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Melbourne Law School

**Intellectual Property Research Institute of Australia
Annual Report 2018**

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Melbourne Law School

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IPRIA Advisory Board

In 2018 the Advisory Board comprised

- Mr Owen Malone, Treasury Wine Estates Limited (Chair)
- Professor Megan Richardson, Director, Melbourne Law School
- Arlen Duke, Deputy Director, Melbourne Law School
- Anna Gibson, Intellectual Property Director, Treasury Wine Estates Limited
- Dr Ben Mitra-Kahn, Chief Economist, IP Australia (a/Razib Tuhin, IP Australia)
- Professor Paul H. Jensen, Faculty of Business and Economics, University of Melbourne
- Professor Sam Ricketson, Melbourne Law School, University of Melbourne
- Assoc. Professor Kwanghui Lim, Melbourne Business School, University of Melbourne



Professor Megan Richardson

Director

Megan Richardson has degrees from Victoria University of Wellington, New Zealand, Yale University, USA, and the Free University of Brussels, Belgium; and she is currently a Professor of Law at the Melbourne Law School. Her fields of research and publication include intellectual property, privacy and personality rights, law reform and legal theory. She has served on consultative panels for New South Wales Law Reform Commission and Australian Law Reform Commission privacy reviews. From 2009-2012 she was the Associate Director Law of the Intellectual Property Research Institute of Australia (IPRIA).



Arlen Duke

Deputy Director

Arlen Duke joined the Law School as a full-time lecturer in February 2005. Arlen graduated from the University of Melbourne with an LLB (First Class Honours) and a BComm. He has also completed a LLM by coursework at the University of Melbourne (with first class honours awarded in all eight subjects). Arlen teaches a range of subjects including: Competition Law (JD), Competition and Consumer Law (breadth), Competition Law and Intellectual Property (MLM), Legal Method and Reasoning (JD), Obligations (JD) and Contract (JD). In 2008 Arlen joined Dr Jeannie Paterson and Professor Andrew Robertson as a co-author of leading contracts texts *Contracts: cases and materials* and *Principles of contract law*. He has also joined Associate Professor John Duns as a co-author of *Competition Law: cases and materials*.



Goals of IPRIA

IPRIA is a centre for the research, discussion and teaching of all aspects of intellectual property law and policy.

The Intellectual Property Research Institute of Australia (IPRIA) was established in March 2002 as an initiative of IP Australia. IPRIA was established to increase the understanding, creation, use and exploitation of intellectual property by Australian organisations and individuals. The focus is to move understanding and engagement with intellectual property from a technical to a strategic consideration. Intellectual property in this context is broader than formal intellectual property rights and includes the management of knowledge, personnel and intangible assets.

From 2002 to 2014 the Institute functioned as a collaborative research centre located at the University of Melbourne with significant funding from IP Australia. The core faculties were the Faculty of Business and Economics, the Melbourne Law School and the Melbourne Business School.

Since 2015 IPRIA has continued to function as a collaborative research centre located at the University of Melbourne without block funding from IP Australia but with continuing support. It is located at the Melbourne Law School and has a team of Directors from the Melbourne Law School, as well as Associates, primarily drawn from the wider University of Melbourne, and Research Staff.

IPRIA is assisted by an Advisory Board from intellectual property industries, the University and IP Australia, and receives support from the Melbourne Law School and Melbourne Business School as well as external research partners.

Research Fellows of IPRIA work on IPRIA research projects. In 2018 they were:

- **Professor Paul Jensen** Professorial Research Fellow, Melbourne Institute of Applied Economic and Social Research
- **Associate Professor Don O’Sullivan** (Melbourne Business School)
- **Professor Andrew Christie** University of Melbourne, Melbourne Law School

Associates of the IPRIA are academics from the Melbourne Law School and elsewhere who share a research interest in intellectual property law and policy. In 2018 they were:

- **Professor Graeme Austin** Melbourne Law School
- **Associate Professor Jason Bosland** University of Melbourne
- **Professor Andrew Christie** Melbourne Law School
- **Associate Professor Chris Dent** Murdoch
- **Arlen Duke** Senior Lecturer, Melbourne Law School
- **Professor Richard Garnett** Melbourne Law School
- **Director Jonathan Gill** Carrick Gill Smyth Lawyers
- **Professor Andrew Kenyon** Melbourne Law School
- **Janice Luck** Melbourne Law School
- **Professor Sam Ricketson** Melbourne Law School
- **Rhonda Smith** Faculty of Economics
- **Professor Julian Thomas** RMIT University
- **Professor Kimberlee Weatherall** Sydney Law School, University of Sydney
- **Professor Beth Webster** Swinburne University of Technology,

IPRIA Staff

IPRIA also includes an Administrator and several casual research assistants.

Hamish Carr | Administrator

Hamish Carr joined IPRIA and the Centre for Media and Communications (CMCL) as an administrator in 2015. Prior to commencing work at the Law School, Hamish was an administrator in the Faculty of Arts, School of Culture and Communication.

In 2018 IPRIA staff, research fellows and associates were involved in major research projects.

ARC Linkage Project: Testing Trade Mark Law's Image of the Consumer

- **Associate Professor Kimberlee Weatherall** University of Sydney
- **Professor Michael Humphreys** University of Queensland
- **Dr Sarah Kelly** University of Queensland
- **Associate Professor Jennifer Burt** University of Queensland
- **Professor Megan Richardson** Melbourne Law School, University of Melbourne

As part of this project Megan Richardson and Jill Klein from Melbourne Business School carried out a study to test the assumption made in the recent High Court decision in *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* [2014] HCA 48 that (in the absence of compelling evidence to the contrary) 'Oro' when used in relation to coffee does 'not ... convey a meaning or idea sufficiently tangible to anyone in Australia concerned with coffee goods as to be a word having direct reference to the character or quality of the goods', with the result that the word could function as a registrable trade mark. The project includes an online consumer survey designed in conjunction with the survey firm Pureprofile and conducted across Australia in September 2015, designed to elicit consumer understanding of and attitudes to the work 'Oro' when used on coffee packets. Results of the survey have been analysed and some publications are being produced .

A Global trade mark database

- **Professor Beth Webster** Swinburne University of Technology,
- **Professor Paul Jensen** University of Melbourne
- **Professor Alfons Palangkaraya** Swinburne University of Technology
- **Assistant Professor Gaétan de Rassenfosse** EPFL,
- **T'Mir D. Julius** University of Melbourne
- **Dr Steve Petrie** Swinburne University of Technology
- **Associate Professor Kwanghui Lim** Melbourne Business School, University of Melbourne
- **Associate Professor Russell Thomson** Swinburne University of Technology
- **Dr Ben Mitra-Kahn** IP Australia

The aim of this project has been to create an international linked trade mark database. Currently, trade mark databases are country specific which makes it expensive, if not unviable, to analyse global aspects of branding and trade mark policy issues. With a team of researchers from computer science, physics and economics the project sets out to link national trade mark data registers on the basis of company names, text and images to form a comprehensive global database.

