COPYRIGHT IN WRITTEN REASONS FOR JUDGMENT

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In 1940 the Lord Chancellor's Committee on Law Reporting described the question of who owned the copyright in reasons for judgment as academic.[1] However, recent State claims to copyright in judgments in this country has aroused interest in the question.[2] Last year in the *Australian Law Journal* Mr. Bannon, Q.C. offered the answer that the Crown has copyright in reasons for judgment.[3] I hope to demonstrate that this view cannot be supported. It will appear from my analysis that the judges themselves have the copyright in written judgments[4] but I will argue that reasons for judgment should not be the subject of copyright at all.

In his note Mr. Bannon cites old English cases to support his contention that "the Crown truly has a prerogative right in the judgments and the reasons therefor . . . ."[5] Before examining these cases, I must briefly sketch the historical context in which they were decided.[6]

Upon the introduction of the printing press into England around 1470, the Crown claimed the exclusive right to control and authorise *all* printing: "not only of public books containing ordinances, religious or civil, but every species of publication whatsoever. . . ."[7] Broadly speaking, this control was maintained until 1640 by royal grants of printing privileges and, shortly thereafter, by a system of statutory licensing. The expiration of the last of the Licensing Acts in 1694 finally stripped the Crown of

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[1] *The Report of the Committee on Law Reporting* (1940) at para. 17.

[2] See, e.g., "Rights of Copyright Owners" (1982) 8 *C.L.B.* 1577 at 1578. It appears from a recent statement by the then Acting Federal Attorney-General, Mr. Neil Brown, Q.C., that the Federal Government believes or simply assumes it owns the copyright in judgments. See "Easing of Restrictions on the Publication and Copying of Commonwealth Laws" (1983) 57 *A.L.J.* 131 at 132.

[3] Bannon, "Copyright in Reasons for Judgment and Law Reporting" (1982) 56 *A.L.J.* 59. See also "The Crown and Copyright in Publicly Delivered Judgments" (1982) 56 *A.L.J.* 326. An interesting Canadian article on this topic came to my attention after I had completed this. See Snow, "Who Owns Copyright in Law Reports?" (1982) 64 *C.P.R.* (2d) 49. Snow argues *inter alia* that the Crown has copyright in reasons for judgment by virtue of the prerogative but no new points are raised that require specific rebuttal.

[4] While I do not subscribe to the view that the distinction between written and oral judgments is "merely of abstract significance" (*id.* 326), I shall deal only with copyright in written reasons for judgment. The position as to copyright in oral reasons for judgment is well covered by Sawer, "Copyright in Reports of Legal Proceedings" (1953) 27 *A.L.J.* 82; Blackstock, "Copyright in Reports of Legal Proceedings" (1953) 70 *S.A.L.J.* 408 and C. G. Moran, *The Heralds of the Law* (1948) at 53-6.

[5] *Supra* n. 3 at 60.

[6] For this I have drawn heavily from Fox, "Copyright in Relation to the Crown and Universities" (1947-9) 7 *U.T.L.J.* 98 at 98-105.

[7] Lord Erskine *en arguendo* before the House of Commons, quoted in J. Chitty, *Prerogatives of the Crown* (1820) at 238-9.

prerogative control over printing[8] but it retained the sole right to print certain books and documents (known as "prerogative copies"). Chitty described the Crown's right to prerogative copies as "the exclusive right to publish religious or civil constitutions — in a word, to promulgate every ordinance by which the subject is to live, and be governed".[9] Under this special prerogative the Crown retains to this day the sole right to publish the authorised version of the Bible,[10] the Common Prayer Book, Acts of Parliament[11] and other State documents.[12]

There is no doubt that in the cases cited by Mr. Bannon judges speak of law reports and law books in terms of Crown prerogative. It remains to be seen whether these references are explained by the now defunct general prerogative over all printing or whether they recognise a Crown right to prerogative copies of law reports and books, as Mr. Bannon asserts.

The first case cited is *Roper* v. *Streater* (1672), which is unreported but referred to in other cases.[13] Roper had bought the rights to the third part of Croke's Reports from the executors of Mr. Justice Croke. Streater had a Crown patent to print law books and reprinted Croke's Reports, without Roper's consent. Roper brought an action in debt, suing as owner under the Licensing Act. Streater pleaded the King's patent. Roper demurred and succeeded in the Common Pleas[14] only to be reversed by the House of Lords. The result, that the Crown and its patent holder had the sole right to publish law reports, is simply explained by the then extant prerogative control over all printing.

