The Government and Copyright: The Government as Proprietor, Preserver and User of Copyright Material under the *Copyright Act 1968*

John S Gilchrist

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The notion of the Crown as legitimate proprietor of copyright is a contentious one. Originally founded in a prerogative right at common law,[1] the Crown's right to own copyright subsequently received statutory recognition.[2] However, the notion that the Crown *should* own copyright has come under attack by the Ergas Committee[3] and the Copyright Law Review Committee[4] on the basis that:

(i) providing an incentive to create through copyright protection is less relevant in the government context, given that the government is bound to discharge its functions;[5]

(ii) open access to government information is an essential characteristic of modern democracy;[6] and

(iii) Crown copyright allows for preferential treatment over contracts, inconsistent with the principle of competitive neutrality.[7]

This reveals an underlying tension between the role of government and the intellectual property rights of private sector institutions. Therefore, in order for the Crown to be justified in owning copyright, the distinctiveness of government institutions from individuals and institutions in the private sector is critical to the debate. However, since 2005, the discussion over Crown copyright has focused on improving open access to public sector information.[8] As a result, legislative reform of sections 176–9 of the

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1 *Attorney-General for New South Wales v Butterworth and Company* (1938) 38 SR (NSW) 195.

2 Prior to federation, this right was recognised under s 18 of the *Copyright Act 1911* (UK), then subsequently under sections 176–9 of the *Copyright Act 1968* (Cth).

3 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000) 113.

4 Copyright Law Review Committee, *Crown Copyright* (2005) xxii.

5 Ibid 38.

6 Ibid 39.

7 Ibid 32, xix.

8 See, eg, Department of Finance and Deregulation, *Engage: Getting on with Government 2.0* (2009) [xvii]; Economic Development and Infrastructure Committee, Parliament of Victoria, *Inquiry into Improving Access to Victorian Public Sector Information and Data: Report* (June 2009) Parliamentary Paper No 198, Session 2006–2009, 19.

Copyright Act 1968 (Cth) ('*Copyright Act*') (which provide for the Crown ownership of copyright) has received scant attention.[9]

The Government and Copyright: The Government as Proprietor, Preserver and User of Copyright Material under the Copyright Act 1968 takes up this discussion by seeking to resolve the question of whether the needs of government are fundamentally different from private sector institutions that also obtain copyright protection under the law.[10] Gilchrist embarks on this endeavour through an analysis of the historical development of copyright law, its international framework, a comparison of statutory copyright regimes, and by discussing the policy considerations that Australian law should take into account.

Gilchrist argues cogently for the legitimacy of the government as proprietor of copyright material, based on the notion that government intellectual property rights are essential in order to ensure that the public interest in accessing government works can be fully realised by ensuring proper attribution and accuracy. Gilchrist's nuanced assessment of the role of government not as a monolithic entity, but as three distinct arms of government with particular needs, is particularly compelling.

Based on this analysis, Gilchrist concludes that the government cannot be equated to private institutions and that it has *distinct* roles and responsibilities that imply peculiar needs. These needs are reflected by the current arrangements in the *Copyright Act* which correlate with the government's role as proprietor, preserver, and user of copyright material.

In Part VII, Gilchrist goes further by arguing that the current arrangements are insufficient, and that reform is needed to reduce ambiguity within the *Copyright Act*.[11] As an example, section 183 of the *Copyright Act* which governs the Crown use of copyright material owned by other persons does not make it clear whether it supersedes the other special defences to copyright.[12] This ambiguity leads to uncertainty over whether the copyright owner has a right for remuneration under s 183(5) of the *Copyright Act*. Therefore, to promote certainty in the law, ambiguous provisions such as section 183 are ripe for legislative reform.[13]

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9 For example, the Productivity Commission's recent comprehensive report on Intellectual Property arrangements made no mention of Crown copyright. See Productivity Commission, *Intellectual Property Arrangements: Draft Report* (2016).

10 John S Gilchrist, *The Government and Copyright: The Government as Proprietor, Preserver and User of Copyright Material under the Copyright Act 1968* (Sydney University Press, 2015) 227.

11 Ibid 189–226.

12 For further discussion of Crown use of copyright material owned by other persons, see Part VI of the text.

13 Other recommended changes to the *Copyright Act* may be found at pages 235–6.

At times, however, the text could benefit from a more comprehensive discussion of the relevant issues. For example, the text defends the broad ambit of the statutory license in section 183 of the *Copyright Act* without considering the merits of alternatives.[14] Without a discussion of the merits of alternatives such as voluntary licensing, this approach comes across as incomplete.[15]

Notwithstanding this criticism, the text remains the most comprehensive treatment of the role of government in Australia's copyright regime. Gilchrist's text is particularly valuable to practitioners, academics and other individuals interested in the tensions inherent in the interaction between government and the copyright regime.

This understanding is particularly important since the advent of the information age. Now, more than ever, there is a greater demand on governments to disseminate public sector knowledge.[16] However, government copyright law and practice has not responded adequately to the information age, nor the desire and ability of individuals to access information quickly and effectively.[17] By revealing these underlying deficiencies, Gilchrist's book encourages the government and private citizens alike to work together to meet the challenges of the changing technological landscape.

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14 Gilchrist, above n 10, 156–7.

15 For a discussion of the merits of promoting voluntary licensing, see Australian Law Reform Commission, *Copyright and the Digital Economy (Final Report)*, Report No 122 (2013) 200–8.

16 Gilchrist, above n 10, 234.

17 Ibid.

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