The Careers of Scientists

- **Associate Professor Catherine de Fontenay** Melbourne Business School, University of Melbourne
- **Associate Professor Kwanghui Lim** Melbourne Business School, University of Melbourne

Kwanghui Lim and Catherine de Fontenay (MBS) are currently working on a project on the careers of scientists. IPRIA funded the initial stages of this project, and it is now an ARC Discovery project. The purpose of this project is to explore how team size and signals of quality affect the promotion prospects (and exit choices) of scientists. At this stage Kwang and Catherine are exploring a model based on economic theory and computer simulation.

‘The Internet of Things’

- **Rachelle Bosua, Sean Maynard, Atif Ahmad, and Philip Dart**, Computing and Information Systems, University of Melbourne
- **Professor Megan Richardson** and **Karin Clark**, Melbourne Law School, University of Melbourne
- **Associate Professor Kwanghui Lim**, Melbourne Business School, University of Melbourne

The Internet of Things (IoT) impacts human lives in many positive ways as a result of data collected through wearables and sensors associated with health, homes, environments, activity and cars (to name a few). The availability of individuals’ personal information to anybody from anywhere, and integration of this data with other online and offline data, increases the risk that newly created data sources have the potential to generate alarmingly personal user/customer profiles. Subject to further processing and inference, these profiles may disclose highly sensitive aspects of individuals, which may significantly impact on individual privacy. This project sponsored by MNSI investigates consumer and business attitudes to the privacy challenges associated with the internet of things and also considers techniques to improve privacy without undermining product innovation. Jeb Webb, Computing and Information Systems, University of Melbourne is a researcher on this project.

This project has resulted in a number of publications.

Designs Law and Practice.

Design within Australia and how Australia compares to its international peers

A joint research project of IP Australia, and the Intellectual Property Research Institute of Australia (IPRIA) at The University of Melbourne

Michael R. Falk University of Melbourne & **Dr Haiyang Zhang** IP Australia

- **Paul Drake** IP Australia
- **Associate Professor Kwanghui Lim** Melbourne Business School, University of Melbourne
- **Brett Massey** IP Australia
- **Dr. Benjamin Mitra-Kahn** IP Australia
- **Professor Megan Richardson** Melbourne Law School, University of Melbourne
- **Razib Tuhin** IP Australia

Design is a central component of Australia's innovation system. The designs legal system represents a potentially powerful instrument by which to nurture design investment. Yet, to date, little empirical evidence has linked design registrations to design inputs or investments.

This study brings together two approaches for comparing the design intensity of countries and industries. We assess how Australia compares to a sample of its trading partners, and how Australian industries compare to one another, on two attributes.

Design IP intensity is assessed by measuring the intensity with which a country or industry makes use of the registered designs system. Design labour intensity is assessed by measuring the extent to which a country or industry employs people in design-related occupations.

Our findings reveal that Australia's design labour force is small, after controlling for the size of our industrial sector, and compared to design forces of other countries. Australia's design economy is productive: Australia is close to the expected level of design IP intensity given its design labour intensity. However, based on 2011–2016 data, Australia lags its competitors both in the rate at which its design labour force is growing and in its rate of growth in design IP generation.

To better understand Australia's position, we examine design registration patterns within Australia. We identify those sectors in which there is the greatest difference between residents and non-residents in terms of their shares of a sector's total design filings. Across many of those sectors, non-residents register, certify and renew more designs than Australian residents.

To place these findings in context, we compare the design intensity of industries across national contexts. We find that those product classes in which Australians focus are ordinarily the purview of resident filers. A potential implication is that Australian residents tend to register designs in industries for which proximity to the market confers competitive advantages.

A central finding of this study is that the design IP intensity of a country increases with its design labour intensity. The structure of a country's design workforce appears to matter also: our analysis indicates that a country's design IP intensity is positively associated with the degree to which its design labour is concentrated across industries.

This study aims to contribute insights into IP Australia's ongoing policy analysis and review of the designs system. In identifying countries worth emulating among our peers, our analysis indicates that Australia should look to design leaders, but also to countries like Denmark and Sweden which have smaller but strengthening design economies.

This study holds insights of relevance for policymakers and their stakeholders. Design impacts an increasingly diverse range of our everyday experiences. One of the foundations of Australia's design economy is the interplay between designs law and practice. This remains a potent area for community engagement and future research.



An empirical analysis of auDRP decisions

- **Professor Andrew Christie** University of Melbourne
- **James Gloster** University of Melbourne
- **Sarah Goddard** Herbert Smith Freehills

The most common way in which a trade mark owner's rights are transgressed in the digital environment is when the trade mark is incorporated into a domain name registered by a person other than the trade mark owner – a practice commonly referred to as “cybersquatting”. Since 1 August 2002, trade mark owners have been able to seek relief against cybersquatting in the .au domain name space under the .au Dispute Resolution Policy (“auDRP”). The auDRP provides a much cheaper and speedier alternative to litigation. Instead of filing a court action, the trade mark owner files a complaint with a private dispute resolution body, which appoints a panelist to decide the matter on written evidence. The trade mark owner will be entitled to the remedy of transfer or cancellation

of the domain name where: (i) the domain name is identical or confusingly similar to the trade mark; (ii) the domain name registrant has no rights or legitimate interests in the domain name; and (iii) the domain name was registered or used in bad faith. Typically, an action under the .auDRP takes two months and costs between \$1,500-\$6,000. This compares very favourably to litigation, which typically takes some years and costs some hundreds of thousands of dollars.

This study is the first – and, to date, the only – detailed quantitative analysis of every one of the 470 determinations made under the auDRP during its first 15 years of operation. By identifying the characteristics of each case and its decision-maker, and by analysing which of those are associated with particular outcomes, we provide previously-unknown information about the factors that contribute to a case's success, and about the procedure's integrity.

We find that the rate at which cases succeed has not changed over time, and does not differ between the two service providers or between the most prolific panelists. When there is a statistically significant difference in the success rate, it is associated with a difference in the characteristics of the individual case – namely, that the complaint is based solely on a trademark rather than on a name alone or together with a trademark, or on a registered rather than an unregistered trademark, or that the complaint is not defended by the respondent. Importantly, these findings support the conclusion that, contrary to some commonly expressed opinions, the auDRP produces outcomes that are consistent and fair.

