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Judges, Judgments and the Jacobean Press: Ownership and control of judicial opinions in the twenty-first century

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1. Introduction[1]

In recent years there has been a lot of attention given to, and much hand-wringing about, the manner in which the family court system operates.[2] Most proceedings in the family courts are held in private and the decisions are generally not made public. However, following the high profile cases concerning Angela Cannings, Sally Clark and Trupti Patel (within the criminal justice system), attention has increasingly turned to the manner in which decisions are made within, not just the criminal courts, but also within the family division, resulting in repeated calls from both within and outside of the judiciary for greater transparency and openness in the manner in which the family courts operate. Following *R* v. *Cannings* [2004],[3] Dame Elizabeth Butler-Sloss (as was), then President of the Family Division issued a Memorandum on 28 January 2004 concerning arrangements to be adopted by judges of the family courts:

> It is … worth giving consideration to increasing the frequency with which anonymised family court judgments in general are made public. According to current convention, judgments are usually made public where they involve some important principle of law which in the opinion of the judge makes the case of interest to the law reporters. In view of the current climate and increasing complaints of the "secrecy" in the family justice system, a broader approach to making judgments in public is desirable.[4]

In *Re B, Kent CC* v. *B* [2004], Munby J., endorsing those views, commented as follows:

> The need to maintain public confidence in the family justice system is particularly important at present when, as I have said, recent high profile cases within the criminal justice system have give rise to a very anxious debate which is no longer confined to the possibility of further miscarriages of justice in the criminal justice system but extends also to the possibility of similar miscarriages of justice in the family justice system … In my judgment, the workings of the family justice system and, very importantly, the views about the system of mothers and fathers caught up in it, are … "matters of public interest which can and should be discussed publicly". Many of the issues litigated in the family justice system require open and public debate in the media.[5]

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[1] This paper was prepared for the BILETA 2007 Conference; it is in draft form only, and should not be taken to represent an accurate or definitive account of the author's views or opinions as to this area of the law. Any comments or criticisms of the same are more than welcome; please forward them to: r.deazley@bham.ac.uk.

[2] For a recent summary of and commentary upon this issue see: *Confidence and confidentiality: Improving transparency and privacy in family courts*, Cm 6886, (July 2006); this DCA consultation paper is available at: www.dca.gov.uk/consult/courttransparencey1106/consultation1106.pdf.

[3] *R* v. *Cannings* [2004] EWCA Crim 1.

[4] Quoted in *Confidence and confidentiality*, 22.

[5] *Re B, Kent CC* v. *B* [2004] EWHC 411 (Fam), para. 99-100.

Later, in a speech he gave to the Jordan's Family Law Conference in October 2005, Munby J. observed that: 'it must never be forgotten that, with the State's abandonment of the right to impose capital sentences, orders of this kind which judges of the family courts are typically invited to make in public law proceedings are among the most drastic that any judge in any jurisdiction is ever empowered to make'.[6] In *Re X: Emergency Protection Orders* [2006] McFarlane J. developed this point in noting that '[t]here can be few more draconian or important orders that justices are called upon to consider than making an EPO'.[7] In that light, he explained his reasons for releasing the judgment in *Re X* as follows: 'There is in my view a public interest in the wide publicity being given to what took place in this case in the hope that lessons may be learned to ensure that what befell this family is not repeated elsewhere'.[8]

In July last year the Department for Constitutional Affairs released a consultation paper, *Confidence and confidentiality: Improving transparency and privacy in family courts*, which set out a series of recommendations designed to both 'increase the openness of family proceedings, and, *at the same time*, extend the principle of anonymity to children involved in proceedings, to adults to'.[9] These included: making changes to attendance and reporting restrictions consistent across all family proceedings; allowing the media, on behalf of and for the benefit of the public, to attend proceedings as of right, with the proviso that the court can exclude the press when they consider it appropriate to do so; allow attendance by individuals who are not party to the proceedings upon application to the court, or on the court's own motion; ensuring reporting restrictions provide for anonymity of all those involved (adults and children); introducing a new criminal offence for breaches of reporting restrictions; and, making adoption proceedings a special case to ensure transparency until the point at which a placement order is made.[10] Whether these recommendations are taken up remains to be seen, but there is, in my opinion, one interesting omission from the substance of the consultation paper, which concerns not just the manner in which proceedings in the family division are reported by the press, nor indeed the frequency with which judges decide to release anonymised judgments, but the process by which those judgments are actually publicly reported and disseminated. The consultation paper addressed the issues of who can *attend* proceedings and *what* can be reported, but it stopped short of considering *who* is entitled to report *which* judgments and *when*. About this process the consultation paper says no more than the following: 'Judgments of the High Court and Court of Appeal are … often published on the HMCS website when the judge considers the case to be of significant public interest'.[11]

This then brings me to the cautionary tale set out in the abstract for this paper. Recently, a good friend (A) completed a co-authored Text, Cases and Materials book for a reputable legal publisher (B). On the day before the book was due to go to press, another reputable legal publisher (C) contacted the first reputable legal publisher (B) to refuse permission for the authors (A, and another) to reproduce any material from their catalogue, which included, amongst other things, some mainstream legal journals and law reports that specialised in this particular area of the law. In relation to the latter, the second reputable legal publisher (C) claimed copyright protection not only in the headnotes to, and the typographical arrangement of, each of the individual law reports, but *in the actual text of the judgments themselves*.[12] Negotiations naturally ensued; at the time of writing, however, the situation has not yet been resolved, and the publication date for the book has been postponed.

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[6] Quoted in *Confidence and confidentiality*, 22.
[7] *Re X: Emergency Protection Orders* [2006] EWHC 510 (Fam), para. 90.
[8] *Ibid*., para. 3.
[9] *Confidence and confidentiality*, 44.
[10] *Ibid*.
[11] See: www.hmcourts-service.gov.uk/cms/judgments.htm.
[12] The *Copyright Designs and Patents Act* 1988, c.48 (the CDPA), does provide that '[c]opyright is not infringed by anything done for the purposes of reporting [judicial proceedings]', but continues that 'this shall not be construed as authorising the copyright of a work which is itself a published report of the proceedings'; s.45(2).

In the era of so-called open government, a post-Woolf world of justice for all, it is curious that meaningful access to contemporary judicial opinions might turn upon the inclinations of a private publishing house. It has traditionally been thought that the right to publish judicial opinions fell within the remit of crown copyright, a concept which has its own roots buried deep within the ill-defined and murky boundaries of the royal prerogative. And yet, that judgments are protected as crown copyright has never been authoritatively established. As recently as 1998, when the UK government released a Green Paper on *Crown Copyright in the Information Age*, it tentatively defined crown copyright as including certain court judgments 'based on advice received from the Treasury Solicitor's office';[13] presumably publisher C would disagree. More recently still, the authors of a 2005 consultation paper on *Crown Copyright* prepared on behalf of the Australian Copyright Law Review Committee (CLRC) concluded that '[a] key area where the law has not been settled is whether Crown prerogative rights cover judgments'.[14] That there should be any mystery or confusion as to what property (if any) resides in judicial opinions, and to whom that might belong, will no doubt strike many current academics and practitioners as anomalous. That these judgments should be owned by anyone at all, rather than falling squarely within the public domain, will strike many others as equally anomalous.

