

# **The Unbearable Lightness of Being an Intellectual Property Lawyer**

## **Intellectual Property Society of Australia And New Zealand, WA Branch**

Chief Justice Robert French AC  
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Quite some time ago I was asked to nominate a title for this luncheon address. For a reason I cannot now recall, 'The Unbearable Lightness of being an Intellectual Property Lawyer' came to mind. The book *The Unbearable Lightness of Being* was written by a Czech novelist, Milan Kundera, in 1984. The term 'lightness of being' was used as a metaphor to contrast with that of heaviness or the burdens of life. The novel had as its theme the impossibility of holding on to moments in life with particular significance. Its characters try to capture in memory those perfect moments but the lightness of life is such that they slip away and happiness dissolves. Having selected a title rather at random, it was necessary to determine how it fits with this address and the general subject of intellectual property law.

It is a good working assumption that no idea, including the title of lunchtime talks, is new. That is not to indicate a bias against novelty but is based on long personal experience. Predictably, an internet search of the term 'the unbearable lightness of being an intellectual property lawyer' validated that assumption. It yielded, among other things, an article by Alastair Hudson, a well-known barrister and academic in the United Kingdom who has written extensively on equity and finance law, including an article with the intriguing title 'Remedies for being thought of as small when in fact you are tall'. The relevant article, for such purposes however, was 'The Unbearable Lightness of Property'.<sup>1</sup> It appeared in a collection of essays on New Perspectives on Property Law Obligations and Restitution.

Hudson's title referred to a discussion of changes in the nature of modern property offered by a social theorist, Zygmunt Bauman. Bauman argues that in today's world a cosmopolitan elite rides on lightness because their property is intangible and not tied to any

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<sup>1</sup> A Hudson, 'The Unbearable Lightness of Property' in A Hudson (ed) *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, 2004) 1.

particular space or workforce. Hudson's argument, based on that idea, was that our traditional property law is focussed on segregation, tangibility and permanence and therefore has a problem because so much property, including intellectual property, is intangible. He explores illogicalities at the heart of the law when it comes to dealing with the ephemeral and disposable nature of property in the contemporary capitalist world.

Lightness of being, which can be applied metaphorically to intangible property, has a particular application to intellectual property rights. Their general nature was discussed by the High Court in 2012 in the *Tobacco Plain Packaging case*.<sup>2</sup> The legislation under challenge imposed restrictions on the use of trade marks on packaging and on tobacco products. The Court held by majority that the Act did not effect an acquisition of the trade mark rights for the purposes of s 51(xxi) of the Constitution which, as interpreted by the High Court, requires that Commonwealth laws providing for the acquisition of property must provide for that acquisition on just terms.

It was not in dispute in that case that registered trademarks, designs, patents and copyright constitute or give rise to exclusive rights which are property within the meaning of s 51(xxi). They are rights, however, which are created by statute in order to serve public purposes although they differ in their histories, their character and the statutory schemes which make provision for them.<sup>3</sup> Gummow J in that case rejected the proposition that registration under the *Trade Marks Act* or the *Designs Act*, a grant under the *Patents Act*, or the subsistence of copyright, confers an unconstrained right to exploit those items of intellectual property or an immunity from the operation of regulatory laws.<sup>4</sup> Some of the public purposes served by intellectual property laws may be in tension with each other. From time to time the balance struck between those competing purposes may be shifted by changes to the law reflecting changes in public policy.

The purposive character of intellectual property rights was asserted by Dr Francis Gurry in his acceptance speech upon his appointment as Director General of the World Intellectual Property Organisation in 2008, when he said:

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<sup>2</sup> *JT International SA v Commonwealth* (2012) 250 CLR 1.

<sup>3</sup> *Ibid* 30 [35] (French CJ).

<sup>4</sup> *Ibid* 44 [88].

Intellectual property is not an end in itself. It is an instrumentality for achieving certain public policies, most notably, through patents, designs and copyright, the stimulation and diffusion of innovation and creativity on which we have become so dependent, and, through trademarks, geographical indications and unfair competition law, the establishment of order in the market and the countering of those enemies of markets and consumers: uncertainty, confusion and fraud.<sup>5</sup>

It seems unlikely therefore, that the creation of tradable intellectual property rights is the ultimate purpose of all intellectual property laws. If it were, then proprietarianism would be the dominant, normative influence on intellectual property law and policy today. If, however, intellectual property rights can be seen as a means to publicly beneficial ends, their underlying purpose may be described as instrumental. Professor Peter Drahos, who wrote about these issues in 1996, said of the latter approach that:

The practical import of the theory would be that the interpretation of intellectual property law would be driven in a systematic fashion by the purpose of that law rather than more diffuse moral notions about the need to protect pre-legal expectations based on the exercise of labour and the creation of value.<sup>6</sup>

Importantly, there is no judicial doctrine in Australia which provides generally for the protection of the products of intellectual effort. The High Court in *Campomar Sociedad, Limitada v Nike International Ltd*,<sup>7</sup> in a unanimous judgment, affirmed as an authoritative statement of contemporary Australian law that of Dixon J in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*<sup>8</sup> that courts of equity had not:

thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that the exclusive right to invention,

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<sup>5</sup> Francis Gurry, 'Acceptance Speech' (Speech delivered at the WRPO General Assembly, Geneva, 22 September 2008).

