



THE UNIVERSITY OF  
**MELBOURNE**

—  
Melbourne Law School

# 2019 Annual Report

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Intellectual Property Research Institute of Australia



**Front cover:**

Melbourne Law School

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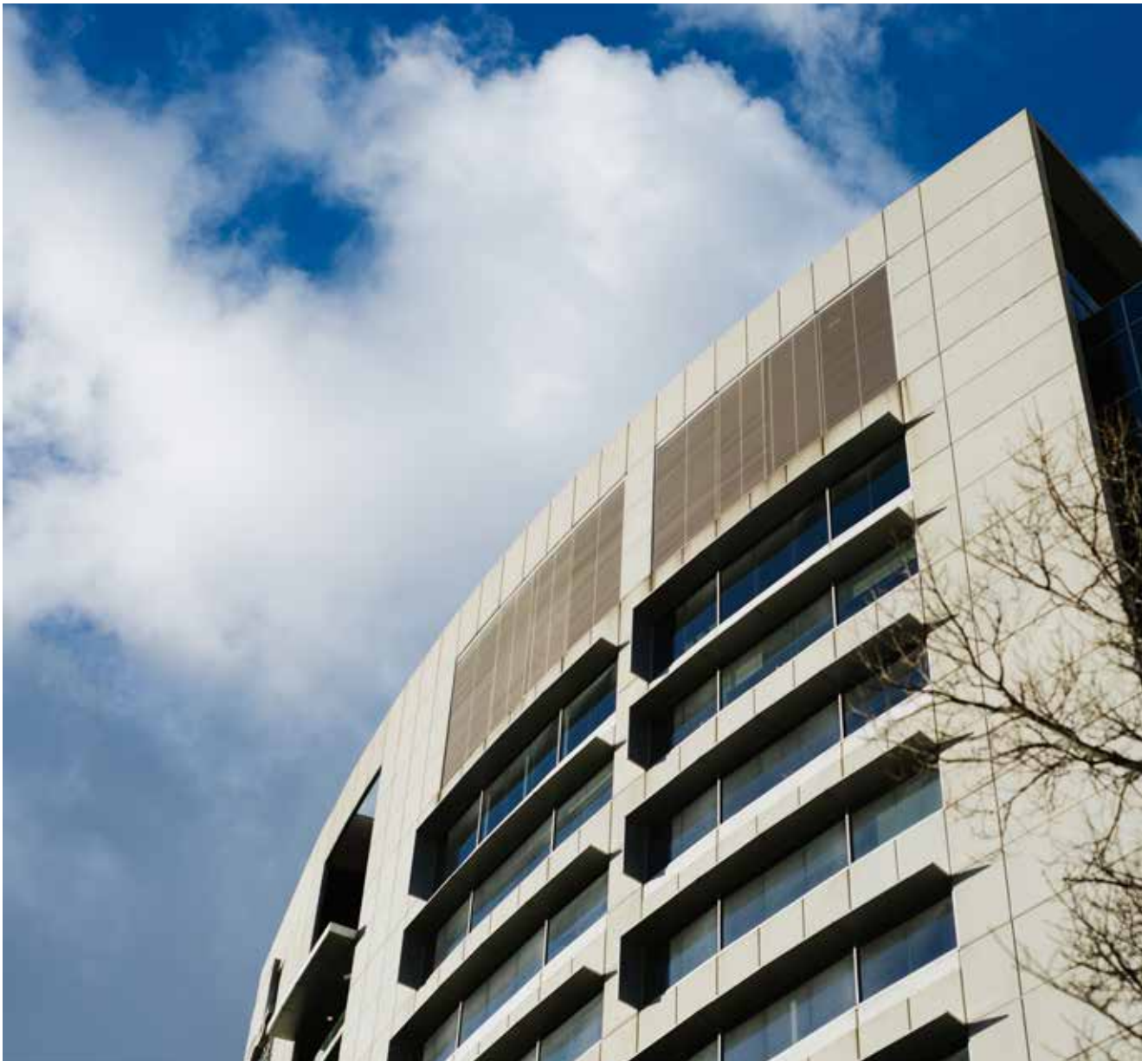
**Editor**

Hamish Carr, Administrator

**Authorised by**

Professor Megan Richardson

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## IPRIA Advisory Board

### In 2019 the Advisory Board comprised

- Mr Owen Malone, Chair
- Professor Megan Richardson, Director, Melbourne Law School
- Arlen Duke, Deputy Director, Melbourne Law School
- Anna Gibson, Intellectual Property Director, Treasury Wine Estates Limited
- Professor Paul H. Jensen, Faculty of Business and Economics, University of Melbourne
- Assoc. Professor Kwanghui Lim, Melbourne Business School, University of Melbourne
- Dr Ben Mitra-Kahn, Chief Economist, IP Australia (a/Razib Tuhin, IP Australia)
- Emeritus Professor Sam Ricketson, Melbourne Law 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 2015-2019 she has served as Co-Director and now Director 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. Arlen has also published widely in the area of competition law and intellectual property on topics that include parallel import restrictions, competition law treatment of attempts by patent holders to protect post expiry profits, and the recent repeal of the IP exemption (s 51(3) of the *Competition and Consumer Act 2010* (Cth)).



