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Third Party Copyright and Public Information Infrastructure/Registries: How much copyright tax must the public pay?

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Introduction: The Issues in Question

In a case currently before the High Court of Australia (*Copyright Agency Limited (CAL) v NSW*³) the fundamental question at issue is whether the owner (in this case surveyors) of copyright material (in this case land survey plans) that is submitted as part of a public register (in this case the land titles registry) with all the benefits that entails, should nonetheless have the right to charge the government and end users every time they reproduce or communicate that material to the public.

The counter argument is that:

- 1) The copyright owner in submitting the material and receiving all the associated benefits (including land development) authorises any further reuse in the public interest
- 2) Not all uses are controlled by the copyright owner. Copyright law comprehends that outside the statutory exceptions certain uses may be unremunerated.
- 3) Constitutionally and in practice the power to make laws with respect to copyright has never been thought to allow copyright owners to claim remuneration for use of their material in a public registry, from which they gain benefits
- 4) Copyright is not only about remuneration of the copyright owner but also about individual rights being bestowed for the public good

If the Copyright Agency Limited (CAL), on behalf of the surveyors, is successful in this case, then reasoning by analogy, use of any third party copyright material submitted to a public register will be charged for (remunerable) every time the government, or an end user (member of the public), reproduces or communicates it to the public.⁴ In this article, we explain why such a result is not dictated by law, and

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³ [2008] HCA Trans 174

⁴ This would be subject to the operation of any exceptions or “free use” provisions in the *Copyright Act 1968* such as the fair dealing exceptions.

would frustrate the important role copyright law now plays in the innovation system, and productivity cycle, of this country.⁵

The focus of the argument has been on the plight of the surveyor as copyright owner, but this detaches the situation from the obvious fact that the plan is submitted to government to allow a land developer to make a profit. The people of NSW should not expect to have to (nor should they ever let their government bargain for them to) pay for generations for this activity through a copyright royalty or levy. In anyone's terms, that would be regarded as an unacceptable state of affairs.

CAL v NSW⁶

The litigation currently before the High Court between the Copyright Agency Limited (CAL) and the State of NSW, as foreshadowed above, concerns copyright in survey plans.

CAL, which according to a decision of the Copyright Tribunal is a duly constituted collection agent for surveyors,⁷ contends that survey plans of land, which in turn are part of, and underpin, the land titles registry in NSW and in every other state in the country, are the copyright (artistic) works of surveyors, and that government should pay a royalty for using them.

The litigation has raised a number of issues but the core issue to be resolved by the High Court is whether:

5. in relation to any Relevant Plan, is the State, other than by operation of s 183 of the Copyright Act, entitled to a licence to:
- (i) reproduce that Relevant Plan; and
 - (ii) communicate that Relevant Plan to the public, within the meaning of the Copyright Act?

On the basis of the litigation to this point, one can assume that the appeal will be argued on the basis that the survey plans are not first published by, or under the direction or control of, the Crown under s 177,⁸ nor made by, or under the direction or

⁵ B. Fitzgerald, "It's vital to sort out the ownership of ideas" February 27, 2008, *The Australian* (Higher Education Supplement)

<<http://www.theaustralian.news.com.au/story/0,25197,23280526-25192,00.html>>

⁶ [2008] HCA Trans 174; *Copyright Agency Limited v State of New South Wales* [2007] FCAFC 80

⁷ Reference by Australian Spatial Copyright Collections Ltd [2004] ACopyT 1

⁸ **Section 177**

Crown copyright in original works first published in Australia under direction of Crown

Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic, musical or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.

Surprisingly, Mr Catterns QC - Counsel for the Appellant (CAL) - in argument before the High Court appears to be saying that his fall back submission on publication before the Full Federal Court which was ultimately adopted by them is no longer a persuasive submission (and that is one reason why his view of the application of s 183 must prevail). He maintained that we "accepted our share of the blame" in putting this submission: [2008] HCA Trans 174 at pp 17-18. Mr Yates SC for NSW on the other hand said he was accepting of the decision of the Full Federal Court on this point: [2008] HCA Trans 174 at p 24.

control of, the Crown under s176⁹ – thereby copyright does not inhere in the Crown due to these special provisions in the *Copyright Act 1968*.¹⁰ It can also be assumed that although survey plans serve a largely functional role as the core infrastructure of the Torrens system of title by registration, and can only be represented in one way,¹¹ they are the subject of copyright protection.

The rulings of the Full Federal Court on ss 176 and 177¹² could be further argued and the Full Court seems to have missed an opportunity to have allowed an interpretation of these provisions exclusive of commissioned or contractual works. In other words, those provisions appear readily applicable to materials created pursuant to statutory requirements (as opposed to contractual arrangements) that come to form part of a public registry. Further, there are unresolved questions about how copyright law should protect functional works¹³ and the extent to which anything like the US merger doctrine has application in Australia.

CAL's argument

CAL is arguing that s 183 provides that the Crown (subject to some restrictions in s 183 (11)) will never infringe copyright yet the Crown must pay a reasonable fee for this copyright use. It appears to take the (very broad) view that all Crown use is remunerable, pursuant to s 183. There is conjecture as to whether, if pushed, CAL would argue that reliance by the Crown on fair dealing provisions in the *Copyright Act 1968* is ousted by s 183, or at very least that if those provisions can be used to avoid infringement, payment is still required under s 183.¹⁴ The practice embodied in the current agreement between CAL and the Commonwealth governing remuneration for Crown copying appears to be that acts normally covered by fair dealing exceptions

⁹ **Section 176**

Crown copyright in original works made under direction of Crown

(1) Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this subsection.

(2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

¹⁰ See *Copyright Agency Limited v State of New South Wales* [2007] FCAFC 80

¹¹ “For most Survey Plans, there is only one way of representing the division of a parcel of land. This means that if land is to be subdivided in a certain manner, the content and layout of the Survey Plan that accomplishes that division will inevitably be drafted in a prescribed way. If a surveyor repeats the work of a previous surveyor, the later surveyor should arrive at the same end result as the earlier surveyor and produce a Survey Plan that is of the same dimensions.” *Copyright Agency Limited v State of New South Wales* [2007] FCAFC 80 at [65] per Emmett J (Lindgren and Finkelstein JJ agreeing). Cf. *Veeck v Southern Building Code Congress International Inc* 293 F.3d 791 (5th Cir. 2002) (en banc) “If an idea is susceptible to only one form of expression, the merger doctrine applies and § 102(b) excludes the expression from the Copyright Act. As the Supreme Court has explained it, this “idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” *Harper & Row*, 471 U.S. at 556, 105 S.Ct. at 2228.”

¹² The precursor of these provisions is s 18 *Copyright Act 1911 (UK)* which was expressed to have application in Australia through s 8 *Copyright Act 1912 (Cth)*.

¹³ *Metricon Homes Pty Ltd v Barrett Property Group Pty Ltd* [2008] FCAFC 46

¹⁴ On this point, see generally: E. Campbell and A. Monotti, “Immunities of Agents of Government From Liability for Infringement of Copyright” [2002] FedLRev 16; (2002) 30 *Federal Law Review* 459; *Report of the Copyright Law Committee on Reprographic Reproduction* (Franki Report) (1976) at [7.10]. We acknowledge Mr John Gilchrist for alerting us to these issues and resources.

are remunerable.¹⁵ While CAL in both their oral submissions to the High Court and written submission in reply suggests the “State might be able to avail itself of many other defences to infringement, such as making of backup copies of computer programs” they do not say such uses would be non remunerable.¹⁶ Further, under the current agreement between CAL and the Commonwealth, one could only speculate how CAL would act in relation to Crown use of copyright materials embodied in a public register, where the Commonwealth parliament¹⁷ has expressly said Crown use is not a copyright infringement.¹⁸

The broader dimension

The role and application of copyright in the digital networks of the information superhighway has been, and still is, a critical issue of our times. As many people use information technologies linked via the Internet to communicate with each other on a daily, if not hourly, basis, the notion of copyright has been embedded at the centre of our lives. In this context, to posit that every use of copyright material by people, industry, government and educators must be licensed and remunerated, is a long way removed from the basic provisions of the *Statute of Anne* (1709) - the first modern copyright statute - or the provisions of the Australian colonial copyright laws, or the first federal statutes in 1905 and 1912.¹⁹

Under those earlier statutes, would anyone have thought that my drawing a plan of the boundaries of my property on my kitchen table to settle a dispute with my neighbour would have been an infringement of copyright, or that if a government officer had posted me a copy of a survey plan of my house block at marginal cost, that they would have been liable for copyright infringement?²⁰ The answer is a straightforward

¹⁵ Australian Government: Attorney-General’s Department, *Agreement between Copyright Agency Limited and the Commonwealth for copying of literary works by the Commonwealth - June 2003* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_IssuesandReviews_Governmentuseofcopyrightmaterial> See Schedule 8, Cl. 12.

¹⁶ Appellant’s Submission in Reply S 595 of 2007, 18 April 2008 at [2]. See also [1] – [6] and *CAL v NSW* [2008] HCA Trans 174 at p 25.

¹⁷ It is suggested that the States cannot effectively do this due to the inevitable inconsistency with Commonwealth copyright law and operation of s109 *Constitution*.

¹⁸ See for example s150K Petroleum (Submerged Lands) Act 1967 (Cth)

¹⁹ B. Atkinson, *The True History of Copyright: The Australian Experience 1905-2005* (2007) Sydney University Press, Sydney, Chapters 1-3.

²⁰ It has been suggested by a Canadian scholar (somewhat contentiously and the view is largely untested) that Australian copyright legislation of 1905 and 1912 did not bind the Crown (on this notion see: *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited* [2007] HCA 38) and therefore the Crown was not liable for copyright infringement up until the 1968 *Copyright Act* entered into force. It is further suggested that infringement in relation to unpublished copyright material (which survey plans would most likely have been considered) was actionable against the Crown at common law from late in the nineteenth century up until 1912 (remembering there was no Crown copyright “by or under the direction or control of the Crown” style provision until 1912 and that unpublished copyright material was not dealt with exclusively by statute until 1912: *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* [1970] HCA 36 per Windeyer J at [3] –[5]) : Jean-Pierre Blais, “Copyright and Compulsory Licences for the Services of the Crown: An Australia Model for Canadian Copyright Reform?” (1994) 5 *AIPJ* 222 at 241-242. See also CLRC, *Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* (The Spicer Report) (1959) at [401]. It is unclear to what extent the introduction of the Crown copyright provision in the *Copyright Act 1912* (while dealing with copyright entitlement rather than infringement) contradicts this view. Nor does this analysis explore the possibility (up to 1968/9) of an agent or servant of the Crown being personally liable as an individual for copyright infringement whilst

– “no”. The liberty to communicate in this space, and on these topics, would have been assured in true Diceyan fashion as an aspect of the rights and liberties that the law provides or does not take away. That kind of liberty is in serious jeopardy of being taking away.²¹

What is at Stake?

If CAL can establish that copyright material created by a non-government actor,²² and required as a fundamental element of a public register and/or public record,²³ must be paid for every time government reproduces or communicates it to the public, or the public later reproduce it, then the Australian government sector, the Australian taxpayer, and the Australian community more generally, will have a very significant levy to pay.²⁴ And more than likely the cost will be borne by everyday Australians. Anyone doing a basic conveyance which relies on the land titles register, and the associated survey plan, will no doubt be required to pay this extra cost. CAL acknowledged as much in argument before the High Court²⁵ but did not clarify that this would not necessarily be a one-off fee. Further copying by the end user/consumer/new land owner of any survey plan would also potentially require permission and a copyright licence fee.²⁶ It would be unlikely that s 183 would give the Crown the right to licence the end user for this type of activity, or on a royalty free basis.