<sup>6</sup> Peter Drahos, *A Philosophy of Intellectual Property* (Ashgate, 1996) 203, 220.

<sup>7</sup> (2000) 202 CLR 45.

<sup>8</sup> (1937) 58 CLR 479.

trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wide generalization.<sup>9</sup>

As a result it is not easy to state a clear normative or moral purpose for particular intellectual property laws. Indeed, in some quarters there is debate about the merits of having such laws at all. A practical illustration of that normative uncertainty is the difficulty of finding effective anti-piracy messages. The use of the theft analogy is weak. As Professor Robert Stevens, Professor of Commercial Law at University College, London, wrote:

In a world which is not one of limitless abundance, we need rules for determining who is entitled to physical things, but these rules of first possession have little application to ideas or information which cannot be possessed.<sup>10</sup>

An anti-piracy message can be made clear when it can be related to the individual creator of a work. The American performer Louis CK made a video of a performance for online purchase for \$5 which he accompanied with this message:

Please bear in mind that I am not a company or a corporation. I am just some guy. I paid for the production and posting of this video with my own money. I would like to be able to post more material to the fans in this way which makes it cheaper for the buyer and more pleasant for me. So, please help me keep this being a good idea. I can't stop you from torrenting; all I can do is politely ask you to pay your five little dollars, enjoy the video and let other people find it in the same way.<sup>11</sup>

The message did not lack for moral clarity.

The question — why is it wrong to infringe a person's intellectual property rights? — may have more than one answer depending upon the nature of the rights and their statutory framework. Sometimes there may be no clear answer because the legislation which defines the right has been influenced by the agendas of particular interest groups. In some cases the

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<sup>9</sup> Ibid 509.

<sup>10</sup> Professor Robert Stevens, 'Rights and Other Things' in Donald Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing, 2012) 115.

<sup>11</sup> Louis CK word — *Live at Carnegie Hall*.

term 'normative' may be too high flown to apply to the compromises reflected in particular statutory provisions. That point was made by the High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*.<sup>12</sup> The case concerned the use of mod chips to bypass access code requirements in Sony PlayStations, thus allowing the use of copied CD-ROMs. There was a provision of the *Copyright Act 1968* (Cth) providing for civil remedies against the vendors of 'circumvention devices' whose purpose was to circumvent or facilitate the circumvention of technological protection measures.<sup>13</sup> The question was whether the access code reader in the Sony PlayStation was a technological protection measure within the meaning of the *Copyright Act*. The joint judgment found little in the way of useful indicators of the statutory purpose. The extrinsic materials gave no clear indication of how the relevant provisions took the final form they did. Their Honours said:

Indeed, the very range of the extrinsic materials, with shifting and contradictory positions taken by a range of interest holders in the legislative outcome, suggests that the legislative purpose was to express an inarticulate (or at least not publicly disclosed) compromise.<sup>14</sup>

The Court observed that to try to identify a single statutory purpose and then construe the definition of 'technological protection measure' by reference to that purpose risked picking a winner when the legislature had not been prepared to do so.<sup>15</sup> McHugh J, in a separate judgment, also made reference to evidence that the provisions concerned the product of a compromise agreed to or forced upon interest groups in the industry affected by the legislation.<sup>16</sup> Kirby J quoted Professor Ricketson's description of copyright as 'one of the great balancing acts of the law' in which '[m]any balls are in play and many interests are in conflict'.<sup>17</sup> Professor Ricketson had described copyright law as a dance and in the passage quoted by Kirby J said:

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<sup>12</sup> (2005) 224 CLR 193.

<sup>13</sup> *Copyright Act 1968* (Cth), s 116A(1).

<sup>14</sup> (2005) 224 CLR 193, 207–208.

<sup>15</sup> *Ibid* 208.

<sup>16</sup> *Ibid* 231.

<sup>17</sup> *Ibid* 241 [169] quoting Ricketson, 'Copyright' in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 152, 154.

the multiplicity of participants and interests now involved in its rhythms inevitably affect the contemporary judicial task of resolving contested questions of interpretation of the *Copyright Act*.<sup>18</sup>

The lightness of being metaphor is therefore apposite to intellectual property rights not only because they are intangible and readily tradable, but also because they are embedded in a statutory cloud of changeable policies and purposes.

