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# Acts of Parliament: Privatisation, Promulgation and Crown Copyright – Is There a Need for a Royal Royalty?

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## **Acts of Parliament: Privatisation, Promulgation and Crown Copyright – is there a need for a royal royalty?**

Mark Perry\*

*The road of privatisation of government assets is littered with the debris of mishaps and oversights. One clear illustration is the history and effect of the sale of the Government Printing Office (GPO) in 1990. Within the sale process there was a failure to ensure adequate consideration of the policy implications from an important perspective, namely the effect of privatising the means of promulgation of the normative materials of the State. Furthermore, there was no enquiry into the dubious assumptions made as to Crown Copyright in legislation.*

*Intellectual property rights in primary legal materials create a dilemma for policy makers. Should the State's normative materials be subject to reproduction restrictions? Is the basis of unsubstantiated economic benefit for the administration and the claimed preservation of the integrity of the materials sufficient ground? Perhaps third parties should be encouraged to reproduce and disseminate such materials, or even the State could take responsibility for large scale dissemination. This article examines issues surrounding the privatisation of the GPO. This requires inquiry into the history of Crown Copyright, the sale of GPO, and the influence of privatisation on the passage of the Copyright Bill 1994.*

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\* The Faculty of Law, The University of Auckland. I thank all those who have provided stimulating comments on early versions of this work, in particular John Smillie, Mike Taggart, and Rick Bigwood.

## 1 Introduction

With the developing accessibility to information resources worldwide there has been concurrent growth in interest in legal materials — not only by the profession, academics, and students of law, but also by other citizens.<sup>1</sup> The benefits of promoting enhanced access for any person to the laws of the land, in particular statutes, may seem to be self-evident and unlikely to raise more than a flicker of dissension or cursory discussion. That the New Zealand Government has considered the effect of copyright as potentially restricting access to normative materials is demonstrated by the provisions of s 27(1) Copyright Act 1994. The Copyright Act provides for there to be no copyright in a range of works emanating from various arms of the state (and the judiciary), including Acts of Parliament. The operation of this section is, however, dependant on the introduction of an order in council.<sup>2</sup> It would seem that the introduction of the order in council is being considered by Cabinet, which is awaiting a paper from the Ministry of Commerce.<sup>3</sup> The explanation of such hesitancy in what would seem to be a simple matter of removing one of the restrictions on the dissemination of Acts of Parliament requires awareness of the agreement that the government made for the publication of statutes through the offices of the Clerk of the House, known as the printing contract. However, since the privatisation of the Government Printing Office in New Zealand, the situation regarding the publication and promulgation of legislation is far from clear. For example, the printing contract is not available for public viewing.<sup>4</sup> Legal opinion on the relationship between the printing contract and the introduction of legislation removing copyright in statutes is not available for public viewing.<sup>5</sup>

This article discusses the background to privatisation of the Government Printing Office, its effect on the introduction of the 'no copyright' section in the Copyright Act, and assertions that the Crown has copyright in Acts of Parliament. In order to take full account of such claims it is necessary to look at the history of Crown copyright and prerogative in statutes.. Public policy considerations as to the promulgation of Acts of Parliament are then considered in the New

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<sup>1</sup> This is evidenced in Australia by statistics on access to primary legal materials held on the Australasian Legal Information Institute web site. See <<http://www.austlii.edu.au/austlii/brochure.html>> which indicates "AustLII's users span the whole community, including educational institutions (about 30%), the legal profession and business (25%), community organisations (15%), government (10%), and 20% from overseas".

<sup>2</sup> As required by s 27(2) Copyright Act 1994.

<sup>3</sup> Phone conversation with the Ministry of Commerce. It was suggested that the contents of the Ministry's opinion paper for Cabinet was unlikely to be made public for some time.

<sup>4</sup> Official Information Act requests rejected on the grounds of commercial sensitivity.

<sup>5</sup> Official Information Act requests rejected on the grounds of legal professional privilege.

Zealand context. This is followed by a brief overview of the argument for retaining a Crown monopoly in promulgation, and some of the developments in Canada, Australia and the United Kingdom.

## 2 Background to Privatisation

The New Zealand Government Printing Office (GPO) was established in 1864 to ensure the publication of legislation and *Hansard*. In addition to the materials originally published by the GPO, by the late 1980s it was also involved with a wide range of general publications, such as New Zealand telephone directories, maps and school journals. It had grown to become an enormous publishing house. In 1987, for example, the GPO had revenues of just under \$100 million with pre-tax profits of \$14.5 million.<sup>6</sup>

Although the GPO was restructured in 1981, taking the form of a notional company, it remained a government department and was not converted into a State Owned Enterprise by the 1986 legislation of that name, unlike many other government departments that were later privatised.<sup>7</sup> Nevertheless, in late 1987 the New Zealand Government announced a policy of selling government-owned businesses as part of a fiscal policy to reduce public debt. Treasury saw the GPO as a natural target for privatisation. It was a discrete organisation regarded as being primarily a commercial enterprise. This view of the role of the GPO ignored the crucial part it had in the dissemination of primary legal materials, and this point was raised by the opposition party in Parliament.<sup>8</sup> The financial performance of the GPO steadily deteriorated following the government announcement in 1988 of intended privatisation.<sup>9</sup>

Cabinet considered a paper from the Minister for State Owned Enterprises in June 1988, and accepted the recommendation that the GPO be sold — an announcement to that effect being made on 9 June 1988.<sup>10</sup> Treasury appointed Faye, Richwhite and Co as its financial adviser for the sale following a tender process. Walter Iles, Chief Parliamentary Counsel, prepared a paper for the Attorney-General dated 25 July 1988, outlining his concerns about the impact of the sale on public accessibility to the law. This is the only mention in the publicly available record of consideration being given to problems relating to the publication of primary legal materials that could arise from privatisation of the GPO. Furthermore, this reference is in the *Report of the*

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<sup>6</sup> *Report of the Government Administration Committee on the Inquiry into the Sale of the Government Printing Office* (1992) New Zealand House of Representatives, 6.

<sup>7</sup> Such as three state banks, state insurance, the railways, the national airline, telecommunications, etc.

<sup>8</sup> See below at note 12, and accompanying text.

<sup>9</sup> Sale Report, above at note 6, at 6.

<sup>10</sup> The paper, “The Future of the Government Printing Office” reported the findings of the Steering Committee, *ibid* at 8.

*Government Administration Committee on the Inquiry into the sale of the Government Printing Office*,<sup>11</sup> which was published nearly five years after the sale of the GPO was mooted.

The policy for the sale of government assets was outlined on 17 December 1987 by Roger Douglas when he announced that the ownership of all state-owned commercial assets would be reviewed.<sup>12</sup> This was reinforced in the Budget of July 1988 where the Government announced a set of “Principles and Procedures” to be followed for the sale of government businesses.<sup>13</sup> The sales criteria were put as:<sup>14</sup>

- a) the Government must receive more from the sale of the business than it would from retaining ownership, bearing in mind the risks attached to continued ownership;
- b) the sale of a particular business must not impede the Government’s economic goals and must contribute to them;
- c) the sale of a particular business must not impede the Government’s social goals but must contribute to them.

Whether the sale of the GPO satisfied any of these criteria is debateable. The sale of the GPO for \$23 million was approved by Cabinet at the end of December 1989.<sup>15</sup> However, the sale was not finally concluded until October 1990, and even then there were still some issues outstanding.<sup>16</sup> The delays cost the government dearly. The majority of the committee of the Sales Report estimates that the proceeds realised from the sale were \$9.685 million.<sup>17</sup> As part of the purchase agreement, Rank Group (who bought the GPO) secured exclusive printing contracts for Parliamentary materials, including Acts of Parliament, Bills, Hansard, and the parliamentary papers required by government departments and agencies, until January 1994.<sup>18</sup> GP Print secured a new contract for printing these materials in 1994 for a further five years, but the specific

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<sup>11</sup> Sale Report, above at note 6, at 6. The main focus of the Report is the procedures, the finances, and the delays of the sale process.

<sup>12</sup> J Kelsey *The New Zealand Experiment: A World Model for Structural Adjustment* (Auckland: Auckland University Press with Bridget Williams Books, 1995) 128.

<sup>13</sup> New Zealand Budget Statement Annex 4, 28 July 1998 “Sale of Government Businesses — Principles and Procedures”, reproduced in Sale Report, above at note 6, Appendix B.

<sup>14</sup> *Idem*.

<sup>15</sup> Sale Report, above at note 6, at 15.

<sup>16</sup> *Ibid*, at 26, and at 20:

In Evidence Fay, Richwhite said that the failure to secure the parliamentary printing contracts was the single factor that delayed the sale process for 12 months.

<sup>17</sup> *Ibid* at 28.

<sup>18</sup> B Edlin “Dowdy civil servitude puts on the gloss” *The Independent* 8th October 1993, 35.

conditions of this contract are unknown.<sup>19</sup> Shortly after the purchase of GPO in 1991, Rank purchased Whitcoulls, New Zealand's leading stationery chain, for \$71 million.<sup>20</sup> Between the time of purchase of the GPO in October 1990 and July 1996, the Rank Group changed its name to Whitcoulls and went public on the New Zealand stock exchange. In 1996 Graeme Hart, the founder of Rank, executed a 'share buyback' (withdrawal from the public sharemarket) of the Whitcoulls Group, and shortly afterwards sold the company to the United States controlled company Blue Star for \$320 million.<sup>21</sup> This sale included that part of the business responsible for printing government sourced materials, which is still known as GP Print.

## 2.1 Privatisation and Crown copyright

The proposed sale of the GPO, which was followed by the sudden introduction of a copyright notice on printed publications of statutes, prompted the government opposition party to introduce the Copyright (Crown Copyright) Amendment Bill 1989. The amendments were drafted to place Bills, Acts of Parliament, *Hansard* and other parliamentary works within the public domain.<sup>22</sup> The Bill reached committee stage but failed to progress further due to Government opposition to the proposal.<sup>23</sup>

There was further Parliamentary debate on the publication of legislation on the introduction of the Statutory Publication Bill on 11 July 1989. The Bill was introduced to take the GPO out of the public service, and in addition it made an attempt to fill the lacuna left by the privatisation of GPO by making basic provision for dissemination of act and regulations.<sup>24</sup> The Bill was introduced by the then Attorney-General the Hon Geoffrey Palmer who said "[t]his is quite an exciting and important Bill because, by strengthening the statutory duty of the Crown to make legislation available to the public, accessibility of legislation will be enhanced".<sup>25</sup> The Hon Doug Graham,

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<sup>19</sup> Requests to the Office of the Clerk of the House of Representatives for the contracts were declined on the ground that "[the printing contracts] are commercially sensitive and contain a confidentiality clause to prevent release of the information".

<sup>20</sup> P Macalister "The Hart of Whitcoulls" (February 1994) *Management Magazine* 12.

<sup>21</sup> *New Zealand Herald* "Hart books a quick Whitcoulls profit" (25 July 1996) Section Three 5.

<sup>22</sup> See Hammond above at note 76, at 241–242. He notes that the introduction of the copyright notice was apparently made without the approval of the Attorney-General, who was responsible for the GPO at that time.

<sup>23</sup> R Hammond "Intellectual & Industrial Property" [1990] *New Zealand Recent Law Review* 227, 229.

<sup>24</sup> See above at note 177, and 499 NZPD 11205 (11 July 1989). There were a number of provisions relating to regulations in the Bill. The Bill was "spit" to become two pieces of legislation, the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989.

<sup>25</sup> 499 NZPD 11207 (11 July 1989).

after noting that there was nothing in the Bill to make it mandatory that legislation be made available to the public, responded for the opposition:<sup>26</sup>

Many people in the community disseminate Acts of Parliament and regulations, and do so — although certainly for commercial gain — to inform the public of the law. I do not think that anybody doubts that it is highly desirable that that be as widely available as possible. The question is: should the Crown have copyright in those documents and therefore be able to charge for them — even if they be photostats of one of the provisions of a statute — or should it not?

By the third reading the Bill had been split into the Acts and Regulations Publication Bill 1989 and the Regulations (Disallowance) Bill 1989. Both Bills were unopposed. The opposition attempts in 1989 to place primary legal materials in the public domain by means of the Copyright (Crown Copyright) Amendment Bill 1989 failed. However, there was an election and change of government in October 1990. International negotiations under the umbrella of the General Agreement on Tariffs and Trade (GATT) in the following years necessitated a reworking of New Zealand intellectual property legislation and led to the introduction of the Copyright Bill in 1994. This was an opportunity for the new government to introduce legislation to effect its policy espoused in the Copyright (Crown Copyright) Amendment Bill 1989 whilst in opposition.

## 2.2 New Zealand Copyright Bill 1994

The introduction of the Copyright Bill 1994 attracted approximately 300 oral and written submissions to the Commerce Committee.<sup>27</sup> Few of these were concerned with clause 27 that proposed the immediate removal of any copyright in Bills, Acts, regulations, Parliamentary debates and reports of select committees. This provision was simply the reintroduction of the terms of the failed Copyright (Crown Copyright) Amendment Bill 1989. In fact, the only submission opposing the adoption of clause 27 came from GP Print.<sup>28</sup> The submission typifies opposition to placing such materials in the public domain, not only in New Zealand but also in the United Kingdom and Canada.<sup>29</sup>

The summary of GP Print's submission to the Commerce Committee makes four points in favour of "retaining" Crown copyright in official information. First, it was argued that the retention "of

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<sup>26</sup> Ibid at 11208.

<sup>27</sup> Most submissions concerned the proposed liberal exemptions for educational copying.