The ultimate question becomes whether Crown use of the plans is some form of unjust enrichment, or taking of value or property unfairly from actors engaged in providing commercial land surveying services, or whether it is the kind of use of the documents (which underpin land title and are guaranteed and endorsed by law) that a democratic society would never expect to be infringing or remunerated.

undertaking their duties: see further P Hogg and P Monahan, *Liability of the Crown* (3rd ed.) Carswell, Toronto Canada, especially Chapters 6, 8 and 11.

²¹ To so take away such a liberty in that time or today would require words of clear intent. It is settled law that a Court should not impute to a legislature an intention either to abolish or to modify a common law right or privilege unless the relevant legislation makes such an intention unambiguously clear : *Coco v Queen* (1994) 179 CLR 427 (Deane and Dawson JJ) [2]; see also (Mason CJ, Brennan, Gaudron and McHugh JJ) [9]–[10]; *Baker v Campbell* (1983) 153 CLR 52, 96, 116, and 123; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, 553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30]; *Coleman v Power* [2004] HCA 39 (Gummow and Hayne JJ) [185], (Kirby J) [250]–[251]; *Marquet* (2003) 78 ALJR 105, 133 [160]; *Bropho v WA* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Potter v Minahan* (1908) 7 CLR 277, 304; *Corporate Affairs v Yuill* (1991) 172 CLR 319; A MacAdam and T Smith, *Statutes* 3rd ed, 262; *A v Boulton* [2004] FCAFC 101; *Al-Kateb v Godwin* [2004] HCA 37 [19] (Gleeson CJ), [193] (Kirby J), [241] (Hayne J); *Singh* [19] (Gleeson CJ); *Ruddock v Taylor* (2007) 221 ALR 32 at 46 (McHugh J); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; 221 ALR 448 at 497 (Kirby J); *Thomas v Mowbray* (2007) 237 ALR 194 at 300 (Kirby J); *Chang v Laidley Shire Council* (2007) 237 ALR 482 at 493 (Kirby J.).

²² The remuneration CAL would require for the use of copyright of the Crown in right of each state and the Commonwealth when used by each other in a public register is also unclear and a complicating factor.

²³ On this notion see: s 199 *Conveyancing Act 1919* (NSW)

²⁴ Cf. s 226 *Patents Act 1990* (Cth)

²⁵ [2008] HCA Trans 174 at p 13

²⁶ One would also expect that a bank/mortgagee (or anyone with an interest in the land) would also need permission and have to pay a fee for any further copying and that this cost might be passed on to the land owner.

Further implications

CAL is an agency that has been of great importance but the advent of the digital age has seen it pursue new revenue streams that are far reaching. If Australia is to be a leader and innovator in the global economy, some leeway and some liberty to use copyright material – subject to international obligations - must exist, especially in the face of technology that every time it is used automates the potential for copyright infringement. Every time we use digital technologies they reproduce the material in question as part of their normal function or operation. The Australian schools sector under the PART VB statutory licence in the *Copyright Act 1968*²⁷ pays CAL remuneration for use of copyright material in schools. In 1999, they were paying some 9 million dollars and by 2007 this had risen to over 51 million dollars.²⁸ Our school level education system is by far and away the largest contributor to CAL. Not industry, nor research institutions and not even universities.²⁹ This dramatic rise in the amount we all pay CAL for school education – some might say this tax on knowledge³⁰ – is tied in with the way in which CAL seeks remuneration for a broad range of uses of copyright material, which is taken to new levels by the digital environment and the Internet.³¹

We move from that type of scenario to the one currently before the High Court. In this case the Crown will be obligated to pay CAL every time a survey plan of land is reproduced or communicated to the public. And what is more, the owner of the land in fee simple will have no right to reproduce or communicate to the public, the plan that is the bedrock of their very title to that land. So much for the notion of life, liberty and estate. CAL argues that the surveyor holds copyright in the plan, and even though it is deposited into a public register (and is a public record), which in turn allows the developer of the land to reap financial benefit, we the people must, for the life of the surveyor plus 70 years, pay to CAL a fee whenever the government or citizen reproduces the plan, or communicates it to the public.

The prospect of such a scheme is alarming and one that the paying public, if apprised of the reasoning behind it, would regard as unconscionable – or more bluntly, a “rip off”. Such a scheme would also stifle access to government information surrounding land in an era where worldwide we are seeing the call for, and implementation of, policies to allow better access to government data and knowledge in the name of innovation – better decision making, better accountability, better health, education

²⁷ Which Mr Catterns QC in argument before the High Court submitted has some similarities to the ss 183, 183A-D statutory licence: [2008] HCA Trans 174 at p 10-11.

²⁸ Delia Browne “CC and Educators - a marriage made in heaven?” <<http://icommons.org/articles/cc-and-educators-a-marriage-made-in-heaven>>

²⁹ The second reading speech of the 1980 *Copyright Amendment Act*, which created the educational statutory licence, stated that most educational copying would be a fair dealing or otherwise fall within a statutory copyright exception. Parliament did not contemplate the possibility that the licence would come to function as a tax on all educational use, though the Shadow Attorney General, Lionel Bowen, declared that the “users of copyright have been unjustifiably disadvantaged by this legislation.”: see B. Atkinson, *The True History of Copyright*, 360.

³⁰ The Labor Senator Henry Givens introduced the phrase “tax on knowledge” into Australian political discourse in 1905 when attacking the 30 year posthumous term proposed in the *Copyright Bill 1905*: see B. Atkinson, *The True History of Copyright*, 39.

³¹ For a detailed treatment of the history of CAL’s collecting activities and its collecting philosophy see B. Atkinson, *The True History of Copyright*, 358-381.

and services, and so on. In the words of Varian and Shapiro, we have moved to the view that we should “maximise value not protection” when it comes to management of government information.³²

The CAL argument has an even broader prospect.³³ Think about how many public registers are out there at state and federal levels of government in Australia. Think about how much copyright material has been inputted into those registers covering things as foundational to commerce, research and life, as the record of births, deaths and marriages. What of the copyright material that is inputted (by a doctor, nurse, parent, marriage celebrant or participant, relative, funeral director) in each of these situations, usually in some standard government format – in much the same way a surveyor collects facts and puts them together in a standard form plan. Will any of that be reproduced or communicated to the public in the public register? The mining sector presents a key example. In that sector, most states will require mining reports to be submitted to government, and many of these reports are made available in their original format as part of the mining register.³⁴ The obligation to input material, like

³² H Varian and C Shapiro *Information Rules: A Strategic Guide to the Network Economy* (1999) Harvard Business School Press, Boston MA., 4.

³³ To this extent it is surprising that neither the Commonwealth nor any other State or Territory has sought to intervene in this matter.

³⁴ See for example the *Mineral Resources Act 1989*(Qld). The *Mineral Resources Act 1989* (Qld) (MRA) establishes a data collection and management regime which features the following elements:

- the provision of reports (progress, relinquishment and final), accompanied by maps, sections, charts and other data eg full particulars and results of exploration programs and investigations is made a condition of each of the various forms of tenure under the Act (exploration permits, mining claims, mineral development licences and mining leases);
- the Minister may “require” the holder of the tenure to provide such reports “when and in the way” the Minister specifies (ss 141(1), 194(1)) or the tenure holder will provide prescribed reports, returns, documents and statements “as prescribed: (s 276(1)(f));
- the obligation to provide such reports is enforceable as the Mining Registrar may require the holder of a mining tenure to take all action necessary to rectify non-compliance with conditions of the tenure and deduct the cost of rectification from the security deposit lodged by the holder of the tenure.

The inclusion of a requirement to produce reports etc, as and when required by the Minister, as a standard condition of mining tenures is illustrated by s 141(1) of the MRA which sets out the conditions attaching to all exploration permits. Section 141(1) provides that each exploration permit shall be subject to various conditions, including:

(f) a condition that the holder must, when and in the way the Minister requires, give to the Minister—

(i) progress, relinquishment and final reports, accompanied by maps, sections, charts and other data giving full particulars and results of the exploration program and investigations carried out on the area specified by the Minister, including details of costs incurred for specified periods within the term of the exploration permit;

QDEX (<<https://qeri.dme.qld.gov.au/qeri/controller/Home>>) is an Internet-based digital document and data management system managed by the Geological Survey of Queensland which allows users to search, display, download and lodge company exploration reports. QDEX contains more than 35,300 scanned copies of all open (that is, non-confidential) company reports filed with the government by mineral, coal and petroleum explorers since the 1950s under mandatory reporting requirements. The collection commenced when the exploration permitting system was introduced in Queensland in the 1950s and continues to have several hundred reports added annually.

Since 1 January 2004, all reports lodged with the Department (now the Department of Mines and Energy, but formerly the Department of Natural Resources, Mines and Energy) for work carried out on Exploration Permits, Mineral Development Licences and all Petroleum Tenures (including Authorities to Prospect) must be submitted digitally using the QDEX electronic lodgment system.

the survey plan, is part of a mining company's cost of business (part of the cost of receiving the benefit of commercial development), and is used to augment knowledge so that we innovate downstream rather than reinvent the wheel.

More frightening is the complexity that such a development would bring to public administration, and the ability of people and industry to reuse the knowledge contained in public registries for all kinds of problem solving and innovation. If Australia was starting out on a strategy to improve its productivity, would it willingly embrace such a model as CAL is urging? The simple answer is "no" and we believe the law does not require such complexity and administrative mayhem to be imposed in our country.

What is to be done?

The Full Federal Court, by rejecting arguments based on ss 176 and 177 of the *Copyright Act 1968*, has in effect removed the assumed application of those provisions. When similar provision were legislatively repealed in the UK in 1988, the UK parliament specifically enacted provisions that made it clear the Crown would retain rights to use copyright material in public registers royalty free.³⁵

In a nation state headed by the Queen of Australia (who is also the Queen of England), and significantly influenced by the English legal system, it would seem obvious that a similar sense of reasoning would apply. If third party copyright documents (e.g. survey plans) are placed in a registry, and are not covered by the Crown copyright provisions - ss 176 and 177 - then we need to articulate a rule of law – as was done legislatively in the UK – that reserves the right of the Crown to use the documents in the name of the public interest.

The Full Federal Court by, for all intents and purposes, repealing the traditionally accepted view that these plans were covered by ss 176 and 177, has left a gap in the legal framework. The judges of the Full Court have filled the gap judicially (while the UK has done this legislatively) by the reasoning in their judgement – on the basis of authorisation.

Further while CAL has suggested the Crown will profit commercially from use of the plans – an issue raised in its submissions and argument to the High Court³⁶ but not properly in issue in answering Question 5 (above) – the international trend is to push for publicly funded research content and information to be provided in an open access,³⁷ royalty free, model. The notion – supported by the Australian Productivity

On the interpretation of the Full Federal Court in *CAL v NSW* one might argue that these reports are first published when the consultant communicates them to the client (mining company) and therefore s 177 is not applicable. Likewise there may be conjecture as to whether s 176 applies.

³⁵ ss 47-50 *Copyright, Designs and Patents Act 1988* (UK)

³⁶ At [17] and [33]; [2008] HCA Trans 174 at p 7. In argument before the High Court Mr Catterns QC said this went to the issue of whether an implied licence existed: "They are all done for the State but they are of a commercial character and we submit that is relevant to whether or not the surveyors are taken to have impliedly licensed what goes on."

³⁷ On the definition of open access see: *The Bethesda Statement on Open Access Publishing* (2003) <<http://www.earlham.edu/~peters/fos/bethesda.htm>; *The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities* (2003) <<http://www.zim.mpg.de/openaccess->

Commission³⁸ and more recently the OECD³⁹ – is that allowing publicly funded knowledge to flow freely will sponsor much greater innovation and productivity than locking it up and distributing it to a few. In the long run, it will mean that much of the public information infrastructure, if not already, will be provided to the public, including industry, free of charge, under liberal copyright licences. The business model of tomorrow, if it does not already exist today, will be based – in much the same way as Google operates - on providing search and value-add services for freely accessible government material. It will not be based on charging for the copies of the survey plan. The action of CAL in this case flows against this tide by seeking to place more barriers on open access to public registries.