The results of our study are due to be published in 2019, in volume 30, issue 1, of the *Australian Intellectual Property Journal*.



Photo by Bernhard Lyons

The changing international framework for protection of intellectual property rights

- **Professor Sam Ricketson** Melbourne Law School

In recent years, Sam has focused much of his research activities to examining and analysing the international framework for the protection of intellectual property rights, in particular with the publication of the second edition of his 1987 commentary on the Berne Convention for the Protection of Literary and Artistic Works (OUP, 2006, co-authored with Professor Jane Ginsburg of Columbia University) and the publication of a new commentary on the Paris Convention for the Protection of Industrial Property (OUP, 2015).

Among the topics covered by Sam's most recent published research on international IP rights are proposals for a new international treaty on resale royalty rights, analysis of the long-delayed draft broadcasters' treaty, and an historical account of the international origins of neighbouring rights protection. Together with Professor Ginsburg, he is now beginning the preparation of a new edition of their Berne Convention commentary

to be published by OUP in 2020/21. Changes in this area since publication of the second edition in 2006 have been both numerous and far reaching, and include: the adoption of two new international treaties in relation to exceptions (the Marrakesh Treaty 2013) and the protection of audio-visual performers (Beijing 2012); continuing work on exceptions and limitations (educational institutions, libraries and archives) within the WIPO Standing Committee on Copyright and Related Rights; significant developments at national and regional levels about the scope of exceptions and limitations generally, the scope of the communication to the public right, and the issue of formalities; and private international law issues.

Sam is also presently editing a book of essays on the past, present and future role of the World Intellectual Property Organization (WIPO) as it reaches its fiftieth year milestone in 2020. The contributors are intellectual property experts from around the world, and the book will be published by Edward Elgar, UK, in 2020.



Game engines and the ‘democratization’ of videogame development

- **Dr Benjamin Nicoll** Queensland University of Technology
- **Professor Megan Richardson** Melbourne Law School, University of Melbourne
- **Dr Bjorn Nansen** University of Melbourne
- **Professor Jeannie Paterson** Melbourne Law School, University of Melbourne
- **Dr Brendan Keogh** Queensland University of Technology

Game engines are software development tools used mainly — but not solely — by videogame developers to create interactive digital content. They are also code frameworks that enable that content to run on various platforms, including videogame consoles, smartphones, and virtual reality devices. Game engines were once custom developed within videogame studios and closely guarded as proprietary secrets. In recent years, however, a small number of commercially available game engines have reached an unprecedented level of dominance in the global videogame industry. The Unity game engine, with its ostensibly ‘free’ software license, accessible editing interface, and ability to scale to a vast range of applications, is reportedly used to create over half of all contemporary videogames.

This collaborative grant, which is jointly funded by the University of Melbourne’s Networked Society Institute, Centre for Media and Communications Law, and Intellectual Property Research Institute of Australia, is the first major research project to examine Unity’s impact on production workflows, design methodologies, software literacies, and legal practices within the videogame industry. Through over 30 semi-structured interviews with Australian videogame developers, educators, and students, as well as ethnographic fieldwork conducted at a videogame co-working space based in Melbourne’s Southbank, the project lifts the veil of secrecy on a tool — the Unity game engine — that is widely used yet rarely analysed from a critical or legal angle.

Much of the existing research on game engines is based on data produced at a time when game engines were custom developed within videogame studios and safeguarded therein. Yet, as discovered in this project, commercial game engines have extended their influence far beyond studio environments. In particular, the Unity game engine is used by everyone from bedroom coders and students to industry professionals and independents. In most Australian tertiary institutions, Unity is the ‘engine of choice’ to train the next generation of videogame and software developers. Unity actively fosters the growth of a ‘Unity family’ by deploying a discourse of ‘democratization’ — the company’s slogan is ‘democratizing game development’ — which has enabled the company to mobilize a community of videogame makers that inhabit online, offline, and inter-regional spaces. And yet, most developers rarely consider their contractual obligations to Unity (which are opaque), and have difficulty articulating the engine’s effects on their production workflows and design methodologies. This project develops a critical vocabulary that will help developers, educators, and students to understand the way Unity is structured, marketed, and governed.

The results of this study are due to be published in a forthcoming Palgrave Pivot manuscript, co-authored by Benjamin Nicoll and Brendan Keogh, titled *The Unity Game Engine and the Circuits of Cultural Software* (2019), with further publications involving various members of the project team to follow.

IPRIA Visiting Scholar

Under IPRIA's Research Visitors Program short-term fellowships are awarded to academics, practising lawyers and media industry professionals. Fellowships enable visitors to spend time, usually between two and four weeks, in Melbourne devoted to research. In 2018 IPRIA welcomed Professor Ruth Towse.



Professor Ruth Towse Bournemouth University, United Kingdom

Ruth Towse is Professor of Economics of Creative Industries at the Centre for Intellectual Property Policy and Management at Bournemouth University in the UK. Before that, she held posts in several UK universities and at Erasmus University Rotterdam in the Netherlands. She has worked for many years in cultural economics and the economics of copyright, concentrating on artists' labour markets and the role of copyright in them, and has published widely in both fields in academic journals. She is the author of *A Textbook of Cultural Economics* and has edited a number of books on cultural economics and copyright. She was editor of the *Journal of Cultural Economics* and later President of the Association for Cultural Economics International of which she was made Distinguished Fellow in 2016. She was a founder member and President of the Society for the Economic Research for Copyright Issues. She serves on several editorial boards and is currently associated with the University of Oslo in research on the impact of digitisation in the music industry.

Research Higher Degree Students

IPRIA is committed to providing outstanding research training for our PhD and MPhil students. IPRIA staff supervise doctoral candidates who also complete a three year Research Support Program, which assists students to develop the high level skills needed to complete an outstanding thesis.

Current Candidates (alphabetical order)

Michael R. Falk

Rules Bound: How Institutional Effects Diffuse Through and Bind the Market Relations Between Firms

Supervisors: Associate Professors Kwanghui Lim, Melbourne Business School, Gavan McCarthy, Melbourne Business School, Don O'Sullivan and Pat Auger, Melbourne Business School,

Michael Falk is a researcher in the Office of the Chief Economics at IP Australia (Australia's national IP office). Michael's dissertation, examined how firms respond to regulation and social norms from outside domains, including "IP norms" related to the protection and sharing of intellectual property. His research found that institutional action targeted at a set of firms in one locale can affect behaviour in another locale among those firms' suppliers. This research cast light on the mechanisms by which markets function and form.



