



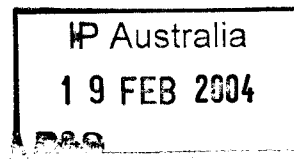
Australian Government
Attorney-General's Department

**Information and
Security Law Division**

04/1569

16 February 2004

Mr Lenn Bayliss
Chair
ACIP Crown use Working Group
The Advisory Council on Intellectual Property
PO Box 200
WODEN ACT 2606



Dear Mr Bayliss

ACIP Review of Crown Use Provisions in Patents and Designs Legislation

Thank you for your letter to the Secretary of this Department dated 1 December 2003 inviting input to the review you are conducting on Crown use provisions for patents and designs.

As you note in your discussion paper, the *Copyright Act 1968* also contains provisions regulating both the ownership and use of copyright material by the Crown. The Attorney-General's Department is also currently exploring issues relating to both use and ownership of Crown copyright.

The attached document briefly sets out some of the issues we have encountered. We hope these comments are of use in informing your review process.

The action officer for this matter is Kirsti Haipola who can be contacted on 02 6250 5418.

Yours sincerely

Helen Daniels
Assistant Secretary
Copyright Law Branch

Telephone: 02 62506313
Facsimile: 02 62505929
E-mail: helen.daniels@ag.gov.au

ADVISORY COUNCIL ON INTELLECTUAL PROPERTY – REVIEW OF CROWN USE PROVISIONS IN PATENTS AND DESIGNS LEGISLATION ATTORNEY-GENERAL'S DEPARTMENT COMMENTS

Statutory requirements for Crown use

Section 2.5 of the discussion paper outlines the Crown use provisions under the *Copyright Act 1968*. As the paper notes, these provisions allow a statutory licence for Government use of works and other subject matter, when such use is for the services of the Government. The statutory licence is subject to the Crown notifying the owner of copyright and paying equitable remuneration. The provisions apply to the Crown in the right of the Commonwealth and each of the States and Territories.

Our general policy in relation to Commonwealth use is that the Commonwealth should not use material in a way that would otherwise infringe copyright, unless the copyright owner has been notified and equitable remuneration is paid, or terms are otherwise settled. Due to the difficulty in finding and negotiating with individual copyright owners of many types of works, the Commonwealth has entered into arrangements with the major copyright collecting societies who collect and distribute money to relevant copyright owners. For example, the Commonwealth (through this Department) has agreements in place with:

- CAL – for copying of print works
- APRA – for public performance of musical works; and
- Screenrights – for copying of televised programs.

For works such as computer software or databases (where no collective administration exists), the Commonwealth should deal with the copyright owner in the usual commercial way.

Due to the nature of patents and designs, and the necessity for registration, we understand that the problems of identification of the holder of the right would not be as difficult. We also assume that the volume of use of patents and designs by Crown entities would be much less than Crown use of copyright materials. Although we note the comments in section 2.5 relating to the relative difficulty in seeking court determination of equitable remuneration, we would support retaining the existing requirements to notify and pay equitable remuneration to holders of rights in patents and designs.

Definition of the Crown

The provisions relating to Crown copyright in the Copyright Act refer to 'the government'. The phrase 'the Crown' is only used in the headings to the provisions. Section 182B of the Copyright Act defines 'government' as the Commonwealth or a State. This is much narrower than the definition in the *Patents Act 1990* which refers to 'an authority of the Commonwealth or a State'. The Attorney-General's Department is aware of the complexities involved in trying to determine which agencies or statutory bodies are part of the Commonwealth. It is often necessary to rely on the common law principles in this area.

The Copyright Law Review Committee (CLRC) is currently examining the law relating to government ownership of copyright material. The CLRC has recently released an issues paper (a

copy of which was forwarded to ACIP) which, among other things, has raised the issue of the definition of 'the Crown'. We draw your attention to the discussion at pages 14 to 16 and issue 6 at page 19 which invites comment on what entities should be included as part of 'the Commonwealth or a State' for the purposes of the Copyright Act.

It is conceivable that the appropriate scope of 'the Crown' for the purpose of Crown use of patents and industrial designs could differ from the appropriate scope of 'the Crown' for the purpose of Crown use of copyright under the Copyright Act.

Circumstances enabling Crown use

The Crown use provisions of the Copyright Act apply only where an act is done for the services of the Commonwealth or a State. Although this term does not have a highly certain meaning, our policy has been that it would be inappropriate to extend the Crown use provisions to acts which are not done for the services of the Commonwealth or a State. We note however, that resale of copyright materials has not emerged as an issue in the way that resale of patent protected material has.