ORIGINS AND SCOPE OF THE PREROGATIVE RIGHT TO PRINT AND PUBLISH CERTAIN WORKS IN ENGLAND

JOHN GILCHRIST*

ABSTRACT

There have been a number of claims made in courts in England and other parts of the United Kingdom over the last three centuries concerning the scope of the Crown's exclusive right to print and publish certain works. This right is currently preserved under s 171 of the *Copyright, Designs and Patents Act* 1988 (UK) but has been substantially altered by that Act. The right remains preserved in Australia under s 8A(1) of the *Copyright Act* 1968 (Cth).

The exclusive right to print and publish certain works is based on an ancient prerogative of the Crown. This article examines the basis and origins of the right, its nature and scope and the extent of the works presently subject to the right in England. An analysis of the extent of those works presently subject to the right in Australia will be published in a later issue of the Canberra Law Review.

I INTRODUCTION

Historically, the exclusive right to print and publish has been claimed to extend to Acts of Parliament, royal Proclamations, law books, Orders in Council, the Authorised Version of the Bible, the Book of Common Prayer, almanacs s[1] and other

* Senior Lecturer in Law, University of Canberra

[1] Almanacs were sold in the form of sheets or little books which contained a calendar for the year and prognostications and information of various kinds on such matters as astrology, meteorology, history, agriculture and medicine. This information was of varying accuracy and value. *Old Moore's Almanack* (Vox Stellarum) is probably the best known of the early almanacs, the first edition appearing in July 1700.

public documents.[2] The exercise of the Crown's prerogative right in England over the centuries has been by the grant in letters patent of exclusive licences to print and publish those works.[3] Most of these grants have been made to persons holding the office of King's Printer.[3a]

The practice of granting exclusive rights to print and publish works arose in England partly as a means of reward[4] and source of revenue[5] and partly as one instrument in

---

2 Yates J in *Millar v Taylor* (1769) 4 Burr 2303, 2382; 98 ER 201, 243 took the view that 'State-papers' fell within the right but there is no other authority for this view. As to 'year-books', refer note 108. As to the 'Latin Grammar', refer page 164. Refer also note 94. In *Rex v Bellman* [1938] 3 DLR 548, 553-557, Baxter CJ held that Admiralty charts were subject to Crown copyright but it is not clear whether he regards the prerogative or a common law proprietary right of the Crown as the basis of the right or not. The judgment is in many respects unsatisfactory.

3 The term 'licence' which was used in the grants is frequently used to describe the nature of the Crown's grants. The licence was in the nature of an exclusive licence rather than a bare licence, although it should be pointed out that there are some instances of the Crown granting concurrent rights in works subject to the prerogative right: refer, for example, *Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 689, 713-714; 31 ER 1260, 1271-1272. Those grants of rights in prerogative works which appear in the Patent Rolls were sometimes made under the authority of a writ of privy seal. This writ was merely an authority to the Lord Chancellor for affixing the Great Seal to letters patent: refer, for example, grants to Richard Grafton and Edward Whitchurche (books of divine service) of 22 April 1547 - Great. Britain, Public Record Office, *Calendar of Patent Rolls: Edward VI*, Vol 1 (1547-1548) (London, 1924), 100, (Calendars of Patent Rolls published by or for the Public Record Office are hereinafter cited merely as 'Calendar of Patent Rolls'): to John Cawood (office of Queen's Printer) of 29 December 1553 - *Calendar of Patent Rolls: Philip and Mary*, Vol 1 (1553-1554) (London, 1937), 53; and to Richard Tottle (law books) of 5 May 1556 - *Calendar of Patent Rolls: Philip and Mary,* Vol III (1555-1557) (London, 1938), 18. Refer also J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London, 1820), 390. In the 18th century it is clear that grants over the more general works at least were made by warrants which were executive acts. Refer WR Anson, *The Law and Custom of the Constitution* (4th ed, AB Keith) (Oxford, 1935), Vol 11, Part I, 62-70, Vol 11, Part II, 353-355; *Calendar of Patent Rolls: Edward III* (1327-1330) (London, 1893), xi. The abbreviation 'By p.s.' in the Patent Rolls stands for 'Per breve de privato sigillo'.

3a The first King's Printer appears to have been Richard Pynson, who was appointed to the position around 1508/9: refer JS Gilchrist, 'The Office of King's Printer and the Commercial Dissemination of Government Information – Past and Prospect' (2003) 7 *Canberra Law Review* 145, 146-147.

4 For example, Queen Elizabeth I granted a privilege over certain school books to Henry Stringer, one of her footmen, for a period of 14 years in 1597: Great. Britain, Public Record Office, *Calendar of State Papers, Domestic*, *1595-1597* (London, 1869), 352; (The State Papers Domestic series are hereinafter cited as '*S P Dom*') Charles I granted a privilege over certain school books including 'Aesopi Fabulae' to George Weckherlin, Under-Secretary of State, in March 1630. The petition of Weckherlin was received with the comment, 'His Matie taking a gracious notice of the peticoners good service, is pleased for his incouragemt. and [...] 'help' to grant vnto him his request.' (WW Greg, *A Companion to Arber* (Oxford, 1967), 267, *S P.Dom: Charles I 1629-1631* (London, 1860), 514, 557). Sir Roger L'Estrange, Surveyor of the Press under Charles II and James II received a privilege from Charles II in 1663. The State Papers record that 'after he had spent above 20 years in the service of the Crown, almost four of them in Newgate under a sentence of death, the King in 1663 granted him a patent for the 'Newsbook', with other privileges of printing, and appointed him overseer of the Press.' (*S P Dom: Charles II 1680-1681* (London, 1921), 665).

the Crown's exercise of control over all forms of publication in the 16th and 17th centuries.[6] This control was exercised by these grants, most of which included penalties for contravention and some of which contained powers of search for and seizure of, pirate books, which were enforced by the Star Chamber, by the grant of a charter from the Crown to the Stationers Company in 1557 which gave the Company a virtual monopoly[6a] over printing and power to enforce its own regulatory regime, and by various decrees of the Star Chamber regulating printing until that Chamber's abolition in 1640. The general licensing regime created by the decrees was perpetuated during the Interregnum and by the *Licensing Act* 1662.

The grants of monopoly rights were originally made by letters patent in respect of a wide variety of works and were not restricted to those listed above which are generally religious or legal in character. For example, Queen Elizabeth I granted exclusive licences to Thomas Marshe for a period of 12 years to print certain school books including "the shorte diccyonary for children with the englyshe before the latyn",[7] to Lodovick Lloyd for a period of eight years to print his translation of Plutarch's "Of the Lives of Emperours etc"[8] and to Thomas Tallys and William Byrde, "two of the gentlemen of the chapel", for 21 years in survivorship for as many "sett songe or songes in partes as to them shall from tyme to tyme seame expedient in the Englishe, Laten, Frenche and Italian tongues", or any language that may serve for

---

5 In 'Considerations on the Nature and Origin of Literary Property', John Maclaurin (Lord Dreghorn) stated that the *Statute of Anne* saved authors and booksellers, 'the Trouble and Expence (from 80 to 100 l.) of applying to the King for a Privilege every Time they printed a new Book': *Freedom of the Press and the Literary Property Debate: Six Tracts 1755-1770* (New York, 1974), Item D, 30 (part of the Garland Publishing Series, *The English Book Trade 1660-1853* edited by Stephen Parks). In a petition by the Stationers Company to the Council of State dated 8 October 1653, it was stated that the cost of buying the right to print almanacs was 'above 1000 l.', apart from those annuities paid to James Robertes, the surviving patentee, and the estate of Richard Watkyns, *S P Dom: 1652-1654* (London, 1879), 193 and C. Blagden, 'The English Stock of the Stationers' Company in the Time of the Stuarts', *The Library* Fifth Series, Vol XII (London, 1957), 167, 168 n.2. As to other payments made in respect of works which formed the basis of the Company's English Stock, refer LR Patterson, *Copyright in Historical Perspective* (Nashville, 1968),106, 107, 108.

6 The motives for this control were principally those of censorship - the prevention of the publication of treasonable, seditious and libellous pamphlets and books in a period of political unrest - and also of the encouragement of an infant printing industry and its protection from piracy both at home and abroad. As to the encouragement of industry refer to the grant in note 7.

6a WW Greg in a paper entitled 'Entrance in the Stationers' Register: Some Statistics', states that while theoretically all copies were supposed to be entered and stationers could be, and occasionally were, fined for printing or publishing works without the formality of entrance, (343) it would seem for the period from 1576 to 1640, the proportion of London-printed books regularly entered at Stationers' Hall was somewhere between 60 and 70 per cent (348). Maxwell JC (ed), *WW Greg: Collected Papers*, Oxford, Clarendon Press, 1966, 343,348.

7 Dated 29 September 1572, *Calendar of Patent Rolls: Elizabeth I,* Vol V (1569-1572) (London, 1966), 333.

8 Dated 18 April 1573, *Calendar of Patent Rolls: Elizabeth I,* Vol VI (1572-1575) (London, 1973), 93.

"the musick either of churche or chamber or otherwyse to be songe or playde".[9] These grants, which were then usually referred to as privileges,[10] began early in the reign of King Henry VIII and although they changed in form over time, there is little in their nature to distinguish legal and religious works from other works.

Privileges normally arose in response to a petition from a printer, bookseller or author to the Crown[11] and were generally made in respect of specific works in the English language, but also in respect of classes of works and in other languages. The earliest class monopoly was that to Richard Tottel (sometimes Tathill, Tottle or Tottell) who in 1553 was granted the exclusive right to print for seven years 'all and almaner of bokes of our Temp[or]all lawe called the comon lawe'.[12] The most important examples of class monopolies were those of law books, almanacs and various religious works. All the grants were made for a specific period of time which,

---

[9] Dated 22 January 1575, *Calendar of Patent Rolls: Elizabeth I*, Vol VI (1572-1575) (London, 1973), 471. Thomas Tallys and William Byrde were joint organists of the Chapel Royal when granted their privilege.

[10] There is some confusion over the use of the word 'privileges' in secondary sources. H Ransom in *The First Copyright Statute* (Austin, 1956), 25, 26, and TE Scrutton in *The Law of Copyright* (2nd ed, London, 1890), 6, 7, 9, 11 use the terms patents and privileges to distinguish between grants over what became known as prerogative right works and other works. However, as Sir Walter Greg points out, the term privilege was the term generally current at the time for all grants of printing rights made by the Crown (WW. Greg, *Some Aspects and Problems of London Publishing Between 1550 and 1650* (Oxford, 1956), 89-102.

[11] The texts of petitions are not frequently found in published records but reference is sometimes made to them in the course of grants. Examples of abstracts of petitions are: Robert Scott of London, bookseller, to print the works of John Selden in Latin: February 1676; *S P Dom*: *1675-1676* (London, 1907), 542; and Edw. Sayer of the Inner Temple, to print all manner of law books touching the common laws of England: June 28 1701; *S P Dom*:*1701-1702* (London, 1937), 391. The microfilm publication *Hanoverian State Papers Domestic 1714-1782* contains copies of some original petitions and grants, for example: 1715, SP 35/74 No 10, petition of John Baskett for the grant of the office of King's printer for the term of 41 years; 1724, SP 35/54 No 87, petition of James Weston to the King for a licence to print 'Stenography Compleated'; 1726, SP 35/61 No 70, petition of William and John Innys of London, booksellers, for a licence to print a new edition of Sir Isaac Newton's *Philosophiae Naturalis Principia Mathematica*.

