

Kookaburra damages award case sounds like bad economics

An opinion piece by Assoc Prof Beth Webster and Assoc Prof Paul Jensen.

As published in The [Fortnightly Review](#) online journal, 15 July 2010.

Yesterday's decision of [Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd \(No. 2\)](#) - [2010] FCA 698 to grant damages to Larrikin Music heralds a new chapter in bad economics. To understand why, consider the economic rationale for the existence of IP rights. As a matter of economic principle, IP rights only exist to stimulate investment in creation of new technology, music or books. IP rights achieve this by protecting against imitation, thereby enabling their owner to sell their works for a higher price than would otherwise be the case. So, decisions to award damages for breach of IP rights should depend solely on the loss of profit sustained by the IP owner.

In February's judgment, (click [here](#) for a summary) Justice Jacobson ruled that Men at Work's song 'Down Under' had indeed infringed Larrikin's copyright in the tune 'Kookaburra Sits in the Old Gum Tree'. Yesterday's ruling dealt with the issue of the damages that this infringement caused. Using our simple economic framework, it is obvious that damages should only be paid if it can be shown that Larrikin suffered an economic loss as a result of the infringement. The relevant question is the following: if 'Down Under' had not been recorded and sold, would Larrikin's profits from 'Kookaburra' be higher? The answer is clearly "no".

So, what did Justice Jacobson rule with regard to damages? Well, he awarded Larrikin damages equal to 5% of profits since 2002. Given the success of the song, this will probably amount to several hundred thousand dollars. Justice Jacobson makes it clear in his judgment that these are *not* damages for copyright infringement. So far, so good. Instead, they are damages payable under s82 of the *Trade Practices Act 1974* as a result of misrepresentations made by the composers (and recording companies) of 'Down Under' to musical royalty collection agencies APRA and AMCOS.

Say that again? You mean the damages are due because the composers of 'Down Under' falsely filled out their APRA form when identifying who wrote the song (and therefore who was entitled to the royalty revenue stream)? In other words, they failed to recognise the contribution of the composer of 'Kookaburra'. But that's absurd. The sales of 'Kookaburra' were not affected in any way shape or form by the success of 'Down Under'. Quite simply, Larrikin should not be due any damages at all.

However, upon a finding of infringement, the parties agreed that damages be determined by taking a percentage of Men at Work's royalties. The parties agreed that the percentage be based on the hypothetical bargain that would have been struck between a willing licensor and a willing licensee of the copyright in Kookaburra. The judge stated that "this approach is in accordance with the principles commonly applied in assessing damages for the infringement of the rights of the owner of an item of intellectual property."

Once again, this approach illustrates how IP law and IP practitioners operate under a veil of ignorance with regard to the economic rationale of IP rights. The problem is quite simple: the law typically assumes that IP rights are based in ‘natural rights’. Viewed through this lens, Larrikin is entitled to capture some of the value created by ‘Down Under’ because it relied on a tune owned by Larrikin. But this is clearly flawed logic: the only reason copyright exists is to provide sufficient incentive for artists to create new works.

We don’t use ‘natural rights’ logic to determine the rewards for doctors who save lives, civil engineers who bring us clean drinking water, or teachers who teach our children to read and write, so why should we use this rule for the creators of music? Hopefully, the outrage over this decision will force a major re-think about the way in which we view IP infringement cases.

By Beth Webster and Paul Jensen

Enquiries:

Associate Professor Beth Webster

Director, Intellectual Property Research Institute of Australia (IPRIA)

University of Melbourne

Ph: +61 3 8344 2114

Associate Professor Paul H. Jensen

Principal Research Fellow

Melbourne Institute of Applied Economic and Social Research, and

Intellectual Property Research Institute of Australia (IPRIA)

The University of Melbourne

Ph: +61 3 8344 2117