



Ms Sabina Wynn  
Executive Director  
Australian Law Reform Commission

By email: [copyright@alrc.gov.au](mailto:copyright@alrc.gov.au)

Dear Ms Wynn

## Copyright and the Digital Economy Discussion Paper

Thank you for the opportunity to make a submission in response to the Australian Law Reform Commission's (ALRC) discussion paper *Copyright and the Digital Economy* (DP 79). My comments follow my submission in November 2012 on behalf of the Office of the Australian Commissioner (OAIC),<sup>1</sup> in response to the ALRC's issues paper on this topic (IP 42).<sup>2</sup>

### Office of the Australian Information Commissioner

The OAIC was established by the *Australian Information Commissioner Act 2010* (Cth) and commenced operation on 1 November 2010. The OAIC is an independent statutory agency headed by the Australian Information Commissioner. The Information Commissioner is supported by two other statutory officers: the Freedom of Information Commissioner and the Privacy Commissioner.

The OAIC brings together the functions of information policy and independent oversight of privacy protection and freedom of information (FOI) in one agency, to advance the development of consistent workable information policy across all Australian government agencies.

### Previous submission to the inquiry

As discussed in the OAIC's previous submission, and recognised in DP 79, the Commonwealth *Freedom of Information Act 1982* (FOI Act) requires Australian Government agencies to publish online specific categories of information and, subject to some exceptions, information released to an FOI applicant (or details of how such information may be accessed). These two requirements are, respectively, the information publication scheme (IPS) established under Part II of the FOI Act, and the FOI 'disclosure log', established under s 11C of the Act.

---

<sup>1</sup> Available at [www.oaic.gov.au/news-and-events/submissions/foi-submissions/copyright-and-the-digital-economy-issues-paper](http://www.oaic.gov.au/news-and-events/submissions/foi-submissions/copyright-and-the-digital-economy-issues-paper).

<sup>2</sup> Available at [www.alrc.gov.au/publications/copyright-ip42](http://www.alrc.gov.au/publications/copyright-ip42).

My earlier submission identified two specific issues of concern arising in relation to the interaction between these publication requirements and copyright law:

- The unintended acquisition of copyright where the Commonwealth becomes the first publisher of a work in the course of complying with IPS or disclosure log requirements (the 'first publication' rule under s 177 of the *Copyright Act 1968* (Cth)).
- The effect that Commonwealth publication on a website of previously published third party material may have on the copyright owner's revenue or market. Documents available under the FOI Act are not confined to those created by the Government. Material in which a third party owns copyright may be available under FOI. (However, the definition of a 'document' in s 4(1) does not extend to material maintained for reference purposes that is otherwise publicly available.)

I also noted in my earlier submission that ss 90 and 91 of the FOI Act provide protection against civil liability for ministers, the Commonwealth and agency staff who give access to documents as required by the FOI Act, or in the bona fide belief that access was required to be given. This protection applies to the publication of information under the IPS or disclosure log provisions (s 90(1)(a)). The protection expressly extends to infringement of copyright (s 90(1)).

This submission reiterates some of the above issues and raises other matters about the operation of the FOI Act in the context of the ALRC's proposals in DP 79.

### **Proposed fair use exception and interaction with the FOI Act**

DP 79 proposes repealing the statutory licensing scheme for government use of copyright material in Part VII Division II of the Copyright Act and instead introducing a 'fair use exception' (the **proposed exception**). The proposed exception would include a non-exhaustive list of factors to be considered in determining whether a use is a fair use, and a non-exhaustive list of illustrative uses or purposes, including 'public administration', that may qualify as fair uses.<sup>3</sup> DP 79 also proposes that, if the proposed exception is not implemented, a public administration exception should instead be enacted.<sup>4</sup>

The OAIC does not have a view on whether the proposed exception or a public administration exception would be the more appropriate approach. However, the OAIC welcomes the references in DP 79 to the use of copyright material for the purposes of open government or FOI legislation (including both the FOI Act and equivalent State and Territory legislation) as examples of a fair use for the purpose of public administration.<sup>5</sup>

---

<sup>3</sup> DP 79, proposals 4-1-4-4.

