

Copyright in statutes, regulations and judicial decisions in common law jurisdictions: Public ownership or commercial enterprise?

Abstract

This paper examines the underlying policy considerations regarding the ownership of copyright in statutes, regulations, and also law reports. It compares and contrasts the positions in New Zealand, Australia, Canada, the United Kingdom, and the United States of America. It looks particularly at the implications of electronic publication, and the role of private publishers. In essence, it asks whether the strict legal principle, that the Crown (or in the American system, the State) owns the copyright in statutes and judicial decisions, is less important than the principle of encouraging public access to the law, or whether these two principles are really incompatible at all.

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Introduction

Before the 1980s the ownership and publication of legislation and regulations in New Zealand was governed by common law rules, and by the Regulations Act 1936. Briefly, the Crown owned copyright in legislation and regulations, and both of these were printed and published by the Government Printing Office. This original legislation, and official reprints, was presumed to correctly set out the law as at the date of printing. They could therefore be relied on by judges, lawyers, and other users of legislation as being authoritative statements of the law.¹ But legislation, as well as regulations, like ordinary literary works, was subject to the laws of copyright.² In the 1990s the Government Printing Office was privatised, raising questions of precisely who owned the copyright in legislation. This issue has been complicated by the advent of the internet and the development of electronic legal resources in general. However, the question of ownership of the law is not new, nor is it limited to New Zealand. Across the common law world the advent of modern electronic publishing has caused policymakers to re-examine the relationship between the ownership and dissemination of laws.

This paper will examine the question ownership of copyright in statutes, regulations, and also law reports in New Zealand. It will compare and contrast the positions in New Zealand, Australia, Canada, the United Kingdom, and the United

¹Evidence Act 1908, s 29A.

²Copyright Act 1962.

States of America, and the European Union. It will look particularly at the implications of electronic publication, and the role of private publishers. In essence, it will ask whether the apparently strict legal principle, that the Crown (or in the American system, the State) owns the copyright in statutes and judicial decisions, is less important than the principle of encouraging public access to the law. It also involves consideration of the tension between public ownership and commercial enterprise.

It will begin with a review of general principles applicable to the ownership of law. It will then examine how these principles are applied with respect to statute law and secondary legislation in the countries which form the subject of this paper. The ownership of judgements is then considered, insofar as the principles and practise differ from statute law. Finally, a conclusion is drawn from this comparative study.

General principles

The publication of the laws has often been to a large extent in private hands. From the earliest times, private publishers were often the sole source of the texts of judicial decisions.³ The earliest reports were from private persons sat in the court room and wrote down the judge's oral reasons as accurately as they could, but the result could not be verbatim. The private reporter claimed copyright in the resulting original work. Over time, private publishers received copies of the decisions from the court, so that the only work required of the publisher was to decide which judgments to publish, to choose an order for printing the decisions, and to add summaries (headnotes⁴) to the decisions. The publishers might correct some typographical errors, add extra citations to court decisions cited by the judges, and of course, add page numbers for their own reports.⁵ In 1834 the United States of America Supreme Court ruled in *Wheaton v*

³However, the Yearbooks were published from the 1280s (clearly officially from about 1550); See EW Ives, "The Purpose and Making of the later Year Books" (1972) 89 LQR 64-86. The private report series were often compiled by men who later came to prominence as judges, such as Sir Edward Coke.

⁴However, even the meaning of headnote was not as clear as it might be, as was observed by the Federal Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada*, Federal Court of Canada, Linden JA, Rothstein JA, Sharlow JA, (2002 FCA 187), 14 May 2002:

It is difficult for me to ascertain precisely what the Publishers mean when they use the term "headnote". At times, they use the term to connote only a summary of the facts, reasons and conclusions from a case. Generally, however, the Publishers indicate that a headnote also includes "catchlines" and a "statement of case". The latter use suggests that a headnote is everything in a reported judicial decision other than the edited judicial reasons, such as the summary, catchlines, statement of case, indexing title and other information about the reasons for judgment.

— Per Linden JA, para 11 (available at <<http://decisions.fct-cf.gc.ca/fct/2002/2002fca187.html>> at 14 February 2006).

⁵Strictly, an editorial rather than an authorial function; cf. *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 (CA).

Peters, 33 US 591 (1834) that “no reporter ... can have any copyright in the written opinions delivered by this court” since they were not “authors”. Nonetheless, because private publishing of court decisions created private profits, many different report series were created, some focusing on specific jurisdictions, some focusing on specific topics.

In the United States of America private publishers essentially monopolized the publication of court decisions, in part because courts felt that the private publishers were already providing adequate access to the law and in part because publishing costs money and required a certain amount of marketing, which the courts might be unwilling to undertake. The New Zealand Council of Law Reporting is responsible for publishing the official New Zealand Law Reports. This body is established under the New Zealand Council of Law Reporting Act 1938.⁶ Publication is by a commercial firm by arrangement with the Council. In the United Kingdom the authorised reports of decided cases commencing from 1866 are published by the direction of the Incorporated Council of Law Reporting for England and Wales.⁷

Recent court decisions in the United States of America and elsewhere have held that copyright does not attach to a party that compiles information or documents written from another source.⁸ Thus, other than the headnotes, private publishers probably do not have copyright in the court decisions they are publishing. They might claim copyright in the selection of court decisions, so long as there is an adequate degree of originality, skill, or judgment involved in choosing the decisions.⁹ Simply

⁶s 12 outlines the functions of the Council.

⁷Although the Incorporated Council of Law Reporting for England and Wales is a registered charity rather than an official organ of the courts or government, its status is clear:

Citation of judgments in court

3.1 For the avoidance of doubt, it should be emphasised that both the High Court and the Court of Appeal require that where a case has been reported in the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales it must be cited from that source. Other series of reports may only be used where a case is not reported in the Law Reports.

– *Practice Direction (Judgments: Form and Citation) (Supreme Court)* [2001] 1 WLR 194 per Lord Woolf CJ.

⁸*Bender v West* 158 F 3d 674 (2nd Cir) (1998).

⁹In the view of the Federal Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada*, Federal Court of Canada, Linden JA, Rothstein JA, Sharlow JA, (2002 FCA 187), 14 May 2002, the Trial Judge misinterpreted that Court’s decision in *Tele-Direct (Publications) Inc v American Business Information Inc* [1998] 2 FC 22 (“*Tele-Direct*”), and other jurisprudence as shifting the standard of originality away from the traditional Anglo-Canadian approach. Neither Article 2 of the *Berne Convention for the Protection of Literary and Artistic Works*, Paris Revision, 24 July 1971, 161 UNTS 18338 (the “*Berne Convention*”), nor Article 1705 of the *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 (“*NAFTA*”), require a more onerous standard for copyright protection than already

publishing all decisions from the Court of Appeal will not suffice.¹⁰ Nonetheless, there is the possibility that private publishers might be able to use copyright claims to limit the availability of court decisions.

It is therefore also important to ascertain who owns the copyright in the laws, whether statutory or judicial. We shall look at how this has been approached in several jurisdictions.

Ownership of statute law and subordinate legislation

In the following section we will compare and contrast the approach to the ownership of statute law and subordinate legislation in a range of common law jurisdictions.

New Zealand

In New Zealand the Parliamentary Counsel Office is responsible, under the Acts and Regulations Publication Act 1989, for arranging for the printing and publication of copies of Acts and regulations, copies of reprints of Acts and reprints of regulations, and reprints of Imperial enactments that have effect as part of the laws of New Zealand.¹¹ Under the same Act, the Parliamentary Counsel Office must make

contained in the Copyright Act. In addition, there are significant differences between Anglo-Canadian copyright law and the American standard of originality that was applied in *Bender v West* 158 F 3d 674 (2nd Cir) (1998); para 27 per Linden JA.

As Chief Justice McLachlin (as she later became) stated in *Bishop v Stevens*, [1990] 2 SCR 467 at 477, the task is “first and foremost ... a matter of statutory interpretation”. The *Act* contains no express requirement of creative spark or imagination; the only prerequisite to protection (relevant to this discussion) is that a work be original. In fact, the Copyright Act, which has been the sole source of copyright protection in Canada since its inception in 1921 (see JS McKeown, *Fox, Canadian Law of Copyright and Industrial Designs* (3rd ed Carswell, Scarborough, 2000) 34-56), contains no mention whatsoever of any requirement other than, or in addition to originality. *CCH Canadian Ltd v Law Society of Upper Canada*, Federal Court of Canada, Linden JA, Rothstein JA, Sharlow JA, (2002 FCA 187), 14 May 2002, para 27 per Linden JA.