2. The Introduction of Printing and the Royal Prerogative

Within ten years of William Caxton establishing his printing press at Westminster in 1476, Henry VII, in 1485, appointed Peter Actors as the first official royal printer. Actors who, while not actually a printer, nevertheless received a grant for life to 'import, so often as he likes, from parts beyond the sea, books printed and not printed into the port of the city of London … and to dispose of the same by sale or otherwise without paying customes, etc. thereon and without rendering any accompt thereof'.[15] He was succeeded in 1504 by William Facques, who held the position for four years, after which Richard Pynson held the office from 1508 to 1530. As the King's official printer, Facques and Pynson, and those who followed,[16] were required to print royal proclamations, injunctions, statutes, and other such works as the monarch might request. In addition to the office of royal printer, however, Henry VIII and the Tudors who succeeded him also assumed, in the exercise of their royal prerogative, the right to grant printing privileges over individual texts [17] as well as entire classes of work (with the latter more often referred to as printing patents).[18] It was not until 1518 that Henry first began to issue such

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[13] *Crown copyright in the information age*, HMSO, 1998, Annex A. The types of judgments listed included those from the: Court of Appeal (Criminal and Civil Divisions); High Court (Chancery, Queen's Bench, and Family Divisions); Crown Court; County Courts; Immigration Appeal tribunal; Lands Tribunal; Social Security Commissioners; Social Security Appeal Tribunal; Pensions Appeal Tribunal; Patents Court; Copyright Court; Data Protection Tribunal; Privy Council Decisions; and 'all other tribunals'. Decisions of the House of Lords are subject to parliamentary copyright as provided for in the CDPA 1988, s.164.

[14] Copyright Law Review Committee, *Crown Copyright*, January 2005, available at: www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Crown_Copyright

[15] Quoted in Judge, C.B., *Elizabethan Book-Pirates* (Cambridge: Harvard University Press, 1934), 6. As Siebert notes, the role which Actors fulfilled was more in the way of King's stationer, rather than King's printer, in that his principal duty was 'to supply written and printed books for the officials and the members of the king's family'; Siebert, F.S., *Freedom of the Press in England 1476-1776* (Urbana: University of Illinois Press, 1965), 30.

[16] Pynson was succeeded by Thomas Berthelet in 1530, and then by Richard Grafton in 1547, John Cawood in 1553, and Cawood & Richard Jugge in 1558.

[17] See for example the privilege granted to John Day, 11 November 1559, to print William Conningham's *The Cosmographical Glass* a transcript of which is reproduced in Patterson, L.R., *Copyright in Historical Perspective* (Nashville: Vanderbilt University, 1968).

[18] The first of these generic printing patents appears to have been granted in 1539 as a result of a request by Richard Grafton that Henry VIII grant him a monopoly over the printing of the Bible in English. Henry responded by granting a privilege providing the exclusive right to print English Bibles for seven years not to Grafton but to Thomas Cromwell; see Siebert, 38. Another early example was that granted to Richard Grafton and Edward Whitechurch in May 1545 by Henry, by way of Royal Proclamation, for printing the Primer (a service-book for use in church) in both English and Latin; see Hughes, P.L., and Larkin, J.F., eds, *Tudor Royal Proclamations, Volume 1* (New Haven and London: Yale University Press, 1964), 353. By the end of the sixteenth century printing patents existed for all manners of works including: bibles and testaments; law books; the *ABC* and the *Catechism*; almanacks and prognostications; latin school books; music books and manuscript paper; and psalters, primers,

privileges, by which time this particular form of book protection was already well established on the continent.[19] In England, while such privileges were often bestowed upon the royal printer,[20] they were also extended to other such printers and booksellers as should find favour with the court.[21] To hold a royal printing privilege ensured that its recipient could publish his work in the knowledge that should any other printer violate the privilege then they could be held to account for so doing before the Privy Council.[22] In short, these printing privileges provided their holders with a valuable legal and economic protection. Indeed, as Siebert notes, within a few years of the first of these privileges being issued, 'the entire craft was scrambling for printing "privileges" and the phrase "cum privilegio a rege" appeared in the colophons of almost all the printers'.[23] As such, these privileges provided the first of two proprietary models for protecting published works which prefigured the introduction of statutory copyright into Britain with the passing of the *Statute of Anne* 1709,[24] the second being the 'stationers' copyright' that developed within the book trade itself following the incorporation of the Stationers' Company in 1557.[25]

When Henry VIII began to grant privileges concerning the right to print and publish certain types of books,[26] he did so under the aegis of the royal prerogative, through which he also sought to regulate and administer national economic policy and trade. The concept of using royal privileges to encourage new manufacture within the country was evidenced as early as 1331 when Edward III granted Letters of Protection to John Kempe, a Flemish weaver, as part of a concerted effort to encourage foreign craftsmen to settle in England.[27] Linen weavers came from Flanders; clock makers came from Delft. Mining, metal working and coining were all industries that benefited from importing the skills of foreign workers, as did the manufacture of ordnance (canons) and gunpowder.[28] Magna Carta may have guaranteed freedom of trade to all merchants within the realm,[29] but it was nevertheless accepted that,

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and prayer books; see *The griefes of the printers glasse sellers and Cutlers sustained by reason of privileges granted to private persons*, August 1577, Arber, E., *A Transcript of the Registers of the Company of Stationers of London, 1557-1640, vol.I* (London: 1875-94), 111.

[19] Indeed the first privileges protecting printed works were issued in Italy and Germany in the 1470s, followed by France and Spain towards the end of the fifteenth century, as well as Portugal in 1501, Poland in 1505, and Scotland in 1507. In general see Witcombe, C.L.C.E., *Copyright in the Renaissance: Prints and the Privilegio in Sixteenth-Century Venice and Rome* (Leiden & Boston: Brill, 2004), 326-43, and Armstrong, E., *Before Copyright: The French Book-Privilege System, 1498-1526* (Cambridge: Cambridge University Press, 1990), 1-20. As to Scotland in particular, James IV granted permission to Walter Chepman and Andrew Myllar to set up a press in Edinburgh with a privilege preventing that import of any books of 'Lawes, actis of parliament, cronicles, mess bukis, and portuus efter the use of our Realme' that they might print. The life of the press was however short-lived. See Armstrong, 9, and Witcombe, 334.

[20] See for example the work printed by Richard Pynson: *These be the Articles of the Pope's Bulle … to which are added letters of protection from Henry VIII*, 26 Oct. 1518, British Library, c.18.e.2.(8).

[21] In addition, privileges were often granted by the Tudor monarchs, not by way of patronage, but simply to ensure that certain types of works were produced for circulation. This was especially true of Elizabeth and her interest in the spread of education and classical learning throughout her reign; see Clegg, C.S., *Press Censorship in Elizabethan England* (Cambridge: Cambridge University Press, 1997), 13.

