

Intellectual Property Principles for Australian Government agencies

Introduction

The Australian Government is a major investor in the creation and development of intellectual property (IP) through its many activities in science, health, education, public infrastructure, information technology, defence and arts and culture.

The Intellectual Property Principles for Australian Government Agencies ('the Statement of IP Principles') provides a policy for the management of IP by Australian Government agencies covered by the *Financial Management and Accountability Act 1997*.¹ Agencies are individually responsible for implementing the Statement of IP Principles by 1 July 2008.²

IP covers the wide range of intangible property that is the result of the creative and intellectual effort of individuals and organisations. This includes inventions, literary and artistic works, computer programs, databases, broadcasts, films, sound recordings, plant varieties, trade marks and designs.

The Statement of IP Principles covers principles relevant to IP management, including procurement, record keeping, industry development and broader innovation policy, and public access.

The business practices and objectives of Australian Government agencies are varied. Many agencies create, publish and distribute materials for the purpose of informing and educating the community. They do not necessarily seek to control the extent to which this public sector information is used. In contrast, other agencies have a strong commercial focus where active management and control of IP may be necessary to achieve business outcomes.

The Statement of IP Principles provides a broad policy framework for IP management by Australian Government agencies. Agencies are encouraged to develop individual IP management frameworks that reflect their own needs and objectives, consistent with other relevant Australian Government policies and requirements.

Agencies should also consider IP management frameworks for matters that cross portfolio interests. For example, a specific IP management framework exists in relation to government funded research (*National Principles of Intellectual Property Management for Publicly Funded Research*).

¹ While the *Statement of IP Principles* does not apply directly to bodies coming under the *Commonwealth Authorities and Companies Act 1997*, these agencies could also consider the Principles as an expression of good practice in the management of IP.

² The *Statement of IP Principles* was amended on 1 October 2010 to reflect Government decisions in relation to ownership of IP in software procured under ICT contracts (principle 8(a)) and free use of public sector information (principle 11(b)).

GENERAL PRINCIPLES

- 1. Australian Government agencies are responsible for managing IP in their control or custody in an effective, efficient and ethical manner.*

The Government, through its agencies, seeks to manage IP for the benefit of the Australian community as a whole. IP should be managed in accordance with all relevant legislation, policies and guidelines.

- 2. Agencies should periodically evaluate the overall effectiveness, including cost, risks, and benefits of the policies and practices they have in place for the management and use of IP.*

In considering its approach to the management and use of IP, agencies should be mindful not only of their own objectives, but also of broader government objectives, including the benefit to the Australian community as a whole.

CORPORATE FRAMEWORK

- 3. Each agency should have an IP management policy which reflects its objectives and these IP Principles.*

Policies and practices established for the management and use of IP should be an integral part of agencies broader governance framework, including procurement, accountability, and records and asset management. Agencies may have several IP management policies reflecting different business areas.

An IP policy should be supported by a management plan, strategy and/or guidelines.

An IP management policy should provide guidance to staff. It should describe an agency's principles, practices and procedures for managing IP and how these relate to the achievement of the objectives of the agency.

An IP management policy should outline an agency's approach to:

- dealing with acquisition, use, sharing, commercialisation, disposal, and public access to IP;
- identifying and recording ownership of IP; and
- monitoring and protecting IP.

It should also detail any broader policy considerations that affect the agency's approach to management and use of IP.

4. *Implementation of the IP management policy should be supported by appropriate training and resources, including access to expert advice.*
5. *Agencies should maintain appropriate systems and processes to identify and record IP.*

Identifying and recording IP, for example in a formal IP register, can support effective decisions on the management and use of IP, including the identification of IP which may be further leveraged in achieving the objectives of an agency.

Agencies should pay particular attention to IP they have identified as being of special value or importance. This could include IP that is of public, strategic or financial value. Where agencies believe that valuation systems are helpful, they should be directed towards valuations for internal risk and asset management purposes. Valuations should also not be used as the sole or principal justification for commercialisation decisions.

