

**ATTORNEY GENERAL'S DEPARTMENT**

**Response to the Issues Paper of the Copyright Law Review Committee  
concerning Crown Copyright**

**March 2004**

**ATTORNEY GENERAL'S DEPARTMENT RESPONSE TO COPYRIGHT LAW  
REVIEW COMMITTEE ISSUES PAPER ON CROWN COPYRIGHT**

***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?***

1. The Issues Paper does not advance policy reasons why government ownership of copyright should *not* extend to all works and subject-matter. Unless a clear and sustainable policy rationale is advanced to justify the application of Crown copyright to some subject matter and not other subject matter, any decision to exclude the application of Crown copyright to certain subject matter will be logically incoherent. Moreover, such a decision is likely to be seen to be designed to favour the interests of some copyright owners against others.

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

2. The Crown exercises the exclusive rights of copyright under the *Copyright Act 1968* ('the Act') in the same capacity as any other first owner of copyright and is therefore entitled, like any other first owner, to exercise the exclusive rights in totality.

3. Whether the government should be entitled to Crown copyright is a different issue from whether the government should be entitled to exercise all the exclusive rights contained in Crown copyright. The Issues Paper does not advance a reason why the government should not be entitled to exercise all the exclusive rights.

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

4. A sustainable policy rationale for excluding government from the operation of Part IX of the *Copyright Act* does not appear to have been enunciated. Until such a rationale is advanced, and accepted, there appears to be no reason to exclude government from the operation of Part IX.

***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:***

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

5. The discussion in paragraphs 23-33 of the Issues Paper is confusing, as it concentrates on the meaning of Crown copyright, not the appropriateness of government ownership of copyright material under ss 176-178. Each topic is dealt with under separate headings below.

### **Crown copyright**

6. The theory (paragraph 28 of the Issues Paper) that the phrase 'Commonwealth or a State' refers only to the executive is rejected. While in constitutional law, a reference to the Crown 'in right of the Commonwealth or State' is a reference to the executive, common sense suggests that a reference in the Act to 'the Crown' comprehends the legislature and judiciary.

7. A reference to the Crown in constitutional law is a reference to the executive exercising the authority of the Crown, not to a putative right on the part of the executive to exercise Crown authority exclusively. The legislature and judiciary also exercise the authority of the Crown and there is no reason why, outside the convention of constitutional law usage, a reference to the Crown should not comprehend all arms of government.

8. It follows that references in Part VII of the Act to the 'Commonwealth or a State', each falling under a heading containing the words 'Crown copyright' are references to the three arms of government comprising 'Commonwealth or State'. The application of the different provisions of Part VII may vary (for example s.176 may apply predominantly to works produced or commissioned by the executive) but each provision referring to 'Commonwealth or State' must refer to the Crown indivisible: executive, legislature and judiciary.

9. It should be noted that while the cases cited in footnote 34 lend support to the view that control by the executive is a determining factor in establishing the subsistence of Crown copyright, none appears to suggest that, for the purposes of the Act, the Crown does not consist also of the legislature and judiciary.

### **Sections 176-178 and s.35(6)**

10. In the first instance, it is important to state that Crown copyright is appropriate to the extent that it promotes the public interest.

11. The history of copyright law gives little guidance on the purpose of, or perceived necessity for, Crown copyright. For example, the *Gregory Report 1951* which supplied the recommendations leading to the British *Copyright Act 1956* discussed Crown use of copyright material not Crown ownership of copyright material.

12. Similarly, the CLRC Report that provided recommendations that formed the basis of the Australian Act (the *Spicer Report*), also dealt primarily with Crown use of copyright material. The *Spicer Report* devoted two paragraphs to discussion of Crown copyright, approving the concept of Crown copyright and recommending that the section of the British copyright legislation providing for the subsistence of Crown

copyright should be enacted in Australia. The *Spicer Report* did not, however, discuss the rationale for Crown copyright.