Ben Hopper

The Patent Grip: The Market's Transformation of 'Traditional Knowledge' into 'Invention'

Supervisors: Professor Megan Richardson, Melbourne Law School, Professor Graeme Austin Melbourne Law School & Professor Sarah Biddulph, Melbourne Law School

Ben Hopper is a second-year PhD candidate and Teaching Fellow at Melbourne Law School. He is completing doctoral research under the supervision of Megan Richardson, Sarah Biddulph and Graeme Austin. The title of his PhD project is: The Patent Grip: The Market's Transformation of 'Traditional Knowledge' into 'Invention'. His PhD thesis asks: what gives patent law grip, i.e., its power to affect social relations in a given society? Why do people use patent laws and why do people obey them? The thesis partly builds work undertaken for his master of laws thesis at Harvard Law School (Intellectually Propertizing Tea: The Growth of Trademarks and Geographical Indications in China's Tea Industry), and stands apart from the myriad normative accounts of intellectual property through its use of empirical methods. Ben is currently conducting fieldwork in southwestern China to build a case study of the commodification and patenting of the traditional medicine of Miao ethnic minorities to test his theory on patent grip.



Vicki Huang

Empirical assessment of the theoretical justifications for intellectual property and information protection (PhD)

Supervisors: Professor Megan Richardson, Melbourne Law School & Associate Professor Chris Dent, Murdoch University

Huang's thesis is an empirical exploration of infringement decisions under the Australian Trade Marks Act 1995 (Cth) between 1 January 1996 and 1 January 2016. The analysis of judicial reasoning reveals that, similar to US studies, a small number of factors (relating to 'use' and 'deceptive similarity') determine the outcome of a case. Also considered are the relevance of collateral claims and reliance on subsidiary infringement provisions. Implications for Australian and some aspects of US law and scholarship are explored.



Ozlem Ozkok

Frontline Knowledge Networks in Open Collaboration Models for Service Innovations

Supervisors: Professor Jagdip Singh, Case Western Reserve University, Ohio, US, Assoc. Professor Kwanghui Lim, Melbourne Business School

Ozlem "Ozzie" Ozkok has a background in supply chain and information technology. She has worked several years in diverse roles such as customer service, planning, and software development. Ozzie studied in the US and obtained a dual Master's Degree in Computer Science and Information Technology Management along with an MBA.

Currently, she is working on open collaborative frontline employee knowledge networks and their impact on innovation. She believes that frontline employee networks are key to developing new service ideas and organisations can benefit from network analysis approach to service innovation. Her research proposal is recognized with an award by the Academy of Marketing Review/Sheth Foundation Doctoral competition. Ozzie also has teaching experience in various marketing and strategy subjects.



Events

Consumer and Public Participation in Converged Communications Industry Rule-Making

Dr Karen Lee University of New England

21 March | Melbourne Law School

In its recent Final Report on the Australian Communications and Media Authority (ACMA), the Department of Communications suggested that reform of the communications regulatory framework should aim to ‘reinvigorate’ self-regulation. Greater reliance on self-regulation raises the issue of consumer and public interest participation in the processes the converged communications industry will use to formulate rules. However, research into consumer and public interest participation in industry rule-making is limited, and there has been no assessment of how such participation can best be deployed to ensure self- and co-regulation within the converged sector is responsive and effective.

This paper begins that process by looking at consumer and public participation in the development of co-regulatory codes of practice in the telecommunications, media and online sectors in accordance with existing legislation. First, the different forms of consumer and public participation permitted by these sectors in their rule-making processes are identified. It is then argued that before the appropriateness of these mechanisms can begin to be assessed, the precise goals of consumer and public participation in these processes must be specified. However, somewhat surprisingly, the role and function of consumer and public participation in these areas have not been clearly delineated. It is therefore suggested in the paper that consumer and public participation should serve three principal purposes, one of which is responsiveness, a term that should be understood to mean the satisfaction of four requirements — ensuring that industry deliberates; discloses sufficient information to enable others to hold it to account; considers the relevant concerns of others before it reaches its decisions and explains and justifies its positions. The paper concludes with some observations about the experience of consumer and public participation in industry rule-making in the Australian telecommunications sector.

Dr Karen Lee is a lecturer in the School of Law at the University of New England and a specialist in telecommunications regulation. Her PhD, for which she received the UNSW Faculty of Law’s PhD Research Excellence Award, involved an in-depth study of the development of three telecommunications consumer codes by working committees of the Communications Alliance. Her book *The Legitimacy and Responsiveness of Industry Rule-making*, which is based on her thesis, will be published by Hart Publishing later this year. She was also the runner up for the Giandomenico Majone Prize for Best Conference Paper Written and Presented by Early-Stage Researchers, awarded by the European Consortium of Political Research’s Standing Group on Regulatory Governance, in 2016. She has published in the *Federal Law Review*, the *Media and Arts Law Review* and the *Australian Journal of Competition and Consumer Law*; and is a contributor to *Australian Telecommunications Regulation and Telecommunications Law and Regulation*. With Dr Derek Wilding at UTS, she has just started working on a research project, funded by the Australian Communications Consumer Action Network, examining consumer and public participation in industry rule-making in a converged communications environment.

2018 IP & Media Law Conference

5 & 6 April | Melbourne Law School

Keynote Speakers

Dr Marta Poblet Balcell Vice-Chancellor's Senior Research Fellow, RMIT

Dr Claes Granmar Associate Professor in European Law, Stockholm University

Dr Andrew Scott Associate Professor of Law, London School of Economics

Dr David Tan Associate Professor, Vice Dean (Academic Affairs) National University of Singapore



Dr David Tan

Panels

Journalists' privilege

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

Chair: **Haroon Hassan** Victorian Bar

Safe harbour and other ports in the storm: The future of user-generated content platforms in Australia

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

Chair: **Joel Barrett** Allens

Copyright Tribunal as exception-maker: Are both flexibility and certainty achievable?

David Brennan University of Technology, Sydney; **Kimberlee Weatherall** University of Sydney; **Jill McKeough** University of Technology, Sydney

Chair: **Sam Ricketson** Melbourne Law School

Future of Public Interest Journalism

Matthew Ricketson Deakin University; **Margaret Simons** Monash University; **Jock Given** Swinburne University

Chair: **Jason Bosland** Melbourne Law School



Safe harbour and other ports in the storm: The future of user-generated content platforms in Australia, Joel Barrett, Emma Shadbolt, Kate Haddock

In addition to the listed keynotes and panels, papers were delivered from researchers in law, media studies, IP and related fields.

