**SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION**

**COPYRIGHT AND THE DIGITAL ECONOMY DISCUSSION PAPER**

**INTRODUCTION**

1. The Department of Immigration and Citizenship (the “department”) welcomes the opportunity to provide a submission to the Australian Law Reform Commission (the “Commission”) in relation to the Commission’s ‘Copyright and the Digital Economy’ Discussion Paper (the “Discussion Paper”).
2. The department recognises that the rapid development of digital technologies is challenging to both the effective management of government copyright policy and the relevance of current Australian copyright laws. Of particular concern is the way in which the Australian Government can continue to effectively harness new technologies, especially online, while minimising the legal risk in the use of these same technologies. Being able to progress policy and operational material in accordance with copyright laws, while minimising the legal exposure for improper use, remains a policy and operational concern for the department.

**STATUTORY LICENCES**

1. The department has concerns regarding the proposed repeal of statutory licences for the Crown as this would impact on the department’s ability to deliver its fundamental responsibilities to the public in the most efficient manner.
2. The statutory licences are provided in limited circumstances and the rights offered to the Australian Government under the Act are distinct from any other institutions or persons. As noted by the Commission, the majority view of the Spicer Committee in recommending the introduction of a statutory licence for the Australian Government in 1959 was that the occasions on which the Commonwealth may need to use copyright material are varied and many, and that “*it is not possible to list* *those matters* *which might be said to be more vital to the public interest than others.*” It was the parliamentary intention to recognise the needs of a government agency to use copyright material in the absence of prior agreements, subject to equitable and reasonable remuneration, because circumstances exist where the public interests it delivers justify such an entitlement.
3. The department submits that this justification remains strong, if not even more so, in the current digital environment. The department uses a large amount of copyright material, either edited or in whole, in its promotional, educational and training material. Copyright material is also used regularly for policy guidance, ministerial briefings or law enforcement matters. As technology develops in an increasingly accelerated and varied manner it is more difficult to forecast the new and different ways the Commonwealth will need to use copyright material in the future. In this way, statutory licences are essential in facilitating the work of the department.
4. In practice, the statutory provisions and the whole of government approach to intellectual property (“IP”) management already impose restrictions to this seemingly wide copyright entitlement and oblige the Commonwealth to inform the copyright owner and seek agreement on the terms for using the copyright material. The department has its own IP Policy that is consistent with the Statement of IP Principles issued by the Attorney-General’s Department and makes every effort to respect the rights of the copyright owners. Where statutory licences are relied upon, the IP Policy provides that the department should seek prior permission to use the material where practical. The department submits that the current legislative provisions and policy guidelines achieve the balance required between providing for the fair remuneration of copyright holders and serving the interests of the ultimate user of departmental works - the public. Removing this right of the Commonwealth to enter into an agreement with the copyright owner on the terms of usage at a later time will cause considerable inefficiency and impracticality for the department in fulfilling its functions for the community, as well as significantly impact on how information can and should be accessed by and communicated to the public.
5. We note that the voluntary licence scheme for government use is proposed to be conducted in light of the availability of exceptions. The Commission proposes that government use should be considered under a general fair use exception with “public administration” as an illustrative purpose. Although ‘public administration’ is to be used in a broad sense and to encompass the activities of all three branches of government (the executive, the legislature and the judiciary), it nevertheless raises legal uncertainty that will be faced by the department under such a new structure. As the Discussion Paper states, the fact that a particular use falls into one of the categories of illustrative purposes does not necessarily mean that the use will be fair. Nor does this create a presumption that the use is fair. In addition, not all uses of copyright material for the purpose of public administration would be fair use. In the absence of more detailed statutory and judicial guidance, such proposed legislative structure has the potential to provide a more restrictive entitlement to use copyright material and increases the legal uncertainty for the Australian Government.
6. The Discussion Paper noted the difficulty in determining equitable and reasonable remuneration for statutory licences. We believe there are a number of remuneration models in the market, for example, on-demand services providers, who have taken account of the realities of the modern digital environment and developed more suitable mechanisms for measuring digital usage. Some providers offer subscription-based services that make no direct reference to the volume of material made available and allow for multiple acts of copying and communication. Rather than relying on the challenge of the current remuneration arrangements as a basis to repeal the statutory scheme, the department proposes further investigations into whether a new remuneration system can be created for an improved method of determining equitable remuneration under the existing government statutory licence scheme.
7. In the absence of an adequate alternative to address our concerns, the department’s view is that the current challenges of a statutory licences arrangement do not outweigh the certainty and practicality it offers.

**GENERAL COMMENT – INFORMATION DATABASES**

1. The department wishes to comment on unauthorised commercialisation of information databases that was not specifically raised by the Commission but nevertheless has been an area of concern for the department.
2. The department creates many works that are owned by the Australian Government and protected by copyright law. These include materials that are publically available, such as information databases, guidance on application procedures for visas and the like. The department has been facing increasing challenges in addressing the commercialisation of freely available government material for private benefit, especially with regards to information databases. In light of current judicial decisions on database infringements, it is challenging for the department to ascertain the scope of defences for such unauthorised actions. Yet the consequence of commercialisation and potential distortion of government information has an impact on the department’s operations and the integrity of its broader messaging to the Australian community (including migrant/diaspora populations), as well as Australia’s positioning within the global migration market as a tourist and skilled visa destination of preference. Given the significance of much government information, it is important that inaccurate, incomplete or unauthorised government-produced information as a result of such unauthorised actions is not easily made available to the public users.
3. In the information age where databases can be a significant source of content, the department is keen to see future discussions on potential legislative measures, such as the 1996 European Union Directive on the legal protection of databases, which created a “sui generis” database right that protects the substantial investment of time, money and effort of database producers, irrespective of whether the database is in itself innovative. Similar legislative protection could assist the department in prohibiting unauthorised extraction or re-utilisation of databases; as well as recognising the vital role databases have in the development of the digital economy.

Department of Immigration and Citizenship

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