

**Response to Copyright Law Review Committee Issues Paper
CROWN COPYRIGHT
March 2004**

Swinburne University of Technology

This submission is made on behalf of Swinburne University of Technology (Swinburne) a Victorian higher educational institution. It proposes that Crown Copyright material from all Australian jurisdictions be made available freely for non-commercial educational purposes. Swinburne uses government owned copyright material extensively for educational purposes, and presents a proposal which aims to address some of the practical administrative needs of a large user of government copyright material in the new technological environment.

There are several reasons for making Crown Copyright material freely available for educational purposes with as few qualifications or restrictions as possible:

- At present, the Commonwealth and the states make their material quite freely available for these purposes, and to make this explicit would clarify the many situations in which institutions are unsure as to whether they should seek permission, or abide by restrictions in the current Act.
- It would be more efficient if educational institutions are able to copy and communicate 100% of a work, or subject-matter other than work, of government copyright material (rather than just 10% under the Part VB statutory licence, or a broadcast under the Part VA licence) for non-commercial, educational purposes.
- The CLRC report notes that for some material published by governments, there is a 'strong and identifiable public interest in ensuring its widest dissemination'¹ and educational institutions play a key role in the dissemination of such information. A blanket educational licence would be the best way to assist educational institutions to use government material and to play a wider role in the dissemination, critique and re-use of information forming the basis of our democratic system.
- Education is very largely funded by government, and it makes sense for government not to charge itself in these circumstances, nor to create a costly administrative barrier to use.
- Government agencies do produce commercial publications, and this issue is addressed below. However, a common government publishing model in the past has been for content to be produced at government expense in the public interest, and cost of distribution (i.e. printing, publishing and distribution) to be recouped by charges. This model is now changing rapidly with the increase use of online publishing and

¹ Copyright Law Review Committee, *Crown Copyright Issues Paper*, February 2004, 7.

distribution by Government, and it seems likely that the course of action proposed would be more likely to save money for Government than to impose a cost.

This proposal does not aim to contradict proposals for a wider availability of Crown Copyright material, but to argue for that availability to apply in particular to its use for educational purposes. For example, it may be proposed that all non-commercial use of Crown Copyright material should be permitted; Swinburne would not necessarily disagree with such a viewpoint. Our comments in relation to Issue 9 indicate a general sympathy with proposals for wider access to government material.

This submission addresses several of the specific questions raised in the Issues Paper (February 2004).

Issue 2: The Committee seeks your view as to whether the government should enjoy all the exclusive rights of copyright.

- It is not inappropriate for government to enjoy exclusive rights of copyright, particularly in situations where material may be commercially exploitable. However if it does, this should be balanced by the provision of an automatic educational licence for non-commercial use by educational institutions.

Issue 7: The Committee seeks your views as to whether all material produced as part of a government function be deemed to have been created by the government. If so, in whom should copyright vest?

- It is often difficult for educational institutions to determine who owns copyright in material which has actually been produced by some arm of government for public dissemination. This may occur where the educational institution wishes to seek permission for the use of the material beyond that allowed under the current Part VA or VB statutory licences (for example to make multiple reproductions of a complete brochure, or reproduce a video tape etc.). If a blanket educational licence applied to all material produced as part of a government function, this would reduce administration costs for educational institutions and increase the efficiency of the educational sector in Australia.
- If the educational licence was restricted to non-commercial use, then there would be no interference with the commercial activities of whoever such copyright was officially vested in.

Issue 8: The Committee seeks your views as to the appropriate duration of government copyright. Should it be the same as for non-government copyright material?

- Most government material is not exploited for the same length of time as commercial material. This means there is a distinct risk of material disappearing from accessibility long before it would enter the public domain under the same terms as non-government material.
- To ensure on-going access for educational institutions, it would be preferable if the duration of government copyright was significantly less than for non-government material. It may be appropriate for government material to be subject to a default sunset clause where material automatically enters the public domain after a set period unless specific material is proclaimed as not being subject to the sunset provision. This would increase certainty for users and encourage the on-going availability of material with little or no commercial value. The ability to 'opt-out' of the sunset provision in certain circumstances would allow for the entry of commercial operators if there was a commercial opportunity for long-term management of specific material.

Issue 9: The Committee seeks your views as to the application of the exceptions to government copyright material. Should the exceptions apply to government copyright material in the same way as they do to non-government copyright material? Should there be special exception for copyright material owned by the government?

- There is a valid case for the implementation of wider exceptions for the use of government material than is available under existing exceptions such as 'fair dealing'. This would reflect the fact that in the modern information society there is a wide variety of valid ways in which citizens engage with information, and these should be particularly encouraged in relation to government material. The range of matters used to determine if a dealing can be considered 'fair' under ss. 40(2), 103C should be clarified and extended beyond the concept of 'research or study' to take into account the realities of modern information usage and the use of digital technologies. Government material is one area where the potential 'chilling effect' of overly restrictive exceptions or impractical compliance requirements should be removed as far as possible to encourage the widest possible dissemination of such information.
- There should be a blanket educational use exception allowing the copying and communication of 100% of government copyright material (except for material designated as exempt for commercial reasons) and making multiple copies, for non-commercial educational purposes. This should not be subject to any compliance requirement which cannot be effectively implemented when using new technologies.