## Assoc. Professor Rebecca Giblin

### Incoming Director

Assoc Professor Rebecca Giblin is an [ARC Future Fellow](#), leading interdisciplinary teams to build evidence about how intellectual property arrangements and other regulations actually work in practice. Her main research areas are copyright, technology regulation, access to knowledge and the regulation of culture (particularly how the law impacts the creation and dissemination of creative works).

Prof. Giblin's Future Fellowship project focuses on how fuller protection of authorship (as distinct from *ownership*) can open a path to meaningful copyright reform, reclaiming currently lost cultural value for the benefit of both authors and the broader public. See [authorsinterest.org](http://authorsinterest.org) or [@authorsinterest](https://twitter.com/authorsinterest). She also leads the [@elendingproject](http://elendingproject.org), investigating the legal and social impacts of library e-lending with a team of legal, social and data science researchers and international library partners. Interactive dashboards and information about the project are available at [elendingproject.org](http://elendingproject.org). She brings to IPRIA a networked leadership approach: utilising a wide range of empirical methods and strong interdisciplinary collaboration to tackle complex problems around creativity and innovation.



## 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 Business School and the Melbourne Law School.

Since 2015 IPRIA has continued to function as a collaborative research centre at the University of Melbourne without block funding from IP Australia but with continuing support. It is currently located at the Melbourne Law School and has a team of Director and Deputy Director from the Melbourne Law School, as well as Associates drawn from the University and other communities.

IPRIA is assisted by an Advisory Board from intellectual property industries, the University and IP Australia, and receives financial and/or in-kind support from the Melbourne Law School, the Melbourne Business School, the Faculty of Business and Economics, and external research partners.



## Research Fellows of IPRIA work on IPRIA research projects. In 2019 they are:

- **Professor Andrew Christie** Melbourne Law School
- **Associate Professor Kwanghui Lim** Melbourne Business School
- **Professor Sam Ricketson** Melbourne Law School
- **Dr Michael R. Falk** IP Australia

## Research Associates of IPRIA are academics from the Melbourne Law School and elsewhere who share ongoing common research interests in intellectual property law and policy. In 2019 they are:

- **Professor Graeme Austin** Melbourne Law School, Victoria University of Wellington, New Zealand
- **Professor Robert Burrell** Melbourne Law School, University of Oxford
- **Associate Professor Jason Bosland** Melbourne Law School
- **Professor Richard Garnett** Melbourne Law School
- **Associate Professor Rebecca Giblin** Melbourne Law School
- **Dr Vicki Huang** Deakin Law School
- **Professor Paul Jensen** Faculty of Business and Economics, University of Melbourne
- **Professor Andrew Kenyon** Melbourne Law School
- **Janice Luck** Melbourne Law School
- **Associate Professor Amanda Scardamaglia** Swinburne University of Technology
- **Professor Julian Thomas** RMIT University
- **Professor Kimberlee Weatherall** Sydney Law School, University of Sydney
- **Professor Beth Webster** Swinburne University of Technology

In addition IPRIA and IPRIA researchers engage with a range of academics from other disciplines, including Business and Economics, Data Science and Information Systems, and Media Studies.

## 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 2019 IPRIA staff, research fellows, associates and collaborators were involved in major research projects.

## A Global Trade Mark Database

- **Professor Beth Webster** Swinburne University of Technology
- **Professor Paul Jensen** University of Melbourne
- **Associate Professor Alfons Palangkaraya** Swinburne University of Technology
- **Assistant Professor Gaétan de Rassenfosse** EPFL,
- **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 long standing 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.

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

- **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 assumptions about consumer perceptions of brands in the High Court decision in *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* [2014] HCA 48. The project included 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 from the survey have now been analysed and published.

## ‘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

The Internet of Things (IoT) impacts human lives in many ways as a result of data collected through wearables and sensors associated with health, homes, environments, activity and cars (to name a few). This project sponsored by the Melbourne Network Society Institute (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.

## 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.

The results of this study are being published in a Palgrave Pivot book, 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.

