



Australian Vice-Chancellors' Committee
the council of Australia's university presidents

***Submission to
Copyright Law Review Committee on
Crown Copyright***

March 2004

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This submission is made by the Australian Vice Chancellors' Committee (AVCC) to the Copyright Law Review Committee's enquiry into Crown copyright as referred to the CLRC by the Commonwealth Attorney General on 4 December 2003. The AVCC is the peak national body representing the presidents of 38 Australian universities.

Background

The universities are both significant creators and users of copyright material. In this dual capacity, the universities see the underlying issue to be one of a balance between the interests of owners of copyright material and users of copyright material. Educational endeavour and research excellence is dependant on the universities having ready and cost efficient access to the latest information available, both domestically and internationally. Ultimately Australia's international competitiveness in all industries hinges on the education and research system having access to this best and latest information both in traditional hardcopy and, increasingly, digital format.

The universities rely heavily on the Part VA and VB statutory licences to use third party copyright material in an efficient and cost effective way. The universities are paying some \$20 million annually to the declared collecting societies. This covers material in hardcopy, analogue and digital format. In order to facilitate distribution of the licence fees to copyright owners, the universities are sampled to determine what material and how much is reproduced and communicated under the licences. In carrying out their administrative roles the collecting societies deduct their administrative costs from the pool of funds to be distributed to copyright owners. In the case of CAL, this is about 18% per annum. Crown copyright material is identified in the sampling process and distributions are made by the collecting societies to the various government owners, from which the collecting societies deduct their operational costs. Where universities have free licences with copyright owners, CAL is notified and any sampling data reported in these circumstances is removed from the distribution process.

It is worthwhile reflecting on the underlying purpose of Copyright. Copyright provides copyright owners with a statutory monopoly for a specified period of time so that the owners can accrue a reasonable return for their efforts. Copyright was never intended to provide owners with ever growing returns by increasing the term of copyright or to limit access to material in order to protect its integrity. Other laws are designed to achieve the latter, including Moral Rights legislation. Under the Australia – United States of America Free Trade Agreement, Australia has agreed to extend the term copyright by 20 years so that it is in harmony with terms in other countries – notably the USA and the European Union. For the sake of consistency it might be appropriate for Australia to adopt the same philosophy in terms of the treatment of Crown Copyright, that is to reject the notion of Crown copyright altogether. This is the case in the USA, although as noted in the Issues Paper, State jurisdictions variously have the equivalent of Crown copyright provisions in place.

The AVCC is not advocating such an approach in Australia because it sees a need to protect the integrity of government material including legislation, judicial

proceedings and other formal reports. However, the AVCC also sees a genuine need for the public to have free access to Crown copyright material where there is a clear national interest to be served. The AVCC believes that this applies in respect of the role of the education sector. Furthermore, it believes that such free access should apply equally across all Federal, State and Territory jurisdictions in Australia. Presently there is a range of practices in Australia where some material is put in the public domain, other material is provided under free licences on request and other material is only provided for a fee. Different administrative procedures have also been established in the different jurisdictions to cater for these arrangements with inherent cost overheads built into the systems. Overall the AVCC believes that there is a clear need for consistency in the Crown copyright arrangements across all jurisdictions.

In essence, the AVCC is of the view that Crown copyright should continue, but that such material should be freely available to Australian education institutions. Furthermore, these arrangements should apply universally across all Australian jurisdictions so that the administrative costs both for education institutions and Crown copyright owners are minimised. The AVCC also considers that Crown copyright should only relate to those areas of government which are integral to public administration, and that those areas which are typically at an arms length should not be included, for example statutory authorities and similar government agencies.

Comments on Issues Paper

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?

The AVCC considers that as a general principle government ownership of copyright material should extend across all subject material as defined in the Copyright Act. Notwithstanding this general principle, the AVCC notes that governments will want to enter into specific contractual arrangements which may vary the prima facie ownership position.

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

The AVCC considers as a principle that governments should enjoy all the exclusive rights of copyright, but that a specific statutory waiver should be provided to Australian education institutions in respect of reproduction and communication of Crown copyright material, both in hardcopy and digital format.

Issue 3: The Committee seeks your views as to whether moral rights should apply in the context of government copyright.

The AVCC notes that Moral Rights legislation relates to the rights that an author of material holds, in this instance a servant of government. Given that this is essentially an issue between governments and its employees it is not a matter that the AVCC has any concerns on which it wishes to comment.

Issue 4: The Committee seeks your views as to whether the legislative scheme establishing government ownership of copyright material is appropriate. In particular, should the government acquire ownership of copyright material by virtue of

- **sections 176 and 178 (works, sound recordings and cinematograph films made by, or under the direction or control of, the government),**
- **section 177 (works if published by, or under the direction or control of, the government),**
- **section 35(6) (works made pursuant to the terms of employment under a contract of service or apprenticeship)?**

As a matter of principle, the AVCC considers that the Crown copyright should apply in respect of all materials created by or on behalf of government departments and agencies. However, the AVCC recognises that government may wish to enter into specific contractual arrangements which vary this principle.

