



Why the “Kookaburra” decision is bad economics

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Introduction

- Recent decision on Larrikin vs Men At Work (the “Kookaburra” case)
 - Men At Work found to have infringed “Kookaburra”
 - Larrikin claimed \$40-60m damages
 - Damages equivalent to 5% profits since 2002
- Was this a “good” decision?
 - From a legal perspective? I have no idea
 - From an economic perspective? No





The Case

- Question on ABC TV's Spicks and Specks
- Owner of "Kookaburra" song (Larrikin) claims infringement
 - Song was written in 1934 by Marion Sinclair as part of a Girl Guides Victoria competition
 - Larrikin claimed ownership in 1990 after Sinclair died
 - "Down Under" song written late 1970s. Big hit 1980s
 - Unaware of "infringement" until Spicks and Specks
 - Original tune did not have the "infringing" flute riff





Economics of IP (1)

- What does economics say about IP?
 - Knowledge (and creative output) has unique properties: non-rivalry and non-excludable
 - Therefore, free market will “under-invest” in innovation
 - IP rights solve the excludability problem
- But: IP rights come at some cost to society
 - Once created, innovation should be provided at MC (≈ 0)
 - IP rights enable owners to charge monopoly price
 - IP rights inhibit diffusion, create “deadweight loss”





Economics of IP (2)

- For an economist, IP rights are about:
 - Stimulating investment in innovation
 - Inducing more innovation than would otherwise occur
- IP rights are *not* about:
 - “Natural” rights to ownership
- If “natural” rights are important:
 - Why aren’t IP rights offered in perpetuity?
 - Why don’t we reward other professions in the same way?





The Judgment

- Does the judgment on infringement make sense? Maybe, but even that's not clear
- Does the judgment on damages make sense? Absolutely not.
- Bottom line: sales of “Kookaburra” weren't affected *at all* by Down Under
- Given this, how could “Down Under” have adversely affected incentive to invest?





Conclusions

- IP rights are all about getting the balance right: stimulating investment without unduly affecting imitation
- Kookaburra case is at odds with this logic
- Could this damage Australia's creative economy? Hard to say.
- But the “natural rights” rationale for IP is misguided