13. The legislative debates of 1911 and 1956 in Britain, and 1912 and 1968 in Australia are virtually silent on the substantive question of the purpose of Crown copyright. In itself, this silence, and the public silence surrounding the issue of Crown copyright, may be indicative of a public perception that Crown copyright serves the public interest.

14. It is not difficult, however, to make a public interest case for Crown copyright, whether on the terms set out in the Issues Paper (paragraphs 45 and 78), or on the basis that dissemination of government-produced information best serves the public interest if the government retains the right to control the reproduction of such material *subject to legislative or policy controls*.

15. In the latter case, the operation of legislation, such as the *Freedom of Information Act 1982*, is clearly important to define the public interest and prevent any potential use by the government of Crown copyright provisions to frustrate legitimate dissemination of information.

16. Moreover, the Commonwealth's policy in relation to reproduction of legislative materials (paragraph 44 of the Issues Paper), and NSW's policy relating to waiver of copyright in respect of similar material (paragraph 73), illustrate how access-to-information policies can co-exist beneficially with Crown copyright.

17. On the other hand, while the merits of Crown copyright may be open to debate, it is relevant to consider that the absence of Crown copyright could lead to:

- chaotic dissemination of government information;
- markets in the supply of some government information (meaning the public pays for the production of information by government and then its secondary sale by private vendors); and
- detriment to government security and commercial confidentiality arrangements.

18. In summary, it appears that ss.176-178 operate to promote the public interest.

**'Made by, or under the direction or control of, the Commonwealth' and s.35(6)**

19. Separate from the question of the necessity or otherwise of Crown copyright, the scope of government ownership of copyright is a matter of significant public importance. In this regard, it is difficult to discern the policy intent behind the phrase in ss.176-178, 'made by, or under the direction or control of, the Commonwealth or a State'.

20. The various legislative debates appear to shed no light on this issue, although in 1956 a parliamentarian sought clarification of the phrase 'by or under the direction

or control of Her Majesty or a government department'. His question, however, went unanswered.<sup>1</sup>

21. In the absence of any guidance from the parliamentary record, it could be surmised that the original provision incorporating the phrase (section 18 of the British *Copyright Act 1911*) was intended to prevent use of information produced or commissioned by the government in a way detrimental to the public interest. Misuse, deliberate or innocent, might, for instance, include the copying and dissemination of reports with security implications or the gratuitous copying, for purposes of sale, of topographical information produced at government expense.

22. Another instance of harm might be sale to the public, by a private vendor, of information obtained from a government-commissioned cadastral database. If information taken from a database compiled by government at public expense were offered for sale to the public at above cost price, then the public would suffer financial detriment, paying both for production by the government and secondary sale by the private vendor.

23. This submission makes no suggestions concerning how the public interest is determined. It proposes, though, that the potential detriment to the public interest arising from removal of the government's right to own material 'made by, or under the direction or control of, the Commonwealth or State' should be a relevant consideration in determining whether or not to remove the right.

24. It is also relevant that s.35(6) of the Act (and ss. 35(4) and (5)) indicate a clear policy intent in the Act to provide for employers and contractors to own the copyright of employees and other contractors, albeit through contract rather than automatically.

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

- (a) the executive;***
- (b) the judiciary; and***
- (c) the legislature.***

25. So far as distinctions between the different arms of government are concerned, the Act already distinguishes, to some extent, between the output of the different arms of government. Section 182A provides for making, by reprographic reproduction, of single copies of prescribed works, including a legislative enactment and judgments of courts and tribunals.

26. The purpose and effect of Part VII of the Act seems clear and uncontroversial. As noted above, executive, judiciary and legislature exercise equally the authority of the Crown indivisible. Interfering with the present arrangement of Part VII is unnecessary and apt to create confusion where none existed.

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<sup>1</sup> Question to Parliamentary Secretary by Mr Montgomery Hyde, Belfast North, British *Hansard* 29 May to 8 June 1955, Vol 553, p.269.

