

Communications LAW

B•U•L•L•E•T•I•N

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS
AND MEDIA LAW ASSOCIATION INCORPORATED

Print Post Approved PP: 234093/00011

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Vol 23 No 1 2004

A Big Boo Boo: The FTA and Copyright Duration

Leon Sher and Niranjan Arasaratnam critique the proposed 20 year extension of copyright announced as part of the recent Australia United States Free Trade Agreement.

Perhaps one of the greatest beneficiaries of the recent Free Trade Agreement (FTA) concluded between the US and Australia is Yogi Bear. Under the terms of the agreement, which is subject to approval by both Parliament and Congress, the duration of copyright protection is to be extended by 20 years.¹ Yogi debuted in 1958, and under the 50 year term of protection for films, his first appearance would be out of copyright at the start of 2008. However, Warner Bros will now retain control of Yogi for a further 20 years.²

Surprisingly, this particular change to copyright law has largely escaped attention in the popular press, even though the term of copyright has been described as 'the single most important issue in copyright law'.³ Nevertheless it has created a storm of controversy amongst librarians, university academics and intellectual property experts alike. This paper argues that the extension of the term is not justified in Australia, and is a 'Mickey Mouse' deal that directly contradicts the Government's own position. In response to a report by the Intellectual Property and Competition Review Committee (IPRC), which saw no merit in extending the term,⁴ the Government stated that it had 'no plans to extend the general term for works'.⁵ It is submitted that the agreement to extend the term is better viewed as a trade 'concession' provided as part of the wider conclusion of the Free Trade Agreement.

A BALANCING ACT: DETERMINING THE DURATION

Copyright law attempts to balance two distinct rights: the right of authors to exploit their creation and obtain a return for their labour, and the right of the public to appropriate and adapt the creation. This balance is achieved by affording authors a *limited time* in which to exercise exclusive rights over the use of their work, after which the work becomes part of the public domain. Currently, section 33 of the *Copyright Act 1968* (Cth) provides that copyright in literary, dramatic, musical and artistic works extends until the end of the 50th year after the death of the author. Copyright in film and sound recordings extends until the end of the

50th year after the year of publication. The focus of this article will be on the extension of copyright works, however the proposed 20 year extension applies to other subject matter as well, including sound recordings and films.

The arbitrariness of selecting life plus 50 was acknowledged by the Copyright Law Review Committee in a report compiled in 1959: 'In weighing up the interests of the community as against those of the author any period of copyright that is chosen will be a somewhat arbitrary one'.⁶ The decision to adopt life plus 50 was based on the British term, and in 1912 the Australian Parliament passed a new Copyright Act essentially adopting the British position.

The duration of copyright protection for Australian works overseas varies

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Knowledge Cycles of Digital Television in Australia

In this edited version of her paper presented at the Communications Research Forum 2003, Cate Dowd looks at the development of Australian digital television and some future directions.

depending on the jurisdiction. In contrast to Australia, both the EU and US have adopted a term of life plus 70 years. The protection of Australian works in the EU is partly governed by the Berne Convention (to which Australia is a party), which imposes several obligations regarding the copyright term. Article 7 prescribes the term as being no less than the life of the author plus 50 years. Article 9 contains what is known as the 'rule of the shorter term', which in certain circumstances allows nations to shorten the protection of foreign works. Where both nations protect copyright for longer than life plus 50, they merely have to reciprocate protection, meaning foreign works are protected for only as long as they would be in their own country. Therefore Australian works receive life plus 50 years of protection in the EU, whereas local European works receive life plus 70.

In the US the copyright term was extended by the *Copyright Term Extension Act 1998* (US) to life plus 70. However, in the US there is no comparison of terms requirement, so foreign works enjoy the same protection as local works. Therefore, Australian works receive life plus 70 years protection in the US.

If legislation to give effect to the Free Trade Agreement is passed by Parliament, Australian works will enjoy a further 20 years of protection in Australia. They will also enjoy 20 extra years in the EU due to the rule of shorter term, and continue to receive life plus 70 in the US. Under Article 17.4.5 of

the draft version of the Free Trade Agreement there is no obligation on Australia to enact retrospective protection for those works already in the public domain.

