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