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Copyright is ours



Christopher Warren, Federal Secretary of the Australian Journalists Association,

discusses copyright issues of concern to journalists

Copyright issues are of growing importance to journalists, artists and photographers both in Australia and around the world. The so-called information revolution has opened up vast new areas for the exploitation of information resources and has dramatically expanded many traditional uses. At the same time the growing concentration of ownership particularly in the print medium has increased the pressure on journalist's work.

This information revolution has called forth from journalist's organisations a copyright resistance. Around the world, journalists' unions affiliated to the International Federation of Journalists have been seeking to resist the pressures on the rights of authors under the slogan "Copyright is Ours" because, of course, copyright is more than just a legal concept for journalists. It is what we sell to make our living, whether on a freelance basis, or on a continuing basis as an employed journalist.

In Australia, the Australian Journalists Association (AJA) has determined that there are three central issues of copyright exploitation which need to be addressed. The first of these is photocopying, the second is electronic publishing and the third is syndication. It is a truism to say that one of the key objectives of copyright is to link in a fair way the creator of a work with the economic exploitation of his or her creation.

For freelance journalists, the rights are unambiguous and unchallenged. But when the author of a work is an employee, the question that needs to be asked is to what extent the salary paid by the employer is sufficient compensation for the rights over the creation that are assigned to the employer. Our employers claim that once the salary is paid, the employer should have all rights. After all, the argument runs, if the work is made in the bosses' time, it should be

the bosses' work.

Journalists, on the other side, say that the work is an expression of its creator and any rights taken over it by the employer should be only for the purposes for which the journalist is employed. Any supplementary or unforeseen exploitation of the work other than that primary exploitation should be for the benefit of the creator not treated as some windfall for the employer.

Around the world, copyright provisions for employed authors vary from country to country although most common law nations place some fetters on exploitation by employers.

In Australia, Section 35(4) of the Copyright Act provides:

"Where a literary, dramatic or artistic work is made by the author in pursuance of the terms of his employment by the proprietor of a newspaper, magazine or similar periodical, the proprietor is the owner of any copyright subsisting in the work by virtue of this Part in so far as the copyright relates to:

- (a) publication of the work in any newspaper, magazine or similar periodical;*
- (b) broadcasting the work; or*
- (c) reproduction of the work for the purpose of its being so published or broadcast, but not otherwise.*

It is in testing the limits this section places on employer exploitation of an employee's copyright that the Association is approaching the three issues of concern.

Photocopying

The ease and superficial cheapness of photocopying over the past decade has seen a dramatic growth in the photocopying of articles from newspapers and magazines. Government departments and large corporations rely extensively on these clipping services to discover what is going on in the media.

As an aside, it should be noted that this spread of information has played a role in potentially reducing free speech by making it easier - and more likely - that defamation action will be taken. Indeed, it was a clipping service that generated the recent defamation by the former New South Wales Minister for Education against a country newspaper in *Cavalier -v- Maves* (1989) which resulted in \$200,000 award (later overturned on appeal).

Increasingly, both government and corporations are relying on contract clipping services to provide this service. These appear to be immensely profitable. Once published estimate of one service two years ago gave it an annual turnover of \$8 million. The AJA's estimate is that the total turnover of the copying industry would be about five times that figure. That's why the AJA together with Copyright Agency Limited have started proceedings in the Federal Court (*AJA, CAL & ors -v- Neville Jeffress/Fidler Pty. Ltd*) to determine the extent of journalists' copyright under Section 35 (4) of the Act.

It will test how far the copyright relates to:

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- publication of the work in any newspaper, magazine or similar periodicals;
- broadcasting the work; or
- reproduction of the work for the purpose of its being so published or broadcast.

It is hoped the proceedings will also clarify the meaning of the phrase "newspaper, magazines or similar periodical". In relation to fair dealing for the purpose of reporting news - which the monitoring company has raised - the question is:

- what is "fair" in all the circumstances;
- what is meant by "news"?
- what is meant by the phrase "for the purpose of, or associated with, the reporting of news"?

Electrocopying

Most newspaper companies have traditionally kept records of information published in their and other publications in a clipping library. When all this was in paper, the ability to exploit this as a resource was limited and often restricted to staff members for research material. Some, such as The Australian Financial Review, used these paper libraries to provide information services, but the cost of handling the amount of paper involved coupled with problems of access limited this sort of exploitation.