[12] The earliest class monopoly was that to Richard Tottel (sometimes Tathill, Tottle or Tottell) who in 1553 was granted the exclusive right to print for seven years 'all and almaner of bokes of our Temp[or]all lawe called the comon lawe.'(L Rostenberg, 'The Preservation of the English Legal Tradition: Thomas Wight, 'Patentee in Law Books''', *Literary, Political, Scientific, Religious and Legal Publishing, Printing and Bookselling in England 1551-1700: Twelve Studies*, Vol I (New York, 1965), 23. See also *Calendar of Patent Rolls Edward VI,* Vol V (1547-1553) (London, 1926), 47. An example of a grant for 14 years in respect of works in a language other than English is that to John Dunmore, Richard Chiswell, Benjamin Tooke and Thomas Sawbridge, booksellers of the City of London, to print various classical works in Greek and Latin 'which by their present scarceness are very dear', and 'provided always that the said books or any of them, were never before printed in the King's dominions and that no other subject has acquired any right in the printing of the said books or any of them, and provided also that, as any of the said books be printed, the Archbishop of Canterbury or the Bishop of London or such as they shall appoint set moderate and reasonable prices on the same for the case of scholars and other buyers' (March 12, 1678): *S P Dom*: *1678* (London, 1913), 37, 38.

although normally short, in fact varied from between two years and perpetuity.[13] Their chief impact, particularly while the printing trade was still largely an infant industry, lay in their commercial value and although Crown grants were never very numerous,[14] their profitability was revealed in a dispute in the early 1580s between the privileged and unprivileged printers of the Stationers Company which led the latter to engage in the widespread production of pirate copies of works subject to exclusive licences and ultimately to the resolution of the dispute by the surrendering of a list of works by the privileged printers for the use of the poor of the Stationers Company.[15]

Grants of exclusive licences to print the more general works in addition to the legal and religious works continued throughout the 16th and 17th centuries, except for the period of the Interregnum, and although it would have been expected that grants of licences for the more general works might have ceased after the enactment of the first Copyright Act of 1709/10 - the *Statute of Anne* - published and unpublished records reveal that the Crown still purported to make these grants long after the passage of that Act.[16] However these grants have been the subject of few reported cases and works which were the subject of the grants have long been considered to fall outside the scope of works subject to the prerogative right of the Crown. Further reference is made to these grants at the conclusion of this article.

II BASIS AND ORIGINS OF THE PROGATIVE RIGHT

The exclusive right to print and publish certain works is one of the more obscure prerogatives of the Crown. The right is that residue, recognised by the common law, of the general prerogative over printing and publication which was exercised by the Crown prior to the growth of responsible government and the establishment of a constitutional monarchy in the 17th century. In an exhaustive examination of the authorities, Long Innes CJ in Eq in *Attorney-General for New South Wales v Butterworth and Co (Australia) Ltd* [17] concluded that the exclusive right to print and publish was a prerogative right in the nature of a proprietary right and not merely an exercise of an executive power such as the granting of a patent for an invention. The prerogative right therefore fell within the same broad category as the Crown's right to

---

13 King James I expressed the grant of monopoly rights in psalters, psalms, prymers, almanacks and other similar books to the Stationers Company on 29 October 1603 and later 8 March 1615, to be 'for ever' (see note 117). Richard Pynson held a privilege over Tunstall's oration in praise of matrimony for two years - the first recorded privilege (1518) (WW Greg, *Some Aspects and Problems of London Publishing Between 1550 and 1650* (Oxford, 1956), 93).

14 Usually numbering less than five grants per year although it is to be noted that some of these grants were in respect of classes of works.

15 Refer Edward Arber, *A Transcript of the Registers of the Company of Stationers of London 1554-1640*, Vol II (London, 1875), 14-21, 783-785, 786-789).

16 Refer to pages 164-169.

17 (1938) 38 SR (NSW) 195 (Sup Ct).

escheats, to the royal metals gold and silver, and to the ownership of vacant lands in a new colony.[18]

The legal development of the exclusive right to print and publish certain works rests ultimately in the courts' attempts to define a rational basis for the right consistent with the King's status and duties as a constitutional monarch and with wider notions of the rights and liberties of the subject.[19] Nowhere is this more evident than in the case of *Basket v University of Cambridge*[20] in which a grant by King Henry VIII to the University of Cambridge in 1534 to print "omnes et omnimodus libros" (all and all manner of books) which might be approved by the Chancellor and three doctors of divinity, a right which was not prejudiced by the *Statute of Anne*,[21] was construed by Lord Mansfield in 1758 to relate only to the "copy-rights" of the Crown - that is, the works of a legal and religious character -"for the construction of the law is, that the Crown intended only to do that, which by law it is entitled to do".[22]

---

[18] (1938) 38 SR (NSW) 195, 246-247. Long Innes C.J. adopted a classification of the prerogatives enunciated by Evatt J in his then unpublished thesis 'Certain Aspects of the Royal Prerogative' which may be briefly summarised as consisting of (1) executive powers, such as the power to declare war and make peace, and to pardon offenders and confer honours, (2) certain immunities and preferences, such as the King's right to the payment of his debts in priority to all creditors, and (3) proprietary rights. This work has since been published. Refer H V Evatt, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924), 47-73 or H V Evatt, *The Royal Prerogative* (Sydney, 1987), 35-50.

[19] The reduction in the Crown's absolute power in the 17th century was considerable, both by Parliament - for example, the abolition of the Crown's arbitrary power of imprisonment (the Petition of Right (1628), and the abolition of the prerogative courts of Star Chamber and High Commission by Acts in 1641 - and to a lesser extent, by the common law courts, - for example, the case of *Proclamations* (1611) 12 Co Rep 74 (77 ER 1352) in which the King was denied the power to create new offences by proclamation, and the case of *Prohibitions Del Roy* (1607) 12 Co Rep 63 (77 ER 1342) in which it was decided that the King could no longer sit as a judge in his own courts. Although the *Statute of Monopolies* (1623) (21 Jac I c.3) did not extend to '... letters patents or grants of privilege ... for or concerning printing' (s.X), the notion of rights and liberties of the subject runs through the cases on the prerogative right over printing and in the almanac cases in particular. Refer, for example, *Company of Stationers v Partridge* (1712) 10 Mod 105 (88 ER 647) and also the judgment of Lord Mansfield CJ in *Millar v Taylor* (1769) 4 Burr 2303, 2401-2403 (98 ER 201, 254-255).

[20] (1758) 1 Black W 105 (96 ER 59); 2 Keny 397 (96 ER 1222) and 2 Burr 661 (97 ER 499) (KB). Blackstone's report appears generally to be the most accurate.

[21] Section IX of the Statute (8 Anne, c.19) provided that nothing in the Act 'ſhall extend, or be conſtrued to extend, either to prejudice or confirm any right that ... any perſon or perſons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed'. Although the section may refer to claims of authors at common law, it would also encompass privileges granted by the Crown. The extent of the Crown's right to grant privileges had, by that time, already been the subject of dispute in the courts and of doubts expressed in published documents and in Parliament (see note 143).

[22] (1758) 1 Black W 105,120 (96 ER 59,65); cf. Kenyon's notes on the same case at 2 Keny 397, 420 (96 ER 1222, 1230). The right in question had been confirmed by Charles I in letters patent of 6 February 1628. The word copy was then used in the technical sense to signify an incorporeal right to the sole printing and publishing of the work (refer discussion by Lord Mansfield CJ in *Millar v Taylor*, (1769) 4 Burr 2303, 2396 (98 ER 201, 251) and also Willes J. in the same case at 4 Burr 2303, 2312 (98 ER 201,206)).

The first reported case dealing with the right was decided in 1666 and it was evident from the early cases that for some time the legal basis of the right was the subject of dispute. Initially, the right of the Crown to make grants of monopoly rights over works was asserted in the widest terms and in a number of early cases, licensees of the Crown enforcing their rights sought to base their right not upon the prerogative but on various notions of "civil property". It was argued in *Hills v Universitat Oxon*[23] for instance, that the exclusive right to print certain works included the Authorised Version of the Bible because King James I paid for the translation so that "the copy was his", [24] and in *Company of Stationers v Seymour*[25] that the almanac which the defendant had printed had no certain author and, therefore, the King had the property in the copy. [26] The proprietary concept was the basis of the majority view in the later case of *Millar v Taylor*,[27] which sought to support a common law right in perpetuity in all published works by analogy from the prerogative right. Willes J expressed the view in that case,

> …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.[28]

Similarly, Lord Mansfield C.J. concluded:

> The King cannot, by law, grant an exclusive privilege to print any book which does not belong to himself. Crown-copies are, as in the case of an author, civil property.[29]

However, other courts adopted the now settled view that the right was in the nature of a proprietary right but based on the prerogative, although the reasons advanced in support of this conclusion have varied and in some cases have been specifically disputed in later decisions. For example, in the earliest reported case of *Stationers v The Patentees about the Printing of Roll's Abridgment* [30] it was argued that the King had a general prerogative over printing because, inter alia, he had an ownership of it, derived from having introduced it at the King's expense and that he had a particular prerogative over law books because, inter alia, the salaries of the judges were paid by the King and reporters in all courts at Westminster were paid by the King formerly. The first proposition is based on a long discredited legend and was disputed by counsel for the defendant in *Basket v University of Cambridge*[31] and by Lord

23 (1684) 1 Vern 275 (23 ER 467) (Ch).
24 Ibid.
25 (1677) 1 Mod 256 (86 ER 865) (CP).
26 (1677) 1 Mod 256, 258 (86 ER 865, 866).
27 (1769) 4 Burr 2303 (98 ER 201) (KB).
28 (1769) 4 Burr 2303, 2329 (98 ER 201, 215).
29 (1769) 4 Burr 2303, 2401 (98 ER 201, 254).
30 Also known as *Atkins* case (1666) Carter 89 (124 ER 842) (HL).
31 (1758) 1 Black W 105, 113 (96 ER 59, 62); 2 Keny 397, 407 (96 ER 1222, 1226).

Mansfield in *Millar v Taylor*.[32] The second proposition has not been advanced by other courts.

In the second reported case of *Roper v Streater*[33] the House of Lords upheld the validity of a patent to print law books on grounds including that the printing of law books concerned the state, and was a matter of public care.[34] The reference to "a matter of public care" appears to be the first reference to the rationale which had been adopted by most courts by the mid-18th century. It was that the basis of the right lay in "the character of the duty imposed upon the chief executive officer of the Government, to superintend the publication, of the Acts of the Legislature, and Acts of State of that description, and also of those works, upon which the established doctrines of our religion are founded - that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative".[35] This view was clearly accepted by Lord Camden in *Donaldson v Beckett*,[36] the dissenting judge Yates J in *Millar v Taylor* [37] and the courts in *Eyre and Strahan v Carnan*[38] and *Manners v Blair*.[39] It also appears to have been the opinion of the court in *Universities of Oxford and Cambridge v Richardson*.[40] It was adopted more recently in the Australian case of *Attorney-General for New South Wales v Butterworth and Co (Australia) Ltd*.[41]

Lord Lyndhurst LC in *Manners v Blair* further clarified this duty of the Crown in the course of considering an argument that the prerogative right in relation to works enumerated in the patent of the King's Printer in Scotland, which were also works of the established religion in England, did not apply in Scotland because the right over these works depended upon the King's character as supreme head of the church, and the King was not the supreme head of the church in Scotland. He concluded:[42]

> I do not refer the prerogative to the circumstance of the King being, in a spiritual or ecclesiastical sense, the supreme head of the church in England, but to the kingly character - to his being at the head of the church and state, and it being his duty to act as guardian and protector of both, - a character which he has equally in Scotland and England.

---

32 (1769) 4 Burr 2303, 2401 (98 ER 201, 254).

33 (1672) Bac Abr 7th ed, Vol VI (London, 1832) 507 (HL) (a brief reference is also made to this case at 2 Chan Cas 67 (22 ER 849)).

34 Ibid.

35 Lord Lyndhurst LC in *Manners v Blair* (1828) 3 Bli NS 391, 402-403 (4 ER 1379, 1383) (HL). Refer also 2 State Tr NS 215, 234.

36 (1774) Cobbett's *Parliamentary History* Vol XVII (London, 1813), 953, 995. (HL).

