

IP Law Policy and Practice Seminar 2006 - Case study:

Episode 3: Bird Flu and the Da Vinci Code

27 July 2006

The Case Study is an unfolding sequence of events relating to your work on Avian Influenza. It consists of six numbered 'scenarios', each being a snapshot of the facts at a point in time. You are to identify and discuss the IP issues arising from each scenario.

Read carefully

Please read the scenarios carefully, reading between the lines as appropriate. Sometimes the issues are obvious; sometimes less obvious.

Focus on IP

Please confine yourself mainly to IP issues. You may see issues in other areas, e.g. privacy, procurement, probity, etc. You may note these issues, but the main focus should be on IP.

Analysis tips

If you think some critical item of information necessary to your decisions is not provided, state what that is and why it matters. Then make the most plausible assumption(s) to enable discussion to proceed. Identifying the questions to ask is more important than knowing all the answers. 'Model answers' will be provided at the end of the Seminar.

Timing

You have 20 minutes *on average* to discuss each scenario. Suggested timing is given in the heading for each scenario.

Role of facilitator

Each syndicate will be assisted by a facilitator, who will be responsible for monitoring time. The facilitator is not there to provide you with the answers. However they may occasionally raise issues or suggest factual assumptions on which discussion should be based.

Feedback

Syndicates will *not* be required to formally present outcomes from the Case Study. However, there will be an opportunity to share experiences and raise questions in the panel session.

De-briefing session

An additional informal session will be conducted a few days later for those wishing to pursue further questions after having read the model answers.

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The material is primarily designed for presentation, rather than to be merely read. Inquiries re conducting the Case Study may be directed to philip.crisp@ags.gov.au.

The material does not constitute legal advice. For any important matter you should obtain appropriate professional advice relevant to your circumstances. The facts described in the Case Study are fictional and any resemblance to individual agencies or persons is coincidental. The legal issues are, however, real. No animals were hurt in the making of this Case Study.

SETTING THE STAGE

In response to the threats posed by global warming, terrorism and possible pandemics, the government has established a new Department of State: the *Department for the Defence of Government Infrastructure and Essential Services* (**DoDGIES**). The mission of DoDGIES includes planning for a possible pandemic of avian influenza.

And not a moment too soon! Avian influenza ('bird flu' to you) is sweeping through Asia, and is anticipated to arrive on the Australian mainland sometime in the next six months, even assuming the best possible quarantine measures.

DoDGIES is now growing rapidly - recruiting scientists, biologists, program managers, *etc* from anywhere they can be found. They even recruit you and your old mate Bruce Bovver.

Staff are moving into DoDGIES' new building in the *Via Barton*.

THOSE WHO STRUT UPON THE STAGE

Bruce ('Boy') Bover

As 'Bruce', he was your boss in two previous Case Studies. You first met in the **Mediwise** project.¹ Then you worked together on the **SCAMGuard** project.² After that failed dismally he retired to Coventry³ for a period, where he spent much of his time meditating and planning a comeback.

He was recruited to manage the Contracts Branch in DoDGIES, but was disappointed to find that the office allotted to him was too small to display the enormous stainless steel construction (**the Pentangle**) which Peta gave him for his birthday. He therefore used his political connections to be appointed as acting Secretary of DoDGIES, which carries a bigger office. Impatient and autocratic, he wants to 'get things done'.

Has no time for things that are too complicated (especially IP, which is a very sore point with him because of a past dispute with Copyright Agency Limited).⁴



Bruce Bover

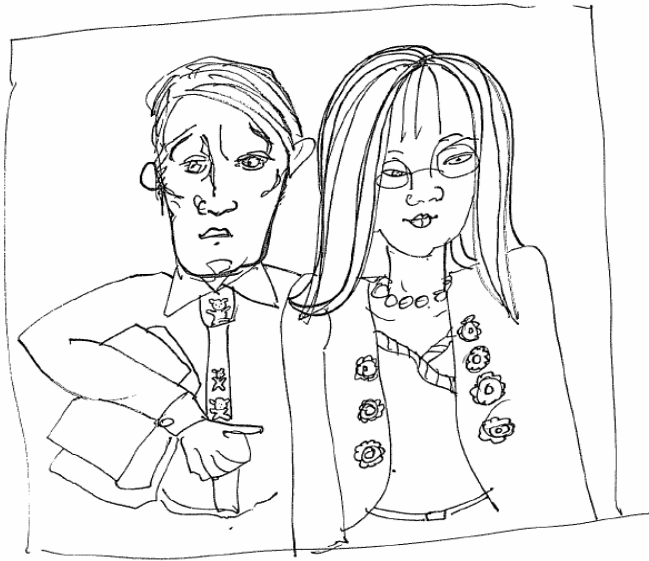
¹ See Episode 1, which is documented in the papers of the 1st AGS IP Law, Policy and Practice Seminar, 2004.

² See Episode 2, which is documented in the papers of the 2nd AGS IP Law, Policy and Practice Seminar, 2005.

³ Coventry is a small rustic settlement near Nimbin, invisible on maps.

⁴ Copyright Agency Limited (CAL) is a copyright collecting society. It collects royalties for print copyright owners under a number of statutory and voluntary licence schemes.

Crunch and Chew



Your legal panel firm. A partnership between Phyle Crunch and Raelene Chew.

(The names are not their real names, but rather a capricious result of MS Word spellchecker which *won't* be corrected.)

Crunch + Chew

Klaus K Krescent

Brilliant software designer and cryptologist,⁵ who engineered the scam *behind* SCAMGuard. A gothic dresser, and dedicated blogger. Published a paper on advanced data mining techniques in the Pacific Journal of Heuristic Computing.

Bover ran into him in Nimbin recently and Klaus said he was studying the 'black death'. Shortly afterward he disappeared, and no amount of 'googling' has turned up a trace of him.



Klaus Krescent

⁵ See Episode 2.

Mary Madeangel



A treasure, now even more ancient than in the last Episode. She is the repository of much corporate knowledge about comings and goings in government.

Now works as assistant to the CEO, Bruce Bover. Has taken to referring to DoDGIES affectionately as '*the Agency*', as if there were no other. A loyal worrier for the cause. Polishes the Pentangle daily.

Mary Madeangel

Peta Plotter

Singer and artist with some indigenous ancestry. Was heartbroken after you tipped her out of 'The Block' in skulduggerous manner.⁶

She later opened up a coffee shop in Nimbin so that she could be close to Bruce during his period in Coventry. *Peta's Eatery* becomes a convenient meeting place for local indigenous artists.



Peta Plotter

⁶ See Episode 1.

You

You have acquired a reputation as an IP hotshot. In your early days you learnt all about franchising by helping develop a business strategy for a donut and coffee chain. This was followed by a stint on the Mediwise smartcard project. You had a short but stellar career on *'The Block'* before you were evicted under dramatic circumstances; but landed on your feet by scoring a plum job advising Channel Nine on character merchandising deals with the other contestants. You then spent a period working on the SCAMGuard project.⁷ Both of your previous projects have featured in AGS seminars on Intellectual Property! You are recruited by DoDGIES where Bover directs that you 'just look after the IP side of things for now and we'll discuss a permanent role for you later.'

⁷ See Episode 1.

⁸ See Episode 2.

THOSE WHO MAKE THE STAGE

DoDGIES

Department for the Defence of Government Infrastructure and Essential Services - described in detail in Scenario 1.

DoCIA

Former Department of Communications, Infrastructure and the Arts - introduced in Scenario 2.

ICS

Former Institute for Climate Studies - introduced in Scenario 2.

CRC-EE (pronounced 'crikey')

Cooperative Research Centre for Experimental Epidemiology - introduced in Scenario 2.

ACAI

Advisory Council for Avian Influenza - introduced in Scenario 4.

BIT PARTS

Barry Bubonic



Barry Bubonic

Enters in Scenario 2

Lingers in Scenario 2

Exits in Scenario 4 - to music

Complexis Corporation

Suppliers of the COMPLEXIS software package used for modelling flows in complex systems. They appear in Scenario 5.

Lloyds

Lloyds of London - they make a move in Scenario 5.

Priory of Sion

You know, from the Da Vinci Code. Mentioned in Scenario 5.

Stretcher bearer

Glimpsed briefly in Scenario 2.

WHO

World Health Organisation - mentioned in Scenario 1. Nothing comes of it, or does it?

SCENARIO 1: THE AGENCY (20 MINUTES)

DoDGIES is an FMA Act agency created to develop a strategic response to the threats posed by global warming, terrorism and possible pandemics (including pandemics that may be deliberately caused). It operates partly in accordance with an Intergovernmental Agreement (**IGA**) of 6 June 2006 between the Commonwealth, States and Territories. There is also a Memorandum of Understanding (**MoU**) with New Zealand. It has been entrusted by the *World Health Organization* (**WHO**) with a leadership mandate in this region of the world.

DoDGIES has a head office in Canberra with branch offices in all capital cities and major regional centres (including New Zealand). There are plans to establish a presence in a number of south Pacific island states.

The activities of DoDGIES relevant to 'bird flu' are:

- research and prediction
- collaboration with WHO and other international bodies to establish protocols for early warning and response
- an ongoing publicity campaign to prepare the public
- establishing robust administrative structures and lines of communication and command that can be invoked rapidly in time of crisis
- protecting key infrastructure and essential services.

The staff of DoDGIES include policy makers, program officers, research scientists, doctors, field officers, computer experts, financial analysts, economists, transport engineers, specialists in various forms of infrastructure and persons experienced in international aid collaboration. In addition DoDGIES has taken on a number of consultants who have been under-employed since 'Y2K'.

