

2 March 2011

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By email: copyright@ag.gov.au

Dear Helen

**SUBMISSION ON DRAFT GUIDELINES ON LICENSING PUBLIC SECTOR INFORMATION
FOR AUSTRALIAN GOVERNMENT AGENCIES**

The National Film and Sound Archive (NFSA), a statutory authority established by the *National Film and Sound Archive Act 2008*, is Australia's national audiovisual archive, responsible for collecting, preserving and providing access to the nation's moving image and recorded sound heritage (**the National Collection**). The National Collection includes a wide variety of material created by the Government to promote Government services or policy (**Government archival works**).

The NFSA has given detailed consideration to the Intellectual Property Principles for Australian Government Agencies (**Principles**) and the accompanying draft Guidelines on Licensing Public Sector Information for Australian Government Agencies (**Guidelines**) published at <http://agimo.govspace.gov.au/2011/02/01/>. We welcome the opportunity to comment on the application of the Guidelines to the good management of intellectual property (IP) following the decision to cease the operation of the Commonwealth Copyright Administration from January 2011.

SUMMARY

NFSA is concerned that, under the Guideline's definition of public sector information (PSI), many items in the National Collection (e.g. Government archival works, digitised/restored works and collection metadata on its databases) could be regarded as PSI. If so, this raises issues for the NFSA's management of those items as compliance would expose it to heightened copyright risks, jeopardise its stakeholder relationships, and undermine its revenue raising initiatives. It would also impose a considerable administrative burden on the NFSA, especially in obtaining rights holders' consents to publish legacy material under open licences like Creative Commons licences.

The NFSA does not believe that it is practical to apply the PSI licensing scheme to the various databases it uses to manage the National Collection. If the metadata in those databases are regarded as PSI, the

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NFSA cannot see how copyright licences could apply to that data since they are arguably not subject to copyright anyway.

The NFSA believes the Guidelines do not adequately protect Government insignia and trade marks in material published under Creative Commons licences. This risk could be better managed by adopting a Government-tailored licence.

Issues

The NFSA has identified several reasons why the implementation of the Guidelines is impractical for cultural institutions:

1. the open definition of Public Sector Information (PSI) and its inexact application to copyright subject matter of concern to those institutions;
2. the complication of an already complex content regulation regime, especially for the agencies responsible for licensing copyright material created or owned by third parties and any Government insignia or trade marks; and
3. the legal and business risks that would be assumed through the proposed licensing scheme, involving open licences under continual development, independent of the Government and its agencies.

Recommendations

The Guidelines could be made more practical by addressing the above issues as follows:

1. providing an exclusive definition of PSI in the copyright context to which the proposed licensing scheme relates.
2. excluding broader types of material from open licensing, such as legacy material that is already publicly accessible through other methods.
3. excluding all material held within the collection of a cultural institution (on the basis that the material is no longer PSI when it is collected).
4. giving clear authority for licensing of PSI in Crown copyright material by specifying that only an author agency (or its successor) can license it and that cultural institutions holding material made by other agencies should not be responsible for licensing that material.
5. prescribing specific licences for particular copyright material, to minimise legal risks such as unintentionally offering Crown copyright material for commercial use under a Creative Commons Non-Commercial licence.
6. simplifying and incorporating the amended Guidelines into the Principles, the proposed revised Australian Government Intellectual Property Manual (**Manual**) and/or in an Australian Commonwealth Government web portal (e.g. like the Government Information Licensing Framework at <http://www.gilf.gov.au>) to facilitate and risk manage open licensing by Australian Government Agencies; or
7. deferring the implementation of the Guidelines until a Government-tailored open licence is formulated to address the specific licensing needs of government and cultural institutions, possibly under the auspices of GILF with input by all concerned agencies.

