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Kathy Bowrey, “The new, the bad, the hot, the fad – popular music, technology and the culture of freedom”*

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I want to begin with an observation about a current fad or fashion that has developed within the digital copyright law discussions of academia.

- Why do we always presume that the primary site of battle over digital technologies and the law is being fought out in the legislatures, global law making bodies and the courts?
- Why do we imply that the outcomes in these places will actually determine what our access to technology and content will be tomorrow or even next year?
- Why do we pretend that the public matters because what is at stake will affect them directly, but really only take the public into account as an object of legal regulation - as really little more than slaves to structures determined elsewhere?
- And why do we fear that the public will probably embrace the new restrictive technological goods and services, even though we also know that a few noble and some dishonourable but skilled die-hards will continue to provide tools to resist the spirit of the new legal enterprise?

As lawyers needing to respond to ongoing proposals for digital copyright law reform we have been drawn into pondering the significance of legal institutions and their deliberations, with too little contemplation of the developing global social relations of the law. In haste to respond to the ‘law on the books’ academia has run with a kind of – often unrecognised - legal and technological determinism that infects many of the discussions and most of the books about the legal environment of the digital future.

Even though there may be an attempt to accommodate social complexity and limits to predictability of social behaviours, I think debate is legally determinist where the emotional content of the text is an unexamined fear that legal subjects are going to obey these bad laws anyway. A fear of legal obedience – that there will be a crossing over from widespread non-compliance to social acceptance of the ‘Say Yes to Copyright’ message is the current subtext of much writing. There may be a suggestion that, in the future, consumers will have no choice but compliance. Perhaps the next generations will be won over by copyright education and propaganda. Perhaps non-compliance will become too inconvenient for the time poor or technologically challenged to engage in. Non-compliance might be rationally judged as too risky or expensive for the middle class to pursue. This all may also eventuate, but if it does, to me there is more to the WHY of this than just pointing the finger at the legislature and Big Business grinding down resistance to the laws and pushing restrictive, inefficient

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technologies,¹ as a sufficient explanation of the social and legal transformation taking place.

According to writers like Bauman (1973), Foucault (1977), Donzelot (1979), amongst others, the construction of Modernity involved the development of new forms of social or cultural regulation that operated at state level in terms of welfare delivery, and also in terms of a reconstruction and intervention at the community level, down to family.

Whatever term you want to use to describe the global condition we are now in - postmodernism, information capitalism, the network economy, Empire - what are the cultural mechanisms or forms of social control that support this state of Being?

Communications technologies are clearly one of the current forms of social and cultural regulation, but we should take care not to be technologically determinist here. Copyright owners cannot determine the digital marketplace and global society simply by effecting copyright laws that enhance control over distribution from their end, even with ISPs in tow.

In terms of a “marketplace” view of the world there are conflicts between content owners and appliance makers. There are conflicts within multinational media conglomerates between the various related enterprises.² There is no simple synchronicity in ambition between established American and Japanese technology makers, and even more complication when you consider the Korean, Indian, Malaysian and Chinese technology businesses.

A more careful look at how technologies function as agents of social control – and how the networks and appliances mesh with new technologically inscribed forms of identity, is essential.

But I am only going to focus here on two details:

Firstly, I want to flesh out one site for optimism. I think the marketing of contemporary music and communications technologies seriously interferes with the embedding of any “Don’t steal music” message at a cultural level. Established technology marketing disrupts the reception of the new legal culture and its technological controls.

Secondly, though it is a new thing, and is generating some excitement at the moment in my country, Australia, I have some concerns about the creative commons, or digital commons movement’s ambitions. It seems to me that this movement, despite its noble intentions as the foundation for a form of freedom, is also a global form of juridification of civil society. It is about securing an identity and consciousness that is expressed as a legal sensibility/subjectivity. On a practical level it is impossible for an artist to remove themselves from the implication of legal relations when they distribute work to the public. But whilst there has been legal engagement, there has also always been a level of frustration and resistance to identifying too much with legal aspirations of any kind. Perhaps that cynicism towards legal power is a good thing. And in any case in terms of strategy, not trusting the lawyers - even the nice ones - might be something we should learn to live with, rather than trying to embark on conversions to the legal faith.

