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EMERGING CHALLENGES IN INTELLECTUAL PROPERTY

Edited by Kathy Bowrey, Michael Handler and Dianne Nicol

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The teaching of intellectual property in Australian law schools (and indeed the teaching of intellectual property into other disciplines such as media, journalism and science) is, like the universe, continuously evolving and expanding. As an undergraduate law student I had the luxury of being taught intellectual property as an elective subject for an entire year. We covered what we thought was ‘everything’ then: copyright, patents, trade marks, designs, and confidential information; but of course, we did not know the important topics that had to be left out due to time constraints. Now intellectual property teachers commonly face the difficulty of the ‘survey course’, all of the above (and more) in one semester. This means that teachers have to attempt to throw everything into one subject or, if they are lucky, their law school may offer two intellectual property electives, and it can be divided into ‘copyright’ and ‘patents’. The dilemma then is what topics to cover and which book to prescribe. Indeed, what book is fair to prescribe for the student doing the survey course or only a one semester elective?

The other problem encountered by intellectual property teachers and textbook writers is the need to remain current. New issues in intellectual property emerge daily, with several appeals being heard by the High Court in the last two years.¹ In addition, there has been a steady stream of reviews and inquiries.² Thus it is

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¹ See, eg, *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; *E & J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) 241 CLR 144; *Health World Limited v Shin-Sun Australia Pty Ltd* (2010) 240 CLR 590; *Roadshow Films Pty v iiNet Ltd* (2012) 286 ALR 46.

² Eg, in 2009 IP Australia released a series of seven public consultation papers proposing reforms to Australia’s intellectual property system. These papers were followed up with a further two consultation papers which consolidated proposals for reform for public discussion, see IP Australia, *Consultation Papers for IP Reforms* (19 December 2011) <<http://www.ipaustralia.gov.au/about-us/what-we-do/ip-reforms/consultation-papers-ip-reforms/>>.

This process culminated in the Intellectual Property Laws Amendment (Raising the Bar) Bill 2011. In 2010, in parallel with this broader process, the Patent Amendment (Human Genes and Biological Materials) Bill 2010 was introduced alongside two separate reports: Senate Community Affairs References Committee, Parliament of Australia, *Gene Patents* (November 2010); Advisory Council on Intellectual Property, *Patentable Subject Matter*, Final Report (December 2010). A similar number of reviews relate to copyright, including the recent announcement that the

difficult to select a textbook that will remain current and will be worth the student's investment. Bowrey, Handler and Nicol have addressed the issue of scope, depth, and currency in their recently published textbook *Australian Intellectual Property: Commentary, Law and Practice*, by focusing on key precedents and using them 'to illustrate how the courts approach the application of intellectual property law to new technologies and meet other social challenges'.³ In addition, they have produced a companion volume which includes 12 essays on 'issues' in the area of intellectual property from a range of Australian intellectual property experts. It is this unique companion volume which is the subject of this review.

Intellectual property ('IP') is an international issue. It is attracting significant interest from governments in the context of trade agreements, competition, and innovation. It is also a domestic issue. Regulated by Commonwealth statutes, areas such as copyright, patent, and trade marks have evolved from their English origin and been shaped by Australia's unique culture and marketplace, as well as our obligations under international treaties. There is a need for Australian law students to learn how intellectual property in Australia fits into its international context, as well as developing in-depth knowledge and skills in domestic IP practice.

Further, topics such as copyright and patent law have become the focus of general public concerns about their tendency to 'restrict', 'block' and 'inhibit' creativity, with models such as Creative Commons being portrayed as more user friendly. As the preface to the collection states:

Opinions on the politics, social costs and benefits of IP rights, and the wisdom (or otherwise) of recent case law or law reform are offered freely. Views can be quite strongly held, but are not always based on sound legal foundations.⁴

This collection of essays, covering topics such as the intersection of intellectual property, politics and philosophy; cultural rights, trade practices and competition; and biotechnology, medicine and cultural rights, is intended to provide sufficient depth for law students to develop an understanding of key issues in the area, as well as to develop their own critical understanding of the issues. The topics chosen are intended to provide readers with an introduction to specific areas of controversy and to place the Australian concerns in these areas in an international context. The chapters can all be read in isolation but collecting them all in one volume makes it easy for students to read a range of pieces developed specifically to

Australian Law Reform Commission is to undertake a review relating to copyright exceptions in 2012 and the proposed revisions to the 'safe harbour' provisions in the *Copyright Act 1968* (Cth), see Australian Copyright Council, *The Attorney General and the Greens Put Copyright Reform on the Agenda* (29 October 2011) <<http://www.copyright.org.au/news-and-policy/details/id/1832/>>.

