

REPRESENTATIVE ACTIONS, PROOF OF FACT AND AUTHOR PRIVACY IN COPYRIGHT LAW: A HISTORY AND A CONCERN

ELIZABETH ADENEY*

Recent judgments in Australia have called for author identification in order that copyright subsistence may be established. There is a risk that such calls will be taken too literally, to the detriment of author privacy. This article considers the legal mechanisms by which author identity has historically been shielded from disclosure, without the operation of the copyright system being impaired. It expresses the hope that those who are responsible for developing copyright law will be mindful of the concern for author privacy which has long been part of copyright discourse.

I INTRODUCTION

In the recent past, a number of Australian cases have discussed the requirements that form the essential foundation for an action for copyright infringement. It has been emphasised by the High Court that the author is central to the system of copyright protection in this country and that authorship must be proved by the person claiming copyright. In some decisions it has also been asserted that the author must be 'identified'. If this assertion were to be taken to denote identification by name, or identification in a way that a name might be ascertained, and if it were taken as a general proposition of copyright law, it would become problematic. It would come into apparent conflict with a number of mechanisms, both international and domestic, which have for more than a century both allowed author identity to be obscured and enabled economic aspects of the copyright system to operate in the absence of author identification. Such absence of identification may result from the loss of knowledge of the author's identity; or it may be caused by the author preferring his or her privacy to be maintained.

Any call by judges for author identification needs to be looked at against this complex of mechanisms. Legislative provisions embodying them range from provisions which grant rights (for example moral rights) to those which establish statutory presumptions, or lay the groundwork for representative actions, or establish copyright duration. The intentions underlying these provisions need to be taken into consideration. The importance of author choice on the question of identification should not be forgotten.

* BA (Hons), PhD (German) (Melbourne), LLB (Hons), PhD (Law) (Monash); Associate Professor, School of Law, Deakin University. I would like to thank an anonymous referee for very useful suggestions.

Part II of this article gives a summary of the recent cases. Part III considers the legislative mechanisms which are capable of protecting author privacy, and particularly the mechanism of the statutory presumption. Part IV looks at the history of these statutory presumptions, in an effort to determine what they say or imply about the need for author identification. Part V of the article considers some of the recent Australian decisions against this background.

II RECENT CASES: THE STATED NEED FOR IDENTIFICATION

It should be stated at the outset that the recent discussion of author identification has taken place in commercial contexts and in cases where individual authors were not themselves seeking to remain unknown. Either the 'works' for which copyright was claimed were put together by unnamed employees of a corporation, were computer-generated, or were the serial productions of a number of small scale and unidentified contributors. Productions of this kind raise difficult issues for copyright law, which need to be addressed. It is not the purpose of this article, however, to discuss the problems of corporate production, nor to suggest how the courts or the legislature should deal with it.

The purpose here is rather to consider the consistency of the recent discussion with the legislative history and to note the danger of pronouncements made in some decisions spilling over into other copyright judgments and impacting upon the prerogatives of individual authors. The danger is that certain judicial pronouncements may skew the copyright system in ways that were not intended by the judges making them. In particular they could impact on author privacy.

A *The Cases, the Statements*

The question faced by the courts in the cluster of recent cases has been whether the existence of original copyright material could be proved without author identification. And, if it could not be so proved, what form that identification should take. The discussion began with *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd*,¹ which was decided in the plaintiff's favour without any kind of identification of authors, despite the judge at first instance, Finkelstein J, intimating that the question of authorship might need to be more thoroughly addressed in future litigation.²

1 (2001) 181 ALR 134.

2 Ibid 136 [4]:

Must a copyright work have an author? ... Does a telephone directory have an author? ... Is every employee who contributes to the final product a joint author of the directory? These are difficult questions for which there are no ready answers ... the case was contested on the apparent assumption that it was either unnecessary for Telstra to establish that a telephone directory has an author, or that those involved in its preparation are joint authors. I will proceed as if these assumptions are correct. But they may not be.

Eight years later, the High Court considered the case of *IceTV Pty Ltd v Nine Network Australia Pty Ltd*,³ concerning the time and title information contained in a Weekly Schedule produced by a television network (the Nine Network), in which it claimed copyright. In that case, French CJ and Crennan and Kiefel JJ noted the lack of any information about the identity of the material's (presumably joint) authors, but did not consider that their judgment was hampered by it, since the defendant had admitted copyright subsistence.⁴ The other three judges (Gummow, Hayne and Heydon JJ) indicated in dicta that joint authorship could not be proved where a joint author was unknown.⁵

The latter judges, in a much quoted statement, also placed weight on the failure to provide details of author identity:

To proceed without identifying the work in suit and without informing the inquiry by identifying the author and the relevant time of making or first publication, may cause the formulation of the issues presented to the court to go awry.⁶

These members of the bench did not indicate whether the 'identification' of the author that they had in mind should be by name; however this would be the most usual form of identification. The statement has been cited repeatedly in later decisions, several of which emphasised at varying levels of sophistication the need for author identification.

In *Telstra Corporation Ltd v Phone Directories Co Pty Ltd*,⁷ a case which concerned copyright in the yellow and white pages of a telephone directory, the applicant wished to rely on the nature of the work itself rather than the identity of the authors in order to establish copyright subsistence under s 32(2) of the *Copyright Act 1968* (Cth). The argument was that if an 'original work' existed, then authorship must by definition have taken place, and publication of the work would then give rise to copyright protection under s 32(2)(c). The applicant did not accept that it needed to identify authors as individuals in order to establish the copyright.

Gordon J at first instance considered this stance problematic where material had been produced jointly, and indeed it is in the area of joint authorship that the matter becomes particularly difficult. Even if it could be established that, on balance, the 'works' raised an inference of sufficient intellectual effort having been applied to satisfy the originality requirement, it could not be proved that a particular author or particular authors had contributed this effort. Since joint authorship does not arise unless *each* joint author has collaboratively, and as part

3 (2009) 239 CLR 458 (*'IceTV'*).

4 Ibid 470 [21], [23].

5 Ibid 507 [151].

6 Ibid 496 [105].

7 (2010) 264 ALR 617 (*'Phone Directories'*).

of a concerted effort, contributed intellectual effort to a production,⁸ and since it was unknown who the possible joint authors were, the judge considered that joint authorship could not be established. Without joint authorship, the claimed copyright material would, at best, collapse into multiple tiny works by individual authors or, at worst, into nothing that could be called a work at all. Therefore the identification of the authors was stated to be essential to the argument that copyright works in the form of whole phone directories had been produced.

