



Australian Government

Department of Health and Ageing

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Copyright Law Review Committee Secretariat
Attorney-General's Department
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Copyright Law Review Committee (CLRC) Issues Paper: Crown Copyright

I refer to the letter of 11 February 2004 from Professor James Lahore, Chairman of the CLRC, to the Secretary of the Department of Health and Ageing, Ms Jane Halton, calling for submissions on the CLRC's Issues Paper examining law relating to government ownership of copyright material. Ms Halton has forwarded your request on to me for a response. I apologise for the delay in finalising this submission.

The Department of Health and Ageing (the Department) deals with a range of varying intellectual property interests involving Crown copyright issues that are relevant to a number of matters raised in the CLRC Issues Paper. This activity includes access to databases, data and software that supports the secure and effective operation of the Medical Benefits Scheme (MBS) and the Pharmaceutical Benefits Scheme (PBS), as well as continuing support for state funded hospital systems. These are key areas where the Department and its portfolio agencies are major funders and purchasers of services, devices and procedures.

At this stage the Department favours retaining the existing level of protection for copyright material. This will allow it to continue support for the efficient and effective delivery of high quality, affordable and accessible health care services to the Australian public.

The Department would like to be kept informed of the CLRC's work in the area of Crown copyright in order to assess and respond to any issues that have the potential to impact on existing controls over data management and on the timely release of health and research related publications. The Department would welcome the CLRC convening portfolio-based forums to discuss issues around possible changes to Crown copyright in more detail.

The Department's submission to the CLRC on its Issues Paper is attached. If you would like any further information, please contact our Intellectual Property Officer, Mr Jason Rasheed on (02) 6289 8987 or by email at Jason.Rasheed@health.gov.au.

A handwritten signature in black ink, appearing to read 'R. Wooding'.

Dr Robert Wooding
First Assistant Secretary
Information and Communications Division
8 April 2004

**Department of Health and Ageing Submission to the Copyright Law Review
Committee – Response to Crown Copyright Issues Paper on Government
Ownership of Copyright**

Discussion

The Australian Government Department of Health and Ageing (“Health”) is committed to the vision of better health and healthier ageing for all Australians through a world class system. In delivering this vision, the Department enthusiastically supports the development and promulgation of new and useful innovations for improved health services.

Health’s activities involve a significant variety of intellectual property interests in terms of both the creation of copyright material and the secondary use of such material. Specifically, the delivery of the Medical Benefits Scheme (MBS) and the Pharmaceutical Benefits Scheme (PBS) results in the administration of a large volume of key data held in a variety of information technology systems.

In addition, the effective delivery of key electronic health programs such as HealthConnect, depends on the strategic development and subsequent possible release of key intellectual property, including copyright (and possible patents) for information technology system applications.

Given the nature of current copyright development material that underpins these programs and possible wider portfolio impacts, modifying the current administration of Crown copyright in terms of the matters raised in the Issues Paper is not supported.

However, in the event that such changes are to be considered further, there is a need to take strong account of public interest factors. Included in this are the need to ensure security and consumer privacy and to oversight public health objectives. In particular, the Department is concerned that the matters raised in the Issues Paper have the potential to erode the value of a widely accessible and high quality public health services by bringing into question access to supporting health systems and accumulated data and information.

In the instance of Crown copyright being made more publicly accessible, this should be measured on the basis of achieving wider public benefits, but should not undermine confidence in existing health information and data. It should also be premised on whether the release is able to deliver improved economic models and enhanced healthcare outcomes for both consumers and clinicians.

Overall, Health is not convinced that the issues and arguments raised in the Issues Paper demonstrate a strong enough case that a significant problem exists with the administration of current copyright law. Therefore at this stage, Health is unable to support any changes to copyright legislation that may result in establishing reduced controls over the protection of Crown copyright material.

Issues

Prerogative rights

The right of the Crown to issue and revoke or recall rights is a historic and exclusive sovereign right unique to the holder. Paragraph 52 of the Issues Paper suggests some uncertainty over the extent to which prerogative rights extend. In terms of applying this to new technologies, the Australian Government is increasingly required to oversee the development of material that is made available for wider distribution on CD Rom and through online sources such as websites.

