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GOVERNMENT RELEASES DRAFT GUIDELINES ON LICENSING OF PUBLIC SECTOR INFORMATION

The Attorney-General's Department (AGD) has released draft Guidelines on Licensing Public Sector Information for Australian Government Agencies (draft Guidelines) and is seeking comments on the draft Guidelines by 21 February 2011.

Background

The draft Guidelines are intended to help agencies to implement the requirements of IP Principle 11(b) of the updated *Statement of IP Principles* (released in October 2010). Principle 11(b) which requires agencies to determine when to license public sector information (PSI) under a Creative Commons licence or other open access licence.

The draft Guidelines are available at: <http://agimo.govspace.gov.au/files/2011/02/Draft-Guidelines-on-Licensing-Public-Sector-Information-for-Australian-Government-Agencies.rtf>.

AGD seeks comments on the draft Guidelines by **21 February 2011**.

What do the draft Guidelines say?

Agencies must make relevant licensing decisions before releasing public sector information

The draft Guidelines clarify that agencies are now required to make licensing decisions about whether to use Creative Commons licences (or other open access licences) *before* publicly releasing their PSI.

Agencies will no longer be able to direct to the Commonwealth Copyright Administration (CCA) any *post*-publication requests to further use text-based material subject to Commonwealth copyright.

Agencies must interpret 'public sector information' widely

'PSI' is defined in the draft Guidelines to mean material with the 'essential purpose of providing Government information to the public'. (See also the definition in IP Principle 11(a) of the *Statement of IP Principles*.)

The draft Guidelines state that a wide interpretation of 'PSI' should be used. They also give examples of PSI and non-PSI material. Non-PSI material is stated to include certain works held by cultural institutions, software, paintings/drawings, confidential material, security classified information, and material containing personal information or sensitive material.

Guidelines for releasing new public sector information

The draft Guidelines emphasise that, under IP Principle 11(b) of the *Statement of IP Principles*, agencies will need to carefully consider the specific circumstances of each item of PSI and undertake a due diligence process to determine whether a Creative Commons licence is appropriate or another option should be selected.

To that end, the draft Guidelines state that agencies should consider matters including:

- the type of licence that best suits their purposes:
 - there are six types of Creative Commons standard format licences. The CC ‘BY’ licence (also known as the ‘Attribution Licence’) is the most liberal and is the default position under the draft Guidelines.
 - the due diligence process may identify that another form of open access licence is more appropriate. AGS has prepared an open access licence tailored to meet government requirements that could be used in such cases.
 - in some limited cases, use of a more restrictive, non-open access licence, may be necessary to protect the Commonwealth's interests
- How will the agency conduct an appropriate due diligence process, and what diagnostic tools are available to assist agencies in making decisions?
- What practical considerations are involved in implementing particular licence models?
 - The Creative Commons licences are generally considered irrevocable (that is, they cannot be withdrawn once applied to the material) and this may not be suitable for all PSI.
 - Does the PSI contain copyright material for which third party consents will be required?
 - Is there a need for ongoing Commonwealth control of the material – for example, where commercially sensitive information is involved?

Guidelines for legacy material

The draft Guidelines define ‘legacy material’ to mean PSI that has been released previously under licensing arrangements that are not Creative Commons licences or other open access licences. From January 2011, the CCA will redirect all inquiries about reuse of legacy material to the author agency.

Agencies should make decisions about re-licensing this material on a case-by-case basis using the same principles that apply to releasing new PSI.

How will the new arrangements affect agencies?

From January 2011, Commonwealth agencies must make licensing decisions at the time that PSI is to be published. In the case of legacy material, agencies must make these decisions when requests for further use of such material are received.

Agencies should familiarise themselves with the draft Guidelines and determine whether they provide adequate assistance to their agency in implementing IP Principle 11(b).

It is likely that agencies will need to update their websites and publication copyright notices and statements so that they are all consistent with the requirements of the new Guidelines. It is also likely that agencies will need to update the IP provisions in their contracts and funding agreements to ensure that they have the necessary rights to release material under

a Creative Commons or other open access licence. AGS has prepared new template versions of these agreements and we can tailor these to the needs of your agency.

The draft Guidelines state that further guidance on due diligence considerations will be provided in the revised *Australian Government Intellectual Property Manual*, to be released on the AGD website in 2011.

Comments on the draft Guidelines

Agencies should email submissions on the draft Guidelines to copyright@ag.gov.au or, alternatively, post comments on the AGIMO blog at <http://agimo.govspace.gov.au/2011/02/01/guest-post-comment-sought-on-draft-public-sector-information-licensing-guidelines/> before close of business on **21 February 2011**.

For further advice on the draft Guidelines and related matters such as the PSI due diligence and risk assessment processes and choice of licence, or if you would like to work through issues that may be relevant to your agency's submission on the draft Guidelines, please contact any of our IP practitioners listed below.

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