

8 April 2004
Fiona Phillips
The Director
Copyright Law Review Committee Secretariat
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Ms Phillips,

CROWN COPYRIGHT

Introduction

1. The Copyright Agency Limited (CAL) is a copyright collecting society that administers, on a non-exclusive basis, the copyright controlled by its members.
2. CAL is a not for profit company limited by guarantee.
3. CAL currently represents the reproduction rights of over 6000 direct "author" and "publisher" members who, in turn, represent many thousands of authors and publishers. CAL also represents thousands of other copyright owners through reciprocal agreements with overseas collecting societies.
4. CAL has been declared by the Attorney-General to be the collecting society for the reproduction and communication of works by educational institutions under Part VB of the *Copyright Act 1968* (the Act). CAL has also been declared by the Copyright Tribunal to be the collecting society for government copying for the purposes of Part 2 of Division VII of the Act.
5. Pursuant to these declarations, CAL administers statutory licences through which educational institutions and Commonwealth, State and Territory governments remunerate copyright owners for the copying of their works.
6. In addition, CAL offers voluntary licences to the public and corporations for the right to copy published works. As a single resource, CAL can provide copyright clearances for hundreds of thousands of books, articles and artistic works through its licences to copy and communicate copyright works.

Issues 1, 2, and 14 - Government ownership of copyright

7. It is CAL's view that governments should be treated consistently with other copyright owners under the Act. This includes the right to own copyright in works and other subject matter which they create. It also means that fair dealing and other exceptions to exclusive rights to their material should, unless there are explicit public interests to the contrary, apply in the same way as to other copyright owners.
8. CAL accepts that there are specific categories of government works such as legislation, that the general community needs to access and use more freely.
9. However, any specific exceptions included in the Act for government works, together with other general exceptions, must be carefully calibrated to ensure that they combine to meet the various public policy objectives of copyright generally and for these specific categories of government works.
10. It is CAL's view that the subsistence of copyright in government works assists in achieving many of the public policy objectives for governments. CAL accepts that the usually stated objective of copyright, to encourage the creation and dissemination of new works, does not apply to works such as legislation and case law. However, CAL contends that the subsistence of copyright in government works can assist in determining the authenticity of a government work. Having copyright in government works also can make these works more accessible by having regulated access regimes in the Act. Copyright also provides incentives to the government to create some categories of works.
11. Further, the ability of governments to licence their copyright, thereby ensuring chain of title, provides incentives to third parties such as legal publishers to invest in the creation, production and distribution of products primarily containing government works.
12. As various arms of government commercialise their activities, many government organisations are publishing works that are not traditional government publications, and are more similar to commercial publications. Examples of these works and publications range from recipe cards and books, histories and other educational materials¹. The government should not be placed in a preferential position compared with its competitors in respect to the acquisition and ownership of copyright of these works.
13. By making Crown copyright protection consistent with the general rules, the incentive to acquire a benefit from falling into one category or another diminishes.

¹ Examples include some of the entries in the Australian Educational Awards ([www.alex.edfac.syd.edu.au/TREAT/centre awards](http://www.alex.edfac.syd.edu.au/TREAT/centre_awards)); or the Australian Bureau of Statistics

Issue 3 - Moral Rights

14. As stated above, it is CAL's view that government should be treated consistently with other rightsholders. This includes the application of moral rights.
15. CAL notes that it is difficult to identify individual authors for many categories of government material. In CAL's view this is no different from the private sector and consequently CAL does not support any changes to the moral rights regime.

Issues 4 and 7 - Direction and Control

16. It is CAL's view that reform is needed to the current legislative scheme in relation to government ownership of copyright. CAL's particular concern centres around the use of the phrase *direction and control* in sections 176 to 178 of the Act and its potentially wide interpretation. Of particular concern to CAL is s.177 which grants government copyright in works previously unpublished when first published by the Crown.
17. The lack of certainty about what is meant by 'direction and control', and the tendency of government bodies to assert that they are the Crown for these purposes, together with a lack of knowledge in the general community about these provisions, leads to confusion and unintended results.
18. For example, if an author receives a grant from a government body would that author consider that the work is published under the direction or control of government and that the government is therefore the copyright owner? Similar issues arise in projects where private sector interests enter into joint ventures with government for the development of other IP materials such as software.
19. CAL's opinion is that government should not be in a preferential position compared to others when obtaining ownership of copyright in works. That is, government should be in the same position as other employers commissioning works. If works are created by public sector employees as part of their regular duties of employment, copyright ownership by government as their employer should be presumed, in accordance with section 35(6) of the Act.
20. CAL is of the view that if the work is commissioned, or not created by an employee of the government, then it should be open to government, as to any other body, to negotiate copyright ownership under contract. Assignment of copyright to government would therefore be reflected in the terms of the contract commissioning the work.
21. CAL has addressed further comments relating to acquisition of copyright material below.

