



Submission to ALRC Discussion Paper – Copyright and the Digital Economy

Spatial Industries Business Association

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Introduction

The Spatial Industries Business Association (SIBA) has represented surveyors in private practice in Australia (including under previous names starting with Association of Consulting Surveyors) for 40 years.

In the last 20 years, technology has broadened the scope of the spatial or location information related industries to include aerial photography, remote sensing, Global Positioning Systems (GPS), Geographic Information Systems (GIS), and a range of application and support activities for those technologies.

SIBA is now the peak industry organisation representing private sector firms in all the spatial industries.

SIBA works closely with the three other sectors involved in the spatial industries (government, professions and academia) to ensure that the industry develops in a way that is beneficial to the industry practitioners, their clients and constituents, and the community generally.

SIBA has private practice members throughout Australia and New Zealand and those members range from micro-businesses to multi-national corporations such as Microsoft, Fugro Spatial Solutions and Sinclair Knight Merz.

SIBA has had an interest in copyright issues since the early 1990s and has assisted members in their correct application of copyright legislation and concepts — including the compilation of a comprehensive manual for the industry.

SIBA has previously lodged a submission to the ALRC at the initiation of its review of the Copyright Act and, in particular, has supported the retention of s.183 of the Copyright Act 1968. SIBA has also met with the ALRC, early in 2013 and reinforced that position.

Discussion Paper

SIBA notes the recommendations in the ALRC Discussion Paper.

SIBA strongly opposes any open-ended free exception that would allow government agencies to make free use of copyright material for “public administration” purposes or the use of voluntary licences for use on a commercial basis that conflicts with the market. Further, it would appear that rights holders and creators are proposed to be completely disenfranchised by having to offer voluntary licences that suit government or suffer free exceptions for commercial use as well.

SIBA also strongly opposes the extension of such free exceptions to local government.

SIBA strongly supports the current regime in s.183 of the Act.

Survey Plans in the Digital Economy

Digital technology has meant that survey plans are more easily distributed to purchasers and the returns to those able to sell this data are enhanced.

In addition, the information shown is even more valuable as a result of digital technologies. The data can now be manipulated for special purposes, including compilation into Digital Cadastral Data Bases (DCDB) which can be value added to produce new products of greater value.

SIBA is of the view that basic recognition and respect of surveyors as content creators should not be removed from the Copyright Act through removal of the right to royalties for commercial use of their copyright.

Surveyor's Copyright

The Association has been active in promoting surveyor's copyright since the early 1990s. That support has led to numerous legal proceedings culminating in a hearing in the High Court in 2008.

The High Court determined that surveyors did own the copyright in their survey plans and that governments were bound, under s.183, to pay compensation for commercial uses.

Surveyors regard their role as a vital one in the creation and protection of the land titling system in Australia and they respect the Torrens Title in each jurisdiction. Accordingly, surveyors have not sought to receive remuneration for internal use by government for registration purposes. However, they do expect respect for their content when government commercialises their works.

The Association and its members have accepted that some government uses of their works should not attract payment — e.g. copies made for registration purposes — and have agreed to this in matters before the courts and the Copyright Tribunal. This has been done within the ambit of the statutory licence regimes.

However, the Association believes that other uses should be fairly compensated.

Para 14.48 of the Discussion Paper contemplates that the owner of the copyright in material open for public inspection has been remunerated by the client.

SIBA is of the view that the surveyor who prepared survey plans is not able to predict at the time of creation, what commercial use will be made of his/her plans and derived products, so there is no opportunity to set a fee scale for preparation that is commensurate with the use of the plans.

In any event, such a procedure would mean that the initial client has to subsidise the subsequent commercial users of the information. The only equitable method of

remuneration for surveyors is a fair fee for the work carried out in the first instance and a royalty for subsequent commercial use.

SIBA respectfully suggests that the High Court's explanation¹ of why it rejected the Full Court finding of an implied licence provides a more comprehensive analysis of the relevant factors than Para 14.48.

Legal Proceedings

SIBA has supported the various actions in the Copyright Tribunal, the Full Court and the High Court by Copyright Agency culminating in the Tribunal determining a rate for fair payment when plans are sold for profit. SIBA understands that this case will set a precedent for other jurisdictions.

SIBA believes that the findings in relation to ownership of copyright in deposited or registered survey plans, and the findings that governments do not have an implied licence beyond the basic requirements of registration, have brought basic recognition and respect to the role of the surveyor as a content creator.

SIBA could not support a change which then removes the right to remuneration when further commercial use is made of those plans by governments and others.

SIBA is concerned about the effect that the proposals listed in the Discussion Paper will have on the determinations in the courts over the last 10 years.

SIBA is concerned that governments will see any legislative change as an opportunity to resile from any findings and determinations of the Courts on surveyor's copyright.