DoDGIES liaises with State, Territory and local governments, as well as industry and professional associations, through various policy committees and *ad hoc* working groups.

You have been asked by Bovver to develop an IP Policy for 'the Agency', as DoDGIES has come to be known by the 'in crowd'. Lying awake at night, you let your imagination run free about the IP issues and challenges an agency such as 'the Agency' might face.

Scenario 1: Responses

Hint:

- what sort of *IP subject matters* would you expect DoDGIES to deal with in the course of its work?
- what legal *IP regimes* apply to those subject matters?
- what *IP rights* are conferred by those regimes?
- in what *contexts / relationships / transactions* might such IP rights in particular subject matters be dealt with?

Alternatively you might arrange your thoughts using a 'Mind Map', or do a 'SWOT' analysis.

<i>IP subject matters</i>	<i>IP regimes & IP rights</i>	<i>contexts / relationships / transactions</i>
research data	These are protected mainly by copyright.	consultancy agreements; licences of data - both in and out
software for modelling, normalisation, extrapolation of the data, <i>etc</i>		software licences
risk analyses, best and worst case scenarios		industry and professions, consultants and DoDGIES staff
consultative documents, discussion papers, <i>etc</i>	The materials listed would generally constitute literary and, sometimes, artistic works, for purposes of the Copyright Act. The main relevant rights are the right to copy the material, and communicate the material electronically.	collaborative development through DoDGIES staff, official committees, industry and professions, and public involvement
draft and final reports		DoDGIES staff, official committees
documents setting out settled policy	In relation to audiovisual materials (films and sound recordings) the main rights are the right to copy the material, perform it in public, and communicate it to the public by broadcast, cable or internet.	may be based on protocols developed by WHO and licensed to DoDGIES, as adapted to Australia by experts in relevant fields
plans and strategies for dealing with different scenarios		DoDGIES staff, medical profession, emergency services. Made available to public <i>via</i> government shop fronts, businesses, schools, charitable and community organisations, <i>etc</i>
specific procedure manuals and protocols, <i>e.g.</i> for medical treatment, patient isolation procedures, <i>etc</i>		DoDGIES staff, consultants
basic information and guidance for the public, <i>e.g.</i> on hand washing, use of rubber gloves, evacuation procedures, <i>etc</i>		
PowerPoint presentations and other training materials		

videos, documentaries, <i>etc</i>		broadcasters
advertising materials, including radio and television		DoDGIES staff, advertising and public relations firms, broadcasters
'branding' including DoDGIES name and logo, program names/logos, domain names, <i>etc</i>	<p>exclusive rights to use of various 'branding' elements arise from:</p> <ul style="list-style-type: none"> • Trade Marks Act; • ss. 52 and 53 of the Trade Practices Act • passing off • domain names registration system 	<p>'branding' communicates your identity to the public.</p> <p>Trade Marks Office in IP Australia registers trade marks</p> <p>various domain name registries may be relevant</p>
pharmaceuticals	patent confers exclusive right to exploit an invention	Patents Office in IP Australia registers inventions
data relating to the efficacy and safety of pharmaceuticals	confidential information	confidentiality agreements
planning for proposed tenders, and tender evaluation materials	copyright; confidential information	RFTs may spell out conditions that DoDGIES will apply re copyright in tenders and dealing in any confidential information contained in a tender

Note: the table above is only intended to give a flavour of some of the more obvious possibilities; it is not exhaustive.

SCENARIO 2: QUESTIONS OF INHERITANCE (20 MINUTES)

DoDGIES acquires the main functions, and almost all the personnel, of two Commonwealth agencies which are now abolished . . .

The former *Department of Communications Infrastructure and the Arts (DoCIA)*: With the exception of the arts component, all elements of DoCIA are folded into DoDGIES through an *administrative arrangements order (AAO)*. The former DoCIA generated a large variety of records, plans, position papers, software and datasets which have now been physically delivered to DoDGIES. In addition it had licensed-in a software product called '**COMPLEXIS**' used for modelling flows in complex systems (*e.g.* population growth, weather patterns, transport movements, *etc.*). The Licence Agreement states that the licence is granted to '*Commonwealth of Australia as represented by DoCIA*'. Having taken over from DoCIA, DoDGIES assumes it will have the use of all the IP materials mentioned. [See questions 1 and 2 overleaf.]

The former *Institute for Climate Studies (ICS)*. This was a CAC Act Agency. *Crunch and Chew* had previously advised that ICS was *not* the Commonwealth for the purposes of Part VII of the *Copyright Act 1968*⁹; thus any copyright material made by ICS would ordinarily vest in it, rather than the Commonwealth. The legislation establishing DoDGIES also abolishes ICS. There had been a large number of 'academic types' in ICS; in fact it produced a minor outbreak of PhDs. Some of these papers had been published on ICS's website. Others were still in preparation at the time of the transfer. Again, DoDGIES assumes it will inherit all the IP rights in work completed or in preparation by the former ICS. [See question 3 overleaf.]

In addition, DoDGIES has recruited heavily from the *CRC for Experimental Epidemiology (CRC-EE)*, currently in its second round of funding.¹⁰ The recruits from CRC-EE come with valuable know-how. During a visit to Bover's grand new office, he mentions that one **Barry Bubonic** has brought a CDROM labelled '**Black Death Data**' which models the emergence, progress and subsidence of the Black Death pandemic. Bover is galvanised by the idea that the Black Death Data could yield valuable predictions about the impact of bird flu. You tell Bover that we need to know how the data was created and who owns copyright, if any. Bover immediately summons Bubonic - as an afterthought asking him to collect his Pentangle from the foyer on his way up. Unfortunately the lift is out of commission and Bubonic struggles up the stairs, collapsing at the top under the weight. Hearing the commotion you and Bover emerge to find him being carted away on a stretcher. The copyright 'pedigree' of the Black Death data remains a mystery! [See question 4 overleaf.]

The stretcher bearer looked vaguely familiar. Is it, could it be . . . Klaus . . . now without the beard?! You push that thought aside. Your immediate task is to ensure there is a sound basis for

⁹ Some CAC Act bodies, despite their having the capacity to own property (including IP), are treated as an agent or emanation of the Commonwealth for copyright purposes. One of the consequences is that copyright in works *etc* created by or on behalf of the agency vest in the Commonwealth proper, to the exclusion of the agency. This topic is explored more fully in Episode 1.

¹⁰ The Cooperative Research Centres (CRC) program was established in 1990. A typical CRC is an R&D collaboration between academic/research institutions, commercial enterprises and interested government agencies. The CRC is generally established under a joint venture agreement called the 'Centre Agreement', which provides for the allocation of IP rights between the participants. The IP provisions deal with both 'Background IP' (brought to the Centre by a Participant) and 'Foreground IP' (created as a result of the 'Activities of the Centre'). The CRC receives dollar-for-dollar funding from the Commonwealth (DEST) under a funding agreement called the 'Commonwealth Agreement'. DEST does not claim IP. CRCs are funded for 5-7 years, but many have had their funding renewed for a second or third round. The parties to a renewed CRC may be different to the original parties. For this reason it may be necessary to distinguish IP developed in the different funding rounds. Thus the 'Centre IP' developed in round 1 may be treated as 'Background IP' brought to round 2 by the continuing parties.

DoDGIES to exercise IP rights in all the materials discussed above.

Scenario 2: Responses

1. *IP 'custodianship' of former DoCIA materials*

Whilst the Commonwealth is a single legal entity, it is usual for a department or agency within the Commonwealth to exercise IP rights in material created under its direction or control - the so-called principle of 'custodianship'. If the functions to which the material relates are transferred to another department or agency the 'custodianship' is similarly transferred. 'Custodianship' is just a convention, based on the reality that there is no other way that things could work in practice.¹¹

Note that the records and documents in the physical possession of DoCIA (and now transferred to DoDGIES) may include non-Commonwealth copyright materials, and Commonwealth copyright materials in which the custodianship vests with another agency. However DoDGIES may inherit an implied licence to use such materials, if such a licence could be implied in the circumstances of DoCIA's possession of the material.

2. *Former DoCIA's licence to use COMPLEXIS*

Normally the transferability of a licence is a matter for construction of the licence agreement. One would look to the description of the Parties; the definition of 'Customer' (does it include successors or assigns?); the licence clause (is it limited to a specific site or processor; does it say the licence is 'transferable', and on what conditions?), the assignment and variation clauses (can the customer transfer the benefit of the contract as a whole?).

In this case there is a quicker answer. A little known provision in the *Acts Interpretation Act 1901*, s.19C, provides that, where functions of a Department of State to which an agreement relates are transferred to another Department, references in the agreement to the former Department shall be read as references to the new Department.

Amongst other things this means that the benefit of a software licence to the former Department will be assigned to the new Department, without the need for any consent from the licensor. In short DoDGIES does not require a novation or contract variation to be agreed with Complexis Corporation.

3. *Transfer of copyright and other IP from former ICS to DoDGIES*

Section 19C only applies to the transfer of functions from one Department to another, not from a CAC Act agency to a Department. So it does not help here.

As noted in the question box, ICS has the capacity to own property. That includes IP which is a form of personal property.

Almost certainly you would find that the legislation abolishing ICS makes provision for the disposition of its assets and liabilities. A usual provision would say that the 'assets' of the ICS immediately before its ceasing to exist become assets of the Commonwealth (which would be understood to be within the 'custodianship' of DoDGIES) immediately after ICS ceases to exist.