THE EXTENSION LAID BEAR

The term of copyright protection is designed to provide authors with a return for their labour and thus provide sufficient incentives to create. At the same time the public has an interest in using, enjoying and building upon these works. It is necessary to consider what effect the extension will have on these interests, and any other benefits or detriments that it may bring.

Incentives vs public domain

The main economic rationale for copyright is to supply a sufficient incentive for creation.⁷ By providing protection to authors it allows them to recoup their initial investment and prevent others from simply copying the fruits of their labour. Therefore the question is whether an extra 20 years provides such an *added* incentive to create, that it is justified when balanced against the overall loss to the public domain.

The answer is that it is doubtful whether such future benefit will be taken into account by authors when deciding whether to create work or not. 'Distant advantages tend to be much less persuasive as a motivator of action than relatively immediate advantage'.⁸ The IPCRC came to a similar conclusion, stating that there was no evidence that

an extension would provide incentives to create works not already being produced.

The actual economic value of a 20 year extension is worth very little to the author. In an *amicus curiae* submission made to the United States Supreme Court in *Eldred v Ashcroft* (a constitutional law case challenging the legitimacy of the 20 year extension), a group of esteemed economists wrote that the twenty year extension provided 'essentially no incentive to create new works.'⁹ This view was expressed by Justice Breyer in his dissent in *Eldred*. Using assumptions about the time value of money provided by the economists, he wrote: '[I]t seems fair to say that... a 1% likelihood of earning \$100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today.'¹⁰

The marginal added incentive must be compared against the detriment to the public domain. The most immediate effect of a 20 year extension means that potential authors are further deprived of the opportunity to reshape works to reflect the events and culture of their time. As Chafee wrote, 'a dwarf standing on the shoulders of a giant can see farther than the giant himself'.¹¹ In other words, works can be enriched by the input and development of new authors. It has been suggested that the public domain is not static, and that access to works can be obtained through a variety of exceptions to copyright rules, for example fair dealing.¹² Nevertheless the fair dealing provisions

have not been interpreted as widely in Australia as in the US for example. In Australia the fair dealing system is prescriptive; that is, if the usage is outside the stipulated scope then it is not fair dealing. In the US on the other hand the system is more open-ended and flexible; users must study four factors in determining whether the reproduction is fair. These include the purpose of the use, the nature of the copyrighted work, the amount used and the effect on the potential market.¹³

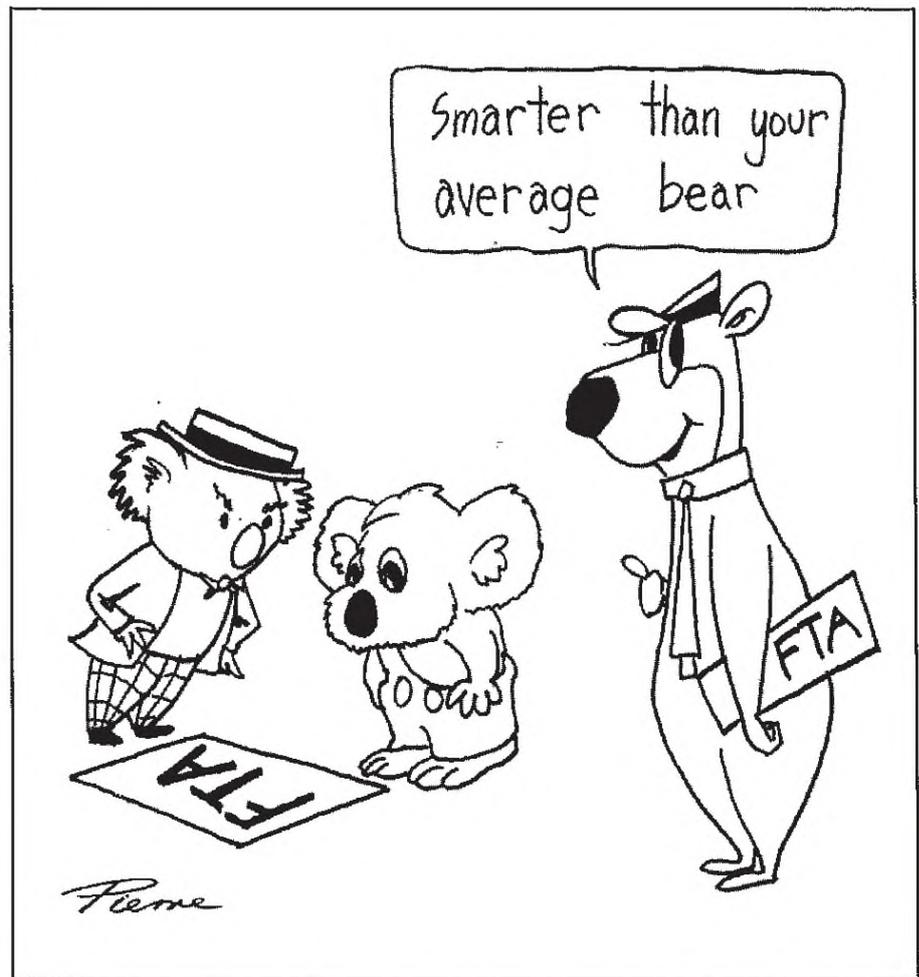
Essentially, the proposed copyright extension ensures potential authors can only see as far as the dwarf for a further 20 years. Therefore, the extension cannot be justified on economic grounds, since the added incentive to create is insubstantial, and does not outweigh the corresponding detriment in preventing public access for another 20 years.

