THE NEW-AGE CONCEPT OF INTELLECTUAL PROPERTY RIGHTS IN AUSTRALIA.

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Intellectual Property law is based on a fundamental principle of balance. The balance between the interests and needs of the public and those of creators. This extrapolates to a balance between consumer versus innovator. Public rights versus propriety rights. Socialism versus capitalism When the legal systems that underpin intellectual property no longer maintain the correct balance or even worse, neglect it, then respect for those systems and intellectual property erodes.

The Present

Intellectual Property law has advanced dramatically in the last 30 years from being an obscure area of the law practiced by a small group of specialists, and not commonly taught (at least in Australia), to being an area of law that is said to underpin industries worth billions of dollars[1]. For this reason it has now entered the public's consciousness and is regularly the subject of debate between countries entering into trade agreements Yet, its importance and relevance is increasingly under threat.

Whilst the threat manifests in a number of forms, the result is essentially a lack of respect for Intellectual Property law. *A significant proportion of the public variously believes:*

1. **They will not get caught for infringement.**
2. ***Infringement does not hurt anyone.***
3. **The rights simply allow holders to obtain inflated margins.**
4. ***The rights place unnecessary restrictions on competing products***

This is based on a perception that the balance has shifted in favour of the rights' holders who are reaping unwarranted benefits, giving rise to authorised distribution channels being avoided and calls made for reform. **A number of examples illustrate this:**

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[1] Patents – Smart Assets, The Economist, 19 February 2005

- **The proliferation of counterfeit products being sold, not just in the notorious Asian markets, but even in the streets of New York outside Fifth Avenue shops selling the genuine articles.**
- **The content traded on the peer to peer networks. Whilst Kazaa, Grokster, Limewire and Morpheus etc, have affected the profits of the music publishers, the ready availability of distribution software, such as BitTorrent5, has given rise to an extensive trade in first release feature length movies.**
- **The public outcry that resulted when large pharmaceutical companies sought to exercise their patent rights over AIDS related drugs in poorer African nations[6].**
- **The recent calls for reform of the US patent system, backed by reports released by the US Federal Trade Commission[2], the National Academy of Sciences and more recently a book published in November 2004 by economists, Adam B. Jaffe and Josh Lerner.**
- **The continual bureaucratic battle in Europe over the European Union Directive on the Patentability of Computer-Implemented Inventions, otherwise known as "the software patent directive"[3]**

There are some of the factors that have led to this lack of respect for or faith in the intellectual property system in the past, the public was content to grant publishers limited exclusive rights against copying to prevent erosion of their business. Similarly, the public also appeared to be content to grant inventors a monopoly for their invention for a limited term, provided they agreed to disclose the secrets of their invention for use by the public afterwards[4]. This seemed to be well suited to the limited forms of publication and artistic expression that existed at the beginning of the last century, and the industrial devices and processes developed by inventors at the same time.

[2] http://www.ftc.gov/os/2003/10/innovationrpt.pdf.
[3] S Merrill, R C Levin and M B Myers, A Patent System for the 21st Century, 2004, The National Academies Press, ISBN 0309089107.
[4] L McLaughlin, European Union Struggles with New Rules for Software Patents, IEEE Software, Sept/Oct 2004, pp 101 to 104; P Mellor,

Technological and political change has produced an expansion in intellectual and service based economies compared to the traditional industrial and product based economies, and has altered the landscape considerably. This change has resulted in three factors having a profound impact:

1. **Digital Reproduction**

   Once it became possible to produce works (such as literary, and musical works, and films) in digital form, to the extent that the original work could not be distinguished from a copy and the copy would not deteriorate, the value in purchasing an authorised copy declined. Consumers have been given technology that allows them to make perfect a copy for themselves and distribute it to others. Producing a perfect reproduction of many works is no longer the domain of a specialist counterfeiter.

