

# Micrographics and the Law of Evidence

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*This article is the text of a paper delivered to a seminar of the Sydney Branch of the Australian Society of Archivists, held in Sydney, on 29 July 1982. It briefly traces the history of the laws of evidence and the changing attitudes of courts as micrographic techniques become more sophisticated and their use more widespread.*

At least as long ago as the early eighteenth century the judges created a rule for use in litigation, the effect of which was that if a party to the litigation wanted to prove the terms of a writing he generally had to do so by producing to the court the original of the writing, assuming it to be in existence. The terms were to be proven in this way, rather than by producing a copy of the writing or by calling a witness to repeat its terms from memory.

Why was such a rule created? The basic reasoning would appear to have been as follows: even slight variations in the wording of writings, particularly writings such as contracts or wills, can make a great deal of difference in the legal rights depending on those writings. A witness seeking to repeat from memory the terms of a writing, even though he is sincere, may well make an honest mistake in doing so, leading to injustice. Likewise a copy of the writing, even though the person copying it was sincere, may suffer from an honest error, leading to injustice. Therefore production to the court of the original of the writing is to be preferred over both of these alternatives as a method of proving its terms.

So far as the witness as an alternative to the original writing is concerned, one can easily understand the fear which led the judges to create the rule preferring the original writing remaining as great as it was 250 years ago. What, however, of the judges' attitude to copies of original writings, particularly copies produced by means other than by hand?

The first opportunity to test the judges' attitude in this regard occurred when in 1780 James Watt, famous to the general public nowadays as the inventor of the steam engine, invented the press-copying machine. It soon became clear, however, that copies of writings produced by letter-press

would fare no better with the judges than copies made by hand. Take for instance the English case of *Nodin v. Murray*, decided in 1812, a case in which the plaintiff was suing the defendant for damages for wrongful detention of the plaintiff's ship. The report of the case reads in part as follows,

In the course of the trial it was proposed to give in evidence, as an original letter, a duplicate taken from the autograph, at one impression, by means of a copying machine — but Lord Ellenborough said, he could only treat this as a copy, though it was likely to be more accurate than one taken by successive imitations....

Thus it appears to have been thought that copies produced by letter-press, even if less risky than those produced by hand, were still insufficiently reliable to be treated as the equivalent of their originals for the purpose of the original writing rule.

The next widely-used advance in methods of copying documents did not occur until after 1905, when the first satisfactory carbon paper was developed. The use of such paper, together with the already invented typewriter, soon rendered press-copying obsolete. Surprisingly, however, the question whether carbon copies of writings should be treated as equivalent to the originals thereof for the purpose of the original writing rule appears not to have been litigated in Australian courts until as recently as 1969, by which time newer copying techniques were doing to carbon paper what it had earlier done to the press-copying machine. In that year a judge of the Victorian Supreme Court, in the case of *Durston v. Mercuri*, took the view that carbon copies should be treated as equivalent to their originals for the purpose of the original writing rule. In doing so, he relied on a well known decision of a court from the American state of Minnesota, handed down in 1907. That decision had emphasised the fact that carbon copies were created simultaneously with their originals, unlike, for instance, letter-press copies, which were created by an act subsequent to the act of creation of their originals. This distinction clearly appealed to the Victorian judge as well, who said in the course of his reasons for judgment, "The same hand using the same pen produced at the same time the writing on both the original and the carbon copy".

One may legitimately wonder why simultaneity of creation of original copy should be thought by these judges to be so important. Surely the real issue should not be whether copy was produced simultaneously with original, but whether copy accurately reproduces original. Unfortunately, however, this notion of simultaneity seems to have beguiled the judges, with important consequences for their attitude to copies produced by modern photographic techniques, copies which are by their nature produced subsequently to the creation of their originals.

When I refer to the attitude of the judges to copies produced by modern

photographic techniques, I mention immediately that I can find no reported judicial decisions in Australia which have dealt with the question of their use in evidence as equivalent to their originals. However, the question did begin to receive attention in America as the use of such techniques became more widespread there and in a well known decision handed down in 1942 the Supreme Court of the state of Illinois refused to treat photographic enlargements of microfilms of original documents as the equivalent of those documents, applying the original writing rule to them. Thus the law in America was that while carbon copies, seemingly because of their time of creation, were admissible in evidence as though originals, photocopies were not, in spite of the fact the latter more perfectly reproduced their originals than did the former. One can imagine that, just as the Victorian Supreme Court adopted the American approach to carbon copies, Australian courts would have adopted this American approach to photocopies had the issue been litigated before them at any time before the mid-1960's.

