Why Governments and Public Institutions Need to Understand Open Content Licensing

PROFESSOR STUART CUNNINGHAM, DR TERRY CUTLER, DR ANNE FITZGERALD, NEALE HOOPE, AND TOM COCHRANE

PROFESSOR STUART CUNNINGHAM

Creative Industries is a relatively new way of describing the sectors from architecture and design, through visual and performing arts, through media, to the emergent new media forms. It is really a grab-bag of a whole range of sectors. The big challenge is: what is connecting all those sectors? Our Faculty has eleven disciplines, and that does not exhaust the range of creative industries sectors that have been grouped under this terminology. The terms were invented by a creative industries task force in 1997 in the UK and they defined Creative Industries in this way:

> Those activities which have their origin in individual creativity, skill and talent and which have the potential for wealth and job creation through the generation and exploitation of intellectual property.[37]

As you can see from that definition, it is not sectorally specific; it is functionally specific, and it raises issues of intellectual property to centre stage in terms of the future coherence and growth of this sector. The Creative Industries Faculty here at QUT is the first. There has been one further naming of a faculty as a Creative Industries Faculty at Edith Cowan in Perth, but we were the first, and really we have, if you like, to use a business terminology, brand leadership in this term in Australia. We were very interested, and it shows through that definition why we were interested, in working closely with law and with the Law Faculty and really this is one of the reasons why we have been very pleased to co-host this event with the Faculty of Law here at QUT.

Where does this panel sit in relation to the architecture of this Conference? Professor Lessig's case for the development of the Creative Commons

[37] "Creative Industries Mapping Document" (1998) *Department for Culture, Media and Sport* <http://www.culture.gov.uk/Reference_library/Publications/archive_1998/Creative_Industries_Mapping_Document_1998.htm> at 13 February 2007

yesterday laid out a compelling vision of a remix, or what I might call a DIY– Do It Yourself – culture where formerly passive consumers become active, engaged and sassy, talking back to the dominant hegemons or controllers of cultural production, appropriating and re-forming communities of practice outside the vectors of media ownership and control. In this vision, where do the state, government and public institutions fit?

Traditions of left progressive thought and activism in the US typically are far more sceptical of the potentially useful role that the state or government might play in forwarding progressive change than otherwise is the case in social democratic traditions, out of Western Europe, Canada or places like Australia and New Zealand. Professor Lessig's case, at least in the bald outline in which he presented it yesterday, steps around these questions. Governments in this vision are challenged to reform their antiquated IP regimes and stop falling into line with corporate interests, but rarely are they seen as having the potential to be much more pro-active and promoting open content licensing as a way of forwarding of their public service and good governance responsibilities and charters. This is what this panel will consider.

DR TERRY CUTLER

The job that I was given was to start to look at some of the public policy issues that might be involved and I took that brief broadly to frame some of the broader issues that are quite interesting. I am focusing on three points.

We can see a systemic failure of public policy across the whole domain of innovation and investment in creative capital and intellectual property. The symptom of this systemic failure as I see it has been an abnegation of public policy leadership basically to non-government organisations, not-for-profit organisations and, increasingly and interestingly, to the private sector – stepping into this vacuum. This failure has been compounded and continues to be compounded by what I see as failure in the government's own administration of public assets.

Let me briefly elaborate on three areas. First, the systemic failure of public policy with respect to the whole area of knowledge and creative assets. In this, I see the fabulous Creative Commons initiatives as being a necessary but far from a sufficient response to the intellectual property and technology challenges of this century. That is an important point to keep

coming back to. What we are doing with Creative Commons is terrific, but as Tom Cochrane said, it is a sort of artful compromise around some of these issues, necessary but not sufficient.

What are some of the symptoms of this systemic failure that I point to? First, the carve-out of intellectual property law from the whole framework of free trade and the notion of free markets. If dear old Adam Smith were to come back today he would be absolutely staggered that we have this whole area where the economic framework is still in the mercantilist model that the wealth of nations was attacking and undermining and replacing, because it is a model that relies on Letters Patent and charters of privilege, which of course was the whole foundation of the mercantilist system that Adam Smith drew the line under in a compelling way. It is ironic that Free Trade Agreements are the vehicle for the capitulation of anything but free markets in intellectual property and ideas.