INTELLECTUAL PROPERTY AT THE NATIONAL FILM AND SOUND ARCHIVE

Most items in the National Collection are subject to copyright. The NFSA also creates a significant amount of copyright material. As an agency subject to the *Commonwealth Authorities and Companies Act 1997* (Cth) with significant expertise around the administration of its stakeholders' and its own copyright material, the NFSA is interested in the Guidelines becoming a good practice standard for intellectual property management by agencies.

ISSUE 1: Definition of Public Sector Information (PSI)

Although PSI is the stated focus of the Guidelines, the IP of relevance is copyright by virtue of the proposed licensing scheme.

Copyright

Copyright is a bundle of rights attached to 'works' and 'subject matter other than works' which, subject to limited public interest exceptions, is exclusive to a copyright owner. **Copyright does not protect information or ideas.** Copyright protects the expression of information and ideas in material form, and limits how a 'substantial part' of this expression may be used. Copyright can be licensed on conditions set by a copyright owner. Licences include implied licences (e.g. where material is made freely accessible on a website) and Creative Commons licences,¹ which are examples of open copyright licences that facilitate the reuse of copyright subject matter in a digital context.

PSI

The Guidelines provide various definitions of PSI that are not entirely consistent and are open to interpretation:

"material with the essential purpose of providing Government information to the public"

"material with the essential purpose of artistic expression (e.g. an art work held by a public institution or a film that does not provide Government information) is unlikely to be treated [sic] PSI for the purpose of the policy"

"audio-visual material that contains Government information"

"archival material that constitutes Government information"

This vagueness about the meaning of PSI is reflected elsewhere. In its Issues Paper 1,² the Office of the Australian Information Commissioner describes databases and the National Library of Australia's Australian Newspapers Digitisation Program as examples of PSI.

The NFSA has difficulty accepting databases as PSI capable of being subject to a copyright licence when prevailing judicial authority suggests that automated compilations and any other databases lacking originality are not protected.³

The NFSA does not consider out of copyright material that has been digitised by a government agency to be PSI simply through its digitisation or funding of such a process by government. It is difficult to reconcile the newspaper example with the definitions put forward by the Guidelines, as the material used in this project was in the public domain so therefore not subject to copyright. The newspapers digitised in this project were also not "material with the essential purpose of providing Government information to the public".

Rights other than copyright also need to be considered when licensing PSI material. PSI may or may not be protected by copyright. This presents problems in the definition of the subject matter of the proposed licences; Creative Commons licences can only be used to licence copyright.

¹ Page 4 of the Guidelines inaccurately refers to Creative Commons licences as "ready-made" contracts.

² *Towards and Australian Government Information Policy*, November 2010, Chapter 6

³ *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 (15 December 2010)

PSI may also contain content that is regulated by other regimes which are not specifically mentioned in the Guidelines, including privacy law and Indigenous cultural and intellectual property rights. Moral rights considerations are also important in examining making legacy material available under Creative Commons licensing.

ISSUE 2: Increased Complexity of Copyright Administration for Agencies

The NFSA believes that the proposed Creative Commons licensing regime will complicate licensing arrangements for agencies, especially in relation to authorising the use of third party material and Government insignia/trade marks. It is also concerned about the financial impact of Creative Commons licensing, which can void a licensor's right to claim statutory and other commercially negotiated royalties.

The Guidelines seem to require agencies to identify and clear rights in *all* third party material, including material used under copyright exceptions or statutory licences. As underlying rights apply to many potential PSI items in the National Collection, this would be impossible for the NFSA. The cost of formally obtaining perpetual, irrevocable, worldwide licences from third party rights holders to licence legacy and future material would be unaffordable.

The NFSA does not believe the Guidelines provide adequate guidance for agencies in protecting Government insignia and trade marks. The licensing arrangements for the Guidelines themselves demonstrates the complexity this issue. The AGIMO website purports to license, with the exception of the Commonwealth Coat of Arms and where otherwise noted, all content for use under the Creative Commons 3.0 Attribution (Australia) licence: <http://agimo.govspace.gov.au/copyright/>. However, the Guidelines, on the AGIMO website do not themselves contain any mention that they are licensed under Creative Commons. The NFSA does not see any benefit to introducing such complicated and confusing licensing arrangements to already free public access to the information in a document such as the Guidelines.

