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CSIRO Submission 12/469

Copyright and the Digital Economy

Australian Law Reform Commission

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This submission is made on behalf of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) in response to the Australian Law Reform Commissions Issues Paper concerning Copyright and the Digital Economy.

CSIRO is Australia's national science agency and one of the largest and most diverse science agencies in the world. In addition to its key role of carrying out scientific research for the benefit of Australia and Australian industry, CSIRO's role includes collecting, interpreting and disseminating information relating to scientific and technical matters and the publication of scientific and technical reports, periodicals and papers.[1]

Increasingly CSIRO carries out its research on a collaborative basis with researchers and entities located around the world. Modern scientific research and collaboration almost invariably takes place in an online environment and relies on generation and sharing of vast amounts of information and data products which may or may not attract copyright protection.

The Issues Paper discusses many issues relevant to CSIRO and what follows is a brief comment on some of those issues.

Principles for copyright laws

The principles set out in the Issues Paper are good ones to guide reform. In particular, the need to ensure that law promotes fair access to and wide dissemination of content (principle 4) and that the complexity of copyright law ought to be reduced (principle 7). The principle of promoting an adaptive, efficient and flexible framework (principle 8) is laudable and should guide recommendations around the development of rights management schemes to remove duplication and decrease transaction costs.

The Australian government, in line with other governments internationally and many research funding bodies, is seeking to implement policies that limit the restrictions placed on copyright material to facilitate the dissemination and reuse of information. This is reflected in the Intellectual Property (IP) Principles for Australian Government Agencies (2010). CSIRO is reviewing its policies for increasing alignment with this policy in a manner which is consistent with its functions. Consequently, CSIRO is concerned to ensure that copyright laws provide a fair balance between the rights of creators and users of copyright material and operate to enhance scientific research outcomes and the dissemination of those outcomes.

Current defences and the proposal for a general 'fair use' provision

The present fair dealing exceptions are limited and the one most relevant to CSIRO is that of 'fair dealing for the purposes of research or study'. It is not always clear whether activity falls within the concept of 'research or study' and reticence to misuse another's IP may mean that uses that facilitate dissemination and communication of scientific and technical information may be avoided despite there being no or marginal impact on the legitimate interests of a copyright owner. If a more general purpose exception applied this concern may be alleviated, the focus then being on the key issue of the impact of the use on the legitimate interests of the copyright owner.

A specific fair quotation right as discussed in the Issues Paper has merit. For example, where existing published material is cited in reports or literature studies which are then intended to be published and made generally available, there may be a question as to the basis on which the report with the cited material may then be permitted to be reproduced or otherwise dealt with. If the quotation is properly made in such a report, then it should be possible for the report to be made available to be disseminated and reproduced without a concern that copyright infringement allegations will be made only because of the included quotations.

[1] *Science and Industry Research Act* 1949 (Cth), s.9.

There is a bias against having rights to reuse works under the banner of an exception or defence which are a 'commercial use'. This is fair enough given that the purpose of copyright law (moral rights aside) is to enable the copyright owner to gain commercial advantage, but there are real difficulties with where the boundaries between commercial and non-commercial use lie. Some cases are clear: for example, taking reports published on a website and republishing them in a book for sale. But other cases are less clear[2]. In the absence of a very clear statement of when a use is commercial and unacceptable, or quasi commercial or not commercial and acceptable, then defences or exceptions justifying use that is characterized only as 'non-commercial' are unhelpful. Conversely a non-prescriptive exception enables the character of the use to be fully considered.

Text and data mining

Access to information is vital for scientific research. Better information and data about an issue is more likely to result in better science and research and better outcomes for Australia as a result. Data or text mining facilitates the obtaining and making available of relevant information which can be used to better inform scientific research.

As the Issues Paper identifies, there is technology that can efficiently identify relevant information and make it available for researchers. Incidental reproduction of copyright material (or material in respect of which copyright rights are asserted) in that process, has the capacity to impede the activity, even if only through a 'technical' infringement but where there is, in the ultimate result, no taking of anything that would normally constitute infringement[3]. Assessing potential infringement issues or seeking licences from all potential rights holders (noting that the activity may be at a global and not just local scale) would be resource intensive and time consuming.