Balance of trade

Australia is a net importer of copyright material, therefore any increased copyright protection benefits foreign copyright owners at the expense of local consumers. Whilst there are limited economic data, a report prepared by Allen Consulting Group in 2001 showed that the growth rate in imports of copyright material to Australia is outstripping the growth of Australian exports.¹⁴

As has already been pointed out, Australian works currently receive life plus 70 in the US, so it is difficult to see what gains are made by extending the term. On the other hand, US works only receive life plus 50 years in Australia, so an extension here allows US authors and companies, who export a vast array of intellectual property, an extra 20 years of royalty payments. It can be seen therefore why the US would desire Australia to increase its protection. It is these extra payments that will have an impact on both universities and libraries; Australian universities alone pay approximately \$20 million a year in copyright fees.¹⁵

It might be argued that many works do not retain their commercial value, and even those that do would see reduced sales such that the cost of the extension might not be as high as first thought. However the extension still requires 20 extra years of payments, and also brings with it a variety of other transactional



costs. For example, if works are still under copyright control then there are costs involved in tracing the works to ensure that no infringement is taking place. The older the works become the harder they are to trace, and thus more costly. Adding a further 20 years will only make it more difficult to locate the copyright holders of works that have been protected for a long period. Further, the creators of documentaries, for example, must negotiate with a variety of previous copyright holders often for minimal uses of their works. Extending the term of protection ensures an increase in such transaction costs as well as a reduction in the number of new works.

Harmonisation

The fact that an extra 20 years would bring Australia's term of protection into line with major trading partners, in particular the EU and the US, has been seized upon as a justification for the extension.¹⁶ It would reduce transaction costs, as it would be easier to manage portfolios of rights since they would all expire at the same time. It would also allow for greater certainty and simplicity in trade.

Arguments such as these compelled the European Commission to extend their copyright term in 1993 to life plus 70; the goal was to ensure a single duration across the EU. It was thought that differences in protection would impede the free movement of goods and services and distort competition in the common market.¹⁷ It is worth noting that the arguments here for harmonisation focused on relations *within* the EU, rather than relations with international trading partners, such as the US. (Incidentally, at that point in time the US had a term of life plus 50 years.)

The focus of harmonisation arguments has been the US and the EU, however it should not be forgotten that another of Australia's largest trading partners, Japan, favours a term of life plus 50.

Whilst harmonisation with our major trading partners is important and clearly a positive outcome, there is a lack of evidence that the reduction of transaction costs associated with harmonisation will prove sufficient to justify the 20 year extension.

Technology today

The recent growth in communications

media has meant that copyright holders want added protection, particularly in light of the increasing ease with which copyright infringements occur. A 2003 report by the Allen Consulting Group suggested that technological developments were undermining the incentives provided by copyright law and that protection should therefore be extended.¹⁸ However, what is at issue there is not the period of copyright protection per se, but rather the width of protection whilst copyright subsists. Piracy will occur regardless of the term, and what is important is finding better methods to enforce authors' rights rather than providing them with the same rights for a longer period.