37 (1769) 4 Burr 2303, 2381, 2383 (98 ER 201, 243, 244).

38 (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 511 (Ex).

39 (1828) 3 Bli NS 391, 402-403 (4 ER 1379, 1383) (HL).

40 (1802) 6 Ves Jun 689, 711-712 (31 ER 1260, 1271) (Ch).

41 (1938) 38 SR (NSW) 195, 229.

42 (1828) 3 Bli NS 391, 404 (4 ER 1379, 1383).

Lord Lyndhurst went on to point out that the duty of the King to act as guardian of the church in Scotland arose from "the statute by which the Reformation was established in Scotland"[43] in which it was declared to be the duty of the magistrates, and the King as supreme magistrate, to be the protector of the church, and by "the Act of 1690, by which the Presbyterian church was established, when the Episcopalian church authority was finally put an end to in Scotland",[44] in which the same principle was laid down and acknowledged. The religious works in question - which included the King James Version of the Bible - had, with one exception, been sanctioned or ratified by the General Assembly of the Presbyterian Church for use in the Church, and Lord Lyndhurst therefore concluded that the King possessed the prerogative to confer rights to print these works on his printer in Scotland.

The earliest manifestations of this duty of the Crown were described by Skinner LCB in *Eyre and Strahan v Carnan*:

> This is certain respecting such origin, that it has ever been a trust reposed in the king, as executive magistrate, and the supreme head of the church, to promulgate to the people all those civil and religious ordinances which were to be the rule of their civil and religious obedience. 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. As to the promulgation of religious ordinances by the king's command, or by his patentee, it is not to be expected that instances should be found of the execution of this trust by the crown during the papal usurpation of the supreme authority over all ecclesiastical matters in this kingdom. It appears, however, by a grant made in the 34th year of King *Henry* the Eighth, to *Richard Grafton* and *Edward*

---

43 Presumably a reference to an Act ‘Concerning the jurifdictioun and autoritie of the bifchope of Rome callit the Paip’, dated 24 August 1560, which provided penalties for administering sacraments of the ‘popish church’ and for hearings on the same ‘to be callit befoir the Juftice or his deputis or befoir the lordis of feffioun’ (*The Acts of the Parliament of Scotland (Scotch Acts)* Vol II (1424-1567) (London, 1814), 534, 535). This Act referred to a Confession of Faith which was adopted by the Scottish Parliament on 17 August 1560 which contained a chapter entitled ‘Of the Ciuile Magistrat’. This chapter declared that Empires, Kingdoms and dominions were ordained by God and that the powers and authorities of the same be they Emperors, Kings, Dukes, Princes and ‘vtheris Magiftratis in fre cieteis’, are not only appointed ‘for ciuile policie bot alfwa for mantenance of the trew religioun’ (Ibid, 534). The Confession of Faith more expressly describes the duty described by Lord Lyndhurst.

44 Presumably a reference to ‘An Act Ratifying the Confefsion of Faith and fettleing Presbyterian Church Government’ dated 7June 1690. A revised Confession of Faith approved by the Scottish Parliament in the same year (26 May 1690) and expressed to be ‘subjoyned’ to the above Act, contained a chapter entitled ‘Of the Civil Magistrate’ which expressed the duty described. *Acts of the Parliament of Scotland (Scotch Acts)* Vol IX (1689-1695) (London, 1822), 127, 128, 133.

> *Whitchurch*, of the sole right of printing the Mass-book and certain other books of divine service, that such books had never at that time been printed in *England*, but had been brought into this kingdom from other countries, probably from *Rome*; though, as the grant recites, printing was at that time arrived at great perfection here. ... The period between the time of the re-establishment of the supremacy of the crown and the completion of the Reformation under Queen *Elizabeth*, considering the fluctuating state of religion, was not likely to afford, and in fact has not afforded, any instance of the superintending care of the crown in printing books of divine service, except that which I have alluded to, and which I have referred to chiefly to shew how the demand of the public for such books had been supplied before that time, namely, from foreign countries...but in the first year of Queen *Elizabeth*, the exclusive right of printing books of divine service was inserted in the same patent with the right of printing the acts of parliament, which had some time before been granted, and from that time they have been regularly granted together, and enjoyed by the king's patentee.[45]

A Extent of Duty on the Crown

Courts have regarded the chief object of the duty imposed on the Crown as to ensure that works of state and religion were published and preserved in a correct and authentic form.[46]

It is also implied from the nature of the works falling within the prerogative and the practice of granting exclusive rights to print and publish, that the duty entails an obligation to satisfy public demand for those works since, without this, the state could not expect citizens to be aware of the law and to faithfully observe the tenets of the established religion. Such an obligation was specifically recognised by Lord Skinner LCB in *Eyre and Strahan v Carnan* [47] where he stated "the right now in question imposes upon the crown an obligation to publish and disperse as many books of divine service as the interest of religion and the demands of the public require" and Lord Eldon LC in *Universities of Oxford and Cambridge v Richardson*.[48] The

---

[45] (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 510-511. The use of the word 'trust' suggests that the duty which lies at the basis of the right is a moral duty. There is no suggestion to the contrary in any other case on the prerogative right.

[46] Refer, for example, to Skinner LCB in *Eyre and Strahan v Carnan*, (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 511, where he refers to 'that duty which lay upon the crown to furnish the people with the authentic text of their ordinances', and Lord Eldon LC in *Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 689, 711 (31 ER 1260, 1271) (Ch) where he states '... the communication of which to the public in an authentic shape, if a matter of right, is also [a] matter of duty in the Crown'. Also Lord Lyndhurst LC in *Manners v Blair* (1828) 3 Bli NS 391, 405 (4 ER 1379, 1384): 'I think, therefore, that this right and prerogative depends upon the King's character as guardian of the church and guardian of the state, to take care that works of this description are published in a correct and authentic form'; and the court in *Grierson v Jackson* (Irish - Ch.) (1794) Ridg L&S 304, 306, '... the King fhould have a power to grant a patent to print the ftatute books, becaufe it is neceffary that there fhould be refponfibility for correct printing...'.

[47] (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 512

[48] (1802) 6 Ves Jun 689, 704 (31 ER 1260, 1267): Lord Eldon LC referred to the need for a 'sufficient supply for the subjects of this country' and later to the 'regular supply by authorised persons of books, which the constitution has supposed to be of such a species, that the public ought to have a security'.

importance of the observance of the rites of the Church of England to the state, in particular, was shown by the fact that worship according to the reformed rites established by the Books of Common Prayer of Edward VI and Elizabeth I, and later Charles II, was made compulsory under the various Acts of Uniformity of 1548, 1551, 1558 and 1662.[49] Throughout the 16th and 17th centuries conformity to the established religion became inextricably bound up with obedience to the state.[50]

There are also suggestions in some cases dealing with the prerogative right that the duty to superintend the publication of Acts of state and of works of the established religion may entail an obligation to ensure that an unreasonable price was not charged for those works. In *Universities of Oxford and Cambridge v Richardson* for instance, Lord Eldon stated that where fees for prerogative works were not ascertained by reference to the privilege, "the benefit shall be reasonable; and if an unreasonable price should be placed upon these works, these authorities and patents would be put in considerable hazard."[51] In *Eyre and Strahan v Carnan*, however, Skinner LCB considered the question whether the price charged for a work was reasonable or not only in respect of the issue of whether the plaintiff could obtain the equitable relief of an account.[52] It is clear, though, that prior to 1947 in England the Crown could have sought a writ of scire facias to repeal a grant where there were abuses of it and in view of the nature of the grant it would be logical for such action to be taken for matters such as unreasonable pricing or unsatisfactory printing,[53] but there are no recorded instances in the cases of it having done so in respect of grants of this kind. The Crown's right to claim this relief was preserved and is now governed by the *Crown Proceedings Act* 1947 (UK).[54]

---

49 2 and 3 Edw VI, c I (1548); 5 and 6 Edw VI, c I (1552); I Elizabeth I, c. II (1558); 13 and 14 Car II, c 4 (1662).

50 As the Guy Fawkes plot (1605) shows. The Elizabethan *Act of Supremacy*, I Elizabeth I, c.I. (1558), which imposed an oath of supremacy on all holders of public office effectively excluded catholic recusants from a wide variety of official positions (see s. XIX).

51 (1802) 6 Ves Jun 689, 712 (31 ER 1260, 1271).

52 (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 510.

53 In *Roper v Streater* (1672) Bac Abr 7th ed, Vol VI (London, 1832), 507, the writ appears from the report of the case to have been regarded as an appropriate remedy for abuses such as ‘unskilfulness, selling dear, printing ill etc’. In the *Calendar of Patent Rolls, Philip and Mary* Vol I (1553-1554) (London, 1937) 53, there is a reference in the record of grant of the office of Queen's printer to John Cawood dated 29 December 1553 to the office having become void because Richard Grafton who held it beforehand ‘forfeited it by printing a proclamation in which was contained that a certain Jane, wife of Guildeford Dudley, was queen of England’, (Lady Jane Gray's proclamation). Counsel for the defendant in *Basket v University of Cambridge* referred to this event by stating merely that Queen Mary ‘obliged’ Grafton to resign his patent but precisely how this was achieved was not discussed: (1758) 1 Black W 105,116 (96 ER 59, 63).
Arber records that in 1632 the King's printers Robert Barker and Martin Lucas were fined 3000 l. for having printed in an edition of the Authorized Version of the Bible the Seventh Commandment as ‘Thou shalt commit adultery’ leaving out the ‘not’: Refer Edward Arber, *A Transcript of the Registers of the Company of Stationers of London 1554-1640*, Vol III (London, 1876) 27.

54 10 and 11 Geo 6, c 44 (see ss 13, 23).

In the *Calendar of Patent Rolls, Philip and Mary* there is a reference in the record of grant of the office of Queen's printer to John Cawood dated 29 December 1553 to the office having become void because Richard Grafton who held it beforehand "forfeited it by printing a proclamation in which was contained that a certain Jane, wife of Guildeford Dudley, was queen of England", (Lady Jane Gray's proclamation). Counsel for the defendant in *Basket v University of Cambridge* referred to this event by stating merely that Queen Mary "obliged" Grafton to resign his patent but precisely how this was achieved was not discussed.

III NATURE OF THE PREOGATIVE RIGHT

In contemporary terms the prerogative right over legal and religious works is frequently said to relate to the printing and publication of those works. The phrase "printing and publication" is the description used in the more recent cases and by commentators such as Lahore.[55] Nevertheless, it is a shorthand description and not one typically found in the grants, since their language has usually referred only to an exclusive right to print or causing to be printed the works in question.[56] However, while the wording of grants has changed over time, they have, in addition to the inclusion of printing rights, normally contained separate prohibitions on others printing, uttering, selling and importing the works into the country.[57] These

---

55 JC Lahore, *Intellectual Property Law in Australia: Copyright* (Sydney, 1977), 11 (para. 115); JC Lahore, *Intellectual Property in Australia : Copyright Law* (Sydney, 1988), para 10. 21. 35 and JC Lahore, *Copyright and Designs* (Sydney, 2004-), para 20,200.

56 It is implicit that the right to print need not be undertaken directly by the grantee provided he causes the printing to be carried out (i.e. by his authority). Skinner LCB in *Eyre and Strahan v Carnan* (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 512 appears to accept that the right includes the right to authorize others to print.

57 A few early grants did not contain the prohibitions (see, for example, the grant of the office of stationer to the King on 5 December 1485, to Peter Actors in CB Judge, *Elizabethan Book-Pirates* (Cambridge, 1934), p 6, but normally they were a standard part of them. Examples of the full text of grants in the 16th and 17th centuries can be found in:

- Edward Arber, *A Transcript of the Registers of the Company of Stationers of London 1554-1640* (5 Vols) (London, 1875-1894), Vol II, 60-63, 746.
- TF Dibdin's edition of *Ames' Typographical Antiquities* (4 vols) (London, 1810-1819) see for example Vol III, 430, and Vol IV, 74.
- Thomas Rymer, *Foedera* (3rd ed., 10 Vols.) (The Hague, 1739-1745), Vol VI, Part III, 77, 85, 157; Vol VII, Part III, 8, 11, 51, 55, 56, 77 particularly. A full list of all grants found in Rymer's *Foedera* is found in the Appendix to TE Scrutton, *The Laws of Copyright* (1st ed.) (London, 1883), 293-298. Later editions of his work do not contain that Appendix.

