

Australian Copyright Council
PO Box 1986 Strawberry Hills NSW 2012
245 Chalmers Street Redfern NSW 2016
tel (copyright information) +61 2 9318 1788
tel (administration & sales) +61 2 9699 3247
fax +61 2 9698 3536
email info@copyright.org.au
www.copyright.org.au



ABN: 63 001 228 780

***Submission on the Government's response
to the report of the Intellectual Property
and Competition Committee***

November 2001

1. In this submission, we set out our position in relation to the Government's response to the recommendations of the Intellectual Property and Competition Review Committee (IPCRC).¹ We also seek responses from the Government in relation to a number of matters. We have made a number of submissions in the past, to the IPCRC and others, in relation to issues considered by the IPCRC. We refer to some of them in this submission. They are available from our website.²

Australian Copyright Council

2. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policies and legislation.
3. Some of the organisations affiliated with the Australian Copyright Council also made submissions to the IPCRC, and have made submissions to the Government in response to the IPCRC recommendations.

Issue 1: Parallel importation

4. We confirm our opposition to allowing parallel importation of articles containing copyright material.³
5. We note the serious concerns of the Senate Legal and Constitutional Affairs Committee – including its Government members – about the Government's unquestioning reliance on the data and analysis provided by the Australian Consumer and Competition Commission (ACCC), given the ACCC's vigorous support for allowing parallel importation.⁴
6. We seek an undertaking by the Government that if, in connection with parallel importation, it refers to pricing data and analysis in the future, it will seek such data and analysis from an independent source.
7. We also note the Senate Committee's concerns that the Government had not responded to the report of the House of Representatives Legal and Constitutional Affairs Committee (LACA Committee) on enforcement of

¹ <http://www.law.gov.au/infopack>. IPCRC report available from <http://www.law.gov.au/ipcr>

² <http://www.copyright.org.au>.

³ Most recently set out in our submission to the Senate Legal and Constitutional Affairs Committee in relation to the Copyright Amendment (Parallel Importation) Bill 2001.

⁴ Report of Senate Legal and Constitutional Affairs Committee on Copyright Amendment (Parallel Importation) Bill 2001.

copyright (released in December 2000). We understand that response to Government inquiries is required within three months. The Government has still not responded to the report. We seek a statement from the Government about when it will respond.

Issue 2: Copyright term

8. We support the extension of copyright protection from 50 to 70 years, consistently with the protection now provided in the US and the EU, for the reasons set out in our submissions to the IPCRC.

Issue 3: Fair dealing and the Digital Agenda Act

3 year review

9. We confirm our view that the Digital Agenda amendments do not sufficiently allow for differences between the online and offline environments. There are a number of respects in which we think the exceptions introduced by the Digital Agenda Act are too broad.⁵
10. We also confirm our view that there was a "right of first digitisation" prior to the Digital Agenda Amendments". The LACA Committee's recommendation, which appears to have been misunderstood by the Government, was that exceptions to infringement should not allow first digitisation of non-digital material. We seek confirmation that this issue will be examined as part of the 3 year review of the Digital Agenda Act.
11. We note that in early 2001 the Government began a review of the application of the library use provisions to corporate libraries, but that the review appears to have lapsed. We seek a statement about when and how this review will be completed.

Technological protection measures

12. We confirm our view that the Copyright Act should include sanctions against the use of circumvention devices and services, as well as against the manufacture and supply, and that there should be no "permitted purposes" for which circumvention devices or services may be manufactured or supplied.

⁵ Our concerns are set out in our submissions to the LACA Committee of October 1999, response to the LACA Committee report of February 2000, and submission to the Government in connection with the revised Digital Agenda Bill of August 2000.

13. We have made submissions to the CLRC, in connection with its inquiry into copyright and contracts, about contracts dealing with activities allowed under the Copyright Act.

Issue 6: Crown ownership of copyright

14. Under the Copyright Act, the Commonwealth or State is the first owner of copyright (subject to any contrary agreement) in:
- any work, film or sound recording made by, or under, its direction or control, and
 - any work first published by, or under, its direction or control.⁶
15. In most other cases, a commissioning client is not the first owner of copyright unless the author assigns the future copyright.⁷ In addition, a person can unwittingly lose his or her copyright by allowing the Crown to first publish a work.
16. There is no reference to preferential treatment of governments, in relation to either ownership or use of copyright, in the international treaties.
17. The provisions in the Copyright Act granting first ownership of copyright to the Crown appear to have originated from the Copyright Act 1911 (UK),⁸ adopted in Australia as the Copyright Act 1912.⁹ It appears that the provision was intended to be limited in scope, applying to material such as reports of Parliament and Royal Commissions, reports of government inspectors, Acts of Parliament, charts and ordnance maps.¹⁰
18. A similar provision was included in the Copyright Act 1956 (UK),¹¹ and subsequently in the Australian Copyright Act 1968 (following a recommendation – without discussion of its merits – in the Spicer Committee's 1959 report¹²

⁶ Sections 176–179.

