

Whose copyright should it be? – another perspective

Ian Robertson examines the background to the Neville Jeffress case and argues that Section 35(4) of the Copyright Act should be reviewed

Historical background

Since 1842 employed journalists in the print media in Britain (and, subsequently, Australia) have enjoyed a privilege in respect of copyright which is not available to other employees who create material in which copyright subsists.

Section 18 of the Copyright Act 1842 (U.K.) provided, in summary, that works composed by the employees of publishers were, subject to agreement to the contrary, the property of the publisher. However, the right of the publisher to publish essays or articles was only for a period of 28 years after first publication and during that 28 year period the employee author had certain rights of approval in respect of such publication.

These rights of the employee journalist were extended by the Copyright Act 1911 (U.K.) which provided that employees who were the authors of articles or other contributions to a newspaper, magazine or similar periodical had the right, in the absence of agreement to the contrary, to restrain the publication of the work other than as part of a newspaper, magazine or similar periodical. The Copyright Act 1912 (Aust.) provided for the Copyright Act 1911 (U.K.) to have force in Australia.

In 1958 the Menzies government appointed the Spicer Committee of Inquiry to consider what alterations were desirable to the Copyright Act 1912. The Australian Journalists' Association (AJA) submitted to the Spicer Committee that employed journalists should, in the absence of agreement to the contrary, have copyright jointly with their employers in works produced in the course of their employment insofar as the copyright relates to publication in any newspaper, magazine or similar periodical other than the first one in which it is published.

In other words, the AJA sought to limit the publisher's exclusive rights in the work of employed journalists to the right of first publication. The AJA requested this protection on the ground that overseas sales and extensive syndication "provide a huge and profitable field for the exploitation of material out of all proportion to the wage which is the employee's sole claim, under the [then] present law, to profit from exceptional work".

The Spicer Committee rejected this submission and expressed doubt as to whether Communications Law Bulletin, Vol. 10, No. 4

such a provision would make any practical difference to the position of journalists as "a newspaper proprietor could, and doubtless would, ensure that his employee's contract of service provided to the contrary".

Print journalists favoured

The Committee instead recommended the enactment of a provision in similar terms to the present Section 35(4). In making that recommendation the Committee stated that "journalists who are employees are, and will under these recommendations continue to be, in a uniquely favourable position as compared with employees in other fields".

Pursuant to Section 35(4) of the Copyright Act 1968 copyright in works made by the employees of newspaper and magazine publishers pursuant to the terms of their employment is owned by the publisher insofar as the copyright relates to publication in any newspaper, magazine or similar periodical, or to broadcast of the works, or to reproduction of the works for those purposes, but not otherwise. The remainder of the copyright in such works is, accordingly, impliedly reserved to the employee.

Journalists who are employed in the electronic media, in advertising, public relations and other fields enjoy no such advantage. Like all other employees, in the absence of agreement to the contrary, the copyright in works made by them in the course of their employment is owned by their employer.

This favoured position of employee print journalists is difficult to justify.

The U.K. and the U.S.A.

It is perhaps for this reason that the copyright privilege enjoyed by employed print journalists was recently abolished in the United Kingdom. Pursuant to Section 11 of the Copyright, Designs and Patents Act 1988 (UK) employed journalists in the British print media are no longer afforded special treatment in respect of the ownership of copyright in the works they create. Rather, they are treated in the same manner as all other employees and copyright in their work is owned by their employers.

The legislation is based on the principle that if a person is employed to produce copy-

right works and is paid for those services then the employer should be entitled to the use of that work at least for the purposes of the employer's business.

This brings the United Kingdom into line with the USA where journalists are not accorded any exemption from the general rule that, in the absence of express written agreement to the contrary, the employer owns all of the rights comprised in the copyright of its employee's works.

In persisting with Section 35(4) of the Copyright Act 1968 Australia is substantially out of line with the world's two major English speaking nations.

Copyright in newspaper and magazine articles

Newspapers and magazines are, of course, collective works. A number of copyrights usually subsist in a collective work including the copyrights of the authors of the published articles and the copyright of the publisher of the work as a whole.

A major article in a newspaper may include the works of several journalists, at least one sub-editor, one or more artists, and (perhaps) cartoonists and photographers. If these people are all employees of the newspaper publisher they will own the copyright in their respective works other than for the purpose of publication in a newspaper, magazine or similar periodical, or for broadcast.

In addition, the publisher will own the copyright in the compilation of the article which is entirely separate from the works which comprise the article. Finally, there is also copyright in the published edition of a newspaper or magazine which is owned by the publisher.

This myriad of copyrights is further complicated by the different contractual arrangements which pertain to material published in newspapers and magazines. In addition to articles, photographs, cartoons and graphic art produced by employees, this material is also obtained from independent contractors, news services, and other publications.

While the use of by-lines and acknowledgments in newspapers and magazines is now prevalent, a substantial number of the copyrights in these publications are nevertheless anonymous. (Indeed, newspapers

such as *The Economist* appear to consider by-lines to be somewhat vulgar).

