Trade and Intellectual Property: Some Observations

ANTHONY MASON

ABSTRACT *Intellectual property rights run counter to the interests of consumers and the public. They are also exploited in anti-competitive ways. On this account these rights should be qualified or subjected to competition regulation. The globalization of intellectual property exposes the interests of consumers and the public to greater risks unless appropriate mechanisms of protection are developed.*

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A cynic might say that the title given to this workshop reflects current academic thinking, founded on reality, that, in order to interest outsiders, notably flint-hearted bureaucrats and commercial people, the word 'trade' must be exhibited in neon lights. Trade is the key to unlocking the gates, if not of paradise, at least of some vaults.

Fortunately, I am not a cynic—at any rate not all of the time—and the relationship between intellectual property and trade is both complex and important. But it is not all important. There is more to life and, for that matter, intellectual property, than trade. The linkage that was made between intellectual property and reform of international trade across the board has serious consequences for developing countries and for countries like Australia that are net importers of intellectual property.

Globalization—its Advantages and its Detriments

There is, of course, a natural linkage between intellectual property and trade in that property. That linkage is all the more significant in an era in which information, knowledge, technology and know-how have assumed such importance on a worldwide basis and have become the engine of vast profits. The rising international trade in intellectual property has given momentum to the globalization of intellectual property in the form of a regime or regimes which, if not uniform, provide for an internationally recognized framework of harmonized legal rights and entitlements. The erection of such a framework, so long as it is acceptable, is obviously desirable from the perspective of trade, the owners and users of intellectual property, as well as the creators of that property.

The erection of acceptable regimes is, however, fraught with many difficulties. The difficulties include those which are inherent in determining the level and mode of protection to be accorded to the creator and the difficulties which are associated with particular nation states and their individual circumstances. They also include the problems of loss of sovereignty and autonomy which necessarily arise from the adoption of an internationally binding regime, engineered at a diplomatic conference, which

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precludes national legislatures and governments from exercising a free and unfettered choice. Of even greater importance is the fact that the erection of such a regime often circumvents ordinary national democratic decision-making processes which allow for the input of domestic interest groups, including consumers.

The tension between private ownership and public interest

Intellectual property law represents an uneasy compromise between the predominant public interest in the availability, accessibility and free flow of information and the public interest in encouraging, rewarding and protecting the creators of intellectual property. The tension between these competing interests is a source of continuing contention. The retrospective TRIPS extension of the duration of a patent for a further term of 10 years is impossible to justify in economic terms. The same applies with equal force to the retrospective European extension of the period of copyright protection. These extensions no doubt advance or will advance the interests of nations which are net exporters of intellectual property but they are detrimental to the interests of nations which are net importers of intellectual property. More than that, they are detrimental to the predominant public interest and the interests of those who wish, for commercial and other reasons, to take advantage of the protected material as soon as protection expires. To say that importing nations have agreed to the patent extension in return for other trade advantages simply does not answer the criticism that the extension has not been justified on economic grounds.

At the same time the rationale for granting exclusive monopoly rights in the form of intellectual property has been questioned. The rationale is that the grant of these rights encourages additional creative and inventive activity. The extent to which additional activity does take place by reason of this incentive seems to be very much a matter of speculation. It is even said that it is not demonstrable that expanded intellectual property rights will necessarily result in additional activity or that this is an efficient use of society's resources. On the other hand, it is clear enough that corporations do invest substantial sums in research and development in reliance on the grant of property rights in relation to new developments. It is, however, a reasonable assumption that the grant of property rights contributes, to an extent which cannot be measured, to innovative developments.

Be this as it may, intellectual property protection gives rise to serious competition policy issues. Some of these problems are identified in the article by Walker in this issue.[1] First, there are the problems associated with parallel imports, identified by the Prices Surveillance Authority, in its various reports relating to *Book Prices*, *The Prices of Sound Recordings*, *Prices of Computer Software* and *Prices of Farm Chemicals*. As Walker points out, lack of effective competition between owners in the small Australian market has allowed price discrimination against the Australian market with higher prices resulting in inefficient distribution. The distribution of books is a notorious example. Restrictions on parallel importing of goods marketed overseas with copyright or patent owners' permission accentuates these problems. Whether the Bill currently before Parliament dealing with parallel importation will be enacted remains to be seen.

Next, there are the decisions of the Full Court of the Federal Court in *Avel v. Wells*,[2] on the application of the Circuit Layouts Act 1989 (Cth) to video games and the subsequent decision in *Galaxy v. Sega*[3] on the application of the Copyright Act 1968 (Cth) to such games. These decisions illustrate the impact of parallel imports on the capacity of amusement centres to prosper and of the detrimental effect which a prohibition of parallel imports is likely to have on such a centre.