2. **The Internet**

   The communications phenomenon has allowed digital reproduction to become widespread and difficult to prevent, but has also provided a mechanism that allows the previously disenfranchised to have their arguments heard on almost the same level as those in authority, an ivory tower or an established and respected organisation. The decentralised nature of the Internet has allowed the peer to peer networks to flourish to an extent that normally there is no central promoter of piracy that content publishers can take action against. In the Kazaa case[5], it has become clear that even if an injunction is granted to prevent use of the Kazaa software client, there are already a number of other versions of the Kazaa client being used that allow the Kazaa network to flourish even if the authorised client is somehow extracted from all of its users, which is largely impossible to enforce in any event. For this reason, the music industry has resorted to taking action against users of the networks which although having some effect, clearly represents a desperate last resort and an inefficient use of legal resources. The Internet has also allowed the geeks to inherent the earth (at least the virtual earth). Web sites produced by traditional media outlets, such as the BBC, CNN, and the New York Times, can only present one page at a time, as does any other site produced by any other group or individual on the Internet. This allows the public to present their views without having to gain the attention of the established media regimes, conduct research or

[5] The Statute of Anne 1709 introduced limited copyright rights primarily to protect booksellers and publishers from piracy

provide a balanced argument. Open source software groups have been formed and the Creative Commons established. The reliance on electronic messaging for communications allows information to be spread quickly across global boundaries to bring together like minded individuals in disparate locations and positions. This allows groups to act when a law is being reviewed such that individual submissions can be delivered quickly en masse, seemingly overwhelming a single submission made by an industry organisation. The validity of individual positions is then further enhanced when the traditional media begins quoting their Internet sites as an authoritative source.

3. **Rights Expansion.** Partly as a response to the first two factors, but also due to an ever increasing demand for propriety rights, Intellectual Property law has continually changed, either by legislature or by the courts, or by Patent Office practice, to increase the array of rights at a creator's disposal. For copyright we have seen the term now extended to the life of the author plus 70 years. The WIPO Internet treaties and their progeny even include the introduction of infringement provisions that have little to do with copying. There is also a call for the introduction of further rights in the US[6]. For patents, we have seen an expansion from protecting simple industrial products to protecting agricultural processes, pharmaceutical compounds, methods of medical treatment, software and now biotechnological processes and genetic material. The Patent Offices have been inundated with applications for patent grant, and with limited resources at their disposal, have been routinely criticised for granting patents that have been considered to be not worthy. As a reaction to this criticism, the Patent Offices have sought to tighten examination standards at the expense of the time it takes to obtain a grant on filing a patent application.

The third can be seen as a knee jerk reaction to the first two, but has primarily arisen due to the technical and political changes mentioned previously that we have experienced over the last 20 years. It is not difficult to see though why the public may perceive how the rights expansion is a desperate attempt to enforce the status quo that the Internet is so effectively challenging.

For the patent system, debate on the appropriate subject matter for patent protection will never be resolved. When reviews are conducted on whether certain subject mater should or should not be covered by a patent, a clear delineation almost never emerges. The subject matter debate

[6] An example is the almost hysterical media reports on the Amazon "one-click" patent.

is largely pointless, particularly when it is conducted in isolation without considering other patentability requirements, and calls to mind the words of the Australian High Court in the often cited NRDC decision:

"To attempt to place upon the idea the fetters of an exact verbal formula could never have been sound. It would be unsound to the point of folly to attempt to do so now"

Leaving subject matter aside, the primary problems that can be focused upon are:

1. **The apparent ease with which patents can be obtained, compared to the difficulties encountered in challenging them.**
2. **The ever increasing delay in the application process.**

The first is due to a combination of factors, ranging from legislative or procedural restraints that vary from jurisdiction to jurisdiction to the extent of Patent Office resources available to handle applications received. Most countries have adopted strict, and in some cases convoluted, legislative provisions governing the type of material that can be used to assess whether a patent claim is novel or obvious, and in some cases the test itself is prescribed32. The constraints generally lead to possibly relevant material being excluded, such as material providing evidence as to standard industry practice but which normally would not be considered to be part of the public domain. When examining patent applications, the Patent Offices need to remain within the constraints, and are also limited by the resources they have at their disposal. A patent examiner tends to rely on any documentary material available from accessible databases, such as patent literature databases and journal databases, when seeking to establish that the claim may not be valid, and is unable to rely upon the expertise and knowledge of those in the relevant industry. Some industries are less prolific than others in producing papers and articles on their work.