[22] Clegg, 6-14.

[23] Siebert, 35.

[24] *Statute of Anne* 1709, 8 Anne c.19.

[25] See in general *Primary Sources on Copyright (1450-1900)*, "Commentary on the Stationers' Royal Charter 1557": www.copyrighthistory.org (*forthcoming*).

[26] Ibid.

[27] Fox, H.G., *A Study of the History and Future of the Patent Monopoly* (Toronto: University of Toronto Press, 1947), 43-46. The letters of protection issued by Edward III in time gave way to the monopoly grants and privileges relied upon by the Tudors and Stuarts; ibid. 55-56.

[28] Ibid., 47-50. In the time of Richard III the printing industry received similar encouragement in allowing foreign printers and booksellers to operate within the city of London at a time when foreign merchants in other trades were prohibited from so doing; *In what Sort Italian Merchants may sell Merchandises. Several Restraints of Aliens*, 1484, 1 Ric.III, c.9.

[29] Magna Carta, c.41: 'All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. This, however, does not apply in time of war to merchants from a country that is at war with

so long as the Crown was acting in the general public good, then it had the power, as part of the prerogative, to grant privileges promoting economic and industrial development by restricting competition.[30] Moreover, these privileges might relate to the import and export of particular goods, to the manufacture and sale of a specific commodity, or to a general power to supervise an individual trade or industry.[31]

During Elizabeth's reign the consistent use of these privileges took on the shape of strategic national policy, while the privileges themselves took on the character of monopolistic grants.[32] At the same time Elizabeth was not above making use of these grants to both increase royal revenue as well as reward those who should find themselves in favour at court. As a result, towards the end of her reign there was growing discontent about her use and abuse of these monopoly grants. In 1597 an address was presented to the Queen concerning the matter. In response, she conveyed her wish that 'her dutiful and loving subjects would not take away her prerogative, which is the choicest flower in her garden, and the principal and head pearl in her crown and diadem', in exchange for which she promised to examine all patents 'to abide the trial and true touchstone of the law'.[33] Despite Elizabeth subsequently agreeing to revoke a number of grants to which the Commons objected,[34] things did not improve. In 1598 she granted Edward Darcy a monopoly on the import, manufacture and sale of playing cards in England and its dominions for the period of twenty-one years, which grant gave rise to the seminal decision of *Darcy* v. *Allen* (1603),[35] otherwise referred to as the *Case of Monopolies*. In *Darcy* the court held that the grant to the plaintiff was void on the grounds of being a monopoly contrary to the common law (as well as several statutes).[36] The decision however did not render all monopolies void; rather it simply set out various common law principles regulating such grants, principles that were further elaborated upon in the subsequent decision of the King's Bench in the *Cloth Workers of Ipswich Case* (1614).[37]

When James acceded the throne, having received a number of petitions concerning Elizabethan monopolies on his journey south from Scotland to London,[38] he responded by issuing a proclamation acknowledging and apologizing for Elizabeth's behaviour in the 'too large extending' of her prerogative in relation to the grant of monopolies, and suspending all grants and charters of monopoly until they could 'be examined & allowed of by us, with the advise of our Counsell, to bee fit to be put in execution, without any prejudice to our loving Subjects'.[39] As one commentator remarks however he

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us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too'. See also: 9 Edw.III, st.1, c.1; 25 Edw.III, c.2; 27 Edw.III, c.10.

[30] Fox writes as follows: '[T]he development of English industry owed much to the importation of foreign skill, particularly in regard to the manufacture of textiles and hardware, and methods of mining, drainage, and refining of materials, and … in this development, the use of the monopoly patent played a substantial and significant role'; Fox, 54.

[31] Fox, 57-65.

[32] Patterson writes: 'Under the Tudors … the patent system underwent a change by reason of the inclusion of monopoly clauses in the grants which perverted the medieval policy of encouraging industry. It is the monopoly clauses which distinguish the Elizabethan grants from the earlier ones'; Patterson, 83.

[33] 1 *Parliamentary History*, 905.

[34] The question of monopolies was extensively debated in the Commons in 1601 (1 *Parliamentary History* 923-42).

[35] *Darcy* v. *Allen* (1603) 11 Co. Rep. 84b.

[36] For a full exposition of the arguments and decision in *Darcy* see Corré, J.I., "The Argument, Decision, and Reports of Darcy v. Allen", *Emory Law Journal*, 45 (1996): 1261-1328.

[37] *Cloth Workers of Ipswich* (1614) Godb. R 252.

[38] Larkin, J.F., and Hughes, P.L., eds, *Stuart Royal Proclamations, Volume I, Royal Proclamations of King James I, 1603-1625*, (Oxford: Clarendon Press, 1973), 12, n.2.

[39] *A Proclamation inhibiting the use and execution of any Charter or Graunt by the late Queene Elizabeth, of any kind of Monopolies, &c* (7 May 1603), ibid., 11-14.

did so only 'to prepare a way for a series of really objectionable [monopolies] of his own creation'.[40] The controversy over the use and abuse of monopolies continued throughout the Jacobean period, with a more politically robust House of Commons exhibiting an increasing willingness to raise grievances against and call into question the scope and use of the royal prerogative.[41] James, for example, had hoped that the first session of the 1604 Parliament might focus upon the issues of subsidy, revision of the laws, and an Anglo-Scots Union; instead the Commons set these aside to address various grievances concerning, amongst other things, the royal interference with members' privileges, abuses in the ecclesiastical courts, and the problem of monopolies.[42] In 1606 a petition concerning several monopolies was presented by the Commons to the King,[43] followed by another in 1610.[44] The question received considerable attention in the House in 1614,[45] and again in the early 1620s,[46] which discussions eventually resulted in the passing of the *Statute of Monopolies* 1624.[47]

Although designed to bring about an end to the abuse of monopolies the 1624 legislation did not immediately do so.[48] Neither did it mark the beginnings of the modern patent system as is often claimed to be the case. Certainly the statute represents a significant moment in the history of the British patent system, but it is perhaps best understood as a declaratory instrument, restating and representing the jurisprudence upon monopolies that had developed in the common law courts throughout the previous two decades.[49] In substance, the statute declared all monopolies to be contrary to the laws of the realm subject to certain exceptions, and provided that what monopolies and privileges should be tolerated were to be 'hereafter examined, heard, tried and determined by and according to the common laws of the realm, and not otherwise'.[50] Exempt from the general prohibition on monopolies were 'letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm',[51] in addition to which existing monopolies for new inventions were not to be prejudiced if granted for no longer than twenty-one years.[52] Significantly, the legislation also included a proviso preserving any existing or future grants 'concerning printing'; in relation to such grants it was to be 'as if this act had never been had nor made'.[53] Just as patents 'concerning the digging, making or compounding of saltpetre or gunpowder, or the casting or making of ordnance, or shot for ordnance'[54] were exempt from the provisions of the legislation so as not to interfere with the manner in which the Crown managed the defence of the realm, so too the security of the state was to be shored up against ideological attack in the guise of critical political speculation and commentary in print. In short, the king's authority over the press was to remain unaffected by the new legislation.

