

### ***Protecting the Intellectual Property in Cave Site Locations\****

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#### **INTRODUCTION**

From the little I know (EDO WA Cape Range litigation on behalf of the ASF) it appears that Western Australia is a speleologist's paradise. I understand that many cave site locations are not publicly disseminated because of the risks posed to fragile cave ecosystems by vandals, thieves or well intentioned but uninformed amateurs. The question is then raised:

#### **How can cave site locations be secured against unwarranted inexpert invasion?**

My paper today provides a brief overview of two protective mechanisms - copyright and confidential information - and follows with a management strategy to forestall unwanted requests for cave site information. (I note in passing that there is no Privacy Act in Western Australia and the *Privacy Act 1988 (Cth)* applies in WA only to corporations.) (I also note in passing that any proposal to enter a cave that might cause significant harm to the cave or its environs can be referred by any person to the EPA for environmental impact assessment<sup>1</sup>.)

#### **What is intellectual property law?**

Intellectual property law is a group of legislative<sup>2</sup> and common law<sup>3</sup> rights affording protection to creative and intellectual effort. It includes laws on copyright, confidential information, design, patent, circuit layouts, plant varieties, trade mark and business reputation<sup>4</sup>. On general intellectual property principles the holder of cave site locality knowledge would own that factual information but having disclosed the information to a caving group such as WASG, the information would belong to both parties. However, the knowledge itself is neither real nor personal property which can be protected at law<sup>5</sup>. What can be protected is the dissemination of knowledge by the reproduction of works that record knowledge or protection of knowledge that is imparted confidentially. The ownership of a record of factual information and the issue of confidentiality are two separate legal issues.

#### **COPYRIGHT**

Copyright is one facet of intellectual property law. Copyright protects the expression of ideas but not the idea itself. Copyright is thereby a protection of the form of expression of an idea<sup>6</sup>. Copyright is personal intangible property which allows the copyright owner (or those authorised by the copyright owner) the exclusive right to prohibit or do certain acts.

In Australia copyright is governed by the *Copyright Act 1968 (Cth)*<sup>7</sup>. Material is protected if there is a connecting factor between it and the *Copyright Act 1968 (Cth)* (the Act). There is no requirement for registration or notice of copyright, for copyright to subsist in a work. Copyright protection is automatic from the moment the subject matter is embodied in a material form. Copyright may subsist in original unpublished or published *literary works*<sup>8</sup>. A literary work is a type of work which is intended to convey information or instruction, or which is intended to afford literary enjoyment<sup>9</sup>. A literary work for the purpose of the Act does not require literary merit<sup>10</sup>. A written record or map of cave site locations can be a literary work for the purpose of copyright protection under the Act<sup>11</sup>.

#### **How is a map or record made by a caving association protected by copyright?**

If a caving group through an exercise of intellectual skill, professional knowledge or opinion makes a composite record (such as a map) of cave sites identified by its individual members, the caving group would own that composite record<sup>12</sup>. Ingenuity in the compilation of the cave site record may be another factor contributing to it obtaining copyright protection<sup>13</sup>. Incorporated associations can own property<sup>14</sup>. As owner of the copyright in the record, the caving group would have the exclusive right to reproduce the information in any material form<sup>15</sup>. It is the copying of the record or map which would be an infringement of copyright under the Act.

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The legitimate use of such records should be identified in the constitutions of caving groups along with what will and will not constitute a breach of copyright. Furthermore, records and map should be marked that they are copyright and in whom the copyright subsists.

### CONFIDENTIAL INFORMATION

Confidential information can be an intellectual property right which is protected by common law principles. Confidential information is made up of facts or knowledge that is not in the public domain. Information in the public domain cannot be confidential but a combination which draws together separate pieces of information in the public domain<sup>16</sup>, resulting in something different may be protected<sup>17</sup>. The range of information which has been protected by actions for breach of confidence is very broad. Information may be simple or of little commercial value but nonetheless constitute confidential information<sup>18</sup>. Confidential information may be disclosed by oral communication and this may be sufficient to impose an obligation of confidence<sup>19</sup>.

