



**NSW CABINET OFFICE**

**NEW SOUTH WALES GOVERNMENT SUBMISSION TO THE COPYRIGHT LAW  
REVIEW COMMITTEE'S ISSUES PAPER ON CROWN COPYRIGHT**

**APRIL 2004**

## 1. INTRODUCTION

The following submission is made by the NSW Government in response to the Copyright Law Review Committee's Issues Paper on Crown Copyright.

In summary, the NSW Government supports the retention of the current right of the Crown to hold copyright, including the current statutory framework.

The NSW Government supports the current system of allowing the NSW Government to hold copyright in various materials owned or developed by the State. This allows the NSW Government to retain some ability to monitor the accuracy and integrity of published information and in appropriate cases allows the State to obtain a return where it has invested substantial public monies in producing materials. The importance of providing access to information of high value to the public is also recognised. To this extent the NSW Government already waives copyright in certain material (such as case law and legislation), and can continue to identify other appropriate cases where this might be able to occur.

## 2. RESPONSE TO SPECIFIC ISSUES

*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?*

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

The NSW Government considers that it should continue to enjoy all of the exclusive rights of copyright. This includes the retention of the current Crown copyright provisions contained in sections 176-179 of the *Copyright Act 1968 (the Act)*.

Copyright protection ensures that unauthorised use of material does not occur and confers economic rights on the holder including the right to copy, publish and distribute the material. As well as providing these rights, it allows the copyright holder to protect the integrity of the relevant material.

Collectively these rights provide an incentive for such material to be produced by ensuring that the creators of the works can derive a return. Copyright protection also encourages distribution of such works because it ensures that the producer has the right to control the subsequent copying and publication of that work, thus protecting the integrity of the original work.

NSW Government agencies produce a wide range of materials requiring continued copyright protection including: research projects, training materials, maps, websites and databases. The Crown should be able to exercise the exclusive rights of copyright under the Act in the same capacity as any other first owner of copyright and should be entitled, like any other first owner, to exercise these exclusive rights in totality.

Without these protections as a first owner of copyright, government may be reluctant to develop many publications, databases, research materials and other information. Some of this material, which may have a high value to the public, is often made available to the public, sometimes below cost or for free.

Without copyright protection this material might no longer be produced at all, while in other cases it might be published by others, possibly at a higher price. Much of this material is produced using public monies. Copyright protection ensures that government is able to recoup any significant investments for the benefit of the public.

Similarly, without copyright protection government might produce material that is valuable to the public, but it might decide not to distribute that work more widely for fear that it might be exploited by some other person, or because the integrity of that work might be compromised.

There is no justification advanced in the Issues Paper as to why copyright protection should not extend to all government material.

Indeed, without the protection of copyright for material produced by the Crown, there is a risk that certain 'public goods' could in effect be privatised. For example, until 1998 in the United States a publishing company effectively held a monopoly over Federal case law due to the fact that it claimed copyright in the pagination of cases. While this was not simply an issue relating to ownership of copyright by government, it highlights the difficulties that can arise where a significant resource is unable to be effectively controlled by government.

The NSW Government agrees that a balance needs to be struck between commercial exploitation of information (providing a return to government) and the public interest in providing wider access to some information.

The NSW Government does currently recognise that material should be made available which is of considerable public benefit. Copyright, for example, is waived in respect of the publication of legislation subject to certain conditions (eg provided it is not represented as an official version). Other legal information, such as case law, is licensed to a number of private sector providers although these compete with the official reports prepared by the public sector.

Any change that would diminish the ability of the NSW Government to control its copyright and ensure the widespread and accurate dissemination of government information at minimal cost is not supported.

Whether government should be entitled to "Crown copyright" is a different issue from whether government should be entitled to exercise all the exclusive rights as a first owner of copyright. The NSW Government's position on the former issue is discussed below.

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

The NSW Government has no comment to make in relation to the retention of moral rights in the public sector.

