



SURVEYORS IN THE HIGH COURT OF AUSTRALIA

INTELLECTUAL PROPERTY AND COPYRIGHT

OVERVIEW

INTELLECTUAL PROPERTY RIGHTS

- A powerful parcel of legal rights that protect the expression of original and creative effort, and for the protection of the economic investment in that creative effort.
- Intellectual Property is a catch all term that includes such rights as copyright, patents, trademarks and registered designs.

OVERVIEW

COPYRIGHT

- Copyright is the **exclusive right** given to the creator of an artistic or literary work to reproduce, publish and sell their work.
- Copyright does not protect ideas or concepts but rather the expression of these ideas or concepts in a material form
- Copyright lasts for 70 years after the death of the author

OVERVIEW

COPYRIGHT ACT



Copyright Act 1968
Act No. 63 of 1968 as amended

583 PAGES

RELEVANT SECTIONS

- **Part VII—The Crown**
- **Division 1—Crown copyright**
 - 176 Crown copyright in original works made under direction of Crown
 - 177 Crown copyright in original works first published in Australia under direction of Crown
 - 178 Crown copyright in recordings and films made under direction of Crown
 - 179 Provisions relating to ownership of copyright may be modified by agreement
 - 180 Duration of Crown copyright in original works
 - 181 Duration of Crown copyright in recordings and films
 - 182 Application of Parts III and IV to copyright subsisting by virtue of this Part
 - 182A Copyright in statutory instruments and judgments etc.
- **Division 2—Use of copyright material for the Crown**
 - 182B Definitions
 - 182C Relevant collecting society
 - **183 Use of copyright material for the services of the Crown**
 - **183A Special arrangements for copying for services of government**
 - 183B Payment and recovery of equitable remuneration payable for government copies
 - 183C Powers of collecting society to carry out sampling
 - 183D Annual report and accounts of collecting society
 - 183E Alteration of rules of collecting society
 - 183F Applying to Tribunal for review of distribution arrangement

OVERVIEW

IMPLIED LICENCE

- Some works may have an **implied licence** granted to users for specific purposes by virtue of conduct or an expressly implied term in a contract.
- e.g. where a Surveyor is engaged for a fee to produce copyright material for a particular purpose, the law could imply that the person making the engagement has permission to use that material for the purpose contemplated at the time of engagement.

SURVEYOR'S HISTORY OF IP

ACSA

CAL



PARTNERSHIP

PRINCIPLES

- 1997 Association of Consulting Surveyors Australia (ACSA) launched a national copyright project and held a national conference on intellectual property.
- 1998 CAL agreed to act as an advisor, agent and representative for surveyors' IP.
- 4 PRINCIPLES
 1. Recognition
 2. Open use and access
 3. Professional participation
 4. Just Reward

THE COPYRIGHT TRIBUNAL

COLLECTING SOCIETY

ACTION COMMENCES

- CAL is the declared collecting society for the government statutory licence found in the *Copyright Act 1968* (the Act) – this licence covers government use of surveyors' plans.
- January 2003 the CAL board decided to fund an action in the Copyright Tribunal
- May 2003 CAL filed an application in the Copyright Tribunal to have it:-
 1. determine a method for working out equitable remuneration for the making of digital copies of survey plans by the State of NSW and
 2. fix the terms upon which the State may communicate survey plans to the public.
- May 2006 the Tribunal received evidence and heard submissions from CAL and the State.

THE TRIBUNAL

QUESTIONS OF LAW

Federal Court Judge: And what Law are you basing this argument on?

Darryl Kerrigan: The Law of bloody common sense!



- CAL and the State jointly requested the Tribunal to have questions of law referred to the Federal Court for resolution.
 1. Were plans made at the direction or control of the State and therefore vest copyright in the State?
 2. Were any of the plans a work that was first published by the State and therefore vest copyright in the State?
 3. Does the State have some other form of licence to reproduce or communicate the plan other than by section 183 of the Act, which permits copying by the State?
 4. Does reproduction in a digital cadastral database (DCDB) fall within the meaning of the Copyright Act?
 5. If copyright vests in the Crown, does it do so other than on just terms so as to be outside the Constitution?

FULL FEDERAL COURT

QUESTIONS OF LAW

- March 2007 the Full Federal Court received evidence and heard submissions.
- June 2007, 3 Federal Court judges handed down their decision.
 1. Plans were not made at the direction and control of the State so copyright therefore does not vest in the crown.
 2. Plans were not first published by the State so copyright does not therefore vest in the crown.
 3. The State has a licence to reproduce or communicate plans (other than by section 183 of the Act) and that the licence is to do everything that governs the regulatory framework of plans.
 4. Reproduction in the DCDB does not fall under the Copyright Act.
 5. There is no acquisition of property other than on just terms.