## 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 brought together two approaches for comparing the design intensity of countries and industries. We assessed how Australia compared 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 examined design registration patterns within Australia.

We identified 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 compared the design intensity of industries across national contexts. We found that those product classes in which Australians focused 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 aimed 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 indicated 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.



Brett Massey IP Australia, Paul Drake IP Australia, Dr Haiyang Zhang IP Australia, Dr Michael Falk IP Australia

## 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.



Photo by Bernhard Lyons

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*.

## 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 activity on 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.



# Across Intellectual Property: Essays in Honour of Sam Ricketson

Edited by

**Graeme W. Austin** Melbourne Law School, Victoria University of Wellington

**Andrew F. Christie** Melbourne Law School

**Andrew T. Kenyon** Melbourne Law School

**Megan Richardson** Melbourne Law School

This edited collection looks across the field of intellectual property law, pulling out and examining some key strands. The rights that diverse IP laws establish have undergone significant expansion over the last century plus, since the 'modern' field of IP law is said to have been established. They bump up against other rights that also have considerable and evolving legal support of their own, including rights of freedom of thought and speech, of access to information, of trade and competition, of artistic and cultural flourishing and of privacy and personality. Conflicts arise when different regimes that fall within the general rubric of IP intersect, creating complex issues of overlap and priority. And then there is the vexed question of the relationships between international and national laws in framing and enforcing the legal standards. In this collection, we look closely at some issues of scope that have been pressing for some time, including where to set limits on what counts as intellectual property, how to deal with overlaps between different IP regimes, how to deal with differences between jurisdictions and how to resolve conflicts in cases where what is at stake is not just about rewarding creators and innovators. We employ a variety of methods and perspectives, drawing on different jurisdictions and regimes for possible answers, bringing in extra-legal modes of analysis and drawing on insights from diverse professions.

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Professor Sam Ricketson, Photo by Hamish Carr



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## IPRIA Visiting Scholars

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 2019 IPRIA welcomed Professor Mark Davison, Dr Poorna Mysoor and Dr Vicki Huang

### Professor Mark Davison, Monash University

Mark Davison is the author of several works relating to intellectual property and competition law and is a special counsel with Knightsbridge Lawyers. He has been named by *Managing IP* as one of the world's 50 most influential people in intellectual property. He has written *The Legal Protection of Databases*, published by Cambridge University Press, and is the first author of all on-line and hard copy editions of *Shanahan's Australian Law of Trade Mark and Passing Off* published since the Trade Marks Act 1995(Cth) came into effect. He is a co-author of the three editions of *Australian Intellectual Property Law*, published by Cambridge University Press. He has co-authored *The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary* published by Edward Elgar. He has also co-authored two casebooks dealing with competition law and aspects of consumer protection and is co-author of the 4th and 5th editions of *Intellectual Property: Cases, Materials and Commentary* published by Lexis Nexis. He has been a Chief Investigator on 5 Australian Research Council grants and won the Vice-Chancellor's Award for Distinguished Teaching at Monash University. He has taught in a number of overseas programs to judges and other government officials.



Professor Mark Davison

He was a member of the Advisory Council on Intellectual Property from 2013 until 2015, a Member of the Commonwealth Department of Health's Expert Advisory Group on Plain Packaging of Tobacco Products and has been a member of the Intellectual Property Committee of the Law Council of Australia for some years. In addition to private legal work relating to various intellectual property disputes, he has provided formal and informal advice to governments and non-government organisations in relation to international and national disputes concerning tobacco regulation. His work has been cited and quoted in over 70 international arbitration and Australian court decisions and written submissions as well as a large number of decisions of the Australian Trade Marks Office.

Dr Davison comments that, 'During my time as a visiting scholar, I have updated my on-line contributions to Shanahan's Australian of Trade Marks and Passing off, contributed to multiple publications, submissions and media reports relating to European Union claims for protection for geographical indications as part of Australian EU free trade negotiations, worked on multiple publications including the 4th edition of Australian Intellectual Property Law and publications on copyright and databases, intellectual property and law reform processes in Australia and the approach to interpreting bi-lateral and plurilateral treaties in the context of public health measures that affect intellectual property. The visiting position has also facilitated attendance at a diverse range of MLS presentations on matters ranging from the effects of blockchain on legal practice through to artificial intelligence and the law and defamation law for those publishing views on public health measures as well as multiple face to face meetings with other visiting scholars.'

### Dr Vicki T. Huang, Deakin Law School

Dr Vicki Huang is a Lecturer of IP Law in Deakin Law School. She graduated from the Melbourne Law School with first class honours in the LL.B and with a PhD. She also completed an L.L.M. at Columbia University Law School on a Burton Memorial Fellowship where she graduated with honours as a Harlan Fiske Stone Scholar.