Topics included:

Amateur media and user-generated content - - - Broadband futures - - - Competition - - - Content creation, use and re-use - - - Convergence - - - Copyright and speech - - - Data and surveillance - - - Defamation and public debate - - - Design cultures and practices - - - Digital publics - - - Free speech - - - Intermediaries, responsibility, control, neutrality - - - Journalism and popular media - - - Measuring and valuing IP - - - Media representations of law - - - Networks and networking - - - Patents and economy - - - Privacy and publicity - - - Privacy by design - - - Public knowledge - - - Public media - - - Reporting courts - - - Strategic uses of IP - - - Surveillance and security - - - Technology and IPRs - - - Trade marks - - - and more...

Watch this (Domain) Space: Developments in the .au Policy Review Panel, Direct Registrations and Domain Name Disputes and Arbitrations

A Victorian Twilight Seminar supported by IPSANZ and IPRIA

7 March | Melbourne Law School

Panel Speakers:

John Swinson King & Wood Malletsons

The Honourable Neil Brown QC Victorian Bar

Professor Andrew Christie The University of Melbourne

Erhan Karabardak Cooper Mills

Chair: **Justin Wheelahan** Victoria Bar



The Honourable Neil Brown QC Victorian Bar

This presentation was an interactive discussion seminar. All presenters shared their knowledge and views on topics with members, and covered topics of discussion such as policy review panel, direct registrations, the domain name after market, the auDRP and trends and current issues in domain name arbitration.

John Swinson is a partner of King & Wood Malletsons, and is the Chair of the auDA 2017 Policy Review Panel. John is also a panelist for WIPO under the UDRP and auDRP, and has decided over 300 domain name ownership disputes.

The Hon Neil Brown QC has had a long and distinguished career in government and the law since 1964. Previously a Minister in the Federal Government in Australia in charge of portfolios in Attorney-General's, Communications and Employment and Youth Affairs. He has appeared in all Australian jurisdictions with experience in commercial, intellectual property, town planning and taxation matters. He is an Adjunct Professor of Law at Murdoch University in Western Australia. A qualified arbitrator and mediator, The Hon Neil Brown QC practices in international and domestic matters in the commercial, communication, intellectual property and governmental fields. He is a leading arbitrator and adviser on internet domain name disputes.

Professor Andrew Christie was appointed the foundation Chair of Intellectual Property at the Melbourne Law School in 2002. He is a member of the panel of neutrals with the WIPO Arbitration and Mediation Center, Resolution Institute, and the Asian Domain Name Dispute Resolution Centre. He has served as a panelist in approximately 200 domain name disputes, and has authored some of the most cited decisions.

Erhan Karabardak Director, Cooper Mills, is a technology lawyer and Trade Marks Attorney. Erhan is also active in the domain name industry and represents domain name registrars and resellers, and has advised some of the world's largest domain name registrars. Erhan is recognised as an expert in domain name law and has run some of the leading cases in the area. Erhan is also a director and board member of the .au Domain Administration (auDA), Australia's domain name regulator, and is the former Chair. He is also a Director and board member of the Asia Pacific Top Level Domain Association (APTLD), which represents ccTLD operators from around the broader Asia Pacific region.

Regulation by Blockchain: The Emerging Battle for Supremacy Between the Code of Law and Code as Law

A seminar supported by the Centre for Corporate Law and Securities Regulation, Centre for Media and Communications Law and the Transactional Law Group at Melbourne Law School

Professor Karen Yeung University of Birmingham

13 April | Melbourne Law School

Many advocates of distributed ledger technologies (including blockchain technologies) claim that these technologies provide the foundations for an organisational form that will enable individuals to transact with each other free from the travails of conventional law, thus offering the promise of grassroots democratic governance without the need for third party intermediaries. But does the assumption that blockchain systems will operate beyond the reach of conventional law withstand critical scrutiny? The aim of this seminar was to subject the intersection and interactions between conventional law promulgated and enforced by national legal systems (ie the 'code of law') and the internal rules of blockchain systems which take the form of executable software code and cryptographic algorithms via distributing computing networks ('code as law') to critical examination to identify whether, and to what extent, 'regulation by blockchain' will successfully avoid governance by conventional law.

Professor Karen Yeung is Interdisciplinary Professorial Fellow in Law, Ethics and Informatics at the University of Birmingham in the School of Law and the School of Computer Science. As a Fellow of the Institute of Global Innovation at The University of Birmingham, she leads a major interdisciplinary project involving over 50 researchers from a range of disciplines under the theme of 'Responsible Artificial Intelligence'. She has been a Distinguished Visiting Fellow at Melbourne Law School since

2016.

Her research expertise lies in the regulation and governance of, and through, emerging technologies, with her more recent and on-going work focusing on the legal, ethical, social and democratic implications of a suite of technologies associated with automation and the 'computational turn', including big data analytics, artificial intelligence (including various forms of machine learning), distributed ledgers (including blockchain) and robotics. Her work has been at the forefront of nurturing 'law, regulation and technology' as a sub-field of legal and interdisciplinary scholarship, reflected in the publication of *The Oxford Handbook of Law, Regulation and Technology* (co-edited with Roger Brownsword and Eloise Scotford) in 2017.

Functions of a Privacy/Data Protection Regulator in an Age of Big Data Analytics

10 May | Melbourne Law School

This free event was co-hosted by CMCL, IPRIA, the Cybersecurity and Democracy Network and the Melbourne School of Government at the University of Melbourne, and the Office of the Victorian Information Commissioner (OVIC).

The recent Cambridge Analytica scandal reminds us of the vulnerability of personal data to massive abuse. So what are the functions of a privacy/data protection regulator in minimising risks and responding to breaches while maintaining space for ethical data research and analysis? This was the topic of a panel discussion chaired by Megan Richardson, Co-Director CMCL and Director IPRIA at the Melbourne Law School, with the Privacy and Data Protection Deputy Commissioner, Rachel Dixon. They were joined by big data, information security and legal experts Abigail Payne, Vanessa Teague, Moira Paterson, Karin Clark and Mark Taylor.

Rachel Dixon Privacy and Data Protection Deputy Commissioner, OVIC. Rachel Dixon has a diverse and impressive career, holding senior positions in the private sector for Australian and International technology companies, where she led large teams and developed expertise in the areas of data, privacy, cybersecurity and information security. Prior to her appointment at OVIC she worked most recently as Head of Identity at the Australian Government's Digital Transformation Agency.

Abigail Payne Director and Ronald Henderson Professor, Melbourne Institute of Applied Economic and Social Research, Faculty of Business and Economics, the University of Melbourne. The Melbourne Institute is the leading Australian institute on applied economic and social research. Professor Payne's own work focuses on empirical public economics issues encompassing questions around student performance and understanding donor and charity behaviour.