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[40] Scott, W.R., *The Constitution and Finance of English, Scottish, and Irish Joint-Stock Companies to 1720*, 3 vols., (Cambridge: Cambridge University Press, 1910-1912), i, 119. Similarly, Loewenstein comments that James' commitment to reforming the use of monopolies 'was notoriously shallow and short-lived'; Loewenstein, J., *The Author's Due: Printing and the Prehistory of Copyright* (Chicago and London: University of Chicago Press, 2002), 139.

[41] In general see Knafla, L.A., *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellsemere*, (Cambridge: Cambridge University Press, 1977), 77-92.

[42] Ibid., 77-78.

[43] St. P. Dom. Jac.I, xxiii, 66; the List of Grievances presented by the Commons is reproduced in Fox, 329.

[44] Cal. St. P. Dom. Jac.I, 1603-1610, 622.

[45] Fox, 98-100.

[46] 1 *Parliamentary History* 1192-94, 1204-08, 1218-28.

[47] *Statute of Monopolies* 1624, 21 Jac.I, c.3.

[48] Fox, 116, 127-39.

[49] For example, Hulme writes that 'the statute must be interpreted as recapitulating limitations already assigned by the common law'; Hulme, E.W., "The History of the Patent System under the Prerogative and at Common Law: A Sequel", *Law Quarterly Review*, 16 (1900): 44-56, 55. See also: Fox, 125; Loewenstein, 140.

[50] s.2.

[51] s.6; the introduction of this fourteen year limit does represent one of the ways in which the statute brought something new to the existing common law principles regulating these monopoly grants.

[52] s.5.

[53] s.10.

[54] Ibid.

The other step that James took to address complaints about Elizabeth's abuse of the monopoly system, in particular in relation to the print trade, was to grant two exclusive privileges (in October 1603), not to an individual printer but to the Stationers' Company itself, for printing primers, psalters and psalms, in verse or in prose (and with or without music), as well as for the ABC and the Catechism, almanacs and prognostications.[55] The grants were deemed to last in perpetuity, and formed the basis of what became known as the English Stock; with it the Stationers' Company, as an institution, became a publisher in its own right.[56] The English Stock was soon expanded to include certain legal texts (for example, Coke's *Reports*, and the Yearbooks from the reign of Edward IV through to Henry VIII), various schoolbooks (for example, *Æsop's Fables* and John Hawkins' *Spelling Book*), as well as individual works such as John Speed's *Genealogies* and Thomas Tusser's *Five Hundred Points of Good Husbandry*. Members of the Company were entitled to buy shares in the English Stock from which they drew a quarterly (and later, an annual) dividends. That the Stock was under the control of the Company mean that, in theory, the Company could ameliorate tensions within the printing trade by making sure that there was always work available for its poorer and less successful members;[57] moreover, the Company could also use the Stock to keep unruly members in line by withholding their dividends as and when they considered it necessary to do so.[58] The grant of the English Stock was reaffirmed in March 1616 (upon surrender of the 1603 grants) and it was this later patent that lay at the heart of the controversy over the printing of almanacs in the late eighteenth century.

3. Thomas Carnan and the Almanac Monopoly

On 4 February 1774, the same day on which the twelve common law judges were ordered to attend the House of Lords to advise upon the landmark case of *Donaldson* v. *Becket* (1774),[59] Thomas Carnan filed an answer in Chancery to a complaint made by the Stationers' Company concerning his alleged infringement of their monopoly over the printing of primers and almanacs.[60] Less than three weeks later, on 22 February, the House handed down its decision in *Donaldson*, overturning the perpetual injunction previously granted by Lord Chancellor Apsley to Becket in November 1772 (in accordance with the decision in *Millar* v. *Taylor* (1769)).[61] In so doing, the Lords dispensed with the spectre of copyright at common law enduring in perpetuity. The timing, for Carnan, could not have been more fortuitous. Here now, the Stationers were seeking to assert a perpetual right to print almanacs, based upon a monopoly grant handed to them by James I in 1616; moreover this was coming before a Lord Chancellor who had proved himself antithetical towards the claims of the

[55] In general see Blagden, C., *The Stationers' Company: A History, 1403-1959* (London: George Allen & Unwin, 1960), 92-109, and Clegg, C.S., *Press Censorship in Jacobean England* (Cambridge: Cambridge University Press, 2001), 39-41.

[56] About the grant of this patent, Clegg writes: 'This patent laid the groundwork for perhaps the most significant change in the Stationers' Company in the seventeenth century – the emergence of the Company as a capitalist venture'; Clegg, *Press Censorship in Jacobean England*, 39.

[57] In addition the Stationers' Company agreed to pay £200 a year out of the profits of the Stock to the poor of the Company; Blagden, 93.

[58] Clegg, *Press Censorship in Jacobean England*, 40.

[59] Journal of the House of Lords (LJ) 34:19. There are various sources of information about the decision in *Donaldson*: there are two records in traditional law reports – 4 Burr 2408, and 2 Bro PC 129; two further accounts can be found in the Journal of the House of Lords (LJ), 34:12-32, as well as Cobbett's *Parliamentary History of England*, vol.17, 953-1003; finally there were two contemporary pamphlets printed at the time of the decision, *The Pleadings of the Counsel before the House of Lords in the great Cause concerning Literary Property* (1774) and an account to which *Notes and Observations and References by a Gentleman of the Inner Temple* were added, both of which are reprinted in S. Parks, ed., *The Literary Property Debate: Six Tracts, 1764-1774* (New York & London: Garland Publishing, 1975). There are, as well, numerous contemporary newspaper accounts of the decision.

[60] Cal. St. P. Dom. Jac.I, 1611-1618, 353.

[61] *Millar* v. *Taylor* (1768) 4 Burr 2303.

London booksellers in *Donaldson*.[62] On 1 March 1774 Apsley LC referred the Stationers' case to the courts of common law with two questions: (i) whether the grant made to the plaintiffs was of a general nature, or limited to just those almanacs as were licensed by the Archbishop of Canterbury and the Bishop of London; (ii) whether the Crown had a prerogative power to grant the same to the plaintiffs to the exclusion of all others.