The mechanisms available for third parties to become involved in the examination process is also limited. Some countries provide ex parte procedures to allow the submission of relevant prior art material to the examiners, but this normally involves the submitting party taking no further part in the process. Similar problems exist for reexamination procedures provided after grant. Post grant or post acceptance inter parte opposition procedures are available in some countries, but compared to the cost involved in an applicant prosecuting an application to acceptance, the procedures can prove costly and difficult for opponents. In other countriesno

action can be taken during the examination process, and the only inter parte procedure available is an action before a court.

The issue of Patent Office resources and their ability to handle the current large number of patent applications is a factor in both of the problems outlined above. The US Patent Office currently receives about 300,000 patent applications a year and is struggling to complete examination within four years. There has also been continual criticism regarding the quality of the patents that have been granted[7]. Some have indicated that one solution would be to abolish examination altogether and simply allow patents to be automatically granted and subsequently challenged by third parties if necessary. Imposing more patent monopolies of doubtful validity on the public hardly seems a sensible course to adopt if respect is to be regained for the patent system. This also could be considered an abrogation of the government's responsibility to only grant exclusive monopolies for a limited term when warranted. To regain the respect and worth of the patent system requires changes to ensure that only worthwhile patents are granted. This means less but more revered patents. The most logical way this can be achieved is to reinvigorate the Patent Offices and allow greater cooperation with interested parties. **Possible steps that can be taken to achieve this include:**

1. **Ensure more funds and resources are devoted to patent examination.**
2. **Remove restraints on how novelty or obviousness of a claim is assessed, such that this can be done on the basis of anything previously known or used.**
3. **Publish applications early, say at three months, and allow examiners to actively conduct investigations and inquiries to assess the validity of a claim. This may involve a discourse with sanctioned industry organisations.**
4. **Allow oppositions to be taken by any party before the Patent Office at any time following publication.**
5. **Invoke strict time limits and a limit on the number of allowable patent claims to try and dispose of applications in a shorter period of time, preferably one year. The time limits can be enforced by imposing monthly fees on applicants and third parties for delays. There are difficulties in imposing similar penalties on the**

[7] Gary L Reback, Patently Absurd, 24 June 2002, http://www.forbes.com/asap/2002/0624/044.html ; J Gleick, Patently Absurd, 12 March 2000,

Patent Office for delays on its behalf, but this could be invoked by providing a reduction in fees at grant.

IP rights infringement concerns content owners, law enforcement authorities and society at large because it results in negative business, legal and social impacts (Grabosky, Smith & Dempsey 2001).

The effects of counterfeiting and piracy on economies and society as a whole are far greater than initially thought. The scope is broad; infringing products are no longer limited to falsely branded items such as fashion clothes, luxury watches and designer sunglasses, but nowadays include a growing number of common food, pharmaceutical, chemical, electronic and household products. In addition to the economic effects on holders of intellectual property rights, such illicit practices increasingly pose threats to the health and safety of consumers. Moreover, the production of counterfeit and pirated goods has also become more sophisticated, with organised criminal groups playing an increasingly important role.

Although the magnitude of infringements is impossible to measure with precision, there are indications of pronounced growth. Seizures by ACS officials are rising, reflecting not only improved enforcement techniques, but also a rising volume of international trade in infringing products. Moreover, it appears that fake products, which have traditionally been sold largely on open markets, are finding their way at an increasing pace into legitimate distribution systems, and thus onto the shelves of established shops. Finally, the growth in the Internet as a platform for selling products has provided a new outlet that counterfeiters and pirates have been quick to exploit (OECD 2006: pars 6–7).