SIBA notes that in the most recent case before the Copyright Tribunal, the State of NSW has continually argued that the for-profit sales of survey plans made by third party providers (brokers authorised by the government and not by the copyright owner) were for public administration purposes.

This is clearly not the case since the majority of these plans would have been sold to the general public, property owners, builders and to real estate agents and lawyers promoting or conveying sales of property. There is no way such uses could, in any ordinary use of the term, be described as "public administration".

SIBA is cognisant of the view that any use that requires payment of a fee would, of necessity, not be described as public administration and that a fee payable would assist in the definition of what use is a "free exception". However, the precedent provided by the strenuous argument by the State of NSW in the Tribunal would suggest otherwise.

¹ Copyright Agency Limited v State of New South Wales [2008] HCA – paras 84-93

SIBA would hate to see public and member funds and resources spent arguing about that definition for every contested government use.

In any event, SIBA is of the view that the need to remunerate a creator for subsequent and unforeseen commercial uses of copyright material is independent of whether a fee is charged for that material by a government agency which acquired that material at no cost under a statutory obligation.

We understand from recent media announcements that the NSW government proposes to privatise the Land and Property Information agency (LPI) and "...find new apps and new ways to sell bits of the information that are commercial". This is clear acknowledgement that the information deposited in the LPI, or compilations derived from it, are being commercialised as well as used for the governance activities that the government is required to perform.

Clearly, it is entirely possible that these "bits of the information" will include survey plans and other items deposited by SIBA members, and SIBA would regard it as entirely inequitable if the content authors were not remunerated for this additional and unforeseen commercialisation of their work.

Government Operations

SIBA notes that repeal of the statutory licence was not, as far as we can determine, sought by any jurisdiction of government, nor by any copyright owners or rights holders or their representatives. Quite the opposite is the case.

Under the proposed amendments, governments will self-determine whether their copying is under a free exception. The rights holder may not even be aware of the copying and therefore will not have an opportunity to contest that determination.

Given the history of government resistance to even the recognition of surveyor's copyright in the plans, SIBA is very sceptical about the likelihood of any government ever determining that a use of a plan is not a "free exception".

Under the current statutory licencing system, creators and rights holders can access information about government copying and commercial uses of materials through the activities of declared collection societies. Under the proposed amendments, creators and rights holders will only ever be able to access information about internal government use via subpoena in an infringement action.

This would not be consistent with policies of transparency of government operations that all jurisdictions aspire to.

In addition, the vast majority of creators and rights holders would be individuals or small business and the necessity to take legal or other action to discover government uses of their copyright and then take action if the use is not considered "public administration" would be an unreasonable burden on them – even with the

assistance of associations like SIBA and other representatives such as Copyright Agency Limited.

SIBA is of the view that statutory licences for government copying under s183 provides a certainty and predictability that benefits both governments and rights holders. Replacement of the statutory licencing regime with an open ended free exception will bring uncertainty to all copies made by government. Any copying relying on the proposed free exception will be open to being contested by the rights holder.

SIBA would suggest that surveyors, following the extended and protracted path through the Courts to obtain recognition of their intellectual property, will likely instruct their representatives to take such action.

Other works

Removal of s.183 directly attacks the rights of surveyors won over the past 12 years or so in relation to survey plans, but it would apply to a wide range of documentation that is deposited or registered under statutory obligations.

SIBA members — surveyors and others — are required to deposit a wide range of documents, for example, as constructed plans, environmental plans, design plans, disclosure plans, etc.

At no time are members able to control or predict the commercial uses of those plans beyond the initial requirements of the agency requiring the deposit. Creating an exception beyond the original purpose of the material would apply to all those documents and perhaps many others in other sections of the economy.

Conclusion

SIBA is strongly of the view that the current regime within s.183 of the Copyright Act 1968 is equitable and even more relevant in the digital economy where the potential commercial uses made of deposited material have increased dramatically and the ease of distribution has done likewise.

SIBA is of the view that s.183 provides security for both government and rights holders with respect to copying of items by government, will limit legal actions and their associated costs for all parties, and provides a transparency of operations that is necessary for governments.

SIBA is of the view that copyright rights holders should not be burdened with the need to discover and, if necessary, contest the right of government to a free exception.

Please contact me if there are any questions about this submission.

About SIBA

The Spatial Industries Business Association (SIBA) is the **peak industry body** representing **private companies** that provide **spatial or location based services and products** to mining, land development, natural resource management, infrastructure and construction, emergency services, transport and **most other areas of daily activity** in modern society.

These **services and products include** surveying, mapping, satellite imagery supply and analysis, geographic information systems, software and systems development, asset management, design, project management, and many peripheral and support activities.

Members **provide** these services and products to **individuals, businesses** and **governments** at all levels.

SIBA represents **companies** ranging from **large** multinationals to **individual** private operators.

SIBA helps its members to drive **business success** through **collaboration, education, support and advocacy**.