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Facing up to the IP tsunami

James Eyers

The Australian head of the UN's intellectual property agency finds copyright laws struggling in the digital age, writes James Eyers.

At a recent meeting, China's Premier, Wen Jiabao, told **Francis Gurry** that intellectual property would be the basis of competition in the future.

"And I think he is right," says Gurry, who, as director-general of the World Intellectual Property Organisation (WIPO), is the most senior Australian in the United Nations. Intellectual property, or IP, protects creative works through patents, trademarks and copyright. It is of critical importance to the health of an economy because it provides "the means for monetising all the investment that goes into knowledge creation, and research and development", says Gurry, who was in Australia last week for meetings with government, judges and academics.

The government agency IP Australia says IP is "one of the essential building blocks of Australia's economy".

A recent WIPO study of the creative industries (those that use copyright in one way or another) in 19 countries show they contribute an average of 5.5 per cent of GDP, and an average of 5.6 per cent of total employment. But the technological tsunami of the past decade has created unprecedented headaches for many of these industries, including newspapers and film, as the internet has challenged traditional distribution and funding models.

Gurry, who has spent 25 years at the Geneva, Switzerland-based WIPO and is approaching one year at its helm, says at the heart of copyright is the principle that those responsible for creating a work should receive the financial reward. He says that copyright "was well adapted to the technologies of the 20th century but is perhaps not so well adapted to the technologies of the 21st century", since the reproduction of creative works in the digital realm has left many authors and other creators unable to recoup a fair share from the market.

A threshold problem for lawmakers, and the creative industries themselves, is overcoming the tendency for most internet users to presume that "content" should be free, but nevertheless continue to be created at a high level of quality and made available to the world. Gurry says this is a non sequitur.

"We need to sensitise the public to what is at stake here, is actually the financing of culture," Gurry says.

The system of international copyright law is clunky, requiring countries to sign on to treaties - such as WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty - which themselves were negotiated in the mid-1990s, before the impact of internet-based technology was properly understood.

So any solution will require far more than a legal fix.

During a recent visit to South Korea, Gurry was taken to a primary school, where a character called "Inspector IP" was giving a theatrical performance about the evils of illegal

downloading to hundreds of children. Similar education campaigns are under way across the United States.

Gurry says it is important that young people learn that "the virtual world is not a space of anarchy".

"These kids are growing up using the virtual world all the time, and it is necessary to have some sensitivity to the fact there are also rules of the road on the information super highway that need to be respected."

But the question of the best way to instil such respect is still a matter of some conjecture. Pushing the piracy button too frequently can create a mass of disenfranchised youth with little respect for the law, so can ultimately be counterproductive.

"If you simply beat the drum of piracy . . . you are creating an antagonism in society because you are alienating the consumers," Gurry says.

He points to the recent case of Boston University graduate student Joel Tenenbaum.

Earlier this month, a US jury ordered him to pay \$US675,000 (\$810,000) to several record companies after he admitted to illegally downloading 30 songs and was pursued by the Recording Industry Association of America.

Gurry says: "Going at the level of the consumer is not going to win the battle for hearts and minds."

The dangers of haranguing youth about piracy has been pushed by Harvard professor Lawrence Lessig, who founded the so-called creative commons movement, which seeks to make works available for others to share and build upon, often through digital media, in 2001.

"Rather than continuing this war that is basically criminalising a generation, we should be finding other ways to decriminalise non-commercial file sharing, so kids are not criminals but artists get paid for it," Lessig told The Australian Financial Review.

"The law should be evolved here, for practical reasons. We aren't going to stop file sharing, so we should build a copyright system that can live with it."

Distributors of content-breaching copyright make more appropriate targets of regulatory action, Gurry says, pointing to the successful prosecution in April in Sweden of the founders of the the website Pirate Bay for facilitating illegal file sharing.

The impact of illegal file-sharing technology on the film industry was made clear to the Swedish government last year, when the two producers and director of a highly-acclaimed local film *Let The Right One In* argued that its availability through Pirate Bay, the same day as its commercial release, compromised the filmmakers' ability to recover their costs in the domestic market and would ultimately result in there being no film industry left in Sweden, he says.