***Issue 6: The Committee seeks your views as to what entities should be included as part of ‘the Commonwealth or State’ for the purposes of the Copyright Act and how this should be determined.***

27. No views expressed.

***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?***

28. The public interest test should again be determinative of the disposition of rights. As noted, the Crown copyright provisions are designed to promote the public interest. While the government could waive copyright on a case-by-case basis, generally speaking, government ownership of material produced as part of its function is necessary to ensure that the integrity of information is not compromised, information is disseminated to the public efficiently, and requirements relating to security and confidentiality are observed.

***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?***

29. The greater length of copyright afforded to non-government works is not an argument to propose extension of the term of government copyright. Term of copyright has been one of the vexed questions of copyright debate since the eighteenth century but public policy arguments typically support a short term of copyright protection.

30. From an economic perspective, the monopoly rights of copyright are purportedly designed to allow owners to realise a return on investment. From a public policy perspective, an expectation of fair return on investment should not transmute into an expectation of monopoly profits for an indefinite period. The only way to prevent monopoly rents, while also promoting dissemination of information, is to limit term. Similarly, limited duration of Crown copyright promotes dissemination of information.

***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?***

31. There is no obvious reason, other than public interest considerations, why the exceptions, introduced primarily to permit public access to copyright material produced and distributed for a commercial purpose, ought not to apply to government copyright material.

32. Public interest considerations include national security and commercial confidentiality attaching to the negotiation of government contracts.

***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 and appropriate model?***

33. The primary criteria in determining the extent of public access to government copyright material ought to be the public interest. In principle, the public interest is best served by the free dissemination of information. However, as noted, considerations such as security and commercial confidentiality are relevant factors in limiting public access.

34. Such considerations do not appear to apply to the prescribed works set out in s.182A. Subject to the limitation expressed in s.182A(2), a licence allowing multiple reproduction of prescribed works, or a blanket licence scheme, would be likely to operate equally effectively to facilitate dissemination of prescribed works.

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

35. Discussion in the Issues Paper of the prerogative rights highlights the uncertainty surrounding the extent of the Crown's prerogative right in relation to copyright material. However, the discussion does not make clear whether the uncertainty surrounding the prerogative right is detrimental to public welfare or the interests of copyright owners.

36. In the absence of evidence of detriment to public or private interests caused by the operation of the prerogative right, it is submitted that clarification of the scope and function of the right is unnecessary. It could moreover be argued that the prerogative right functions to promote the public interest by imposing on the Crown, through historical usage, an obligation to disseminate certain information it produces.

***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.***

37. This submission holds that the Crown functions in Australia indivisibly through each arm of government. While in constitutional usage the Crown refers to the executive, in reality the Crown is the source of authority for all forms of government in Australia. If executive, legislature and judiciary function solely by exercise of the Crown's authority, then each must, when the Crown is defined as a functional entity, form part of the Crown.

38. If the Crown operates indivisibly then there is no conflict between the Crown in right of the Commonwealth and the Crown in right of the State. Typically, Commonwealth and State relations are governed by consent and deference to convention.

39. This means that while the Commonwealth carries responsibility for administration of the Act, the States have complete discretion, within the terms of the

Act, to make all necessary administrative arrangements in respect of copyright relevant to the State. It is submitted that the Commonwealth has no authority to interfere with the administrative arrangements of the State.

***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?***

40. NSW is committed, where appropriate, to close consultation with other Australian governments to improve legislation and administrative practice. At present, NSW, together with the other States and Territories is jointly negotiating government statutory copying agreements.

41. However, while appropriate harmonisation of the copyright administrative practices of States and Territories is a sensible policy goal, it is essential that NSW retains the discretion to make independent administrative arrangements in relation to copyright. The public interest waivers referred to in paragraph 73 of the Issues Paper are one example of the exercise by NSW of its administrative discretion.

