

# An international agenda for balanced IP

## Background

The political economy of intellectual property is broken.

Fading businesses with legacy business models focus their energies on lobbying lawmakers to impede new business models, rather than to innovate themselves.

IP rights holder groups seek draconian powers over legitimate businesses that are the infrastructure of the new economy, such as internet service providers, internet intermediaries, and cloud services providers. They seek domestic legislative change.<sup>1</sup>

While there is a legitimate case for preventing subversion of IP rights, these initiatives show little regard for the public interest. Extraordinarily, some national IP regimes, such as Australia's provide no clear right for those in the value chain, such as ISPs like Bigpond, TPG and iiNet and search engines like Google, or social networks like Facebook and Twitter to handle IP, *even where their only purpose and effect is to disseminate the IP and so assist IP holders in exploiting their work.*

Increasingly, rights holders seek to reach beyond domestic legal and legislative channels to pursue their interests in other jurisdictions: directly, through the extradition of alleged copyright infringers to face trial in the US,<sup>2</sup> and indirectly, through the financing of court actions in other countries. In Australia, Hollywood movie studios financed the copyright action brought against the Australian ISP, iiNet, because in their view iiNet was insufficiently vigilant in preventing copyright infringement by its users.

Further, international pressure is exerted through the US Trade Representative's Special 301 process, under which many of the US's closest diplomatic allies and trading partners in other contexts, such as Canada and Australia, have been placed on the "Priority Watch List" as soft on IP, even where, broadly speaking, their IP regimes are of comparable strength to the US's and in some regards stronger.

Special 301 pressure often produces the desired result, as illustrated recently by Spain enacting provisions that enable websites and web-services to be shut down without due process within ten days of complaints being made. There is also pressure to agree to international treaties aimed at maintaining and extending IP rights, as in the Anti-

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<sup>1</sup> Most recently observed in the US in the Hollywood-backed Protect Intellectual Property Act (PIPA) and Stop Online Piracy Act (SOPA). These bills would have enabled internet services and websites to have been closed for allegedly inadequate vigilance against piracy with minimal due process. The bills were strenuously opposed by virtually every significant internet innovator and included Facebook, Google, Yahoo, Wikipedia and even American Express.

<sup>2</sup> as in the case involving the operators of Megaupload.



Counterfeiting Trade Agreement (ACTA). Today there are substantial IP chapters in virtually all trade agreements.

### What is needed

Whereas typically the US will pursue the maintenance and extension of IP rights in such treaties, other countries tend simply to resist changes to their own law. Eventually some compromise is reached between US assertiveness and the defensiveness of their trading partners. Yet it is surprising that countries other than the US do not assert their own interests more strategically and energetically. This proposal seeks to address this lacuna.

What is missing for IP user countries is a framework within which they might assert their own strategic interests and, by balancing the US's assertiveness, produce a more balanced global regime which is more in tune with their own interests – and that of the global public interest. To be effective, any such framework would embrace simple economics and political economy to elucidate the case for a more balanced approach to IP in a way that is simple and compelling to the interested lay-person.

Given the existing polarisation of the IP field, it would be imperative that the framework be ideologically centrist rather than partisan. There is no shortage of partisan activism on both sides of the IP debate. The Washington Declaration on Intellectual Property and the Public Interest<sup>3</sup> is a worthwhile document in this regard, though its ideological provenance is social-democratic. The proposal here seeks to build on the wider self-interest of businesses and citizens in promoting more economically efficient outcomes.

### Some principles and propositions

The broad principles which could be part of such a framework are as follows:

- Whereas harmonising and reducing trade barriers is presumptively in the interests of all countries involved in such activity,<sup>4</sup> there is no such presumption in the case of IP treaties (including of course the IP chapters of trade treaties), which typically involve net exporters of IP winning and net importers losing.
- Increased IP helps IP producers and hurts IP consumers. If producers and users were always different parties, it would probably be best to err on the side of producers' interests, at least where IP generates dynamic benefits and productivity growth. However:
  - Even here this should not extend to:

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<sup>3</sup> See <http://infojustice.org/washington-declaration-html>.