In this instance it seemed that such identification was envisaged as a naming of the authors. Gordon J stated that:

for a work to be sufficiently original for the subsistence of copyright, 'substantial labour' and/or 'substantial expense' is not alone sufficient. More is required. What that more is will, of course, vary from case to case but *must involve 'originality' by an identified author in an identified work.*⁹

Lists of names were in fact prepared by the plaintiff in this case, though their accuracy was rejected by Gordon J.¹⁰

In a further case, *Primary Health Care Ltd v Federal Commissioner of Taxation* — concerning copyright in a series of notes contributed to patient records by a succession of medical practitioners — Stone J stated:

it is not sufficient, and in many cases it is probably not possible, to establish that a work is an original product of independent intellectual effort without identifying the author.¹¹

Her Honour evidently had in mind the naming and description of the various persons who had contributed to the records. Her Honour rejected the idea that the authorship of a work of this kind could be inferred from the nature of the work itself.¹²

Subsequently, in the case of *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* — which concerned either: (1) each individual headline in a newspaper, or (2) each article including its headline, or (3) the compilation of articles, including headlines, in each newspaper edition, or (4) each entire edition — Bennett J commented, drawing again on the High Court decision in *IceTV*, that '[a] requirement for originality is that the work originates

8 See *Copyright Act 1968* (Cth) s 10(1) (definition of 'work of joint authorship'). Section 10(1) was discussed in *IceTV* (2009) 239 CLR 458, 470 [23]:

A 'work of joint authorship', as recognised under the Act, requires that the literary work in question 'has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors'.

9 *Phone Directories* (2010) 264 ALR 617, 624 [20] (emphasis added).

10 *Ibid* 683–4 [333]–[338].

11 (2010) 186 FCR 301, 312 [37] ('*Primary Health Care*').

12 *Ibid* 312 [34] (Stone J), quoting (with apparent approval) Gordon J's statement in *Phone Directories* (2010) 264 ALR 617, 628 [35] that '[t]o suggest that copyright does not require the identification of authors where a work is sufficiently original (howsoever that question of originality is to be answered) puts the cart before the horse'.

from the author as opposed to being copied. It is therefore important to identify the author of the work in which copyright is said to exist'.¹³

Bennett J's comments, and those which preceded them, were expressed sufficiently broadly to seem to be calling for a naming of the author.

While there was no indication in these cases that any of the authors would have desired to remain unnamed, there was a real possibility that the comments would be applied generally as stating standard requirements for the establishment of originality either for subsistence or infringement purposes. This was particularly the case in *Phone Directories*, where Gordon J appeared to be stating, in general terms, a checklist of the requirements for establishing copyright:

You must identify authors, and those authors must direct their contribution ... to the particular form of expression of the work. Start with the work. *Find its authors*. They must have done something, howsoever defined, that can be considered original.¹⁴

To be fair, however, her Honour had previously stated that

it is important to note the distinction between identifying *an* author or authors of the original work and *the identity of the* author or authors of the original work ... If an author or authors (within the meaning of the Copyright Act) cannot be identified *at all*, in contradistinction to a situation where the author's or authors' exact identity cannot be identified, copyright cannot subsist.¹⁵

This statement sits uneasily beside the blunt instruction to '[f]ind its authors'.¹⁶ If it means that the authors need not actually be identified in court, then it may represent a welcome moderation of the more extreme assertions made elsewhere in the cases. Gordon J's stance was subsequently given the latter, more moderate interpretation by two judges of the Full Federal Court on appeal, as will be discussed further in Part V below.

III COUNTER INDICATIONS TO THE CALL FOR IDENTIFICATION

It was mentioned above that our legislation contains provisions which seem to work against the requirement of author identification in various ways. Some legislative provisions create rights that actively protect the author from unwanted disclosures. Other provisions allow the copyright system to operate (in

¹³ (2010) 189 FCR 109, 127 [71] (*Fairfax v Reed*).

¹⁴ *Phone Directories* (2010) 264 ALR 617, 685 [344] (emphasis added). On appeal, Yates J expressly approved this statement, saying that the primary judge had 'correctly identified the relevant chain of inquiry': *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* (2010) 194 FCR 142, 182 [133]. He was, however, not joined in this by the other two judges. See below Part V.

¹⁵ *Phone Directories* (2010) 264 ALR 617, 630 [37] (emphasis in original).

¹⁶ *Ibid* 685 [344].

most circumstances) without author identification. These provisions have been recognised as being available to an author who wishes to maintain privacy, and some have been discussed in the recent Australian decisions. It is instructive to identify them and consider why they have been adopted.

A Moral Rights

The moral rights of the author, present in the Australian copyright legislation since 2000, engage with the question of author identification. The moral right of attribution of authorship does so most obviously. Although this right is primarily concerned with the revelation of author identity, it also taps into much older trends in author-protection — namely the same tolerance of authorial masking that led to the special treatment of anonymous or pseudonymous works in relation to copyright duration.¹⁷ Under the attribution right in Australia the author has the express right to choose the form of designation to be used, and can therefore choose a pseudonym.¹⁸ In some countries the author is expressly permitted to opt for anonymity.¹⁹ Once a pseudonym is chosen, the author's 'true' identity is masked in those contexts that are most likely to reveal that identity. Nobody may reproduce the work, publish it, perform it, adapt it or communicate it to the public under any name other than the pseudonym, even the true name of the author.²⁰

However, any right to pseudonymity (or any tolerance of pseudonymity or anonymity in cases where moral rights do not exist) will protect privacy effectively only if the rest of the Act will accommodate such protection. Privacy is effectively protected only if the commercial interests of the copyright owner, be that person the author or not, can be asserted in court without the author being named or otherwise identified. To this end, further procedural mechanisms are needed.

B Mechanisms that Mitigate the Need for Author Identification

The *Copyright Act 1968* (Cth) both tolerates and facilitates the withholding of information that would identify the author. For example, the masking, erasing or losing of information going to author identity does not prevent the copyright

17 This special treatment dates back at least to 1870 in Germany and to the *Copyright Act 1956*, 4 & 5 Eliz 2, c 74 sch 2 in the UK. In Australia it dates back to the *Copyright Act 1968* (Cth). In the *Berne Convention*, the first fully developed treatment of this kind originated in art 7(4) of the Brussels Act which revised earlier versions of the *Berne Convention: Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 26 June 1948, 331 UNTS 217 (entered into force 1 August 1951) art 7(4). Prior to that, the term of protection of anonymous and pseudonymous works was governed, under art 7(3) of the *Berne Convention*, either by the country where protection was sought or that where the work originated: *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, [1901] ATS 126 (entered into force 5 December 1887).

18 *Copyright Act 1968* (Cth) s 195. The right to choose a form of designation is given on the proviso that the designation chosen is a reasonable one.

19 See, eg, *Copyright Act*, RSC 1985, c C-42, s 14.1(1); *Urheberrechtsgesetz* [Copyright Law] (Germany) §13.

20 *Copyright Act 1968* (Cth) ss 193–4.

owner from exploiting the work and may not greatly impact upon the value of the work as a commodity in economic life. In these circumstances, under s 34 of the *Copyright Act 1968* (Cth), the copyright term will be calculated from the date of publication rather than the death of the author, but the copyright otherwise remains unaffected.

