

Introduction to IP.....	18
The Nature of Intellectual Property	18
What is IP?	18
What is copyright?	18
Constitutional Basis for IP law	18
Union Label case 1908	19
Grain Pool of WA v Commonwealth 2000	19
International Influences.....	19
Treaties	19
Berne Convention for the Protection of Literary and Artistic Works 1886	19
WIPO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994 ..	19
Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled 2013	20
Bilateral, Regional, and Plurilateral Trade Agreements.....	20
Key Treaty principles.....	21
History and Basic Principles	21
The mid-90s Copyright Crisis.....	22
Philosophical Justifications	23
Utilitarian/Incentive Theory.....	23
Lockean natural right theory: ‘you should not reap where you have not sown’	23
Hegelian Personality theory.....	23
Others	24
Traditional Cultural Expressions and the rights of Australian Indigenous People.....	24
Bulun Bulun v R&T Textiles Pty Ltd 1998	24
M* & Ors v Indofurn Pty (1994) 54 FCR 240.....	25
The public domain.....	26
Copyright is property	26
Copyright Act s.196(1).....	26
The idea/expression dichotomy	26
Hollinrake v Truswell (1894)	27
Early case illustration of what falls under copyright.....	27
IceTV v Nine (HC 2009).....	27
Victoria v Pacific Technologies (Aust) Pty Ltd (No 2)	27
Criteria for Subsistence of Copyright	27
Originality and authorship	28
Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd (2002)*	29

Feist Publications v Rural Telephone Service Co 1991.....	29
IceTV v Nine Network Australia (2009)*	29
IceTV brought a new focus on the author and authorship as essentially bound up with originality	29
Telstra Corporation Ltd v Phone Directories Company Pty Ltd (2010)*	31
Originality and ‘slavish copying’	31
Cummins v Bond 1927*	32
Monkey selfie case.....	32
The requirement of Material Form.....	32
CA s10 Definition.....	32
Works	33
CA s21 Reproduction and copying into a ‘material form’.....	33
CA s22 Making of work into a material form	33
CA s24 References to sounds and visual images embodied in an article	33
Subject matter other than works.....	33
s89 Sound recordings in which copyright subsists.....	33
s90 Cinematograph films in which copyright subsists	33
s91 Television broadcasts and sound broadcasts in which copyright subsists.....	34
s92 Published editions of works in which copyright subsists	34
s22 Provisions relating to the making of a work or other subject-matter.....	34
s29 Publication	35
Territorial Connecting Factors/Qualification	35
Basic rule (eg CA s 32; s 84).....	35
Publication s29(1)	36
Protection of foreign works	36
Duration of copyright.....	36
Copyright Subject Matter	38
A contrasting approach: Title 17 of U.S.C. s 101.....	38
Pt III Works.....	38
Literary Works.....	38
s10 Definition	38
s22 Provisions relating to the making of a work or other subject-matter.....	39
Literary, dramatic, musical or artistic works.....	39
University of London Press Ltd v University Tutorial Press Ltd [1916]	39
Exxon Corp 1981	39
Fairfax Media Publications Ltd v Reed International Books Australia Pty Ltd [2010]* ..	39

A UK Comparison:	40
Infopaq and Meltwater	40
Newspaper Licensing Agency v Meltwater Holding BV (UK)	40
Compilations	41
IceTv	41
Telstra Corporation Ltd v Phone Directories Company Pty Ltd (2010)*	41
Computer programs as literary works	41
s 10 Definition	41
Computer programs' challenges to copyright law	41
Apple Computer Inc v Computer Edge Pty Ltd (1983)	41
Autodesk Inc v Dyason No2 (1993)*	42
Data Access Corporation v Powerflex Services Pty Ltd*	42
Wrinkle	43
Statuscard Australia v Rotondo [2008]	43
Question: copyright in 'screen display'?	43
CA Inc v ISI Pty Ltd	43
Dais Studio Pty Ltd v Bullet Creative Pty Ltd [2007]	43
Dramatic works	44
S10(1) Definition of dramatic work.....	44
Two Controversial areas	44
Nine Network Australia v ABC.....	44
Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd [2000]	44
Musical works	45
CBS v Gross 1989*	45
Coffey v Warner/Chappell Music Ltd*	45
Sawkins v Hyperion Records*	46
Boomerang Investments Pty Ltd v Padgett (Liability) [2020]*	46
Artistic Works.....	46
S10 Definition of Artistic work	46
Creation Records Ltd v News Group Newspapers Ltd (1997).....	47
Merchandising Corporation of America v Harpbond.....	47
Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd (2008)*	47
Engravings and Sculptures	48
Lincoln Industries v Wham-O Manufacturing Co (1984)	48
Model Frisbee found to be a sculpture and the moulds/dies based on it were found to be engravings	48

Greenfield Products Pty Ltd v Rover Scott Bonner (1990).....	48
Lucasfilm Ltd v Ainsworth (2009).....	48
Buildings.....	48
s 10.....	48
Darwin Fibreglass [1998].....	48
Other Subject Matter (Part IV Subject Matter).....	49
Sound recordings	50
S10 Definitions of ‘Sound Record’ ‘Record’	50
s24 References to sounds and visual images embodied in an article.....	50
PPCA v FACTS (1998).....	50
Cinematograph films.....	50
S10 definition of Cinematograph film.....	50
Galaxy Electronics Pty Ltd v Sega Enterprises Ltd (1997)	51
Commissioner of Taxation v Seven Network 2016	51
Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd [2000]	51
Sound and Television Broadcasts.....	52
s 91 Television broadcasts and sound broadcasts in which copyright subsists.....	52
S10 definitions	52
When does a broadcast begin and end?.....	52
s87 Nature of copyright in television broadcasts and sound broadcasts	52
s25 Provisions relating to broadcasting.....	52
The Panel Case	53
Commissioner of Taxation v Seven Network [2016].....	54
Published editions.....	54
s88 Nature of copyright in published editions of works	54
News Pty Ltd v Copyright Agency Limited (1996)	55
Immoral works?	55
Glyn v Weston Feature Film Co [1916]	55
Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd (2006).....	55
Ownership and Exploitation	56
Issues in ownership.....	56
First ownership of Pt III works: basic rules	56
s 35 Ownership of copyright in original works.....	57
Joint authorship	58
s 10.....	58
Consequences of joint authorship	58