Vanessa Teague Department of Computing and Information Systems, Faculty of Engineering, the University of Melbourne, is a cryptographer with an interest in cryptographic protocols that support a free and democratic society. Her main research interest is in electronic voting protocols, which aim to protect individual voter privacy while providing verifiable evidence of a correct election result.

Moira Paterson Faculty of Law, Monash University, researches in field of information law, with a key focus on freedom of information, privacy and data protection, health records and public records law. She is the author of *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis, 2005) and *Freedom of Information and Privacy in Australia: Information Access 2.0* (LexisNexis, 2015).

Mark Taylor Melbourne Law School, is Deputy Director HeLEX@Melbourne. He specialises in privacy and legal and ethical conceptions of the public interest. Author of *Genetic Data and the Law* (CUP,

2012), he was British Academy Mid-Career Fellow, and Establishing Chair of the Confidentiality Advisory Group for the Health Research Authority in England before taking up his appointment at the University of Melbourne.

Karin Clark was Special Counsel with Allens and practised for many years in the firm's Communications, Media and Technology Practice Group specialising in advising on compliance with privacy laws. She also worked in the firm's commercial, finance and resources departments and headed its knowledge management department. She is currently a Senior Fellow (Melbourne Law Masters) teaching in the Privacy Law subject.



Professor Ruth Towse, Professor Paul Jensen

Copyright, contracts and cultural economics

Professor Ruth Towse Bournemouth University, United Kingdom

Chair: **Professor Paul Jensen** University of Melbourne

Wednesday 4 July | Melbourne Business School

The influence of copyright on the earnings of authors and performers, has been challenged by research in cultural economics on artists' labour markets testing the frequently made claim that copyright 'ensures' that they are rewarded for their work. Empirical research, standard in economics but not in law, is important in assessing whether the intended effects of a policy or change in the law actually come about. Proposals on copyright and their proponents often make claims about the effect on artists' earnings that are very unlikely to be borne out in practice. Empirical studies of creative and performing artists have consistently shown that they typically earn below the average for their age and level of education and copyright royalties and other remuneration add relatively little to their

earnings. Of course the superstars benefit from high earning from fees and royalties but they are by definition exceptional. These empirical results follow the same pattern for composers and song-writers as for other artists.

Copyright is a form of regulation that works through the markets – the market for the goods whose content it protects and the market for artists’ labour that creates the copyrightable content - and Ruth Towse regards her research as an aspect of economics of regulation rather than one of law and economics. The demand for artists’ work in the creative industries is mostly from private enterprises, often large corporations, with whom the individual artist, albeit backed up by a professional association or trade union, has to contract from a relatively weak bargaining position. It is via the contract that copyright takes effect in practice, since the contract is the means of transferring the rights granted in copyright law. Contract theory is a branch of economics that considers the balance of risk, incentive and reward alongside the transaction costs of contracting: this paper applies these concepts to contracts in music publishing.

Ruth Towse is Professor of Economics of Creative Industries at the Centre for Intellectual Property Policy and Management at Bournemouth University in the UK. Before that, she held posts in several UK universities and at Erasmus University Rotterdam in the Netherlands. She has worked for many years in cultural economics and the economics of copyright, concentrating on artists’ labour markets and the role of copyright in them, and has published widely in both fields in academic journals. She is the author of *A Textbook of Cultural Economics* and has edited a number of books on cultural economics and copyright. She was editor of the *Journal of Cultural Economics* and later President of the Association for Cultural Economics International of which she was made Distinguished Fellow in 2016. She was a founder member and President of the Society for the Economic Research for Copyright Issues. She serves on several editorial boards and is currently associated with the University of Oslo in research on the impact of digitisation in the music industry.

Paul H. Jensen is the Deputy Dean (Faculty) at the Faculty of Business and Economics, The University of Melbourne. His work relates to solving real-world problems and improving productivity via better public policy. He is a Research Fellow of the Intellectual Property Research Institute of Australia (IPRIA) and the Oxford Intellectual Property Research Centre (OIPRC) at Oxford University. Professor Jensen is an important contributor to Australian policy debates as well as an internationally-recognised scholar. He publishes regularly in the top domestic journals – including *The Economic Record* – and in leading international journals such as *The Review of Economics and Statistics* and *RAND Journal of Economics and Strategic Management Journal*.

Owning ‘Red’: A Theory of Indian (Cultural) Appropriation

Professor Angela R. Riley UCLA School of Law

8 August | Melbourne Law School

A seminar co-hosted with the Centre for Media and Communications Law

When non-Indians use Indian names, imagery, iconography, and other symbols—particularly for commercial purposes and without Indian input— Indian tribes and individuals increasingly claim that such usages constitute “cultural appropriation.” Wide-ranging examples include Victoria’s Secret models walking the runway in Indian headdresses, Urban Outfitters marketing “Navajo Print Wrapped Flasks” and “Navajo Hipster Panties,” Boy Scout Troops mimicking Pueblo Indian dances, and the many sports teams with Indian mascots, including the Washington Redskins. This talk situated these cultural property claims in a larger history of the dispossession of Indian property and described the often extra-legal steps tribes have taken to push back against appropriation.



Professor Kirsty Gover, Professor Angela R. Riley, Professor Megan Richardson

Angela R. Riley is a member of the Citizen Potawatomi Nation of Oklahoma. She is Professor of Law at UCLA School of Law and Director of UCLA's Native Nations Law and Policy Center. She directs the J.D./M.A. joint degree program in Law and American Indian Studies and is the UCLA campus representative on issues related to repatriation under the Native American Graves Protection and Repatriation Act (NAGPRA). Professor Riley's research focuses on indigenous peoples' rights, with a particular emphasis on cultural property and Native governance. Her work has been published in the *Yale Law Journal*, *Columbia Law Review*, *California Law Review*, *Georgetown Law Journal* and numerous others. She received her undergraduate degree at the University of Oklahoma and her law degree from Harvard Law School. In 2003 she was selected to serve on her tribe's Supreme Court, becoming the first woman and youngest Justice of the Supreme Court of the Citizen Potawatomi Nation.

Negotiating Aboriginal Art: Christine Black in Conversation with Judith Lovell

25 September | Melbourne Law School

Dr Judith Lovell Charles Darwin University

The Aboriginal art industry in central Australia continues to bring through the strongest and most innovative of artists and some art centres are now well into their third generation of local artists. In many, but not all of these places cultural custodians continue to play a strong role in education and training, instilling the stories, laws and literacies that the younger generations require to practice

within culture and community. Here, cultural being is central to practice and product, and the genealogies and provenance of artworks are relatively straightforward.

But artists are artists: they innovate, seeking new media, audiences and forms for their work. And sometimes they collaborate 'between' cultures to do so. Sure, collaboration can occur without the need to make explicit reference to one another's heritage or cultural genealogies or other provenances. This is particularly true where the collaborative nature of the process is about relationships and processes of managing production.