Issue 10: The Committee seeks your views as to whether the licence in s 182A to reproduce legislative materials and the decisions of courts and tribunals should be expanded to allow multiple copies? Alternatively, is a blanket licence scheme an appropriate model?

- The licence provided under s 182 should be extended to allow multiple copies and to allow communication for non-commercial, educational purposes. A blanket licence scheme for educational use is an appropriate model which should extend to both Commonwealth and State and Territory governments.

Issue 15: The Committee seeks your views as to the effect of new technologies on government ownership of copyright material. In particular:

- (a) does copyright continue to be relevant?**
 - (b) how does one safeguard against the distortion or inappropriate use of government material made available through new technologies?**
 - (c) is facilitating government information online inconsistent with the policy objectives behind government ownership of copyright?**
- In the new technological environment, the operation of copyright legislation is challenged by citizens engaging daily in practices which could potentially infringe copyright.

Technology, heedless of law, has developed modes that insert multiple acts of reproduction and transmission – potentially actionable events under the copyright statute – into commonplace daily transactions. Most of us can no longer spend even an hour without colliding with the copyright law.²

The rapid exchange of information made possible by the Internet has produced a radically new environment in relation to both the use of copyright material and the potential for enforcement of the rights of copyright owners.

- In this environment the assertion of copyright in government material intended for wide dissemination can only produce a ‘chilling effect’ on use of the material, and undermine any public policy of providing the widest possible access. It is incumbent on government therefore to ensure that law-abiding citizens are not dissuaded from the most efficient method of using government material, by laws which have been practically outdated by the realities of technology and the accepted ‘norms’ of day-to-day human interaction. It is not appropriate for copyright to be applied to government material if its effect is to

² Jessica Litman, ‘The Exclusive Right to Read’ (1994) 13 *Cardozo Arts & Entertainment Law Journal* 29.

make citizens unsure if their legitimate desire to make use of government material may potentially infringe copyright.

- It would benefit educational institutions if all government material was deemed to be free of copyright however this could produce attendant problems where government material has the potential for commercial exploitation, or for material produced by statutory authorities with a commercially focused role. On balance therefore a blanket educational licence is likely to provide the most practically effective solution for the education sector.
- If copyright is to be retained in government material made available online, the government should ensure that there is an explicit acknowledgement accompanying the material stating that the material is freely available for further use but only without distortion or alteration and only with appropriate acknowledgement. The nature of the Internet means that there is an inherent risk of misuse or distortion, however this is balanced by the massive benefit provided by making government material widely available.

Issue 18: The Committee seeks your views as to options for reform, legislative or otherwise, and the costs and benefits of those operations.

- Educational institutions carry a significant administrative cost burden in relation to copyright management. This is increasing significantly in the new technological environment where copyright material is sold online and copyright owners are seeking to protect their rights. This often produces a 'chilling effect' for academic staff who wish to employ new technologies when using copyright material but are unsure about the legal complexities. This has the potential to restrict the development of innovative educational products. It is inappropriate for government to extend this burden in relation to material which is created using public money, for the purposes of public dissemination, and the availability of which is in many cases is an important part of the education of future citizens.
- The provision of a blanket licence within copyright legislation for the non-commercial, educational use of both Commonwealth and State government material, including executive, judicial and legislative material, would produce significant social and economic benefits. The education sector in particular would benefit from the certainty provided by such an arrangement.
- If a blanket educational licence was inserted into copyright legislation, it may be necessary to include an 'opt-out' mechanism which could be implemented for material produced with a commercial intent (beyond mere cost recovery) or material produced in partnership with commercial operators, by providing some recognised form of notification to users that the publication is a commercial one, where over-riding commercial rights have been asserted and therefore the educational licence does not apply to this material. This might apply, for example, to some publications produced by the ABC.

Issue 20: The Committee seeks your views as to any other matters arising out of this Issues Paper.

- On balance the most effective option for reform for educational institutions is likely to be the adoption by government of a specific blanket educational licence for the use of all government material.
- In addition an extension of existing fair dealing exceptions in relation to government material should make it clear that in the current technological environment forms of usage which may in the past may have resulted in the potential for copyright infringement, are considered non-infringing in relation to government material. These could include caching of material for educational purposes, electronic communication of 100% of a document and other innovative uses of new technologies to deliver educational products.
- In order to ensure the on-going availability of government material in light of s.116A it should be prohibited for any person to apply a Technological Protection Measure to government material whether or not copyright is retained by the government following this review.

Making government material more widely accessible, in particular through a blanket education licence as proposed in this submission, will enhance the purposes of government while also assisting Australian educational institutions to operate more effectively in the new technological environment.

Consent is given for this submission to be made available online, in digital form.

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