¹¹ In relation to *published copyright* material the Department or agency's 'custodianship' is qualified by the special role of the *Commonwealth Copyright Administration*. CCA deals with routine requests from the public to reproduce Commonwealth copyright material that has been published in print form or on a website, and gives administrative advice to agencies on copyright management. However CCA would not advise on more complex licensing transactions such as joint ventures, technology exchange agreements, etc., which would be managed by the custodian agency with their legal advisor.

The legislation would define assets broadly, to include every kind of interest in property, rights under contracts, *choses in action*, etc. There would be a similar provision for the transfer of 'liabilities'.

Accordingly it is likely that DoDGIIES would have the benefit of any IP rights (ownership or licence rights) of the former ICS.

You should make further inquiries about the circumstances surrounding the academic papers, as the facts suggest that in some cases IP rights may be owned by their authors, and not ICS:

- if the work was done *within* the scope of their employment, then ICS would own copyright;
- if the work was done *outside* the scope of their employment, then the author would own copyright;
- but any agreements entered into between ICS and the authors in regard to allocating IP rights would override any conclusions arising from the preceding points. For example, an agreement might have provided for ICS to own copyright, but allow the author a licence to use the material for the purposes of their study and to publish elsewhere.

As an alternative line of reasoning, publication by ICS on its website, accompanied by a claim of ICS copyright, with the acquiescence of the author, could be construed as acknowledgment that the material was *made within* the course of their employment.

Unlike ICS, DoDGIIES is the Commonwealth. If the initial publication of the papers eventually takes place under the direction or control of DoDGIIES, copyright is transferred to the Commonwealth (DoDGIIES).¹²

You may have to negotiate a clarification of the situation, including addressing any moral rights concerns the authors may have.

4. *Know-how and data brought by people recruited from CRC-EE*

There is nothing wrong with recruiting staff who bring with them 'know how', as long as that know-how has not crystallised as an identifiable piece of 'confidential information' or some form of intellectual property such as an invention or copyright material.

In regard to confidential information, we must be cautious wherever there are objective indicators that a recruit may have divulged to us confidential information in breach of their obligations of fidelity to their previous employer.¹³

Assertions of copyright in relation to 'data' can be problematic. However, in Australia at least, the standard of originality is very low and it is likely that copyright subsists in the Black Death Data - see *Telstra v Desktop Marketing*.¹⁴ There is no 'orphan work' provision in our law, so we are not excused from copyright compliance merely because the copyright owner or whereabouts is unknown. However if we were to exercise s.183 we could use the procedure provided in the *Copyright Regulations*, i.e. advertising in the Gazette, as an alternative to notifying the copyright owner of our s.183 uses.

¹² Copyright Act, s.177. There are some controversial aspects of the application of this proposition in practice.

¹³ *University of Western Australia v Gray* (No.3) [2006] FCA 686

¹⁴ Some US authority suggests a higher standard of originality might be expected there - *Feist Case*.

SCENARIO 3: IN WHICH TWO CONSULTANTS MAKE IP (20 MINUTES)

When engaging consultants, Bovver uses a form of *Consultancy Contract* prepared by Crunch and Chew. It contains IP provisions which you recognise as typical of consultancy contracts:

- IP in all '**Contract Material**' vests in DoDGIES (the Commonwealth), subject to next point.¹⁵
- This doesn't affect the ownership of IP in:
 - any '**Agency Material**' incorporated into Contract Material¹⁶
 - any '**Background Material**' specified in the Schedule.¹⁷
- DoDGIES grants a licence to the Consultant to use, reproduce and adapt the Agency Material, for the purposes of the Contract only.
- The Consultant grants DoDGIES a permanent, irrevocable, royalty-free, world-wide, non-exclusive licence (including a right of sublicense) to use, reproduce, adapt and exploit the Background Material, in conjunction with the Contract Material.¹⁸
- In addition, the Consultant is required to obtain a 'clearance' of moral rights from any authors who contribute to the Contract Material.

Bovver is very happy with the DoDGIES Consultancy Contract; he tells you it has been used successfully many times and has met with acceptance by most consultants. However one day you get a worried note from Mary. She says that two consultants have kicked up a fuss about the IP provisions and are refusing to sign. It is urgent that this be resolved.

Peta Plotter is to be engaged to develop 'imagery and visual elements' for a publicity campaign to prepare the public for a possible pandemic of bird flu. The engagement would involve her working on site in close collaboration with DoDGIES staff. She will be substantially full time during the six months consultancy, but you suspect she will be exploring other opportunities before that time is up. She has sought a broad licence-back in respect of 'all IP or know-how developed as a result of the Services - so that I will have a secure career after the end of the Consultancy'. She also objects to the requirement to give a moral rights clearance.

CRC-EE (through its commercial agent CRC-EE Pty Ltd) claims that the Black Death Data is 'substantially' their IP, but will not be drawn as to details. They are to be engaged for a 2-year period to work on the Black Death Data with the COMPLEXIS package, producing data models of the possible behaviour of a bird flu pandemic (**Bird Flu Models**) under varying assumptions regarding population density, hygiene, infection rates and mortality. They will be paid a small retainer. From time to time they may be commissioned to develop a specific Model on a time and materials basis, under a **Work Order** to be agreed. In a typical month they might bill for between 1 and 5 personnel, depending on what jobs come up. It is expected they will work out of their own

¹⁵ '**Contract Material**' is defined (in summary) as all Material: (i) created for the purposes of the Contract; (ii) provided or required to be provided to DoDGIES as part of the Consultancy; or (iii) any Material derived from the foregoing. The term 'Material' is defined as the subject matter of any category of IP rights.

¹⁶ '**Agency Material**' is defined (in summary) as Material provided by DoDGIES to the Consultant at any time for the purposes of the Contract. The IP may be owned by DoDGIES anyway, but if not DoDGIES is responsible for procuring a licence to enable the Consultant to use it in carrying out the 'Services'.

¹⁷ '**Background Material**' is *pre-existing* Material specified in the Schedule and brought to the Contract by the Consultant. The Consultant does not necessarily own IP in Background Material, but they must be entitled to incorporate it as part of the Contract Material.

¹⁸ In other words, DoDGIES can do anything they like with the Contract Material as a whole, but they cannot deal with the Background Material (or layer) separately.

premises.

The CRC-EE tender raised the issue of IP rights and specified lower pricing if they were allowed several concessions:

- they claim that that they are already in the process of developing improvements to the Black Death Data, so any such improvements that are utilised for the consultancy services should be treated as Background Material;
- they also insist that, *inasmuch* as the Bird Flu Models incorporate the Black Death Data, they ‘cannot’ provide a broad licence allowing DoDGIES to exploit and sublicense it, though they will give a licence for internal use;
- on the other hand they want DoDGIES to grant a ‘licence back’ of the Bird Flu Models, broad enough to allow them to exploit and sublicense the Models. This last one particularly incenses Bovver: *‘No way! We paid for it, and now they’re just going to make a mint flogging it to other governments’*.

In hospital Barry Bubonic is diagnosed with bird flu.

Scenario 3: Responses

You develop a negotiating position for DoDGIES in the form of a table.

Consultants' top 5 requests re IP clauses	Requests by Peta Plotter	Requests by CRC-EE
<p>Treat concurrent work as Background: The 'carve-out' for Background Material should include Material developed after commencement of the Contract <i>but for a completely different purpose</i>, which is later applied for purposes of the Contract</p>	<p>(Concession not sought)</p> <p>[Chances of her developing something concurrently seem small.]</p>	<p>In the circumstances we should allow them to treat the enhancements to the Black Death Data currently being prepared as 'Background Material', since they are already <i>bona fide</i> engaged in its creation.</p>
<p>Drop requirement for a list of Background IP: The 'carve-out' for Background Material should apply to <i>any</i> Material incorporated in the Contract Material, <i>with no requirement to identify such Background Material</i></p>	<p>(Concession not sought)</p> <p>[There is none as yet, and chances of it arising are small. If it did arise we would need to know.]</p>	<p>(Concession not sought)</p> <p>[If it was sought we should resist in light of the concessions above and below, because it is then even more important to ensure that we know the extent of the Background Material. NB: for best results, the requirement for a list could be applied at the Work Order level.]</p>
<p>Narrower licence for Background IP: The licence required to be granted (or procured) in relation to Background Material, should only allow the Agency to use, reproduce and adapt the Material <i>internally</i>, i.e. not to exploit or sublicense.</p>	<p>(Concession not sought)</p>	<p>Not acceptable. DoDGIES objectives (see Scenario 1) necessitate that it be able to exploit and sublicense the Contract Material, including the Background layer.</p> <p>We should press CRC-EE for an explanation of their position. It is likely they perceive that they do not own specific components or layers of the Black Death Data. In that case we should pinpoint the problem area so that we know which third parties we may need to deal with to get the necessary rights.</p>
<p>Grant licence back: The Agency should grant a broad 'licence back' to the Consultant, i.e. a non-exclusive licence to use, reproduce, adapt and exploit the Contract Material (including the right to sublicense)</p>	<p>Not appropriate. She hasn't brought any Background Material to the consultancy. Hasn't established this whole area of work is her intellectual 'stock in trade'.</p> <p>Also, the messages of the government publicity campaign should not be confused with any commercial message or cause she may promote later.</p> <p>It may be more appropriate to employ</p>	<p>We need to consider what DoDGIES 'business plan' is in relation to the Bird Flu Models.</p> <p>It seems the Bird Flu Models could greatly facilitate governments, industry, professions and families in planning for a bird flu pandemic. Thus it is probably in the public interest that the Models be <i>widely available on liberal terms</i>, and not rationed out</p>

