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

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Abstract

A cautionary tale …

Recently, a good friend and colleague (X) completed a co-authored Text, Cases and Materials book, on a mainstream area of the law, for a reputable legal publisher (Y). On the day before the book was due to go to press, another reputable legal publisher (Z) contacted the first reputable legal publisher (Y) to refuse permission for the authors (X, and another) to reproduce any material from their catalogue, which included, amongst other things, some mainstream legal journals and law reports. In relation to the latter, the second reputable legal publisher (Z) 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*. 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.

On 'owning' the law …

In the era of so-called open government, a post-Woolf world of justice for all, it is curious in the extreme 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'; presumably publisher Z 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 concluded that '[a] key area where the law has not been settled is whether Crown prerogative rights cover judgments'. 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, as is the case with federal materials in the US, will strike many others as equally anomalous. In considering these issues, this paper will explore what it means to 'own' judicial opinions within a historical and theoretical framework, as well as offering some suggestions to guide the future development of the law in this area.