

COPYRIGHT and its INIQUITIES AND ANOMALIES

1. This last minute submission is intended to support emphasis on what I understand to be the Productivity Commission's principled approach to the unjustified monopoly afforded by Copyright (which I suspect had something to do with noble legislators trying to look after younger siblings and sons who sought to make something of their writing or painting).
2. My university degrees have been mostly economics. This led me, after practice at the Bar, to be an enthusiastic founder member of the Society of Modest Members formed in the late 70s by Liberal MPs (of which I was one in the Victorian Legislative Council) in honour of Bert Kelly, the famous objector to Country Party protection-all-round.
3. Since I became aware of the scandalous extradition for an alleged Copyright offence of Hew Griffiths to the United States as a result of the weak negotiation and acceptance of the Copyright provisions contained in the US-Australia Free Trade Agreement, well known to be the product of Disney influence on US legislators in need of money to stay elected, I have made representations to Attorneys-General, not least on extradition law, but have fallen far short of what I think the two subjects deserve in my efforts. In fact this short exhortatory piece results from my having just picked up today's (2nd June) Age and read the article by Peter Martin supporting the Commission's draft recommendations.
4. I hope the Commission will ensure that all policy makers and legislators have clearly before them that all IP is a gift of a right with legal effect by the people of a country represented by their legislators. That is to say there is no intellectual property right absent the choice of legislatures to create one for reasons of public benefit. Subject to the discussion in the next paragraph the criterion of public benefit means that the gift at the public expense to creative people must be justified by being sufficient, but not more than substantially sufficient, to ensure that creative people actually find it worthwhile to produce work which could be copyrighted and above all to make it public. What follow from this is dealt with in par. 6.
5. Not all laws are passed with any calculation of benefit in mind or even regarded as relevant. It is easy to forget that morality enforced by law seemed as right to our not so distant ancestors as Sharia law's ancient sanctions seems to conservative Muslims. Laws against abortion come to mind. There is no such generally accepted underlying morality of either an intuitive or reasoned nature in relation to IP. A latter day tendency to rationalise that artists deserve to get the benefit of their work as a basis for some undefined right over reproduction of their work does not stand up to analysis even if the market may be given some preference over Premier's and Prime Minister's awards and prizes as a means of keeping artists alive and working. Inherently there is no reason to prefer the artist's/writer's/composer's monopoly over a free for all copying which leads to improvements on the original, enjoyable pastiche or sardonic implied criticism of the content. The law has always provided adequate remedy against fraudulent passing off. No Copyright law is needed to inhibit a Van Meegeren from pretending that his products are

Vermeers.

6. Setting aside for the moment the case of a patron or business commissioning or creating some work of art at vast expense which could only be expected to recoup the investment if copying was prohibited for some very long period, it is simply inconceivable that a person with creative talent who has a taste for exercising it will fail to exercise his talents if not rewarded with a monopoly against copying for a period of his lifetime plus 25 years. From asking artists and writers I would be confident that a period of life or 25 years whichever was the greater would be almost certain to obtain the benefit to the public which exercise of talent and making public might afford. It is sufficient to make my point that the protection now afforded rich hoarders of Copyright, or in the case of the absurd Resale Rights Royalty for Visual Artists legislation which could extend to conferring largesse on great-grandchildren 100 years after the date of creation, is vastly excessive and ought to be the subject of attempts to mitigate its effects if treaties make it impossible to change in practice.

The sheer absurdity of what Disney has bought (and was already excessive anyway) is made clear if one considers how long a monopoly is afforded to the inventor of a life saving drug or the means to halve fuel consumption in an engine.

7. Before opining definitively on the case of the patron or other commissioner of copyrightable work to which I was alerted by a Washington DC lobbyist whom I would have liked to cross-examine at length I would want to consider exemplary cases in detail or at least hypothetical ones. As a first pass I would divide the cases into commercial and non-commercial.

The non-commercial might be exemplified by a rich patron whose purpose is to glorify or otherwise earn credit for himself or his family or to give something for a church, museum, gallery or public space. If he acquires the copyright as part return for his patronage there seems to be no case for finding a public interest in his being able to prevent copying for any period, certainly not for any lengthy period. Indeed, after an initial showing to draw people to a gallery it might be thought that the public interest lay in many copies becoming available, rather like Rodin statues, identical copies of which are to be found in many major galleries.