<sup>28</sup> Submission of GP Print Ltd to the Commerce Committee on the Copyright Bill 1994 "Crown Copyright", C/94/142.

<sup>29</sup> For example, see G Robbie "Crown Copyright—Bête Noir Or White Knight?" (1996) 2 JILT <<http://elj.warwick.ac.uk/elj/jilt/leginfo/2robbie/>>.

Crown copyright is not inconsistent with and is in fact necessary for maintaining the accessibility of the law”; in particular that “the Crown has a statutory obligation to make the law accessible”. It was noted further that the Crown “has not traditionally taken a restrictive approach to its copyright”.<sup>30</sup> The submission offers little in support for this proposition, except for citing the Acts and Regulations Publication Act 1989 and the Depository Library Scheme. The former merely provides that the Chief Parliamentary Counsel shall, under the control of the Attorney-General, arrange for the printing and publication of Acts, regulations and reprints, and requires that they be available for purchase “at a reasonable price” by members of the public at the places designated from time to time by the Attorney-General.<sup>31</sup> The depository scheme provides for 21 libraries to receive copies of official information. In this part of its submission GP Print argues that the “Crown’s traditional approach of not enforcing its copyright when official material is appropriately reproduced, support the proposition that the accessibility of the law is not restricted by the retaining of Crown copyright”.<sup>32</sup> It could be thought curious that the practice of non-enforcement of copyright is relied on as a ground for retention of that copyright, especially when proposed by a ‘privatised’ publisher with a contractual link with the Crown. The fact that most jurisdictions worldwide specifically provide that official legal materials are not subject to copyright seems to have been ignored.<sup>33</sup>

GP Print’s second argument is that “retention of Crown copyright in official material is essential to maintain the integrity of the law”,<sup>34</sup> and this has been raised in other jurisdictions.<sup>35</sup> There is, however, no evidence of decreased quality of published official materials in those jurisdictions that allow for free replication. Indeed, the counter argument, that competition in publication is more likely to give rise to value-added products and high quality dissemination, is more tenable.

The third argument is perhaps closer to the heart of the matter — GP Print submitted that clause 27 of the Bill would breach the Crown’s contract with GP Print for printing and distribution.<sup>36</sup> Clause 9.1 of the contract provides:<sup>37</sup>

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<sup>30</sup> GP Print submission, above at note 28, Summary at para 3(i).

<sup>31</sup> Sections 4 and 10, Acts and Regulations Publication Act 1989.

<sup>32</sup> GP Print submission, above at note 28, at para 39.

<sup>33</sup> See below at note 48 and accompanying text.

<sup>34</sup> GP Print submission, above at note 28, at para 46.

<sup>35</sup> Robbie, above at note 29. Robbie also refers to the practices of the Crown not enforcing its copyright. At least in the United Kingdom there is certainty of Crown copyright in Acts of Parliament as these are specified in the Copyright Designs and Patents Act 1988. The “integrity” argument was also made in Canada in *From Gutenberg to Telidon, A White Paper on Copyright* (Government of Canada, 1984) 76.

<sup>36</sup> GP Print Ltd submission, above at note 28, Summary at para 3(iii).

<sup>37</sup> This is taken from GP Print Ltd submission, above at note 28, at para 59. Official Information requests for the current and prior contracts have been denied on grounds of commercial sensitivity.



The parties acknowledge that the Crown holds and will continue to hold copyright in legislation and Parliamentary publications in whatever form, including printed and electronic form, in which legislation and Parliamentary publications are printed or stored.

Despite the uncertain nature of the Crown claim to copyright,<sup>38</sup> it is likely that this contention brought forth the introduction to the qualifier to s 27 Copyright Act 1994, namely that the removal of copyright from those listed sections would not be effected until an Order in Council. The Law Reform Division of the Department of Justice advised that it would seek “legal opinion from the Solicitor-General” with regard to this objection from GP Print.<sup>39</sup> This apparent — and so far successful — attempt by a private company to use a private contract to determine the public policy actions of Parliament throws interesting light on the relationship between the state and private enterprise in the 1990s.<sup>40</sup>

The final point was a submission by GP Print that the “proposed relinquishing of Crown copyright... is in contradiction with Clause 221 of the Bill which expressly retains Crown copyright existing under Crown prerogative”.<sup>41</sup> However, the validity of Crown prerogative in primary legal materials is highly doubtful, as we shall see shortly, and would be extinguished by the specific statutory provision in any case. Section 27(2) of the Copyright Act 1994, requiring an Order in Council to give effect to s 27(1), was introduced after the submissions were received on the Bill. This amendment can only be interpreted as meaning that the contractual argument raised by GP Print was thought to have some substance, or at least that the Crown was not prepared to face litigation over the issue.<sup>42</sup> There were no other submissions opposing the introduction of clause 27 as it stood.<sup>43</sup>

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<sup>38</sup> See below at note 44 and accompanying text.

<sup>39</sup> “Copyright Bill: Departmental Report” 3 November 1994, LRD 6-1-1, Law Reform Division, Department of Justice, 31. A request for the report under the Official Information Act was rejected by the Ministry of Commerce, saying “it would not be appropriate for us to release this opinion on the grounds that it is subject to legal privilege”.

<sup>40</sup> For a discussion of the latter see J McLean “Contracting in the Corporatised and Privatised Environment” 7 Public Law Review 223.

<sup>41</sup> GP Print submission, above at note 28, Summary at para 3(iv).

<sup>42</sup> However, in the words of Robertson J in *Rothmans of Pall Mall (NZ) v Attorney-General* [1991] 2NZLR 323, at 328: “It is elementary that the executive may not restrict the legislative competence of Parliament by contract”. See also Cooke P, in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2NZLR 301, at 308: “[P]ublic policy requires that the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it”.

<sup>43</sup> Other publishers, such as Newspaper Publishers Association (Submission of the NPA, C/94/135), and CCH New Zealand Ltd (Submission of CCH New Zealand Ltd, C/94/79) actively supported the original clause.

### 3 Crown Claims

The orthodox view, and that of the administration, within Commonwealth countries has been that the Crown has an exclusive right to publish Acts of Parliament, although there was no specific statutory provision granting the Crown reproduction rights over legislation. This has been based variously on Crown prerogative,<sup>44</sup> and Crown copyright,<sup>45</sup> but perhaps the true basis is convenience.<sup>46</sup> Although the United Kingdom has now legislated to establish Crown copyright in statutes and bills,<sup>47</sup> the great majority of jurisdictions worldwide have explicit provisions that there should be no copyright in such materials.<sup>48</sup> Canada, New Zealand and Australia (jurisdictions that traditionally followed the English model in handling the promulgation of government information) have recently taken measures to relax copyright control over primary legal materials, including legislation. Even in the United Kingdom, the recent Green Paper *Crown Copyright in an Information Age*<sup>49</sup> may be taken as an indication that there is some dissatisfaction there with the current system. Confusion as to the extent of intellectual property rights in the statutes of New Zealand remains, particularly in relation to the applicability of Crown prerogative.<sup>50</sup> In order to appreciate the prevalent misunderstanding regarding Crown prerogative and copyright in Acts of Parliament it is necessary to take a close look at the claims made by the Crown in the early days of printing in England.

On the face of it there are three possible grounds upon which the Crown could have rested claims to exclusive publication rights in Acts of Parliament; namely, Crown prerogative, common law copyright and copyright under statute. The distinction between these different grounds is not at all clear when reviewing the English literature and case law, but analysis provides a useful insight into the development of copyright law in many Commonwealth jurisdictions and the current status of copyright and prerogative rights in legislation.

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<sup>44</sup> *The Attorney-General for New South Wales v Butterworth & Co. (Australia) Ltd* (1937) 38 SR (NSW) 195 (see discussion below at note 72 and accompanying text).

<sup>45</sup> For example, see O Mitchell “Crown copyright in legislation” (1991) 21 VUWLR 351 quotes Hon G Palmer, member of the New Zealand Parliament, as saying in a letter to a leading New Zealand legal publisher in early 1989 “[c]learly, Crown copyright subsists in statutes under the Copyright Act”.

<sup>46</sup> Until recently in Commonwealth countries, statutes were compiled, printed, published, and distributed by various arms of the executive. Allowing the assumption that there is copyright in Acts of Parliament, who would hold it other than the Crown?

<sup>47</sup> The Designs Patents and Copyright Act 1988 (UK) establishes Parliamentary Copyright in Bills, and specifies Crown Copyright in Acts of Parliament.

<sup>48</sup> For a comparison of such statutory provisions see the compilation of world copyright provisions in the Appendix of Mitchell, above at note 45, at 387 and also J Sterling “Crown Copyright in the United Kingdom and Other Commonwealth Countries” (1996) 10 Intellectual Property Journal 157, 168.

<sup>49</sup> *Crown Copyright in the Information Age* HMSO 19 January 1998.

### 3.1 Early development influencing Crown copyright

Most commentators do not dispute the major factors in the history of copyright's development.<sup>51</sup> Prior to the introduction of moveable type enabling the mass production of printed materials,<sup>52</sup> the protection of reproduction rights was not an issue of great import, although there was an association known as 'Writers of Court Hand and Text Letters' in the fourteenth century. In the very early days of the printing press in England, the production and distribution of materials was actively encouraged,<sup>53</sup> but within 50 years or so from the introduction of the press to England, Henry VIII assumed total control by establishing a system of licensing.<sup>54</sup> This provided the Crown with a handsome source of revenue for the royal coffers and an effective means of censorship.<sup>55</sup> The focus was clearly on the control of printing and distribution, with no thought of the intellectual efforts of the authors. The establishment, by charter, of the Stationers' Company in 1557 ensured that the Crown and the printers had total control over this new medium. Abrams summarises the climate of that age:<sup>56</sup>

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<sup>50</sup> See above at note 28 and accompanying text.

<sup>51</sup> Cf J Feather "From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries" (1991) 10 *Cardozo Arts and Ent LJ* 455, which takes the view that the foundation for authors' rights is to be found in the pre-revolution patents and trade practices and suggests that legal commentators have largely ignored the practical protection of literary works that was prevalent well before statutory protection.

<sup>52</sup> Burrows, in 4 *Burr* 2418, records the debate between those putting the first English printing press in Oxford around 1468 and those championing Caxton soon after 1471, commenting that "it is very unsafe to trust to common history; and necessary to recur to original testimonies, if we would know the state of facts with exactness". Most commentators now agree that the printing press was introduced into England by Caxton in 1476, see below at note 55.

<sup>53</sup> At the beginning of the realm of Richard III, The Importation of Books by Aliens Act 1483 (1 Ric 3 c9) was introduced to encourage the printing of books and to allow their importation and sale, even by non-English merchants.

<sup>54</sup> Printers and Binders Act 1533 (25 Hen 8, c15).

<sup>55</sup> For a historical background to control of printing practices (from the perspective of those writing on copyright), see E Skone James et al *Copinger and Skone James on Copyright* (London: Sweet and Maxwell, 12th ed 1980) paras 21-45; B Kaplan *An Unhurried View of Copyright* (New York: Columbia University Press, 1967) 1-25; H Fox "Copyright in Relation to the Crown and Universities" (1947) 7 *UTLJ* 98; and H Fox *The Canadian Law of Copyright and Industrial Designs* (Toronto: Carswell, 1967) 269-270, Ch 2.

<sup>56</sup> H Abrams "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright" (1983) 29 *Wayne LR* 1119, 1135-36.

Only members of the Company of Stationers could legally print books and only books authorized by the Crown could be published. The Company was authorized to seize and destroy any unauthorized books and presses, thus silencing political and religious opposition to the Crown while eliminating economic competition to themselves. This powerful economic incentive harnessed the self interest of the publishers to the yoke of royal censorship.

The decrees and ordinances of the Star Chamber continued to restrict printing severely.<sup>57</sup> Despite the abolition of the Chamber in 1640, Parliament was quick to bring in a series of acts to ensure that the power of the Company was maintained, a practice continued during the Restoration. For example, the Licensing Act 1662 prohibited the printing of any book unless it was registered with the Company and also forbade any publication:<sup>58</sup>

[W]herein any doctrine or opinion shall be asserted or maintained which is contrary to the Christian faith, or the doctrine or discipline of the Church of England, or which shall, or may, tend to be the scandal of religion or the church, or the government or governors of the church, state, or common wealth, or of any corporation or particular person or persons whatever.

The last in the series of such Licensing Acts expired in 1694, prompting publishers and booksellers to petition for a new statute. However, the resulting legislation was of a new kind, being the first statute to recognise that the property right in “books and writings” was first vested in the author, rather than being concerned solely with the proprietary rights of the printers and seller. The preamble to the Statute of Anne 1710 states that it is “[a]n Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned”.<sup>59</sup>

This Act is the fountainhead of subsequent copyright legislation in common law countries. It provided authors with a sole right of printing unpublished works for only 14 years, with an extension of 14 more years if the author was still living. It also provided for registration with the Company of Stationers. Between 1710 and the Copyright Act of 1911 there was little change in the protection afforded to authors, although the Copyright Act of 1842 extended the term of protection to 42 years, or the life of the author plus seven years, whichever was longer. A variety

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<sup>57</sup> Copinger and Skone James above at note 55, at para 22:

In 1637, the Star Chamber again decreed that “no person is to print or import (if printed abroad) any book or copy in which the Company of Stationer, or any person, hath or shall, by any letters patent, order or entrance in their register book, or otherwise, have the right, privilege, authority, or allowance, solely to print”.

<sup>58</sup> The Licensing Act 1662, 13&14 Car 2 c33.

