Journalists' Copyright

Charles Alexander argues that employed journalists should cease to be the owners of copyright under the Copyright Act

This paper addresses from the publishers' perspective the current debate about recognition and protection of journalists' copyright under section 35(4) of the *Copyright Act*.

History of Copyright

In 1809 copyright was first protected by statute. 1842 saw the *Copyright Act* amended to include a provision under which publishers of encyclopedias, reviews, magazines or periodical works were granted the copyright in works prepared by employees for a period of 28 years from first publication. Thereafter the rights reverted to the employees for the purpose of separately publishing those works. This provision was amended in the 1911 UK Act to include a provision to the effect that publisher/employers were entitled to copyright in their employees' works subject to the employee being able to restrain their employer from publishing those works in publications other than newspapers and magazines.

Section 35(4) of the Australian *Copyright Act* in its present form came into existence in the 1968 Act. As in the 1911 Act, the 1968 Act (in section 35(6)) sets out the general provision that where a work is made by an author in pursuance of the terms of his or her employment the employer is the owner of copyright in the work. However, section 35(4) provides that where a work is made by the author in pursuance of the terms of his or her employment by the proprietor of a newspaper, magazine or similar periodical, for the purpose of publication in the newspaper, magazine or similar periodical, the proprietor is the owner of the copyright insofar 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 it being so published or broadcast but not otherwise.

It was also the 1968 Act which introduced the concept of a copyright in a published edition of a literary, dramatic, musical or artistic work. The ownership of this right was given to the publisher of the work and it appears that the right extends only to the typographical arrangement of a work.

Over the next 20 odd years the provisions were not the subject of any significant interest. However, in July 1990 their significance came into sharp relief when Mr Justice Beaumont handed down his decision in the *De Garis* and *Moore* cases. In that decision his Honour held that the copyright in certain underlying works contained in newspapers, one prepared by an employee and the other by a freelancer, was infringed when it was photocopied by a press clipping agency, Neville Jeffress Pidler. Despite this favourable decision the Court is yet to determine the "value" of any of the articles which were copied.

A little time prior to this decision, the AJA (now the Media and Arts Alliance) had joined Copyright Agency Limited ("CAL") with a view to CAL licensing copying of works by its members. In these early days the AJA seemed to be suggesting that the funds which they hoped to receive from this licensing would be used for the general purpose of the AJA, because of the difficulties of identifying authors. It now seems that the AJA may have changed tack and is prepared to distribute funds to its members in respect of works where the authors are identified. However, it is understood that it still claims a right to retain funds received from CAL for articles copied from newspapers and magazines where the author cannot be identified.

Following the *De Garis* and *Moore* decisions, CAL commenced negotiations with the Government to obtain payment for Government copying performed under the authority given in section 183 of the Act. Section 183 allows the Crown to do any acts comprised in the copyright if the acts are done for the services of the Commonwealth or a State. The great majority of publishers of newspapers and magazines have not joined CAL. For this reason CAL only sought payments from the Commonwealth in respect of copying of the published edition. Nevertheless, CAL appears to have been able to complete one of the best deals concluded by a copyright owner in the history of copyright. It negotiated to be paid by the Government $1 an A4 page for copying taken from a newspaper and $4 an A4 page of copying taken from a magazine. The copying by Government departments is very substantial and the arrangement will result in large payments being made to CAL.

CAL also has been collecting amounts for copies from educational institutions. It says it is only collecting for works, not published editions, and that therefore the publishers are not entitled to any payment for copying of their works by those educational institutions. This is presently the subject of litigation with CAL.

The publishers' concerns

This leads to the present position faced by the publishers:

(a) they publish newspapers and magazines paying wages, related expenses, rent, production costs, research and development costs but find the material contained in databases, for which they could license access to third parties, may belong to the journalists who wrote it rather than the publishers who store it and who developed those databases; and
(b) if someone copies a newspaper or magazine with a photocopier instead of buying that newspaper or magazine it is the employed journalist who gets paid. This is not a bad incentive for employed journalists to encourage photocopying.

Therefore, with some justification, the publishers have questioned the present law. They are concerned about their investment in databases. They also consider that photocopies of newspapers are just their newspapers in other forms, and that if anyone is to be paid for photocopying it should be them. The Attorney General has announced an inquiry into whether section 35(4) should be abolished or amended.