De Grey CJ, Gould, Blackstone and Nares JJ, all of whom were involved in the *Donaldson* litigation, presided over the case in the Court of Common Pleas.[63] In the argumentation before the Lords in *Donaldson*, much had been made of the prerogative grants concerning printing both as evidence for and against the existence of copyright at common law. Thurlow, for example (for Donaldson) 'was very diffusive upon grants, charters, licences, and patents from the crown, both to corporate bodies and individuals, tracing them far back, and asserting that they all specifically proved, that if there had been any inherent right of exclusively multiplying copies, such instances of exerting the royal prerogative would have been unnecessary'.[64] In contrast, on Becket's behalf, it was argued that the concept of prerogative copies was evidence 'that an interest or property similar to that claimed by authors, may subsist at common law'.[65] In *Donaldson* the four Common Pleas judges said little about the matter, apart from Blackstone J, who considered that some support for the existence of the common law right might be drawn from "the adjudged cases at common law, wherein the crown hath been considered as invested with certain prerogative copy rights". For, he continued: "if the crown is capable of an exclusive right, in any one book, the subject seems also capable of having the same right in another!"[66] Lord Camden however, speaking to the House after the judges had given their opinions, had plenty to say. He dismissed all the arguments concerning the legal foundation of 'the prerogative copies' as based upon an authorial or proprietary construct with his usual tact: "Away with such trifling!"[67] The 'true footing' of the Crown's prerogative, he continued, was as follows:

> Ought not the promulgation of your venerable codes of religion and of law to be intrusted [*sic*] to the executive power, that they may bear the highest mark of authenticity, and neither be impaired, or altered, or mutilated? These printed acts are records themselves, are evidence in a court of law, without recurring to the original parliamentary roll. Will you then give this honourable right to your sovereign as such? or will you degrade him into a bookseller?[68]

That is, the exclusive authority to print such works as the statutes of the realm flowed, not from any inherent authority the crown retained over the regulation of the press, but from the responsibility of the sovereign to ensure the accurate and authentic publication of materials that touched upon the government, Church and state.[69] When Carnan's counsel argued his client's case before the court he appeared to rely upon the veracity of Camden's pronouncement, almost word for word:

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[62] For more on Lord Chancellor Apsley's decision in *Donaldson* see Deazley, R., *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Oxford: Hart Publishing, 2004), 191-210, 217-220.
[63] *Stationers Company* v. *Carnan* (1775) 2 W. Bl. 1004.
[64] Anon., *The Pleadings of the Counsel before the House of Lords in the great cause concerning Literary Property* (London: Wilkin et al, 1774), 3.
[65] Anon., *The Cases of the Appellants and Respondents in the Cause of Literary Property* (London: Bew, 1774), 17. The argument continued: '[T]hough the reasons, on which authors claim an interest in their own private copies, are not precisely the same as those from which the interest of the crown in public copies is derived, yet they are not less forcible; but give to authors a title of property, as well founded in justice as the title of the crown is founded in policy, and one equally consistent with public utility'; *ibid*., 17-18.
[66] Anon., *The Cases of the Appellants*, 38.
[67] Ibid., 50.
[68] Ibid.
[69] See Monotti, A., "Nature and Basis of Crown Copyright in Official Publications", *European Intellectual* Property Review 14 (1992): 305-16, 306-307.

> [N]one of the true grounds, on which a prerogative copyright can be founded, appear in the present case. Codes of religion and of law ought to be under the inspection of the executive power, to stamp an authenticity upon them. Therefore, Bibles, Common Prayer Books, and Statutes are proper Objects of exclusive Patents. But almanacks are not of this kind.[70]

On 29 May, in answering the Lord Chancellor's questions, the court decided that the grant by James I to the Stationers extended only to such almanacs as had received official sanction, and that 'the Crown had not a Prerogative or Power to make such Grant to the Plaintiffs exclusive of any other or others'.[71] In short, the profitable monopoly which the Stationers had enjoyed in printing almanacs, since the establishment of the English Stock in 1603, was brought to an end. Carnan, in celebration, was reported to have driven 'repeatedly, in triumph, round St. Paul's church yard and through Paternoster row, in his lofty phæton and pair'.[72]

The Stationers responded to the decision in a number of ways. First, as with the long-standing arrangement which the Stationers had with the Universities of Oxford and Cambridge,[73] they tried to buy Carnan's complicity, reputedly offering him £10,000 if he would stop printing any almanacs that might compete with their own.[74] Carnan refused and, with the market for almanacs no longer protected, the Stationers instead stopped making their annual payments to the Universities.[75] This resulted in a second strategy, which the Stationers pursued in conjunction with the Universities – that of lobbying for a renewed statutory protection. On 16 April 1779, Lord North, then Prime Minister and Chancellor of the University of Oxford, raised the issue in the Commons of the loss of the Stationers' monopoly, in which he described the consequent loss of revenue to the Universities as 'extremely inconvenient' and 'prejudicial to the cause of learning'.[76] As a result he moved that leave be given to bring in a *Bill to vest the sole Right of printing Almanacks, in that part of Great Britain called England, in the Two Universities of Oxford and Cambridge, and the Company of Stationers of the City of London, respectively*. Although North's proposal attracted some adverse comment,[77] leave was granted by the House,[78] and on 28 April he presented the Bill for its first reading.[79] Carnan presented a petition against the Bill the following day in which he argued that, in breaking the monopoly, he had been 'greatly instrumental in rendering almanacks in general more useful, by being more correct than they were heretofore', as well as in exposing 'not only many absurd, erroneous, but even many useless, immoral and very indecent passages' which had featured in the almanacs published by the Company. Carnan had presented the same arguments concerning the benefits of a competitive market before the Court of Common Pleas: 'Their whole authority depends on their correctness. The way to make them correct, is to permit an emulation and rivalship'.[80]

When the Bill came on for its second reading on 10 May Carnan's counsel, Davenport spoke to the issue, condemning that proposed legislation as 'an attempt to restrict the free trade of the subject, as a

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[70] *Stationers Company* v. *Carnan*, 1007.
[71] Ibid., 1009.
[72] West, W., *Fifty years' recollections of an old bookseller* (Cork: printed for the author, 1835), 21.
[73] In general see Blagden, C., "Thomas Carnan and the Almanack Monopoly", *Studies in Bibliography*, 14 (1961): 26.
[74] Ibid., 28.
[75] As Blagden notes: 'On 26 Oct. 1775 [the Company] made the last payment to Messers Wright & Gill, the farmers of the Oxford privilege, and on 28 June 1776 the last to the Vice Chancellor at Cambridge'; ibid., 30, n.15.
[76] Hansard (1779), 602.
[77] See for example the comments of Mr. Turner and Mr. Dempster; Hansard, ibid., 603-604.
[78] Journal of the House of Commons (CJ) 37:329.
[79] CJ 37:352.
[80] *Stationers' Company* v. *Carnan*, 1008. In this regard, there was certainly some validity in his assertions. As Blagden notes, in response to the decision, 'more was done [by the Company] to improve the contents of the Almanacks. On 5 October 1775 the Company made an agreement with Charles Hutton, Professor of Mathematics at the Royal Military Academy, Woolwich, for checking the much criticized astronomical and meteorological data in the old Almanacks and for rewriting some of them'; Blagden, "Thomas Carnan", 33.