⁷ The exceptions are portraits, engravings and photographs commissioned for a private or domestic purpose (section 35(5)), films (section 97(3)) and sound recordings (section 98(2)).

⁸ See Copyright and Designs Law: Report of the Committee to consider the Law on Copyright and Designs, HMSO, London, 1977 (the Whitford Committee report) at para 592

⁹ Section 18 provided:

Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

¹⁰ See Copinger and Skone James, *The Law of Copyright* (8th ed), 1948 at pp243–245.

¹¹ Section 39

¹² Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth, para 403.

19. In 1977, the Whitford Committee (UK) reviewed the Crown ownership provisions in the Copyright Act 1956 (UK), found no justification for them, and recommended they be repealed.¹³
20. There are provisions relating to Crown ownership in the Copyright Designs and Patents Act 1988 (UK), but they are much narrower than those in the 1956 Act: copyright vests in the Crown where the work is made by an officer or servant of the Crown in the course of his or her duties. This is similar to the provisions in the UK and Australian legislation applying to employees of non-governmental organisations.¹⁴ There is a separate provision in the UK Act vesting copyright in the House of Commons or the House of Lords in works made under their direction or control;¹⁵ the provision is intended to apply to material such as Bills, reports such as Hansard, and recordings and broadcasts of Parliamentary debates.¹⁶ The provision does not apply, however, to commissioned works.
21. The Copyright Act 1976 (US) defines a “work of the United States Government” as being “a work prepared by an officer or employee of the United States Government as part of that person’s official duties”.¹⁷ These works are in the “public domain”.¹⁸
22. There has never been a review of the Crown ownership provisions in Australia.¹⁹ Clearly, the number and nature of documents and other material being commissioned and published by government departments and agencies today are vastly different than they were in 1911, and the provisions are thus having a vastly different effect than intended when first introduced. It seems clear, for example, that commissioning of architectural plans was not contemplated when the provision was introduced in 1911, and unlikely to have been contemplated in 1968.
23. We regard the Government’s response to the IPCRC’s recommendation as unsatisfactory, as it fails to provide any justification for the provisions, or address a number of uncertainties in the provisions. These uncertainties include determining whether or not a body is part of the Commonwealth or a State for the purposes of the provision,²⁰ and what “direction or control” means.²¹

13 Para 600.

14 Section 35(6) in the Australian Copyright Act.

15 Section 165.

16 See Laddie, Prescott and Vitoria, *The Modern Law of Copyright*, Vol 1, Butterworths, London 1995 at para 22.26.

17 Section 101

18 Section 105

19 The Copyright Law Review Committee, in its 1995 report on Computer Software Protection, declined to make any recommendation in relation to the issue as it related to computer software: para 7.12–7.13

20 We note that Crown bodies in the UK are listed on the HMSO website: <http://www.hmso.gov.uk/crownbod.htm>. It also lists bodies which are not the Crown: <http://www.hmso.gov.uk/crownbod.htm#noncrown>. Such listings for Australian governments would be very useful – in our experience, there is a great deal of uncertainty about whether certain bodies are or are not the Crown. Another possibility would be listing bodies which are part of the Crown in the Regulations to the Copyright Act.

24. We support the development of best practice policy guidelines; these would still be desirable if the Crown ownership provisions were repealed, but do not solve the problem of preferential treatment.
25. We ask the Government to undertake a review of these provisions in the next 12 months.

