

# Electronic newspapers – who owns the copyright?

Anne Davies examines the Copyright Law Review Committee's recent recommendations

In June Australia's newspaper and magazine publishers had a significant win in their campaign to extend control over the copyright in their journalists' work.

The majority of the Copyright Law Review Committee (CLRC) recommended that section 35(4) of the *Copyright Act 1968* be amended to bring journalists into line with all other employees; that is, that all copyright in the works created in the course of their employment would rest with their employer.

This represents a recommended change in the long standing rule that journalists retain the residual copyright in their work. Their employers, the publishers, currently have rights only in relation to the publication in a newspaper, magazine or similar periodical, and broadcasting of those works.

## an industrial impasse?

The publishers may have been hoping that the CLRC Report on Journalists' Copyright (1994) would end the matter but far from being the end of the saga, the Report is only one milestone in this long running issue.

Both the majority of the CLRC and the Government have now told the parties that they regard the issue as an industrial one to be resolved by newspaper and magazine proprietors and the journalists at the bargaining table.

Until the parties strike a deal, it seems unlikely that the Minister for Justice, Duncan Kerr will move to implement the Report.

At stake is who owns the rights to electronic newspapers which will be made possible by the emerging new telecommunications technologies.

## the current position

Unlike other employers, who are the copyright owners of their employees' works, section 35(4) gives the proprietors of newspapers and magazines the copyright in their journalists' works only for the purpose of publishing it in a newspaper or magazine and broadcasting it.

The historical roots of this special rule are a little uncertain but is said to stem back

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to Charles Dickens, who was angered when a work he had allowed to be serialised, was published as a book without his permission.

Provisions similar to section 35(4) were to be found in the UK Copyright Act 1956 which served as the model for the Australian Act.

Generally, it has been accepted by both journalists and publishers that the effect of this rule is to allow journalists the freedom to publish their work in book form. This right mainly benefits columnists, but sometimes journalists are asked whether they would allow articles they have written to be reproduced in academic texts.

[Assoc. Ed.: Submissions to the CLRC advanced the pattern of media ownership in 1968 as being the reason for inclusion in s.35(4) of the publishers' exclusive right to broadcast their journalists work. In 1968 most private television stations in Australia were owned by newspaper proprietors.]

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### the Media Monitors case

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**U**ntil 1990, the question of who might own copyright in journalists' works was uncontroversial. In that year, two journalists, on behalf of the Australian Journalists Association (now known as a section of the Media Entertainment and Arts Alliance (MEAA)) won a case against a newspaper clipping service (*De Garis v Neville Jeffress Pidler Pty Ltd*) - the *Media Monitors* case.

In the *Media Monitors* case, the Federal Court established that journalists owned copyright in their work when it was photocopied. The Court ordered that royalties be paid to those journalists.

The publishers were not party to the *Media Monitors* case, and appeared unperturbed by it until the Copyright Agency Limited, representing the reproduction rights of all its members including the journalist members of the MEAA, signed an agreement with the Commonwealth to pay for its use of photocopied works, including news clippings. While the publishers maintain that they, not the journalists, have copyright in material published electronically or diffused via data bases, significant doubt was created as a result of the case.

They began a concerted lobbying campaign to convince the then Attorney General, Mr Michael Duffy, to change the law. The Thatcher Government had repealed the corresponding section in the UK Act at the request of Rupert Murdoch, and the Australian publishers wanted similar changes.

With an election looming, Mr Duffy decided to refer the politically contentious issue to the CLRC.

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### the majority view

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**T**he majority of CLRC members who took part in the review - Chairman, Justice Sheppard, Ms Lyndsey Cattermole, Ms Janice Luck, Professor Dennis Pearce and Bob Rodgers - recommended a change in the law which would have the effect of treating journalists in the same way as other employed authors.

The majority argued that difficulties would be encountered with new technology unless section 35(4) was altered.

The publishing business was an integrated one and it would become "increasingly difficult logically to distinguish between primary and secondary uses of journalists' work", the majority said.

