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29 March 2004

Ms F. Phillips
The Director
Copyright Law Review Committee Secretariat
Attorney-General's Department
Rober Garran Offices
National Circuit
BARTON ACT 2600

Dear Ms Phillips

Re: Crown Copyright Law Review

I refer to my email of Saturday 27 March, and once again apologise for the lateness of the attached submission.

Thank you for your consideration.

Yours sincerely

Roger Clarke, Chair

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Submission to the Crown Copyright Law Review

29 March 2004

Introduction

AEShareNet Limited (AESL) is a Ministerial company owned by the nine bodies politic, represented by the Ministers responsible for Vocational Education and Training (VET). The company was formed in the year 2000. Its purposes are:

- to encourage greater professionalism in the administration of copyright materials within the education sector;
- to provide a set of standard licence-types appropriate to materials relevant to learning and teaching; and
- to provide a Web-based copyright licensing service.

The company's initial focus has been on the VET segment, but its scope extends to all segments of the education sector.

The education sector makes constructive use of a great deal of material that is produced by and for Australian governments. AESL accordingly makes this submission in order to represent what it perceives to be the interests of the education sector in relation to Crown Copyright. Clearly, AESL cannot in any sense speak formally on behalf of the sector. On the other hand, its central role within the sector, and its expertise in relation to copyright matters in the sector, provide the company with a perspective which it hopes the Review Committee will find to be of value.

Parts of the Issues Paper Addressed in This Submission

The company's expertise extends to only some of the matters in the Issues Paper. The comments below address the following:

- **Practical Operation of the Law** (paras. 65-76 and **Issue 13**, pp. 30-33);
- **The Effect of New Technologies** (paras. 82-84 and **Issue 15**, p. 36-38);
- **Materials Produced in the Three Arms** (paras. 85-86 and **Issue 16**, p. 38-39);

- **Relevance of Overseas Models** (paras. 87-119 and **Issue 17**, pp. 39-51);
- **Options for Reform** (paras. 120-125 and **Issue 18**, pp. 51-53).

Analysis

1. Governments are very substantial producers of works. In some topic-areas, government data, publications and even software represent a very important segment of the available materials.
2. Learners and teachers are therefore heavily dependent on having early, convenient and inexpensive access to works produced by and for governments. Making those works available contributes a great deal to education and training, and hence to the quality of the workforce, and to the quality of civic decision-making on such important matters as health and the environment. Conversely, delays in and impediments to access to government works are harmful to education and training, and to the quality of the workforce and of civic decision-making.
3. Accordingly, **it is very much in the interests of the education sector for access to the works of governments to be facilitated, and impediments reduced.**
4. The term 'public domain' has several interpretations. The meaning presumed in this Submission is that the public domain comprises works in which no copyright subsists, and which are accordingly able to be used without a licence.
5. Some authors express doubts about whether works can be successfully released into the public domain (other than through expiry of the term of copyright). It is of especial concern that material that is in the public domain may be able to be, in effect, re-copyrighted (e.g. by updating it). To the extent that this occurs, the work may thereby be put out of the reach of educational users.
6. For these reasons, the company believes that an alternative approach should be favoured over the placing of Government works in the public domain.
7. Specifically, **the company believes that public access to information is best served by the Crown asserting copyright, but applying liberal licence terms appropriate to the particular work.**
8. Customised copyright licences are sometimes appropriate. There are, however, a great many circumstances in which the substantial costs and delays involved in the development of specific-purpose licences are not justifiable.
9. The company accordingly submits that **a collection of copyright licence-types is needed, that reflects the varying categories of documents, and the varying degrees of control and of openness that are appropriate in different contexts.**
10. Some standardised licence-types require formal commitment by the parties.
11. **Some standardised licence-types, on the other hand, need to be designed so as to require no action on the part of the licensee in order to gain a licence.** The benefits of this approach are significant reductions in the effort, costs and delays

involved in licensing, for learners and teachers, for other categories of individuals, associations and small business enterprises, but also for agencies.