Crown use of copyright material: section 183

26. We have similar difficulties with the provision allowing use of copyright material for the services of the Commonwealth or a State. The provision is too wide. There is great uncertainty about which bodies are the Crown, and about the scope of "services of the Commonwealth or State". In addition, as with Crown ownership, the provision is out of step with international practice.
27. The provision originated from a recommendation by a majority of the Spicer Committee in its 1959 report.²² The two minority members recommended that the government's right to use copyright materials should be confined to use for defence purposes only, supporting the view of the UK Gregory Committee, whose 1952 report preceded the Copyright Act 1956 (UK).²³ The Crown use provisions in the Copyright Act 1956 (UK) and the subsequent Copyright Designs and Patents Act 1988 (UK) are much narrower than the Australian provisions.
28. There has never been a comprehensive review of this provision, even though the extent and types of use are now vastly different than they were when the Spicer Committee last considered the issue in 1959.
29. In its 1995 report, *Computer Software Protection*, the CLRC recommended the government use provision be "restricted to those cases where a copy of the program cannot be obtained from the copyright owner...within a reasonable time at a normal commercial price".²⁴ There has been no response from the Government to this recommendation.
30. The CLRC did not consider the Crown use provision at all in its 1998 report *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners*.
31. We ask the Government to undertake a review of these provisions in the next 12 months.

²¹ The Whitford Committee said: "A provision such as this is bound to lead to difficulty. What do the words 'direction or control' mean?". [para 593]

²² See para 404

²³ The Gregory Report recommended that the government should be empowered to reproduce copyright material in connection with the equipment of the armed forces and possibly also for civil defence and essential communications, subject to compensation [paras 73 to 75]

²⁴ Paras 10.119 and 10.122. There has not been a response from Government this recommendation.

Issue 7: Broadcast fee price capping

32. We confirm our view that the price caps on fees payable for broadcasting sound recordings should be removed. We regard the Government's response to the IPCRC's recommendation as inadequate. The only fair statutory licence, by definition, is one which ensures payment of equitable remuneration. Of course it is important that community, public and regional broadcasting services continue, but it is not the role of copyright to effectively subsidise these services.

Issue 9: Collecting societies

Grounds for Ministerial revocation

33. We support the Government's response to concerns about disclosure of information relating to input and output arrangements of copyright collecting societies: that is, the development of a code of conduct dealing with these and other issues.

Extended jurisdiction of Copyright Tribunal

34. We support the extension of the Copyright Tribunal's jurisdiction to cover other collectively managed licence schemes, as set out in our submissions to the CLRC in connection with its inquiry into the Copyright Tribunal. We note that the Government has not yet responded to the CLRC's recommendations, and that it would have been desirable for the Government to respond to the CLRC's recommendations at the same time as responding to the IPCRC's recommendations.
35. We support the use of ADR to resolve disputes, and note that ADR mechanisms are addressed in the code of conduct being developed for collecting societies.
36. We submit that it is inappropriate for the ACCC to issue guidelines about what it considers relevant to the determination of equitable remuneration and other licence conditions, as these are matters to be determined by the Copyright Tribunal having regard to any matters set out in the Copyright Act and Regulations.
37. We note that the ACCC may apply to the Copyright Tribunal to become a party to proceedings, pursuant to section 157(5) of the Copyright Act, and may be made a party if the Tribunal is satisfied that the ACCC has a substantial interest in the matter in dispute. The ACCC thus already has an opportunity to put its views to the Tribunal.

Authorisation from ACCC

38. As noted below, we oppose amendment to section 51(3) of the Trade Practices Act, except to extend it to the Plant Breeders' Rights Act.
39. We submit that a compulsory requirement to apply to the ACCC for authorisation in relation to every licence scheme will impose an unjustifiable financial burden on collecting societies. Whether or not to apply for authorisation should be a matter for each collecting society to assess in relation to each of its licence schemes, having regard to its market power in relation to each scheme.

Issue 10: CLRC report on simplification Part 1

40. Our views in relation to Part 1 of the CLRC's report on Simplification of the Copyright Act are set out in our submission to Government of March 1999 responding to the CLRC's recommendations.
41. We seek confirmation from the Government that, as indicated by its response to the IPCRC's recommendations regarding the CLRC's report, it has rejected the CLRC's central recommendation that an "open-ended" fair dealing be introduced. We also seek a statement from the Government about when it will respond to the other recommendations in the CLRC's report.

Issue 10: CLRC report on simplification Part 2

42. The following sets out our position in relation to recommendations in the CLRC's report *Simplification of the Copyright Act 1968, Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues*.

Distribution right

43. We support Australia's accession to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and thus we support compliance with the requirements regarding a distribution right in those treaties. We note that there are already provisions dealing with distribution in the Copyright Act: the right to first publish²⁵ and the provisions dealing with distribution of pirate copies and unauthorised imports.²⁶ We support retention of the right of control over parallel importation and the distribution of unauthorised parallel imports, and thus do not support the Committee's recommendation that, if a distribution

²⁵ Section 31

²⁶ Section 38 and 103

right is to be introduced, it be exhausted after first sale of a copyright article anywhere in the world.