great oppression, and a monopoly which ought not to be sanctioned by law'.[81] In this he was followed by Thomas Erskine, the future Lord Chancellor, then a young and ambitious barrister keen to impress in this parliamentary hearing. Erskine was nothing less than brilliant. Although he stood before Parliament to represent his client's interests, Erskine's speech against the Bill was firmly grounded in considerations of public policy and the 'universal good'.[82] Passing the Bill, he argued, would represent an interference with the principles of free trade such that 'no man would venture hereafter in any commercial enterprise, since he never could be sure that, although the tide of his fortunes was running in a free and legal channel, its course might not be turned by parliament into the bosom of a monopolist'.[83] Not just the freedom of the market, however, but the 'liberty of the press' required that the Bill be rejected. Reintroduce the monopoly on almanacs and surely 'the various departments of science may, on much stronger principles, be parcelled out among the different officers of the state':

> There is no telling to what such precedents may lead;- the public welfare was the burden to the preamble to the licensing acts;- the most tyrannical laws in the most absolute governments speak a kind, parental language to the abject wretches, who groan under their crushing and humiliating weight … who can look into the future?- this precedent (trifling as it may seem) may hereafter afford a plausible inlet to much mischief,- the protection of the law may be a pretence for a monopoly on legal subjects;- the safety of the state may require the suppression of histories and political writings;- even philosophy herself may become once more the slave of the schoolmen, and religion fall again under the iron fetters of the church.[84]

In speaking against the Bill, he continued, 'I lose sight of my client, and feel that I am speaking for myself,- for every man in England'.[85] Finally, as with Camden in *Donaldson*, Erskine explained the nature of the prerogative copies as reflecting sound constitutional principles determined in the interests of the common good. The expiration of the *Licensing Act* 1662,[86] at the end of the seventeenth century, he observed:

> [F]ormed the great era of the liberty of the press in this country, and stripped the crown of every prerogative over it, except that, which upon just and rational principles of government, must ever belong to the executive magistrate in all countries, namely, the exclusive right to publish religious or civil constitutions:- in a word, to promulgate every ordinance, which contains the rules of action by which the subject is to live, and to be governed.[87]

When Lord North first introduced the Bill a motion was made that its second reading be delayed 'for three months', a suggestion that would in effect have brought it to an end; the motion was defeated by a vote of 129 to 42.[88] When, after Erskine spoke, it was motioned that the Bill be committed, the House rejected the proposal by a vote of 60 to 40, and the life of the Bill came to an end.[89]

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[81] Hansard (1779), 608-609. See also Davenport's observations concerning the merits of protecting such works wherein 'there was no genius, no invention, no pretence to original ideas'; ibid.
[82] Ibid., 610-11.
[83] Ibid., 614.
[84] Ibid., 616.
[85] Ibid.
[86] *Licensing Act* 1662, 13&14 Car.2, c.33.
[87] Hansard (1779), 612.
[88] CJ 37:352 (28 April).
[89] CJ 37:388 (10 May). A third tactic that the Stationers' Company adopted, which ultimately proved successful, may have been suggested to them by Carnan himself. When he lodged his petition against North's Bill in April 1779, Carnan argued that to reintroduce the monopoly 'would tend, as formerly, to discourage science, be a disgrace to literature, and will moreover essentially injure and lessen the revenue, by reducing the number of stamps, which will otherwise be required in a free sale'. Since 1711 all almanacs had to be printed on stamped paper, which duty currently stood at 2*d* for a single sheet almanac and 4*d* for all others. The revenues generated for the government were not insubstantial. As Blagden notes, as a result of this tax, the Company 'had to find

4. *Carnan* and the Concept of Prerogative Copyright

Regardless of the implications which *Carnan* had for the almanac market, the case did have a lasting impact upon the manner in which the crown's prerogative right in relation to printing was understood. In the mid-seventeenth century, following the abolition of the Star Chamber, the prerogative grants began to be called into question.[90] At that time the common law courts upheld their validity, although their reasons for doing so were not always consistent or clear. In the *Company of Stationers* v. *Seymour* (1677), for example, the courts upheld the prerogative right to print almanacs upon the basis that '[t]here is no particular author of an almanack', as a consequence of which, 'by the rule of our law, the King has the property in the Copy'.[91] In *Roper* v. *Streater* (1672) the House of Lords upheld the validity of a patent for printing law books based upon the fact that the publication of the same 'concerned the State, and was a matter of publick [*sic*] care'.[92] Later, in the mid-eighteenth century, in *Basket* v. *University of Cambridge* (1758),[93] the King's Bench upheld both the validity of a printing patent granted by Queen Anne in 1713 to print all Acts of Parliament which patent now lay with the plaintiffs, as well as a grant from Henry VIII to the University of Cambridge in 1534 for printing 'omnes et omnimodos libros'.[94] Yates J, dissenting in *Millar* v. *Taylor* (1769), argued that, while the sovereign was 'said to have a property' in prerogative copies, these were in no way analogous to the 'private rights of authors'.[95] This right of 'prerogative property' he continued was 'founded on a distinction that can not exist in common property, [or] in the case of a subject'. Rather, it was the unique constitutional position of the monarch as head of both church and state that mandated his right to print certain types of material:

> The Books are Bibles, Common-Prayer-Books, and all Extracts from them, (such as Primers, Psalters, Psalms,) and Almanacs. Those have Relation to the National Religion, or Government, or the political Constitution. Other Compositions to which the King's Right of Publication extends, are the Statutes, Acts of Parliament, and State-Papers. The King's Right to all these is, as Head of the Church, and of the political Constitution.[96]

£6,000 each summer for the stamps on the half million Almanacks which it published in November'. Carnan's argument turned on the assertion that, with an unregulated market, the publication of almanacs would increase and as a result so too would the government's coffers. The Stationers however turned Carnan's premise on its head, co-opted the fiscal argument, and themselves encouraged an increase in the stamp duty on single sheet almanacs. On 6 April 1781, on the order of the day that the House resolve itself into a committee to discuss the supply granted to the Crown, Lord North proposed that the committee consider a means of providing an allowance to the two Universities 'in lieu of a sum formerly paid to them by the Stationers' Company for the privilege of printing almanacks'. This allowance, North suggested, could be paid for by doubling the current stamp duty upon single sheet almanacs (from 2*d* to 4*d*), which increase he continued would generate an additional income of approximately £2600 a year. Despite some protest, it was agreed that the committee would consider the matter when they next met; moreover, when they did meet, Joshua Baldwyn, the Clerk of the Stationers' Company, was ordered to be in attendance. Not surprisingly perhaps, the committee approved the suggestion, the Bill was introduced on 26 April, and it passed to the Lords on 4 May; the upper chamber approved it without amendment whereupon it received the Royal Assent on 5 July. Carnan did petition against the Bill however this time to no avail. For further details, and references, see *Primary Sources on Copyright (1450-1900)*, "Commentary on *Stationers' Company* v. *Carnan* (1775)": www.copyrighthistory.org (*forthcoming*).

[90] See for example *The Stationers* v *The Patentees about the printing of Rolle's Abridgment* (1666) Cart. 89.

[91] *Stationers' Company* v. *Seymour* (1677) 1 Mod. 256, 258.

