
Chapter 3

Crown ownership of copyright

3.01 As a background to the Committee's discussion of policy issues and possible options for reform, this chapter outlines:

- the current position in Australian law in relation to Crown copyright;
- the history of the Crown copyright provisions, including a brief examination of copyright law in the United Kingdom and the development of Crown copyright provisions in Australia; and
- reviews of Crown copyright provisions in other common law countries.

The current law in Australia

3.02 Australian law in relation to government ownership of copyright is briefly discussed below in relation to: the legislative powers of the Commonwealth and the States; Australia's international obligations; and the Copyright Act.

Legislative power with respect to copyright

3.03 Under section 51(xviii) of the Commonwealth Constitution, the Commonwealth has power to legislate with respect to 'copyrights, patents of inventions and designs, and trade marks'.¹ While there is nothing in the Constitution to suggest that the powers under section 51 are exclusive to the Commonwealth,² Commonwealth law will prevail over any inconsistent State law.³

¹ Section 51 provides that the Commonwealth Parliament 'shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to' the listed matters.

² Section 107 of the Commonwealth Constitution preserves the powers of State parliaments unless they have been vested exclusively in the Commonwealth under the Constitution.

³ Section 109 of the Commonwealth Constitution provides that when a law of a State is inconsistent with a Commonwealth law, the Commonwealth law shall prevail, and the State law shall, to the extent of the inconsistency, be invalid.

3.04 While the Australian colonies prior to federation had enacted some limited laws in relation to copyright (as discussed further below), copyright subsists today only by virtue of the Copyright Act,⁴ subject to the preservation of those prerogative rights in the nature of copyright.⁵

Australia's international obligations

3.05 Australia is a signatory to various international conventions relating to copyright, including the Berne Convention for the Protection of Literary and Artistic Works,⁶ the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations,⁷ and the TRIPS Agreement.⁸

3.06 However, these conventions do not impose any obligations in relation to government ownership of copyright. The Berne Convention specifically provides that it is a matter for legislation in each member state to determine the protection to be granted to 'official texts of a legislative, administrative and legal nature, and to official translations of such texts'.⁹ Members also have the discretion as to whether they, by legislation, exclude wholly or in part 'political speeches and speeches delivered in the course of legal proceedings'.¹⁰

⁴ Section 8.

⁵ Section 8A.

⁶ (1886), as revised.

⁷ (1961).

⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, which is a key multilateral treaty on the range of intellectual property rights. TRIPS came into force on 1 January 1995 and links intellectual property rights to rights and obligations under the General Agreement on Tariffs and Trade (GATT) or the World Trade Organisation.

⁹ Art 2(4). The Committee notes that the Commission of the European Communities has issued guidelines stating that the public sector should 'to the highest extent possible' make use of the discretion to exempt such texts (Commission of the European Communities Guidelines for improving the synergy between the public and private sectors in the information market, Directorate-General for Telecommunications, Information Industries and Innovation, 1989).

¹⁰ Art 2bis(1).

The Copyright Act 1968

3.07 There are three possible sources of government ownership of copyright under the Copyright Act:

- the general ownership provisions, particularly those which vest copyright in employees' work in their employer;
- the Crown prerogative in the nature of copyright; and
- the special Crown ownership provisions in Part VII of the Act.

3.08 These categories are not necessarily mutually exclusive: there is authority to suggest that a government may own copyright in a work under either the general provisions of the Act or under the Part VII provisions.¹¹

General copyright ownership

3.09 Under Parts III and IV of the Copyright Act, copyright subsists in literary, dramatic, musical and artistic works ('works'),¹² sound recordings, cinematograph films, television and sound broadcasts, and published editions of works ('subject matter other than works').¹³

3.10 Copyright in works is generally owned by the author, who must be a natural person.¹⁴ However, this general rule is subject to several exceptions, one of which concerns works made during the course of employment. Section 35(6) of the Copyright Act provides that, subject to Part VII, copyright in literary, dramatic, musical and artistic works created pursuant to terms of employment under a contract of service or apprenticeship is owned by the employer (subject

¹¹ For example, *Director-General of Education v Public Service Association of New South Wales* (1985) 4 IPR 552. In continuing an interlocutory injunction to restrain copying or communicating the contents of a departmental committee report, McLelland J of the Supreme Court of New South Wales stated that the State of New South Wales owned copyright in the report under either subsection 35(6) or section 176 of the Copyright Act.