The second area of carve-out, and this is really the important one, is from competition policy and competition law. One of the things we often neglect with the direct importing of legal regimes and trade agreements and international treaties, is that we do not look at what we are not importing in terms of the offsetting regimes that accompany some of these legal frameworks.

If we look at intellectual property law and copyright, while we have holus bolus with a stroke of the pen adopted the US regime under the Free Trade Agreement, what we have not imported are some of the offsetting protections. If you look at Europe there is a strong tradition there, particularly in the patent and drug area, around the legislative promotion of generic drugs – sort of a framework concept that we are far from here. But more importantly in the US and in Europe, the whole framework of anti-trust legislation has been crucial in providing balance to a lot of the abuses around intellectual protection, and of course we have none of that here. That has been a really neglected part of the whole Free Trade debate.

The other thing that strikes me when I look at the systemic failure is the lack of focus and attention in public policy discourse in the US, where you are not seeing the addressing of issues, you are seeing in what we can describe as parallel areas, or issue areas. One of the things I like to do when I work with my technology companies is, when they come up with some bright ideas as draughtsmen, ask them what does this sort of problem, or product, or potential service, most look like in action. You learn what it might mean to implement and employ something, and it is interesting to

ask yourself the question, ‘what do these copyright and IP issues often most look like in other areas of public sector debate and public policy concern?’ I thought when I was looking at the Conference programme, would it not be great to get some people from other fields, like interesting thinkers around economics, particularly around development economics. This took me back to one of my heroes, Amartya Sen, who of course, won the Nobel Prize in 1998 for his work in development economics, and his science is really around social choice theory.

What does that imply for intellectual property? It is how we make choices around the balance of priorities within a community, and one of Sen’s famous observations from his work was that famines have never occurred in a country with a democratic political framework. That got me thinking, because when you look at his work, it is all about the causes of famine in un-democratic – in unopen societies – where there is a failure of equitable distribution. We are saying that in these key areas, failure of distribution does not occur in the democratic society where people sort of vote against anyone who disregards basic needs. He defines poverty, which I find really interesting, as a serious deprivation of certain basic capabilities, often through expropriation. You have these areas of public policy investigation that are posing seriously interestingly questions, which in my view apply directly to the discussion of intellectual property and copyright issues. It is interesting in my mind to ask the question of why does intellectual or knowledge deprivation (you know freedom is the lack of capability) occur in this class of sustenance we call intellectual capital, which is so crucial to feeding the mind and creative spirit? Why do we have to accept potential poverty in this area, when we do not accept that in the physical world? And failure within a democratic society is a failure of the greatest magnitude.

The second area of systemic failure I see is caused by positive policy distortions, and here governments are at fault. The problem here is the total lack of balance in current government policies with respect to the generation and exploitation of knowledge and intellectual capital. I was reading yet another Federal desk report on commercialisation of IP in the public sector and the only matrices they looked at when they looked at public sector research institutions and universities were twofold – one patents and secondly the number of spin-off companies – and this sort of mindless obsession with the notion that success is getting intellectual property out into a spin-off company as quickly as possible is distorting the public discourse and behaviour in this whole domain hugely.

The problem there is the lack of balance it causes against the offsetting public policy imperative (and we can see the lack of public policy discourse around the whole notion of technology diffusion and take-up across the whole economy and within the community). It is again this lack of balance, and the lack of attention to the issues of distributional efficiency or equity, that this matters. If we look at what is happening in the digital and technology world, what we are seeing is the impact of network effects at the macro-economic level. The more rapid the technology diffusion, the more rapid the take-up, the greater the externalities that arise from the wide-ranging penetration of new ideas and know-how. But that notion of realising the community benefits of the externalities is completely at odds with the notion of expropriating public sector funded knowledge into the micro-economic level of the firm and start-ups and so forth. This is a lack of balance which is starting to become a serious problem, not only in Australia but more widely.

The second point I noted was the abnegation of public policy leadership and what is interesting is that all the exciting initiatives, like the Creative Commons and so forth, are not coming from government, but from non-government organisations, special interest groups and so forth. If we look more broadly across the intellectual property domain, and not just at copyright but also at the whole patent domain and what is happening around technology innovation generally, we are seeing a fundamental ground shift in the way the private sector is thinking about intellectual property and its exploitation, which is very reassuring.