  Examples of the full text of 18th century grants can be found in:
- *Hanoverian State Papers Domestic* Series *1714-1782* (microfilm publication) (Sussex, 1978): see for example, Part I 1714-1722, SP 35/8 No. 87 (March 26, 1717 to Bernard Lintott, bookseller); Part II 1722-1727, SP 35/61 No. 70 (25 March 1726 to William and John Innys, booksellers).

  The full text of some grants are also contained in cases on the prerogative right, for example, *Stationers' Company v Carnan* (1775) 2 Black W 1004 (96 ER 590),

prohibitions would seem to be particularly important since the object of the grants was to disseminate the work and the right to print works does not, on its face, ensure control over dissemination. But, as the courts pointed out in *Universities of Oxford and Cambridge v Richardson* and *Manners v Blair*,[58] the effect of each privilege rested on its true construction and if on such a construction the Crown purported to grant the whole of its authority, then the right to print must necessarily carry with it the right to exclude others. As Lord Lyndhurst LC stated in *Manners v Blair*, this right of excluding others included the power of excluding others from participating in the right of circulating works as well as printing them and he held in *Manners'* case that the power to prevent others circulating works was not limited by a prohibition which was only expressed to prevent importation from "beyond the seas".[59]

Accordingly, it is implicit in the nature of the authority granted in the patents as well as from the prohibitions themselves that the prerogative right has always been exercised and can be regarded as a right to "print and publish" in the sense in which these terms are presently understood, that is, the mass reproduction of the work and the dissemination or circulation of copies of the work to the public, usually by sale.

A Scope of the Right

The rights of those granted exclusive licences by the Crown depended not only on a proper interpretation of their privileges but ultimately, since the Crown could not grant rights which it did not possess, on the precise scope of the right of printing and publication.

There is no definitive examination of the right in any of the reported cases but there have been decisions and dicta on various patents which provide some clarification of its scope. It is clear, for instance, that courts have considered that the prerogative right extends to prevent others importing copies of works for the purpose of trading, but the extent to which the right goes beyond this has never been clearly elucidated in any of the cases. The Crown, in grants of exclusive licences in respect of other works, had included prohibitions in respect of the distribution of works,[60] and it is implicit from the object of the grants and the power to exclude others from circulating

---

Manners v Blair (1828) 3 Bli NS 391 (4 ER 1379), and *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd* [1964] Ch 736.

[58] Refer to judgment of Lord Eldon LC in the former case 6 Ves Jun 689, 712-714 (31 ER 1260, 1271, 1272) and Lord Lyndhurst LC in the latter case 3 Bli NS 391, 409-413 (4 ER 1379,1385,1386).

[59] (1828) 3 Bli NS 391, 410-412 (4 ER 1379, 1385, 1386). As to the right to prevent importation of works for sale, refer *Company of Stationers v Lee* (1681) 2 Show KB 258 (89 ER 927); *Company of Stationers Case* (1681) 2 Chan Cas 76 (22 ER 854) and *Company of Stationers* (1682) 2 Chan Cas 93 (22 ER 862).

[60] Refer, for example, to the prohibition against distribution contained in the grant of George I to Bernard Lintott, bookseller of London, to print 'The Reformade', dated 26 March 1717: *Hanoverian State Papers Domestic Series*, *1714-1782* Part I 1714-1722 (Sussex, 1978), SP 35/8 No. 87.

works that the right must extend to prevent others importing for the purpose of unauthorised gratuitous dissemination of copies of the work to the public. It is, though, logical to assume that the importation of a copy or copies of a work for personal or family use would not constitute an infringement of the right because it could not amount to a dissemination or circulation of copies of the work to the public.

It is also clear law that the exclusive right to print and publish prerogative works includes the right to print and publish abridgments of those works. This right was specifically included in some early patents and was upheld in *Basket v University of Cambridge*.[61] However, there is little authority which would provide assistance on what types of dealing with a prerogative work a court would regard as "fair" and not be an infringement of the right. It is settled that the reproduction of an entire work with the addition of annotations or other independently collected material does not take the new work outside the scope of the prerogative right. In *Baskett v Cunningham*[62] the King's Printer in England sought to restrain the defendants from the publication of certain Acts of Parliament in a book entitled "A Digest of the Statute Laws, containing the statutes at large, from Magna Charta to the end of the last parliament in 1760, in alphabetical order, together with such cases determined thereon as are necessary to explain them. By T Cunningham, esq Vol I". The statutes were methodised under different heads and had large notes and references at the beginning and end of each statute or title, and in the margin. Although the court only granted a limited injunction, leaving the parties to adjust their rights in due course of law, it was of the opinion that the new work was "entirely within the patent of the king's printer" and that the notes were "merely collusive".[63]

There is, however, no authority on the question whether the unauthorised reproduction of a prerogative work as an appendix to a book such as a textbook amounts to an infringement of the right. A common example is the inclusion of an Act of Parliament at the end of a legal textbook. The reproduction of such a work in this context would, when the book is published, amount to a printing and publication of the work, and would also be prejudicial to the interests of the Crown's exclusive licensee since it would deprive the licensee of sales of the work. It should, therefore, be regarded as an infringement of the right. As Lord Eldon LC stated in *Universities of Oxford and Cambridge v Richardson*:

> for the duty [on the Crown] cannot be exercised without great expense; and then every infringement, having a tendency to defeat the purposes of that expence incurred in the necessary establishment for the execution of that duty, has a tendency, not only to the pecuniary damage of those entrusted to discharge it, but also to put an end to the regular supply by authorised persons of books, which the constitution has supposed to be of such a species, that the public ought to have a security.[64]

---

61 (1758) 1 Black W 105 (96 ER 59); 2 Keny 397 (96 ER 1222).
62 (1762) 1 Black W 370 (96 ER 208); 2 Eden 137 (28 ER 848) (Ch).
63 1 Black W 370, 371 (96 ER 208); 2 Eden 137, 138 (28 ER 848, 849).
64 (1802) 6 Ves Jun 689,704 (31 ER 1260, 1267).

There is also no authority on the question whether the printing and publication of a portion of a prerogative work amounts to an infringement of the right in that work, for example, the reproduction of a substantial part of an Act of Parliament such as a Division or Part, since all litigation has concerned the reproduction of whole works. However, the report of the case of *Roper v Streater* indicates that the House of Lords took the view that the Crown's rights in law books did not extend to a book containing a quotation of law, and although there are no decisions in point, it would be reasonable to assume that courts, if faced with the issue, would adopt a test of infringement of the right which, in paying due regard to the objects of the right and the economic interests of the licensee, would permit some measure of fair or lawful use with the work for certain purposes such as review or criticism just as the equity and common law courts did in relation to copyright works in the 18th and 19th centuries.[65]

Some patents of the Crown, including that of 29 May 1901 granting the office of King's Printer to the firm of Eyre and Spottiswoode, also purported to grant rights to print prerogative works in languages other than English.[66] The tradition of such grants emanates from the 16th century when Latin and French were in more common use and there were Printers to the King in different languages.[67] Although there are no cases in point, it would be anomalous if the Crown’s right did not include the capacity to sanction the printing and publication of translations of the works of religion and state in England, particularly if this was required to ensure understanding of the law and religion amongst immigrant communities whose grasp of English was less than adequate.[68]

There is only a little assistance to be gained from cases on the prerogative as to whether the making of one or a small number of copies of a prerogative work would

---

65 Refer EJ MacGillivray, *A Treatise upon The Law of Copyright* (London, 1902), 103-118 for a discussion of the early cases.

66 Refer to the text of the grant in *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd*. [1964] Ch 736, 738-740. An early example is a grant by Charles II in 1662: ‘Oct. 6 Order by the King that John Durel's French translation of the Prayer Book be used as soon as printed, in all the parish churches of Jersey and Guernsey, etc., in the French congregation of the Savoy, and all others conformed to the Church of England, with licence to him for the sole printing of the said translation’. *S. P. Dom 1661-1662* (London, 1861), 508.

67 Refer, for example, to the grant of Edward VI to Richard Grafton ‘of the office of the kings's printer of all books of statutes, acts, proclamations, injunctions and other volumes issued by the king ... in English or English mixed with any alien tongue, except only instructions in the rudiments of Latin grammar’, for life, (22 April 1547)*: Calendar of Patent Rolls: Edward VI* Vol I (1547-1548) (London, 1924), 187; and the grant of Edward VI to Reynold Wolff of the office of the King's typographer and bookseller in Latin, Greek and Hebrew which included a licence ‘not only to print all Latin, Greek and Hebrew books but also grammars of Greek or Latin, although mixed with English, and also charts and maps useful or necessary to the king and his countries in those tongues; also to provide all such books as the king orders’, for life, (19 April 1547) (Ibid).

68 The translation right would also seem to be necessary in the historical sense for the adequate dissemination of prerogative works in other areas of the United Kingdom where there are indigenous languages (for example, Welsh (Cymraeg) and Gaelic and Lallans). Refer note 66.

infringe the right of printing the work. There has been no suggestion in any of the cases that the right in question extends to a right of reproduction in the broad sense and there is also an implication in the judgment of Long Innes CJ in Eq in *Butterworth's* case that the making of a copy or a small number of copies of a prerogative work would not infringe the prerogative right. In discussing the right of an individual at common law to inspect and take copies of documents which are of a public nature, Long Innes CJ took the view that the extent of the right depended on the interest of the individual in what he wanted to copy and what was reasonably necessary for the protection of that interest. He concluded that the right encompassed those New South Wales statutes enrolled and recorded in the office of the Registrar-General under provisions of the *Registration of Deeds Act* 1897 (NSW). He stated:

> It seems to me that the extent of the interest which a member of the public has in inspecting the statutes enrolled and recorded in the office of the Registrar-General is to inform himself of the state of the law with a view to knowing his rights and liabilities, or of being in a position to advise others, and to make such copy or copies as will suffice to keep himself so informed; it cannot, in my view, extend to allowing him to deprive the Crown of its proprietary rights in the nature of copyright or to affect them except to that limited extent.[69]

The view that the making of a copy or a few copies of a prerogative work is not an infringement of the prerogative right in that work, a view which is implicit in this statement, would appear to be correct in principle since it is unlikely that such reproduction could be regarded or would amount to the "printing" of that work in the sense that the word "printing" is normally used and understood and as contemplated by the grant of exclusive rights. Prohibitions contained in the grants preventing others printing, selling or importing works were often expressed to be construed "contrary to the true meaning of this our Graunt" or "contrarie to the meaninge of this our prefente Lycence and Priviledge" or words similar in effect. These words themselves suggest that the grants were directed toward the mass reproduction and circulation of works since the purpose behind the grants was to provide a monopoly in the commercial exploitation of the works.[70]

A further issue relating to the scope of the right is whether it is infringed by the reproduction of the work in another form or medium, for example, by the microform reproduction of statutes or by the incorporation of statutes in a database of an online computer-based legal information retrieval system. This issue highlights the difficulty of relating the prerogative of printing and publication to modern conditions.

---

69 (1938) 38 SR (NSW) 195, 257.

70 The Star Chamber decree of 1586 also made reference to the 'true intent and meaninge' of the grants (refer note 124). The right is distinguishable from those prerogatives which are more broadly expressed and in respect of which courts have taken a more expansive view, eg., with respect to the granting of a patent for an invention (refer *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252 and s.VI of the *Statute of Monopolies* 1623).