<sup>59</sup> 8 Anne c19.

of *sui generis* statutes were also introduced to protect engravings,<sup>60</sup> sculptures,<sup>61</sup> dramatic works<sup>62</sup> and fine art.<sup>63</sup> The United Kingdom Copyright Act 1911 was the first statute to provide explicitly for Crown copyright. Section 18 applied to any work “prepared or published by or under the direction or control of Her Majesty or any government department”, subject to agreement with the author.<sup>64</sup> Prior to the enactment of this provision the Crown could only have been entitled to statutory copyright by satisfying the general provisions for copyright in literary works. It would have had to have shown that the Crown was the author of a particular work, or that it had commissioned the work or the contributions in a compilation work.<sup>65</sup> The introduction of s 18 in the 1911 Act considerably widened the scope of works that could fall under the veil of Crown copyright. Most Commonwealth jurisdictions based their copyright legislation on the 1911 Act, repeating verbatim s 18.

It has been argued by some commentators that the provisions under this and subsequent legislation for the protection of copyright give the Crown copyright in the published versions of Acts of Parliament. Monotti, for example, in relation to the Australian provision,<sup>66</sup> suggests: “as parliamentary counsel provides drafting advice when a Bill drafted by his office is considered by the Houses of Parliament, the Act is probably ‘made’ by the Commonwealth or State as the case may be.”<sup>67</sup> The problem with this approach is that bringing Acts of Parliament within the type of provision provided by s 18 of the 1911 Act suggests that Acts of Parliament are made under the direction or control of the Crown. It is clear that the substance of Acts of Parliament must be regarded as the work of the House of Representatives, even when parts are drafted by civil servants, government agencies or contractors.<sup>68</sup> Problems of mixed authorship, with contributions

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<sup>60</sup> The Engraving Copyright Act 1734.

<sup>61</sup> Sculpture Copyright Act 1814.

<sup>62</sup> Dramatic Copyright Act 1833.

<sup>63</sup> Fine Arts Copyright Act 1862.

<sup>64</sup> United Kingdom Copyright Act 1911, s 18.

<sup>65</sup> In *Lawrence Ltd v Aflalo* [1903] 1 Ch 318 the House of Lords decided that the copyright in articles submitted for publication in an encyclopedia vested in the proprietors of the encyclopedia who had commissioned the contributions, and this conclusion depended on the inferences of fact that a reasonable man might draw from the circumstances.

<sup>66</sup> Ss 176–177 of the Australian Copyright Act 1968 (Commonwealth) essentially reproduce s 18 of the United Kingdom Copyright Act 1911.

<sup>67</sup> A Monotti “Nature and Basis of Crown Copyright in Official Publications” (1992) 9 EIPR 305, 313. Note that here Monotti is referring to the Commonwealth and States of Australia and the provisions in ss 176–177 Australian Copyright Act 1968 (as amended), but similar arguments could be applied to those commonwealth countries with similar wording.

<sup>68</sup> The move to privatising drafting of legislation in the United Kingdom and New Zealand, particularly where it is complex and specialised, has received little comment. See T Bates “Privatised Drafting and the

to parts of legislation made by persons outside the House, could be avoided by placing Acts of Parliament in the public domain.

Some of the problems with suggesting that the Crown holds copyright in Acts of Parliament under the terminology of the 1911 Act were resolved in the United Kingdom in 1988 with a *sui generis* solution. Chapter 10 of the United Kingdom Copyright, Designs and Patents Act 1988 provides for Crown and Parliamentary copyright. Section 164(1) states “Her Majesty is entitled to copyright in every Act of Parliament or Measure of the General Synod of the Church of England” for a period of 50 years.<sup>69</sup> Provision for copyright in Parliamentary Bills is vested in either or both Houses of Parliament until assent.<sup>70</sup> Provision is made for other works in terms similar to that of s 18 of the Copyright Act 1911 giving Crown copyright in a work “made by Her Majesty or by an officer or servant of the Crown in the course of his duties”.<sup>71</sup> The explicit granting of Crown copyright over Acts of Parliament and “House” copyright in Bills could be taken as reinforcing the contention that they were not covered by the provisions in the earlier legislation, or at least that the extent of copyright in Acts of Parliament needed clarifying by statute.

The wording of s 18 Copyright Act 1911 Act was used in the United Kingdom until the 1988 Act. Similar or identical provisions have been in force in Canada, Australia, New Zealand and several other Commonwealth countries, although there have been recent changes in the wording of Crown Copyright sections. The interpretation and extent of application of the section has been seldom considered, and there is no reported case that turns on the question of statute-based copyright in Acts of Parliament. However, the Australian equivalent of s 18 of the 1911 Act (UK) was considered briefly in *Attorney-General for New South Wales v Butterworth*<sup>72</sup> (1937) where the Crown was seeking to enforce its monopoly over the publication of Acts of Parliament in Australia. The case was finally decided in favour of the Crown on the grounds of prerogative, so Long Innes CJ found it unnecessary to determine the question of the application of the equivalent of s 18.<sup>73</sup> However, he did express an opinion as to the conclusion he would have arrived at had he not found that the prerogative applied. His comments on the operation of the section are worth noting especially in light of the dearth of authority on the operation of the section in relation to Acts of Parliament. The defendants proposed that s 18 did not create copyright, but merely declared in whom and for what term copyright was to subsist in certain works, that there was no

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Finance Bill” (1996) 17 Scots Law Times 153 which draws attention to the potential dangers of “stylistically untidy or worse” legislation when multi-agency drafting is employed.

<sup>69</sup> Copyright, Designs and Patents Act 1988, s 164(1).

<sup>70</sup> Copyright, Designs and Patents Act 1988, s 166.

<sup>71</sup> Copyright, Designs and Patents Act 1988, s 163.

<sup>72</sup> *The Attorney-General for New South Wales v Butterworth & Co. (Australia) Ltd* (1937) 38 SR(NSW) 195.

<sup>73</sup> *Ibid* at 258.

author of a statute, and that the wording “subject to any agreement with the author” included in s 18 limited the section to those situations in which there was an author or authors.<sup>74</sup> Long Innes CJ rejected these arguments, although he did recognise that there was a problem in ascertaining the authorship of statutes.<sup>75</sup> The lack of consideration of the purpose of copyright legislation, namely the protection of authors’ rights, whether based on a natural law or an economic basis, and the operation of s 18 of the 1911 Act, is unfortunate as this is the only case where the opportunity arose for a full judicial discussion of the issues.

Although there has never been a specific statutory provision for Crown copyright in Acts of Parliament in New Zealand there have been attempts to introduce legislation to place Acts in the public domain. The Copyright (Crown Copyright) Amendment Bill 1989 was introduced by the opposition party to place Bills, Acts of Parliament, *Hansard* and other parliamentary works within the public domain. As noted above, this was stimulated by the declared aim of the Government of the day to privatise the GPO, and the introduction of a copyright notice on statutes.<sup>76</sup> The Bill reached committee stage but failed to progress further due to Government opposition to the proposal.<sup>77</sup> The current Copyright Act 1994 provides in s 27(1)(b) that no copyright exists in Acts of Parliament, subject to the subsection being brought into force by an Order in Council. No such Order has been made.<sup>78</sup>

In order to attract Crown copyright, Acts of Parliament would need to come within either s 26 of the Copyright Act 1994 or under the general provisions. Section 26 is of a similar character to s 18 of the 1911 Act (UK), but with significantly different wording. It claims Crown copyright for a work “made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for service”, narrower than the previous “under the direction or control” phrasing used in the Copyright Act 1962 (repealed).<sup>79</sup>

There are still substantial difficulties with bringing Acts of Parliament within this wording of statutory Crown copyright provisions or the general provisions. The first is to determine an

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<sup>74</sup> K Bonney for defendant, *ibid* at 202.

<sup>75</sup> *Ibid* at 258–259. Long Innes CJ also interpreted the provisions of s 18 as only delimit the extent of statutory copyright that could be claimed by the Crown, negating any suggestion that there could be a different genus of copyright created solely for the Crown.

<sup>76</sup> This was without the approval of the Attorney-General. See R Hammond “Intellectual & Industrial Property” [1989] NZ Recent Law Review 239 at 241–242.

<sup>77</sup> R Hammond “Intellectual & Industrial Property” [1990] NZ Recent Law Review 227 at 229.

<sup>78</sup> A telephone conversation with Ministry of Commerce Copyright Division, April 1997, suggested that the Order was ‘being drafted’. However, in a letter to the author dated 31 March 1998, the suggestion is that although the recommendation of the Competition and Enterprise Branch to Ministers will be that the s 27(1) is brought into force, this may be delayed until 2001.

<sup>79</sup> Copyright Act 1962 (repealed), s 52.

author. Members of Parliament, Parliamentary Counsel and others could be regarded as the joint authors of a Bill with the possible result that parts of an Act would be ‘protected’ by Crown copyright, parts would fall within an individual’s copyright, and perhaps some parts in the public domain.<sup>80</sup>

Another flaw in claims of copyright is that substantial portions of New Zealand Acts of Parliament may be based on other jurisdictions’ legislation or international treaties. This would go to the originality requirement for copyright in s 14(1), which has been a requirement since the Copyright Act 1911 (UK).<sup>81</sup> Many sections of the Copyright Act 1994 (NZ), for example, are based directly on sections in the Copyright, Designs and Patents Act 1988 (UK). The Layout Designs Act 1994 (NZ) owes much of its wording to the Circuit Layouts Act 1989 (Australia) and its extent to the General Agreement on Tariffs and Trade, Agreement on Trade-Related Aspect of Intellectual Property Rights (Articles relevant to Integrated Circuit Designs) 1994. Given the need for compliance with a range of international treaties, and the limited scope for original expression in local legislation of the ideas contained therein, it is hard to see the originality of some Acts of Parliament in many jurisdictions. Other legislation may be highly original, such as the Accident Compensation Act 1972 (NZ) (repealed) or various Finance Acts. However, even parts of these are likely to be borrowed from earlier legislation or from other jurisdictions legislation. This would leave some legislation possibly attracting Crown copyright, with others being compilations with copyright in parts held by international organisations, other states’ legislature and persons in New Zealand.

Although the copyright status of Acts of Parliament has not been judicially examined in New Zealand, an early decision of the Ombudsman under the Official Information Act 1982 considered an application under the Act for disclosure of the final draft of a proposed Competition Bill.<sup>82</sup> The Ombudsman accepted the characterisation of the Bill as a “legal instrument proffered as part of legal advice” with the “Government as the ‘client’ of parliamentary counsel”.<sup>83</sup> This decision has been castigated as ignoring public interest,<sup>84</sup> and widespread adoption of this approach would be entirely inappropriate, but it is illustrative of the

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<sup>80</sup> However, it should be noted that s 6(4) of the Copyright Act 1994 (NZ) provides:

Where, in relation to a work of joint authorship, copyright would not exist in the work if one or more of the authors were the sole author or sole joint authors, the work shall be treated as if the other author or authors were the sole author or sole joint authors of the work.

This would allow for copyright protection for those parts of Acts of Parliament that were subject to Crown or other persons’ copyright.

<sup>81</sup> Copyright could still be claimed under Copyright Act 1994, s 2, as compilations.

<sup>82</sup> See I Eagles, M Taggart and G Liddell *Freedom of Information in New Zealand* (Auckland: Oxford University Press, 1992) 391–393.

<sup>83</sup> *Ibid* at 392.

<sup>84</sup> *Idem*.



complexities involved in considering the drafting of legislation from a copyright perspective. In *Glogau v Land Transport Safety Authority*,<sup>85</sup> Gallen J considered the inclusion of statutory matter in a log book and commented that it was “clearly material in the public domain”.<sup>86</sup>

The assumption that the Crown has copyright in Acts of Parliament is widespread, as illustrated by the following notice from the Attorney-General of New South Wales entitled “Waiver of Crown copyright in NSW”:<sup>87</sup>

Recognising that the Crown has copyright in the legislation of New South Wales and in certain other material, including but not limited to prerogative rights and privileges of the Crown in the nature of copyright, and that it is desirable in the interests of the people of New South Wales that access to such legislation should not be impeded except in limited special circumstances....

An inference of Crown copyright may also be drawn from s 182A of the Commonwealth Copyright Act 1968 which includes Acts of Parliament in the definition of prescribed works for which one copy of the whole or part may be made. Despite the assumption of Crown copyright in Acts of Parliament, it can be seen from the above discussion that there is little evidence to support the supposition.

Section 26 of the Copyright Act 1994 (NZ) provides for Crown copyright, but in s 26(7) it specifies that the section is subject to s 27, (which provides for no copyright in bills, acts, regulations, bylaws, parliamentary debates, select committee reports, judgments of courts and reports of Royal commissions). Brown suggests that the inclusion of s 26(7) and the lack of any similar provision in ss 21 and 28 indicates that “the legislature believed that all works listed in s 27, whenever made, would otherwise be subject to Crown copyright”.<sup>88</sup> However, although it may be a generally held opinion, it is far from clear that this is the case. Indeed, the wording of s 27 — “[n]o copyright exists in any of the following works” — rather than “no Crown copyright” could be taken to acknowledge the possibility of holders of copyright other than the Crown in the included works.

That the ownership of copyright in Acts of Parliament cannot be determined with certainty is a matter of concern not only for those wishing to replicate them in their own works, but also as a matter of public policy.

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<sup>85</sup> [1997] 3 NZLR 353.

<sup>86</sup> Ibid at 359.

<sup>87</sup> Attorney-General for the State of New South Wales, “Waiver of Crown Copyright in New South Wales” New South Wales Government Gazette (27 August 1993) 107,993.