¹² Section 32 of the Copyright Act.

¹³ Sections 89–92 of the Copyright Act.

¹⁴ Part III, section 35. Section 32(4) defines a qualified person as an Australian citizen, Australian protected person or Australian resident. The Copyright (International Protection) Regulations extend these provisions to citizens, nationals and residents of Berne Convention countries, World Trade Organization countries and other countries that are parties to the Universal Copyright Convention 1952.

to any contrary agreement¹⁵ and subject also to certain exceptions set out in subsections 35(4) and 35(5)¹⁶).

3.11 Ownership of copyright in subject matter other than works is dealt with in Part IV of the Act. The owner of copyright in relation to sound recordings and films is generally the maker.¹⁷ The owner of copyright in television broadcasts and sound broadcasts is the maker¹⁸ and in published editions of works is the publisher.¹⁹ Unlike the Part III provisions relating to works, it is not necessary for makers and publishers to be natural persons for copyright to subsist, and in most cases they are corporate entities.

Crown prerogative

3.12 The Crown prerogative in the nature of copyright, discussed in more detail in Chapter 6, is recognised by section 8A of the Act. Its exact scope is unclear but it is generally considered to apply to certain primary legal materials such as statutes.

Part VII of the Act

3.13 Division 1 of Part VII of the Act is headed ‘Crown copyright’. Under subsection 176(2), the Commonwealth or State is the owner of the copyright in an original literary, dramatic, musical or artistic work ‘made by, or under the direction or control of’, the Commonwealth or the State. Subsection 178(2) contains a similar provision in relation to sound recordings and cinematograph films. Subsections 176(1) and 178(1) provide for subsistence of copyright in such materials.

¹⁵ Section 35(3) of the Copyright Act.

¹⁶ Subsection 35(4) concerns work done by employees of a newspaper, magazine or similar periodical. Subsection 35(5) concerns contracts for portraits, photographs for private or domestic purposes and engravings.

¹⁷ In the case of commissioned films and sound recordings, the commissioning party generally owns copyright (sections 97–8 of the Copyright Act).

¹⁸ Section 99 of the Copyright Act.

¹⁹ Section 100 of the Copyright Act.

3.14 Crown ownership of copyright may also be acquired through the first publication of a work in Australia. Section 177 vests in the Commonwealth or State ownership of copyright of original literary, dramatic, musical or artistic works first published in Australia by, or under the direction or control of, the Commonwealth or the State. The operation of sections 176, 177 and 178 may be modified by agreement with the author of the work.²⁰ The Part VII provisions are discussed in more detail in Chapter 5.

Duration of copyright in government works

3.15 The duration of government ownership of copyright varies according to which of the statutory provisions or the prerogative right in the nature of copyright applies. Under the general provisions of the Copyright Act, the duration of copyright in published literary, dramatic, musical and artistic works is the life of the author plus 70 years²¹ (recently extended from life plus 50 years by the *US Free Trade Agreement Implementation Act 2004* (the US FTA Act)).²² Copyright in a work that is unpublished at the author's death continues to subsist until 70 years after the end of the year of first publication.²³

3.16 By comparison, copyright in a literary, dramatic or musical work under the Part VII provisions subsists as long as a work remains unpublished, and where the work is published, for 50 years after the end of the year of first publication.²⁴ In the case of an artistic work, the duration of copyright is fifty years after the end of the year when the work is made,²⁵ and for engravings and photographs, it is 50 years after the end of the year of first publication.²⁶ Duration of Crown copyright in sound recordings and films is 50 years after the end of the year of first publication.²⁷ The duration under the Part VII provisions

²⁰ Section 179.

²¹ Subsection 33(2).

²² The Act commenced on 1 January 2005.

²³ Subsection 33(3). The provision applies where the work had not been published, performed in public or broadcast and records of the work had not been offered or exposed for sale to the public.

²⁴ Subsection 180(1). This provision was not altered by the US FTA Act, as the US federal government does not have an equivalent to the Crown copyright provisions: see Chapter 5 for further details.

²⁵ Subsection 180(2).

²⁶ Subsection 180(3).

