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Professor James Lahore
Chairman
Copyright Law Review Committee
Attorney General's Department
Robert Garran Offices
Barton ACT 2600

Dear Professor Lahore,

Thank you for the opportunity to provide comment on the CLRC's current investigation into the law relating to government ownership of copyright material.

Although Film Australia is not resourced to provide a full submission on the issue, I would like to draw the committee's attention to the implications for Film Australia should the CLRC recommend abolishing crown copyright in audio-visual archival material such as that currently managed by Film Australia on behalf of the Commonwealth.

Background

Film Australia is an Australian Government-owned production and distribution company—an integrated business which performs a community service. Its mission is the creation of an audio-visual record of Australian life, through the commissioning, distribution and management of programs which deal with matters of national interest to Australia or illustrate and interpret aspects of Australian life.

Film Australia was incorporated in 1988 as a company limited by shares. In 1989 the inaugural National Interest Program contract with the Commonwealth of Australia was signed to engage Film Australia to devise, produce and distribute National Interest Programs. Up until 1991, Film Australia also had the monopoly on all commissioned Commonwealth film production.

Prior to its incorporation in 1988, Film Australia operated as a division of the Australian Film Commission, and before that as various government instrumentalities including the Department of Media and the Commonwealth Film Unit.

As one of its community services, Film Australia operates a Library which manages and provides access to its unique collection of heritage audio-visual materials produced by Film Australia in which the Commonwealth owns copyright.

Film Australia's archive is a significant holding and is one of the largest and most historically significant sources of archival, documentary and stock footage in Australia. There are more than 5000 completed productions in the archive along with thousands of reels and tapes of out-take material and stills. The collection is constantly being updated with footage from each new National Interest Program production, making it a unique record of life in Australia from the late 19th century to the present day.

In September 2001, the Government announced funding for Film Australia's community services, including finance to support essential preservation work and to improve access to a significant proportion of its extensive Library. Although this funding becoming available for the first time in 2002-03, Film Australia is still required to run this facility on a commercial basis.

Crown Copyright

According to legal advice obtained by Film Australia, ownership of copyright in materials managed by the Library is vested as follows:

- for cinematograph films ("films") made before 1 July 1988 – the Government department commissioning the film unless otherwise provided in the agreement with the Australian Film Commission
- for films made between 1 July 1988 and 30 June 1991 – Film Australia in its own right; and
- for films made after 30 June 1991 – the person specified by the contract between Film Australia and the Government department as owning the copyright.

Please note that this advice relates only to copyright in films commissioned by Commonwealth Government departments. Copyright in National Interest Programs is vested in Film Australia Limited. Indeed Film Australia is required by its funding agreement with the government to be the owner or one of the first owners of the copyright in each National Interest Program. (A copy of the National Interest Program guidelines is attached.)

Where copyright is owned by a commissioning Commonwealth government department or agency, then the Copyright Act provisions relating to Crown copyright may be relevant to those materials.

However where copyright in materials is owned by Film Australia, it is owned by the company in its own right and the Crown copyright provisions do not apply. Although the Commonwealth is the sole shareholder in the company, Film Australia operates independently from the Government, and is separate from the Crown.

In particular, the current funding agreement between Film Australia and the Commonwealth, specifies that should the Commonwealth, because of the operation of Section 178¹ of the Copyright Act become the owner of any work produced in the course of Film Australia's activities in relation to the National Interest Program and its Community Service Obligations, the Commonwealth will assign any and all copyright to Film Australia.

Rights Management

Provision of access to Film Australia's archive is the core Library business. In order to make the collection accessible, the Library provides a stock-shot operation that catalogues, researches, duplicates and licenses Film Australia owned material. Users include producers of documentaries, films, television and educational programs, TV commercials, new media programs as well as, from time to time, museums and other specialist exhibitors.

Access to the collection is carefully managed by the Library to ensure the materials are properly preserved, that maximum revenues are achieved and that sensitive materials are appropriately handled. In an increasingly complex and fragmented media environment, with converging and developing technologies, the marketing, exploitation and licensing of the rights in its audio-visual collection require considerable specialist expertise, which Film Australia's Library is able to provide.

Many of the Commonwealth departments or agencies that originally commissioned the films in Film Australia's Library no longer exist. Establishing a contact to allow access to the material is therefore problematic. Film Australia's Library provides a central point for access to this material, and allows it to be managed in an appropriate manner.

The archive also contains a significant collection of ethnographic material which, for example, shows life in Aboriginal and Torres Islander communities which may be culturally sensitive. Often such material requires careful negotiation of permissions if it is to be viewed and/or licensed for purposes other than those for which it was originally recorded.

As stated above, from 2002-03 the staff and operating costs of the stock-shot business have been partially financed through the Government's community services funding to the company. This will support the acceleration of essential database/cataloguing work to provide greater access to the collection. However access costs are substantially offset by revenues earned from the research and "licensing" of stock-shots. (As some material managed by Film Australia is either in the public domain or copyright is vested with the Commonwealth, Film Australia charges an "access fee" to cover costs associated with the care and management of this material, including the ongoing work of cataloguing, maintaining and storing the material. Additional costs are incurred in the case of material needing to be transferred from film to tape. It

¹ The current funding agreement between the Commonwealth and Film Australia actually refers to Section 176. However, previous agreements referred to section 178, and Film Australia is seeking an amendment to the funding agreement to address this drafting error.

should be noted that the fees are favourable when compared to other stock footage libraries.)

Impacts for Film Australia of any changes to Crown Copyright legislation

Film Australia would be concerned if any changes to the Copyright legislation in relation to treatment of Crown copyright affected its ability to manage the archival materials on behalf of the Commonwealth in line with the company's mission and objectives.

Should Crown Copyright be abolished and an expectation arise that access to those parts of the collection would become automatic, Film Australia could face the following problems:

- Film Australia would not be able to sustain an increase in non-revenue activities, and consequently would not be able to continue to operate its Library without significant additional resources from government;
- Any impact on the operation of Film Australia's Library would limit Film Australia's capacity to fulfil its contractual obligations with regard to the National Interest Program and its Community Service Obligations. As an integrated part of Film Australia, the Library is able to supplement the rising costs of documentary production by discounting archival licence fees for National Interest Program titles;
- Film Australia or the Commonwealth may be legally compromised by automatically granting or authorising the uses of material it may not have the legal or moral right to grant. For example in the case of shared copyright, underlying rights or where culturally sensitive material is involved; and
- Film Australia is prevented from releasing some of its print holdings due to commercial in confidence and privacy considerations.

In summary, we believe that there are significant difficulties with any proposal to abolish or limit crown copyright in cinematograph films, which relate to the complex legal and practical properties of film and its ongoing use. It would also effect the operations of Film Australia as an integrated production and distribution company.

Therefore, Film Australia would recommend that CLRC closely examine the impact any changes to the treatment of Crown Copyright, given the particular issues relating to the management of access and rights to audio-visual materials.

Should require any more information about Film Australia and its Library, please contact my office on 02 9413 8733.

Yours sincerely,

Sharon Connolly
Chief Executive Officer