Mechanisms are also in place to allow litigation to be commenced despite lack of authorial designation. Chief among these are the ‘proof of fact’ provisions or statutory presumptions. A provision of this type allows presumptions (as to authorship and nationality, for example) to be made where the author’s name is unknown to the court. Proof of authorship by a specified person does not need to be established in order for an action to be mounted. Such procedural devices are contained in ss 128 and 129 of the Australian Act, but devices of this kind came to the fore long ago, at the point in history when the practice of registration of copyright works was in decline. In the absence of an entry in the register, provisions of this kind were needed to provide a legal platform from which an action for copyright infringement could be launched.²¹

In association with these general proof of fact provisions, express provision has long been made, internationally and sometimes domestically, to establish who can protect the ‘author’s rights’²² in an anonymously or pseudonymously authored work. The current text of the *Berne Convention for the Protection of Literary and Artistic Works* (*Berne Convention*), for example, provides that, in the case of anonymous and pseudonymous works, the publisher will be deemed to represent the author in any action to protect the author’s rights.²³ Thus the possibility of representative actions has been established.

IV HISTORY AND DISCUSSION OF THE STATUTORY PRESUMPTIONS

To understand our current statutory presumptions it is necessary to look at the history and purposes underlying provisions which allow actions related to the work of an unidentified author. Such provisions were intended to facilitate commercial transactions and to protect the interests of a copyright holder. However, the history of the provisions also indicates a concern for the author as a person, and this should be remembered when the descendants of these provisions are construed by the courts.

21 See below n 46.

22 And this term is compendious, embracing both the economic and the moral rights.

23 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, [1901] ATS 126 (entered into force 5 December 1887), as last revised by the *Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works*, signed 24 July 1971, 1161 UNTS 30 (entered into force 15 December 1972), and further amended by the *Amendments to Articles 22 and 23 of the Paris Act of 14 July 1971 of the Berne Convention for the Protection of Literary and Artistic Works*, signed 28 September 1979, [1984] ATS 40 (entered into force 19 November 1984) art 15.

A Before Berne

One of the first ‘proof of fact’ provisions, and one which influenced the drafting of the *Berne Convention*, was present in the German law of 1870. The German statute provided for representative actions as well as inserting a further device to obviate the need for author identification. The anonymous or pseudonymous author’s rights could be enforced by a third party, and the *publisher was nominated as the author’s successor in title*. Under the statute:

In the case of anonymous and pseudonymous works, the editor and, if no indication of editorship is given, the publisher, is entitled to enforce the author’s rights.

The publisher whose name appears on the work is deemed, in the absence of proof to the contrary, to be the successor in title to the anonymous or pseudonymous author.²⁴

There was a specific reason for this nomination of the publisher as a ‘successor in title’ rather than merely as a representative. The last paragraph was explained at the time by a leading commentator as follows:

Only in the case of anonymous and pseudonymous works must the publisher be regarded as the successor in title to the author in the absence of any information to the contrary. *Otherwise the author would be forced to step out of his anonymity in order to pursue his rights.*²⁵

The deemed transfer of title to the publisher meant that, for legal purposes, only the publisher needed to deal with the courts and would not need to prove the transfer of title from the author. Thus, the author’s anonymity would be preserved if the publisher were to take action to defend the author’s rights and presumably also the publisher’s own rights. While in most cases the publisher would have known full well the identity of the author, the German statute removed any necessity to divulge it.

The price paid by the author who did not want to be identified was a shorter period of protection — 30 years from first publication rather than 30 years from the author’s death.²⁶ In order to avoid the penalty, the identity of the author could subsequently be divulged for the purposes of registration. This could be done

24 *Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken vom 11 Juni 1870* [Law Relating to the Copyright in Literary Works, Visual Images, Musical Compositions and Dramatic Works of 11 June 1870] (Germany) § 28 [author’s trans].

25 Robert Fischer, *Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken vom 11 Juni 1870* [Law Relating to the Copyright in Literary Works, Visual Images, Musical Compositions and Dramatic Works of 11 June 1870] (Griesbach, 1870).

26 *Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken vom 11 Juni 1870* [Law Relating to the Copyright in Literary Works, Visual Images, Musical Compositions and Dramatic Works of 11 June 1870] (Germany) § 11 sentence 3 [author’s trans].

only, however, by the author or by those successors in title who were authorised to do so, not by the copyright owner of his own volition.²⁷

This provision was influential. The idea of the ‘proof of fact’ provision was taken up in the negotiations which led to the drafting of the *Berne Convention* during the 1880s,²⁸ negotiations in which the German delegates were very active. These negotiations throw further light on the assumptions upon which the drafting of the provisions was based.

B The Berne Convention

As indicated by the negotiators, the proof of fact provisions in the *Berne Convention* were a response to the fact that many countries had dispensed with registration systems by this stage.²⁹ It was thought desirable to insert into the *Convention* a clause which would facilitate cross border infringement action by removing from the plaintiff the initial need formally to justify the claim to copyright.

1 Early Drafting

The relevant article of the *Berne Convention* was formulated in 1884 (three years before the finalisation of the first *Convention* text) as follows:

To ensure that all works of literature or of art receive the protection laid down in article 2, and so that the authors of the said works should, unless the contrary is proved, be considered as such and therefore permitted to take action for copyright infringement in the tribunals of the various countries of the Union, it shall be sufficient that their name be indicated on the title page of the work, below the dedication or the preface or at the end of the work.

*For anonymous or pseudonymous works, the publisher whose name is indicated on the work is entitled to protect the author's rights. He is, in the absence of proof to the contrary, deemed to be the assignee of the anonymous or pseudonymous author.*³⁰

27 Ibid § 11 sentence 4: ‘If, within a period of 30 years from first publication, the true name of the author is reported — by the author himself or by his successors in title who are authorised to do so — for the purposes of entry in the Register, the work will receive the longer period of protection provided for in § 8’ [author’s trans].

28 The negotiations took place in Berne in September 1884 and 1885.

29 See *Actes de la conférence internationale pour la protection des droits d’auteur réunie à Berne du 8 au 19 septembre 1884* [Proceedings of the International Conference for the Protection of Authors’ Rights held in Berne from 8 to 19 September 1884] (1884) 36, 56 [author’s trans].

30 Ibid 56 (emphasis added).

The similarities with the 1870 German legislation were obvious. Even the indication of where the name needed to appear on the work was taken partly from that source.³¹

The draft article (art 12 at that time) was discussed the following year. During that discussion the article was described as ‘procedural’ and as not competing with any domestic registration requirements in the work’s country of origin.³² The provision became art 11 of the proposed *Berne Convention* text.³³

At this stage it had been asked by an unnamed delegate whether the second sentence of paragraph 2 — ‘[The publisher] is, in the absence of proof to the contrary, deemed to be the assignee of the anonymous or pseudonymous author’ — should be removed, since it appeared to him otiose.³⁴ However it was explained that the sentence was far from superfluous, as would have been clear to any person familiar with the German statute. It existed, it was explained, so that both the author and the publisher could receive protection, *without the author’s true name needing to be revealed*.³⁵ If the *author’s* rights had been violated the publisher could defend them in court without revealing the identity of the author. This arose from the first sentence of the paragraph. But if the *publisher’s* rights had been violated (and at this stage certain publishers were expressly protected by the *Berne Convention*)³⁶ the danger arose that, in order to make good his own rights, the publisher would have to reveal the name of the author, since it was from the author that the publisher had derived his title. In order for this kind of disclosure not to be necessary, the sentence had been drafted in a way that deemed the publisher to be the assignee of the anonymous or pseudonymous author and hence as asserting his own rights:

If this article is removed, the publisher (*éditeur*) is obliged, in case of legal action, to prove that his right comes to him in a proper way from the author. He can do this by producing his contract with the author or in some other way, *but in any event the name of the author is revealed, which is undesirable (fâcheux)*.³⁷

31 *Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Compositionen und dramatischen Werken vom 11 Juni 1870* [Law Relating to the Copyright in Literary Works, Visual Images, Musical Compositions and Dramatic Works of 11 June 1870] (Germany) s 11: ‘on the title page or under the dedication or under the preface’ [author’s trans].