She is a visiting scholar at the Melbourne Law School in 2019 and 2020. Her work has been published by the *Sydney Law Review* (2019) and she is a co-author of two textbooks - the 6th edition of S Ricketson, M Richardson, M Davison and V Huang, *Intellectual Property : Cases, Materials, and Commentary* (forthcoming); and N Suzor, K Papparlardo, R Matulionyte, A Daly, A Chalk, A Witt, V Huang, *Governing the Internet*, open source textbook: <https://wikijuris.net/cyberlaw/home>

In 2019, Vicki was a finalist for 'Academic of the Year' at the Lawyers Weekly Awards and Women in Law Awards.

Prior to her appointment at Deakin, Vicki was a sessional lecturer at the Melbourne Law School. She previously worked for the Federal Court of Australia as a Research Associate to the Hon. Justice Finkelstein. She also worked for a number of years at law firms in Melbourne (Ashursts) and the USA (Morrison Foerster) with a focus on litigation and intellectual property law. She has been admitted to practice in Victoria as an Australian lawyer and admitted to the State Bar of California as an American attorney.

Vicki also has a first class honours degree in psychology and economics and has worked in management consulting and investment banking. She also worked as an intern at the United Nations, New York in the Secretary General's Office. Her multi-disciplinary background is reflected in her research work.

Vicki's research focuses on inter-disciplinary aspects of intellectual property law and empirical research methods into law. Her current projects relate to speech, race and gender.



Dr Vicki T Huang

She currently teaches cyberlaw, intellectual property law, and property (land) law.

### **Dr Poorna Mysoor, Oxford University, United Kingdom**

**Dr Poorna Mysoor** is a Leverhulme Trust Early Career Fellow at the Law Faculty at Oxford. Her current research examines the interface between property law and copyright law. She completed her DPhil at the Law Faculty at Oxford in 2017. She has taught several core private law subjects such as Land Law, Contract Law and Tort Law at various colleges in Oxford and Copyright Law at the Law Faculty at Oxford. Poorna obtained her undergraduate law degree from National Law School of India University, Bangalore and her LLM from SOAS, University of London. Before embarking on her DPhil, Poorna practised intellectual property law in Hong Kong and was a litigator in India.

During Dr Mysoor's visit she gave a seminar on *Implied Licence for Copyright Balance* (see page 22).



Professor Sam Ricketson, Dr Poorna Mysoor and Professor Megan Richardson

## 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)

#### 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.



#### Ozlem Ozkok

##### **Frontline Knowledge Networks in Open Collaboration Models for Service Innovations**

Supervisors: Prof. Jagdip Singh, Case Western Reserve University, Ohio, US, Assoc.Prof. 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

### Designs Law and Practice Workshop

*Design within Australia and how Australia compares to its international peers*

A seminar held at Melbourne Law School which presented the joint research project of IP Australia, and the Intellectual Property Research Institute of Australia (IPRIA), 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

### Website Blocking Injunctions and Safe Harbours: Recent Developments in Australia and the EU

**Dr Jaani Riordan** Barrister, 8 New Square, London

Chair: **Professor Sam Ricketson** Melbourne Law School, University of Melbourne

Melbourne Law School | Thursday 7 March

Confronted with the challenges presented by internet copyright infringement and other forms of online wrongdoing, courts and legislatures in a number of jurisdictions have been tasked with developing legal responses which are effective yet strike a fair balance between competing fundamental rights.

- Dr Riordan considered recent developments in website blocking injunctions and safe harbours in the European Union and Australia, including:
- The recent decision of the Supreme Court of the United Kingdom in *Cartier International AG v British Telecommunications plc* [2018] UKSC 28 and its possible application in Australia;
- The emergence of 'live' blocking orders which target infringing transmissions of live sports broadcasts;
- Amendments made by the Copyright Amendment (Online Infringement) Act 2018 (Cth);
- Recent case law concerning jurisdiction, discretion, costs, and safeguards; and
- The relationship between injunctions and safe harbours.

**Dr Jaani Riordan** is a barrister at specialist intellectual property chambers 8 New Square in London, and has appeared for both applicants and respondents in major blocking cases, including the ISPs

in Cartier, the Premier League, and UEFA. He is the author of *The Liability of Internet Intermediaries* (OUP, 2016) and a co-author of the textbook *Laddie, Prescott and Vitoria on the Modern Law of Copyright* (5th ed, 2018). Before being called to the Bar, Jaani graduated from the University of Melbourne with degrees in law and computer science, and practised as a commercial solicitor. He also holds a PhD in law from the University of Oxford, where his research examined internet wrongdoing.