¹⁰*Tele-Direct (Publications) Inc v American Business Information Inc* (FCA) 1997-10-27. This decision is consistent with *Feist Publications v Rural Telephone Service Co*, 499 US 340, 111 S Ct 1282 (1991).

¹¹ss 4, 6 (permissive for those made before the commencement of the Act); Geoff Lawn, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office, Wellington, “Access to Legislation” (Legislative Council Chamber, Parliament House, 17 August 1999) “What Makes Parliament Tick?” para 5 Seminar paper <<http://www.ParliamentaryCounselOffice.parliament.govt.nz/CorporateFile/access.html>> at 22 August 2002.

available for purchase by members of the public, at a reasonable price,¹² copies of Acts and regulations.¹³

This does not necessarily mean that the copyright in Acts and regulations belonged to the Crown, or that private publishers might not print their own copies of Acts, regulations, and judgments for sale to the public. Copyright in statutes was not inherently different to that of any other literary works. Similarly, while the publication of law reports has been conducted by a number of publishers,¹⁴ the question of who actually owned the copyright in the decisions of the courts was not always clear. These questions became important when whole process of publishing and reprinting legislation was reviewed.

Legislation Direct is the official printer of legislation and parliamentary publications in New Zealand. Prior to privatisation in 1990 Legislation Direct (formerly GP Legislation) was part of the Government Printing Office. In 1990 it was purchased by the Rank Group (which later became the Whitcoulls Group) and was awarded the Parliamentary printing and distribution contract. In 1994 the contract was tendered out and again Legislation Direct secured it. In 1996 Legislation Direct (along with the rest of the Whitcoulls Group) was purchased by the Blue Star Group and is now a division of one of New Zealand's largest commercial printing groups.¹⁵

As well as printing and distributing legislation and parliamentary information, Legislation Direct acts as the distributor for a number of international publishers. These include the UN, OECD, WHO, FAO, HMSO, AGPS and UNESCO.¹⁶

The arrangement whereby one agency (whether private or government) controlled the publication and distribution of legislation was not without its difficulties. Geoff Lawn, Deputy Chief Parliamentary Counsel, speaking to a seminar on the Parliamentary process several years ago, commented that the then current compilation (or reprinting) process was not working, for a number of reasons. These he identified as follows: it did not take advantage of modern technology, and as a result was too slow and inefficient; it did not satisfy the need for timely access to up-to-date legislation; it was difficult to link subordinate legislation to its primary legislation; and it did not make the law available in an easily accessible form.¹⁷

¹²Though what is a "reasonable price" is uncertain. If this includes the real cost of making legislation available it could be too high.

¹³s 10.

¹⁴The New Zealand Law Reports are the official report series for case law, starting 1881. This has been available electronically since the end of 1997, published by Butterworths New Zealand Limited, now LexisNexis.

¹⁵<<http://www.gplegislation.co.nz/about.html>> at 22 August 2002.

¹⁶<<http://www.gplegislation.co.nz/about.html>> at 22 August 2002.

¹⁷Geoff Lawn, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office, Wellington, "Access to Legislation" (Legislative Council Chamber, Parliament House, 17 August 1999) "What Makes Parliament Tick?" para 9 Seminar paper <<http://www.ParliamentaryOffice.parliament.govt.nz/CorporateFile/access.html>> at 22 August 2002.

Other jurisdictions have embraced the new technology, and many now provide free public access to legislation in electronic form over the Internet. New Zealand was slow to follow suit. The private sector had moved to fill the gap, but generally on the basis of user pays,¹⁸ and the cost was not inconsiderable for full access. One or other of the two commercially available databases of New Zealand legislation is used by many law firms, by Government departments, and by the Judiciary. The Parliamentary Counsel Office itself subscribed to one.¹⁹ The Parliamentary Counsel Office has since 2002 run an interim site providing access to statutes and regulations.²⁰

In its review during the 1990s, the Parliamentary Counsel Office went back to first principles. Everyone is presumed to know the law, and ignorance of the law is no excuse. But to the extent that the law is contained in legislation, if one is to know what the law is, then it is necessary to have access to legislation in an up-to-date and authoritative form.²¹ This basic principle is echoed in the statement of Wild CJ in *Victoria University of Wellington Students' Association v Government Printer*:

I think it can be accepted that the Crown is broadly responsible for making the text of enactments of the Legislature available for public information. People must be told what Parliament is doing and must be able to read the letter of the law.²²

¹⁸LINX the Legal Information Service (<<http://www.knowledge-basket.co.nz/linx/welcome.html>> at 14 February 2006) and its close relation Briefcase (<<http://www.knowledge-basket.co.nz/briefcase/welcome.html>> at 14 February 2006) are available to subscribers, through the Knowledge Basket; Status Publishing makes its value-added materials available on the Internet (<<http://www.status.co.nz/public.htm>> at 13 January 2003); Brooker's, have made Court of Appeal decisions available on the Internet for free but these have little value added (<<http://www.brookers.co.nz/legal/judgments/default.htm>> at 20 September 2002); David Harvey, "A Judicial Perspective on Public Access to Case Law on the Internet", Conference Paper, 1999 (3) The Journal of Information, Law and Technology (JILT). <<http://elj.warwick.ac.uk/jilt/99-3/harvey1.html>> at 20 September 2002.

¹⁹Geoff Lawn, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office, Wellington, "Access to Legislation" (Legislative Council Chamber, Parliament House, 17 August 1999) "What Makes Parliament Tick?" para 11 Seminar paper <<http://www.ParliamentaryCounselOffice.parliament.govt.nz/CorporateFile/access.html>> at 22 August 2002.

²⁰"Public Access to Legislation Project" <<http://www.legislation.govt.nz>> at 14 February 2006. This is maintained by Brookers for the Parliamentary Counsel Office.

²¹Geoff Lawn, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office, Wellington, "Access to Legislation" (Legislative Council Chamber, Parliament House, 17 August 1999) "What Makes Parliament Tick?" para 12 Seminar paper <<http://www.ParliamentaryCounselOffice.parliament.govt.nz/CorporateFile/access.html>> at 22 August 2002.

²²[1973] 2 NZLR 21, 23

The Parliamentary Counsel Office issued a public discussion paper²³ on this subject in September 1998. Perhaps unsurprisingly, 95% of submissions said that the Government should continue to make available an official version of legislation. The majority also supported electronic publication, including that over the Internet.²⁴

The Parliamentary Counsel Office then engaged PricewaterhouseCoopers (PWC) to assist in formulating recommendations to the Government as to the way ahead. The basic rationale for involving PWC is the complex situation in which New Zealand finds itself with respect to public access to legislation.²⁵

New Zealand may have been behind other countries in providing public access to legislation, but one advantage of this is that New Zealand has gained from the experience (and perhaps mistakes) of other countries in developing a system that meets the needs of New Zealand.²⁶

As a general rule any ‘work’ which is not itself a copy attracts a copyright.²⁷ It covers literary, artistic, and musical works, films, video productions, photographs, and designs of all types.²⁸ The aim of the law in this area is to protect the honest efforts of a person who produces an original work, regardless of their intention in doing so.²⁹

The Copyright Act 1994 covers literary and artistic works, dramatic and musical works, sound recordings, cinematographic films (including their soundtracks),

²³*Public Access to Legislation: A Discussion Paper for Public Comment*, Parliamentary Counsel Office, Wellington, September 1998 <[http://www.Parliamentary Counsel Office.parliament.govt.nz/papers](http://www.ParliamentaryCounselOffice.parliament.govt.nz/papers)> at 22 August 2002.

²⁴Geoff Lawn, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office, Wellington, “Access to Legislation” (Legislative Council Chamber, Parliament House, 17 August 1999) “What Makes Parliament Tick?” para 15 Seminar paper <[http://www.Parliamentary Counsel Office.parliament.govt.nz/CorporateFile/access.html](http://www.ParliamentaryCounselOffice.parliament.govt.nz/CorporateFile/access.html)> at 22 August 2002.

²⁵Geoff Lawn, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office, Wellington, “Access to Legislation” (Legislative Council Chamber, Parliament House, 17 August 1999) “What Makes Parliament Tick?” para 16 Seminar paper <[http://www.Parliamentary Counsel Office.parliament.govt.nz/CorporateFile/access.html](http://www.ParliamentaryCounselOffice.parliament.govt.nz/CorporateFile/access.html)> at 22 August 2002.