Issue 6 - What is the Crown

22. CAL agrees that the scope of the term *the Crown* for the purposes of the Act is unclear. This causes uncertainty about which bodies and which works come under the provisions contained in Part VII of the Act, both in terms of the creation of works and the use of works by government.
23. CAL has experience of the complications and difficulty created by the uncertainty of the definition of the Crown as outlined in the following paragraphs.
24. Recently CAL and the Commonwealth entered into an agreement for the copying of works by the Commonwealth under section 183A of the Act. Because of this uncertainty, the Commonwealth was unable to specify which government agencies and statutory bodies were to be covered by the agreement. The solution reached was for CAL and the Commonwealth to include in the agreement an endorsement process whereby each government department, agency and statutory body that considered itself to be covered by section 183 of the Act had to lodge an endorsement with CAL. Neither the Commonwealth Attorney General's department nor CAL had a decision-making role in this process.
25. CAL and the State and Territory governments are negotiating a new agreement under section 183A of the Act. The issue of how to identify which bodies are the Crown and therefore entitled to rely on s183A has also arisen in these negotiations.
26. CAL believes there is a need for greater certainty in relation to which bodies are considered to be part of the Crown. Greater certainty would lead to increased efficiencies in dealings relating to the Crown and certainty that parties were complying with the provisions of the Act dealing with the Crown.
27. To resolve this issue, for both the ownership and use sections of the Act, CAL supports the form of register recommended by the Australian Copyright Council in its 2001 publication, *Submission on the Government's response to the report of the Intellectual Property and Competition Committee*, as a means of informing users (and government bodies themselves) of their status in the Regulations to the Copyright Act.

Issue 8 - Duration of Copyright

28. CAL notes that prerogative rights in the nature of copyright enjoyed by the Crown are of infinite duration (section 8A). CAL notes that prerogative rights are understood to extend to legislative material², and not necessarily to case reports. CAL understands there may be a policy reason for prerogative rights in the nature of copyright to endure over legislation – in order that Government can ensure the

² *Attorney-General (NSW) v Butterworth & Co (Australia) Ltd* (1937) 38 SR (NSW) 195

integrity and authenticity of copies of legislative material relied on by the community.

29. However, CAL is aware that prerogative rights are not well understood by the community. CAL supports the Australian Copyright Council's proposition that prerogative rights are anachronistic, and that any protection by them still deemed to be necessary should be covered by other provisions of the Copyright Act. CAL's submission is that all prerogative rights in the nature of copyright, whether referred to in the Act or as understood in common law should be repealed and subsumed into the copyright framework of the Act.
30. The duration of copyright in materials in which Crown copyright subsists is determined by section 180 of the Copyright Act. CAL supports the Australian Copyright Council's submission in relation to this, that copyright duration should be consistently applied to the various works referred to, in order to simplify interpretation of these provisions for users of Crown copyright work.

Issue 9 - Application of the exceptions to government copyright material

31. CAL believes that exceptions to copyright should be applied as consistently as possible to all works, including government copyright works.
32. However, as stated below, CAL supports an approach, which ensures that certain categories of government works are easily accessible to the community on public policy grounds.
33. In CAL's view an approach such as taken in s.182A in which certain types of government works are defined as *prescribed works* is the appropriate response to this issue.

Issue 10 - Single copies of a prescribed work

34. CAL agrees that for public policy purposes specific categories of government works – those included in the definition of Prescribed Works under section 182A(3) of the Act - should have particular provisions relating to their access included in the Act. CAL supports the public policy position expressed in the Issues Paper that legislation and judgments of courts and tribunals should be freely and easily available to the public.
35. CAL is aware of the impetus for the inclusion of s182A into the Act. Those public policy considerations were discussed in the 1976 Franki report, *Copyright Law Committee on Reprographic Reproduction*.
36. CAL believes that the current section 182A is adequate to meet the requirements of community access to the law. CAL cannot see how extending the provision to permit multiple copying of primary legal materials under s 182A will improve the

accessibility of those materials. For this reason CAL does not support any changes to section 182A.

37. In CAL's view, mechanisms outside copyright, such as rights management and identifiers are the appropriate mechanism to improve access to government materials.
38. CAL has reservations about the impact of the existing provision (and by analogy, any proposal to extend the provision) on commercially provided legal materials. CAL believes that commercial publishers have a legitimate expectation that their works will attract remuneration and protection under the Act, subject to reasonable fair dealing provisions.
39. CAL submits that legal publishers are entitled to copyright protection of works they create which meet the threshold requirement of originality under copyright law as understood in Australia.
40. CAL notes the recent decision of the full court of the Supreme Court of Canada, a jurisdiction with similar copyright laws to Australia, in *CCH Canadian Ltd v Law Society of Upper Canada*³ which found that there is sufficient originality for copyright to subsist in "the headnotes, case summary, topical index and compilation of reported judicial decisions", and that the fair dealing provision under which the law society was providing copies of materials, including reported judgements, was limited to single copies for a 'specific purpose' identified at the time a request for a copy was made.⁴ CAL submits that this is similar to the fair dealing provisions in Australia under section 40 and 43 of the Act, and section 182A.
41. The question of the works subject to s182A was considered in *Baillieu v Electoral Commission*⁵.
42. The judge in that case, Sundberg J, interpreted the scope of s182 quite narrowly, saying *what s.182A contemplates is that as a result of the reprographic reproduction the copier will have an exact replica of the original and no more.*
43. In CAL's view that interpretation is correct, and that many of the editions produced by commercial publishers are sufficiently original to qualify as separate works⁶ and are not subject to s182A.