In the case of patents, the concept of patentability itself is subject to judicial development according to a common law process. A recent example of this was the decision of the High Court in *Apotex Pty Ltd v Sanofi-Aventis Pty Ltd*.<sup>19</sup> The Court held there that a method of medical treatment for the human body was a patentable invention as a 'manner of manufacture' within the meaning of s 6 of the Statute of Monopolies'. That criterion of patentability appears in s 18(1)(a) of the *Patents Act 1990* (Cth). There is no statutory definition of the term 'manner of manufacture'. The concept has developed according to common law processes. As was stated in the *National Research Development Corporation v Commissioner of Patents*<sup>20</sup> it has always been applied:

beyond the limits which a strict observance of its etymology would suggest, and ... a widening conception of the notion has been a characteristic of the growth of patent law.<sup>21</sup>

That common law process of development is necessarily informed by the proper limits of the judicial function. Not all proposed developments are necessarily best made by judicial decision. Developments in the law which involve the balancing of complex and contending policy considerations should generally be left to the legislature. In *Apotex* the patentability of methods of medical treatment was held to be logically and normatively consistent with the existing body of principles developed for the application of the criterion in s 18(1)(a) of the *Patents Act*.

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<sup>18</sup> Ibid 241 [169].

<sup>19</sup> (2013) 253 CLR 284.

<sup>20</sup> (1959) 102 CLR 252.

<sup>21</sup> Ibid 269–70.

There is another aspect of intellectual property rights that makes the metaphor of lightness apposite. That is their negative character. In a passage from the 4<sup>th</sup> edition of Laddie, Prescott and Vitoria on *The Modern Law of Copyright and Design*, the authors observed that:

Intellectual property is ... a purely negative right, and this concept is very important. Thus if someone owns the copyright in a film he can stop others from showing it in public but it does not in the least follow that he has the positive right to show it himself.<sup>22</sup>

Lord Herschel LC made a similar comment in relation to patents as long ago as 1893 in a case called *Steers v Rogers*<sup>23</sup> which was quoted with approval by the plurality in the High Court in *Grain Pool of Western Australia v Commonwealth*:

The truth is that letters patent do not give the patentee any right to use the invention — they do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all; only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way, and using a particular invention.<sup>24</sup>

Enough about rights, what about people. In his novel, Milan Kundera attributed lightness of being to one of his characters, a woman called Sabina, who had simply left a man because she felt like leaving him. The author wrote of her:

Her drama was a drama not of heaviness but of lightness. What fell to her lot was not the burden, but the unbearable lightness of being.

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<sup>22</sup> Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Design* (LexisNexis, 4<sup>th</sup> ed, 2008) 3 [1.1].

<sup>23</sup> [1893] AC 232, 235.

<sup>24</sup> (2000) 202 CLR 479, 514 [84].

There is in intellectual property law a person to whom we can attach the attribute of an unbearable lightness of being. It is the intellectual lawyer's imaginary friend — the person skilled in the relevant art. There is an entity who truly embodies Kundera's characteristic. It was recently seen running through the pages of the judgments in the High Court and the Federal Court in *AstraZeneca AB v Apotex Pty Ltd*<sup>25</sup> dodging inventive steps and following a paper trail of prior art, which it examined one at a time as required by s 7 of the *Patents Act*, and keeping only the most obvious clues to its ultimate, uninventive destination. I do not assign gender to this entity which, after all, is a legal construct. Nor, despite the best efforts of counsel in *AstraZeneca* can it be attributed with will or purpose. It is, as I observed in my judgment, not an avatar for an expert witness, not even the most convincing expert witness — it is a pale shadow of a real person, a tool of analysis which guides the court. Its shadowy existence and elusive qualities place it well within my lunchtime metaphor.

There are many such imaginary persons to be found in the law. They are a species of lightly personified legal constructs used for the purposes of judicial decision-making. There is, for example, the recently notorious fair-minded lay observer who is used to determine whether or not there is a reasonable apprehension of bias on the part of a decision-maker.<sup>26</sup> Then there is the hypothetical referee who determines whether particular material is defamatory.<sup>27</sup> The hypothetical reasonable person has a variety of legal tasks determining whether a use of postal communication services is offensive<sup>28</sup> and in determining whether a representation to the public constitutes misleading or deceptive conduct.<sup>29</sup> Each of these constructs hovers at the edge of evaluative judgment. They are, of course, not available for all evaluative judgments of which there are a number in intellectual property law.

I hope I have said enough to justify the application of this rather unlikely sounding metaphor to the work of intellectual property lawyers. I have tried to demonstrate its application by reference to the intangible character of intellectual property rights, their dependency upon the statutes which gave rise to them, and the changeable purposes and policies informing those statutes, their negative character, the common law process of development of the concept of patentability, and the nature of the imaginary person skilled in

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<sup>25</sup> [2015] HCA 30; (2014) 226 FCR 324.

<sup>26</sup> Discussed in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

<sup>27</sup> Discussed in *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460; *Harbour Radio Pty Ltd v Trad* (2012) 247 CLR 31.

<sup>28</sup> *Monis v The Queen* (2013) 249 CLR 92.

<sup>29</sup> *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45.

the relevant art. That leaves only the question whether the metaphor is applicable to the people sitting in this room. I would like to suggest that lightness of being in the sense of intellectual agility is indispensable to the intellectual property practitioner who faces a continually shifting and intellectually demanding, but intensely interesting, area of practice.