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The Value of Copyright: Determining Shadow Prices

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The pricing of copyright use outside the market

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The rights structure question

- It is a matter of public choice in a global market economy
 - The scope of copyright subject matter
 - How exploitations of that subject matter are regarded
- Considerations involve views on the nature of civil society
 - Economic incentive and allocation of resources
 - Justice for those with creative talent

Presentation is not about this broader public choice

How exploitations of copyright are regarded

1. Activity implicates an exclusive right
2. Activity implicates a right to remuneration
3. Activity implicates a free exception



How should quantum be considered?

Copyright as a right to remuneration

1. Domestic statutes meeting international norms
 - Satisfying the equitable remuneration standard
 - Berne (broadcasting/retransmission, recording musical works)
 - Rome/WPPT (secondary uses of sound recordings)
 - Satisfying the three-step test standard
 - Berne (reproduction right) & TRIPS (all other exceptions)
2. Courts refusing final injunctive relief
 - *Campbell v Acuff-Rose*
 - Because fair use often requires close questions of judgment courts should bear in mind that the goals of copyright are not always best served by automatically granting injunctive relief, and the copyright interest may be adequately protected by damages

The common law tradition

- **Kirby (in *Woolworths v Kelly*) on the ‘no assessment of adequacy of consideration’ rule**
 - ‘The disinclination of the courts to become involved in economic evaluation derives, in part, from a realisation of the limited expertise of lawyers. That expertise does not necessarily qualify the lawyer to substitute his or her opinion about the wisdom of the bargain achieved for that of the parties, so long as some consideration for the bargain can be demonstrated.’

Judicial pricing: harm or gain based?

- **Public good nature of copyright means that once created it is an inexhaustible resource and no actual consumption of that resource occurs when exploited**
 - However 3rd-party commercial exploitation often causes
 - Economic harm to owner (compensation-based award)
 - Economic profit to 3rd-party (gain-based award)
- **But what if neither harm nor profit can be readily identified from an exploitation?**
 - Bundled local area retransmission or the prerecorded music played in discothèques
 - How should any price be determined?

Measuring value of use

- **Counterfactual bargain posited prior to the use**
 - Assessing price by prior or comparable bargains
 - The House of Lords in *General Tire & Rubber* (1975) considered that patent damages could be assessed solely by reference to prior litigation settlements
 - The European Court of Justice in *SENA v NOS* (2003) accepted that equitable remuneration for the broadcast of sound recordings could resolve in part to a 1986 agreement
 - The US Copyright Royalty Board (2008) determined a rate for recording musical works based on a 1996 agreement
 - Assessing price by stated preference data to estimate the actual value of the particular use
- **Plucking numbers from the air ...**
 - The mysterious black box of ‘judicial estimation’

The nanoeconomics of judicial pricing based on stated preferences

- 1. If** a user exploits copyright bundled as an aspect of a service provided to its customers
 - Pay television provider (communication to public of broadcast content by way of retransmission)
 - Discothèque provider (causing sound recordings to be heard in public)
- 2. Then** the value to user of the exploitation can be estimated by surveying its customers about what they would be willing to pay for their enjoyment of copyright
 - Screenrights (2006): contingent valuation
 - PPCA (2007): choice modelling
- 3. And** a price for the exploitation can be assessed as comprising a portion of that value

As a result of recent changes in Australian law, Cable TV providers may be required to make payments to the owners of the programs in order to continue transmitting via cable the regular channels (that is, ABC, Channel 7, Channel 9, Channel 10 and SBS).

If that happens, one possibility is that the Cable TV providers would remove transmission of the regular channels from the Pay TV service. Provided subscriber demand was sufficient, Pay TV may then offer the transmission of the regular channels as a separate service for an additional fee. This would mean that Cable TV subscribers would pay a monthly fee to receive Pay TV channels and an extra monthly fee to continue receiving the regular TV channels through cable.

Please remember that if the regular TV channels were no longer available through your Cable TV, you could still have access to these channels through a TV aerial.

We are now going to ask you some questions about whether or not you would be prepared to pay to continue to receive the regular TV channels through your cable service.

If you had the choice of paying [\$1 to \$10 price-points] extra per month to continue receiving the regular TV channels through your cable TV service or paying what you do now and losing this part of the service, in which case you would have to receive the regular channels through a TV aerial, would you ...?

Pay \$1 extra per month to continue receiving the regular channels through your cable TV, which amounts to \$12 per year and you would not have this money to spend on other things ...

Not pay \$1 extra per month and lose access to the regular channels through your cable TV ...

(Don't know)

Screenrights v Foxtel

- **Survey (conducted face-to-face of 2,373 Australian pay-TV households) generated an average customer willingness to pay of \$2.98 per month for retransmission of the free-to-air channels**
- **Australian Copyright Tribunal**
 - ‘We have such a level of doubt about the Survey that we attach no weight to it. Our own appreciation of the benefits that retransmission of [free-to-air channels] offers to subscribers is that they are minor and would be viewed by subscribers and prospective subscribers as minor.’
 - Tribunal estimated a price per subscriber for retransmission of \$0.225 per month

Put yourself in the following scenario:

- you are visiting a late night venue on an average Friday or Saturday night
- the people who go to these venues are a similar age and type to yourself
- you're happy with the level of security
- in the nightclub venues, there is recorded music being played (e.g. CDs, vinyl)
- in the bars and late night venues that are not nightclubs, no music is being played
- the nightclub is playing a type of music that you like listening to
- you are picking the venue, even if you normally visit late night venues as part of a group of friends

The following questions may look similar, but in each of the questions the cover charge and features of the late night venues are different.

When answering these questions, please keep in mind the amount that you are usually prepared to spend when attending a late night venue and the features that are important to you.

[Eight questions followed:]

Suppose the following two late night venues were the ONLY ones available for you to go to. Realistically, which late night venue would you choose to go to?

[For example:]

1. Nightclub with dance floor and no DJ or
2. Bar with no dance floor and no music played

*[Where variable attributes were provided:
venue type; drink prices; décor; closing time;
location; cover charge]*

Re PPCA

- Survey (conducted via the Internet of 813 young adult Australians who had been to a disco in the last year) generated an average willingness to pay of \$6.97 to visit a nightclub without a DJ rather than a bar with no music
- Australian Copyright Tribunal (supported on appeal)
 - Accepted the survey result of \$6.97 as a starting point (a proxy ‘retail price’)
 - 20% discount for use of US-sound recordings (non-conferral of secondary rights under the Copyright Act 1968)
 - 20% discount to take account of the effects of competition between venues and the elasticity of patron demand (estimated)
 - Results in a value of use of PPCA-recorded music: \$4.19
 - 50% retained by nightclub, 25% to each of APRA & PPCA
 - PPCA rate: \$1.05 per person, per night (from \$0.0748)

My concluding thoughts

- **Estimated value of use should be legislatively mandated as one matter that the Australian Copyright Tribunal must have regard to in all rate determination cases**
 - All economic value is driven by subjective-preferences and if objective evidence of those preferences is adduced, that should influence pricing determinations (and displace intuition)
 - Shifts focus to the sharing of the ascertainable benefits of the copyright exploitation