Moral rights: Requirement to procure clearances should be deleted

<p>Peta under a contract of service, rather than engage her under a contract for services. This would address her apparent need for job security.</p>	<p>under restrictive conditions. We might even stipulate that downstream derivatives be made available on similar liberal terms.</p>
<p>Discrete acknowledgment of her authorship may be appropriate.</p> <p>We should still seek a consent in advance to any variation or other treatment of her artwork that DoDGIES may deem appropriate for current or future publicity campaigns.</p> <p>If she was an employee as suggested above, a consent would be easier to secure, because the Act allows employee consents in broader terms.</p> <p>Another approach would be to require her to merely 'acknowledge' DoDGIES moral rights policy, which may help later in establishing 'reasonableness' of our treatment of her artwork.</p>	<p><i>(Concession not sought)</i></p> <p>[If a concession was sought, we could offer as a compromise that the moral rights clearance be given on an 'as requested' basis. A decision whether to request a clearance could be made for each Work Order.]</p>

SCENARIO 4: LICENSING-IN (15 MINUTES)

The *Advisory Council on Avian Influenza (ACAI)* is the most important of the external committees associated with the work of DoDGIES. It includes senior officials of the Commonwealth, persons selected from State, Territory and local governments, a New Zealand official, and representatives of the medical profession, the insurance industry, business bodies, *etc.* ACAI is supported by a secretariat within DoDGIES. Council members collaborate in developing a wide range of materials which are freely circulated within their organisations, and in some cases published by DoDGIES in print form and on its website. Until now, nobody has thought about copyright in these materials. But you think it needs to be sorted out . . .

It is proposed that DoDGIES establish a 'disaster line' for people to report various events in time of crisis. No-one really knows how many staff will be required to operate the Call Centre, and Mary is worried there will be delays. She suggests a 'music on hold' service, so that worried people can be appropriately soothed whilst waiting to be evacuated, informed of the fate of their loved ones, *etc.* Bovver likes the idea and suggests *Pachelbel's Canon* and all that old stuff would be just perfect 'and on top of that we won't have to pay any copyright fees because its out of copyright'. You ring Phyle Crunch and he says that is nonsense. You consider your options . . .

A reggae version of Pachelbel's Canon is played at Barry Bubonic's funeral.¹⁹

Meanwhile the Bird Flu Models are producing astonishing results, which closely match the actual behaviour of the bird flu pandemic as it works its way through Asia towards Australia. In preparation for possible commercialisation of the Models, Bruce suggests we should register '*Avian Influenza Modelling*' as a business name.

¹⁹ If Pachelbel was alive today he would turn over in his grave.

Scenario 4: Responses

Advisory Council on Avian Influenza (ACAI)

- the workings of the ACAI and its members are likely to involve multiple relationships and collaborations, so copyright in materials prepared under the ACAI umbrella may be fragmented
- as a first step you should check the IGA for any existing IP provisions binding the Commonwealth and the States and Territories
- it might be possible to put in place additional formal agreements to ensure that the Commonwealth (DoDGIES) owns all the relevant IP, and create licences for use by others
- to the extent this is not possible, you could consider reliance on the Crown ownership provisions:
 - creation under direction or control (ss. 176, 178)
 - publication under direction or control (s. 177)
- to make this work more effectively, you could seek an acknowledgment from each representative that they are acting under 'direction or control of the Commonwealth' (perhaps at same time as confidentiality undertakings are sought)
- re claims by NZ, you might also check the MoU - the fact it is called an MoU does not mean that it could not possibly contain a provision re IP ownership.

The disaster line - who're you gonna call about music on hold?

- check any agreement with Telstra, Optus or other service provider to see if they have it covered
- if not you may consider from PPCA in respect of the sound recording copyright
- or you could use 'pre-paid' copyright material on which the performance / communication rights are pre-licensed - there are providers of such content
- or use own recorded messages rather than music recordings

Pachelbel's Canon - reggae version

- the reggae version could be a new transcription or arrangement, in which a fresh music copyright arises - an APRA licence may be needed
- aside from copyright in the musical work, there is copyright in the sound recording - a PPCA licence will be needed
- however, it is not your problem if the funeral directors assume responsibility for any licensing arrangements which they probably would

The business name

- Bruce is misguided in suggesting a business name be registered. Business names are not a form of IP and do not confer exclusive rights to use of the name. On top of that it would be necessary to register in each State and Territory. It would be better to apply to IP Australia to register a trade mark
- Note that the Advisory Council on Intellectual Property (ACIP) has issued a report: 'A Review of the Relationship between Trade Marks and Business Names, Company Names and Domain Names', 13 March 2006.²⁰

²⁰ Available online at: <http://www.acip.gov.au/library/TM.%20business.company.domain%20names-%20Final%20Report.pdf>

SCENARIO 5: LICENSING OUT & COMMERCIALISATION (25 MINUTES)

As a result of the CRC-EE consultancy, you are presented with a quite complex situation. The schedule of Background Material reveals that the **Black Death Data** is comprised of two parts:

- 1) the **locus mortis compilation**. This is a compilation of data on the locations of burial sites used during the black death. It is derived from scattered records kept secret for centuries by various chapters of the **Priory of Sion**. The records were located, combined and normalised over 20 years by a syndicate of insurers from **Lloyds of London**. You learn that CRC-EE is now in dispute with Lloyds in regard to the initial release of the *locus mortis* compilation to DoDGIES;
- 2) **DNA data** from tissue samples taken from the burial sites under the direction of CRC-EE. The process of DNA sampling commenced under the first funding round and continued with the current round. It was completed one month after the commencement of the consultancy agreement.

Using both parts together the Black Death Data allows a picture to be built up of the emergence, progress and subsidence of the black death. Now, under the consultancy agreement, CRC-EE have enhanced it with the aid of the COMPLEXIS package to produce the **Bird Flu Models**. The new Models have the capacity to predict the emergence, progress and subsidence of bird flu.

After tough negotiation, the CRC-EE consultancy agreement had provided that:

- ‘Background Material’ includes anything that was initially developed for a purpose *other than* the performance of the consultancy services. Thus CRC-EE retains ownership of the DNA Data, *even though* it was completed during the consultancy period is reproduced in the Bird Flu Models.
- DoDGIES is granted a licence to do pretty well anything with the Bird Flu Models, *except* for an important ‘carve-out’ insisted on by CRC-EE: no licence (or warranty) is given to the extent that the Bird Flu Models incorporate a reproduction of the *locus mortis* compilation.

To make it more complicated, Mary remembers that ICS was originally a party to the CRC-EE in first round, but withdrew at some point. You suspect it may have acquired a share to the IP rights in the early DNA Data, and any such IP would now be inherited by DoDGIES. You obtain the current **Centre Agreement** and it provides that non-continuing parties from round 1 retain their IP rights as stated in the **round 1 Centre Agreement**. It transpires that ICS’s signed original of the round 1 Centre Agreement has been lost in the movement of records to DoDGIES, but after an intensive search you locate an unsigned copy of that Agreement. The IP clauses occupy 5 dense pages, so you forward the document to Phyle Crunch for an expert opinion.

A few days later Ms Chew rings with news. First, Phyle Crunch has left unexpectedly for an urgent meeting in London. She also has bad news: the document you retrieved only contains the odd numbered pages from the original round 1 Centre Agreement; evidently it was photocopied in a hurry from a double-sided original!

Meanwhile the world is beating at Bover’s door to obtain access to the Bird Flu Models. Among those interested are: Lloyds, CRC-EE and **Complexis Corporation**. Lloyds has offered US\$15,000,000 cash for an exclusive licence.

Scenario 5: Responses

Are we just unlucky, or could the missing even-numbered pages be a conspiracy? (1 minute)

There is a 95% chance that it is not a conspiracy at all, just a cock-up (it does happen)

Dissect the layers of IP material; for each layer say who owns IP and who has a licence