32 *Actes de la 2me conférence internationale pour la protection des œuvres littéraires et artistiques réunie à Berne du 7 au 18 Septembre 1885* [Proceedings of the 2nd International Conference for the Protection of Literary and Artistic Works held in Berne from 7 to 18 September 1885] (1885) 50 [author’s trans].

33 Ibid 50–1.

34 Ibid 50.

35 *Actes de la conférence internationale pour la protection des droits d’auteur réunie à Berne du 8 au 19 septembre 1884* [Proceedings of the International Conference for the Protection of Authors’ Rights held in Berne from 8 to 19 September 1884] (1884) 78 [author’s trans].

36 In art 3 of the Draft Convention adopted by the 1884 Conference it was stated that the provisions applying to authors applied equally to publishers (*éditeurs*) of works published within the Union but whose authors did not belong to a Union state: *ibid* 78.

37 *Actes de la 2me conférence internationale pour la protection des œuvres littéraires et artistiques réunie à Berne du 7 au 18 Septembre 1885* [Proceedings of the 2nd International Conference for the Protection of Literary and Artistic Works held in Berne from 7 to 18 September 1885] (1885) 50 [author’s trans].

Subsequently, a few alterations were made to the *Convention* text prior to it being signed. The words ‘on the title page of the work, below the dedication or the preface or at the end of the work’ were replaced by the more compendious phrase ‘in the usual manner’ (*en la manière usitée*).³⁸ Otherwise the provision was as planned.

2 *Berlin to Brussels*

The next opportunity to consider the provision came at the Berlin conference in 1910 when the provision became art 15. It was reiterated in Berlin that ‘[i]t is desirable that the author’s rights can be protected *without him being obliged to indicate his true name*’.³⁹

No significant discussion of the provision took place at the following revision conference in Rome in 1928, a conference which, however, moved the *Berne Convention* onto a more unambiguously pro-author footing through the insertion of the inalienable moral rights. It was not until the Brussels conference after the Second World War that the provision was altered at the instigation of the French delegation. This alteration, which was possibly misconceived, removed the last sentence from the formulation — that sentence which had earlier been stated to obviate the need for author identification in the case of a publisher’s action for infringement. (At this stage the *Berne Convention* was no longer expressed to protect publishers’ rights expressly, nor to assimilate the rights of a successor in title to the author’s rights).⁴⁰ In relation to the ‘anonymity’ paragraph the French delegation stated, *inter alia*:

The idea of the representation of the author by the publisher seems to the French government legally more precise than the notion of the assignee of the author which is contained in the present text. ... While maintaining its original position on matters of principle, the French government therefore proposes the following text:

For anonymous works, and for pseudonymous works other than those which were mentioned in the previous paragraph, the publisher whose name is indicated on the work is, in the absence of proof to the contrary, presumed to represent the author. He is in this capacity entitled to protect and assert the rights of the said author. The arrangements contained in the present paragraph cease to be

38 Ibid 76.

39 *Actes de la conférence de l’Union internationale pour la protection des œuvres littéraires et artistiques réunie à Berlin du 14 octobre au 14 novembre 1908* [Proceedings of the International Union for the Protection of Literary and Artistic Works held in Berlin from 14 October to 14 November 1908] (Bureau de l’Union Internationale pour la Protection des Œuvres Littéraires et Artistiques, 1910) 266 (emphasis added) [author’s trans].

40 This was in contrast to arts 3 and 5 of the 1884 text: see above n 35.

applicable when the author has revealed his identity and established the capacity in which he acts.⁴¹

Thus, the author's anonymity would be maintained in a representative action, but no clear guidance was now given in respect of a situation where the publisher or another person might want to protect their own rights. The proposed provision was adopted, effectively without discussion.

It is unclear here whether the delegation members had missed the point of the earlier wording, or whether they considered it unnecessary, given that the *Convention* did not expressly assimilate the rights of a successor in title to the authors' rights. It seems unlikely that this delegation would have intended to undermine the protection of authorial anonymity, since the French nation had always been enthusiastic in its protection of the author as a person.

3 The Present Berne Text

Subsequently, the provision assimilating the assignee's rights to the author's rights was reinstated (except where moral rights were concerned), so that assignees would be taking action in their own name.⁴² Nevertheless, the French wording of the anonymity provision has been retained, leaving unaddressed the legal position of the author where an assignee (or indeed any other copyright owner, such as an employer) needs to establish the origin of his or her own title to the work. Must the author be identified by name or not? The spirit and the history of the *Berne Convention* would generally indicate that this should not be necessary.⁴³

The current text reads:

In the case of anonymous and pseudonymous works, other than those referred to in paragraph (1) above, the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity he shall be entitled to protect and enforce the author's rights. The provisions of this paragraph shall cease to apply when the author reveals his identity and establishes his claim to authorship of the work.⁴⁴

It is notable here that, in line with earlier thinking, the step out of anonymity appears to be entirely the prerogative of the author. No indication is given

41 *Documents de la conférence de Bruxelles 5–26 juin 1948* [Records of the Brussels Conference from 5 to 26 June 1948] (Bureau de l'Union Internationale pour la Protection des Œuvres Littéraires et Artistiques, Berne, 1951) 369–70.

42 *Berne Convention* art 2(6).

43 Delegates at the Stockholm revision conference addressed a cluster of further issues — among them how the case of an anonymously authored *unpublished* work (the delegates had in mind a work of folklore) should be dealt with. As a result the Member States are now obliged by art 15(4) to nominate an authority to represent the author in litigation in Union countries. Such protection cannot be contingent on the identification of the author. Indeed a distinction appears to be drawn in the *Convention* between the 'anonymous' and the 'unknown' author, the former term suggesting a chosen anonymity and the latter a more impenetrable obscurity.

44 *Berne Convention* art 15(3).

that it could be imposed by a court. Likewise the initial choice of anonymity or pseudonymity appears to be conceived of as an author's choice. These are not simply cases of the author being unidentifiable to the world at large through some historical accident. It would be extraordinary if, for example, the publisher mentioned in art 15(3) of the *Berne Convention* did not know the 'true' identity of the author; such knowledge does not bar the maintenance of the anonymity under the *Berne Convention*.