There is a fabulous book that just came out by a Californian practitioner called Hank Chesbrough called *Open Innovation: The New Imperative for Creating and Profiting from Technology*.[38] It really brings together the sort of radical shifts in the way that major technology companies, like Intel, IBM and CISCO, are thinking about how they exploit IP assets and recognises that you cannot develop intellectual capital on a vertically integrated, closed model in the way that we did in the past, and that the open diffusion and transfer exchange of innovation across firms within markets, is now working to the benefit of all.

We pull out the great anti-heroes of copyrighting – Microsoft or the Motion Picture Association or whoever – but in doing so we often ignore the fact that there are profoundly important developments happening and a shift of the ground in the corporate scene which reinforces a re-balancing of the

[38] (2003) Harvard Business School Press, Cambridge.

public policy agenda despite the lack of attention of government. One of the signals of this is also the greater focus and push by industry around standards, formation and so forth. You will see in the online world the role of groups like The World Wide Web Consortium in very much pushing an open innovation model, where in fact sort of proprietary IP is positively frowned on. That gives me some encouragement, but it is a great pity that its developments have not been paralleled in government thinking in the public policy debate.

The third point I just wanted to end on was the obvious one of the failure of government's administration of its own public assets – our assets. There are a number of areas here that are interesting and a number of them were highlighted for us from work that I did with Stuart Cunningham and CIRAC here at QUT on the role of innovation and research and development in the whole digital content sector. There has been a serious lack of attention to the impact of IP regimes on collaborative practice and inter-disciplinary research, and that is going to be one of the big issues into the future, but more directly the lack of explicit recognition of the role of, particularly, public cultural institutions in the innovations system. What you see when you look at it, when we looked around this whole digital content arena was in fact that a lot of really important break-through innovation was coming out of museums, places like The Centre for the Moving Image, which I chair, around meta-data standard development and so forth. It was totally not recognised in the charters of these organisations, not legitimised in terms of how governments see the role of these cultural institutions, and, not surprisingly, not funded. It has been a really important, default, but largely underground role, and the challenge for government is to see the positive role of public institutions within a whole innovation system.

A related point is the role for public cultural institutions, in particular, as open content repositories. We have seen the initiatives like the BBC Archive in the UK, but the role of the ABC, museums, galleries, places like The Centre for Moving Image, open content repositories, in a country like Australia is crucially important because in a small country economy like Australia it is only in the public sector that you find the scale that potentially can make a difference. Here public cultural institutions can play a disproportionate role in creating critical mass around open content repositories and it would be great to see more attention given to that.

Finally, the failure of government to address the issue of Crown copyright is extraordinary. We have been so slow in reforming this area in Australia

compared to the intelligent discussion and debate you see in countries like the UK. We are so far behind, but it is one of the areas where the more you talk to industry players, a change in policy so that governments put the IP assets they develop or control – our assets – back into the public domain is one of the crucial things that could make an enormous difference to not only access to content but also industry development in Australia. If Queensland is going to be such a Smart State, and thinking about the question of how Queensland might respond to being the birthplace of the Creative Commons in Australia, then it would be fabulous if we could see an announcement that Queensland is going to adopt a Creative Commons framework for its crown IP. Let me end with a note that comes back to that parallel of content, knowledge and the reservoir of creative expression that makes up our civilisation, and say in no democratic society would we let people go hungry and starve to death for lack of food, but we do not put the same passion and attention into making sure that the intellect and the creative spirit does not starve to death because of a poverty of ideas and creativity.

That is really a perfect segue into the next presentations, which will be as a group. Dr Anne Fitzgerald and Neale Hooper will be presenting on certain projects within the Queensland Government, in particular a project called Information Queensland, on applying Creative Commons philosophies to Crown information.

DR ANNE FITZGERALD

I should preface this by saying that what we are saying here today is not an official statement. Although a lot of what we do say is already included in published documents, submissions made by the Queensland Government, in particular, to the Copyright Law Review Committee's (CLRC's) present enquiry into Crown copyright which is available on the CLRC website. Neale Hooper and I had a hand in drafting those along with people from other departments, so I should also put a rider here. It is very difficult to come and talk about something you have been so closely involved with for such a long time and to try and encapsulate it in a few minutes. Apart from yesterday, for the previous six working days, I have taught intellectual property law for 5 hours per day, five days straight at Macquarie University, and then Monday here in the Internet Law course at QUT.