While there is a growing use of open licensing models, particularly for public sector information, that will make material available more readily, much information relevant to researchers is and will continue to be published under restrictive arrangements and copyright rights asserted.
Solutions discussed in the Issues Paper include providing rights to mine data for 'non-commercial' research. Putting aside the difficulty of setting boundaries to what is or is not 'commercial' research as noted above, such a limitation would seem to mean that 'commercial research' must duplicate effort and would be at odds with a goal of making information (as opposed to illegal copies of journal articles, for example) efficiently available for researchers to facilitate better research outcomes whether the research is 'commercial' or otherwise.

As noted, much research is conducted through international collaboration. If the laws in Australia are more restrictive than elsewhere or if the administration of any rights system is cumbersome or onerous and creates excessive cost for research, then that might be expected to impact on the desirability of Australia as a research destination.

Orphan Works

The Issues Paper discusses a number of potential mechanisms to deal with orphan works, including expanding collecting agency schemes and providing a mechanism for the grant of limited licences. Various administrative schemes are discussed, including schemes to establish registers, compulsory licence schemes and so on. There is merit in having a system that facilitates use where reasonable inquiries have failed to identify the copyright owner. One question that arises is who ought to carry out

[2] For example, is it commercial research if it is funded through taxpayer funds and then unexpectedly produces a patentable invention which is licensed commercially? Is it commercial research if it is research carried out by a scientist for the purposes of publishing a paper in a journal which is conducted for profit? Is it commercial research if it is research carried out with funding from industry and government but where the results are intended to be published on an open access basis?

[3] The Issues Paper identifies that existing defences under the Copyright Act may not operate.

the inquiries and where should they make those inquiries? A system that passed that responsibility to a central authority has the benefit of ensuring consistency and the generation of records but may not always be able to respond speedily to inquiries or carry out searches relevant to all jurisdictions where a would be user may be exposed, potentially resulting in duplication. The existence of such a scheme should not remove or reduce any fair use or other exception. CSIRO considers that a would be user of an orphan work should be entitled to carry out their own reasonable due diligence searches and not be obliged to have a central authority conduct those searches.

The suggestion that a licence fee would be paid to a collecting society seems strange where the issue is the identity of the recipient. Disbursement of money after a period to members of the collecting society seems unfair to the user of material who may claim to be entitled to a refund or to be obliged simply to agree to pay a reasonable royalty should the correct rights holder be identified. CSIRO considers that an obligation to pay a reasonable royalty for the use should a rights holder come forward within a period of time is appropriate. In the absence of agreement the royalty would be set by the Copyright Tribunal.

There is no discussion of the obligation of an author or copyright owner to self identify – though clearly that cannot be made a prerequisite to protection. Older material may identify rights holders and the issue is more of not being able to contact them or any successors. So far as new material posted on the internet without identification is concerned, however, that factor seems to be relevant to the assessment of fairness of the use made.

Contracting out

A consideration of this issue identifies that there are some matters that make drawing a boundary between acceptable and unacceptable contracting out of rights to use copyright materials very difficult.

It needs to be recognized that rights holders may have legitimate interests concerning the copyright subject matter beyond purely copyright interests which are best managed by contract. That management may have the effect of limiting rights of use that may otherwise be claimed under copyright law. For example contracts may be best placed to deal with matters such as: appropriate use of sensitive cultural material; misrepresentation of the impact of early stage and incomplete research results where the aim may be to ensure that the entire report only is reproduced to ensure that adequate notice of limitations etc is given to readers of the report; confidential information where any use may destroy confidentiality.

While any use made of such material may ultimately be held to be unfair, particularly in a digital environment, the damage may well have been done and be largely irremediable if a rights holder is left to manage the use through copyright laws. Where the damage that could be done by inappropriate reuse is foreseeable it seems reasonable for contractual restrictions to be imposed, even if the indirect impact is a prima facie restriction on fair use rights.

As a matter of principle, where the legislation appropriately balances interests of copyright owners and copyright users, that balance ought not to be compromised by contracts intended to remove rights. However, any broad prohibition against contracting out of rights of use needs to be qualified to enable the protection by contract of legitimate interests such as those referred to above.