5th World Summit on Arts and Culture

Round Table: Moving fast and flexible - the changing landscape of digital technologies

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‘Cultural Funding Agencies in a New World’

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Part I: Introduction

I would like to make a preliminary point before going to the main point of my paper. A new technology does not inhibit arts practice. Never has; never will.

Rather, it decimates the technology that it supersedes. CD didn’t eat away at music – it destroyed the market for vinyl records; MP3 didn’t destroy music – it massacred the CD business. And this last example is a good one: technology does not ‘eat away’ at traditional art forms, arts practitioners or arts audiences. It may, however, ‘eat away’ at the business models upon which the commerce of the art form is based. In music, in an era when CD sales are down and digital sales are rising, income from live performance has never been higher. Music is not suffering from a download culture; audiences are certainly not suffering. Record companies are suffering. Perhaps some artists are suffering. But both record companies and artists realise that they have to change their business models in recognition of the new circumstances.

Technological development promotes cultural richness and diversity.

From the creator’s point of view, new technologies provide new ways to create their art. They also provide new means of making that art available to its audience; how it is advertised and promoted; how it is distributed and delivered; and which middlemen are used to do these things.

From the audience’s point of view, emerging technologies are changing the way it hears about art that interests it; the way the audience tells others about its experience of art; the way it collects the artefacts of art; the way it participates in art practice.

From the point of view of agencies that provide funding in the support of art, technological change is extremely challenging.

Part II: Changes in the way that Support Agencies work

The easiest path is to support what you are used to. After all, most arts support organisations are still probably divided into conventional art form areas; Does this really work in an age in which art-practice is more and more cross-media? Given the changes in the marketplace, does the shape of the arts funding bureaucracy, divided according to traditional artform sectors, really reflect the new cultural world or is it just comfortable to stay with what we know? If we are worried about the greying of audiences, do our funding models in fact exacerbate the problem rather than challenge it?

Let me pose the challenge this way: Imagine that the management of your agency was taken over by Google, one the most successful on-line technology companies in the world.

- How would your agency change?
- How would it reorganise the structure of your organisation?
- How would Google relate to grant applicants?
- How would it evaluate and process proposals?
- How would it impact on the cultural aims of the organisation?

I am not suggesting the Googlisation of your agency! But I am suggesting that every agency examining the challenges and opportunities provided by the new technological environment, would benefit from looking at such different and instructive models.

Part III: The role of copyright

I also want to focus on the role of **copyright**. I have spent a career in the world of copyright. I am a supporter. I am not a person who believes that the Internet has made copyright redundant – that it no longer has a positive role in cultural life.

That said, I do think that it is time to reflect.

Technology drives legislative change and legislation affects cultural policy. It is essential that your national cultural support agency actively monitors and reflects upon proposed changes to copyright legislation. Further, the national cultural support agency must have an active voice in the shaping and drafting of your country's copyright legislation.

Part IV Example

Let me give you a practical example of how you can be more effective and your modest resources can be more effectively applied if you actively participate in the legislative process that is a fundamental part of the way that copyright law adapts to technological change.

Those responsible for copyright legislation, understandably, deal with the Internet largely from within their own paradigm – one which seeks to protect the existing legal structure and which is reticent to recognise the public benefits that can come from a truly open balancing of the public interests involved.

In copyright world, until the copyright period expires, the owner of the copyright in a work has the exclusive right to decide when where and how their work is reproduced. This control is an acknowledged public good. It is at the very heart of copyright.

Let's take the example of an art museum. In museum world, a museum's website is a tool for granting and promoting public access to the institution's collection and public services. It is fast becoming one of the very important ways in which such institutions fulfil their mandate - their public purpose. The website is only interesting and informative if it is rich in content – and in the art museum, content necessarily means visual images. The ability to digitise artistic works and provide public access to them through the museum's website is a public good.

However, anyone who works on the digitisation of museum collections understands that copyright is one of the great problems that they face. Identifying and locating the true copyright owner is an administratively expensive and time-consuming task and the legal machinery of obtaining individual licences impedes the implementation of the public purpose, the public good, of the institution.

In Australia we have a provision in the Copyright Act 1968 that is supposed to assist public collecting institutions, to provide a clear process so that collecting institutions are able to publish copyright works on their site and make them publicly available (section 200AB).

What do we really have? We have a provision that provides a process written in obtuse language that sets out a procedure that is absolutely impracticable if you have a digitisation program that requires the reproduction of thousands of works. The process is so expensive and cumbersome that it does not deliver the intended public cultural good.

What is happening? This is a classic example of two public goods colliding - and the safe haven response is to provide a solution that, only apparently, provides a solution for the collecting institutions while at the same time recognises the exclusive rights of the copyright owner. Such non-solutions bring copyright into disrepute. They are a danger to the copyright regime because they make it seem that copyright is antagonistic to the benefits that technology can bring.

How much would my theoretical art museum save in administration if it were able to change the workflow in its digitisation program? Hundreds of thousands of dollars.

How would it affect management of legal risk and the cost of insurance, if the institution had the benefit of that clear statutory licence?

How would public access be improved if the collection were available on-line?

What am I suggesting? In this example, why not have a simple mechanism that permits public art museums a right to reproduce copyright artistic works on their website provided that certain conditions are met: Conditions that are clearly articulated and not administratively burdensome. What damage is done to the interests of the artist if a public museum that owns the work, reproduces it on its own website as part of its public access mandate?

Of course any statutory licence must provide protections:

- The museum would be required to be a public museum – and it is simple to put conditions around that requirement.
- Regulation of the quality of the reproduction is easy (so that the copy is not suitable for commercial reproduction;
- Acknowledgement of authorship and the basic moral rights would be required.

In other words, you set up a statutory licence for the access to artistic works for use by public art museums in which the required administrative burdens focus establishing the qualifications of the institution and the settings of the system rather that the reproduction of each individual work.

We know that this would be possible. For many years we have had a system of statutory licensing in the music industry whereby anyone is entitled to make a recording of a musical composition of song provided that it has already been recorded and publicly released. When it was introduced it was seen by many people as an assault on the exclusive rights of copyright; an assault on the rights of private ownership. But it is now recognised that a carefully constructed statutory right of access can turn competing public benefits into concurrent public benefits.

What might we learn from this example?

First, that it is essential that a nation's principal cultural agencies have a voice in legislation that affects culture. You must be an activist and provide resources to it. No one else in the governmental hierarchy is going to be the voice of culture. No one in government better understands the cultural sector and how legislation might better promote the public cultural interest.

Secondly, in a world in which there is a great shortage of cultural funding, and every funding agency is besieged by its clients needing more money, it is very easy to concentrate on improving the oversight and governance of the process of grant application, award and acquittal in the belief that this is improving the effectiveness of the government money spent on culture. The statutory licence example is just one way that legislation could be used to cut unnecessary expense within a museum's budget and free up the money for real cultural benefit.

Part V: Conclusion

So, as a copyright lawyer who has spent a career specialising in legal issues in the cultural sector, my message today is this. You are among the guardians and the promoters of culture in your country. Technology is providing everyone in the cultural sector with new forms of making, marketing, distributing, viewing, participating and making money.

It is also providing cultural support agencies with similar opportunities. This is not a time to be defensive. It is an opportunity to reflect on how best to deliver the agency's services in a cultural environment that is rapidly evolving.

One of these opportunities is through legislation. If it is to achieve the best public outcomes, the process of reforming the law of copyright requires active participation from those within government who have responsibility for the creation of cultural policy, the articulation of that policy and the funding of it.

Legislation in general, and copyright in particular, must not be allowed to stifle the cultural public good; it must promote it.