The topic, and particularly the way Dr Cutler has led into it, does raise a lot of issues. A simple solution is to say you would have more freedom, more

competition, more ready access to material, if you removed copyright. If we remove that set of proprietary rights, if we say that no one has rights in information, apart from the person who can get their hands on that information and then make something of it, that will allow that person to inevitably turn it into another proprietary product, which will probably be locked up and made less accessible.

The answer to the question is not so simple as to say abolish Crown Copyright. Unfortunately licensing as a concept and practice was not particularly addressed in the Crown Copyright Issues Paper and Discussion Paper (July 2004). It has been approached much more from the point of view of the academic, or ex-academic, doctrinal lawyers, rather than the way that copyright is used in practice, which is essentially from a licensing perspective. What we have seen, in looking at freedom and access and the remix of material, which is essential to culture, the fabric of society, the running of our communities, knowledge about law, judgements, government information and so forth, is that it is not necessarily the case that that information is going to be made more freely available and accessible by the removal of copyright. It may be made more accessible by retaining copyright. It is very strange in this era to think about removing copyright. The approach that has been developed through Professor Lessig's group – which is really now expanding internationally – is to assume the existence of intellectual property rights but to more creatively make material available. Whether we call it free licensing in a software sense, open content licensing has a lot of attraction.

I would like to go through very briefly what we are talking about with the CLRC Inquiry. For those of you who are not really familiar with it, there are special provisions in Part VII of the *Copyright Act* which set out special rules relating to Government ownership and Government use of copyright material. Special rules apply to the kinds of materials in which governments attain copyright. These rules can be seen to operate somewhat more broadly than those that would otherwise apply under the general provisions of the Act. For example, sections 176-178 of the Act say to us that government obtains copyright in materials that are produced by or under the Director or control of the Crown. If we deconstruct that we can see what we have got here is, as well as harking back to our general provisions of the *Copyright Act* and how copyright comes into existence in works 'made by authors', we have this add-on, this particular phrase, 'Made by or under the direction or control of the Crown'. It has not been subject to any significant interpretation. There is one case which has dealt with it in passing, but when you look at the kinds of materials in which

copyright would exist from a government perspective, and the kinds of materials which governments need to be able to control, you can see that you can categorise them into really essentially three broad groups.

What we have is the usual situation that any employer is going to be in of materials that are made by the employees. In a government context we could interpret that statutory formula as also including material that has been commissioned by government from outside contractors or suppliers. It is as if a default rule is read into that – it is arguable as to whether this is the correct interpretation of the law but it has been accepted by academic commentators as being the way that the law operates – to say that where government commissioned material, where something is made under the direction or control of the Crown including under a commissioning contract, that copyright would by default, unless there is some agreement to the contrary, vest in the Crown.

There is a whole other group of materials which in fact the CLRC did not address at all in its initial report on Crown copyright. It was pointed out to them in the submissions that went in from Queensland Government that there is a massive amount of material that government holds and collects and that is essential to the performance of the State's constitutional function, which would also arguably come within the statutory formula of 'made under the Director or control of the State'. And that is where you have got provisions set out in legislation, regulation and often hugely detailed administrative guidelines, requiring people to lodge materials of a whole range, so that some kind of document, which may be a report, which in itself would be the kind of material that would attract copyright protection, you are required to do this under a statutory obligation to produce that material and lodge it with the State.

Those kinds of materials are usually required for carrying out public administration – the kind of thing that, when you are in Government, it is pretty obvious that you need that material embodied in those documents. Essentially you need the information and it just happens to be embodied in documents which also attract copyright protection. It is material that is quite essential to the functioning of the State. It could be detached from those particular documents and reorganised so that you do not have to worry about the copyright in the document in which it was submitted. But those are really the three broad types of groups which we could say you could identify in terms of the kind of material that Government deals with.