Gurry says creating enduring funding models for cultural activities, and determining how copyright is being compromised, will involve "disaggregating the value chains" in different industries - books, media, film, music.

For example, he points to newspapers, and the reproduction of articles, often by news aggregators. Aggregators, such as Google News, assemble various sources and provide links through to stories hosted on the original publishers' websites.

But the aggregators have the advantage of earning advertising revenue derived from the aggregated offering, essentially benefiting from others' efforts collecting the news.

Gurry says news aggregators "are exploiting holes in the system . . . they are seeing a business opportunity".

"They put together the potential of advertising of the lot and they don't have to pay correspondents in the field - what they are are mere news distributor, not collectors. You shouldn't be able to make money out of news by taking someone's hard work, which is what they do. Who is going to collect the news from the source in the future? Copyright has to find a way to protect the collectors."

But Gurry suggests that media companies should take control of their own destiny and not rely on governments or the legal system to find immediate solutions.

He points to comments made last week by News Corp chairman Rupert Murdoch, who said News's publications were planning to charge for all of their news websites, declaring "quality journalism is not cheap".

Gurry says: "If all the newspapers were to adapt their model to no longer allow free on-line, then the aggregators would go out of business because they have nothing to link to."

While newspapers may still hold their own futures in their hands, Gurry seems more pessimistic about the book industry, suggesting a grand opportunity was lost over the failure to recognise the potential good in making public book collections digital.

This public policy oversight created a vacuum, which Google has filled over the past four years, as it scanned and made available online millions of books from the collections of global research libraries. Google recently settled a class action, brought by copyright holders of the books, delivering them a revenue stream, but Gurry says "a major public policy question has become a business plan. And that is not necessarily a good result".

Gurry says you can't criticise Google for the project, given the obvious benefits of having such a collection publicly available online, "but you can criticise ourselves, or supposedly the public policymakers, for not having foreseen this and operating it.

"This is a major strategic asset, and should it be in private hands? Being a privately controlled scheme or asset leaves it open to the possibility of being taken over."

Gurry admits that prompting governments to have such debates, and to act quickly to protect public assets from being snapped up by the fast-moving and aggressive technological behemoths is a daunting challenge for the WIPO.

"In a sense, we are running after the train after it has left the station and trying to leap on," he says. "But it is a question of trust. We have to try to develop trusted relationships so people feel free to raise major question of public policy for discussion without it coming back to bite them."

Gurry, who started his legal career at Allens Arthur Robinson and Freehills in Sydney before he moved to WIPO in 1984 (his interest in IP was piqued while researching a PhD on protection of trade secrets and confidential information), has been credited with rejuvenating the WIPO since his election to the top job, including restructuring the secretariat to bolster its ability to analyse economic trends and communicate with governments and other stakeholders.

Gurry says that Australia could be doing more to elevate discussions about intellectual property within government.

China recently elevated consideration of IP issues to a committee chaired by the Vice-Premier Wu Yi. Last week, South Korea also announced that IP discussions would be co-ordinated by a committee to be chaired by the President or Prime Minister.

Both countries have followed Japan, whose former prime minister Junichiro Koizumi established a strategic unit for IP within the prime minister's department, chaired by the prime minister. Given 70 per cent of Japan's land is non-arable and the country has few

natural resources, "the only thing it has got is its human and intellectual capital", Gurry says.

"The Japanese idea of having a [high-level] co-ordination is a very good one, and that has been copied by China and Korea," Gurry says.

"Australia brings its groups together, but not at the same level."

China recognises that in the future, it will not be competing on the basis of cheap labour, Gurry says, but on improved productivity, more productive design, and product differentiation. Such areas need a robust system of IP protection.

"What we are seeing with China is an historical correction," Gurry says. "For most of the last 1000 years, China has been an economic giant in the world. China has a long memory. And they have every interest in protecting intellectual property now, as they are becoming major producers."