These observations have relevance to the recent judgments.

C Another History: Developments in the United Kingdom

During the 20th century, a form of 'proof of fact' provision was introduced into the English law of 1911 and hence into Australian law through the operation of the *Copyright Act 1912* (Cth). In both countries, decades before either introduced moral rights provisions, arrangements were made to allow litigation to be initiated to protect the rights of the copyright owner (though not necessarily the author) of anonymous and pseudonymous works. These countries were obliged to provide such protection in order to give foreign stakeholders something like the level of protection that they enjoyed under the statutes of their home countries. The provisions facilitated the author's choice of anonymity, but how far the UK and Australian Acts went in the preservation of the author's privacy is open to debate.

1 The Copyright Act 1911

The United Kingdom delegation at the Berne revision conferences was never enthusiastic about the proposals for presumptions of the kind discussed there and generally remained aloof from the discussion.⁴⁵ Nevertheless, in its *Copyright Act 1911* the UK, having dispensed with the requirement of registration,⁴⁶ did provide for presumptions of a kind, and echoes of the *Berne Convention* can be heard in the wording of s 6(3)(b) which states:

if no name is ... printed or indicated [on the work in the usual manner], or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner

⁴⁵ See comment by the British delegate, Mr Bergue in *Actes de la 2me conférence internationale pour la protection des œuvres littéraires et artistiques réunie à Berne du 7 au 18 Septembre 1885* [Proceedings of the 2nd International Conference for the Protection of Literary and Artistic Works held in Berne from 7 to 18 September 1885] 35 [author's trans].

⁴⁶ MacGillivray observes in relation to the presumptions: 'This provision becomes necessary by reason of the abolition of registration and of the *prima facie* proof of copyright which the certificate of registration now affords': E J MacGillivray, *Copyright Act, 1911, Annotated* (Stevens and Sons, 1912) 80 (emphasis in original).

of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.⁴⁷

The focus here was on copyright ownership and the provision was concerned solely with the provisional validation of outward appearances for litigation purposes. The emphasis of the presumptions was markedly different from that of the *Berne Convention*, and the concept of a representative action on behalf of the unnamed author was entirely missing. It would appear that it was impossible for an anonymous author/copyright owner to assert rights while maintaining the mask; only a non-author could do that.

On the other hand, the functioning of the provision did not appear to require the naming of the author by his or her 'real' name. MacGillivray, writing on the provision in 1912 in a leading commentary, noted that the crucial relationship was between the designation on the work and the plaintiff or his assignor:

the author's name may be a *nom de plume* by which he is commonly known *qua* author. It will not matter that, in private life, he is known by his true name. All that will be necessary will be to call evidence to prove the identity of the plaintiff or his assignor, as the case may be, with the name which is indicated on the work.⁴⁸

Of course the litigating publisher or proprietor would almost certainly have known the identity of the author.⁴⁹ This must have been assumed by the legislators given the widespread use of pseudonyms on published works in the 19th century.⁵⁰ Since the provision dealt only with the outward or superficial masking of identity (through the author's true name not being indicated on the work), the author need not be 'unknown' in any more profound sense in order for the presumption to be relied on.

MacGillivray did not suggest that the tribunal should closely examine the relationship between the author and 'proprietor'. On the other hand he did warn against certain types of sharp dealing by the plaintiff:

it would seem that evidence under this section cannot be manufactured for the purpose of the trial, and that the *prima facie* proof afforded by putting in a copy of the work with the author's name indicated thereon would be rebutted by the defendant showing that the name had been put on solely for the purpose of the litigation. The author's name must be indicated in the usual manner, and that would seem to imply that it must have been put on at or about the time the work or the copy thereof in question was made.⁵¹

47 *Copyright Act 1911*, 1 & 2 Geo 5, c 46, s 6(3). See also MacGillivray, above n 46, 80.

48 MacGillivray, above n 46, 81 (emphasis in original).

49 The same point could be made of the equivalent provision in *Berne*, as evidenced by the delegates' references to a contract subsisting between the publisher and the anonymous author. See above n 34.

50 For example the pseudonyms George Sand, Currer, Ellis and Acton Bell, the 'Author of Waverley' and George Eliot.

51 MacGillivray, above n 46, 80–1 (emphasis in original).

The *Berne Convention* drafters, who had initiated the reference to the ‘usual manner’, may not have had in mind its capacity to protect against unconscientious dealings by litigators.⁵² But, although MacGillivray’s comment was based on specific wording in the text, it reminds us that legislation is unlikely to be interpreted in a way that rewards sharp practice — for example an employer’s practice of deliberately removing or suppressing the name of the author or failing to make attribution in circumstances where attribution could well be made — in the expectation that the presumption could therefore be relied on by itself.

At this stage no thought had been given to an anonymous unpublished work nor was any express presumption of originality made. This provision constituted the law in Australia on ‘proof of facts’ until 1969, when the *Copyright Act 1968* (Cth) came into force.

2 The Copyright Act 1956

In 1956, the ‘proof of fact’ provision in the UK was expanded.⁵³ The section — in its express presumption of copyright subsistence⁵⁴ — appeared to have shifted closer to provisional validation of the copyright itself, though this may already have been implicit in 1911. And for the first time the originality of the work was expressed as a matter to which the presumptions applied.⁵⁵

Again, no provision was made for the rights of the unnamed author to be asserted by a representative. Therefore, serious impediments remained to the author’s own enjoyment of rights.

Under the 1956 Act, the presumption of originality and the presumptions concerning the date and time of publication applied where:

- a work was published anonymously or under what was claimed by the plaintiff as a pseudonym, and
- it was ‘not shown that the work [had] ever been published under the true name of the author, or under a name by which he was *commonly known*’, nor shown that it was ‘possible for a *person without previous knowledge of the facts* to ascertain the identity of the author by *reasonable inquiry*’.⁵⁶

The question of who must ‘show’ (hence presumably prove on the balance of probabilities) the relevant facts is left open, but one would assume that it would be the person who did not wish the presumption to apply, hence the defendant. As for the term ‘commonly known’, such a requirement seemed to refer to the general knowledge of the public. Whether the public at large was envisaged, or merely a relevant segment of the public, is unclear.

52 The term seems to have been intended as a conveniently compendious term which circumvented the need to specify all the positions in the printed copy which an authorial designation might normally occupy.

53 *Copyright Act 1956*, 4 & 5 Eliz 2, c 74, s 20.

54 *Ibid* s 20(1).

55 *Ibid* s 20(6).

56 *Ibid* (emphasis added).

The reference to ‘a person without previous knowledge of the facts’ seems to exclude a party to the publication relationship and a person intimate with the author, since they could be supposed to have that previous knowledge. The author’s employer would also fall outside the category if the work had been produced within the employment relationship. An assignee of the author would also, in most cases, be excluded. The fact that the class of persons was narrowed to those without previous knowledge of the facts and therefore beyond the author’s immediate circle meant that the provision had some real scope for operation. An author who did not want to be identified could expect the provision to help maintain his or her privacy.