The present CLRC Inquiry kicked off from a two-line comment that was made by a previous Committee, the Intellectual Property and Competition Review Committee, in its 2000 report, which was an overview to ascertain whether the intellectual property legislation was satisfactory under the competition principles. It essentially addressed the second of those two categories that I have referred to. Where you have got it being interpreted as there being a default rule that goes into operation where governments commission material to be produced by contractors, essentially people are saying, 'well this puts the Government in an unfair bargaining position'. A lot of people do not understand the operation of this rule.

Without getting into the arguments of whether that is correctly the case, or whether that is in fact government practice in this day and age, the CLRC Inquiry, as it states at the beginning of the first discussion paper that it put out, the Issues Paper (February 2004) essentially starts from this. There are some competition concerns about the operation of these provisions of the *Copyright Act* which invest copyright in the State. We can identify the concerns about competition on the one hand. But our concern really in this context is what has tended to be the concern of the State, which is not so much the competition concern of enabling other people to get hands on that government material so they can make downstream products from it, but enabling members of the public to obtain ready access to that material so that they have ready access to information which is relevant to them.

The CLRC put forward a range of suggestions as to how what it perceived as the unfairness in the system could be addressed. Interestingly, it did not seriously propose any extension of the existing set of exceptions in copyright. Copyright, as we know, is really a balance of interests: the balancing of the rights of the creators of the material on the one hand and the interests of dissemination of information, the interest of the general public on the other. The CLRC in its 2002 report *Copyright and Contract*[39] had stated that the rights of copyright are in fact defined by the exceptions and limits.

Interestingly, the CLRC in this enquiry is not really interested in access to copyright material by general members of the public; what they are interested in is not so much there being a greater set of exceptions or limitations, which would enable people to use parts of those materials;

[39] Copyright Law Review Committee, *Copyright and Contract* (2002) <http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Copyright_and_Contract>

what they are more interested in is those materials being copyright free and essentially being collected and created into new copyright products. Probably it would have been better if they had addressed this more openly in the report. Because the other thing is that when we start looking at that spectrum in Australia we start looking at the inevitable differences between our law and that of essentially all of Europe and the United States.

Our low level of originality means that copyright is easy to attain, whereas in the United States you will not really obtain copyright in a factual compilation or in a collection of material in which there is no pre-existing copyright. The same would really have applied throughout much of Europe. In Europe they have introduced specific database legislation to protect those kinds of collections of materials. The problem that we have is that unfortunately, the CLRC did not significantly address the interests of increased access to Government material, the underlying theme seemed to be, 'let us see how we can remove copyright in whole from various categories of documents so that those entire categories can be freed up', obviously for some implied further downstream use. If that further downstream actually use results in production of copyright materials that, in turn, will have a deleterious effect on access to the materials which we were trying to free up. My point about it not really being an issue of access is that CLRC in this enquiry did not raise in any way the issue of fair use. It had been recommended in the CLRC's report of 1998 that I participated in as a member of the Expert Advisory Group. The CLRC recommended the introduction of a broader style US fair use provision. That recommendation was supported by the Joint Standing Committee on Treaties, which reviewed the implementation of the Australia-US Free Trade Agreement, acting late last year, so lots of interesting issues are raised by the idea of removal of copyright from government materials, but essentially what we can say is that that step in itself is not necessarily one that is going to result, in the not too distant future, in improved access to those materials.

NEALE HOOPER

I found myself in violent agreement with many of the comments and observations of Dr Terry Cutler. I was almost wondering whether that was what I should be doing and then to balance things up a little there was a bit of a sting in the tail of his address when he came along to the concept of Crown copyright. I understand and respect those views. It is a point of contention. There is obviously a public policy balance here and that is what we are really discussing and debating, that the whole idea of balance is

what it is about. Open content licensing, let us be clear about this, is not the silver bullet. It is not the panacea. It is not the only solution to all these problems. But we are operating in a creative industries environment as a matter of intellect and as a matter of looking at the options that are available for the management and licensing and use and access of the products of intellectual endeavour – the open licence model is a very fine model, which is worthy of very close consideration.

