blurring of the roles and distinctions between the various media, with the consequence that print media publishers are already having to compete with the electronic media in providing news services and in securing the advertising dollar. The primary concern of the publishers is that unless they move to some form of electronic distribution of their product, their continued existence and viability is threatened.

¹ The minority recognises that the reliance on electronic technology, including digital technology, may not be the only method by which newspaper publishers may publish news and information—future advances may make publication possible by some other means. For the purposes of this report, however, the minority limits the scope of its comments to publication by any form of electronic technology.

11.03 The claims of the CNMCCA regarding newspaper circulation and consumer trends appear to the minority to be supported by the facts. Figures supplied to the Committee show that newspaper circulations have slowly declined in the period 1950 to 1990 by almost half and, concurrently, that television viewing of news and current affairs programs has **increased.**² The CNMCCA's paper, "Implications for the print media of new technology", stated that from 1980 to 1991 there was a 178 percent increase in the volume of news, current affairs and information programs broadcast on television. Additionally, there was an increase of 20.8 percent in the size of the average nightly audience viewing such programs over the same periods This suggests that today's consumers prefer to receive news and information through electronic means, which has the advantage of providing immediate and up-to-the-minute news coverage of local, national and international events. That there would be a decline in the circulation of newspapers as a result of new forms of communication media was predicted in 1981 by newspaper industry experts in their submissions to a Canadian Royal Commission on **Newspapers.**⁴ In 1981, it was estimated that print circulations would be maintained for up to 10 years, without serious competition from the electronic media. However, it was also stated that the effect on newspapers would become critical in the **1990s.**⁵ The minority notes that no separate evidence was presented to the Committee regarding the circulation rates of magazines. However, the minority understands that in particular sectors of the magazine industry there is a growing, rather than a declining, circulation, and that in some areas the range of magazines available has **increased.**⁶

11.04 In addition to the decline in newspaper circulation, the CNMCCA also presented evidence to the Committee regarding the current impact of the electronic media on the traditional business areas of newspaper publishers. The CNMCCA pointed to the fact that in the early days of television, its primary role was to entertain, which was in direct contrast to the perceived role of newspapers to provide news, commentary and information, but that today that distinction is not so clear cut. Television programming today places greater emphasis on news and information while newspapers as a matter of course include segments on lifestyle and general entertaining **content.**⁷ The overlap in roles was also recognised and

² Submission of the Combined Newspaper and Magazine Copyright Committee of Australia (CNMCCA), The Committee's Submission, p. 7. See table headed "Metropolitan newspaper circulation-penetration per 1000 of population".

³ Submission of the CNMCCA, Report 4, Part 1, pp. 10-11.

⁴ Royal Commission on Newspapers, (The Kent Commission), *Report of the Royal Commission on Newspapers, 1981*, Ottawa, Canada, p. 194.

⁵ Royal Commission on Newspapers, (The Kent Commission), *Report of the Royal Commission on Newspapers, 1981*, Ottawa, Canada, p. 195.

⁶ Reference to research being **carried** out by the *Age* on why the circulation of women's magazines was **rising**; See Steve Dow, "Paper is yesterday's news for the media, says editor", *the Australian*, 13 October 1993, p. 4; Submission of the CNMCCA, Report 4, Part 1, p. 11.

⁷ Submission of the CNMCCA Report 4, p. 9.

commented upon (independently of the CNMCCA) by the editor of the *Age*, Mr Alan Kohler in an address to the Melbourne Press Club. He said,

We all know that over the past 20 years television, radio and then computers have either taken or made inroads into every part of the market traditionally held by newspapers. News is now primarily delivered via television and radio, radio has talk back, which in some ways is better and more popular than letters columns, documentaries on television are doing what feature articles do, and now infotainment programs do what our sections were launched to **do**.⁸