In our view, the holding of the Full Federal Court should and must be upheld for the following five reasons:

Five Reasons Why the High Court Should Reject CAL's Arguments

1. The Crown use of the plans to create a public register and communicate their contents to the public is authorized by the copyright owner as part of the bargain for the development of the land.
2. Not all uses of copyright material are remunerable and the use of plans by the Crown in order to establish a public register and communicate the contents of that register to the public is a non-remunerable act.

berlin/berlindeclaration.html; *The Budapest Open Access Initiative* (2002) <<http://www.soros.org/openaccess/view.cfm>>; *The Bermuda Principles* (1996) <http://en.wikipedia.org/wiki/Bermuda_Principles>; N Jacobs (ed), *Open Access: Key Strategic, Technical and Economic Aspects*, (2006) Chandos Publishing, Oxford; John Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship* (2005) MIT Press, Cambridge MA; The Hon. Kim Carr Minister for Innovation, Industry, Science and Research “There is More Than One Way to Innovate: Research for Discovery, Understanding and Application” (2008) <<http://minister.industry.gov.au/SenatortheHonKimCarr/Pages/THEREISMORETHANONEWAYTOINNOVATERESEARCHFORDISCOVERY,UNDERSTANDING,ANDAPPLICATION.aspx>>

³⁸ *Cost Recovery by Government Agencies Report* (2001) <www.pc.gov.au> See also Office of Fair Trading, *Commercial Use of Public Information*, (2006) <http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/public-information> ; D Newbery, L. Bently, and R. Pollock, *Models of Public Sector Information Provision via Trading Funds*, (2008) Cambridge University <http://www.berr.gov.uk/files/file45136.pdf> ; J. Houghton, C. Steele and P. Sheehan, *Research Communication Costs in Australia: Emerging Opportunities and Benefits* (2006), <http://www.dest.gov.au/NR/rdonlyres/0ACB271F-EA7D-4FAF-B3F7-0381F441B175/13935/DEST_Research_Communications_Cost_Report_Sept2006.pdf> ; Productivity Commission, *Public Support for Research and Innovation* (2007) 240, 243 <<http://www.pc.gov.au/study/science/finalreport/index.html>> at 3 April 2007.

³⁹ The OECD has a draft set of principles on *Open Access to Public Sector Information* that will be considered for adoption at its Ministerial Conference in Korea in June 2008. See also OECD, *Declaration on Access to Research Data from Public Funding* (2004) <<http://www.oecd.org/dataoecd/9/61/38500813.pdf>> <http://www.oecd.org/document/0,2340,en_2649_34487_25998799_1_1_1_1,00.html> See also proceedings of a WPIE Workshop on PSI, “The Socioeconomic Effects of Public Sector Information on Digital Networks: Toward a Better Understanding of Different Access and Reuse Policies” (2008) <http://www.oecd.org/document/48/0,3343,en_2649_34223_40046832_1_1_1_1,00.html>

3. The acts of the Crown in using the survey plans to construct a public register and communicating that register to the public are not “any act comprised in the copyright” and therefore not an infringement under s 36 (1) of the *Copyright Act 1968*.
4. The Crown use of the plans to create a public register and communicate their contents to the public is not an activity covered by the exclusive rights of the copyright owner as contemplated by the term “copyright” in the *Constitution*.
5. The acts of the Crown in using the survey plans to construct a public register and communicating that register to the public is fair dealing for the purpose of the public interest.

Argument 1 – Crown Use is Authorised

The default rule in copyright is that you cannot reproduce, or communicate to the public, copyright material without the permission of the copyright owner. Permission, however, does not have to entail explicit written or verbal authorisation. Nor does permission mean automatically that a royalty for copyright use is then payable. Section 183 is one form of obtaining that permission but it is not the only way. There is nothing stopping us from giving the Crown permission to reproduce this article without having to pay us any money or remuneration. To suggest otherwise in a democratic country like Australia would be mischievous.

In this instance, the surveyor has authorised – given permission through conduct to – the Crown to use the plans in keeping a public register of land title, as part of the broader bargain of the developer gaining the right to develop, or further subdivide, existing land to their commercial advantage. The developer receives the imprimatur of the Crown, and the benefit of ownership, through registration of title, all based upon the functional nature and quality of the survey plan. This privilege is granted by the people of the State, through their government, for a fee. The suggestion that the people of NSW should pay further for this development project, through a royalty or levy on reproduction or communication to the public of the copyright material in question, is contrary to policy and public expectation. By removing the issue of copyright in the plan from the broader context of the commercial development of land, we lose sight of the true bargain that is being struck between the citizens and the land and copyright holders.

No more so than in a period of crisis concerning the affordability of housing in Australia would it be folly to suggest that the people of NSW would agree to a commercial bargain that sees them bestowing on a land developer a great privilege and commercial opportunity to develop land, yet have to pay for generations a further fee to the developer or surveyor every time the public record of this is reproduced or communicated to them. The only common sense interpretation of the conduct in this case as the Full Federal Court explained is that the copyright owners have authorised the Crown to engage in the acts in question without seeking any further fee.

Emmett J (Lindgren and Finkelstein JJ agreeing) explained:

There can be no doubt that the surveyor who was the maker of a Relevant Plan authorised the State to use the Relevant Plan in all of the ways described above. By assenting to the submission of the Relevant Plan for registration, the

surveyor who made the Relevant Plan authorised the State to do everything that it was obliged to do in consequence of the registration of the Relevant Plan so as to become a registered plan. The consequence of registration is that the State was authorised to do the acts in question. It was an incident of each surveyor's assenting to the submission of a Relevant Plan to LPI, with the intention of its becoming a registered plan, that the surveyor authorised the State to do with the Relevant Plan all of the acts described above that might otherwise constitute an infringement of the copyright in the Relevant Plan.⁴⁰

The argument advanced by CAL paints the state of NSW (and its people) as extremely naïve, not knowing how to structure a commercial bargain. It suggests they would sell off a valuable asset and then say to the purchaser and "what is more we are happy to pay you (back) for generations a royalty on the paperwork that could possibly exceed the amount of money you paid for the land in the first place." The reality is that in the situation at hand, the surveyor works with the developer and should seek remuneration from that commercial actor. In granting the privilege of land ownership (an estate in land) the Crown is not simply receiving (in return) the right to own one tangible plan, but more so the right to record the development plans in the public record as a part of an act of informing the public and bringing order to society.

In this bargain, as CAL envisages it, it seems odd that neither the ultimate (radical) title holder of the land (the Crown),⁴¹ nor the everyday citizen that purchases the fee simple in good faith from the developer, ever obtains or reserves the right to make a copy of the survey plan. They require permission (statutory licence or otherwise) to do so. In this sense neither is ever sovereign in this aspect. Why the Crown as the representative of the people of the state of NSW would enter such a bargain is unfathomable. In broader thinking, it could be characterised as a breach of any fiduciary duty the Crown may hold to the public.

Emmett J (Lindgren and Finkelstein JJ agreeing) explained that:

⁴⁰ Copyright Agency Limited v State of New South Wales [2007] FCAFC 80 at [155].

⁴¹ *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1. There are many statements on the notion of radical title in this case. See for example: Deane and Gaudron JJ at [7]: "The English common law principles relating to real property developed as the product of concepts shaped by the feudal system of medieval times. The basic tenet was that, consequent upon the Norman Conquest, the Crown was the owner of all land in the kingdom. A subject could hold land only as a tenant, directly or indirectly, of the Crown. By 1788, the combined effect of the Statute Quia Emptores 1290 and the Tenures Abolition Act 1660 had been largely to abolish the "pyramid of free tenants"(166) Gray, *Elements of Land Law*, (1987), p 57 which had emerged under the feudal system of tenure and to confine the practical significance of the basic tenet that all land was owned by the Crown to matters such as escheat and foreshore rights. The "estate" which a subject held in land as tenant was itself property which was the subject of "ownership" both in law and in equity. The primary estate of a subject, the estate in fee simple, became, for almost all practical purposes, equivalent to full ownership of the land itself. Nonetheless, the underlying thesis of the English law of real property remained that the radical title to (or ultimate ownership of) all land was in the Crown and that the maximum interest which a subject could have in the land was ownership not of the land itself but of an estate in fee in it. The legal ownership of an estate in land was in the person or persons in whom the legal title to it was vested. Under the rules of equity, that legal estate could be held upon trust for some other person or persons or for some purpose."

The systems of land holding in New South Wales and the statutory and regulatory framework described above depend in no manner upon the existence of the Copyright Act. If s 183 did not exist, it is clear that there would be no utility whatsoever for a surveyor in submitting any of the Relevant Plans for registration unless, by doing so, or assenting to that being done, the surveyor authorised the State to do what it is obliged by the statutory and regulatory regime described above to do, as a consequence of registering the Relevant Plan. Whether or not s 183 has the effect that the doing of the acts, because they are done for the services of the State, are deemed not to be an infringement of copyright, a surveyor must be taken to have licensed and authorised the doing of the very acts that the surveyor was intending should be done as a consequence of the lodgement of the Relevant Plan for registration.⁴²

The whole purpose and object of the preparation and lodgement with LPI of the Relevant Plans was to obtain registration of them so as to become registered plans, with the intention of creating or affecting legal rights in, or with respect to, the land to which they relate, or to create or affect the capacity to create or affect legal rights in respect of that land. The purpose was that lots in the Relevant Plans, whether a plan of subdivision or a strata plan, would become separate and discrete parcels in the register of land holdings of the State. Those lots or parcels would themselves become part of the cadastre of the State, by the infrastructure and mechanisms provided for under the Real Property Act, the Conveyancing Act, the Strata Freehold Act, the Strata Leasehold Act and the Community Land Act. The surveyors who prepared each of the Relevant Plans must be taken to have authorised the State to do, in relation to the Relevant Plans, everything that the State is obliged to do in consequence of their registration, quite apart from the coincidental effect of s 183(1).⁴³

The notion of an implied licence is nowhere mentioned in the judgment of the Full Federal Court. This notion has been reintroduced by the Appellant (CAL) in the special leave application and in its submission to the High Court.⁴⁴ The submission here is that there is express permission evidenced by the conduct of the parties. The bargain is not contractual in nature but rather it is a bargain evidenced by a series of statutory provisions. By acting in accordance with those statutory provisions the surveyor has consented to the plan being used in the public register without further remuneration. This is the way it has always been.

The notion of an implied licence is a poor conceptual tool with which to underpin the reasons for the decision in this case. A more sophisticated approach is warranted otherwise the implied licence established will simply be denied at the point of submission of the plan. The better view is that the State of NSW would only accept the plan for registration if it is authorised to reuse it in the way that public order requires. This raises no issues relating to “just terms”⁴⁵ nor would the State’s refusal to register the plan be seen as an act inconsistent with the federal copyright law under

⁴² *Copyright Agency Limited v State of New South Wales* [2007] FCAFC 80 at [156]

⁴³ *Copyright Agency Limited v State of New South Wales* [2007] FCAFC 80 at [157]

⁴⁴ Appellant’s (CAL) Submissions 9 April 2008 at [1], [12].

⁴⁵ See [2008] HCA Trans 174 at pp 4 and 22

s 109 *Constitution* as the Crown's need to hold appropriate user rights in building public registries has always been accepted even before the *Constitution* was enacted.

Argument 2 - Acts in question are non remunerable

Section 183 only applies to remunerable uses and the use in question is not a remunerable use.⁴⁶ Copyright law is designed to provide an incentive for creators and makers to produce various types of works and other subject matter.⁴⁷ In this instance, copyright confers no incentive on the surveyor. The surveyor's incentive to produce survey maps or plans is contractual: the payment of surveyor by the land developer is the incentive to create the plans. There is no doubt that surveying businesses could, and in the past have, operated on the basis that they would receive no remuneration from the Crown for dealing with plans in the setting up of a public register of land holding.⁴⁸

The section 183 licence permits government to use copyright material subject to payment of remuneration. Surprisingly, the parties to proceedings have focused most of their attention on the Crown's *rights* as user of copyright material, and paid no heed to the question of the surveyor's entitlement to *remuneration* for use. When the surveyor's assumed entitlement is examined, it can be seen that CAL's claim that the State must pay copyright fees for the use of survey plans is not consistent with policy. Statutory licences are instruments of public policy and their scope and application must be determined by reference to statutory language *and* policy.