There are also serious questions as to the operation of competition law on the

exercise of intellectual property rights. At present section 51(3) of the Trade Practices Act 1975 (Cth), as the Submission notes, provides an exemption from Part IV of the Act in relation to conditions of licences and assignment so far as they relate to intellectual property rights. The Hilmer Report, following a submission by the Trade Practices Commission, considered that there was force in arguments to reform the current arrangements including the possible removal of the exemption.[4] The matter is subject to pending review.

The protection of databases involves serious anti-competitive considerations. In Australia, there is copyright protection for compilations of databases though not for the data. The distinction is not easy to make. The potential for anti-competitive exploitation of copyright protection of compilations is illustrated by the Magill decision of the European Court of Justice.[5] That case proceeded on the footing that copyright existed in the weekly programme listing of television stations. The Court held that as the stations had a monopoly over the information from which the compilation was made, a refusal to grant a licence was an abuse of a dominant position in contravention of Article 86 of the Treaty of Rome.

There is an interesting discussion in the Opinion of Advocate-General Gulmann of the relationship between copyright protection and competition law. He pointed out[6] that, as the copyright laws of member states have balanced the various interests that must be protected by society, including the interests of the copyright owner and undistorted competition, the natural consequence is that compulsory licences under competition law were practically without precedent in member states in the field of copyright. In the words of the Advocate-General: '[i]n principle, where copyright law confers an exclusive right, that must be respected by competition law'. He concluded, however, that this did not preclude further limitations on the copyright owners' exclusive right on the basis of the Treaty of Rome's competition rules, his view being confirmed by the Court.

In passing, it is of interest to note that the Advocate-General did not consider that 'the copyright interests thus protected [by member states' copyright laws] can be regarded as substantial...'.[7] In this respect, the European Commission had submitted to the Court of First Instance:

> ...the program listings are not in themselves secret, innovative or related to research. On the contrary they are mere factual information in which no copyright could therefore subsist.[8]

The *Magill* case, as well as instances in Australia, discussed by Walker, relating to meteorological information and telephone directories, show that copyright in databases enables the rights holder to engage in anti-competitive conduct by denying access to monopoly sources of information or the data underlying compilations.

What *Magill* and the Australian instances raise for consideration is a question of some substance. Should the exercise of intellectual property rights be subjected to competition law regulation? On the face of it, that might seem to be the obvious answer. An alternative answer is that intellectual property rights should be more stringently defined. Thus, entitlement to copyright might be defined in such a way as to depend upon a stronger element of originality than is presently insisted on—presently the originality element is low.

On the other hand, subjecting the exercise of the right to competition law regulation may well entail very considerable regulatory supervision, casting a very heavy burden on the regulatory agency at a time when government is seeking generally to reduce the cost of supervisory regulation and to promote the virtues of self-regulation. The cost of regulation is a major problem in Australia and that may mean that appropriately limiting

the grant of rights will become of greater importance for us. If American and European models are to be adopted for international purposes and those models proceed on the footing that strong rights are granted which are nonetheless subject to competition law regulation, we may be forced to accept the model notwithstanding that it is not best suited to our circumstances.

Yet another side of the coin is that the adoption of American and European models will provide us with a growing corpus of judicial interpretation and application which will be beneficial to us and lessen the need for expensive litigation in Australia.

It is also probably true that the grant and extent of intellectual property rights is influenced by the interests of owners rather than by the interests of the public at large. That tendency reflects the capacity of intellectual property owners to influence the shaping of the regimes of protection, a capacity which was exemplified in the course of events leading up to TRIPS and the WIPO Copyright Conference in December 1996. The capacity of owners to influence the critical decisions is in all probability greater at the international level than it is at the national level. It is more difficult for interest groups opposed to owner interests to organize and mount resistance at the international level than at the national level. There are, of course, exceptions. The December 1996 WIPO Copyright Conference was a spectacular example, though the support of the telecommunications industry was a critical factor in the modification of the draft Treaty. There can be no certainty that the example will be repeated, though the Internet and other means of electronic communication have enhanced the capacity of interest groups to build cross-border alliances. The success at WIPO was in part due to the work that had been done at national level in a number of countries which resulted in national governments supporting the public interest point of view.

An achievement of major importance was the inclusion in the preamble to the Copyright Treaty of the recognition of the primacy of the public interest considerations underlying copyright. The preamble recited the need to maintain a balance between the rights of authors and 'the larger public interest', particularly education, research and access to information, as reflected in the Berne Convention. The primacy of that public interest, in the sense that it is not to be subordinated to private interests, is just as important in the case of other forms of intellectual property, notably patents.

