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# Copyright in primary legal materials in common law jurisdictions

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

## INTRODUCTION

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

## POSITION PRIOR TO PRIVATISATION, AND ITS IMMEDIATE EFFECT

In New Zealand, the Parliamentary Counsel Office is responsible, under the *Acts and Regulations Publication Act 1989* (NZ), ss 4 and 6, for arranging for the printing and publication of copies of Acts and regulations, copies of reprints of Acts and reprints of regulations, and reprints of Imperial enactments that have effect as part of the laws of New Zealand.<sup>3</sup> Under the same Act, the Parliamentary Counsel Office must make available for purchase by members of the public, at a reasonable price,<sup>4</sup> copies of Acts and regulations (s 10).

This does not necessarily mean that the copyright in Acts and regulations belonged to the Crown, or that private publishers might not print their own copies of Acts, regulations and judgments for sale to the public. Copyright in statutes was not inherently different to that of any other literary works. Similarly, while the publication of law reports has been conducted by a number of publishers,<sup>5</sup> the question of who actually owned the copyright in the decisions of the courts was not always clear. These questions became important when the whole process of publishing and reprinting legislation was reviewed.

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<sup>1</sup> *Evidence Act 1908* (NZ), s 29A.

<sup>2</sup> *Copyright Act 1962* (NZ).

<sup>3</sup> Lawn G, *What Makes Parliament Tick?* (Legislative Council Chamber, Parliament House, NZ, 17 August 1999), <http://www.pco.parliament.govt.nz/pal/access.shtml> (viewed 10 July 2008) para 5.

<sup>4</sup> Although what is a "reasonable price" is uncertain. If this includes the real cost of making legislation available it could be too high.

<sup>5</sup> The *New Zealand Law Reports* are the official report series for case law, starting at 1881. These have been available electronically since the end of 1997, published by Butterworths NZ Ltd (now LexisNexis).

Legislation Direct is the official printer of legislation and parliamentary publications in New Zealand. Prior to privatisation in 1990, Legislation Direct (formerly GP Legislation) was part of the Government Printing Office. In 1990 it was purchased by the Rank Group (which later became the Whitcoulls Group) and was awarded the parliamentary printing and distribution contract. In 1994 the contract was tendered out and again Legislation Direct secured it. In 1996, Legislation Direct (along with the rest of the Whitcoulls Group) was purchased by the Blue Star Group and is now a division of one of New Zealand's largest commercial printing groups. As well as printing and distributing legislation and parliamentary information, Legislation Direct acts as the distributor for a number of international publishers. These include the United Nations, the Organisation for Economic Co-operation and Development, the World Health Organization, the Food and Agriculture Organization, Her Majesty's Stationery Office, the Australian Government Publishing Service and United Nations Educational, Scientific and Cultural Organization.<sup>6</sup>

The arrangement whereby one agency (whether private or government) controlled the publication and distribution of legislation was not without its difficulties. Geoff Lawn, Deputy Chief Parliamentary Counsel, speaking to a seminar on the parliamentary process several years ago, commented that the then current compilation (or reprinting) process was not working, for a number of reasons. These he identified as follows: it did not take advantage of modern technology and as a result was too slow and inefficient; it did not satisfy the need for timely access to up-to-date legislation; it was difficult to link subordinate legislation to its primary legislation; and it did not make the law available in an easily accessible form.<sup>7</sup>

Other jurisdictions have embraced the new technology, and many now provide free public access to legislation in electronic form over the internet. New Zealand was slow to follow suit. The private sector had moved to fill the gap, but generally on the basis of user pays,<sup>8</sup> and the cost was not inconsiderable for full access. One or other of the two commercially available databases of New Zealand legislation is used by many law firms, by government departments, and by the judiciary. The Parliamentary Counsel Office itself subscribed to one.<sup>9</sup> The Parliamentary Counsel Office has, since 2002, run an interim site providing access to statutes and regulations.<sup>10</sup>

In its review during the 1990s, the Parliamentary Counsel Office went back to first principles. Everyone is presumed to know the law, and ignorance of the law is no excuse. But to the extent that the law is contained in legislation, if one is to know what the law is, then it is necessary to have access to legislation in an up-to-date and authoritative form.<sup>11</sup> This basic principle is echoed in the statement of Wild CJ in *Victoria University of Wellington Students' Association v Government Printer* [1973] 2 NZLR 21 at 23:

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

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<sup>6</sup> See <http://www.gplegislation.co.nz/about.html> (viewed 22 August 2002).

<sup>7</sup> Lawn, n 3, para 9.

<sup>8</sup> LINX, the Legal Information Service, <http://www.knowledge-basket.co.nz/linx/welcome.html> (viewed 20 September 2002) and its close relation, Briefcase, <http://www.knowledge-basket.co.nz/briefcase/welcome.html> (viewed 20 September 2002) are available to subscribers through the Knowledge Basket. Status Publishing makes its value-added materials available on the internet, <http://www.status.co.nz/public.htm> (viewed 13 January 2003). Brookers have made Court of Appeal decisions available on the internet for free but these have little value added, <http://www.brookers.co.nz/legal/judgments/default.htm> (viewed 20 September 2002); Harvey D, *A Judicial Perspective on Public Access to Case Law on the Internet* (1999) 3 JILT, [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999\\_3/austlii/harvey1](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_3/austlii/harvey1) (viewed 4 October 2006).

<sup>9</sup> Lawn, n 3, para 11.

<sup>10</sup> *Public Access to Legislation Project*, <http://www.legislation.govt.nz> (viewed 3 October 2006), maintained by Brookers for the Parliamentary Counsel Office.

<sup>11</sup> Lawn, n 3, para 12.

The Parliamentary Counsel Office issued a public discussion paper<sup>12</sup> on this subject in September 1998. Perhaps unsurprisingly, 95% of submissions said that the government should continue to make available an official version of legislation. The majority also supported electronic publication, including that over the internet.<sup>13</sup>

The Parliamentary Counsel Office then engaged PricewaterhouseCoopers (PWC) to assist in formulating recommendations to the government as to the way ahead. The basic rationale for involving PWC was the complex situation in which New Zealand found itself with respect to public access to legislation.<sup>14</sup>

New Zealand may have been behind other countries in providing public access to legislation, but one advantage of this is that New Zealand has gained from the experience (and perhaps mistakes) of other countries in developing a system that meets the needs of New Zealand.<sup>15</sup>

## GENERAL PRINCIPLES

Publication of the laws has often been to a large extent in private hands. From the earliest times, private publishers were often the sole source of the texts of judicial decisions.<sup>16</sup>

The earliest reports were produced when a person sat in the court room and wrote down the judge's oral reasons as accurately as they could, but the result could not be verbatim. The private reporter claimed copyright in the resulting original work. Over time, private publishers received copies of the decisions so that the only work required of the publisher was to decide which judgments to publish, to choose an order for printing the decisions, and to add summaries (headnotes<sup>17</sup>) to the decisions. The publishers might correct some typographical errors, add extra citations to court decisions cited by the judges, and of course, add page numbers for their own reports.<sup>18</sup> In 1834 the United States Supreme Court ruled in *Wheaton v Peters* 33 US 591 (1834) that "no reporter ... can have any copyright in the written opinions delivered by this court" since they were not "authors". Nonetheless, because private publishing of court decisions created private profits, many different report series were created, some focusing on specific jurisdictions, some focusing on specific topics.