²⁶Geoff Lawn, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office, Wellington, “Access to Legislation” (Legislative Council Chamber, Parliament House, 17 August 1999) “What Makes Parliament Tick?” para 20 Seminar paper <[http://www.Parliamentary Counsel Office.parliament.govt.nz/CorporateFile/access.html](http://www.ParliamentaryCounselOffice.parliament.govt.nz/CorporateFile/access.html)> at 22 August 2002.

²⁷*University of London Press v University Tutorial Press* [1916] 2 Ch 601, 608-609 (Petersen J); *Macmillan & Co v Cooper* (1923) 40 TLR 186, 190 (Lord Atkinson); *Ladbroke Ltd v William Hill Ltd* [1964] 1 WLR 273, 289 (Lord Devlin), 292 (Lord Pearce).

²⁸e.g. dress templates: *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* (Unreported, High Court, Auckland, Hillier J, 9 December 1988, CL 15/87).

²⁹The question of originality is a question of fact and degree in each case: *International Credit Control Ltd v Axelsen* [1974] 1 NZLR 695, 699 (Mahon J).

television broadcasts and sound broadcasts. ‘Literary work’ is broadly interpreted e.g. an original computer software programme even though in source code (algebraic symbols and technical keywords).³⁰

Section 14 of the Copyright Act 1994 provides that unpublished works attract copyright from the moment they are written provided the author is a New Zealand citizen or was living in New Zealand at the time the work was created. It goes on to provide that published³¹ works enjoy New Zealand copyright if they were first published in New Zealand or if the creator was living in New Zealand at the time of first publication or immediately before his or her death whichever occurred first. Reciprocity of protection exists with most overseas countries,³² although the levels and quality of protection in overseas countries varies.

Section 21 of the Copyright Act 1994 sets out that subject to three stated exceptions, the author of the work is the owner, holder of the copyright.³³ The exceptions cover persons who produce works in the course of employment (e.g. for a newspaper) in which case the employer ‘owns’ the copyright for publication in the employment context only, commission work, the copyright passing to the person commissioning the work and a person employed to make works or designs for another, the latter becoming the copyright owner.³⁴

The Crown is the first owner of any copyright subsisting in any work created by a person who is employed or engaged by the Crown, under a contract of service, apprenticeship, or a contract for services.³⁵ This covers, for example, work created by a Minister of the Crown, the Governor-General, and the Queen.³⁶

At common law, and under the Copyright Acts until recently, the Crown acquired title by a kind of prerogative copyright in certain books or publications such as Acts of Parliament, Proclamations, Orders in Council, the Book of Common Prayer, and the Authorised Version of the *Bible*.³⁷

However, there has been a deliberate divestment by the Crown of its copyright in law – principally in light of the policy considerations which hold that law should be

³⁰See *International Business Machines Corp v Computer Imports Ltd* (1989) 2 NZBLC 103, 679.

³¹Armorial bearings are conferred by Letters Patent, which are made ‘patent’ or published for the world at large. They are addressed: ‘to all and singular to whom these Presents shall come.’ They are thus a published work.

³²Copyright Act 1994, s 233.

³³s 21.

³⁴s 5, definition of “author”.

³⁵Copyright Act 1994, s 26(1)(b).

³⁶s 2(1), definition of “Crown”.

³⁷*Oxford and Cambridge Universities v Eyre & Spottiswoode Ltd* [1964] Ch 736 (Plowman J declined to decide the extent of the Crown prerogative over the publication of Bibles) and *Attorney-General for New South Wales v Butterworth & Co (Australia) Ltd* (1937) 38 SR 195 (the Crown prerogative to control the publication of statutes was contested). See also *Hansen v Humes-Maclon Plastics Ltd* (1984) 1 NZIPR 557 (no Crown copyright in drawings filed in the Patent Office).

freely available. However, s 27(1) of the Copyright Act 1994 contains a list of works in which there may be no copyright.³⁸ This section, which came into effect 1 April 2001,³⁹ provides that there shall be no copyright in statutes or judgements –

27 (1) No copyright exists in any of the following works, whenever those works were made:

- (a) Any Bill introduced into the House of Representatives:
- (b) Any Act as defined in section 4 of the Acts Interpretation Act 1924:
- (c) Any regulations:
- (d) Any bylaw as defined in section 2 of the Bylaws Act 1910:
- (e) The New Zealand Parliamentary Debates:
- (f) Reports of select committees laid before the House of Representatives:
- (g) Judgments of any court or tribunal:
- (h) Reports of Royal commissions, commissions of inquiry, ministerial inquiries, or statutory inquiries.

There is, in New Zealand, under s 27 of the Copyright Act 1994, no copyright in regulations.⁴⁰

The ‘user pays’ or ‘fee based’ mentality applies to legal research resources available on the Internet in New Zealand.⁴¹ Despite this, the Government has not been necessarily averse to providing free internet access to legislation.

The Attorney-General, the Rt Hon D.A.M. Graham, in a Press Release of 14 September 1998, announced a discussion paper distributed by the Parliamentary Counsel Office which canvassed issues surrounding public access to legislation, called *Public access to legislation*.⁴² The paper was principally about how legislation should be made available to the public, but it also raised the issue of how proposed changes to Acts in the form of Bills presented to Parliament might be better presented to the public.

³⁸Since the *Book of Common Prayer*, and the Authorised Version of the *Bible* are not enumerated in s 27(1) of the Copyright Act 1994, we might speculate whether they are subject to Crown copyright in New Zealand. Probably, however, they would be covered, as they were compiled or translated on behalf of the Crown: s 26(1)(b). This is so irrespective of the relationship between Church and State in New Zealand; see Noel Cox, “Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia” (2001) 6(2) Deakin Law Review 266-284.

³⁹Copyright Act Commencement Order 2000 (SR 2000/245), cl 2.

⁴⁰Which are defined as meaning the same as in the Acts and Regulations Publication Act 1989. Section 2 of the Acts and Regulations Publication Act 1989 defines regulations in terms of the Regulations (Disallowance) Act 1989, s 2. This includes “Rules or regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand.”

⁴¹David Harvey, “A Judicial Perspective on Public Access to Case Law on the Internet”, Conference Paper, 1999 (3) The Journal of Information, Law and Technology (JILT). <<http://elj.warwick.ac.uk/jilt/99-3/harvey1.html>> at 20 September 2002.

⁴²<<http://www.pco.parliament.govt.nz/Archive/pressreleases.html>> at 22 August 2002.

On 10 April 2000, the Hon Margaret Wilson, the new Attorney-General, announced the next steps in a process. The Government had authorised the Parliamentary Counsel Office to produce a business case for the development of a system that would provide an authoritative, accurate and up-to-date electronic database of New Zealand legislation, made publicly available over the Internet. Responses to a 1998 Parliamentary Counsel Office public discussion paper on this issue indicated that many people felt frustration that, while they could access legislation of numerous overseas jurisdictions over the Internet, they could not do so for themselves here at home.⁴³

In a Press Statement of 7 May 2001⁴⁴, Attorney-General, announced that the Parliamentary Counsel Office had selected Unisys New Zealand Ltd as the preferred implementation partner for the project to improve public access to legislation. The government plans to make authoritative, accurate, and up-to-date versions of New Zealand legislation available without charge through the internet. Print access will continue to be provided at a reasonable price.

The issue of access to New Zealand decisions on the Internet is not a high priority for the Judiciary, and one that introduces a number of problems and issues, among them matters of privacy, compliance with suppression orders, selection of judgements and the like.⁴⁵ An interim website, run by Brookers for the Parliamentary Counsel Office, is now operational.⁴⁶

Judgements remain accessible only through fee-paying services.

Canada

In Canada, leaving aside the question of Crown prerogative, the federal government has legislative authority for copyright in the law.⁴⁷ Section 12 of the Copyright Act⁴⁸ is the provision dealing with Crown copyright. This section gives copyright to the Crown in works that are “prepared or published by or under the direction or control of Her Majesty or any government department.”⁴⁹

⁴³<<http://www.pco.parliament.govt.nz/Archive/pressreleases.html>> at 22 August 2002.

⁴⁴Margaret Wilson, Attorney-General, Media Statement, 7 May 2001, <[http://www.Parliamentary Counsel Office.parliament.govt.nz/Archive/pressreleases.html](http://www.ParliamentaryCounselOffice.parliament.govt.nz/Archive/pressreleases.html)> at 22 August 2002.