Issue 5: The Committee seeks your views as to whether the Copyright Act should make express provision with respect to copyright in materials produced by:

- **the executive;**
- **the judiciary; and**
- **the legislative.**

The AVCC considers that Crown copyright should extend across all 3 arms of government.

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.

The AVCC considers as a matter of principle that all government departments and government agencies which are integral to public administration, including organisations which are subject to Ministerial direction, should fall within the purview of Crown copyright. However, it would seem that certain statutory authorities and other similar bodies should not fall within this purview and that in order to identify such bodies it may be appropriate to exclude them by way of gazettal notice or regulation

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?

Crown copyright should apply unless express contractual provisions stipulate otherwise.

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?

The term of copyright should be universally consistent.

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 a special exception for copyright material owned by the government?

While the AVCC is primarily concerned with use of copyright material for educational purposes, it believes that there are strong public interest arguments in favour of adopting a more liberal regime of exceptions for crown copyright material than the regime which applies to privately owned material. By way of example, members of the public who wish to use crown copyright material for fair dealing purposes currently provided for in the Copyright Act should not be restricted to using a “reasonable portion” only of that material.

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?

Should the government decide not to adopt the changes to the Copyright Act as recommended by the AVCC in this submission, that is, to provide the educational sector with a statutory waiver in respect of use of crown copyright material for educational purposes, the AVCC considers the Government must amend s182A must to allow for multiple copying. Furthermore, this exception must be technologically neutral so that all forms of copying and communications are accommodated; at present it applies to reprographic copying only, not digital copying and not communication.

Issue 11: The Committee seeks your views as to the appropriate nature and scope of prerogative rights. Should the prerogative rights in the nature of copyright be clarified or replaced by legislation?

The AVCC has no comment.

Issue 12: The Committee seeks your views as to any issues arising under the Commonwealth Constitution and how these may affect the possible options for reform.

The AVCC considers that the Commonwealth should seek to achieve a common approach across all jurisdictions in Australia. If this fails, then consideration should be given to its scope for reliance on Commonwealth heads of Constitutional powers available to effect such a change.

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?

As stated above, the AVCC considers that there should be uniformity in the way the different Australian jurisdictions provide access to Crown copyright material, and as the AVCC has stated earlier, Australian education institutions should be granted a statutory waiver. Currently, differing arrangements between governments make it burdensome and administratively expensive for universities to avail themselves of free licences and permissions granted by a myriad government bodies. In practice, the intent of government bodies to grant such exemptions is defeated by the administrative processes which different jurisdictions have implemented.

Issue 14: The Committee seeks your views as to the appropriateness of the law relating to government ownership of copyright given the operation of freedom of information and privacy laws in regulating access to, and use of, personal and government information.

The AVCC notes that freedom of information and privacy laws have quite specific purposes unrelated to Crown copyright and for this reason the AVCC has no comment to make.

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

- **how does one safeguard against the distortion or inappropriate use of government material made available through new technologies?**
- **is facilitating government information online inconsistent with the policy objectives behind government ownership of copyright?**

Provision of material online greatly improves the economics of information access and in the AVCC's view, does not unacceptably risk compromising the integrity of the information. This is the experience in the private sector where increasingly copyright material is made available over the internet. Improvements in the economics of the internet are clearly in the national interest and care needs to be taken to ensure that the full benefits of internet technology are not diminished by unnecessary restrictions on certain technological practices, such as caching and the making of temporary copies within information technology systems which improve the efficiency of the internet and its use.

Issue 16: The Committee seeks your views as to whether, as a matter of public policy, the government should own copyright in materials produced by the:

- **executive arm of government?**
- **legislative arm of government?**

- **judicial arm of government?**

The AVCC considers that all arms of government should have a consistent approach to Crown copyright, and that all must be included under the statutory waiver recommended by the AVCC in respect of Australian education institutions.

Issue 17: The Committee notes that these models, and other overseas models, do not treat government copyright material in a uniform manner and seeks your views as to whether any of them provide useful models for Australia.

The AVCC contends that its recommendation to provide a statutory waiver on Crown copyright in respect of copying and communications undertaken by educational institutions achieves the best features of arrangements in other countries, while at the same time ensuring the integrity of government material.

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

The AVCC considers that Australian educational institutions should have free access to government material covered by Crown copyright. The AVCC believes that a statutory waiver is the most practical and administratively simple way to achieve this. Leaving individual government and government departments to decide whether or not to provide free licences has not worked effectively in the past, to the extent that the intent of policy has mostly been defeated by the administrative practices.

Issue 19: The Committee seeks your views as to any transitional issues arising out of the options for reform.

The AVCC believes the statutory waiver sought should take effect immediately after the amendments to the Copyright Act are given Royal assent.

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

The AVCC has no comment.