The earlier case of *Stationers* v. *The Patentees about the Printing of Roll's Abridgement (Atkin's case)* (1666)[15] is open to the same interpretation.[16] In this case, counsel for the patentees argued on alternative grounds. First, it was argued that the King had prerogative control over all printing and thereby the sole right to print *Roll's Abridgement*. The argument in the alternative was that the King had "a particular prerogative

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[8] H. Laddie, P. Prescott and M. Victoria, *The Modern Law of Copyright* (1980) at para. 15.24; *Home Office* v. *Harman* [1982] 1 All E.R. 532 at 543, *per* Lords Scarman and Simon (H.L.). The explanation for this must be that the general prerogative control over printing was subsumed by the Licensing Acts and expired when they did in 1694. See *Attorney-General* v. *De Keyser's Royal Hotel Ltd* [1920] A.C. 508 (H.L.) and H. Street and R. Brazier, *de Smith's Constitutional and Administrative Law* (4th ed., 1981) at 140. *Cf.*, *R.* v. *Bellman* [1938] 3 D.L.R. 548 at 553 *per* Baxter, C.J. (N.B.S.C., App. Div.):

> Constitutional changes have shattered the idea of prerogative [control over printing] but there remains in the Crown the sole right of printing a somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive.

[9] *Op. cit. supra* n. 7 at 238.

[10] *Universities of Oxford and Cambridge* v. *Richardson* (1802) 6 Ves. Jun. 690; 31 E.R. 1260; *Re 'The Red Letter' New Testament (Authorised Version)* (1900) 17 T.L.R. 1; *Universities of Oxford and Cambridge* v. *Eyre and Spottiswoode Ltd* [1964] 1 Ch. 736.

[11] See *The Attorney-General for New South Wales* v. *Butterworth & Co. (Australia) Ltd.* (1938) 38 S.R. (N.S.W.) 195 (N.S.W.S.C., Eq.).

[12] See generally Fox, *supra* n. 6 at 116-8.

[13] See *Company of Stationers* v. *Parker* (1685) Skinner 234; 90 E.R. 107 and *Millar* v. *Taylor* (1769) 4 Burr. 2303 at 2329; 98 E.R. 201 at 208, *per* Willes J.

[14] Another case records that the ground for judgment in the Common Pleas was the uncertainty as to what was meant by the phrase "law book". See *The Company of Stationers* v. *Partridge* (1713) 10 Mod. 105; 88 E.R. 647.

[15] Carter 89; 124 E.R. 842.

[16] So also are the *dicta* in *The Company of Stationers* v. *Seymour* (1678) 1 Mod. 256; 86 E.R. 865 and *The Company of Stationers* v. *Partridge*, *supra* n. 13 at 107; 648.

over law books [i.e., as prerogative copies], and so he would have had, if the art of printing had never been known".[17] Of the three reasons given to support this last argument, only one is germane to Crown prerogative over reasons for judgment;[18] i.e., "The salaries of the Judges are paid by the King; and reporters in all Courts at Westminster were paid by the King formerly".[19] The House of Lords gave no reasons for holding for the King's patentee[20] and so we are left guessing as to which ground found favour.

I suggest that the case is best explained by the King's undoubted prerogative control over all printing at that time. Firstly, in the absence of reasons for judgment, one is entitled to favour the less radical result.[21] Secondly, the above quoted reason given by counsel for a "particular prerogative over law books" is, in respect of judge-made law, unlikely to be accepted today.[22] The contention that as the judges were paid by the King he had copyright in the judgments is inextricably bound up with the wider question of whether judges are under a contract of employment with the Crown. Authority and principle are against such a proposition.[23] Moreover, as to the reporters, there is considerable doubt as to whether they existed at all,[24] but, even if they did, the evidence suggests that they were not paid by the King.[25]

In the next case, *Millar* v. *Taylor* (1769),[26] the King's Bench had to consider the basis of the Crown's exclusive right to prerogative copies. The majority held that the King's copyright rested on property. Only Yates, J. asserted that the basis of the King's copyright was the prerogative. However, it is the judgment of Willes, J. that is of the most interest to us. Early in his judgment,[27] Willes, J. referred to both *Atkin's Case* and *Roper* v. *Streater*, and later on said this:

> It is settled, then, "that the King is owner of the copies of all books or writings which he had the sole right originally to publish; as Acts of Parliament, Orders of Council, Proclamations, the Common-Prayer Book." These and such like are his own works, as he represents the State. So likewise, where by purchase he had the right originally to

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[17] *Supra* n. 15 at 91; 843.

