



Australian Government

Australian Law Reform Commission

**Submission to the Copyright Law Review Committee in relation to
Crown Copyright**

23 March 2004

The Australian Law Reform Commission (ALRC) is making this submission as an executive government body that produces works over which the Crown holds the copyright. The ALRC makes no comment on materials created by the judicial or legislative arms of government. None of these issues have been considered by the ALRC as a part of any of its current or past inquiries.

Background – the ALRC as a creator and publisher of copyright works

The ALRC is a federal government body, established under the *Australian Law Reform Commission Act 1996* (Cth), that undertakes inquiries into legal issues at the request of the Attorney-General of Australia, and makes recommendations for change in the form of reports.

The ALRC is established by federal statute and operates under the *Commonwealth Authorities and Companies Act 1997* (Cth). While the issue has not been the subject of formal legal advice or judicial determination, the ALRC has, since its establishment in 1975, operated as a part of the Commonwealth for the purposes of the *Copyright Act 1968* (Cth).

The ALRC creates and/or publishes a variety of literary and artistic works, including:

- consultation papers (background papers, issues papers and discussion papers) which are distributed in hard copy and on CD-ROM free of charge, and made available on the ALRC website;
- final reports and annual reports which are made available free of charge on the ALRC website and sold in hard copy or on CD-ROM;
- a journal, *Reform*, which includes contributions from external authors;
- a variety of pamphlets, brochures and information sheets; and
- the general ALRC website with information about the ALRC and its past and current projects.

The ALRC website is hosted by the *Australasian Legal Information Institute* (AustLII) website. All of the ALRC's past reports, and all consultation papers published since 1996, are available free of charge on the AustLII website.

Unless the ALRC has entered an agreement with the creator of the work, copyright in ALRC created and/or published material vests in the Crown. The Commonwealth is noted as the owner of copyright in all ALRC publications except the journal *Reform*. The Commonwealth Copyright Administration administers copyright in published ALRC materials. Revenue for use of copyright in ALRC works collected by the Copyright Agency Limited is received by the Department of Communications, Information Technology and the Arts. The ALRC is not aware of the levels of revenue collected.

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Clarity of application of the Act

[Issue 6] The ALRC considers that there would be benefit in clarifying which instrumentalities are considered to be a part of the Crown for the purposes of the *Copyright Act*, rather than leaving it to judicial determination on a case-by-case basis. As noted above, after consideration against the usual factors, the ALRC considers itself to be a part of the Commonwealth for the purposes of the Act, although this has never been tested formally. However, the ALRC is aware of similar federal and state bodies who claim copyright separately from the relevant government.

Clarification is required not only to know who owns copyright in works created by instrumentalities (and thus who should manage copyright and receive revenue), but also whether a particular instrumentality is entitled to rely on the Crown statutory licence established by s 183. Internal administrative actions would differ significantly depending upon whether or not an entity was considered to be a part of the Crown for these purposes.

A similar issue—of whether or not a particular entity is entitled to claim Commonwealth immunity—was considered by the ALRC in its report ALRC 92 *The Judicial Power of the Commonwealth*.¹ The ALRC found that the existing need for case-by-case analysis was inefficient, and that there should be some clear expression of the circumstances in which an entity was considered to be part of the ‘Commonwealth’. In that report the ALRC was considering a range of immunities, some of which are governed by common law, and therefore recommended that the establishing statute of an entity should expressly state whether the body is entitled to enjoy the privileges and immunities of the Commonwealth, and to what extent. However, for a particular privilege established by statute such as Crown privilege in the *Copyright Act*, it would be appropriate to put the express clarification in the statute establishing the privilege.

Consequently, the ALRC would support a clear listing of those bodies considered to be a part of the Commonwealth for the purposes of the *Copyright Act*, either by an official list available on a website (as in the United Kingdom), or, preferably, a listing of such bodies in regulations or a schedule to the *Copyright Act*.

Objective of government copyright ownership

In fulfilling its functions, an integral part of the operations of the ALRC is to consult widely with the Australian public. In order to do this, the ALRC must disseminate information about itself, its processes, and the details of the legal issues and policy options under investigation.

Consistent with the functions of the ALRC, much of the material published by the ALRC is made available free of charge. The exceptions are: ALRC final reports, which are distributed free of charge to participants in the inquiry and made available on the ALRC website, but sold to the general public in hard copy and CD-ROM format; and the ALRC journal *Reform* which is sold on subscription.

