Submission to the Productivity Commission's Intellectual Property Arrangements Inquiry

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Introduction

Four years ago in November 2011 I was asked by the British Government to review and, as appropriate, implement a major recommendation coming out of Professor Ian Hargreaves' independent report for the British Government Digital opportunity – a review of intellectual property and growth (May 2011)[1]. In this submission I try and distil, briefly, the key learnings from the last four years which may be of use to the Australian landscape. The focus of this submission and of our work is quite specific – secondary/permissions licensing, one of the three categories of copyright licensing (see below). We have found it has implications for other policy areas such as data privacy and consumer licensing

The Hargreaves recommendation – implementing a digital copyright exchange (DCE) - led me first to carry out a diagnostic review of the many problems surrounding copyright licensing in the UK[2] in the digital age and then writing, with my civil servant Dr Ros Lynch, a final report summarising our recommendations for action[3]. Ros and I then went on to implement the DCE renamed The Copyright Hub. Ros went back into the civil service in 2013 and Dominic Young, ex News Corporation, took over as CEO. The Copyright Hub is based in London, working closely with the Digital Catapult that is developing the technology. It is funded by British Government and, importantly, by the creative industries in the UK and internationally (for example Copyright Agency Ltd in Sydney). The end of this submission describes the Copyright Hub in more detail.

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[1] *https://www.gov.uk/government/uploads/.../ipreview-finalreport.pdf*

[2] Hooper, Richard, Rights and Wrongs – Is copyright fit for purpose for the digital age – the first report of he Digital Copyright Exchange Feaibility Study, Intellectual Property Office, London, March 2012
www.copyrighthub.co.uk/Documents/dce-report-phase1.aspx

[3] Hooper, Richard and Lynch, Dr Ros, Copyright works – streamlining copyright licensing for the digital age, IPO, London, July 2012
www.copyrighthub.co.uk/Documents/dce-report-phase2.aspx

Learning no. 1 - complexity

In the 300 years since Queen Anne introduced the first copyright act in the UK, copyright has become ever more complex. It is therefore a good idea to get some purchase on definitions. My team and I struggled to get agreement on definitions and did not, do not, always achieve it. In essence there are three types of copyright licensing:

- Primary licensing
- Consumer licensing
- Secondary licensing

Primary licensing involves the creator, for example an author, in licensing a publisher to publish his or her book. This has not been the focus of our work (although some stakeholders have identified for themselves the relevance that our technology and approach could have for their primary licensing activities).

Consumer licensing involves the user/the consumer agreeing, probably without being aware of it, to a licence to, for example, view a DVD – you are not allowed, the screen says, at the start of the DVD playing, to charge an entrance fee. This is also not the focus of our work (although, again, some possible applications of our work in this area have been spotted).

Our work has focussed on secondary licensing, called in publishing in the UK, permissions licensing. Secondary/permissions licensing is about the right to reuse an existing copyright work or part thereof to create a new work or reuse it in a way that the law says requires a licence – ie not an exception, not fair dealing. An example would be an Australian tv drama being licensed to a broadcaster in the UK, a family wanting to put a piece of music on the wedding video, a poem being read out at a music festival, an image or a film clip being reused in a YouTube video. We talk of the long tail of uses and long tail of users. The Copyright Hub's prime focus is the long tail.

Do be tough on definitions so that we are all talking about the same things.

Also, as set out below, the Copyright Hub technology helps, in CEO Dominic Young's words, "to hide the complexity". A simple Google search hides huge complexity because of the internet's/the world wide web's underlying architecture.

Learning no. 2 the political narrative

There is a strong political dimension to any debates surrounding copyright. It can be quite toxic. When I began the work in 2011, the political narrative was: there are problems with copyright in the digital age; therefore the copyright laws need to be changed. QED. And the

moment that a Government declares it is going to change the copyright laws, war breaks out between pro and anti-copyright forces thus increasing the political headache.