In the United States, private publishers essentially monopolised the publication of court decisions, in part because courts felt that the private publishers were already providing adequate access to the law and in part because publishing cost money and required a certain amount of marketing, which the courts might have been unwilling to undertake. The New Zealand Council of Law Reporting is responsible for publishing the official New Zealand Law Reports. This body is established under the *New Zealand Council of Law Reporting Act 1938* (NZ).<sup>19</sup> Publication is by a commercial firm by

<sup>12</sup> Parliamentary Counsel Office, *Public Access to Legislation: A Discussion Paper for Public Comment* (Wellington, September 1998), <http://www.pco.parliament.govt.nz>.

<sup>13</sup> Lawn, n 3, para 15.

<sup>14</sup> Lawn, n 3, para 16.

<sup>15</sup> Lawn, n 3, para 20.

<sup>16</sup> However, the Yearbooks were published from the 1280s (clearly, officially from about 1550): see Ives EW, "The Purpose and Making of the Later Year Books" (1972) 89 LQR 64-86. The private report series were often compiled by men who later came to prominence as judges, such as Sir Edward Coke.

<sup>17</sup> However, even the meaning of "headnote" was not as clear as it might be, as was observed by the Federal Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada* [2002] FCA 187 (Federal Court, Canada, Linden JA, Rothstein JA and Sharlow JA, 14 May 2002): "It is difficult for me to ascertain precisely what the Publishers mean when they use the term 'headnote'. At times, they use the term to connote only a summary of the facts, reasons and conclusions from a case. Generally, however, the Publishers indicate that a headnote also includes 'catchlines' and a 'statement of case'. The latter use suggests that a headnote is everything in a reported judicial decision other than the edited judicial reasons, such as the summary, catchlines, statement of case, indexing title and other information about the reasons for judgment." per Linden JA at [11], <http://www.decisions.fct-cf.gc.ca/fct/2002/2002fca187.html> (viewed 20 September 2002).

<sup>18</sup> Strictly, an editorial rather than an authorial function; cf *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 (CA).

<sup>19</sup> Section 12 outlines the functions of the Council.

arrangement with the Council. In the United Kingdom the authorised reports of decided cases commencing from 1866 are published by the direction of the Incorporated Council of Law Reporting for England and Wales.<sup>20</sup>

Recent court decisions in the United States and elsewhere have held that copyright does not attach to a party that compiles information or documents written from another source.<sup>21</sup> Thus, other than the headnotes, private publishers probably do not have copyright in the court decisions they are publishing. They might claim copyright in the selection of court decisions, so long as there is an adequate degree of originality, skill or judgment involved in choosing the decisions.<sup>22</sup> Simply publishing all decisions from the Court of Appeal will not suffice.<sup>23</sup> Nonetheless, there is the possibility that private publishers might be able to use copyright claims to limit the availability of court decisions.

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

## OWNERSHIP OF THE LAW

### Australia

One view is that the Crown owns copyright in the law, and that copyright is administered by the executive branch of government. This view is perhaps most clearly seen in *Attorney-General (NSW) v Butterworth & Co (Aust) Ltd* (1938) 38 SR (NSW) 195. In this case, Long Innes CJ, held that Crown prerogative gives the Crown the exclusive right to print and publish statutes, and that this right is in the nature of a proprietary right. The Chief Justice also suggested, without making a definitive finding, that if copyright were not contained in the Crown prerogative, it would be found to be covered by the *Copyright Act 1911* (IMP) (1 & 2 Geo 5 c 46), then in effect. Thus, the government was granted a decree that Butterworths had no right to publish statutes. But this decision has not prevented the development of a healthy legal publishing industry in the common law countries, and Australia, as discussed in detail later, is a leader in making the law publicly available.

Although it was clear that copyright belonged to the Crown with respect to statutes, the picture was less clear for judgments.<sup>24</sup> It had been argued variously that the Crown did have copyright,<sup>25</sup> or

<sup>20</sup> Although the Incorporated Council of Law Reporting for England and Wales is a registered charity rather than an official organ of the courts or government, its status is clear: "Citation of judgments in court. 3.1 For the avoidance of doubt, it should be emphasised that both the High Court and the Court of Appeal require that where a case has been reported in the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales it must be cited from that source. Other series of reports may only be used where a case is not reported in the Law Reports.": Practice Direction (Judgments: Form and Citation) (Supreme Court) [2001] 1 WLR 194 per Lord Woolf CJ.

<sup>21</sup> *Bender v West* 158 F 3d 674 (2nd Cir) (1998).

<sup>22</sup> In the view of the Federal Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada* [2002] FCA 187, the trial judge misinterpreted that court's decision in *Tele-Direct (Publications) Inc v American Business Information Inc* [1998] 2 FC 22, and other jurisprudence, as shifting the standard of originality away from the traditional Anglo-Canadian approach. Neither Art 2 of the *Berne Convention for the Protection of Literary and Artistic Works*, Paris Revision, 24 July 1971, 161 UNTS 18338, nor Art 1705 of the North American Free Trade Agreement, 17 December 1992, Can TS 1994 No 2 (NAFTA), require a more onerous standard for copyright protection than already contained in the *Copyright Act*. In addition, there are significant differences between Anglo-Canadian copyright law and the US standard of originality that was applied in *Bender v West* 158 F 3d 674 at [27] (Linden JA) (2nd Cir) (1998). As McLachlin J stated in *Bishop v Stevens* [1990] 2 SCR 467 at 477, the task is "first and foremost ... a matter of statutory interpretation". The Act contains no express requirement of creative spark or imagination; the only prerequisite to protection (relevant to this discussion) is that a work be original. In fact, the *Copyright Act*, which has been the sole source of copyright protection in Canada since its inception in 1921 (see McKeown and Fox, *Canadian Law of Copyright and Industrial Designs* (3rd ed, Carswell, 2000), pp 34-56), contains no mention whatsoever of any requirement other than, or in addition to originality. *CCH Canadian Ltd v Law Society of Upper Canada* [2002] FCA 187 at [27] (Linden JA).

<sup>23</sup> *Tele-Direct (Publications) Inc v American Business Information Inc* [1998] 2 FC 22. This decision is consistent with *Feist Publications v Rural Telephone Service Co* 499 US 340; 111 S Ct 1282 (1991).

<sup>24</sup> "The Crown and Copyright in Publicly Delivered Judgments" (1982) 56 ALJ 326 at 326-328.

<sup>25</sup> Bannon C, "Copyright in Reason for Judgments and Law Reporting" (1982) 56 ALJ 59.

that individual judges owned the copyright in their judgments.<sup>26</sup> While either position could be correct – for although a judge delivered their written judgment as part of their function as a judge, it could be argued that only their decision, and not the reasons for it, was official and therefore covered by the Crown copyright. In January 2005, the Copyright Law Review Committee reported that it was “not persuaded” that the accuracy and integrity of official government publications were enhanced by public ownership of copyright in primary legal materials.<sup>27</sup> As a result they recommended that Crown copyright be abolished.<sup>28</sup> However, this recommendation has yet to be implemented.

## Canada

In Canada, leaving aside the question of Crown prerogative, the federal government has legislative authority for copyright in the law.<sup>29</sup> Section 12 of the *Copyright Act* RSC 1985, c C-42 is the provision dealing with Crown copyright. This section gives copyright to the Crown in works that are “prepared or published by or under the direction or control of Her Majesty or any government department”.