12. **Guidelines need to be provided to government agencies** in order to assist them in selecting from the collection the particular licence-type appropriate to each particular work and context.
13. The 'open source', 'open content' and 'creative commons' notions are appropriate to a considerable proportion of works that are subject to Crown copyright. The paper at Appendix 2 discusses key decisions involved in selecting appropriate licence terms. The Guidelines should actively encourage agencies to strongly favour the more liberal alternatives, and to apply the more restrictive licence-types only where clear justification exists.
14. A number of licence-types exist that could be drawn upon in developing the collection.
15. It is not likely that the available licence-types are sufficiently rich to satisfy all of the various needs. **Action is needed to identify existing licence-types, and to specify the additional categories that are needed.**
16. AESL manages, on behalf of the education community, a range of licence-types. Some provide maximum openness, others support varying degrees of managed openness, and a few are tightly controlled, for-fee licences. Some are formal licences that require execution, while others are automatically-granted licences. An outline is provided in Appendix 1. Further details are available from the company's web-site, at <http://www.aesharenet.com.au>.
17. The company submits that the AEShareNet protocols represent an important investment, which can form a core around which to build the envisaged collection of licence-types. This would substantially reduce the cost and time involved in licensing activities, both for agencies and for licensees.
18. The company submits that the AEShareNet Web-based licensing process is directly applicable to the licensing of works by governments to educational institutions.
19. In addition, the AEShareNet model offers many lessons relevant to the design of licensing processes for use in other contexts.
20. **In summary**, it is submitted that:
 - the Crown should continue to assert copyright, to ensure orderly management of the public interest in works produced by and for governments;
 - there should be a formal policy that licence terms are to be generally liberal, and no more restrictive than is justified by the content and context;
 - concrete guidance should be provided to agencies relating to the licensing terms appropriate under particular circumstances;

- concrete guidance should also be provided to agencies concerning specific copyright licences that implement sets of terms that are appropriate in particular circumstances;
- the AEShareNet protocols should be adopted as a core set of licence-types, for works by governments that have potential use by learners and teachers;
- the AEShareNet licensing process should be adopted by governments as the means whereby works are licensed to educational institutions, and as a model for licensing works in other contexts as well.

Comments on the Specific Issues

13. Practical Operation of the Law

There would be significant advantages in encouraging an appropriate degree of commonality of processes and licence terms.

Given the diversity of agencies, document-types, and sensitivities, however, it is considered that excessive uniformity, and features such as a central body and a single central register, would not be appropriate.

The following are suggested as being appropriate measures to improve the administration of Crown Copyright:

- a formal policy that licence terms are to be generally liberal, and no more restrictive than is justified by the content and context;
- concrete guidance regarding licensing terms that are appropriate in particular circumstances;
- concrete guidance regarding specific copyright licences that implement sets of terms that are appropriate in particular circumstances;
- adoption of the AEShareNet protocols as a core set of licence-types, applicable to works by governments that have potential use by learners and teachers;
- adoption of the AEShareNet Web-based licensing service, for the licensing of works by governments that have potential use by learners and teachers;
- study of the AEShareNet Web-based licensing service, as a basis for the establishment of licensing services to support contexts additional to education.

The AEShareNet model is an example of collaborative federalism, and has achieved a considerable degree of commonality across jurisdictions. It is suggested that the model is capable of being applied more broadly than education alone.

15. The Effect of New Technologies

Re 15(a), copyright continues to be relevant, because it provides a basis on which orderly administration can be implemented.

Re 15(b), it is important that terms of copyright licences be appropriate to the nature of the work, its content, and the context in which it will be used.

Re 15(c), it is vital to efficient access to works by learners and teachers that works produced by and for governments be available on-line, under copyright licences appropriate to the work, its content, and the context in which it will be used.

16. Materials Produced in the Three Arms

The Prices Surveillance Authority (PSA) 1992 argument that "information produced using public money ... should be freely available" (para. 85) is supported.

However, contrary to the rest of the PSA's argument, it is submitted that the means whereby the agreed objective is best achieved is firstly by asserting copyright, and secondly by ensuring that copyright licences are as liberal as possible, given the nature of the work, its content, and the context in which it will be used.

These comments are as applicable to works of the legislative and judicial arms as they are to those of the executive arm of government.

17. Relevance of Overseas Models

A number of aspects of the EU, UK and Canadian models are not supported. This section identifies those aspects that are supported.

The EU Directive's features, as outlined in para. 93, are generally supported, especially Article 8, which requires that "public sector bodies may impose conditions on the re-use of documents in the form of a licence, and licences should be standardised".

Several of the UK's "eight guiding principles" are supported (para. 101), specifically:

- transparent licensing and charging terms;
- consistency of approach across ... government[s], extending the principles as appropriate, to all public sector information;
- establishing routes and finding guides enabling users to locate material;
- a streamlined administrative process, where licensing control is required, making maximum use of new technology.

Two of IHAC (Canada)'s recommendations are supported (para. 111), specifically:

- crown copyright should be maintained;
- where Crown copyright is asserted for generating revenue, licensing should be based on the principles of non-exclusivity and the recovery of no more than the marginal costs incurred in the reproduction of the information or data

18. Options for Reform

In relation to para. 124, 7 bullet-point options are offered.

This submission essentially supports a variant of the 5th option, viz. "retaining crown copyright ..., but ... allow[ing] licences over [most] types of material",

supplemented by specific measures to improve the selection of licence-types, and the administration and issue of licences.

Appendices

1. AESL's Licence Protocols
2. Clarke R. (2003) 'Copyright: The Spectrum of Content Licensing' Xamax Consultancy Pty Ltd, July 2003, at <http://www.anu.edu.au/people/Roger.Clarke/EC/CCLic.html>