



THE UNIVERSITY OF
MELBOURNE

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Melbourne Law School

Centre for Media and Communications Law

**Intellectual Property Research Institute of
Australia**

IP & Media Law Conference | Program

University of Melbourne, 5 & 6 April 2018

City Centre

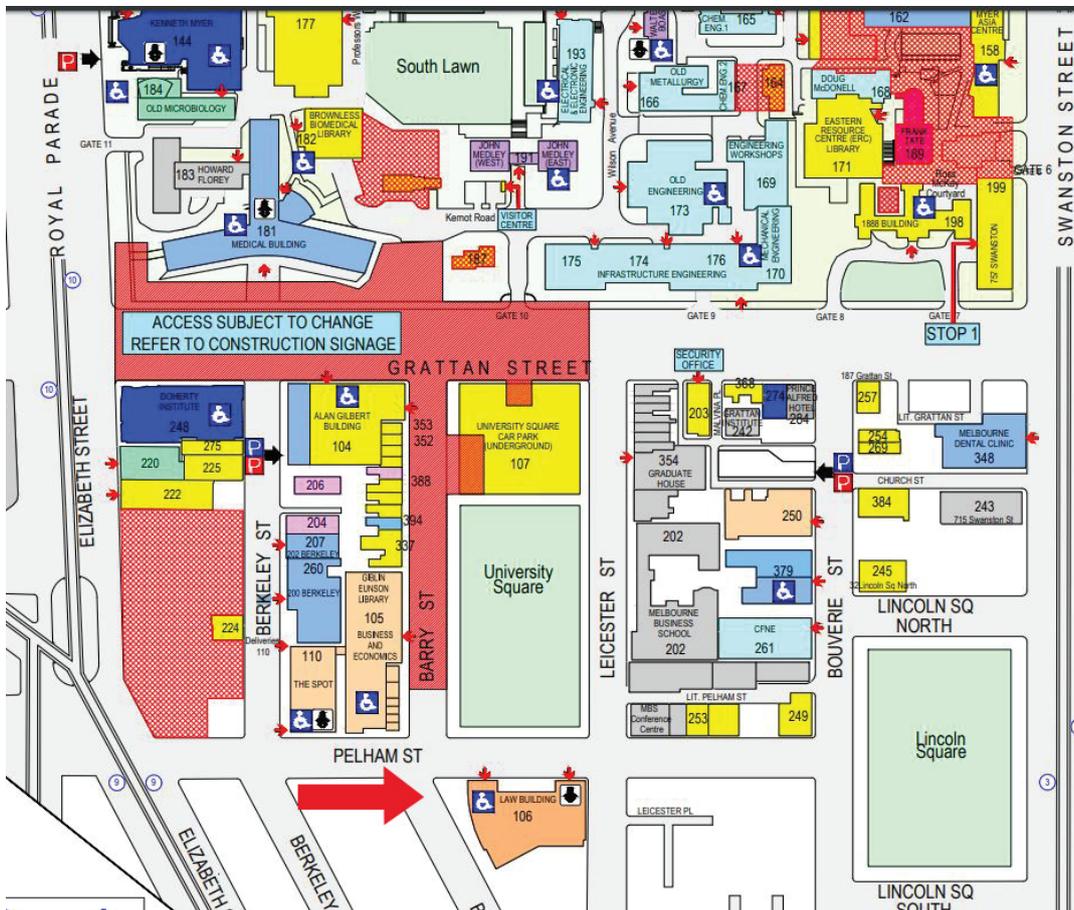
The city centre (CBD or downtown area) is walking distance from the Law School: the GPO is 1.5 km away. Trams also run to the city centre - most frequently along Swanston Street (200 m to the east of the Law School), and almost as frequently along Elizabeth Street (200 m to the west of the Law School).

Conference Location

All conference sessions will take place at the Melbourne Law School, 185 Pelham Street, Carlton. All floors are accessible by lifts and by stairs.

Airport

Melbourne Airport is located approximately 25km north-west of the Melbourne's CBD on the Tullamarine Freeway. Transport to and from the airport can be arranged using the bus, taxi or private car.



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Contents

Conference schedule Day 1	4
Conference schedule Day 2	6
Abstracts	8

IP & Media Law | Day One

Registration | 9:00 – 9:30am | Level 1

Welcome | 9:30 – 9:45am | Room 102

Andrew Kenyon, University of Melbourne

Keynote | 9:45 – 10:30am | Room 102

Cultural (Re)Codings: Copyright, trade marks and the right of publicity

David Tan, National University of Singapore

Chair: Andrew Kenyon, University of Melbourne

Morning tea | 10:30 – 11:00am

Panel 1 | 11:00 – 12:30pm

Panel 1A | Law and lawyers in action | Room 109

Chair: Jason Bosland, University of Melbourne

Privacy enforcement and litigation: Missed opportunities and failure of regulation

Peter Clarke, Victorian Bar

Extraterritorial injunctions enjoining the Internet: The case for curial self-restraint

Michael Douglas, University of Western Australia

Procedural Reform for Hearing Intellectual Property Cases in Australia – the IPEC

The Hon. Justice Peter Vickery, Supreme Court of Victoria

Panel 1B | Copyright: sharing, AI and fanfiction | Room 108

Chair: Megan Richardson, University of Melbourne

Tolerating sharing: re-thinking harm and moral rights in copyright law

James Meese, University of Technology Sydney

Could Australian copyright law protect works created by AI?

Dilan Thampapillai, ANU College of Law

A world of superheroes, princesses and wizards: Fictional characters, fanfiction, cosplay and copyright

Wellest Potter, University of New England

Panel 1C | Speech heroes? | Room 109

Chair: David Tan, National University of Singapore

In defence of pie throwing

Harry Melkonian, Macquarie University

Fake news, real problems, the continued use of legitimate laws to curb legitimate expression; freedom of expression at the cross roads! A Malaysian perspective

Cirami Mastura Drahman, Sunway University

New twists and uncertainties in Chinese civil defamation law and the protection of heroes and martyrs in mainland China

YAN Mei Ning, University of Hong Kong

Lunch | 12:30 – 1:30pm

IP & Media Law | Day One

Panel 2 | 1:30 – 3:00pm

Panel 2A | Roundtable on journalists' privilege | Room 109

Chair: Haroon Hassan, Victorian Bar

Larina Mullins, Editorial Counsel, Fairfax

Michael Bachelard, Investigations Editor, The Age

Justin Quill, Principal Lawyer, M+K Lawyers

Dan Oakes, Senior Reporter, ABC News

Jason Bosland, Deputy Director, Centre for Media and Communications Law

Chip le Grand, The Australian

Panel 2B | Roundtable on safe harbour and other ports in the storm: The future of user-generated content platforms in Australia | 108