When the elements of copyright policy are interrogated, including the policy of statutory licensing and the statutory exceptions, they reveal that:

- copyright does not confer a right of remuneration
- some copyrights are economically sterile.

⁴⁶ The statutory licence for Crown use of copyright material is broadly framed, but nothing in the report which recommended enactment of the statutory licence suggested a belief that *all* government uses were remunerable: *Report of the Copyright Committee 1995* – (The Spicer Report) at [404]-[405]. The function of a statutory licence is not taxation of uses made by government purely in the public interest and without prejudice to the economic welfare of the copyright owner.

⁴⁷ See *Welcome Real-Time SA v. Catuity Inc.* [2001] F.C.A. 445 at [129]; *Mazer v. Stein* 347 U.S. 201 (1953); CLRC, *Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* (The Spicer Report) (1959) at [13]; A Fitzgerald and B Fitzgerald, *Intellectual Property in Principle* (2004) LBC/Thomson Sydney, Ch 1.

⁴⁸ Arguments in this section focus on the content of legal rights but it should be noted that legal policy, especially when dealing with economic rights, is informed by economics. Economic theory holds that if the copyright owner is permitted to impose fees on copyright use that exceed the return necessary for the owner to continue production, transaction costs increase resulting in sub-optimal dissemination of information. In cases, such as the present one, where the copyright owner does not rely on the exclusive rights for economic reward, and copyright fees impose a public cost, the argument for policy-sanctioned taxation cannot be sustained on grounds of economic necessity. Cf. *British Columbia Jockey Club v. Standen* (1985), 8 C.P.R. (3d) 283, 22 D.L.R. (4th) 467 (B.C.C.A.) per Hutcheon J.A.: "The only thing that I would add is that there may be cases where the publication of material becomes part of the public domain either because of a statutory requirement to publish the material or because it is inherent in the circumstances that to recognize the claim to copyright would be contrary to public policy."

These propositions, and their relevance to the present case, are discussed below.

No right of remuneration

The exclusive rights of copyright are commonly said to be economic rights. No exclusive right, however, confers a right of remuneration. The copyright enables the owner to bargain for payment. It does not confer a right *to* payment.⁴⁹ The exclusive rights are economic rights because they allow the owner to control the production and dissemination of copyright material, and the economic outcome of such control is usually payment for copyright use. In the case of statutory licensing, the government either imposes a bargain between owner and user, or requires that a bargain be struck. But the exclusive rights in themselves do not entitle a copyright owner to remuneration for copyright use.⁵⁰

If no right of remuneration exists, what is the scope of the copyright owner's economic entitlement? Within the boundaries of international law (namely the three-step test)⁵¹ this is, firstly, for government and legislature to determine.⁵² In the case of statutory licensing in Australia, policy has usually tied remuneration to copyright uses that prejudiced the owner's sales.⁵³ The compulsory licences in the 1912 *Copyright Act* provided that royalties were payable at a specified rate for each copy of records or books made for the purpose of sale.⁵⁴ The educational statutory licence passed into

⁴⁹ In 1928, Sir Robert Garran, the Secretary of the Attorney General's Department, on behalf of the Attorney General (the future Chief Justice) John Latham, informed a prominent licensee of the Australasian Performing Right Society (APRA) that APRA had "no right" to "demand" copyright fees. APRA could exercise its copyright to prosecute, prevent or withhold permission for the public performance of music, and it could "name its price" for the public performance of music. But it could not compel payment: see B. Atkinson, *The True History of Copyright*, 128.

⁵⁰ For discussion of some questions of remuneration as they arose in Australian copyright legal history, see B. Atkinson, *The True History of Copyright* chapters 4-8 generally (dealing with commercial disputes in Australia between the world wars centred around payment of performing right fees), and pp. 352-355, 359-363, 428-430.

⁵¹ The three-step test, adopted in Article 9(2) of the Berne Convention in 1967 specified criteria for creating exceptions to the exclusive right of reproduction. The test is replicated in the *TRIPS Agreement* Article 13 (as the basis for creating copyright exceptions) and the *Australia-United States Free Trade Agreement* Article 17.4.10(a) (also the *WIPO Copyright Treaty* Article 10, EC Directives 96/9 and 2001/29 and *WIPO Performances and Phonograms Treaty* 1996).

⁵² The 1976 Franki Report (*Report of the Copyright Law Committee on Reprographic Reproduction*) stated that the copyright owner's economic expectations should be balanced against public interest considerations [at 1.02]: "There is, we believe, particularly in Australia, a very considerable public interest in ensuring a free flow of information in education and research, and the interests of individual copyright holders must be balanced against this element of public interest."

⁵³ The Franki Report, which recommended enactment of the educational licence for copying, said [at 1.52]: "However, in principle, we consider that multiple copying should not be carried out without remuneration to the copyright owner in any case where it represents a substantial use of his property or it could *prejudice sales* of his work, particularly if the work has specifically been written for use in schools." (*Italics added*). The remuneration policy of the s.183 licence is less easy to discern, since neither s.183, nor the related s.183A were explained in second reading speeches. The Spicer Report (*Report of the Committee to consider what alterations are desirable to the copyright law of the Commonwealth*), which proposed the s.183 licence, only sketchily outlined policy for the section. The Report recommended [48] that: "The Commonwealth and the States should be empowered to use copyright material for any purposes of the Crown, subject to the payment of just compensation [405]." The Report did not, however, explain whether *all* Crown use demanded "just compensation".

⁵⁴ The UK Parliament introduced the compulsory licences for sound recordings and books in the 1911 *Copyright Act* (incorporated in Australia's copyright legislation in 1912). The licences were consumer welfare measures although Parliament introduced the recording licence after extensive lobbying by the

law in 1980 on the assumption that it would compensate the copyright owner for uses that prejudiced sales.⁵⁵

To determine the scope of the s.183 licence, it is necessary to consider the policy of international, as well as domestic, copyright law. Neither can be said to posit that copyright use is, of itself, remunerable.⁵⁶ Analysis of the three-step test, which authorises copyright exceptions in “certain special cases which do no conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder,” suggests that uses harmless to the copyright owner’s economic interest may be free.⁵⁷ As discussed, it is possible to adduce from the history of statutory licensing in Australia the policy principle that a statutory licence compensates the owner for direct economic prejudice (that is, lost sales) caused by the exercise of exclusive rights.

Sterile copyright

phonographic industry. The industry argued that unless a licence were introduced, a single phonographic company, or a combine, could purchase available music copyrights and establish monopoly or cartel control over the supply of music. Parliament intended both licences to compensate copyright owners for lost sales by the arbitrary fixing of royalty rates payable for each reproduction made under licence: see B. Atkinson, *The True History of Copyright*, 47-53, 70-76, 428-430.

⁵⁵ Both the Franki Report and the second reading speech which explained the 1980 legislation introducing the educational statutory licence, stated that the statutory licence was unlikely to apply to most copying by educational institutions. The Franki Report said [at 1.22]: “The evidence we have shows that much of the photocopying that takes place is likely to be within the exceptions to the rights of the copyright owner established in the Copyright Act.” The Franki Committee earlier recognised that public welfare considerations played little part in copyright owners’ arguments for remuneration [1.20]: “The view that ‘what is worth copying is worth protecting’ has been put before us emphatically and persuasively. However what this usually means is ‘what is worth copying is worth paying for.’ Very few authors want restrictions for their own sake but rather as a means of securing remuneration.”

⁵⁶ See, eg, the Franki Report [1.39]: “We do not know of any proposal elsewhere that would require the payment of a royalty on all copies made, irrespective of the number of copies made and the purpose of the copying.”

⁵⁷ Note the approach of the Colombian Supreme Court (Cassation), which, in a judgment delivered on 30 April 2008, held that transferring music from vinyl to digital format did not constitute criminal infringement of the owner’s reproductive right because, applying the three-step test, the use did not cause economic injury to the respondent: it was not profit-making, the appellant did not intend to cause economic injury and the appellant did not cause economic injury. See <www.karisma.org.co/carolina_publico/Sentencia%20CSJ.rtf> for Spanish text of judgment. See <<http://commons.org/articles/colombian-ruling-on-copyrights-without-profits-there-is-no-criminal-offence>> for English summary. Cf S. Ricketson, “The three-step test, deemed quantities, libraries and closed exceptions” (advice prepared for the Centre of Copyright Studies, publ CCS 2002). Ricketson reasons tendentiously to propose an interpretation of the three-step test that would constrain fair use. His detailed discussion of considerations relevant to application of the three-step test, including the proposition that a fair use must not place the user in “economic competition” with the owner, supplies insight into some of the treaty issues relevant to consideration of remunerable use. Discussing the meaning of “normal exploitation”, Ricketson refers to guidance from a WTO Panel, which defined “exploitation” as activity “to extract economic value from their [copyright owners’] rights to those works.” In proposing ways to determine whether a copyright owner could expect to receive compensation for a use, Ricketson suggests consideration of “potential, as well as current and actual, uses or modes of extracting value from a work.” (p. 32). It can be seen that even a partisan analysis of the three-step test must acknowledge that a use is not of itself remunerable, and remunerability must be related to economic, or market, analysis.

The exclusive rights enable the owner to bargain for payment for copyright use. Do they do so in all cases? Or is it possible for a copyright to have no economic potential? The answers to these questions lie in policy, and, specifically, the policy of the statutory copyright exceptions. Although the 1911 UK *Copyright Act* specified six categories of non-infringing use, and the subject aroused comment in Parliamentary debate, the policy origins of the copyright exceptions are not altogether clear.⁵⁸ The logic of the exceptions, however, is unambiguous. As stated in a relatively recent Australian government document, a copyright exception, “permits copyright material to be used without authority or compensation.”⁵⁹

When analysed, the elements of the three-step test, and the statutory criteria for determining fair use or fair dealing, disclose a policy uniting the copyright exceptions. This policy can be stated in the proposition that if copyright use:

- does not unreasonably prejudice the economic or moral interests of the copyright owner, and
- is for a definable purpose consistent with public welfare,

the use is non-remunerable.

In the present case, the relevant question is whether copyright uses to which the statutory exceptions *do not* apply may be non-remunerable. The answer is yes - if it is agreed that the policy of the statutory exceptions is as applicable to the State’s copying and communication of survey plans as it is to (for instance) copying and communication under the statutory library exceptions. Recent scholarship has shown that Parliaments in the United States, UK, and Australia traditionally tied remunerability of use to the copyright owner’s economic interests in a market. It may be inferred from this disposition on the part of legislators and others that they would consider certain copyright uses not governed by the statutory exceptions to be non-remunerable.⁶⁰

⁵⁸ B. Atkinson, *The True History of Copyright*, 88-94.

⁵⁹ “Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age”, *Issues Paper*, Commonwealth Attorney General’s Department, May 2005, 8.