- the **burial site records**: The monks of the Priory of Sion are too long dead for there to be any copyright still subsisting. However there is a suggestion that the data or certain aspects of it are 'confidential information'; that is, the circumstances in which it has been divulged to recipients (including DoDGIES) are such as to import an obligation of confidentiality, owed to the Priory of Sion (or their legal representative). You do not have enough information as yet to determine whether DoDGIES should have drawn the inference that the CDROM was confidential, and the one person who may have helped has, tragically, died of bird flu.
- the **locus mortis compilation**: It appears that (as well as reproducing the burial site records) this incorporates an additional *layer* of copyright, vesting in Lloyds, in relation to their effort and skill in 'normalising' the records. Also, even if they make no changes to the records, it is likely that by selecting and collecting together the individual records they have acquired a copyright in the collection as a 'compilation' under the Copyright Act. Also, DoDGIES may have obligations of confidentiality to Lloyds, similar to those for the Priory of Sion.
- **DNA data**: It is likely that the IP is owned by the participants in the CRC-EE as it was collected under their direction, and that the IP would be exercisable on their behalf by their commercial agent, CRC-EE Pty Ltd (our consultant). Under the Consultancy Agreement CRC-EE Pty Ltd grants DODGIES a broad licence to use and commercialise the DNA data as incorporated in the Bird Flu Models (their final deliverable to us). This comes with a warranty so we do not need to inquire as to their entitlement. They did not, however, give a licence (or warranty) in respect of the *locus mortis compilation* to the extent this might be reproduced in the Bird Flu Models. Thus if the Bird Flu Models are a reproduction in a copyright sense of the *locus mortis compilation*, we may have to deal separately with Lloyds.
- **Bird Flu Models**: Under the consultancy agreement we own the improvements made in order to produce the Bird Flu Models. However we do not own the underlying layers. As noted above, we have a licence to the DNA Data layer, but no licence in relation to the *locus mortis compilation*. To the extent of our ownership of the Bird Flu Models, we have granted a broad licence back to CRC-EE Pty Ltd.
- **COMPLEXIS**: We know that this was 'used' by CRC-EE Pty Ltd under the consultancy in order to generate the Bird Flu Models from the pre-existing data. That does not tell us whether the Bird Flu Models incorporate a reproduction of a 'substantial part' of the COMPLEXIS package. One would expect that the COMPLEXIS software is merely a language or analytical tool that works on existing data to produce enhanced data. However some software packages are used as 'application generators' which create an application incorporating code ('run time modules') from the package. In such cases the licence agreement will set out the licensee's rights to distribute applications built using the package. You may need to check this out. Even if the Bird Flu Models *as such* do not incorporate a reproduction of COMPLEXIS copyright, the use or modification of the Models in practice may require the presence of the COMPLEXIS software, or a similar product. Again, you need to investigate to get a sound understanding of the technical dependence of our 'product' on COMPLEXIS, as this would affect our IP strategy.

In summary:

- we can exploit the Bird Flu Models subject to Lloyds copyright in the DNA Data, and possible obligations of confidentiality to Lloyds and the Priory of Sion;
- CRC-EE Pty Ltd may also exploit the Bird Flu Models, subject to the same potential limitations;
- exploitation of the Bird Flu Models (in both cases) may require appropriate arrangements with COMPLEXIS.

What should your IP objectives be in the current situation?

- Bruce would probably say we should use the IP for whatever monetary returns we can get
- however, DODGIES would be better advised to consider its broader objectives, which are to protect against a pandemic, not to make money
- bird flu is not just an Australian problem, and the Bird Flu Models could be valuable to the whole world
- our objective in this case should arguably be to promote wide availability of the Bird Flu Models on liberal licensing terms

What strategies might you follow in order to achieve your objectives?

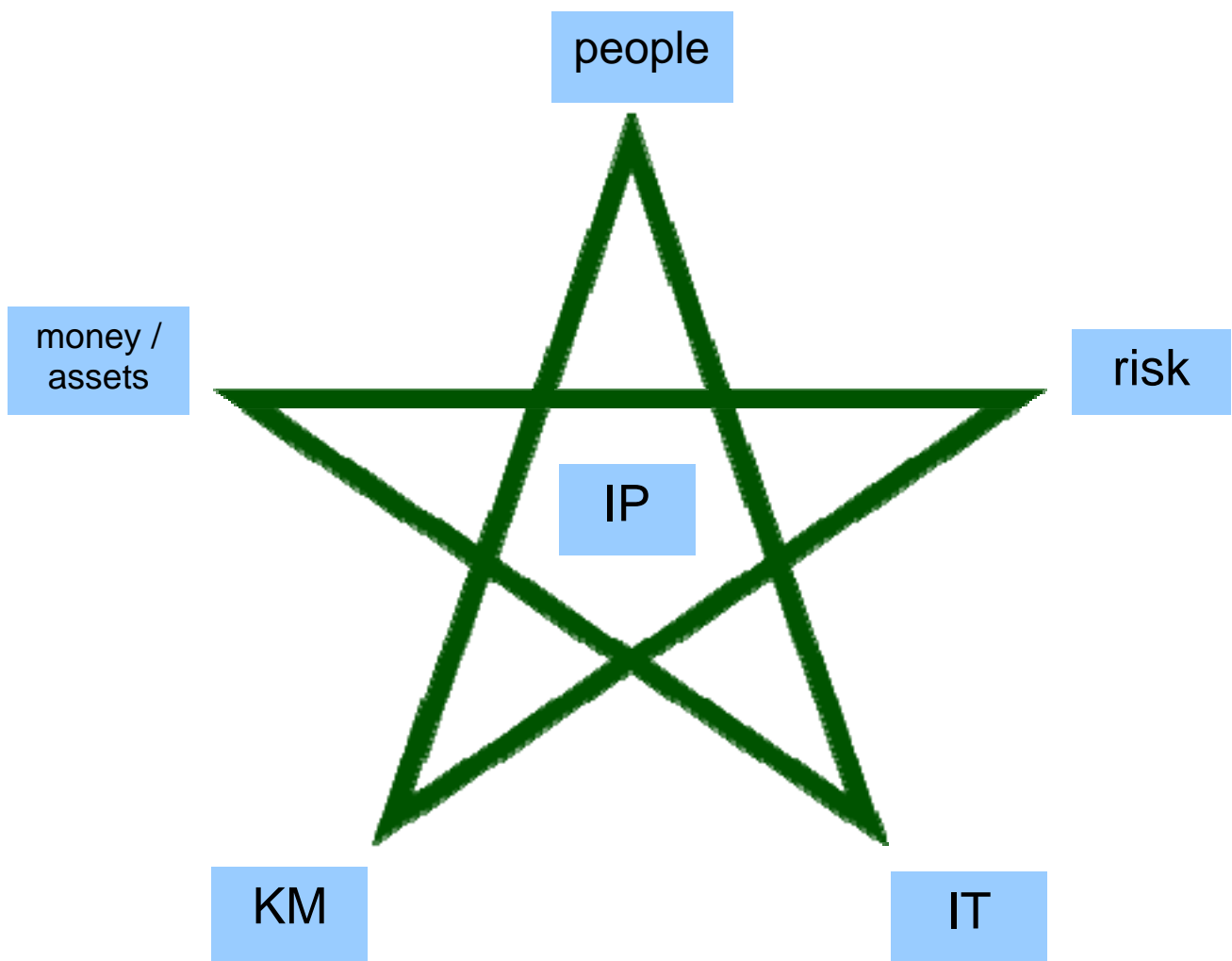
- our objective is more likely to be achieved if some of the layers of IP could be collapsed together rather than being fragmented
- public ownership may also help to ensure that critical IP is available on liberal terms, rather than being rationed under proprietary business models
- as a first step you should make further inquiries to assess:
 - possible Lloyds copyright in the *locus mortis compilation*
 - possible obligations of confidentiality to Lloyds and the Priory of Sion
 - the technical dependence of the Bird Flu Models on the COMPLEXIS product.
- your strategy might consist in part of the appointment of a Distributor. If so you could:
 - try to consolidate IP before seeking bids, to maximise IP value;
 - encourage bidders to form consortia to consolidate their IP, as part of the bidding process;
 - appoint a single party as distributor and leave it to them to make any necessary arrangements with third parties who control essential IP
- in regard to commercialisation generally, note that:
 - sale (assignment) of IP is a disposal of ‘public property’ under FMA Act s.41
 - granting a free licence (e.g. to a South Pacific island state) is arguably a gift of public property under FMA Act s.43
 - granting a commercial licence to end users invokes obligations under FMA Act s.44 to properly manage Commonwealth resources
 - the appointment of a distributor is probably an acquisition of a service under the CPGs
 - a distributor may be taken to be handling ‘public money’ for purposes of the FMA Act.

SCENARIO 6: THE LECTURE (15 MINUTES)

You are a star! Due to your work developing an excellent solution to the IP issues raised in Scenario 5, Secretary Bover²¹ is now convinced of the central role that IP plays in the affairs of the Agency. He asks you to present a keynote address at the *South Pacific Regional Conference on Avian Influenza* convened by the ACAI.

You decide to present a holistic message, demonstrating the relevance of IP to other key areas of corporate governance within the Agency. The premise is that IP is not a discrete topic, but has areas of tangency with other objectives or values. Your audience will include stakeholders, the executive, policy makers, program administrators, HR managers, lawyers, accountants, auditors, *etc.*, and you expect to be able to say something that each one of them can relate to.

After some thought you come up with a model which focuses on five key areas of corporate governance. This is great because you will be able to illustrate your theme with an image of Bover's beloved Pentangle. Peta insists on proper attribution of course, and a place on the main table at the **Conference Dinner**.



²¹ No-one calls him 'Boy' now.

