is likely to enhance social welfare. For example if B steals A's automobile, A is deprived of its use. As between A and B the automobile is a scarce resource. In order to assure that the value of B's use is higher than A's, we acknowledge A's property rights and require B to purchase the automobile at a negotiated price. However, with intangible values such as ideas, the appropriation by B does not prevent a continued use by A. These intangible values are what economists call "public goods"; once produced they can be shared widely at little if any marginal cost. Once the idea is produced, society is clearly better off if both A and B can exploit the idea rather than if A has a monopoly in its use. The catch is, of course, that unless A is granted protection for the ideas A creates, A has less incentive to produce ideas in the first place.

The creation of property rights in writings and inventions through the copyright and patent systems is justified precisely on the ground that protection will encourage inventors and authors to invent and write. But how much encouragement should be given to writing and inventing over other important social activities such as farming and lawyering. The scope of the property right we grant an inventor or author will determine, at least at the margin, the extent to which resources flow into inventing and writing. But how much incentive is enough? Policy makers must balance the claims of those who invent against the claims of those who would (at no marginal cost, remember) benefit from an absence of property rights.

The copyright and patent systems of most countries reflect very hard fought and intensely negotiated compromises, usually of an ad hoc nature, regarding the scope of protection for particular classes of writings or inventions. This balancing does not lend itself to the principled decision-making associated with judicial decisions but rather the give and take of the legislative process.

misappropriation and competition

The theory of unjust enrichment cannot provide a rational basis for measuring the metes and bounds of the property right at issue in these cases. To be sure there is a powerful moral imperative to the abstract idea of "reaping only what one has sown" which animates the decision of INS. But on closer analysis, one recognises that the advance of civilisation has depended on both the development of original ideas and their appropriation by others. In both the arts and sciences, progress comes by the accretion of modest originality onto the accumulated efforts of others.

Copyright and patent systems recognise this by limiting the scope of the right and the time in which the right can be exercised. On a more mundane level, the gains derived from most economic activity are attributable, at least in part, to the efforts of others - a "reaping" of unsown grain. The small shop at a shopping mall directly profits from the customer traffic generated by the investment of the larger department store. Book publishers profit from the invention of electric lights. Hot dog vendors outside a stadium profit from the investment of the football team. In a multitude of interdependent ways, one's economic activity "appropriates" or builds upon the sowing of others.

The flip side of "misappropriation" is competition. Competition requires that multiple sellers offer to sell similar goods to the same buyers. Competition is accordingly reduced to the extent that a doctrine of misappropriation confers exclusive rights in ideas, styles, and designs. A rational legal system will attempt to balance the societal returns from increased investment in development resulting from the grant of property rights against the social gains derived from an increased competition resulting from allowing others to freely copy. In our view the INS case has not served as a springboard for achieving such a balance.

Whether the Courts will explicitly accept the analysis of the Restatement and applaud the burial of the INS decision remains to be seen. In practical effect, however, they have already done so for the decision is seldom acknowledged and even less frequently applied. It stands as a stone monument to a pitched battle between two news agencies against the backdrop of World War I. If seems to have little practical relevance to the modern world.

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Continuous Disclosure - an additional legal obligation

David Williams describes enhanced disclosure obligations and their impact on film investments.

On 4 March 1994 the *Corporate Law Reform Act 1994 ("the Act")* received Royal Assent after wide debate associated with its passage through the Houses of Parliament (since 1992).

The Government's intention in passing the Act was to apply "enhanced" disclosure obligations on all entities (not just entities listed on the Australian Stock Exchange) in which the public invest with the aim of enabling investors to make informed investment selections.

The Act has very significant implications not just for listed companies and trusts but also for fund managers who have unlisted products in which the public is invited to invest or has been invited in the past to invest.

The changes to the Corporations Law made by *the Act* of most relevance are those relating to continuous disclosure (including financial reporting) and to the prospectus provisions of the Corporations Law. These provisions commenced on 5 September 1994. In addition, the Corporations Regulations implement certain aspects of the continuous disclosure regime.

This article looks at the continuous disclosure implications of *the Act* from the point of view of a manager of unlisted products. This article does not cover the altered reporting requirements.

who is affected?

The enhanced disclosure provisions of *the Act* apply to "Disclosing Entities".

A Disclosing Entity is a body or undertaking which issues securities which are "ED Securities" (a shorthand term used in *the Act* for enhanced disclosure securities).

