



## ASF KNOWLEDGE MANAGEMENT

by Evalt Crabb     January 1999

### INTRODUCTION

Issues of intellectual property, copyright and financial enterprises have been subject to discussion recently in informal avenues within the Australian Speleological Federation. These discussions have lacked clarity because of confusion about the basic principles of copyright.

The intention of this paper is to define copyright in simple terms, then discuss how intellectual property can be most effectively managed. In view of the quantity of data collection and recording in our activity, there will be particular attention to copyright issues affecting cavers, caving clubs and ASF. At this time it is intended to use a narrative form - the hundreds of references can be made available on demand.

### DEFINITION

The concept of copyright is quite simple. Copyright laws protect authors and publishers by giving them certain exclusive rights. These rights create a market for the products produced by authors and publishers and allow them to make a living, or at least gain some reward, from the use of their work. Unauthorised copying deprives authors and publishers of valuable income and reduces incentive to create new works.

Copyright is a type of property (or asset) which can be bought or sold, and is only different from tangible property such as a house or car in that it is not a physical entity. Hence the term 'intellectual property'. It is different to physical property in that it can often be duplicated easily without the knowledge of the owner.

Copyright is the exclusive right by law to produce copies, often involving payment of a fee, and to control an original literary, musical or artistic work, by the creator, for a specific number of years. In Australia as in many other countries, an author's copyright exists for 50 years after the author's death. Copying can only be done with the permission of the copyright owner or their exclusive licensee or agent.

The law of copyright in Australia is set out in the *Copyright Act 1968* (as amended). A 1984 amendment to the Act included in the definition of the term 'literary work' a table, or compilation, expressed in words, figures or symbols (whether or not in a visible form) and a computer program or compilation of computer programmes. Later amendments (up to July 1998) expand detail of electronic media rights and employed journalists' rights.

### WHAT DOES COPYRIGHT PROTECT?

#### MORAL RIGHTS

*Although pre-empted, there is not yet legislation in respect of Moral Rights. In brief: where the copyright of a work can be assigned or sold to another person, moral rights are personal to the artist and recognise the link between a creator and their work irrespective of ownership of the copyright.*



*Some of the proposed points in a Moral Code are:*

- The artist should be attributed
- A work should not be falsely attributed
- An artist's decision to remain anonymous or use a pseudonym should be respected
- An artist's choice to have their name removed from a work should be respected
- Works should not be intentionally destroyed, mutilated, distorted or defaced
- Works should be maintained in good condition
- Artists should be consulted about alterations to their work
- Adaptations of a work should maintain the integrity of the original work
- An artist's work should not be trivialised.

For the purpose of this Code the term 'artists' refers to all creators, such as writers. The final details will not be known until the legislation is introduced.

## REGISTRATION

There is no system of registration of copyright in Australia. Copyright protection does not depend on publication, a copyright notice or any other procedure - the protection is free and automatic. A work or other subject matter is protected from the time it is first written or recorded in some way, provided it has resulted from the creator's skill and effort and is not merely copied from another work. However, a compilation of non-original material may qualify for protection if the compilation is sufficiently distinctive. It is the compilation that attracts the copyright. Although the copyright notice is not required for protection in Australia it is advisable to place the notice on all copies because it indicates the work is protected and identifies the owner. The notice consists of the symbol © followed by the name of the copyright owner and the year of first publication.

Example: © Evalt Crabb 1999

NB. To avoid the possibility of a claim that a copy preceded yours it is desirable for a copy to be annotated with the actual date of completion. If the original work is stored as a computer file, the time and date are automatically recorded.

## OWNERSHIP OF COPYRIGHT

The general rule is that the first owner of copyright in a work is its creator. The first owner of copyright in a film is usually its producer or investors. The first owner of copyright in a sound recording is usually its investor.

\*Generally, the author of any "literary work" will hold copyright in that work (s35(2)). "Literary work" is used in a legal sense and refers not only to works of what would normally be regarded as literature, but in fact any written compilation of information. The term is expressly defined to include tabulated data (such as a cave survey) and computer programmes (such as the electronic Karst Index).

The "author" will be whoever had intellectual input in compiling that work. In the case of a survey, it will be all the people who participated in that survey. In the case of a cave map, it will be the person who translated the survey data into a map.



For cavers, there is one relevant exception to the above. Section 35(6) provides that a literary work made under the terms of employment by another person under a contract of service, then the employer owns the copyright. However, for most volunteer speleologists, this exception is not likely to apply. The law differentiates between employment "under a contract of service" and engagement under a contract for the provision of services. In the first case, a relationship of employer/employee exists; the second case is that of an independent contractor engaged to perform services for someone. The following are some possible indicia of employment under a contract of service:

- the author is an "integral part" of the employer's business
- the employer's resources are made available to the author to carry out the author's job
- the author does not use their own capital for the job
- the employer's remuneration is not affected by the success or failure of the activity being performed
- the employer deducts tax and superannuation contributions from the employee's salary.

