1. PROPERTY IN CREATIVITY

1.1 THE NATURE OF INTELLECTUAL PROPERTY

- Ideas are intangible assets, certain of which are deemed meritorious of legal protection as 'intellectual property'
  - Difficult to define IP b/c it is the creation of rights in abstract ideas; also difficult to define b/c in the digital age there is growing scope, application, complexity of the field, and constant change/evolution
- Dickens case: sister was given manuscript of book (tangible) but not explicitly given copyright to it. It was determined that Dickens' children owned the words (intangible); the kids didn't have the right to reproduce the contents of the manuscript by demanding it from sister any more than the sister had the right to copy the manuscript w/o kids' permission → there are two **separate** pieces of property

Characteristics of IP:

Intellectual: derived from human intellectual activities, esp. innovation and creativity

Property: the rights exercisable against other, esp. exclusivity

∴ **an intangible subject matter emanating from the human intellect in respect of which a legal right of exclusivity may be granted.**

Similarities b/w Intellectual & Physical Property	Dissimilarities
- Same grant of exclusive right to exploit what one owns - Exclusive rights can be transferred to others	- Physical property is **rivalrous** (where only one person can use at any one time) - Physical property is **exhaustible** (wears out from use) vs. ideas which cannot be depleted by use - Physical property is **excludable** (capable of being physically possessed to the exclusion of all others); IP is non-excludable → the legal system's response is to allow you to 'build a legal fence' around your IP using copyright in order to protect it

Protecting IP:

- What are the boundaries of intangible property?
- How do you know it has been reproduced or used w/o permission?
- How do you prove that someone has *intentionally* used a design?

Exclusive rights and correlative obligations:

- Exclusive right to exploit, use, & control a work, invention, information, or idea, is safeguarded by IP law
  - Negative right: laws don't provide how something is to be used but rather gives the right to prevent others from engaging in unauth'd activities
- Right to criminally prosecute those who exploit IP w/o authorization (right to engage nation-state intervention in order to enforce)

4 Key Principles of Int'l IP Treaty Protection : (necessary b/c IP laws don't operate o/s territory where granted)

1) **Minimum Standards:** abiding by minimum standards of protection for IP rights
2) **National Treatment/non-discrimination:** treating citizens of other member countries no worse than own citizens
3) **International Recognition:** recognizing certain acts undertaken in another member country as giving rise to entitlement to protection in 1st country
4) **Right of Priority:** Regarding certain applications for registration undertaken in another member country as giving rise to priority to make similar application in 1st country
   → [3+4 ensure that IP owners are able to receive protection in other countries]

1.2 OBJECTIVES OF INTELLETUAL PROPERTY PROTECTION

- Tension b/w the interests of **idea creators** *vs* **idea users**
  - Must balance incentives to invest in creative effort w/ freedom to access and develop material
  - Exclusive use and control of ideas/monopoly of information has the potential to impede social, economic, and cultural innovations and curb economic growth **but** for most IP that reaches the market, there has been a significant amount of labour and effort that has been invested
  - ∴ to ensure that the necessary resources are allocated to creation and exploitation of ideas, rewards, in the form of exclusive rights, are only granted for limited times
- The general rule is **free competition** ∴ the exception is intellectual property rights (IPRs) → b/c it is the exception, there must be a rationale

Rationales for Protecting IP:

1) MORAL: Individuals have **natural rights of entitlement** to the products of their intellectual activity/labour
    a. ***Locke's Labour Theory****:* person who exerts labour upon resources either unowned or commonly owned, has acquired a natural property right to exploit those resources
        Limits: why does mixing what one owns w/ what one does not own = a gain for me rather than a loss of what I owned? Not all IP is derived from mixing labour with pre-existing material resources.
    b. ***Hegel's Personality Theory:*** innovative works should be protected b/c they are an emanation/expression of the creator's personality
        Limits: do people own their personalities? Are more personal ideas (i.e., creative acts) entitled to greater protection (vs. scientific acts)?

