The Structural Framework: Encouraging Creativity or Stagnation?

Singer and lawyer Karen Knowles seeks greater protection for artists' expression.

With the onset of the various new technologies changing the realities of existing industries, when looking at the "big picture", there is a need for legislative intervention and a need for business adaptation. We then have some big questions to answer:

- What are we encouraging?
- What are we valuing?
- Does the current framework serve these purposes?
- Is it time for a review?

HISTORICAL POSITION OF CREATORS IN AUSTRALIA

Historically, the position of creators in UK and Australia, as compared with continental Europe, has been very different. French law has long recognised rights of creators and artists whereas in the UK and Australia no natural rights are granted to the creator.

It is well established that Australian law is predominantly based on UK precedent. Over recent years, with its joining into the European Community, it has been necessary for the UK to adapt its laws in unison with other European countries. As a consequence, this obviously gives European laws more influence in Australia. However, it remains to be seen whether this influence will bring about cosmetic or more fundamental change in Australia.

DEFINING CREATION

The traditional view of what is meant by creation is an action by which, through adding, subtracting or combining previous elements, a completely new form is forged that did not previously exist. An artistic creation is that which transcends the mundane, questions or even provokes, provides us with a better view of who we are or deeply touches our inner self.

In this era, with the predominance of the balance sheet and content that is futile, superficial or simply entertainment seeking immediate gratification, creation is often undervalued.

CLRC REPORTS

In Australia, we are currently engaged in an overview of copyright. The Copyright Law Review Committee ("**Committee**") has recently released two reports – the first predominantly dealing with exceptions to the exclusive rights of copyright owners and the second predominantly on the simplification of the *Copyright Act 1968* ("**Act**").

It is important to note, as Professor Dennis Pearce hastened to add at a Copyright Society Seminar late last year when speaking about the release of the first report, the limited terms of reference granted to the Committee when preparing these reports. Specifically, Professor Pearce noted that the Committee was not directed to review the policies behind the Act – the focus was on the simplification of the Act rather than a general review of copyright laws.

In relation to the first report, some commentators such as Peter O'Donoghue of Jacaranda Wiley Publishers have made some comments worthy of further consideration. Mr O'Donoghue noted:

- the need for some more hard thinking about the new paradigms and what these mean in practice, rather than merely preserving and extending privileges into the new world;
- the use of the word "balance" in the context of digital technology is nonsense;
- in the case of copyright and digital technology, the need to define what a normal exploitation is before we look at exceptions; and
- the proposed changes in the first report will mean *"bucket loads of extinguishment"* for authors and publishers.

On this last point, when a member of the Seminar panel was queried about the potential drop in copyright owners' incomes if the Committee report recommendations were adopted, their reply was that the parties could seek a determination from the Copyright Tribunal about equitable compensation. A quick reality check would indicate that the cost involved in such an application is clearly prohibitive for most creators and therefore not a proposal of substance.

PROPOSED LEGISLATIVE AMENDMENT: DIGITAL AGENDA BILL

The Digital Agenda Bill has also recently been put forward by the Federal Government for comment.

The media release on the Bill and the stated objectives of the Bill appear to be at odds. While the promotional media release on the new Bill states that the Bill intends to promote "creative endeavour", one of its stated objectives is to reinforce the traditional utilitarian model of what is worthy of copyright. Under Australian law, no natural rights are given to the creator. I note with surprise that one well known commentator has expressed relief that this is clearly stated in the Bill's objectives. I, conversely, ask why, as we approach the 21st century, we are seeking to entrench what has always been, instead of seeing an overview of Australian copyright and new media law within a global context and with due consideration to the broader objectives of encouraging creativity. Surely we are now brave enough to break through the closed cycle of the past and consider other ways to achieve objectives of a flourishing, more dynamic society.

In the current constantly developing environment of new technologies redefining markets, use and misuse of ideas and forms of expression, we now need a definition of "creative endeavour". If we want the tradition of creative people to flourish, we need to discuss the possibility of defining this term, even from a legislative perspective, and not to allow ourselves to be easily overcome by simplistic rhetoric.

There is of course a fine line between what can and should be legislated for, and what should be left to other means to achieve stated objectives. Other considerations such as how such means can be manipulated without the backing of legislation need also to be considered. In that regard, I believe it is wishful thinking to believe that voluntary codes of ethics alone can protect creators if they are not legally binding.

Some may argue that defining "creation" is some sort of censorship. The contrasting argument is that without such a definition, a full "free-for-all" access, either to the original inspiration or the supposedly newly existing form, easily leads to a loss of meaning.

BUSINESS PRACTICES - THE REALITY

Aside from the various leaps and bounds being made in the technological spheres, from an historical perspective, most would agree that nowadays we live in a period of stagnation in relation to the creative arts.

In the musical field, aside from popular dance music, which uses the new technologies and means of adaptation to the full, a majority of today's releases are sticking to a proven formula, using and re-using well worn out conception and ideas, essentially going through the motions. Indeed, as mergers of the large corporations become more prevalent and impose their market share, there is an increase in the practice of old proven formulas being funded, and such music being the only music available on shelves.

While this "is just the way it is" for many, it is all too clear that this environment and attitude does not promote new ideas, concepts or true creation.

AMENDING COPYRIGHT OR OTHER MEANS?

We also need to question whether we should be solely considering the amendment of copyright or looking at other means.