¹ For a discussion of the success of inefficient technologies see Shirky, (2003).

² See Rose (2003).

Technology Marketing

Information capitalism is associated with businesses maintaining flexible production techniques, linked to increased cycles of information flowing from producers to consumers and back, feeding very short product cycles and life spans. It is a state some have called 'perpetual innovation'.³ Associated with this there is a shift from physical to experiential commodities:

a shift towards goods "either used up during the act of consumption, or, alternatively, based upon the consumption of time, as opposed to a material artefact". (Kline 2003 p67-8)

This is supported by the development of new technologies and appliances – the DVD, MP3, cell phones – devices capable of freeing “previously dead time and empty space” into “purchasable experience.” (Kline 2003 p66) These commodities are not just useful objects or new tools. The objects cannot be consumed, dissociated from their advertising:

Advertising is not simply an adjunct to the system of objects: it cannot be detached therefrom, nor can it be restricted to its 'proper' function (there is no such thing as advertising strictly confined to the supplying of information). (Baudrillard, 1996 p164)

In this system of manufacturing desire the style and brand of the Walkman, the MP3 player and better still, the iPod⁴, is a key to communicating identity to others. It is not enough to consume digital music as a private experience in this economy. It is not simply about the convenience of purchasing a portable music service and consuming that service. The ephemera associated with the gadget, the symbolism, the cultural meaning of the experience – its fashionableness - matters too. But given the fluidity of these identities we construct within a perpetual innovation cycle, there is an ongoing need for us to reinvest in new purchases, to refresh ours identities and aesthetic experiences, in response to the new trends.

As experienced, affluent consumers we know the game element of this. We understand the functional obsolescence of the technologies and the disposability of the associated signs. We know this is especially true in the case of popular music⁵ - with its emphasis on hits, discovering new talent, celebrity, appropriating different cultural styles and reworking of old genres. This is music designed by business enterprises for mass consumption and once pushed through new media like radio, cassette-singles and video hits. And changing the specific delivery mechanisms and music formats to streaming media or per pay downloads is not all that groundbreaking an experience for consumers, inured to the flux of product cycles associated with both the music industry and with entertainment technologies.

The Recording Industry anti-piracy messages only focus on music as an artefact divorced from the technological modes of its consumption. The primary commodity experience suggested is the social relation between the artist and the fan.

³ There is a good overview of this concept in Kline et al, (2003) at p66ff.

⁴ It is worth noting that the distinctive white headphones of the iPod have become an important sign in a different economy- rendering wearers to risk of mugging. See Haines, (2004).

⁵ See “Popular music” Wikipedia. Available at http://en.wikipedia.org/wiki/Popular_music

Many do value this connection a great deal, but I don't think this one relation is able to obliterate other meanings and associations suggested by the experience of music consumption. You can't readily suppress the social meaning of the technological delivery mechanism as part of the choice that is made through consuming particular music. And I don't think you can easily suppress a common sense appreciation of commodity cycles and an understanding of the control that music consortiums could exercise globally over them, through strong copyright laws. Lots of major and minor artists have told us fans about the disputes they have had with their labels. The industry has always exercised control over creative content through contracts, often related to unfair conditions, anti competitive practices, sharp management practices. This knowledge of the industry interferes with any simple message they push that the industry protects the creativity of the artist and supports product innovation. The industry itself panders to this knowledge in its bad boy/girl, rebel image marketing of artists with an Attitude.

So why is the anti-piracy message grudgingly assumed to be a potent force?

The anti piracy message tries to dis-embed the consumption of music from the full range of signs and mix of meanings associated with that practice. This goes against the description of this age or stage of capitalism by most critical theorists – who use terms that emphasise the fluidity of identity and the flux associated with production and consumption of those identities. I just don't think the music industry can really sell a Piracy message that tries to capture one particular meaning in isolation from other messages and sell that en masse, or even to a few, for long. We are too used to information capitalism and the affluent are too sophisticated and demanding as consumers.