Chair: Joel Barrett, Allens

Emma Shadbolt, Assistant Director, Copyright Law and Policy Section, Department of Communications and the Arts

Martin Hosking, co-founder and Chief Executive Officer, Redbubble Ltd

Kate Haddock, Chair of the Australian Copyright Council and partner of Banki Haddock Fiora

Afternoon tea | 3:00 – 3:30pm

Panel 3 | 3:30 – 4:30pm

Panel 3A | Defamation evolutions | Room 109

Chair: Andrew Scott, London School of Economics

Developing rights and responsibilities for bloggers in defamation law

Ursula Cheer, University of Canterbury, New Zealand

Permanent injunctions in defamation cases: Proposed changes to Canadian law

Hilary Young, University of New Brunswick, Canada

Panel 3B | Copyright: past to future | Room 108

Chair: Jason Bosland, University of Melbourne

A new right for press publishers online? Historical lessons to be learned

Rita Matulionyte, University of Newcastle

The rise of Esports: Traditional broadcasting and user-generated streaming of live events

Cam Rogers, Cam Rogers Legal

Keynote | 4:45 – 5:30

Common law? Recent developments in English media law and their (potential) relevance in Australia

Andrew Scott, London School of Economics

Chair: Jason Bosland, University of Melbourne

Dinner | 6:30 for 7:00

University House, Woodward, level 10, Melbourne Law School

IP & Media Law | Day Two

Registration | 9:00 – 9:15am | Level 1

Keynote | 9:15 – 10:00am | Room 102

E-commerce and the EU data protection regulation

Claes Granmar, Stockholm University

Chair: Megan Richardson, University of Melbourne

Morning tea | 10:00 – 10:30am

Panel 4 | 10:30 – 12:00pm

Panel 4A | Creating cultures | Room 109

Chair: Megan Richardson, University of Melbourne

Copyright, human rights and cultural rights

Martin Fredriksson, Linköping University, Sweden

Musicology, objectification of artistic creativity in infringement of musical works

Paul Sugden, Monash University

Panel 4B | Surveillance, politics and stealth | Room 108

Chair: Marta Poblet, RMIT

Immunity from surveillance: A magazine that forces you to disconnect from the Internet

Alex Beattie, Victoria University of Wellington

Communicating with voters in an era of big data: Time to rethink the political exemption in the Privacy Act

Moira Paterson and Normann Witzleb, Monash University

Regulation by stealth: How legislators are both defining and avoiding media standards

Derek Wilding, University of Technology Sydney

Panel 4C | Probing patents | Room 102

Chair: Claes Granmar, Stockholm University

Streamlining patent law to accommodate to the challenges of 3D printing technologies: In terms of patent infringement and related remedies

Chung-Lun Shen, National Chengchi University, Taiwan

Regulating the conduct of standard-essential patent holders: A 'race to the bottom' or a merge to the middle?

Julian Scarff, Monash University

Panel 5 | 12:10 – 1:10pm

Panel 5A | True contempt? | Room 109

Chair: Jason Bosland, University of Melbourne

'Serial' concerns: The rise of 'new true crime' journalism in the United States, and corresponding legal impediments in Australia

Hope Williams, University of Sydney

When politics, the media and the judiciary collide: A case-study in contempt

David Rolph, University of Sydney

IP & Media Law | Day Two

Panel 5B | Designs and trade marks | Room 108

Chair: Sam Ricketson, University of Melbourne

Designing GUIs: Current treatment of virtual or non-physical designs in Australia

Tyrone Berger, Monash University

Is there any evidence of trade mark cluttering in Australia?

Haiyang Zhang, IP Australia

Lunch | 1:10 – 2:00pm

Panel 6 | 2:00 – 3:30pm

Panel 6A | Roundtable on the Copyright Tribunal as exception-maker: Are both flexibility and certainty achievable? | Room 109

Chair: Sam Ricketson, Melbourne Law School

David Brennan, University of Technology, Sydney

Kimberlee Weatherall, University of Sydney

Rhonda Smith, University of Melbourne

Panel 6B | Roundtable on the Future of Public Interest Journalism | Room 108

Chair: Jason Bosland, Melbourne Law School

Matthew Ricketson, Deakin University

Margaret Simons, Monash University

Jock Given, Swinburne University

Keynote | 3:45 – 4:30pm | Room 102

Linked democracy: Knowledge, technology, and open data for civic action

Marta Poblet, RMIT

Chair: Andrew Kenyon, University of Melbourne

Closing drinks | 4:30 – 5:15pm

Keynotes

David Tan

Cultural (Re)Codings: Copyright, Trademarks and the Right of Publicity

In his critique of consumption, Jean Baudrillard contends that the consumer no longer relates to a particular object in its specific utility, but to a set of objects in its total signification. Thus, increasingly, when consumers make their purchases, they do not simply select goods and services purely for their functional or utilitarian values, but are buying into the significations of these commodities in the construction of their self-identities. Objects of intellectual property (IP), in particular copyrighted works, trademarks and the celebrity personality, represent far more than a bundle of legal rights. They are invariably associated with a set of coded cultural narratives and semiotic meanings which are ultimately consumed.



A well-known literary or artistic work does much more than simply educate, inform or entertain, but it also functions as a signifier of a set of signified meanings. A trademark does not only designate the source or origin of goods. Famous brands like Louis Vuitton, Apple and Nike possess particular configurations of meanings that offer peculiarly powerful affirmations of belonging, recognition, and meaning in the midst of the lives of their customers around the world. Celebrities, whose identities may be protected against commercial appropriation by the right of publicity, have become common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory. This paper explores how the encoded narratives in certain objects of IP may be read as polysemous texts that invite playful semiotic recodings, culture jamming and poststructural disruptions. It also suggests how audiences who engage with works of copyright, trademarks and celebrities via such textual signification may avail themselves of a number of legal defenses under the current legal regime

David Tan is Vice Dean (Academic Affairs) at NUS Law where he oversees the undergraduate and postgraduate teaching curriculum, and is the first to be appointed to the Dean's Chair there. He is concurrently Director (Communications) where he oversees the faculty's branding and strategic communications. He holds Ph.D., LL.B. (First Class Honours) and B.Com. degrees from the University of Melbourne and an LL.M. from Harvard. He has held visiting positions at University of Hong Kong Faculty of Law and Melbourne Law School, teaching courses in intellectual property and popular culture.

