Policy and Politics behind Intellectual Property Laws

Peter Banki*

Policy and Politics behind Intellectual Property Laws

Peter Banki

Abstract

Speech given at Session 2: World Communication: Where is Technology Leading Us? Is it technology? Is it economics? Is it content? Mr. Banki furthered the debate by adding that some people think it's the law. He mapped out some of the legal problems, mostly in the intellectual property laws. He also noted that some of the things which were talked about at the conference give rise to legal issues.

POLICY AND POLITICS BEHIND INTELLECTUAL PROPERTY LAWS

Peter Banki

We've heard a lot about what's driving this debate. Is it technology? Is it economics? Is it content? I guess my role this afternoon is to tell you that some of us think it's the law.

I will try to map out some of the legal problems, mostly in the intellectual property laws. Some of the things, as you have heard about this afternoon, give rise to legal issues.

We've heard a lot about technology, the speed of communication, and the cost of telecommunications compared to five or ten years ago. There is access across national borders, there is access to a growing range of materials, and there is access in many forms — multimedia — a host of ways in which material can now be made available to a user.

Without question, there is a technological imperative in all of this, and, for years, law reformers have been grappling with it. The technological imperative demands that users are able to use the technology that's available. The sad news is that the law takes so long to catch up.

Today, there is a new development — there is an access imperative — and it is at the heart of all I am going to say.

You can see the many ways in which people argue the imperatives of access. It is based on notions of freedom of communications. Interoperability — not just in the hardware area, but also in the software area — facilitates access. There are demands that information must be accessible in terms of the hardware and software of the technology.

There is a parallel argument against proprietary rights being used to prevent access and to somehow corner the market in the valuable parts of new developments in these technologies. So, in the name of building on the past and investing in innovation, there is an argument that proprietary rights are something to be avoided.

There is also a suggestion abroad that everything should be

---

* Partner, Banki Palombi Haddock & Fiora. Mr. Banki is the Chairman of the Australian Copyright Council.

digitized. It can be and it should be. This extends to what's in the museums. Materials now capable of being digitized should be, and access should be given as a matter of public policy.

All of this will expand business and trade opportunities. "If we don't," say nationals in one country, "others will." Someone else will beat you to the punch. Most take the position that everyone ought to be able to compete. This amounts to the imperative of access versus individual rights.

From the point of view of the carriers and service providers, the laws that are most relevant have to do with industry structural issues, telecommunications, broadcasting, computing, radio communications, and laws relating to the way in which the joint venture arrangements are built and developed.

For the content providers, and for business generally, the relevant legal issues concern the laws relating to what could be generally described as electronic commerce — securities issues, laws of evidence, the question of digital signatures, consumer protection issues, and business law in general.

But, in relation to individual rights, there is another area of the law that is often forgotten. These are laws relating to content — intellectual property — mainly copyright, to a lesser extent trademarks, privacy of information, classification of materials, censorship issues, and cultural questions. These are the "forgotten laws," if you will. These laws relate to individual rights. I am going to concentrate on copyright and highlight a few of the copyright issues that I think these modern communications give rise to.

There are policy issues and there are practical questions. Here, in no particular order are some of them. Let me deal with the policy issues first.

One of the big policy questions is what you should protect. The real issue here is how much should be protected — whether, for example, one should raise the level of protection for copyright and only make that available to materials that meet a certain artistic criteria.

Under Australian copyright law, for example, with one exception relating to works of artistic craftsmanship, there is no test of artistic merit. In fact, it doesn't matter how lacking in merit the subject matter is. If it's yours and you can show you

created it, you are protected by copyright. There is an argument that the entry barrier is too low and should be higher.

There is also the issue of whether to protect other materials, not just the works that authors create. Under Australian copyright law, for example, certain other subject matter is protected, such as broadcasts. The question arises: should transmissions which are not broadcasting also be protected by copyright. There will be a range of possible protected subject matter. If one increases the amount of protected subject matter, will this be a barrier to access?

Once you decide what is to be protected, the issue is what levels of protection to give to this existing or new subject matter. At the moment, for example, under most laws protected subject matter is protected against broadcasting. The copyright owner has a number of exclusive rights, including the right to authorize the broadcasting of the protected material. One issue is whether copyright should include the sort of transmissions most of the speakers have been talking about today, transmissions on the Internet.

But how wide should copyright rights be? If one goes too far and grants broad rights, there may be an access problem.

What about the issue of moral rights? These exist in some European countries. These are the rights that allow authors, including self-publishing authors, as a consequence of the new technology, to insist on being attributed as the authors of a work and to prevent the distortion and mutilation of their work in certain circumstances. What do such rights mean for material which is placed on the system in one country, used in another country for an author whose rights are protected in yet a third country. Once you've released a work, is it there for the taking? How does that gel with ideas of moral rights, attribution, and protection against distortion and mutilation?

This raises difficult questions: what is the responsibility of the carrier? The service provider? The owner of the web site? The user? Perhaps all are liable. Licenses will vary according to the legal system. A person may be liable for copyright infringement in certain circumstances, depending on what role the person plays.

Obviously, telecommunications companies and copyright

collecting societies are taking different views about these issues. They must be resolved in setting up the system.

Most importantly, I think, from the point of view of the rights owners, is the measurement system for what should require permission and what can be done without permission. In other words, should a user have to get permission from the content provider every time he uses the material or if he uses a little bit? What should be the measurement? "Less than a substantial part," which is the basis for copyright infringement? Or "fair use" or "fair dealing" under Australian law? Should the test be the one used in international convention, "normal exploitation?" It seems to be that none of these concepts makes much sense in the context of modern communications technology. Where you set the boundary — where you draw a line in the sand — will be very important.

What are the practical issues?

One that I think is emerging with the expansion of communication technology is the growing importance of copyright collecting societies, and the way in which, representing groups of owners, they negotiate with users for protection and for fees. What that does for the collecting societies is it forces them — and not least of all because of the technological imperatives — to start selling their services. They haven't done this in the past very well. They have really just sat there and the users would come to them. But, I think in the new environment, the copyright collecting societies will go out and hawk their goods, perhaps in competition with other societies, and contact the buyers. They might, for example, become clearinghouses in the multimedia environment.

Another practical question for copyright owners is how they enforce their rights. Even if they have protected subject matter and they've got copyright rights, what do they do about enforcing them? How can they detect infringements? And, even if they could detect them, what practical remedies are available to enforce their rights?

A particularly important practical problem is for those who are building the systems to make sure that they acquire the necessary rights. Under many copyright laws, for example, the status of commissioned works is not clear. Business must ensure that its position is protected in all jurisdictions.

I think, finally and most significantly, that what is happening is that the traditional way in which intellectual property has been dealt with for many by territory, is no longer relevant. You used to divide a copyright up according to territory. Now, there is only one territory, and that's the rest of the world. Once you put something on the Internet, it's going to be very difficult to carve up territories and distribute or transmit rights accordingly.

It might be possible, for example, if you are licensing the use in territory *A* of a web site in territory *B* to obtain a license to reproduce that material in your territory. But once the material is on the server, anyone can access it. So the copyright owner in territory *B* really must now think, in terms of his business, whether it is desirable for any use in territory *A*, because of the potential for anybody to access it from anywhere, and to possibly copy it, or retransmit the material.

Thank you.