On a practical note, there is also the problem of limited income, ever increasing disparities in wealth in our communities, and the realities of consumption choice that will interfere with the selling of a reduced music experience. For example, one of the most consistent findings in market surveys of youth is the high level of cell phone penetration and the cost burden on youth budgets.⁶ It is an environment of multiple, competing, discretionary, price sensitive communications expenditures.

Of course the response to that is the return to law - that the music industry is so powerful, conniving and strong globally that they will be able to control access to technologies that offer 'more' than a service constrained by strong copyright that inhibits the consumer experience. The suggestion is they can drive the Korean appliance makers into copyright compliance, regardless of the demand for their unshackled communications products. And vertical integration of these communications and content networks will continue alongside this, to swamp consumer choice.

There is already a certain degree of cynicism amongst consumers over a felt gap between the promise of new technology, and what might actually be experienced on delivery. But in an industry traditionally associated with a premium on hype and freshness, operating in tandem with a culture of technology that traditionally sells by offering new enhanced experiences, what is going to drive demand for these sad products? Who is going to want to buy them? And what will prevent the anti-piracy message from being another kind of distinctive information branding- another part of the mix of related consumption choices - discarded in its time, alongside other fashions?

⁶ Global Information Inc (2003); Robin Robertson (2003).

This is not a ‘have faith in a free market and be exuberant about the social or creative potential inherent in product innovation’ argument.⁷ Rather my analysis is sceptical of that politics. But it is driven by a belief that manufacturing desire has a history for us. It has a meaning for us as experienced consumers. And it is not that easy to overcome this history by embarking on a different kind of marketing. The current practices are a part of who we understand we are and what our role is, as consumers in an information economy. And because of that it is hard for any player in the information economy, no matter how large or well connected to law making bodies, to simply compartmentalise the depth of that experience and seek to smother unwelcome parts of it by new legal words, and set off in another marketing direction.

So perversely, my claim is that the success of the mechanisms that drive the information economy at this point in time, creates cause enough to doubt that digital copyright reform is really worth the crushingly overwhelming attention it has been receiving from IP critics. It is an interesting battle where the nexus of law and economic power is patently exposed. But arguably it is equally the smaller and seemingly less dramatic changes to things like trade marks law that entrench the global power of the well known brand,⁸ that will ultimately have much impact on social life, creativity and our experience of consumption. Here there is far less meaty jurisprudence to chew because it is presented as the law simply ‘updating’ its logic to global economic realities. Whereas with digital copyright the claim is that the law is embarking on an entirely new trajectory, at odds with its history.⁹ This ahistoricises the connection between IP laws and the development of capitalism, implying there is some natural, optimal association or trajectory – rather than conflicting political choices about economy, society and law that have been and continue to be made.

The digital commons movement

It used to be argued that the shift to technological forms of copyright control combined with ‘clickwrap’ contracts, were a threat to the copyright balance established in legislative provisions and potentially a dangerous erosion of sovereignty.¹⁰ It was feared that private power would be extended globally and penetrate more deeply via distribution of works over the internet, where it is possible to control and terminate access in ways impossible to do with hard copies of works. However the current loss of faith in government and legislation, as protectors of the public interest in a ‘balanced’ copyright regime, has led to a significant reappraisal of the role of private law in the information economy.

The digital commons movement is an attempt to move on from the limited agenda set by digital copyright reform, and strike out in a different direction. Building upon the free software and open source programming traditions, one strategy for ‘restoring’ the copyright balance now involves advocacy of public spirited copyright licenses for content in order to construct a digital commons of information. For example, in Australia we have seen the launch of a ‘Free for Education’ licence¹¹ which gives creators and users of educational content a range of options including

⁷ This is characteristic of the popular writings of Larry Lessig, advocated alongside the need for ‘balanced’ IP rights that embody that spirit.

⁸ See Klein, (1999).

⁹ See for example, Boyle (2003).

¹⁰ Copyright Law Review Committee (2002).