***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.***

42. In light of continuing research into copyright, the theory that copyright law functions to balance incentive to produce with dissemination of information is problematic.<sup>2</sup> English copyright originated from the system of government control of the publication of books and its history since the eighteenth century is one successive reproductive industries (publishing, recording, cinematographic, broadcasting and software) successfully asserting, by political influence, monopoly rights in the production and distribution of information.

43. Early political agitation by the publishers, for instance, led to the introduction, in the British *Copyright Act 1842* (5&6 Vict. C.12), of the parallel importation system. The system was designed, and operated, to provide British publishers with a monopoly in the distribution of books throughout the British Empire. The intent and effect of the legislation was purely to grant monopoly production and distribution privileges to one industry.

44. The balance theory of incentive/dissemination ought therefore to be treated with caution. More particularly, since the theory has never been verified by empirical studies, it is submitted that it is not appropriate to posit the theory's non-applicability

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<sup>2</sup> See articles, eg, Patterson, L Ray, 'Free Speech, Copyright and Fair Use' (1989) *Vanderbilt Law Review*, 40, pp 1-66; Plant, A, 'The Economic Aspects of Copyright in Books' (1934), *Economica*, 1, pp 167-195, Travis, H, 'Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment' (2000), *Berkeley Technology Law Journal*, 15(2), pp 1-65; books, eg, Bently, L, and Sherman, B, *The Making of Modern Intellectual Property Law*, Cambridge University Press, 1999 and Masters Thesis, BAC Atkinson, *Copyright Law in Australia 1905-1908: Narrative, Counter-Narrative and the Challenge of the Historical Record* (University of Sydney, 2002).

to government production of copyright material as a reason to limit the operation of Crown copyright.

45. On the other hand, the questionable nature of the prevailing theory about the purpose of copyright law is not a reason to suspend critical examination of the purpose of Crown copyright.

46. The likelihood of conflict between Crown copyright and privacy and other legislation is perhaps remote: access to information is not necessarily incompatible with restrictions on the reproduction of information. Copyright information could, theoretically, be provided subject to restrictions on the further reproduction of the format in which the information is supplied.

47. The more substantial question is the extent to which competition policy calls into question the appropriateness of government ownership of copyright.

***Issue 15: The Committee seeks your views as to the effect of new technologies on government ownership of copyright material. In particular:***

- (a) does copyright continue to be relevant?***
- (b) how does one safeguard against the distortion or inappropriate use of government material made available through new technologies?***
- (c) is facilitating government information online inconsistent with the policy objectives behind government ownership of copyright?***

48. (a) As noted in the Issues Paper, government has a number of motives in dealing with copyright material: ensuring public dissemination of information, safeguarding the integrity and authenticity of government publications, reducing the administrative burden of negotiating third party copyright contracts, and so on.

The determinant of the relevance of Crown copyright is the extent to which it promotes the public interest. To some extent, it could be said that the public interest is defined by government policy, which ideally responds to the public will. In this respect, it could be argued that Crown copyright is relevant insofar as it facilitates achievement of the objectives of national policies such as the creation of national information economy, e-Government strategy and competition policy.

49. (a) No views expressed.

50. (c) A difficulty in responding to the question concerns definition of the policy objectives behind government ownership of copyright. This submission posits that the policy behind Crown copyright, expressed in s.51(viii) of the Commonwealth Constitution, is serving the public interest. However, it is apparent that no definite consensus exists in relationship to the policy underlying government ownership of copyright.

51. If facilitating government information online lies in the public interest – as most people would presumably agree – then that policy ought not to be inconsistent with the policy objectives behind government ownership of copyright. To the extent that government ownership of copyright impedes the facilitation of supplying government

information online, then information dissemination ought logically to take precedence over copyright, subject to limitations that are themselves in the public interest (national security, commercial confidentiality etc).