[92] *Roper* v. *Streater* (1672) Bac. Abr. 6th ed., Vol.IV, 209.

[93] *Basket* v. *University of Cambridge* (1758) 1 Black W. 105.

[94] Ibid.

[95] Burrow, J., *The Question Concerning Literary Property* (London: Strahan and Woodfall, 1773), 95-96.

[96] Ibid., 96. Yates J continued: 'Upon the whole of this prerogative claim of the Crown, it appears to me, that the Right of the Crown to the sole and exclusive printing of what is called *Prerogative* Copies, is founded on reasons of Religion or of State. The only consequences to which they tend are of a national and public concern, respecting the established Religion or Government of the Kingdom; and have no analogy to the Case of *private Authors'*; ibid., 97.

With *Carnan* however there begins to emerge a more subtle version of Yates J's account of prerogative copies. It was not that the sovereign had an undisputed constitutional right to print such works, but rather that the crown bore an *obligation* to ensure the dissemination of authentic and authoritative versions of the same, from which obligation flowed the right to print prerogative works.[97] In the early nineteenth century this latter theory of prerogative copyright took root. In *Manners* v. *Blair* (1828), for example, Lord Chancellor Lyndhurst explained the concept of prerogative copyright as a consequence of:

> [T]he duty imposed upon the chief executive officer of the government, to superintend the publication of the Acts of the Legislature, and Acts of State of that description, and also of those works upon which the established doctrines of our religion are founded,- that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative.[98]

In this he considered himself to be in accord with Lord Camden in *Donaldson*, as well as with Lord Eldon in the decision of the *Universities of Oxford and Cambridge* v. *Richardson* (1803).[99] When Joseph Chitty published his *Treatise on the Law of the Prerogatives of the Crown*, in 1820, he relied specifically upon *Carnan*, and in particular Erskine's speech before the Commons, as authority for the fact that prerogative copyright existed '*on grounds of political and public convenience*' as a consequence of which 'its applicability must be restrained to the reasons for its existence'.[100] As '*executive magistrate*', Chitty wrote, the Crown had 'the right of promulgating to the people all the acts of state and government', and as '*supreme head of the church*, he hath a right to the publication of all liturgies, and books of divine service'.[101] More recently, in *Attorney-General (NSW*) v. *Butterworth & Co (Australia) Ltd* (1937), Long Innes CJ continued in this tradition when he observed that the duty of the sovereign was 'to superintend the publication of acts of the legislature and acts of state of that description, carrying with it a corresponding prerogative'.[102]

5. Crown Copyright and Court Judgments

What then is the situation under the current legislative regime, the *Copyright Designs and Patents Act* 1988 (the CDPA)? Section 163 sets out that '[w]here a work is made by Her Majesty or by an officer of servant of the Crown in the course of his duties' then the work 'qualifies for copyright protection' which copyright vests in the crown.[103] The CDPA, however, also established a separate system of

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[97] Monotti writes that: 'From the late 18th century … a consistent theme emerged, namely that the sovereign has a duty, based upon grounds of public utility and necessity, to superintend and ensure authentic and accurate publication of matters of national and public concern relating to the government, state and the Church of England'; Monotti, 306.

[98] *Manners* v. *Blair* (1828) 3 Bligh N.S. 391, 402-03.

[99] *Universities of Oxford and Cambridge* v. *Richardson* (1803) 6 Ves. 689.

[100] Chitty, J., *A Treatise on the Law of the Prerogatives of the Crown* (London: Butterworth, 1820), 239 (emphasis added).

[101] Ibid. Chitty continued: '[H]e is also said to have a right, *by purchase*, to the copies of such law books, grammars, and other compositions, as were compiled or translated at the expense of the Crown'; ibid.

[102] *Attorney-General (NSW)* v. *Butterworth & Co (Australia) Ltd* (1937) 38 SR (NSW) 195, 229. In the English case of *Universities of Oxford and Cambridge* v. *Eyre & Spottiswoode Ltd* [1964] Ch 736, 752, Plowman J refused to be drawn upon the nature of the prerogative right, commenting as follows: 'The inquiry in this case ranged over a large number of matters of history, such as the control of the Press, the translation of the Bible, the patents of the Royal Typographers and their activities, and the nature and extent of the royal prerogative in relation to printing. Moreover, I was referred to a great many authorities to which I have not referred in this judgment. To traverse this ground again would, I think, only be to proliferate obiter dicta and to obscure what I regard as the crux of the matter, namely, that the Crown has never claimed, and no one can now claim in right of the Crown, that the royal prerogative extends to the licensing of a breach of copyright'.

[103] This in effect restates, albeit within narrower parameters, s.39 of the *Copyright Act* 1956, 4&5 Eliz.2 c.74, which set out that: '(1) In the case of every original literary, dramatic, musical or artistic work made by or under the direction or control of Her Majesty or a Government department, - (a) if apart from this section copyright would

'parliamentary copyright',[104] as well as placing the copyright subsisting in Acts of Parliament and Measures of the General synod of the Church of England upon a statutory footing.[105] Moreover, the prerogative rights in these latter materials were specifically repudiated.[106] The legislation, however, doesn't say anything about judgments *per se*.[107] As was mentioned in the introduction, when the UK government released a Green Paper in 1998 on *Crown Copyright in the Information Age*, it defined Crown Copyright as including certain court judgments 'based on advice received from the Treasury Solicitor's office'.[108] That same Green Paper acknowledged that treating judges as officers and servants to the Crown did raise some concerns in relation to the operation of an independent judiciary, but continued that, based upon the need for 'integrity, authority and accuracy', 'where the stamp of official authorship is key to … information being recognised as being authoritative', then court judgments should be understood as falling within the parameters of 'crown copyright' as statutorily defined.[109] Not everyone however agrees with this particular reading of the legislation. Cornish and Llewelyn, for example, argue that, in order to maintain the independence of the judiciary, judges, when delivering judgments, should not be viewed as falling within the scope of s.163 of the CDPA. As a consequence, they conclude that 'a judgment remains personal to its author [that is, the judge] for copyright purposes'.[110] With respect, I would disagree with Cornish and Llewelyn's position. On point of principle, if one accepts that the crown, and by extension the government, have a responsibility to ensure the dissemination of an accurate and authentic account of 'the law', whether grounded in the prerogative or placed upon a statutory footing, then, within a common law system, that obligation should extend equally well to judgments as to enactments of the legislature.[111] That being the case, whether the copyright in judgments falls within the rubric of 'crown copyright', or indeed within the parameters of the prerogative, then, either way, any claims that individual members of the judiciary might make to the copyright in their own opinions ought to be rendered nugatory.