So, if an employee of a karst management authority surveys a cave, then the employee will not own copyright and it will subsist with the management authority; however, if the management authority asks or engages a speleologist to survey a cave, copyright rests with the speleologist (subject to the provisions discussed below).

There are other exceptions in s35 that are unlikely to be relevant to cavers - relating to work under a contract of service for a newspaper, magazine or similar periodical; and commissioned portraiture (photographic, artistic or sculptural).

*(The Copyright Amendment Bill 1997 introduced changes whereby copyright ownership is split between employed journalists and newspaper proprietors under s35(4). Employed journalists will own copyright for reproduction of the work for the purpose of inclusion in a book and photocopying, while newspaper proprietors will own copyright for all other purposes, including electronic publication. etc).*

Another exception is provided by s176. Where a literary work is made "by, or under the direction or control of, the Commonwealth or the State", copyright subsists in the Commonwealth or State, as the case may be (henceforth referred to as "the Crown").

The legal result of this is not absolutely clear. In particular, does a requirement on a permit that "copies of any survey must be provided to management" mean that the survey was done "under the direction of" the Commonwealth or State? It would appear to be the case, that if the work was compelled to be done then it belongs to the Crown; however, if work is done voluntarily and then provided to the Crown, even if pursuant to a permit condition to provide any such voluntary work, then copyright nevertheless subsists in the author. Although Crown permission may be required to enter a cave, and activities in the cave may be regulated, the Crown is not exercising "control" over the production of the survey. It would only be doing so if it required the survey to be done, and dictated, for example, the grade of the survey, the instruments to be used and so forth; and also requiring the survey to be done.

Note that trip report forms which some Crown land managers require to be filled in as a condition of entry are probably Crown copyright as they are filled in at the direction of the Crown.



Since compulsory trip reports may be Crown copyright, cavers may wish to publish a different version of the trip report to that which is supplied under a permit condition, to avoid any doubt over the ownership of the material in that report. \*

## **REWARDS FROM OWNERSHIP OF COPYRIGHT**

The owner of copyright can gain reward from their endeavours in many ways.

- **NON-CASH REWARDS**

The owner of copyright may permit general free use of the work, their only benefit being self-satisfaction, or prestige arising from correct attribution. This often occurs when the owner is attempting to influence other people or the general public.

- **SELF-PUBLISHING**

The owner may choose to self-publish and sell the published work directly or indirectly to consumers, retaining all rights for the duration of the copyright. Or they may change the licensing status at any later time.

- **BOOK PUBLISHING - ROYALTY BASIS**

The right to publish and sell the product may be assigned to a publisher, with a contract specifying conditions and limitations. This is the usual course for books, and the conditions may include sales only in a specified country, the format and construction of the book, and any time limitation.

The owner (author) can assign the right to publish a book to one person; to translate into another language to a different publisher, or allow another to produce a dramatised version.

Payment to the owner is usually on a royalty basis; for example, the author may receive 10% of the retail price of every book sold. Most contracts between publisher and author call for variations for different quantities of sales, or a variation of royalty between hard cover and paperback editions. It is usual for a publisher to pay some royalty in advance, then quarterly or six-monthly amounts depending on actual sales.

Disputes often arise because the author must depend on the sales figures provided by the publisher, and also the growing trend to remaindering a book (from which the author gets no return) if it does not achieve high sales figures within a few months of launch.

A new scenario is imminent. Hand-held reading devices are now being sold, usually with ten books stored electronically. It is possible to down load these books onto a computer to clear some space (and therefore become available for use by anyone else) and replace them with new books from the internet. Presumably a fee would be applicable. This has the potential to be a nightmare in author/publisher relationships because of a perceived threat to the authors' income potential.

- **PUBLIC LENDING RIGHT**

Another source of income for authors and publishers is the Public Lending Right scheme.

Australia is one of the few countries in the world with Public Lending Right legislation under which some authors and publishers receive from the public purse annual compensation for use of their books by Australian libraries - being able to borrow a book obviously diminishes sales.



However, it should be noted that not all authors or all publishers are funded in this way. Only those books, which are fairly widely distributed to libraries qualify. Each year the Australia Council, which administers the scheme, surveys a selected number of libraries throughout Australia. All titles of which 50 or more copies are found, to be held in libraries qualify for the Public Lending Right payment. Authors and publishers have to lodge separate claims for each title but the claim only needs to be made once - annual payments are automatic as long as a sufficient number of the title are held.