Ricketson and Creswell argue that the prerogative is flexible and can extend to new non-print technologies such as online dissemination,[71] while others have argued that it cannot because in the words of Diplock LJ in *BBC v Johns* 'it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative'. The grants of exclusive rights were directed at mass reproduction and circulation of works with the objective of providing a commercial monopoly in the exploitation of the works. To the extent that electronic technologies achieve this object then it is arguable that the Crown's prerogative right will encompass mass reproduction and circulation in these forms.

Bearing in mind the opposition of courts to broadening the prerogative, there is some doubt whether placing statutes online and enabling reproduction of statutes through down-loading on to disk or through print-outs, would be considered 'printing' within the plain meaning of that term, although it is akin to 'publication' as contemplated by the right. Online dissemination of statutes has largely replaced traditional publication of statutes in the sense understood by the right and governments have approved electronic sites which provide authorised electronic versions of that law.[72] It is therefore suggested that courts would regard online dissemination as a new circumstance by which the prerogative right may be exercised.

Although the facsimile reproduction of statutes in microfiche, microcard or other microform is not "printing" in the sense traditionally understood, it is nevertheless closely analogous, and a work may be published in this way. It is therefore likely that

---

71 S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (2nd ed 2002) vol 2 looseleaf 14.205: '…that the promulgation of statutes etc in non-printed form comes within existing prerogative rights as a necessary adaptation to changing circumstances, rather than their extension into a new field altogether'; '…[the prerogative] should be capable of being applied in a flexible way so as to accommodate changing circumstances and conditions, so long as the fundamental objective of the exercise remains the same'. In *BBC v Johns* [1965] Ch 32, 79. Diplock L.J. stated '... it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension' and in particular Diplock LJ stated that the Crown's claim to a general prerogative right to the monopoly of any activity was denied and circumscribed by the *Statute of Monopolies* 1623. Section X of this Act, it should be noted, exempted 'letters patents or grants of privilege ... for or concerning printing' from its operation. Printing patents should be construed in such a way as not to go beyond the prerogative right of the Crown, refer Chitty, op cit, 394.

72 For example, Australian Capital Territory. *A.C.T Legislation Register*, (approved under the Legislation Act 2001) (ACT) *Legislation register—authentication of material* (23 August 2011) <http://www.legislation.act.gov.au/Updates/authentication.asp>. 'Until recently, ACT legislation was authorised only when viewed electronically on this web site or when the copy was printed by the government printer. Extra security is necessary to make sure the documents that are downloaded are true copies of ACT legislation. The ACT Parliamentary Counsel's Office (PCO), the office that drafts and publishes ACT legislation, has implemented measures to provide this security'. Refer ss 24-26 of the *Legislation Act 2001* (ACT). Similarly, also refer to the *Acts Publication Act 1905* (Cth) ss 4-8.

courts would regard the making and distribution of microform copies of statutes or other prerogative works as falling within the scope of the right.

IV WORKS FALLING WITHIN THE PREOGATIVE RIGHT

A Works of the Established Religion

Both Blackstone in his *Commentaries on the Laws of England* and Chitty in his early monograph on the prerogatives of the Crown stated that, as supreme head of the Church, the Crown in England had "a right to the publication of all liturgies and books of divine service".[73] Most recent commentators on the subject, however, list only a small number of specified religious works as subject to the prerogative.

It is clear that in England the Crown's prerogative right extends not to Bibles generally but only to the Authorised Version of the Bible of 1611 and its principal parts, the Old and New Testaments and most probably the Books and Gospels contained therein. Although at one time the Crown made grants of exclusive rights in respect of other versions of the Bible such as the Genevan edition[74] and continued to express grants over three centuries in broad terms such as "all Bibles and Testaments in the English language",[75] it was settled in *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd*[76] that the Crown's prerogative right did not extend this far. The plaintiffs in that case had published an entirely new translation of the New Testament called the "New English Bible: New Testament" and the defendants, the Queen's Printers, relying on a patent which had granted to them the right to print "all and singular Bibles and New Testaments whatsoever in the English Language or in any other language", printed and published one of the Gospels from the plaintiffs' translation. That translation was not authorised by the Crown as head of the Church of England although it had the support of the Christian churches and Bible societies. Plowman J held that there was no legal authority for the view that the prerogative extends to any translation of the Bible other than the Authorised Version and that the prerogative did not cover the right to print a work which would amount to an infringement of copyright. It should be noted that the Crown's grants in various letters

---

[73] W. Blackstone, *Commentaries on the Laws of England Book* II (Oxford, 1766), p 410 and Chitty, op cit, 240.

[74] 8 January 1561, Licence for seven years for John Bodeleigh to print the English Bible 'with annotacions faithfully translated and fynyshed' in the present year A.D. 1560 and dedicated to the queen; no others to print it on pain of the queen's displeasure and forfeiture to the Crown of 40s for every Bible printed, and all such books to be forfeited to the person who shall bear the costs and sue the forfeiture on behalf of the Crown; provided that the Bible printed may be so ordered in the edition thereof as may seem expedient by the advice of the bishops [sic] of Canterbury and London. By ps *Calendar of Patent Rolls: Elizabeth I* Vol II (1560-1563) (London, 1948), 218. Reference is also made to this edition in Arber, *op. cit*. Vol II 15, 63 (full text of the grant).

[75] This appears to have been the expression used in the grant of the office of King's printer to John Basket dated 19 December 1715 (refer *Eyre and Strahan v Carnan* (1731) Bac Abr 7th ed, Vol VI (London, 1832), 509).

[76] [1964] Ch 736.

patent to the King's Printer have formally expressed its rights to include Testaments and there is authority for the view that they so extend: *Re "The Red Letter New Testament (Authorized Version)"*.[77]

There is also some early authority which suggests the Books and Gospels of the Bible are in themselves subject to the right and it would be anomalous if this were not so, in view of the separate nature of these works and of the likely prejudice to the interests of the exclusive licensee and the Crown which would occur through the pirate printing and publication of them. In *Company of Stationers v Lee*[78] it was successfully argued that the King as head of the Church had a particular prerogative in the printing of primers, psalters and psalms which, it appears from the case, had, with a number of almanacks, been imported and sold in breach of the plaintiff's patent. Further support for this proposition rests on some unreported decisions mentioned in both the judgment of Yates J in *Millar v Taylor*[79] and by counsel for the plaintiff in *Company of Stationers v Partridge*.[80] Yates J in fact took the view that these works fell within the Crown's right.[81]

The Psalter is the Book of Psalms which forms part of the Old Testament and is the hymn book and prayer book of the Bible, being divided into five collections or books which comprise 150 psalms. Although the Crown made grants of printing rights in psalms and psalters of various versions which were not derived from the Authorised Version of the Bible, the Crown's right could not now extend to include the right to print and publish any version other than the Book of Psalms in the authorised form. Furthermore, while Crown grants over psalters or psalms have used the expression "books" of psalters or psalms or "the Psalms of David",[82] the absence of any clear authority makes it difficult to determine whether the Crown's right over psalms extended to the printing and publication of an individual psalm. For reasons which were advanced earlier,[83] however, it would be anomalous if an exclusive licensee of

---

77 (1900) 17 TLR 1 (Ch). Obiter dicta in other cases also suggests that the prerogative right does not extend to any other early version of the Bible: refer, for example, to *Millar v Taylor* (1769) 4 Burr 2303, 2405 (98 ER 201, 256).

78 (1681) 2 Show KB 258 (89 ER 927) (Ch).

79 (1769) 4 Burr 2303, 2382 (98 ER 201, 244).

80 (1712) 10 Mod 105, 107 (88 ER 647, 648) (KB).

81 4 Burr 2303, 2382 (98 ER 201, 243).

82 Refer, for example, to the grant of 3 July 1559 to William Seres (*Calendar of Patent Rolls: Elizabeth I* Vol I (1558-1560) (London, 1939), 54; grant to John Daye of 2 June 1567 (*Calendar of Patent Rolls: Elizabeth I* Vol IV (1566-1569) (London, 1964), 108; grant to William Seres the elder and William Seres the younger of 23 August 1571 (*Calendar of Patent Rolls: Elizabeth I* Vol V (1569-1572) (London, 1966), 268; grant to the Company of Stationers dated 29 October 1603 (Arber, op cit, Vol III, 42). The expression 'books' has been construed widely (refer *Eyre and Strahan v Carnan* (1781) Bac Abr 7th ed, Vol VI, 509 where a 'form of prayer' was included within the description.

83 Refer pages 17/18, '... every infringement, having a tendency to defeat the purposes of that expence incurred in the necessary establishment for the execution of that duty, has a tendency, not only to the pecuniary damage of those entrusted to discharge it, but also to put an end to the regular supply by authorised persons of books, which the constitition has supposed to be of such

the Crown could not prevent the unlicensed printing of the Authorised Version of the Book of Psalms or one of the five collections of psalms under a grant even where that grant was expressed only to cover Bibles, as is the case with the grant to the existing Queen's Printer.

Primers were used principally as school books and books of private devotion and were the subject of Crown grants in the 16th and 17th centuries. They took a number of early forms, originally being printed in Latin, but in Elizabethan times had become "nothing more nor less than a school edition of [the] Morning and Evening Prayer from the Prayer Book, with the Catechism. To this was added an ABC, the Litany, the Seven Penitential Psalms, with sundry graces drawn largely from Henry VIII's Prymer, with the title of "The Primer, and Cathechisme"".[84] After 1585 it seems probable that the work became "merely a glorified ABC book containing certain elements drawn from the Prymer, and bound cheaply in paper or vellum wrappers for school use"[85] and although James I granted the Company of Stationers the monopoly in them, which Charles II later confirmed,[86] the nature of the works and the Crown's ultimate abandonment of grants compellingly suggest that the work could not now be subject to the prerogative right.

It is nevertheless clear that the prerogative encompasses the 1662 Book of Common Prayer which is still the principal authorised form of worship in the Church of England.[87] This right has been accepted in a number of cases although it is by no means clear that judges have viewed the right as restricted merely to the 1662 version. Yates J in *Millar v Taylor*, for instance, took the view that the right extended to "Common-Prayer Books" and his use of the plural suggests that he may have referred to more than the 1662 version. Similarly grants in letters patent to the King's Printer have over the centuries referred to such descriptions as "all Books of Common Prayer",[88] and "any Books of Common Prayer"[89] which suggest that the Crown purported to claim rights in earlier versions of the work. However, although these versions were once authorised forms of worship, they have long since ceased to be and it is extremely doubtful whether the Crown may validly claim these works to be within the modern scope of the prerogative since the duty on the Crown which lies at the basis of the prerogative cannot be present in respect of the works.

---

a species, that the public ought to have a security ...' Lord Eldon LC in *Universities of Oxford and Cambridge v Richardson*.

[84] Edwyn Birchenough, 'The Prymer in English', *The Library* Fourth Series, Vol XVIII (1937-1938), 177, 194. According to the author it seems probable that the Prymer, either in Henry VIII's version, or according to the Book of Common Prayer, was rarely printed after 1585 (194).

[85] Ibid, 194.

[86] Ibid.

[87] *Halsbury's Laws of England* (4th ed.) Vol 14 (London, 1975), 489, 490, 493-495.

[88] Grant of 19 December 1715 to John Baskett of the office of King's printer cited in *Eyre and Strahan v Carnan* (1781) Bac Abr 7th ed, Vol VI (London, 1832), 509.

[89] Letters patent to the Queen's printer of 29 May 1901 in *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd* [1964] Ch 736, 738-740.

