

## IS INTELLECTUAL PROPERTY DIFFERENT, OR ARE ALL UNHAPPY MONOPOLISTS SIMILAR?

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### I INTRODUCTION

Is there something different about the exercise of market power when the dominant market players happen to possess intellectual property rights as the basis of their business? The Dawson Committee ('the Committee') received submissions to the effect that 'the application of s 46,<sup>1</sup> particularly in relation to copyright, is uncertain and it was proposed that the section be amended to clarify and strengthen the position of owners of intellectual property'.<sup>2</sup> In the event, the Committee recommended no amendment to s 46, and noted that the extent to which intellectual property confers market power on the owners for the purposes of s 46 is currently before the courts in the form of an appeal from *Australian Competition and Consumer Commission v Universal Music Pty Ltd*<sup>3</sup> ('*Universal Music*'). The Dawson Committee is the latest of a number of review bodies to enquire into and make recommendations with respect to clarifying boundaries between the laws intended to promote competition on the one hand and allow a degree of monopoly rights on the other. The Committee noted that in 2001 the Government asked the Australian Competition and Consumer Commission ('ACCC') to issue guidelines on the application of Part IV of the *Trade Practices Act 1974* (Cth) ('*TPA*') to intellectual property, and endorsed this by recommending '[t]he ACCC should consult with industry and issue guidelines on the application of Part IV to intellectual property'.<sup>4</sup> This continues in the fine tradition of suggesting that there needs to be clarification of the issue of resolving

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1 Section 46 of the *Trade Practices Act 1974* (Cth) prohibits abuse of a dominant position in a marketplace.

2 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) (the 'Dawson Review') 87.

3 (2001) 115 FCR 442.

4 Dawson Review, above n 2, recommendation 3.3.

tensions between intellectual property and competition law,<sup>5</sup> a topic on which there is very little authority and a large degree of trepidation exhibited by the intellectual property industry. Recently this anxiety, previously inchoate and free-floating, found a basis in *Universal Music*<sup>6</sup> and in a generally more interventionist approach from the ACCC.<sup>7</sup>

## II INTERACTION OF INTELLECTUAL PROPERTY AND COMPETITION LAW

Providing consumers with better, more affordable products, promoting higher living standards and expanding the choices, income and benefits to society are the aims of both competition policy and intellectual property laws, and the two are largely complementary.

The intellectual property system serves to promote innovation, which is a key form of competition. Competition policy, by keeping markets open and effective, preserves the primary source of the pressure to innovate and to diffuse innovations.<sup>8</sup>

There are, however, tensions between these regimes that arise because there is a potentially anti-competitive cost to granting intellectual property rights. The encouragement to invest in technology beneficial to society, or in knowledge products such as software, books and films, is provided in the form of a period of controlled exploitation which theoretically may allow the owners of the rights to unduly restrict the diffusion of the products embodying the intellectual property below the level that maximises societal gain from the stock of knowledge. However, since the exercise of intellectual property rights is generally regarded as not inherently anti-competitive, s 51(3) of the *TPA* offers some protection from exposing the exercise of the rights (in the form of licensing others to exploit intellectual property) to the full gaze of competition lawyers. These exemptions do not apply against the general prohibitions against monopolistic behaviour found in Part IV in s 46 (misuse of market power) and s 48 (resale price maintenance).

It is increasingly clear that general principles of competition law will apply to dealings involving intellectual property rights; the difficulty is distinguishing between exercising a right and abusing market power *beyond* that granted by the relevant right. Competition law is becoming more relevant than ever to the exercise of intellectual property rights as those rights stray from their boundaries as defined in the various statutes (and common law actions). The proprietary

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5 See Intellectual Property Competition Review Committee ('IPCRC'), Commonwealth of Australia, *Review of Intellectual Property Legislation under the Competition Principles Agreement Final Report* (2000) 215; National Competition Council ('NCC'), Commonwealth of Australia, *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974* (1999).

6 (2001) 115 FCR 442.

7 For example, the ACCC obtained amicus curiae status to argue competition points in the case *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002) 55 IPR 407.