[18] In one of the other reasons there is the hint of an argument that may be relevant but a discussion of this is postponed until later. The hint is "[a]ll the laws of England are called the King's laws . . ." (*ibid.*, reason 1) and the argument addressed later is that Crown prerogative covers all the laws of England, not only statutes but also judge-made law. See *infra* at notes 42-52 and accompanying text.

[19] *Ibid.* (reason 2).

[20] It is not until the beginning of the nineteenth century that the present practice (*quaere* duty) evolved of giving reasoned decisions in every case. See Taggart, "Should Canadian Judges Be Required To Give Reasoned Decisions in Civil Cases?" (1983) 33 *U.T.L.J.* 1 at 33 n. 111.

[21] *Cf.*, the proposition that an unreasoned judgment is only authority for what it actually decided. See R. Cross, *Precedent in English Law* (3rd ed. 1977) at 61.

[22] Bannon, *supra* n. 3 at 60. *Contra*, Fox, *supra* n. 6 at 116, H. G. Fox, *Canadian Law of Copyright* (2nd ed. 1967) at 269-70 and J. Lahore, *Intellectual Property in Australia: Copyright* (1977) at para. 534.

[23] *Infra* at nn. 58-9.

[24] See the reasoned doubts in Holdsworth, "The Year Books" in *2 Select Essays in Anglo-American Legal History* (1908) at 104-7 and 117.

[25] See Simpson, "The Source and Function of the Later Year Books" (1971) 87 *L.Q.R.* 94 at 117-8, suggesting that the reporters "were not paid by the King, but by the Chancery students in commons".

[26] (1769) 4 Burr. 2303; 98 E.R. 201.

[27] *Id.* 2315-6; 208.

> publish; as the Latin Grammar, the Year-Books, &c. And in these last cases the property of the Crown stands exactly on the same footing as private copyright: as to the Year-Books, because the Crown was at the expence of taking the notes; and as to the Latin Grammar, because it paid for the compiling and publishing it.
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> The right of the Crown to these books is independent of every prerogative idea.
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> The only doubt, as to the judgment of the House of Lords, upon Roll's Abridgement and Croke's Reports is, "that neither collection was made by the authority, or at the expence of the Crown;" and "that the King had no right of original publication; the Courts of Westminster-Hall having the sole power to authorize and authenticate the publication of their own proceedings".[28]

This is at least a clear statement that the Crown does not have prerogative copyright in the Year Books but only a property right in them as works made at its expense. This is a view repeated by Blackstone[29] and Chitty:[30] but, as I have said, there are grave doubts whether the cases in the Year Books were reported at the Crown's expense.[31] Willes, J. would have been on firmer ground to place the Crown's property right on "the compiling and publishing" of the Year Books, as he did in respect of the Latin Grammar. For it is known that the first King's Printer, Richard Pynson, had a "virtual monopoly of the production of Year Books"[32] from his appointment in 1508 until his death in 1528 (the Year Books peter out around 1535). Of course, even if for this reason the property analysis is well-founded in respect of the Year Books, Willes, J. recognised that the analysis did not sit well with *Roper* v. *Streater* and *Atkin's Case*. The obvious explanation of those cases is that the King *did* have prerogative control over all printing at that time. However, Willes, J. could not accept this explanation and still justify his decision that the plaintiff had perpetual common law copyright in his work that was unaffected by publication or the Statute of Anne. The way Willes, J. and the majority reached this result was by identifying the property rights of the private copyright holder with the rights of the Crown in prerogative copies. By viewing the Crown's right as one based on property, the majority could grant the private copyright holder the perpetual protection that the Crown enjoyed over prerogative copies.[33] This tortuous reasoning and the majority's decision was rejected by the House of Lords in 1774.[34]

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[28] *Id.* 2329; 215.