The extent of the Crown's duty as supreme head of the Church of England to print and publish works upon which the established religion is founded is particularly evidenced in *Eyre and Strahan v Carnan*.[90] In that case the plaintiffs, who were the King's Printer, relied upon a patent which purported to give them the right to print "all Bibles and Testaments in the English language; and all Books of Common Prayer and Administrations of the Sacraments, and other Rites and Ceremonies of the Church of England...and of all other books which he, [the King] his heirs or successors, should order to be used for the service of God in the Church of England".[91] The defendant, without the permission of the plaintiffs, printed a Form of Prayer which had been ordered by King George III to be read in all churches on 4 February 1780. Skinner LCB held that this Form of Prayer fell within the patent and the prerogative of the Crown, and granted the King's Printer an account of profits in relation to the sale by the defendant of copies of the work. It is interesting to note that the Crown included words of similar import to the above in letters patent to the current Queen's Printer.[92]

B Legal Works

Prior to the commencement in England of the *Copyright, Designs and Patents Act* 1988 (UK), which provides specifically that Crown copyright rather than the Crown's prerogative right subsists of every Act in Parliament, the Crown's right to print and publish Acts of Parliament and their abridgments was well established. It has previously been referred to. It should be pointed out, however, that there is no suggestion in any of the cases that the prerogative right extended or extends to Bills before Parliament nor has the Crown ever made such a claim. Bills are not Acts of state which, to use the language of Skinner LCB, determine a subject's civil obedience,[93] and do not therefore fall within the rationale behind the right. Other Acts of state of similar description which fall within the rationale of the prerogative are royal proclamations, Orders in Council and instruments made under an Act such as Regulations and Ordinances, and all must, in principle, be considered to be encompassed by it.[94]

---

90 (1781) Bac Abr 7th ed, Vol VI, 509.

91 Ibid.

92 Refer *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd* [1964] Ch 736, 739, 740.

93 *Eyre and Strahan v Carnan* (1781) Bac Abr 7th ed, Vol VI, 509, 511.

94 Willes J in *Millar v Taylor* (1769) 4 Burr 2303, 2329 (98 ER 201, 215) took the view that Acts of Parliament, Orders of Council, Proclamations 'and such like' fell within the right. The listed Acts of State would fall within this scope. See also Yates J in the above case (4 Burr 2303, 2381, 2382: 98 ER 201, 243) and Lord Eldon LC in*Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 689, 704 (31 ER 1260, 1267) who appears to have accepted the view that Proclamations and other 'Acts of State' (apart from statutes) fell within the right. The following commentators have expressed similar views: Chitty, op cit, 239 - the right encompassed 'Acts of Parliament, proclamations, and orders of council'; Blackstone, op cit, Book II, 410 was of the same view; Lahore, op cit, 11 citing *Millar v Taylor* included Acts of Parliament, Proclamations, Orders in Council, and 'similar State ordinances'.

A more controversial area, however, is that of the Crown's right over what have been termed "law books". The privilege in law books is the earliest example of a "class monopoly" in printing grants and various grants were made over the period 1553 to 1788, when the last one was made for a term of 40 years.[95] The precise meaning of the term "law book" is not clear, a matter recognised in the case of *Roper v Streater*,[96] and the grants have not all been couched in the same wording. The first recipient of a grant, Richard Tottel, who was licensed to print "all and almaner of bokes of our Temp [or] all lawe called the comon lawe"[97] was able to list 25 legal works in his stock, apart from year books, which he considered fell within his grant. Included in those works were Brooke's *Newe Cases* and Littleton's *Tenures*.[98] Later, Thomas Wight who, with Bonham Norton, purchased the law patent of Charles Yetsweirt in respect of "the bookes of the laws of this realme" in 1599, published before his death in 1609 textbooks and books of practice, case law and precedents, statute law, abridgments and source books. These works included *A Direction or Preparative to the Study of the Lawe* by William Fulbecke, *A Profitable booke treating of the lawes of England* by John Perkins, *A Collection of Statutes* edited by William Rastell, Coke's *Reports* and Lambarde's work *Eirenarcha*.[99]

In the first case dealing with this right, *Stationers v Patentees about the Printing of Roll's Abridgment*[100] the House of Lords held that a patent to print "all law-books that concern the common law" included within it the right to print Roll's Abridgment

---

95 Great Britain, Public Record Office, *M.S.S. Calendars and Indexes to the Patent Rolls: 1 Elizabeth I - 7 William IV,* (London, 1965), (microfilm publication) 90, (179 Patent Roll):

> 29 George III ‘20th day of August Doth Give and Grant unto Andrew Strahan and William Woodfall the Privilege of Printing all Law Books touching the Common Law of England for forty years from the 30 Day of April 1789’.

The manuscript copy of the grant expresses it as ‘full power Licence Privilege and sole Authority of printing or causing to be printed ALL and all manner of Law Books whatsoever they may be which in any manner or wise touch or concern the Common Law of that part of this Our Kingdom of Great Britain called England’. Fifth Part of Patents in the Twenty Ninth Year of King George the Third (5 /29 Geo 3d), National Archives (UK) Kew, Surrey, England.

96 (1672) Bac Abr 7th ed, Vol VI (London, 1832) 507.

97 Dated 12 April 1553. The wording is that described in L Rostenberg, ‘The Preservation of the English Legal Tradition: Thomas Wight, 'Patentee in Law Books'‘, *Literary, Political, Scientific, Religious and Legal Publishing, Printing and Bookselling in England 1551-1700: Twelve Studies*, Vol I (New York, 1965), 23. The relevant Patent Roll abstract reads,

> ‘Licence and privilege to Richard Tathill of London, 'stacioner and printer' to have the sole printing for seven years from this date of 'almaner bokes of oure temporall lawe called the Common lawe' for which no other person has at present any special privilege, provided that 'the same bokes be allowed and adjuged mete to be imprinted either bi one of the justeces of the lawe or two serjantes or three apprentices of the lawe whereof th'one to be a reder in Courte'. By p.s.’ (*Calendar of Patent Rolls: Edward VI* Vol V (1547-1553) (London, 1926), 47.

98 WW Greg, *Some Aspects and Problems of London Publishing Between 1550 and 1650* (Oxford, 1936), 99, and Arber, op cit, Vol II, 419. Tottel received two subsequent grants on 5 May 1556 and 12 Jan 1559 in respect of books of the common law: *Calendar of Patent Rolls: Philip and Mary* Vol III (1555-1557) (London, 1938), 18, and *Calendar of Patent Rolls: Elizabeth I* Vol 1. (1558-1560) (London, 1939), 62, respectively.

99 Rostenberg, op cit, 40, 43, 44.

100 (1666) Carter 89 (124 ER 842).

which was in the nature of a digest of statute and case law as well as parliamentary records, and not merely a topical collection of cases. In the second major case, *Roper v Streater*, a grant to the defendant of the right to print law books "touching or concerning the common or statute law" was regarded as including a right to print the third part of Croke's *Reports*, a right which the plaintiff had specifically purchased from the executors of Mr Justice Croke. The House of Lords in making its decision reversed the decision of the Court of Common Pleas which had been made on grounds which included that the wording of the grant was "loose and uncertain". However, the House of Lords hardly clarified the scope of the grant, the report of the case merely indicating that it took the view that the words in the grant "were to be taken secundum subjectam materiam, and not to be extended to a book containing a quotation of law, but where the principal design was to treat on that subject".[101]

The Crown's right over law books was accepted by the courts in *Company of Stationers v Seymour*[102] and *Company of Stationers v Partridge,*[103] although both those cases concern the pirating of almanacks. It appears also to have been accepted by one judge in *Millar v Taylor*.[104] However, in the light of the decision in *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd* which held that the prerogative did not cover the right to print, or authorise others to print, any works the printing of which would be an infringement of copyright, the modern scope of the right over law books cannot be considered to cover secondary sources such as original textbooks, or original headnotes, annotations, abridgments or compilations of cases prepared by a reporter, as well as published editions of law reports, the printing of which would be an infringement of copyright. To the extent that the Crown’s right over law books may still exist, it can only do so in relation to the written judgments of its judges.[105]

---

101 (1672) Bac Abr 7th ed, Vol VI (London, 1832) 507.

102 (1677) 1 Mod 256, 257, 258 (86 ER 865, 866). In this case the court took the view that almanacks were a stronger case than that of law books for being subject to the prerogative, but appears to have accepted the rationale that law books were ‘matters of State... [which] were never left to any man's liberty to print that would’.

103 (1712) 10 Mod 105, 107 (88 ER 647, 648). The court stated, ‘the patent for the sole printing of law books is not now to be shaken, having had the sanction of the House of Lords’, (apparently a reference to *Roper v Streater*).

104 Though subject to the expression of some doubt: refer judgment of Willes J at 4 Burr 2303, 2315, 2316, 2329 (98 ER 201, 208, 215).

105 The right would encompass written reasons for a decision of a judge and probably formal court orders. The right to print and publish a verbatum report of an oral judgement not delivered from script would probably vest in the reporter - refer *Walter v Lane* [1900] AC 539 and G Sawer, *Copyright in Reports of Legal Proceedings* 27 ALJ. 82, 84-86 (discussed 250, 465). As to edited reports, refer Lahore, op cit, p 100.
In a sequel article in this Review, it is argued that copyright does not subsist in written judgments. Even if copyright co-existed with the prerogative right, the printing of judgments under the authority of, or by the Crown, would not be an infringement of copyright because:
(a) in England, assuming copyright was held by the judge as author, there would be an implied licence to the Crown to print and publish or to authorise others to print and publish such judgments, or
(b) in Australia, any copyright would vest in the Commonwealth or State.

By virtue of the prerogative the Crown is the source and fountain of justice, from whom all jurisdiction is ultimately derived.[106] Although this jurisdiction is invariably now statute-based, judges still derive their authority from the Crown, by commission required by law, and judicial power is still deemed to be exercised in the Queen's name.[107] Because judges in writing reasons for their decision are exercising that judicial power, in principle it follows that rights in judgments should be held by the Crown. Further, the nature of judgments, that is, their role in formulating the law, is such that it is arguable that the Crown has a duty to superintend their publication to ensure they are disseminated in an accurate and authentic form in the same way it has in relation to statutes. However, the Crown has displayed little direct evidence of a duty on it to do so. Although there is some evidence that the state was involved in the production of some reports in the reign of James I,[108] law reporting has, over the centuries, been almost entirely left to members of the legal profession and private publishers.

There have, however, arguably been some indirect manifestations of such a duty, exercised through the Crown's judicial officers. Licensing by judges of "books of the common law" was required under the Star Chamber decrees of 1586 and 1637 and this regime continued under the *Licensing Act* of Charles II after the Civil War.[109] Even after the *Licensing Act* lapsed in 1694, the practice of obtaining judicial approval for reports of cases continued until the early part of the 18th century.[110] As the Report of the Law Reporting Committee points out, the requirement in s 2 (in fact, s III), of the *Licensing Act* 1662 that "all books concerning the common laws of this realm, fhall be printed by the fpecial allowance of the lord chancellor, or lord keeper of the great feal of England for the time being, the lords chief juftices, and the lord chief baron for the time being, or one or more of them, by their, or one of their appointments" was interpreted to cover the publication of law reports long after the

106 Bac Abr 7th ed, Vol VI, (London, 1832) 'Prerogative (D)', 428.

107 In legal contemplation, the Sovereign is deemed always to be present in court (W Blackstone, *Commentaries on the Laws of England* 18th ed, Book 1, 269); '... all jurifdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pafs under his feal, and are executed by his officers', Blackstone, op cit, 1st ed, (1765) Book 1, 257. Refer also *Halsbury's Laws of England*, 4th ed., Vol 8, (London, 1974), 603.

108 Great Britain, Lord Chancellor's Dept, *Report of the Law Reporting Committee* (March 1940) (London, 1940), 6. There have been claims made in some cases on the prerogative that the Crown's prerogative right specifically included 'year books' - refer, for example, to the argument of counsel for the defendant in *Basket v University of Cambridge* (1758) 1 Black W 105, 114 (96 ER 59, 62) that they fell within the prerogative right on the basis of 'property by purchase' as it was claimed that they were made by reporters paid by the King. Willes J in *Millar v Taylor* (1769) 4 Burr 2303, 2329 (98 ER 201, 215) in fact accepted that they fell within the right. It is certain that year books were published by law book patentees (for example, Tottel) but the claim that they were made by reporters paid by the King is based on legend. (Refer *Report of the Law Reporting Committee,* above, 6, W. Holdsworth, *A History of English Law*, (3rd ed.) Vol II (London, 1923), 525-556 (534 particularly)).