Scenario 6: Responses

People management

- IP is the result of human creative effort; i.e. *people create IP* - see also under 'KM' below
- a modern, knowledge- and service-based organisation should provide the intellectual inputs, tools and resources to support the creative efforts of its people
- agencies should show they value the results of those creative efforts, including by respecting moral rights where appropriate; a moral rights policy should form part of agency IP Guidelines
- new employees could be asked to acknowledge the moral rights policy at the same time as they acknowledge / give undertakings re: privacy, confidentiality, conflict of interest, acceptable internet and email use, security, responsible (including non-infringing) use of software, *etc*
- similar acknowledgements / undertakings may be required from Contractor personnel engaged in the performance of services for an agency
- arrangements re study leave, LWOP, staff exchanges, academic publications, *etc*, should clearly specify ownership of any IP created; and provide for licences as appropriate

Knowledge management (KM)

- corporate knowledge may crystallise as a category of 'IP' (e.g. copyright; confidential information)
- however KM is a broader concept than IP: 'informal' know-how may be too commonplace or fluid to be captured as IP, so leveraging it depends on retention of staff
- a records and document management system helps (may serve in part as IP / assets register)
- overall, KM (including IP) is an important way of differentiating from competitors, and a source of competitive advantage in a service economy

IT planning

- a lot of important IP is IT-related - see *IT IP Guidelines* on DoCITA website
- some of the more complex IP issues arise in an IT context, because of the capacity of computers to copy and communicate documents, and to manipulate information to create derivatives, giving rise to complex layering of foreground and background
- licences for software and digital data products must be managed carefully to lessen the risk of infringement; may need to catalogue licences (perhaps part of an IP / assets register)
- there are related issues of privacy, security, acceptable internet and email use, responsible (including non-infringing) use of software
- IT managers may adopt 'open source' software, but IP and product warranties problematic

Asset and financial management

- IP is a form of property, albeit intangible
- thus it attracts accountability obligations as an asset under FMA Act (s.44) and CAC Act

- value may be quantified in certain cases
- in acquisition context, a decision not to claim all the IP rights may achieve favourable pricing; this is an indirect reflection of value
- IP that an agency controls may be used to generate a stream of revenue, where appropriate
- may need to amortise cost of development and/or licence fees over a period
- special arrangements possible for royalties received; or they go into consolidated revenue

Risk management

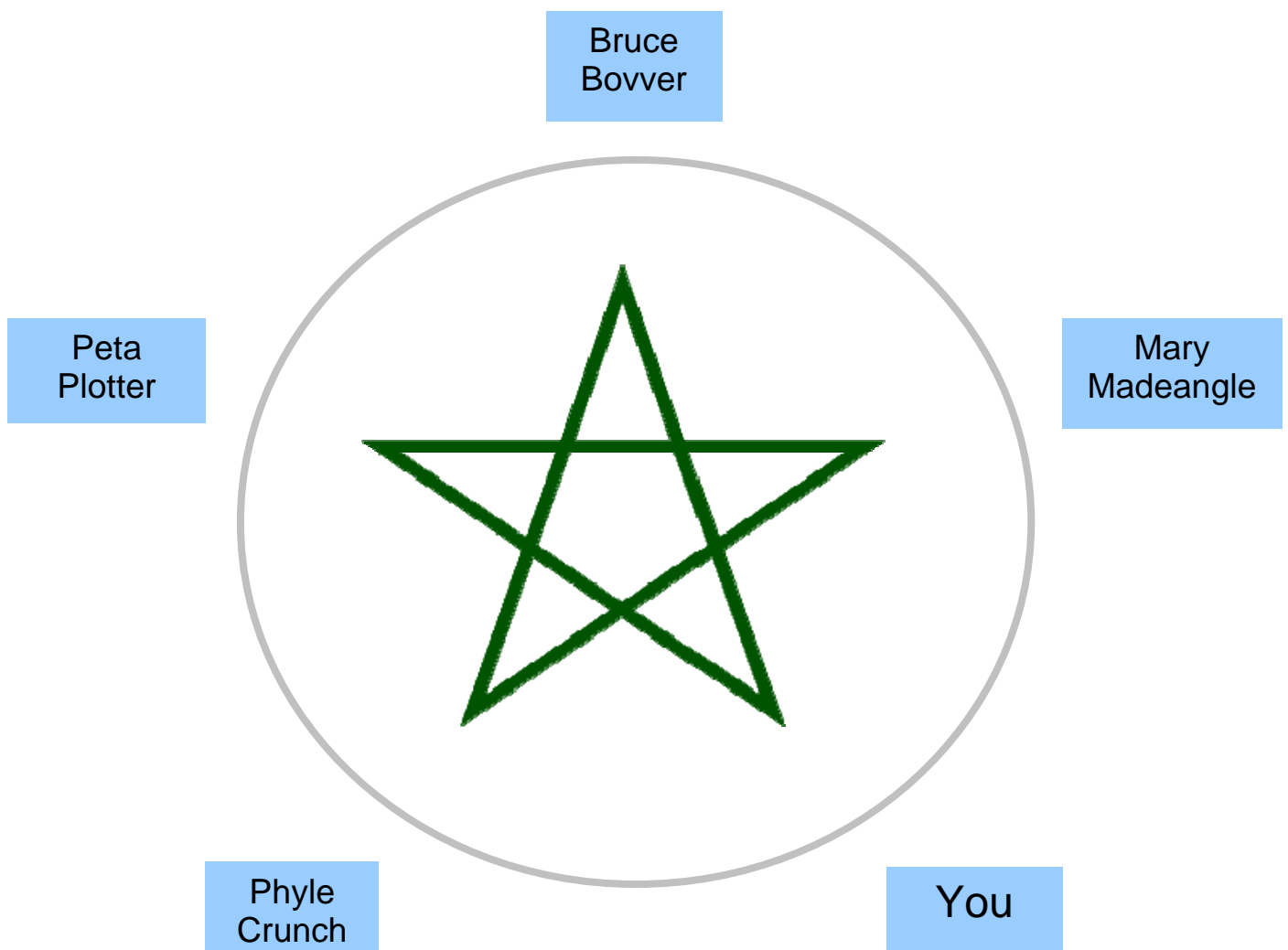
- liability to third parties for infringement, especially in relation to software
- third party infringement of agency IP, e.g. 'branding' deceptively similar to agency programs
- loss of 'IP', e.g. failure to register patent or leaking of confidential information into public domain
- lost opportunity by failure (or delay) to leverage IP appropriately, including by acquiring it unnecessarily and depriving industry
- regulatory risks from failure to manage IP as a valuable asset - FMA Act s.41

DENOUEMENT

It's been a hectic period, capped off by your keynote address to the *South Pacific Regional Conference on Avian Influenza*. And now its time for you to just relax and swap gossip at the Conference Dinner.

Just before you meet for dinner it is announced on the news that the government has fallen. Weakened after the **SCAMGuard** debacle²², the final straw was the abject failure to properly anticipate the speed of emergence of bird flu, which now represents a palpable threat to Australia. Mr Costello, at last, is drafted to form a government of national unity.

At dinner, you find the main table laid out with **the Pentangle** as the central theme.²³



²² See Episode 2, which is documented in the papers of the 2nd AGS IP Law, Policy and Practice Seminar, 2005.

²³ As readers of the *Da Vinci Code* will know, the Pentangle is an ancient symbol which has held a variety of religious and other connotations over time. It is constructed by five straight lines, forming the vertices of a 5-pointed star. The intersections this created divide the lines into proportions equal to the 'golden ratio' or the 'golden mean', which is approximately 1:1.618. A rectangle with sides in that proportion is generally thought most pleasing to the eye, and has been used in art and architecture since ancient times.

Everyone except Phyle Crunch is present. No-one seems to know if he's still in London. But the rest of you are in an ebullient mood. For there are many mysteries to be discussed, and everyone wants to compare notes:

- how did you stitch up the IP deal for the Bird Flu Models?
- whatever happened to Klaus?
- how did Barry Bubonic really die?
- why did Crunch go to London?



Bruce Bower

Bruce in particular is in an expansive mood. He boasts that he has just got off the phone from the new PM. Never one to miss an opportunity, Bruce rang him to congratulate him on his appointment.

“Tim . . . “

he began.

“Tim . . . *mate* . . . congratulations . . . I'd always felt you'd do it . . .“

You can guess the rest. Bruce is convinced a safe seat is in the bag!

This revelation prompts others, first of all from You. You have gossip on **Phyle Crunch**: he had gone to London a disillusioned man, after he heard a rumour that the government was about to abolish the special provisions concerning Crown ownership of copyright - ss. 176 - 179 . . .

“. . . beautiful little sections . . . he told you . . . they've been a nice little earner for as long as I can remember . . . I don't know what I'm going to do . . .“

But in London, he recovered his optimism and hatched a little plot. He convinced the Priory of Sion that the secret they had kept for centuries, the *locus mortis compilation*, was now in the public domain, as it had been passed somehow to the CRC-EE and there was no indication of any obligation of confidentiality being imposed at the time. On your instructions he then went to see Lloyds of London, and then to the WHO, and the rest is history. A deal has been done, and everybody is happy. For reasons of confidentiality you can't go into details over the dinner table . . .

. . . Raelene leans over and starts to whisper something to you about her partner in the firm, Phyle Crunch . . .

. . . something about Phyle Crunch's desk .
 . . something about missing odd-numbered pages . . . something about a confidentiality obligation . . . something about not a cock-up at all . . . something about a conspiracy .
 . .



Crunch + Chew

. . . but before you can absorb the implications of her remarks, your attention is diverted by a most unexpected arrival . . .



Klaus Krescent

. . . **Klaus** whom you haven't seen for a year walks in, large as life, and sits down in the seat reserved for Phyle Crunch.

Fortified by wine he reveals secrets that you could never have imagined. (And the account I give to you today is based up revelations made at the dinner, and also fragments of information that I came upon later from a number of sources, who must be kept confidential.)

For **Klaus K Krescent** had been a grandmaster of the Priory of Sion for a number of years . . .

As you know the Priory of Sion is a centuries old secret society dedicated to keeping secret the *Holy Grail* - interpreted as the location of relics proving that Jesus married and that his blood line continues today.

However Klaus fell out with the organisation in the 1970s, establishing a splinter group over his alternative theory about the real meaning of the Holy Grail. The breakaway movement was initially called the Priory of Sion at Nimbin, although after some unpleasant correspondence it was renamed the **Priory of Nimbin**.

. . . Much later, Peta Plotter became a member of the Priory of Nimbin although it must be said her commitment was only skin deep . . .