The new procedures adopted by the Australian government with respect to the making of treaties involving consultations and tabling of a treaty in the Parliament leading to parliamentary consideration, will lead to greater scope for consideration and discussion by affected interest groups before adoption of a treaty by the Australian government. On the other hand, it is possible that the new procedures will result in a greater reluctance on the part of the government to ratify international conventions. Such a reluctance is, however, more likely to emerge in relation to conventions and treaties affecting human rights than in relation to instruments affecting trade where Australia's exclusion from major trading blocs invests international trading arrangements with a special importance.

It would be a mistake to ignore the element of isolationism in Australia, the sentiment that we should 'go it alone'. But it would also be a mistake to think that a reluctance on our part to ratify international conventions springs from precisely the same reasons that have induced the United States to decline to ratify a large number of international conventions. In the case of the United States, a treaty once made automatically becomes part of the law of the land. In Australia, the isolationist sentiment is, in general, unlikely to prevail over our need to free up and promote international trade in view of our dependence on that trade.

The element of isolation in Australia is related to apprehensions about loss of

sovereignty and autonomy arising from the ratification of a treaty and the establishment of an international regime based on international standards, more particularly political and human rights standards. Entry into an international obligation by means of ratification of a convention necessarily constrains Australia's freedom of choice. Although the existence of the obligation will not necessarily deny legislatures power to enact a law to the contrary where that power otherwise exists,[9] it is not to be readily supposed that legislative power would be exercised for such a purpose. In that practical sense, entry into an international obligation entails loss of sovereignty or autonomy. And it is not merely loss of legislative autonomy. Depending on the nature of the international regime there may be a loss of executive and judicial autonomy, as is the case when enforcement is entrusted to international courts or tribunals.

According to traditional thinking, there is much to be said in favour of granting jurisdiction to international courts and tribunals when jurisdiction is exercised against nation states but less so when individuals are involved. No doubt greater uniformity of decision and interpretation result from one court or tribunal exercising jurisdiction than from a myriad of national courts. On the other hand, concern has been voiced about the quality of the work of some international tribunals, for example the UN Human Rights Committee, compared with that of national courts.

In this context, it is instructive to read the article by Evans on 'Intellectual Property Disputes and the Supercourt of the World Trade Organization: The Case for a New Model of Dispute Resolution' in this issue. The author challenges orthodoxy in the resolution of international intellectual property disputes, making a strong case for granting access to private litigants as well as states, notwithstanding that the WTO dispute resolution procedures are tied to sanctions. Evans makes the telling point that the WTO Supercourt exhibits a marked democratic deficit, countenancing domination by powerful corporations, financial institutions, influential producer associations and interest groups. Indeed, she implies that domestic reforms cannot overcome the deficit because the nation state cannot initiate action which will protect the varied and conflicting interests of all its citizens. In the course of the discussion, an interesting comparison is made of the WTO Supercourt with the European Court of Justice, emphasizing the early common approbation of integrating policies which may later give way to strong criticisms of legitimacy. The parallel is illuminating.

The democratic deficit identified by Evans extends to its procedures which in the eyes of a civil lawyer no less than a common lawyer fall short of minimum standards of natural and transparent justice. Closed hearings, lack of access on the part of those with a material interest, inadequate mechanisms for the resolution of disputed questions of fact and the imbalance of legal resources available to developed and developing nations have all contributed to a view that is less than favourable to the tribunal. That is largely because the tribunal has been seen as a state's forum with the consequence that the aspects of due process which are essential to adjudication involving private interests have not been applied.

One other aspect to be noted about the establishment of an internationally established regime regulating intellectual property, even one which provides for national legislation and national regulation, is that it is generally less susceptible to alteration than is a national regime. Uniformity becomes such a dominating force that the momentum for change must be very considerable if it is to succeed.

Global harmonization of intellectual property rights is both desirable and inevitable. It is in the interests of creators, owners and consumers. But it is necessary to ensure that the interests of owners are not predominant and also to devise procedures which will enable other interest groups to make an effective input into the decision-making

processes. Harmonization is not to be equated with uniformity. A uniform framework leaving certain areas to be dealt with by national treatment may provide sufficient harmonization.

Notes and References

1. This article is based on an Australian submission to an OECD Competition Law and Policy Committee, Roundtable on Intellectual Property Rights, October 1997.
2. (1992) 36 FCR 340.
3. (1997) 145 ALR 21.
4. *National Competition Policy*, Report by the Independent Committee of Inquiry, AGPS, Canberra, 1993.
5. *Radio Telefs Eireann v. European Commission* (1995) 4 CMLR 718.
6. *Ibid.* at 729.
7. *Ibid.* at 730.
8. *Ibid.* at 757.
9. But the external affairs power granted to the Federal Parliament by the Australian Constitution would not authorize a contrary law.