*“...information which on its own is public knowledge may be confidential between the two parties where the information is associated with a particular context and the confidant knows or should know that the association of the information with the context is a matter of special significance, peculiar sensitivity or confidentiality...”<sup>20</sup>.*

Furthermore, possessors of confidential information are often subject to fiduciary duties which prevent them from misusing the information for their own advantage<sup>21</sup>. A fiduciary relationship is a relationship of trust and confidence<sup>22</sup>. The critical feature of the fiduciary relationship is that the fiduciary agrees to act on behalf of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense<sup>23</sup>. Clearly, associated caving groups are in a fiduciary relationship with their members<sup>24</sup>.

*“...In the vast majority of cases...the duty of confidence will arise from a transaction or a relationship between the parties...it is well settled that a duty of confidence may arise in equity...”<sup>25</sup>*

Thus equitable remedies to restrain or for damages for the unauthorised dissemination of confidential information may be available to caving associations or their individual members.

An action will lie in certain circumstances to prevent a breach of confidence or to compensate the creator of the confidential information for the consequences of unauthorised use or disclosure of confidential information<sup>26</sup>. To establish a cause of action against a breach or proposed breach of confidence, a complainant must show:

- that the information has the necessary quality of confidence; and
- the defendant owed a duty of confidence to the complainant.
- furthermore, it is likely that it will be necessary to show that some prejudice to the complainant's interests must or will occur as a result of the breach of confidence<sup>27</sup>.

There are a number of defences to excuse conduct that is a breach of confidence and one of these is disclosure in the public interest<sup>28</sup>. Even when disclosure of confidential information is required for example, by a statute or court order, an action may lie if the information is used by the recipient for some other purpose<sup>29</sup>.

### Are cave site locations confidential information that is protected by the common law?

When confidential cave site information is disclosed by individual members of a caving association to that association which in turn reduces that information into a record or map held by the association, the member who provides that information should expressly state that the information is confidential and how the information might be used.

Equally the recipient association should disclose to the member providing confidential information how the information will be treated and under what circumstances it will be disseminated. Clearly it is important that the constitution of each caving body outlines how confidential cave site information will be treated and disseminated.

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## MANAGEMENT STRATEGIES

### WA Caving Associations

In Western Australia I understand that there is the:

**Speleological Research Group Western Australia Inc.** (SRGWA) which is incorporated under and has a Constitution and Rules of the Association<sup>30</sup>. An incorporated association under the Act means that the affairs of the group are regulated by the Act and its constitution and rules (and any changes thereto) must be approved by the Commissioner for Consumer Affairs<sup>31</sup>. Through its Rules the SRGWA has adopted the Code of Ethics and Minimal Impact Caving Code produced by the Australian Speleological Federation Inc. (ASF). There is no specific affiliation of the SRGWA with other caving groups identified in its constitution or rules but I am informed that it is a member of the ASF.

**Western Australian Speleological Group Inc.** (founded in 1958) (WASG Inc) is also incorporated<sup>32</sup>. The objects and rules of WASG are outlined in the Constitution and By-laws of the Group. WASG Inc.'s identified as a Full Council Member of the ASF.

**Cavers Leeuwin Inc.** (CLINC) is a subgroup of WASG, its members are WASG members but it is separately incorporated<sup>33</sup> with its own formal constitution which identifies CLINC as an affiliate of WASG.

The three associations each include as one of their objects “...to foster preservation...” of WA caves. WASG Inc qualifies this object by saying that it will be in cooperation with other interested organisations. It is arguable that the object to foster cave preservation would support a decision to suppress a cave site location ensure its preservation and accordingly, suppression of the information would be consistent with the objectives of each of the organisations.

