

# ARTICLE

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## No Copyright in Newspaper Headlines

In the first decision internationally to examine and decide on this issue, the Australian Federal Court recently determined that copyright does not exist in newspaper headlines. This effectively dismissed claims by Fairfax Media Publications Pty Ltd (**Fairfax**) that LexisNexis Australia (**Reed International or Reed**) had breached Fairfax's copyright by using headlines from the *Australian Financial Review* in its abstracting service. The decision accords with earlier cases concerning titles, short phrases and advertising slogans, and supports the long-held understanding that these 'snippets' of text are too trivial and insubstantial to attract copyright protection as 'literary works'. As stated by Bennett J, 'The use of titles of articles and books for the purposes of identification is well-known and routine...' In this respect, the decision arguably represents a triumph of common-sense, since it would be untenable for copyright to impinge on the ability to reference and cite articles and consequently access and share information.

### 1. Background

Fairfax is the publisher of the national newspaper *The Australian Financial Review* (**AFR**). Reed International publishes the ABIX abstracting service by which subscribers are provided with abstracts of articles published in various newspapers and magazines,

including the AFR. LexisNexis has been creating abstracts of the AFR since the early 1980s. Each abstract includes the headline of the relevant article (with the headline rarely being altered), the by-line of the journalist who wrote the article and a short summary of the article (written by Reed staff). The appearance is not identical to the appearance of the original article: the abstract does not include the advertisements, photographs or quotes from the original articles; the arrangement of the abstracts is dissimilar to the arrangement of articles in the original publication; and the headline, though unchanged, is also not presented in the same order. Irrespective of these dissimilarities, Fairfax alleged that the Reed service reproduces the arrangement of the articles and headlines in the AFR.

In July 2007, Fairfax sued Reed for copyright infringement under the *Copyright Act 1968* (**Act**), alleging that copyright subsisted in its newspaper headlines and that reproduction of a whole or substantial part of the following works in the ABIX abstracts amounted to an infringement of its copyright:

1. each individual headline in an AFR edition (**headline**);
2. each article, including its headline and by-line, written by



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journalists employed by Fairfax and published in an AFR edition (**article/headline combination**);

3. the compilation encompassing all the articles, including their headlines and by-lines (and excluding other material such as photographs, market tables and advertisements) in an AFR edition (**article compilation**); and
4. each entire edition of the AFR, including the articles, their headlines and other material such as photographs, market tables and advertisements (**edition work**).

Reed argued that copyright did not subsist in these identified 'works' (excluding the edition work, which was not in fact substantially reproduced by Reed). Fairfax sought an injunction to restrain future reproduction of these works by Reed. The original trial was carried out in September 2008, but additional submissions were accepted after the High Court decision in *IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458 (Ice TV case)*.

## 2. The decision

### 2.1 Are headlines literary works in which copyright can subsist?

Fairfax put forward ten headlines as examples of 'works' in which copyright subsisted, arguing that each of these was original and 'literary' in conveying information. Fairfax provided evidence of the 'creativity, thought, application, effort and experience' involved in composing headlines.

Bennett J, after considering relevant authorities including the *Ice TV* case, determined that Fairfax's failure to identify the authors of the ten headlines was fatal to a finding of copyright. '*IceTV*...suggests that there can be no finding of joint authorship within the meaning of s10(1) of the Act where one of the authors is unknown'. As a result, a presumption of originality was not available.

'It is Fairfax's own submission that headlines, which are generally written by sub-editors, often derive in one way or another from the content of the body of the article, which is written by the journalists. Therefore, the authorship of the ten selected headlines cannot be assumed in the absence of specific evidence.'