At NUS Law, Tan has pioneered courses in Freedom of Speech and Entertainment Law. His areas of research cover personality rights, copyright, trademarks, freedom of expression and tort law, and his articles have been cited by Singapore's highest appellate court. His law publications have appeared in a wide range of journals that include Yale Journal of International Law, Harvard Journal of Sports & Entertainment Law, Cardozo Arts & Entertainment Law Journal, Fordham Intellectual Property, Media & Entertainment Law Journal, Law Quarterly Review, Media & Arts Law Review, International Journal for the Semiotics of Law, Sydney Law Review and Singapore Journal of Legal Studies. His monograph, *The Commercial Appropriation of Fame: A Cultural Analysis of the Right of Publicity and Passing Off*, was published by Cambridge University Press in 2017.

Tan was previously with the Singapore Administrative Service from 2001-2006, where he served as Director (International Talent) and Head of Contact Singapore at the Ministry of Manpower, and Director (Sports) at the Ministry of Community Development, Youth & Sports. He is also an accomplished fine art and fashion photographer, having published a coffee-table book *Visions of Beauty* in association with Versace, and *Tainted Perfection* in collaboration with Cartier in Singapore. His photographic works comprising fashion editorials and advertisements have

appeared in magazines such as Time, Vanity Fair, Harper's Bazaar, Elle and The New Yorker.

Andrew Scott

Common Law? Recent Developments in English Media Law and their (Potential) Relevance in Australia

Andrew's research focus is the constitution of the public sphere. His current research agenda includes projects on the laws of defamation and privacy, the interplay between defamation and religious faith, freedom of expression and access to information, corporate power and the public sphere, and the regulation of journalistic newsgathering practices.

Andrew Scott is a graduate of Queen's University, Belfast (LLB Hons, MPhil) and the University of Wales (PhD). He held a senior lectureship at Norwich Law School, UEA before taking up a post at the London School of Economics in 2006. He is Assistant Director of the Executive LLM.



Claes Granmar

E-commerce and the EU data protection regulation

On 25 May this year, Regulation 2016/679/EU on the protection of natural persons with regard to the processing of personal data and the free movement of such data (GDPR) becomes applicable. As indicated in the title, the regulation aims both at the liberalisation of cross border data flows between the Member States of the European Union (EU) and at protecting personal data. In many instances, the regulation codifies the state of EU law prior to its adoption in April 2016. On that note, much has been said about the normative powers of the EU with regard to data protection, but the discussion has often been abstracted from its regulatory and economic context. Indeed, the provisions of the GDPR are properly understood only in the light of the competences conferred by the Member States upon the EU-institutions in accordance with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). More to the point, the Regulation transposes the Charter of Fundamental Rights of the EU ("EU-Charter") and whereas the GDPR is a piece of the puzzle to shape a digital internal market, it is also closely linked to the development of an external common commercial policy (CCP). I will address the competences of the EU to safeguard the rights of its data subjects in cases where the personal data is transferred to non-EU Member States or international organisations.



Claes Granmar is Associate Professor in European Law at Stockholm University (SU) Faculty of Law. He wrote his dissertation "Trade Mark Paradoxes in European Brand Competition" at the European University Institute (EUI) and as a visiting doctoral candidate at New York University (NYU). In the course of writing his dissertation Claes also visited the Max Planck Institute in Munich, and he worked for six months in the president's cabinet at the EFTA Court in Luxembourg. Claes has a background as domain name consultant and in-house lawyer in the media company Morningstar Europe Inc. and he has written a book on trademarks and domain names. In July 2012 Claes was appointed as senior lecturer at the SU and he has been teaching EU law, intellectual property law, competition law, human rights law and international trade law. He is since 2014 director of the course in European law at the SU undergraduate law program as well as of the optional courses in internal market law and external trade relations law. Claes became Associate Professor at the Stockholm University (SU) Faculty of Law in May 2017.

Marta Poblet

Linked democracy: knowledge, technology, and open data for civic action

Contemporary democracies face growing scepticism about their capacity to manage complex societal problems. Citizens' support of democratic institutions is reaching new lows in European countries and, globally, voters' turnout and engagement with traditional politics are steadily but consistently declining. Yet, amidst the emergent threats to democracy, citizens are also finding new, blended channels for civic and political action. A myriad of digital tools (platforms and apps) are now supporting citizens in activities such as collecting data, monitoring representatives, making petitions, engaging in deliberation, drafting legislation, and voting. This presentation offers an overview of new civic practices and institutions emerging from the interaction between people, data, and digital tools in the context of the third generation of the Web (Web 3.0). Within this context, the notion of 'linked democracy' is conceptualised as a participatory, distributed ecosystem of institutions that generates, shares, and reuses politically relevant knowledge across platforms and geographical boundaries.



Marta Poblet is an Associate Professor at RMIT University's Graduate School of Business and Law. She is one of the co-founders of the Institute of Law and Technology at the Autonomous University of Barcelona and past researcher at ICREA (Catalonia). She holds a JSD in law (Stanford University 2002) and a Master in International Legal Studies (Stanford University 2000). Her research interests cover different areas at the intersection of law, political sciences, and technology. She is also interested in the connections between technology developments (AI, blockchain, human computer interaction) and the different theories of democracy and citizenship. She has been the PI of a number of national and international research projects and has published over 40 scientific articles on these topics in journals and books.

Speakers

Alex Beattie, Victoria University of Wellington

Immunity from Surveillance: A Magazine That Forces You to Disconnect From the Internet

In today's age of ubiquitous connectivity, it is difficult to imagine digital media experiences that evade the gaze of surveillance. In this paper, I propose that disconnecting from the internet offers users immunity from surveillance practices (such as Google Analytics) that occur when connected to the internet. This protection is provisional, however, given the degree to which day-to-day activities are increasingly dependent on a connection to the internet (Couldry and Hepp, 2017) making long periods of disconnection unfeasible for many people (Beattie, 2018). However, immunity from surveillance practices could be democratized if common online activities (such as media consumption) were untangled from the internet. To this end, I analyse The Disconnect, an "offline digital magazine" that forces readers to disconnect from the internet after they download the magazine in its entirety. Building upon Galloway and Thacker's (2007) considerations of the 'tactics of nonexistence', and Mejias' (2013) concept of the 'paranode', I analyse The Disconnect as a publication that inoculates its readers from surveillance practices during the period of media consumption. The Disconnect demonstrates that the internet is not synonymous with ubiquitous surveillance, and imagines alternative methods of presenting and distributing media content that could enhance user engagement, privacy and trust.