¹¹ Available at <http://www.aesharenet.com.au/ffe/>

free and non-free usage, and the introduction of a new 'Creative Commons' Australian licence,¹² which copies the model developed in the US.¹³

There is some attraction in lawyers using private power to found a new global 'sharing' sensibility and in them advocating the importance of creativity to the economy and society. However, what is here described and justified as an 'international' social movement and the foundation of an important freedom, is also an extension of legal power and juridification of a communicative sphere that many once embraced as "free", as meaning outside of effective legal practice. The 'information wants to be free' slogan of the 1990s¹⁴ was in part a celebration of the impotence of formal law and regulation on the internet.

Whilst lawyers were relatively quick to point out the improbability of this state of affairs lasting, and Lessig (1999) amongst others explained the role of other kinds of private regulation in cyberspace, for many the anarchic 'free' movement of information was part of the attraction of the internet, and especially of peer to peer.

Is attaching a creative commons license actually necessary to establish freedom? Legally it is not, and traditionally it was argued that as a matter of law there was an implied license to use works made available via websites for free – free as in free beer.¹⁵ Has the 'piracy' message changed our culture so much that the legal presumption is now that any 'copyright-unbranded' works available online are all to be feared as potentially infringing copies? To rebut a presumption of illegality do we now need to formally affirm our status as lawful proprietors of the copies? The 'civility' of the commons is that of the respectable property holder, graciously consenting to specified free or less restrictive uses, so long as the prescribed notice stays attached.

It is not surprising that it is the sciences, libraries and academia that are most interested in the new licensing regime. Here researchers are already immersed in an institutional and bureaucratic culture. Adding another layer of paperwork, checking consents and documenting permissions comes more naturally here. Compare for example the response of a non-lawyer, Geert Lovink:

But the digital commons as such should, in my view, not be limited to legal issues (implicitly always those of US law). Creativity may end in legal battles, but that's not its source. It is good to have lawyers defending your case in court, but should they appear in every aspect of life? Even those who reject copyright altogether will in the near future be forced to "metatag" their work with a legal document. Like wearing seatbelts, licensing may become compulsory, irrespective of your opinion on "intellectual property rights". Before the licensing rage kicks off, perhaps it is time to point at the specific US elements in the Creative Commons project and design variations of the CC licenses that are beyond "localisation," tailored for specific countries, languages, regions and

¹² See Fitzgerald (2004). The license is available at <http://creativecommons.org/projects/international/au/>

¹³ For a brief history of the movement see <http://creativecommons.org/learn/aboutus/>

¹⁴ See Barlow (1994).

¹⁵ With the development of the information economy, US thinkers like Richard Stallman and Larry Lessig have been very effective in promulgating the freedom of the internet in terms of free speech. As Stallman explains, "'Free software' is a matter of liberty, not price. To understand the concept, you should think of 'free' as in 'free speech,' not as in 'free beer'". See Gay (2002) p41.

cultures. In the meanwhile, we should be realistic and demand the impossible: "A license-free world is possible". (Lovink 2003 at 55)

To a copyright lawyer this attitude seems strange or naïve. Artists act in legal ignorance to their peril, and art schools and organizations stress that legal awareness is an important part of professional practice. But it should be noted that even Linus Torvalds resents the intrusion of law into his creative programming life:

"I spend a lot more time than any person should have to talking with lawyers and thinking about intellectual property issues," Torvalds says with a sigh. (Rivlin 2003)

There is more to this concern about the prominence of intellectual property issues than simply tiredness, apathy or ignorance. There is an intuitive resistance to juridification, because previously it was possible to express a creative practice without rights awareness assuming such a priority. No doubt how comfortable one is with a rights based consciousness (commonly associated with US civics), is culturally variable. In any case, the spread of intellectual property rights globally is not intrinsically a good thing, even where the license purports to be on the side of the angels.

Legal fads and fashions

Intellectual property lawyers have fashioned their own signs, and forged distinctive attitudes in relation to current developments. Academia itself is becoming branded and there is pressure on us all as copyright lawyers, to display the latest fashionable wardrobe. But in responding to current initiatives there is a need to relate the critical insights of other disciplines and take on board suspicions about the hipness of identifying too strongly with legal culture(s) at all.

