

# Laws3308 Marketing Law Lecture Notes

## Lecture 1: Policy and introductory matters: Introduction to the unit and to the institutions of Marketing Law

- **Marketing law involves...**
  1. Intellectual property law
  2. Laws relating to different modes of marketing or distribution of goods or service
    - o Competition Law - Important act = *Competition and Consumer Act* (CCA)
  3. Laws relating to the protection of consumers when goods or services have been purchased and are then found to be unsafe or otherwise unsatisfactory
    - o ACL – part 3-2 and 3-5 (unsafe and unsatisfactory goods)
    - o Tort of negligence = ‘product liability’
    - o S18, s29 of ACL (misleading or deceptive conduct)
    - o Manufacturers’ liability, suppliers’ liability
- **Intellectual Property Law**
  - o Rights of creators and innovators
    - Copyright
    - Trade marks
    - Patents
    - Design
    - Trade secrets
  - o Example:
    - soft drink can with trademarks stamped or otherwise displayed on it
    - a sheet of paper with a copyright musical score written on it
  - o Intellectual property law = branch of law which prescribes and defines the **nature** of and the **manner** in which certain sorts of intellectual creations (*information*) can be *monopolised* and thus *owned*
    - Can be sold by creator (or *assigns*) to another
  - o Intellectual property rights grants **exclusive rights** to creator to deal with the information in **prescribed** and **limited** ways (traditional rights of any property owner)
    - Traditional rights over property = **right to exclude others from dealing with the information**
    - Right to permit such dealings on whatever terms the **owner chooses** (*use courts to enforce owner’s decision*)
- **Intellectual Property (IP) has two Broad Categories**
  1. IP rights over ‘creative’ materials
    - o E.g. patentable invention, registrable design for an article in trade or commerce and literary, dramatic, musical or artistic works to which copyright can apply (Creative Rights)
  2. IP rights over trademarks, logos, names or other ‘indicia’ and ‘information’ by which the reputation of a trader is preserved and developed + communicated to customers (Marketing Rights)

- **Creative rights and Marketing rights**
  - Differ in nature but in the end = both **exclusive rights to certain limited types of information**
  - Each enables the owner both the right to:
    1. **Profit from commercial exploitation of that information** (directly or through license arrangements)
    2. **Take legal action to prevent “free-riding”**
- **Other Effect of IP Rights**
  - Provide all competitors in a market with an **incentive to innovate**
    - Potential for **monopoly profits**
    - Need for trader who wishes to **remain competitive**
  - IP rights do not only reward innovators, they also encourage **further innovation** by forcing those who wish to **compete** in the market for particular goods and services to **design around** or **improve** existing IP protected subject matter (**rather than copying them**)
- **Relationship between IP Rights and Competition Policy**
  - Preventing IPR owners too broad a set of exclusive rights = ultimately prevent legitimate competition
    - Limit beneficial innovation
    - Constrain the transmission of new ideas and incremental improvements
  - Struggle to find **balance between** encouragement of beneficial innovation and business competition **against** the need to prevent **deceptive or unfair business practices**
- **IP Rights as Moral**
  - Should not emphasis IP rights as solely grounded in economics
  - These innovation are creative expressions and ideas of the owner = **inherently worthy of protection** (regardless of economic or market value)
  - Notion of **moral rights** in copyright law (Australia has adopted some of these ideas recently – not to same extent as exists in *Continental European* law)

### Lecture 3: Trade Secrets Law

- **From marketer’s perspective important to know:**
  - What **IP laws** protect Trade secrets?
  - What **rights** does the owner of trade secrets have?
  - How are those **rights infringed**?
  - **Remedies** available?
- **Overview:**
  - Introduction to the action of the breach of confidence as it applies to Commercially Valuable Information
- **Sources of the law on breach of confidence**
  - Lots.... Property, contract, bailment, tort etc.
- **Coco v A. N. Clark (Engineers) Ltd**

- Motorbike case (plaintiff disclosed designs) – defendant independently produced moped, plaintiff sued for injunction
- Judge ruled:
  - Information must be **genuinely confidential** or secret
  - Information must have been **obtained in circumstances which “import an obligation of confidence”**.
  - Defendant must have made an **unauthorised use of the information causing detriment** to the plaintiff
- **Modern Formulations of Coco**
  - Information must be able to be **specifically identified** and not merely in global terms;
    - Must specify what the secret is –cannot be general statement)
  - **genuinely confidential** or secret;
  - **obtained in circumstances “importing an obligation of confidence”**;
  - **Unauthorised use** of information by defendant (perhaps) causing **detriment**;
  - Enforcing the obligation of confidence must be **reasonable** in all the circumstances.
    - Court has discretion to enforce or not enforce obligation of confidence
- **Element 1:**
  - When does information have “necessary quality of confidence about it?”
    - Examples of confidential information:
      - Product ideas
      - Computer technology
      - Recipes e.g. coca-cola recipe
      - Marketing information
      - Ordinarily excludes customer lists
  - **Guidelines**
    - No real limitations on kind of info
    - Private, gov. business secrets covered
    - Need not be novel or innovative
    - Absolute secrecy not necessary provided some obligation of confidence *NP Generations v Feneley*
      - Some people in a business can know about secret, provided no widespread public dissemination
    - **Must have some commercial value** (relevant to trade secrets)
    - Regarded as secret by plaintiff
    - \*\*\*see TRIPS\*\*\* (LECTURE NOTES)
  - **Checklists and general principles**
    - Consider all circumstances of case, reasonable man test *Deta Nominees v Viscount Plastic Products; Ansell Rubber* case
    - No absolute checklist