Prior v Sheldon (2000) FCA	58
Joint authorship and the 'right kind' of contribution?.....	59
Tate v Thomas	59
Kogan v Martin.....	59
Martin & Anor v Kogan [2021]	60
Collaboration?.....	60
Fairfax Media v Reed International 2010 FCA	60
Acohs v Ucorp (MSDS).....	60
Specific rules for certain activities	61
Employees.....	61
Commissioned works	61
s35(5) Commissioned Works	61
s35(4) Journalists get:	61
General Ownership rules for Pt IV subject matters	62
'Maker' of a sound recording.....	62
'Maker' of a film	63
Crown Copyright (ss176-178)	63
Copyright Agency Limited v State of New South Wales [2007]	63
s176 Crown copyright in original works made under direction of Crown	64
s177 Crown copyright in original works first published in Australia under direction of Crown.....	64
s178 Crown copyright in recordings and films made under direction of Crown	64
Should we be doing ownership differently?	64
Exploitation and Licensing	65
Transfer of rights (assignment)	66
s196 Assignments and licences in respect of copyright.....	66
s197 Prospective ownership of copyright.....	67
Consequences of partial assignment	67
s30: Ownership of copyright for particular purposes	67
Equitable interests	67
Acorn Computers Ltd v MCS Microcomputer Systems Pty Ltd (1984)	67
Massine v de Basil [1936–45].....	68
General Principles regarding voluntary licensing	68
Basic contractual rules apply.....	68
Types of licences	68
Implied licences.....	69

Parramatta Design & Developments Pty Ltd v Concrete Pty Ltd (2006)	69
Copyright Agency Limited v State of New South Wales [2008]	69
Assignment or Licence?	69
Wilson v Weiss Art Pty Ltd (1995).....	69
Larrikin 2009	70
Boomerang Investments v Padgett (Liability) [2020].....	70
The unequal bargaining position of individual authors and creators.....	70
Directive on Copyright in the Digital Single Market.....	71
Collective Administration of copyright	71
Boomerang Investments Pty Ltd v Padgett (Liability):.....	72
Infringement General Principles	73
To prove direct infringement of a Pt III work, you must:.....	73
Causal connection	73
Creation Records v News Group Newspapers (1997)	73
Frank Winstone (Merchants) Ltd v Plix Products Ltd [1985]	74
Proving and disproving causal connection/copying	74
Retsis v Network Ten Ltd (1998)	74
Unconscious copying?	74
Francis Day and Hunter v Bron [1963]	74
Bright Tunes Music Corp v Harrisongs Music Ltd (1976)	74
“Objective similarity”	75
EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd (2011)	75
Substantial part.....	76
s 14 Acts done in relation to substantial part of work or other subject-matter deemed to be done in relation to the whole	76
Articulating the test	76
Ladbroke v William Hill [1964]	76
Designer’s Guild	76
The role of ‘substantial part’	77
Larrikin	77
Zeccola v Universal City Studios Inc (1982).....	77
Baigent v Random House Group Ltd [2007]	78
IceTV.....	79
EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited [2011]	79
Substantial part and artistic works	80
Cummins v Vella (2002)	80

Designers Guild v Russell Williams.....	80
Elwood Clothing Pty Ltd [2008].....	81
Substantial part and computer programs.....	81
Autodesk Inc v Dyason [No 2] (1993).....	81
Data Access Corp. v Powerflex Services Pty Ltd (1999)	81
Substantial part and Pt IV subject matter.....	82
Network Ten v TCN Nine (Panel case).....	82
Infringement: Exclusive Economic Rights	84
Infringement	84
Exclusive Rights in Pt III Works.....	84
Pt III Works – Exclusive rights (s31)	84
CBS v Telmak	85
In thinking about exclusive rights.....	85
1. Identify each act that could fall within one of the exclusive rights	85
2. Identify who is responsible for doing that act.	85
Reproduction	86
Trans-dimensional copying	86
CA’s Deeming provisions.....	86
Is it reproduction if you use the recipe to bake the cake?	86
Autospin Oil Seals v Beehive Spinning [1995 UK]	86
Cuisenaire v Reed [1963]	87
Reproductions in ‘material form’	87
Stevens v Sony; AVRA v Warner.....	87
Performing the Work in Public.....	88
CA Provisions: To perform the work in public	88
s27 Performance	89
When is performance “in public”?.....	89
APRA v Tolbush [1986]	89
Rank Film Production v Dodds (1983).....	89
APRA v Commonwealth Bank of Australia (1992)	89
To communicate the work to the public.....	90
S10 Definition.....	90
s22 Provisions relating to the making of a work or other subject-matter.....	90
Broadcasts and other communications	90
s27 Performance	90
Performance v communication.....	91