⁶⁰ From the nineteenth century, copyright policy in the US, UK and Australia considered that the economic interests of the author defined the boundaries of copyright. The author was not entitled to remuneration for uses that did not prejudice the author’s economic interests. See B. Atkinson, *The True History of Copyright*, 428-430 and 352-355. Among recent works published in the UK see, eg, R. Deazley, *Rethinking Copyright: History, Theory, Language* (2006) Edward Elgar, UK. Deazley suggests that nineteenth century theorists helped to create a utilitarian concept of copyright’s scope that informed 20th century copyright policy (see also his commentary on Copinger’s *Law of Copyright* (1870) at <http://copyright-project.law.cam.uk/htdocs/index.html>). He argues that in the second half of the 19th century, US jurists and the English author Walter Copinger, who borrowed heavily from them, created a paradigm of copyright legal analysis that tied the content of copyright to the owner’s economic interest). Atkinson notes that policymakers and legislation never declared that the exclusive rights were underpinned by an implied “right of remuneration”. See also earlier groundbreaking US scholarship on fair use. For example, Lyman Ray Patterson, “Free Speech, Copyright and Free Use”, (1989) 40 *Vanderbilt Law Review* 1-66, distinguished between the *purpose* and *function* of copyright. Hannibal Travis, “Pirates of the Information Infrastructure: Blackstonian copyright and the First Amendment” (2000) 15 *Berkeley Technology Law Journal* 1-65, explained the exclusory effect of the fair use doctrine.

It is therefore advisable to avoid the assumption that copyright uses to which the statutory exceptions do not apply must be remunerable. When Parliaments created the exceptions they did not consider that these exceptions represented the totality of permitted uses that did not require consent of or payment to the copyright owner. They were just boundary markers along the way. However, owners then successfully created a public consensus - or more accurately, perception - that these markers mapped the entire perimeter of this type of permitted use. While the *Copyright Act 1968* states, in detail, rights and exceptions to those rights, the statute is *not* comprehensive. The *Copyright Act* contains lacunae that may be falsely interpreted to misrepresent Parliament's intent.

The wide reaching claims made by CAL that Crown use in this case must fall within s 183 is an example of false interpretation that misrepresents the will of the legislature. Such claims seek to remove any fabric of common sense or fairness from the statutory framework. To suggest that outside the exceptions stated in the *Copyright Act*, all copyright uses are remunerable, is to propose that federal Parliament intended that surveyors would be entitled to tax government, and therefore the public, for copyright use that does no economic or moral harm to the surveyor and benefits the public. CAL's claims also distract attention from consideration of the *purpose* of a specific copyright use. Questions of remunerability, however, cannot logically be separated from consideration of purpose.

As discussed earlier, copyright does not confer a right of remuneration. A copyright's economic potency depends on whether it enables the owner to strike a bargain for reward. If the copyright owner is unable to rely on the copyright to bargain for reward, the copyright is economically sterile. Interpretation of the language and intent of the *Copyright Act 1968* shows, predictably, that most copyrights are economically potent – the owner can, without restriction, and consistent with policy, rely on the rights to bargain for reward.

While most copyrights are economically potent, in the present case the copyright in survey plans is economically sterile. Policy does not support the surveyor using the copyright to bargain for reward. Applying the policy of the statutory exceptions, the focus of analysis is not on the copyright but its use. A survey plan is used by the State in a way that does not unreasonably prejudice the surveyor's economic interests or moral rights. The use is not for the purpose of competing against the surveyor in a market: it is for public welfare.⁶¹ The use does not negate the copyright but renders it economically sterile insofar as the particular use is concerned.⁶²

⁶¹ Which is not to say that government use undertaken for public welfare always maximises public welfare. In the absence of clear government information protocols, (cf. Australian Productivity Commission, *Cost Recovery by Government Agencies Report* (2001) <www.pc.gov.au>) which stipulate that government must disseminate certain types of copyright information to the public at marginal cost, government may mistakenly assume that information distribution imposes costs that are more efficiently allocated to private third parties. If this is the case, third party information brokers, commissioned to distribute some information to the public on government's behalf, will do so at greater than marginal cost. It is important, however, when discussing the effect of government use on the economic potency of the surveyor's copyright, to distinguish between government's failure to implement policy, and the merits of the policy itself. Sub-optimal dissemination by government – which results directly from the failure to issue dissemination protocols that make mandatory the supply of certain types of material at marginal cost – in no way invalidates the policy that the information in

It can be seen that in the absence of a right of remuneration, the copyright owner must use his or her copyright to bargain for reward (copyright fees), and policy determines the boundaries of his or her economic (bargaining) rights. In the present case, policy constrains the surveyor from bargaining for reward. The policy of the statutory exceptions, applied to the present circumstances, dictates that the State's use of survey plans is a non-remunerable use.⁶³ The surveyor's copyright in the survey plans is therefore economically sterile.

No Right is Absolute

The *Report of the Copyright Law Committee on Reprographic Reproduction* (Franki Report) of 1976 noted that:

The rights of the copyright owner have never been absolute, in the sense that no dealing with his work could ever take place without his consent. This is the

survey plans should be disseminated to the public free of copyright imposts. Substantive elements of Ricketson's article, "The three-step test, deemed quantities, libraries and closed exceptions" (CCS 2002), lend weight to this proposition. Although the rights-based jurisprudence endorsed by authors like Ricketson seems delicately to suggest a sovereign role for the copyright owner in determination of what, under the Berne Convention's Article 9(2), "unreasonably prejudice[s]" the owner's "legitimate interests", discussion of the three-step test cannot escape the undertow of economic reality. Analysing the term "normal exploitation" as it occurs in the language of the three-step test, Ricketson is unable to find a formula that allows the owner to entirely divorce the concept of normal exploitation, or utility of use, from considerations of economic utility. Thus, even adopting so limited a conception of free use as is evident in Ricketson's paper, it is apparent that, in the present case, the surveyor does not produce survey plans for a market purpose, but rather at the statutory behest of the State, which uses the plans *not* to compete in a market, but to disseminate information for public welfare. On the role of government in the digital age see generally: J. Stiglitz, P. Orszag and J. Orszag, *The Role of Government in the Digital Age* (2000) <<http://globalchange.gov/policies/role-gov.html>> ; G. Vickery and S. Wunsch-Vincent, *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking* (2007) Organisation for Economic Co-operation and Development <<http://www.oecd.org/dataoecd/57/14/38393115.pdf>> ; E. Mayo and T Steinberg, *The Power of Information* (2007) (and UK Government response) <http://www.cabinetoffice.gov.uk/reports/power_of_information.aspx>; European Commission, *Web 2.0 in Government: Why and How?* (2007) <<http://ftp.jrc.es/JRC45269.pdf>>. On protocols for managing Public Sector Information (PSI) see : European Union *Directive on Reuse of Public Sector Information* 2003/98/EC <http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf>; *Office of Management and Budget's Circular A-130 or Management of Federal Information Resources (OMB Circular A-130)* available at <<http://www.whitehouse.gov/omb/circulars/a130/a130trans4.pdf>> and <<http://www.whitehouse.gov/omb/circulars/a130/a130trans4.html>> ; B Fitzgerald et al *Internet and E Commerce Law* (2007) LBC/Thomson Sydney, 260-269; Queensland Spatial Information Council, *Government Information and Open Content Licensing: An Access and Use Strategy* (2006) <<http://www.qsic.qld.gov.au>>; Office of Spatial Data Management (OSDM), *Spatial Data and Access Pricing Policy* (2001) <<http://www.osdm.gov.au/OSDM/Policies+and+Guidelines/Spatial+Data+Access+and+Pricing/default.aspx>>

⁶² A "sterile" copyright may still be exercised by the author - the author may withhold consent to the use of the copyright - but the author is deprived of the right to receive remuneration for the use of the copyright.

⁶³ Therefore s 183 does not apply as it only applies to remunerable acts that require the permission of the copyright owner. In this case this use is allowed because the Crown has helped create and verify this document, the document was created for and has become part of a public register (a foundation stone of public administration and democratic governance) and thereby part of the public information infrastructure that underpins and brings order to the society and the economy.

position under the international conventions relating to copyright and the domestic laws of the countries where copyright is protected. The most universal exception is the right to copy minor or insubstantial parts of works. There is also widespread exclusion from the rights given to authors of various rights of copying of a fair dealing or public benefit nature by libraries, educational bodies, research establishments and individuals. In other words, it has always been the policy of the law that the monopoly granted to the author is of a limited nature. Historically therefore the author is not in a position to maintain his claim with regard to copying of published works from a position of absolute right.”⁶⁴

The Franki Report at a later point commented: “we are satisfied that *as a matter of principle* a measure of photocopying should be permitted without remuneration, for purposes such as private study, to an extent which at least falls within the present limits of ‘fair dealing’.”⁶⁵ (emphasis added) The majority of the Copyright Law Review Committee in its report titled the *Simplification of the Copyright Act 1968 PART 1 Exceptions to the Exclusive Rights of Copyright Owners (1998)* agreed with the Franki Committee on this point.⁶⁶ They further explained “the Committee agrees with Kurtz, who stated that there is no ‘tax’ in issue and copyright owners have never been entitled to an unlimited scope of rent⁶⁷ for their creations. .. The preamble to the 1996 WCT sets out the international community’s recognition of the need to ‘... maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention ...’.”⁶⁸

As well, this is not the first time the Appellant in this case has sought to extend the exclusive rights of the copyright owner to cover wide ranging activities especially in the digital environment. In the recent litigation *CAL v Queensland Department of Education*⁶⁹, CAL had sought to include the action “[teachers] tell students to view” in the list of questions used to survey the use of copyright materials by schools. The purpose of the survey was to assess the amount of equitable remuneration payable for the reproduction and communication of works in electronic form under the educational statutory licence in Pt VA of the *Copyright Act 1968*. CAL’s argument was based on the assertion that when a student has been directed to a website and clicks on a hyperlink or types a URL into a browser window, the student is communicating the work to themselves. Assuming that the student is a member of the copyright owner’s public, it follows that their action in accessing the website amounts to a communication to the public. Many people were surprised by such a far reaching claim and ultimately the legislature moved to reject such an argument in the 2006 amendments: see s 22 (6A) *Copyright Act 1968*. The example provided in the explanatory note to this provision expressly states that a person who merely clicks on a hyperlink to gain access to a website is not to be considered responsible for determining the content of the communication and does not exercise the

⁶⁴ At [1.09]

⁶⁵ At [2.18]

⁶⁶ At [6.24]

⁶⁷ “In this context the Committee understands an economic rent to accrue when supply is restricted relative to demand. This situation may result from the absence of effective competition.” at [6.27].

⁶⁸ At [6.27].

⁶⁹ [2006] ACopyT 1.

communication right.⁷⁰ The point to be made is that not every act is or should be remunerable. Without common sense in the system every reproduction or communication to the public in the digital environment becomes a potential infringement or cost and Australia's ability to engage in the Internet world and digital life, culture and economy is stifled. Mr Catterns QC – Counsel for the Appellant (CAL) – conceded the existence of some leeway at the hearing of the special leave application by saying that “one lives with infringements around the edges whether they are impliedly licensed or not.”⁷¹

Argument 3 - This is not the doing of “any Act comprised in the copyright” under s 36 (1) or 183 (5)

If the Crown use in question is not an infringement under s 36 then the *Copyright Act 1968* including s 183 is not in issue. s 36 (1) states:

(1) Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

s 183 (5) states:

(5) Where an act comprised in a copyright has been done under subsection (1), the terms for the doing of the act are such terms as are, whether before or after the act is done, agreed between the Commonwealth or the State and the owner of the copyright or, in default of agreement, as are fixed by the Copyright Tribunal.

Section 13 provides:

(1) A reference in this Act to an act comprised in the copyright in a work or other subject-matter shall be read as a reference to any act that, under this Act, the owner of the copyright has the exclusive right to do.

(2) For the purposes of this Act, the exclusive right to do an act in relation to a work, an adaptation of a work or any other subject-matter includes the exclusive right to authorize a person to do that act in relation to that work, adaptation or other subject-matter.

Are the acts of the Crown in using the survey plans to construct a public register and communicating that register to the public acts comprised in the copyright? This question goes to the heart of the issues before the High Court. It leads directly to the deeper philosophical question – what is the content of copyright? Does copyright comprise a set of possessory entitlements – the exclusive rights – that are subject only to the limitations expressed in the statutory exceptions and exemptions stated in other legislation? Or are the possessory entitlements subject also to public policy that, while

⁷⁰ B Fitzgerald, A Fitzgerald, G Middleton, Y Fen Lim and T Beale, *Internet and E Commerce Law* (2007) at 166.