Peta Plotter

Talking of skin deep, you may be interested to know that Peta has a distinctive birthmark on her bottom, somewhat resembling a two fingered salute . . .



At Nimbin Peta hit upon the idea of registering the mark as a trade mark. This led to a falling out with Bruce who was convinced the mark would be caught by the provision relating to 'scandalous' trade marks. But she proceeded with her application.

The examiner initially rejected the application on the ground that there is no category under the *Nice Classification of Goods and Services* for bottoms, although not until after a close examination.

Eventually she managed to register the birthmark as a certification trade mark for use in connection with clothing, and it has proved a popular emblem on the back pocket of designer jeans.

Later there was version for people with fatter bottoms, with the word 'Cheeky' replaced by 'Chunky', which led to a challenge on the basis that the mark was descriptive rather than distinctive.

But I digress . . . back to **Klaus**. His group had dedicated itself to the notion that the real Holy Grail was the mysterious mathematics underpinning the operation of the universe itself: . . . *God's Unified Theory* if you like. It was a central tenet that if this was ever to be discovered by man, the end of days would be nigh. Indeed, progress in unlocking the secrets of the universe was occurring at a rate that Klaus found alarming:

- special relativity 1908
- general relativity 1915
- Schrödinger's equation 1927
- Heisenberg's uncertainty principle 1928
- Gödel's incompleteness theorems 1931
- Turing Machine 1936, *etc.*

Now you may wonder why we tell this story at all in a seminar on IP. But truth be known the central tenet of the Priory of Nimbin was really a proposition about intellectual property:

- You see all God's trade secrets were coming into the public domain.
- Not only that, but his patent rights were being usurped regularly by pretenders lodging applications for segments of life itself, and claims that discoveries of laws of nature were inventions.
- And God's copyright in his most beloved number series were being breached on a huge scale - the first one million prime numbers having been worked out.

Now I can reveal something never before told. I can tell you about the vault containing the most secret of AGS opinions. There are two opinions I will mention today. I recall seeing the opinions in my early days at AGS, and what I can tell you is from an imperfect memory.

The first opinion was sought by Klaus (then a graduate clerk) around Easter 1966 after evidence emerged that God was dead.



This raised an important question about how long God's copyright could continue to subsist. Now I recall that there were some complications that needed to be addressed, such as whether God's copyright subsisted under Parts III and IV of the Act, or was a Crown copyright under Part VII, or perhaps a Prerogative Right in the nature of copyright. However I won't trouble you with the details. Advice was duly given:

Your question, as rephrased by me:

1. Is God Dead?

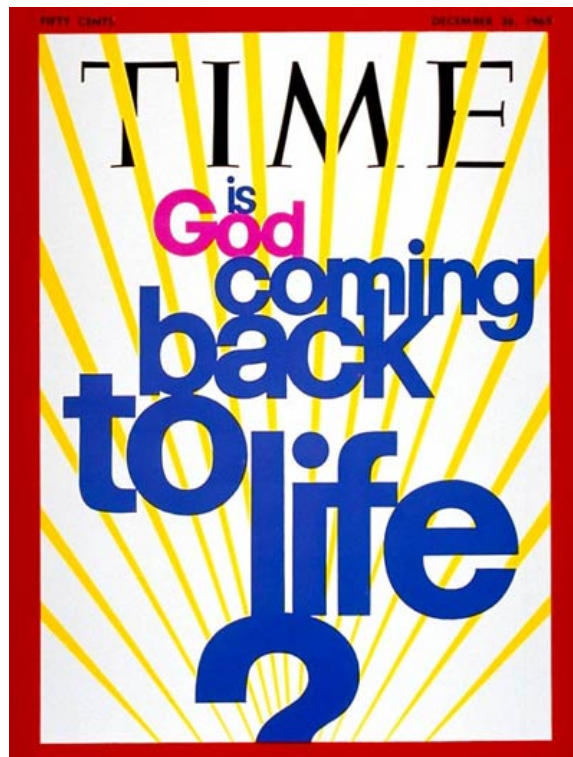
Answer:

1(a) For purposes of the *Copyright Act 1968* - yes

1(b) For other purposes - not necessary to answer.

It seemed that God's copyright and hence his ability to stave off the end of days would be extinguished in 50 years, i.e. at the end of calendar 2016 at the latest.

However new evidence emerged, around Christmas 1969, that God might not be dead after all.



This was the occasion for a second request for advice. Klaus was advised:

Your question, as rephrased by me:

On the assumption that God has been revived, for purposes of the Copyright Act, does the copyright term for his works now extend beyond the 2016 date previously advised?

Answer:

On that assumption, no.

Again I won't trouble you with the detailed reasoning. The relevant thing is that it was this advice which finally prompted the formation of the Priory of Nimbin. Klaus placed the advices in a quantum digital cryptex²⁴ and lodged them for safekeeping with Phyle Crunch.

From his vantage point in Nimbin he watched further troubling events.

In 1974 the *four colour map theorem* was solved.

Then in 1994 *Fermat's Last Theorem*, one of the great unsolved mysteries of mathematics which had tormented successive generations of mathematicians for over 350 years, was finally proved by Andrew Wiles.

Around 1637, Fermat wrote the following comment (in Latin) in the margin of his copy of Diophantes *Arithmetica*:

Cubum autem in duos cubos, aut quadratoquadratum in duos quadratoquadratos, et generaliter nullam in infinitum ultra quadratum potestatem in duos eiusdem nominis fas est dividere cuius rei demonstrationem mirabilem sane detexi. Hanc marginis exiguitas non caperet.

It is impossible to separate a cube into two cubes, or a fourth power into two fourth powers, or in general, any power higher than the second into two like powers. I have discovered a truly marvelous proof of this, which this margin is too narrow to contain.

To Klaus the pace seemed to be quickening!

Something had to be done to stave off the 'end of days', and Klaus hatched a brilliant solution:

AUSTRALIA US FREE TRADE AGREEMENT

Australia falls into line with US and EU

Copyright term extended to life plus 70 years

God saved

Alas, this was only a delaying tactic. The final straw was the arrival of bird flu, and news that **Barry Bubonic** has stumbled across a simple mathematical relationship, based on the Fibonacci series²⁵, which underpinned the astonishing accuracy of the **Bird Flu Models**. That was an insult

²⁴ As described in the *Da Vinci Code*, a 'cryptex' is a device invented by Leonardo Da Vinci for storing secret documents, which can only be opened with the use of a code. It is so constructed that any attempt to force it open will destroy the message inside. The modern use of encryption to protect documents is analogous. Electronic signatures based on 'public key technology' exploit the properties of prime numbers. In particular, the fact that whilst it is easy to multiply two large prime numbers together, it is almost impossible to work backwards from the product to figure out the prime numbers from which it was created. Such a feat requires massive computing power on present technology. But the possibility that someone might discover an efficient algorithm for computing two prime numbers from their product cannot be ruled out. If it occurred, the electronic authentication systems now in wide use would be vulnerable. For that reason it has been suggested that encryption systems could make use of quantum effects, in particular the properties described by Heisenberg's uncertainty principle. Thus if a secret message composed of individual photons was intercepted it would be destroyed in the process of decryption. For an explanation of how this works, see: *Quantum Confidential*, by Simon Singh, in *New Scientist*, 2 October 1999, page 28. The quantum digital cryptex developed by Klaus Krescent is the first working implementation of this concept, to the author's knowledge.

²⁵ A mathematical series in which each number is the sum of the two previous numbers. Thus: 0, 1, 1, 2, 3, 5, 8, 13, 21 . . . Successive pairs of number in the Fibonacci Series approximately ever more closely to the Golden Mean. See also footnote 23.

to God, and bad enough. But he compounded his error by lodging a patent application for the mathematical relationship he had discovered. This was rejected by the patent examiner, and quite rightly. But the damage had been done . . .

. . . Klaus knew that Bubonic had to go . . .



So that my friends is the sad ending to Barry Bubonic, and my story.

I've told you all I know.

But I'm acutely aware that vital questions still remain:

- Will Bruce get a safe seat?
- Will Peta get back together with Bruce?
- How did Barry Bubonic get the DNA data in the first place?
- Where is the *quantum digital cryptex* now?
- What is Phyle Crunch really doing in London?
- Will Raelene Chew take over the practice?

... and ...



- why didn't Mary Madeangel say anything at the dinner
- what mysterious secret lies behind her enigmatic smile?

Mary Madeangel

I'll keep on the case, and these secrets and more will be revealed next year.