⁴⁵David Harvey, “A Judicial Perspective on Public Access to Case Law on the Internet”, Conference Paper, 1999 (3) The Journal of Information, Law and Technology (JILT). <<http://elj.warwick.ac.uk/jilt/99-3/harvey1.html>> at 20 September 2002.

⁴⁶“Public Access to Legislation Project” <<http://www.legislation.govt.nz>> at 14 February 2006.

⁴⁷Copyright Act RSC, 1985, c C-42, and its relevant amendments, see *Compo Co Ltd v Blue Crest Music Inc* [1980] 1 SCR 357 at 372-373.

⁴⁸Reprinted Statutes of Canada 1985, c. C-42.

⁴⁹s 12.

It might be argued that s 12 protects works created by the Executive Branch of the government, and does not cover works created by Parliament or the Courts. Under this argument, any implication that governments can “give” permission to copy the laws might be erroneous. However, there are no precedents upholding this argument, in part perhaps because there are no “copyright in the law” cases in Canada and few elsewhere. The Canadian courts might be guided by British jurisprudence, since Canadian copyright law was historically based upon, and still closely resembles British law.⁵⁰ On the other hand, the Supreme Court of Canada has indicated that American jurisprudence must be carefully scrutinized, because there are important differences between Canadian and American copyright policy and legislation.⁵¹ There is also a diversity of approaches to copyright in Canadian legislative materials between the various jurisdictions – not least because of the civil law tradition in Quebec.

The Information Highway Advisory Council, in its 1995 Final Report,⁵² recommended that Crown copyright generally, and not specifically in relation to the laws, should be maintained, but that the Crown in Right of Canada should, as a rule, place federal government information and data in the public domain.

It was also recommended that where Crown copyright is asserted for generating revenue, licensing should be based on the principles of non-exclusivity and the recovery of no more than the marginal costs incurred in the reproduction of the information or data ... the federal government should create and maintain an inventory of Crown works covered by intellectual property that is of potential interest to the learning community and the information production sector at large; negotiate nonexclusive licenses for their use on the basis of cost recovery for digitization, processing and distribution; and invite provincial and territorial governments to provide similar services.⁵³

The Yukon Territory and the federal government take the most liberal approach to Crown copyright in statutes and regulations, by permitting anyone to make copies without permission for any purpose – except commercial – while the other jurisdictions make fairly strongly worded prohibitions against copying the laws for anything other than personal use. It appears that perhaps the intent of these notices is to prevent copying by commercial publishers of the electronic version as prepared by the government, while permitting commercial publishers to manually type (or optically scan) the text of statutes if they wish to publish individual statutes (presumably with some value added to the raw legislative text).

Because the federal government was the leader in publishing statutes and regulations for free in Canada, and is responsible for the Copyright Act, it is important

⁵⁰See JS McKeown, *Fox, Canadian Law of Copyright and Industrial Designs* (3rd ed Carswell, Scarborough, 2000) 38-39.

⁵¹*Compo Co Ltd v Blue Crest Music Inc* [1980] 1 SCR 357 at 367.

⁵²<<http://strategis.ic.gc.ca/SSG/ih01015e.html>> at 22 August 2002.

⁵³Final Report of the Information Highway Advisory Council (Information Highway Advisory Council, Ottawa, 1995) <<http://strategis.ic.gc.ca/SSG/ih01015e.html>> at 22 August 2002.

to take note of the Reproduction of Federal Law Order, PC 1996-1995, 19 December 1996.⁵⁴ The preamble states the basic principles that support the copyright notice.

Whereas it is of fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.⁵⁵

The federal Department of Justice has granted a free licence for copying federal law.⁵⁶

The Yukon Territory has perhaps the simplest copyright notice of all Canadian jurisdictions: "The legal material on this site may be reproduced, in whole or in part and by any means, without further permission from Yukon Justice."⁵⁷

By contrast, the other jurisdictions in Canada all restrict copying for commercial purposes (and sometimes for other purposes as well). One can speculate that the reason that some provinces assert copyright and limit electronic access to the law is to sell legal texts to legal publishers and the law profession. To ensure governments have something to sell, it is necessary to impose copyright limits and to ensure that the electronic access to the law that is provided is not as functional as it could be.

It should also be noted that governments are increasingly limiting the paper production and distribution of their laws and court decisions. This makes it all the more important for governments to provide the maximum access to electronic versions of the law.

Perhaps the most detailed copyright notice is from British Columbia, which refers to matters of ownership, reproduction, distribution, sale private study, and so on. It even tells the reader who to contact if they have any questions, and how to do so.⁵⁸

See also the copyright notices from Ontario,⁵⁹ Alberta,⁶⁰ New Brunswick,⁶¹ Newfoundland,⁶² Nova Scotia,⁶³ Quebec⁶⁴ and the Northwest Territories.⁶⁵

⁵⁴ <<http://www.canlii.org/ca/regu/si97-5/part181879.html>> at 14 February 2006.

⁵⁵ <<http://www.canlii.org/ca/regu/si97-5/part181879.html>> at 14 February 2006.

⁵⁶ <http://canada.justice.gc.ca/loireg/crown_en.html> at 14 February 2006.

⁵⁷ "Disclaimer and Copyright information related to this legislative material" (Statutes and Regulations of Yukon) <http://www.lex-yk.ca/disclaimer_en.html> at 13 January 2003.

⁵⁸ "Important Information" (British Columbia Statutes and Regulations on this web site) <<http://www.qp.gov.bc.ca/statreg/info.htm>> at 14 February 2006.

⁵⁹ <<http://www.gov.on.ca/MBS/english/publications/statregs/contents.html>> at 14 February 2006.

⁶⁰ <<http://www.gov.ab.ca/qp>> at 14 February 2006.

⁶¹ <<http://www.gov.nb.ca/justice/discla-e.htm>> at 22 August 2002.

As would be expected, jurisdictions that do not publish their statutes for free on the Internet have tougher copyright notices.⁶⁶

The British Columbia Superior Courts notice reads:

The decisions of the Superior Courts are made available on the Internet for the purpose of public information and research. The material on the database/web site may be used without permission provided that the material is accurately reproduced and an acknowledgement of the source of the work is included. Copying of the materials, in whole or in part, for resale or other commercial purposes is strictly prohibited unless authorized by the Superior Courts.⁶⁷

The question of who owns copyright in statutes and court and administrative tribunal decisions is one that is rarely litigated. It has been used by some governments to justify a refusal to publish the laws electronically and to justify using the laws to generate revenues. One way to challenge these arguments is to question the legal theory of copyright in the laws, but perhaps the better way is to focus on the policy choices and arguments relating to access to the laws. This latter has been the approach in New Zealand.

In *Tolmie v Attorney-General of Canada*, Oct. 14, 1997 (F.C.T.D.), McGillis J dealt with a case where Mr. Tolmie requested, on 6 January 1995, under the Access to Information Act, the Revised Statutes of Canada in electronic form. “The preferred format is the existing WordPerfect 5.1 format that is presently used within Justice Canada for creating the Statutes. However, alternative formats such as the Folio format used on the CD-ROM produced for this purpose would be acceptable.”⁶⁸ On 20 August 1995, the Department of Justice published the electronic statutes and announced they would soon be published on CD-ROM, which occurred in October

⁶²This notice appears above individual statutes: “All material copyright of the Government of Newfoundland and Labrador. No unauthorized copying or redeployment permitted. The Government assumes no responsibility for the accuracy of any material deployed on an unauthorized server.”

⁶³<<http://www.gov.ns.ca/legi/legc/sol.htm>> at 14 February 2006.

⁶⁴<http://www.doc.gouv.qc.ca/html/lois_consult2.html> at 22 August 2002.

⁶⁵<http://www.legis.acjnet.org/ACJNet/TNO/copyright_en.html> at 22 August 2002.

⁶⁶For example, see Saskatchewan: <<http://www.qp.justice.gov.sk.ca>> at 22 August 2002:

Copyright and all other intellectual property rights of the publications of the Saskatchewan Office of the Queen’s Printer, including all material on this website, belong exclusively to Her Majesty the Queen in Right of Saskatchewan as represented by The Queen’s Printer, Saskatchewan Justice. No person may copy, transfer, print, electronically distribute or otherwise use this material except in accordance with the Subscription Agreement or with the express written consent of the Queen’s Printer.

