

# Costs aplenty in 'free' trade IP deals with US

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The funny thing about the free trade agreement with the United States is that its most debatable feature has little to do with ordinary exports and imports.

It's our agreement to change our intellectual property rights to conform with those in the US and, in the process, beef them up.

If you want to understand the way the focus is shifting in trade negotiations - especially those the Americans have anything to do with - you have to be up to speed on IP: intellectual property.

And you couldn't do better than read the research paper on the subject by David Richardson, of the Commonwealth Parliamentary Library (it's on the Parliament House website).

IP rights are granted by such things as copyright, trademarks, patents and industrial design. And copyright covers items such as books, recordings, movies, computer games and software.

The thing to get clear from the outset is that IP is an unnatural act. It doesn't spring from the market, it represents a government intervention in the market.

It's the government granting to inventors, innovators and creators a legislated monopoly over the use of the thing they've produced for a certain period. Other people can't use that thing or copy it without their permission.

Thus, IP rights are fundamentally anti-competitive. In which case, why would any government grant them?

So as to encourage more invention, innovation and creativity - all the stuff of the technological advance that keeps our productivity improving and making us ever more prosperous.

The idea is that if competitors were free to copy people's new ideas as soon as they appeared on the market, this would greatly reduce the economic incentive for people to come up with new ideas, which is often a time-consuming and expensive business.

Of course, that's just another way of saying that governments deliberately allow innovators to charge consumers a much higher price for their new ideas than would be the case if normal competitive forces were allowed to apply.

So IP is a delicate balancing act - a "trade-off" as economists say - between the evil of discouraging competition and the virtue of encouraging innovation.

Two important points follow from this. First, it's quite a contradiction to be including an increase in the protection given to the owners of IP in an agreement that's claimed to be about free trade. It's about restricting trade, not freeing it up.

Second, IP puts great temptation in the way of politicians. The private interests who own copyrights, patents and trademarks stand to gain a lot from an increase in protection but such increases are contrary to the public interest if they do more to inhibit competition than to encourage inventiveness.

Mr Richardson reminds us that, over the years, some of the biggest names in economics - the heroes of economic rationalism - have expressed serious reservations about the merits of IP rights: Alfred Marshall, Friedrich von Hayek and Milton Friedman.

Then there were the 17 leading economists - including five Nobel laureates - who petitioned the US Supreme Court to strike down the Copyright Term Extension Act of 1998.

This was when Congress had been persuaded to extend the duration of copyright from 50 years after the author's death to 70 years, so the Walt Disney Corporation wouldn't lose control of Mickey Mouse.

Mr Richardson also reminds us that, since the negotiation of the World Trade Organisation's Uruguay Round in the early '90s, the Americans have had the strengthening of worldwide protection of IP rights as one of their highest priorities in trade negotiations.

Why are the Yanks so obsessed with IP? Because they're the world's biggest exporter of music, movies, computer games, software, drugs and thousands of other patented items. And their trade names - Levi Strauss, McDonald's, Coca-Cola - are highly valuable.

They weren't much interested in protecting other countries' IP rights in the 19th century when they were using a lot of European IP to develop their economy but now they're hot against the evil of pinching other people's IP. Now being a poor developing country is no excuse.

They declined to agree to the Uruguay Round until the TRIPS agreement - trade-related aspects of IP rights - was added to it. It was TRIPS that obliged us to extend the life of our patents from 16 years to 20.

The Americans are big on the "harmonisation" of different countries' IP laws. And it's always harmonising to the US's higher levels of protection, not to any other country's lower levels. The part of the FTA that deals with IP is there not so much because we have weak protection of IP - we don't - as to set the precedent for America's free trade deals with all the countries behind us in the queue.

We've agreed to harmonise our protection of trademarks, extend copyright to 70 years, strengthen our actions against people trying to get around the "regional coding" US firms use to stop Australians buying cheaper CDs in other countries, and bind our hands against further

actions to remove restrictions on "parallel imports" (imports of IP by someone other than the local representative of the foreign IP owner).

As a small country trading with the technological giants of the US, Europe and Japan, we will always import far more IP than we export. So - as with the developing countries - we stand to lose from the Americans' efforts to increase IP protection around the world.

But, even if Australian firms were winners rather than losers, most of the changes we've agreed to can't be defended on economic grounds.

Retrospectively increasing the duration of copyright protection, for instance, gives the holders of active rights (such as Disney) a windfall gain at the expense of consumers, while obviously doing nothing to incentivate creativity in the past.

But won't the rise in the value of copyright increase the *future* incentive to create? No, not really.

Why not? Because the value today of money you hope to receive in 50 to 70 years' time is zip. And also because most copyright is valueless long before 50 years have passed. Who wants to use software that's even 10 years old? (By the same token, of course, extending copyright doesn't cost us much.)

Finally, tricks such as regional coding and prohibitions on parallel imports simply permit IP owners to engage in price discrimination - charging more in some markets than others. And there's a long and sorry history of firms manipulating IP protections so as to stifle the creativity of their rivals. How's that in the public interest?

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