

- **Intellectual Property:** various rights or bundles of rights which the law accords for the protection of creative effort, such as copyright or patents.
- **World Intellectual Property Organisation (WIPO) definition:** Rights relating to literary, artistic, scientific works, performances, broadcasts, inventions, scientific discoveries, industrial designs, trademarks, commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

### Current forms of regulation

- Australian law still influenced by UK, but increasingly becoming divergent.
- **Section 51(xviii) of Constitution:** authorises the making of laws which create, confer and provide for the enforcement of, IP rights in original compositions, inventions, designs, TM and other products of intellectual efforts. → HC has adopted this broad interpretation of the power.<sup>1</sup>
- It should not be thought that the boundaries of the power conferred by s 51(xviii) are solely based on what in 1900 would have been treated as a copyright, patent or TM.
- *Grain Pool of Western Australia v Commonwealth:* Kirby took view that the notion of 'products of intellectual efforts' could be expanded to fit modern times.
- **Section 51(xxix):** Used to implement protective regimes which are subject of an int treaty to which Aus is a party, since IP is usually the subject of int cooperation.
- Just terms: Issue arises when attempts made to reform existing IP legislation that reduces owners' property rights without 'just terms', contrary to s 51(xxxi).
- *JT International SA v Commonwealth:*
  - Tobacco companies challenged the plain packaging scheme on the ground that it was an unjust acquisition of their intellectual property.
  - HC held that Cth did not acquire property within the meaning of s 51(xxxi).
- *Phonographic Performance Company of Australia v Commonwealth:*
  - PPCA unsuccessfully argued that a 'cap' on the amount that broadcasters are required to pay for a compulsory licence unjustly acquired pre-existing copyrights in their sound recordings.
- Free use exceptions (such as fair dealings with copyrighted material) can raise constitutional issues → potentially diminish their rights by an acquisition of property on unjust terms.
- **Statutory regimes:**
  - Copyright – *Copyright Act 1968* (Cth)
  - Performers rights – *Copyright Act 1968*
  - Moral rights: rights that are personal to the creators of certain copyright material, regardless of who owns the copyright for other purposes, eg right to be identified as creator and to object to derogatory treatment of their material
  - Patents – *Patents Act 1990* (Cth)

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<sup>1</sup> Nintendo Co Ltd v Centronics Systems Pty Ltd.

- Designs – *Designs Act 2003* (Cth). Establishes a system for the registration of new and distinctive designs for the visual presentation of commercial products.
- Trademarks – *Trade Marks Act 1995* (Cth)
- New plant varieties – *Plant Breeder's Rights Act 1994* (Cth). On registration, breeders obtain exclusive rights over their varieties for a period of 20 or 25 yrs.
- Circuit layouts – *Circuit Layouts Act 1989* (Cth).
- Artists' resale rights – *Resale Royalty Right for Visual Artists Act 2009* (Cth). Grants artists a royalty on the resale of original artworks.
- Some IP protections might go against the CCA 2010 which deals with restrictive practices/anti-competitive behaviour. Also tort of passing off – misleading/deceptive.
- Admin and policy making: CR is the responsibility of the Attorney-General. Patents, designs, TM are responsibility of Department of Industry. IP Australia operates in that department.
- Advisory Council on IP (ACIP) provides advice on patent, design, TM and plant breeder rights issues.

#### Areas of omission

- **Scientific discoveries:** not protectable under Patents Act because Patents require the invention of a manner of manufacture that is new/not obvious.
  - Critics argue that patent protection is critical for discoveries because of highly expensive research.
  - They say that the work required and the application of tech to produce a useful result is a process of invention, not mere discovery.
  - Others argue that patents would prevent access and inhibit the development of genetic material.
- **Indigenous art and culture:** intangible forms of cultural heritage not protected. Aboriginal culture may come under threat from commercial entrepreneurs who want to cash in on the latest craving for aboriginal art, or researchers.
  - Copyright doesn't cover communal ownership.
  - In 2009, govt adopted UN Declaration on Rights of Indigenous Peoples, which states that they have right to maintain, control, protect their cultural heritage.
- **Products that aren't that new/inventive:** Patents protect new/inventive designs or products, but there isn't protection for designs that aren't that inventive.
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#### Nature of Intellectual Property

- Property right: a bundle of exclusive rights, whether absolute/limited, that the law is prepared to recognise as governing the relations of persons to a 'thing'.
- IP are more like money in that they have value only by virtue of the regime that gives them exchange value.