Tyrone Berger, Monash University

Designing GUIs: Current Treatment of Virtual or Non-Physical Designs in Australia

Virtual or non-physical designs (referred to as 'graphical user interfaces' (GUIs) and screen icons) are important and ubiquitous design elements in many modern products. The widespread adoption of touch screen technologies, for example, means that software applications running on computer hardware are now used to provide user interface functionality, and in some cases even providing an identity for the product. The fact that these visual features are only present when the function is active should not detract from the importance of those features to both the visual appeal and functionality of the device from a user's perspective. In recent years, GUIs and screen icons have been increasingly lodged as designs applications. However, registrability is not considered during IP Australia's formalities process, and as such, GUIs and screen icons are appearing on the designs register without undergoing substantive examination. In many cases their status in Australia's design system is currently uncertain.

This paper considers the background to this subject in Australia, and how the definition of a product could be recast in light of the increase of non-physical designs being registered. In order to protect GUIs and screen icons, changes to the Designs Act 2003 (Cth) may be required such as amending the definition of 'product', 'visual features', and 'registrable design'. Another option canvassed will be consideration of a product in its active state, not just its resting state, when determining validity. At present, the Australian Designs Office has a practice which requires that the design be visible when the product is 'at rest' (that is, when the device is not powered). Lastly, some concluding remarks are offered that may go some way towards initiating a broader conversation about the role of design protection in the new 'experience age'.

Ursula Cheer, School of Law, University of Canterbury, New Zealand

Developing Rights and Responsibilities for Bloggers in Defamation Law

This paper uses an analysis of a 2017 decision of the New Zealand High Court, *Sellman v Slater* [2017] NZHC 2392, to examine a variety of contemporary issues in defamation law. The case arose from statements published on a notorious blog about a number of public figures which remained online for some time. Defamation issues which are discussed include how publication occurs on the internet including hyperlinking, whether there can be liability for procuring the publication

of defamatory words rather than directly publishing them, and whether defamation law should require a threshold of harm similar to that mandated in the UK to be met by a plaintiff before a defamation claim can proceed. The paper will also discuss the nature of blogging in particular as online speech, and whether it is in some sense immune to defamation law because of its special character as robust expression.

Peter Clarke, Victorian Bar

Privacy enforcement and litigation: missed opportunities and failure of regulation

Since the inception of the Privacy Act enforcement has been tentative and timid, even when armed with significant powers since March 2014. The paper/presentation will review at the approach of the Privacy Commissioner (now Privacy and Information Commissioner) in own motion investigations, determinations and enforceable undertakings. The paper will also consider why the Commissioner has failed to take civil penalty proceedings and undertake high profile actions. There will be a consideration of the reasons for this approach and consequences for compliance with the law and the culture regarding privacy and data protection. The paper will compare and contrast this approach with the attitude taken by overseas regulators in particular the US Federal Trade Commission and the UK Information Commissioner's Office.

The second part of the presentation focuses on opportunities and challenges in undertaking privacy related litigation in the context of the Privacy Act and the Victorian Privacy and Data Protection Act. A review of decisions in the Victorian Civil and Administrative Appeals ("VCAT") and on appeal to the Supreme Court indicates that privacy is being treated as a form of administrative law rather than a discrete area of law, thereby limiting the operation of the Information Privacy Principles. Is the case law is distorting the intention of the legislators? The paper will compare and contrast the experience here with the development of privacy law in other common law countries.

The question is whether privacy litigation relying on legislation and enforcement is becoming a fruitless exercise and, if so, can anything be done to reverse this trend. Is the answer to focus on equitable relief instead?

The paper will conclude by reviewing the Federal Court's decision in Privacy Commissioner v Telstra and its impact on the operation of the Privacy Act.

Michael Douglas, University of Western Australia Law School

Extraterritorial Injunctions Enjoining the Internet: The Case for Curial Self-Restraint

In *Fourie v Le Roux*, Lord Scott said that 'provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it*' But just because the court has jurisdiction does not mean that it should exercise it.

What are the appropriate limits to the scope of courts' jurisdiction to issue extraterritorial injunctions? This question was considered in two recent decisions made on opposite sides of the globe. In June 2017, the Supreme Court of Canada determined *Google Inc v Equustek Solutions Inc.*** This was an appeal from a decision of the Supreme Court of British Columbia*** to compel Google to de-index websites from its search results. The Court affirmed that it was appropriate to enjoin a foreign non-party to remove content from the internet around the globe. The second case is *X v Y & Z*, where the Supreme Court of New South Wales held that it had jurisdiction to issue an injunction to take effect 'everywhere in the world'.^ The reasons are brief, but they provide a neat illustration of what might be called an exorbitant jurisdiction. Recently, in a sequel judgment, it was revealed that 'Y & Z' are manifestations of Twitter.^

These cases will be considered in the course of an argument for judicial restraint. It is notable that each case concerned activities on the internet. Digital globalisation will see an increase in the number of cases concerning claims for extraterritorial injunctions as plaintiffs seek to have content

removed from the internet. The principles of domestic law^{^^^} which are invoked in this context will become increasingly important. This paper will consider extraterritorial injunctions directed towards conduct on the internet, with a focus on breach of confidence and defamation.

* *Fourie v Le Roux* [2007] 1 All ER1087, [30] (Lord Scott).

** *Google Inc v Equustek Solutions Inc* 2017 SCC 34.

*** *Equustek Solutions Inc v Jack* 2014 (2014) 374 DLR (4th) 537; *Equustek Solutions Inc v Google Inc* (2015) 386 DLR (4th) 224.

[^] *X v Y & Z* [2017] NSWSC 1214, [29] (Pembroke J).

^{^^} *X v Twitter Inc* [2017] NSWSC 1300.

^{^^^} Including principles of private international law, AKA the conflict of laws.

Cirami Mastura Drahaman, Sunway University Business School, Malaysia

Fake News, Real Problems, the continued use of legitimate laws to curb legitimate expression; freedom of expression at the cross roads! A Malaysian perspective

In recent years, Malaysia and in fact countries around the world, have begun to use online platforms for the sharing and dissemination of news and this has now become a common factor in everyday life, with television and newspaper corporations increasingly turning to this new media in the hope of disseminating news instantaneously.

In Malaysia, cries of fake news on the online platforms, are mounting by the day. To make matters worse, old laws have been and continue to be used indiscriminately to stifle and in some instances, smother the media's right to freedom of expression which is enshrined within Article 10 of the Malaysian Federal Constitution. The Sedition Act 1948, has also been utilised to gag the media. To further complicate issues, the Malaysian Evidence (Amendment) (No.2) Act 2012 introduced via section 112 A, a presumption of publication in digital media or computer, which may if fully complied with endanger freedom of expression in cyberspace whilst also appearing to shift the burden of proof vis-à-vis publication onto the defendant. This together with the provisions of the Communications and Multimedia Act 1998 which is soon to be amended to prevent the dissemination of fake news (which is difficult to define) on the pretext of protecting national interests puts freedom of expression at risk and can if not curbed, seriously undermine the media's effectiveness in the country.