**Professor Sam Ricketson** has written widely and taught in all areas of IP law. He also practised part-time at the Victorian Bar until mid-2015, principally in intellectual property. Prior to his appointment to the University of Melbourne in November 2000, he was the Sir Keith Aickin Professor of Commercial Law at Monash University. He is currently a panel member of the World Intellectual Property Organisation's dispute resolution body in relation to domain names.



Assoc. Professor Jason Bosland, Dr Jaani Riordan, Dr Poorna Mysoor, Jonathan Gill

## Implied Licence for Copyright Balance

**Dr Poorna Mysoor** University of Oxford

Melbourne Law School | 15 March

A person infringes copyright if she exercises one of the exclusive rights without the licence of the copyright owner. An express licence granted by the copyright owner is the most common example of such a licence. Copyright law in most jurisdictions also provides for statutory limitations and exceptions, to balance the competing interests, including those of content users and the public. Such limitations and exceptions address specific instances of permitted uses of copyright works to achieve specific policy objectives. If a person's actions are covered neither by an express licence, nor by the statutory limitations or exceptions, it does not automatically mean that the person has infringed copyright. It may be possible to imply a licence to cover her actions. In contrast to the rigidity of statutory limitations and exceptions, implied licences are characterised by their malleability in being

able to address a more diverse set of circumstances as the need arises, providing an additional mechanism to achieve the copyright balance. However, implication as a process is contentious, and there are no established rules for implying a copyright licence. Given the uncertainty surrounding the doctrine of implied licence, courts have not embraced them as readily as they should. This presentation argued that to allay the fears of uncertainty, one must address the process of implication itself, and make it more methodical and transparent. It draws inspiration from contract law, and in particular the rules of implication of a term into a contract, to guide the process of implying a copyright licence.

**Dr Poorna Mysoor** is a Leverhulme Trust Early Career Fellow at the Law Faculty at Oxford. Her current research examines the interface between property law and copyright law. She completed her DPhil at the Law Faculty at Oxford in 2017. She has taught several core private law subjects such as Land Law, Contract Law and Tort Law at various colleges in Oxford and Copyright Law at the Law Faculty at Oxford. Poorna obtained her undergraduate law degree from National Law School of India University, Bangalore and her LLM from SOAS, University of London. Before embarking on her DPhil, Poorna practised intellectual property law in Hong Kong and was a litigator in India.

## The Business of Crown Copyright

**Professor Ysolde Gendreau** Université de Montréal, Canada

Melbourne Law School | 22 March

University of Technology | 25 March



Professor Ysolde Gendreau

At the end of March this year, the Supreme Court of Canada will hear the appeal in *Keatley Surveying Ltd. v. Teranet Inc.*, a case where the issue of Crown copyright is at the core of the relationship between land surveyors and a privately owned corporation that manages plans of survey registered by land surveyors according to the electronic land registry system of the province of Ontario. The corporation provides on-line access to the plans for a fee, but does not share any of its income with the surveyors because it claims that the publication of the plans triggers the application of the rule that gives copyright ownership in the plans of survey to the Crown. This talk discussed the arguments that were made in this case and questioned the issue of the exercise of Crown copyright in Canada. It served as the starting point for an examination of the contemporary evolution of Crown copyright in both Canada and Australia, both of which inherited this concept from British law.

**Professor Ysolde Gendreau** is currently Associate Dean for External Affairs and Communications at the Faculty of Law of the Université de Montréal in Canada. Her main field of specialization is copyright law and she has published extensively on Canadian, comparative, and international aspects of this branch of intellectual property law in Canada and abroad. She remains actively involved in international intellectual property associations such as ATRIP, of which she has been president, and ALAI, where she is one of the vice-presidents.

## Design Innovation and Intellectual Property: Launch of IPRIA-IP Australia Report on Designs Law and Practice

Melbourne Business School | Monday 6 May

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



Dr Charlie Day, CEO, Innovation and Science Australia, Brett Massey IP Australia, Paul Drake IP Australia



The Report on Designs Law and Practice: Design within Australia and how Australia compares to its international peers was a collaborative production of IPRIA and IP Australia, authored by Michael Falk and Haiyang Zhang. It represents the culmination of a six-month study comparing design labour data and registered design data across multiple countries including Australia. It finds that increases in design labour are positively associated with increases in the use of registered design rights, and raises a number of questions about the relationship between designs protection and design innovation.

The report was introduced by **Paul Drake**, **Dr Michael Falk** and **Dr Haiyang Zhang**, Office of the Chief Economist, IP Australia, **Brett Massey**, Assistant Director Domestic Policy & Legislation, IP Australia, **Associate Professor Kwanghui Lim**, Melbourne Business School, and **Professor Megan Richardson**, Melbourne Law School.