- **THE CROWN AND COPYRIGHT**

The Crown is entitled under the Copyright Act to use any copyright work so long as the work is used for the services of the Crown. The Crown does not have to obtain the consent of the copyright owner, but it is required to notify the owner of the use of the material and to pay compensation as agreed upon by the Crown and the owner, or as fixed by the Copyright Tribunal.

- **COPYRIGHT AGENCY LIMITED**

The Copyright Agency Limited was established in 1974 by the ASA, ABPA and the Australian Copyright Council to be a viable, central agency to collectively administer the copyright of authors and publishers in the volatile copying environment, representing authors and publishers.

It is the collecting society authorised by the Federal Attorney-General to administer the statutory licences as contained in the Copyright Act, and also offers/administers voluntary copying licences. It collects from government departments, educational institutions, corporations, associations, places of worship and information brokers. It is a **not-for-profit** company and distributes collected fees to its member authors and publishers. While its previous focus was print copying, it is now extending its services into electronic media.

- **ASSIGNED RIGHTS**

The owner of copyright can assign his or her rights, in whole or in part. Remuneration may be part of the agreement. This is the basis of sale of the right to publish freelance work. The work may be offered to a publisher (newspaper, magazine, etc) for first publication rights only. Variations might be:

- all rights
- first Australian rights
- one-time only rights
- English language only rights
- specific use rights, and others.

In the commercial world a written contract is used, which specifies the extent of the rights to publish and the remuneration, which is usually a "once-off" payment on publication - sometimes but not often on acceptance for publication.

Over the past few years there has been increasing conflict between authors and publishers re assigned rights due to greater use of electronic media. When a writer assigned a work it was expected that it were for print, and the fee was commensurate with circulation of the publication. But some publishers used the same work in electronic form and writers believed that they should receive additional payment.



The case of National Geographic best illustrates this conflict. Virtually all of the content - text and photos - of National Geographic is freelance work, on the basis outlined by Chris Norton "an independent contractor engaged under a contract for the provision of services... " and assignment of rights was "first world rights".

National Geographic recently compiled all past issues as a collection on 10 CD-ROMs. Writers regarded this as a new publication. The ultimate ruling was that: it was not a new use of the material but merely a different edition similar to, say, a large print version. As the reproduction was an exact facsimile including editorial and advertising material, National Geographic still held the copyright on the full layout of the magazine which included all of the assigned material. It has been stated that if the reproduction had been modified to display only some or all of the assigned material (without advertising, editorial content, an index, etc then there may have been a breach of assigned rights... Or the original contracts may have permitted an anthology...

The point here is that former processes for assignment of rights are now inadequate and while there is still much conflict, both writers' and publishers' organisations are trying to resolve the issues.

The assignment of rights is being breached quite clearly in another way. There are on-line services which "find" and reproduce (transmit) intellectual property for a fee without having the right to do so. In some cases these services have developed huge databases on particular subjects. Although action has been taken against a few of these services, they are often hard to detect and even harder to locate.

If an author or publisher wants to protect their income, they should be very cautious of e-publishing.

#### • LICENSING

There are two methods of payment for licensed use of copyright material; a "once-off" fee, or "per capita usage". There are also possible licensing limitations:

- \*Partial assignment - so that the owner retains part only of the rights, for example, the author of a book may retain the rights to republish the book but assign the rights to make a movie or stage play based on the book.
- Exclusive licensing - the owner permits another person to exercise the rights, in whole or part, to the exclusion of anyone else, either indefinitely or for a specified period of time.
- Joint licensing - the owner permits another person to exercise the rights, in whole or part, either indefinitely or for a specified period of time, but maintaining the right to use those rights themselves or assign similar rights to others.
- Regional assignment or licensing - the owner assigns or licences rights to another person that are only exercisable within a particular part of Australia. \*

An example of "once-off" fee is the marketing of computer software, whereby the user is licensed to use the work for their own use, but not dispose of it to another party nor copy, nor allow copies to be made for use by another party. Anyone who has purchased software would be familiar with the voluminous terms, conditions, limitations attached to the package.

An example of "per capita" licensing would be a training course package used by a licensed individual or organisation where a fee is payable for every participant in such a training course.

In both examples, the owner retains the copyright and also the exclusive right to amend the product.



- **INTELLECTUAL PROPERTY IN ASF**

There is a very wide range of intellectual property in respect of ASF and its parts; ownership, permitted or licensed use has never been clearly determined, although the above discussion does define automatic ownership.

- **INDIVIDUAL CAVERS**

Copyright automatically belongs to any caver who reports on their experiences, observations or data collected.

Where data is collected jointly, such as cave survey data, the copyright is owned jointly. The copyright in any drawn map rests with the person who drew the map (or jointly, if more than one person was the draughtsman). Individuals may, if they wish, permit the use of their work by clubs or ASF, with or without limitations, but copyright does not automatically flow to the club or ASF.