11.05 In order to respond to the combined effect of declining circulation of newspapers and the expansion of television programming, the newspaper industry has made it clear to the Committee that the electronic publication of the news is an essential element of the newspaper publishing industry for the future. However, the descriptions of the electronic “newspaper” available to the Committee seem to the minority quite general. The principal elements of such a publication, as envisaged at this stage, appear to be that the news publication⁹ will be able to be viewed by a user on the screen of a television or a personal computer’s visual display unit, and will be modelled on the layout of newspapers as they exist today. That is, the user will see a facsimile of the normal hard-copy of a newspaper that is very similar in layout to today’s newspaper. The electronic news publication will also be able to be manipulated and searched by the user in a variety of ways that is not possible with existing hard-copy versions. A description of the features of the electronic news publication was given by Mr Keith Smith, Manager of Wellington (NZ) Newspapers at a conference in 1992. He said,

The “paper” will have a front page, as now, containing headlines, news and a lead story for each section. Control of the unit will be either by touch screen, mouse, scroll buttons, or even voice. Click to the headline and a person gets a radio broadcast-ideal if they are eating breakfast, click on the main story if they have more time and there will be a full page of text, pictures and ads. More detailed information will be available in different windows.¹⁰

11.06 Even the method of delivery of the electronic news publication is uncertain at this stage, as is illustrated by the comments of Mr Kerry Packer who said,

I am sure that newspapers per se will exist. They may not be delivered in the same way as they are delivered today. There may well be a printer in your home. It may come over the television channel, the radio, off a cable, or whatever the hell it is. That paper may be in effect printed at home; it may be part of a television service. I do not know

⁸ A. Kohler, “Anniversaries and Reflections”, *Media Australia*, 29 October 1993, p. 5.

⁹ From here on the minority refers to the electronic “newspaper” as a news publication in order to distinguish it from the *newspaper proper*.

¹⁰ Submission of the CNMCCA, The Committee’s Submission, p. 8.

what it is going to be. I am sure it will not be as it is today, but I am sure that the printed word delivered in the form of a newspaper will not disappear either.¹¹

11.07 Mr Alan Kohler also spoke about electronic delivery of news. First, he commented that the types of news and information that can realistically be expected to be delivered electronically during our lifetimes (or the next 30 to 40 years) would be limited to classified advertising, television programs, entertainment listings generally, basic news, law lists, weather information, sports results and stock exchange listings, that is, up to two-thirds of the information currently available in newspapers. He also stressed that the method of delivery of the news was a side issue, since newspapers were not in the *newspaper* business, but in the business of producing journalism. His actual words were,

But we are not in the newspaper business at all. We produce journalism, which is an eclectic combination of information, writing and independent scrutiny of institutions. Newspapers just happen to be the way we get it to our customers at the moment. . . What's important is what we write... How their [ie, journalists'] work is transmitted to those who love it and value it is as relevant as how they got to work this morning.¹²

11.08 The minority notes that common to both Mr Packer and Mr Kohler's remarks is the realisation, and perhaps hope, that the electronic publication of newspapers will not herald the complete demise of news delivered by paper. Bearing this in mind, it seems to the minority that what the newspaper publishers are seeking to do is simply expand their business activities to secure any advantage offered by electronic publication, while at the same time not dismantling the newspaper production methods as they currently exist. The minority is of the view that while this may, require some redefinition of their identity, newspaper publishers will predominantly remain in the business of journalism, though their principal method of communication may change. Whether or not electronic publication is successful will depend upon a number of factors, including the size of the actual market for such services, the cost of implementing the technology necessary for such distribution, the comparative cost of print based and electronic based publication and consumer tastes.

Conclusions

11.09 Based on the preceding summary of the nature of electronic delivery of news, the minority has formed the opinion that this would constitute an activity falling within the realm of the business activities of publishers of newspapers and magazines and that accordingly electronic publication of articles produced by employee-journalists should be recognised by *the Copyright Act 1968* (the Act) as one of the rights owned by the proprietor. Central to this view are the minority's conclusions that (a) it is an act of "publication" of a newspaper, magazine or periodical to deliver it by electronic means to the public, and (b) the proprietors

¹¹ Submission of the CNMCCA, The Committee's Submission, p. 8.

¹² A. Kohler, "Anniversaries and Reflections", *Media Australia*, 29 October 1993, p. 6.

of newspapers and magazines will still be engaged in publishing “newspapers” and “magazines”.