It might be argued that s 12 protects works created by the executive branch of the government, and does not cover works created by Parliament or the courts. Under this argument, any implication that governments can “give” permission to copy the laws might be erroneous. However, there are no precedents upholding this argument, in part perhaps because there are no “copyright in the law” cases in Canada and few elsewhere. The Canadian courts might be guided by British jurisprudence, since Canadian copyright law was historically based upon, and still closely resembles British law.<sup>30</sup> On the other hand, the Supreme Court of Canada has indicated that United States jurisprudence must be carefully scrutinised, because there are important differences between Canadian and United States copyright policy and legislation.<sup>31</sup> There is also a diversity of approaches to copyright in Canadian legislative materials between the various jurisdictions.

In *CCH Canadian Ltd v Law Society of Upper Canada* [2002] FCA 187,<sup>32</sup> the Federal Court of Canada held that there was copyright in judicial reports (at [73] per Linden JA).

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

The threshold for originality is relatively low, so that two independently produced compilations that may appear similar in some ways are both entitled to copyright protection (at [75]).

The Information Highway Advisory Council, in its 1995 Final Report,<sup>33</sup> recommended that Crown copyright generally, and not specifically in relation to the laws, should be maintained, but that the Crown in Right of Canada should, as a rule, place federal government information and data in the public domain.

<sup>26</sup> Taggart M, “Copyright in Written Reasons for Judgment” (1984) 10 Syd LR 319-329.

<sup>27</sup> Copyright Law Review Committee, *Crown Copyright Report* (2005), p xxiv, <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E4858F514CA25735100827559> (viewed 26 June 2008).

<sup>28</sup> Copyright Law Review Committee, n 27, p xxvi (Recommendation 4).

<sup>29</sup> *Copyright Act* RSC, 1985, c C-42, and its relevant amendments, see *Compo Co Ltd v Blue Crest Music Inc* [1980] 1 SCR 357 at 372-373.

<sup>30</sup> See McKeown and Fox, n 22, pp 38-39.

<sup>31</sup> *Compo Co Ltd v Blue Crest Music Inc* [1980] 1 SCR 357 at 367.

<sup>32</sup> Federal Court of Canada, Linden JA, Rothstein JA and Sharlow JA, 14 May 2002.

<sup>33</sup> <http://www.strategis.ic.gc.ca/SSG/ih01015e.html> (viewed 22 August 2002).

It was also recommended that where Crown copyright is asserted for generating revenue, licensing should be based on the principles of non-exclusivity and the recovery of no more than the marginal costs incurred in the reproduction of the information or data – the federal government should create and maintain an inventory of Crown works covered by intellectual property that is of potential interest to the learning community and the information production sector at large; negotiate non-exclusive licences for their use on the basis of cost recovery for digitisation, processing and distribution; and invite provincial and territorial governments to provide similar services.<sup>34</sup>

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

Because the federal government was the leader in publishing statutes and regulations free of charge in Canada, and is responsible for the *Copyright Act*, it is important to take note of the *Reproduction of Federal Law Order* SI 97-5, PC 1996-1995, 19 December 1996.<sup>35</sup> The preamble states the basic principles that support the copyright notice:

Whereas it is of fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law; 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 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*.<sup>36</sup>

### ***Reproduction of Federal Law Order***

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Canadian Government, 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.<sup>37</sup>

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

The Department of Justice is pleased to advise you that public access to primary federal legal information has now been improved. Federal statutes and regulations and the decisions of courts and tribunals can now be copied without the usual restrictions of Crown copyrighted materials. There is no requirement to seek permission and there are no fees. Please note that this measure applies only to federal Crown copyrighted material and has no effect on privately copyrighted material that is added to or packaged with primary federal legal information.<sup>38</sup>

The Yukon Territory has perhaps the simplest copyright notice of all Canadian jurisdictions:

The legal material on this site may be reproduced, in whole or in part and by any means, without further permission from Yukon Justice.<sup>39</sup>

By contrast, the other jurisdictions in Canada all restrict copying for commercial purposes (and sometimes for other purposes as well). One can speculate that the reason that some provinces assert

<sup>34</sup> Final Report of the Information Highway Advisory Council (Information Highway Advisory Council, Ottawa, 1995) <http://www.strategis.ic.gc.ca/SSG/ih01015e.html> (viewed 22 August 2002).

<sup>35</sup> <http://www.canlii.org/ca/regu/si97-5/part181879.html> (viewed 13 January 2003).

<sup>36</sup> <http://www.canlii.org/ca/regu/si97-5/part181879.html> (viewed 13 January 2003).

<sup>37</sup> <http://www.canlii.org/ca/regu/si97-5/part181879.html> (viewed 13 January 2003).

<sup>38</sup> [http://canada.justice.gc.ca/loireg/crown\\_en.html](http://canada.justice.gc.ca/loireg/crown_en.html) (viewed 13 January 2003).

<sup>39</sup> *Disclaimer and Copyright Information Related to this Legislative Material* (Statutes and Regulations of Yukon) [http://www.lex-yk.ca/disclaimer\\_en.html](http://www.lex-yk.ca/disclaimer_en.html) (viewed 13 January 2003).

copyright and limit electronic access to the law is to sell legal texts to legal publishers and the law profession. To ensure governments have something to sell, it is necessary to impose copyright limits and to ensure that the electronic access to the law that is provided is not as functional as it could be.

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

Perhaps the most detailed copyright notice is from British Columbia, which reads:

This HTML version of the Statutes and Regulations of British Columbia is for private study or research purposes only, and is not the official version. The Province of British Columbia does not warrant the accuracy or the completeness of this electronic version of the Statutes and Regulations and in no event will the Province be liable or responsible for damages of any kind arising out of the use them.

Copyright in this internet version of the Statutes and Regulations belongs exclusively to the Province of British Columbia. No person or entity is permitted to reproduce in whole or part these Statutes and Regulations for distribution either free of charge or for commercial purposes, unless that person or entity has a signed license agreement with the Intellectual Property Program of the Province of British Columbia. The reproduction for the purposes of sale, rent, trade, or distribution, or posting them on the internet or on electronic bulletin boards is not permitted. Further details about copyright protection over these and other government-owned works can be obtained by reference to the federal *Copyright Act* and the Provincial Government Management Operating Policy Manual, Section 4.98.

Persons may make a single copy of specific Acts and Regulations, in whole or in part, for Personal Use or for Legal Use. Personal Use refers to private study or private research; it does not include permission to make more than one copy. Legal Use refers to reproduction for use within letters of advice provided by a lawyer, accountant or other professional as well as reproduction for use in judicial, administrative or parliamentary proceedings. These Acts and Regulations may not be reproduced by, or for, members of the public for purposes other than Personal Use or Legal Use without the prior written consent of the Intellectual Property Program. Any questions regarding the reproduction of provincial legislation should be directed to the Intellectual Property Program by e-mailing to [ipp@mail.qp.gov.bc.ca](mailto:ipp@mail.qp.gov.bc.ca) or faxing to (250) 356-0846.<sup>40</sup>

See also the copyright notices from Ontario,<sup>41</sup> Alberta,<sup>42</sup> New Brunswick,<sup>43</sup> Newfoundland,<sup>44</sup> Nova Scotia,<sup>45</sup> Quebec<sup>46</sup> and the Northwest Territories.<sup>47</sup>

<sup>40</sup> *Important Information* (British Columbia Statutes and Regulations) <http://www.qp.gov.bc.ca/statreg/info.htm> (viewed 13 January 2003).

<sup>41</sup> "The legislative materials on this site are owned by the Government of Ontario and protected by copyright law. They may be used for personal or in-house use, but not for redistribution or resale to third parties. To request permission for redistribution or resale rights, contact the Senior Copyright Analyst, Publications Ontario.": <http://www.gov.on.ca/MBS/english/publications/statregs/contents.html> (viewed 22 August 2002).