⁶⁷<<http://www.courts.gov.bc.ca/info/permis.htm>> at 22 August 2002.

⁶⁸*Tolmie v Attorney-General of Canada*, Oct. 14, 1997 (F.C.T.D.), McGillis J.

1995. The CD-ROM was priced at \$225.00. McGillis J rejected Mr. Tolmie's request on the grounds that the statutes were publicly available in electronic format and therefore excluded from the application of the Act under s 68(a).⁶⁹

If Canadian legislatures, governments, and courts decide to follow Australia's leads in publishing the laws, and adhere to the electronic publishing standards noted above, there should not be undue concern for the role of private legal publishers. Private publishers will always have an important role to play because they can add value to legislation and to court decisions. A good example are various annotated Criminal Codes. The real value of these books, in addition to presenting the text of the Criminal Code, are the notes about the different cases that have considered different sections of the code and editorial commentary. This is a valuable service for many practitioners and electronic publishing of the primary law should not pose a threat to this value-added publishing.

The concentration of legal publishing is another reason why governments and courts should be more active in publishing their own laws and judgments electronically. Nonetheless, privatization of the laws and corporate concentration should not unduly threaten public electronic access to the law. The only developments that can threaten free electronic access to the law would be choices by Canadian governments and courts not to publish electronically and not to make electronic copies available for free on the Internet.

As governments and courts become more active in publishing their laws, one danger area to watch out for is "co-publishing" agreements with private publishers, where the contractual terms might preclude free access to the law. This is what happened with respect to the JURIS and FLITE databases in the United States of America. It is possible to avoid unintended limits on access to the law by self-publishing, by publishing with a non-profit organization (such as a university), or by hiring private electronic publishers on a fee for service basis.⁷⁰

Unlike New Zealand, where there is only one jurisdiction, and where the publishing sector is comparative small, Canada enjoys the advantages – or disadvantages of a federal system and a large and highly competitive publishing sector. However, the basic principles under which copyright in statute is more closely aligned in Canada to the historic origins of copyright law than it is in New Zealand. It is unclear which is the better approach, but it is fairly clear that much depends upon how the publishing community operates, and this involves broader questions of competition and monopolies.

United States of America

⁶⁹It should be noted that the question of whether the requester or the government has the right to choose the format is relevant to all kinds of information requested under freedom of information and privacy laws, and to prosecution disclosures to accused persons required by s 7 of the Charter of Rights and Freedoms. The case law appears to be at a preliminary stage in its evolution.

⁷⁰Examples are available of each of these approaches.

The United States of America has a quite dissimilar approach to Canada's, one which is closer to that in New Zealand. In the United States the Copyright Act, 17 USC. Section 105 (1988) prohibits copyright of federal information by the government. Thus, the USA federal laws are in the public domain and no copyright attaches. The same is true of court decisions. It is not difficult to see the motivations behind this:

The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.⁷¹

Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments.⁷²

The decisions of the courts, and legislation, would ensure that laws would be subject to copyright law, in some respects. The American threshold for copyright protection does contain requirements of both originality and creativity. According to the United States Supreme Court in *Harper & Row Publishers Inc v Nation Enterprises*,⁷³ a work "must be original to the author". The United States Supreme Court has also interpreted Article I, § 8, cl 8 of the United States Constitution as requiring "independent creation plus a modicum of creativity".⁷⁴

In the United States of America the exclusion of legislation from the scope of copyright laws dates to 1834, when the Supreme Court interpreted the first federal copyright laws and held that "no reporter has or can have any copyright in the written opinions delivered by this Court ...".⁷⁵ In the same case it was argued – and accepted by the Court – that "it would be absurd, for a legislature to claim the copyright; and no one else can do it, for they are the authors, and cause them to be published without copyright ... Statutes were never copyrighted." Further, "it is the bounden duty of

⁷¹*State of Georgia v Harrison Co*, 548 F Supp 110, 114 (ND Ga 1982).

⁷²The Compendium of Copyright Office Practices (Compendium II) section 206.01<<http://www.faqs.org/faqs/law/copyright/faq/part3/>> Paragraph 3.6 at 14 February 2006.

⁷³471 US 539 (1985) at 547-549.

⁷⁴See *Feist Publications Inc v Rural Telephone Service Co* 499 US 340 (1991) ("Feist"), citing *The Trade-Mark Cases*, 100 US 82 (1879); *Burrow-Giles Lithographic Co v Sarony*, 111 US 53 (1884)). In *Feist* the United States Supreme Court stated (at 345) that "original, as the term is used in copyright means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." *Bender v West*, 158 F 3d 674 (2nd Cir) (1998) expanded on the American standard in the context of legal publications set out in *Feist*.

⁷⁵*Wheaton v Peters*, 33 US (8 Pet) 591, 668 (1834). This case concerned the assertion of copyright in an annotated compilation of Supreme Court judgements. The Court distinguished between the reporter's individual work and the Justices' opinions.

government to promulgate its statutes in print”.⁷⁶ Counsel emphasised the governing policy that “all countries ... subject to the sovereignty of the laws” hold the promulgation of the laws, from whatever source, “as essential as their existence.”⁷⁷ “If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by which we guide our actions.”⁷⁸

That the public interest is the primary determinant is clear from *Banks v Manchester*.⁷⁹ In this the United States Supreme Court denied a copyright to a court reporter in his opinions of the Ohio Supreme Court, on the grounds that “There has always been a judicial consensus, from the time of the decision in the case of *Wheaton v Peters*,⁸⁰ that no copyright could, under the statutes passed by Congress, be secured in the products of the labour done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute.”⁸¹

The law, as thus widely defined, is in the public domain, and therefore not amenable to copyright.⁸² In *Howell v Miller*,⁸³ Justice Harlan denied an injunction sought for the compiler of Michigan statutes, holding that “no one can obtain the exclusive right to publish the laws of the state in a book prepared by him.”⁸⁴ The question of formal ownership of the text of laws and decisions is perhaps secondary to the question of the dissemination of the law.

In the United States, the Missouri Court of Appeals upheld a trial judge’s order that a requester be given the electronic version of the Statutes of Missouri in *Deaton v*

⁷⁶See *Precis of Argument by Counsel for Wheaton [petitioner]*, 33 US (8 Pet) at 615-616.

⁷⁷See *Precis of Argument by Counsel for Wheaton [petitioner]*, 33 US (8 Pet) at 618-619.

⁷⁸See *Precis of Argument by Counsel for Wheaton [petitioner]*, 33 US (8 Pet) at 620.

⁷⁹128 US 244, 9 S Ct 36 (1888). This case has been followed by more modern authority, such as *Harrison Co v Code Revision Commission*, 260 SE2d 30,34 (Ga 1979); *State of Georgia v The Harrison Co*, 548 F Supp 110, 114-115 (N.D. Ga 1982); *vacated per stipulation*, 559 F Supp 37 (ND Ga 1983).

⁸⁰8 Pet 591.

⁸¹*Banks v Manchester*, 128 US 244, 253, 9 S Ct 36, 40 (1888).

⁸²In *Davidson v Wheelock*, 27 F 61, 62 (D Minn 1886), for example, the court stated that a compiler of state statutes “could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him”. Generally, see L Ray Patterson & Craig Joyce, “Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations” (1989) 36 University of California Los Angeles Law Review 719; Melville B Nimmer & David Nimmer & Melville Nimmer, *Nimmer on Copyright* (Matthew Bender, New York, 2000) ch 5.06; William Patry, *Copyright Law and Practice* (BNA Books, Rockville, 1994) 351, 357.

⁸³91 F 129 (1898).

⁸⁴91 F 129, 137 (1898).

Kidd.⁸⁵ The Missouri government office responsible for the statutes, the Revisor of Statutes, had a contract with two private sector parties to sell the computerized versions of the laws, with royalties payable to the Revisor's office. The court found that the Missouri equivalent to the Official Information Act applied to the computerized version of the statutes. The court found that he did not comply with the law, that the computerized version of the laws was a record and that the Revisor is required to make the computerized version available.