[29] W. Blackstone, *2 Commentaries on the Laws of England* (9th ed. 1783 reprint) at 410.

[30] Chitty, *op. cit. supra* n. 7 at 240.

[31] *Op. cit. supra* nn. 24-5.

[32] L. W. Abbott, *Law Reporting in England 1485-1585* (1873) at 14. On the printing of the Year Books, see generally W. C. Bolland, *A Manual of Year Book Studies* (1925) ch. 3 and Seule, "Year Book Bibliography" (1900-1) 14 *H.L.R.* 556 at 563-4.

[33] On this see Fox, *supra* n. 6 at 118-9. For the duration of Crown copyright today see Copyright Act 1968 (C'th) s. 180 No. 63.

[34] *Donaldson* v. *Beckett* (1774) 4 Burr. 2408; 98 E.R. 257. It has been said that the reasoning of the majority in *Millar* v. *Taylor*, *supra* n. 26, is unaffected by the House of Lords decision in *Donaldson* v. *Beckett*, *ibid.* See *The Attorney-General for New South Wales* v. *Butterworth & Co. (Australia) Ltd.*, *supra* n. 11 at 232.

In the passage quoted above, Willes, J. also asserted that the Royal Courts had "the sole power to authorize and authenticate the publication of their proceedings". The reporter Douglas gives the best explanation of this remark:

> Soon after the Restoration, an act of Parliament having prohibited the printing of law-books without the license of the Lord Chancellor, the two Chief Justices and the Chief Baron, it became the practice to prefix such a license to all reports published after that period in which it was usual for the rest of the judges to concur, and to add to the *imprimatur* a testimonial of the great judgment and learning of the author. The act was renewed from time to time, but finally expired in the reign of King William. But the same form of license and testimonial continued in use till not many years ago; when, as one had become unnecessary, and the other was only a general commendation of the writer, and no voucher for the merit of the work, the judges, I believe, came to a resolution not to grant them any longer; and accordingly the more recent reports have appeared without them.[35]

It seems then, that the licence was merely a label attached as a matter of course[36] and I know of no instance where a licence was refused.[37]

There is, however, the case of *Gurney* v. *Longman* (1807),[38] where an order of the House of Lords prohibiting unauthorised publication of the report of an impeachment trial in that House was enforced by interim injunction in the Court of Chancery. Although counsel for the infringing printer raised and discussed the question of copyright, Erskine, L.C. expressly declined to rest his decision on this ground. The injunction was issued on the ground that the House of Lords was in the "same position" as to publication of its proceedings as the Crown was in respect of prerogative copies.[39] This does *not* support the view that the Crown has a prerogative over the publication of court proceedings. The House of Lords undoubtedly was sitting as a court of law and the Lord Chancellor referred to the Crown's right to prerogative copies by way of analogy only. The decision is best explained on the ground of (parliamentary) privilege; the privilege to restrain publication of proceedings being one of the "many peculiar privileges" reposing in the High Court of Parliament.[40] Indeed, in 1698 the House of Lords had voted that it was a breach of privilege to report the judicial decisions of the House![41]

I submit that none of these cases support the view that the Crown has

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[35] Preface, (1813), 1 Douglas's Reports at ix.

[36] See C. G. Moran, *op. cit. supra* n. 4 at 45.

[37] It appears that Sir James Burrow refused to apply for a licence for his reports. Burrow probably recognised that the statutory authority to license reports had long since disappeared because his apology and confession to a "contempt" by publishing without a licence does not have the ring of sincerity. See Preface, (1756), 1 Burrow's Reports at vii.

[38] (1807) 13 Ves. Jun. 493; 33 E.R. 379.

[39] *Id.* 507; 384 (in effect, adopting the argument of counsel for the plaintiff, see *id.* 500-1; 382).

[40] *Kielly* v. *Carson* (1842) 4 Moo. P.C.C. 63 at 89; 13 E.R. 225 at 235, *per* Parke B. (P.C.).

[41] See H. Slesser, *The Art of Judgment* (1962) at 29 and J. P. Dawson, *The Oracles of the Law* (1968) at 89. The unfortunate reporter was Shower. It was not until 1812 that the full reasons for judgment delivered in the House appear in Dow's Reports.

the right to prerogative copies of reasons for judgment or law reports. But even if one puts these cases aside, the historical origin and scope of the Crown's prerogative copyright are also against that contention.