²⁷ Section 181.

is the same whether the government actually owns copyright or would, but for a contrary agreement under section 179, own copyright.²⁸ Works protected by the Crown prerogative, by contrast, are subject to perpetual copyright. A comparison is provided in the table below:

Table 2: Comparison of terms of copyright protection under the *Copyright Act 1968*¹

Type of work	Prior to 1 Jan 2005 under the general provisions of Copyright Act	By virtue of US FTA Act (commenced 1 Jan 2005)	Part VII provisions ²	Prerogative
Literary, dramatic and musical works	Published works: life of author plus 50 years s33(2). ³ Anonymous works: 50 years after publication s34 ⁴	Extended to life plus 70 years. Anonymous works: 70 years after publication	50 years after publication s180(1)	Perpetual (applies only to certain legal works) ⁵
Artistic works (not including photographs or engravings)	Life of author plus 50 years s32 Anonymous works: 50 years after publication s34	Extended to life plus 70 years. Anonymous: 70 years after publication (includes photographs)	50 years after the end of the year when work is made s180(2)	-
Photographs	Photographs: 50 years after publication s33(6)	s33(6) repealed – duration for photographs to be same as for other artistic works.	50 years after publication s180(3)	-
Engravings	Life of author plus 50 years. If unpublished when author dies, 50 years after publication s33(5)	If unpublished when author dies, 70 years after publication	50 years after publication s180(3)	

²⁸ Subsections 180(1)-180(3).

Type of work	Prior to 1 Jan 2005 under the general provisions of Copyright Act	By virtue of US FTA Act (commenced 1 Jan 2005)	Part VII provisions ²	Prerogative
Sound recordings & films	50 years after publication ss 93–4	70 years after publication	50 years after publication s181	-
Broadcasts	50 years after the end of the year of making s95	unchanged	-	-
Published editions	25 years after publication s96	unchanged	-	-

Notes to Table 2

1. References to ‘after publication’ mean after the end of the year of publication
2. Includes not only material in which the Crown owns copyright, but material in which the Crown would own copyright but for a contrary agreement under section 179.
3. Where the author of a literary work (other than a computer program), a dramatic or musical work dies before publication, copyright in the work continues to subsist until 50 years after the end of the year of publication (section 33(3)).
4. Section 34 also applies to pseudonymous works. The section does not apply where the author’s identity is generally known or can be ascertained by reasonable inquiry.
5. As discussed in Chapter 6.

History of Crown copyright

3.17 Australian copyright law has its origins in English law, with the current Copyright Act being heavily based on the *Copyright Act 1956* (UK). Consequently the Committee considered it useful to examine the origins and development of copyright law and policy in England and Australia, as part of considering whether the provisions are appropriate today.

A brief history of copyright law in England

3.18 Concern about the copying of written works first became significant in England in the late 15th century with the introduction of the printing press.²⁹ The Crown recognised the importance of the new technology and maintained a close interest in it from its beginnings. While foreign printers and booksellers were initially encouraged to come to England, by the first part of the 16th century there was growing resentment at foreign competition. Statutes against foreign competition in 1523 and 1529 included printers and booksellers, and in 1533 the importation and retailing of foreign books was banned.

3.19 During this time, the Crown's interest in printing moved from trade issues to censorship of material, particularly in relation to issues of religion. Under a proclamation by Henry VIII in 1538, the printing of any English book was banned unless it had been examined and licensed by the King and Privy Council. Later a charter was granted to the Stationers' Company, a group of letter writers, illuminators, bookbinders and booksellers. Star Chamber Decrees in 1566 and 1586 gave the Stationers' Company more specific powers in relation to censorship, including requiring registration of and limitations on the number of printing presses.

3.20 From the beginning of printing in England, the Crown granted privileges (that is, exclusive rights to print and publish books), its power to do so being based on the royal prerogative. These Crown grants, and the system of control

²⁹ For a more detailed discussion of the development of copyright law, see S Ricketson & C Creswell, *The law of intellectual property: copyright, designs and confidential information*, paras 3.40–365; J Lahore & W Rothnie, *Copyright and Designs*, Butterworths, paras 4041–220.

exercised by the Stationers' Company, were at the basis of a recognition of property rights in books. By the beginning of the 18th century, censorship ceased to be a significant factor in the development of copyright law, and its focus became the recognition of property in printed works.

3.21 The first modern copyright law was the Statute of Anne in 1709, which granted authors of books a limited copyright of 28 years,³⁰ consisting of the exclusive right to print and publish them in England. The preamble to that Act described it as 'an act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies'.³¹

3.22 The Statute of Anne did not specifically refer to the Crown, but the Crown was entitled to own copyright material under general copyright principles.