⁷¹ [2007] HCA Trans 700.

not made explicit in the *Copyright Act 1968*, is implicit in the exceptions, and logically applies to copyright uses not governed by the exceptions?

These questions have not before been directly answered by a court. The deep waters of copyright's purpose and scope have only partly been charted at common law. But the present case illustrates that increasingly questions of copyright statutory interpretation demand an understanding of law and policy that goes beyond the simple proposition that copyright owners are entitled to demand payment for copyright uses irrespective of the purpose of the uses. It is a question of fact whether an "act is comprised in the copyright" in any given case.⁷² No one case will be the same as the next. In this case the factual determination should be that this is not an act comprised in the copyright.

Argument 4 - This is not an act covered by the rights of the copyright owner as contemplated by the Constitution

The *Copyright Act 1968* has no constitutional basis to empower copyright owners to control the Crown use in question. It is almost inconceivable that in 1900 the word "copyright" as it appears in the *Constitution* would have been interpreted to allow the copyright owner to levy fees for the use of survey plans. The Hansard record of Parliamentary debates over the 1905 Copyright Bill – which became Australia's first federal copyright statute – show that the Senate (where substantive debate took place) was hostile to what senators considered commercial oppression by publishers and stressed the needs of the public in receiving access to copyright material.⁷³ In 1900, the building of the NSW land register, and the reproduction of material therein recorded, and its communication to the public, would not have been remunerable acts. No politician and no judge to this point has ever suggested that they were. It is not too presumptuous to state, on the basis of careful reading of the *Hansard* record of debates over the Commonwealth Copyright Bills of 1905 and 1912,⁷⁴ that not a single legislator would have supported CAL's contentions before either the Federal Court or the High Court.

The word "copyright" in the constitution is not unbounded. For instance copyright applies to expression not ideas and its term has some limit – it is not perpetual.⁷⁵ We

⁷² Transcript of Proceedings, *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (High Court of Australia, McHugh and Kirby JJ, 7 October 2005); *Conkey & Sons Ltd v Miller* (1977) 16 ALR 479; *The University of New South Wales v Moorhouse* (1974) 133 CLR 1, 12 (Gibbs J), 21 (Jacobs J).

⁷³ B. Atkinson, *The True History of Copyright* 37-41.

⁷⁴ And also the Copyright Bill of 1968 in which many speakers focused on one or other aspect of the public interest in copyright.

⁷⁵ In the last 15 years, numerous scholars, including Rose, Feather, Bently and Sherman and recently Deazley, have examined the long-running debate in the United Kingdom over perpetual or common law copyright: J. Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (1994) Mansell, London; R. Deazley, *On The Origin of The Right to Copy* (2004) Hart Publishing, Oxford; M. Rose, *Authors and Owners* (1993) Harvard University Press, Cambridge MA; B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law* (1999) Cambridge University Press, Cambridge. See also C. Seville, *Literary Copyright Reform in Early Victorian England: the Framing of the 1842 Copyright Act* (1999) Cambridge University Press, Cambridge, and the recent précis of the issues by Atkinson, *The True History of Copyright*, 31-37. In *Donaldson v Beckett* (1774) 98 Eng Rep 257, the House of Lords declared that *Statute of Anne 1709* extinguished so-called common law copyright seemingly putting an end (in law) to the argument for perpetual copyright (at least in relation to published material; unpublished material being dealt with exclusively by statute since the British *Copyright Act 1911* and the Australian *Copyright Act 1912*): for a recent and detailed analysis of the

would also suggest that the *Constitution* did not allow in 1901, nor does it now, a copyright owner to control and seek remuneration for use of material created for use in a public register (which register in turn brings a distinct commercial advantage to the material and associated activities) and that is used to communicate fundamental knowledge about order in the society.

While it is acknowledged that the High Court has said that the notion of what falls within the term “copyright” can evolve over time, there is no reason to suspect that such a fundamental element of copyright law should have disappeared or changed.⁷⁶ We argue that the copyright head of power in 1901 did not permit the legislature to allow the copyright owner to limit the use of, or seek remuneration for, copyright material that was embedded in public registries. That was an established limit much the same way as term limits and the expression/idea dichotomy. To the extent that s 183 seeks to override such a limit our argument would be that it is beyond the power enumerated in 51 (18) and to this extent is unconstitutional.

Put bluntly prior to the enactment of s 183 in 1968 (effective from May 1969) it would have been inconceivable that a surveyor (or third party copyright owner with material in any form of public registry) could have sought an injunction to restrain use of copyright material by the government⁷⁷ or the owner of the land in fee simple. This would not only be an “unbelievable” result but it would undermine the very fabric of order in society including the economy. The enactment of s 183, in providing a statutory licence to the Crown, does not paper over the fact that in history we would never have allowed the function of government in creating public order (e.g. a functioning system for land title and transactions) to be at the discretion of or driven by a single private actor. Nor does it take away the same underlying issue of concern – of having to be beholden to a private actor in relation to the operation of something as fundamental as the system of land title, through remuneration in the case of the Crown, and the requirement to seek permission and remunerate in the case of the current owner of the land in fee simple.

Argument 5 - Fair dealing in the Public Interest for the Creation and Administration of Public Registries

different readings of the judgements, see R. Deazley, *On The Origin of The Right to Copy* (2004) Hart Publishing, Oxford. The famous satiric speech of Lord Macaulay in the House of Commons in debate over the 1842 Copyright Bill destroyed forever (or so it seemed) the continuing campaign for perpetual copyright. In 1905 in debate over the Australian Copyright Bill, Sir Josiah Symon, a leading Senator, strongly endorsed Macaulay’s arguments. See also *Jefferys v. Boosey* (1854) 4 HLC 815 (10 ER 681); *Grain Pool of WA v Commonwealth* [2000] HCA 14 per Kirby J at [133] f/n 218.

⁷⁶ On interpretation of s 51 (18) *Constitution* see: *Grain Pool of WA v Commonwealth* [2000] HCA 0014; *Attorney General of NSW Ex Rel Tooth and Co v Brewery Employees Union of NSW* (1908) 6 CLR 469

⁷⁷ See generally, footnote 20. On the narrowest reading of the law only a copyright owner of unpublished copyright material could have taken such an action against the Crown at common law and only from late in the nineteenth century up until 1912; where after unpublished copyright material became the subject of statutory regulation and a Crown copyright provision was introduced: see Jean-Pierre Blais, “Copyright and Compulsory Licences for the Services of the Crown: An Australia Model for Canadian Copyright Reform?” (1994) 5 *AIPJ* 222 at 241-242. Individual servants of the Crown on the other hand were most likely subject to an action for infringement in relation to unpublished and published copyright material at any time up to 1968/9; where after the Crown was expressed to be bound by the new 1968 *Copyright Act* : see P Hogg and P Monahan, *Liability of the Crown* (3rd ed.) Carswell, Toronto Canada, especially at 318-319.

The final argument is that the Crown use at issue is fair dealing for the purpose of the public interest. This doctrine recognised by Mason J (as he then was) in *Commonwealth v John Fairfax and Sons Ltd*⁷⁸ is seen as a defence to copyright infringement:

It has been accepted that the so-called common law defence of public interest applies to disclosure of confidential information. Although copyright is regulated by statute, public interest may also be a defence to infringement of copyright. Lord Denning M.R. considered that it is: see *Fraser v. Evans* (1969) 1 QB 349, at pp 362-363, as did Ungood-Thomas J. in *Beloff v. Pressdram Ltd.* (1973) 1 All ER, at p 260; cf. *Hubbard v. Vosper* (1972) 2 QB, at pp 96-97. Assuming the defence to be available in copyright cases, it is limited in scope. It makes legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm. It has been acknowledged that the defence applies to disclosures of things done in breach of national security, in breach of the law (including fraud) and to disclosure of matters which involve danger to the public. So far there is no recorded instance of the defence having been raised in a case such as this where the suggestion is that the advice given by Australia's public servants, particularly its diplomats, should be ventilated, with a view to exposing what is alleged to have been the cynical pursuit of expedient goals, especially in relation to East Timor. To apply the defence to such a situation would break new ground.⁷⁹

The contours of this defence are not fully understood⁸⁰ although the existing decisions have sought to limit the application of the defence to specific circumstances.⁸¹ The judgement of His Honour Justice Gummow in *Collier Constructions Pty Ltd v Foskett*⁸² rejects such an imprecise notion in the face of a "complex of provisions reflecting the accommodation by the legislature of a range of competing interests."⁸³

While the *Copyright Act 1968* must be the starting point we do not read His Honour to be suggesting that the legislation was born or remains in a vacuum. Its meaning must (to some extent) draw from its underlying assumptions and contextual setting.⁸⁴

Assumptions: The *Constitution* (including s 51 (18)) was created at a time and upon assumptions that a new nation, and government in particular, had a primary role in creating order upon which commerce and success could build. The three federal copyright acts of the twentieth century – in 1905, 1912 and 1968 – are based upon

⁷⁸ (1980) 147 CLR 39 at 56-7. See further *Ashdown v Telegraph Group Ltd* [2002] Ch 149.

⁷⁹ (1980) 147 CLR 39 at 57.

⁸⁰ There is conjecture as to whether the defence would meet the requirements of the *Berne Convention*. However, Articles 2 (4), 9 and 17 *Berne Convention* provide room for argument. In the instance at hand – public registries are a special case and as explained above the use proposed is not detrimental to the legitimate interest of the copyright owner.

⁸¹ See generally: R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005) Cambridge University Press Cambridge UK, Chapter 3.

⁸² (1990) 19 IPR 44 at 54-57. See also *Corrs Pavey Whiting and Byrne v Collector of Customs* (1987) 10 IPR 53 and *SmithKline and French v Department of Community Services and Health* [1990] FSR 617 (1990)

⁸³ (1990) 19 IPR 44 at 55. Cf. *Copyright, Designs and Patents Act 1988* (UK) s 171

⁸⁴ Cf. Justice Gummow's reference at p 56 to "fundamental principle".

similar assumptions, which are evidenced in the 1912 and 1968 legislation by the Crown copyright provisions, which up until very recently would have been regarded by all as allowing the Crown to deal (royalty free) with survey plans in the public interest. CAL did not suggest otherwise.

Contextual setting: Furthermore, since the *Collier* judgement, much has changed. We now live in a world driven by information and computer technology fuelled by the Internet. Technology that by its very nature reproduces content through mere use. In this context we have seen a greater appreciation of the need to properly define the boundaries of control a copyright owner can exert, especially over the general structure of social activity, and society more generally.⁸⁵ Despite the significant limits placed by international copyright law on exceptions to (or derogation from) the exclusive rights of the copyright owner, the content of the exclusive rights has yet to be fully explored and articulated by policymakers and courts.

As part of its operation, copyright law must be able to accommodate such assumptions and contextual factors. Otherwise, its application will be artificial, and defeat its core purpose, which is to encourage creative endeavour in the name of the public interest. Every application of copyright law that exceeds that purpose comes at a cost to each and every Australian. That is why we argue that fair dealing in the public interest is a concept that must be considered when articulating the boundary of copyright law. It can either be expressed as an exception to the *Copyright Act 1968* or as a principle which a court should consider in interpreting provisions of the *Copyright Act 1968*.