<sup>42</sup> "Copyright of these documents belongs to the Province of Alberta. Any downloading of all or part of any document forming part of this database will be for the sole purpose of printing single copies of those retrieved documents for internal use only. The user undertakes and agrees not to rent, sell, lend, lease, distribute, transfer or sublicense the documents forming part of this database (or any parts thereof) to any person in any format. Any uses beyond those specified require the prior permission of the Queen's Printer. This consolidation of Statutes and Regulations has no legislative sanction and has been produced solely for the convenience of research. The official Statutes and Regulations must be consulted for all purposes of interpreting and applying the law. This consolidation does not contain maps, charts and graphs contained in the printed version.": <http://www.gov.ab.ca/qp> (viewed 22 August 2002).

<sup>43</sup> "The Province of New Brunswick, through the Queen's Printer, owns and retains the copyright for New Brunswick acts and regulations including consolidations. All rights are reserved and any form of reproduction is accordingly restricted.": <http://www.gov.nb.ca/justice/discla-e.htm> (viewed 22 August 2002).

<sup>44</sup> This notice appears above individual statutes: "All material copyright of the Government of Newfoundland and Labrador. No unauthorized copying or redeployment permitted. The Government assumes no responsibility for the accuracy of any material deployed on an unauthorized server."

<sup>45</sup> This notice appears above the statutes: "These electronic versions of the statutes are provided for your convenience and personal use only and may not be copied for the purpose of resale in this or any other form. Formatting of these electronic versions may differ from the official, printed versions. Where accuracy is critical, please consult official sources.": <http://www.gov.ns.ca/legi/legc/sol.htm> (viewed 22 August 2002).

As would be expected, jurisdictions that do not publish their statutes for free on the internet have tougher copyright notices.<sup>48</sup>

The British Columbia Superior Courts notice reads:

The decisions of the Superior Courts are made available on the Internet for the purpose of public information and research. The material on the database/web site may be used without permission provided that the material is accurately reproduced and an acknowledgement of the source of the work is included. Copying of the materials, in whole or in part, for resale or other commercial purposes is strictly prohibited unless authorized by the Superior Courts.<sup>49</sup>

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

## New Zealand

As a general rule any “work” which is not itself a copy attracts a copyright.<sup>50</sup> It covers literary, artistic, and musical works, films, video productions, photographs, and designs of all types.<sup>51</sup> The aim of the law in this area is to protect the honest efforts of a person who produces an original work, regardless of their intention in doing so.<sup>52</sup>

The *Copyright Act 1994* (NZ) covers literary and artistic works, dramatic and musical works, sound recordings, cinematographic films (including their soundtracks), television broadcasts and sound broadcasts. “Literary work” is broadly interpreted, eg an original computer software program even though in source code (alegraic symbols and technical keywords).<sup>53</sup>

Section 14 of the *Copyright Act* provides that unpublished works attract copyright from the moment they are written, provided the author is a New Zealand citizen or was living in New Zealand at the time the work was created. It goes on to provide that published<sup>54</sup> works enjoy New Zealand copyright if they were first published in New Zealand or if the creator was living in New Zealand at

<sup>46</sup> “Ce document a été élaboré par L’Éditeur Officiel du Québec et Gaudet Éditeur Ltée. La gestion des droits d’auteur afférents aux Lois et règlements du Québec est effectuée par les Publications du Québec.”: [http://www.doc.gouv.qc.ca/html/lois\\_consult2.html](http://www.doc.gouv.qc.ca/html/lois_consult2.html) (viewed 22 August 2002).

<sup>47</sup> “The legislative material in the consolidations may be used for a non-commercial purpose without seeking permission, provided that it is accurately reproduced and includes an acknowledgement of the Government of the Northwest Territories as its source. Reproduction of the legislative material is permitted, in whole or in part, and by any means.”: [http://www.legis.acjnet.org/ACJNet/TNO/copyright\\_en.html](http://www.legis.acjnet.org/ACJNet/TNO/copyright_en.html) (viewed 22 August 2002).

<sup>48</sup> See, eg Saskatchewan: “Copyright and all other intellectual property rights of the publications of the Saskatchewan Office of the Queen’s Printer, including all material on this website, belong exclusively to Her Majesty the Queen in Right of Saskatchewan as represented by The Queen’s Printer, Saskatchewan Justice. No person may copy, transfer, print, electronically distribute or otherwise use this material except in accordance with the Subscription Agreement or with the express written consent of the Queen’s Printer.”: <http://www.qp.justice.gov.sk.ca> (viewed 22 August 2002).

<sup>49</sup> See <http://www.courts.gov.bc.ca/help/permission.asp> (viewed 10 July 2008).

<sup>50</sup> *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 608-609 (Petersen J); *Macmillan & Co v Cooper* (1923) 40 TLR 186 at 190 (Lord Atkinson); *Ladbroke Ltd v William Hill Ltd* [1964] 1 WLR 273 at 289 (Lord Devlin), 292 (Lord Pearce).

<sup>51</sup> For example, dress templates: *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* (unreported, High Court, NZ, Auckland, Hillier J, 9 December 1988, CL 15/87).

<sup>52</sup> The question of originality is a question of fact and degree in each case: *International Credit Control Ltd v Axelsen* [1974] 1 NZLR 695 at 699 (Mahon J).

<sup>53</sup> See *International Business Machines Corp v Computer Imports Ltd* (1989) 2 NZBLC 103 at [679].

<sup>54</sup> Armorial bearings are conferred by Letters Patent, which are made “patent” or published for the world at large. They are addressed: “to all and singular to whom these Presents shall come”. They are thus a published work.



the time of first publication or immediately before his or her death, whichever occurred first. Reciprocity of protection exists with most overseas countries,<sup>55</sup> although the levels and quality of protection in overseas countries varies.

Section 21 of the *Copyright Act* sets out that subject to three stated exceptions, the author of the work is the owner, holder of the copyright. The exceptions cover persons who produce works in the course of employment (eg for a newspaper) in which case the employer “owns” the copyright for publication in the employment context only, commission work, the copyright passing to the person commissioning the work, and a person employed to make works or designs for another, the latter becoming the copyright owner.<sup>56</sup>

The Crown is the first owner of any copyright subsisting in any work created by a person who is employed or engaged by the Crown, under a contract of service, apprenticeship, or a contract for services.<sup>57</sup> This covers, for example, work created by a Minister of the Crown, the Governor-General, and the Queen.<sup>58</sup>

At common law, and under the Copyright Acts until recently, the Crown acquired title by a kind of prerogative copyright in certain books or publications such as Acts of Parliament, Proclamations, Orders in Council, the Book of Common Prayer, and the Authorised Version of the Bible.<sup>59</sup>

However, there has been a deliberate divestment by the Crown of its copyright in law – principally in light of the policy considerations which hold that law should be freely available. However, s 27(1) of the *Copyright Act* contains a list of works in which there may be no copyright.<sup>60</sup> This section, which came into effect on 1 April 2001,<sup>61</sup> provides that there shall be no copyright in statutes or judgments.

- 27(1) No copyright exists in any of the following works, whenever those works were made:
- (a) Any Bill introduced into the House of Representatives;
  - (b) Any Act as defined in section 4 of the *Acts Interpretation Act 1924*;
  - (c) Any regulations;
  - (d) Any bylaw as defined in section 2 of the *Bylaws Act 1910*;
  - (e) The New Zealand Parliamentary Debates;
  - (f) Reports of select committees laid before the House of Representatives;
  - (g) Judgments of any court or tribunal;
  - (h) Reports of Royal commissions, commissions of inquiry, ministerial inquiries, or statutory inquiries.