Current copyright provisions have already been determined as covering material such as literary works, so the contention at Issue 11 in the Paper that prerogative rights over copyright should be clarified or replaced by legislation is largely unfounded. Any further analysis and discussion needs to take into account the different classes of copyright material that may require different treatment. Relevant classes could be:

- Large holdings of data (eg Medicare benefits and pharmaceutical benefits data)
- Sensitive Personal information (eg clinical records, medical benefits information)
- Software (Health communications and e-health)

The Copyright Power and alternatives to vesting in the Crown

Paragraph 59 of the Issues Paper states that current legislation provides for vesting of government created copyright in the Crown in the first instance. In addition, paragraph 77 discusses this as a less than optimal means of dealing with such material since there is no legislative incentive or onus on the creator (Government) to consider better alternatives.

It should be noted that imposing a requirement for the Australian Government to obtain agreements in this circumstance would lead to considerable taxpayers' resources being devoted to securing such agreements and possibly litigation around the agreements. This should be weighed against the costs to the community of obtaining permission to use Crown copyright material. Agencies should have the scope to examine any implications arising from the reallocation of resources to accommodate any new accountability mechanisms.

Public policy and competition policy

Paragraph 77 of the Issues Paper may be interpreted as misconstruing the nature of copyright as a means of protecting or attributing rights in works. In particular, the following statement indicates that government outputs purposely set out to produce material of high value, at the exclusion of its emergence from another source, only to have it released under copyright:

“The Committee notes that in the case of the government, it is difficult to see how copyright provides an incentive for creation. The government is bound to carry out its functions regardless of benefits it may gain under copyright law. In these circumstances, one may think that the government's interest in public administration would shift the balance in favour of free access to

government materials. (Footnote: The Committee notes that this argument may also be applied to many copyright authors)”

However, many government functions, especially in health care, are limited by the amount of funding available. As noted in the Issues Paper, Crown copyright can generate revenue, which can enable governments to carry out functions that might not otherwise be possible without controlled access to copyright material.

Of relevance is the “Doha Declaration” on the operation of the Trade Related Aspects of Intellectual Property agreement (TRIPS - Marrakesh Agreement). The “Doha Declaration” raises concerns about the availability of public health services and access to essential medicines where levels of pharmaceutical production capacity are low and compulsory licensing provisions are ineffective or non-existent. In countries such as these, consumers are likely to pay comparatively high prices for widely beneficial drugs that would otherwise comprise a threshold standard of quality pharmaceutical products that would be commonly available in developed nations.

The “Doha Declaration” associates technological applications in the production and availability of widely used (and potentially cheap to produce) drugs with an improved ability to deliver quality health care outcomes. Whilst this relates primarily to compulsory use of patents and designs to deliver higher levels of population health, licensing copyright or the release of copyright under conditions of assignment, are equally important aspects to ensure that non market interests are represented.

The Issues Paper discusses competition policy in line with the *Intellectual Property and Competition Review Committee’s Review of Intellectual Property Legislation under the Competition Principles Agreement (September 2000)*. In this respect the principles of competition policy apply where there is significant government business in competition with the private sector. The Issues Paper appears to apply a definition of ‘business’ so as to exclude services that are provided where a viable market does not exist or where these may be heavily subsidised for example, the provision or funding for essential health services.

Health suggests that should there be any reduction of Crown copyright, this be limited to areas where there is competition with the private sector.

“Competitive neutrality requires that government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership.”

Source: Commonwealth Competitive Neutrality Policy Statement 1996 - Treasury web site.

Any changes to Crown copyright will need to be accompanied by clear guidelines for agencies that set out the basis upon which to allocate or assign government-owned copyright.

Exceptions

There are arguably several significant exceptions that need to retain equal, if not greater priority as options for vesting copyright¹. In particular, this may include the areas of population health, bio-terrorism, national security, and for national communications and infrastructure projects.

While the Issues Paper provides scope for such issues to be considered indirectly at Issue 9, no specific reference is made in either the Issues Paper or the Copyright Law Review Committee's (CLRC) Terms of Reference to possible exceptions on the basis of matters of high priority. Health strongly suggests that the CLRC conduct further investigations into exceptions of national significance, especially for population health.