In addition, more than mere authorship is required. Copyright will only subsist in works that are the result of mental effort of a literary nature. As is the case with titles of publications, advertising slogans, invented words and logos, Bennett J held that '[h]eadlines generally are...simply too insubstantial and too short to qualify for copyright protection as literary works'. Headlines are

'too trivial' to be literary works, even if skill and labour has been expended on creation. Thus, the provision of evidence by Fairfax regarding the skill and effort involved in writing the ten headlines did not distinguish this case from the relevant authorities. Her Honour held that '[t]he majority of the headlines in the sample editions are short factual statements of the subject of the article. The addition of a pun does not, of itself...convert such statements into literary works'. While the decision turned on copyright principles, it led to a highly sensible result on policy grounds:

'The headline and by-line is...meta-information about the work, not part of the work, the work being the article. The need to identify a work by its name is a reason for the exclusion of titles from copyright protection in the public interest. A proper citation of a newspaper article requires not only reference to the name of the newspaper but also reproduction of the headline... If titles were subject to copyright protection, conventional bibliographic references to an article would infringe.'

Importantly, however, Bennett J did not exclude the possibility that a headline could attract copyright protection if the headline bore specific characteristics:

'It may be that evidence directed to a particular headline, or a title of so extensive and of such a significant character, could be sufficient to warrant a finding of copyright protection...but that is not the case here.'



## 2.2 Does copyright subsist in the other works?

Bennett J held the following in relation to the remaining works examined:

- **The article/headline combination:** Fairfax submitted that this 'work' was a 'work of joint ownership', whereby the contribution of each author was not separate from the contribution of the other. Bennett J found that headlines and articles had distinct authors and could not be combined to form a work of joint ownership. Her Honour held that the lack of an identifiable author for this 'work' undermined a finding of copyright.

- **The article compilation:** Fairfax submitted that Fairfax editorial staff must work around the finite spaces reserved for the advertisements and other material for each page and finalise the content and arrange the layout of the various articles and headlines. Reed argued that the article compilation is a 'hypothetical work' which is merely a subset of the edition work, since there is nothing to suggest that the article compilation has a separate existence. Her Honour rejected this argument and held that the article compilation 'represents a discrete aspect of the preparation of the edition by particular editorial staff'. Evidence showing the 'skill and labour expended in the page by page selection and arrangements of the articles into the template' supported a finding that the article compilation was a 'literary work' in which copyright may subsist.
- **The edition work:** Her Honour found that the edition work was an original literary work of joint ownership protected by copyright and this was not disputed by either party.

The article compilation and edition work both involved 'skill, judgment, knowledge, labour and expense' and were copyright works. However, by only extracting the headlines and by-lines of articles, 'Reed does not take any part of the selection, co-ordination and arrangement that constitutes the original work of the compiler. It does not take a substantial part of the Edition work or of the Article Compilation'.

## 2.3 Are any defences available?

Despite finding that no infringement had been committed, Bennett J considered, in obiter, defences raised by Reed.

Her Honour considered that fair dealing defences were relevant. Reproduction in the ABIX service could amount to fair dealing for the purpose of news reporting under s42(1)(b) of the Act. Whether a reproduction of the headlines constitutes a fair dealing depends on the context in which the headlines are used. Reed invested a significant amount of skill, labour and effort in the preparation of its abstracts, and use of a headline as a proper citation to the newspaper article could constitute fair dealing (a proper citation requires use of the headline in full).

However, Her Honour did not find that estoppel could be raised as a defence since it was not shown that Fairfax had encouraged an assumption, and that Reed had relied on that assumption, that Fairfax would not assert copyright in respect of its headlines.

## 3. Implications

This decision is consistent with earlier decisions relating to short titles, phrases and slogans. Summarising publications, including the direct inclusion of the original headlines in order to cite the source of the information, will not amount to copyright infringement. Businesses offering, or intending to offer, information to the public that involves news aggregation or abstracting services are unlikely to be exposed to successful claims of copyright infringement. Such businesses may continue to use titles or headlines as long as they are used to accurately cite the original source. However, these businesses must ensure that they do not reproduce substantial parts of the original article, which remains subject to copyright protection.

By contrast, publishers of news content cannot rely on copyright protection to control the dissemination of content relating to their



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headlines and article/headline/by-line combinations, unless the content is so extensive and of such significant character that it is distinguishable from the works examined in this decision.

The decision remains open to appeal by either party.

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