52. However, it is submitted that copyright principles no more impede the government from communicating information than they do private copyright owners. The government is entitled to make copyright material available online on such terms as it sees fit, without derogating from its copyright entitlement. The entitlement thus remains unaltered but the government is free to permit uses of copyright material that far exceed those allowed by copyright law.

***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:***

- (a) executive arm of government?***
- (b) legislative arm of government?***
- (c) judicial arm of government?***

53. The government should own copyright in materials produced by each arm of government to the extent that such ownership promotes the public interest. As noted, the public interest is partly identified by reference to national policies promulgated by the elected Commonwealth government. Competition policy is an example of such a policy.

54. It is submitted, however, that while competitive neutrality principles state 'Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership'<sup>3</sup> the extent to which the Competition Principles Agreement can be applied to Crown copyright is open to question.

55. The first observation to be made in relation to the Competition Principles Agreement is that it in referring to government, it refers to 'Government businesses' and 'government business enterprises', neither of which term is defined in the Agreement.

56. This submission cannot determine whether the production or dissemination of Crown copyright material is typically by 'Government businesses' or a 'government business enterprise'. But it is relevant to observe that, depending on how the terms 'Government businesses' and 'government business enterprise' are construed, the observations of the Ergas Committee may apply not to the government-as-a-whole but only to discrete portions of government.

57. Assuming, however, that the terms are intended to apply broadly to the whole-of-government, there is another reason to look critically at the observations of the Ergas Committee. This is that the concept of 'net competitive advantage' accruing to government under s.176 of the Act may not be sustainable in the context of copyright practice.

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<sup>3</sup> s.3(1) Competition Principles Agreement

58. The government is not competing in a market with private owners of copyright. While the government's ownership of copyright in material made under its 'direction or control' is automatic under s.176, it is open to debate that s.176 thereby confers a 'net competitive advantage' on the government. It is difficult to see how ownership of copyright material under s.176 for public interest purposes, such as effective dissemination of information, disadvantages the private owners of copyright who acquire copyright by written assignment or contracts of employment.

59. On the contrary, it can be argued that the government's automatic ownership of material produced under its 'direction or control' means that relevant information contained in such material is supplied to the public at a lower cost than information contained in copyright material privately owned.

60. On this basis, it is submitted that, taking account of relevant policies, such as National Competition Policy, government ownership of copyright material should continue to the extent that such ownership promotes the public interest. It is noted that the consequences of promoting a competitive market in the supply of the material produced by each arm of government would be highly unpredictable. Crown copyright offers a settled system for delivering government information to the public efficiently and without compromise to the integrity of the information.

***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.***

61. As noted in this submission, provisions relating to Crown copyright should only be disturbed if amendments would result in a clear benefit to the public interest. In legislative and public debate, government ownership of copyright material has been an uncontroversial topic, indicating that current legislative arrangements work effectively.

62. The Canadian model referred to in the Issues Paper has desirable features relevant to Australia and in fact some close similarities with the NSW copyright system.

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

63. The Issues Paper does not identify adequate reasons for abolishing Crown copyright. As the Act does not differentiate between types of owner, to derogate from the rights of ownership accruing to the government under the Act would be to disturb the logical coherence of the Act.

64. This submission does not assert that Crown copyright is intrinsically justified, but it notes that in the context of the historical development of copyright legislation, its existence is, in policy terms, no less defensible than that of privately owned copyright.

65. In addition, the probability that Crown copyright promotes the public interest, by, for example, the dissemination of authoritative material documenting all

processes of government, supplies an argument for its retention. It seems evident, though, that the purpose and benefit of Crown copyright is not well understood. As a result, it is possible that difficulties arising from the operation of Crown copyright result less from deficiencies in the legislation than failings of administration.

66. It is submitted that administration of Crown copyright in Australia would benefit from a clear statement of the principles and objectives of government ownership of copyright. Such a statement could incorporate the management guidelines utilised in the United Kingdom and Canada and set out guidelines promoting public access to information through effective disclosure and dissemination.

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

67. No views expressed.

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

68. No views expressed.