*Fair Dealing for the Public Interest (Registries) as an Exception or User Right*⁸⁶

We would argue that in the case at hand the Crown holds the right to use (reproduce or communicate to the public) the plans (royalty free) and that this is embodied in the Crown's power and obligation to establish registries in the name of public order (especially in relation to land) – fair dealing for the public interest.⁸⁷ The existence of such a prerogative right or privilege is either guaranteed or informed by constitutional limits inherent in the copyright power, or is expressly preserved by s 8A of the *Copyright Act*,⁸⁸ and can therefore be articulated as a stand alone exception.⁸⁹ Section 183 does not purport to remove such a prerogative, rather it talks to the situation

⁸⁵ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58

⁸⁶ On this notion see: *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13 [2004] 1 S.C.R. 339; (2004), 236 D.L.R. (4th) 395; B. Fitzgerald, "Copyright 2010: The Future of Copyright" [2008] *European Intellectual Property Review* 43 <<http://eprints.qut.edu.au/archive/00013305>>

⁸⁷ It could be argued that such a prerogative is subject to a requirement of "acquisition on just terms": see H.V. Evatt, *The Royal Prerogative* (ed. L. Zines) (1992) LBC Sydney 249; *Attorney General v De Keyser* [1920] A.C. 508; *Matthey v Curling* [1922] 2 A.C. 180; *Oxford and Cambridge (Universities Of) v Eyre & Spottiswoode Ltd* [1964] Ch 736. A reply to such claims is made more broadly below in relation to s 51 (31) *Constitution*.

⁸⁸ Section 8A (1) provides: "Subject to subsection (2), this Act does not affect any prerogative right or privilege of the Crown."

⁸⁹ Such foundations, we submit satisfy Justice Gummow's concern that "there is no legislative or other warrant for the introduction of such a concept in the law of this country": *Collier Constructions Pty Ltd v Foskett* (1990) 19 IPR 44 at 57.

where the Crown would have “but for” s 183 been infringing. As this kind of activity was never regarded as infringing, s 183 was not meant, or intended, to cover the activity, and, therefore, unless such a power has been removed by clear words it still remains.⁹⁰

Fair Dealing for the Public Interest (Registries) as a Principle Underlying Interpretation

If fair dealing for public interest is not an established defence to copyright infringement in Australia as suggested by Mason J in *Fairfax*, then it should at very least be a fundamental principle that informs the construction of the *Copyright Act 1968*, and in particular s 36 (1), and the words “any act comprised in the copyright”. Ultimately, copyright law is not only about incentive for individual authors, or publishers, but also about the benefit of such a law to the Australian community.

S 51 (31) Constitution – “Acquisition of Property on Just Terms” - Arguments

The impression that the Crown is able to use the copyright of a third party without paying for it, immediately raises the question whether such use breaches the requirement of “acquisition of property on just terms” under s 51 (31) of the *Australian Constitution*. This section which enumerates legislative powers of the Commonwealth or Federal Parliament provides: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.” The provision has been seen as a guarantee (although not everyone would use this term) of the right to be compensated for acquisition of your property through a legislative enactment of the federal parliament.

Like similar provisions in constitutions throughout the world, this section is hard to define, especially in relation to intangible intellectual property. The jurisprudence of the High Court over the last 15 years has appeared to move from a view that readjusting the scope of the exclusive rights of the copyright owner would not conflict with the section, to a view that readjusting the scope of exclusive rights of the copyright owner might need more scrutiny.

The Case Law

A starting point is the case of *Australian Tape Manufacturers Association Ltd v Commonwealth (Tape Manufacturers Case)*⁹¹ where the *Copyright Act 1968* was amended to provide for what the court ultimately decided was an unconstitutional “tax” on blank tapes. Another provision of the scheme provided that copying a sound recording on to a blank tape for private and domestic use would not be infringing activity. In relation to that provision Justices Dawson and Toohey (Mason CJ, Brennan, Deane and Gaudron JJ at agreeing⁹²) explained:

⁹⁰ Nor does ss 176 or 177 *Copyright Act* purport take away such a prerogative.

⁹¹ [1993] HCA 10

⁹² [1993] HCA 10 at [1]

Nor do we think that there is any force in the plaintiffs' second argument. Copyright consists of the exclusive right to do all or a number of acts with respect to the subject-matter of the copyright ((86) See ss.31, 85). For present purposes the most important is the right to make a reproduction or a copy. Copyright is capable of ownership ((87) See ss.35, 97.) and is designated by the Act as personal property which is transmissible by assignment, by will and by devolution by operation of law ((88) See s.196(1)). There can be no doubt that copyright constitutes property within the scope of s.51(xxxi) of the Constitution ((89) See *Pacific Film Laboratories Pty. Ltd. v. Federal Commissioner of Taxation* [1970] HCA 36; (1970) 121 CLR 154, at pp 165-166.). Section 135ZZM(1) provides that copyright is not infringed by the copying of a sound recording on to a blank tape for private and domestic use. **The effect of that section is to diminish the exclusive rights conferred elsewhere in the Act by way of copyright but it does not result in the acquisition of property by any person. All that the section does is to confer a freedom generally to do something which previously constituted an infringement of another's proprietary right.** Moreover, s.135ZZA provides that despite any other provision of the Act, "the making of a copy of a sound recording that is not an infringement of copyright under (Pt VC), does not vest copyright in any work or other subject-matter in any person". Whilst the word "property" in s.51(xxxi) is to be construed liberally so that it extends to "innominate and anomalous interests" ((90) *Bank of N.S.W. v. The Commonwealth* [1948] HCA 7; (1948) 76 CLR 1, at p 349.), for the paragraph to apply it must be possible to identify an acquisition of something of a proprietary nature. **The mere extinction or diminution of a proprietary right residing in one person does not necessarily result in the acquisition of a proprietary right by another** ((91) See *Reg. v. Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* [1985] HCA 84; (1985) 159 CLR 636, at p 653; *The Commonwealth v. Tasmania (The Tasmanian Dam Case)* [1983] HCA 21; (1983) 158 CLR 1, at pp 145, 181, 247, 283; *Australian Capital Television Pty. Ltd. v. Commonwealth (No.2)* (1992) 66 ALJR 695, at pp 714, 728; 108 ALR 577, at pp 615, 640.). Section 135ZZM(1) confers nothing upon any person which may be described as being of a proprietary nature. If the immunity which the section confers can correctly be described as a right, it is a right which is applicable to all but arises only on the occasions upon which copying takes place. It is not a right which is of a permanent character or capable of being assigned to third parties, those being usual characteristics of a right of property ((92) See *National Provincial Bank Ltd. v. Ainsworth* [1965] UKHL 1; (1965) AC 1175, at pp 1247-1248; *Reg. v. Toohey; Ex parte Meneling Station Pty. Ltd.* [1982] HCA 69; (1982) 158 CLR 327, at pp 342-343; *Australian Capital Television Pty. Ltd. v. Commonwealth (No.2)* (1992) 66 ALJR, at pp 714-715, 729; 108 ALR, at pp 615-616, 641-642.). It is not a right which can be described as being by way of copyright or of a licence under copyright since it entirely lacks exclusivity. It does not, in our view, amount to an interest in property. Section 135ZZM(1) is not, therefore, a law with respect to the acquisition of property.⁹³ (emphasis added)

⁹³ [1993] HCA 10 at [37]-[39]

This decision was followed by a series of s 51 (31) cases in the mid 1990s,⁹⁴ culminating in *Commonwealth of Australia v WMC Resources Ltd (WMC Case)*.⁹⁵ In that case Justice McHugh made forceful arguments that rights granted by legislation were necessarily subject to modification, and that this would not conflict with s 51 (31).⁹⁶ An argument the current High Court (see below) is cautious not to overstate. Justice Gummow in line with the *Tape Manufacturers Case* explained:

On the other hand, a law which reduces the content of the exclusive rights created by these statutes, for example, by providing that certain acts henceforth will not infringe those rights, will not attract s 51(xxxi). Thus, as *Tape Manufacturers* decided, the immunity which the law in question conferred upon those who otherwise would have been infringers could not be described as proprietary in nature. For s 51(xxxi) to apply, it would be necessary to identify an acquisition, whether by the Commonwealth or a third party, of something proprietary in nature. In *Tape Manufacturers*, this Court was concerned with the validity of Pt VC of the Copyright Act which was inserted by the *Copyright Amendment Act 1989* (Cth). The Court was particularly concerned with two provisions of that Part. Section 135ZZP imposed a “royalty” upon the first vendor of blank tape. Had it not been classified as a tax, the “royalty” would have constituted an “acquisition of property” to which s 51(xxxi) applied. That provision is not of present concern. What is of present relevance is s 135ZZM. This provided that copyright in a published sound recording, or in any work included in such a recording, was not infringed by certain copies made on blank tapes for private and domestic use. Section 135ZZM was held not to be a law with respect to the acquisition of the property in the respective copyrights. The present appeal does not involve reduction of the content of subsisting statutory exclusive rights, such as those of copyright owners which were at stake in *Tape Manufacturers*, by the conferral upon third parties of immunity from infringement of those rights. The position of WMC is even weaker than that of the copyright owners and so is further removed from the application of s 51(xxxi).⁹⁷ (emphasis added)

⁹⁴ *Nintendo Company Limited v Centronics Systems Pty Ltd* [1994] HCA 27; *Mutual Pools & Staff Pty Ltd v The Commonwealth* [1994] HCA 9; *Health Insurance Commission v Peverill* [1994] HCA 8; *Georgiadis v Australian and Overseas Telecommunications Corporation* [1994] HCA 6; *Re Director of Public Prosecutions; Ex Parte Lawler* [1994] HCA 10; *Commonwealth v Mewett* [1997] HCA 29; *Newcrest Mining (WA) Limited v Commonwealth* [1997] HCA 38. See also: B Fitzgerald, ‘Unjust Enrichment as a Principle of Australian Constitutionalism’ <http://eprints.qut.edu.au/archive/00007414>

⁹⁵ [1998] HCA 8. The facts as summarised by Kirby J at [209] were: “WMC Resources Ltd, formerly Western Mining Corporation Ltd (the respondent) was the holder of an interest in an exploration permit (“the Permit”) issued under federal legislation to permit and encourage exploration for petroleum in defined areas of the Australian continental shelf. Subsequently, the Commonwealth agreed with the Republic of Indonesia to establish a Zone of Cooperation (“the Zone”) in an area of the disputed seabed boundary between the Island of Timor and Australia known as the “Timor Gap”. Some of the areas of exploration provided by the Permit fell within the Zone and by subsequent federal law were extinguished in order that new permits might be granted within the Zone by a joint authority constituted by Australia and Indonesia.” (footnote omitted)

⁹⁶ McHugh J at [124] – [142].

⁹⁷ Gummow J at [185]- [187]

It is interesting to compare the reasoning of Justice Gummow in the *WMC Case* with that of Gleeson CJ, Gummow, Hayne and Crennan JJ in *Attorney-General for the Northern Territory v Chaffey; Santos Limited v Chaffey*⁹⁸ where their Honours explain:

It is too broad a proposition, and one which neither party contended for in these appeals, that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi). *Newcrest Mining (WA) Ltd v The Commonwealth* is an example to the contrary. That case concerned the use of statute to carve out mining interests from the radical title enjoyed by the Commonwealth upon the acceptance of the Territory pursuant to s 111 of the Constitution. **Again, a law reducing the content of subsisting statutory exclusive rights, such as those of copyright and patent owners, would attract the operation of s 51(xxxi).** On the other hand, the statutory licensing scheme for off-shore petroleum exploration the validity of which was upheld in the *Commonwealth v WMC Resources* was constructed so as to subject the scope and incidents of licences to the form of the legislation from time to time. In *WMC*, as with Pt V of the Work Health Act, by express legislative stipulation in existence at the time of the creation of the statutory “right”, its continued and fixed content depended upon the will from time to time of the legislature which created that “right”.⁹⁹ (footnotes omitted) (emphasis added)

This reasoning, ten years on from the *WMC Case*, sees the High Court (including Justice Gummow) being more circumspect in its approach to any universal rule on legislative modification, and, more specifically, rejecting the notion that reducing the content of subsisting exclusive rights of copyright and patent owners is not within the ambit of s 51 (31).¹⁰⁰ In the latest pronouncement on s 51 (31) by all current members of the High Court, we are provided with the starting point for our current discussion. In *Telstra Corporation Limited v The Commonwealth (Telstra Case)*¹⁰¹ Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ state that:

Rather than begin from some constructed taxonomy of rule and exceptions to a rule, it is necessary to begin by recognising the force of the observation by Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ in *Victoria v The Commonwealth (Industrial Relations Act Case)* that: “It is well established that the guarantee effected by s 51(xxxi) of the Constitution extends to protect against the acquisition, other than on just terms, of ‘every species of valuable right and interest including ... choses in action’.” (emphasis added) Further, references to statutory rights as being “inherently susceptible of change” must not be permitted to mask the fact that “[i]t is too broad a proposition ... that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi)”. Instead, analysis of the constitutional issues must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue” (footnotes omitted).