*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)?*

The NSW Government supports the retention of the current Crown copyright provisions contained in sections 176-179 and 35(6) of the Act.

It is recognised that the current Crown copyright framework confers special rights on the Crown, including government agencies. Specifically, the Crown copyright framework provides an important safeguard which ensures that information produced on behalf of government, which may be of high public value, is protected and ensures that government retains control over its dissemination.

In practice, ownership of copyright in material produced for government through a commercial transaction with a third party provider is dealt with on a case by case basis through the terms of a contract. As such, little reliance is placed on Crown copyright protections in these circumstances.

While the Crown copyright protections are of limited relevance in a commercial context, the Crown copyright provisions play an important role in respect of 'core' government functions. For example, where a government appoints a person to prepare a report for public discussion, this may not necessarily be commissioned through a formal contract. Without the protection provided by Crown copyright, there is a risk that the author of the report may retain ownership of the material and government could lose the right to deal with that report for the benefit of the public.

There may be areas where the special protection provided to government by the Crown copyright provisions should not apply. One such area may be in relation to government business enterprises which are removed from the 'core' functions of government where competitive neutrality issues might come into play. Many of these businesses may not have the benefit of Crown copyright as they no longer represent the Crown, for example, State Owned Corporations, or because copyright issues would be dealt with through commercial negotiations. This is discussed further below.

*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.*

*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.*

*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 government. If so, in whom should copyright vest?*

The NSW Government supports the retention of the current provisions of the Act which it believes do not distinguish between whether materials are produced by the

executive, judiciary or legislature. This issue is addressed in detail in the submission from the NSW Attorney General's Department.

The NSW Government considers that the current approach of the Act in deeming material produced in the course of government functions (whether it is produced by the executive, judiciary or legislature) is appropriate. In the absence of reasons in the Issues Paper demonstrating that such a provision is contrary to the public interest, no change is recommended. To the extent that there is specific material in which copyright could be waived, so that the material is made more widely available, government could adopt policies to ensure that this happens.

The NSW Government recognises that the current legislation produces a level of uncertainty about which government entities within the executive arm of government are covered by the Crown copyright provisions. As referred to in the Issues Paper (paragraphs 23-26) the issue is currently determined by reference to whether the government entity is controlled or owned by government.

The NSW Government considers that the Crown copyright provisions should continue to apply to government departments and other agencies where they are controlled by government and carry out government functions.

Government businesses that operate on a purely commercial basis arguably should not have the benefit of the Crown copyright provisions, but should be subject to the usual contract negotiations about which party should own copyright. As is noted above, this is often what happens in practice.

If the Commonwealth considers there are specific types of government entities that should not receive Crown copyright protection, then these should be identified and further consultation should occur with the States. While consideration could be given to more clearly defining the entities that should continue to receive the protection, it is unclear if such a step needs to be taken in light of the operation of the existing provisions in practice.

*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 NSW Government supports the retention of the current provisions for the duration of government copyright.

*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?*

The exceptions to copyright infringement should apply equally to government and non-government owned copyright material. There is no obvious reason why the exceptions, introduced primarily to permit public access for limited research and educational purposes to copyright material produced and distributed for a commercial purpose, ought not to apply to government copyright 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?*

In principle, the public interest is best served by the free dissemination of information such as that covered by s.182A. While considerations such as security and commercial confidentiality are relevant factors in limiting public access, 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.

The current New South Wales system allows for the waiver of copyright over legislative material and judicial decisions. Effectively this enables multiple copies to be made of these materials so no legislative change is required.

*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 Issues Paper states that the existence and exact extent of the prerogative right to hold copyright in legislative and judicial materials is unclear. The NSW Government has, however, relied on the prerogative right (at least in part) to waive copyright in legislation and case law to make it more widely available. Any uncertainty does not appear to be having a significant adverse impact.