Dr Judith Lovell is a Senior Research Fellow with the Northern Institute at Charles Darwin University. Her expertise is in the multidisciplinary and collaborative uses of research and evaluation to enhance social, environmental, cultural and economic capabilities in Australian and international societies. Judith has an emerging interest in realist philosophy and arts-based interventions as means to understand, inform and support educational and economic participation. Based in Alice Springs she is a member of the Realist Research Evaluation and Learning Initiative (RREALI) undertaking national and international research and evaluation. She also leads projects with a community focus through the Studio360 Portfolio.

Is the trade mark register too cluttered?

This seminar was part of a series generously supported by IP Australia

25 October | Sydney, Herbert Smith Freehills, ANZ Tower 161 Castlereagh St, Sydney NSW 2000

Professor Robert Burrell Faculty of Law, The University of Sheffield and The University of Melbourne

Dr Haiyang Zhang Office of the Chief Economist, IP Australia

Chair: **Professor Michael Handler** The University of NSW

Host: **Rebekah Gay** Partner, Herbert Smith Freehills

Companies and trade mark attorneys are probably familiar with the struggle to find a good, attractive trade mark in what seems to always be a crowded field. Some of the problem might just be competition, but there has been concern that part of the problem is that the trade marks register is full of unused, or overly broad marks. In its Inquiry into IP Arrangements, the Australian Productivity Commission suggested this was a problem and suggested some reforms. But is there a problem – and if there is, what would a sensible solution look like? In this seminar we heard two perspectives on these questions: from trade mark scholar and attorney Professor Robert Burrell, and Haiyang Zhang, who presented new research out of the Office of the Chief Economist at IP Australia.

Professor Robert Burrell is a leading scholar in international and Australian trade mark law and Professor at the Universities of Sheffield, UK and Melbourne, and a registered trade mark attorney. He is the author, with Michael Handler, of *Australian Trade Mark Law* (2nd ed 2016), and an active participant in trade mark law reform processes, engaging with IP Australia and the Productivity Commission in the course of various inquiries. He was an investigator in a recent ARC Linkage Project investigating trade mark law's conceptions of the consume.

Dr. Haiyang Zhang is an economist with over 10 years' experience in IP policy analysis. He is currently working at IP Australia's Office of the Chief Economist.

Let's get smart about fake Indigenous art

This seminar was part of a series generously supported by IP Australia

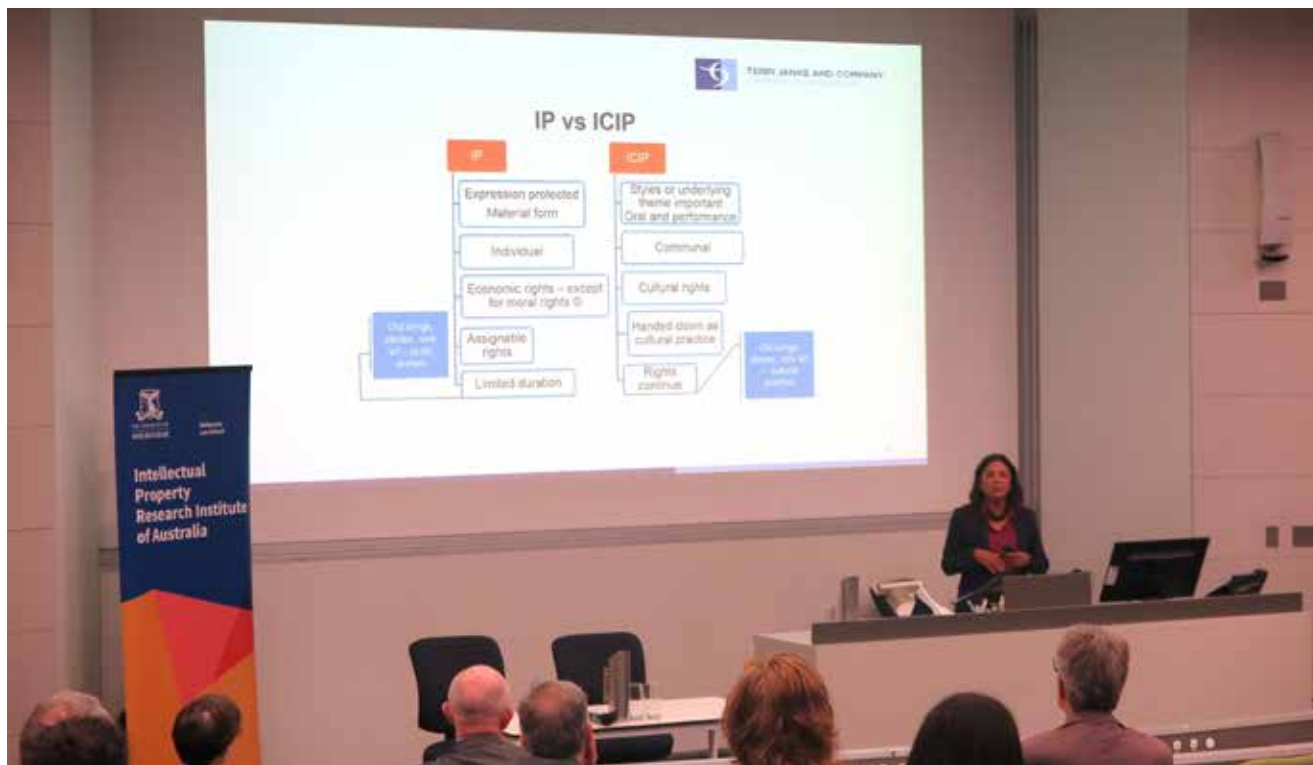
20 November | Melbourne Law School

Terri Janke Solicitor, Director, Terri Janke and Company

Colin Golvan AM QC Victorian Bar

Chair: **Professor Sam Ricketson** Melbourne Law School

The sale of fake Indigenous art is a continuing problem for Indigenous artists and consumers. Fake Indigenous Art is harmful as it misappropriates Indigenous culture and takes away opportunities from Indigenous Artists, denying them and their community benefits from their work. Consumers are also disadvantaged as they are misled into buying inauthentic and de-valued items. Terri outlined a number of appropriation examples to examine the gaps in the law. To combat fake Indigenous arts, Terri advocates for using protocols, trade marks and a National Indigenous Cultural Authority and new laws to enable Indigenous Artists to stop theft of culture.