11.10 As already discussed in Chapter 4 of this report at paragraph 4.30 onwards, publication is deemed by s. 29(1)(a) of the Act to have **occurred** when reproductions of a literary, dramatic or artistic work are supplied to the public, but that the act of “publishing” and its related expressions, such as the right granted in s. 31 to “publish” the work are not defined by the Act and the courts have had to **interpret** the meaning of “publish”. As far as the minority is concerned, the making public of that which has previously not been made public, even though the means of doing so is electronic transmission, should come to be regarded as just as much an act, of publication. **as** meeting public demand by hard copies. The minority considers that the technical method by which a work is supplied to the public ought not to be a material consideration in determining whether publication has **occurred**. However, the minority is conscious of the limitations currently imposed by the Act in the interpretation of “publication”, for instance, that it is not a “publication” of a work to perform it and that for publication to occur “reproductions “ must be supplied. ¹³ The minority also notes that in certain circumstances, electronic transmission of news publications may constitute transmission to subscribers to a diffusion service, which is another exclusive right comprised in the copyright in works. The consequence of this would be that the diffusion right in employee-journalists’ articles would need to be vested in the publisher for the purpose of “electronic publication”, if **publishers** were to be able to take full advantage of this new form of distribution of their product. The minority **reaffirms** its view, stated in Chapter 4, that the right of publication conferred on the publisher in **s.35(4)** should not be limited to **first publication**.

11.11 The second conclusion of the minority is that what is proposed to be published (or diffused) by the proprietors of newspapers and magazines can continue to be characterised as a newspaper or magazine. The legal definitions of newspaper and magazine have also been discussed in Chapter 4, and it is clear that their meanings are to be based on popular usage. It seems reasonable to expect that future **interpretation** of “newspaper” and “magazine” will extend to electronic publication if it becomes a widely used form of delivery. As far as the minority is concerned, the distinguishing feature of a newspaper or news publication will continue to be that such a publication is primarily a vehicle in which information, reports and commentary on a variety of events is provided.

Rights that should remain with employee-journalists

11.12 If, as recommended by the minority, publishers will own the copyright in their employees’ articles not only for hardcopy publication in a newspaper or magazine and for

¹³ *Copyright Act 1988*, s. 27 and s. 29.

broadcasting but also for electronic transmission of the publisher's publication, including diffusion, then what would be left to the employee as residual copyright owner, and would its denial to the publisher be unreasonable?

11.13 In *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 307, Beaumont J quoted from the *Copyright Bulletin* vol. XXIII, No 3 at p. 13 as follows

The employed journalist retains copyright for all purposes other than those specifically granted to the proprietor. Owning "the rest" enables the journalist to control and licence such things as publication in book form, photocopying and clipping services, inclusion of the work in certain database systems, filming and probably merchandising of cartoon characters, for example on badges and tee-shirts.

While declining to express an opinion on the views advanced in relation to the other activities said to be within the rights of the author, Beaumont J agreed that photocopying and clipping services were. He went on to say that "In my view, the distribution of photocopies of selected newspaper articles does not constitute the publication of a newspaper, magazine or similar periodical for the purposes of s. 35(4)".

11.14 The minority would be surprised if the publishers could or would assert that the future livelihood of their businesses depended to any substantial degree on controlling some of the activities included in the indicative list just quoted, eg, filming and merchandising. However the Committee was made well aware that photocopying of articles and their inclusion in clipping services and on databases are matters of controversy between the publishers and the journalists.

Photocopying

11.15 The minority has difficulty in accepting that controlling photocopying of articles in their publications is important to the businesses of the proprietors to the extent that they need to control it. It seems significant that the publishers were not party to the proceedings in the *De Garis* case. If there is substantial copying of any edition of a newspaper, the publishers may be able to have recourse to their rights as owners of the copyright in the edition or in the compilation of articles and other material comprising the edition as a collective work. Those comments apply to clipping services, which in essence are systematic photocopying of parts of newspapers.

Creation of databases¹⁴ “

11.16 Coming to databases, it has already been noted that the development of databases **are**, or should in the minority's view be, the right of the publisher insofar as copies comprising paper databases are made for the purpose of publication and archives, and an electronic database is created in the course of the writing by journalists of their articles. It is the new commercial possibilities opened up by the networking and search facilities of electronic databases that are at the heart of the dispute.