3.23 Crown copyright became a focus of increased interest or debate in the 1880s.³² At this time a few private sector publishers began to realise the commercial potential of some of the titles of more general interest being issued by Her Majesty's Stationery Office (HMSO) and made reproductions of this material.³³ On advice from the Crown's law officers, the Treasury published a notice in the London Gazette of 23 November 1886:

Printers and Publishers are reminded that anyone reprinting without due authority matter which has appeared in any Government publication renders himself liable to the same penalties as those he might under like circumstances have incurred had the copyright been in private hands.³⁴

³⁰ That is, an initial term of 14 years with an additional term of the same length. Works already published when the Statute of Anne was enacted were given a term of 21 years.

³¹ The preamble continues: 'Whereas Printers, Booksellers and other Persons have of late frequently taken the Liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For preventing therefore such Practices for the future, and for the Encouragement of learned Men to compose and write Books.' See Ricketson & Creswell, op cit, para 3.125.

³² G Robbie, 'Crown copyright – bete noire or white knight?', 2 *Journal of Information Law and Technology*, 1996, p. 1.

³³ *ibid.*

³⁴ *ibid.*

3.24 The Lords of the Treasury later remarked:

My Lords see no reason why such works – often produced at considerable cost – should be reproduced by private enterprise for the benefit of individual publishers.³⁵

3.25 These quotes illustrate that the fiscal value of government information, which had been recognised early in the development of the prerogative right, became the focus of greater attention around that time.³⁶

3.26 Copyright protection was successively extended by statute in relation to new types of subject matter during the 18th, 19th and 20th centuries, often in response to direct lobbying from interested groups such as record manufacturers and broadcasters.³⁷ As a result, English copyright law was described in 1977 as:

... a modest Queen Anne house to which there have since been Georgian, Victorian, Edwardian and finally Elizabethan additions, each adding embellishments in the style of the times.³⁸

Copyright law in Australia

3.27 Prior to federation, the colonies of Victoria, New South Wales, South Australia and Western Australia passed copyright Acts during the late 1800s. These Acts were supplementary to the Imperial Acts that were in force and only applied to works created in the colonies. In 1905 the first Commonwealth copyright law was passed, but it was short-lived and made no provision for Crown copyright.

3.28 In 1911 the UK enacted new copyright legislation, which brought together for the first time its piecemeal legislation on copyright for different

³⁵ *ibid.*

³⁶ See also J Gilchrist, ‘The Office of King’s Printer and the commercial dissemination of government information’, *Canberra Law Review* vol 7, 2003, pp. 145–79, at 155–60.

³⁷ Lahore & Rothnie, *op cit*, paras 4090–135; Ricketson & Creswell, *op cit*, paras 3.230–285.

³⁸ Committee to consider the law on copyright and designs (Whitford Committee), *Copyright and designs law: Report of the Committee to consider the law on copyright and designs*, Chairman the Hon Mr Justice Whitford, Cmnd 6732, HMSO, London, 1977, p. 3.

types of work. The enactment of the new legislation was also prompted by the UK's earlier accession to the Berne Convention, which required changes to its domestic laws. For the first time, statutory provisions specific to Crown copyright were included.

3.29 Shortly after the enactment of the 1911 UK Act, the Commonwealth passed the *Copyright Act 1912*, which repealed the 1905 Act and applied the 1911 UK Act in Australia from 1 July 1912.

Crown ownership under the 1911 UK Act

3.30 Section 18 of the 1911 UK Act provided that, without prejudice to any rights or privileges of the Crown, copyright in an original literary, dramatic, musical or artistic work prepared or published by or under the direction or control of 'His Majesty' or any government department belonged to His Majesty, subject to any agreement with the author, and would continue for fifty years from first publication.

The 1956 UK Act

3.31 Following a review in 1952 by the Gregory Committee,³⁹ the UK enacted new copyright legislation in 1956.⁴⁰ The provisions in relation to Crown copyright were expanded, with a major change being provision for the subsistence of Crown copyright in an unpublished work where the author was not a qualified person. Subsection 39(1) of the Act provided:

In the case of every original literary, dramatic, musical or artistic work made by or under the direction or control of Her Majesty or a Government department:

- (a) if apart from this section copyright would not subsist in the work, copyright shall subsist therein by virtue of this subsection, and

³⁹ Copyright Committee *Report of the Copyright Committee*, Cmnd 8662, (Chairman H S Gregory), Board of Trade, 1952. While the report made recommendations on Crown use of copyright material, it did not address Crown ownership of copyright.