As for the term ‘reasonable inquiry’, what is considered ‘reasonable’ must change over time, as technologies develop. However, one might assume that the hiring of a private investigator to make inquiries would fall on the unreasonable side of the line.

3 The Copyright, Designs and Patents Act 1988 (UK)

The current law in the UK appears to represent a rethinking of the ‘proof of fact’ provision and does nothing to enhance an author’s privacy. Where the author is unknown, s 104(5) applies:

If the author ... cannot be ascertained by reasonable inquiry, it shall be presumed, in the absence of evidence to the contrary —

- (a) that the work is an original work, and
- (b) that the plaintiff’s allegations as to what was the first publication of the work and as to the country of first publication are correct.⁵⁷

As in the 1956 Act, originality is expressly made the subject of the presumption. But the legislature has worded the subsection so that it applies to a narrower set of circumstances than the 1956 Act. The terms ‘anonymous’ and ‘pseudonymous’, suggestive of an author’s choices, have been dropped in favour of the much narrower concept of unascertainable identity. This would appear to indicate that the author’s prerogative of choosing anonymity or pseudonymity is no longer to be given particular protection under the statute. If that is the case, the provision sits very uncomfortably with the moral rights of the author that were introduced by this very Act.⁵⁸ Under the UK right of attribution, the author has the right to choose the designation under which he or she wishes to be known, that is, to choose a pseudonym.⁵⁹ It would be curious if that choice (which is unlikely to lead to unascertainable identity) were not supported by the statutory presumptions.

The passive construction ‘cannot be ascertained by reasonable inquiry’ is not linked to any particular subject (eg ‘a person without previous knowledge of the facts’) as it was under the 1956 Act. This suggests that the provision applies only

⁵⁷ *Copyright, Designs and Patents Act 1988* (UK) c 48, s 104(5).

⁵⁸ *Ibid* ch IV.

⁵⁹ *Ibid* s 77(8).

when *nobody* using reasonable inquiry can ascertain the author's identity. Would this mean that it could not apply even when only the publisher of the work knew the author's identity? This would set the bar very high indeed. On the other hand, the choice of the word 'inquiry' suggests that some kind of objective or external viewpoint is imagined, a viewpoint perhaps outside the relationships to which the author is party.

If the anonymous or pseudonymous author's identity were not considered unascertainable, the originality of the unattributed work would not be presumed but would have to be proved. Therefore the act of authorship would have to be established, though whether this requires author identification by name is another question. If it did, this would run counter to the continuing spirit of the *Berne Convention* and the age-old respect accorded to the anonymous author.

Again, the development of English law on this issue has something to say about Australian law.

D The Australian Law

In Australia, the law in this area is currently regulated by the *Copyright Act 1968* (Cth), which replaced the 1912 Act. The current Australian Act postdates the 1956 UK Act and predates the 1988 UK Act. Like the UK statutes, the Australian Act does not allow for action to be taken on behalf of the anonymous or pseudonymous author. Author privacy therefore comes at a considerable cost and Australia does not appear to be compliant with any of the Acts of the *Berne Convention* in this respect.

The proof of fact provisions in Australia show similarities with those of the 1956 UK Act. For example, in Australia the originality of the work is expressly made the subject of the presumption.⁶⁰ Further, the Australian proof of fact provisions use the words 'anonymous' and 'pseudonymous',⁶¹ which suggests that the presumptions will apply in cases where the lack of identification is the result of an author's choice. Australian legislators have not adopted the requirement of 'unascertainable identity' which would considerably narrow the scope of the provisions. In Australia, the presumptions apply where:

- (a) a literary, dramatic, musical or artistic work has been published;
- (b) the publication was anonymous or is alleged by the plaintiff to have been pseudonymous; and
- (c) it is not established that the work has ever been published under the true name of the author, or under a name by which he or she was commonly known, or that the identity of the author is generally known or can be ascertained by reasonable inquiry ...⁶²

60 *Copyright Act 1968* (Cth) s 129(1).

61 *Ibid* s 129(2).

62 *Ibid*.

The concept of the ‘commonly known’ name is used (again, the nature of the relevant population segment by which commonality is to be assessed is not specified). The presumption will not be available if the author can be identified through ‘reasonable inquiry’. On their face, the provisions are more generous to the unidentified author than their current UK counterpart.

On the other hand, the reference in the 1956 UK Act to ‘a person without previous knowledge of the facts’⁶³ — as the hypothetical person exercising ‘reasonable inquiry’ into the author’s identity — is omitted. It would appear that Australian legislators did not wish to limit the category of persons who might engage in the ‘reasonable inquiry’. Nevertheless, the concept that a person would be engaged in ‘inquiry’ at all may suggest, as mentioned above, that that person would, by definition, not have an inside or previous knowledge of the facts. The words ‘without previous knowledge’ may merely have been considered otiose.

If one were to take the opposite view, and read the provision as alluding to the knowledge of *any person at all* (though presumably excluding that of the author), the result would be that a living author’s name could practically never be established as unknown. In the case of a deliberately anonymous or pseudonymous author the provision could rarely be relied on.

Once the presumption of originality is raised, the case can proceed until evidence establishes that the work is not original or that copyright does not subsist in it. Issues of authorship or lack thereof will be raised in evidence, as has occurred in the recent Australian cases. After all, a presumption is not proof. Nevertheless, considering that:

- (1) the right to choose pseudonymity is one of the moral rights of the author in Australia;
- (2) this choice of a pseudonym would be meaningless if the mask could not be retained through the litigation process;
- (3) the *Berne Convention* requires its Member States to enable authors’ rights to be asserted in the absence of author identification; and
- (4) the *Berne Convention* requires Member States to provide for representative actions in such a way that identity need not be revealed,

our courts should not endorse the proposition that author identification (at least by name) can necessarily be called for when copyright subsistence is in issue.

1 A Summary

In summary, the safeguards of authorial privacy furnished by the Australian Act are already inferior to the protection envisaged by the drafters of the *Berne Convention* and adopted as a binding obligation by Australia. Although pseudonymity is now expressly provided for and the copyright generated by the anonymous or pseudonymous author is protected for a substantial period of time,

⁶³ *Copyright Act 1956*, 4 & 5 Eliz 2, c 74 s 20(6).

the proof of fact provisions in Australia, and also in the UK, are not consistent with the requirements of the *Berne Convention*.

For one thing, they pertain only to the assertion of copyright (an economic right), while the *Berne Convention* provisions focus on the assertion of authors' rights, including moral rights.

Secondly, the Australian provisions, like their UK counterparts, do not appear to allow the assertion of rights *on behalf of* the anonymous author (and without divulgence of the author's identity) even if that author is *also* a copyright owner. There is simply no mechanism that allows the exercise of rights in this circumstance. Yet this means of protecting the author's privacy is and always has been fundamental to the *Berne* provisions.