To communicate the work to the public.....	91
APRA v Telstra (1997).....	91
Cf European law	91
Who communicates?	92
s 22.....	92
Cooper v Universal Music Australia Pty Ltd (2006)*	92
Pokémon Co International, Inc v Redbubble Ltd [2017]*	93
Case C-160/15, GS Media BV v Sanoma Media Netherlands BV*	94
More on responsibility: Joint liability under general tort principles	94
NRL v Optus [2012]	94
The right to publish.....	96
The Right to Adaption	96
S10 adaptation means:	96
Cf US law	97
Rental Right.....	97
S31 Nature of copyright in original works	98
Exclusive rights in subject matter other than works	98
Teleproducts (Aust) Pty Ltd v Bond International Pty Ltd (1985)	98
Who is responsible for doing the act?	98
NRL v Optus 2012.....	98
Authorisation and online infringement.....	99
Authorisation: general principles.....	99
University of New South Wales v Moorhouse (1975).....	99
Subsections 36(1A) and 101(1A).....	100
The analogue copying equipment cases.....	101
CBS Songs Ltd v Amstrad Consumer Electronics Plc [1988].....	101
WEA v Hanimex (1987)	101
Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia (1993)	101
Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984)	101
Infringement and Enforcement Online.....	102
Works: s39B Communication by use of certain facilities.....	103
Subject Matter OTW: s112E Communication by use of certain facilities	103
s113A Agents may act on behalf of groups of performers	103
Cooper v Universal Music Australia Pty Ltd (2006).....	103
Authorisation in the online environment	103

A&M Records, Inc. v. Napster, Inc. (US 2001).....	104
MGM Studios, Inc. v. Grokster, Ltd (US 2005)	105
Universal Music v Sharman Licence Holdings (2005).....	105
Apple’s ‘Rip, Mix, Burn’ campaign 2001 + iPod Launch	105
Safe Harbours.....	106
S112E Communication by use of certain facilities	107
The Safe Harbours (Australian version)	107
Key difference between EU/US Safe Harbours and Australian Safe Harbours is scope (who gets benefit)	107
Roadshow Films Pty Ltd v iiNet Ltd [2012]*	108
Subsequent developments	109
Pokémon Co International Inc v Redbubble Ltd [2017]*	109
Power to prevent infringement?	109
Website blocking.....	110
CA s115A Injunctions relating to online locations outside Australia	110
CA s115A Matters to be taken into account	111
Ongoing developments in Europe	112
Developments in Australia.....	113
Anti-circumvention Rules.....	113
Basics.....	113
Technical protection measures (TPM)	113
TPMs provided for under the Act.	114
Exclusions from protection	114
TPM 3 main causes of action:	114
Indirect infringement (other than authorisation).....	115
Indirect infringement is broad: s37 and s38	115
SECT 37 Infringement by importation for sale or hire	115
SECT 38 Infringement by sale and other dealings	116
Pokémon Co v Redbubble 2017*	116
Pokemon relied on s38. Redbubble said we’re not selling these things on the website. But s38 is broader than that, not just sale, but exhibiting an article in public byway of trade. Includes electronic and exhibiting electronic copies. Those copies on redbubble sites were this. Even if no fulfillers ever printed a t-shirt. Very broad – don’t underestimate s37 & s38	116
Parallel Importation	116
Copyright Exceptions and Limitations	118
Introduction to Exceptions.....	118

Remunerated Exceptions	118
- Remunerated exceptions are also known as the ‘statutory licences’ statute effectively grants licence, subject to equitable remuneration.	118
- Cases where the copyright owner’s right to exclude (cant say no) is replaced with a right to equitable remuneration	118
- Arise:	118
○ where individual negotiations would be difficult/wasteful: in particular where user requires access to a wide array of copyright works and cannot find/negotiate with each individual owner.....	118
• Statutory licences for copying (literary, artistic works) for education: ss113N-113U	118
- Quantative limits, cant copy whole book for eg	118
• Statutory licence for radio broadcasters: s 109	118
• Playing sound recordings in public (restaurants, bars, gyms, hotels...): s 108 (note, performing the musical work is covered by APRA, not a statutory licence)	118
○ Government use: s 183B	118
- In general: rate of equitable remuneration is negotiated; or determined by the Copyright Tribunal of Australia.	119
- Remuneration is administered by collecting societies which receive payment, determine distribution (either based on full data or sampling), and distribute to copyright owners	119
- Details beyond the scope of this course	119
Fair Dealing	119
(not fair use – that’s American)	119
- Series of fair dealing exceptions, not fair use	119
○ Fair Use has open texture? purposes, courts can recognise new uses as fair, Aus has a specified list.	119
○ DO have a similar analysis of uses - fit requirement of fairness	119
Fairness:	119
What is a fair dealing?.....	120
Hubbard v Vosper 1972*	120
Fairness Factors.....	121
Fair dealing for purposes of research or study	121
ss 40 (Pt III), 103C (Pt IV) (and s248A(1A)).....	122
s40 Fair dealing for purpose of research or study	122
10 (2) Reasonable Portion.....	123
s103C Fair dealing for purpose of research or study	124
De Garis v Neville Jeffress Pidler 1990*	124