This paper will seek to analyse the various laws impacting on freedom of expression in Malaysia and the various reforms that may be undertaken in an endeavour to ensure a free and impartial press in the future, what can the Malaysian media do to reinforce their position as the fourth estate of Government?

Martin Fredriksson (presenting author), Linköping University, Sweden Christiaan de Beukelaer, University of Melbourne

Copyright, Human Rights and Cultural Rights

A closer look at UN's Universal Declaration of Human Rights of 1948 reveals tensions in the global political economy of copyright. Article 27 of the declaration comprises two components. On the one hand, it states that everyone has the right to take part in cultural life and freely enjoy arts and scientific knowledge. On the other hand, it also acknowledges every author the right to protection of material or moral interests associated with her or his scientific or artistic production. While the illegal distribution of culture and information is most commonly an infringement of section two, it could be permissible under section one. Much recent research has even implied that piracy might in some contexts promote the first goal of Article 27 by providing access to culture and information that is hard to access through formal media channels.

The paradox of article 27 furthermore enraptures another tension in contemporary, international, copyright law that tends to approach copyright exclusively as a transferable economic right and disregard its function as a non-transferable moral and cultural right, which is also acknowledged in the UDHR. These cultural rights are further elaborated in UN's International Covenant on Economic, Social and Cultural Rights (ICESCR)

The relationship between intellectual property and cultural rights are explored in two 2015 reports by UN's Special Rapporteur on Cultural Rights, Farida Shaheed, focusing on copyright and patents. This presentation takes Shaheed's reports as a starting point to discuss the relation between cultural rights and copyright. Most importantly, it discusses how and why the piracy versus copyright debate needs to acknowledge the importance of cultural rights in general and the implications of the paradox in Article 27 in particular.

Rita Matulionyte, University of Newcastle

A new right for press publishers online? Historical lessons to be learned

Recent decades have witnessed a dramatic change in news publication market, such as a move from print to digital environment, which led to disrupted traditional revenue streams. New intermediaries have emerged, such as search engines and social platforms that are increasingly used by consumers to access news but are unwilling to share revenues generated from such uses with content producers, ie press publishers. Currently, the European Parliament is discussing a possibility to introduce a new right that would enable press publishers to request license fees for distributing news items via such platforms. This proposal that is found in the Draft Directive for the Single Digital Market has been strongly supported by the publishing industry but heavily criticized by most academic commentators and civic groups. This is not the first time that publishers are requesting ancillary (or neighbouring) rights to their publications. In 1950's the UK publishers have successfully advocated for a copyright to typographical arrangements which was subsequently introduced in UK Copyright Act 1956 and later copied by a number of Commonwealth countries, including Australia. These rights however have not been as useful and effective as publishers had expected. The paper examines the legislative history of a copyright to published editions and compares it with the current discussions on the proposed press publishers' right. It asks whether parallels could be drawn and what historical lessons could be learned in order to create legal mechanisms that are useful and effective in addressing the needs of the contemporary publishing industry.

James Meese, University of Technology Sydney

Tolerating sharing: re-thinking harm and moral rights in copyright law

This paper presents findings from a study of vernacular models of content protection on social media. Social media audiences regularly infringe copyright by sharing memes and images amongst their friends and followers and these practices are tacitly encouraged by the structural design of social media platforms. However, certain individuals attempt to challenge the "spreadable" (Jenkins et al. 2013) nature of online content by appending their own original content with hashtags and watermarks to assert their ownership. We explore this phenomenon by analysing data drawn from a series of focus groups held with people who use social media regularly and through a case study of the Instagram hashtag #copyright. This research informs a working taxonomy of "vernacular content regulation" that details what ethical decisions individuals are making around whether to share or not share content.

The paper then goes on to consider how copyright law could best incorporate these changed social norms around the replication of copyrighted content. We suggest that that copyright law could better incorporate dominant social norms by offering a more detailed conceptualisation of harm in relation to commercial use and considering whether the author's moral rights of attribution and integrity have been addressed in analyses of remedies for infringement. We suggest a future reform agenda that embeds a formalised tolerance for use, allowing people to share content safely without having to rely on the presumed disinterest of the copyright holder.

Mei Ning Yan, The University of Hong Kong

New Twists and Uncertainties in Chinese Civil Defamation Law and the Protection of Heroes and Martyrs in Mainland China

In December 2017, mainland China produced a draft law providing comprehensive protection

for heroes and martyrs. Expected to be enacted sometime in 2018, the draft legislation prohibits twisting, vilifying, or negating the deeds and spirit of heroes and martyrs. Acts infringing on the names, images, reputation, or honor of heroes and martyrs can also give rise to civil liability, and be subject to administrative punishments or criminal sanctions. A new legislative provision that came into effect in October 2017 imposes civil liability on torts infringing on personality rights (except for image rights) of heroes and martyrs that also cause harm to the public interest. The December 2017 draft law further provides that procuratorates will have the power to bring civil lawsuits against tortfeasors if the deceased heroes and martyrs have no surviving family members or if their family members do not take legal action. These recent legislative endeavors are in response to several high-profile court decisions concerning the defamation of the Langyashan Warriors, who according to Chinese Communist Party propaganda are World War II heroes. The Supreme People's Court highlighted in October 2016 that these court decisions are model cases for protecting the reputation of national heroes. But the conservatives and army personnel have continued intense lobbying for specific legislative protection in view of a trend towards increasing doubt and mockery by Chinese netizens of heroes and martyrs. The lobbyists regard such online activities as vicious attacks on the Chinese Communist Party's history, creating a negative impact on the legitimacy of the CCP's rule over the country. These recent legislative enactments and judicial decisions have brought new twists and fresh uncertainties to PRC civil defamation law and are indicative of the rapid deterioration in freedom of speech and academic freedom in China's increasingly inhibiting political environment.

Harry Melkonian, Honorary Associate, Macquarie University Law School

In Defense of Pie Throwing

On 8 May 2017, Qantas CEO Alan Joyce was pied during a business breakfast event in Perth. The pie thrown was a meringue and the pie thrower said that he committed the act to oppose Joyce's views on same-sex marriage. Joyce pressed charges and the perpetrator was fined \$3600 in the Magistrate's Court and was banned for life from flying on Qantas. In the recent past, both Bill Gates and Rupert Murdoch have been the targets of pie-throwers.