<sup>88</sup> B Brown et al, *Intellectual Property in New Zealand* (Wellington: Butterworths, Nov 1997) C267.

### 3.2 The Illusion of Copyright at Common Law

The United Kingdom Act of 1911 explicitly abolished common law copyright,<sup>89</sup> and in return provided statutory protection for unpublished works.<sup>90</sup> Similar provisions remain today.<sup>91</sup> The importance of claims of common law copyright dates back to the earlier cases involving conflicting printing patents granted by the Crown that contain dicta to the effect that the right was based on a common law ‘copy-right’ rather than another form of prerogative right. In order to follow the reasoning that the Crown prerogative was based on a common law copyright it is necessary to look at the basis for any such common law right.

The status of common law copyright before and after the passage of the Statute of Anne is not as clear as texts often suggest. The generally accepted approach is that there was clearly a developed doctrine of copyright at common law, as held by the Court of King’s Bench in *Millar v Taylor*<sup>92</sup> (1769) and that the House of Lords in *Donaldson v Beckett*<sup>93</sup> (1774) held that although a perpetual copyright did exist under the common law the right was “impeached” by the Statute of Anne 1710 for published works. This approach would seem to be mistaken, and the better interpretation is that the House of Lords in *Donaldson* reversed the decision in *Millar*.

With regard to *Donaldson v Beckett*,<sup>94</sup> (1774) Drone’s treatise on the law of intellectual property emphatically takes the traditional position:<sup>95</sup>

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<sup>89</sup> Copyright Act 1911 (UK), s 31:

No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force.....

<sup>90</sup> Copyright Act 1911 (UK), s 1.

<sup>91</sup> See the United Kingdom Copyright Designs and Patents Act 1988, s 171, and the New Zealand Copyright Act 1994, s 225(2) (which provide that, subject to Crown prerogative, no copyright or right in the nature of copyright shall exist otherwise than under statute).

<sup>92</sup> *Millar v Taylor* (1769) 4 Burr 2303; 98 ER 201.

<sup>93</sup> *Donaldson v Beckett* (1774) The Parliamentary History of England vol XVII (1771–1774) *Proceedings in the Lords on the Question of Literary Property* (1774) 954. An incomplete report is also given in 4 Burr 2408; 98 ER 257 and in 2 Bro PC 129; 1 ER 837. See also the report of A Gentleman of the Inner Temple, first published in 1774 and reproduced in *The Literary Property Debate: Six Tracts 1764–1774* (Garland 1974). References hereafter are to the report in The Parliamentary History of England unless otherwise noted.

<sup>94</sup> *Idem*.

It is a fact which may be regarded as judicially conceded, that copyright in printed books was not created by legislation, but that it existed by the common law long before, and when the Statute of Anne was passed. This doctrine was declared by the King's Bench in *Millar v Taylor*; and it has never been judicially overruled. It was expressly approved by a majority of the judges in *Donaldson v Beckett*; and was in effect affirmed in that case by the House of Lords, whose judgment was not, that copyright had been created by the Statute of Anne, but that the common-law right had been superseded by the statutory.

*Copinger and Skone James on Copyright* takes the view that “this case must be taken to have decided finally that publication put an end to the common law perpetual right, and that after publication an author had to base his claim for protection upon his statutory right”.<sup>96</sup> This position, that the outcome of *Donaldson* was simply that publication brought an end to a copyright at common law, is reiterated with little clarification: “[in] the case of *Donaldson v Beckett*, the House of Lords finally decided that the effect of the statute was to extinguish the common law copyright in published works, though leaving the common law copyright in unpublished works unaffected”.<sup>97</sup> Ricketson takes a similar approach,<sup>98</sup> but does note that he is discussing the opinions of the judges called to advise the House of Lords in *Donaldson* rather than the ultimate decision of the full House.

A detailed analysis of *Donaldson* by Abrams reveals the Lords voted against the existence of common law copyright by twenty-two to eleven.<sup>99</sup> Ironically, the confusion is mainly attributable to the ban on reporting House of Lords proceedings at that time, ostensibly because of a fear of possible errors in the reporting process. At that time it was contempt of the House, punishable by imprisonment, to report the speeches of the Lords.<sup>100</sup> It was thus prudent for reporters to confine

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<sup>95</sup> E Drone *A Treatise on the Law of Property in Intellectual Production in Great Britain and the United States* (New Jersey: Hackensack, Reprint 1972) 20 (footnotes omitted). Although Drone does note that it was the advisory opinions of the judges reported, he does not consider the decision of the full House of Lords. Drone's treatise was first published in 1879.

<sup>96</sup> Copinger and Skone James, above at note 55, para 5.

<sup>97</sup> Ibid at para 30.

<sup>98</sup> S Ricketson *The Law of Intellectual Property* (North Ryde, New South Wales: Law Book Company, 1991) 70.

<sup>99</sup> Abrams, above at note 56, at 1157–1158. See also R Tompson “Scottish Judges and the Birth of British Copyright” [1992] *The Juridical Review* 18.

<sup>100</sup> Shower was the unfortunate subject of the wrath of the Lords at the end of the seventeenth century when his reports of the House's deliberations were ruled a breach of privilege. Regular reporting of the House did not reappear until the reports of Josiah Brown at the end of the eighteenth century. See R Stevens *Law and Politics, The House of Lords as a Judicial Body, 1800–1976* (Chapel Hill: University of North Carolina Press, 1978) 12; W Holdsworth *A History of English Law* (London: Methuen, 3rd ed, 1945), at

their work to the advisory opinions of the judges. Burrow's report, almost invariably the only one cited, thus omits the speeches in the House of Lords deliberations in *Donaldson* and simply reports some advisory opinions of the judges solicited to assist. Some of the Lords' speeches are reported in the *Parliamentary History of England*. These are indicative of the total rejection by the full House of the notion of common law copyright.<sup>101</sup> However, the judicial statements commonly have been interpreted to be the controlling opinions in this case, whilst the actual decision and opinions expressed in the House of Lords have been overlooked. Although the advisory opinions of the judges were frequently followed, it was the Lords that had the final say in matters before them. A clear and well documented illustration of this is found in *Bishop of London v Ffytche*<sup>102</sup> (1783), where the opinion of the judges was not followed and the ruling of the lower court reversed upon the urging of the Episcopalian members of the House.<sup>103</sup> In *Jeffereys v Boosey*<sup>104</sup> (1854) common law copyright again came before the House of Lords, and again it was rejected.

Despite the actual decision in *Donaldson*, as opposed to the widely promulgated opinions of the judges, several cases have applied the concept of a common law copyright in unpublished works,<sup>105</sup> although a direct claim of copyright at common law has never been made by the Crown.

### 3.3 The Crown prerogative

Legislation in many Commonwealth countries does not directly refer to prerogative in Acts of Parliament, however the prerogative rights of the Crown are invariably reserved.<sup>106</sup> Definitions of prerogative are legion. Dicey refers to "the residue of discretionary power left at any moment in

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572; and Abrams, above at note 56, at 1159. The House of Lords judgments are now within the scope of Parliamentary Copyright under s 165 of the United Kingdom Copyright, Designs and Patents Act 1988.

<sup>101</sup> Abrams, above at note 56, at 1164.

<sup>102</sup> *Bishop of London v Ffytche* (1783) 2 Bro. Parl. Cas. 211.

<sup>103</sup> See Stevens, above at note 100, at 11–12.

<sup>104</sup> *Jeffereys v Boosey* (1854) 4 HLC 814. W Cornish *Intellectual Property* (London: Sweet & Maxwell, 3rd ed, 1996) at para 9-03 comments that the House of Lords consulted the judges, but rejected their majority opinion and unanimously agreed with Lord Chief Baron Pollock, who put the case against a common law right strongly at 4 HLC 814, 937:

[C]opyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each state may direct, and has no existence by the Common law of England.

<sup>105</sup> A full discussion of these cases can be found in *Re Dickens* [1935] Ch 267.

<sup>106</sup> See Copyright Designs and Patents Act 1988 (UK), s 171, and the Copyright Act 1994 (NZ), s 225(1).

the hands of the Crown”.<sup>107</sup> Chitty spoke of prerogative as “that special preeminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his Royal dignity”<sup>108</sup> These oft quoted definitions give little help, but Evatt classified prerogative under three main heads: executive powers, such as declaring war, making peace, and seizing property in wartime; immunities, such as immunity from the ordinary process of the courts; and proprietary rights, including the right to treasure trove, royal fish and gold and silver mines.<sup>109</sup> In *The Attorney-General for New South Wales v Butterworth & Co*<sup>110</sup> (1937) the Crown prerogative over the publication of legislation was said to fall in the category of proprietary rights. This case is discussed below.

The development of a doctrine of copyright since the introduction of the printing press has been one of fitful progression. Copyright has been extended greatly since its early inception; now, for example, authors can claim ‘moral rights’ in some of their creations.<sup>111</sup> The claim of the Crown to exercise unfettered prerogative rights conversely has diminished over this period. In general it was severely curtailed by the Bill of Rights 1689, and even the seventeenth century Licensing Acts Dicey saw as part of the trend towards the freedom of printing from “exceptional authority” of the Crown<sup>112</sup> Regarding the printing of Acts of Parliament, this trend has culminated in the United Kingdom with s 164 of the Copyright, Designs and Patents Act 1988, which provides that the Crown is entitled to copyright in every Act of Parliament, and in s 164(4) which provides that no other copyright, or right in the nature of copyright, can subsist in an Act or Measure. Although s 171 preserves Crown privileges generally, this section explicitly preserves the exclusion of the privilege in s 164(4).

The situation in other Commonwealth countries is not so clear. In New Zealand, whereas s 27 of the Copyright Act 1994 will place copyright in Acts of Parliament in the public domain (when and if the section is given effect by Order in Council), s 225 still preserves the rights and

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<sup>107</sup> A Dicey *The Law of the Constitution* (London: Macmillan, 10th ed 1959) 424–425, and an identical passage in an earlier edition is cited by Lord Dunedin in *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508, 526.

<sup>108</sup> J Chitty *A treatise on the law of the prerogatives of the Crown, and the relative duties and rights of the subject*. (London: Printed for J. Butterworth, 1st ed 1820) 4.

<sup>109</sup> H Evatt *The Royal Prerogative* (Law Book Company, 1987) 30–31. Evatt’s thesis was written in 1924.

<sup>110</sup> *Supra* at note 72.

<sup>111</sup> For moral rights in New Zealand law see the Copyright Act 1994, ss 94–101.

<sup>112</sup> Dicey, above at note 107, at 268, referring to the Licensing Act, states: “The passing, however, of the statute, though not a triumph of toleration, was a triumph of legality. The power of licensing depended henceforward, not on any idea of inherent executive authority, but on the statute law”. In relation to the Bill of Rights, however, Dicey perhaps overstates the case when he said at 269: “The abolition of the censorship was final in England, because the exercise of discretionary power by the Crown was inconsistent with our system of administration and with the ideas of English law”.

privileges of the Crown.<sup>113</sup> Thus even after s 27 comes into effect, it could be argued that a Crown prerogative over publication would still exist in New Zealand, although the consequence of such a prerogative claim is unlikely to have any effect in light of the specific provisions in s 27.<sup>114</sup>

The Canadian White Paper prior to the introduction of the Copyright Act 1985 recommended the retention of Crown copyright as “rights can be waived where protection is not required”, following the approach in the United Kingdom where Crown copyright can be waived in limited circumstances. The White Paper then comments:<sup>115</sup>

There presently exists in Canada a Crown prerogative right to authorise printing and publishing of works such as Acts of Parliament and judicial decisions. In view of the above proposals for the exercise of Crown Copyright, and in order to ensure the integrity of use of such works, this Crown prerogative right will remain.

The justification for this call to ‘retain’ uncertain prerogative rights over printing is to ensure the integrity of works. The paper also seems to confuse copyright and prerogative, adding to uncertainty rather than offering clarification. Prerogative rights were preserved in Canada.<sup>116</sup>

In Australia, the application of prerogative in the nature of copyright has been retained by s 8A(1) of the Copyright Act 1968 (Cth), although innocent infringement of the prerogative by a copyright holder is exempt from legal action.<sup>117</sup>

There has been only one case directly concerned with Crown prerogative rights in the publication of Acts of Parliament. Considering the subject matter, and the general approach of the Crown in recent years to enforcing any rights, the dearth of authority is hardly surprising.<sup>118</sup> The application of the Crown prerogative to print statutes was last considered in the Australian case of *Attorney-General of New South Wales v Butterworth*<sup>119</sup> (1937). The Attorney-General of New

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<sup>113</sup> Section 225(1) of the New Zealand Copyright Act 1994.

<sup>114</sup> Nonetheless, this point was made in “Submissions of GP Print Ltd to the Commerce Committee Copyright Bill 1994 – Crown Copyright” C/94/142-97, paras 68–70.

<sup>115</sup> *From Gutenberg to Telidon, A White Paper on Copyright* 1984 (Government of Canada) 75–76. See also See H Fox “Copyright in Relation to the Crown and Universities” (1947) 7 UTLJ 98.

<sup>116</sup> Canadian Copyright Act 1985, s 12.

<sup>117</sup> Australian Copyright Act 1968, s 8A(2).

<sup>118</sup> In the United Kingdom the Civil Service Department General Notice Gen 75/76–Crown Copyright at para 6 provides:

It is in the public interest that the information contained in publications falling in the first three classes [includes Acts of Parliament] should be diffused as widely as possible, and legal rights of the Crown in respect of copyright in them will not normally be enforced.

<sup>119</sup> *Supra* at note 72.