8 IPCRC, above n 5, 6.

rights show a tendency instead to become the exercise of market power based upon the art of the possible. Perhaps the most obvious examples are found in the potential licensing practices of those controlling information in the electronic environment where the market for digital material may consist of demand for very small amounts of information, not necessarily the 'property' of any copyright holder since the capacity to quote or use material for fair dealing purposes presently constrains the notion of exploitable 'property'.<sup>9</sup> The issue tends to become whether licensing agreements will regulate the use of copyright material in a way which infringes the *TPA*. This in turn leads to the question of what the *TPA* has to say about the exploitation of intellectual property – a matter which is by no means crystal clear.

### III REVIEWS OF COMPETITION POLICY AND INTELLECTUAL PROPERTY

The interface between intellectual property and competition policy in Australia has been under scrutiny for a decade, and successive governments have demonstrated a determination to use competition to encourage microeconomic reform and enable the Australian economy to blossom in a more open, contestable world economy. This process began with the Independent Committee of Inquiry into National Competition Policy, established in October 1992 under the chairmanship of Professor Hilmer, to examine how all nine Australian governments ought to deal with competition policy. The Hilmer Report,<sup>10</sup> released in August 1993, was eagerly awaited by various industry sectors. Turning to the part that dealt with intellectual property led to discovery of a paragraph saying, in effect, 'this is a very complex issue and will need to be the subject of a separate review'.

This specialist review took place in the form of the Intellectual Property Competition Review Committee ('IPCRC') which reported in September 2000. A major part of the review was to consider whether intellectual property rights should receive special treatment under the *TPA* and specifically whether the exploitation of intellectual property rights through licensing should continue to be exempted by s 51(3) from the operation of much of Part IV of the *TPA* (although the exception provided by s 51(3) does not apply to ss 46, 46A or 48). This review in turn followed the National Competition Council ('NCC') report into s 51(3) of the *TPA*.<sup>11</sup>

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9 Issues of licensing of intellectual property and the potential effect on exercise of rights are presently under discussion in Australia, see Copyright Law Review Committee, Commonwealth of Australia, *Copyright and Contract* (2002); IPCRC, Commonwealth of Australia, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

10 Committee of Inquiry into National Competition Policy, *Review of the Committee of Inquiry into National Competition Policy* (1993) (the 'Hilmer Report').

11 NCC, Commonwealth of Australia, *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974* (1999). The NCC was created following recommendations from the Hilmer Report to create a national body to assist with reviews of micro-economic reform and to provide competition policy advice to all levels of government. See Professor Allan Fels, 'Decision Making at the Centre' (Speech delivered at the

At present the recommendations of the IPCRC with respect to exploitation of intellectual property through licensing have been partially accepted by the government, but not acted on. Submissions to the Dawson Committee pointed out the uncertainty created by the recommendations of the IPCRC on s 51(3) and ‘significant implications’ for Australian intellectual property industries of having licensing practices subject to a general ‘substantial lessening of competition test’, without guidance as to what this means.<sup>12</sup> Quite apart from licenses relating to the subject matter of intellectual property, this uncertainty prevails with respect to behaviour in a marketplace generally, including the general prohibition against misuse of market power in s 46 of the *TPA*. As Professor Pengilly pointed out in his submission to the Dawson Committee ‘[t]he major problem with s 46 is that no-one knows what it means. Thus business cannot make decisions with any degree of confidence’.<sup>13</sup> The difficulty in providing confidence to business, through ACCC guidelines as so often recommended, is that it is difficult to develop a ‘theory of everything’ to apply to all situations and that the main form of guidance comes from extrapolation from decided cases.<sup>14</sup>

