Blue Sky Conference: Future Directions in Copyright Law

The Future of Copyright, Queensland University of Technology

Sydney, February 25, 2011

Francis Gurry, Director General, World Intellectual Property Organization

Video

I am delighted to have the opportunity to participate in this Conference. I commend the Faculty of Law of the Queensland University of Technology (QUT) and the principal organizers of the Conference, Professor Brian Fitzgerald and Ben Atkinson, for taking up the gauntlet thrown down by the digital society.

Few issues in intellectual property or, if I may suggest, cultural policy are as important as the consequences of the revolutionary structural change introduced by digital technology and the Internet. Recently, as the number of people in the world with access to the Internet passes two billion[1], support for addressing the consequences of this fundamental change has come from the highest levels. Both President Sarkozy of France and President Medvedev of the Russian Federation have called for the G20 to consider the issue. In his speech at Davos earlier this year, President Medvedev stated that “the old

principles of intellectual property regulation are not working anymore, particularly when it comes to the Internet". That, he stated, "is fraught with the collapse of the entire intellectual property rights system".

Digital technology and the Internet have created the most powerful instrument for the democratization of knowledge since the invention of moveable type for printing. They have introduced perfect fidelity and near zero-marginal costs in the reproduction of cultural works and an unprecedented capacity to distribute those works around the globe at instantaneous speeds and, again, near zero-marginal costs.

The enticing promise of universal access to cultural works has come with a process of creative destruction that has shaken the foundations of the business models of our pre-digital creative industries. Underlying this process of change is a fundamental question for society. It is the central question of copyright policy. How can society make cultural works available to the widest possible public at affordable prices while, at the same time, assuring a dignified economic existence to creators and performers and the business associates that help them to navigate the economic system? It is a question that implies a series of balances: between availability, on the one hand, and control of the distribution of works as a means of extracting value, on the other hand; between consumers and producers; between the interests of society and those of the individual creator; and between the short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture.

Digital technology and the Internet have had, and will continue to have, a radical impact on those balances. They have given a technological advantage to one side of the balance, the side of free availability, the consumer, social enjoyment and short-term gratification. History shows that it is an impossible task to reverse technological advantage and the change that it produces. Rather than resist it, we need to accept the inevitability of technological change and to seek an intelligent engagement with it. There is, in any case, no other choice – either the copyright system adapts to the natural advantage that has evolved or it will perish.

Adaptation in this instance requires, in my view, activism. I am firmly of the view that a passive and reactive approach to copyright and the digital revolution entails the major risk that policy outcomes will be determined by a Darwinian process of the survival of the fittest business model. The fittest business model may turn out to be the one that achieves or respects the right social balances in cultural policy. It may also, however, turn out not to respect those balances. The balances should not, in other words, be left to the chances of technological possibility and business evolution. They should, rather, be established through a conscious policy response.

There are, I believe, three main principles that should guide us in the development of a successful policy response.

The first of those is neutrality to technology and to the business models developed in response to technology. The purpose of copyright is not to influence technological possibilities for creative expression or the business models built on those technological possibilities. Nor is its purpose to preserve business models established under obsolete or moribund technologies. Its purpose is, I believe, to work with any and all technologies for the production and distribution of cultural works, and to extract some value from

the cultural exchanges made possible by those technologies to return to creators and performers and the business associates engaged by them to facilitate the cultural exchanges through the use of the technologies. Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests.

A second principle is comprehensiveness and coherence in the policy response. I do not think that there is any single magical answer. Rather, an adequate response is more likely to come from a combination of law, infrastructure, cultural change, institutional collaboration and better business models. Let me take each of those elements and comment on them briefly.

Law was for many decades, if not centuries, considered to be the way to make copyright policy. It must still be the final arbiter, but we know that it is a rather rigid and limited instrument in the digital environment. In that environment, the volume of traffic, the international or multi-jurisdictional nature of so many relationships and transactions and the loose regulation of the Domain Name System, which permits a large degree of anonymity, all make law a mere shadow of itself in the physical world, a weakened force. Its institutions and their reach are trapped in a territorial cage, whereas economic and technological behaviour burst out of that cage some time ago. In consequence, the culture of the Internet is such that platforms influence behaviour as much as, if not more than, law.

Recognizing the limitation of law, and its inability to provide a comprehensive answer, should not mean that we abandon it. There are many important legal questions to be addressed. Among them, I believe that the question of -- and here I use, or misuse, advisedly a term from civil law -- the responsibility of intermediaries is paramount. The position of intermediaries is key. They are at once, service providers to, as well as partners, competitors and even clones of creators, performers and their business associates; hence the difficulty that we have in coming to a clear position on the role of intermediaries.

As I have hinted, I believe that infrastructure is as important a part of the solution as law. Let us dare to say that the infrastructure of the world of collective management is out-dated. It represents a world of separate territories and a world where right-holders expressed themselves in different media, not the multi-jurisdictional world of the Internet or the convergence of expression in digital technology. This is not to say that collective management or collecting societies are no longer needed. But they need to re-shape and to evolve. We need a global infrastructure that permits simple, global licensing, one that makes the task of licensing cultural works legally on the Internet as easy as it is to obtain such works there illegally. Time does not permit me to go into detail here, but I would like to repeat two messages from recent conferences[2]. First, I believe that an international music registry -- a global repertoire database -- would be a very valuable and needed step in the direction of establishing the infrastructure for global licensing. And, secondly, in order to be successful, future global infrastructure must work with the existing collecting societies and not seek to replace them. It should provide a means of linking them into a global system, much as the Patent Cooperation Treaty (PCT) links the patent offices of the world, rather than replacing them.

Beyond law and infrastructure, we have culture, and the Internet has, as we know, developed its own culture, one that has seen a political party, the Pirate Party, emerge to contest elections on the basis of the abolition or radical reform of intellectual property, in general, and copyright, in particular. The