Alberta (Education) v Access Copyright [2012]*	125
Fair Dealing for purposes of criticism or review	125
s41 Fair dealing for purpose of criticism or review	126
s103A Fair dealing for purpose of criticism or review	126
What counts as criticism or review?	126
De Garis v Neville Jeffress Pidler Pty Ltd (1990)*	126
Pro Sieben AG v Carlton UK Television Ltd [1999]*	126
Time Warner v Channel 4 [1994] EMLR 1: 'The Clockwork Orange Case'	127
TCN Channel Nine v Network Ten (2002) ("The Panel" case)*	127
Fair Dealing for Parody or Satire	128
s41A Fair dealing for purpose of parody or satire	128
s103AA Fair dealing for purpose of parody or satire	128
Campbell v Acuff-Rose (1994) (Pretty Woman Case)*	128
US case, not extended to Aus.	128
Rap version of Pretty Woman by Two Live Crew. Similar music and tune, but different words. "big hairy woman you need to shave that stuff"	128
- Even though a commercial use, competing in music market, and impact of parody could undermine original, subjected to ridicule, is an exception.....	128
- Supreme Court say the change in words highlight issues in original version of pretty woman, highlighting problems of calling out to women on street.....	128
- Some comedic uses may not revert straight back to song, this is trickier.....	128
- May not be fair use to copy material for satiric purposes. You don't have to copy someone else's material, make it up yourself. This is a limitation to this exception. Can't just label as parody.....	128
Pokémon Company International, Inc. v Redbubble Ltd [2017]*	129
Universal Music Publishing Pty Ltd v Palmer (No 2) [2021]*	129
AGL Energy Limited v Greenpeace Australia Pacific Limited [2021]	129
Fair Dealing for Reporting of News.....	130
s42 Fair dealing for purpose of reporting news.....	131
s103B Fair dealing for purpose of reporting news.....	131
Examples	131
Panel Case (2002)*	131
De Garis (1990)*	131
Media monitor does not report news.....	131
Commonwealth v John Fairfax (1980)*	131
Fairfax Media Publications v Reed International (2010)*	132
Blanket exception for judicial proceeding; fair dealing for legal advice/proceedings.....	132

s43 Reproduction for purpose of judicial proceedings or professional advice	132
Access by persons with a disability	132
s 113E Fair dealing for purpose of access by persons with a disability	132
s113F Use of copyright material by organisations assisting persons with a disability	133
Private copying exceptions (introduced 2006)	133
s111 Recording broadcasts for replaying at more convenient time	134
How far does s 111 extend?	134
NRL v SingTel Optus Pty Ltd [2012]*	134
Using digital works: exceptions	135
s43A Temporary reproductions made in the course of communication	135
s43B Temporary reproductions of works as part of a technical process of use	136
s111A Temporary copy made in the course of communication	136
s111B Temporary copy of subject-matter as part of a technical process of use	136
Computer program exceptions	137
s47B Reproduction for normal use or study of computer programs	137
Artistic Works Exceptions	138
68 Publication of artistic works	138
70 Reproduction for purpose of including work in television broadcast	138
72 Reproduction of part of work in later work	139
73 Reconstruction of buildings	139
Many issues but consider	139
An exception in the public interest?	140
United Kingdom	140
Australia?	140
Commonwealth v John Fairfax & Sons Ltd (1980)	140
Collier Constructions v Foskett (1990)	140
Reform	141
Fair Use in the US (17 USC §107)	141
Moral Rights	142
The basics of moral rights	142
The international foundation of moral rights: Berne, 6bis	142
Who and what?	142
Key definitions: s 189	142
Co-authorship and performances with more than one performer	143
Duration and exercise	143
Key rights (Australia)	143

1. Right of attribution	143
How to do attribution?	144
Note the defence of reasonableness	144
2. Right not to have authorship falsely attributed.....	144
Acts of false attribution	144
3. Right of integrity	145
Tidy v Trustees of the Natural History Museum (1995).....	145
Snow v Eaton Shopping Centre	145
Perez [aka Mr 305] & Ors v Fernandez [DJ Suave] [2012]*	146
Boomerang Investments v Padgett 2020*	146
Infringement, Defences, Remedies.....	146
Infringement	146
Reasonableness and other defences	147
Factors in determining reasonableness	147
Parody?	147
Other exceptions.....	147
Remedies for moral rights infringement:.....	148
MR s 195AZA, PMR s 195AZGC	148
Meskenas v ACP Publishing Pty Ltd [2006]	148
Moral rights: key points to remember:.....	148
Hybrid Rights: the droit de suite (or resale royalty)	148
Performers Rights	149
Part XIA Performers' protection against unauthorised recordings	149
Performers non-economic rights (Part XIA).....	150
Performers' rights of control over authorised uses of live performance (economic rights)	150
So...if you have a live performer... ..	150
Remedies for Infringement.....	152
Who can sue?	152
Depends on which part of the act brings the action	152
Boomerang Investments Pty Ltd v Padgett (Liability) [2020]*	152
Where can you sue?.....	153
Relevant CA sections:.....	154
s115 Actions for infringement	154
Cf - s115A Injunctions against carriage service providers providing access to online locations outside Australia.....	155
s116 Rights of owner of copyright in respect of infringing copies.....	156

