



**SUBMISSION TO THE
COPYRIGHT LAW REVIEW COMMITTEE
ON THE
CROWN COPYRIGHT ISSUES PAPER**

MARCH 2004

Introduction

As of 1 July 2003, ScreenSound Australia – The National Screen and Sound Archive (“the Archive”) was integrated with the AFC. The AFC is a statutory authority and aims to enrich Australia’s cultural identity by fostering an internationally competitive audiovisual industry, developing and preserving a national collection of sound and moving images, and making Australia’s audiovisual heritage available to all Australians.

The AFC wishes to comment on a number of issues raised in the Committee’s Issues Paper. These comments are set out below.

Issue 6: The Committee seeks your views as to what entities should be included as part of ‘the Commonwealth or a State’ for the purposes of the Copyright Act and how this should be determined.

It remains unsettled as to whether the AFC (as a statutory authority) is considered the Commonwealth for the purpose of Crown Copyright.

The Issues Paper explores this and confirms the unclear nature of Crown copyright’s application to statutory authorities. The Issues Paper points to a series of factors suggested by judicial precedent that can be used to determine the statutory bodies to which the government ownership provisions of the Copyright Act may apply. These include:

- the terms and intention of the legislation establishing the body,
- the terms of any relevant contract,
- the nature and purpose of the body,
- the powers and functions of the body,
- the extent of ministerial direction and control over the body,
- the way in which the body is funded, and
- whether the body can hold and dispose of property on behalf of the government.

The AFC is aware of advice by the Australian Government Solicitor to the Department of Communications, Information Technology and the Arts that makes a strong case that since the Minister can give directions to the AFC, the AFC should be regarded as ‘the Commonwealth’ for the purposes of the *Copyright Act 1968*.

Under the *Australian Film Commission Act 1975* (“the AFC Act”), the AFC is established as a body corporate. It is given various functions relating to the production, promotion and collecting of Australian films and recordings as defined in that Act: s 5.

The AFC consists of members appointed and removed for cause by the Governor-General (ss.15, 23). The Commission receives budget appropriation (s.31) and it requires the Minister’s approval to enter into major contracts (s.35). The AFC is not subject to taxation (s.41) and it may engage its own staff (s.29).

Section 8 of the AFC Act also deals with Directions to the AFC by the Minister:

- (1) *The Minister may, by writing under his or her hand, give directions to the Commission with respect to the exercise of its powers or the performance of its functions but shall not give such a direction with respect to a particular project.*
- (3) *Where the Minister gives a direction under this section, he or she shall, within 15 sitting days after giving that direction, lay before each House of the Parliament a copy of the direction together with his or her reasons for giving the direction.*

The AFC therefore believes that it is likely that the AFC is a government body for the purposes of crown copyright under the Copyright Act and that material created by the AFC is material made under the direction or control of the Commonwealth.

Issue 1: The Committee seeks your views as to whether government ownership of copyright material should extend to all works and subject-matter. For example, should it only apply to literary works? Should artistic works such as architectural plans be excluded?

and

Issue 4: The Committee seeks your views as to whether the legislative scheme establishing government ownership of copyright material is appropriate.

and

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?

Much of the copyright the AFC holds is assigned or licensed to it under contractual arrangements. This applies to the films it funds and the research it publishes.

Crown copyright occurs where an original work (including a film or sound recording) is made under the direction of the Commonwealth or a State: s176. The general principle of copyright law is that copyright vests in the creator of the work. Crown Copyright is one of the exceptions to this principle.

Working from the assumption that the AFC can hold Crown copyright, Crown copyright arises in materials and works that the AFC produces or invests in. These include:

- Films

- Research Databases
- Information materials produced
- Public (published) submissions to reviews and inquiries and unpublished submissions
- The AFC Website
- Marketing materials
- Film funding application guidelines
- Material commissioned under the direction or control of the Archive, which may include some oral histories and home movies lodged with the Archive.