I am expressing my personal views here. But I bring a wealth of experience from the public sector. My understanding and my experience has been that government is bringing quite an open mind to the degree to which it might utilise and implement these open licensing models. The reality is that government is, as Dr Cutler said, a very significant repository and custodian of major data sets. The citizenry have a right very often to access those databases. They are strategically important from a Government perspective. In fact they often arise – and this is what Anne Fitzgerald was alluding to – they often arise incidentally to the operation and provision of government services on a day-to-day basis. But they are strategically, fundamentally important to the efficient operation of government. The citizens of the State have paid, indirectly and directly, for the creation of those data sets.

Terry Cutler will take issue with me now about how that contribution by the public might be best recognised. I do not wish to put words in his mouth, but I suspect he would say, 'let us just dispense with Crown copyright. It has already been paid for by the public once. Why should it be paid for again?' Of course, the private sector and commercial enterprise and undertakings equally would have free access to that, so it becomes a question of balance. It is not a question of all or nothing, and I suspect Dr Cutler does not think that either. But the irritant, or the point on which we are refocusing in the public policy arena, is what balance we strike about accessing public sector intellectual property and, indeed, intellectual capital. I hope you will forgive me for that, but I just wanted to set it in perspective and it is not a question of all or nothing.

With respect to the CLRC, they are somewhat naïve to think that you either do have Crown copyright or you do not. Their view seems to be basically there is no good reason for it, so let us do away with it. I agree also with Terry Cutler about the importance of rational and considered debate on these topics. The UK has gone through that process. Significantly, and very often, critics and those in favour of the abolition of Crown copyright do not mention that under those other initiatives of reform, etc. a lot of the

fundamental rights of government (if I can use that term) in fact are preserved under licensing regimes or whatever.

It is not as if the UK has just abandoned Crown copyright; it has not. It has achieved an objective with a better balance, enabling government to still conduct itself in, hopefully, an effective and efficient manner, but at the same time freeing up – and if I may say this as a practitioner in this space, I am all for that – the utilisation of very valuable public sector intellectual property assets. The moving, if you like, or the promotion – I like the word promotion – of those public sector assets, in a sense out into the private sector, all under collaborative arrangements, is a highly desirable outcome. We want further commercial movement and activity in this State and in Australia as a whole.

I agree very strongly on a personal level with Terry Cutler's comments. Australia has dropped the ball in many respects. We can be doing so much better and we have such respect from around the world, if only we realised how highly regarded our software writers are, our creative people. We can do as good a job as anyone. With the light touch – and I am getting a bit political here – that government has displayed to date, primarily at the federal level, we might have done a better job had we been a little more pro-active and perhaps worked a little more closely in liaison between the private and public sectors.

Government is obviously a recipient of information as well as the creator and custodian of information. It is vitally important in my view that government does understand the open content licensing regimes because, as a recipient, for argument's sake, of open source software, which government will undoubtedly increasingly take up, if for no other purpose other than the increased security which the technical experts assure me is available through open source, the government needs to be aware of the terms and conditions, the obligations that it is under when it receives that open source or open content material. In other words, Government needs to be acting in a responsible, lawful manner in accordance with its contractual obligations.

On that purely pragmatic basis of being a recipient of information – a simple example is the open source software – it needs to be mindful and aware of those conditions. On the other side of the coin is that it also needs to be aware of the possibilities offered by the Creative Commons, the open content licensing arrangements, which all had significant part in the open source software initiative, that is where the genesis was, because the open

licensing arrangements afford governments significant opportunities to increase the accessibility to these data sets or its other intellectual property; yet, at the same time, not simply relinquish unthinkingly its intellectual property rights.

As I said at the beginning, it is not all or nothing. It is not copyright or public domain. That is not the issue. The open licensing arrangements provide, as I see it, a very useful tool under which Government can rationally make available, more readily perhaps and I am not opposed to that at all, access to its information and data sets. For instance, without once again being political, the Queensland Government does have things called Information Standards. They have got an Information Standard No. 13, which deals with access to Government information. I am not saying that is a panacea. I am trying to say Government to some extent is starting to address these issues.

We also have Information Standards in relation to intellectual property more generally, so I am trying to say that Government is starting to think about these issues. They have been doing it for some time. A Smart State initiative has at its core a very significant emphasis on the collaboration between the private and public sectors, the promotion of public sector intellectual property out into the private sector in appropriate circumstances. Which is most instances, unless there is a good reason why the ownership should not be retained by Government. There is a whole debate about the intellectual property ownership in legal judgements and Acts, which I will not get into. That is a separate issue. But in these creative endeavours the multi-media world, etc. open licensing affords government a very real opportunity, through initiatives such as the spatial information industry, which deals with mapping information – say in a Department such as Natural Resources and Mining. And, if you think about it, the repositories of the data sets, say for mining, for land title information, etc. these are all extraordinarily valuable, important data sets. They need to be managed properly.