s119 Rights of exclusive licensee	156
s195AN Exercise of author's moral rights	157
s195AZ Actions for infringement of author's moral rights	157
s195AZA Remedies for infringements of author's moral rights	157
s116AN Circumventing an access control technological protection measure	157
Where did the infringement occur?	158
Pokemon v Redbubble 2017*	158
Remedies for breaches of economic rights	158
Interlocutory (interim) remedies	159
Interlocutory Injunctions	159
Obtaining Evidence: Anton Piller Orders	160
Anton Pillar v Manufacturing Processes (1976)*	160
Stirling House (Guildford) Pty Ltd v Coghlan [2005]*	160
Search orders (r 7.43 Federal Court Rules 2011 (Cth))	160
Process for a search order	160
Freezing Orders (Mareva Orders)	160
Federal Court Rules 7.32	161
Mareva Compania Naviera SA v International Bulkcarriers SA [1975]*	161
Cardile v LED Builders Pty Ltd [1999]*	161
Final Orders	161
Permanent injunctions	161
Ludlow Music v. Robbie Williams (No. 2) [2002] EMLR 585	162
Refusing injunction as judicially created statutory licence – or expropriation	162
Permanent Injunctions – as of right or discretion?	162
Shelfer v. City of London Electric Lighting Company [1895] 1 Ch 287	162
eBay, Inc v MercExchange, LLC 547 US 388 (2006)*	162
Monetary Remedies (Damages)	162
Firestone Tyre & Rubber Co Ltd (1976)*	163
Aristocrat 2007*	163
Lost Profits method	163
Prior v Lansdowne Press	163
Eagle Rock v. Caisley (2005) / Elwood Clothing v Cotton On Clothing [2009]	163
Dart Industries Inc v Décor Corporation Pty Ltd	164
Value of use method	164
Ludlow v Williams/APRA v Grebo Trading	164
APRA v Grebo Trading	164

Value of use base?	164
Ludlow v Williams (Robbie Williams)	165
Regard to commercial scale infringement arising from communication to the public	165
Additional damages	165
Aristocrat.....	166
Damages in conversion or detention	166
Account of profits	166
Dart v Décor (patent case)	166
Universal Music v Palmer	166
Colbeam Palmer (trade mark case).....	166
Sony Entertainment (Australia) Ltd v Smith 2005.....	167
Delivery up for destruction	167
Costs.....	167
Innocent Infringers.....	168
Groundless threats.....	168
Groundless Threats s202.....	168
Introduction to Designs Law	169
Why protect designs?	169
Design law summary	170
Registration	170
The Registration Process.....	171
What designs are protected?.....	171
Registrable Designs: Definition of Design	172
Innovation Threshold: what is the examiner looking for?	173
Prior art: s 15.....	173
Note the grace period introduced by the Design Amendment (Advisory Council on Intellectual Property Response) Act 2021 (Cth):	173
SECT 19 Factors to be considered in assessing substantial similarity in overall impression	174
Who is an informed user?	175
Multisteps v Source and Sell 2013	175
Review 2 Pty Ltd v Redberry	175
Ownership and duration	175
Ownership.....	175
Section 13:.....	175
Duration	176

Infringement	177
Key points:.....	178
Revocation	178
Defences.....	178
Design law and 3D printing?	179
The Copyright-Design overlap.....	179
Why is there an overlap between copyright law and designs, and why is it a problem?	179
Limitations –.....	180
Copyright Act 1968 (Cth) Pt III Div 8 (ss 74-77A).....	180
Exceptions	180
First exception: s 75 confines design owner who has registered to their remedies under design law	180
75 Copyright protection where corresponding design registered.....	180
2nd exception: s 77 excludes copyright protection where there is no registered design, but a corresponding design has been embodied in a product	180
S77 Application of artistic works as industrial designs without registration of the designs	180
Burge v Swarbrick [2007] HCA 17*	181
S77(1A) This section also applies if:	181
3 rd Exception: s77A derivative reproductions (eg catalogues, advertisements)	182
s77A Certain reproductions of an artistic work do not infringe copyright	182
What constitutes a corresponding design?	183
s 18 Designs Act 2003	183
“Embodied in a product”	183
s74 Corresponding design.....	183
Polo/Lauren [Co LP v Ziliani Holdings Pty Ltd [2008] FCAFC 195; (2008)	184
Seafolly Pty Ltd v Fewstone Pty Ltd*	185
Meaning of ‘applied industrially’	186
Copyright Regulations 2017 Reg 12	186
Gold Peg International Pty Ltd v Kovan Engineering (Aust) Pty Ltd*	186
Problem Question Scaffold.....	187
1. is the work a copyright work.....	187
A) Subject matter	187
B) Subsistence	188
i) Originality and authorship	188
ii) Material form	189
iii) Duration	189

iv) public domain, licensed?.....	189
2. Ownership.....	189
B) Assignment & Licensing.....	190
3. Infringement	190
In thinking about exclusive rights.....	190
1. Identify each act that could fall within one of the exclusive rights	190
2. Identify who is responsible for doing that act.	190
Direct Infringement (Strict liability)	191
Breach of moral rights.....	193
3. Exceptions	193
Personal Use	193
Covered by the terms of a licence?.....	193
Fair dealing.....	193
4. Who can sue?.....	195
5. Remedy	195
5. Design Law	196

Introduction to IP

The Nature of Intellectual Property

What is IP?

TRIPS Agreement Art 1.2

- “the big 3”
 - o Copyright and related rights
 - o Trade marks
 - o Patents
- Others:
 - o Geographical Indications
 - o Industrial Designs
 - o Plant Varieties
 - o Integrated Circuit Layouts
 - o Trade Secrets [Australia: confidential information]
 - o Unfair competition/passing off
 - o clinical/test data protection

What is copyright?

- A law that grants **creators and investors** (eg authors, producers) in **artistic, cultural, and informational works** (artistic, literary, musical, dramatic, films, sound recordings, broadcasts) exclusive (property) rights in their creations.
- Copyright is the law that means:
 - o A musician who composes owns their song
 - o A photographer (including you) can stop others using their photograph
 - o Websites that stream content without permission can get blocked in Australia
- The Copyright Act confers other, non-proprietary rights on creators and performers, also considered in this course. IP is not a neat or consistent category of laws: enormous variation in:
 - o How you acquire rights: registration vs rights at the point of creation
 - o Absolute v relative monopolies
 - o Duration
 - o Framing/scope of rights (use in commerce, v use generally)

Constitutional Basis for IP law

- IP is a matter of **Federal** jurisdiction
- [Commonwealth Constitution s 51\(xviii\)](#): Commonwealth given power with respect to ‘*copyrights, patents of inventions, and designs and trademarks*’
- can include plant varieties and circuit layouts (Union Label dissent became the majority position)
- Also: [external affairs power s 51\(xxix\)](#)

Union Label case 1908

Early authority interpreted [s 51\(xviii\)](#) narrowly

The majority held that a union label was not a trade mark within the meaning of the Constitution in that the constitutional term should be of the technical meaning that it had held in 1900.