This is still the political narrative and the political headache in many countries around the world today. Australia should avoid it. I suggest you replace the traditional political narrative with the following narrative, which we have managed to create here in the UK:

- There **are** problems with copyright in the digital age, yes.
- The creative industries should stop being in denial about this, stop being defensive, and should identify forensically what exactly those problems are.
- They and anyone looking hard at the issues will discover that a number of the problems have nothing to do with the phrasing of the law but have to with processes and organisations, especially in regard to secondary licensing. An English school having to deal with twelve different educational rights licensing bodies four years ago (much streamlined today as part of the Copyright Hub work) is not a law problem, it is a process/organisational problem.
- As a result of taking this approach, there will need to be some big changes to copyright licensing processes and organisations.
- Some changes will still probably be needed to the law but they are much smaller in quantity, thus reducing the heat of battle between pro and anti-copyright forces.

Learning no. 3 Identifying the problems with copyright licensing in the digital age

It is important to identify and agree what the specific problems are with copyright in the digital age following from learning no. 2. Our first report in March 2012, referenced above, did that for the UK. It was written, working closely with the creative industries. They fully accepted it, as did the Government. I will just emphasize two key problems (there are many more set out in the report).

- Treating licensees properly as customers
- Improving the quality of data.

Licensors should treat licensees in the way that proper customers should be treated[4]. Four years ago the two big music collecting societies here in the UK licensed restaurants and hairdressers wanting to play music, separately. This aggravated restaurant owners and hairdressers – having to have two licences for the same music from two bodies that did not talk to each other very much. Today, almost all those licences are joint and much easier to

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[4] There is a difference between a customer deciding whether or not buy meat from the butcher, and a restaurant playing music. The restaurant can decide not to play music but if it does, it is required by UK law to be properly licensed. Unlike with butchers, of whom there are many, very often with copyright there is no choice of where to get a licence. That leads to a slightly more nuanced customer relationship. But it is still in my view a customer relationship.

deal with, leading to much more contented customers/licensees. Note that discontented customers/licensees complain to politicians about poor treatment by licensors and quickly the debate becomes one about changing the law and making more exceptions to copyright. The opposite of what the creative industries want.

The second problem is the quality of data. The Chief Executive of the British Library in 2012, Dame Lynne Brindley, put it succinctly: "We do not know who the rights owners are – therefore we cannot reimburse them." The data (referred to often as metadata) about copyright works, about creators, about licences, might be alright for the analogue age with a relatively small number of transactions.   The data quality is absolutely not alright in the digital age with huge numbers of transactions. Knowing accurately who owns the rights to a work is at the heart of the matter. In our first report (page 42, para 145) we quoted one top-of-the-market large secondary licensing contract, which had been revenue assurance audited. 5-10% of the contract quantum (£millions of pounds) was ending up in the wallets of the wrong creators and wrong rights managers. Because of poor or non-existent data. It is also worth saying that in the internet age, many many more people are themselves creators, not just users/consumers, for example the fourteen-year-old in the back bedroom. The volume of works outside the formal "industry" is much larger, even more disorganised and increasingly commercially relevant on the internet. So the solution for the future needs to embrace those in its scope too, as the Copyright Hub does.

I would suggest that for the Productivity Commission, this issue of poor data be at the top of its agenda for copyright.

There is evidence around the world that some people make money from poor data and therefore are not in a rush to improve it. Also poor data probably keeps more people in jobs and that may also reduce the incentive to create and keep high quality data. Turkeys seldom vote for Christmas.

Learning no.4 Solutions

There are sensible actions that can be taken to improve the issues raised above. The Copyright Hub in the UK does three things – a forum, copyright education, and a technology. They could I think help with similar approaches in Australia. Indeed we are delighted to have Copyright Agency Ltd in Sydney as a partner.