Systems for identifying and recording IP may complement, or be linked to, but generally not duplicate asset and record management systems. Where possible, IP information should be integrated into these systems.

6. *Agencies should have strategies and guidelines to ensure that IP is protected in an appropriate manner.*

In line with their general responsibility for ensuring proper and effective use and management of assets, agencies should put in place appropriate mechanisms to protect, monitor and prevent inappropriate use or infringement of IP.

Strategies and guidelines for protection of IP should be based on a well considered risk assessment.

Agencies should take care in disclosing any information regarding their IP to third parties prior to its publication or commercialisation. Premature disclosure may reduce the commercial value of the IP and/or in the case of patentable subject matter or a design, the opportunity to seek a registration may be entirely lost.

7. *Agencies should have procedures in place to reduce the risk of infringement of the IP rights of others.*

The risk of infringement of IP rights can be reduced through a number of formal and informal processes, include training and awareness raising for staff, regular review of use of IP and record keeping within agencies. These processes will assist in meeting expectations that agencies will act ethically in the handling of the IP rights of others.

CREATING AND ACQUIRING IP

8. *Agencies should maintain a flexible approach in considering options for ownership, management and use of IP.*

In considering their options, agencies should be mindful of

- their objectives and activities;
- opportunities for obtaining appropriate value in all IP arrangements;
- opportunities for financial savings in procurement contracts including through obtaining only those IP rights required to meet the objectives of the procurement;
- the costs of managing and administering IP assets retained by agencies and the potential for some IP assets to rapidly depreciate in value;
- the desirability of making IP available to entities that are able to use Government IP to create jobs and commercial opportunities; and
- other relevant government policy objectives, including the promotion of industry development and the promotion of Government 2.0.

8.(a) In respect of information and communication technology (ICT) contracts for software, agencies should adopt a default position in favour of the ICT supplier owning the IP in the software developed under the procurement contract.

An agency will still be required to conduct an IP needs analysis to determine whether the Commonwealth should retain IP ownership (for example to provide an open licence for the public use of the IP). However, the default position is to be the starting position for this analysis. This ownership position is conditional on the ICT supplier granting the Commonwealth a perpetual, irrevocable, world-wide (if required), royalty free, fully paid up licence to all rights normally accompanying IP ownership (including a right to sub-license but excluding a right of commercial exploitation) in the developed IP for government activities. Where the supplier is not willing to agree to the whole-of-government licence, the supplier should not retain ownership of the IP.

Agencies should only depart from the default position in exceptional circumstances. For example:

- reasons of national security and/or strategic interest
- reasons of law enforcement
- reasons in the public interest
- where there are statutes, regulations, Commonwealth Government policies or prior obligations to a third party or parties that preclude ownership of the developed IP by the ICT supplier
- where the main purpose of the ICT contract and the developed IP is to generate knowledge and information for public dissemination or the agency intends to allow free use of the IP on open source terms
- where the IP applies to a critical Government ICT system
- where the IP includes personal information
- where there are protected matters relating to fraud detection and return processing rules

- where complex information technology assets involve multiple build partners over the asset lifecycle
- where the underlying IP is wholly or predominantly owned by the Commonwealth before entering into the service agreement
- economic and financial risks.

9. Agencies should recognise innovation and creativity in the development of IP in an appropriate manner which is consistent with agency objectives.

Recognition of innovation and creativity within agencies can be an important contribution to a rewarding, effective and efficient work environment. This can be linked to human resource performance management systems or other mechanisms which recognise and reward contributions to the achievement of agency objectives.

10. Contracts and other agreements must address IP issues where relevant.

IP issues should be addressed at an early stage, in developing contracts for the creation of IP.