If the CLRC is to consider exceptions then Health recommends that Crown copyright is retained for software and commercially valuable published works as produced by key Health program and service delivery areas. Important portfolio statutory authorities such as the Health Insurance Commission (HIC) and the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) are currently notable contributors.

The Australian Institute of Health and Welfare (AIHW) Act gives the AIHW the power to own, acquire and dispose of property in their own name. Any review of Crown copyright should acknowledge that some government agencies might act in the right of the Crown for some purposes, but not for others, including for copyright.

Government agencies are building up considerable intellectual capital in software and systems copyright in the health field. The Issues Paper raises no valid argument to support why the value of Copyright material should be available (or assigned) free of charge to the private sector, who may in turn commence charging the Government and other potential customers copyright fees for derivatives of the software. In fact, current legislative provisions included in the *Financial Management and Accountability Act 1997* (FMA Act); *Commonwealth and Companies Act 1997*; and, the *Auditor-General Act 1997*, provide for responsible accountability frameworks to be in place in dealing with assets, including for the efficient and ethical use of government resources.

The CLRC needs to give consideration to instances where it is desirable to vest or assign government owned copyright in parties other than the Crown. For instance the provisions of the FMA Act can be reflected through a best practice framework that releases copyright in accordance with agreed accountability principles and appropriate delegate authorisation.

Access to data and ongoing data management issues

Of the twenty matters raised in the Issues Paper, three are potentially significant for access to data and ongoing data management.

Issue 11 raises the matter of appropriate nature and scope of prerogative rights and that these should be clarified or replaced by legislation. It is currently unclear whether the

¹ Refer Part 3 – Terms of reference; paragraphs 40-42 and 120-125 of the Issues Paper

important matter of prerogative rights, which traditionally covers the printing and publishing industries, will be clarified to cover new technologies.

Issue number 14 raises the appropriateness of 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. This has relevance in terms of the provision of information owned by the Australian Government for secondary research purposes. If copyright laws are to change so that the Government ceases to own the information that is currently held within information technology applications, then Health's activities may be negatively impacted as a result of possible constraints on releases of value added information in the future.

The Australian Government and States have overlapping ambits in health and ageing. Cooperative arrangements in the area of e-health software and data acquisitions, and analysis and dissemination, should not be disrupted by unilateral action by the Crown in relation to copyright.

Copyright in the results of analyses of data holdings can be sensitive. For data that does not contain overtly personal information, it may be possible to identify a particular person within a cohort of persons from metadata when this is the result of a combination of low frequency of particular recordings with geographical information². In this respect the AIHW has legislative provisions to protect identifying data, which, combined with accepted statistical techniques and conditions from data providers, work to suppress data in cells that have the potential to identify particular individuals or even, for example, particular hospitals.

It can be argued that there is strong public interest merit in such data being retained to remain anonymous without the private sector having the right to access and acquire, and possibly publish, such information.

The myriad of privacy legislation noted through Paragraphs 79-81 seeks to enable protection of personal consumer information. However current copyright law delivers the means by which this protection can be effective as a practical mechanism for copyright attribution.

New technologies and public interest

In relation to new technologies on government ownership of copyright material as raised under Issue 15, Health would be interested in this being more fully explored. This may be particularly useful in terms of the provision of information owned by the Government to the public sector, especially where it might be used for secondary research purposes. If copyright laws change approval processes for the release of information, then Health would need to consider more closely the ramifications of this in terms of continuing to provide vital health data and the downstream processing of health research information.

² For example, when a cell in a table gives a number of 5 or less - say for the number of people claiming benefits of a particular kind in a particular geographical data.

Any question of changes to Copyright law to make more widely available Crown owned copyright would need to satisfy the test of continuing to represent the interests of the public, including consideration of the use of waivers similar to raised at Issue 13 of the Issues Paper.

In particular, Health would like the CLRC to present a detailed range of possible options for legislative and/or best practice policy changes that preserve and enhance the effective value in Crown copyright material. Any implications of proposed changes for the delivery of policy and program objectives could then be considered in greater detail.