INDEX

IP concept / issue	Where and how it arises
accountability for public expenditure	An implicit issue in the choices about when, how and with whom we will licence or commercialise the Bird Flu Models - see Scenario 5.
'acts comprised in the copyright'	The things a copyright owner has an exclusive right to do. For example, the 'performance' and 'communication' rights mentioned in answer to Scenario 4.
Agency Material	A common term used to denote IP subject matter brought to a consultancy agreement by the Agency - see Scenario 3.
background material	<p>A common term used to denote IP subject matter brought to a consultancy agreement or joint venture relationship by one of the parties.</p> <p>In a consultancy agreement the service provider typically retains IP in the background material, and the Agency typically receives a licence (only) in relation to any background material included in the Contract Material - see Scenario 3.</p> <p>Issues that can arise include: (i) whether background material must be listed by the service provider; (ii) whether it has to be in existence prior to the commencement of the agreement. In Scenario 5 we relent on the latter point, for purposes of our agreement with CRC-EE.</p>
business name	Distinguished from a trade mark in the answers to Scenario 4.
business plan	<p>Often a pre-cursor to, or a component of a Distributorship agreement. Needs to be kept up to date. May incorporate revenue and royalty targets.</p> <p>Although the details are not recorded, you would probably have considered the need for a business plan as part of the arrangements concluded at Scenario 5.</p>
CCA	<p>The Commonwealth Copyright Administration, within the Attorney-General's Department.</p> <p>CCA deals with routine requests from the public to reproduce Commonwealth copyright material that has been published in print form or on a website, and gives administrative advice to agencies on copyright management. However CCA would not advise on more complex licensing transactions such as joint ventures, technology exchange agreements, <i>etc.</i>, which would be managed by the 'custodian' agency with their legal advisor.</p>
certification trade mark	In the <i>Denouement</i> section, we record that the birth mark on Peta's bottom was registered as a certification mark for use in connection with clothing (note: not bottoms), although what precisely it certifies is unclear.
character merchandising	The marketing of personalities through endorsements, <i>etc.</i> Not a discrete area of law, but rather based on an amalgam of trade

	<p>practices law, trade marks, contract, <i>etc.</i></p> <p>You are a natural at it - see <i>Those who Strut upon the Stage</i>.</p>
collecting society	<p>Two examples are mentioned in the answers to Scenario 4: the Australasian Performing Rights Association (APRA) and the Phonographic Performance Company of Australia (PPCA).</p> <p>We also mention Copyright Agency Limited at footnote 4.</p>
Commonwealth	<p>DoDGIES (like the Department of Communications, Infrastructure and the Arts which it replaced) is a part of the single legal entity: the Commonwealth.</p> <p>Special rules apply to ownership of copyright by the Commonwealth; e.g. s.177 mentioned in Scenario 2 in relation to ICS materials; s. 176 mentioned in Scenario 4 in relation to materials developed under the umbrella of ACAI.</p> <p>In the Denouement, Phyle Crunch is disillusioned by proposals to abolish the above provisions.</p> <p>Some CAC Act bodies are treated as the Commonwealth for the above purposes - see footnote to Scenario 2.</p> <p>A software licence to a Department can be transferred to another Department under the <i>Acts Interpretation Act 1901</i> s.19C - see answers to Scenario 2.</p>
CPGs	<p>Commonwealth Procurement Guidelines.</p> <p>In the answers to Scenario 5 we mention some implications of the CPGs for a Distributorship or other commercialisation agreement.</p>
confidential information	<p>The only possible form of 'IP' to protect the <i>locus mortis compilation</i> - see Scenario 2.</p>
conflict of interest	<p>Often relates to misuse of confidential information.</p> <p>It seems that Phyle Crunch might be flouting this principle - see <i>Denouement</i>.</p>
corporate governance	<p>In Scenario 6 you demonstrate successfully that IP is a central to the areas of corporate governance, including people management, asset/financial management, IT strategic planning, knowledge management and risk management.</p>
Contract Material	<p>Common term used to denote the IP subject matter created as part of carrying out a contract, principally 'foreground material', but may also include embedded 'background material'.</p> <p>See Scenario 3.</p>
Custodianship	<p>Whilst the Commonwealth is a single legal entity, it is usual for a department or agency within the Commonwealth to exercise IP rights in material created under its direction or control. This is the so-called convention of 'custodianship'. It rests on the reality that there is no other way that things could work in practice.</p> <p>In relation to <i>published copyright</i> material, an agency's 'custodianship' is qualified by the special role of the Commonwealth Copyright Administration - see above under 'CCA'.</p>

data	<p>Assertions of copyright in 'data' can be problematic - see answers to Scenario 2.</p>
Distributorship	<p>A form of licence agreement, under which the licensee (Distributor) is appointed to commercialise IP material, in return for payment of royalties.</p> <p>This would be one of the possibilities you considered at Scenario 5. In the answers we mention briefly some FMA Act issues arising in connection with Distributorships.</p>
employment (relationship)	<p>The importance of this relationship is that IP in anything created by an employee in the course of that employment is owned by the employer.</p> <p>In Scenario 2, questions arise as to whether academic papers prepared by ICS staff were made in the course of their employment. In Scenario 3 we speculate that it would be better if Peta Plotter had been engaged as an employee rather than as a consultant.</p>
foreground material	<p>Can be roughly equated to 'Contract Material' as used in consultancy agreements. In CRC Centre Agreements may be roughly equated to Centre Material / IP.</p> <p>Issues may arise over the IP treatment of background material incorporated in the foreground material - see Scenario 3.</p>
infringement	<p>In the case of copyright, usually arises when someone performs an 'act comprised in the copyright' without the permission (direct or indirect) of the copyright owner.</p> <p>Barry Bubonic infringes God's copyright and moral rights and is struck down by bird flu. (Copyright owner interests have urged amendments to the <i>Copyright Act 1968</i> to provide for this sanction more generally.)</p>
IP Policy	<p>Having surveyed the landscape and laid the groundwork in Scenario 1, you synthesise a brilliant IP policy for DoDGIES in Scenario 6.</p> <p>You conclude DoDGIES can best achieve its objectives by adopting a relatively open (rather than proprietorial) IP policy in regard to the Bird Flu Models.</p>
IP Regime	<p>A legal form of protection for creative subject matter.</p> <p>Copyright, trade marks, confidential information and patents are examples that appear in this Case Study - see Scenario 1.</p>
IP Register	<p>See Scenario 6. Although not mentioned there, CRC-EE probably maintains an IP Register to keep track of IP created (foreground) and/or licensed in (background) for both round 1 and round 2.</p> <p>The list of background IP required under DoDGIES standard consultancy agreement might provide data for a DoDGIES IP Register.</p>
IP rights	<p>The rights conferred under an IP Regime in relation to relevant subject matter. An IP strategy that one may apply to a given relationship is largely about the choices one makes in allocating (i) rights of ownership and (ii) rights reserved or acquired by way of a</p>

	licence.
joint venture	Usually means an unincorporated joint venture. The CRC-EE is an example - see Scenarios 2 and 5.
know how	<p>Corporate knowledge (including technical know how) <i>may</i> constitute a form of 'IP', such as copyright or confidential information. If inventive in nature, it may also form the subject of a patent application.</p> <p>Equally, however, some corporate knowledge does <i>not</i> crystallise as a category of 'IP', and thus 'knowledge management' is a broader term than 'IP management'. Informal know how may be too commonplace or fluid to be captured as IP, so leveraging it depends on DoDGIES ability to retain its staff. See answers to Scenario 6.</p> <p>See Scenario 2, which raises the need to characterise the 'know how' brought to DoDGIES by former employees of CRC-EE.</p>
licence	<p>Authorisation by or on behalf of the owner of the relevant IP rights for a third party to do some act in relation to the protected subject matter that the IP owner has the exclusive right to do.</p> <p>In Scenario 2 we consider whether a software licence to a Department can be transferred to another Department under the <i>Acts Interpretation Act 1901</i> s.19C - see answers to Scenario 2.</p> <p>In Scenario 3 we consider licences in the context of a consultancy; in particular a licence of background IP to DoDGIES, and a licence back of foreground IP to CRC-EE. Later we find that CRC-EE seeks to limit the licence back to DoDGIES - see Scenario 5.</p> <p>One kind of licence is a 'Distributorship' - see above.</p>
moral rights	<p>Mentioned in Scenario 2 in relation to academic papers prepared by former ICS staff.</p> <p>Clearance of moral rights later emerges as an issue under the standard DoDGIES consultancy agreement - see Scenario 3.</p>
partnering	A vague term which could cover a range of 'commercialisation' options where a commercial entity is involved.
probity issues	<p>Probity issues are alluded to in the <i>Denouement</i>.</p> <p>See also entries for 'confidential information' and 'conflict of interest', above.</p>
royalties	Periodic payments under a Distributorship, based on the volume of commercial activity.
statutory licence	<p>A licence given by statute (as opposed to an ordinary (voluntary) licence. An example relevant to this Case Study is s.183 of the Copyright Act, which allows the Commonwealth to use third party copyright materials 'for the services of the Commonwealth', subject to certain requirements.</p> <p>This is an option for DoDGIES in relation to the Black Death Data - see Scenario 2. But because of the uncertain pedigree of the Black Death Data, in lieu of notice to the copyright owner it will be necessary to advertise in the Gazette as prescribed in the</p>

	Copyright Regulations.
subject matter	<p>The material or thing which is capable of protection under an IP Regime.</p> <p>In Scenario 1, we attempt to identify the IP subject matters which seem likely to arise in the work of DoDGIES, the applicable IP Regimes and IP rights arising, and the relationships in which IP rights fall to be allocated.</p>
trade mark	<p>In Scenario 1 you should have considered the possibility of protecting various DoDGIES indicia as trade marks. In Scenario 4, Bruce Bovver confuses a trade mark with a business name, but we put him right in the answers to Scenario 4.</p> <p>Trade marks are registered in relation to goods or services in a particular <i>category</i> of the Trade Marks Register, which follows the categorisation set down in the <i>Nice International Classification of Goods and Services</i> - see <i>Denouement</i> in which Peta Plotter seeks a certification trade mark in relation to clothing.</p> <p>See also above re 'certification trade mark'.</p>
AUSFTA	<p>Australia - United States Free Trade Agreement.</p> <p>Amendments flowing from the AUS FTA include extensions to the term of copyright, which proves of some importance to the Priory of Nimbin - see <i>Denouement</i>.</p>