South Wales brought an action to restrain Butterworths from publishing a twelve-volume work of annotated Statutes of New South Wales. The hearing lasted 26 days, in the course of which many of the early decisions on prerogative were examined. Long Innes CJ had little trouble finding that the Crown had the exclusive right of printing and publishing Acts of Parliament by virtue of its prerogative, and furthermore that this was a proprietary right. However, the analysis of the many cases in that judgment seems to ignore their historical context. Long Innes CJ, by his own admission, extensively relied on Evatt's then unpublished thesis. Evatt classified prerogative into three categories — executive powers, immunities/privileges and proprietary rights.<sup>120</sup> Long Innes CJ accepted this division and put statutes in the third category saying “the right is, I think, based on property. I do not think that the decision in *Millar v Taylor*, that the Crown had a property in the nature of copyright, has been affected by the later decisions”.<sup>121</sup> However, whether the prerogative right relied on in the *Butterworth* decision is immutable, or even rooted on a solid foundation, is an open question, and requires revisiting some of the earlier case law.

*Basket v The University of Cambridge*<sup>122</sup> (1758) illustrates the approach taken in the years immediately following the Statute of Anne. Here the issue was whether the plaintiff had a right to print the Acts of Parliament and abridgments exclusive of all other persons under letters patent dated 13 October 1713. The University of Cambridge claimed that they too had been granted the right to print the Acts and Abridgments based on patents dating from 1534. The very brief certificate of the court diplomatically allowed the plaintiff's claim to print “exclusive of all other persons, not authorised to print the same by prior grants from the Crown”, but recognised that the University had “a concurrent authority, to print Acts of Parliament and abridgments”.<sup>123</sup> Lord Mansfield observed:<sup>124</sup>

[W]hether the Crown, in fact, meant to assume a power over the art of printing in general, when these patents were granted, or whether only over copy-rights, it is clear, they can only operate in point of law as to the copy-rights of the Crown; for the construction of the law is, that the Crown intended only to do that, which by law it is entitled to do.

The counsel in *Basket* admitted that “the Crown by prerogative had the sole right of printing Acts of Parliament”,<sup>125</sup> but it should be noted that both parties were printers and based their claims on patents issued under the Royal prerogative. A century earlier the Crown had exercised its prerogative over printing of all materials, and was especially interested in works that were linked with the governance of the state, namely religious, legal and political works. Lord Mansfield was

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<sup>120</sup> Evatt, above at note 109, at 31.

<sup>121</sup> *Supra* at note 72, at 247 (footnote omitted).

<sup>122</sup> *Basket v The University of Cambridge* 1 Black W 106; 96 ER 59 (KB 1758).

<sup>123</sup> *Ibid* at 120; 65.

<sup>124</sup> *Idem*.

<sup>125</sup> *Supra* at note 72, at 230.

developing a line of reasoning that placed the royal prerogative (as exercised a century earlier over printing materials of public importance, such as bibles and statutes), within a category of common law property rights, preferably copyright. The eighteenth century was a period of great constitutional change requiring assimilation of the post-Restoration ideologies. The application of the terms of the relatively new Statute of Anne and considerable suspicion of prerogative gave the judiciary considerable scope for innovation. The concept of prerogative powers of the Crown was extremely unpopular in the eighteenth century, and reached a high point in the late 1760s.<sup>126</sup> Lord Mansfield's approach to claims to print that were based on patents issued under the Crown prerogative to print was to suggest the claims were founded in a common law property right of the Crown. This culminated in his judgment in *Millar v Taylor*<sup>127</sup> (1769).

The case of *Millar* is cited more often than the House of Lords decision in *Donaldson*. There are several possible reasons for this. The reporting of *Millar* is more complete, and it was the first King's Bench case where Lord Mansfield was challenged by a dissenting judgment.<sup>128</sup> The case also had notoriety at the time, due in part to Lord Mansfield's status. In *Millar* Lord Mansfield again stressed that the Crown had no control over the act of printing in general,<sup>129</sup> and solidified the proposition that the Crown prerogative was simply a proprietary right of the Crown recognised at common law in much the same way as authors' rights.<sup>130</sup>

The argument in *Millar* is based on reasoning that the right relied on in the judgment given in *Basket*<sup>131</sup> was a copyright of the Crown at common law, and one that had not been preempted by the Statute of Anne. This reasoning is highly suspect. The concept of Crown prerogative being a property of copyright was dismissed emphatically by Lord Chief Justice De Grey a few years later in *Donaldson*:<sup>132</sup>

The case of *Basket and the University of Cambridge*... appeared upon the pleadings to be a question arising between two parties who claimed under concurrent and inconsistent grants of

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<sup>126</sup> E Heward *Lord Mansfield* (Chichester, Eng: Barry Rose Ltd 1979) 75.

<sup>127</sup> *Millar v Taylor* (1769) 4 Burr 2303; 98 ER 201.

<sup>128</sup> C Fifoot *Lord Mansfield* (Oxford: Clarendon Press 1936) 47, notes that the dissenting Justice Yates "nursed a grievance until reticence became intolerable. In 1770 he expressed his desire to 'retire into the Court of Common Pleas' and was succeeded by Sir William Blackstone. Blackstone himself shrank under the immediate eye of his patron and was glad to seek the same shade before the end of the year". The plaintiff in *Millar* was claiming a common law copyright in Thompson's *Seasons* and it was Blackstone who acted for the plaintiff.

<sup>129</sup> *Millar v Taylor* (1769) 4 Burr 2303, 2401.

<sup>130</sup> *Ibid* at 2405.

<sup>131</sup> *Supra* at note 122.

<sup>132</sup> *Donaldson v Beckett* (1774) The Parliamentary History of England vol XVII (1771–1774) *Proceedings in the Lords on the Question of Literary Property* (1774) 954, 989.



the crown. My late honourable and learned friend (Mr. Yorke) who argued that case, endeavoured to shew that his client's right might arise from the power of the crown, and to illustrate his argument said, it might perhaps be 'property founded on prerogative' — a language, however allowable for counsel, not very admissible by, or intelligible to a judge, but the certificate [of the court] in the above case does not say a word of property, and indeed if such a claim as that had been founded on property, every one would have as good a right to publish abridgments of the statutes, as of any other book.

Lord Camden also devoted part of his speech in *Donaldson* to criticising judges who assume the role of lawmakers: “their business is to tell the suitor how the law stands, not how it ought to be” — a barb thought to be aimed at Lord Mansfield.<sup>133</sup>

Following *Donaldson* there was some doubt about the status of Crown prerogative over printing. However, at the end of the eighteenth century and the beginning of the nineteenth there were a few cases that lent support to the prerogative. In *Eyre & Straham v Carnan*<sup>134</sup> (1781) the question before the court concerned a Form of Prayer ordered by the King to be read in all churches. Unauthorised reproductions of the Prayer were being printed in large quantities by Carnan. The plaintiffs claimed the sole right to print under a grant of King George I that had been assigned to them. Although the court had doubts as to the origin of the Crown's right, whether based in a purely proprietary right or executive prerogative, it found that the right itself was not in doubt and that the monopoly of the Crown in this area was assured. Lyndhurst LC came to a similar conclusion in *Manners v Blair*<sup>135</sup> (1828), where the King's printer in Scotland succeeded in restraining the import of English Bibles. Here the judgment for the King's patentee was based on “the kingly character” being the “guardian and protector” of church and state. His Lordship noted that, although the power of the King to grant such patents had not been seriously questioned in any court, various judges had referred to this power and based it on different principles.

Putting aside the terms of the Copyright, Designs and Patents Act 1988 (UK),<sup>136</sup> it is unlikely that a case like *Butterworth* would be decided on the basis of prerogative today. The modern English approach to prerogative has been very restrictive, especially where a monopoly is claimed, or where there is statutory relief available. Where the Crown is given powers by statute in an area

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<sup>133</sup> Lords Camden and Mansfield had very different approaches to the function of judging, see Heward, above at note 126, at 131.

<sup>134</sup> *Eyre & Straham v Carnan* (1781) VI Bac Abr 509.

<sup>135</sup> *Manners v Blair* (1828) 3 Bligh NS 391; 4 ER 1379.

<sup>136</sup> The provisions of which prescribe prerogative in Acts of Parliament.

previously occupied by prerogative, the Crown may not revert to the absolute prerogative it previously exercised.<sup>137</sup>

Conflicting claims of copyright and prerogative were considered in *Oxford and Cambridge v Eyre & Spottiswoode*<sup>138</sup> (1964). Plowman J confined his decision in this case to the narrow question of “whether the prerogative right of printing extends to the New English Bible”, and avoided the more general question which was raised for the first time ever, namely the precise extent of the prerogative right of printing bibles. His Honour decided that royal prerogative did not give the right to infringe a modern copyright, and that such a right could not therefore be conferred by patent. Shortly after this Diplock LJ said in relation to prerogative that “it is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative”.<sup>139</sup> All that can be said with certainty is that the standing of the Crown prerogative in printing is uncertain where it has not been specifically delimited by statute.

To this day there are still arguments made in favour of the application of prerogative claims to the publication of statutes. Monotti, for example, writes:<sup>140</sup>

A decision to replace the prerogative by statute is not simple, as it requires consideration of the nature of the works which would be affected and the policy for and against retaining perpetual protection in respect of any of such works. Furthermore, the uncertainty surrounding the prerogative makes one wary of wiping it out altogether.

To argue that uncertainty in the very narrow area of publication of state documents is a benefit to society is to stretch the arguments put forward for the retention of prerogative rights over publication past breaking point.

## 4 Public Policy and Promulgation

Public policy issues should be taken into account when considering primary legal materials. The changing emphasis in regulation of publications in general also needs consideration. The

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<sup>137</sup> *Attorney-General v De Keyser’s Royal Hotel* [1920] AC 508 where the House of Lords held that the Crown prerogative to seize land in an emergency in wartime had been superseded by the statute offering the same powers (but with a responsibility to compensate). See also S de Smith and R Brazier *Constitutional and Administrative Law* (Harmondsworth: Penguin, 7th ed 1994) 142–150, and generally G Rubin *Private Property, Government Requisition and the Constitution, 1914–1927* (London: Hambleton Press, 1994).

<sup>138</sup> *Oxford and Cambridge (Universities of) v Eyre & Spottiswoode, Ltd* [1964] Ch 736; [1963] 3 All ER 289.

<sup>139</sup> *BBC v Johns* [1965] Ch 32, 79.

<sup>140</sup> Monotti, above at 67, at 315.

development of protection of literary materials can be roughly categorised into four major ages. These reflect the policy of the times to censorship and control of information. The pre-press age relied on handwritten works, and, given the time and effort required for mass duplication, copying was of little consequence.<sup>141</sup> The fifty years following the introduction of the moveable type printing press to England by Caxton in 1476 was the only period of no regulation. This was followed by nearly two and a half centuries of total Crown control, whether by Crown prerogative, the enforcement of the Licensing Acts or management of ‘copy’ by the Stationers’ Company. This was an era where the Crown was exercising censorship policies on any materials it considered detrimental to its position in England by means of maintaining the monopoly of the Company of Stationers. The Statute of Anne 1710 was the first in a series of statutes that provided for rights for all authors.<sup>142</sup> The aim of the Statute was to prevent future monopolies and break the monopoly held by the Company of Stationers.<sup>143</sup> The law developed to reflect a policy of protecting authors’ interests in their works.

At the end of the twentieth century, we can see the beginnings of a new philosophy of protection in works of the intellect. Copyright legislation is now a highly codification. The provisions for a limited monopoly have been extended in both term and extent.<sup>144</sup> This decade has seen radical changes in the application of copyright doctrines worldwide, and challenges to the efficacy of the doctrine by digital media. Mass reproduction of works on a printing press is not now the major concern for copyright holders. The widespread use of the photocopier in the 1980s, digital media in the early part of this decade, and global networks today, have given every user of “literary works” the potential to infringe copyright on an unprecedented scale. Just a few decades ago the focus of concern was almost exclusively other publishing companies and plagiarism by other authors.

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<sup>141</sup> Prior to the introduction of the moveable type printing press, the only concern was with promulgation of heretic materials.

<sup>142</sup> Although L Patterson *Copyright in Historical Perspective* (Charlotte: Vanderbilt University Press, 1968) at 145–147 considers that more significant was the Act’s codification of rights previously limited to Members of the Company of Stationers and giving that right to “all persons”.

<sup>143</sup> *Ibid.*, at 144.

<sup>144</sup> The United Kingdom Copyright Act 1911 ran to 37 sections, compared to the New Zealand Copyright Act 1994 which has 236 sections and four schedules. Further extensions to the realm of copyright are under consideration. For example, the December 1996 Round of talks in Geneva of the World Intellectual Property Organisation discussed, but as yet has not adopted, broad spectrum copyright type protection of databases, many of which may be mere collections of raw data, belying any principle of artistic authorship and furthering the trend giving copyright protection to functional works.

We are entering a new age in which the fair use of copyrighted works and the realm of the public domain is becoming more restrictive.<sup>145</sup> Some of the natural law principles of the doctrine of copyright, such as providing public access to knowledge by offering only a limited monopoly for authors, are being eroded within a framework that stresses an economic analysis of copyright. However, this approach is not fully developed, as one commentator suggests:<sup>146</sup>

Essentially the history of economic thinking about copyright suggests that the analysis has progressed only to the point of presenting a serious alternative to the natural rights rationale: an alternative rationale based normatively on the criterion of economic welfare and on an explicit balancing of the costs of the copyright system against the economic objective of improving the operation of the unregulated... market.