⁴⁰ *Copyright Act 1956* (UK).

(b) in any case, Her Majesty shall, subject to the provisions of this Part of the Act, be entitled to the copyright in the work.

3.32 The Act made similar provision for sound recordings and commercial films.⁴¹ In addition, where a literary, dramatic, musical or artistic work was first published in the United Kingdom or in another country to which the Act extended, copyright vested in the Crown.⁴² These provisions had effect subject to any contrary agreement between the Crown and the author.⁴³ Copyright continued to subsist in unpublished work until it was published and, in relation to published work, the term of the copyright was 50 years from the end of the year of publication.⁴⁴

The Copyright Act 1968 (Cth)

3.33 Following the UK amendments in 1956, a committee chaired by Sir John Spicer examined Australian copyright law in 1958–9. The Spicer Committee briefly discussed section 39, noting:

The effect of this provision is that the Crown has copyright in works and articles made under its direction or control without regard to the nationality or residence of the ‘author’ or the place of first publication.⁴⁵

3.34 The Spicer Committee recommended the enactment of a provision similar to section 39, to apply to the Crown in right of the Commonwealth and the States.⁴⁶

3.35 The Attorney-General’s Second Reading Speech for the subsequent bill introduced in 1967 noted that the bill was based on the Spicer Committee’s

⁴¹ Subsection 39(4).

⁴² Subsection 39(2).

⁴³ Subsection 39(6).

⁴⁴ Subsection 39(3).

⁴⁵ Committee to consider what alterations are desirable in the copyright law of the Commonwealth (Spicer Committee), *Report of the Committee appointed by the Attorney-General to consider what alterations are desirable in the copyright law of the Commonwealth*, Chairman Sir John Spicer, AGPS, Canberra, 1959, para 402.

⁴⁶ *ibid*, para 403.

recommendations. No specific comment on the Crown copyright provisions was made, other than the statement:

The position of the Crown is more clearly defined under the Bill than under the present law. The Crown will continue to have copyright in respect of works produced or published by it.⁴⁷

3.36 The provisions in Part VII (Division 1) headed ‘Crown copyright’ are clearly closely modelled on section 39 of the 1956 UK Act.⁴⁸ This matter is discussed in more detail in Chapter 5.

Reviews of Crown copyright in other common law countries

3.37 The Crown copyright provisions in Australia have not been reviewed since their passage in 1968. By contrast, such provisions have been reviewed and significantly modified in other common law countries such as the UK, Ireland and New Zealand. A review is also planned in Canada.

3.38 The law and practice in these countries is briefly outlined below.

United Kingdom

3.39 In 1977 a committee chaired by Justice Whitford reviewed and recommended extensive changes to copyright and designs law.⁴⁹ Amongst other things, the Whitford Committee recommended the abolition of the special Crown copyright ownership provisions, particularly the ‘first publication’ provision.⁵⁰

⁴⁷ Hon Nigel Bowen QC MP, Attorney-General, ‘Copyright Bill 1967: Second Reading Speech’, *House of Representatives Hansard*, vol 55, 1967, p. 2334.

⁴⁸ See *Commonwealth of Australia v Oceantalk Australia* [1998] 34 FCA (Burchett J), discussed in more detail in Chapter 5.

⁴⁹ Whitford Committee, op cit.

⁵⁰ *ibid*, p. 155. The report also considered that the extent of what it termed ‘Bible rights’ (that is, the right in the UK to print the Authorised Version of the Bible and the Book of Common Prayer) might warrant further inquiry (p. 167).

3.40 In 1988 new legislation was finally passed. Under the *Copyright, Designs and Patents Act 1988* (UK), provision was still made for Crown ownership of copyright but its ambit was narrowed. The phrase ‘by or under the direction or control’ in the 1956 Act was replaced with a reference to works ‘by an officer or servant of the Crown in the course of his duties’.⁵¹ A separate system of Parliamentary copyright was established⁵² and copyright in Acts of Parliament and Measures of the General Synod of the Church of England was vested in the Crown.⁵³ Crown copyright arising from first publication was abolished.