One of WASG Inc.'s objects is to publish results of its investigations if suitable: By-law 10.4. The Constitution is silent as to the meaning of “...if suitable...”. Any member of WASG Inc is entitled to inspect the WASG Inc records: Constitution, at clause 18. The Constitution is silent as to what purpose such inspection can be for. The WASG constitution requires the State Cave Recorder appointed by WASG Inc to publish cave area lists: By-law 10.4. *Publish* is not defined and the By-law is silent as to whom the information should be published. Accordingly, it is likely that the ordinary meaning – to make public – would apply. The WASG Inc By-law 11.0 pertains to copyright in information obtained on field trips and provides that copyright to this information does not subsist in the WASG Inc. However, it does not identify in whom the copyright (of WASG Inc.'s information) subsists. Furthermore, By-law 11.0 does not identify what information is held by WASG Inc in which copyright in favour of WASG Inc.

The WASG Inc Map Curator and SRGWA librarian are responsible the maps held by their organisations. The WASG Inc Map Curator may sell copies of or lend maps at his discretion. The SRGWA librarian may only divulge confidential information with the approval of the SRGWA committee. The SRGWA constitution is silent as to whom or under what circumstances the committee may authorise the release of confidential mapping information or in whom copyright subsists in respect of cave site records.

CLINC's mapping curator is responsible for the group's maps but their constitution is silent as to whom or under what circumstances map information may be divulged.

All of the constitutions are silent as to the consequences for breach of copyright or confidential information by members, ex-members, officers or the committee. The Three associations each include as one of their objects “...to foster preservation...” of WA caves. It is arguable that this object would support a decision to suppress a cave site location to foster its preservation. However, other objectives of the various groups might be said to be inconsistent with this approach<sup>34</sup>. For example, the WASG Inc. constitution has as an objective “...promote and encourage speleology in all its aspects...” Furthermore, the WASG Inc Constitution, objective at clause 2.1 requires publication of suitable information and By-law 10.4 requires the State Cave

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Recorder to publish and update cave lists. Accordingly, in determining to suppress cave site information each of the objectives must be addressed and meshed to a cohesive strategy to ensure a committee's actions are consistent with all of the objectives of its organisation.

### The Constitutions

Clearly, the constitution of each organisation could, in respect of cave site locations, identify:

- in whom reposes the copyright;
- the criteria to establish what information is confidential and why;
- the circumstances under which information can be released;
- to whom information can be released;
- remedies available to the groups in respect of unauthorised release of map information;
- appropriate security for confidential maps; and
- identification of opportunities to educate the community about the reasons for protecting certain cave site locations.

Constitutional amendments take time and the process is described under the constitution and the *Associations Incorporation Act 1987 (WA)* of which the secretary of each group should have a copy. Changes to the WASG Inc By-laws however can be made by the Committee from time to time. By-laws could expand on the meaning of clauses of the Constitution provided that they are not inconsistent with the Constitution.

### Requests for information

When asked for confidential information in respect of cave sites a caving group committee should:

- Ensure the request is in writing and that the written request identifies the person or organisation making the request, under what law, regulation, order or power the request for information is made, for what purpose the information is needed and how the information - if given - will be kept confidential;
- Consider the *Associations Incorporation Act 1987 (WA)*, the group's obligations to be found in its constitution and its rules or by-laws;
- Formally refer the request to the group's committee for its consideration;
- Enter the request into the minutes and record any decisions made in respect of the request;
- Speak to the person who provided the group with the sought after information in the first place as to his or her attitude to the request;
- Consult with the owner, occupier and/or manager of the land under which the material cave sites are located; and
- Identify any known risks of or features that require special care associated with a particular cave and make these known to the person to whom the information is divulged, the site of which is divulged.

## CONCLUSION

### **Can a caving group be compelled to divulge confidential cave site locations?**

There is little doubt that a caving group cannot be compelled to provide confidential cave site locations without a requirement under their constitution to do so, statutory authority or a court order supporting such a demand. Nonetheless, a group's reputation will be enhanced by acting co-operatively with the reasonable request from government agencies or authorities. This could be achieved while at the same time preserving confidentiality in cave site locations. A policy to guide such co-operative ventures would be of benefit to all and mark a beginning in development of a comprehensive strategy to manage this increasingly vexed issue for speleologists.

