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A question which has been circling for some time in the Copyright Tribunal was the copyright ownership of survey plans prepared by registered surveyors in respect of real property.

Background

A number of questions of law were referred by the Copyright Tribunal to the Federal Court for determination under s 161 of the *Copyright Act 1968* (Cth). The Copyright Agency Limited (CAL) had applied to the Tribunal to fix terms for the acts of copyright (specifically reproduction), done by the Crown with respect to survey plans.

CAL was collection society under s 153F for Division 2 of Part VII purposes (use of copyright material for the Crown). CAL submitted that the surveyors were authors and owners of the copyright in the survey plans which were ‘artistic works’, and accordingly were entitled to terms being determined by the Tribunal for the acts of reproduction.

CAL’s submitted that, as it was a collecting society under the *Copyright Act*, s 183A(1) operated to replace the usual Crown use provisions requiring notice and the fixing of terms contained under ss 183(4) and (5).

The State of New South Wales (the State), submitted that neither ss 183(5) nor s 183A(2) operated in relation to the acts done by the State in relation to survey plans, firstly because it owned the copyright in the survey plans and secondly, if it did not own copyright in the surveys, it had a licence to use them for the proper maintenance and conduct of the land title system.

Ownership was claimed through the operation of ss 176 or 177 of the *Copyright Act*, which in essence provides for ownership by the Crown where that the survey plans were either made (s 176) or first published (s 177) by, or under the direction or control, of the State. In the alternative, it was authorised to do the acts, by

reason *other than* by the compulsory licence mechanism in s 183 of the *Copyright Act*, for which remuneration is required to be paid to the copyright owner.

Decision

Their Honours decided that the State did not own the copyright pursuant to either s 176 or s 177 of the *Copyright Act*. In addition, the State was entitled to a licence to use the surveys other than by the mechanism provided for in s 183 of the *Copyright Act*.

Reasons

The ownership issue

The Full Court considered that surveys were not made by or under the direction and control of the State, predominantly because the State did not have the ability to require the landowner to order the survey or complete the survey once started. A survey plan might be commenced, but the State could not direct or control its completion.

Rather the work was determined to be 'brought about' or made because of the direction of the client of the surveyor who instructed the making of the survey.

The benefits bestowed on a survey complying with all of the regulations, were not relevant to either the making (s 176) or the first publication (s 177) of the survey, as neither would occur but for the clients instructions to have the survey made.

The licence issue

The full Court determined that quite apart from the entitlement to licence copyright material under s 183, the State was given a licence from the copyright owner in relation to surveys.

The exclusive right to do any of the acts comprised in copyright of the artistic work, includes a right to authorise someone to do such act or acts: s 13(2) of the *Copyright Act*. In relation to works, those acts are found in s 31. Under the Part VII Crown Use provisions, particularly s 183, the acts of the State would be an infringement of the copyright but for the Crown Use right.

Infringement of works is governed by s 36 and in the case of an artistic work, copyright is infringed if an act set out in s 31 is done by someone not the owner or *without the licence of the owner* (s 36(1) of the *Copyright Act*). In this regard, the phrase is done if the doing of the act was done by a licence binding on the owner: s 15 of the *Copyright Act*.

The Full Court determined that licenced surveyors (the copyright owners of the survey), must be taken to know that when a survey satisfied any requisitions, that it will be registered for the purpose of defining the land it related. Accordingly, by allowing the survey to proceed to registration, the surveyor knew, accepted and authorised the State to do all of the acts required of a registered plan, including the right to reproduce it. The court said at [155]:

By assenting to the submission of the Relevant Plan for registration, the surveyor who made the Relevant Plan authorised the State to do everything that it was obliged to do in consequence of the registration of the Relevant Plan so as to become a registered plan. The consequence of registration is that the State was authorised to do the acts in question. It was an incident of each surveyor's assenting to the submission of a Relevant Plan to LPI, with the intention of its becoming a registered plan, that the surveyor authorised the State to do with the Relevant Plan all of the acts described above that might otherwise constitute an infringement of the copyright in the Relevant Plan.

CAL lodged on 2 July 2007, an application for special leave in the High Court.

Copyright Agency Limited v State of New South Wales [2007] FCAFC 80 (Lindgren, Emmett & Finkelstein JJ, 5 June 2007)