Grain Pool of WA v Commonwealth 2000

Interpreted [s 51\(xviii\)](#) broadly

Kirby J interprets lawmaking power for all “products of intellectual effort”

International Influences

Treaties

Berne Convention for the Protection of Literary and Artistic Works 1886

- administered by World Intellectual Property Organization (WIPO); covers ‘works’ and films. Incorporated into TRIPS. 179 signatory countries.
- seeks to provide an international system of protection for some subject matters recognised in the Australian Copyright Act.
- The logic of the Berne Convention rests on two pillars: national treatment and minimum standards.
 - **National treatment** is embodied in [article 2\(1\)](#) “Authors who are nationals of one of the countries of the Union, or their successors in title, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which their respective laws do now or may hereafter grant to their nationals.”
 - Under this system, each member of the Berne Union affords foreign authors the same copyright standards they afford domestic authors.
 - If Country A grants authors 50 years of protection, and B grants 20 years of protection, then B’s authors will enjoy 50 years in A even though their works are out of copyright in country B.
 - **Minimum standards:** If national treatment was the sole obligation with the Convention, it would permit each member of the Berne Union to fashion widely divergent national copyright standards (country B could continue to have its 20 year term). To avoid this, the drafters of the 1886 Berne Convention inserted a variety of minimum rights for certain works.
- [Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961](#): provides an international system of protection for so-called ‘neighbouring rights’ in sound recordings, broadcasts and performances.

WIPO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994

- [WIPO](#); covers other subject matters (sound recordings, broadcasts, performers)
- 164 members

- An agreement under the umbrella of the World Trade Organization (WTO) Agreements. Every member of the WTO must comply with TRIPS. TRIPS incorporates most of the provisions of Berne, and includes some further obligations, particularly on newer technologies and enforcement. Breaches of TRIPS can be the subject of dispute settlement proceedings in the WTO which may ultimately lead to sanctions.
- Part of WTO agreements. Incorporates most of Berne (see [Art 9](#)). Covers all copyright/neighbouring rights.
- >> main one
- Adds to and incorporates Berne
- Doesn't recognise certain things, including moral rights.
- [WIPO Internet Treaties 1996](#): Update Berne & Rome for digital age; administered by WIPO.
 - WIPO Copyright Treaty (110 contracting parties)
 - WIPO Performances and Phonograms Treaty (109 contracting parties)
 - In 1996, two new agreements, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty were concluded. The goal of these treaties was to update/supplement copyright law to take account of the rise of digital and network technologies (such as the internet).
- [WIPO Beijing Treaty on Audiovisual Performances 2012](#) (42 contracting parties)
 - Leftovers from the 1996 negotiations: updating rights in performances in film for digital age. In force April 2020. Australia is not a signatory.

Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled 2013

- 71 contracting parties)
- This is the first multilateral agreement that obliges signatories to have exceptions to copyright law. Previous copyright treaties have provided for mandatory rights and optional exceptions and provisions that limit the right of countries to introduce new copyright exceptions ([TRIPS art 13](#)). The agreement seeks to address the 'book famine' that sees something like 5% of all published literary works available in forms accessible to blind or visually impaired people. It requires exceptions for domestic copyright law and to allow cross-border transfer of accessible versions subject to various limitations. The Marrakesh Treaty came into effect in September 2016, and spurred amendments to Australian law in the form of the Copyright Amendment (Disability and other Access Measures) Act 2017 (Cth).
- Australia is a party, and passed implementing legislation in 2017

Bilateral, Regional, and Plurilateral Trade Agreements

- IP obligations have become commonplace in bilateral, plurilateral and regional trade agreements. Australia's law has, for example, been significantly influenced by the IP chapter in the Australia-US Free Trade Agreement concluded 2004. Australia also in 2015 concluded the Trans-Pacific Partnership (TPP), a regional agreement involving 12 countries and including a detailed IP Chapter. The US repudiated the TPP but the remaining TPP members concluded the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership (CPTPP) (suspending a few provisions including some copyright provisions). Australia has since also concluded the Regional Comprehensive Agreement on Economic Partnership (RCEP) with a set of regional actors, not including the US. It too includes a detailed IP chapter (albeit less detailed

than the CPTPP). Australia continues to negotiate further agreements, and is presently in negotiations with Europe, and the now-Brexit UK

- Bilateral
 - US-Australia Free Trade Agreement 2004
 - Korea-Australia Free Trade Agreement 2014 (in force)
 - Japan-Australia Economic Partnership Agreement 2014
 - China-Australia 2015 (in force)
- Plurilateral:
 - Comprehensive Agreement for a Trans-Pacific Partnership 2018 (CPTPP)
 - Regional Comprehensive Economic Partnership (RCEP) 2020