**Dr Charlie Day**, CEO, Innovation and Science Australia, acted as discussant and formally launched the Report

## Intellectual Property Law and International Trade Law Workshops for Thai Judiciary

Melbourne Law School | 22 July - 2 August

This event was instigated by Associate Professor Andrew Godwin, Associate Dean (Engagement). During the workshop, IPRIA staff and associates delivered workshops and presentations on IP Conventions, IP Law in Australia and in the Region, Trademark Law, Designs Law and Practice Domain Names Disputes, Patent Law, IP and Human Rights and Copyright Law. These presentations were delivered over a 2-week period to members of the Thai Judiciary.



Thai Judges, The Honourable Diana Bryant AO and Assoc. Professor Andrew Godwin

## Is the Trade Mark Register Too Cluttered?

Melbourne Law School | Wednesday 25 September

**Professor Robert Burrell** Oxford University and Melbourne Law School

**Anna Gibson** Intellectual Property Director, Treasury Wine Estates Limited

**Professor Beth Webster** Director, Centre for Transformative Innovation, Swinburne University of Technology

**Dr Haiyang Zhang** Office of the Chief Economist, IP Australia

Chair: **Professor Kimberlee Weatherall** Sydney Law School

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

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 perspectives on these questions from a range of experts,

including Dr Haiyang Zhang from IP Australia, who discussed new research out of the Office of the Chief Economist at IP Australia.



Paul Drake, Professor Robert Burrell, Professor Kimberlee Weatherall

**Professor Robert Burrell**, Oxford University and Melbourne Law School, is a leading scholar in international and Australian trade mark law 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 consumer.

**Anna Gibson** is the Global Director of Intellectual Property at Treasury Wine Estates, headquartered in Melbourne. Previously the wine division of Foster's Group, Treasury is one of the world's largest wine companies, with over 4000 trademarks in over 150 countries worldwide. Brands she manages include famous names like Penfolds, Wolf Blass, Lindemans, 19 Crimes, Squealing Pig and Beringer.

**Professor Beth Webster** is Director of the Centre for Transformative Innovation at Swinburne

University of Technology. She is also Pro Vice-Chancellor for Research Impact and Policy. Her expertise centres on the economics of the way knowledge is created and diffused through the economy. She has a PhD in economics from the University of Cambridge and an M.Ec and B.Ec (hons) from Monash University. She is a fellow of the Academy of Social Sciences Australia.

**Dr. Haiyang Zhang** is an Economist at the Office of the Chief Economist in IP Australia. He has worked in the field of intellectual property for more than 20 years. Haiyang received his Masters and PhD degrees in Development Economics from the Graduate Institute for Policy Studies in Japan in 2006 and 2009. He moved to Australia in 2012 and worked as a research associate at the Australian National University before joining IP Australia in 2016.

**Professor Kimberlee Weatherall**, University of Sydney Law School, teaches and research's across intellectual property law and the IP-trade nexus. She has published extensively in leading Australian and international journals on issues ranging from digital copyright, and bilateral and multilateral trade agreements and IP, to the conception of the consumer in trade mark law.

## Forthcoming Events

### Where to From Here? Fashion Design Law, Technology and Practice in Australia

Melbourne Business School | Wednesday 13 November

**Colin Golvan AM QC** Victorian Bar

**Alana Kushnir** Lawyer and Curator, Director and Founder of Guest Work Agency

**Brett Massey** Assistant Director Domestic Policy & Legislation, IP Australia

Chair: **Kwanghui Lim** Associate Professor, Melbourne Business School

*This seminar is part of a series generously supported by IP Australia*

Design rights have been described as 'An Expensive, Confusing, and Ineffective Suit of Armor' when it comes to the IP protection of emerging fashion designers in the digital age (Janssens & Lavanga, Fashion Theory, online 26 October 2018). Indeed, notwithstanding the plethora of IP rights marginally available to fashion design, according to OECD data for 2016 footwear and clothing top the trade in counterfeit and pirated goods worldwide (OECD, Trends in Trade in Counterfeit and Pirated Good, 18 March, 2019). And the prospects of civil and criminal liability seem quite ineffective in the face of an entire fashion industry which is 'built around the idea that trendy clothes should be available to consumers at accessible price points' rather than rewarding and encouraging innovative design (Bruculier, Huffington Post, 4 September 2018).

So where are the gaps in the Australian IP laws that may be called on to protect fashion design, what do these laws protect, how is technology changing current practices, and how might design rights perform better for a new generation of fashion designers in Australia specifically? A panel of experts from law, industry and IP Australia will consider these questions.