In *Eyre and Strahan* v. *Carman* (1781)[42] Lord Skinner, C.B. explained the origin of the King's exclusive right to publish the "civil . . . ordinances" in this way:

> There are traces of the ancient mode of promulgating the ordinances of the state yet remaining to us, suited to the gloominess of the times when few who heard them could have read them; the king's officers transmitted authentic copies of them to the sheriffs, who caused them to be publicly read in their county court. When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the people were supplied with copies by the king's command by his patentee. This seemed a very obvious and reasonable extent of that duty which lay upon the crown to furnish the people with the authentic text of their ordinances. Our courts of justice seem to have so considered it when they established it as a rule of evidence, that acts of parliament printed by the king's printer should be deemed authentic and read in evidence as such.[43]

This confirms Lord Mansfield's view that the publication of statutes "always belonged to the King . . . [t]he art of printing . . . only varied the mode [of publication]".[44] It appears that the duty to publish that lay on the Monarch as the head of state, carried with it a corresponding prerogative.[45]

Clearly, the historical basis of the duty to publish statutes makes it difficult to include reasons for judgment within the prerogative over "civil ordinances".[46] At the most, all one can say is that the mischief of inaccurate publication of statutes and religious works[47] also existed in respect of reasons for judgment.[48] This has never been put forward as a ground for Crown prerogative in reasons for judgment or law reports.[49] Indeed, none of

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[42] (1781) Exchequer, reported only in 6 Bac. Abr. (7th ed. 1832) 509. The case is quoted in *R.* v. *Bellman*, *supra* n. 8 at 553-4 and *The Attorney-General for New South Wales* v. *Butterworth & Co. (Australia) Ltd.*, *supra* n. 11 at 228.

[43] *Id.* 511. See also Blackstone, *op. cit. supra* n. 29, vol. 1 at 185.

[44] *Millar* v. *Taylor*, *supra* n. 26 at 2404; 255.

[45] See Fox, *supra* n. 6 at 114-5 and the cases cited there.

[46] Nor is it any less difficult if the paraphrase "civil constitution" or such like is used to describe the ambit of the prerogative. The origin of the duty shows clearly that this was not intended to be a prerogative over the laws of England, merely over "civil . . . ordinances", i.e. statutes. Moreover, one can argue with some force that in the fifteenth century the "sorts of argument and reasons" recorded in the Year Books were not "law" in the sense that statutes and the court rolls were. See Simpson, *supra* n. 25 at 97. See also J. H. Baker, *2 The Reports of Sir John Spelman* (1978) at 159-63.

[47] See, e.g., *Stationers Company* v. *Carman* (1775), 2 Wm. Bl. 1004 at 1007-8; 96 E.R. 590 at 592: 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.

[48] The inaccuracies of certain of the named reporters are legion. See generally J. W. Wallace, *The Reporters* (4th ed. 1882).

[49] However, successful counsel for the Crown in *Gurney* v. *Longman*, *supra* n. 38 at 501-2; 382 did refer to the mischief of inaccurate reporting and asserted that it was the duty of the House of Lords "to secure to the public an authentic account" resting upon "the same principle" as the Crown's right to publish prerogative copies.

the classic, contemporary writers suggest that the Crown had the right to prerogative copies of such works. Even if there was once some justification for granting the Crown prerogative over law reports on the ground of accuracy or authenticity, the modern attitude to prerogative powers would preclude us doing so today. As Chitty says:

> It is, therefore, on grounds of political and public convenience, that the prerogative copyright exists and its applicability must be restrained to the reason for its existence. The law reprobates monopolies, and even in the case of the Crown they are only allowed to subsist when necessity requires it.[50]

It may seem odd to some lawyers, particularly constitutional lawyers, to argue that copyright in reasons for judgment does not lie within the prerogative of the Crown. After all, it might be asked, isn't the Monarch ultimately the source of all legal authority and the fountain of justice?[51] Furthermore, isn't it true that even in Tudor and early Stuart times the "acts" of Parliament", often then described as "giving judgment by Parliament", were not perceived to be different in nature from the "acts" of other courts of law? How then is it possible, as a matter of constitutional theory and history, to distinguish between statutes and reasons for judgment in this context? My answer is that the historical basis of the Crown's right to prerogative copies of statutes is entirely foreign to reasons for judgment and law reports. While it *may* make constitutional sense for the Crown to have a prerogative over the laws of England, both statutory and judge-made, (reflecting the original unity of power in the Monarch) this is not in fact the prerogative that we have and it is no longer possible to expand existing prerogatives or to create new ones.