1. ECONOMIC: IPRs encourage people to invest in the innovation process, which benefits society overall
    a. ***Deadweight Loss:*** ideas are non-rivalrous, non-exhaustible, non-exclusive ∴ producer is unable to prevent competitors and users from copying their works (free-riding) → if producer can't control freeriding, there will be under-investment in creation ∴ demand for creative products will go unfulfilled
        Limits: may take years for ideas to be modified, if at all, if they are monopolized; is there enough done by creator to justify IPR as reward?
    b. ***IPRs as Incentive:*** ideas offer the producer a limited monopoly over idea in return for its creation (and supply to market) which increases the ease with which IP is traded, divided, transferred
        Limits: w/o a legal monopoly, not enough info will be produced but *with* monopoly, too little of info will be used

→ ensures adequate protection from freeriding which, in turn, ensures there will be enough production of creative ideas & provides incentives, in the form of limited monopoly, for creators which encourages creation (which is beneficial for society as a whole)

Rationales for *not* protecting:

- Suppresses innovation and only benefits small minority
- They offer too much protection and is @ odds w/ the economic case for allowing free movement of goods

1.3 PRINCIPLES OF INTELLECTUAL PROPERTY RIGHTS

The right of exclusivity → b/c IP cannot be physically secured against access by 3Ps, they must be **legally secured** by IPR, enforceable by IPR-holders, with the backing of the state

Characteristics of IPRs:

1. Rights only apply w/r/t a sub-set of all creations (i.e., **specific subject matters**)
2. Innovation/creativity thresholds must be surpassed (ensures: equality b/c all IP must pass tests; transparency/clarity of what will be protected; certainty and ability to plan for future)
3. Specific exclusive rights: they only apply in certain circumstances but are granted to IP owners to the exclusion of all others
4. Not absolute: 3Ps are free to engage w/ IP in certain ways even w/o owner's consent which allows ideas to be developed and used for overall societal benefit
5. Rights are of limited duration: degree of control over subject matter is inverse to the duration of the protection
6. Rights are transferrable to other parties: via assignment, licensing, or bequeathing
7. Rights are mostly statutorily-based: Copyright = ***Copyright Act 1968*** // Design registration = ***Designs Act 2003***
8. Territoriality: IPRs only have effect in the country in which they were enacted

REGIME	SUBJECT MATTER	THRESHOLD	RIGHTS	LIMITATIONS	DURATION
Copyright	Literature Drama Music Art Audio/video rec. Radio/TV signal Typographic layout	Original Made	Copy Reproduce Publish Perform Communicate Adapt	Fair dealings Time-shifting Format-shifting Design overlap [various other]	Authors life + 70 years 70 years 50 years 25 years

Design Registration	Visual feature of a product	New Distinctive	Make Import Sell Use Keep for sale, etc.	Spare parts	10 years

What is the difference between 'specific exclusive rights' and 'limitations on exclusive rights'?

Specific exclusive rights refer to the fact that the protex avail to IPOs are specific, insofar as not every act i/r/t SM is protected (e.g., reading a book is not a protected act) vs. limitations refer to the fact that even where a protection exists, it's not absolute (e.g., w/r/t copying, allowance for fair use of another creator's work)

Should there be a common characteristic of IPR? If so, what should it be?

- Unifying principle based on **unfair competition** (i.e., misappropriation of the fruits of a competitor's labour) → general scheme that would not specify specific SMs or thresholds of protex but rather focus on **methods of unauthorized exploitation** that result in disincentives to create or innovate
- 2 functions:
    - Fills in the gaps where misappropriation has occurred but no relevant IPR infringed
    - Would consolidate and replace individual regimes rather than constantly granting new IPRs or expanding the application of existing ones

2. COPYRIGHT SUBJECT MATTER

2.1 CATEGORISATION OF COPYRIGHT SUBJECT MATTER

- Copyright is categorized to allow differential treatment of various subject matters under the legislation ∴ must first know what a particular subject matter is b/c that will determine the exclusive rights exercisable by the owner

Simplifying Copyright Law – The Why and the How (pp 41-48)

- Christie's article argues that Australian copyright law should be reformed and simplified b/c the legislation is structurally complex, beyond the requirements of the purposes of categorization, it unjustifiably discriminates b/w different types of subject matter, and it is technologically specific
- Unjustifiable discrimination: (Results in breach of Australia's obligations under international treaties)
    - A consequence of categorisation is that it creates gaps for subject matter that falls o/s those categories
    - 2 specific instances where differential treatment is esp. problematic:
        - Artistic works are not provided w/ right of adaptation, unlike other Pt III SM, despite the fact that the Berne Convention requires otherwise (in article 12)
        - Cinematograph films are not provided w/ exclusive rights to either reproduction or adaptation (breach of articles 14, 14bis of Berne Convention)
- Technological Specificity: (results in patchwork leg'n for creation and exploitation of copyright material in digital age)
    - Issues: **narrow definitions** used for both **protected SM** and **exclusive rights**; distinctions drawn b/w tangible and intangible embodiments; requirement for work to be identified with a human author
    - Uncertainty of the act and pressure to adopt ad hoc amendments to deal with such uncertainty
    - Generally accepted that only a human can be an author of a work → this reflects hx understanding that works are the products of *human intellect* and therefore explains the application of moral rights to works but not to other subject matters
        - New developments in the tools which we use to create SM may not be easily assimilated into the existing legislative structure