Colin Golvan has raised the question whether the right of copyright can in fact provide the much needed and fundamental incentive to produce works. He discusses the possibility of protection against "unfair copying" and notes the dilemma of the two opposing arguments, which are:

- the application of a general prohibition against unfair copying to copyright may too heavily favour restrictions against the use of ideas (that have always been exempt from protection under the Act); and
- that in an age of free copying, it is too easy to disguise the form of expression of ideas as ideas and avoid copyright protection completely.

Susan King, in a more general sense, notes the limitation of copyright stating that *"current intellectual property laws are concrete parameters set out for concrete materials"*.

On a practical level, a major problem that faces us in the new media environment is enforcement. New measures are required in order to adapt. As an example, there are many musicians and audio artists who are now actively engaged in "found sound appropriation" and the ranks of outlaws are continuing to grow. These issues pose the following questions:

- Is the law of copyright relevant there?
- How do we balance the need for artists to have resources open to them while at the same time not encouraging plagiarism?
- Should we be promoting some sense of what is valuable in order for a proprietary right to ensue?

A WAY FORWARD

We need an international viewpoint when considering these issues as to talk merely from an Australian perspective is insular and ignores the reality of the new global environment. In this relatively new environment, such questions are surely required to be addressed in order for us to move forward.

This discussion is not merely the domain of legislators. Business people constantly make choices that affect these outcomes. I believe that we need to build international networks, working within our circle of influence and accepting responsibility for the society that we desire.

An encouragement to me in presenting these views are the comments made by Justice Michael Kirby, now of our Australian High Court, who has long argued that law is too important to be left

exclusively to lawyers, judges or parliamentarians.

Today I speak for the often silent voice of creative people and encourage a consideration that creators should be invited into the fold. There does exist a danger that copyright law reform will be driven by economic concerns of trade and competition rather than by an understanding of art and culture.

Finally, John Mountbatten in *"Law: The Big Picture"* has made the following comments with which I concur:

> *"Like art, at its best, law should aim, more often than it does, to challenge and, where necessary, shatter the shibboleths of received orthodoxy which inhibit human flourishing. Law should positively encourage the liberation of our deepest personal and social aspirations and point us – wherever possible – in the direction of the sublime".*

For me, that is the big picture and that is the challenge – not just for legislators but for us all.

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Protection for Internet Consumer Transactions - A Purpose-Built International Consumer Protection Convention

Consumer protection for the Internet is a growing concern for governments across the globe. Daril Gawth argues the case for an international consumer protection convention.

For the first time in history, because of the Internet, we have a technology which allows and encourages literally millions of people to engage in minor consumer transactions to purchase goods and services internationally (those where the consumer and the merchant aren't in the same country); but only a new body of international law - a technology-neutral international consumer protection convention - would be effective in legally protecting such transactions. Why is that? The need for an international consumer protection convention arises for four major reasons.

Firstly, current international trade protection laws, such as the *Vienna Sales Convention*, are simply inapplicable to consumer transactions, those where the buyer is a private individual.

Secondly, national consumer protection laws, such as the *Trade Practices Act* and the *Sale of Goods Act* in Australia, whilst applicable to consumer transactions, are not applicable to international consumer transactions - they just don't operate outside their own national boundaries.

Thirdly, even if an extremely-determined legitimately-aggrieved consumer were to try to pursue a remedy via (say) an action in contract in a foreign court, virtually insurmountable problems would arise. There implicitly exists an approximate monetary threshold below which it would simply not be cost-effective to pursue such an action. For convenience, that threshold could be set as low as about $50,000. Thus, if you spent $50,000 or less on purchasing goods or services internationally (via the Internet or otherwise) and the deal went wrong, then you've lost your money in the present legal regime - possibly a very large sum of money. Also, there will be enormous complexity, delay and uncertainty involved; and that will *follow* a dispute about who has jurisdiction.

Fourthly, one solution being explored by some - industry self-regulation ("improved" or otherwise) - just isn't practical, unless you think asking the fox to look after the chickens is a good idea.

Thus, in practical terms, there currently aren't any means which offer effective (relatively cheap and simple) avenues of redress for aggrieved international Internet consumers. This fact is recognised by many, but no solution has yet been provided.

Interestingly, the recent arrival of the Internet (with its projected usage growth rate) hasn't created the problem - international consumer transactions can be mediated by other means - but the Internet has intensified it, and powerfully stimulates demand for an effective remedy. The Internet is a social and technical phenomenon to which the law has not yet adjusted.

Protection is required to provide an appropriate mechanism for resolving post-transaction problems. These could arise where there are fully-performing consumers but, post-transaction, such consumers *prima facie* have some legitimate grievance concerning performance by a foreign Internet vendor, and where the vendor is hostile, uncooperative or unavailable, or there is some other problem with them preventing resolution of the problem. Such grievances will typically involve non-delivery or wrong-delivery of goods and services.

There are some who consider *any* regulation to be excessive; that regulation will simply strangle an emerging new economic force in its infancy, and that "market forces" will regulate the market. In recent times even the US Government appears to have taken a similar view - in *"A Framework For Global Electronic Commerce"*, President Clinton stated that *"governments must adopt a non-regulatory, market-oriented approach to electronic commerce"* - but apparently to allow it room to grow in its formative years only (it stretches credulity to suggest that any government would allow any