My submission that the Crown has no prerogative copyright in reasons for judgment or law reports also accords with reality. In England, there has been no State connection with, or interference in, the publishing of law reports since the end of the seventeenth century.[52] And when it has been thought necessary in some Commonwealth jurisdictions to grant a monopoly over law reporting, this has been done by legislation rather than by an assertion of Crown prerogative copyright.[53]

If, as I submit, there is no Crown prerogative copyright in reasons for judgment the question of ownership falls to be determined by the general law of copyright. It would follow from first principles that the judge, as

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[50] Chitty, *op. cit. supra* n. 7 at 239. *Cf.*, Diamond, "Repeal and Desuetude of Statutes" (1975) 28 *Curr. Leg. Probs.* 107 at 119.

[51] I am indebted to my colleague, Dr. F. M. Brookfield, for bringing these arguments to my attention. See generally C. H. McIlwain, *The High Court of Parliament and its Supremacy* (1910) ch. 3: "Parliament as a Court".

[52] See Holdsworth, "The Named Reporters" (1943) *Contemp. L. Pamphl., Anglo-American History Series No. 8*, at 12 and "Law Reporting in the Nineteenth and Twentieth Centuries" (1941) *Contemp. L. Pamphl., Anglo-American History Series No. 5*, at 6.

[53] See *infra* n. 60. However, it should be noted that if any Crown prerogative copyright had existed (which I dispute) the orthodox view is that it is not lost by desuetude. See *Attorney-General for New South Wales* v. *Butterworth & Co. (Australia) Ltd.*, *supra* n. 11, at 226-7 where the conflicting authorities are collected. *Cf.*, the suggestion that a "strong case" could be made out that the prerogative had "lapsed by desuetude or renunciation": (1982) 56 *A.L.J.* 326 at 327. See also Diamond, *supra* n. 50.

author of a literary work, owns the copyright in his judgments.[54] However, it is necessary to address provisions of the Copyright Act 1968 that might be said to alter this position.[55]

The Act states that the Crown has copyright in any work made in the course of a contract of employment[56] or under the direction or control of the Commonwealth or State.[57] I suggest that reasons for judgment are not covered by these provisions. It seems clear that a judge is not under a contract of employment with the Crown.[58] Nor, if the doctrine of judicial independence is to mean anything, can it be said that judges act under the direction or control of the Crown.[59]

At first blush s. 182A(1), inserted in 1980, might indicate to some that the Crown has copyright in judgments. The section provides that copyright, including Crown prerogative copyright, in any "prescribed work" is not infringed by the making of a single copy. Section 182A(3)(b), (d) and (e) defines a "prescribed work" to include the reasons for judgment of the judges of the Federal and State courts. It is important to observe that s. 182A(1) is neutral regarding ownership of copyright in reasons for judgment. Notwithstanding the fact that s. 182A(1) appears in the part of the Copyright Act dealing with Crown copyright, the provision certainly does not establish or even recognise that the Crown has copyright in reasons for judgment. This is hardly surprising as the section is not concerned with copyright ownership but rather with authorising infringement of that copyright. Moreover, the reference to Crown copyright in s. 182A(1) and the insertion of the section in the part of the Act concerning "The Crown" can be explained by the inclusion of legislation as a "prescribed work" under s. 182A(3)(a).

It is, of course, within the competence of Parliament to override judicial copyright by legislation and this has been done in an important respect in Victoria and New Zealand.[60] However, apart from the limited fair

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[54] Others that hold this view are Laddie, Prescott and Vitoria, *op. cit. supra* n. 8 at para. 15.13; Moran, *op. cit. supra* n. 4 at 53 and Young, "A Look at American Law Reporting in the 19th Century" (1975) 68 *L. Lib. J.* 294 at 297. The point is alluded to but not decided by North, J. at first instance in *Walter* v. *Lane* [1899] 2 Ch. 749 at 756.