Key Treaty principles

- The “Berne Floor” – Berne art 20
- **Minimum standards:** treaties establish minimum levels of protection (but, in general, not maximum levels) (see [TRIPS art 1](#))
- **National treatment:** foreign authors get same treatment as local authors ([TRIPS art 3](#)) (unless national treatment would be below minimum standards)
- **Most favoured nation** ([TRIPS art 4](#)): In Country A, authors from Country B must receive most favourable treatment offered to any other set of foreign authors (eg, those from Country C)
- Consider the remedies – they will impact on the strength and impact of the treaty provisions
 - [Berne](#): ICJ only
 - [TRIPS](#): inter-state dispute settlement where all WTO members can intervene, so disputes become major exercise in multilateral treaty interpretation
 - Some [bilateral agreements](#): inter-state dispute settlement (without external rights of intervention), and, in some cases, investor-state dispute settlement

History and Basic Principles

- First Act: Statute of Anne, for books
- The ‘Literary property wars’: does perpetual, common law copyright exist?
 - There was perpetual in Australia until a few years ago
- 18th and 19th Centuries: the accretion of new subject matters via sui generis legislation
- Early 20th Century:
 - Rationalisation of copyright: the collection of multiple copyright acts into one system
 - Promulgation of a ‘Commonwealth’ model: in Australia, a federal model, and a similar model across the UK’s foreign territories
- Mid 20th Century: reform to address the “new” technologies (film, broadcast, sound recording)
 - UK’s 1956 Act; Australia’s 1968 Act
- 1970s mini-crisis when photocopying is invented
- 1980s mini-crisis when personal computing expands

[Millar v Taylor \(1769\)](#)

perpetual common law right to publish work was in perpetuity

The dissent of Yates J proved influential in the later case of *Donaldson v Becket* (1774). He argued that to succeed, Millar needed to prove that compositions of authors were property.

Donaldson v Beckett (1744)

The finding for exclusive common law literary property that survived the Statute of Anne in *Millar v Taylor* was soon effectively overruled by the House of Lords in *Donaldson v Becket* (1774), another case concerning Thomson's *The Seasons*

Donaldson is generally understood as affirming the existence of copyright at common law but finding that the natural authorial property right had been supplanted by the Statute of Anne for published books. This left common law copyright as a form of protection that attached to unpublished works only, and copyright generally considered as a creature of positive law.

The mid-90s Copyright Crisis

- *"The riddle is this: if our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds? And, if we can't get paid, what will assure the continued creation and distribution of such work?... The economy of the future will be based on relationship rather than possession. It will be continuous rather than sequential."*
 - o John Perry Barlow, *Selling Wine without Bottles on the Global Net*.

'The answer to the machine is in the machine'

- Encryption
- Digital rights management (DRM) (and legal rights to prevent hacking)
- Building DRM into devices (CSS and DVD players; other proposals like SDMI)
- Continued attempts to 'strengthen copyright'
 - o Notice and takedown > notice and stay down?
 - o Website blocking
 - o Domain name seizures
 - o Multinational law enforcement efforts (Kim Dotcom)
 - o Follow the money: the credit card providers and the online advertising companies do something(s)
 - o The copyright "value gap" and the EU's Digital Single Market Directive
 - Online Platforms
 - Newspapers: Media Code
- Continued battle to expand 'user rights'
 - o ALRC Final Report recommendation in favour of fair use and flexibility in copyright still waiting action

Intellectual property is *still* controversial

- *"Progressives may rail at the term "IP" for its imprecision, but truly, it has a very precise meaning: "IP" is any law that lets me control the conduct of my customers, competitors and critics, such that they must arrange their affairs to my benefit.' In that regard, it is a perfect*

grifter's tool – a way to put you on the wrong side of the line for simply living your life in the way that works best for you, not the grifter.”

- Cory Doctorow

Philosophical Justifications

Utilitarian/Incentive Theory

- Copyright's exclusive rights create an incentive for investment in creation/distribution of creative works. Securing exclusivity means creator cannot be undercut/copied/have market taken.

Incentives: the classic economic rationale

- Investment is necessary to create intangibles (literary/arts or scientific)
- Intangibles are readily duplicated once publicly released
- Copyists can undercut original creators because didn't make investment in creation (less sunk costs to recover)
- Thus exclusive rights: allows creation of a market for intangibles
- Full economics: see Landes & Posner, 'An Economic Analysis of Copyright Law' (1989) 18 Journal of Legal Studies 325
- Throsby survey 2015: Australian authors reported
 - average incomes of A\$62,000, of which A\$12,900 comes from 'practising as an author'.
 - Median income of A\$2,800 across all authors
 - What this means: there are a small number of authors making a good living and a large number making very little
- Average income from writing of top 25% of literary fiction authors A\$9,000
 - 70% stated that low earnings from creative labour prevented them from engaging in more of it.
- Nearly 20% of surveyed authors worked full time at writing; fewer than 5% were able to earn the average annual income from that creative work alone.
- Most income came from royalties and advances.

Lockean natural right theory: 'you should not reap where you have not sown'

- Lockean idea of property: states that if you mix your labour with some resource that was commonly and freely available, or expend your labor generally, then you extend some part of yourself to the final product and therefore it should be yours
- **Lockean/Natural Rights theory:** I made it, therefore I own it: i.e. I mix my labour with 'stuff free for the taking', then I own the results, provided I leave 'enough and as good' for others.

Hegelian Personality theory

- Property is a mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person. A person's personality and dignity is manifest in their creative outputs; by according a person control over their creative outputs, society recognises their dignity as an individual.
- Property in my creative outputs is State's means of recognizing my inherent individual dignity; I put something of myself into my creative works, and as a result, retain a connection with those works worthy of recognition by the State.