In deciding what form guidelines should take, it is instructive to consider previous proposals. The IPCRC recommended, among other things, that licensing of intellectual property be subject to a ‘substantial lessening of competition test’ and that the ACCC issue guidelines to provide sufficient directions to owners of intellectual property rights to clarify the types of behaviour likely to result in a substantial lessening of competition.<sup>15</sup> Although these guidelines were recommended with respect to proposed changes to s 51(3) of the *TPA*, the general principles recommended by the IPCRC can also be applied to any guidelines under s 46, apart from the suggestion for provisions for parties to seek written clearance from the ACCC (for licensing practices) under the ‘letters of comfort’ model included in the ACCC’s merger guidelines. Since the Dawson Committee rejected the suggestion that parties be able to seek authorisation for conduct that would otherwise breach s 46, presumably copyright and other intellectual property owners should be aware that ‘[t]he economic and social consequences of misuse of market power conduct mean that it is most unlikely to be in the public interest, and hence most unlikely to be authorised’.<sup>16</sup>

Another challenge faced by the intellectual property world, mainly the copyright industries, are the substantial changes to the law which are causing a degree of industry restructuring in certain ways, with more possibly to come.<sup>17</sup> In fact, it is in the creative industries protected by copyright law that the winds of

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European Institute Workshop on the Implementation of Antitrust Rules in a ‘Federal’ Context, Florence, 19 April 1996).

12 Motion Picture Association, *Submission to the Review of the Trade Practices Act 1974* (2002) 2.

13 Warren Pengilly, *Submission to Trade Practices Act Review Committee* (2002) 3.

14 Existing guidelines on s 46 were issued in 1990. See ACCC, *Misuse of Market Power – Section 46 of the Trade Practices Act Background Paper* (1990); ACCC, *Application of the Trade Practices Act to Intellectual Property* (1991).

15 IPCRC, above n 5, 213–15.

16 Dawson Review, above n 2, 88.

17 It is appropriate to differentiate between copyright and other forms of intellectual property. See Allen Consulting Group, Centre for Copyright Studies, *Economic Perspectives on Copyright Law* (2003), 5–7.

change have blown most coldly. Recent changes in copyright law include: freeing up the market for sound recordings and other goods; removing parallel importing restrictions based only on labels of goods; the 'Digital Agenda' amendments; introducing moral rights and allowing decompilation of computer programs for the purposes of interoperability. Most recently the *Copyright Amendment (Parallel Importation) Act 2003* (Cth), signed into law 15 April 2003, allows parallel importation of computer programs, as well as books, periodicals and sheet music in electronic form. The provisions are intended to extend the application of the legislation to related copyright material, except feature films, in imported articles and are intended to allow the parallel importation of items such as computer games and CD-ROMs.

#### IV UNIVERSAL MUSIC CASE

Many of these changes can be seen as eroding the rights of copyright owners, and the *Universal Music* litigation is an example of an attempt to achieve through agreement what was previously legitimated by the *Copyright Act 1968* (Cth) – that is, a prohibition on importation of sound recordings except subject to exclusive distribution agreements. In 1998 Australian copyright law was amended<sup>18</sup> to make it legal to import into Australia CDs made in other countries, so long as they did not infringe the copyright laws of the country in which they were manufactured. Prior to the 1998 copyright amendments, the importation into Australia of CDs manufactured outside Australia (at least where copyright protection was available in Australia) *without the licence of the owner of copyright* in Australia was an infringement of copyright and an offence.<sup>19</sup>

In *Universal Music*, Warner Bros and Universal music were found liable for breach of restrictive trade practices for conduct against record stores selling cheaper parallel import CDs. Justice Hill found that Universal and Warner had taken advantage of their substantial market power to prevent the entry into the wholesale market of persons who would sell imported recordings under Universal or Warner labels. The overseas wholesalers had access to non-infringing copies and could provide CDs at lower prices than those recommended by the major suppliers

Faced with the threat of record stores selling legitimate but cheaper CDs imported at lower cost than those supplied through 'official distribution channels', Universal and Warner advised Australian retailers that if they ceased to obtain Warner's catalogue of recorded music exclusively from Warner, or sourced supply through parallel imports, Warner would no longer provide trading benefits, including the support of sales and promotional teams, extensive point of sale material, television, print and radio advertising and promotional visits. In

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18 *Copyright Amendment Act (No 2) 1998* (Cth).

