

A Breach of Copyright – is it?

It has come to our attention through both a number of councils and recent media articles that the Copyright Agency (“the Agency”) has embarked on a campaign to ‘encourage’ councils to take out licences. This is on the basis of allegations made by the Agency that various SA councils have breached the *Copyright Act 1968* (Cth) (“the Act”).

The focus for the Agency is the reproduction and communication of newspaper articles that are included (or referred to) on council websites, in council newsletters and in council agenda reports for the purposes of informing elected members and for informing residents in relation to council decisions.

“Section 42...provides an exemption in certain circumstances, including “fair dealing for the purposes of reporting the news”.”

This issue is important because it is common practice for councils to reproduce publications from newspapers and journals in a variety of methods for the purpose of informing elected members and communicating with the public. For this reason, whether your council has received a letter from the Agency or not, it is important to be aware that the same allegations can be made against any council which engages in the same conduct – even though that council is not currently the subject of such accusations by the Agency.

The Agency, which represent various publishers of newspapers and magazines, including the Messenger Newspapers Pty Ltd, Advertiser – News Weekend Publishing Co Pty Ltd, Advertiser Newspapers Limited and News Limited, have alleged that various councils have reproduced and communicated works protected by copyright in breach of the Act. The allegations are said to relate to reproduction and communication of newspaper and journal articles on the council’s website, contained in newsletters and also in council reports in the absence of a licence from the Agency.

Whilst the Agency has made these allegations to a number of councils, none of the correspondence that we have seen has recognised the existence and benefits of section 42 of the Act. This provision provides an exemption, in certain circumstances, including “*fair dealing for the purposes of reporting the news*” as follows:

1. A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if:

- 1.1. *It is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a similar acknowledgment of the work is made; or*
- 1.2. *It is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.*

Based on this provision, it is our opinion, that any council affected by the concerns of the Agency should have an arguable case that it has not infringed the copyright of the publishers. With respect to those councils for which we have examined the circumstances of their publications and have assisted to respond to the Agency, the Agency has not yet responded to the availability of this exemption.

Given the relevant case law in this area, it is our view that, on the circumstances as they usually exist, there is a readily identifiable argument that:

- where the council includes copies of articles for the purpose of “media reports” this purpose is or can be said to be for the purpose of, or is associated with, the reporting of news;
- the council does not include such copies for a commercial or revenue raising purpose but on a non-profit basis in relation to material that is relevant to the functioning of the council and hence relevant to the activities of its governing body;
- the council’s agenda and related website publications can be said to be a means of communication; and
- the fact that the articles are displayed on the council’s website for free for the sole purpose of identifying relevant news articles for both the governing body and the local community, all support a position that the council’s actions constitute a fair dealing.

“...councils have an arguable case that it has not infringed the copyright of the publishers.”

For the above reasons, until we hear further from the Agency, it is important that councils that have received correspondence from the Agency do not simply agree to the allegations that are contained within the letter but, instead, assess and, as appropriate, challenge the allegations on the above basis. At the very least this may avoid ongoing licence fees which are required to be paid by the council on an annual basis.

If you have any questions please contact either Tracy Riddle on 8113 7106, 0431 867 523 or triddle@kellyjones.com.au or Natasha Jones on 8113 7102, 0419 864 531 or njones@kellyjones.com.au