"As technology takes hold, there will be increasing uncertainty. This will lead to increasing disputation the result of which will be likely disruption of business and employment and ultimately a most adverse effect on the public interest because of interruptions to the supply of information which is so essential to a modern community," they warned.

The majority also pointed to "numerous practical problems" in establishing the ownership of copyright among authors. By-lines - the basis under which payments are distributed under the photocopying agreements - could lead to unfairness as they did not take account of other employees who might have contributed to the ultimate form of the material, they argued.

Other factors which led the majority to support the proprietors' case was the fact that the proprietors provided expensive equipment to assist the journalists in the creation of their work, and that they took the business risks associated with the enterprise.

The majority rejected the argument put forward by MEAA that giving copyright to the proprietors would result in greater concentration of media ownership by concentrating copyright ownership in fewer hands.

That said, however, they also concluded that it was an industrial issue concerning the conditions of employment, which should be settled at the bargaining table between the parties.

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### the minority view

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**T**he minority, - made up of the departmental member, Mr Chris Cresswell, Mr Derek Fielding and Mr Patrick Gallagher, - also noted that it was an industrial issue but proposed amendments which shared the rights between proprietors and journalists. Their

proposal was to amend the Act to give proprietors the right to establish data bases for the purposes of publishing or for archival purposes to provide public access for research. But if material was to be copied or transferred into other data bases, it could only be done with the author's permission.

"The minority has formed the view that the creation of data bases of articles in the newspapers where those data bases are not created by the proprietors in the course of electronic delivery of newspapers is not an activity which can be regarded as part of the publication of news and information. It should be properly regarded as a separate field of activity," they said. "As such the right should remain with the authors of the articles under the existing terms of section 35(4) along with the other residual rights enjoyed by them by virtue of the section."

The minority was more relaxed about the difficulty of identifying authors, pointing out that often this is not a simple matter in copyright law.

It also rejected the argument that failure to amend the Act would lead to more disputes. "Whatever else it did, repeal of the section would weaken the bargaining positions of the journalists for apparently no strong reasons than that their present possession of residual copyright in their articles is an inconvenience to proprietors of apparently profitable businesses," they said.

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### where to now?

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**T**he current minister, Mr Kerr, is in no hurry to embroil himself in solving the journalists' copyright dilemma. His clear message to both parties has been to ask them to find a mutually satisfactory solution.

That appears unlikely. The journalists' union is strongly supportive of the minority position; that they should not be made to relinquish their residual copyright. The bottom line for the employers seems to be that they want the certainty the majority's proposed amendments would give them.

The parties met in early July to begin negotiations. On books and anthologies, it seems likely that the parties will agree to the status quo, with journalists retaining the right to exploit their work further in book form.

Photo sales have been the subject of long standing arrangements whereby photographers and proprietors share the proceeds of profits from sales apart from sales through syndication deals, and these seem likely to continue.

On freelancers' copyright, MEAA is pushing to have the issue resolved as part of ongoing negotiations on minimum rates of pay.

But the real crunch points are electronic data bases and photocopying. The MEAA has put a proposal that the proprietors be allowed to exploit information data bases for their own use, including commercial uses, in return for the payment of a continuing copyright allowance, either weekly or annually. However the journalists are seeking a profit sharing arrangement when data bases are licensed to third parties.

In relation to photocopying the argument is likely to turn on the percentage shares of the rights, as the publishers have asserted that they hold copyright in the published form, while the journalist holds copyright in the work's contents. There is also a dispute about what should happen to payments for rights where the author cannot be identified. The proprietors are

## The seven figure ouch

**Paul Reidy and Nicholas Pullen review the second Carson trial and the issues for the media including the Court's decision on the use of personal injury verdicts**

It's finally over. On 10 July 1994 Nicholas Carson's defamation proceedings against John Fairfax & Sons Limited were settled. In the Court of Appeal, Counsel for Fairfax read the following apology:

*"On April 21 1987 and May 6 1988, The Sydney Morning Herald published articles which a jury has found to convey defamatory imputations about Mr Carson. The imputations were false and very serious. John Fairfax and Sons has not previously apologised to Mr Carson for the serious hurt which the publications caused him. John Fairfax has instructed me to say to this honourable court in Mr Carson's presence that John Fairfax and Sons sincerely apologises to Mr Carson for having published the imputations. John Fairfax and Sons assures the court and Mr Carson that it did not intend to convey the imputations against Mr Carson and wholly withdraws them".*

In a statement released by Carson he said the "jury was correct to award me the verdict that they did on the material before them". However, he acknowledges that "the verdict is vulnerable and could be overturned".

