

APPENDIX C (Paragraph 5 of Report)

Report of 2 July 1984 by the Committee
on Reference concerning the meaning
of "publication" in the
Copyright Act 1968

COPYRIGHT LAW REVIEW COMMITTEE

TO: Senator the Hon. Gareth Evans, Q.C.,
Attorney-General of Australia

Report by Committee on reference concerning
the meaning of "publication" in the Copyright Act 1968

You have referred to the Committee the question of whether any changes should be made to the meaning of "publication" in paragraph 29(1) (a) of the Copyright Act 1968, especially in connection with sections 31 and 38 of the Act.

The Issues

2. A sub-committee was appointed to assist the Committee in its deliberations. The sub-committee prepared a short discussion paper that identified the following two issues.

3. First, given that the Act presently provides in section 31 that the copyright in literary, dramatic, musical and artistic works includes the exclusive right "to publish the work", should that right be unlimited or be limited to first publication? Secondly, would an Australian court interpreting section 31 hold, as the House of Lords held recently in relation to the equivalent U.K. provision, that the right of publication is a right only to first publication, because paragraph 29(1)(a) is not a definition of "publication" for the purposes of section 31?

The Committee's Recommendations

4. In relation to the policy issues the Committee is unanimously of the opinion that the right to publish conferred by section 31 of the Act should be the right to publish the work for the first time in Australia; in other words, the right to make public in Australia a work that has been previously unpublished here.

5. Concerning the legal interpretation issue, the Committee is not unanimous. Most members of the Committee (including the Chairman) consider that an Australian court would find that "to publish the work", in sub-paragraphs 31(1) (a) (ii) and 31(1) (b) (ii), means "to publish the work for the first time in Australia". Those members are of the view that paragraph 29(1)(a) would be construed as a provision dealing with the subsistence of copyright, and not a definition provision. However, some members are concerned about the difference in language between the provisions considered by the House of Lords and the Australian provisions and believe that sufficient doubt exists to warrant legislative amendment.

6. Thus, to put the matter beyond any doubt, section 31 could be amended by the addition of the words "for the first time" after the word "work" in sub-paragraphs 31(1) (a)(ii) and 31(1) (b) (ii). However, the Committee agreed that, given the relationship between sections 31 and 38 of the Act, final consideration of any amendment of section 31 should be reserved until work has been completed by the Committee on its reference on the importation provisions in sections 37 and 38 of the Act.

Reasons

7. Dealing with the policy issues first, it was noted in the discussion paper that an unlimited publication right would allow the "copyright owner to control the supply of any

reproductions of his work to the public, whether the work be new or second hand. This would amount to a de facto distribution right which, it seems to the Committee, would have some most undesirable consequences. For example, mere sale of a copy of a work would be an infringement of copyright even though the copy had been made with the copyright owner's permission.

8 . On the other hand if the right to publish is limited to first publication the copyright owner may control further uses of his work through the exercise of his other exclusive rights. They include the right to reproduce? to broadcast and to perform in public.

9. In relation to the legal issue, the House of Lords decision referred to above is Infabrics Limited v. Jaytex Limited [1982] A.C.1. It was decided in that case that the expression, "publishing the work", in s.3(5) (b) (and by inference s. 2(5) (b)) of the Copyright Act 1956 (U.K.) means making public in the United Kingdom a work hitherto there unpublished: (per Lord Scarman [1982] A.C. at p. 25). At the heart of the decision in the Infabrics case was the conclusion that s.49 of the United Kingdom Act (which contains provisions not dissimilar from those of s.29 of the Australian Act) was not a definition section as the Court of Appeal had thought but rather a provision dealing with the subsistence of copyright; see Lord Wilberforce at p. 15 and Lord Scarman at p. 22. Had the House of Lords thought that s. 49 was a definition section, it would have been in agreement with the Court of Appeal that the words, "publishing the work", in s. 3(5) (b) meant publishing the work, not only for the first time, but on subsequent occasions as well.

10. The reference to this Committee is entitled "Definition of Publication". We have assumed this to be a reference to s. 29 of the Australian Act. But central to the question of how the

Act should be amended, if it is desired that it should be, is the problem of whether s. 29 is a definition or is, instead, to be construed in the same way as s. 49 of the United Kingdom Act. If it is, there is no problem. If, on the other hand, it is a definition section, as the reference implies, the undesirable consequences referred to in paragraph 7 would result, and the Act would need to be amended.

11. Most members of the Committee (including the Chairman) are of opinion that no amendment to the Act is necessary in order to make it clear that the right to publish is the right to publish for the first time. In their view the Act here would receive the same construction as has the United Kingdom Act. But they acknowledge that the matter cannot be regarded as being within the realm of absolute certainty. Firstly, there are differences of language between s. 49 of the United Kingdom Act and s. 29 of the Australian Act. Moreover, although the House of Lords was unanimous in its decision that s. 49 of the United Kingdom Act was not a definition section, there is no gainsaying that a reading of the two leading speeches delivered by Lord Wilberforce and Lord Scarman shows that their Lordship did not reach their conclusion easily. The contrary view of the Court of Appeal was not discarded lightly. It must therefore be acknowledged, both because of the differences between the United Kingdom and the Australian sections and the judicial disagreement in the United Kingdom, that the question cannot be regarded as foreclosed in Australia.

12. Nevertheless, most members of the Committee (including the Chairman) are of opinion that the likelihood is that, if the matter were put to the test, the outcome would be the same here as it was in the United Kingdom. This opinion is held largely because the outcome is in general accord with well understood principles of copyright law prior to the enactment of the 1956 Act in the United Kingdom and the 1968 Act here. There is no warrant for taking the view that the legislatures

in the two countries intended to work a fundamental change in those principles. As Lord Wilberforce said ([1982] A.C. at p. 16) , "All through the history of copyright, under the common law and through the legislation over 260 years, there has been the well known contrast between unpublished works and published works. The distinction lies at the roots of the law."

13. Flowing from that view is a further consideration of great importance which arises because of the provisions of s. 32 of the Australian Act. It makes different provisions in relation to the subsistence of copyright depending upon whether a work is unpublished or published. It is a section which needs to be looked at in conjunction with s. 29. The importance of s. 32 is that it proceeds on the basis that the conditions for the subsistence of copyright in the case of published work will be different from those which apply in order that copyright may subsist in an unpublished work. That is a strong pointer to the exclusive right to publish the work in s. 31 being limited "to a right to publish it for the first time. This was a matter relied upon by Lord Wilberforce and Lord Scarman; see pp. 17 and 23 to 24 and ,ss.. .(2) (i) and (ii) and (3) (iii) of the United Kingdom Act which make provisions" comparable to s. 32.

14. Despite those considerations, those who are of the opinion that the Australian Act would receive the same construction as the United Kingdom Act concede that the matter is not without doubt .

15. The Committee has given some thought to whether or not it should be provided in any amending Act that the amendment is not to be understood as working any change in the existing law. On the whole, the Committee is of the view that such a provision should be included but would like the views of the Office of Parliamentary Counsel to be taken into account in making a final decision.

16. It remains **to say** that the Committee gave **consideration to whether or not the amendments to s. 31 should not say, "for the first time in Australia"**. It was **felt, however,** that there might then be a problem in relation to the importation provisions contained in ss. 37 and 38. **As mentioned in para 6,** this is something upon which the Committee may have a **clearer view after it has completed its consideration of the** importation reference.

17. Finally it should be recorded that the Committee did not invite submissions on the matters before it, though this course of action was proposed in the sub-committee's discussion paper. It was considered not to be necessary.

For the Committee

I.F. SHEPPARD.
Chairman