109 Arber, op cit, Vol II 807-812, Decree of 1586 (s.4); Vol IV 529-536, Decree of 1637 (s.III); *Licensing Act* 1662 (13 and 14 Car II c.33, s.III).

110 Report, op cit, 6, 7. The Report points out that the Act was repealed by the *Statute Law Revision Act* 1863, but fails to mention that it had already lapsed in 1694 (7).

Act lapsed, and "a number of volumes of reports published in the last third of the 17th and the early years of the 18th century bear an imprint allowing their printing and publishing". This role continued as a correcting and revising role and ultimately assisted in the development of authorised reports in the late 18th century.[111] The role was confirmed in the establishment of the Incorporated Council of Law Reporting[112] and has continued until the present day.

While this area of the law is not free from doubt, the better view would appear to be that the Crown's prerogative right encompasses the judgments of its judicial officers and that this right represents the last vestiges of the law book monopoly which it exercised until the 19th century. It should be pointed out that the absence of evidence relating to the grant of monopoly rights over law books in more recent times is not determinative of the existence of the prerogative right. Even if the grant of monopoly rights was the only evidence relevant to this question, there is no doctrine that a prerogative right may cease to exist merely because it is not used.[113]

C Other Works

Courts took the view for about a century after the Restoration that almanacs were encompassed within the prerogative largely on the basis, which was erroneous, that they were derived from the calendar that was printed with the Book of Common Prayer (see *Company of Stationers v Seymour*)[114]. Almanacs were popular, ephemeral and therefore lucrative works which "by the end of the sixteenth century, had become a necessary annual publication which was consulted by all classes of the community ...".[115]

---

[111] W Holdsworth, *A History of English Law,* Vol XII, 112, 117 and Vol XIII, 424-426.

[112] A recommendation of the Law Amendment Society in 1853 rejected the idea of a voluntary association amongst the profession for the publication of *Reports* but instead advocated the creation of a Board, appointed by the Crown, to superintend the production and publication of *Reports*. It pointed out that it was as much the duty of the state to undertake this work, as it was its duty to undertake the work of publishing the statutes and Parliamentary papers. (Holdsworth, op cit, Vol XV (London, 1965), 251). However the notion of a voluntary association advocated by W.T. Daniel in 1863 ultimately led to the formation of the Council composed of the law officers, representatives from Lincoln's Inn and the Inner and Middle Temple and the Law Society, and the Council induced nearly all the authorized reporters to take service under it. As Holdsworth states, 'The judges were asked to approve the reporters appointed, to permit the editors and reporters to have access to their written judgments, to revise their unwritten judgments before publication, and that they '[would] recognize the editors and reporters as members of the Bar exercising a professional privilege for a public object, under responsibility, through the Council, to the Judges, the Bar and the Profession at large" (Holdsworth, op cit, Vol XV, 253, 254 quoting W.T.S. Daniel, *The History and Origin of the Law Reports,* 276, n.v).

[113] *Burmah Oil Company v Lord Advocate* [1965] AC 75, 101 (HL); *Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 689, 710 (31 ER 1260, 1270); *Toy v Musgrove* (1888) 14 VLR 349, 378. *Contra, State of South Australia v State of Victoria* (1911) 12 CLR 667, 703;*Wensleydale Peerage Case* (1856) 5 HLC 958, 961, 962 (10 ER 1181,1183).

[114] (1677) 1 Mod 256 (86 ER 865).

[115] EF Bosanquet, 'English Seventeenth-Century Almanacks', *The Library,* Fourth Series, Vol X No 4, (March 1930) (London, 1930), 361, 362.

The Crown's first privilege in them was granted in 1571[116] although the earliest copies now extant date from the 12th century. In 1603 the Company of Stationers acquired the monopoly by a grant from James I which was expressed to be "for ever"[117] and these works formed the basis of what become known as the Company's English Stock. Subsequently the privilege was also granted to the Universities of Oxford and Cambridge, but most early English almanacs were published by the Company, and their popularity continued throughout the 17th and 18th centuries and were often the subject of piracy. The Stationers Company asserted its right to the monopoly in a number of reported cases and it was upheld in *Company of Stationers v Seymour* and *Company of Stationers v Lee*,[118] but in 1775 doubts about the validity of the right, which had been evident in *Company of Stationers v Partridge*,[119] were ultimately resolved in *Stationers' Company v Carnan*[120] when the Court of Common Pleas held that the Crown did not have a prerogative or power to make such a grant to the plaintiff exclusive of any other or others. Crown grants in respect of almanacs thereafter ceased.

In *Millar v Taylor* there are references in the judgments of Lord Mansfield C.J. and Willes J. to the Crown's rights in "the Latin Grammar".[121] Both judges considered this work to be the property of the Crown on the basis that the Crown had paid for the compiling and publishing of it. The claim was also mentioned by counsel for the defendant in *Basket v University of Cambridge*.[122] The Latin Grammar was a school textbook vulgarly known as Lily's Latin Grammar and was prescribed during several reigns as the only grammar to be taught in schools, in order to avoid problems associated with a diversity of grammars. Although it was produced by a committee appointed by King Henry VIII, from a number of works including those of William Lily and first authorised by the King in c1540,[123] and was once the subject of the grant of monopoly rights, the nature of the work is such that it cannot, in the light of authority, be within the modern scope of the prerogative right.

Reference has already been made at the beginning of this article to the Crown's practice of granting privileges in a wide variety of works apart from those in which

---

116 *Calendar of Patent Rolls: Elizabeth I*, Vol V (1569-1572) (London, 1966), 240 to Richard Watkyns and James Robertes of London, 'starcyoners' for 10 years.

117 Refer grants of 29 October 1603 (Arber, op cit, Vol 111, 42) and 8 March 1615 (quoted in part in *Stationers' Company v Carnan* (1775) 2 Black W 1004 (96 ER 590, 591).

118 (1681) 2 Show KB 258 (89 ER 927).

119 (1712) 10 Mod 105 (88 ER 647) where the Court of King's Bench failed to give an opinion, and ordered the case 'to be spoke to again' to enable the Company of Stationers to show the Crown had some special interest in the printing of almanacs. Judgment was never given in the case.

120 (1775) 2 Black W 1004 (96 ER 590) (CP).

121 Refer 4 Burr 2303, 2329 (Willes J) (98 ER 201, 215); 4 Burr.2303, 2405 (Lord Mansfield CJ) (98 ER 201, 256).

122 (1758) 1 Black W 105,116 (96 ER 59, 63); 2 Keny 397, 412 (96 ER 1222, 1228).

123 F Watson, 'The Curriculum and Text-Books of English Schools in the First Half of the Seventeenth Century', *Transactions of the Bibliographical Society,* Vol VI (1900-1902), (London, 1903), 159, 182. See also generally CG Allen, 'The Sources of 'Lily's Latin Grammar'. A Review of the Facts and Some Further Suggestions', *The Library*, Fifth Series, Vol IX (London, 1954), 85-100.

courts have considered the Crown has special duties and rights. The practice of petitioning for, and the making of, such grants which began in the 16th century was well established by the 18th century and was similarly observed in other European jurisdictions. While grants were originally supported by the Star Chamber decrees of 1585 and 1637[124] and their validity was further recognized by the *Licensing Act* 1662,[125] the *Statute of Anne* provided in s IX, that nothing in the Act should be construed to "prejudice or confirm any right that ... any perfon or perfons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed".[126]

Crown grants made after the *Statute of Anne* which were not religious or legal in character include the right to print and publish Newton's *Philosophiae Naturalis Principia Mathematica*[127] and the vocal and instrumental music of J C Bach[128] and Handel.[129] These grants were consistently phrased and differed from earlier grants in a number of respects. They were all expressed to relate to the printing and publication of works and were all made for a period of 14 years, the principal term of protection of the *Statute of Anne*, and all purported to be consistent with that Statute by being expressed" ... agreeable to the Statute in that behalf made and provided ..." or with words similar in effect. Some grants specifically referred to the right and title of the

---

124 For the Decree of 1586 refer Arber, op cit, Vol II, 807, 810. Section 4 provided, inter alia, that no person 'shall ymprynt or cause to be ymprinted any book, work or coppie against the fourme and meaninge of any Restraynt or ordonnaunce conteyned or to be conteyned in any statute or lawes of this Realme ... or against the true intent and meaninge of any Letters patentes, Commissions or prohibicons under the great seale of England ...'
For the Decree of 1637 see Arber, op cit, Vol IV, 529, 531. Section VII provided:
'That no person or persons shall within this Kingdome, or elsewhere imprint, or cause to be imprinted, nor shall import or bring in, or cause to be imported or brought into this Kingdome, from, or out of any other His Maiesties Dominions, nor from other, or any parts beyond the Seas, any Copy, book or books, or part of any booke or bookes, printed beyond the seas, or elswhere, which the said Company of Stationers, or any other person or persons haue, or shall by any Letters Patents, Order, or Entrance in their Register book, or otherwise, haue the right, priuiledge, authoritie, or allowance soly to print...'

125 13 and 14 Car II, c.33, s.XXII.
'Provided alfo, That neither this act, nor any thing therein contained, fhall extend to prejudice the juft rights and priviledges granted by his Majefty, or any of his royal predeceffors, to any perforn or perfons, under his Majefties great feal, or otherwife, but that fuch perfon or perfons may exercife and ufe fuch rights and priviledges as aforefaid, according to their refpective grants; anything in this act to the contrary nothwithftanding'.

126 8 Anne, c.19, s.IX. This section was also relied upon by those who claimed that there was a common law right to print and publish works in perpetuity after publication which was not extinguished by the *Statute of Anne*, a right upheld in *Millar v Taylor* but subsequently overruled in *Donaldson v Beckett* (1774) 2 Bro PC 129 (1 ER 837), 4 Burr 2408 (98 ER 257).

127 *Hanoverian State Papers Domestic 1714-1782*, Part II (1722-1727) (Sussex, 1978), SP 35/61, No. 70; March 25, 1726, Licence to William and John Innys, booksellers.

128 CS Terry, *John Christian Bach*,(2nd ed, London, 1967), 78 (text of grant).

129 OE Deutsch, *Handel: A Documentary Biography*, (London, 1955), 105, 106 (14 June, 1720). Subsequent grants in respect of Handel's works were made to John Walsh on 31 October 1735 (ibid, 488, 489) and 19 August 1760 (ibid, 844).

copy having vested in the grantee, that is, a reference to the rights given by the Statute[130] or as claimed at common law.