<sup>4</sup> DP 79, proposal 14-2.

<sup>5</sup> DP 79, paragraphs 11.43, 14.29-14.41.



## Commonwealth acquisition of copyright in third party material

Chapter 14 of DP 79 provides an example of some of the potential uncertainties about who owns copyright in cases where the Commonwealth publishes material for the first time in response to an FOI request. DP 79 points out that:

... the Office of the Australian Information Commissioner's freedom of information disclosure log includes a document where the copyright is not owned by the Australian Government.<sup>6</sup>

That reference is to an email from the Canadian Information Commissioner to the OAIC that had not been published elsewhere before being published on the OAIC's disclosure log in August 2012.<sup>7</sup>

The OAIC's view is that it is unclear whether, as a result of the operation of s 177 of the Copyright Act, the Commonwealth acquired copyright in the email by publishing it first on the OAIC disclosure log. As noted in the 2005 Copyright Law Review Committee *Crown Copyright* report, it is unclear whether s 177 should be read in conjunction with s 29(6) of the Copyright Act.<sup>8</sup> This would have the effect of limiting Commonwealth acquisition of copyright under s 177 to cases where the author of the unpublished work had authorized publication.

The OAIC suggests that, in finalising its recommendations about the proposed exception to Government, the ALRC should address the operation of s 177 of the Copyright Act in order to deal with uncertainty about whether copyright is vested in the Commonwealth for material first published in response to obligations under the FOI Act. One option, highlighted in our earlier submission, would be to amend the FOI Act or the Copyright Act to exclude material published under the FOI Act from the operation of s 177 of the Copyright Act.

### ***Other implications of the proposed exception***

DP 72 says that the proposed exception should address the OAIC's concerns about damaging the market of copyright owners through publication in line with FOI obligations.<sup>9</sup> But the discussion paper also says that:

It would still be necessary for FOI laws to provide that governments must not release material where that would infringe copyright. The question of infringement would be answered by reference to the fairness factors—the purpose and character of the use, the nature of the material used, the amount and substantiality of the part dealt with, and the effect of the use upon the market for the material.<sup>10</sup>

---

<sup>6</sup> DP 79, paragraph 14.29.

<sup>7</sup> Available at <http://www.oaic.gov.au/about-us/foi-disclosure-log/>.

<sup>8</sup> Copyright Law Review Committee (2005), *Crown Copyright*, paragraphs 5.49–5.57, available at <http://pandora.nla.gov.au/pan/52120/20050920-0000/www.clrc.gov.au/6+APRIL+full+version+crown+copyright.pdf>.

<sup>9</sup> DP 79, paragraph 14.41.

<sup>10</sup> DP 79, paragraph 14.40.

This arrangement would differ significantly from current legislative arrangements under the FOI Act and the Copyright Act. At present, agencies are required to give access to documents in response to an FOI request unless the documents are exempt or conditionally exempt under the FOI Act (and, if conditionally exempt, unless disclosure would be contrary to the public interest). There is currently no provision in the FOI Act requiring specific consideration of the copyright status of documents released under the Act.<sup>11</sup>

In practice, however, it may be possible for agencies to consider third party copyright issues either directly or indirectly through other provisions of the FOI Act. For example, when deciding whether disclosure of a conditionally exempt document to an FOI applicant would be contrary to the public interest, it would be open to a decision maker to treat a potential breach of copyright as a factor against disclosure. It is also possible that, in some cases, documents containing copyright material could fall under the exemption in s 47 for documents containing trade secrets or commercially valuable information.

However, these provisions would not prevent disclosure of documents in all cases where disclosure would infringe copyright. And the FOI Act provides agencies and ministers the discretion to release exempt and conditionally exempt documents, as long as disclosure is not prohibited by other legislation (s 3A(2)). I note, also, that giving access to a document under the FOI Act does not constitute authorisation or approval for the person receiving access to use the document in a way that would infringe copyright (s 91(2)).