The Copyright Hub, a not for profit company limited by guarantee, provides a forum for different sectors of the creative industries to come together and solve both analogue and digital problems. Four years ago the sectors were very siloed by their own admission yet the internet is as profoundly multimedia as it is profoundly global.   For example the Educational Licensing Working Group, set up by the Copyright Hub under the leadership of

a top copyright lawyer, has significantly streamlined the educational licensing problem in English schools, leading to significant cost savings for both schools and the licensing bodies. We are also working on the difficult topic of metadata stripping by web publishers, for example newspapers, social media, broadcasters. Metadata stripping refers to the practice whereby identifiers are removed from copyright works - the exact opposite of all the Copyright Hub aspires to in terms of better data. And in the UK, the USA, Europe and Australia, at least, illegal.

Copyright at its base is simple. The creator of a work, or the rights manager intermediary, has the right – the freedom - to decide what can and cannot happen with that work in terms of secondary licensing. The Copyright Hub's ambition is to make that reality work.

Secondly, the Copyright Hub is one of a number of UK bodies that undertake copyright education. This is important in its own right but also has a key role to play in, for example, reducing piracy. But we have come to believe that the best type of copyright education may come from doing it rather than talking about it. Imagine a teacher and a pupil who has written a poem or short story. Imagine the teacher going online with the pupil, via the emerging technology of the Copyright Hub, and being assigned a unique party identifier for the pupil and a unique identifier for the poem or short story. Imagine further the pupil/creator defining a handful of easy to use licences, which may or may not involve money, for those who want to reuse their work and where the transaction machine to machine using internet architecture has a zero cost. You have imagined the third role of the Copyright Hub – delivering a suite of open source technology building on the standards and protocols of the Brussels-funded Linked Content Coalition.

So thirdly, the Copyright Hub is a technology and we are committed to making it work across the internet, first of all in the UK, then Australia and then USA thanks to funders in those two countries (Copyright Agency Ltd in Sydney, the Copyright Clearance Center and the Motion Picture Association of America in the USA). The internet is global, the vision for the technology is global. But we have to walk before we run. We learn to walk by turning use cases suggested by the UK industry, and working with the UK industry, into public services. To date there are five public services working – all from the images sector, and a million images with identifiers out there "in the wild". We have 105 use cases queueing up for attention from the four creative sectors - images, music, audio-visual and text publishing.

The idea is simple. A copyright work has or is assigned a unique identifier which resolves back, machine to machine, to the rights owner/the creator. The prospective reuser/licensee can do something as simple as right-clicking on the work, currently using a plug-in but soon we hope to be incorporated in browsers, and find out what licences are available to reuse the work and/or be directed back to the rights owner's website. The transaction cost is zero. The licence itself may of course cost something. That decision, whether to charge for a reuse

licence, is up to the rights owner, nothing to do with Copyright Hub. Many rights owners/creators are happy to have their work reused for free as long as they can be properly acknowledged and have their name spelt properly!

Conclusion

In conclusion, three key points for the Productivity Commission. Firstly, the size of the addressable market for secondary licensing. In a typical market, at the top there is a small number of large payers and in the middle and at the bottom there is a large number of small payers. Because of the transaction cost before the arrival of the Copyright Hub technology, a vast amount of the potential transactions in the middle and at the bottom of the market were just/are just not viable. So the Copyright Hub is opening up a huge addressable market that historically has not been addressable. The UK creative industries are currently worth £77bn – the Hub technology will add significantly to this.

Secondly, in 2012 we did some research on people wishing to reuse copyright works. 38% of them, one in three, could not find the rights owner in any sensible time span. So what did they do? They did not reuse the work – negative outcome for the creator and the creative economy. Or they pirated it – negative outcome for the creator and the creative economy.

Thirdly, as with so many innovations, we face the chicken & egg problem of innovation adoption. The problem of critical mass. Browser owners will not, for example, incorporate our right-click plug-in into their browsers until there are lot of identifiers and lots of potential licences being offered in an automated way. But licensees will not use the system so readily if the browsers do not contain our right-click simple-to-use functionality. So the role that legislators can play in promoting the rapid achievement of this critical mass should be considered.