

# Current Copyright & Associated Problems and the history of Law Reporting in the UK

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## Points to cover ...

- Provide overview of copyright of case law as a problem in UK – primarily of interest to civil lawyers.
- Discuss what BAILII may do to resolve this issue.
- Suggest that the time has come for an idea from the 1970s – a National Law Library.

# Case Law is the 'Real Law'

- Legislation is sometimes viewed as the main body of law.
- This is incorrect, since in common law jurisdictions, it is the interpretation of legislation by the judges which matters. (To Bentham: The age-old method of training dogs by waiting until they do what they are to be forbidden to do and then kicking them.)
- This is why access to case law is so important.

# Case law can have a long life ..

- In common law countries, precedent is never properly codified, so prior cases remain important sources for understanding law.
- They may last as precedents for several centuries, or they may be ignored immediately. They may even be important but ignored (if other judges don't approve of them).

## But access has been difficult ...

- Neither judges nor most courts felt responsible for the promulgation of case decisions.
- Why? Because:
  - Underfunding of courts;
  - No sense of ‘public need’ for access;
  - A privatised system had grown up since 12<sup>th</sup> century to deal with these.

# Private systems and private property

- The publishers/reporters view case reports as being two properties, both of which they own:
  - The headnote (in red, right).
  - The text of the judgment as made by the judge (in blue).
- All agree that the headnote is the IP of the publisher, but not all agree that the judgment by the judge is.

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QUEEN'S BENCH DIVISION.

[1900]

1899

Dec. 6, 21.

BROWN v. PETO.

*Mortgage—Lease by Mortgagor in Possession—Mansion-house, Furniture, and Sporting Rights—Foreclosure—Lease binding on Mortgagees—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 18.*

A mortgagor of land while in possession leased for fourteen years the mortgaged mansion-house, together with the furniture and with sporting rights over the whole of the mortgaged land. The mortgagees having foreclosed:—

*Held*, that the lease was valid as against the mortgagees under s. 18 of the Conveyancing Act, 1881.

ACTION tried before Bigham J. without a jury.

The following statement of facts taken from the written judgment of the learned judge.

“This is an action to recover possession of a house and premises known as Knowlton Court, and for a declaration that the defendant never had and has not any right of shooting or sporting over the estate known as the Knowlton estate, and for mesne profits.

The plaintiff brings his action for possession on the grounds that the defendant was a yearly tenant to the plaintiff of Knowlton Court, and that the tenancy was duly determined by notice before writ, and he brings his action for the declaration as to the sporting rights on the ground that the defendant claims without title to exercise such right.

The defence is that the house and the sporting rights are both held by the defendant under a lease for fourteen years granted by one Lewis D’Aeth, and dated November 26, 1890, by which lease it is alleged the plaintiff is bound.

The question is whether that lease is binding on the plaintiff.

The facts were not in dispute, except so far as they related to certain circumstances which were said by the defendant to evidence a confirmation by the plaintiff or his predecessor of the lease in question, or to constitute an estoppel by acquiescence.

Knowlton Court and the Knowlton estate were in the year 1887 in mortgage to the plaintiff’s predecessors in title to secure a sum of 30,000*l.*, Mr. Lewis D’Aeth, the beneficial owner, being then in possession. In the beginning of the year

# Why is this a problem to Bailii?

- Basically, because the system was privatised and the court service did not participate in publishing or storing of cases, most materials before around 2000 are not available in public format.
- This means that UK law is, to a very large extent, a privatised commodity.

# The Publisher's View

- Publishers (and reporters) will point to the effort and expense which they have undertaken to get a copy of the judgment produced, checked and approved. This effort, they suggest, means that the (very low) level of originality required by UK copyright law has been met.

# The view from US

- In the Hyperlaw litigation, assumed by court that cases were not subject to copyright through statute:
  - **§ 105. Subject matter of copyright: United States Government works** Copyright protection under this title is not available for any work of the United States Government, ...
- That is, that they are the output of government and thus no copyrights can be asserted on these by publishers.

## And in Canada ...

- Not enough done in publishing to pass hurdle or originality:
  - “This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. ... It would not be copyright infringement for someone to reproduce only the judicial reasons.”
  - *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 (CanLII).

## But in UK, there is confusion

- “There remains a fog of ambiguity and disagreement as to copyright in court judgments. They may be Crown copyright, if judges are 'servants or officers of the Crown' Cornish says with some diffidence that: While no judge would hold himself to be a servant of the Crown, he or she is appointed by royal authority and is therefore probably an officer of the Crown ... Not surprisingly, the Treasury Solicitor agrees with this view. Although no action has yet been taken to enforce it, HMSO states that it intends to issue a policy statement soon.” Picciotto, 1996.

# In Practical Terms

- BAILII received funding to add cases which would be particularly relevant to teaching core areas of law.
- The project had considerable difficulty in accessing judgments which could be made available on the system due to copyright problems.
- These were basic elements required to understand basic UK law, yet they were unavailable unless one had access to a good law library or online subscription service.

# Judgments don't always come to BAILII

- Having a system which has relied upon private enterprise for so long, there is no central 'clearing house' for many judgments.
- High Court judges may pass their decision on to BAILII or they may not.
- The decisions may never become public, even though lawyers will use them as precedents.

# BAILII's coverage

- This leads to BAILII having:
  - Very limited coverage overall prior to 2000;
  - Very good coverage of upper courts (HoL and Court of Appeal) from 1997 or so;
  - Moderate coverage of High Court decisions (improving in recent years).
- This is a positive position as a publishing enterprise, but does not give a true perspective of UK Law as it now stands.

## BAILII could 'go nuclear' ..

- And simply scan and digitise the judgments it wants from hard copy.
- BAILII could argue that there is no IP in the underlying judgments.
- Unfortunately, we presume that the publishers would litigate to protect what they view as their property (and litigation in the UK is a system designed for the wealthy).

# Towards a National Law Library

- In the 1970s, the Society for Computers and Law argued that a 'National Law Library' was required and could be achieved in the digital age.
- BAILII is capable providing that, and is only stopped from doing so by copyright.
- BAILII could provide to government, public and lawyer, a system which reflected law as is.

# Might BAILII achieve this goal?

- Perhaps –
  - BAILII is affecting the marketplace for legal information. Many lawyers who have paid for access, prefer to use BAILII because of its speed and ease of access
  - The market for judgments must change and be less profitable to commercial companies.
  - We might assume that rather than be competitors the publishers will eventually co-operate with BAILII.

# Why would they do this?

- BAILII could provide a deep-linking facility to judgments, removing the requirement for them to provide this (and save costs);
- Publishers could concentrate upon what they are best at – providing:
  - “the market with primary material in value-added form in a range of formats, *along with timely commentary by quality expert authors in each field*. The emphasis on commentary draws heavily on our "traditional" publishing skills – knowledge of what the market wants (and will want), fitting products to its needs, commissioning and selection, and the layout, design, structure and quality and process control of products.” (Greener, 1996)

# Conclusion

- The situation where case law is not freely available to the public in the UK is disgraceful.
- Case law is where one must look to determine what the law is, and should be made available as part of the ‘social capital’ of a country.
- A ‘National Law Library’ is clearly the best way to enable this.