Terri Janke, Solicitor, Director, Terri Janke and Company

Colin has had extensive experience in the area of infringement of copyright in Indigenous art and was also senior counsel in the seminal art forgery case of *Blackman and Dickerson v Gant* [2010] VSC 229. He will speak about his experience in the protection of Indigenous arts from unauthorised reproduction and measures available to artists to prevent the sale of fake paintings.

Terri Janke is a Wuthathi/Meriam woman from Cairns. She empowers Indigenous people so they prosper. Terri advises on legal matters including incorporation, joint venture, procurement, governance, employment and engagement. She is an international authority on Indigenous Cultural and Intellectual Property (ICIP) and has written the leading protocols and ICIP models in the film, arts, museum and archival sector. She is valued mentor, an advocate for Indigenous business, an

accredited mediator and governance expert.

Colin Golvan AM QC practises predominantly in the intellectual property and trade practices areas. Colin appears in the Federal Court throughout Australia, and has appeared in intellectual property, trade practices and defamation matters in the High Court.

He is the author of the legal books *Copyright - Law and Practice* (Federation Press 2007), *An Introduction to Intellectual Property Law* (Federation Press 1992), *Words and Law* (Penguin 1990) and co-author of *Writers and the Law* (Law Book Company 1986). He has also been general editor of the monthly Australian Intellectual Property Law Bulletin (published by LexisNexis) and the co-editor of the quarterly Media and Arts Law Review (published by Law Book Company).

Colin is the author of papers on intellectual property subjects published in various legal journals, including the European Intellectual Property Review, as well as in the Australian Book Review and the Australian Financial Review.

Blurring the Boundaries: New business technology platforms and challenges for intellectual property/competition law

This seminar was part of a series generously supported by IP Australia

5 December | Melbourne Law School

Dr David Brennan University of Technology Sydney

Arlen Duke Melbourne Law School, University of Melbourne

Dr Rhonda Smith Melbourne Law School, University of Melbourne

Changes in technology have resulted in new or altered business models that are more complex than those they have replaced. This is especially true of platform businesses which often involve the supply of multiple product lines and more complex decision-making arrangements. This business model will be the focus of the discussion. The changes raise questions as to the feasibility and appropriateness of applying well-accepted principles of intellectual property and competition law. This seminar, offered by experts in the intellectual property and competition fields, offered insights on both aspects. Particular focuses were on the characterisation of the alleged infringer's business in *Pokémon Company International, Inc v Redbubble Ltd* [2017] FCA 1541 and the implications of *Ohio v American Express Co* 585 US ___ (2018).

Dr David Brennan is a Visiting Fellow at the University of Technology Sydney, Faculty of Law. His primary fields of research are patent and copyright law, with focuses on their connections to economics, other legal regimes and legal history. He is an editor of the *Australian Intellectual Property Journal*, has taught patent law at Oxford University and is currently teaching intellectual property into the Monash postgraduate law program. David is a consultant to Screenrights – The Audio-Visual Copyright Society and has been involved in Australian copyright law reform activities over several decades.

Arlen Duke is a Senior Lecturer in Law at the Melbourne Law School. He primarily researches in the area of competition law, with a particular focus on the intersection between competition law and intellectual property. This has led to him publishing articles examining the competitive effects of parallel imports and teaching the Masters of Law subject "Competition Law and Intellectual Property".

Dr Rhonda Smith is a Senior Lecturer in the Economics and a Senior Fellow in the Law School at the

University of Melbourne. She is a former ACCC commissioner and was a lay member of the High Court of New Zealand. Currently she is a member of the Australian Copyright Tribunal. Rhonda provides economic advice in relation to competition issues to government agencies and to businesses and has acted as an expert witness in a number of competition cases.



Arlen Duke, Deputy Director, IPRIA

Designs Law and Practice - Workshop

12 December | Melbourne Law School

A joint research project of IP Australia, and the Intellectual Property Research Institute of Australia (IPRIA) at The University of Melbourne

This workshop brought together two approaches for comparing the design intensity of countries and industries. Academics and practitioners assessed how Australia compares to a sample of its trading partners, and how Australian industries compare to one another, on two attributes.

A comprehensive summary of this joint research project *Designs Law* can be found on page 13.

Michael R. Falk University of Melbourne & **Dr Haiyang Zhang** IP Australia

- **Mitchell Adams** Swinburne University of Technology
- **Dr. Michael Campbell** IP Australia
- **Paul Drake** IP Australia

- **Associate Professor Kwanghui Lim** Melbourne Business School, University of Melbourne
- **Brett Massey** IP Australia
- **Dr. Benjamin Mitra-Kahn** IP Australia
- **Professor Megan Richardson** Melbourne Law School, University of Melbourne
- **Dr Warwick Rothnie** Victorian Bar
- **Jenifer Bowen Smith** IP Australia
- **Razib Tuhin** IP Australia
- **Professor Kimberlee Weatherall** University of Sydney

Publications

Books

Christie A. and Gare S. (eds), *Blackstone's Intellectual Property Statutes* (14th ed.) 2018, Oxford University Press, Oxford.

Research Book Chapters

Ozkok, Singh, Lim and Bell, *Service Innovation from the Frontlines in Customer-Centric Organizations*, forthcoming in Handbook of Customer Centricity. Final version sent to publisher Sep 2018.

Richardson, M. & Thomas J. Image Rights and Other Unorthodox Forms of Intellectual Property. *Framing Intellectual Property Law in the 21st Century: Integrating Incentives, Trade, Development, Culture, and Human Rights*. Cambridge University Press. 2018.

Richardson, M. Neave, M. Rivette, M. Invasion of Privacy and Recovery for Distress. *Remedies for Breach of Privacy*. Hart Publishing. 2018.

Journal Articles Refereed

R. Burrell and K. Weatherall, 'Towards a New Relationship between Trade Mark Law and Psychology' (2018) 71 *Current Legal Problems*, 87 - 118. 2018

R. Burrell and C. Kelly, 'Myths of the medical methods exclusion: medicine and patents in nineteenth century Britain' 37 *Legal Studies*, 607-626. 2018

Duke, Arlen. Competition and Fair Trading Practices in the Higher Education Sector: A Comparative Review of the Position in the UK and Australia. *European Competition Law Review*. 39. 2018

Duke, Arlen. Lessons for Market Definition from Air Cargo. *Australian Business Law Review*. 46. 2018.

Ozkok, Bell, Singh and Lim (forthcoming), Frontline knowledge networks in open collaboration models for service innovations, *AMS Review*. Accepted Dec 2018.

Richardson, M. 'A Virtual 'Puppet': Performance and Privacy in the Digital Age, *Canadian Journal of Comparative and Contemporary Law*, 4 (1), 2018.

S Ricketson, "The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Obstacles", (2018) 41 *Columbia-VLA Journal of Law & the Arts* 341-367



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