³ Kathy Bowrey, Michael Handler and Dianne Nicol, *Australian Intellectual Property: Commentary, Law and Practice* (Oxford University Press, 2010) xxxv.

⁴ Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) vii.

provide accessible scholarship on a breadth of intellectual property issues. Given the student focus of the chapters, their emphasis is on the practical rather than the theoretical. It must also be kept in mind that the chapters are intended to serve as an introduction to the area being discussed, thus there is little room for in-depth doctrinal analysis and debate.

The collection opens with Kimberlee Weatherall's 'IP in a Changing Information Environment'.⁵ Weatherall focuses on the key issues of intellectual property (largely copyright) in the digital environment, namely digital locks, intermediary liability, the Commons movement, the issue of private ordering through contracts, and licences versus public ordering through enforcement of intellectual property rights. This is a well structured and clear introduction to the issues that follow and she has consciously and deliberately avoided much of the hyperbole in this area, whilst still signposting readers to the alternative views of commentators such as the US 'free culture' proponents, Lessig, Barlow and Benkler.⁶

The next chapter authored by Peter Drahos, 'Six Minutes to Midnight: Can Intellectual Property Save the World?', adopts a patent focus.⁷ Drahos places the patenting versus innovation argument in the context of climate change and asks whether strong intellectual property rights are more likely to impede or promote effective and timely responses to climate change.⁸ This current and topical example of the potential role of patenting is an effective method of getting readers to focus on specific issues rather than general unfocused arguments about rights, which is often a key weakness of undergraduate legal writing.

Kathy Bowrey's chapter highlights both the domestic and international failures to deal adequately and effectively with indigenous intellectual property rights ('IPRs').⁹ Again, whilst dealing with a specific issue, this chapter uses those issues to highlight the place of domestic IPRs in the global context.

⁵ Kimberlee Weatherall, 'IP in a Changing Information Environment' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 1.

⁶ Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin, 2005); John Perry Barlow, 'The Economy of Ideas: Selling Wine without Bottles on the Global Net' (1994) 2.03 *Wired* 8; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006).

⁷ Peter Drahos, 'Six Minutes to Midnight: Can Intellectual Property Save the World?' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 30.

⁸ See generally Matthew Rimmer, *Intellectual Property And Climate Change: Inventing Clean Technologies* (Edward Elgar, 2011).

⁹ Kathy Bowrey, 'Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights?' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 46.

David Lindsay focuses upon the complex relationship between ‘Copyright and Freedom of Expression’.¹⁰ Lindsay outlines the foundational discourse in this area, particularly the US academic writing where this issue has been most extensively considered.¹¹ He then considers the key Anglo-Australian case law, *Commonwealth v John Fairfax*¹² and *Ashdown v Telegraph*.¹³ This area has of course become even more topical with recent controversial developments such as WikiLeaks and the News of the World scandal in the UK.¹⁴

A selection of copyright-related issues are considered by Leanne Wiseman in her chapter, with specific emphasis on their impact upon the creative arts.¹⁵ She discusses the resale royalty right for artists, the Google Books settlement and its implications for the Australian context, Creative Commons, the role of fair dealing and the need for copyright reform. Again this is a neat overview of a collection of contemporary issues, clearly summarised for undergraduate discussion.

Jason Bosland and Megan Richardson tackle the complexities of trade mark law, looking specifically at the apparent shift from a harm-based approach to a rights-based approach.¹⁶ They give a rounded overview of the complexities of trade mark protection, considering the role of brands in the marketplace, the impact of free speech interests and the lack of a rigorous approach to the role of limitations in the enforcement of trade mark protection. This chapter highlights the importance of a valuable intellectual property right which is often overlooked.¹⁷

This analysis leads neatly on to the next chapter in which Michael Handler and Robert Burrell consider the role of Geographical Indications (‘GIs’).¹⁸ They outline

¹⁰ David Lindsay, ‘Copyright and Freedom of Expression’ in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 68.

¹¹ Melville Nimmer ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 *UCLA Law Review* 1180, cited in Lindsay, above n 10, 72–3.

¹² (1980) 147 CLR 39.

¹³ [2002] Ch 149.

¹⁴ Bret Stephens, ‘News of the World vs WikiLeaks’, *The Wall Street Journal* (online), 19 July 2011 <<http://online.wsj.com/article/SB10001424052702303795304576453722472758028.html>>.

¹⁵ Leanne Wiseman, ‘Copyright and the Creative Arts: Emerging Issues’ in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 90.

¹⁶ Jason Bosland and Megan Richardson, ‘Competing Discourses of “Rights” and “Harms” in Trade Mark Law’ in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 103.