Computer-based publishing resolves both these difficulties and allows publishing companies to provide this service electronically. Stories written by staff journalists on visual display terminals can be stored in an electronic data base, accessed through relevant keywords. Access to this data base can be provided to anyone with a personal computer and modem. Having been copied once, the only limit on further electronic copying is the size and linking of data bases.

A number of companies are now providing this service, such as the Ausinet system available from the Fairfax group.

This additional exploitation of copyright is currently being treated as a bonus by the companies involved. Despite approaches to the employer, no steps have been taken to properly compensate the journalists for the profits this extra - and often unforeseen - use provides.

Some of the older types of these data bases, such as the Teletext service provided by the Seven Network, rely on broadcasting. The more common method now, and the one used by Ausinet, is delivery over cables such as telephone lines. Where the information is broadcast it may be argued that Section 35(4) seems to provide that the copyright has been assigned to the employer. But cable transmission is not a right that section transfers to the employer.

These services are by their very nature archival, not periodical. It is the very strong

view of the AJA that this means that employed journalists retain their copyright when their material is made available in these sort of services.

Clipping services so far are only an initial attack on journalists' copyright. Electronic copying will be the major challenge of the 90's for copyright owners such as journalists.

"Copyright is more than just a legal concept for journalists. It is what we sell"

A recent report for the International Federation of Reproduction Rights Organisations on electronic copying said it "opens the door to an intensity of use far beyond the level of use made possible by reprographic reproduction". The report adds that "alongside this major point lies the sheer undetectability of electrocopying which increases enormously the risks to copyright owners of abuse of their rights".

Syndication

Syndication of journalists work is not a new phenomenon. It is as old as newspapers in Australia. Since 1803, newspapers (as they still do today) have relied on reprinting material from Britain and elsewhere.

Journalists have long found this sort of syndication unsatisfactory. Whatever the legal position, there is no doubt that it is an abuse of the basic reason for which a journalist is employed.

In its Bulletin 59 "Journalists and Copyright", the Australian Copyright Council indicates its view that in light of industry practice, "the proprietor presumably owns the copyright for the purpose of syndication - including the work in any newspaper or periodical anywhere in the world for any number of times". This is not a view the AJA accepts. Syndication rights must be limited by the contract of employment of the employed journalist. If a journalist is employed by a particular publication, then it is at least arguable that the contract of employment with the particular publication limits the use of copyright material outside that employment relationship.

Being aware of uses of journalists copyright where that copyright has not been paid for is one thing. It is quite another to attempt to develop mechanisms to license use of that copyright in any way that is not excessively

bureaucratic or does not restrict the free flow of information.

Collection agency

As the registered trade union for Australia's 12,500 journalists, artists and photographers, the AJA has among its objects to "act as agent and/or licensor for members in all respects in relation to the authorisation of uses of copyright material and the collection and distribution of copyright fees".

This enables the Association to collect copyright fees for its members from copyright users. In line with this, the AJA has recently authorised the Copyright Agency Limited to collect fees due to journalists from copying in educational institutions.

But a major difficulty that the AJA, like all other collection societies, needs to address is the method of distribution of fees gathered.

It is accepted by the samplers that the journalistic work identified by the sample is not statistically sound. All the sample can show is what proportion of the total is from newspaper or magazines. How that proportion is divided among individuals cannot be shown in a statistically valid way by a sample survey.

This has forced the Association together with journalists associations overseas to look at equitable means of collective distribution. This has become the common method in northern European and Scandinavian countries. However, individual property rights in countries in those traditions are generally weaker than they have been held to be in countries in the Anglo-American tradition.

Still, it is difficult to think of a more equitable way of distributing those copyright fees to journalists without an administrative bureaucracy that would absorb all the fees itself without benefiting any of the creators.

Control over copyright is not just an academic exercise for journalists. Creating copyright protected work is what we do and how we earn our living. Unless journalists properly confront the increasing exploitation of their rights, they run the risk of losing those rights altogether. Already media monitoring companies are actively lobbying Parliament to be given a free right to copy journalists' work.

Unless journalists demand their rights, demand control of uses of their work, demand proper payment for its exploitation, those rights will not be maintained.

** This is an updated and adapted version of a speech to the Fourth Copyright Law and Practice Symposium, September, 1989.*