Contracts in which IP might be created should address the identification of new and pre-existing IP and arrangements that apply to the ownership and use of the IP, including licensing arrangements. Agencies should ensure that IP rights secured are appropriate to identified needs and objectives and should only obtain those rights required taking into account questions of the efficient, effective, and ethical use of agency resources.

SHARING, COMMERCIALISATION, DISPOSAL, AND PUBLIC ACCESS TO IP

11. (a) Agencies should encourage public use and easy access to material that has been published for the purpose of :

- *informing and advising the public of government policy and activities;*
- *providing information that will enable the public and organisations to understand their own obligations and responsibilities to Government;*
- *enabling the public and organisations to understand their entitlements to government assistance;*
- *facilitating access to government services; or*
- *complying with public accountability requirements.*

This includes all materials which agencies are generally obliged to publish or otherwise allow free public access to. This material may also be described as ‘public sector information’. It does not necessarily include materials that have been published for commercial purposes. Nor does it cover materials which are of a sensitive nature, such as information that impacts on national security or information which would destroy the possibility of subsequently obtaining patent protection where such protection is necessary to achieve public benefit.

Permission for public use and re-use of such material should generally be given royalty free and on a non-exclusive basis. Exclusive licences to use such materials should only be given in exceptional circumstances.

11.(b) Consistent with the need for free and open re-use and adaptation, public sector information should be licensed by agencies under the Creative Commons BY standard as the default.

An agency’s starting position when determining how to license its public sector information should be to consider Creative Commons licences (<http://creativecommons.org.au/>) or other open content licences.

Agencies should license their public sector information under a Creative Commons licence or other open content licence following a process of due diligence and on a case-by-case basis.

Before releasing public sector information, for which the Commonwealth is not the sole copyright owner, under a Creative Commons BY standard or another open content licence, an agency may need to negotiate with any other copyright owners of the material.

11.(c) At the time at which Commonwealth records become available for public access under the Archives Act 1983, public sector information covered by Crown copyright should be automatically licensed under an appropriate open content licence. Agencies will be responsible for the selection and use of an appropriate licence.

12. Australian Government agencies should be mindful of opportunities to share IP for which they are responsible with other agencies.

IP in the custody of an agency which does not have a legal identity separate from that of the Commonwealth, may be useful to other Australian Government agencies. Agencies should therefore maintain an awareness of opportunities to share IP.

Where it is the expectation that IP that is procured will be shared with other Australian Government agencies, then agencies should make this clear to potential suppliers in the procurement process. In particular, in relation to ICT procurement contracts see principle 8(a). Agencies should be mindful of potential savings from obtaining licences to IP which might preclude sharing it with other agencies.

13. Agencies should be responsive to opportunities for commercial use and exploitation of IP, including by the private sector.

Agencies should consider the potential benefits that may be realised through appropriate transfer and uptake of IP, including commercialisation by the private or other sectors which can result in cost savings, and continued development of the product or service.

14. Unless commercial activities are required as an integral part of an agency's objectives, commercialisation of IP (including public sector information) by an agency should be no more than an ancillary part of its activities and should not become a core business activity.

Where agencies consider opportunities to engage in commercialisation, they should be mindful of the resources, including expertise required. Where IP is identified as suitable for commercialisation, the private or other sectors should be considered. Agencies should consider whether exposure to commercial risk is consistent with corporate objectives.

15. Where IP is commercialised or disposed of, agencies must do so in an accountable manner consistent with Australian Government legislation, policies and guidelines.

Before commercialising IP, agencies should conduct an assessment of the commercial potential of the IP and potential costs and risks. Agencies should also be mindful of competitive neutrality principles and consider the potential impact on industry from such an activity.

The benefits flowing to the Government from the commercialisation of IP may be reduced unless commercialisation activities are carried out with the assistance of appropriate expertise. An emphasis should also be placed on avoiding risks that are disproportionate to the potential rewards.

Agencies should have regard to their core activities and business objectives when commercialising IP, and avoid any detriment to those activities and objectives when engaging in commercialisation activities.