The control over publishing, in the broadest sense, primary legal materials has its roots in seventeenth century England, as discussed above. The legacy of this absolute control still influences the approach taken by some Commonwealth governments when dealing with the promulgation of “normative state information”.<sup>147</sup>

#### 4.1 Development of promulgatory theory

The maxim *ignorantia legis neminem excusat*<sup>148</sup> is fundamental to the common law world. Frémont describes it thus:<sup>149</sup>

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<sup>145</sup> For a discussion of the threat to the public domain by implementation of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) in the United States, see P Jaszi “Goodbye to all that — A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law” (1996) 29 *Vanderbilt Journal of Transnational Law* 595. On the reaction of governments to a perceived threat from electronic media and digitisation of works see P Samuelson “Adapting Copyright to Meet the Challenges Posed by Digital Technologies” Symposium on Digital Technology and Copyright, Canada 1995, which is reproduced at the Canadian Government internet site <<http://canada.justice.gc.ca/folio.cgi/digital.nfo/>>.

<sup>146</sup> G Hadfield “The Economics of Copyright: An Historical Perspective” (1991) 38 *Copyright Law Symposium* 1.

<sup>147</sup> See J Frémont “Normative state information, democracy and Crown copyright” (1996) 11 *Intellectual Property Journal* 19.

<sup>148</sup> Section 25 New Zealand Crimes Act 1961 succinctly provides:

The fact that an offender is ignorant of the law is not an excuse for any offence committed by him.

See also H Broom *A Selection of Legal Maxims, Classified and Illustrated* (London: Sweet & Maxwell, 10th ed 1939) 169–181.

It is of course true that no one is supposed to ignore the law. It is also true that the State has the countervailing duty to disseminate its norms; otherwise a system of secretive normativity would exist and individuals would have to follow rules which they have no chance of knowing.

There are no maxims reflecting the state's duty to promulgate the law, to give access to primary legal materials, or to ensure that all citizens are aware of their obligations under the law. Provision for dissemination is usually couched in vague terms.<sup>150</sup> Major legal works rarely consider that there may be problems with the establishment of ligature between the demands of the state for compliance with the rule of law and the practical ability of the citizen to have knowledge of the rules. Fuller comments on the need for education and promulgation of law, and continues:<sup>151</sup>

Even if only one man in a hundred take the pains to inform himself concerning, say, the laws applicable to the practice of his calling, this is enough to justify the trouble taken to make the laws generally available. This citizen at least is entitled to know, and he cannot be identified in advance. Furthermore, in many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves.

In addition to restrictions on the replication of statutes, there is the further issue of a lack of access to the materials even if the Crown waives any such rights that it may have. This problem is acute in New Zealand with regard to parliamentary materials, such as Acts of Parliament, due to the privatisation of the GPO in 1991.

The duty of the state to promulgate the law has been recognised at law to some extent since the time of the medieval statutes which were primarily concerned with restrictions of activities such as the playing of "loish, kayles, half-bowl, hand-in-hand and hand-out, quekeboard".<sup>152</sup> These statutes were entered on Rolls and read out in open court. Writing in the mid-fifteenth century, Fortescue considered promulgation to be an essential part of giving written laws the force of "a constitution or something of the nature of statutes".<sup>153</sup> In medieval times it was common for

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<sup>149</sup> Frémont, above at note 147, at 29.

<sup>150</sup> The limited provisions in New Zealand are discussed below.

<sup>151</sup> L Fuller *The Morality of Law* (New Haven and London: Yale University Press 1964) 51.

<sup>152</sup> F Maitland *Selected Historical Essays* (chosen by H Cam) (England: Cambridge University Press, 1957) 124.

<sup>153</sup> J Fortescue *De Laudibus Legum Anglie* (1468–1471) (trans S Chrimes) (Cambridge University Press, 1942) Ch XV, 37:

But customs and the rules of the law of nature, after they have been reduced to writing, and promulgated by the sufficient authority of the prince, and commanded to be kept, are changed

copies of statutes to be sent to sheriffs of each county at the end of each session, along with any writs of the monarch, which were read out in court, and copies were kept for public inspection. In addition to this customary dissemination, statutes often legislated for their own promulgation with occasional provision for periodic repetition of the process.<sup>154</sup> However, a failure to so promulgate a statute was not seen as fatal to an action brought on it.<sup>155</sup> The practice of sending the King's writ to the county sheriff with the command "that those statutes and all the parts thereof must be publicly proclaimed in all the public places where they are to take effect and that they are strictly held and observed" continued until the reign of Henry VII.<sup>156</sup> Blackstone thought that as "everyman in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives" there was no need for formal promulgation.<sup>157</sup> It is unlikely that many would agree with such a proposition today. Earlier, in 1651, Hobbes had considered a similar thesis, but countered with realism, pointing out that only the members of the Houses of Parliament have knowledge of the Acts of Parliament. Hobbes further suggests:<sup>158</sup>

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into a constitution or something of the nature of statutes; and thereupon oblige the prince's subjects to keep them under greater penalty than before, by reason of the strictness of that command. Such is no small part of the civil law, which is reduced to writing by the Roman princes in large volumes, and by their authority commanded to be observed. Hence that part has now obtained the name of civil law, like the other statutes of the Emperors. If, therefore, I shall prove that the law of England excels pre-eminently in respect of these three fountains, so to speak, of all law, I shall have proven also that law to be good and effectual for the government of that realm.

In Ch XVIII Fortesque turns to the "third fountain", entitled *Herein he shows with what solemnity statutes are promulgated in England*.

See also T Aquinas *Summa Theologiae* (c 1270), Question 90, Article 4 "Is promulgation essential to law?"

<sup>154</sup> Such as 1 Hen 4 c2.

<sup>155</sup> See N Doe *Fundamental Authority in Late Medieval English Law* (Cambridge: Cambridge University Press, 1990) 39.

<sup>156</sup> 1 Bl Com 185, translated from the Latin by L Barnard, the Faculty of Law, The University of Auckland, 1997.

<sup>157</sup> 1 Bl Com 185.

<sup>158</sup> T Hobbes *The English Works of Thomas Hobbes of Malmesbury, A Dialogue between a Philosopher and a student of the Common Laws of England* (ed Molesworth, London: J. Bohn, 1839–1845), 27–28. The point is made with more force in T Hobbes *Leviathan* (1651) (London: Dent & Sons, 1947) in Ch 31 "Of the Kingdom of God by Nature" para 3:

To rule by words requires that such words be manifestly made known; for else they are no laws: for to the nature of laws belongeth a sufficient and clear promulgation, such as may take away the excuse of ignorance; which in the laws of men is but of one only kind, and that is, proclamation or promulgation by the voice of man.

I think it were well that every man that can read, had a statute book; for certainly no knowledge of those laws, by which men's lives and fortunes can be brought into danger, can be too much.

In *Discourses*, Hobbes raises the key issues that are in question today: the duty of the citizen to know the law, the need for promulgation, the impossibility of complying with an unknown law, and even the question of costs.

With the introduction of printed statutes it became customary for copies to be distributed amongst the judges. The perceived duty of the Crown in the eighteenth century to promulgate "all those civil and religious ordinances which were to be the rule of their civil and religious obedience" is summarised in Lord Chief Baron Skinner's judgment in *Eyre & Straham v Carnan* (1781).<sup>159</sup>

In *Attorney General for New South Wales v Butterworth*<sup>160</sup> (1937) Long Innes CJ was much taken by Lord Chief Baron Skinner's judgment and quoted it at length. He was thus adopting the argument that found much favour in the eighteenth century cases that discussed the Crown prerogative over printing materials of importance to the state, which in short proposed a reciprocating right and duty upon the Monarch. Being responsible for promulgating the laws of the land (at least the Acts of Parliament) was at least partial justification for the Crown prerogative in printing such material.

More recent judicial consideration in the United Kingdom has emphasised the importance of access to both statutes and law reports to the citizen. In *Incorporated Council of Law Reporting for England and Wales v Attorney-General*<sup>161</sup> the question came before the Court of Appeal as to whether the Incorporated Council for Law Reporting could be considered a charity for tax purposes. Russell LJ said:<sup>162</sup>

There are some matters which require no proof. The making of the law of this country is partly by statutory enactment (including therein subordinate legislation) and partly by judicial exposition in the decision of cases brought before the courts. It cannot be doubted that dissemination by publication of accurate copies of statutory enactments is beneficial to the community as a whole; and this is not the less so because at least in many instances the ordinary member of the public either does not attempt to, or cannot by study, arrive at a true conclusion of their import, or because the true understanding is largely limited to persons engaged professionally or as public servants in the field of any particular enactment, or

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<sup>159</sup> Supra at note 134.

<sup>160</sup> *Attorney-General for New South Wales v Butterworth*] 38 SR (NSW) 195.

<sup>161</sup> *Incorporated Council of Law Reporting for England and Wales v Attorney-General and another* [1972] Ch 73; [1971] 3 All ER 1029.

<sup>162</sup> *Ibid*, at 1034.

otherwise interested in that field. The fact that to perhaps the majority of those who acquire and study a copy of (for example) a Finance Act it constitutes what might be described as a tool of their trades or professions or avocations in no way lessens the benefit to the community that results if accurate versions of that Finance Act are published and not kept like a cat in a bag to be let out haphazard.

Recent political comment in New Zealand has followed the same line of reasoning. On the introduction of the New Zealand Copyright (Crown Copyright) Amendment Bill 1989, Mr Doug Graham (National MP, Remuera) stated:<sup>163</sup>

The Crown has never [enforced copyright in primary legal materials] because historically it has always accepted the constitutional importance of wide dissemination of the law. It would hardly be proper to continue with the maxim that ignorance of the law is no excuse if citizens were unable to find out relatively easily what the law was. Therefore over the years the Crown has not enforced its copyright in relation to various Government publications. In 1932 the Crown Law Office gave an opinion based on a Treasury minute of the English Government dated 1887. The Crown Law Office concluded: "The Crown allows the reproduction of certain classes of Government publications by any person without restriction in the interests of the public in order that they may be made known as widely as possible." That view was restated by the Government Printer in February 1948 in a memorandum prepared for the Registrar of Copyrights.

It should be noted that the assumption that Crown copyright does apply to primary legal materials seems to be common amongst those Commonwealth politicians who have considered the matter.

In the United Kingdom, the House of Lords Select Committee on Science and Technology has taken the prospect of access and promulgation a stage further, recommending:<sup>164</sup>

All Government publications providing information of widespread interest to citizens should be made available free of charge in electronic form. The Government should set all Departments and Agencies minimum standards for the electronic publication of information.

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<sup>163</sup> 496 NZPD 9699 (14 March 1989).

<sup>164</sup> House of Lords Select Committee on Science and Technology 5th Report, *Information Society: Agenda for Action in the United Kingdom* HL Paper 77 July 1996 para 6.14.



## 4.2 Promulgation in reality

### 4.2.1 Access

Although there is general consensus that the Crown has a duty to promulgate the law of the land, until recently the ability of the citizen to gain access to collections of materials has been limited to public libraries or private purchase.<sup>165</sup> In 1995, Saxby described the position in the United Kingdom thus:<sup>166</sup>

The fact is that the British Constitution, such as it is, fails to secure even any public entitlement to the text of the law of the land. It is available, of course, but first it must be paid for.

For more than a century now the Crown has maintained that it is proper to seek a fair return from purchasers and commercial publishers of material affected by such [Crown] copyright.<sup>167</sup>

With the proposed privatisation of Her Majesty's Stationery Office (HMSO) in 1996, pressure mounted on the United Kingdom government to ensure that better access to government materials was provided for under the new regime. The response was initially muted:<sup>168</sup>

The Government proposes to privatise HMSO during the summer of 1996. We shall retain a residual body, which will keep the title 'HMSO', to administer Crown copyright and to fulfil certain statutory responsibilities and oversight of the Gazettes. The residual body could also administer Parliamentary copyright if Parliament so wished. Irrespective of the privatisation, we intend that the administration of Crown copyright should be further separated from official publishing functions. The residual HMSO will continue to administer Crown copyright with

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<sup>165</sup> G Palmer & M Palmer *Bridled Power, New Zealand Government under MMP* (Auckland [New Zealand]; Oxford: Oxford University Press, 1997) 166:

In 1996, a full set of annotated New Zealand statutes cost \$3131. Unfortunately, however, much of this would be printed in the form of loose acts; the official bound volumes of statutes are years behind.... [I]t is impossible to buy a complete set of New Zealand's regulations from the Government Bookshops. Some of them are simply out of print.

<sup>166</sup> S Saxby "Commercial Exploitation of Primary Legal Materials" [1995] *Computers and Law* (August/September issue) 25.

<sup>167</sup> *Ibid* at 26. In this context 'fair return' can be taken as meaning a normal commercial return rather than the application of any norm of fairness.

<sup>168</sup> Cabinet Office Press Office "Roger Freeman Announces Government Plans For Crown Copyright" 13/96, 9 Feb 1996 <<http://www.coi.gov.uk/coi/depts/GCO/coi5470b.ok>>.

a view to making official information as widely and readily available as possible, taking into account the need to protect the interests of the taxpayer.