Resale royalty (droit de suite)

44. We support the introduction of a resale royalty right in Australia. We note the recently adopted EU Directive requiring EU member states to have a resale royalty right in their domestic legislation, and that the issue is currently under review by the Contemporary Visual Arts and Crafts Inquiry.²⁷
45. In 1988, we completed a study – commissioned by the Australia Council and the Commonwealth Department of the Arts – of the feasibility of introducing a resale royalty right in Australia. The conclusion from the study was the proposal was generally supported in principle, but there were concerns about the administration of the scheme in the absence of an existing collective management body. Now that a visual artists collecting society (VISCOPY) has been established, most of the concerns relating to administration of the right can be addressed.

Categorisation of subject matter

46. We think that more targeted amendments to the Copyright Act may provide more certainty than the majority's proposal. We refer to our submissions to the CLRC of May 1998 and September 1995, in which we referred to examples of open-ended protection of copyright subject matter which include a non-exhaustive list of protectible subject matter. We think the main areas of concern in relation to the current provisions are the protection of compilations (in particular, whether compilations of non-text material are adequately protected) and protection of artistic works (whether, for example, computer-generated images are adequately protected).

Determining whether a work "has been published"

47. Section 29 determines whether a work has been published for the purposes of determining:
 - whether copyright subsists;
 - how long the copyright lasts;
 - whether certain of the library use provisions apply; and
 - whether the Commonwealth or a State owns copyright by virtue of first publication.
48. The CLRC thought it was unclear whether a work made available online is published for these purposes.

²⁷ <http://www.cvacinquiry.dcita.gov.au>

49. We support the clarification of section 29 in relation to its determination of subsistence and duration of copyright. We would not support its extension in relation to the library use provisions, or in relation to Crown ownership.

Jurisdiction of the Copyright Tribunal

50. We note that the Copyright Tribunal has been the express subject of a later CLRC inquiry, but that the Government has not yet responded to the Committee's December 2000 final report. We support the extension of the Tribunal's jurisdiction, as set out in our submissions to the CLRC in connection with that inquiry.

Untraceable copyright owners

51. This issue was considered by the CLRC in its later inquiry into the Copyright Tribunal. As set out in our submissions to the CLRC in connection with that inquiry, we support a mechanism for granting licences where a copyright owner is genuinely untraceable.

"Ephemeral" copying by broadcasters

52. We oppose the Committee's recommendation and support the repeal of sections 47, 70 and 107.

Legal deposit

53. We oppose any extension of the legal deposit provision in the Copyright Act, for the reasons set out in our submission to the Committee of June 1997.

Published edition copyright

54. We note the amendments made by the Digital Agenda Act to section 88 of the Copyright Act, regarding the nature of copyright in published editions.

Proof of subsistence and ownership of copyright

55. We note, and support, the later recommendation by the House of Representatives Legal and Constitutional Affairs Committee, in its December

2000 report on enforcement of copyright, for a general presumption along the lines of section 26A.²⁸

Issue 26: Section 51(3) TPA

56. We do not support the Government's proposal in relation to sections 45, 45A, 47 and 4D of the Trade Practices Act, for the reasons set out in our submissions to the National Competition Council in connection with its review of section 51(3) of the Practices Act, and our submissions to the IPCRC. In particular, section 51(3) has not been demonstrated to have had any undesirable consequences in practice, but the Government's proposal will mean additional compliance costs for copyright owners (even with the proposed ACCC guidelines).

Summary of responses sought from Government

Parallel importation

- will the Government seek pricing data from an independent source rather than from the ACCC?
- when will the Government respond to the recommendations in the LACA Committee's report *Cracking down on copycats: enforcement of copyright in Australia*?

Digital Agenda Act

- will the review of the Digital Agenda Act include the LACA Committee's recommendation that exceptions to infringement should not allow first digitisation of non-digitised material?
- when and how will the Government's review of the application of the library use provisions be completed?

Crown ownership and use

- will the Government review the Crown ownership provisions, and, if so how and when?
- will the Government review the Crown use provision, and, if so, how and when?

²⁸ Recommendation 14, para 5.18.

CLRC report on simplification of the Copyright Act
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- has the Government rejected the CLRC's recommendation for an "open-ended" fair dealing exception?
 - when will the Government respond to other recommendations in Part 1 of the Committee's report?
 - when will the Government respond to the recommendations in Part 2 of the Committee's report?
57. We would be happy to provide further information in relation to any of the issues we have raised.

Libby Baulch
Executive Officer
November 2001