Relevant commercial examples might include hypothetically the commissioning of the 85 year old reluctant Picasso to put aside everything else for one huge work that would be seen as the great exemplar of his late period. The entrepreneur commissioning it wants to recover the \$25 million outlaid by brief annual showings in London and New York for the next 50 years with 6000 people a year each paying \$250 for the viewing, lecture and drinks. At least equally plausible cases might be made for some filming with spectacular effects, great stars and extraordinary props. But these are certainly exceptional cases and can therefore be dealt with quite simply by enacting a right to apply for proleptic extension at the time of conception with the possibility that some such condition might be added that the extended copyright would end after a rate of return in excess of X per cent had been

achieved.

In any event some discretion could be allowed for special cases based on the public interest being the creation and making public of artistic or other valuable work.

8. Finally I would hope that comment might be made on the very unsatisfactory result of the negotiations for the US-Australia Free Trade Agreement which, in relation to Copyright, did far worse than give in to an unwarranted extension of Copyright in Australia by 20 years. It has also led to a shameful departure from the principles of criminal justice, with particular reference to Extradition, that was exemplified by the said Hew Griffiths case. It can surely be said as a matter relating to the present and future of Copyright Law – indeed all IP – that negotiations over it should not be allowed to pervert justice.

Apart from, I believe, criminal offences having been created which were not part of Australian law previously but were introduced at the instance of US lobbyists and their clients several traditional legal protections for Australians were removed or simply ignored.

First, possibly, was the principle of extradition law that the offence had to be one in both countries.

Second was that the offence had to have been committed by the accused when physically in the country seeking extradition or at least within its jurisdiction (perhaps in an embassy). In Hew Griffiths case the outrageous precedent was set that someone who had never been to America (or at least not at any relevant time) was extradited there.

Third was the ignoring of the practice of countries more robust in defence of their citizens from strange jurisdictions where law, customs and, effectually, even language may not be understood. The logic of countries like Israel and France, not to mention Russia et al. that they catch and try their own is as impeccable as the humanity of it. If an offence has been committed which is an offence in both countries which is an essential starting point then what is the problem about having the accused tried in his own country? A foreign prosecutor may be invited to help prepare and run the case. And is it reasonable that a (probably impecunious young) Australian should be held in a foreign prison pending, in the US in particular, a punitive plea deal made under duress with a prosecutor free under the First Amendment to commit what would be contempt of court in Australia in public slander of the defendant. Is that reasonable when he could be on bail in Australia while foreign prosecutor (if he chooses) and any witnesses who have to be present in court are lodged at the Hilton Hotel?

At the very least I trust the Commission will weigh all its words and recommendations so that it does not contribute to the harm done by those lightly creating occasion of injustice by ill-considered concessions in international negotiations. The holding of an accused person without bail in Australia is the first unnecessary but invariable injustice in contested

extraditions or ones where the Justice Minister's final decision is awaited. Then there is the prospect of a person ignorant of the foreign law and its procedures, and having no ability to obtain reliable legal advice or defence, possibly not speaking the language, being incarcerated away from the support of friend and families and his means of livelihood for months or years before his case is even tried – or, as noted above, settled with a coerced plea deal. The assistance provided by the Australian government in such cases is normally worthless even if some junior member of the consular staff visits the accused in prison.

9. The moral dimension of dealing with IP law without contributing to injustice to individuals which is, according to our traditional values, of much greater moment than the loss of some royalties by a large corporation to an offender who is a lone individual rather than a powerful body of conspirators or rival corporations, cannot be ignored I submit.

Perhaps even clearer, though not touching the liberty of the individual, is the dubious morality inherent in the state creating and upholding Trade Mark rights where it is effectually allowing, indeed supporting, for an improbably long period, a representation that a reputation for quality or value once justly earned continues to be justified after repeated transfers of ownership and/or the Trade Mark. Obviously it should be an actionable tort, if not a crime, for a business to be claiming falsely to be producing and selling with false Trade Mark another business's famous name product but is it not also desirable and possible to apply sanctions to the use of Trade Marks which deceive the consumer because of changes over time? Should there perhaps be a term after which a Trade Mark has to be renewed against possible objections from others?