Within a short time, however, the role of the remaining “residual” body of HMSO was clarified. John Wreford, Head of HMSO Information Services, delivered a paper at a major conference held in Stockholm entitled “Access to Public Information”, describing improved access to government information in the United Kingdom. He stated that the full text of Acts of Parliament were to be published on the Internet and that similar distribution for *Hansard* had been approved.<sup>169</sup> Since late 1996, some English materials have become available for reference via the internet, including Acts of Parliament,<sup>170</sup> Order Papers, *Hansard*, Public Bills before Parliament, Select Committee reports, Miscellaneous Papers,<sup>171</sup> and similar publications from the House of Lords.<sup>172</sup> The materials are subject to Crown or Parliamentary copyright, with reproduction guidelines issued in the ‘Dear Publisher’ letters from the HMSO.<sup>173</sup> The situation regarding reasons for judgments has not improved, with the exception of judgments of the House of Lords which are available via the internet within two hours. The lack of wide dissemination of reasons for judgments was recently bemoaned by the Court of Appeal in *Bannister v SGP plc & Others* (1997).<sup>174</sup> Hopefully the publication on the internet site of the Lord Chancellor’s Department of this and other cases foreshadows a trend for publication of reasons for judgment in the United Kingdom using the internet.

As noted by the English court, this progress was preceded by innovative steps in Australia, taken by the Australasian Legal Information Institute (AustLII),<sup>175</sup> and also in Canada, by the University of Montreal Public Law Research Centre and the Canadian Department of Justice.<sup>176</sup> One advantage of the AustLII solution, where materials are collected at one site, is that makes the

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<sup>169</sup> *Access to Public Information: A key to Commercial Growth and Electronic Democracy* 27–28 June 1996 Stockholm. The Report of the conference can be found at the internet site <<http://www2.echo.lu/legal/stockholm/welcome.html>>.

<sup>170</sup> With effect from the first Public General Act of 1996, all new Public General Acts are available, generally within ten days of assent at <<http://www.hmso.gov.uk/acts.htm>>.

<sup>171</sup> A wide range of parliamentary materials in the United Kingdom can be accessed via <<http://www.parliament.the-stationery-office.co.uk/pa/>>.

<sup>172</sup> The House of Lords pages provide links to *Hansard* (House of Lords debates), bills, and judgments of the House — see the House’s web site at <<http://www.parliament.the-stationery-office.co.uk/pa/ld/ldhome.htm>>.

<sup>173</sup> These are at <<http://www.hmso.gov.uk/publet.htm>>.

<sup>174</sup> The Court of Appeal, 25 April 1997; The County Court Rules Order 17, Rule 11, *Bannister v SGB plc & others*: (1997) C/A <<http://www.open.gov.uk/lcd/lcdhome.htm>> per Saville J.

<sup>175</sup> See <<http://www.austlii.edu.au/>>.

<sup>176</sup> See <<http://www.montreal.ca/>> and <<http://canada.justice.gc.ca/>>.

location of materials very easy via a sophisticated search engine. It also facilitates cross referencing, such as using hyperlinks from judgments to sections of statutes.

In New Zealand there are somewhat vague statutory provisions for the promulgation of law. The preamble to New Zealand's Acts and Regulations Publications Act 1989 provides that it is an Act:<sup>177</sup>

(a) To provide for the printing and publication of copies of Acts of Parliament and statutory regulations; and

(b) To ensure that copies of Acts of Parliament and statutory regulations are available to the public;...

However, promulgation of statutes is limited to the provisions of s 10(1):

The Chief Parliamentary Counsel shall, under the control of the Attorney-General, make available for purchase by members of the public at the places designated from time to time by the Attorney-General under section 9(1) of this Act copies of Acts of Parliament and regulations at a reasonable price.

With the privatisation of the GPO the term "reasonable price" for Parliamentary materials would seem to indicate a commercial price.

#### 4.2.2 Cost

The main restriction on open access to primary legal materials is economic. Naturally, primary legal materials are available in some public libraries,<sup>178</sup> or for purchase in a variety of media. A full set of New Zealand statutes cost in excess of \$5711.<sup>179</sup> One years' subscription to the New Zealand Law Reports will cost in the region of \$1000.<sup>180</sup> It is also possible for anyone to go to a courthouse and ask for a copy of a particular decision.<sup>181</sup>

There are many commercial legal databases available to New Zealanders, but subscription to these are at a cost well outside the range of the average citizen or student. The Lexis database in the

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<sup>177</sup> Acts and Regulations Publications Act 1989. The preamble also includes that the act provides for the GPO to cease to be a department of the Public Service.

<sup>178</sup> Under the New Zealand Depository Library Scheme around twenty public libraries receive copies of legislation that the public may access at no charge.

<sup>179</sup> As advised by Bennetts Government Bookshop.

<sup>180</sup> This is the approximate cost to the Davis Law Library, The University of Auckland.

<sup>181</sup> The scale of fees payable for this service is set out in the High Court Fees Regulation 1992 (SR 1992/127), and starts at \$12 for up to five pages.

United States is well known as being the first to offer comprehensive online access to legal materials in 1976, and this now offers New Zealand Law Reports.<sup>182</sup> Inside New Zealand there is a number of commercial sources of online law hosted locally.<sup>183</sup>

The GP Legislation Acts database contains Bills, as they appeared before the House in the first, second and third readings, Supplementary Order Papers which might have altered the Bills, Acts and amending Acts. The subscription cost to access the full database is \$300 per month, or \$3 per search and \$2 per view.<sup>184</sup> Status Publishing Limited specialises in electronic publications, primarily on compact disk, and has recently offered access to its statute database online for a subscription of \$170 per month or \$2 per search and \$2 per view.<sup>185</sup> Typically value-added services are offered at additional cost, such as information agents that will watch for updates to a specific database and email subscribers.<sup>186</sup> There have been some recent publications on the internet free of charge, including the Waitangi Tribunal Reports.<sup>187</sup> GP Print has also recently made legislation available online in a non-searchable, non-consolidated form.<sup>188</sup> The New Zealand Government web pages offer access to general government information, as well as some of the more important reports.<sup>189</sup> Although these developments may be seen as part of a democratic maturity in access to official information, coupled with the rapid growth of internet use, they have undoubtedly been stimulated by the presence of internet sites such as the Australasian Legal Information Institute,<sup>190</sup> the Legal Information Institute New Zealand,<sup>191</sup> and other publications calling for reform.<sup>192</sup>

The approach of the United States makes an interesting comparison. Works of the United States Government are not the subject of copyright, and this is now embodied in Section 105 of the Copyright Act 1976. This has led to a huge range of legal materials being published with added

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<sup>182</sup> A single search of Lexis could cost hundreds of dollars.

<sup>183</sup> The prices here are given solely to indicate the type of charges that may be incurred as of April 1998.

<sup>184</sup> See <<http://www.knowledge-basket.co.nz/gpprint/acts.html>> for current pricing and details.

<sup>185</sup> See <<http://www.knowledge-basket.co.nz/statuspub/prices.html>> for the current pricing and details of Status Publishing. This database includes history notes for various sections of legislation.

<sup>186</sup> For example, the agent for Status legislative databases is charged at \$50.00 per month.

<sup>187</sup> See <<http://www.knowledge-basket.co.nz/waitangi/welcome.html>>.

<sup>188</sup> These have been available at <<http://www.knowledge-basket.co.nz/gpprint/>> since 3 March 1997. There is no provision made available at the site for searching the database. The Acts are only consolidated in as much as 'reprints' have been published (ie amendments are not included within the major Act as is common with electronic forms).

<sup>189</sup> New Zealand Government web pages are at <<http://www.govt.nz/>>.

<sup>190</sup> See <<http://www.austlii.edu.au/>>

<sup>191</sup> See <<http://www.liinz.org.nz/>>

<sup>192</sup> Such as M Perry "The Curious Status of Statutes – putting a cash cow to the steak" [1996] NZLJ 373.

value. It is possible, for example, to purchase a compact disk containing the entire United States Code for less than NZ\$100, or access them online without subscription.

### 4.2.3 Attitudes

Although the general consensus is that the wide promulgation of primary legal materials can only benefit the operation of democracy, there is the suggestion that access to the law and its interpretation should be left in the hands of the profession.<sup>193</sup> The main obstacle to the widespread provision of freely accessible primary legal materials is financial — a problem that largely could be overcome with the introduction of an online centralised electronic database of primary legal materials.

The Law Commission Act 1985 lists the four principal functions of the Commission, the fourth being “[t]o advise the Minister of Justice on ways in which the law of New Zealand can be made as understandable and accessible as is practicable”.<sup>194</sup> The same section further provides that in reporting to the Minister the Commission “[s]hall have regard to the desirability of simplifying the expression and content of the law, as far as that is practicable”.<sup>195</sup> Presumably the basis of these provisions is that citizens may wish to read the legislation. The Legislation Advisory Committee report *Legislative Change – Guidelines on Process and Content* also indicates the need for legislation to be accessible and understandable.<sup>196</sup> This report “has been endorsed by the Cabinet as the Bible, in conjunction with Chapter 5 of the *Cabinet Office Manual*, on legislative process within government”.<sup>197</sup> Why make the law understandable to the lay person if only lawyers are to gain access to the materials?

## 5 Arguments for a Crown Monopoly and Commonwealth Trends

### 5.1 Authenticity

The history of copyright shows a progression from origins in a crude Crown monopoly exercised primarily for censorship, to a sophisticated doctrine of protection of authors’ interests and the

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<sup>193</sup> Such an inference could be drawn from the judgment of Penlington J in *R v Royal, Royal, Taylor and Johnson* (1993) (HC Hamilton T 66/91 & 6/92) 4–5. This was a pre-trial ruling upon the application of one of the defendants under s 24(d) of the New Zealand Bill of Rights Act 1990 claiming that the subsection had been breached as he had been given insufficient access to legal materials.

<sup>194</sup> Law Commission Act 1985, s 5(1)(d).

<sup>195</sup> Law Commission Act 1985, s 5(2)(b). See also Law Commission Report 17 *A New Interpretation Act to Avoid ‘Prolivity and Tautology’*, (1990).

<sup>196</sup> *Legislative Change – Guidelines for Change* (1991) Report 6 Legislation Advisory Committee.

<sup>197</sup> Palmer & Palmer, above at note 165, at 152.

stimulation of science and culture by means of a highly codified limited monopoly over the reproduction of works. One reason often given to support the Crown claiming copyright in legislation is that it ensures authenticity of reproductions and deters misrepresentation.<sup>198</sup> However, copyright is not a tool well suited to prevent inaccurate copying. There is better legal protection against misrepresentation than that offered by copyright. It is also clear that in those countries that do not restrict the copying of primary legal materials, a majority worldwide, there is no glut of bogus legislation.

## 5.2 Cost

The suggestion has been made that the provision of electronic versions of legislation cannot be treated in isolation, as “costs will also continue to be incurred and must be met”.<sup>199</sup> The issue with the cost of promulgating primary legal materials is whether it should be borne by the state or by the citizen wishing access. As described above,<sup>200</sup> there is limited provision for charge-free access in New Zealand. Current debate is whether the internet should be used as a delivery mechanism for such materials subsidised by the state. The advantages of such electronic dissemination is that the cost of making the materials available is minimal in comparison to printed versions. However, some overseas commentators are not convinced at the benefits of electronic distribution. Stanbury comments, “[i]ndeed, less than 40 per cent of Canadian house holds have a computer at home. As important, only 17 per cent have access to the Internet”.<sup>201</sup> Such analysis is flawed as it suggests that traditional locations for access to primary legal materials will no longer be available, but it is likely that public libraries will have public terminals for internet, and thus online legal resources. The 17 percent figure given for 1996 is one that represents an isolated point in very rapid growth of take up of the technology over the past five years.<sup>202</sup> The availability of materials within the home of the citizen would make them easier to access. Furthermore, the access from the home must be taken as an additional means of access, thus 17 per cent more households will have easy access to primary legal materials if they are made available in this way.

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<sup>198</sup> For example, see *Crown Copyright in the Information Age*, above 49 at paras 4.2–4.3; G Robbie “Crown Copyright in the Information Age” (1995) 6 *Journal of Intellectual Property Law* 67 <<http://elj.warwick.ac.uk/elj/jilt/leginfo/2robbie/>>; and Monotti, above at note 67 at 316.

<sup>199</sup> See G Robbie “Primary Legal Materials—The Other Side of the Coin” [1995] *Computers and Law* (June issue) 3, 4 and *Crown Copyright in the Information Age*, above 49 at paras 4.4.

<sup>200</sup> *Supra* at note 178, and accompanying text.

<sup>201</sup> W Stanbury “Aspects of Public Policy Regarding Crown Copyright in the Digital Age” (1996) 10 *Intellectual Property Journal* 131, 139.

<sup>202</sup> The figures for New Zealand are available in M Templeton “Statistics on Information Technology in New Zealand” (October 1997) Ministry of Commerce — available online at <<http://203.97.170.9/comms/it/public.html>>. These put computer home ownership in New Zealand at over 27% in March 1997.

Stanbury also criticises the approach advocated by Barlow,<sup>203</sup> that digitisation allows for information to be “instantaneously distributed all over the planet without cost”.<sup>204</sup> Although Barlow’s proposition that there is no cost is an exaggeration, when considering the traditional forms of promulgation of primary legal materials, the cost is minuscule in comparison. For example, the cost to the user to receive all of New Zealand’s statutes electronically would be in the region of \$15.<sup>205</sup> There are additional costs for the provider, such as the electronic versions of the data,<sup>206</sup> the provision of equipment to serve the data to the user, and an infrastructure for maintenance of the data and systems. However, all Commonwealth governments now have the hardware and systems available to support such a venture. The additional cost of mounting primary legal materials, especially those generated within Parliament, is infinitesimal in comparison to the total cost of generation of the material.<sup>207</sup> The cost of funding a centre with a similar scope to that of AustLII would fall well short of the recent New Zealand government spending of excess of one million dollars for a nationwide campaign on basic values.