11.17 The minority has concluded that a distinction can be drawn between uses of the electronic database developed in the normal course of preparation of a newspaper that should be the right of the publisher, and those that go beyond what a publisher can claim is important to the business of publication of the newspaper or magazine. Just as a publisher may now grant access to hardcopy archives to researchers, so the publisher should be able to grant access to the electronic database of editions of the newspaper. Subject to the final report of the Committee on its inquiry into the protection of computer software, it may be that the granting of such access to view material on screen does not involve any copying. If so, and if there is no authorizing of making of hardcopies, there is no exercise of any copyright rights. **If** a user of access to the database wishes to make a hardcopy, that user should be in the same position as the maker of a photocopy.

11.18 Where, however, the publisher wishes to establish a database of news articles other than in the course of publishing a newspaper or magazine - either in hard copy or electronically - or wishes to provide a copy of the articles to another person for that purpose, then the minority is of the **view** that that should remain subject to the rights of the authors of the articles. If such separate database is akin to an electronic clipping service, then the minority thinks that the view of Beaumont J in the *De Garis* case that a hardcopy clipping service was not a newspaper should apply. What is being undertaken is a different business to that of providing a newspaper. The authors of articles could reasonably claim that as they were written for publication in a newspaper - as required by 5.35(4) - the new database was a separate use from publication - even electronically - as a newspaper.

Evidence of the publishers

11.19 In summary, the **CNMCCA** has presented a case to this Committee for a change to the law, as it currently exists, to facilitate the expansion **of** their business activities in the future, by allowing the use of the contents of their newspapers in various types of databases. It is the intention of the **CNMCCA** that such databases would be available on-line to paying

¹⁴ With respect to the general copyright issues raised by databases, the minority refers readers to the Committee's earlier report: Copyright Law Review Committee, *Draft Report on Computer Software Protection*, Canberra, AGPS, June 1993, Chapter 14- Works Stored in Computer Memory: Databases. (Hereinafter "*Draft Report on Computer Software Protection*").

subscribers and that fees paid by subscribers would supplement the declining revenue of the publishers from their traditional business of publishing newspapers. The **CNMCCA** have explained that because of the fact that newspapers are now generated digitally, the material can be "... easily accessed for immediate or future use or for transmission in a variety of forms".¹⁵ Central to the case presented by the **CNMCCA** is that the activity of creating news databases should now be regarded **as** part of their core business activities, that is, that the creation of databases should be viewed as an extension of the business of print media operators

11.20 The **CNMCCA** provided an explanation to the Committee **of** the types of databases currently in use in Australia and overseas that draw on newspaper publications for their content. In Australia, at **present**, they include:

- (i) **Ausinet** which includes full text of all articles in the *Australian Financial Review* written by staff of the paper but not advertisements, trivial articles or articles from other sources such as **AAP**;
- (ii) **PressCorn** which is a full text database of the editorial content of a range of newspapers but is only available on-line once files have been "massaged" or edited by library **staff**;
- (iii) **QNIS** which stores Queensland newspapers and provides access to a variety of users, including the blind (a similar service is available in Western Australia which includes three newspapers on database); and
- (iv) The **Compuserve** system from the United States which allows access to American newspapers in combination with weather and sports information. **16**

11.21 In the United States, where more than 50 percent of the world's databases are produced, they include:

- (i) Mead Data's topic-oriented databases which compile **files** on selected topics after scans are made of hundreds of newspapers and magazine sources;
- (ii) Mead Data's **Merger file** which incorporates content **from** a variety of sources such as acquisition reports, news, and financial statements;
- (iii) Dow Jones' **Clip** product and DataTimes' **Passport** service which both filter sources based on end-user information needs;
- (iv) Dialog's gateway to **Westlaw** which allows users to retrieve full-text newspaper and magazine **articles**.¹⁷

¹⁵ Submission of the **CNMCCA**, The Committee's Submission, p. 9.

¹⁶ For a discussion of Australian databases see Submission of the **CNMCCA**, Report 4, Part 2, pp. 4044.