Others

- Neil Netanel's democratic theories (allows independence of creators from patrons; allows critical cultural and informative sector)
- [IP as a human right: UDHR, art 27\(2\)](#): everyone has right to protection of moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author

New reasons to exist/new roles

- Mechanism for determining fair competition in relation to the 'resource base of the knowledge economy'
- Mechanism for finding equilibrium among competing interests: including interests of society in access to creations, sharing social benefits of new knowledge.
- Financing mechanism for underwriting activities
 - o eg sporting events which are funded through sale of broadcasting rights
 - o What responses might we have to these developments?

Traditional Cultural Expressions and the rights of Australian Indigenous People

Anglophone common law philosophies of intellectual property are not the only way of thinking about how people relate to, control, and benefit objects of culture. Australia's indigenous people have a very different relationship with art and culture, reflecting connections to country, concepts of perpetual custodianship rather than limited duration ownership, and differentiated access to cultural items rather than the public domain. Understanding these differences helps shine a light on the fact that copyright is a system, designed and shaped by certain policy considerations and philosophies that are by no means universal.

There has been considerable discussion in Australia and worldwide regarding the status of indigenous art in 'Western' copyright systems. Arguments available under Australian law were tested in *Bulun Bulun*, including arguments that copyright in a painting, in accordance with customary laws, of traditional, culturally significant designs was jointly owned by the artist and community.

Issues around indigenous knowledge and culture have gained new prominence with the debate over ownership and control of the Australian Aboriginal flag, as well as the 2018 inquiry into fake Aboriginal art. At the time this guide was produced, IP Australia was running a project into the protection of indigenous knowledge.

[*Bulun Bulun v R&T Textiles Pty Ltd 1998*](#)

von Doussa J rejected a claim of communal 'joint authorship' as the community had not made the 'right kind of contribution' to the painting in question. However, in support of the efforts made in the case by the Aboriginal claimants and their lawyers to have communal title in traditional ritual knowledge— in particular in artwork— recognised and protected by the Australian legal system, he acknowledged a role for equity to intervene to protect communal property interests in traditional knowledge in certain circumstances.

- Closed definitions
 - A) a **painting, sculpture, drawing, engraving or photograph**, whether the work is of artistic quality or not;
 - B) a building or a **model of a building**, whether the building or model is of artistic quality or not; or
 - C) a work of **artistic craftsmanship** whether or not mentioned in (a) or (b).
 - **Building** is not a closed definition, can be “a structure of any kind” s10
 - Included a half tennis court in **Half Court Tennis 1980**
 - Did not include the mould and plug for a pool **Darwin Fibreglass 1998**
 - **Engravings** may include moulds for creation of products **Wham-O 1984**
 - **Sculpture** beyond traditional conception of ‘art’ eg film props **Lucasfilm 2009**
 - **Photograph**: doesn’t include the arrangement contained within **Creation Records 1997**
 - **Artistic Craftmanship**: requires a level of complexity, on a sufficient surface **Merchandising Corporation of America**
 - Can be stretched to include arrangement on a T Shirt **Elwood Clothing 2008**
- Pt IV
- Sound recordings
 - Doesn’t include soundtracks made for films, synced with visuals
 - Does include sound recordings where used in film, retain their quality **PPCA v Facts**
 - Cinematograph films
 - Must be recorded into material form, made into a copy before copyright protects
 - TV and sound broadcasts
 - Must be by a broadcaster under the Act, or ABC / SBS
 - Published editions
 - Not the text, the overall arrangement

B) Subsistence

i) Originality and authorship

- Originality: relevant in analysing infringement. When a work has not been exactly copied, a court will have to decide whether a ‘substantial part’ of the work has been taken, taking into account the originality of the part copied.
- Copyright is personal property, transferrable s196(1)
 - All works original remains with author eg original manuscript **Dickins**
- Idea/expression dichotomy
 - Copyright doesn’t protect ideas WIPO & Trips art 9
 - Idea or scheme for measurement for eg not protected **Hollinrake 1894**
 - Reporting shows and time not **IceTV**
 - Has to be be a compilation or pattern to the information, more than a phrase that expresses an idea for eg **Victoria v Pacific technologies** (taxi)
- Requirement of original thought **Ice Tv**
 - **Telstra Phone Directories** - computer generated does not meet

- Doesn't need to be creative, eg math problems **University of London Press**
- AI
- Exercising control / effort
 - **Ice TV**
 - What choices were made? Control / contribution, by a person or AI?
 - Low bar for intellectual input. Artistic contribution. Choosing where to stand and shutter

ii) Material form

- Comes up in economic rights – reproduction into material form
 - S10 “whether visible or not”, includes storage of work or substantial part of a work
 - S22 reduced to writing or material form
 - S24 sounds and images embodied, with or without aid of a device (in storage, CD)
- Territorial factors
 - s 32, if the Part III work is unpublished then you look at personal connection. If the Part III work is published then you look at either personal connection and territorial connection (whether the publication of the work took place in Australia). Is that correct?
- III:
- IV: broadcast, sound recording, published work (s89-92, 22, 29)

iii) Duration

- has copyright expired

iv) public domain, licensed?

- is it not copyright by reason of being in the public domain, creative commons licence?

2. Ownership

- General rule: author owns the copyright (s35?)
 - Subject to assignment and other rules such as...
 - Made in course of employment
 - See whether employee falls under this heading (looked at leave and tax)
 - See whether the work falls under, eg case re software outside of work (some did some didn't)
 - Journalists
 - Newspaper owns except for putting into print (ss?)
 - Commissioned works
 - EG author is owner except private portraits where commissioner controls where it goes
- Joint authorship
 - Either can bring an action?
 - Can't licence or exercise without consent of the others
 - Tenants in common, subject to agreement
- IV Works ownership
 - = maker
 - Can be more than one