Thirdly, there has been a narrowing of the proof of fact provisions in the UK, and perhaps Australia — depending on how our statute is read — which may prevent the provisions assisting in the maintenance of an author's privacy even when the litigant is the copyright owner asserting the owner's own rights. The conditions for the applicability of the presumptions have become increasingly onerous over the years.

It remains to be considered how the proof of fact provisions, together with the issue of author identification as opposed to author privacy, have been treated in recent Australian cases.

V AUSTRALIAN DECISIONS IN THE LIGHT OF THE LEGISLATIVE HISTORY

Beyond the widespread calls for author identification mentioned at the beginning of this article, the applicants in two recent Australian cases sought to rely on the proof of fact provisions to establish copyright in the absence of author identification. Although author privacy was not at issue in either case, the general comments made by the courts about the use of the provisions are capable of broad, if inapposite, application.

A *Telstra v Phone Directories*

In *Phone Directories*,⁶⁴ the applicant adduced several pieces of evidence in an attempt to prove that the works were original authored material, created in the relevant way by its unnamed employees. Apparently as a fallback position, it attempted to rely on ss 128 and 129 (the latter of these directed to anonymous or pseudonymous works) of the *Copyright Act 1968* (Cth) on the basis that these

64 (2010) 264 ALR 617.

works appeared without any designation of authorship.⁶⁵ This attempted reliance on the statutory presumptions did not assist the applicant because, as Gordon J pointed out, the evidence adduced by it rebutted the presumption on which it was seeking to rely.⁶⁶

In interpreting the two sections, however, her Honour made a curious comment that:

s 129 [relating to anonymous and pseudonymous works] itself *only* gives rise to a presumption of originality and the location of first publication, *not to the identity of the author* or authors, or of subsistence of copyright in the work: compare s 128 of the Copyright Act. *For that reason* the provision has no relevance and may be put to one side.⁶⁷

The comment seems to imply that the establishment (albeit provisional) of the work's originality is secondary to the establishment of the author's identity and to the establishment of copyright subsistence. But this is surely the reverse of the truth. The 'identification' of the author must be subsidiary to the main question of whether original expression, hence authorship, has occurred. If authorship and an original work are correlatives, then to presume originality is to presume authorship.⁶⁸

What Gordon J appears to mean, in the passage from which this is taken, is that the presumption can perhaps operate in the absence of an author's name but that it cannot operate in the face of an *already proven* lack of authorship. In this particular case evidence of authorship had been adduced and had been found wanting, so it was reasonable to state that the presumption could not then be relied on. But that was an unusual case. The statement cannot be taken as suggesting that, simply because an author cannot be located or the person's authorship established, the presumption does not apply and is irrelevant.

A further point made by Gordon J in dismissing the relevance of the proof of fact provisions is of particular interest to those concerned with the maintenance of the author's privacy. Her Honour stated that in this case the authors were not to be considered anonymous or pseudonymous, with the result that s 129 would

65 Section 128 provides that if the work is published and a publisher's (but no author's) name appears on the work it will be assumed that copyright subsists in the work and that the publisher is the copyright owner. Section 129 provides that, if a work is anonymous or pseudonymous, it will be presumed to be original and to have been created at a time and place which make it amenable to Australian copyright law.

66 Likewise, when the case went on appeal to the Full Federal Court, Perram J was of the opinion that the presumption in s 128 was not of a kind which would 'compete with actual evidence' in such a way that reliance on it would preclude the adducing of evidence: *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* (2010) 194 FCR 142, 180 [123]–[124]. The evidence adduced by the appellant was taken into account by his Honour as disproving the fact on which the operation of the presumption pivoted.

67 *Phone Directories* (2010) 264 ALR 617, 631–2 [42] (emphasis added).

68 On this question, see David Lindsay, 'Protection of Compilations and Databases after *IceTV*: Authorship, Originality and the Transformation of Australian Copyright Law' (2012) 38(1) *Monash University Law Review* 17, 44 noting that the shift in primary emphasis from originality to authorship occurred as a result of *IceTV*.

not apply.⁶⁹ This was despite the fact that there was no author designation. The judge may have been indicating here that, in the proven absence of authorship, it is idle to talk of anonymity. Or she may have been raising a question already raised by the new formulation of the proof of fact provisions in the UK,⁷⁰ and distinguishing between the type of anonymity that is chosen by the author and the systemic failure to either record or disclose authorship that one finds in large organisations. If it is true that the latter type of failure to disclose authorship does not constitute anonymity, it might be usefully raised to drive home the fact that, if an organisation fails to fulfil its obligation to respect the authors' moral right of attribution, the organisation cannot rely on whatever benefits flow from the statutory presumptions. On the other hand, if the author *chose* to remain unnamed, the statutory presumptions might retain their operation.

B Fairfax v Reed

The case of *Fairfax v Reed*⁷¹ concerned articles published in the Australian Financial Review newspaper and their titles, and raised questions of whether each of the claimed 'works', some of which were unattributed, had been authored in the relevant way. Fairfax Media Publications Pty Ltd, which had been either unable or unwilling to identify the authors of the 'works', attempted to rely on the presumptions relating to anonymous works. However, Bennett J declined to apply the presumptions.⁷² Her Honour's reasons focused on the type of inquiry that needed to be undertaken in order to establish whether the authorship was anonymous, and hence whether the presumption could assist the applicant.⁷³ Such questions had been covered by the equivalent provision, s 20(6), in the 1956 UK Copyright Act.

Fairfax Media Publications Pty Ltd had submitted that 'reasonable inquiry' in s 129 (of the type which might yield relevant information as to the author's identity) had, or would have, failed, thus bringing the presumption into play.⁷⁴ It argued that the concept 'should be construed to mean reasonable inquiry *external to the author or his or her employer*'⁷⁵ — in other words, an inquiry by a 'third party'. This argument was apparently inspired by the 1956 UK Copyright Act. However, Bennett J rejected this contention, due to the absence of any such express limitation in the Australian provision's wording.⁷⁶

69 *Phone Directories* (2010) 264 ALR 617, 631–2 [42].

70 *Copyright, Designs and Patents Act 1988* (UK) c 48, s 104(5).

71 (2010) 189 FCR 109.

72 *Ibid* 129 [79].

73 *Ibid* 129–30 [80].

74 *Ibid* 129 [77].

75 *Ibid* (emphasis added).

76 *Ibid* 129 [79]: 'There are no additional words in s 129(2) that provide that the test becomes whether the identity of the author can be ascertained by reasonable inquiry "external to the author or their employer"'.

Despite this judicial disapproval it is arguable, as noted above, that reasonable ‘inquiry’ must imply inquiry by a person external to the author and in most cases external to the employer. The author or, generally, the employer (the person who has instigated the work) would hardly be engaged in an ‘inquiry’ as to the author’s identity. This is all the more so since the knowledge of other employees of the employer — those who had worked closely with the author — would be attributable to the employer itself on normal principles. There would be no need for ‘inquiry’ within this relationship.