The AFC would seek to continue control over all of these materials and any other works and material produced. The AFC believes that government ownership of copyright material should extend to all works and subject-matter including sound and audiovisual recordings. All material produced as part of a government function should be deemed to be created by the government. The copyright should vest in the government body responsible for the production of material.

The AFC believes that as much flexibility as possible in relation to Crown copyright must be maintained – the aim being to not only fulfil the AFC’s statutory functions, but also to ensure that it shares appropriately in any commercial benefit from the copyright it controls or in which it has an interest.

A considerable amount of the material to which Crown copyright would apply is likely to have no commercial value (eg information sheets, application forms etc), but is essential for the public dissemination of information about the work of the AFC.

In the case of the Archive’s holdings, the AFC should also retain the ability to control those rights that are assigned to it. For example, oral histories may not only have a value as archival and research material but may also have some economic value in commercially produced educational material or as additional material in commercially released DVDs.

The AFC also has a strong interest in controlling information and material contained in its databases and published statistical material. The collation, analysis and publishing of such material is a key objective of the AFC:

“The AFC will collect analyse and disseminate high-quality information about the financing, production and performance of Australian films...”

In pursuing this objective over many years the AFC has built substantial databases of information, much of it from its own primary research that provides a unique picture of the film industry in Australia. This information is made available to the industry and the general public in both a printed format and online. This material has limited commercial value, but some, such as financial information can be highly sensitive and confidential. This is only provided to the AFC on it’s undertaking that it will only publish this in aggregate form.

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?

It is the AFC's opinion that the duration of government copyright should be the same as for non-government copyright material, or less. One of the fundamental principles of copyright law is that it strikes an appropriate balance between protecting the property rights of creators and ensuring that advances in knowledge and information are made available to the public. Government material is created in the national interest and often for non-commercial gain although film investment through the AFC and the government owned company, the Film Finance Corporation (FFC) are exceptions. The AFC suggests that, for consistency the duration of copyright protection for all government works should be the same as our non-government material.

Issue 13: The Committee seeks your views as to the practical operation of the law relating to the administration or licensing of copyright material. In particular, should government practice be encouraged to achieve uniformity throughout the different Australian jurisdictions?

The AFC believes government practice should be encouraged to achieve uniformity throughout the different Australian jurisdictions.

The AFC would like to draw the CLRC's attention to an omission in its description of the function of the CCA (Commonwealth Copyright Administration) in Paragraph 66 of the Issues paper. The description suggests that the CCA's main function is to grant permission to reproduce Commonwealth copyright materials. This assumes that the CCA manages administration of audiovisual materials, as well as printed material. The CCA only manages administration of printed material. There is currently no centralised government body to administer the Crown copyright in cinematograph film or sound recordings.

There are specific agencies, such as the FFC, Australian Broadcasting Corporation, the Special Broadcasting Service and Film Australia which are involved in the production of audiovisual material and who manage the copyright they control.

As a result agencies separately manage copyright in the audiovisual material they hold. This can result in some confusion, particularly where the agency concerned no longer holds the material because it has been lodged with the Archive and is uncertain as to whether it actually controls the copyright. A recent example illustrates the current difficulties: a recent Archive's database of copyright holders has always referred to the commissioning department as copyright contact (administrator). While there remains some ambiguity as to the efficacy of this arrangement, it has largely provided clients of the Archive with a point of contact. Departments have traditionally either granted or denied access to the relevant material. This arrangement was initiated in the absence of a central point of copyright administration for audiovisual material.

However, in July 2003 ScreenSound referred a client wanting access to a sound recording of a Prime Ministerial speech from the 1940s to the commissioning department (in this case the Department of Defence). The Department of Defence referred him to the Attorney General's Department, who referred him to the Department of Prime Minister and Cabinet, who referred him to DCITA, who referred him back to ScreenSound.

The AFC believes that consideration should be given to centralising the management of Crown copyright in cinematograph film and sound recordings, made or commissioned by Commonwealth agencies other than those whose principal activity is audiovisual production.