Pie throwing is a traditional and highly expressive way of communicating displeasure, to publicly ridicule and humiliate – not physically injure. Typically, pies consisting of meringues, whipped cream or even shaving cream are used – to eliminate physical injury and perhaps to maximise the attendant messiness. As perhaps best demonstrated by the Three Stooges, pie throwing is also an effective means of bringing the toffs down to size.

Yet, nowhere is pie throwing a protected form of free speech. Even in the USA, where speech receives the broadest protection, pie throwing, apart from the Three Stooges consensual variant, is treated as a criminal assault.

This paper explores the idea that pie throwing should be protected speech. It is broadly recognised that speech consists of many activities outside of the written or spoken word. Sculpture, paintings, music, boycotts and a host of other activities have come within the umbrella of speech. Under traditional free speech theory, to constitute speech, the act must be expressive; and where there is a physical component of the speech – to be protected the expressive aspect must exceed the accompanying physical act.

But, where the line should be drawn is unclear. The US Supreme Court has held that burning the American flag constitutes protected speech. Booing and jeering have long been protected; why not pie throwing? Pie throwing is so expressive – it is meant to convey displeasure by publicly humiliating. Pie throwing makes the self-righteous look like fools and is less-threatening than an angry mob.

Moira Paterson, Monash University
Normann Witzleb, Monash University

Communicating with voters in an era of Big Data: time to rethink the political exemption in the Privacy Act

The issue of microtargeting of voters by political parties has come to the fore in recent times due to the claims concerning the role of data analytics in the Trump and Brexit election results. An associated trend which has also attracted considerable controversy is the issue of so-called fake news and the use of social bots in order to distort social media conversations and manipulate public opinion.

The key law which regulates information privacy in Australia, the Privacy Act 1988 (Cth), does not apply to registered political parties and also contains an exemption for the political acts and practices of certain organisations. At the time of their enactment these exemptions were justified with respect to the significance of freedom of political communication to Australia's democratic process.

This paper begins with an overview of the political exemptions in the Privacy Act and discusses the issues to which they give rise in the context of emerging communication trends such as micro targeting of electors by political parties and Big data analytics. It then explores the implied freedom of political communication, with a special emphasis on developments that have taken place since the exemption for political acts was introduced in 1990. It then considers whether and to what extent a roll-back of the political exemptions in the Privacy Act would be both desirable and constitutionally feasible.

Wellett Potter, University of New England

A World of Superheros, Princesses and Wizards: Fictional Characters, Fanfiction, Cosplay and Copyright

This presentation shall discuss the relationship between copyright and fictional characters. Specifically, it will examine the cultural phenomenon of fanfiction, fanart and 'cosplay' (costume play), and the potential copyright implications under Australian law. The recent Australian case of *Tolkien Estate Limited v Saltalamacchia* [2016] FCA 944 will be discussed.

The first half of this presentation will introduce fanfiction, fanart, cosplay and associated items and explore issues pertaining to subsistence. The second half will discuss infringement, enforcement, possible defences to infringement and the moral right of an author's integrity.

Cam Rogers, Cam Rogers Legal

The Rise of Esports: Traditional Broadcasting and User-Generated Streaming of Live Events

'Esports' is a blanket term used to describe competitive video gaming. Online participation in esports is immensely popular worldwide, but esports, viewed live as an organised, incentivised, competition-based platform with teams and fans, is relatively new. As popularity of this emerging format grows around the world, demand for vision and commentary to accompany the live event has exploded. A desire to watch live broadcast of traditional sport is well established, and in this regard, esports can readily be compared. However, the framework that underpins each is dramatically different.

Broadcasting of esports in general – the live vision of the events, the oral commentary, and even the associated music is the hot topic for all content creators, from online community figures, live-streamers and the fans themselves, to professional broadcasters, like the world's largest esports company, ESL. But 'broadcasting' in the context of esports presents some unique complexities, due to the esports organisational structure, and online behaviour itself.

Traditional sports have no 'owner', but esports games are owned by private companies. Australian Rules Football is governed by a peak body who protects the interests of the sport. But it does not

own football. In contrast, the game 'League of Legends' ("LoL") is owned by, and the rules are controlled by, the private company Riot Games. It is both owner and event organiser. This simple fact of ownership creates a licensing conundrum for broadcasting that plays out in various ways. On top of this, we have seen a surge in online individuals appropriating live vision of broadcasts, adding their own commentary and re-broadcasting their own version of live events without any authority to do so commercially. While this is of concern to broadcasters, it is less important to the game owner, who view it as promotion for their game.

An analysis of broadcasting live esports presents to us an opportunity to review traditional broadcasting and copyright through a critically new format that challenges our understanding of an owner's right to public performance, and reproduction of an original work.

This paper aims to examine the issues of broadcasting, user generated content and copyright ownership in esports and consider the roles the game's owner and the traditional broadcaster play. It will also look at how those parties rights intersect with those of the online fan and the live streamer. It will attempt to isolate how copyright law applies in this context, examining what new works are created or contributed, and how their interests too should be protected, so the value of esports broadcasting can evolve alongside its growth as an international phenomenon.

David Rolph, University of Sydney

When Politics, the Media and the Judiciary Collide: A Case-Study in Contempt

The jurisdiction to punish contempt of court is exercised sparingly in Australia. Thus, when three Federal Government Ministers are summoned by the Victorian Court of Appeal to address the court as to why they should not be prosecuted for contempt of court over comments made to a national newspaper, the incident is worth close examination. In June 2017, The Australian newspaper published a front-page story, 'Judiciary "light on terrorism"'. The article includes quotes from Federal Government Ministers, Greg Hunt, Michael Sukkar and Alan Tudge, all representing electorates in Victoria. The comments were highly critical of Victorian judges' sentencing in cases involving terrorism-related offences. The impetus for the Ministers' comments was a news report about an appeal hearing before the Victorian Court of Appeal, in which the Commonwealth Director of Public Prosecutions was the appellant and the decision was reserved. The three Ministers – dubbed, by sections of the media, 'the Yarra Three' – soon found themselves in legal difficulty when the Victorian Court of Appeal summoned them to answer why they should not be dealt with for contempt of court. For a fortnight, the Federal Government confronted a serious political and legal crisis, which was only resolved by the Victorian Court of Appeal's ultimate decision not to refer the Yarra Three for prosecution for contempt. The Yarra Three affair brought into sharp relief how little understood the principles for contempt of court are, as well as highlighting the sometimes fraught relationship between politicians and the judiciary and the tensions between the Federal and State levels of government in Australia.