2.2 PART III SUBJECT MATTER – "WORKS"

- **Berne Convention** mandates copyright protection for **literary and artistic works** which, according to article 2, includes "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematograph works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."
- **TRIPS** later mandated that computer programs and compilations of data must be protected under copyright as literary and artistic works

A. LITERARY WORK

Defined inclusively in the ***CA s. 10,*** and mentions two special cases: "a table or compilation, expressed in words, figures, or symbols" and "a computer program or compilation of computer programs."

Nb: inclusive definitions serve to demarcate the *margins* of the category

Concept of a literary work: must be **literary** in character; must be in writing or something like writing; the audience must engage with it in a literary sense (i.e., you **read it**). Something will not qualify as literary only when it is **too insubstantial** (e.g., short phrases or single sentences)

***Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd* [2000] FCA 1273**

I	Whether the written principles and commands of a slot machine constitute a literary work
D	Yes.

RA	The specifications were a compilation expressed in words, figures, and symbols. [42] Sufficient work and effort were reflected in the expression contained in the specifications to give rise to copyright. The work comprised calculations, decisions, analysis, judgments. [43]
RE	• Compilation • In writing • Reflects literary effort (i.e., not a randomly generated string of words, letters, and numbers)

***State of Victoria v Pacific Technologies (Australia) Pty Ltd (No. 2)* [2009[FCA 737**

F	Respondent came up with phrase to be displaced on taxi screens to alert public to the fact a driver was in danger: "*Help Help Driver in Danger Call Police Ph. 000"*
I	Whether the phrase is protected by copyright as a literary work
D	No.
RA	Short phrases and single sentences are too insubstantial to qualify as a literary work. We cannot give out exclusive rights to the basic building blocks of things, like language.
RE	• Literary works must comprise something more than mere idea – the author must add something of substance in form of the expression of ideas • Skill or labour is necessary – cannot be insubstantial • Must afford either information and instruction or pleasure in the form of literary expression • Phrase uses the obvious words for drawing attention to a driver needing urgent assistance and does no more than state an idea [22-23] [i.e., the expression is **inseparable** from the fundamental idea] ○ Where expression of an idea is inseparable from its function, expression **is** the idea and is not entitled to copyright protection [23]

***Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* [2008] FCAFC 197**

F	Elwood designed a graphic t-shirt and a product swing tag with pictures and words; Cotton On also designed some shirts that looked v similar
I	Whether Elwood's t-shirt was a literary work.
D	No; It is an artistic work.
RA	It is an artistic work that consists of the layout, balancing, form, font, positioning, shaping and interrelationship of the various elements. Any meaning conveyed by the numerals and text is too obscure and subjective to the reader to constitute a literary work. The writing/numerals is subservient to the artistic aspect.
RE	• Although the words can be read, they don't mean anything – rather they contribute to the overall feel/sense of the design • The semiotic meaning of words and numbers is insubstantial and vague; whereas a literary work is typically expressed in notation or code comprehensible by a human addressee • Its essence is not as a literary work

B. DRAMATIC WORK

Defined inclusively in ***CA, s. 10(1);*** includes "a choreographic show or other dumb show" and "a scenario or script for a cinematograph film."

DOES NOT INCLUDE: "a cinematograph film as distinct from the scenario or script for a cinematograph film."

In essence: something to be **performed;** must be capable of performance [This is the characteristic that distinguishes it from a literary work (meant to be performed, not read; distinction b/w Macbeth and a novel)].

***Green v Broadcasting Corporation of New Zealand* [1989] UKPC**

F	Copyright alleged to have been infringed was claimed to subsist in the scripts and dramatic format of a TV show called 'Opportunity Knocks'
I	Are there enough characteristic features of the show which were repeated in each performance to constitute a 'dramatic format'?