¹⁷ For a discussion of United States databases see Submission of the **CNMCCA**, Report 4, Part 2, p. 36.

11.22 The **CNMCCA** also supplied some figures regarding revenue generated from databases. In 1991 an estimated US\$10.2 billion was generated worldwide from the sale of databases. This amount represented an estimated 18.5 percent increase from 1990 when revenue generated was **US\$8.6** billion. Of this, 78 percent was generated from the on-line delivery of material **sourced from** newspapers and **magazines**.¹⁸

11.23 The **CNMCCA** also made the following comments as part of their argument that the Act should be amended.

As Publishers move into new areas of the dissemination of information services, the Australian Copyright Act needs to reflect the fact that these are just as much a part of the Publishers' business as the traditional publication of newspapers, magazines and other periodicals in hardcopy **form**.¹⁹

The print media is being forced to redefine its core business. Having traditionally seen itself as a producer of printed media products, it is now coming to view itself as a producer of information and **entertainment**.²⁰

Comment

11.24 In respect of the evidence of the publishers on the worldwide revenue generated **from** databases, the minority notes that the **CNMCCA** did not provide the Committee with any indication of the likely income to be generated from similar services in Australia, or a breakdown indicating where the greatest percentage of that revenue is currently being derived, though the minority anticipates that it would be **from** the United States. In **fact**, the picture presented **was** that, up to now, investment in the creation and use of databases in Australia has been limited and where it has **occurred** the returns have been low. For example, in relation to the use of databases by John Fairfax, it was stated that, "**Current** revenues are quite low, whereas the cost of preparing the material is relatively **high**"²¹, and in respect of the overall Australian experience to date of databases the **CNMCCA** said that, "In contrast to their colleagues in the United States, Australian publishers have been reticent to take advantage of modem technology to provide additional information distribution services to the Australian **public**":²² It seems to the minority that given that Australian investment in databases has been far less than in the United States, this example is not very useful in indicating future trends in Australia, especially when the comparative size of the marketplaces of both countries is taken into account and the reticence on the part of publishers to engage in the creation and use of databases was not explained by the **CNMCCA**.

¹⁸ Submission of the **CNMCCA**, The Committee's Submission, pp. 9-10.

¹⁹ Submission of the **CNMCCA**, Report 1, p. 59.

²⁰ Submission of the **CNMCCA**, Executive Summary, p. 8.

²¹ Submission of the **CNMCCA**, Report 4, Part 2, p. 41.

²² Submission of the **CNMCCA**, Report 4, Part 2, p. 40.

11.25 If it is correct that the publishers intend to **reap** lost income from sales of newspapers through databases, then the minority expects that the success of those databases would have to be far greater in Australia than the present trends indicate. While the minority acknowledges that the present trends in Australia are not **necessarily** an accurate predictor for the future, the minority remains **sceptical**, based on the **CNMCCA's** own comments, regarding the real **future** growth of databases in Australia. In the minority's view, the reliance by the publishers on what may possibly be exaggerated claims to support their argument that publishers need to have copyright ownership to create databases, makes their argument weaker. In particular, the minority also notes that none of the submissions from regional or country **newspaper** publishers raised the issue of databases as a reason why newspaper proprietors should have total ownership of copyright in their employee-journalists' works.

Other modifications proposed to section 35(4)

The broadcast right²³

11.26 As part of their submissions, both the MEAA and the Australian Copyright Council (ACC) submitted that s. 35(4)(b), which provides that the proprietor is **the owner** of the right to broadcast works, should be removed. The ACC doubted whether there had ever been a valid justification for the granting of this right to the proprietor and submitted that it was now, at least, no longer consistent with the principle that an employer should only have rights necessary to use the work for the purposes for which it was **created**.²⁴ The MEAA added that the pattern of media ownership where proprietors owned television and broadcasting stations as well as newspapers no longer exists.

11.27 The **CNMCCA** only commented briefly on the broadcasting right in s. 35(4) implying that the Australian provision was enacted as a consequence of the New Zealand *Copyright Act 1962* which had inserted the broadcasting right, "after it was discovered by newspaper proprietors that, if a work produced by an employee was later broadcast, the copyright in the broadcast would be owned by the **employee**".²⁵ The minority has not examined the validity of this assertion and, moreover, has not formed a view on whether any change should be made in respect of the broadcast right in s. 35(4). Accordingly, it makes no recommendations in respect of it.

