De Garis & Moore v Neville Jeffress Pidler Pty Limited

Michael Hall reports on this recent Federal Court decision

On 6 July 1990 Justice Beaumont of the Federal Court gave judgment in this important copyright case. The case, brought by two journalists against a media monitoring company (NJP), tested the rights of journalists to restrain, or to collect licence fees for, use of their original literary works by press clipping bureaus. The Federal Court upheld the claims of the journalists, holding that a media monitor requires permission of the original author of the work, before it may reproduce an article for distribution to its clients.

Dr Brian de Garis complained that his book review *Looking Past the Winners* had been copied by NJP for sale to one of its customers. De Garis is a freelance writer and there was no serious question about his ownership of the copyright. The case turned on four defences raised by NJP: three of "fair dealing" in sections 40, 41 and 42 of the Copyright Act 1968, and a claim that authors, by permitting their works to be published in newspapers, impliedly licence others to reproduce those articles in the course of media monitoring.

Matthew Moore is an employed journalist with the Sydney Morning Herald. In his case, the same defences were raised, but there was the additional question of ownership of copyright.

The general rule is that the author owns the copyright in a literary work, notwithstanding that it was written in the course of employment. Section 35(4) of the Act, however, creates an exception for employed journalists. By that section, where a literary work is made by an author in pursuance of the terms of her employment by the proprietor of a newspaper, for the purpose of publication in a newspaper, the proprietor is the owner of the copyright 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.

Justice Beaumont held that section 35(4) has the effect of dividing up the ownership of copyright. The newspaper proprietor owns the copyright for the purpose of publication of the work in a newspaper, etc., or broadcasting, but the journalist owns the copyright for all other purposes.

Justice Beaumont briefly considered, but did not decide, the question of whether the syndication right, that is the right to republish the work in further newspapers or periodicals after its first publication, was held by the journalist or the proprietor.

Fair dealing

Section 40 governs fair dealing for the purpose of research or study. NJP argued that its purpose was research. Justice Beaumont considered the meaning of research meant diligent and systematic enquiry or investigation into a subject in order to discover facts or principles. He rejected the contention that NJP was entitled to claim that this was its purpose, on two grounds. First, while NJP made a systematic enquiry to recover articles or newspaper clippings on a particular subject, it did this for purely commercial reasons, rather than to make any discovery of facts or principles concerning that subject; second, the relevant purpose has to be that of the person who was making the copy, so that an intention by NJP's customer itself to carry out research, could not assist the monitoring organisation.

Section 41 of the Act protects a fair dealing for the purpose of criticism or review. Justice Beaumont held that the monitoring organisation did not make enough cognitive input to qualify as either a critic or a reviewer. Its process involved scanning the media for particular subjects, and did not extend to the passing of a judgment as to the merit of the articles identified. He therefore rejected the contention that NJP's purpose was within section 41.

Section 42 deals with fair dealing for the purpose of reporting news. Reporting news, it has been established, goes well beyond the reporting of current events, but in this case, Justice Beaumont decided that it did not stretch to reproducing de Garis's book review. In Moore's case, it was clear that the material being copied was news. The defence failed here, however, because the section is limited to such reporting in a newspaper, magazine or similar periodical. Justice Beaumont did not consider NJP's clippings constituted a newspaper.

Finally, Justice Beaumont held that, even if NJP had established that it had any of the requisite purposes for sections 40, 41 or 42, its use of the works would still not have been fair. To have copied the whole of the work, as opposed to a small portion of it, for a purely commercial purpose without making any payment, could not be considered to be fair.

Implied licence

Justice Beaumont dismissed the defence of implied licence. He agreed that a freelance writer submitting an article to a media organisation impliedly gave that organisation a licence to publish it in its newspaper or magazine. This was necessary to give commercial efficacy to the contract. However, that contract could work without any need to imply a further licence to third parties, unknown to the journalist, to further reproduce the work.

The intention of the Australian Journalists Association, which supported the two applicants, is now to offer licences to media monitors to reproduce the original copyright works of all Australian journalists. The AJA proposes to appoint the Copyright Agency Limited to collect the copyright licensing fees.

This case is currently on appeal in the Full Court of the Federal Court.

Michael Hall is a lawyer with the Sydney office of Phillips Fox, Solicitors. This article is an edited version of a piece in that firm's newsletter "Briefings".

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Julia Madden President, CAMLA