There are a number of explanations for the continuation of these grants. There were a number of uncertainties surrounding the scope of the *Statute of Anne* and it was natural for booksellers and authors, particularly in view of doubts expressed by courts about their claims at common law to print and publish works after publication,[131] to petition the Crown for grants of exclusive rights in circumstances where their rights or acquired rights were not clear under the Statute. For example, it was not settled until the case of *Bach v Longman* in 1777[132] that musical compositions were protected by the Statute. In that case Lord Mansfield held that the Act extended to "books and other writings" which were not confined to language or letters but included the signs and marks of music. Similarly it was also uncertain whether the Act extended beyond merely "learned works", since it was expressed to be "An act for the encouragement of learning, by vefting the copies of printed books in the authors or purchafers of fuch copies". In *Pope v Curl* [133] it was argued unsuccessfully that a collection of letters from Swift, Pope and others on familiar subjects and about the health of friends was not properly called a learned work. Although this decision may have dispelled a fear in relation to that particular work, a number of later grants may be explained on this general basis, such as those relating to a *Court and City Register* [134] *The Military*

---

130 Refer grant to Stephen Austin of 8 January, 1741/2 for 'A new hiftory of the holy Bible, from the beginning of the world to the eftablifhment of Chriftianity, etc' in 'Campbell, Hay: Information for A.D. and J. Wood, Booksellers in Edinburgh ...', *The Literary Property Debate, Six Tracts 1764-1774*, (New York, 1975), Item B, 1, 2. (one of the Garland Series '*The English Book Trade 1660-1853'* (ed. Stephen Parks)).
Refer also 'Rae, Sir David, Lord Eskgrove: Information for Mess. J. Hinton ... '*The Literary Property Debate: Six Tracts 1764-1774,* (New York, 1975), Item D, 24, 25, where the author states, 'it is not the patent which creates the right, but it only tends to fecure and preferve it, by a public prohibition of encroachments upon it' (24), and later arguing that the royal grants recognise a common law right in authors states,'... it appears, that Mr Auftein did then pofitively and truly affert his having obtained *the fole right and title of the copy of the faid work*, antecedent to his application to his Majefty; and he only demanded the aid of the royal licence, during fuch time as his Majefty pleafed to grant it, for the better publication of his right, and preventing others from interfering in his enjoyment of it' (25). It is possible that the reference to 'the sole right and title of the copy of the faid work' is a reference to the right given by the *Statute of Anne* and not as claimed at common law. No examples of grants containing this or similar phrases have been found in respect of works which were outside the period of protection of the Statute.

131 Refer note 126. Cases prior to *Millar v Taylor* concerning the common law right to print and publish in perpetuity after publication are discussed by Willes J in that case at 4 Burr 2303, 2325-2328 (98 ER 201, 213, 214), and in a number of secondary sources, for example, TE Scrutton, *The Laws of Copyright*, (1st ed, London, 1883), 99, 100, and Patterson, op cit, 158-168. Doubts about the right began to be evident from about 1750.

132 2 Cowp 623 (98 ER 1274) (KB).

133 (1741)2 Atk 342 (26 ER 608) (Ch).

134 Great Britain, Longman and Co, *Calendar of Home Office Papers 1760-1765,* (London, 1878), 500. Warrant of 29 November 1764 to John Rivington, bookseller (for 14 years). The Home Office Papers are herein after merely cited as 'Calendar of Home Office Papers'.

Register, [135]*Different Marginal indexes or classes, to be printed with a dictionary* [136] and *The Complete English Traveller* [137]. Furthermore, the *Statute of Anne* provided in s VII that it did not extend "to prohibit the importation, vending, or felling of any books in Greek, Latin, or any other foreign language printed beyond the feas" and there is strong circumstantial evidence that the printers William and John Innys obtained a privilege in 1726 in respect of Newton's *Principia*, of which all principal editions were in Latin, in order to secure protection for the third edition of that work against unauthorised copies printed overseas. The second edition of Newton's *Principia* had apparently been pirated and printed in Amsterdam as "Editio Ultima" in 1714 and again in 1723.[138] The language of the grant to the printers purported to provide that protection:

> ... Strictly forbidding all Our Subjects within Our Kingdoms and Dominions to reprint the fame ... or to Import, Buy, Vend, Utter or Distribute any Copies thereof, Reprinted beyond the Seas, during the aforesaid Term of 14 Years, without the Consent or Approbation of the [said] Wm. Innys and John Innys ... Whereof Our Commifsioners and other Officers of Our Customs, the Master Warden and Company of Stationers are to take Notice, that due obedience be rendred thereunto.[139]

This lack of adequate statutory protection was remedied in 1739 when an Act (12 Geo. II, c. 36) prohibited the importation from abroad of any book first written or printed in Great Britain.

Similarly, since the *Statute of Anne* applied only to Great Britain, privileges may also have been sought in an attempt to secure protection against piracy in Ireland and the American colonies in which it was rife, since grants of such privileges were expressed to apply to all the kingdoms and dominions of the Crown.[140] There are also some

---

135 *Calendar of Home Office Papers 1766-1769*, (London, 1879), 270. Warrant of 9 November 1767 to John Almon, bookseller (for 14 years).

136 *Calendar of Home Office Papers 1770-1772,* (London, 1881), 165. Warrant of 18 July 1770 to William Hooper, Gentleman (for 14 years).

137 Ibid, 622. Warrant of 7 May 1772 to John Cooke, bookseller (for 14 years).

138 IB Cohen, *Introduction to Newton's 'Principia'*(Cambridge, 1971), 256-258; *The National Union Catalog Pre-1956 Imprints* (London, 1975), Vol 417, 468 (cols 1,2); *British Museum General Catalogue of Printed Books* (London, 1963), Vol 171, cols 325, 333.

139 Refer note 127 and also A Koyre and IB Cohen (ed), *Isaac Newton's Philosophiae Naturalis Principia Mathematica*: *The Third Edition (1726) with Variant Readings* Vol 1 (Harvard, 1972), 3, for the full text of the privilege as printed in the third edition of the '*Principia*'.

140 Contemporary concern about book piracy in Ireland is evidenced in 'Campbell, Hay: Information for AD and J Wood, Booksellers in Edinburgh ...', *The Literary Property Debate: Six Tracts (1764-1774)* (New York, 1975), Item B, 59, 60 and 'Richardson, Samuel: The Case of Samuel Richardson, of London, Printer...', *English Publishing, the Struggle for Copyright, and the Freedom of the Press: Thirteen Tracts 1666-1774* (New York, 1975) Item L, 3. (Both are pamphlet reprints which are part of the Garland Publishing Series - *The English Book Trade 1660-1853*). There have been statements in some American works that the *Statute of Anne* applied to the American colonies. LE Abelman and LL Berkowitz in 'International Copyright Law', *The Complete Guide to the New Copyright Law* (New York, 1977), 330, state that the *Statute of Anne* as well as English common law extended to the American colonies citing as authority F. Crawford, 'Pre-Constitutional Copyright Statutes' (1975) 23 Bull Cr Soc 11, 12. That author states, 'of course, since the laws of Great Britain applied throughout its empire,

recorded instances of privileges being obtained in an attempt to extend protection for a work beyond the period of protection which the work enjoyed under the *Statute of Anne.*[141]

---

printers and publishers in Usher's time [1672] were protected by English common law copyright and later by the British Copyright Act of 1710, which policed violations of intellectual property rights'. The authority cited in support of this statement was J Shulman, 'The Battle of the Books Revived -Copyright Law Revision in the Year 1971'(1977) 17 Bull Cr Soc, 397, 404 who states that 'in the half century which followed the adoption of the Statute of 1710, no copyright legislation appears to have been necessary in the colonies since the rights of authors were undoubtedly governed by the statute which had been enacted in Great Britain'. No authority was cited in support of this conclusion.
The principles governing the reception and status of English law in the 'settled colonies' were set out in a Privy Council Memorandum of 9 August 1722 (Case 15 - *Anonymous*, 2 Peere Williams 75: 24 ER 646). In relation to statutory law, the Memorandum stated that 'after such country is inhabited by the English, acts of Parliament made in England, without naming the foreign plantations, will not bind them'. This position is in accord with that position generally adopted by American colonial courts and later by the Supreme Court of the United States, that is, that no post-settlement British statute applied in the American colonies unless it operated by paramount force or by an Act of a local colonial legislature: refer *Morris's Lessee v Vanderen* (1782) 1 Dallas 64, 67 (1 US 62, 65); *Cathcart v Robinson* (1831) 5 Peters 264, 280 (30 US 170, 180); *Tayloe v Thomson's Lessee* (1831) 5 Peters 358, 368 (30 US 229, 236). There is, however, occasional evidence of application by long usage (refer, *Respublica v Mesca* (1 Dallas 73, 75: 1 US 72, 73) and generally JH Smith, *Cases and Materials on the Development of Legal Institutions* (St. Paul, 1965), 448-449). The *Statute of Anne* did not either expressly or impliedly refer to any of the colonies or Ireland. Nor was it adopted by local enactment in any of the colonies. In relation to the common law, Story J in the United States Supreme Court decision of *Van Ness v Pacard* (1829) 2 Peters 137 (27 US 85) pointed out that early British settlers did apply generally the principles of the common law, but not without certain reservations and exceptions, based upon local attitudes and conditions. As to the recognition of the claimed common law right of authors in published works, refer GT Curtis, *A Treatise on The Law of Copyright* (Boston, 1847), 74-81, who stated that a common law right was 'tacity assumed and acted upon' in the American colonies and that there was evidence of such a right in several of the States before the adoption of the U.S. Constitution. He took this view despite the decision of the Supreme Court (by a majority of three to two) in *Wheaton v Peters* (1834) 8 Peters 591 (33 US 374) that the English common law right did not exist by the common law of Pennsylvania and that the first federal copyright Act of 1790 did not sanction an existing perpetual right in an author in his works but created a right for a limited time.

[141] Refer, for example, to 'Information for J Robertson..., Defender; against J Mackenzie...and others...', *The Literary Property Debate: Seven Tracts 1747-1773* (New York, 1974), Item D, 1, 2. Pages 1 and 2 record how Mr Ruddiman, a Latin teacher, compiled and published a book entitled 'The Rudiments of the Latin Tongue' and also a 'Latin Grammar', but 'neither at that time applied for any patent to exclude others from printing thefe books, nor did he follow the method pointed out by the Ftatute 8 vo Annae, which had paffed a few years before, and in virtue whereof he might have vefted in himself, under certain conditions, a temporary exclufive right to the publication and profits of his books'. However the information records that 'when advanced in years' he 'began to think of making fome profit to his family by an exclufive fale of them' and he applied to the King in 1756 for a 'patent' in respect of his two books setting forth their merits, which he subsequently received for a term of fourteen years from 5 May 1756. The patent was expressed 'fo far as may be agreeable to the ftatute in that cafe made and provided'. The privilege was apparently respected, the defendant in the action having pirated the work after the privilege's expiration (p 3). Refer also 'Rae, Sir David, Lord Eskgrove: Information for J Mackenzie and others, trustees appointed by Mrs A Smith...' *The Literary*

Thus the practice of petitioning for privileges which had been long established by the 18th century was obviously regarded as an additional means of seeking protection for works over and above those rights provided by statute and as claimed at common law. Although the privileges were almost always printed with the works to which they related[142] and would have carried substantial prestige and authority, they were, in the light of common law authority such as *The Company of Stationers v Partridge* and *Basket v The University of Cambridge* at the time, invalid, and doubts about their validity were certainly expressed in some contemporary documents.[143] However, unpublished records show that the grants continued until the early 19th century[144] and this alone suggests that regardless of their legal validity, they may have been reasonably efficacious.

Property Debate: Seven Tracts 1747-1773 (New York, 1974), Item E, 2, 3. (against J Robertson, in the same action).

[142] Refer, for example, to A Koyre and IB Cohen (ed) op cit, Vol I, 3 (note 139) and W Beawes, *Lex Mercatoria Rediviva: or, the Merchant's Directory* (4th ed) (London, 1783) ii.

[143] Doubts had been expressed well prior to the *Statute of Anne* , for example, in the debate over the renewal of the *Licensing Act* 1662. The Journal of the House of Commons records that the Commons could not agree to its renewal on grounds including 'Becaufe that Act gives a Property in Books to fuch Perfons, as fuch Books are, or fhall be, granted to by Letters Patents, whether the Crown had, or fhall have, any Right to grant the fame, or not, at the time of fuch Grant'. (Great Britain, *Journal of the House of Commons* Vol XI, 306 (17 April 1695). These reasons were accepted by the House of Lords on 18 April 1695 and the Act lapsed (Great Britain *Journal of the House of Lords* Vol 15, 545, 546).

[144] Unpublished records in the National Archives (UK) Kew, Surrey, show that grants continued until at least 1810 when Thomas Christopher Banks was granted, by Geo III's command, the 'sole Right and Privilege to republish and vend the said New Editions of Dugdale's Baronage' for the term of 14 years on 19 April 1810. HO 38/13, National Archives (UK), Kew, Surrey England.