I mention the mid-1960's as a cut-off point, because it was then that most Australian legislatures, imitating what most of their American counterparts had done earlier, began to intervene in this area and enact legislation to overcome the judges' assumed reluctance to treat photocopies as the equivalent of their originals. The relevant New South Wales legislation is the Evidence (Reproductions) Act, enacted in 1967.

The impact on business of this New South Wales legislation so far as microfilm in particular is concerned is best appreciated if one understands what would have been the position of a business which, before the legislation's introduction, had microfilmed its records, which records would obviously have included many original writings.

Let us imagine that the business had microfilmed some original writing in its possession. Let us further imagine that this writing was one the original of which was required by some state or federal law such as a tax law kept for some period of time which had not yet expired, so that the business had in its possession both a microfilm of the writing and the original writing itself. If the business had wished to prove the terms of the writing in some litigation to which it was a party, it would have had to produce the original of the writing rather than a print of its microfilm, even though it would have been much cheaper for it to produce the latter than the former. This obligation would have flowed from the application of the original writing rule to photocopies, including microfilm, as already explained.

Let us next imagine that the business had microfilmed some original writing in respect of which it was under no legal obligation of retention. Could the business have destroyed the original writing after microfilming it and then, if it later became necessary for the business to prove the terms

of the writing in litigation to which it was a party, do so by producing a print of the microfilm?

Theoretically the answer to this question would have been in the affirmative, because the original writing rule only applies while the original writing remains in existence. Practically, however, the answer to the question would have been in the negative, because the business would have known at the time of microfilming the original writing that before a court would allow it to use a print of the microfilm in evidence the court would require it to prove certain matters. Proof of those matters would probably be so onerous for the business at the time of the litigation that it would not have bothered to destroy the original writing in the first place, but would have retained it and the microfilm and would then, because of the original writing rule, be obliged to produce the former should the necessity of proving its terms later arise.

To enumerate those matters which the court would have required the business to prove and the way in which the business would have been required to prove them, it would have required the business to call as a witness alternatively a person who had compared the original writing with the microfilm after the latter was produced and could swear that the latter was a true copy of the former or a person who could swear that the photographic equipment was working properly at the time the microfilm was made. Next, it would have required the business to prove that it had a system by which original writings not required by law to be kept were microfilmed and then destroyed as a matter of course. This evidence would have been necessary to repel any inference which might otherwise have been drawn that the business had destroyed the original writing in bad faith. Next it would have required the business to call as a witness the person who destroyed the original writing after it was microfilmed or, failing him, a person who could swear that he had conducted an appropriate search of the records of the business and could not find the original writing among them. Finally, it would have required the business to call as a witness alternatively a person who had compared the microfilm with the print of the microfilm after the latter was produced and could swear that the latter was a true copy of the former or a person who could swear that the photographic equipment was working properly at the time the print was made.

Could anyone fault a business, if knowing at the time of microfilming an original writing that if it destroyed the writing it would have to prove all these things in the manner described in order to use a print of the microfilm in evidence, the business decided it had better keep both the microfilm and the original writing?

Let us now turn to the New South Wales legislation of 1967 to see how it

has changed the position of our hypothetical business which has microfilmed its records.

The first thing to mention about the legislation is its notion of the "approved machine". Section 5(1) of the Act provides,

For the purposes of this Act the Minister may, by notification published in the Gazette, approve for photographing documents in the ordinary course of business any make, model or type of machine and any such machine, so approved, is in this Part referred to as an "approved machine".

A considerable number of machines have been approved under this section. Let us assume that our hypothetical business has wisely used one of them to do its microfilming.

Section 5(3) of the Act provides that where an original document made or used in the course of a business has been microfilmed, a print of the microfilm is generally admissible in evidence as though it were the original document, provided the party seeking to use it proves that the microfilm was made in good faith by using an approved machine and that the print is a true copy of the microfilm. When these matters are proven the print is admissible whether or not the original document is still in existence.