Practical considerations undoubtedly play a part in this need for anonymity. If all the copyrights subsisting in a substantial newspaper article of the type referred to above were acknowledged, the copyright acknowledgments would more closely resemble film credits than by-lines.

The NJP case

In the recent case of *DeGaris & Moore v Neville Jeffress Pidler Pty. Limited* ("the NJP Case") Justice Beaumont in the Federal Court held that the copyright of an employed journalist and a freelance journalist respectively was infringed by NJP when it photocopied newspaper articles written by them in the course of providing its newspaper clipping service. However, the case leaves unanswered two important questions concerning the practical application of Section 35(4).

First, the applicants were the authors of the relevant articles reproduced by NJP. However, the other owners of the copyrights which may have subsisted in the articles including, in particular, the publishers of the newspapers concerned were not parties to the proceedings.

The question therefore remains as to whether newspaper publishers can themselves restrain the reproduction of material from their newspapers by commercial clipping services. In some cases it is likely that they can.

Secondly, how are the owners of the copyrights which are infringed by unlawful reproduction to be fairly recompensed?

It is understood that the Copyright Agency Limited is to collect a royalty from NJP, on behalf of the AJA, for each article reproduced. It is unclear as to what arrangements have been made to collect royalties on behalf of the owners of copyrights infringed by NJP who are not members of the AJA.

More importantly, it is also unclear as to how the royalties collected on behalf of the AJA are to be distributed. An article by the Federal Secretary of the AJA in the August, 1990 edition of *The Journalist* acknowledges this problem in stating that "It will be almost impossible to identify individuals whose work has been copied without onerous administrative costs that would wipe out most of the gains made".

This difficulty appears to have been overcome in the short term by the AJA's decision not to distribute the royalties collected to its members at all. Instead, the royalties "will be used for a copyright fighting fund to fund the AJA's legal and educational campaign on copyright".

It would have been more usual (and sensible) for the trade union to have taken up the

suggestion of the Spicer Committee some 30 years ago when it stated that the question of journalists' ownership of copyright is "related to conditions of employment that would be more appropriately dealt with by an industrial tribunal than by the copyright law".

Direct negotiation with newspaper and magazine publishers (particularly when they were solvent) for appropriate remuneration for AJA members as a result of the use of their works for purposes additional to those specified in Section 35(4) may have led to a more direct benefit for the AJA's members.

Other Section 35(4) issues

In an endeavour to maintain newspaper circulations (and, of course, advertising revenues) Australian newspaper publishers have constantly sought new ways to promote their products. In addition to the traditional area of photographic sales, clipping services and educational services for readers have been introduced by some publishers primarily as a means of promoting their newspapers. These services can usually not be justified as stand-alone profit centres.

To the extent that these services utilise material produced by employees of newspapers and magazines it is unlikely that the publisher owns the copyright in that material for such purposes.

It is difficult to justify the favoured position of employee print journalists'

It remains to be seen whether the next stage of the copyright enforcement process by employed journalists in the print media will be an attack on these reader services. If so, it is likely that publishers will have little economic choice but to close the services which may not be in the longer-term interest of the newspaper industry.

Another area for future legal consideration is the ownership of syndication rights in the work of employed journalists. This issue was referred to in the judgment of Justice Beaumont in the NJP Case but was not decided. The question centres on the newspaper and magazine publisher's ownership of the copyright in its employees' works insofar as the copyright relates to "publication of the work in any newspaper, magazine or similar periodical". Does "publication" in fact mean "first publication"?

Finally, the ownership of the copyright in works contained in computer data bases will undoubtedly emerge as a significant issue. It is likely that employed journalists own the copyright in data base services which are

delivered by means of telephone lines or similar cables. These services are most likely diffusion services for the purposes of copyright law and the right of transmission by means of the services is one of the rights impliedly reserved to employee journalists in the print media by Section 35(4).

Alternatively, it can be (and has been) argued that computer data bases are merely another method of publishing a newspaper, magazine or similar periodical and the newspaper or magazine publisher is accordingly the owner of the copyright pursuant to Section 35(4). However, it would seem that this approach involves a very substantial extension of the meaning of the words "newspaper, magazine or similar periodical".

Conclusion

It is difficult to justify the favoured position of employee print journalists in Australia on grounds of either equity or public policy.

Section 35(4) of the Copyright Act 1968 takes an approach to copyright ownership in the newspaper and magazine industries which is contrary to that now taken in the world's two major English-speaking nations. This has the potential to place Australia's newspaper and magazine industries at a local and international competitive disadvantage.

Other information providers are not similarly disadvantaged with regard to the ownership of the copyright in material produced by their employees. Further, the increasing globalisation of the print media means that newspaper and magazine publishers in the UK and the US may be well able to supply data bases and other information technologies to the Australian market without any need to recompense their employees or overcome the almost impossible administrative difficulties in trying to do so.

It is understood that Australia's newspaper and magazine publishers are seeking the removal of Section 35(4) from the Copyright Act. If these endeavours are successful the considerable industry discussion that has been generated by the NJP Case will have served a useful purpose.

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