The objects of the FOI Act are set out in s 3. One of the Act's objects is to give the Australian community access to information held by government (s 3(1)). Parliament intends, by the objects of the Act, to promote Australia's representative democracy (s 3(2)), and to increase recognition that information held by government is to be managed for public purposes, and is a national resource (s 3(3)). The OAIC believes that, given the principles underlying the FOI Act, and given that third party copyright issues can be appropriately considered within the existing legislative framework, it is important that FOI laws continue not to prevent governments from releasing material where that would infringe copyright.

### ***Interaction between the proposed exception, the IPS and the disclosure log***

The proposed exception may resolve some of the difficulties involved with publishing third party material through the IPS. Section 8C(2) of the FOI Act allows that agencies do not have to publish information falling under the mandatory IPS requirements if publication is prohibited or restricted by other legislation. A decision that publication of third party material would not be a fair use under the Copyright Act could satisfy this requirement.

However, the FOI Act does not contain an equivalent provision for the disclosure log. The obligation is to publish information in documents released to an FOI applicant unless the information is personal information, information about a business, or information of a kind

---

<sup>11</sup> However, agencies and ministers are not required to give access to a document in a form requested by the applicant where giving access would infringe copyright but for the FOI Act, unless the document relates to the affairs of an agency or Department of State or if the copyright holder is the Commonwealth, an agency, Norfolk Island or a state (s 20(3)(c)). Where this provision applies, agencies and ministers may refuse access to the document and give access in another form.



determined by the Information Commissioner, and publication would be 'unreasonable' (s 11C(1)).

The decision to publish information on the disclosure log is separate to the decision to grant an FOI applicant access to a document containing that information. Although it is open to agencies and ministers to decide that disclosure log publication would be unreasonable due to copyright concerns about making information provided to an FOI applicant publicly available, this is not explicitly provided for in the FOI Act.

Consequently, and given the protection against civil liability for agencies and ministers in s 90(1), it is unclear whether the ALRC's proposed exception would operate as intended in terms of disclosure log publication without amendment to the operation of the FOI Act. Alternatively, as mentioned in our previous submission, this problem could be addressed by the Australian Information Commissioner issuing a determination under s 11C(2) of the FOI Act explicitly exempting, from the disclosure log requirements, material whose publication would have an unreasonable impact on copyright owners.<sup>12</sup>

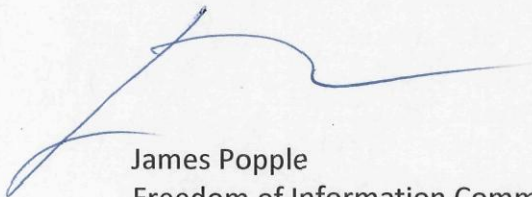
## Conclusion

Third party copyright issues can be appropriately considered within the existing legislative framework for dealing with requests for access under the FOI Act. It is important that FOI laws continue not to prevent governments from releasing material where that would infringe copyright.

The proposed exception may resolve some of the difficulties involved with publishing third party material through the IPS. The proposed exception will probably not resolve difficulties relating to third party material published on the disclosure log, but those difficulties could be resolved through legislative amendment or by a determination made by the Information Commissioner.

If we can be of further assistance in relation to this matter please contact Natasha Roberts, Acting Assistant Director—Regulation and Strategy, on (02) 6239 9138 or at [natasha.roberts@oaic.gov.au](mailto:natasha.roberts@oaic.gov.au).

Yours sincerely



James Popple  
Freedom of Information Commissioner

6 August 2013

---

<sup>12</sup> The Information Commissioner also has the power under s 8(3) to determine that it would be unreasonable to publish certain types of information through the IPS. The OAIC does not have a view at this stage about whether an IPS determination covering material that would not be a fair use under the ALRC's proposed exception would be preferable to relying on s 8C(2).