

Public Domain Films

Kendall Odgers discusses the impact of international copyright laws on films

in which the copyright is about to expire

The last few years have seen "public domain" video distributors in the US generate millions of dollars in earnings from film titles which, with the passing of time, have lost their copyright protection in the US. The US public domain distributors have already made their presence felt in Australia with the release of a large catalogue of 1930's titles. Companies seeking to distribute this material in Australia must however deal with a very complex legal question — is a film which is in the public domain in the US also in the public domain here?

This question is one of the most complex in copyright law, and, because of the relatively recent nature of the industry, is not one which courts in this country have had much opportunity to consider. It arises largely because the period of copyright protection of films in the US is different to that in Australia.

US v Australian Law

Take the example of *Gone with the Wind*, first released in 1939. Under US law, the film was entitled to an initial 28 year period of copyright protection and, providing it had been registered for copyright in that initial 28 year period, a further 28 years protection upon renewal in 1967. Assuming the registration requirements were complied with, *Gone with the Wind* will enter the public domain in the US in 1995.

Under Australian law, a film made in 1939 is not protected as a film, but as a series of photographs and as a dramatic work. The copyright in the photographs comprising *Gone with the Wind* would have lasted 50 years, and expired in 1989. The copyright in a film as a dramatic work expires 50 years after the end of the year in which the "author" of the film died.

One of the many uncertainties is the meaning of "author" in relation to a film. It is possible that the author of a film could be the script writer, or the director, or both. If the latter, copyright in *Gone with the Wind* as a dramatic work will not expire until 50 years has elapsed since the year in which the survivor of the script writer and the director died.

Assuming that 50 years has not passed since the death of the "author" of *Gone with the Wind*, the film will be protected

by copyright in Australia (up until the end of the relevant year) — subject however to Australia's International Copyright Protection Regulations.

These regulations provide that a "published" film will not be protected by copyright in Australia if protection "in the nature of copyright" in the film has expired in the "country of origin". Accordingly, if *Gone with the Wind* has been "published" and the "country of origin" of the film (under the Regulations) is the US, the film will no longer be protected by copyright in Australia once copyright in the film in the US expires in 1995.

Defining Publication and Origin

The definition of "publication" used in the Regulations is not what might be expected — a film is "published" if copies of the film have been sold or hired to the public. Under this definition, merely exhibiting a film in a theatre will not of itself constitute "publication", because copies have not been sold or hired to the public. It is arguable that "publication" does occur according to this definition where copies of a film are hired to cinema operators for public exhibition in their cinemas — depending on whether cinema operators can be considered to be "the public". Certainly, release of a film on video will constitute "publication".

The definition of "country of origin" is also a problem area. The US will clearly be the "country of origin" of *Gone with the Wind* if first publication was in the US and the film was not published anywhere else within the next 14 days. On the other hand, if the film was first published in the US and then also published in the UK within 14 days, either country could be the "country of origin" for the purpose of the Regulations.

To summarise, if *Gone with the Wind* has been "published" and its "country of origin" is the US, the film will enter the public domain in Australia at the same time as the US, that is, no later than 1995. If, however, the film was simultaneously published in the US as a result of which the UK is the "country of origin", copyright protection in Australia for *Gone with the Wind* could subsist well beyond 1995 — because the films are protected by copyright in the UK in the

same way as they are in Australia (that is, as a series of photographs and as a dramatic work).

Lessons for Distributors

The lessons for distributors of US public domain material looking to operate in Australia are clear. While many films will enter the public domain in Australia at the same time as they become public domain in the US, caution must be taken to determine the "country of origin" and whether the film has been "published". If a film is unpublished, or the country of origin is not the US, a "public domain" distributor may find that instead of successfully exploiting a new market for its products in Australia, it is faced with costly legal proceedings for copyright infringement which may result in loss of the products and damages payments to the owner of the copyright in the film.

Quite apart from any question of copyright protection, considerable care must also be taken to avoid any misleading suggestion on packaging or advertising that a film has been released in Australia by or with the approval of the former (or present) copyright owner.

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In both cases, they would be able to point to their relatively weak financial positions. The Government and, more so, the community are the losers. The Government finds itself with a reduced capacity to capture an increased proportion of the scarcity value of licences. The community, however, not only forgoes the benefits of increased program choices which would have resulted from the entry of competing broadcasters, but also suffers from the reduced capacity of the existing broadcasters to increase their program quality.

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