This is the mistake made in the anti-piracy campaign of the RIAA and its strategists. There is a presumption that the only form of power that counts is power conceived of in formal and bureaucratic terms. The idea is that if you get the right laws in place, all of us, societies of consumers, will just fall into the slots they make. But this is not what the information economy is all about, and the more diffuse expressions of identity and social power should not be so readily ignored. The notion that individuals will simply obey a legal command is problematic in terms of criminal law. It is even more problematic when compliance involves choices to be made about the meaning of an act of consumption.

For the same reason we should not be surprised if there is not a rush, especially outside of the US, to embrace creative commons licensing. A defined legal identity may be a part of global citizenship. However the formal expression of legal identity is not essential to the network economy. And a law-free sign still has some currency in it, at least for now. It is one of the many identity choices we are still permitted to make and in the name of freedom, we should not abandon it too eagerly.

Barlow, John Perry (1994) "The Economy of Ideas: A Framework for Rethinking patents and copyright in the Digital Age", Wired, 2.03.

Baudrillard, Jean (1998) [1970], The Consumer Society: Myths and Structures: Sage.

Baudrillard, Jean (1996) Transl. James Benedict, The System of Objects: Verso.

Bauman, Zygmunt (1973) Culture as Praxis: Routledge and Kegan Paul.

Boyle, James (2003) "The Second Enclosure Movement and the Construction of the Public Domain", Law and Contemporary Problems, Vol. 66 pp33-74.

Copyright Law Review Committee (2002). Copyright and Contract: Commonwealth of Australia.

Donzelot, Jacques (1979) Trans. Robert Hurley, The Policing of Families: Pantheon.

Fitzgerald, Brian & Oi, Ian (2004) "Free Culture: Cultivating the Creative Commons", 25 Media & Arts Law Review.

Foucault, Michel (1977) Trans. Alan Sheridan, Discipline and Punish: The Birth of the Prison: Vintage.

Gay, Joshua (ed) (2002) Free Software, Free Society. Selected Essays of Richard Stallman: GNU Press.

Global Information Inc (2003) "Youth Mobile Products Market Analysis, Data & Figures": Press Release 7 May 2003. Available at http://www.gii.co.jp/press/w2f1333_en.shtml

Haines, Lester "iPod: this season's must-have for muggers", The Register, 30 March 2004. Available at http://www.theregister.co.uk/2004/03/30/ipod_this_seasons_musthave/

Hardt, Michael and Negri, Antonio (2001), Empire: Harvard University Press.

Harvey, David (1989), The Condition of Postmodernity. An Enquiry into the Origins of Social Change: Blackwell.

Klein, Naomi (1999), No Logo. Taking Aim at the Brand Bullies: Picador.

Kline, Stephen, Dyer-Witherford, Nick, de Peuter, Greig (2003) Digital Play: the interaction of technology, culture and marketing: McGill-Queens University Press.

Lessig, Lawrence (1999) Code and Other Laws of Cyberspace: Basic Books.

Lessig, Lawrence (2001) The Future of Ideas: the fate of the commons in a connected world: Random House.

Lessig, Lawrence (2004) Free Culture. How Big Media uses technology and the law to lock down culture and control creativity: Penguin.

Lovink, Geert (2003) My First Recession: Critical Internet Culture in Transition: V2_NAi Publishers.

Lyotard, Jean-Francois (1984) The Postmodern Condition: A Report on Knowledge: University of Minnesota.

Rivlin, Gary (2003) "Leader of the Free World", Wired 11:11.

Robertson, Robin (2003) "Moving pictures to crackle open youth market", Australian Financial Review, 6 March, 2003.

Rose, Frank (2003) "The Civil War Inside Sony", Wired 11:02.

Shirky, Clay (2003), "File-sharing Goes Social", Networks, Economics, and Culture: Mailing list, 12 October, 2003. Available at http://www.shirky.com/writings/file-sharing_social.html