<sup>4</sup> Although of course there can be exceptions.



- Criminalising actions that are widely practiced as reasonable by the populace (especially where this involves minimal damage to producers' interests and assists in supporting productivity growth).
  - Imposing onerous rights on innocent parties in the value chain who are not seeking to promote IP infringement.
- More importantly however, since before Newton spoke of seeing further by standing on the shoulders of giants, those who produce IP have also been users of IP. Thus an imperative of the IP system is to minimise any constraints it imposes on new and innovative ways of adding value to existing IP to produce new IP.
- IP imposes costs; therefore it is only justified where its benefits exceed those costs. This cannot be the case unless it produces incentives to create new IP as without inducing new IP, IP protection simply imposes costs.
- There will never be a justification for retrospective extensions of IP terms. This can only generate windfalls to existing IP holders, rather than incentives to create new IP.
  - Simple economics tells us that it will impose greater costs on consumers than it generates benefits for producers. In this sense such measures are very unlikely to even be in the interests of countries proposing them. Rather, they reflect the political dominance of IP rights holders over the interests of IP users.
- Encouraging countries to prohibit parallel imports is presumptively contrary to their own interests and to the global public interest in economic efficiency.
- There are clearly areas in which IP is more extensive than is warranted by any benefits it may generate.
  - This includes orphan copyright works and rights to handle IP for legitimate purposes, such as caching, search, and adequate 'safe harbour' rules.
- The US rule of flexible fair use has been important in supporting innovation on the internet in the US, despite that country's preference for other countries to adopt more narrow exceptions.
  - US 'fair use' permissions provided critical facilitation of both Google search and Apple's iPod business models where both would have faced substantially higher risks with other countries' narrower 'black letter law' exceptions.
- Rights should be both practically enforceable and proportional. It is on the grounds of practicality that IP rights holders have argued that the legal costs of detecting and prosecuting individual rights violations is prohibitive on a case by case basis and therefore seek mandatory statutory damages



for IP infringement – a route which often lacks proportionality. The case for or against such a measure will depend on circumstances, but there are huge inequities between large firms on the one hand and small firms and individuals on the other in their access to legal remedies. This should be addressed in including with penalties for vexatious litigation and IP ‘trolling’. More and more, legitimate IP creators are being preyed upon by IP trolls exploiting the fear, uncertainty and doubt generated by vexatious legal action (particularly against small parties).

- While international treaties should be respected, they should not operate to prevent sensible adjustment of national IP regimes to the new phenomena of the digital economy. Where sensible domestic reforms are stymied by the architecture of international agreements such as that existing under the Berne Convention, it is important for nations to cooperatively update those agreements, not just on behalf of IP producers, but also on behalf of users and particularly of those who use IP in innovative ways to generate new IP.
- Because of the complexity of the issues, transparency is important to allow stakeholders to understand what is at issue and help to inform the debate.
- It follows that such treaties should not be negotiated in secret, but that negotiating drafts should be released to the public at regular intervals during negotiations.
- Extensions to IP should not proceed without some independent economic analysis of such measures to determine the likely costs and benefits for
  - Producers;
  - Users (including users seeking to use IP in the production of IP);
  - The community as a whole.
- This principle should be applied by nations in the same way that this principle *has* been applied in Australia to industry assistance like tariffs since the 1920s.
- It should also be applied to treaty making to improve the transparency of decision-making as countries seek to serve their own economic interests in the context of the wider global community's interest. Thus, as alternative provisions are negotiated, there should be some independent expert advice on the effects of such provisions on each of the parties, and where it is impracticable for this to be detailed quantitative analysis there should be some independent qualitative analysis by those qualified to provide it.