What is more persuasive against the use of the statutory presumptions in *Fairfax v Reed* is that there appears to have been an element of laxity or complacency by the employer/legal team. For reasons that remained unclear, no attempt had been made to compile the information which would have been relevant to the use of the presumptions and to which the authors would presumably not have objected.⁷⁷

More worryingly, Bennett J further noted that s 129(2) ‘cannot be intended to address the situation where the source of the work and the authors are evident to or available to be ascertained by the employer but the employer claiming copyright decides not to identify the precise authors’.⁷⁸ Applied to the facts in issue, the statement is understandable. But, like a number of statements in these judgments, if it is accepted as a generally applicable pronouncement there is a danger that it will undermine the principles on which our copyright law is built. Should an author not wish to be identified by name, and should he or she express this to the employer, there is no principle of law that identification should be forced upon the author and no reason why the statutory presumption should not apply. The presumptions enshrined in the *Berne Convention* were always intended to apply to a situation where the author had requested the copyright owner to respect his or her desire not to be named.

C Later Developments and the Need to Distinguish between Author and Authorship

In summary, there has been much in recent judgments to cause concern to those who value the manner in which copyright legislation can offer privacy protection. Side by side with the consistent and broadly stated assertion that author identification is necessary to the establishment of copyright protection, the courts have also declined — sometimes for reasons that are stated in excessively sweeping terms — to allow the statutory presumptions to be used by the plaintiff/claimant.

Nevertheless, it does appear that some judges have stepped back from demanding author identification as a precondition to finding originality. For example, in obiter dicta, Bennett J in *Fairfax v Reed* gave a more nuanced view of what needed to be established:

77 Ibid: ‘Fairfax has chosen not to identify the authors. The onus does not shift to Reed to identify those authors, failing which Fairfax will be entitled to the benefit of a presumption that its works are original’.

78 Ibid 130 [80].

I am not persuaded that, where evidence establishes a work of joint authorship, the authors are identified as Fairfax employees holding specified job descriptions and the skill and labour involved in those job descriptions are identified, it is fatal to a claim of copyright that each person making contributions to the contended works is not identified.⁷⁹

Apparently some sort of description of the authors by reference to their role in the organisation might have been enough. How precise such a description would need to be is unclear but it does seem that it would not be sufficient merely to allude to the existence of such employees. It is not clear that the degree of identification which her Honour had in mind falls far short of an identification by name.

This moderation of the demands for author identification has been repeated by two judges of the Full Federal Court, deciding the appeal in *Telstra Corporation Ltd v Phone Directories Co Pty Ltd*.⁸⁰ While Gordon J's overall decision was upheld, Keane CJ endorsed the appellant's objection to the proposition that all the authors (if such authors existed) must be identified:

One may accept that identification by name of each and every author is not necessary in order to make out a claim that copyright subsists under s 32(2)(c): what is necessary, however, is that it be shown that the work in question originates from an individual author or authors.⁸¹

In other words it was authorship rather than an author which needed to be identified in order to establish the subsistence of copyright. Perram J took a similar view, indicating that he did not understand the trial judge to have insisted on the naming of authors, but rather on the demonstration that such authors existed.⁸² In any event, his Honour stated:

I would not accept that it is necessary to identify each author ... all that needs to be demonstrated is that such persons exist. Their identification is not legally required by the concept of an original work.⁸³

As for the High Court comment that had set off the wave of calls for author identification, Perram J regarded it as 'a counsel of wisdom rather than a legal stipulation'.⁸⁴

It is to be hoped that generalised calls for the identification of the author will cease, and emphasis will instead be put on the establishment of *authorship* (albeit by individuals) on the balance of probabilities in order to establish copyright. Likewise the operation of s 128 should not be expressed to depend on the 'identification' of authors and their particular contribution to the work.

79 Ibid 131 [89].

80 (2010) 194 FCR 142.

81 Ibid 162 [57].

82 Ibid 181 [127].

83 Ibid.

84 Ibid.

The High Court has refused to hear an appeal in *Telstra Corporation Ltd v Phone Directories Co Pty Ltd*,⁸⁵ so it appears that it is content to leave the last word with the judges of the Full Federal Court. But one cannot help feeling that a great deal of confusion would have been avoided if the courts had, from the outset, made a distinction between authorship (which, if it exists, can frequently be established on balance without any identification of persons) and the author. ‘Authorship’, like its correlative ‘originality’, is required for copyright subsistence and must be established to a sufficiently high level of probability. But, to a significant extent, our statutory scheme is designed to function without an identified ‘author’.

The point where the greatest difficulty arose among the recent cases was in *Primary Health Care*,⁸⁶ where it was genuinely unknown who the alleged authors of the alleged joint works (medical records) were, what contribution they had made to the ‘works’ in question and whether they were ‘qualified persons’ at the relevant time. It was quite possible here that no Australian copyright material existed at all due to the material being no more than an aggregation of factual statements by different and unknown persons; the evidence was insufficient for a case to be made on the balance of probabilities. Even had the presumptions been activated, they would not have been able to withstand a challenge. In that case authorship of a copyright work could not be established.

But the fact that identifying an author can solve an evidential problem is not to say that the establishment of author identity must be looked for as a first or automatic step, in the way suggested in some of the judgments discussed in this article. In the situation where it is not even certain that a work exists at all, if the ‘authors’ can be produced, well and good. If they cannot, or do not wish to be identified, the standard of proof will simply not be met unless other witnesses can attest to their existence and input. This is not overly hard on the copyright claimant. Indeed one could expect the copyright claimant — a publisher, perhaps, or an employer — to be able to act as such a witness without the need for author identification. Likewise, the presumption of s 128 should stand until the basis for that presumption is overturned by evidence.

VI CONCLUSION

The protection of authors’ privacy through the copyright regimes has a long history and has been fortified recently with the incorporation of the moral right of attribution in our statutes. If authors are to have an express right to mask their identity with a pseudonym, then the law needs to support that choice in its other provisions and in the interpretation of those provisions. The courts need to be mindful of this aspect of the copyright regime when considering such fundamental matters as the requirements for copyright subsistence. As they frequently remind us, the legislative regime is centred on the author and this requires due attention

85 Transcript of Proceedings, *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* [2011] HCATrans 248 (2 September 2011).

86 (2010) 186 FCR 301.

to be given to author preferences. Despite this, the protection of the author's privacy though copyright legislation in Australia is significantly less robust than is required by the *Berne Convention*. Representative actions on behalf of the deliberately unnamed author appear to be impossible. The 'proof of fact' provisions are, in this area, much less effective than they were intended by the Berne drafters to be. In the UK they are even showing an evolution away from their role of allowing authorial masking; in Australia they tend to be cast aside.

In light of the existence of moral rights and the history of the proof of fact provisions, we must be careful not to allow unjustified slippages to occur in judicial formulations of the requirements for copyright subsistence. It is important that we regularly remind ourselves of the humanism that informed both the introduction of the moral rights to the *Berne Convention* and the solicitude for author privacy that contributed to the form of the Berne proof of fact provisions. In fact, in this digital age when privacy and anonymity are often disregarded and where the desire for them can sometimes seem quaint, we may need to be more vigilant than ever to ensure their continued protection.