

## Intellectual Property Weekly Textbook Readings

### Chapter 1: An Overview

- Intellectual property is a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort
  - some forms of creative investment are not protected at all
- historical foundations:
  - evolved from printing press in England to that of Europe
  - common to use two terms more than one, where intellectual property was used to describe higher forms of literary work and industrial property which was used to describe more prosaic forms of work in the world of commerce
  - now the term intellectual property is used more often and as a umbrella term to cover all types of literary work
- WIPO and TRIPS definition
  - intellectual property is defined by WIPO under ch 21 art 2 (viii) of the Convention
  - TRIPS defines intellectual property under article 1.2
- Current forms of regulation
  - development of Australian laws
    - = still deeply influenced by our former ties to the UK
    - = many statutes were seen as re-enactments of their British counterparts
    - = The Copyright Act 1911(UK) was enacted in Australia and kept going til 1969, 12 years after the 1911 Act had ceased operation in the UK
    - = increasing regulatory differences between current Australian law and Britain
  - constitutional powers under s 51 (xviii) may have a limiting nature as turn of the century technology is created as it only explicitly caters for 'copyrights, patents of designs and trade marks'
    - = only time HCA struck down legislation for exceeding limits of s 51 (xviii) was in the Union Label case 1908
    - = broad interpretation of this power in more recent cases by the HCA in Nintendo Co v Centronics Systems 1994
    - = Grain Pool of WA v Commonwealth 2000: Kirby J interprets lawmaking power for all "products of intellectual effort"
    - ~ allow for "dynamicism"

- ~ rejected the challenge to the Plant Variety Rights Act 1987 as these plants would already be protected and thus not a new invention, where the contemporary meaning of s 51 (xxviii) should not be 'shackled' by what people thought it was meant to include in 1900
- = other options: likely that the commonwealth will continue its practice of seeking to rely on the 'external affairs' power in s 51 (xxix) of the Constitution as IP has a high degree of international cooperation and comity, but this approach is unsatisfactory as the Commonwealth lacks clear comprehensive power over IP
- = just terms: another area where constitutional issues arise is when attempts are made to reform existing IP leg that may reduce owner's property rights without 'just terms' contrary to s 51 (xxxix).
- ~ Nintendo v Centronics HCA rejected just terms argument
- ~ JT International SA v Commonwealth: Tobacco plain packaging was external to the IP regimes that were affected
- ~ Phonographic Performance Company of Aust v Commonwealth: PPCA unsuccessfully argued that a 'cap' on the amount of broadcaster's pay unjustly acquired pre-existing copyrights in their sound recordings
- ~ free use exceptions such as fair dealings with copyright material can also raise this constitutional issue
- the statutory regimes: so far nothing has been said of the nature of copyright, patents and the other heads of protection; below are the current statutory regimes in operation in Australia
  - = copyright: which is governed by the Copyright Act 1968 (Cth) protects the expression in material form of ideas and information
  - = Performer's rights: although contained in pt XIA of the Copyright Act, were in fact introduced in 1989 because live dramatical performances do not attract copyright, not being fixed in material form
  - = moral rights: are rights that are personal to the creators of certain copyright material, regardless of who owns the copyright for other purposes
  - = patents: are granted under the Patents Act (1990) Cth. A patent for which an application must be made to the Patent Office, provides the exclusive right to exploit an invention for a limited period, in return for which the patentee must publish details of the invention