There is, in New Zealand, under s 27 of the *Copyright Act*, no copyright in regulations.<sup>62</sup>

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

<sup>55</sup> *Copyright Act 1994* (NZ), s 233.

<sup>56</sup> *Copyright Act 1994* (NZ), s 5, definition of “author”.

<sup>57</sup> *Copyright Act 1994* (NZ), s 26(1)(b).

<sup>58</sup> *Copyright Act 1994* (NZ), s 2(1), definition of “Crown”.

<sup>59</sup> *Oxford and Cambridge Universities v Eyre & Spottiswoode Ltd* [1964] Ch 736 (Plowman J declined to decide the extent of the Crown prerogative over the publication of Bibles); *Attorney-General (NSW) v Butterworth & Co (Aust) Ltd* (1938) 38 SR(NSW) 195 (the Crown prerogative to control the publication of statutes was contested); see also *Hansen v Humes-Maclon Plastics Ltd* (1984) 1 NZIPR 557 (no Crown copyright in drawings filed in the Patent Office).

<sup>60</sup> Since the *Book of Common Prayer*, and the Authorised Version of the *Bible* are not enumerated in *Copyright Act 1994*, s 27(1), we might speculate whether they are subject to Crown copyright in New Zealand. Probably, however, they would be covered, as they were compiled or translated on behalf of the Crown: s 26(1)(b). This is so irrespective of the relationship between Church and state in New Zealand: see Cox N, “Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia” (2001) 6(2) *Deakin Law Review* 266.

<sup>61</sup> *Copyright Act Commencement Order 2000* (SR 2000/245), cl 2.

<sup>62</sup> Which are defined as meaning the same as in the *Acts and Regulations Publication Act 1989* (NZ); s 2 of that Act defines regulations in terms of the *Regulations (Disallowance) Act 1989* (NZ), s 2; this includes: “Rules or regulations made under any *Imperial Act* or under the prerogative rights of the Crown and having force in New Zealand”.

Court or Court of Appeal except with the consent of the Council of the New Zealand Law Society.<sup>63</sup> This consent will only be given on the ground that the New Zealand Council of Law Reporting has failed to publish or to arrange for the publication of adequate reports within a reasonable time and at a reasonable cost.

The New Zealand Council of Law Reporting is a body corporate.<sup>64</sup> The principal function of the Council is to prepare, publish, and sell, or to arrange for the preparation, publication, and sale of reports of such judicial decisions given in New Zealand or elsewhere as may in its opinion be necessary or of value to persons engaged in the administration or practice of law in New Zealand.<sup>65</sup> The Council may also, if it thinks fit, prepare, publish, and sell or arrange for the preparation, publication, and sale of any other legal works.<sup>66</sup> It may also, on such terms as it thinks fit, buy and sell copies of law reports or other legal publications.<sup>67</sup>

The Attorney-General is the Chairperson of the Council and presides at all meetings at which he or she is present.<sup>68</sup> The Council consists, apart from the Attorney-General, of a Judge of the High Court appointed by the Chief Justice, the Solicitor-General, the President of the New Zealand Law Society, and five barrister members of the New Zealand Law Society.<sup>69</sup> The Council may from time to time as it thinks fit make grants to the New Zealand Law Society or to any District Law Society.<sup>70</sup> That the New Zealand Council of Law Reporting has a monopoly means that the copyright in law reports (so far as this survives despite s 27 of the *Copyright Act*<sup>71</sup>) will generally be in the official sphere – though not necessarily the Crown.

## United Kingdom

In the United Kingdom the position remains that copyright in statutes remains vested in the Crown,<sup>72</sup> but there is a general right to reproduce the text of statutes. For example, on a typical internet-based copy of a statute the following is stated:

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

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

<sup>63</sup> It is probable that this monopoly was devised to protect the position of the New Zealand Council of Law Reporting in a small market where competition might destroy it.

<sup>64</sup> *New Zealand Council of Law Reporting Act 1938* (NZ), s 3.

<sup>65</sup> *New Zealand Council of Law Reporting Act 1938* (NZ), s 12(1).

<sup>66</sup> *New Zealand Council of Law Reporting Act 1938* (NZ), s 12(1).

<sup>67</sup> *New Zealand Council of Law Reporting Act 1938* (NZ), s 12(1).

<sup>68</sup> *New Zealand Council of Law Reporting Act 1938* (NZ), s 10, as amended by *New Zealand Council of Law Reporting Amendment Act 1997* (NZ), s 2; s 2 has also added ss 10A – 10D to the principal Act covering various administrative details relating to the proceedings of the Council, these include the election of a Deputy Chairperson, provisions for the absence of certain members at meetings, and quorum requirements.

<sup>69</sup> *New Zealand Council of Law Reporting Act 1938* (NZ), ss 6, 7.

<sup>70</sup> *New Zealand Council of Law Reporting Act 1938* (NZ), s 14. The question whether income of the Council is exempt from taxation was considered in *New Zealand Council of Law Reporting v Commissioner of Inland Revenue* (1979) 3 TRNZ 93; *New Zealand Council of Law Reporting v Commissioner of Inland Revenue* [1981] 1 NZLR 682; (1981) 4 TRNZ 321 (CA).

<sup>71</sup> Principally in respect of typographic features.

<sup>72</sup> For example, for the *Access to Health Records Act 1990* (UK), the internet version states that the copy is “© Crown Copyright 1990”. It continues: “The legislation contained on this web site is subject to Crown Copyright protection. It may be reproduced free of charge provided that it is reproduced accurately and that the source and copyright status of the material is made evident to users. It should be noted that the right to reproduce the text of Acts of Parliament does not extend to the Royal Arms and the Queen's Printer imprints. The text of this Internet version of the *Access to Health Records Act 1990* (c 23) has been prepared to reflect the text as it received Royal Assent. The authoritative version is the Queen's Printer copy published by The Stationery Office Limited as the *Access to Health Records Act 1990* (c 23), ISBN 0105423904.”, [http://www.bailii.org/uk/legis/num\\_act/athra1990221/notes.html](http://www.bailii.org/uk/legis/num_act/athra1990221/notes.html) (viewed 13 January 2003).

The text of this Internet version of the Act has been prepared to reflect the text as it received Royal Assent. The authoritative version is the Queen's Printer copy published by The Stationery Office Limited.<sup>73</sup>

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

## United States

In the United States, the *Copyright Act* 17 USC s 105 (1988) prohibits copyright of federal information by the government. Thus, the United States federal laws are in the public domain and no copyright attaches. The same is true of court decisions. It is not difficult to see the motivations behind this:

The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.<sup>74</sup>

Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are federal, State, or local, as well as those of foreign governments.<sup>75</sup>

The decisions of the courts, and legislation, would ensure that laws would be subject to copyright law, in some respects. The American threshold for copyright protection does contain requirements of both originality and creativity. According to the United States Supreme Court in *Harper & Row Publishers, Inc v Nation Enterprises* 471 US 539 at 547-549 (1985), a work "must be original to the author". The United States Supreme Court has also interpreted Art I, s 8, cl 8 of the *United States Constitution* as requiring "independent creation plus a modicum of creativity".<sup>76</sup>

In the United States, the exclusion of legislation from the scope of copyright laws dates to 1834, when the Supreme Court interpreted the first federal copyright laws and held that "no reporter has or can have any copyright in the written opinions delivered by this Court".<sup>77</sup> In the same case it was argued – and accepted by the court – that "it would be absurd, for a legislature to claim the copyright; and no one else can do it, for they are the authors, and cause them to be published without copyright ... Statutes were never copyrighted". Further, "it is the bounden duty of government to promulgate its statutes in print".<sup>78</sup> Counsel emphasised the governing policy that "all countries ... subject to the sovereignty of the laws" hold the promulgation of the laws, from whatever source, "as essential as their existence".<sup>79</sup> "If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by which we guide our actions."<sup>80</sup>

<sup>73</sup> *Appropriation Act 2002* (UK), Ch 18. <http://www.legislation.hmsso.gov.uk/acts/acts2002/20020018.htm> (viewed 22 August 2002).