The trial judge said: "Although the text is identical, electronic versions of the statutes offer faster and more thorough research to a computer user." Earlier in the decision, the judge noted:

The Revised Statutes on computer disk have additional features not offered by the book form. The annual computerized version integrates previous supplements into the main body of the Revised Statutes. There is no need to compare the hardbound books with the soft cover supplements. The computerized version allows the user to search all volumes in seconds by key word, phrase or statute number. The user is no longer limited by the index or his knowledge of where to look in the Revised Statutes to find a particular topic.⁸⁶

The Court of Appeals, per Lowenstein J, said:

Whether the Revised Statutes are public records is an easy question given a legal system which charges the public with having a knowledge of the law and proclaims that ignorance of the law is no excuse for its violation. As the trial court notes, "it is hard to think of a more important public record than the general laws of the state." This court's analysis is not affected by the fact that the public record at issue is on computer tape.⁸⁷

The Court of Appeals noted that the Committee on Legislative Research has the power, by statute, to determine the form and price for selling the statutes and that this power permits the Committee to set a price higher than marginal costs. However, the Court ruled that this power did not allow the Committee to establish the price through bidding "because it essentially limits access to a public record to those who bid the highest ... Until the price is set by the Committee in the manner prescribed by 3.140, the tapes should be sold at cost as ordered by the trial court."⁸⁸

Other USA states have differently worded laws and thus different approaches to access to the electronic version of the statutes.⁸⁹

⁸⁵932 SW 2d 804 (1996, upholding Circuit Court of Cole County, No CV193-1426CC, 21 November 1994).

⁸⁶*Deaton v Kidd* Circuit Court of Cole County, No CV193-1426CC, 21 November 1994.

⁸⁷*Deaton v Kidd* 932 SW 2d 804, 806 (1996, upholding Circuit Court of Cole County, No CV193-1426CC, 21 November 1994).

⁸⁸*Deaton v Kidd* 932 SW 2d 804 (1996, upholding Circuit Court of Cole County, No CV193-1426CC, 21 November 1994).

⁸⁹In California it is a statutory requirement to publish the law on the Internet. In Kentucky, there are specific laws requiring institutions to disclose electronic records.

With respect to freedom of information relating to access to electronic databases of court decisions, there are two American cases on this topic. In *Tax Analysts v US Department of Justice*,⁹⁰ the District Court of the District of Columbia considered a request for the Department of Justice's "Justice Retrieval and Inquiry System" ("JURIS"), an electronic database of federal cases, regulations and digest material. The system was developed by the Department of Justice and became operational in 1974.⁹¹ However, in 1983, the Department of Justice contracted with West Publishing to provide 80% of the information in JURIS. West collected, organized, and computer-formatted cases, opinions, and digests to make them ready for use on JURIS.⁹² The contract limited how the USA government could use the data it had contracted for.

The issue was whether JURIS was an "agency record" for the purposes of the USA Freedom of Information Act, and specifically, whether JURIS was "under the control" of the Department of Justice at the time of the request. The court ruled that because of the above constraints on the use of the JURIS database, the database was not "under the control" of the Department of Justice and was not an "agency record" for the purposes of the Freedom of Information Act.⁹³

There is already a body of recent case law from the United States concerning private copyrights in the law. These cases do not concern photocopying of someone else's publications, but merely a reference to those publications. The cases primarily concern West Publishing, which is now owned by the Thomson Group. The first of these cases arose from a successful attempt by West Publishing to obtain a preliminary injunction against Mead Data to prevent Mead Data from publishing electronic court decisions that told readers where the court decisions, and the precise pages, they were reading in electronic format were available in West's print reports of the same decisions. The reference to West's reports and page numbers is called "star pagination" (because of the symbols inserted in the body of the text to indicate West's pagination).⁹⁴ West has a virtual monopoly in publishing United States of America court decisions.⁹⁵

In Mississippi, the Attorney General issued an official opinion dated 14 August 1995 that the statutes in electronic form did not need to be produced in electronic form because such a disclosure would be a significant intrusion into the business of a public body (a specific exemption in Mississippi's Public Records Act) and because such a requirement appears to exempt the statutes from the Public Records Act. Section 1-1-1 of the Mississippi Code specifically provides that the state government may enter into and execute a contract with a competent company for the recodification and indexing of the statutory laws of the State of Mississippi and recompilation and indexing of the constitution of the state and of the United States.

⁹⁰913 F Supp 599 (D DC 1996).

⁹¹<<http://www.juris.com/home/default.asp?selected=6&jinc=4&page=Juris-At-A-Glance>> at 13 January 2003.

⁹²Carole Hafner, Taxpayer Assets Project <http://www.eff.org/Activism/competition_legal_info.report> at 14 February 2006.

⁹³*Deaton v Kidd* 932 SW 2d 804 (1996).

⁹⁴*West Publishing v Mead-Data Central* 799 F.2d 1219 (8th Cir 1986).

⁹⁵*West Publishing v Mead-Data Central* 799 F.2d 1219 (8th Cir 1986).

The alternative to referring to paper page numbers is to develop a consensus approach to citing electronic decisions. The electronic citation method will require courts to assign a unique identifier to each decision it renders, for courts to adopt a unique abbreviated name, and for courts to number the paragraphs in their decisions. Nonetheless, the debate continues, especially in the United States.

The tendency in the United States is to encourage public dissemination of laws, and to limit the creation of de facto monopolies. But as elsewhere the creation of practical cartels has proved a problem.

Australia

In the world of the common law realms, one view is that the Crown owns copyright in the law, and that copyright is administered by the executive branch of government. This view is perhaps most clearly seen in *Attorney General of New South Wales v Butterworth & Co (Australia) Ltd.*⁹⁶ In this case, the New South Wales Supreme Court Chief Justice, Long Innes, held that Crown prerogative gives the Crown the exclusive right to print and publish statutes, and that this right is in the nature of a proprietary right. The Chief Justice also suggested, without making a definitive finding, that if copyright were not contained in the Crown prerogative, it would be found to be covered by the Copyright Act then in effect.⁹⁷ Thus, the government was granted a decree that Butterworths had no right to publish statutes. But this decision has not prevented the development of a healthy legal publishing industry in the common law countries, and Australia, as discussed in detail later, is a leader in making the law publicly available.

The Australasian Legal Information Institute (AustLII), approaches the question of “who owns the law” this way:

We have intentionally treated it as largely irrelevant to the development of AustLII. Our approach is that the obligation of governments, courts etc. to provide access to the law is independent of any questions of ownership. Furthermore, since the most liberal copyright law still does not deliver an electronic copy of a statute or case to a publisher – and certainly not on a daily or weekly basis – cooperation by public bodies is essential, and such cooperation inherently involves them licensing the materials to you, even if they do claim copyright. So we have just humoured claims of copyright, and treated them as something we need not deal with (and be distracted by) in the primary task of establishing the principle and practice of free public access to these materials. We have not had the same problems in Australia with the commercial publishers as in the USA, so it has been easier for us to take this approach.⁹⁸

⁹⁶(1938) 38 NSWSC 195.

⁹⁷*Attorney General of New South Wales v Butterworth & Co (Australia) Ltd* (1938) 38 NSWSC 195.

⁹⁸Quoted in Tom McMahon. “Improving Access to the Law in Canada With Digital Media” *Government Information in Canada/Information gouvernementale au Canada* No. 16 (March 1999) <<http://www.usask.ca/library/gic/16/mcmahon.html>> at 14 February 2006.

No Australian Court, Tribunal, or government agency tries to sell primary legal materials (statutes, cases, treaties etc) without also (at least) allowing a publisher like AustLII to provide free access, and/or provide it themselves.⁹⁹ So even with Crown copyright, the public interest in dissemination has prevented a governmental – or commercial – monopoly from operating.

Of course, copyright is still an important question. Among other things, it affects whether commercial publishers have to pay royalties to republish primary legal materials, and this also complicates arguments about free access. It affects the control public bodies can exert over how ‘their’ data is presented. However, AustLII’s experience shows that the problems of copyright do not have to be solved before the principle of free public access can be established.

United Kingdom

The United Kingdom is the well-spring of copyright law, and serves as an important normative influence upon the common law world, the economic and political might of the United States notwithstanding. In the United Kingdom the position remains that copyright in statutes remains vested in the Crown,¹⁰⁰ but that there is a general right to reproduce the text of statutes. For example, on a typical internet-based copy of a statute the following is stated:

⁹⁹AustLII (Australasian Legal Information Institute) <<http://www.austlii.edu.au>> at 14 February 2006. “provides free internet access to Australian legal materials. AustLII’s broad public policy agenda is to improve access to justice through better access to information. To that end, we have become one of the largest sources of legal materials on the net, with over seven gigabytes of raw text materials and over 1.5 million searchable documents” <<http://www.austlii.edu.au/austlii/>> at 14 February 2006.