3.41 During the 1990s the UK also reviewed the management of Crown copyright, releasing a Green Paper which posed various options including the abolition of Crown copyright in all or some of the material originated by government.⁵⁴ The subsequent White Paper⁵⁵ noted that while there was support for abolition of all Crown copyright and placing material in the public domain, there was strong opposition to this option. The paper referred to a ‘recognised’ need to ‘preserve the integrity and official status of government material’,⁵⁶ but did not explain the basis of that view.⁵⁷ Ultimately the Government determined to retain Crown copyright and provide for waivers for certain categories of information within a ‘light touch’ management regime.⁵⁸

3.42 The White Paper concluded that, ‘subject to the copyright safeguard being in place to prevent misuse and to preserve the integrity of Crown material’, formal and specific licensing should not be necessary for certain categories of material. Those categories included primary and secondary legislation;

⁵¹ Section 163. Crown copyright subsists for a term of 125 years from the end of the calendar year in which it was made or, where the work is published commercially within 75 years from which it was made, for a term of 50 years from the end of the calendar year in which it was published.

⁵² Sections 165 and 166. It includes copyright in works by employees of the Parliament and in bills.

⁵³ Section 164. Copyright subsists from Royal Assent for a period of 50 years. Subsection 164(4) specifically excludes prerogative rights from subsisting in Acts of Parliament or Measures.

⁵⁴ Minister for the Cabinet Office, *Green Paper: Crown copyright in the information age*, HMSO, London, 1998.

⁵⁵ Minister for the Cabinet Office, *The future management of Crown copyright*, Cm 4300, HMSO, 1999.

⁵⁶ Para 5.1.

⁵⁷ The White Paper also referred to the general perception that Crown copyright ‘operates as a brand or kitemark of quality indicating the status and authority of much of the material produced by government’ (ibid, para 5.1).

⁵⁸ Para 5.1.

government forms; government consultative mechanisms; published papers of a scientific, technical or medical nature; unpublished records which are available to the public; and the text of ministerial speeches and articles.⁵⁹

Other common law countries

3.43 Ireland has very similar legislative provisions to the UK in relation to government ownership of copyright in material made by officers in the course of their duties, and separate parliamentary copyright.⁶⁰

3.44 In New Zealand,⁶¹ the Crown owns copyright in works ‘made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services’ (subject to any contrary agreement).⁶² Copyright does not subsist in various legal, parliamentary and other materials: Bills, legislation, regulations, bylaws, parliamentary debates, reports of select committees, judgments of any court or tribunal, and reports of commissions or inquiries.⁶³ These works are in the public domain.

3.45 The New Zealand Government has a statutory duty to make legislation available to the public under section 4 of the *Acts and Regulations Publication Act 1989* (NZ). The Chief Parliamentary Counsel is responsible for arranging the printing and publication of copies of Acts and regulations, copies of reprints of Acts and regulations and reprints of Imperial Acts that have effect as part of the laws of New Zealand. A common law duty to make legislation available to the public was also referred to in *VUWSA v Government Printer* [1973] 2 NZLR 21, at 23, where Wild CJ stated, ‘I think it can be accepted that the Crown is broadly responsible for making the text of enactments of the

⁵⁹ Paras 5.1 – 5.13.

⁶⁰ *Copyright and Related Rights Act 2000* (Ireland), Chapter 19, discussed further in Chapter 5. The provisions replace section 51 of the former *Copyright Act 1963* (Ireland) which contained the ‘direction or control’ test.

⁶¹ *Copyright Act 1994* (NZ).

⁶² Section 26. Copyright subsists for 25 years in the case of typographical arrangements of a published edition and 100 years from the end of the calendar year in which it was made in the case of all other works.

⁶³ Section 27. This provision was drafted so that the material listed would be brought into force by Order in Council at an appropriate date.

Legislature available for public information. People must be told what Parliament is doing and must be able to read the letter of the law.’

3.46 The New Zealand Parliamentary Counsel Office has established a Public Access to Legislation Project which is designed to improve the public’s access to New Zealand legislation. The object of the project is to provide access to current official legislation in both printed and electronic form. The electronic forms are to be available free from the Internet, while printed copies will still be available for purchase.⁶⁴ The implementation of the project has been delayed and thus it is difficult to determine the full impact of this project.