³ 2004 SCC 13.

⁴ 2004 SCC 13 at para [3].

⁵ 53 IPR 494 at 503 - 4

⁶ Sundberg J found that copyright protection is granted to compilations in Australia in *Baillieu v Electoral Commission*, where "some greater coherence or order has been imposed upon" a presentation of works, 53 IPR 494 at 506.

44. In CAL's view s182A should be amended to clarify this issue, confining its application to the original materials as produced by government. CAL notes that this submission is consistent with the UK situation.
45. In the UK a waiver over certain Crown copyright materials, including legislative instruments, exists in conjunction with Guidance Notes for the operation of the waiver. Of particular interest are the conditions placed on the waiver, and the clear limits of its operation to cover only "Official", government produced versions. Under paragraph 15 of Guidance Note 6, a clear distinction is made between "Official" versions, which are covered by the waiver, and commercial products published by legal publishers, as well as "Database product or any other value added legislation product or service provided by Government."⁷
46. CAL's submission is that s182A should be amended to reflect point 15 of the Guidance Note 6, as 182A already operates as a waiver of Crown copyright. CAL believes having the exception and the conditions on its operation contained in the Act is simpler for users of legislative materials and will lead to increased compliance with the Act, and minimise infringements of non-Crown copyright works.
47. CAL suggests that an additional clause be added at the end of 182A(3) which reads substantially the same as Paragraph 15 of the UK Guidance 6, ie:

A prescribed work as defined in subsection (3) is only a work as it appears in either a government published version or by downloading it from legislation and case law websites administered by government. *Prescribed works* do not include material from other sources, such as commercial products published by law publishers, for example. Nor do *prescribed works* include value added products or services provided by Government.

Issue 12 – Government acquisition of property on just terms

48. CAL believes that government should be able to negotiate the acquisition of copyright on the same terms as other bodies in its role as an employer and also, under contract, when it is commissioning works.
49. Where there is some overriding public interest in government acquiring copyright over third party material any insistence on its acquisition must be consistent with the constitutional guarantee that it will be on just terms under s 51(xxxi) of the *Commonwealth of Australia Constitution Act*.

⁷ Guidance Note 6: *Reproduction of United Kingdom, England, Wales and Northern Ireland Primary and Secondary Legislation* at: http://www.hms0.gov.uk/copyright/guidance/gn_06.htm, at Para [15].

50. Where government bodies are attempting to acquire works from third parties they must be compelled to do so on just terms. CAL would support the creation of guidelines on government acquisition of intellectual property which expressly require that government bodies adopt transparent and equitable policies for such acquisitions.
51. If government acquires rights over third party material via an assignment, CAL submits that government should implement policies to ensure that copyright owners are properly and independently informed of the rights they are assigning.
52. CAL is aware that Trade Practices Acts and Fair Trading Acts, as well as Acts such as the *NSW Contracts Review Act 1980*, control contract terms and ensure their fairness. However, CAL believes that higher standards should be set for government staff contracting with members of the public for intellectual property rights ensuing that such acquisition takes place with transparency and fairness.

Issue 15 - New Technologies

53. Copyright is increasingly relevant to ensure in a digital environments that the interests of copyright owners and users are balanced, and also to ensure the integrity and authenticity of copying of copyright owners' material.
54. For works covered by Crown copyright provisions of the Act, a central concern in the digital environment is the authenticity and integrity of material copied. CAL therefore believes that the use of digital technologies, should be considered by government.
55. CAL believes that one such mechanism that would greatly enhance access to government materials would be to adopt one of the emerging standards for works identifications, such as the Digital Object Identifier.
56. It is CAL's view that the use of Digital Object Identifier (DOI) by government would be beneficial to government in a number of ways. These include monitoring the use of government material, ensuring that government material was always accessible to the public, and providing a reliable method of tracking authenticity of government material.
57. Attached is an explanation of how the DOI works, and a case study examination of its use by The Stationery Office in the UK, to manage access and authentication of government materials.
58. CAL is a DOI registration agency and CAL's CEO is a director of the International DOI Foundation. CAL stands prepared to offer further advice and assistance to Government on the digital access and management of government materials.

Conclusion

59. CAL is disappointed that the Terms of Reference for the Review do not cover the use by the Crown of copyright material under Division II of Part VII. CAL believes that discussion in relation to the Crown and copyright would have been better balanced with consideration of use as well as ownership by the Crown of copyright material. CAL believes there is a need for review of the government use sections of the Act and would welcome the opportunity to comment on these provisions in the future.
60. CAL is also disappointed at the short period of public consultation given by the CLRC. The issues dealt with in this reference are significant and any recommendation to change the current regime may have major effects on the public, government and copyright owners.
61. If more information is required, please do not hesitate to contact CAL.

Yours sincerely,

Michael Fraser
Chief Executive