Given the nature of Creative Commons licensing, it may be difficult to convince third party rights holders to make their work available under the conditions of one of these licences. For example, if a campaign used a well-known song to promote a government product, the non-government rights holder would be unlikely to want to release this title under Creative Commons as it would represent a substantial loss of commercial revenue. There may also be issues with government coercion if rights holders were not given any option but to sign up for Creative Commons in order to have their works used for a particular campaign.

In the absence of formal acknowledgement by the Attorney-General's Department of the financial impact of Creative Commons licensing, both in relation to copyright administration costs and the waiving of rights to claim statutory and commercial royalties, the NFSA is concerned that the proposed regime would fail to fairly balance the interests that the government, its agencies, and the public have in PSI.

The NFSA's preferred approach would be to continue with the existing regime of implied licences, which give users free public access to information in a comparatively simple and cost effective way. The NFSA sees a continuing role for the Commonwealth Copyright Administration in guiding agencies in licensing PSI.

ISSUE 3: Legal/Business Risks of Proposed Open Licensing Scheme

A Creative Commons licence would allow use of any insignia and trade marks not expressly excluded, for whatever purposes the licence allows. An express exclusion is necessary, as demonstrated by the

AGIMO website. The management of this inherent risk could be simplified, and could cater for exclusions of other high risk material, through the development of a Government-tailored Creative Commons licence. The NFSA would welcome the opportunity to work on the modification of an existing Creative Commons licence that would serve the interests of government and public stakeholders.

As Creative Commons licences are irrevocable, the need to ensure that correct rights are obtained from third party rights holders places a large burden of risk on the Government. Applying these licences as proposed may allow free and almost unrestricted private and public uses, including commercial uses, of material produced with government resources. Even the Creative Commons Non-Commercial licences give scope for commercial uses provided that they are not "intended for or directed towards commercial advantage or private monetary compensation".

If the NFSA was under a general requirement to publish collection items under open, irrevocable licences, its revenue raising ability would be undermined and it would not be able to sustain its operations.

As part of its role in providing access to the National Collection, and subject to licensing and copyright obligations, the NFSA makes collection items accessible to the public at low cost. Many collection items can be viewed for free through its websites, access centres, exhibitions and National Program events. Others are made available for free educational use through education sector partnerships. Where appropriate, and subject to rights holders giving consent, the NFSA already makes some of this material available under Creative Commons licences.

However, the NFSA also engages in commercial and revenue raising activities (e.g. operating a cinema and shop in its Canberra headquarters), as it is expected to do in performing its statutory functions. Project 6 of the Government 2.0 Taskforce acknowledged budget pressures require cultural institutions (like the NFSA) to develop pricing policies to supplement their revenue sources notwithstanding the public benefit of free access:

The absence of additional funding for digitisation, and the pressure for continuous reductions in expenditure on the traditional collection, maintenance and storage mission is, therefore, an important factor in determining the pricing policies of cultural institutions. Such institutions will typically be very reluctant to give up existing revenue sources in the absence of reliable replacement funding, even if economic analysis suggests that free provision of information is likely to yield substantial net social benefits.⁴

The NFSA's relationship with its stakeholders would also be compromised as rights holders would not be prepared to deposit or donate items to the National Collection if it was likely that the NFSA would be required to publish them in this way.

We appreciate the Attorney-General Department's consideration of the issues and recommendations outlined in this submission. If you have any questions about this submission, please contact Adam Flynn, Senior Legal Officer, by phone on 02 6248 2056 or by email at adam.flynn@nfsa.gov.au.

Yours sincerely



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⁴ John Quiggin, *Project 6: The value of Public Sector Information for cultural institutions*, <http://gov2.net.au/projects/project-6/> at page 16.