3.47 In Canada, review of the Crown copyright provisions is envisaged within the next few years as part of a broad review of copyright law.⁶⁵ The current legislation is very similar to the former UK provisions, whereby ‘Her Majesty’ owns copyright in any work prepared or published by or under the direction or control of Her Majesty or any government department (subject to contrary agreement with the author), for a term of 50 years from first publication.⁶⁶

3.48 A previous Canadian review in 1995 by the Information Highway Advisory Council⁶⁷ recommended that while Crown copyright should be retained, a ‘more liberal approach’ should be taken to making Crown works available to the public.⁶⁸ In particular, the review recommended that:

⁶⁴ See <http://www.pco.parliament.govt.nz/pal/>.

⁶⁵ In October 2002, in accordance with a statutory requirement to report to Parliament on the operation of and recommended reforms to the Copyright Act, the Canadian Minister of Industry tabled *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*. The report identified and prioritised issues that have remained outstanding since 1997, as well as new issues. Crown copyright was listed as a medium term issue for review within 2 to 4 years, but as at September 2004 was not considered a priority (correspondence from M. Jean-Paul Boulay, Copyright Policy Branch, Canadian Heritage, dated 29 September 2004). The reform process is also subject to review by a federal parliamentary committee.

⁶⁶ *Copyright Act 1985 C-42* (Can), section 12. Section 12 is expressed to be ‘without prejudice to any rights or privileges of the Crown’.

⁶⁷ Information Highway Advisory Council, *The challenge of the information highway*, Industry Canada, Ottawa, 1995. The review considered whether Crown copyright was appropriate in light of the principle of ensuring that the Internet provides universal and easy access to information (p. 37).

⁶⁸ *ibid.*, p.116.

- the Crown in right of Canada should, as a rule, place federal government information and data in the public domain,⁶⁹ and
- where Crown copyright is asserted to generate revenue, licensing should be based on the principles of non-exclusivity and the recovery of no more than the marginal costs of reproducing the information or data.⁷⁰

3.49 In relation to legislative and judicial materials in Canada, a Federal Law Order issued in 1997 provides that anyone may reproduce federal legislative and judicial materials, provided that ‘due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version’.⁷¹

The United States of America

3.50 The United States of America (US) is in a different position from other common law countries in that copyright protection is ‘not available for any work of the United States Government’.⁷² The phrase ‘work of the United States Government’ is defined as ‘a work prepared by an officer or employee of the United States Government as part of that person’s official duties’.⁷³ With limited exception,⁷⁴ neither the federal US government, nor the government employee creator, can own copyright in work created by the government or the employee. However, the United States Government may receive or hold copyright ‘transferred to it by assignment, bequest, or otherwise’.⁷⁵

⁶⁹ *ibid.*, Recommendation 6.7(b).

⁷⁰ *ibid.*, Recommendation 6.7(c).

⁷¹ Canada Federal Law Order SI/97-5, 8 January 1997.

⁷² Section 105 of the US Copyright Act.

⁷³ Section 101.

⁷⁴ Section 105 does not apply to works of the United States Postal Service: see US House of Representatives Committee on the Judiciary, *Legislative history for Copyright Act of 1976: Notes of the Committee on the Judiciary*, House Report No 94-1476 (1994).

⁷⁵ Section 105. Whether copyright subsists in works prepared under government grant or contract is to be determined in particular circumstances by specific legislation, agency regulations or contractual restrictions (see US House of Representatives Committee on the Judiciary, *op cit*).

3.51 In addition, the United States Supreme Court has held that copyright does not subsist in primary legal materials. In *Banks v Manchester*⁷⁶, for example, the court held that copyright does not subsist in judgments as they are ‘the authentic exposition and interpretation of the law’. The court held that given that the law is binding on citizens, and that citizens are presumed to know the law, everyone should have free access to the law.

3.52 The US Copyright Act does not apply to US State governments and the scope of copyright protection for government works can vary greatly between States. For example, many States protect copyright in compilations of statutes, while others claim copyright in statutory codes. The State of Virginia expressly claims copyright in statutes, whereas the State of Illinois has placed statutes in the public domain.⁷⁷ There is inconsistency between the common law denial of copyright protection of basic legal texts and some State legislation claiming copyright in that material.

⁷⁶ 128 US 244 (1888).

⁷⁷ See I Dmitrieva, ‘State ownership of copyrights in primary law materials’, *Hastings Communications and Entertainment Law Journal*, vol. 23, 2000, p. 81.