[55] One of the arguments based on the Act is best treated in a footnote. The argument appears to be this: ss. 43 and 104 provide that copyright in a "literary work [i.e. reasons for judgment] . . . is not infringed by anything done for the purposes of . . . a report of a judicial proceeding" and so judgments can be freely reported. See (1982) 56 *A.L.J.* 326. I suggest that this is an untenable reading of the provisions. The intent is clear when the sections are read in full: "The copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding". In other words, courtroom participants can read, play or act any material without infringing copyright and such can be reported with the same impunity.

[56] Copyright Act 1968, s. 35(6).

[57] Copyright Act 1968, s. 176(2).

[58] See *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482 at 499, *per* Lord Goddard C.J.: ". . . a Judge holds office by Royal appointment and not by contract". See also Bannon, *supra* n. 3 at 59 and Laddie, Prescott and Victoria, *op. cit. supra* n. 54.

[59] Laddie, Prescott and Vitoria, *ibid. Cf.*, (1982) 56 *A.L.J.* 326 at 327 (describing this as a "moot point").

[60] See 10(3) of the Council of Law Reporting in Victoria Act, 1967, No. 7569 and s. 12(3) of the New Zealand Council of Law Reporting Act 1938. These provisions make it unlawful for anyone, apart from the appropriate Council of Law Reporting, "to commence the publication of or to publish a new series of reports of judicial decisions" of the courts in those jurisdictions.

use provision in s. 182A, there is nothing in the Copyright Act as it stands at present which affects the judges' copyright.[61]

In my submission the correct legal position is that the judges, and not the Crown, own the copyright in reasons for judgment. As it is unlikely that the judiciary would ever assert their copyright[62] the practical consequence of all this is that anyone can use, copy or publish reasons for judgment without fear of restraint. I believe this to be a desirable state of affairs: so much so that I would prefer reasons for judgment not to be subject to copyright at all. This can and should be achieved by an amendment to the Copyright Act. In the absence of legislative amendment, it is open to a court to reach this result in a specific case by relying on the doctrine of abandonment or by invoking public policy.[63]

In principle an author can, by conduct, abandon copyright and let his work fall into the public domain.[64] It is difficult to know what evidence would be required[65] but the customary[66] non-assertion of judicial copyright might amount to abandonment. In which case the doctrine of precedent might preclude any later attempt by a judge to invoke copyright.

The other possibility is for a court to hold that reasons for judgment are not subject to copyright at all as a matter of public policy. This has long been the position in the United States for the reasons expressed by Blatchford, J. in *Banks* v. *Manchester*:

> Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship as against the public at large in the fruits of their judicial labours. 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 from the time of the decision in the case of *Wheaton* v. *Peters* [1834] 8 Pet. 591, that no copyright could, under the statutes passed by Congress, be secured in the products of the labour done by judicial duties. The whole work done by the judges constitutes

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[61] The Law Librarian at the University of New South Wales has called on the Australian Government to amend the Act to prevent the States from keeping the copyright in judgments. See "Rights of Copyright Owners", *supra* n. 2 at 1578. It is my thesis that the States can only acquire copyright by legislation.

[62] See, e.g., the extra-judicial views of Street, C.J. quoted in (1982) 56 *A.L.J.* 326 at 327 and Laskin, C.J. in "The Institutional Character of the Judge" (1972) 7 *Israel L.R.* 329 at 347.

[63] This would be one of those rare instances where, by necessity, a judge must decide a case that directly affects the rights of the judiciary. See also, e.g., *The Judges* v. *The Attorney-General of Saskatchewan* [1937] 2 D.L.R. 209 (P.C.).

[64] Authority is scant but see *International Press Ltd* v. *Tunnell* [1938] 1 D.L.R. 393 at 410, *per* Rowell, C.J.O. (Ont. C.A.). Abandonment would appear to be the legal basis for the suggestion by Coghill, "Correspondence" (1953) 27 *A.L.J.* 250 that "the Judge intends his pronouncement to be a publication to the world at large".

[65] *International Press Ltd* v. *Tunnell*, *ibid.*: ". . . it is difficult to say what amount of evidence the Court would require as to the fact of a dedication of a copyright to the public".