Units of a unit trust and other prescribed interests (together "prescribed interests") will be ED Securities if:

- they are listed; or
- a prospectus in relation to those prescribed interests has been lodged

and prescribed interests have been issued pursuant to the prospectus and there have been at least 100 holders of prescribed interests at all times since the prescribed interests were issued under the prospectus.

An important consequence of this is that many "closed" unit trusts or other prescribed interest offers which are no longer being marketed but at some time previously have issued prescribed interests pursuant to a prospectus will be Disclosing Entities (for so long as they have at least 100 holders).

This will cover most film investment where there has been a prospectus (but probably not those where the funds were raised using an offer document that fell within section 215C of the former Companies Code).

Securities that are quoted on the Australian Bloodstock Exchange Limited are declared not to be ED Securities.

what must be disclosed?

Section 1001A applies to a listed disclosing entity, and requires compliance with stock exchange rules relating to continuous disclosure (including Listing Rule 3A(1)).

In the case of an unlisted disclosing entity, section 1001B applies.

The continuous disclosure rules apply to information which:

- is not generally available; and
- a reasonable person would expect to have a material effect on the price or value of the Disclosing Entity's ED Securities, i.e. it is "price sensitive".

Information is "generally available" if:

- it is readily observable; or
- it has been made know to investors in securities of a kind whose price or value might be affected by the information and a reasonable period of time has elapsed since the information was made known for it to be disseminated among such investors.

Information is likely to have a material effect on the price or value (i.e. is price sensitive) if the information would or would be likely to influence the investors described above in deciding whether to subscribe for or buy or sell the securities. The fact that there is no buy-back covenant and that there may be no market in the relevant securities (as is the case in many prescribed interest schemes) will not automatically mean information is not "price sensitive".

These concepts follow closely the insider trading provision of the Corporations Law.

Importantly, the threshold test in determining whether information is generally available refers to investors and not their advisers. The information must therefore be widely disseminated to reach those investors who invest in securities whose price or value might be affected by the information.

In contrast to the continuous disclosure rules for listed entities (especially the revised Listing Rule 3A(1)), there is currently no express exception for commercially sensitive information where the release of such information would cause a detriment that arguably outweighs the benefit of disclosing the information to the market.

how and when is information to be disclosed?

The obligation to disclose information arises when the manager of the Disclosing Entity becomes aware of the information.

Such obligation is satisfied by the manager of the Disclosing Entity lodging the information with the ASC as soon as possible. Information that has been lodged is not required to be sent to the holders of the prescribed interests.

Information is not required to be lodged with the ASC if the information would be required to be included in a supplementary or replacement prospectus.

This means that the continuous disclosure requirements will generally not adversely impact on a manager of a prescribed interest fund which has a prospectus on issue so long as that manager is fully complying with its obligations to issue supplementary or replacement prospectuses. However, a manager of a Disclosing Entity which does not have a current prospectus on issue (or where the information specifically does not relate to that prospectus) will be required to lodge relevant information with the ASC.

contravention

A contravention of the continuous disclosure rules as they apply to prescribed interest schemes will occur if the manager of the Disclosing Entity intentionally, recklessly or negligently fails to disclose the required information.

A person involved in that contravention may be civilly liable to a person who suffers loss or damage as a result.

It is a criminal offence if the failure to disclose is intentional or reckless.

exemptions and modifications

The ASC has the power to exempt specified persons from all or specified disclosing entity provisions.

In addition, regulations may be made to exempt specified persons from all or specified disclosing entity provisions or to declare specified securities of bodies not to be ED Securities.

It is not clear in what circumstances exemptions or modifications will be made.

David Williams, Partner, Mallesons Stephen Jaques.

Telecommunications after 1997 - Carriage, Convergence, Consumers

Helen Mills, Director, Communications Law Centre reports on the CLC's conference held on 9 November 1994.

One of the most engaging features of the conference was hearing debates between the major telecommunications players on licensing, regulation, interconnect arrangements, universal service and other critical aspects of the post - 1997 arrangements, at a point just before submissions were due to be sent to government.

Not surprisingly, perhaps, Telstra is adopting a purist pro-competitive position on these issues; Optus favours continued involvement by the regulator and policy makers to keep the rules of the game; and the service providers argued that they were already effectively bearing many of the burdensome obligations of carriers, while getting none of the benefits (eg: interconnect at carrier rates).

Why Limits on Telecommunications Providers

Optus Director of Corporate and Regulatory Affairs, Andrew Bailey, argued that while Telstra has control of the customer base, sunk infrastructure costs and the advantages of its diverse network, it will enjoy advantages which cannot be neutralised simply by the operation of general competition law. Hence Optus supports continuation of a regulator which