¹⁷ See, eg, Bosland and Richardson, above n 16, who observe that ‘many IP students and scholars are rather scornful of trade mark law, relegating it to the narrow role of protecting consumers from confusion’: at 104.

¹⁸ Michael Handler and Robert Burrell, ‘GI Blues: The Global Disagreement over Geographical Indications’ in Kathy Bowrey, Michael Handler and Dianne Nicol

the political, cultural, and economic drivers for GI protection and highlight the lack of international consensus regarding the shape and nature of GI protection. This serves to demonstrate how different GIs are from the other forms of intellectual property rights discussed in the book. Interestingly, although given a whole chapter in this collection, the subject of GIs takes up only a few paragraphs in the companion text book.

Dianne Nicol considers how the judiciary is responding to the emerging challenges in patent law created by biotech patents.¹⁹ She addresses the issues of utility and the inventive step, and places the broader theoretical discussion in the context of the case of the BRCA1 gene, mutations of which have been linked to increased risk of breast cancer. Again, this specific example provides readers with a clear demonstration of the practical importance of the broader issues being discussed.

Intellectual property and plants are the subject matter of the chapter by Jay Sanderson.²⁰ He deals with a range of issues including the patenting of gene sequences, access to plants for research, and the role and effectiveness of Plant Breeders' Rights ('PBRs'). In particular, he assesses the effectiveness of patent protection versus PBRs, and concludes that PBRs have a valid role to play in the protection of plants.

The interaction between intellectual property protection and competition law is an important issue, which often receives less attention than it deserves in the overall consideration of intellectual property law. This is in part due to the complexity of the relevant law. In her chapter 'Competition Law and Intellectual Property: Establishing a Coherent Approach' Jane Nielsen argues that it is in the enforcement, rather than the grant, that the majority of competition problems emerge in the IP context.²¹ Nielsen argues that the goals of competition law and IP are broadly aligned. She compares the Australian law with that of the European Union and the US. This serves again to highlight the importance of placing IP in its domestic as well as its global context. This chapter provides a useful starting point for further consideration of a challenging topic.

Christopher Arup looks at bilateral and multilateral approaches to IP enforcement in his chapter 'Intellectual Property and International Trade: Securing and

(eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 126.

¹⁹ Dianne Nicol, 'Are the Courts Solving the Emerging Challenges of Biotech Patents?' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 145.

²⁰ Jay Sanderson, 'Intellectual Property and Plants: Constitutive, Contingent and Complex' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 164.

²¹ Jane Nielsen 'Competition Law and Intellectual Property: Establishing a Coherent Approach' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 183.

Sharing the Benefits'.²² He stresses the fact that countries have used free trade agreements as a way to alter the bargain struck in multilateral agreements such as *TRIPS*.²³ Given the significant impact that the *Australia–United States Free Trade Agreement* has had on Australian copyright law in recent years,²⁴ necessitating several rounds of amendments to intellectual property statutes,²⁵ the importance of this issue cannot be overstated.

The final chapter by Adam Liberman addresses the frequently neglected matter of intellectual property and commercialisation.²⁶ It is excellent that this topic is addressed with equal weight to some of the more academic issues, as it forms the basis of intellectual property practice. The basic point that 'success requires a good commercialisation strategy'²⁷ is rarely a focus of undergraduate intellectual property courses. Liberman provides an overview of commercialisation issues as well as an outline of various commercialisation models. This is an excellent treatment of a neglected topic.

The 12 essays therefore cover a variety of topics from a practical, rather than a solely academic focus. They are intended to assist with providing the context for class and public debate about the role intellectual property protection plays in society, and the collection satisfies this aim. It is a useful resource for an undergraduate law course and could be prescribed as readings to assist with the limited class time available to consider these matters in any depth. It also provides an excellent resource as the starting point for undergraduate research assignments, providing the foundations from which further in-depth study may be undertaken.

The individual chapter topics are well chosen to reflect both important legal and social issues as well as identifying matters that are likely to be of interest to students and those with only an embryonic understanding of the law in the area. Thus the book would also make for good preliminary reading for anyone undertaking a masters unit requiring an overview of intellectual property, or as a refresher for anyone working in the area who wants a quick 'dip' into a range of topics.

²² Christopher Arup, 'Intellectual Property and International Trade: Securing and Sharing the Benefits' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 202.

²³ *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS') is a treaty administered by the World Trade Organization: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C.

²⁴ *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

²⁵ See, eg, *US Free Trade Agreement Implementation Act 2004* (Cth); *Copyright Legislation Amendment Act 2004* (Cth); *Copyright Amendment Act 2006* (Cth).

²⁶ Adam Liberman, 'Intellectual Property and Commercialisation' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 218.

²⁷ *Ibid* 218.