FULL FEDERAL COURT

QUESTIONS OF LAW

- CAL had never suggested that the State infringed copyright.
- The questions of law were intended to establish the basis on which copying was done. CAL had always maintained that copying was done under section 183 of the Act.
- CAL thought that the Federal Court had erred because it implied some form of copyright licence arose when there was an express statutory licence which permitted the copying.
- CAL said that there is no need for a licence to be implied as a totally comprehensive licence to do all the required copying is expressly stated in section 183.

FULL FEDERAL COURT

QUESTIONS OF LAW

[Federal Court Judge](#): And what Law are you basing this argument on?

[Darryl Kerrigan](#): The Law of bloody common sense!



- The decision with respect to the DCDB was disappointing.
- The Federal Court appeared to be swayed by an argument stating that the copying of bearings and distances from a plan into computer software and the subsequent conversion of these bearings and distances to machine coordinates and best fitting these to an existing DCDB did not constitute a copy of the survey plan.
- CAL argued that the reproduced DCDB image showing lines and polygons was plainly discernable as a copy of the original plan and that it is a copy of a substantial part of the original work.

HIGH COURT OF AUSTRALIA

LEAVE TO APPEAL

[Dennis Denuto](#): It's the vibe of the thing, your Honour.



- July 2007 the summary of CAL's argument was submitted to the High Court.
- November 2007 the High Court heard further submissions from CAL and the State of NSW.
- The judges hearing the submission granted leave to appeal whether the Full Federal Court had erred in finding that the State had a licence to reproduce and communicate plans to the public independent of section 183 of the Act.
- Disappointingly, it did not allow an appeal on the matter of whether a reproduction in the DCDB is a substantial copy under the Act.

HIGH COURT OF AUSTRALIA

THE APPEAL
APRIL 2008



- **GUMMOW J:**this is using someone else's property, even as a matter of common law - would you impute a gratuitous licence? Common law would suggest you would not.
- **MR YATES:** Your Honour, part of the circumstances that we rely upon is the fact that the surveyor is already remunerated for the preparation of the plan - - -
- **GUMMOW J:** By somebody else?
- **MR YATES:** By the client, but that remuneration includes fair and reasonable remuneration for the fact that others will be relying on that information.
- **GUMMOW J:** That is true of a lot of copyright material. It is no defence for an infringer to say to an artist, "Oh gee, you were paid to paint this picture. See you later."
- **MR YATES:** No, your Honour, but the circumstances are different here, because the whole purpose for creating this plan - there can be many plans of survey. The particular survey plan here is one that is to be registered as a registered plan, and therefore it has to be prepared in a particular way for a particular - - -
- **GUMMOW J:** One begins with the proposition that this Act binds the Crown in the right of the State.
- **MR YATES:** That is so, your Honour, we accept that, but the plan - - -
- **GUMMOW J:** How do you readily get out of the situation that the Act contemplates that the Crown, of all people, can take someone else's property for its statutory purposes of the State law and not pay for it?

HIGH COURT OF AUSTRALIA

THE DECISION

6th AUGUST 2008

THE APPEAL SHOULD BE ALLOWED



- "... there is nothing in the conduct of a surveyor in preparing plans for registration which involves abandoning exclusive rights bestowed by the Act, particularly since the statutory licence scheme qualifies those exclusive rights on condition that remuneration be paid for permitted uses.
- **Secondly**, a surveyor cannot practise his or her profession, insofar as it touches land boundaries, without consenting to the provision of survey plans for registration knowing the uses, subsequent to registration, to which the plans will be put.
- **Thirdly**, an application on behalf of a surveyor for equitable remuneration in relation to government uses of survey plans which involve copying and communication of the plans for, and to, the public, subsequent to registration, does not undermine or impede the use by the surveyor's client of the survey plans for the purposes for which they were prepared, namely lodgement for registration and issue of title.

HIGH COURT OF AUSTRALIA
THE DECISION

- **Fourthly**, neither a surveyor nor a surveyor's client could be expected to factor into remuneration under any contract of engagement between them, such copying for public uses as may be engaged in by the State.
- **Fifthly**, the State imposes charges for copies issued to the public.
- **Sixthly**, there is nothing in the express terms of s 183(1) (or its history) which could justify reading down the expression "for the services of the ... State" so as to exclude reproduction and communication to the public pursuant to express statutory obligations. "

WHAT HAPPENED NEXT?

NEGOTIATIONS

TRIBUNAL

MEDIATION

- CAL, on behalf of its' surveyor members, has commenced negotiations with the State of NSW, to establish a benchmark rate for copying, a method of capturing all the copying activities and a method of payment of equitable remuneration.
- CAL has sought a court order from the Copyright Tribunal for the negotiations for rates to hopefully be determined in a Tribunal-based mediation.
- On the 22nd of December 2009, Justice Perram made Orders in accordance with CAL's application to have the proceedings referred for mediation before the Registrar of the Tribunal as soon as practicable after 15 March 2010.
- The proceedings were also stood over for further directions on 9 April 2010.
- CAL is currently preparing the relevant documentation for those mediation proceedings. **WHICH ARE SCHEDULED FOR 30TH APRIL.**

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