### 5.3 Canada

The Canadian Privy Council has recently recognised the jurisprudential problems with exercising Crown monopolies over primary legal materials.<sup>208</sup>

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<sup>203</sup> J Barlow “The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age (Everything You Wanted to Know about Intellectual Property Is Wrong)” (March 1994) *Wired* 84.

<sup>204</sup> Stanbury, above at note 201, at 144.

<sup>205</sup> This figure is based on experimentation by the author and reflects a download charge for the complete text of all New Zealand statutes. It is unlikely that many citizens would wish to have a copy of all statutes in force.

<sup>206</sup> The electronic versions are currently held and maintained by GP Print in New Zealand. In 1989 Hon G Palmer commented, “[i]t must be remembered we are in the age of electronic legislative databases, and the Crown has gone to a great deal of cost and expense to erect those databases” (496 NZPD 9703 14 March 1989).

<sup>207</sup> The cost of Parliament should be taken into account here, as one of its main purposes is to produce the normative legal materials for the state. The current cost of running the New Zealand House of Representatives is difficult to quantify, but the “Budget Economic & Fiscal Update” (Wellington: GP Print, A Division of Blue Star Print Ltd, June 1997) 113 puts the cost of “Core government services” at \$1,623 million for the 1996–1997 period. Perhaps another useful comparison would be that budgeted for “Law and order” which is put at \$1,279 million for the same period (*idem*). Rodney Hide (ACT Member of Parliament) puts the cost of supporting ministers and members at around \$138 million for the year 1996–1997 (correspondence on file).

<sup>208</sup> Reproduction of Federal Law Order SI/97-5, 8 January, 1997 (Canada Gazette Part II, Vol. 131, No. 1) 444.

Whereas it is of fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law; And whereas the Government of Canada wishes to facilitate access to its law by licensing the reproduction of federal law without charge or permission; Therefore His Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, the Minister of Industry, the Minister of Public Works and Government Services, the Minister of Justice and the Treasury Board, hereby makes the annexed *Reproduction of Federal Law Order*.

#### REPRODUCTION OF FEDERAL LAW ORDER

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.

Although the order is limited to federal materials, it is likely that the provinces will take note of relaxation of control on reproduction rights. A variety of materials are now available on the internet for no charge, including the reports of the Supreme Court of Canada,<sup>209</sup> Federal Court decisions,<sup>210</sup> Federal statutes and regulations.<sup>211</sup> The provincial governments are starting to provide similar internet services offering a variety of materials such as *Hansard*, legislation and reports at no charge.

## 5.4 Australia

In Australia an order allowing reproduction of official materials in New South Wales has been in effect since 1993.<sup>212</sup> The Notice authorises anyone to publish New South Wales legislation, providing copyright remains with the State, the publication does not infer that it is the official version, the arms of the State are not used, and that the material is “accurately reproduced in proper context” and is “of an appropriate standard”.<sup>213</sup> The Notice proclaims that it has the effect as a licence binding on the State.<sup>214</sup>

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<sup>209</sup> At <<http://www.droit.umontreal.ca/doc/csc-scc/en/index.html>>.

<sup>210</sup> At <<http://www.fja-cmf.gc.ca/en/cf/decisions.html>>.

<sup>211</sup> At <[http://canada.justice.gc.ca/Loireg/index\\_en.html](http://canada.justice.gc.ca/Loireg/index_en.html)>.

<sup>212</sup> *Waiver of Crown Copyright in NSW, Notice: Copyright in Legislation* New South Wales Government Gazette 27, August 1993.

<sup>213</sup> *Ibid*, 2.

<sup>214</sup> *Ibid*, 3.



In addition to the New South Wales provision, licences have been granted by most states for the Australasian Legal Information Institute (AustLII) to reproduce legislation and reasons for judgment.<sup>215</sup> AustLII has received grants in the order of A\$1.5 million to support the site from 1995, which will probably carry it through until the next millennium.<sup>216</sup>

## 5.5 The United Kingdom

United Kingdom governments have a tradition of treating information as an asset. The Copyright, Designs and Patents Act 1988 clarified the legal position with regard to statutes and other parliamentary materials, but did not settle the question of reasons for judgment. However, this attitude towards primary legal materials has been criticised extensively.<sup>217</sup> With the approach of privatisation of Her Majesty's Stationery Office and amid growing criticism, the government announced in February 1996 that:<sup>218</sup>

The Government will continue the existing policy of allowing secondary publishers without charge or prior permission and on a non-exclusive basis, to reproduce in value-added print formats Acts, Statutory Instruments and Statutory Rules and Orders. I have decided that this concession should now be extended to electronic and microfilm formats.... HMSO is now releasing onto its Internet service the summaries of over 200 Acts of Parliament from 1984 to date, and is planning to publish henceforth on the Internet the full text of all new Acts.

The recent papers *Your Right to Know*, *The Government's proposals for a Freedom of Information Act*<sup>219</sup> and *Crown Copyright in the Information Age*<sup>220</sup> give some indication that there

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<sup>215</sup> See <<http://www.austlii.edu.au/>>.

<sup>216</sup> *Idem*.

<sup>217</sup> F Bennion "Want to Know the Law? It'll Cost You" *The Times*, July 26, 1994 wrote: "The rot started with the passing of a new Copyright Act in 1988. This created a novel form of Crown copyright in our laws and gave the management of it to HMSO. Once this was a useful little public body, concerned with letting everyone know what the Government was up to; now it aims to be a money-raising entity". Mr Justice Laddie, at the Intellectual Property Institute Memorial Lecture in London, November 1995, commented: "It is legitimate to point out that the frenzy to get on the copyright bandwagon now extends to the legislature seeking to make money out of the exploitation of the legislation which it passes and which should be available to all", reported in F Gibb "Attack on Copyright" *The Times*, December 5, 1995. See also Saxby, above at note 166.

<sup>218</sup> Mr Roger Freeman, Answer to Question 192, 9 February 1996, reproduced in Cabinet Press Office "Roger Freeman Announces Government Plans for Crown Copyright" at <<http://www.coi.gov.uk/coi/depts/GCO/coi/5470b.ok>>.

<sup>219</sup> Cm 3818, London: The Stationery Office Ltd, 1997

<sup>220</sup> *Supra* 49.

may be changes in the way that the United Kingdom government gives access to primary legal materials.

## 5.6 New Zealand

There are signs of changes in attitudes within New Zealand as well. The recent Report of the Regulations Review Committee,<sup>221</sup> which criticised the current state of publication of regulations and has drawn a response from the government. Although the Report was concerned with regulations (which are outside the scope of this article) the Government's response concluded:

The Government agrees with the Committee that better public access to regulations is highly desirable. The Government also agrees with the Committee that there are problems with access to statute law, and binding codes and rules falling outside the definition of "regulations". The Government regards the ready availability of a single comprehensive index of legislation as important to improved public access to legislation. As the Government's response to recommendations 1 and 2 indicates, the Government will direct the Parliamentary Counsel Office to take up the matter with GP Print Ltd and report back to the Government. The wider question of access to an index and the full text of Acts and regulations in electronic form will be the subject of further investigation.<sup>222</sup>

It is hoped that the New Zealand Government will take the opportunity to establish a basis for citizens to gain access to primary legal materials without charge.

## 6 Conclusion

There would seem to be general agreement within the major Commonwealth countries considered here that promulgation of primary legal materials can be enhanced by providing online access to sites without charge to the user. There have been a range of attempts by the various governments to provide some type of electronic dissemination of materials. In most cases this has been

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<sup>221</sup> *Report of the Regulations Review Committee, Investigation into Access to Regulations* 1996 New Zealand House of Representatives 74435-96.

<sup>222</sup> See Government Response to the Report of the Regulations Review Committee on Investigation into Access to Regulations. The Government has made provision for electronic publication of this Response on the internet which can be found at <<http://www.knowledge-basket.co.nz/gpprint/govres.html>>. The response also notes: "The Federal and State Parliamentary Counsel Offices in Australia are also looking at the publication of official versions of legislation on the Internet. A considerable amount of Australian federal and State legislation is already available on the Internet, in a non-official form, through the Australasian Legal Information Institute's website".

approached in a piecemeal fashion, with little consideration of the cost/benefit for both government and citizen.

It is interesting to note that the use of computer technology for improving the promulgation of the law was first given serious consideration in 1970.<sup>223</sup> This was seen as a possible response to the perceived burgeoning of European laws and regulations at the time.<sup>224</sup> However, it is now possible, with the widespread accessibility of networked computers combined with software that is easy to use, to make the distribution of primary legal materials effective on an unprecedented scale. The Australian approach, which is primarily research-funding based, has had the most success in providing a well organised and easy to use site from which even those without great experience in the mechanics of searching electronic legal materials can use to their advantage. This article has not exhausted research into availability, cost, and alternative modes of dissemination of primary legal materials, the detailed analysis of these areas being outside the scope of this work.

This article has discussed Crown copyright, prerogative, policy and promulgation in regard Acts of Parliament in New Zealand, with comparison to the situation in Australia, Canada and the United Kingdom. The suggestion is made that despite commentary to the contrary, Acts of Parliament fall within the public domain. The preferred position would be for all primary legal materials to be explicitly placed in the public domain as envisaged by s 27 Copyright Act 1994 (NZ), and to treat access to such normative materials as a basic right rather than use of a Crown owned asset. In the interests of improving awareness of the norms of our society the state should actively encourage dissemination, rather than provide obstacles to reproduction. There is some evidence to suggest that where copyright restrictions have been relaxed, such as in Australia and Canada, the accessibility of primary materials is stimulating public interest in their content.

Despite the expression by Members of Parliament and various government ministers extolling the benefits of easy accessibility to primary legal materials in New Zealand, it is still difficult or costly for the majority of the population to gain access to the law. Furthermore, the privatisation of the GPO has obstructed, so far, the advancement of public access to primary legal materials that have their source in Parliament. Advancing open access to the normative materials of our society, for example by making statutes (and reasons for judgment for that matter) freely available on the internet, does not endanger the profitable private sector publication of value-added materials, the majority of paying users of such resources is unlikely to change. The profitability of merely reproducing raw unedited primary legal materials would undoubtedly, and in my opinion quite rightly, be eliminated or severely reduced. The removal of restrictions placed on reproduction and the free provision of digitised primary materials is more likely to stimulate the production of value-added resources. In the United States, for example, there is now a thriving industry that

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<sup>223</sup> See S Simitis *Informationskriese des Rechts und Datenverarbeitung* (Germany: Karlsruhe 1970).

<sup>224</sup> See J Bing "Regulations: Map or Mould?" Norwegian Research Centre for Computers and Law Papers at < <http://www.jus.uio.no/iri/lib/papers/regulations/regulations.html>>.

supplies enhanced legal resources on a wide range of media. The effect of widespread access to the laws of the nation has yet to be seen in countries such as Australia and Canada where primary legal materials are just starting to be made use of by the population at large. Developments in this area will be of great interest. In New Zealand there will be a rapid evolution in the field of legal publishing when obscure and anachronistic “rights” restricting reproduction are explicitly eliminated from primary legal materials, and hopefully the state will aid their free dissemination. This must be an important step in the direction of improved access to justice, and stimulate further understanding of the rule of law.

The privatisation of the GPO has had a chilling effect on the promulgation of primary legal materials in New Zealand. In addition to the restriction placed in s 27(2) of the Copyright Act 1994, which has left the intellectual property rights in reasons for judgment and Acts of Parliament in an uncertain state for several years, there are flow-on effects from the privatisation and contractual arrangements for printing government-based primary legal materials. The confidentiality claimed for the printing contracts in which there is a high public interest is in itself undesirable. It would seem that the public purse is still paying for the printing of Acts of Parliament, thus subsidising their production, but whether the Crown has retained control over the electronic versions of the databases of these materials is uncertain. Any obligation placed on the holder of the printing contract to promulgate primary materials, beyond the vague provisions of the Acts and Regulations Publication Act 1989, are also unknown. The Office of the Clerk of the House of Representatives circulated a “Request for Registration of Interest” prior to the expiry of the first contract with GP Print in 1994.<sup>225</sup> This document does outline in general terms the required services from the printer. These are printing, distribution and selling. An interesting point is that “[t]he printer is required to store in electronic form all specified publications. The Office of the Clerk and the Parliamentary Counsel Office must have access to this information”.<sup>226</sup> There is a further statement:<sup>227</sup>

The Crown will retain copyright in legislation and parliamentary publications in whatever form, including printed and electronic form, in which the legislation or parliamentary publication is printed or stored.

How the contract between GP Print and the Office of the Clerk implemented these general requirements is not public. Even the length of the term of the contract is not public. A more open approach to dealing with the contractual relationship between the Crown and the printer of government produced primary legal materials should be adopted in the future. Furthermore, one

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<sup>225</sup> The “information pack” referred to in paragraph two was “not available” from the Office of the Clerk of the House of Representatives.

<sup>226</sup> Office of the Clerk of the House of Representatives “Request for Registration of Interest”, on file.

<sup>227</sup> *Idem*.

should not be left to speculate on the likelihood or extent of state subsidisation of the printing of Acts of Parliament.

That a contract for the printing of parliamentary materials can keep the status of copyright in primary legal materials in an uncertain limbo is extraordinary. The current contract was due to expire in 1998.<sup>228</sup> Hopefully, action can be taken this year to pave the way for better promulgation of primary legal materials. A start would be for an immediate Order in Council as needed to enable s 27(1) Copyright Act 1994.

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<sup>228</sup> However, there would appear to be a clause in the current contract that allows for extension until 2001 – this information was gleaned from the Ministry of Commerce.