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CHAPTER EIGHTEEN

SUBMISSION TO CLRC ON CROWN COPYRIGHT*

Brian Fitzgerald

My submission is that in preparing its report the CLRC should consider the role of ‘open content’ licensing in the management of Crown copyright.

Ten years ago the question would have simply been whether the Crown should or should not have copyright? Many advocating for no Crown copyright would have been seeking open access to information.

Today however we know more about the intricacies of open content licensing. It is arguable that a broader and more robust information commons can be developed by leveraging off your copyright rather than merely ‘giving away’ material.

As has been explained elsewhere:

The powerful insight that Richard Stallman and his advisers at the Free Software Foundation (such as Professor Eben Moglen of Columbia Law School) discovered was that if you want to structure open access to knowledge you must leverage off or use as a platform your intellectual property rights. The genius of Stallman was in understanding and implementing the ethic that if you want to create a community of information or creative commons you need to be able to control the way the information is used once it leaves your hands. The regulation of this downstream activity was achieved by claiming an intellectual property right (copyright in the code) at the source and then structuring its downstream usage through a licence (GNU GPL). This was not a simple ‘giving away’ of information but rather a strategic mechanism for ensuring the information stayed ‘free’ as in speech. It is on this foundation that we now see initiatives like the Creative Commons expanding that idea from open source code to open digital content. The context for this is the underutilisation of significant amounts of digital content. Through concepts such as ‘digital junkyards’ people are allowed to access digital content for the purpose of reutilisation and further innovation. Taking digital content from the commons, as under the open source model, may carry obligations such as attributing the source and owner of

the digital content or sharing back to the commons your derivative product. In this creative commons model intellectual property rights owners manage and control their rights at the source to structure open access downstream:
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If the Crown is to have the capacity to strategically manage Crown copyright either in a closed manner for maximum economic reward or in an open fashion for maximum public access then it is my submission that Crown copyright should remain. The copyright becomes the key tool in managing downstream usage – open or closed. A proposal that the Crown does not have any rights to copyright material would in effect reduce the ability of the Crown to structure user rights and otherwise manage information.

Once it is acknowledged that Crown copyright should remain the question then becomes what kind of material should be available for open access and in what way should open content licensing be used to structure that access. To this end in its report the CLRC should engage with and evaluate the significance of open content ‘licensing out’ models in achieving open access. In doing so it should also evaluate how such licensing models could be employed to facilitate open access to Crown copyright.

For a system of open content licensing to prosper in government, policy on information management needs to be clearly articulated in accord with core democratic principles and where necessary legislatively reinforced. In other words if the Crown is to retain copyright its obligation (as fiduciary of the people?) to license out certain kinds of information in an open manner should be articulated, at least at the level of principle. If Crown copyright is to remain the CLRC should consider, at very least, the principles upon which this copyright material should be available for access – (when and on what conditions it should be available). The spectrum seems to run from copyright material that will only ever be commercially available through to copyright material that may be subject to open content licensing that ensures the broadest possible access to that information.

The approach taken in the EU (pp. 40–42 Issues Paper (Feb 2004)) and that contemplated in the UK (pp. 44–45 Issues Paper) appears to reflect the philosophy that government copyright should remain and that what becomes important is the management of that information downstream.

* This submission was made to the Copyright Law Review Committee in 2005 during their inquiry into Crown Copyright www.clrc.gov.au. This was first published as *Crown Copyright Submission No 17* by Professor Brian Fitzgerald. The original submission is available at: www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Present_Inquiries_Crown_copyright_Submissions_2004_Sub_No_17_-_Professor_Brian_Fitzgerald