Expansion of section 35(4) to include journalists in the broadcast media

11.28 At the same time as submitting that the broadcast right should be removed from s. 35(4), the MEAA and the CAL have advocated that broadcast journalists should be covered

²³ Brief discussion of the broadcast right in s. 35(4) is also made at **paras.** 5.16 and 7.19 of this **report**.

²⁴ Submission of the Australian Copyright Council, p. 3, **para.** 4 (a).

²⁵ Submission of the **CNMCCA**, Report 1, p. 39.

bys. **35(4)**, and thats. 35(4) should be amended to include them **in its ambit**.²⁶ The minority notes that this proposal involves a consideration of the scope ofs. 35(6) which presently applies to broadcast journalists and which the Committee has decided falls outside its terms of **reference**.²⁷ Accordingly, the minority has formed no view on this submission and makes no recommendations in relation to it.

Other comments of the minority

11.29 One of the principal reasons for not recommending wholesale repeal of s.35(4) is that the minority has not been convinced by the arguments presented by the publishers that this come of action is necessary or desirable. For a change to be made in the law as sought by the publishers, there should be overwhelming evidence and reasons that such a change is necessary and desirable. The reasons stressed by the **CNMCCA** as **warranting** the repeal of s. 35(4) have focused on the alleged **unworkability** and arbitrary nature of the section as it **currently** stands, the fact that the business activities of the publishers are changing, as is the whole media industry, and that proprietors of newspapers and magazines are not treated like other employers whose employees create copyright materials in the course of their employment.

11.30 While not commenting at length on these reasons, the minority notes that the **first** major reason advanced by the publishers for the repeal ofs. 35(4) is not borne out by the history of the provision, which has been in existence for a long time without having been the subject of much, if any, litigation. It would seem that up until the decision in *De Garis*, disagreement over the split in copyright created by s. 35(4) had either not arisen or had been negotiated satisfactorily **between** the parties. As to the suggestion that **s.35(4)** inhibits the possibility of transferring negotiations between publisher and employee-journalist to the industrial arena where they more appropriately **belong**, **(The** minority wholeheartedly supports the resolution of conflict between the parties by negotiation, but notes **that**, whatever else it achieved, the repeal of **s.35(4)** would weaken the bargaining position of the one of the parties, ie, the employee-journalists. More generally, it appears to the minority that the twin objectives of copyright law of encouraging investment in intellectual endeavors and rewarding authors' **of** such material have been met by s. 35(4)-that newspapers and magazines continue to remain profitable business operations and that journalists continue to be employed demonstrates this.

11.31 In particular, the minority have not been persuaded that the difficulty in identifying authors and owners of copyright where a by-line is either not accurate or not used makes the section unworkable. The technology which the Committee viewed at the *Sydney Morning*

²⁶ **The** Australian Society of Authors supported the submission of CAL on this point as well.

²⁷ See the Committee's comments regarding its **terms** of reference at para. 1.03 of this report.

Herald demonstrated that it is possible to track contributions and alterations by a number of authors which thereby makes the task of determining the author of a work far easier. While such a tracking program may show that there have been a number of authors working on a piece, it should also facilitate the accurate identification of the author who is the most responsible for the piece. In the minority's view, the argument made by the publishers that copyright would be easier to administer if it was owned in entirety by one party may be a practical consideration, but forms no just basis for the allocation of property rights.

11.32 With respect to the second major reason advanced by the publishers, namely, that the Act should be amended to reflect their changing business practices, the minority is not satisfied that this is a strong **reason** on which to base legislative change. The minority notes that even the **CNMCCA** expressed the opinion that, "A recommendation to abolish a provision which **grants a property** right should only be made after due consideration is given to the position of the persons who have the benefit of that property **right**"²⁸. This statement indicates that the publishers recognise that the legislative change sought by the **publishers** is significant. Yet, in their submission the **CNMCCA** tended to focus on the benefit that would flow to publishers as a result of a change to the section and played down the consequences for journalists who would lose copyright in their work.

