

Submission on Crown copyright

I would like to propose the following provision become part of the law in relation to Crown copyright. I have included, following the provision, a short history of intellectual property law highlighting, I hope, the long-standing historical support for such a provision.

The provision I would suggest for the Commonwealth is that there be a presumption of grant of a non-exclusive licence for use of Crown copyright material (other than confidential material) on application by any publisher or other user, at a fee set by the Crown (including the possibility of a fee of nil should the Crown wish to provide a particular copyright as a public service). I would also suggest an applicant have recourse to the Copyright Tribunal (*Copyright Act 1968 (C'wth)*) should they dispute the size of the fee set or should a licence application be refused. I would also suggest that the Crown be able to require a particular standard of reproduction of copyright material if that is appropriate to the circumstances.

What is different about the formulation in this provision from the present law is that it discourages exclusive distribution arrangements between the Commonwealth and commercial reproducers and distributors of Crown copyright material

This is a purposeful change and takes copyright law back to its roots as I shall attempt to now explain.

Although there appears to have developed, over recent times, strong protections for authors, inventors and suchlike and their assigns, the interests associated with the general good of society appear to have waned in their influence. For example, sections 133 and 135 of the *Patents Act 1990 (C'wth)* allows someone who cannot obtain a licence on reasonable terms under a registered patent to apply to the court for the grant of a compulsory licence. I have been unable to determine if there has ever been such an application.

It would seem to me that the relevant rights of an author or inventor in contemporary intellectual property law could be separated into two rights – a right to be paid by others for use of the work or invention and a right to control distribution. Why does an author or inventor need a right to control distribution? If anyone else copies the work or invention the copyright holder will be paid, surely that is enough, and does not society have an interest in seeing that manufacture and distribution are accomplished as efficiently as possible and for the greater good. What the inventor currently gets along with a right to be paid is a plain old garden fashion monopoly. And ‘monopoly’ is a word that takes us back to the very beginning of western intellectual property law.

Sir Edward Coke (1552-1634) railed against monopolies and his analysis and arguments have proved a significant influence on US corporate and industrial law in a way that has not been particularly replicated in Britain or Australia. However, the contemporary discussion of ‘monopolies’, and even the definition of the word, is heavily influenced by this US legal development over the last century in particular. In Coke’s time, the word had a somewhat different meaning.

During, and prior to Coke's time, the monarch, and particularly Elizabeth, had taken to granting 'monopolies' to individuals over important areas of economic activity.

Sir William Blackstone in his *Commentaries* quotes Coke in explaining 'monopolies' as "...being a licence or privilege allowed by the king for the sole buying and selling, making, working, or using, of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had done before." For example, if the king grants a monopoly in card making (which was done, see *Darcy v Allin*, Coke's Reports) to an individual then all other card makers were to cease that commercial activity or obtain permission (at a fee) from the monopoly holder.

Blackstone further goes on to explain that 'monopolies' "...had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by Sir Edward Coke in the beginning of the reign of king James the first." Luckily for the country, Coke was in a position to do something about monopolies and argued for and drafted the *Statute of Monopolies (1624)*: 21-22 James I, c. 3. A by-product of drafting the *Statute of Monopolies* was a recognition by Coke that inventors may need to be considered separately.

The *Statute of Monopolies*, somewhat by accident then, became the foundation stone of western intellectual property law. Coke essentially outlawed 'monopolies' but "*provided nevertheless ... that any declaration before mentioned shall not extend to any letters patent and grants of privilege for the term of one-and-twenty years or under, heretofore made of the sole working or making of any manner of new manufacture within this realm to the first and true inventor or inventors of such manufactures, which others, at the time of the making of such letters patent and grants, did not use, so they be not contrary to the law*".

One can see in this simple provision the essence of contemporary intellectual property law.

It seems strange that a person, such as Coke, who saw such evil in monopolies should grant one without qualification.

The interesting thing to me in the *Statute of Monopolies* is that Coke didn't provide the grant without qualification. He retained his awareness of the evil of monopolies even in this situation and did, indeed, provide an important qualification to the letters patent for an invention.

The Statute of Monopolies went on to say "*...such letters patent and grants ... be not contrary to the law, nor mischievous to the state by raising of the prices of commodities at home or hurt of trade, or generally inconvenient, ...*"

Coke did not see the State granting some incontrovertible human right to inventors. He clearly retained his view of *any* monopoly having the potential for evil and retained a right for the State to intervene should the inventor's monopoly become a tool for outrageous overpricing or be otherwise 'inconvenient' to the State. I think refusing to allow manufacture of a 'wonder' drug for the dying would have fallen within Coke's description of an 'inconvenient' circumstance for the State. Sections

133 and 135 of the *Patents Act 1990 (C'wth)* would appear to be a descendant of that qualification from the *Statute of Monopolies*.

The need for such qualification to the grant of letters patent for invention in contemporary circumstance seems obvious. When, and why, has the force of it disappeared from many of the subsequent enactments of intellectual property law?

A further important step in the development of contemporary intellectual property law came with the enactment *Statute of Anne (1710)*, 8 Anne, c. 19. This statute is considered the foundation of copyright law. It provides, in the future, that authors, and book publishers who have bought the rights to a book, “*..shall have the sole right and liberty of printing such book and books for the term of fourteen years ..*” and “*..provided always, that after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.*”

The *Statute of Anne*, although enacted a century after the *Statute of Monopolies*, did, however, still retain the right of the State to intervene should the monopoly granted prove onerous to consumers.

The *Statute of Anne* provided “*.. that if any bookseller .. set a price upon .. any book .. as shall be conceived by any person .. to be too high and unreasonable; it shall .. be lawful for any person .., to make complaint [to the Authorities]*” who shall “*..have hereby full power and authority to reform and redress the same, and to limit and settle the price of every such printed book .. according to the best of their judgements ..*”. It is also interesting that in such a circumstance a successful complainant, according to the Statute, is to be awarded the costs of their complaint.

Apparently the decision to grant a monopoly rather than to simply require authors/inventors to be paid by those using their intellectual products related to the difficulty at the time of enforcing the requirement to pay upon small scale producers.

Control of economic entities such as book publishers and other uses of copyright material is a very different feature of our society in comparison to the sixteenth and seventeenth centuries. Contemporary taxation law and company reporting are just a small part of the modern mechanisms for economic control of small entities and enforcement against ‘pirate’ publishers would not necessarily be a difficult matter for the Commonwealth.

It would appear to me that there is justice and fairness in allowing that reproducers of copyright material be free to publish copyright works of the Crown so long as a reasonable fee is paid to the copyright owner. The ultimate price of the reproduced work, it is to be hoped, is then determined according to market forces and the efficiency of individual reproduction and distribution companies. For these reasons I would commend the provision at the opening of this submission.

[Ron Ross](#)
Office of Legislative Drafting
Attorney-General's Department
Phone: 6250 6862

Fax: 6250 5935