

## Case Note

Michael Ellicott, Junior Counsel for the Appellant in this very important Judgment delivered by the High Court handed down on 6 August 2008, gives a summary of the decision.

### COPYRIGHT AGENCY LIMITED –v- STATE OF NEW SOUTH WALES

The High Court has in a joint judgment reversed a unanimous decision of the Full Federal Court in Copyright Agency Limited –v- State of New South Wales(see [2008] HCA 35).

The Copyright Tribunal had referred certain questions to the Full Federal Court which included the question the subject of the High Court decision. In substance the question was whether the State had the benefit of an implied “free” licence in respect of survey plans and was therefore outside the statutory licence provisions to be found in Part VII Division 2 of the Copyright Act (1968)(C’wth). The effect of the State argument was that because it had an implied licence it was not bound to reach agreement with owners of copyright in the survey plans as to remuneration for uses of their works in circumstances where those uses would otherwise infringe the exclusive rights of reproduction and communication to the public.

Survey plans of land and strata are artistic works under Section 10(1) of the Copyright Act. The plans the subject of the decision were prepared by registered surveyors and for, inter alia, the purposes of lodgment for registration of the survey plans. The plans were prepared so as to comply with the rigorous legislative requirements relating to the preparation of such plans. The registered surveyors were owners of copyright in the survey plans and were also members of CAL.

The plans were registered by a division of the Lands Department of NSW-the LPI (formerly Land Titles Office). The practical consequence of registration of a survey plan is that after registration copies are available over the counter and electronic copies of the plans are also made available to LPI staff, government agencies, councils, relevant authorities, information brokers and members of the public. Fees are payable to LPI for access to and copying of such plans.

The principal contention of the State was that it is not dependent on s 183 to except it from infringement in the above circumstances because it has an implied licence, binding on the owners of copyright in the plans, to do everything that it is required to do under the statutory and regulatory framework which governs such plans. It contended that it was discharging important state obligations concerning registration of title and that surveyors were aware of the uses to which the plans would be put. The Full Federal Court unanimously upheld this submission on the basis that surveyors must be taken to have licensed and authorised all uses consequent upon registration of the plans by assenting to lodgment of the plans for registration.

The High Court unanimously rejected this approach and upheld the contention of CAL that Section 183, in effect, governed the field and that there was no necessity to imply a licence where an express statutory licence was otherwise available.

The Court's joint judgment referred to the numerous statutory licence schemes now embodied in the Copyright Act which endeavour to balance the competing interests of owners and users of copyright material and the need for public access to copyright works on a reasonable basis. In particular it drew attention to Crown use "for the services of the Crown" of such materials and the fact that the Crown had been bound by the provisions of the Copyright Act (see Section 7 which came into operation in 1969).

Sections 183 and 183A contain provisions enabling the use of copyright material by the Crown. The Court held that these provisions established a comprehensive licence scheme for government use of copyright material and that those sections did not provide any support for a contention that the Crown could take advantage of outside arrangements which would circumvent the operation of those provisions in relation to the survey plans under consideration. The Court held that there was nothing in the sections or their history which would justify reading down the words "for the services of the.. State" so as to exclude acts done pursuant to express statutory obligations.

The Court distinguished decisions relating to implied licences of copyright (such as those relating to architects' plans) on a number of bases. It observed that the relevant surveyors were not abandoning any exclusive copyright rights and particularly because the statutory licence scheme qualified those rights. Secondly an element of compulsion was present. Thirdly, neither the surveyor nor its client could be expected to factor into the relevant remuneration under the agreement between them remuneration for uses by the State. The State in those circumstances is a third party and not a party to the relevant dealing.

Finally, the Court referred to previous decisions concerning implications of terms into contracts and into particular classes of contracts and the fundamental requirement that the implication be based upon necessity (see *Byrne -v- Australian Airlines Limited* (1995) 185 CLR 410 at 450 per McHugh and Gummow JJ). In the context of the existence of a statutory licence scheme relating to the relevant uses there simply could not be any such necessity for the implication of a licence.

Hence the Court held that there could be no implication of a licence, as a matter of law, into all contracts between surveyors and their clients, in favour of the State, which is a stranger to such contracts and that there could be no founding of any licence in an authority or consent given by the surveyors to the State, independently of the contracts between the surveyors and their clients.

The proceedings in the Copyright Tribunal will now continue and the Tribunal will determine the terms upon which the State may copy and communicate the relevant survey plans to the public.

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