The basic objective of copyright protection is to encourage creativity through reward of effort and investment, while ensuring dissemination of information to the public. The ALRC acknowledges the point made in the CLRC Issues Paper (at para 77) that the government is bound to carry out its functions regardless of the profit incentive. However, in an environment in which government agencies are expected to operate on a cost recovery basis wherever appropriate, there are some instances where the economic incentives of copyrights are applicable to government bodies.

Even if it can be argued that economic rights should not be given to government entities, the ALRC considers that an equally important aspect of copyright protections is to enable the copyright holder to retain

¹ Australian Law Reform Commission, *Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (2001), ch 29.

control over the manner in which the material is disseminated in a non-economic sense. The importance of these aspects is highlighted by the moral rights provisions inserted into the *Copyright Act* which provide the right to attribution of authorship, the right not to have authorship falsely attributed, and the right of integrity of authorship. For example, without copyright protection a particular interest group would be able to legally reprint passages of an ALRC paper and claim it as its own—this may offend certain participants to an ALRC inquiry who would not have had dealings with the particular interest group, and discourage their participation in future ALRC inquiries. It would also be possible for a certain interest group, which has radical views that are inconsistent with the independent approach and reputation of the ALRC, to take parts of an ALRC paper out of context to support its own views. While it is true that these situations may occur now, copyright protections give the ALRC the ability to redress such uses of its material.

While the government (or corporations) cannot ‘own’ moral rights under the existing legislation, the ALRC considers that the existing copyright ownership vested in the government effectively gives it the ability to assert these rights in addition to the economic rights. Any proposal to remove government ownership of copyright would effectively remove the government’s right to control how its information is disseminated.

[Issue 14] The CLRC Issues Paper asks whether copyright is needed in the light of freedom of information and privacy laws. While freedom of information and privacy laws provide a means of regulating access to information held by government, in practice this relates only to material not already in the public domain. These laws have a very limited impact on the way in which material can be used once published or otherwise released to the public.

[Issue 15] The CLRC Issues Paper identifies the possibility that technological change may have an effect upon government ownership of copyright. The ALRC considers that the effect is upon the way in which copyright protections are enforced, and therefore does not require a change to the basic objectives of the copyright system. The ALRC agrees with the view of the Intellectual Property and Competition Review Committee (the Ergas Committee) that the current balance between owners and users of copyright material should be maintained in the digital environment.²

The ALRC’s experience of using the internet to disseminate information while retaining control of copyright has been positive. In part this relates to the fact that the ALRC is not reliant (in the main) on copyright protections for profit reasons, but rather as a means of maintaining the integrity of its information. While the online environment does allow for easier copying and transfer of information, the ALRC is not aware of any blatant misuses of its papers or reports. The benefits of the internet in aiding dissemination of information have greatly outweighed concerns regarding breach of copyright. In a number of cases the ALRC has been approached by persons wanting to link personal, educational or organisational website users to the ALRC website. Permission is granted (it is doubtful it could be refused) on the condition the website provider does not attempt to pass off the ALRC information as an extension of its own site. This comes back to the ALRC’s priority of ensuring that authorship is appropriately attributed, and that the integrity of the ALRC’s works (and the ALRC’s reputation) are upheld.

In relation to published commercial texts excerpting ALRC information, requests continue to be lodged with the Commonwealth Copyright Administration.

Moral rights

[Issue 3] The ALRC would like to see further consideration of providing government with ownership of rights similar to the existing ‘moral’ rights. As noted elsewhere in this submission, the ALRC considers that one of the benefits of copyright ownership is the ability to protect the integrity of work and to have the

² Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement: Final Report* (2000), 34.

ability to ensure correct attribution of authorship. This would be particularly important if there was to be any change to government ownership of copyright in general.

The ALRC supports the existing application of moral rights for individual creators over works where copyright is owned by the government. The ALRC considers that it is appropriate to consider these issues when acting as an employer or contracting for services by having standard procedures in place that provide appropriate attribution of authorship and maintain integrity of the work.

Obtaining ownership of copyright

While the ALRC considers that the Crown should have ownership of copyright in executive material, there are questions about the breadth of the ownership rights currently given to the Crown under the *Copyright Act*.