11.33 The detrimental effect that the minority sees flowing from the removal of s. 35(4) is that it would no longer be clearly recognised by the Act that journalists are authors of copyright works. Rather, journalists would be treated under the Act principally as employees. Further, there would be no recognition of the fact that they are joint collaborators with publishers in the business of publishing news and information by being given some rights in the copyright in their work. In this latter respect, it is interesting to compare the example set by the book publishing industry which appears to operate on the assumption that authors and publishers both have a role to play in the production of literary works. Copyright in works of the author will generally be licensed by agreement to the publisher, even though both parties are not in an employment relationship.

11.34 The third argument advanced by the publishers—that as a consequence of the operation of s. 35(4) they are treated differently from other **employers**—is at **first** sight a more convincing argument for its abolition. However, this provision has a long history, and logic has not always governed the allocation of copyright rights. It is a case of accepting that s. 35(4) is part of the status quo and that inevitably a certain burden lies on those who seek its removal to justify that action on policy grounds rather than relying on theoretical consistency. Putting it another way, the reality that the rights flowing from the provision are long established, rather than a temporary aberration, and that there are other special cases in the

²⁸ Submission of **the CNMCCA**, The Committee's Submission, p. 33.

Act **offset**, in the minority's view, the initial attraction of the argument that repeal of 5.35(4) is desirable in the interests of consistency.

Public policy grounds said to militate against change to section 35(4)

11.35 The minority also wishes to acknowledge the submission made by the Communications Law **Centre** (the **CLC**) which outlines public policy grounds that **are** said to militate against the removal or modification of s. 35(4).²⁹ However, though the minority refers to this submission, it has not based any of its recommendations or conclusions on the public policy grounds put forward in this submission. Essentially, the public policy grounds raised by the CLC were, **first**, that it is in the public interest that the contents of newspapers (and magazines) should be as widely available as possible, and second, that the reliability of the information they contain ought to be safeguarded.

11.36 Citing the finding of the **Lee** inquiry into the Australian print media industry that the concentration of media ownership in Australia is high, the CLC submitted that the risks posed by the concentration of media ownership should not be reinforced by a change to s. 35(4) that would vest copyright entirely in the proprietors of newspapers and **magazines**.³⁰ In summary, the risks identified by the CLC were that, given the present concentration of media ownership, there is a chance that if proprietors also totally owned copyright, the dissemination of works may be limited either by the exercise of market power overpricing by the publishers or by the exercise of editorial power over content. Essentially, the CLC presented the view that control over copyright by newspaper and magazine proprietors could be used to control dissemination of information and news in such a way that it would be contrary to the public **interest**.

11.37 The CLC also cited the **public** interest in ensuring that once information is published and used in databases, it remain widely available and unchanged. With respect to databases, the CLC raised the possibility that because the information contained in databases may be **extremely** valuable, publishers may, act to increase their **returns** by limiting distribution and so enhancing the scarcity value of the **product**.³¹ On the other hand, the CLC submitted that if journalists retained residual rights, there would be a strong financial incentive for publishers to commission all forms of distribution of the product to cover the cost of acquiring those rights. The CLC also drew attention to the possibility that proprietors may deliberately act to remove material from databases that they regarded as "discomforting". The CLC submitted that this would also be contrary to the public interest **in** ensuring that material once published

²⁹ The submission made by the Australian Council of Trade Unions also referred to the implications for media ownership if s. 35(4) was removed.

³⁰ *Report from the House of Representatives Select Committee on the Print Media - News and Fair Facts: The Australian Print Media Industry, 1992.*

³¹ Submission of the Communications Law **Centre** (the **CLC**), p. 11.

remained reliable. The CLC stated that if journalists **were** able to control the use of their work in databases and if it was not being reproduced and made available properly, then they could assert the right to have the reliability of the data records restored.

11.38 In summarizing their argument the **CLC** said:

Public policy makers, especially those involved in intellectual property rights, increasingly must address the public interest dimension. Is it healthy for so much of the raw material on which so much activity depends to be concentrated in so few hands? . . . As technologies converge, what safeguards can the public expect to ensure the continued availability and reliability of the data ?³²

11.39 While these **members** have not **formed** any views on these public policy matters, they expect that the issues raised by the CLC may be of interest to readers of this **report**.