¹⁰⁰For example, for the Access to Health Records Act 1990, the internet version states that the copy is “© Crown Copyright 1990”. It continues:

The legislation contained on this web site is subject to Crown Copyright protection. It may be reproduced free of charge provided that it is reproduced accurately and that the source and copyright status of the material is made evident to users.

It should be noted that the right to reproduce the text of Acts of Parliament does not extend to the Royal Arms and the Queen’s Printer imprints.

The text of this Internet version of the Access to Health Records Act 1990 (c. 23) has been prepared to reflect the text as it received Royal Assent. The authoritative version is the Queen’s Printer copy published by The Stationery Office Limited as the Access to Health Records Act 1990 (c. 23), ISBN 0105423904.

– http://www.bailii.org/uk/legis/num_act/athra1990221/notes.html> at 14 February 2006.

The legislation contained on this web site is subject to Crown Copyright protection. It may be reproduced free of charge provided that it is reproduced accurately and that the source and copyright status of the material is made evident to users.

It should be noted that the right to reproduce the text of Acts of Parliament does not extend to the Royal Arms and the Queen's Printer imprints.

The text of this Internet version of the Act has been prepared to reflect the text as it received Royal Assent. The authoritative version is the Queen's Printer copy published by The Stationery Office Limited.¹⁰¹

This combination of Crown ownership and freedom to replicate reflects the common position in many jurisdictions.

The Copyright Designs and Patents Act 1988 narrowed the ambit of Crown copyright. Section 163 states that it applies where the author is "an officer or servant of the Crown in the course of his duties". Such wording of course would clearly encompass judgements. The Act also introduced a separate parliamentary copyright for Bills, and copyright in Acts and Measures are vested in the Crown.¹⁰² This subsists for 50 years from the date of the royal assent.

In 1999 a White Paper considered whether Crown copyright in legal materials ought to be abolished.¹⁰³ It concluded that while there was support for abolition, there was also strong opposition to this possibility.¹⁰⁴ This was justified both by the "recognised need" to preserve the integrity of legal materials, and also because Crown copyright offered a valuable "brand or kitemark".

It is questionable whether the assertion of ownership by the Crown – or the state in United States' practice – is either a hindrance or a fostering influence to the dissemination of legal information.

Ownership of judgements

There is, in New Zealand, under s 27(1) of the Copyright Act 1994, no copyright in the judgements of any courts or tribunals.

Despite their being no copyright in court judgements, the New Zealand Council of Law Reporting Act 1938, s 12(3) makes it unlawful for any person, firm, or company other than the New Zealand Council of Law Reporting to commence the publication of a new series of reports of the High Court or Court of Appeal except with the

¹⁰¹ Appropriation Act 2002 2002 Chapter 18
<<http://www.legislation.hmso.gov.uk/acts/acts2002/20020018.htm>> at 14 February 2006.

¹⁰² s 164.

¹⁰³ Minister for the Cabinet Office, *The Future management of Crown copyright* (HMSO, London, 1999) Cm 4300.

¹⁰⁴ Para 5.1.

consent of the Council of the New Zealand Law Society.¹⁰⁵ This consent will only be given on the ground that the New Zealand Council of Law Reporting has failed to publish or to arrange for the publication of adequate reports within a reasonable time and at a reasonable cost.

It shall not be lawful after the passing of this Act for any person, firm, or company other than the Council to commence the publication of or to publish a new series of reports of decisions of the [High Court] or Court of Appeal [or of the Land Valuation Tribunal] (either separately or in conjunction with reports of any other judicial decisions) except with the consent of the Council of the New Zealand Law Society, which may be given on the ground that the New Zealand Council of Law Reporting has failed to publish or to arrange for the publication within a reasonable time and at a reasonable cost to purchasers of adequate reports of the decisions of the [High Court] or Court of Appeal [or of the Land Valuation Tribunal], but shall not be given on any other ground.¹⁰⁶

The New Zealand Council of Law Reporting is a body corporate.¹⁰⁷ The principal function of the Council is to prepare, publish, and sell, or to arrange for the preparation, publication, and sale of reports of such judicial decisions given in New Zealand or elsewhere as may in its opinion be necessary or of value to persons engaged in the administration or practise of law in New Zealand.¹⁰⁸ The Council may also, if it thinks fit, prepare, publish, and sell or arrange for the preparation, publication, and sale of any other legal works.¹⁰⁹ It may also, on such terms as it thinks fit, buy and sell copies of law reports or other legal publications.¹¹⁰

The Attorney-General is the Chairperson of the Council and presides at all meetings at which he or she is present.¹¹¹ The Council consists, apart from the Attorney-General, of a Judge of the High Court appointed by the Chief Justice, the

¹⁰⁵It is probable that this monopoly was devised to protect the position of the New Zealand Council of Law Reporting in a small market where competition might destroy it.

¹⁰⁶In subs (3) the references to the Land Valuation Tribunal were substituted by s 2(4) of the Land Valuation Proceedings Amendment Act 1968 (as amended by s 6(7A) of the Land Valuation Proceedings Amendment Act 1977, as inserted by s2 of the Land Valuation Proceedings Amendment Act (No 2) 1977) for references to the Administrative Division of the Supreme Court which by s 2(4) of the Land Valuation Proceedings Amendment Act 1968 had been substituted for references to the Land Valuation Court which had been inserted by s 38 of the Statutes Amendment Act 1949.

¹⁰⁷New Zealand Council of Law Reporting Act 1938, s 3.

¹⁰⁸s12(1).

¹⁰⁹s12(1).

¹¹⁰s12(1).

¹¹¹New Zealand Council of Law Reporting Act 1938, s 10, as amended by s 2 of the New Zealand Council of Law Reporting Amendment Act 1997. Section 2 of the New Zealand Council of Law Reporting Amendment Act 1997 has also added ss 10A – 10D to the principal Act covering various administrative details relating to the proceedings of the Council. These include the election of a Deputy Chairperson, provisions for the absence of certain members at meetings, and quorum requirements.

Solicitor-General, the President of the New Zealand Law Society, and five barrister members of the New Zealand Law Society.¹¹² The Council may from time to time as it thinks fit make grants to the New Zealand Law Society or to any District Law Society.¹¹³ That the New Zealand Council of Law Reporting has a monopoly means that the copyright in law reports (so far as this survives despite s 27 of the Copyright Act 1994¹¹⁴) will generally be in the official sphere – though not necessarily the Crown.

In *CCH Canadian Ltd v Law Society of Upper Canada*,¹¹⁵ the Federal Court of Canada held that there was copyright in judicial reports.

[T]he summaries of the facts, reasons and conclusions could have been long or short, technical or simple, dull or dramatic, well-written or confusing; the organization and presentation might have varied greatly. I take judicial notice of the fact that in the past Canadian headnotes have been authored by some of the greatest legal minds in our country such as the late Chief Justice Bora Laskin, Dean Cecil A. Wright and other well-respected academics and practitioners including the witnesses professors Dunlop and Feldthusen. It is doubtful that such distinguished scholars would have devoted their time and effort to mundane copying. The independently composed features are obviously more than simply abridged copies of the reasons for judgment.¹¹⁶

The threshold for originality is relatively low, so that two independently produced compilations that may appear similar in some ways are both entitled to copyright protection.¹¹⁷

In *Canada Post v Minister of Public Works*, the Federal Court of Appeal considered a case involving documents held by the Department of Public Works pursuant to a contract with Canada Post.¹¹⁸ The contract contained very strong confidentiality clauses. Despite the clauses of the contract, which strictly limited how Public Works could deal with the documents in question, the Court of Appeal held that the contractual provisions did not change the fact that the documents were “under

¹¹²New Zealand Council of Law Reporting Act 1938, ss 6, 7.

¹¹³New Zealand Council of Law Reporting Act 1938, s 14. The question whether income of the Council is exempt from taxation was considered in *New Zealand Council of Law Reporting v Commissioner of Inland Revenue* (1979) 3 TRNZ 93 and *New Zealand Council of Law Reporting v Commissioner of Inland Revenue* [1981] 1 NZLR 682; (1981) 4 TRNZ 321 (CA).

¹¹⁴Principally in respect of typographic features.

¹¹⁵Federal Court of Canada, Linden JA, Rothstein JA, Sharlow JA, (2002 FCA 187), 14 May 2002.