**Colin Golvan AM QC** has had extensive experience in the area of infringement of copyright, registered designs, patents and trade marks and was also senior counsel in the seminal fashion design cases of *Seafolly Pty Ltd v Madden* [2013] FCA 314; [2014] FCAFC 30 and *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* [2008] FCAFC 197. He will speak about his experience in the

protection of fashion design from unauthorised reproduction and measures available to designers to prevent the sale of fake designs. He will also discuss the design/copyright overlap provisions, having regard to argument raised about that issue in the recent Federal Court proceeding of *Globe International Limited v Kmart Australia Limited*.

**Alana Kushnir** is the founder and director of Guest Work Agency, an art advisory and law firm for artists, designers, collectors, galleries, arts organisations and museums. Alana is also a sessional lecturer at The University of Melbourne, teaching subjects on contemporary art and art law, and the Principal Investigator of the Serpentine Galleries' R&D Platform Legal Lab. She holds a BA/LLB(Hons) from the University of Melbourne and an MFA (Curating) from Goldsmiths, University of London. She will speak about the legal challenges facing emerging designers.

**Brett Massey** is a senior policy officer with over a decade of experience at IP Australia providing policy advice and changing intellectual property legislation, and is a leading figure in IP Australia's current work on designs law reform. He is an advocate for evidence-based policy, deeper stakeholder engagement, and continuous innovation in the policy and legislative process. He will speak about IP Australia's consultations in its designs review and options for law reform.

## **.au Dispute Resolution Policy**

2 December 2019 | Davies Collison Cave, Melbourne

**Professor Andrew Christie** Melbourne Law School, University of Melbourne

**Jürgen Bebbler** Corrs Chambers Westgarth

**Sally Foreman** Davies Collison Cave

Chair: **Professor Sam Ricketson** Melbourne Law School, University of Melbourne

*This seminar is part of a series generously supported by IP Australia*

## **Media Law & IP Conference**

5 & 6 December 2019 | Melbourne Law School

**Centre for Media and Communications Law & the Intellectual Property Research Institute of Australia**

**Plenary speakers for the 2019 conference:**

**Associate Professor Sara Bannerman** McMaster University, Canada

**Professor David Rolph** Sydney Law School, University of Sydney

**Associate Professor Paul Wragg** School of Law, University of Leeds, United Kingdom

**Panel presentations include:**

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 - - - Privacy and publicity - - - Privacy by design - - - Public knowledge - - - Public media - - - Reporting courts - - - Surveillance and security - - - Technology and IPRs - - - Trademarks - - - and more...

## Publications

The following publications from IPRIA researchers, associates and collaborators have been selected as particularly relevant to IPRIA.

### Books

G.W. Austin, A.F. Christie, A.T. Kenyon and M. Richardson (eds), *Across Intellectual Property: Essays in honour of Sam Ricketson* (forthcoming, 2019, Cambridge University Press)

S. Ricketson, M. Richardson, M. Davison, V. Huang, *Intellectual Property: Cases, Materials and Commentary*, Sixth Edition, LexisNexis Butterworths, 2019

### Research Book Chapters

G.W. Austin, 'Connecting Intellectual Property and Human Rights in the Law School Syllabus', Ch. 14 in G W Austin, AF Christie, AT Kenyon and M Richardson (eds), *Across Intellectual Property: Essays in honour of Sam Ricketson* (forthcoming, 2019, Cambridge University Press)