The following are some of the negative economic impacts of piracy and counterfeiting:

- **Reduced sales of goods and services with an IP component, as legitimate items are forced to compete with lower-priced pirated copies**
- **Reduced rates of return available to IP rights holders, thereby reducing incentives for innovation and further investment in the production of goods and services with an IP component (OECD 2006)**

- **Long-term effects, including reduced economic growth, reduced taxation collections, reduced employment levels in industries focused on the production of goods and services with an IP component (OECD 2006)**
- **Increased national trade and balance of payments deficits, especially if the IP industries detrimentally affected by piracy are export industries (OECD 2006)**
- **Reduced direct investment in creative industries – pirates 'do not invest in recorded music' (Rosen 2002)**
- **Reduced ability of companies to engage in e-commerce (WIPO 2002: 33)**
- **Impediments to developing countries who seek to use IP to achieve economic growth. Omkar Goswani, Chief Economist of the Confederation of Indian Industry and moderator of the 2003 East Asia Economic Summit described piracy as a 'cancer' strangling developing countries (East Asia Economic Summit 2003).**

Counterfeiting also results in additional costs for companies whose goods are counterfeited (Allen 2003: 6–7) which include:

- **Reduced sales as they are forced to compete directly against counterfeiters for market share**
- **Significant expense (millions of dollars in some cases) protecting their intellectual property by conducting investigations and mounting litigation against counterfeiters**
- **Developmental costs associated with designing products that may be more difficult to counterfeit (e.g. copy-protected games, online software activation procedures, etc.)**
- **Depressed prices and reduced sales**
- **Undermining the brand image**
- **Perception that the original product is expensive.**

Criminal offences for infringement under Australian IP legislation are limited to three types of IP:

- **Copyright**

- **Trade marks**
- **Plant breeder's rights (PBR).**

Infringements of other categories of IP such as patents, designs, circuit layouts and confidential information can only be addressed through civil remedies.
Copyright offences

On 1 January 2007, amendments to the *Copyright Act 1968* (Cth) came into operation, providing new enforcement measures to combat copyright piracy including a new tiered offences regime, proceeds of crime remedies, an infringement notice scheme (on-the-spot fines), strengthened evidential presumptions to make it easier to establish copyright piracy, and additional powers for courts to award larger damages payouts or other remedies to address large scale Internet piracy. In addition to these amendments, a number of the criminal law offence provisions of the Act were amended to harmonise the criminal law offence provisions with Australian Government criminal law policy and the *Criminal Code Act 1995* (Criminal Code).

Indictable, summary and strict liability offences were created with a range of penalty options, generally involving maximum penalties for indictable offences of fines not exceeding 550 penalty units or imprisonment for not more than five years, or both and for summary offences of fines of up to 120 penalty units or imprisonment for two years, or both. The strict liability offences are underpinned by an infringement notice scheme in the Copyright Regulations 1969. This gives police and prosecutors a wider range of enforcement options depending on the seriousness of the conduct.

Commercial-scale infringements that have a substantial prejudicial impact on the owner of the copyright are now proscribed under s 132AC of the *Copyright Act 1968* (Cth) as is airing of infringing works, sound recordings and films in public (ss 132AN, 132AQ, 132AR).\

Amendments were also made to the evidential presumption provisions in civil and criminal proceedings to assist copyright owners and reduce costs in the litigation process. They provide that statements contained on labels, marks, certificates, etc. are presumed to be correct unless the contrary is established, rather than the existing 'admissible as prima facie evidence'. New

presumptions were also introduced to recognise the labelling practices of commercially released films and computer software that will apply in both criminal and civil proceedings. The amendments also introduced a presumption of originality for computer programs. Amendments were also made to the provisions providing protection, civil remedies and criminal offences in relation to subscription broadcasts.

Over the period the law has been Evolved in Australia Along with the new age-technology and it been benefit not only to the inventors but the public as well, whether it may be lay men