Recapitulation of amendments proposed to the Act

11.40 **The** amendments to s.35(4) recommended by the minority are to achieve the following:

- The right of the publisher to publish an employee's article in a newspaper or magazine should:
 - clearly extend to republication in a newspaper or magazine, ie, it should not be confined to first publication;
 - extend to publication by way of delivery of the newspaper or magazine in electronic form-to the extent that that does not constitute transmission to subscribers to a diffusion service.
- The publisher should have the right to transmit the article to subscribers to a diffusion service when done as part of so transmitting the newspaper or magazine.
- The right of the publisher to reproduce the work for the purpose of publishing or broadcasting it **should** clearly extend to the making of a copy for archival purposes.

The minority intends that, through the proposed confirmation of the right to establish an archival database (paper or electronic), the publisher will be able to provide a public access service for research. However, the requirement that this right be contained **within** the existing reproduction right in aid of publication or broadcasting is intended to deny the publisher the

³² Submission of the **CLC**, p. 16.

right, without the author's permission, to make copies or authorise copying **from** the database to setup another database or for any other **purpose**.

11.41 As regards extending publication to delivery in electronic form, the minority notes that the United Kingdom *Copyright, Designs and Patents Act 1988* (CDP Act), defines "publication" ins. 175(1) as follows:

(1) In this Part "publication" in relation to a work -

(a) means the issue of copies to the public, and

(b) includes, in the case of a literary, dramatic, musical or artistic work, making it available to the public by means of an electronic retrieval system;

and related expressions shall be construed accordingly.

The reference in s. 175(1)(b) to the making of works available by an electronic retrieval system clearly indicates that publication electronically, that is, making a work accessible to members of a computer network is now contemplated by the CDP Act. No definition is given of what is meant by an electronic retrieval system, but "electronic" is defined as, "actuated by electric, magnetic, **electro-magnetic, electro-chemical or electro-mechanical energy**".³³

Simplification of wording of the section

11.42 The minority notes that, while the general effect of 5.35(4) appears to be understood by lawyers and the general public, it is a particularly wordy section. The Whitford Committee in 1977 expressed **the view that** a section such as s. 35(4) should not contain any **reference** to "contract of **service**".³⁴ The Whitford Committee remarked that such a phrase is generally only intelligible to lawyers and does not aid in interpretation of the section, since to correctly interpret the phrase requires a determination on the facts of the case as to whether or not a person is employed in a certain manner and on certain conditions. Accordingly, the minority recognises and recommends that the wording of 5.35(4) be reviewed for possible simplification.

11.43 The minority notes that s. 172(2) the CDP Act expressly provides that where **there** has been a change of expression in a provision in the CDP Act from the previous *Copyright Act 1956* (UK), such change is not to be construed as a departure from the previous law **merely** because of the change of expression. The object of s. 172(2) of the CDP Bill, prior to its enactment, was explained as follows:

³³ *Copyright, Designs and Patents Act 1988 (UK)*, s. 178.

³⁴ *Report of the Committee to consider the Law on Copyright and Designs*, 1977, (Under the Chairmanship of the Hon. Mr Justice Whitford), Cmnd 6732, para. 568.

One of the **functions** of the Bill is to restate large parts of the existing law unchanged but in a much plainer and more easily understood form. The danger of such a restatement of the law in different language is that the courts will assume that the use of different language necessarily means that the law has changed . . . The changes in wording are not to be construed as leading to a change of meaning. . . In other words, the court is not to search for a change of meaning just because of a change of words where a change of meaning is not, in **fact, apparent**.³⁵

Such a section appears to the minority to sufficiently overcome problems associated with any change in wording in sections, and if a similar provision was incorporated in the Act at the same time as any changes were made to simplify the wording of s. 35(4), there should be less difficulty in implementing the change.

³⁵ **Halsbury's** Statutes of England and Wales, 4th **Edn**, Vol. 11.1991, Notes p. 470. Citing 491 H of L Official Report cols 567,569,14 December 1987.