⁹⁸ [2007] HCA 34

⁹⁹ [2007] HCA 34at [24]-[25]:

¹⁰⁰ Cf. Kirby J in *WMC Case*[1998] HCA 8 at [237]

¹⁰¹ [2008] HCA 7

The starting point must now be the “practical and legal operation of the legislative provisions in issue” – reducing the content of a copyright owner’s exclusive rights is no longer (if it ever were) a special category removed from the ambit of s 51 (31).

Application to our Arguments

Argument 1 that we have put forward above is based on authorisation, and therefore should not be subject to any claims that it requires the *Copyright Act 1968* to operate in conflict with s 51 (31), nor that any state legislation operates in a manner inconsistent with the *Copyright Act 1968* (as defined in s 109 *Constitution*).

Arguments 2, 3, 4 and 5 on the other hand are likely to be challenged on the basis of s 51 (31). This is confirmed by the fact that Justice Gummow alluded to s 51 (31) in the hearing of argument before the High Court¹⁰² and the approach of the current High Court in the *Telstra Case*.

We consider that any s 51 (31) challenges to our Arguments 2, 3, 4 or 5 can be countered on the basis that:

- a) The Crown use in question – as highlighted above - was anticipated when the *Constitution* was enacted;
- b) The *Copyright Act 1968* interpreted as we suggest – “the practical and legal operation of the legislative provisions” - would not be a law with respect to the acquisition of property as (i) there is no acquisition of property (in line with *Australian Tape Manufacturers Association Ltd v Commonwealth*¹⁰³) and/or (ii) the primary purpose of the legislation as interpreted is to allow the creation of a public register and instil order in the community and any other impact on property is incidental and/or (iii) in contrast to *Oxford and Cambridge (Universities Of) v Eyre & Spottiswoode Ltd* [1964] Ch 736 this is not expropriation of another’s commercial interest in the exploitation of copyright material but rather “use” of a plan created for a definable public purpose for that purpose, in circumstances where the remuneration of the surveyor by the land developer to the surveyor is left intact and other commercial return could not be expected and/or (iv) there can be no acquisition where a “sterile” copyright (as explained above) is involved as nothing of value has been “subtracted” from the copyright owner¹⁰⁴ and/or (v) nothing is being acquired as the interpretation is simply an articulation of the rights of use already in place;
- c) Copyright is a set of statutory entitlements and must be able to be recast as time goes on, a view reinforced by the fact that the *Berne Convention* in Article 9 (see also *TRIPS Agreement* Article 13, *Australia-United States Free Trade Agreement* Article 17.4.10(a); *WIPO Copyright Treaty* Article 10;

¹⁰² Justice Gummow at pp 4 and 22 of the transcript: [2008] HCA Trans 174

¹⁰³ [1993] HCA 10 per Dawson and Toohey JJ. at [37]-[39] (Mason CJ, Brennan Deane and Gaudron JJ at [1] agreeing))

¹⁰⁴ B Fitzgerald, ‘Unjust Enrichment as a Principle of Australian Constitutionalism’ <http://eprints.qut.edu.au/archive/00007414>

WIPO Performances and Phonograms Treaty 1996) permits exceptions and those type of exceptions must be able to exist and evolve and in line with 51 (31) *Constitution* – in other words un-remunerated use in some form must be allowed and able to be implemented and adjusted in line with international law.

Conclusion: Public Information Infrastructure as the bedrock of both order and productivity – at what cost?

As outlined above the case of *CAL v NSW* presents difficult questions for the High Court yet common sense must prevail.

We should be mindful that in the UK, when parliament chose to remove key aspects of Crown copyright, it legislated to keep in place long held tradition by expressly allowing the Crown, and in certain circumstances the public, to deal royalty free with third party copyright material deposited in a public register. In Australia, surveyors have not until recent times requested any money from the government, presumably because they accepted that plans were Crown copyright – made, or first published by, or under the direction or the control of, the Crown. The Federal Court’s decision concerning ss 176 and 177, has, like the UK legislation, removed what were thought to be key aspects of Crown copyright. In doing so, the Court has left a gap in the law that should be filled by interpretations that will keep intact long held traditions on Crown use, and will not fracture the fabric of government and order in this country.¹⁰⁵

The reach of copyright owners has grown exponentially over the last five years. As mentioned above remuneration paid by Australian schools to CAL has skyrocketed from \$ AUD 9.6 million in 1999 to AUD \$51 million in 2006 (for the copying and communication of print and electronic works under the education statutory licenses in Part VB *Copyright Act*).¹⁰⁶ In 1996, CAL’s total annual revenue amounted to \$18 million. In 2006, annual revenue exceeded \$100 million, while expenditure remained below 15% of revenue.¹⁰⁷ As noted, the mere use of digital technologies automates the potential for copyright infringement. If common sense and basic logic cannot win the day in this case, then we layer another cost on the potential for innovation and building productivity.

The world wide trend is for access to government information to be open (available under liberal copyright licences) and free (costed as close to zero as possible).¹⁰⁸ This

¹⁰⁵ Cf. Brennan J (as he then was) in *Mabo v Queensland (No 2)* [1992] HCA 23 at [29] and [43].

¹⁰⁶ Delia Browne “CC and Educators - a marriage made in heaven?” <<http://icommons.org/articles/cc-and-educators-a-marriage-made-in-heaven>>

¹⁰⁷ B. Atkinson, *The True History of Copyright*, 374.

¹⁰⁸ See generally: Australian Productivity Commission, *Cost Recovery by Government Agencies Report* (2001) <www.pc.gov.au>; Office of Spatial Data Management (OSDM), *Spatial Data and Access Pricing Policy* (2001) <<http://www.osdm.gov.au/OSDM/Policies+and+Guidelines/Spatial+Data+Access+and+Pricing/default.aspx>>; D Newbery, L. Bently, and R. Pollock, *Models of Public Sector Information Provision via Trading Funds*, (2008) Cambridge University <<http://www.berr.gov.uk/files/file45136.pdf>>; ePSIplus, “Recommendations to the EC’s 2008 Review of the PSI Re-use Directive” (2008) <http://www.epsipius.net/reports/epsipius_recommendations_to_the_ec_s_2008_review_of_the_psi_re_use_directive> at “6. Economic Case”; B Fitzgerald et al *Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sectors* (2006);

is seen as a key innovation strategy that will fuel the activities of the research and business sector alike. Such a strategy aims to harness the great potential that information technology and the Internet can provide and promises to allow us the opportunity to find new ways of doing things – to solve key intergenerational issues of climate change, education and health, to name a few. Information in public registries will be critical to this kind of activity.

In our view developers and their commissioned surveyors, through the agency of CAL, should not be placed in a position to perpetuate the old charging models of the past and, in effect, hold the public to ransom. The simplistic “user pays” copyright thesis advanced by CAL distorts the reality of cost allocation in the supply of information. Australian and international economists investigating the economics of intellectual property rights point to the consumer deficits caused by using legal rights to practise price discrimination (in the present case meaning taxation of supply). The logic of economic arguments advanced by CAL - and other proponents of the copyright owner’s entitlement to charge for use regardless of the purpose of use – crumbles in the face of current economic analysis.¹⁰⁹

B Fitzgerald et al *Internet and E Commerce Law* (2007) LBC/Thomson Sydney, 260-269; J. Houghton, C. Steele and P. Sheehan, *Research Communication Costs in Australia: Emerging Opportunities and Benefits* (2006), <http://www.dest.gov.au/NR/rdonlyres/0ACB271F-EA7D-4FAF-B3F7-0381F441B175/13935/DEST_Research_Communications_Cost_Report_Sept2006.pdf> ; The Hon. Kim Carr Minister for Innovation, Industry, Science and Research “There is More Than One Way to Innovate: Research for Discovery, Understanding and Application” (2008) <http://minister.industry.gov.au/SenatortheHonKimCarr/Pages/THEREISMORETHANONEWAYTOINNOVATERESEARCHFORDISCOVERY,UNDERSTANDING,ANDAPPLICATION.aspx> ; The Hon. Peter Costello (then Treasurer), “Australian Bureau of Statistics Centenary Celebration” (2005) <<http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=speeches/2005/019.htm&min=phc>> ; *Policy Framework for New Zealand Government-held Information* (1997) <<http://www.ssc.govt.nz/display/document.asp?DocID=4880>> ; H Varian and C Shapiro *Information Rules: A Strategic Guide to the Network Economy* (1999) Harvard Business School Press, Boston MA. ; OECD draft principles on *Open Access to Public Sector Information* that will be considered for adoption at its Ministerial Conference in Korea in June 2008. Cf. *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998) <<http://www.unece.org/env/pp/ctreaty.htm>>

¹⁰⁹ The economics of copyright have been increasingly investigated over the last 20 years. The interest of academic economists in the effectiveness or efficiency of copyright regulation is evidenced for example by the activities of the Society for Economic Research on Copyright Issues (SERCI). SERCI (www.serci.org) holds an annual congress to discuss research on the economics of copyright and a collection of congress papers were published in 2003 in *The Economics of Copyright, Developments in Research and Analysis* (eds. Wendy J Gordon and Richard Watt). For a relatively brief summary of leading economists’ studies of copyright regulation see B. Atkinson, *The True History of Copyright*, 3-9. It is clear from the literature that most significant analyses of the economic effects of copyright regulation adopt an equivocal view of the benefits of regulation that is at odds with the opinion - expressed by regulatory authorities and copyright organisations – that copyright monopoly deters free-riding and thus encourages production. Economists from Arnold Plant to the Nobel Laureates Ronald Coase and Kenneth Arrow accepted the necessity for property rights to encourage efficient production and dissemination but also called into question the extent of regulation. Plant called for a compulsory licence in publishing 5 years after publication and Coase noted that over-regulation increased transaction costs causing social welfare deficits. Public choice theorists like James Buchanan and Gordon Tullock argued that collaborations between self-interested actors like copyright industries and government regulators distort regulation to the detriment of public welfare. Others, such as Edwin Hettinger argued that much more empirical evidence is required before intellectual property laws can be declared to work efficiently. The US Supreme Court Justice Stephen Breyer has argued that regulation does not noticeably increase public welfare. It is evident from academic analysis that copyright regulation is an instrument of allocative inefficiency, precisely because laws were designed in accordance with the demands of vested interests – originally the proponents of authors’ rights and

Does a surveyor own copyright in an original artistic work in the form of a survey plan? The answer the High Court will most likely give is “yes”. Should its use by government, land owners or the public, when embedded as part of the most fundamental legal infrastructure in our society - land title – be remunerated? The answer of anyone looking to the future would surely be that such an impost will stifle innovation through the increased cost of access to public information infrastructure. The next generation Australian will build wealth around information. Our submission to the High Court is that there is a persuasive interpretation of the law that will ensure the next generation will not be lumbered with an outdated model of public sector information management. We need to ensure that Australians are not placed in a weaker position than other countries in the world.

As a general rule people input copyright material into public registries to secure an entitlement to participate in a society in a particular way, and this in turn forms the bedrock of order and productivity. To unhinge this delicate balance with the complication CAL’s interpretation of the copyright law will introduce is both unnecessary and unwise.

The High Court should reject this appeal.

later the representatives of copyright industries. To suggest that regulation promotes equity and efficiency is, in the words of Hettinger, ‘facile’ (Edwin C Hettinger, ‘Justifying Intellectual Property’, (1989) 18 *Philosophy and Public Affairs* 51).