<sup>74</sup> *State of Georgia v Harrison Co* 548 F Supp 110 at 114 (ND Ga 1982).

<sup>75</sup> *The Compendium of Copyright Office Practices (Compendium II)*, s 206.01, <http://www.faqs.org/faqs/law/copyright/faq/part3>, [3.6] (viewed 22 August 2002).

<sup>76</sup> See *Feist Publications Inc v Rural Telephone Service Co* 499 US 340 (1991), citing *The Trade-Mark Cases* 100 US 82 (1879); *Burrow-Giles Lithographic Co v Sarony* 111 US 53 (1884). In *Feist* the US Supreme Court stated (at 345) that "original, as the term is used in copyright means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity". *Bender v West* 158 F 3d 674 (2nd Cir) (1998) expanded on the US standard in the context of legal publications set out in *Feist*.

<sup>77</sup> *Wheaton v Peters* 33 US (8 Pet) 591 at 668 (1834). This case concerned the assertion of copyright in an annotated compilation of Supreme Court judgments. The court distinguished between the reporter's individual work and the justices' opinions.

<sup>78</sup> *Precis of Argument by Counsel for Wheaton [petitioner]* 33 US (8 Pet) at 615-616 (1834).

<sup>79</sup> *Precis of Argument by Counsel for Wheaton [petitioner]* 33 US (8 Pet) at 618-619 (1834).

<sup>80</sup> *Precis of Argument by Counsel for Wheaton [petitioner]* 33 US (8 Pet) at 620 (1834).

That the public interest is the primary determinant is clear from *Banks v Manchester* 128 US 244, 9 S Ct 36 (1888).<sup>81</sup> In this the United States Supreme Court denied a court reporter copyright in his opinions of the Ohio Supreme Court on the grounds that:

There has always been a judicial consensus, from the time of the decision in the case of *Wheaton v Peters* 8 Pet 591, that no copyright could, under the statutes passed by Congress, be secured in the products of the labour done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute.<sup>82</sup>

The law, as thus widely defined, is in the public domain, and therefore not amenable to copyright.<sup>83</sup> In *Howell v Miller* 91 F 129 (1898), Harlan J denied an injunction sought for the compiler of Michigan statutes, holding that “no one can obtain the exclusive right to publish the laws of the state in a book prepared by him”.<sup>84</sup> The question of formal ownership of the text of laws and decisions is perhaps secondary to the question of the dissemination of the law.

## ACCESS TO ELECTRONIC STATUTES

### Australia

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

We have intentionally treated it as largely irrelevant to the development of AustLII. Our approach is that the obligation of governments, courts etc. to provide access to the law is independent of any questions of ownership. Furthermore, since the most liberal copyright law still does not deliver an electronic copy of a statute or case to a publisher – and certainly not on a daily or weekly basis – cooperation by public bodies is essential, and such cooperation inherently involves them licensing the materials to you, even if they do claim copyright. So we have just humoured claims of copyright, and treated them as something we need not deal with (and be distracted by) in the primary task of establishing the principle and practice of free public access to these materials. We have not had the same problems in Australia with the commercial publishers as in the USA, so it has been easier for us to take this approach.<sup>85</sup>

No Australian court, tribunal, or government agency tries to sell primary legal materials (statutes, cases, treaties etc) without also (at least) allowing a publisher like AustLII to provide free access, and/or provide it themselves.<sup>86</sup> So even with Crown copyright, the public interest in dissemination has prevented a governmental – or commercial – monopoly from operating.

Of course, copyright is still an important question. Among other things, it affects whether commercial publishers have to pay royalties to republish primary legal materials, and this also complicates arguments about free access. It affects the control that public bodies can exert over how

<sup>81</sup> This case has been followed by more modern authority, such as *Harrison Co v Code Revision Commission* 260 SE2d 30,34 (Ga 1979); *State of Georgia v The Harrison Co* 548 F Supp 110, 114-115 (ND Ga 1982); vacated per stipulation, 559 F Supp 37 (ND Ga 1983).

<sup>82</sup> *Banks v Manchester* 128 US 244 at 253, 9 S Ct 36 at 40 (1888).

<sup>83</sup> In *Davidson v Wheelock* 27 F 61 at 62 (D Minn 1886), eg, the court stated that a compiler of state statutes “could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him”. Generally, see Patterson LR and Joyce C, “Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations” (1989) 36 *University of California Los Angeles Law Review* 719; Nimmer MB and Nimmer D, *Nimmer on Copyright* (Matthew Bender, 2000), Ch 5.06; Patry W, *Copyright Law and Practice* (BNA Books, 1994), pp 351, 357.

<sup>84</sup> *Howell v Miller* 91 F 129 at 137 (1898).

<sup>85</sup> Quoted in McMahon T, “Improving Access to the Law in Canada With Digital Media” *Government Information in Canada/Information gouvernementale au Canada* No 16 (March 1999), <http://www.usask.ca/library/gic/16/mcmahon.html> (viewed 13 January 2003).

<sup>86</sup> AustLII (Australasian Legal Information Institute) “provides free internet access to Australian legal materials. AustLII’s broad public policy agenda is to improve access to justice through better access to information. To that end, we have become one of the largest sources of legal materials on the net, with over seven gigabytes of raw text materials and over 1.5 million searchable documents”, <http://www.austlii.edu.au/austlii> (viewed 13 January 2003).

“their” data is presented. However, AustLII’s experience shows that the problems of copyright do not have to be solved before the principle of free public access can be established.

## Canada

In *Tolmie v Attorney-General of Canada*, 14 Oct 1997 (FCTD), McGillis J dealt with a case where Mr Tolmie requested, on 6 January 1995, under the *Access to Information Act*, the *Revised Statutes of Canada* in electronic form:

The preferred format is the existing WordPerfect 5.1 format that is presently used within Justice Canada for creating the Statutes. However, alternative formats such as the Folio format used on the CD-ROM produced for this purpose would be acceptable.<sup>87</sup>

On 20 August 1995, the Department of Justice published the electronic statutes and announced they would soon be published on CD-ROM, which occurred in October 1995. The CD-ROM was priced at Can\$225.00. McGillis J rejected Mr Tolmie’s request on the grounds that the statutes were publicly available in electronic format and therefore excluded from the application of the Act under s 68(a).<sup>88</sup>

In *Canada Post v Minister of Public Works* [1985] 2 FC 110 (10 February 1995, Federal Court of Canada) the Federal Court of Appeal considered a case involving documents held by the Department of Public Works pursuant to a contract with Canada Post. The contract contained very strong confidentiality clauses. Despite the clauses of the contract, which strictly limited how Public Works could deal with the documents in question, the Court of Appeal held that the contractual provisions did not change the fact that the documents were “under the control” of the government department. The court emphasised in its reasons the importance of giving a broad interpretation to favour access to information.<sup>89</sup>

In Canada, the concern proceeded to a lawsuit between the Law Society of Upper Canada and three legal publishing companies, Carswell Thomson Professional Publishing, Canada Law Book Inc and CCH Canadian.<sup>90</sup> The Law Society made photocopies of court cases and excerpts from other legal texts as requested by Ontario lawyers and judges and for this service it charged a fee which it said was intended to approximate plaintiff’s cost in providing this service.<sup>91</sup> The publishers filed a statement of claim on 23 July 1993, but did not immediately pursue the action. The Law Society later filed an application for a declaration that its practice did not infringe copyright. The publishers then revived their original claim.