One might of course take issue with the historical and theoretical rationale upon which the prerogative right, and its subsequent statutory incarnation, is based – is it really the case that we need to propertize such things as court judgments in order to ensure dissemination of accurate and authentic accounts of the same? The government's 1988 Green Paper certainly suggested that this was the case. Similarly, in the White Paper that followed in 1999, *Future Management of Crown Copyright*, it was set out that '[c]rown copyright operates as a brand or kitemark of quality indicating the status and authority of much of the material produced by Government', and as such was necessary 'to preserve

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not subsist in the work, copyright shall subsist therein by virtue of this subsection, and (b) in any case, Her Majesty shall, subject to the provisions of this Part of this Act, be entitled to the copyright in the work'.

The *Copyright Act* 1911, 1&2 Geo.5 c.46, s.18 had previously provided that: 'Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of first publication of the work'.

[104] CDPA s.165 provides that works 'made by or under the direction or control of the House of Commons or the House of Lords' are copyright protected; s.166 extends copyright protection to 'every Bill introduced into Parliament'. See also ss.166A and 166B which address Bills of the Scottish Parliament and the Northern Ireland Assembly.

[105] Copyright in these materials lasts for 50 years from the end of the calendar year in which the Royal Assent is given; CDPA s.164.

[106] s.164(4) sets out that '[n]o other copyright, or right in the nature of copyright, subsists in an Act or Measure'.

[107] Judgments of the House of Lords are now considered to fall within the parameters of 'parliamentary copyright' as defined in s.165.

[108] *supra* n.12.

[109] *Crown Copyright in the Information Age*, para. 2.8-2.9.

[110] Cornish, W., and Llewelyn, D., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet & Maxwell, 2003), 532; see also Taggart, M., "Copyright in written reasons for judgment", *Sydney Law Review*, 10 (1984): 319-29.

[111] See also Monotti who writes that judgments 'contain the common law of the land and should be regarded the same as statute law – they have equal impact on and significance for people and there is no logical basis for treating them differently'; Monotti, 311.

the integrity and official status' of that material.[112] However, consider the approach of the US Supreme Court in *Banks* v. *Manchester* (1888), when the court decided that what copyright might subsist in a volume of law reports did not cover 'the syllabi, statements of the cases, and opinions, which were the work of the judges'.[113] Delivering the court's opinion, Blatchford J continued as follows:

> Judges … can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and headnotes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial *consensus* … that no copyright could, under the statutes passed by congress, be secured in the products of the labor 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 a statute.[114]

That is, that court judgments constituted authoritative statements of the law, which law everyone is deemed to know, was sufficient reason to ensure that such pronouncements remain squarely within the public domain.[115]

When the Australian Copyright Law Review Committee issued their report on crown copyright in 2005 they rejected the arguments as to the role that crown copyright plays in securing authentic and accurate statements of the law, so far as it extended to such things as 'statutes, judgments and official government reports',[116] upon the basis that it was unlikely 'that re-publishers of primary legal source materials would either deliberately or negligently disseminate inaccurate copies, as a lack of integrity, authority and accuracy in the materials would considerably affect the publisher's reputation'.[117] Instead, noting that '[o]pen access to government is an essential characteristic of modern democracy', and taking into account the 'strong public interest in making information accessible to the public', they recommended that 'copyright in certain materials produced by the judicial, legislative and executive arms of government should be abolished'.[118] To this they married the additional recommendation that, '[i]n view of the public interest in promoting the widest possible public access' to the law, a statutory duty to disseminate legislation, judgments, and so on, should be introduced, as is the case in New Zealand in relation to legislation.[119] I would broadly agree with the Law Review Committee's

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[112] *The future management of Crown copyright*, Cm4300, HMSO, 1999, para.5.1.
[113] *Banks* v. *Manchester* 128 US 244.
[114] *Banks*, 253.
[115] On the noncopyrightable nature of US government materials, including court judgments, see *Patry on Copyright* (Thomson/West Publishing, 2007), Volume 2, Chapter 4, §4.54 - §4.88.
[116] *Crown Copyright*, 2005, xxiv.
[117] Ibid., 54.
[118] Ibid., xxv-xxvi. The list of materials in which the Committee recommended copyright should be abolished included: 'bills, statutes, regulations, ordinances, by-laws and proclamation, and explanatory memoranda or explanatory statements relating to those materials; judgments, orders and awards of nay court or tribunal; official records or parliamentary debates and reports of parliament, including reports of parliamentary committees; reports of commissions of inquiry, including royal commissions and ministerial and statutory inquiries; and other categories of material prescribed by regulation'; ibid., xxvi.
[119] Ibid., xxvi-xxvii. The *Acts and Regulations Publication Act* 1989 (NZ) s.4(1) provides that: '(1) The Chief Parliamentary Counsel shall, under the control of the Attorney-General, arrange for the printing and publication of - (a) Copies of every Act enacted by Parliament after the commencement of this section; and (b) Copies of all regulations made after the commencement of this section; and (c) Reprints of Acts of Parliament and reprints of regulations; and (d) Reprints of Imperial Acts that have effect as part of the laws of New Zealand'. In New Zealand copyright does not subsist in bills, legislation, regulations, by-laws, parliamentary debates, reports of select committees, judgments, and reports of commissions and inquiries; *Copyright Act* 1994 (NZ), s.27. The New Zealand copyright legislation does provide however that '[w]here a work is made by a person employed or engaged by the Crown under a contract of service, a court of apprenticeship, or a contract for services, - (a) The work qualifies for copyright … and (b) The Crown is the first owner of any copyright in the work'; ibid., s.26(1).

proposals, however, there is, it seems to me, also an argument to be made for retaining the concept of either the prerogative or crown copyright in relation to judgments. It seems inappropriate, as a matter of public policy, that any private publisher should be in a position to assert a proprietary claim to the text of any decision of a public court of law, as was (and still is) the situation in my cautionary tale. And yet, were all court judgments declared to be public domain material, then given the ludicrously low threshold which this jurisdiction has adopted in relation to the concept of 'originality' within the copyright regime, one can easily imagine a publisher making the argument that converting an official court transcript into that publisher's particular house-style (for example, changing the word 'section' to read: 's.' or 's'; or perhaps changing 'v.' to read simply: 'v') represents an investment of sufficient time and effort to imbue the edited version of the judgment with copyright status (albeit 'thin'). True, if there was a meaningful statutory obligation placed upon the government to publish all court judgments, then it might make little difference, in practice, that individual publishers claim rights over what is otherwise both freely available as well as free of copyright encumbrances. Ultimately though, I would suggest that there is value in the state retaining some form of proprietary control to ensure that the subsequent reproduction of court judgments is managed in a way that ensures the widest possible unencumbered dissemination of the same. At present the Office of Public Sector Information sets out on its website that: 'Crown copyright protected material (other than the Royal Arms and departmental or agency logos) may be reproduced free of charge in any format or medium provided it is reproduced accurately and not used in a misleading context'.[120] In the post-Creative Commons world, one can easily imagine that rubric being amended to ensure that anyone reproducing such crown copyright material does so on the express understanding that that material is to remain freely reproducible by all.

Crown copyright materials are protected for 100 years from the end of the calendar year in which the work is made; ibid., s.26(3)(b).

[120] See: www.opsi.gov.uk/about/copyright-notice.htm.