Julian Scarff, Monash University

Regulating the Conduct of Standard-Essential Patent Holders: A "Race to the Bottom" or a Merge to the Middle?

In a 2017 international roundtable on competition policy, the United States ("US") representative criticised a recent South Korean decision against the standard essential patent ("SEP") owner, Qualcomm Inc ("Qualcomm"). In its criticism, the US claimed the decision had ignored international comity, the right that jurisdictions grant one another to regulate their own internal affairs.

The US representative alleged this had occurred as, in addition to fining Qualcomm the equivalent to US\$854 million, the South Korean decision sought to restrict how Qualcomm could negotiate with South Korean manufacturers globally. For example, it banned Qualcomm from requiring that these manufacturers license its SEPs as part of a portfolio license, even when the relevant SEPs were registered for use outside of South Korean jurisdiction. The US representative warned that such extraterritorial regulation of SEP holders' conduct could trigger a 'race to the bottom', in which the most restrictive national regime would apply globally.

This paper argues that such comments take a highly particular view of Qualcomm's licensing practices and of developments in the regulation of SEPs more generally.

The remedies imposed on Qualcomm were global in their effect, as the harm the SEP holder's conduct inflicts on licensees is, likewise, global in its effect. Similarly, the South Korean decision is unlikely to set off rounds of reactive regulation internationally, as jurisdictions outside of the US – in South Korea, Japan, China and the European Union – have imposed restrictions on SEP holder conduct in negotiations for half a decade or more. In fact, the real issue here is the significant differences among and between the existing requirements and prohibitions that these jurisdictions impose on SEP holders.

Therefore, this paper proposes that the true threat to international comity is the resistance of any jurisdiction to the development of a consistent approach in the regulation of SEP holder conduct. Towards that end, the paper examines where the above five jurisdictions converge and diverge in their approaches and suggests how a better correspondence might be achieved.

Chung-Lun Shen, National Chengchi University, Taiwan

Streamlining Patent Law to Accommodate to the Challenges of the 3D Printing Technologies: In terms of Patent Infringement and Related Remedies

It is well observed that the development of technologies has changed the landscape of the legal system. The traditional value recognized by the legislators under law often faces the predicament on how to accommodate, other than resist, the new value emerging on the track of technological innovation to achieve the paramount policy goal of such the law. Patent law seems to have been struggling over the legal issues happening where the third parties took advantage of new media or business model to infringe upon the patent so that the exercise of the exclusive rights and the evaluation of patent infringement under tradition patent law are sharply challenged. While the judicial practice under patent law has thoroughly not formed the consensus on the resolution of the disputes involving in the interaction between patent infringement and new emerging technologies, the new technological surroundings inevitably facilitate the leeway for the infringers to intentionally or incidentally escape the liability of patent infringement owing to the mechanic interpretation of patent law. Following the recent development of patent law in the various jurisdictions, besides the issue of the divided infringement in the era of electronic commerce, 3D printing technologies are also contributing to the complexity about the impact of new technologies over the traditional patent value and the protection of the patent rights.

Under the parent law system, the framework of patent protect starts from granting the patentee "the exclusive right to make" to stop the unauthorized manufacture of the patented articles and also to seek adequate remedies, including the injunction relief and damages. The establishment of such the exclusive right may reflect the concern of the legislators about the stage where the threat of patent infringement has been obviously brought to the economic interest of the patentee, through the preemption or substitution effect in the market. While the exclusive right to make is recognized under patent law, other exclusive rights function with it to secure the patentee's interest in normal exploitation of the patent connected with the commercial transactions.

However, the 3D printing technologies has been breaking down the expectation of the legislator about the grant of the exclusive rights to protect the patentee from the illegal practice of the patent made by the infringer. The unauthorized commercial exploitation of the patent through the 3D printing technologies may occur at earlier stage where the CAD file was made to cover the all elements disclosed in the claim, than the one where the physical object has been made by practicing the same claim. According to the current patent law and its fundamental jurisprudence, the making of a CAD file never constitutes the violation of the exclusive right to make on the ground that such the CAD file is not considered the patented article as a physical object. Further, the uploading or downloading the CAD file in the website, as well as the later distribution certainly steps out of the patent infringement. The CAD file creates a black market for the patent infringement at the early stage, and facilitates the risk of making and selling the infringing article through the practice of the 3D printing. The patentee seems unable to seek the adequate remedies against the activities of reproducing and transferring the CAD file in the market to stop such the software

from being embodied to the infringing articles.

The main purpose of this article is to explore the challenges of the emerging technologies on the legal system of patent enforcement. It is expected to begin with the development of the 3D printing technologies to reflect the predicament faced by the traditional concepts about patent infringement and the exclusive rights, and then seek a feasible approach to adjust the recognition of patent value in the market to prevent the illegal exploitation of new technologies over the patent at the early stage of patent infringement., for the reference of future judicial decisions in the various jurisdictions. Under this concept, this article will seek the dynamic value of patent vulnerable to illegal exploitation in the occasion of distribution of CAD files for 3D printing. As well, a flexible interpretation about the exclusive rights to determine patent infringement and necessary remedies will be proposed to secure the legislative goal of patent law against the development of the 3D printing technologies.

Michael Doolan, University of Sydney
Paul Sugden, Monash University

Musicology, Objectification of artistic creativity in infringement of musical works.

This paper proposes a musicological analysis of music to argue that artistic creativity that demotes the artist's personality as expressed in their music, can be objectively identified for purposes of assessing copyright infringement in music. This would broaden the criteria from notes, chords, music structure by rhythm, note structure and origin of these written items historically with in musical genera's. This current objective on the physical ignores the creativity of the musician and the musical concepts of 'homage'. The concentration on history and musical structure physically expressed with new forms of music and digital developments is limiting, as new notes chords and arrangements are themselves limited.

Dilan Thampapillai, ANU College of Law

Could Australian copyright law protect works created by AI?

In recent years there have been rapid advances in the complexity and abilities of artificial intelligence (AI). Notably, AI is now capable of creating works of art and literature that might otherwise be eligible for copyright protection if they were created by a human author. Google Deep Dream is an example of AI creating art. The Next Rembrandt project also demonstrated AI's capacity to recreate seemingly new works of art in the style of famous painters. Similarly, there has been an instance of AI creating its own language.