Proof that the microfilm was made in good faith by using an approved machine can be given by tendering an affidavit to that effect from the person who microfilmed the original document, such affidavit having been made at or about the time the microfilm was made. The person does not have to be called as a witness. Proof that a print is a true copy of the microfilm can be given by tendering an affidavit to that effect from the person who made the print, such affidavit having been made at or about the time the print was made. Again the person does not have to be called as a witness. Thus, provided our hypothetical business has been careful to use an approved machine and obtain the necessary affidavit by the microfilmer at the time of microfilming, it can later use a print of the microfilm in evidence in place of the original document, should it become necessary to prove the document's terms, by producing to the court the print along with the necessary affidavits. It would be possible to qualify the print for use in this fashion even if the original document remains in existence.

Does the Act allow a business which has microfilmed an original document on an approved machine and obtained the necessary affidavit from the microfilmer to destroy the document afterwards? The answer to this question is that it does, but only in certain cases.

It may be that the document is one which is required by federal law to be retained for a specified period which has not yet expired. In that case the original document will have to be retained until the expiration of that period, the state legislature having no power to override federal law in this regard.

It may be that the document is one which is required by New South Wales law to be retained for a specified period which has not yet expired. In that case s. 9 of the Act provides in effect that where any other New South Wales law requires documents to be retained for a longer period than three years, that requirement is not breached by a business if it destroys the document after three years, having first microfilmed it on an approved machine, provided it retains the microfilm instead of the document for the balance of the time specified in the other law. Of course, if the specified period is three years or less, this provision is irrelevant and the original document will have to be retained until the expiration of that period.

Finally, it may be that the document is one in respect of which there is no legal obligation of retention. In that case the document may be destroyed after microfilming, but a print of the microfilm of a document will generally be admissible only if the document is at least twelve months old at the time of its destruction. The practical effect of this provision of the Act is that if an original document is microfilmed at any time before it is twelve months old, it must be retained until it is twelve months old before it can be destroyed safely.

There are two other provisions of the Evidence (Reproductions) Act to which I should draw attention.

First, the Act does provide for the use in evidence of prints of microfilms of original documents even where the documents have been microfilmed on an unapproved machine, but only if the document has been destroyed after microfilming and was at least a year old at the time of its destruction. In such case three affidavits are required before the print can be used, rather than the two required when the microfilming has been done on an approved machine. The third affidavit required is one from the person who destroyed the original document.

Secondly, the Act allows the microfilmer to make just one affidavit in respect of his microfilming of a series of documents instead of making a separate affidavit in respect of each document, but this concession is only available in respect of microfilming done on an approved machine.

Having given the crudest outline of the provisions of the Evidence (Reproductions) Act I now address myself for a short time to the question of the legislation's effectiveness in overcoming the problems which existed before its enactment so far as microfilm was concerned. This question is one which was recently discussed in a working paper of the Australian Law Reform Commission entitled "Secondary Evidence of Documents". In that paper many criticisms were made of the legislation. Among them the two most important seem to me to be these:

1. The microfilmer's affidavit must, if it is to be used to prove that the

microfilm was made in good faith, depose to the condition of the document microfilmed at the time of its microfilming with respect to its legibility and the extent of any damage to it. The Commission comments;

With present microfilming equipment and procedures designed to copy large numbers of documents at extremely high speed, it is quite impractical for the operator to examine each document immediately before it is photographed. In fact, to have to do so would defeat the object of having the equipment. People in the microfilming industry have advised that about 90% of users fail to meet the requirements of the legislation.

2. The provision that a print of a microfilm cannot be used in evidence unless the document it reproduces was in existence for at least twelve months limits the benefit of the legislation. The Commission comments,

The period for which it is sought to require documents to be kept may . . . be thought too long. In most commercial transactions one would expect any problems or disputes to have emerged within a period of, say, six months.

By way of conclusion, I venture this opinion: legislation of the type of the Evidence (Reproductions) Act was necessary to overcome judicial inflexibility towards copies of original writings produced by modern photographic techniques. There must, however, be serious doubt as to whether the legislation does not exhibit the same sort of inflexibility that led to its enactment. It would appear that further legislation in this area is required.