The open content licensing regime enables Government, for instance, to give free access where appropriate to the citizenry, if there is a non-commercial use. We have heard all these issues before about who is the information to be made available to? Is it a commercial entity? If that commercial entity is going to make a profit, the public policy issue is, if the Crown can still retain the copyright in it, but enables that private sector entity to value add to that, to create further products, you know the jargon, derivative products, enhanced products, well that does not mean that the

Crown's intellectual property should just be abolished. It should be respected. It should be acknowledged under the open content licensing model. It does not mean an abolition of Crown copyright, but what it does do, it frees it up. It enables people to use it more readily on clearly understood terms and conditions.

In summary, government needs to understand the issues around open licensing regimes. Creative Commons provides a very exciting and useful model under the licensing and management regimes that government needs to seriously think about and there will be use made of it in appropriate circumstances. Let the debate begin as to where that should apply in relation to what material and how we best implement that in an effective and efficient way.

DVC TOM COCHRANE

Before the age of 17 one of the questions with which my childhood was most frequently visited was, 'what are you going to do when you grow up?' I had a variety of answers to that, and not one of them contained the word 'copyright'. Not one of them expressed the sentiment that I was going to spend a lot of time thinking about and talking about and writing about copyright. I suspect that everyone in this room is the same – that this is not necessarily a vocational aspiration that you identified at a tender age. But we are all here and we do, I know, represent a full gamut of views on these issues.

What I want to do with my part of the presentation today is to step outside this room. And although the perspective is informed by some of the jobs that Stuart Cunningham just outlined, and in particular a background as a Library professional for some years, and involvement with some of our cultural institutions, in particular in an advisory capacity with the National Library in the 1980s and 1990s; and although it is informed by the experience of being on the two references that I enjoyed being on with the CLRC, the second of which was extremely engaging and on the question which is to prevail in the sense of contract overriding copyright law – my remarks are based on experience as an administrator responsible for seeing that, in a very large institution, we do the right things.

Universities and large cultural institutions are quite rightly seen by most people as places of enlightenment. They are places where expertise is developed and where you expect to find experts. They are places where,

usually, you expect people to be very confident about their opinion in their discipline, and particularly in their opinion about how the place should be run, and to be proud of their way of dealing with complexity, except in one area. Raise a copyright issue or query, issue a copyright notice, make a statement about the matter, and the most familiar responses are that passing look of bewilderment, followed by the moment of relief at realising that someone else is going to think about this. More recently, I might add, and in the context of the word 'music', more responses are better described by the words 'indignation' 'disbelief'' and outright contradiction, as happens in cases where we send a network broadcast to the university community reminding them of what they can and cannot do in terms of the deployment of music, including music for private consumption in the work place.

The essential issue in our institutions is that they are places where people use, deploy, repeat, manipulate, generate, modify, share and publish information and knowledge. If I extend the writing metaphor that was used so usefully in Professor Lessig's keynote address, the issues that face us in the next few years are not to be resolved by a process of virtual infinite sub-division of the components of that knowledge and information into building blocks that have price tags. If I extend the metaphor, it is not that each letter of the alphabet as redeployed in each new word is to generate itself new revenue. Now that statement is in direct contradiction to what is a generally expressed, but not necessarily in that form, view about what the next few years might be about.

I want to talk about a couple of things in a couple of arenas that have developed by way of copyright activity and response in our institutions and then engage at the end in the issue of what open content licensing, and, in particular the now-approved Australian version of the Creative Commons licence might, on the ground, mean for QUT and for other institutions.

We have intense activity in our institution under the general banner of on-line teaching. It provides every day a stream of questions about what is to happen with the deployment of copyright material. For some years we had an online teaching environment in which our main constraint was that material which was copyright, material which the University should be expected to recognise as copyright, could not be deployed in that environment.