In essence, the publishers claimed copyright over their publication of court decisions. The publishers claimed that their works were copyright by virtue of the system of citations, cumulative indexes, headnotes, classification of cases, summaries of references to statutes and other reported cases, addition and verification of citations and the status of any appeals from reported cases.<sup>92</sup> All of

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<sup>87</sup> *Tolmie v Attorney-General (Canada)*, 14 October 1997 (FCTD), McGillis J.

<sup>88</sup> It should be noted that the question of whether the requester or the government has the right to choose the format is relevant to all kinds of information requested under freedom of information and privacy laws, and to prosecution disclosures to accused persons required by s 7 of the *Charter of Rights and Freedoms*. The case law appears to be at a preliminary stage in its evolution.

<sup>89</sup> An argument that does not appear to have been raised in either the *Canada Post* or the *JURIS* case is the principle that a government department should not be able to contract out of access to information laws. If documents are under the department’s control (regardless of what confidentiality clauses may be contained in a contract), then the test is to see if there are any exemptions under the Act that protect those documents. One available exemption is to protect confidential commercial information in certain circumstances. Whether this would protect the work done for *JURIS* would require a somewhat different analysis concerning whether *JURIS* is under the control of the Federal Department of Justice.

<sup>90</sup> *CCH Canadian Ltd v Law Society of Upper Canada* [2002] FCA 187. For the trial see *CCH Canadian Ltd v Law Society of Upper Canada* [2000] 2 FC 451 (abridged version); 169 FTR 1; 179 DLR (4th) 609; 2 CPR (4th) 129; [1999] FCJ No 1647 (QL).

<sup>91</sup> <http://www.library.lsuc.on.ca/GL/home.htm> (viewed 13 January 2003).

<sup>92</sup> Relying on *Meyer v Bright* (1992) 94 DLR (4th) 648; *R v CIP Inc* (1992) 71 CCC (3d) 129; *Hewes v Etobicoke* (1993) CLLC 14,042.

these elements are created independently of the actual text of judicial opinions, statutes and regulations. The publishers acknowledged that they have given both implied and express licences to lawyers to make copies from their publications on the photocopiers of their own law firms. Thus, the idea is to make it necessary for law firms to purchase the publishers' publications. If the Law Society is permitted to send copies to law firms, the law firms may feel it is unnecessary to purchase the publishers' publications.

The Law Society claimed that the publishers had no copyright in the text of the court decisions, that it only copied individual cases without any regard to the publishers' selection and arrangement criteria, and that if there was copyright infringement by copying the headnotes, it was a fair dealing that was permitted by law. The Law Society emphasised that the copies it provided to its members were in all cases provided for the purpose of research or use in court. The Law Society denied that it made a profit from providing this service, while the publishers alleged that the Law Society was making a profit through its photocopying service. The Law Society claimed that 90% of the requests it received were for individual judicial opinions, but other requests were for short passages from legal texts published by the plaintiffs which summarise and explain the law.<sup>93</sup>

The results of the legal copyright case, *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; [2004] SCC 13, set a benchmark in Canada for what the law requires and permits with respect to private copyright of texts with content primarily created by the courts and legislatures. It established that setting up the facilities that allow copying does not amount to authorising infringement.

In 1996, the Canadian Judicial Council, composed of all the Chief Judges and Associate Chief Judges of the superior courts across Canada created and approved a standard for the preparation of electronic court judgments. The standard includes the obligation for courts to include paragraph numbers. Today, the majority of Canadian courts are identifying the paragraph numbers in their judgments.<sup>94</sup> The Canadian Citation Committee has created a uniform way to identify courts and to number court decisions, without reference to private publishers' reports. These standards should avoid private publisher copyright issues, and will also make it possible to cite cases more uniformly (uniform citation is an important way to improve access to the law).<sup>95</sup>

Private publishers will always have an important role to play because they can add value to legislation and to court decisions. A good example are various annotated criminal codes. The real value of these books, in addition to presenting the text of the relevant criminal code, are the notes about the different cases that have considered different sections of the code and editorial commentary. This is a valuable service for many practitioners and electronic publishing of the primary law should not pose a threat to this value-added publishing.

The concentration of legal publishing is another reason why governments and courts should be active in publishing their own laws and judgments electronically. Nonetheless, privatisation of the laws and corporate concentration should not unduly threaten public electronic access to the law.

As governments and courts become more active in publishing their laws, one danger area to watch out for is "co-publishing" agreements with private publishers, where the contractual terms might preclude free access to the law. This is what happened with respect to the JURIS and FLITE

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<sup>93</sup> *CCH Canadian Ltd v Law Society of Upper Canada* [2000] 2 FC 451 (abridged version); 169 FTR 1; 179 DLR (4th) 609; 2 CPR (4th) 129; [1999] FCJ No 1647 (QL).

<sup>94</sup> This practice has also been adopted in the courts of England and Wales; Practice Direction (Judgments: Form and Neutral Citation) 11 January 2001, Lord Woolf CJ (CA).

<sup>95</sup> For discussions of similar standards in the US see Ventura R, *The Centre for Information Law and Policy Whitepaper on Policy Governing Pennsylvania Citations* (23 April 1998); Hillis B, *Considerations When Placing Court Opinions on the Internet* (4 June 1996).

databases in the United States. It is possible to avoid unintended limits on access to the law by self-publishing, by publishing with a non-profit organisation (such as a university), or by hiring private electronic publishers on a fee for service basis.<sup>96</sup>

### New Zealand

The “user pays” or “fee based” mentality applies to legal research resources available on the internet in New Zealand.<sup>97</sup> Despite this, the government has not been necessarily averse to providing free internet access to legislation.

The Attorney-General, the Rt Hon D Graham, in a press release of 14 September 1998, announced a discussion paper distributed by the Parliamentary Counsel Office which canvassed issues surrounding public access to legislation.<sup>98</sup> The paper was principally about how legislation should be made available to the public, but it also raised the issue of how proposed changes to Acts in the form of Bills presented to Parliament might be better presented to the public.

On 10 April 2000, the Hon Margaret Wilson, the new Attorney-General, announced the next steps in a process. The government had authorised the Parliamentary Counsel Office to produce a business case for the development of a system that would provide an authoritative, accurate and up-to-date electronic database of New Zealand legislation, made publicly available over the internet. Responses to a 1998 Parliamentary Counsel Office public discussion paper on this issue indicated that many people felt frustration that, while they could access legislation of numerous overseas jurisdictions over the internet, they could not do so for themselves at home.<sup>99</sup>

In a press statement of 7 May 2001,<sup>100</sup> the Attorney-General announced that the Parliamentary Counsel Office had selected Unisys New Zealand Ltd as the preferred implementation partner for the project to improve public access to legislation. Print access will continue to be provided at a reasonable price.