CONCLUSION

There is little evidence that Australia should be embracing an extra 20 years of protection for copyright works. Whilst extending the term will provide some benefits in the form of easier copyright management and harmonisation with major trading partners, these are overwhelmingly outweighed by the detriments it will bring. The extension is highly unlikely to provide any greater incentives for creation and it reduces the public domain of works. It also offers little in the way of economic advantages since

Australia is a net importer of copyright material. Given that Australian material already receives life plus 70 years of protection in the US, extending the term here only benefits US copyright owners.

The decision to extend the term is best understood as a trade concession provided to the US in the course of concluding the Free Trade Agreement. Perhaps the negotiators believed that overall Australia had more to gain than lose from the Agreement and were thus willing to make the desired changes to copyright. However, the decision has wide-ranging effects on the public availability and development of copyright works, making it a real 'boo boo'.

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1 The draft version of the agreement can be found at: http://www.dfat.gov.au/trade/negotiations/us_fta/text/index.html. The legislation will not be retrospective.

2 <http://www.worldhistory.com/wiki/Y/Yogi-Bear.htm>.

3 Kanwal Puri, 'The Term of Copyright Protection: Is it too Long in the Wake of New Technologies?' (1989) 23(6) *Copyright Bulletin* 19.

4 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement* (2000) 80-84.

5 *Government Response to Intellectual Property and Competition Review Recommendations* (2000), available online at www.ipcr.org.au.

6 Copyright Law Review Committee, *Report of the Committee to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959) [48].

7 Amicus Curiae brief to Supreme Court of the United States in *Eldred v Ashcroft*, 'The Copyright Term Extension Act of 1998: An Economic Analysis' 4.

8 Jenny Dixon, 'The Copyright Term Extension Act: Is Life Plus Seventy Too Much?' (1996) 18 *Hastings Communications and Entertainment Law Journal* 945, 955.

9 Amicus Curiae brief to Supreme Court of the United States in *Eldred v Ashcroft*, 'The Copyright Term Extension Act of 1998: An Economic Analysis', 8.

10 *Eldred v Ashcroft* (2003) 56 IPR 608, 644.

11 Zechariah Chafee, 'Reflections on the Law of Copyright' (1945) 45 *Columbia Law Review* 503, 511.

12 Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs* (2003) 12-13.

13 Section 107 of the Copyright Act (Title 17, U.S. Code).

14 Allen Consulting Group, *The Economic Contribution of Australia's Copyright Industries* (2000) iv.

15 Tim Dodd, 'Trade Deal Bites Unis on Copyright Costs'. (2004) *Australian Financial Review* (February 14) 16.

16 Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, above n 12, 30.

17 European Union Directive 93/98/EEC on Copyright Term of Protection.

18 Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, above n 12, 35.

Broadband Wars

David McCulloch provides a perspective on the recent ACCC moves against Telstra's wholesale and retail broadband pricing.

Australia is at a critical point in the growth of broadband. This is reflected in the serious battles being waged between Telstra and its wholesale internet service provider (ISP) customers over Telstra's broadband pricing. The Australian Competition and Consumer Commission (ACCC) stands in the middle of the fray, seeking to adjudicate.

STATE OF BROADBAND IN AUSTRALIA

To set the scene for the hostilities it is necessary to take a snapshot of the state of broadband in Australia. Currently, there are about 600,000

broadband subscribers, or about 7% of households. At the retail level about half of these services are provided by Telstra, either on its Hybrid Fibre Coaxial (HFC) cable, or via DSL, which uses the traditional copper phone line, commonly known as the public switched telephone network (PSTN), as the conduit.

With the exception of about 130,000 customers on the Optus HFC cable, most of the remainder of subscribers acquire their services from ISPs who are reselling Telstra's DSL service.

The industry sees broadband as an area of considerable growth. Telstra has a publicly stated goal of acquiring at least 1 million customers (retail and wholesale) by the end of 2005.

Whilst Australia's broadband penetration rates are behind countries like Hong Kong at 53% and Canada at 35%, there is a sense that a tipping point has been reached. In part, this is because there is a ready market for broadband - dial up internet users. How quickly broadband penetration can increase is reflected in the Canadian experience, which increased from 2% penetration to its current level of 35% in only three years.

CATALYST FOR HOSTILITIES

To meet its goals Telstra needed to drive take-up, and increase both its retail and wholesale customer base. At the same time, Optus - the second largest player in the market - needed