Under the United Kingdom's Copyright, Designs and Patents Act 1988 (UK) it might technically be possible for AI works to be protected under copyright law. The Australian Copyright Act 1968 (Cth) does not specifically preclude protection of AI works. However, a purposive reading of the Act would be inconsistent with extending copyright protection to AI works. Nevertheless, there are a number of legal and policy questions that are worth exploring.

For example, could the doctrine of originality maintain its coherence if copyright were extended to AI works? If AI creates works independently of direct human control, then what happens when AI creates a work that is in the style of an existing copyright protected work? The relationship between copyright law and AI now looms as an issue that extends beyond mere doctrinal concerns. This talk address a number of the issues that are now emerging in this area.

The Hon. Justice Peter Vickery, Supreme Court of Victoria

Procedural Reform for Hearing Intellectual Property Cases in Australia – the IPEC

The paper considers the need for procedural reform for hearing intellectual property cases in Australia. The reforms in England and Wales, which established the Intellectual Property Enterprise Court (the IPEC) are examined in the context of possible applicability in the Australian context.

On 1 October 2010, secondary legislation came into force in England and Wales to amend the IP Civil Procedure Rules to introduce a new procedural scheme for what was then called the Patents County Court. Under the new Rules, the managing court was renamed the Intellectual Property Enterprise Court. As Justice Birss, the founding judge, said: 'The point of those reforms was to improve access to justice in IP matters, particularly for small businesses.'

The cumulative effect of the IPEC reforms in the United Kingdom has been highly significant. In addition to an increase in the numbers of filed cases at the IPEC, the creation of the streamlined IPEC for litigating disputes has fundamentally altered the IP dispute landscape in the United Kingdom, and in doing so has increased the likelihood in this jurisdiction that IP holders will attempt to uphold their rights against potential infringers.

The question is posed – is there a need in Australia for a similar structure to manage IP cases?

Derek Wilding, University of Technology Sydney

Regulation by Stealth: How legislators are both defining and avoiding media standards

Media standards schemes were in the spotlight in Australia five years ago during the policy wave that included the Finkelstein inquiry, the Convergence Review and the attempted Gillard government reforms of 2013. Enthusiasm for these schemes waxes and wanes. Some critics observe an industry view that prevalence of cross-border publication, the glare of social media and the facility for online corrections make formal standards schemes redundant. In Australia, neither the legislative overhaul of media laws nor the public attention to misinformation and resulting erosion of trust has led to a resurgence of interest in such schemes. Yet some of the same difficulties have appeared in other contexts, such as the furore surrounding the definition of 'journalism' in national security laws.

This paper is based on research which updates earlier work on the core elements of a robust standards scheme, reviewing other jurisdictions for examples of cross-platform regulation and how this can be pursued without imposing intrusive statutory powers. The paper includes a comparison of advanced schemes such as those in Denmark (where the scheme encompasses all media platforms) and Ireland (which combines a press council with an ombudsman), along with recent developments in the UK and New Zealand. It then looks at the complexity and ambiguity in statutory definitions of journalism in Australia. The paper highlights the continuing attempts by legislators to impose media standards other than via formal standards schemes.

Hope Williams, University of Sydney

'Serial' concerns: The rise of 'new true crime' journalism in the United States, and corresponding legal impediments in Australia

The 'true crime' genre conjures notions of cheap paperback thrillers, second hand book stalls and gratuitous violence. However, since 2014 a new species of true crime is challenging and transforming these conventions. This paper charts the rise of 'new true crime' podcasts in the United States, and their parallel success in the Australian market – with a primary focus on the implications of translating an 'American' genre into Australia's media law landscape. By re-investigating unsolved cases or unsatisfactory verdicts, new true crime is a tool of corrective justice in cases where a real or perceived injustice has occurred.

While recognising the productive potential of new true crime, this paper raises concerns about the genre's potential to negatively impact the fair trial, and unjustifiably diminish public confidence in the administration of justice. It considers whether existing mechanisms for controlling prejudicial publicity in Australia can adequately manage the unique risks posed by the genre – which arise not only through the actions of the journalist, but the reactions of its listeners.

Hilary Young, University of New Brunswick Canada

Permanent Injunctions in Defamation Cases: Proposed Changes to Canadian Law

Interlocutory injunctions are exceptional remedies in defamation because courts are wary of prior restraint. Permanent injunctions following a finding of liability are less problematic, but they still interfere with freedom of expression. In Canada, a permanent injunction will be awarded in defamation if: a) it is likely that the defendant will continue to publish defamatory statements, despite a finding of liability; or b) the plaintiff will likely not receive any compensation. In Australia and the UK, it seems that only the likelihood of continued publication justifies a permanent injunction.

This paper discusses the test for permanent injunctions for defamation and its application in Canada, addressing three issues. First, the test itself inappropriately penalizes those with fewer resources, as it allows the sole basis for awarding an injunction to be the defendant's inability to pay damages.

Second, there has been a significant increase in Canada in the percentage of cases in which a permanent injunction has been granted, especially when publication is on the internet. This is sometimes justifiable, as where an increased potential for harm on the internet incentivizes a plaintiff to seek an injunction where she would otherwise have been satisfied by a finding of liability. Sometimes, however, it is unclear why injunctions are warranted.

Finally, injunction orders are often problematically broad. For example, injunctions may prohibit speaking about the plaintiff at all. More commonly, they prohibit further defamation, turning what would otherwise be a civil matter into a criminal one. How similar, then, should the defendant's speech have to be to the original publication to warrant an injunction and possible contempt of court? I argue that speech should have to have a similar sting to that for which liability was found in order to justify awarding an injunction.

Haiyang Zhang, IP Australia

Is there any evidence of trade mark cluttering in Australia?

The Intellectual Property Arrangements – Inquiry Report by the Productivity Commission in 2016 highlights trade mark cluttering as a potential problem to be addressed in order to ensure the effectiveness of the trade mark system in Australia. However, the report does not provide any evidence in this connection. This paper explores whether there is any evidence indicating trade mark cluttering in Australia and how serious it has been. We find that the overall situation of trade mark cluttering in Australia is not very serious as less than one per cent of registered trade marks have been removed annually by a third party via the non-use removal procedures. However, it has become more and more difficult to register simple and catchy words as a trade mark because they are more likely to have been registered already. Potential sources of trade mark cluttering have also been increasing in Australia as the first renewal rate has decreased from about 70 per cent in 1980s to 50 per cent in 2000s, among which an increasing number of trade marks have remained on the register for an average of extra four years after their owners deregister their businesses. A comparison of average number of classes per trade mark between Australia and some countries including the United States and the European Union indicates that the per-class-based fee system and proof of use mechanism have played a positive role in avoiding non-use trade marks and over broad non-use classes remaining on a register.



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