The issue of access to New Zealand decisions on the internet is not a high priority for the judiciary; it is one that introduces a number of problems and issues, among them matters of privacy, compliance with suppression orders, selection of judgments and the like.<sup>101</sup> An interim website, run by Thomson Brookers for the Parliamentary Counsel Office, is now operational.<sup>102</sup>

### United States

In the United States, the Missouri Court of Appeals upheld a trial judge’s order that a requester be given the electronic version of the Statutes of Missouri in *Deaton v Kidd* 932 SW 2d 804 (1996) (upholding Circuit Court of Cole County, No CV193-1426CC, 21 November 1994). The Missouri government office responsible for the statutes, the Revisor of Statutes, had a contract with two private sector parties to sell the computerised versions of the laws, with royalties payable to the Revisor’s office. The court found that the Missouri equivalent to the *Official Information Act* applied to the computerised version of the statutes. The court found that he did not comply with the law, that the computerised version of the laws was a record and that the Revisor is required to make the computerised version available.

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

The Revised Statutes on computer disk have additional features not offered by the book form. The annual computerized version integrates previous supplements into the main body of the Revised

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<sup>96</sup> Examples are available of each of these approaches.

<sup>97</sup> Harvey, n 8.

<sup>98</sup> *Public Access to Legislation*: <http://www.pco.parliament.govt.nz/Archive/pressreleases.html> (viewed 22 August 2002).

<sup>99</sup> <http://www.pco.parliament.govt.nz/Archive/pressreleases.html> (viewed 22 August 2002).

<sup>100</sup> Wilson M, Attorney-General, Media Statement, 7 May 2001, [http://www.Parliamentary\\_Counsel\\_Office.parliament.govt.nz/Archive/pressreleases.html](http://www.Parliamentary_Counsel_Office.parliament.govt.nz/Archive/pressreleases.html) (viewed 22 August 2002).

<sup>101</sup> Harvey, n 8.

<sup>102</sup> *Public Access to Legislation Project*, <http://www.legislation.govt.nz> (viewed 13 January 2003).

Statutes. There is no need to compare the hardbound books with the soft cover supplements. The computerized version allows the user to search all volumes in seconds by key word, phrase or statute number. The user is no longer limited by the index or his knowledge of where to look in the Revised Statutes to find a particular topic.<sup>103</sup>

The Court of Appeals, per Lowenstein J, said:

Whether the Revised Statutes are public records is an easy question given a legal system which charges the public with having a knowledge of the law and proclaims that ignorance of the law is no excuse for its violation. As the trial court notes, "it is hard to think of a more important public record than the general laws of the state." This court's analysis is not affected by the fact that the public record at issue is on computer tape.<sup>104</sup>

The Court of Appeals noted that the Committee on Legislative Research has the power, by statute, to determine the form and price for selling the statutes and that this power permits the Committee to set a price higher than marginal costs. However, the court ruled that this power did not allow the Committee to establish the price through bidding "because it essentially limits access to a public record to those who bid the highest ... Until the price is set by the Committee in the manner prescribed by 3.140, the tapes should be sold at cost as ordered by the trial court".<sup>105</sup>

Other American States have differently-worded laws and thus different approaches to access to the electronic version of the statutes.<sup>106</sup>

With respect to freedom of information relating to access to electronic databases of court decisions, there are two United States cases on this topic. In *Tax Analysts v US Department of Justice* 913 F Supp 599 (D DC 1996) the District Court of the District of Columbia considered a request for the Department of Justice's Justice Retrieval and Inquiry System (JURIS), an electronic database of federal cases, regulations and digest material. The system was developed by the Department of Justice and became operational in 1974.<sup>107</sup> However, in 1983, the Department of Justice contracted with West Publishing to provide 80% of the information in JURIS. West collected, organised, and computer-formatted cases, opinions, and digests to make them ready for use on JURIS.<sup>108</sup> The contract limited how the United States government could use the data it had contracted for.

The issue was whether JURIS was an "agency record" for the purposes of the United States *Freedom of Information Act* and, specifically, whether JURIS was "under the control" of the Department of Justice at the time of the request. The court ruled that because of the above constraints on the use of the JURIS database, the database was not "under the control" of the Department of Justice and was not an "agency record" for the purposes of the *Freedom of Information Act*.<sup>109</sup>

There is already a body of recent case law from the United States concerning private copyrights in the law. These cases do not concern photocopying of someone else's publications, but merely a reference to those publications. The cases primarily concern West Publishing, which is now owned by the Thomson Group. The first of these cases arose from a successful attempt by West Publishing to obtain a preliminary injunction against Mead Data to prevent Mead Data from publishing electronic

<sup>103</sup> *Deaton v Kidd* Circuit Court of Cole County, No CV193-1426CC, 21 November 1994.

<sup>104</sup> *Deaton v Kidd* 932 SW 2d 804 at 806 (1996), upholding Circuit Court of Cole County, No CV193-1426CC, 21 November 1994.

<sup>105</sup> *Deaton v Kidd* 932 SW 2d 804 (1996), upholding Circuit Court of Cole County, No CV193-1426CC, 21 November 1994.

<sup>106</sup> In California it is a statutory requirement to publish the law on the Internet. In Kentucky, there are specific laws requiring institutions to disclose electronic records. In Mississippi, the Attorney-General issued an official opinion dated 14 August 1995 that the statutes in electronic form did not need to be produced in electronic form because such a disclosure would be a significant intrusion into the business of a public body (a specific exemption in Mississippi's *Public Records Act*) and because such a requirement appears to exempt the statutes from the *Public Records Act*. Section 1-1-1 of the *Mississippi Code* specifically provides that the State government may enter into and execute a contract with a competent company for the recodification and indexing of the statutory laws of the State of Mississippi and recompilation and indexing of the constitution of the State and of the US.

<sup>107</sup> <http://www.juris.com/home/default.asp?selected=6&jinc=4&page=Juris-At-A-Glance> (viewed 13 January 2003).

<sup>108</sup> Hafner C, *Taxpayer Assets Project*, [http://www.eff.org/Activism/competition\\_legal\\_info.report](http://www.eff.org/Activism/competition_legal_info.report) (viewed 13 January 2003).

<sup>109</sup> *Deaton v Kidd* 932 SW 2d 804 (1996).



court decisions that told readers where the court decisions, and the precise pages they were reading in electronic format, were available in West's print reports of the same decisions. The reference to West's reports and page numbers is called "star pagination" (because of the symbols inserted in the body of the text to indicate West's pagination).<sup>110</sup> West has a virtual monopoly in publishing United States court decisions.<sup>111</sup>

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

## CONCLUSION

In summary, a 1938 case that protected Crown copyright against a private publisher has not prevented Australia from moving to the vanguard in publishing its laws freely on the internet.<sup>112</sup> In Canada, a decision limiting the right of an information requester to obtain a copy of the electronic version of the federal laws did not prevent the federal government from publishing those versions for free on the internet (and at a relatively modest price on CD-ROM).<sup>113</sup> In the United States, decisions under the *Freedom of Information Act*<sup>114</sup> which limited public access to electronic versions of court decisions has not prevented free electronic public access to all Supreme Court and Federal Court of Appeal decisions.<sup>115</sup> The legalities of ownership appear to be less important than the public policy decisions.

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

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<sup>110</sup> *West Publishing v Mead-Data Central* 799 F 2d 1219 (8th Cir 1986).

<sup>111</sup> *West Publishing v Mead-Data Central* 799 F 2d 1219 (8th Cir 1986).

<sup>112</sup> *Attorney General (NSW) v Butterworth & Co (Aust) Ltd* (1938) 38 SR (NSW) 195.

<sup>113</sup> *Tolmie v Attorney-General (Canada)*, 14 October 1997 (FCTD), McGillis J.

<sup>114</sup> 5 USC s 552, as amended by Public Law No 104-231, 110 Stat 3048.

<sup>115</sup> Although this has been liable to the formation of near-monopolistic situations.