

## Article Information

Authors: Tim O’Callaghan, Travis Shueard, Laura Coppola

Service: Corporate & Commercial, Dispute Resolution & Litigation, Intellectual Property & Technology, Projects & Construction

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## Defences to Copyright Infringement - What is a “Service for the Commonwealth or State”?

*Australian News Channel Pty Ltd v Isentia Pty Limited* [2024] FCA 363

In the Federal Court decision of *Australian News Channel Pty Ltd v Isentia Pty Limited*,<sup>[1]</sup> the Court was granted an opportunity to examine the scope of section 183(1) of the *Copyright Act 1968* (Cth) (Act), which has to date received limited consideration.

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### Background

Section 183(1) of the Act provides a party with a defence to copyright infringement if that party is authorised in writing by the Commonwealth or a State to provide services for the Commonwealth or State.<sup>[2]</sup>

Australian News Channel Pty Ltd (**Australian News**) through its Sky News Australia channel, delivers various forms of news content through subscription and free-to-air television channels and online. Isentia Pty Limited (**Isentia**) provided media monitoring services involving searching for and extracting parts of news and other media items to its clients.

Australian News commenced proceedings against Isentia, alleging that Isentia was infringing Australian News’ copyright in its Sky News Australia content.

The issue in dispute was whether Isentia’s supply of media monitoring services to various Commonwealth and State government entities was done specifically for the purposes of the Commonwealth or State, and therefore did not infringe the copyright of Australian News.<sup>[3]</sup> The parties disagreed on the meaning of the phrase: “for the services of the Commonwealth or State”.

### Representative government clients

Isentia selected three representative government clients for the proceedings, each of which provided Isentia and the Court with signed authorities warranting that the entity required Isentia to do acts comprised in the copyright of works for the delivery of its media monitoring for the services of the Commonwealth or State (where relevant).<sup>[4]</sup>

Various samples of Sky News content, monitored and provided by Isentia to the government clients were selected as representative samples for the proceedings.<sup>[5]</sup> Sample 1 was for the ACT government and included a two page article published on the Sky News website on 3 August 2022.<sup>[6]</sup> The parties agreed that *but for* the operation of section 183(1) of the Act, copyright in works as in Sample 1 and similar reports would have been infringed by Isentia.<sup>[7]</sup>

### “For the services of the Commonwealth or State”

Australian News argued that the phrase “for the services of” draws attention to whichever service that government body is said to be providing to its citizenry, and therefore, Isentia providing general media monitoring services to government bodies was not a direct connection to the provision of government services.<sup>[8]</sup> Isentia submitted that acts done by a person authorised by a governmental body for the benefit of the government fall within the scope of section 183(1) of the Act.<sup>[9]</sup>

Isentia contended that the relevant question is whether the acts within copyright are being done for the benefit of the relevant government client in carrying out its functions. In support of this, Isentia argued that media monitoring is central to the performance of many government bodies and functions.<sup>[10]</sup> Without that service being provided, the government body would be required to perform that monitoring themselves, which itself requires its own expertise.<sup>[11]</sup>

In considering whether section 183(1) of the Act affords protection against a finding of copyright infringement against Australian News, Justice Burley reviewed the statutory context of the section of the Act and the Act's legislative history. His Honour held that:

*"... the language of "acts done for the services of the Commonwealth or State" provides no intrinsic connotation limiting the type of acts to those done for outward facing or end-use services provided by the Commonwealth or State."*<sup>[12]</sup>

His Honour disagreed with Australian News' position, and held that an otherwise infringing act is done *for* the services of the Commonwealth or State when the purpose of the act is to benefit the relevant government entity.<sup>[13]</sup> In this case, the benefit was providing media monitoring to government bodies to assist with the operation of the entity. In support of this, Burley J agreed that media monitoring: *"... is important to the performance of the functions of the representative governments clients to keep abreast of what is report in the media."*<sup>[14]</sup>

Australian News submitted that some of the sample Sky News content copied by Isentia in the preparation of its media monitoring reports was not relevant to the activities of the specific government client, and therefore should not be afforded the protection of section 183(1) of the Act. Burley J rejected this submission, and held that section 183(1) of the Act does not require a 'granular'<sup>[15]</sup> examination of each otherwise infringing act; rather, it requires, a holistic interpretation of the wider purpose of the infringing act. On proper construction, section 183(1) had a *"broad and facilitative"* effect, with the purpose enabling the Crown to use copyright in a manner which would otherwise infringe the owner's rights.

His Honour held that on the basis of the evidence, he was satisfied that:

1. Isentia's media monitoring was conducted for the benefit of each of the representative government clients;
2. The instructions supplied by the government clients ensures that Isentia's media monitoring falls within the purpose above; and
3. Isentia's otherwise infringing acts are undertaken for the services of each representative government client.<sup>[16]</sup>

Therefore, the requirements of section 183(1) of the Act were made out, and Burley J dismissed Australian News' application.

Finally, it is also worth observing that Part VII of the Act imposes a requirement on the Crown to compensate copyright owners for use by the Crown of their works, which obviates the need for the Crown to seek permission to use the works in advance of that use.<sup>[17]</sup>

### **Key takeaways**

This case clarified the phrase *"for the services of the Commonwealth or State"* in section 183(1) of the Act, and likely provided comfort to not only Isentia but other media monitoring companies that provide similar services to government entities.

Piper Alderman has a nationally recognised practice in intellectual property enforcement and protection, with experience in all jurisdictions. Please contact Tim O'Callaghan and his team if you require intellectual property advice.

<sup>[1]</sup> [2024] FCA 363.

<sup>[2]</sup> *Copyright Act 1968* (Cth) s183(1).

<sup>[3]</sup> *Australian News Channel Pty Ltd v Isentia Pty Limited* [2024] FCA 363, [5].

<sup>[4]</sup> *Ibid* [15] - [16].

<sup>[5]</sup> *Ibid* [18].

<sup>[6]</sup> *Ibid* [20].

<sup>[7]</sup> *Ibid* [21].

<sup>[8]</sup> *Ibid* [41] - [43].

[\[9\]](#) *Australian News Channel Pty Ltd v Isentia Pty Limited* [2024] FCA 363, [44], *Copyright Act 1968* (Cth) s183(1).

[\[10\]](#) *Australian News Channel Pty Ltd v Isentia Pty Limited* [2024] FCA 363, [48] - [49].

[\[11\]](#) *Ibid* [49].

[\[12\]](#) *Ibid* [76].

[\[13\]](#) *Ibid*.

[\[14\]](#) *Ibid* [105].

[\[15\]](#) *Ibid* [77], [111].

[\[16\]](#) *Ibid* [111].

[\[17\]](#) *Ibid* [70]; see, for example, *Copyright Act 1968* (Cth) s 183B.