The break through came in the passage of the agreement between CAL and the AVCC in 2001, which mirrored really the way that the Australian legislation at that stage was being reformed. And without going into some

of the deeper questions of the legal precepts and some of the assumptions about IP on which our statutory licensing is based, I must say that when we exchanged views with our colleagues in other jurisdictions, in particular in Europe and, for other reasons, in the US, the statutory licensing scheme in its current form – and generally speaking at its current pricing – is the envy of many people who are responsible for administering learning and teaching environments and research environments in other institutions. Having said that, there are many issues involved in considering the future of that, and those who are concerned with that will be spending a lot of effort on that in the next few years.

What is interesting about the most recent developments in relation to copyright law in Australia, and which I have seen from my particular portfolio perspective in the last few years, is the extent to which those who are responsible for network administration, those whose background is professional IT work, need suddenly to engage with issues that frequently surprise them. Of course, one of the things that has happened with the most recent amendments to the Act is that it has become necessary for Universities and other institutions to clarify the extent to which they need to respond to safe harbour provisions and other provisions that really need to be administered by those people in our institutions who are not, in their normal vocation, involved with content issues.

It is well known that one of the great paradoxes in the economics of what we do in Universities is in the area of research and research output. I am sure most people now in this room are familiar with the proposition that one of the most extraordinary things that happens is that a very large amount of the formal research output of our institutions is developed by people who do not expect direct remuneration for what they do. They are doing it for recognition, certification, engagement with their discipline communities worldwide. Their discipline communities are their most important points of engagement and unless they have specific commercialisation intent, or unless they are publishing in an area which normally returns royalty, what they expect is that recognition.

The process of quality certifying it is also one which is provided gratis. The great majority of refereeing activity is provided for nothing. This is an old issue. For years people have been pointing out that when that material is re-purchased by the sector seen internationally as one entity, at the most inflated prices that exist in the world of publishing, something is seriously amiss. In the last few years we have seen a lot of discussion, a lot of theorising about what might happen, but more recently more practical steps

being taken to try to ensure the freeing up of the on-line research literature. What is interesting to me is that, having monitored this from virtually the beginnings of the argument, which are over ten years old, the real momentum has been gained, being led by disciplines and researchers, not by institutional fiat, not by any kind of more heavy-handed approach. Having said that, the reality in which information is provided day to day in our institutions is that we are increasingly finding high-bred models for provision so that in some cases an information request might be satisfied by having recourse to finding quality information on the net, other times it is satisfied by having recourse to the increasingly impressive array of material that can be licensed in libraries in both universities and elsewhere.

Into this mix of issues about learning and teaching and about research and research output arrives the artful compromise (I did not say artful compromise yesterday, but artful is a great adjective) and one of the things that we will do here following the decision last Monday is that we will look at the way this can be deployed in a way that is useful for our students and for our staff. I know the way we do that will be quite constrained in some of things that we look at, but let me just share with you a couple of things that people have said in the last few months, once they have got the hang of what this Creative Commons stuff is about. Someone in our Business Faculty – a Head of School in our Business Faculty – listened and then said, "Tom, that is going to be very useful in resolving ambiguity in cases where we want students to work collaboratively to prepare material which then gets assessed.

In particular, case study work, which is quite often a feature of higher undergraduate or postgraduate study in business, was in his eyes an ideal case to assert Creative Commons licensing over.

In some cases all this will do is clarify and codify for people things that they now have great uncertainty about. And the problem with uncertainty is that it generates not only confusion and inefficiency, but it also, in the long term, can be seen to generate inhibition in what people are willing to do.

Another issue arising for us is the frequency with which student work either as exemplar or simply for the purpose of generating greater community in class groups is to be shared online. In the area of research there is a more public discussion about the applicability of Creative Commons licensing to some of the repository developments that we have. We already know, we were reminded yesterday, that the Public Library of Science is using this kind of model but there are many others that might

and will be considered in the future. Indeed we have our own institutional repository for refereed research output and other research output at QUT.

One of the first things we will do is review whether there might be some way that we should be looking at the terms of this licence applying to all or some part of that repository. On both research and teaching and learning fronts there is a set of things for us to do. In the Creative Industries area, in particular, it is also going to be looked at with great interest in terms of its practical implication and implementation over the next few months.