[66] The lone exception is Edwards, J. of the New Zealand Supreme Court, who, for several years at the beginning of the century refused to make his judgments available for reporting until paid a suitable fee. See R. B. Cooke (ed.), *Portrait of a Profession* (1969) at 163-4.

> 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.[67]

Thirty years ago, Geoffrey Sawer saw "little hope" of an Australian court adopting this approach, saying "it would be difficult to exclude only judicial opinions from the scope of copyright".[68] The difficulty is the assumption that all literary work is the subject of copyright and this assumption is strengthened by the recent statutory provision for non-infringement of copyright in reasons for judgment in certain circumstances.[69] However, in my opinion, it is not beyond the capacity of the common law to deny copyright protection to judgments on public policy grounds.[70] As Colin Tapper points out, "if one of the justifications of the copyright system is that it provides an incentive to publish it hardly applies . . . to the judges who clearly have an overriding duty to make the law available".[71] We have also the judicial and extra-judicial views of Street, C.J. that case law should be "*publici juris* — available to all to be studied, to be used and to be quoted as a matter of public entitlement".[72] This "entitlement" can be seen as a corollary to the principle of open justice. As long ago as 1807 counsel argued against judicial copyright on this basis:

> The first principle of the administration of justice is free access to every Court; of which the liberty of communicating to the public what passes is a consequence. The public nature of the transactions in Courts of Justice would be of little value, if the means were not afforded of letting all the world know the fairness of their proceedings. The same principle, that requires a Court to be open, authorises the widest dissemination of what passes. . . .[73]

Similar statements can be found in the recent House of Lords decision in *Home Office* v. *Harman*.[74]

In my opinion the American approach is the most satisfactory one.[75] The conclusion that public policy demands that judgments not be subject to copyright draws together, in an acceptable way, several threads; including

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[67] (1888) 128 U.S. 244 at 253 (U.S.S.C.). The older decisions are collected in *Building Officials and Code Adm.* v. *Code Technology Inc.* (1980) 628 F.2d 731 (5th Cir.). The background to the landmark decision in *Wheaton* v. *Peters* (1834), 33 U.S. 591 is given by Thomas, *supra* n. 54. For an interesting account of the difficulties raised by the placing of copyright notices in privately published American law reports, see Patterson, "On Copyrighting 'Law' " (1976) 13 *Georgia State B.J.* 60.

The copyright laws of most European countries provide that there is no copyright protection for law reports. See "Copyright and Sources of Law" (1980) 15 *J.S.P.T.L.* 75 at 77.

[68] Sawer, *supra* n. 4 at 83.

[69] Section 182A(1) of the Copyright Amendment Act 1980, no. 154 discussed *supra* in the text immediately following note 59.

[70] Lahore describes the position as "arguable": *op. cit. supra* n. 22. See also *The Whitford Committee on Copyright and Designs Law* (1977) at para. 591.

[71] C. Tapper, *Computer Law* (2nd ed. 1982) at 21. Sir John Donaldson, M.R. has observed recently that it is a prerequisite to the maintenance of the rule of law that the people know what the law is: *Merkur Island Shipping Corp.* v. *Laughton* [1983] 1 All E.R. 334 at 351 (C.A.).

[72] Quoted in (1982) 56 *A.L.J.* 326 at 327-8.

[73] *Gurney* v. *Longman*, *supra* n. 38 at 495-6; 380.

[74] *Supra* n. 8, especially at 547, *per* Lords Scarman and Simon (dissenting).

[75] See also (1982) 56 *A.L.J.* 326 at 327-8 and McVittie, "Correspondence" (1953) 27 *A.L.J.* 465.

the principle of open administration of justice, the fact of public payment of judges and the position they hold, the prevalent notion that it would be unacceptable for judges to assert copyright in their judgments and the public interest in the widest dissemination of law. This approach may yet find favour with the Australian judiciary which seemingly neither needs nor wants the potential copyright power to control the dissemination or publication of reasons for judgment.

I have attempted to show here that the Crown does not have copyright in judgments either by virtue of the prerogative or under the Copyright Act. In light of this, the premises of copyright law seem to dictate that the judges themselves have the copyright but I have argued that reasons for judgment should not be subject to copyright at all.