### NOTES AND REFERENCES

\* The intellectual property issues addressed in this paper are based on general principles and are not intended to constitute specific legal advice on any particular issue.

1. *Environmental Protection Act 1986 (WA)*, section 38.
2. See for example the *Copyright Act 1986 (Cth)*.
3. See for example the protection of confidential information.
4. Butterworths Concise Australian Legal Dictionary, 1997, page 210.
5. Butterworth's, Halsbury's Laws of Australia (240-505).
6. *Pacific Film Laboratories Pty Ltd v FCT* (1970) 121 CLR 154; *Autodisk Inc. v Dyason (No 1)* (1992) 173 CLR 330; 22 IPR 163.
7. Butterworths Concise Australian Legal Dictionary, 1997, page 91.
8. *Copyright Act 1968 (Cth)* (the Act), section 32.
9. Butterworths Concise Australian Legal Dictionary, 1997, page 246; *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171; 6 IPR 1; 65 ALR 33; *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 84 FCR 101; 5 IPR 213 at 232.
10. The Act, section 10(1); Butterworths Concise Australian Legal Dictionary, 1997, page 246; and *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171; 6 IPR 1; 65 ALR 33.
11. The Act, section 10.
12. *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1963) 3 All ER 413; and *Coco v A N Clark (Engineers) Ltd* (1968) FSR 415; and *Breen v Williams* (1996) 186 CLR 71.
13. *TR Flanagan Smash Repairs Pty Ltd v Jones* (2000) FCA 625.
14. *Associations Incorporation Act 1987 (WA)*, sub-section 11(1).
15. The Act, sections 13 & 36, and sub-section 31(1)(a)(i).
16. Butterworths Concise Australian Legal Dictionary, 1997, page 246; *Coco v A N Clark (Engineers) Ltd* (1968) FSR 415; (1969) RPC 41.
17. Butterworths Halsbury's Laws of Australia (240-570); and *Coco v A N Clark (Engineers) Ltd* (1968) FSR 415; (1969) RPC 41 at 47, per Megarry, J.
18. Butterworth's, Halsbury's Laws of Australia (240-560); *Nichrotherm Electrical Co Ltd v Percy* (1956) RPC 272; and (1957) RPC 207, CA
19. Butterworth's, Halsbury's Laws of Australia (240-570).
20. Gurry F Breach of Confidence Clarendon Press 1904 cited in Butterworth's, Halsbury's Laws of Australia (240-560) at footnote 8.
21. *Seager v Copydex Ltd* (1967) 1 WLR 923; Butterworths Concise Australian Legal Dictionary, 1997, page 81.
22. *Boardman v Phipps* (1967) 2 AC 46; (1966) 3 All ER 721; Butterworths Concise Australian Legal Dictionary, 1997, page 157.
23. Butterworths Concise Australian Legal Dictionary, 1997, page 157; and *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; 55 ALR 417.
24. *Associations Incorporation Act 1987 (WA)*, section 13(2).
25. *Attorney-General v Observer Ltd* (1990) 1 AC 109 at 281 sub nom *Attorney-General v Guardian Newspaper Ltd (No 2)* (1988) 3 All ER 545, per Lord Goff, HL.
26. Butterworth's, Halsbury's Laws of Australia (240-500).
27. Butterworth's, Halsbury's Laws of Australia (240-630).
28. Butterworth's, Halsbury's Laws of Australia (240-990) (240-1025).
29. Butterworth's, Halsbury's Laws of Australia (240- 650).
30. *Associations Incorporation Act 1987 (WA)*.
31. *Consumer Affairs Act 1971(WA): Associations Incorporation Act 1987 (WA)*, section 9.
32. *Associations Incorporation Act 1987 (WA)*.
33. *Associations Incorporation Act 1987 (WA)*.
34. I am grateful to EDO solicitor Lee McIntosh who first raised this point with me.