That statement marked the end of a saga which began over seven years ago on 21 April 1987 with the publication of an article in the Sydney Morning Herald by John Slee. It had involved a one week Supreme Court jury trial, an appeal to the Court of Appeal and then the High Court, a re-trial before a jury in the Supreme Court for another two weeks and then another appeal to the Court of Appeal. Added on to

very reluctant to sign up the Copyright Agency Limited, the collecting body which currently administers payments on behalf of the journalists.

The parties are expected to report back to the Minister in September with the outcome of their talks. It will be difficult for them to find common ground, but equally, the Government will be reluctant to intervene. This is not an issue which will be resolved quickly and even if the proprietors convince the Government of the strength of their case, the vagaries of the Senate make passage of amendments uncertain.

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that there were the interlocutory skirmishes - the separate trials on the capacity of the articles to convey the imputations, the arguments about discovery and interrogatories and the admission of evidence. All in all an extraordinary piece of litigation.

Now that it is over, media defendants should sit back and ask a few hard questions: why did Carson get a record combined verdict of \$1,300,000?; and what issues does the Carson case raise about the conduct of future defamation trials?

### the jury's verdict was huge

A t a combined total of \$1.3 million (\$500,000 for the first, and \$800,000 for the second, action) it was more than double the previous record verdicts given to Carson at his first trial and almost 10 times the record verdict given to former Police Commissioner Kel Glare in Victoria in 1992. It was even more significant given the orders of His Honour Justice Levine that Fairfax pay \$147,098 interest and Carson's costs (on a party/party basis to September 1993 and thereafter on an indemnity basis).

### the articles

On 21 April 1987, the Sydney Morning Herald included on its leader page a commentary by John Slee headed "Dr Rajska a war on many fronts".

As Carson later told the jury he immediately forwarded a letter to the

Herald's Editor in Chief requesting the publication of an apology. The Herald declined to publish that apology but offered to publish a statement correcting two factual errors in the article. Carson did not accept that offer and after further haggling about apologies Carson commenced proceedings in May 1987.

On 6 May 1988, a further comment piece by John Slee appeared on the paper's leader page, headed "The Criminal Phase of Rajska case". This time, without delay, Carson filed further proceedings against the Herald.

### the imputations

The imputations found to be defamatory from the first article were that Carson:-

- (i) wrongfully attempted to intimidate Dr Metcalf by threatening to sue him for defamation over a medical report written by him; and
- (ii) wrongfully brought defamation proceedings in his own name against Mr Arthur Carney, a solicitor for the sole purpose of causing Mr Carney to forthwith cease to act for his client, Mr Rajska.

The imputation before the jury from the second article was that Carson:-

- (i) was wrongfully a party to a conspiracy with Mr Moshe Yerushalmy to obstruct the course of justice by evading service of criminal process.

### the second trial - Carson's case in chief

Carson gave evidence over 3 days. He said he was appalled by the publication of the first article, "It made me very angry and wounded because it was just, it seemed to be so wrong that something that was false could just be published like that". Of the second article he said "I was just absolutely astounded when that was published, it was just such a wild allegation all I could think was this was just a vendetta against me, an attack on me, telling a lie to besmirch me".

In cross-examination by Maurice Neil QC for Fairfax, Carson agreed he was still friends with each of his reputation witnesses. He was still a senior partner at Blake Dawson Waldron and he had been invited onto the Board of the Sydney Dance Company. Carson did not agree with Neil's suggestion that he had resigned from a public company to focus on his legal practice. He said, "I was asked to leave the Board by the main shareholder, the Commonwealth Superannuation Fund because I did not have a big enough commercial profile".