Publication of previously unpublished material

[Issue 4] The ALRC has some concerns about the extent of the copyright ownership granted to government under s 177 of the *Copyright Act*, in particular that copyright vests in the government if it is the first to publish a work. This clearly erodes the rights of the author of the work where the creator is not under the direction or control of government. While it is possible to make an agreement with the author to alter this arrangement (s 179), this is not always possible nor practicable. Without clear agreements with each contributing author, the copyright in all articles published in the ALRC journal *Reform* vests in the Commonwealth. The CRC Issues Paper highlights another area that may be future concern to the ALRC: the publication of submissions to an inquiry on the ALRC's website. While it would not be the intention of the ALRC to usurp copyright from the author, unless agreements were made with each submission-maker prior to the time of publication, copyright would vest in the Commonwealth.

It is appropriate to give the government the right to publish a previously unpublished work without breaching the rights of the author. This is covered by s 183 'Use of copyright for the services of the Crown'. However, the ALRC questions whether copyright automatically should vest in the government as a result of this publication. It may be more appropriate to provide the government with limited rights to control dissemination of the particular publication, rather than to usurp copyright in the work as a whole.

By and under the direction of the Commonwealth

The Ergas Committee considered the breadth of s 176 of the *Copyright Act* which provides that the Crown owns the copyright in any works made 'under the direction and control' the Commonwealth or a State. This section places the government in a more favourable position than other contractors and employers, who only become copyright owners subject to the terms of a contract of employment or by assignment. The Ergas Committee recommended that the government should not be provided preferential treatment compared with other parties in terms of contractual arrangements.

While the ALRC is sympathetic to this view, it is also mindful of the efficiency of government administration. It notes comments made to the Ergas Committee about the need for detailed intellectual property provisions in all government contracts if s 176 were to be altered. As a small government agency without extensive infrastructure, the cost of making agreements with service providers would increase greatly if s 176 were to be altered. If such changes were to be introduced, the ALRC—and no doubt a host of similarly placed agencies—would benefit from whole-of-government best practice guidelines for incorporating appropriate copyright provisions in service contracts.

Exceptions to copyright

[Issue 9] As outlined above, the ALRC wants to ensure that the information in its publications is widely disseminated. In most of its publications, the ALRC chooses to use a copyright notice that includes the

phrase, “You may download, display, print and reproduce this material in whole or part, subject to acknowledgment of the source, for your personal, non-commercial use or use within your organisation.”

The ALRC considers that the existing fair dealing exceptions cover most of the circumstances in which the ALRC would agree to (and, in fact, encourage) dealing with our material without concerns of a breach of copyright. The ALRC would consider favourably any proposals to allow for broader fair dealing exceptions to material produced by the executive provided that such dealings maintained the integrity of the ALRC’s work by, at a minimum, appropriate attribution of authorship. This particularly would be the case in relation to non-commercial uses.

Administration of government copyright

[Issue 13] The ALRC does not have a concluded view as to whether the existing system or a more devolved system would be more appropriate for administration of requests to use Commonwealth copyright. Under the existing system the Commonwealth Copyright Administration (CCA) is the contact for queries regarding use of material created and published by the ALRC. The CCA fields queries and negotiates licence agreements where appropriate, but consults with the ALRC before making a final decision.

If a more devolved system of administration were to be implemented, with the ALRC taking greater responsibility for management of copyright in ALRC material, the ALRC would prefer to be supported by whole-of-government best practice approaches, particularly in relation to the negotiation of licence agreements.

Regardless of the administrative scheme established to manage Crown copyright, the most important factor for the ALRC is the right to consider a request and make the decision, or at a minimum advise another body of the ALRC’s opinion, as to whether or not the proposed use of the ALRC material is appropriate. This stems from the ALRC’s view of the value of copyright ownership in terms of upholding the integrity of the ALRC’s work. The ALRC considers that the creating body is best placed to make this assessment.

The ALRC would also support further consideration of who is paid revenue from use of Crown copyrighted works. As noted above, all revenue collected by the Copyright Agency Ltd (CAL) is currently paid to the Department of Communication, Information Technology and the Arts. Consistent with the government policy of cost recovery activity, it may be appropriate for separate entities such as the ALRC to receive revenue generated from use of works it has created. This would be even more appropriate if administration of Crown copyright were devolved back to separate agencies—the income generated by use of copyrighted works would help to offset the increased cost to the agency of dealing with individual requests to use the works.