- **CAVING CLUBS**

Non-incorporated clubs have no legal identity and therefore cannot own any property, including intellectual property. Any claims that "the club" owns copyright are invalid. An exception occurs where there is a formal Deed of Trust and Trustees appointed in accordance with the appropriate legislation. This was the situation with ASF prior to Incorporation.

Incorporated clubs have a legal identity and may own property. Whether it is desirable for individuals to yield their rights to a club is outside the purpose of this paper.

A common club function is the publication of newsletters, journals and sometimes occasional papers. The latter is usually the work of an individual who thus owns copyright. Copyright in serial publications is usually vested in the editor or publisher, unless claim to copyright is indicated for particular items.

- **ASF**

Many documents are being produced and have been produced by or on behalf of ASF, and there has been preliminary discussion (admin. meeting 29/8/98) which tried to examine both ownership issues and marketability including archives and private papers as resources.

The copyright in some publications is definitely vested in ASF. These are:

- Australian Caver.
- Speleo Handbook 1
- Australian Karst Index (but not necessarily raw data used in compilation)
- Various leaflets promoting caving or ASF
- All policies, codes and guidelines
- Administrative Handbook
- (possibly) the qualifications, training and appointments material now in course of preparation.

Marketing any of the products above is not for decision or recommendation by this author, but will no doubt be addressed elsewhere.



In view of the above, it is believed to be important to fully review the "ASF PUBLICATION POLICY & COPYRIGHT" (Dec. '72), as several anomalies exist.

Attention is drawn to clause 9 of that policy, which states that data collected by the ASF Commission on Bibliography be published as "Australian Speleological Abstracts" and the copyright of that journal shall vest in the Sydney Speleological Society.

## FINAL COMMENTS

The above paper has dealt with issues of ownership of copyright with some comment on use of copyright material. But many questions are left unanswered. Below are further comments by Chris Norton:

### • WHAT IS ASF PROPERTY?

What sort of material makes up ASF property? Is it anything done by ASF members in caves? Surely not - that would mean any club's maps, bulletins etc were ASF property. To this end, something should only be ASF's property if there is an agreement between the ASF members producing that property and ASF.

### • OWNERSHIP

What should the terms of that agreement be? Should the members retain any rights over the property, or should it belong completely to ASF? Should this be determined on a case-by-case basis? What consideration should there be where someone assigns their intellectual property rights to ASF? One-off payment (which may be nominal)? 'Royalties' on any amounts earned by ASF from the work?

Where someone retains partial intellectual property rights, what happens to any amounts received for use of that property? Should the individual and ASF share any profits? Should each party retain all the profits made by their own use/marketing of the property?

Where someone retains partial intellectual property rights, is the express permission of ASF and the person both required before any use is made of the property? Or is a clause granting full permission to be included in any agreement of assignment of property?

My preference is that all rights are handed over to ASF for an agreed sum. Whether or not this sum should represent "fair return" for the input of the individual is probably a matter for case-by-case analysis. How many tens of thousands does ASF propose to pay Krunchy, yourself et al for the work done on the Caving Leadership standards?!

## USE BY ASF ORGANISATIONS

- On what terms should ASF clubs, members, speleo councils, commissions be able to use ASF property? Should an agreement be used? Should use be limited to ASF purposes only?
- Should members get a discount on standard licence fees for private (non-ASF) use of ASF material?

## USE OF PROPERTY BY NON-ASF ORGANISATIONS

- Does ASF hand over all intellectual property rights (of the Exit survey), or merely grant a licence? My preference is ASF should always grant a licence or it will end up having to ask permission to use its own work!





- What should the terms of the licence be? A one-off payment is easier to enforce and less admin hassle. A 'pay per use' agreement may be more lucrative (particularly for training materials eg pay \$x for each student).
- Should a licence be time-limited?
- Does a licensee have any rights to updates, new versions etc? For free? At a reduced rate? Can a licensee sub-licence?
- Should ASF be identified on all material used as the copyright holder/author?
- Is any liability accepted by ASF for eg whether the material complies with any relevant standards; loss in tort including negligence; damages in contract?
- Is liability limited to the purchase price?

## PROTECTION/ENFORCEMENT

- What physical steps can be taken to protect AEF property? (eg printing of logos on each page of documents, maps; protection of computer files)
- What attitude would ASP take to the alteration of its material by a licensee for the licensee's purposes?
- What will the ASF's attitude be to any breach of agreement, either by its members or a licensee/assignee?\*

\*Sections enclosed in asterisks (pp. 2-3, 6, 7-8) copied from comments by Chris Norton (pers. com.)

### Sources:

Australian Copyright Council

Australia Council for the Arts

Australian Society of Authors

Copyright Agency Limited

Style Manual (of the Australian Government Publishing Service)

PLR - Dept. Of The Arts and Administrative Services

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