Contentions

It is a principal contention of the publishers that the *Copyright Act* is a statute concerned with rewarding enterprise with a view to encouraging the making of further works. In this context, the publishers contend that it is they who provide the total environment and resources for creation, publication and dissemination of news. It is the publishers who have developed systems which provide for faster and

better news reporting and new methods of disseminating news. They consider it is the publishers that should be provided with incentive to develop that system. In their view, the journalists themselves are already fully rewarded. Those journalists who have special skills and expertise (and therefore, might expect to have their works copied more frequently) are receiving very considerable rewards in recognition of their talent. The situation is entirely different from those authors who are not usually paid until they have achieved success and whose endeavours are entirely their own. This is the category of the freelance journalist who can negotiate with the publisher to decide on what basis he or she will sell their product. The freelance is not usually paid for time spent, but is paid for the product he or she produces and negotiates how that product may be used.

It is the publishers' contention that the Act, in section 35(6), generally recognises the philosophical concept of an employer ownership. There is no basis upon which employers of journalists should be treated differently. In saying this the publishers have made it clear that if a journalist uses his or her materials in publication of a book they would in recognition of past practice not expect ownership for that purpose.

Technology outpacing law

The other major contention of the publishers is that this is yet another area where the law has not kept pace with technological change. The law when framed and later revised in reality, only resulted in the journalist being able to use his or her works for publishing in book form. Indeed when broadcasting was introduced, the Act was amended to ensure that the rights of the publishers were extended to allow them to use works prepared by employees for the purpose of broadcasting those works either by themselves or third parties. However, since 1968, photocopying and computer technology have opened new horizons and opportunities. The publishers claim they are being denied the right to exploit those opportunities, while at the same time having to compete against the new technology. This new technology in reality allows publication of newspapers in a different form, but the substance remains the same.

The publishers contend that the time has come for them to be treated like other employers in the United Kingdom and the United States and, indeed, all other employers in Australia. There is no ground for continuing the discriminatory provisions which are contained in section 35(4) of the Act.

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World Review

A survey of some recent International developments

Japan is to launch commercial TV satellites in the new year, the Japanese Government announced last month. A basic program for a satellite television service is to be drawn up by an advisory panel of the Posts and Telecommunications Ministry. Six channels will be provided for satellite broadcasting at first. About ten firms are reported to be interested in applying for a licence.

Hungary's Muzertechnika (MT), the national monopoly carrier signed an agreement recently with Orbital Communications (OrbComm), a US based satellite corporation, to become the exclusive provider of OrbComm services in Hungary. MT will own and operate the OrbComm network and the service will commence fully in 1995, complementing MT's plans to vastly expand the scope of telecommunications services offered in Hungary.

Korean company Samsung has also been enlisted by OrbComm as its sole service provider in Korea, as well as sole supplier of OrbComm personal communicators.

Lithuania has finally been connected up to the world telephone network in a move which reinforces the state's independence from Moscow. The state now has access to a satellite link from Kaunas to Copenhagen, providing direct links to the global network. Beforehand, all calls were routed through Moscow or St. Petersburg.

China made what is believed to have been its largest single order for fibre optic cable. Pirelli Cables won the $10 million contract to supply over 2,300 kilometres of cable to the Hunan Post and Telecommunications Bureau.

Greece and **Korea** have both awarded mobile telephone network licences to consortia including Arena GSM consortium member Vodaphone, the group bidding for Australia's third telecom licence.

Finland has announced moves to open up its long distance telecommunications links to competition from 1994. Local telephone companies have apparently been waiting for twenty years for deregulation to occur, and are now pushing for deregulation in Finland's domestic market.

Europe: British Telecom has won a three year contract to provide a fully managed network for the European offices of BP Chemicals. The contract means the first combination of Syncordia, BT's global outsourcing subsidiary and Global Network Services, its present international managed data networking service.

FLAG (Fibre Optic Link Around the Globe), has entered into its final planning stages. Nine telecommunication carriers in Malaysia, Korea, Singapore, Indonesia, India, Egypt, Gibraltar, Italy and the UK all signed an agreement to land the cable, while the Japanese are presently at the negotiating table. The cable will link Japan and the UK via the Indian Ocean. To be operational by the end of 1996, FLAG will cost its backers in excess of $1.4 billion, becoming the world's longest undersea fibre optic cable, 25,000 kilometres in length.

Sri Lanka's Telecom has chosen OTC Australia, the international arm of AOTC, as its partner to provide a cellular mobile telephone service in Sri Lanka.

This edition of World Review was prepared by Richard Phillips, itinerant traveller and undergraduate at Caius College, Cambridge.