¹¹⁶Federal Court of Canada, Linden JA, Rothstein JA, Sharlow JA, (2002 FCA 187), 14 May 2002, para 73 per Linden JA.

¹¹⁷*CCH Canadian Ltd v Law Society of Upper Canada*, Federal Court of Canada, Linden JA, Rothstein JA, Sharlow JA, (2002 FCA 187), 14 May 2002, para 75 per Linden JA.

¹¹⁸[1985] 2 F.C. 110 (10 February 1995, Federal Court of Canada).

the control” of the government department. The court emphasized in its reasons the importance of giving a broad interpretation to favour access to information.¹¹⁹

In Canada, the concern has now proceeded to a lawsuit between the Law Society of Upper Canada and three legal publishing companies, Carswell Thomson Professional Publishing, Canada Law Book Inc. and CCH Canadian.¹²⁰ The Law Society makes photocopies of court cases and excerpts from other legal texts as requested by Ontario lawyers and judges and for this service it charges a fee which it says is intended to approximate Plaintiff’s cost in providing this service.¹²¹ The publishers filed a statement of claim on 23 July 1993, but did not immediately pursue the action. The Law Society later filed an application for a declaration that its practice did not infringe copyright. The publishers then revived their original claim.

In essence, the publishers claim copyright over their publication of court decisions. The publishers claim that their works are copyright by virtue of the system of citations, cumulative indexes, headnotes, classification of cases, summaries of references to statutes and other reported cases, addition and verification of citations and the status of any appeals from reported cases.¹²² All of these elements are created independently of the actual text of judicial opinions, statutes, and regulations. The publishers acknowledge that they have given both implied and express licenses to lawyers to make copies from their publications on the photocopies of their own law firm. Thus, the idea is to make it necessary for law firms to purchase the publishers’ publications. If the Law Society is permitted to send copies to law firms, the law firms may feel it is unnecessary to purchase the publishers’ publications.

The Law Society claimed that the publishers had no copyright in the text of the court decisions, that it only copied individual cases without any regard to the publishers’ selection and arrangement criteria, and that if there was copyright infringement by copying the headnotes, it was a fair dealing that was permitted by law. The Law Society emphasized that the copies it provided to its members were in all cases provided for the purpose of research or use in court. The Law Society denied that it made a profit from providing this service, while the publishers alleged that the Law Society was making a profit through its photocopying service. The Law Society

¹¹⁹ An argument that does not appear to have been raised in either the Canada Post or the JURIS case is the principle that a government department should not be able to contract out of access to information laws. If documents are under the departments control (regardless of what confidentiality clauses may be contained in a contract), then the test is to see if there are any exemptions under the Act that protect those documents. One available exemption is to protect confidential commercial information in certain circumstances. Whether this would protect the work done for JURIS would require a somewhat different analysis than the analysis concerning whether JURIS is under the control of the federal Department of Justice.

¹²⁰ *CCH Canadian Ltd v Law Society of Upper Canada*, Federal Court of Canada, Linden JA, Rothstein JA, Sharlow JA, (2002 FCA 187), 14 May 2002. For the trial see *CCH Canadian Ltd v Law Society of Upper Canada* [2000] 2 FC 451 (abridged version); 169 FTR 1; 179 DLR (4th) 609; 2 CPR (4th) 129; [1999] FCJ No 1647 (QL).

¹²¹ <<http://library.lsuc.on.ca/GL/home.htm>> at 13 January 2003.

¹²² Relying on *Meyer v Bright* (1992) 94 DLR (4th) 648; *R v CIP Inc* (1992) 71 CCC (3d) 129; and *Hewes v Etobicoke* (1993) CLLC ¶ 14,042.

claimed that 90% of the requests it received were for individual judicial opinions, but other requests were for short passages from legal texts published by the Plaintiffs which summarize and explain the law.¹²³

The results of the *Thomson et al v Law Society* legal copyright case will likely set a benchmark in Canada for what the law requires and permits with respect to private copyright of texts with content primarily created by the courts and legislatures.¹²⁴

In 1996, the Canadian Judicial Council, composed of all the Chief Judges and Associate Chief Judges of the superior courts across Canada created and approved a standard for the preparation of electronic court judgments. The standard includes the obligation for courts to include paragraph numbers. The implementation of this part of the standard is now well underway, such that today, the majority of Canadian courts are identifying the paragraph numbers in their judgments.¹²⁵ The Canadian Citation Committee is currently consulting on a second standard that will create a uniform way to identify courts and to number court decisions, without reference to private publishers' reports. These standards should avoid private publisher copyright issues, and will also make it possible to cite cases more uniformly (uniform citation is an important way to improve access to the law).¹²⁶

Although it was clear that copyright belonged to the Crown with respect to statutes, the picture was less clear for judgements.¹²⁷ It had been argued variously that the Crown did have copyright,¹²⁸ or that individual judges owned the copyright in their judgements.¹²⁹ While either position could be correct – for although a judge delivered their written judgement as part of their function as a judge, it could be argued that only their decision, and not the reasons for it, was official and therefore covered by the Crown copyright. However, this may shortly become an academic

¹²³*CCH Canadian Ltd v Law Society of Upper Canada* [2000] 2 FC 451 (abridged version); 169 FTR 1; 179 DLR (4th) 609; 2 CPR (4th) 129; [1999] FCJ No 1647 (QL).

¹²⁴The case is set down for a hearing by the Supreme Court of Canada, after the Federal Court of Canada and the Federal Court of Appeal had heard it; <<http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/bul/2002/html/02-11-15.bul.html?query=%2229320%22&langue=en&selection=&database=en/bul&method=all&retour=/csc-scc/cgi-bin/srch.pl?language=en~~method=all~~database=en%2Fbul~~query=29320#disp>> at 14 February 2006.

¹²⁵This practice has also been adopted recently in the courts of England and Wales; Practice Direction (Judgments: Form and neutral citation) 11 January 2001, Lord Woolf, CJ (CA).

¹²⁶For discussions of similar standards in the US, see “The Centre for Information Law and Policy Whitepaper on Policy Governing Pennsylvania Citations,” Russell Ventura, 23 April 1998, “Considerations When Placing Court Opinions on the Internet,” Bradley Hillis, 4 June 1996.

¹²⁷“The Crown and copyright in publicly delivered judgments” (1982) 56 Australian Law Journal 326-328.

¹²⁸Bannon C J, “Copyright in reason for judgments and law reporting” (1982) 56 Australian Law Journal 59.

¹²⁹Taggart M, “Copyright in written reasons for judgement” (1984) 10 Sydney Law Review 319-329.

question. In January 2005 the Copyright Law Review Committee reported that it was “not persuaded” that the accuracy and integrity of official government publications were enhanced by public ownership of copyright in primary legal materials.¹³⁰ As a result they recommended that crown copyright be abolished.¹³¹

Conclusion

In summary, a 1938 case that protected Crown copyright against a private publisher has not prevented Australia from moving to the vanguard in publishing its laws freely on the internet.¹³² In Canada, a decision limiting the right of an information requester to obtain a copy of the electronic version of the federal laws did not prevent the federal government from publishing those versions for free on the Internet (and at a relatively modest price on CD-ROM).¹³³ In the United States, decisions under the Freedom of Information Act¹³⁴ which limited public access to electronic versions of court decisions has not prevented free electronic public access to all Supreme Court and federal Court of Appeals decisions.¹³⁵ The legalities of ownership appear to be less important than the public policy decisions.

Although the courts in the USA held long ago that there was no copyright in law, there have been ongoing difficulties with respect to pagination, headnotes, and typography. In contrast, upholding Crown copyright in Canada and Australia may perhaps have allowed better public access to the law.

Does the principle of State ownership, or public access prevail? Which ought to do so? The tensions between public ownership and commercial enterprise are important, but are only one aspect of this broader question.

¹³⁰*Crown Copyright* (Copyright Law Review Committee, Canberra, 2005) xxiv.

¹³¹*Crown Copyright* (Copyright Law Review Committee, Canberra, 2005) xxvi (Recommendation 4).

¹³²*Attorney General of New South Wales v Butterworth & Co (Australia) Ltd* (1938) 38 NSWSC 195.

¹³³*Tolmie v Attorney-General of Canada*, Oct. 14, 1997 (F.C.T.D.), McGillis J.

¹³⁴5 U.S.C. § 552, As Amended By Public Law No. 104-231, 110 Stat. 3048.

¹³⁵Though this has been liable to the formation of near-monopolistic situations.