D	No.
RA	It is stretching the original use of the word "format" a long way to use it metaphorically to describe the features of a TV series such as a talent, quiz or game show which is presented in a particular way, with repeated but unconnected use of set phrases and the aid of particular accessories. A dramatic work must have **sufficient unity** to be capable of performance.
RE	• No script ∴ must rely only on dramatic format to ground copyright • Format features: title, catchphrases, clapometer → all unrelated except as 'accessories'; i.e., you can use them in a performance but their use does not constitute a performance • No **certainty of SM** → b/c copyright accords a monopoly ∴ certainty in SM must exist in order to avoid injustice to the rest of the world

***Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd* [2000] FCA**

I	Is the poker machine a **dramatic work?**
D	No.
RA	There is no plot, choreography, script, characterisation or interaction b/w characters. There is a strong element of randomness – all of which point away from being a dramatic work.

C. MUSICAL WORK

CA does not define a musical work. It was defined in the previous act as "any combination of melody and harmony or either of them."

Includes: harmony and/or melody

Excludes: words/lyrics to a song; single notes; 'noise'; silence

Essence of a musical work: must have some kind of musicality (i.e., not silence), an intentional arrangement of sounds (not random) that humans hear and perceive as being musical.

D. ARTISTIC WORK

Unlike literary and dramatic works, artistic work is defined **exhaustively** (∴ if it does not fit w/in one of these subcategories, it is not an artistic work).

Artistic work means:

(a) A **painting, sculpture, drawing, engraving or photograph**, *whether the work is of artistic quality or not*

Painting: (NO DEFINITION)

- **Essence of a painting:** markings made with paint or paint-like substance on a surface that humans engage with visually as an artistic work; does not include face paint on a face (***Merchandising Corp v Harpbond* (UKCA 1983)**)

Sculpture: *includes* "a cast or model made for the purposes of sculpture"

- **Essence of sculpture:** 3D object created through a process of casting, carving, producing, constructing, and received as sculpture

Drawing: *includes* "a diagram, map, chart, or plan"

- ***Elwood Clothing Pty Ltd*:** A drawing is essentially a 2D work in which shape and images are depicted by lines, often without colouring. It need not represent anything that actually exists. It can simply give pleasure, attract attention, or convey a visual impression. But a **visual function** is necessary.
- Does not need to be the "work of an artist":
  - e.g., design drawings for an exhaust pipe were considered to be "drawings" (***British Leyland v Armstrong* (HL 1986)**)
  - e.g., simple stylised letters considered to be drawings (***Roland Corp v Lorenzo* (FCA 1992)**)

Engraving: *includes* "an etching, lithograph, product of photogravure, woodcut, print or similar work, not being a photograph."

Photograph: **exclusively** defined as "a product of photography or a process similar photography"

- *Includes* a product of xerography but not an embodiment of images forming part of a cinematograph film
- **Process of photography:** using a device, capturing light (most often reflected) to produce an image
- **Similar to photography:** using a device to produce an image

(b) A **building or model of a building,** whether the building or model is of artistic quality or not

- *Includes* a structure of any kind
- **Essence of a building:** providing shelter; constructed; three-dimensional

(c) **A work of artistic craftsmanship** *whether or not mentioned in paragraph (a) or (b)*

- NO DEFINITION IN STATUTE
- Must have artistic quality (*cf* (a) and (b))
- **Artistic:** that which pertains to an artist; i.e., one who cultivates one of the fine arts" (***Burke v Spicers Dress Designs* 1936**)
- **Craftsmanship:** product of a 'craft'; i.e., of a "calling requiring special skill and knowledge especially a manual art – a handicraft – an artisan." (***Cuisenaire v Reed* (VSC 1963)**)

***Burge v Swarbrick* [2007] HCA**

F	Yacht plug and hull
I	Is it a work of artistic craftsmanship?
D	No.
RA	Determination of what is a WAC turns on assessing the extent to which the particular works' **artistic expression**, in its form, is unconstrained by functional/utilitarian considerations. The greater the req'ments in a design brief to satisfy utilitarian considerations, the less scope to encourage subst'l artistic effort ∴ less likely to be WAC It **does not** turn on assessing the aesthetic appeal/beauty of the work.
RE	• Impossible/unwise to exhaustively/predictively identify what is/isn't WAC • The boat hull plug was not the work of an 'artist-craftsman'; it had significant functional requirements