19 See, eg, *Time-Life International (Nederlands) BV v Interstate Parcel Express Co Pty Ltd* (1976) 12 ALR 1.

fact, Warner at one point closed the account of one store, Raiders Pty Ltd, because Raiders had stocked parallel imports of non-infringing copies.

In deciding whether the companies had abused a dominant position in the marketplace, Hill J said:

The object of s 46 was said by the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191 to be to protect the interest of consumers and, by the same Court differently constituted in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253 at 258, to promote competition, the former policy being effected by the latter. It does this by proscribing conduct which involves the use by a corporation of power in the market, which is unconstrained by competitive forces, for a purpose which Parliament has identified as anti-competitive.<sup>20</sup>

Justice Hill went on to find that Universal and Warner took advantage of their substantial market power to prevent the entry into the wholesale market of persons who would sell imported recordings under their labels by wholesale or wholesalers from overseas with access to non-infringing copies who wished to export to Australia.

The analysis in the *Universal Music* case is not specific to copyright. The 'proscribed purpose' for the purposes of s 46 was established on the strength of inferences from the conduct in question, the analysis of market power required the usual extensive discussion of the definition of 'market', and *Melway* and *Queensland Wire* were followed in deciding that the record companies did indeed possess dominant market power. What is different for the music industry, and increasingly for other copyright industries, is the change in copyright law which removes or weakens the ability of exclusive distributors to use the *Copyright Act* to protect import monopolies. As *Universal Music* illustrates, attempting to use contractual means to achieve the same effect may be anti-competitive by applying a general competition test. In any event, although there is a distinction between exercise of an intellectual property right and exercise of market power, 'market power can arise in a range of circumstances which include statutory and contractual rights'.<sup>21</sup> It would appear that increasingly, the removal of prohibitions on anti-competitive conduct from the *Copyright Act* will expose dealings with copyright subject matter to the gaze of competition lawyers.

## V SPECIFIC GUIDELINES UNDER S 46

A major question in formulating guidelines for business (or particular industry sectors) is whether intellectual property is sufficiently different from other forms of property to warrant special exemptions. For example, provisions such as s 51(3) of the *TPA* which exempts intellectual property licences and assignments from general provisions of the *TPA* and, if so, what form these exemptions should take. The ACCC has suggested that intellectual property should be regarded as all other forms of property and not receive special treatment under

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20 *Universal Music* (2001) 115 FCR 442, 402.

21 Ray Steinwall et al, *Australian Competition Law* (2000) 283.

the *TPA* since Australian law has shown sufficient sophistication in its approach to competition and market power, so as to deal with intellectual property in a manner far removed from any crude classification of those rights as per se monopolistic.<sup>22</sup> The NCC also advocates that intellectual property rights are the same as other property rights when it comes to competition law.<sup>23</sup> The IPCRC considered it appropriate to make the protection of intellectual property ‘more naturally consistent with the structure and goals of the *Trade Practices Act*’<sup>24</sup> and that licensing practices be assessed with respect to the likelihood of ‘substantially lessening competition’ as interpreted in a manner consistent with the case law under the *TPA* generally. From *Universal Music* it appears that normal criteria will be applied in assessing issues of dominance in a marketplace.

The amendments removing restrictions on parallel importing of copyright material have been fought every step of the way. The 2003 amendments were described as ‘yet another piece of ideology masquerading as policy’<sup>25</sup> and were passed only after amendments boosting up the enforcement provisions of the *Copyright Act*, to enhance protection against importation of infringing copyright material. It is clear that the copyright sound recording industry understands only too well what *Universal Music* has illustrated: that possessing intellectual property rights does not in itself confer protection from the *TPA*. However, it is also clear that any change in a legislative regime is unsettling and needs to be explained. To assist copyright and other owners in understanding changes, a plethora of committees has recommended guidelines. Whatever the outcome of the *Universal Music* appeal, it is clear that the exercise of intellectual property rights must be understood from a competition viewpoint.

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22 IPCRC, above n 5, 209.

23 Ibid 203.

24 Ibid 213.

25 Commonwealth, *Parliamentary Debates*, Senate, 27 March 2003, 10361 (Senator Ludwig).