- = designs are governed by the Designs Act 2003 (Cth) which establishes a system for the registration of new and distinctive designs for the visual representation of commercial products
- = trademarks are signs including devices, labels, names e.t.c which indicates that goods or services originate from a particular trader
- = new plant varieties which may or may not be patentable, depending on the circumstances are the subject of a specific regime established by the Plant Breeder's Rights Act 1994 (Cth)
- = circuit layouts: likewise attract special provision
- = artists's resale rights are dealt with under the Resale Royalty Right for Visual Artists Act 2009 (Cth), which grants artist a royalty on the resale of the original artworks
- why statutory regulation?: regulation has obvious advantages as a method of protecting intellectual property
- role of the common law:
  - = it must not be thought that the common law had no part to play in protecting IP
  - = when parliament leaves a concept to be developed by the courts this introduces a level of uncertainty that some stakeholders find difficult to accept
  - = it must be remembered that it is the courts that interpret statutory provisions, and sometimes the result can be expansive no matter how intricately those provisions have been drafted
  - = the common law is also an important source of IP rights
  - = the problem with common law, if viewed globally, it cannot claim to be thought out on any coherent basis
- consumer protection legislation: one important set of provisions which has not yet been mentioned but has had a significant impact on the field of IP is that contained in the Competition and Consumer Act 2010 Cth
- administration and policy-making:
  - = responsibility within the fed gov for administration of Australian IP laws is curiously fragmented
  - = this division of responsibilities with copyright separate from the other regimes means that there is no single person or body responsible either for policy-making within the gov, or for providing expert advice on appropriate legislative and administrative changes for all IP

= the only inquiry in recent times to range across the various IP regimes has had a very specific focus

- Areas of omission
  - general: not all forms of IP under the WIPO definition are protected Australian law, and some are just given scant protection
  - scientific discoveries: are not eligible for protection under the Patents Act 190 except to the extent that their secrecy may be preserved
  - indigenous arts and culture: the present regimes are ill-suited for the protection of intangible forms of cultural heritage
  - product simulation and the 'gap' in designs/patent protection: when a firm puts a new product on the market, it may be able to call on a number of intellectual property rights to preserve or at least delay competitors copying the product and cutting into the firm's profits
- The nature of IP:
  - property rights: there is something different about IP than other forms of property
- policy issues:
  - the importance of IP: the works represent the livelihood of the author and also their profits
    - = moreover, this protection has gained in importance over the past century
    - = a further impact has been the impact of new tech
    - = advances in info tech have had a similar impact upon copyright law
  - rationales for protection
    - = moral arguments: given the pressure imposed on legislatures and courts to protect creative effort, it becomes vital to identify the rationale for according such protection
    - = economic arguments: the main considerations in countries bearing the British influence have been economic rather than moral
      - ~ the underlying problem here is that information is effectively a 'public good'
      - ~ another adverse consequence is that the development of certain ideas may be deferred indefinitely
  - innovation and incentive: what all this comes down to is whether sufficient incentives are being provided for the right sort of innovation to take place
    - = but even accepting that the economic rationale for IP rights is a thoroughly modern and indeed Western construct, this is not to deny its force today

- = if the justifications for the granting of IP rights is economic and an aspect of its rationales is founded upon incentives to innovate, then ideally the granting of new rights or the existing rights ought to be based upon sound economic analysis and their effectiveness reviewed upon that basis
- the limitations of economic analysis: can be useful to estimate, atleast in crude dollar terms, what it costs or would cost society to pursue various objectives and even more useful to predict the likely reactions of those subjected to particular forms of regulations
  - = patent law offers two important illustrations of public policy questions in the field of medical research both recently and before Australian courts:
    1. patenting genes
    2. whether methods of medical treatments should be patentable
  - = it is not always easy for these questions to be addressed in the political realm, but ut is there where they are ultimately played out
- striking a balance: the formulation of IP rights requires a delicate balance to be struck
- Determining the scope of protection:
  - decisions to be made: it should be apparent that the law must be constantly wary of the extent of the protection that it offers to the creative efforts; there must be a system of checks and balances
  - who should own the rights?: given that a right is to be allocated, the law must identify who is to exercise that right and be able to transfer it to others
    - = each regime has adopted a general qualification that in practice is crucial to the determination of ownership
    - = the notion of employer ownership is by no means uncontested, however, especially in the higher education sector
    - = the change in attitude has been prompted by a number of factors
    - = some universities have found that it is not always easy to ensure that a policy on the ownership and management of IP is both sensibly drafted and legally effective, even in relation to its employees
  - nature of protection and degrees of exclusivity: depends on the subject matter that is to be defined in the first place
  - compulsory licensing: demands may arise for others to be given the chance to use or exploit the relevant matter, even during the subsistence of that rights