*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 NSW Government would have significant concerns if the Commonwealth sought to remove or alter existing copyright protections for the States and would need to consider all options, including whether there is an entitlement to compensation under the provisions of the Constitution requiring the acquisition of property to occur on just terms.

*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?*

The NSW Government supports in principle attempts to achieve improved consistency of administration across jurisdictions, where possible. Any attempt, however, to

improve consistency across jurisdictions would incur some costs. It would, therefore, need to be demonstrated that these costs are outweighed by the benefits.

It also notes that the individual requirements of each jurisdiction may justify differing approaches. Indeed, uniformity should not be at the expense of measures such as the waivers issued in New South Wales in relation to specific material such as legislative material and judicial decisions.

*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 NSW Government does not agree with the assertion in the Issues Paper that freedom of information and privacy laws govern the use of information, as well as regulating access. There are no provisions in the relevant NSW legislation that confer a right to use the information obtained for any purpose. Indeed the NSW *Freedom of Information Act* reinforces copyright by allowing an agency to refuse access to information where the document sought is available for purchase.

There is no inconsistency between copyright being held by the Crown and freedom of information and privacy laws. It is unclear why the Issues Paper considers that such laws undermine the policy justification for government ownership of copyright. While those laws allow individuals to access information, and indeed complement other government initiatives to make information available, release of that material does not appear to have any influence or effect on 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?*

The NSW Government's view is that government ownership of copyright continues to be relevant in respect of new technologies. The provision of government information online is not inconsistent with government ownership of copyright. Government should retain the right to decide what information is of a high public value and whether or not it should be made available either free of charge or for a fee. The decision to make such information available through electronic means should not inhibit the right of the Crown to ensure that the material is not used for commercial purposes without an appropriate fee.

*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?*

As noted in response to Issue 2, the NSW Government believes that government control of copyright can play a valuable role in facilitating the development and distribution of information by government. Without copyright protection, the significant benefits that arise from such protection in encouraging the preparation and distribution of material would be lost.

The Issues Paper notes that the Prices Surveillance Authority recommended that Crown copyright in legislation and related materials be abolished because that information is produced using public money to facilitate government. The paper also argues that competition policy places pressure on the continuing rationale for Crown copyright.

While government material is produced using public money, without copyright protection there is a risk that some of this material will no longer be produced. In some cases government will be exposed to risk in developing certain material

(required by the public) because it might be unable to recoup any costs incurred. This might arise, for example, where it produces material at significant cost which is then distributed. Without copyright protection, others may seek to distribute and publish the material at a lower cost than government, as they do not have the full production costs, thus impacting on government's return.

While such arguments may apply in relation to government business enterprises, in practice (as is noted above) it is unlikely that Crown copyright is relied upon to any significant extent in commercial contexts.

In relation to other material produced by the executive, judicial and legislative arms of government, there is a net public benefit in retaining government ownership of copyright, having regard to the need to encourage the production of this material and to preserve its integrity. The NSW Government has always demonstrated a flexible approach in relation to these core areas, for example, by waiving copyright in case law and legislation.

*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.*

Given the division of legal and administrative responsibility between the Commonwealth and States and the different approaches used by all jurisdictions, there would be difficulties if a model attempted to be too prescriptive. The model that has most relevance to Australia is the Canadian model because it seeks to maintain government ownership of copyright and allows for licensing on a low cost recovery basis while recognising regional differences by allowing provincial and territory governments to make their own rules, (paragraph 111). The Canadian approach is similar to how the New South Wales system currently operates.

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

The NSW Government supports the retention of current legislation with some modification to administrative procedures. The NSW Government believes that its current system of waiving copyright provides the public with low cost or free access to a wide range of government information while still reserving to government the ability to maintain some control over the accuracy and integrity of the information. The NSW Government does not support the abolition of government ownership of copyright as this would result in government losing the ability to maintain the accuracy of its information.

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

The NSW Government has no comment on this issue.

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

The NSW Government has no other matters arising from the Issues Paper on which it wishes to make further comment.