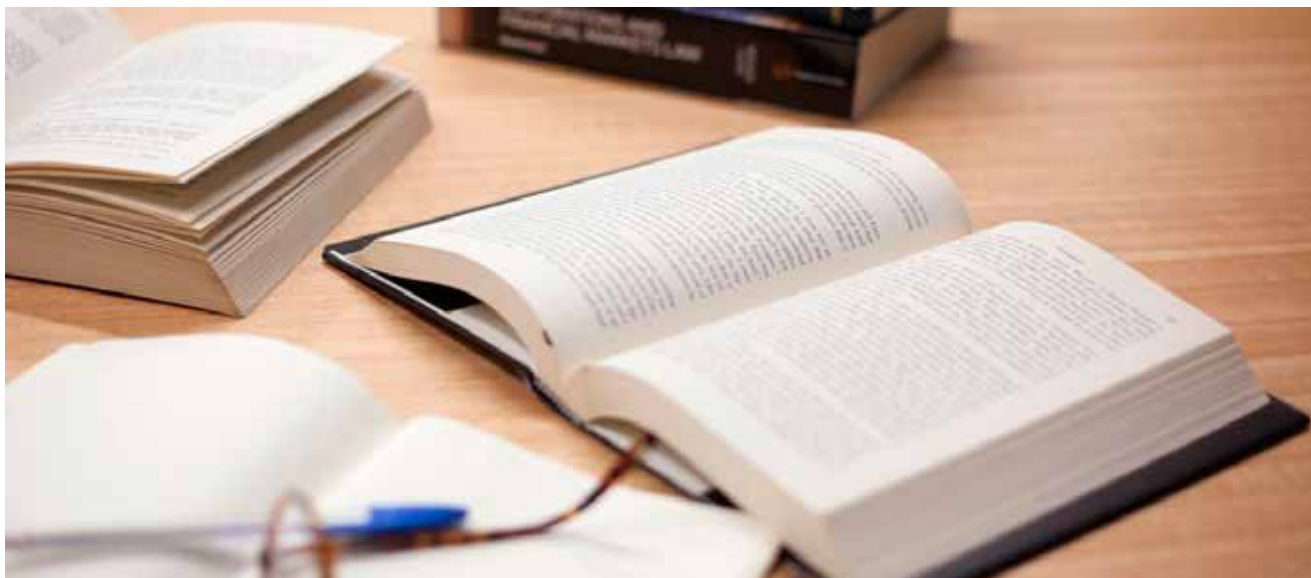
R. Burrell, 'Rethinking the Relationship between Registered and Unregistered Trade Marks', Ch. 3 in G W Austin, AF Christie, AT Kenyon and M Richardson (eds), *Across Intellectual Property: Essays in honour of Sam Ricketson* (forthcoming, 2019, Cambridge University Press)

R. Burrell, 'Unpacking Constitutional Protection for Trade Marks: The Plain Packaging Disputes before National Courts' in Christopher Heath and Anselm Kamperman Sanders (eds), *Intellectual Property and International Dispute Resolution* (Kluwer 2019), pp. 245-261.

R. Burrell and M. Handler, 'Keyword advertising and actionable consumer confusion' in Aplin (ed.), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2019), pp. 424-442

A.F. Christie, 'A Matter of Sense: What Intellectual Property Rights Protect', Ch. 1 in G W Austin, AF Christie, AT Kenyon and M Richardson (eds), *Across Intellectual Property: Essays in honour of Sam Ricketson* (forthcoming, 2019, Cambridge University Press)

O. Ozkok, J. Singh, K. Lim and J. Bell, 'Service Innovation from the Frontlines in Customer-Centric Organizations', *Handbook of Customer Centricity*. Elgar, 2019.



M. Richardson, 'Resisting Labels: Trade Marks and Personal Identity', Ch. 16 in G W Austin, AF Christie, AT Kenyon and M Richardson (eds), *Across Intellectual Property: Essays in honour of Sam Ricketson* (forthcoming, 2019, Cambridge University Press)

M. Richardson, 'Oscar Wilde Portrait', in Claudy Op den Kamp and Dan Hunter, Swinburne Law School, eds, *A History of Intellectual Property in 50 Objects*, (Cambridge UK, NY: Cambridge University Press, 2019) pp. 112-119.

M. Richardson, J. Thomas and J. Klein, 'From "Oomoo" to "Oro": Nostalgia Labels and Cultural Policy on the Australian Trade Marks Register', *The Object and Purpose of Intellectual Property*, ATRIP Intellectual Property Series (Cheltenham, UK: Edward Elgar Publishing, 2019) pp.7-29

## Journal Articles Refereed

R. Bosua, K. Clark, M. Richardson, J. Webb (2019), 'Intelligent Warning Systems: "Technological Nudges" to Enhance User Control of IoT Data Collection, Storage and Use', in Angela Daly, Monique Mann and S Kate Devitt, eds, *Good Data, Theory on Demand*, Amsterdam: Institute of Network Cultures, University of Amsterdam, pp. 330-343

A.F. Christie, J Gloster and S Goddard (2019), 'An Empirical Analysis of 15 Years of Australian Domain Name Disputes' *30 Australian Intellectual Property Journal* 1-22 (in press)

P. Doran, and B. Webster, (2019) 'Who influences USPTO patent examiners?' *World Patent Information*, 56, 39-42.

A. Duke and E. Handsley (2019), 'Protecting the Child Consumer from Misleading Advertising: A Comparison of Media Regulation and Consumer Protection Approaches' *26 Competition & Consumer Law Journal* 238

A. Duke and R.L. Smith (2019), 'Inequality and competition law' *27 Competition & Consumer Law Journal* 1.

A. Duke and R.L. Smith (2019), 'Protecting Profits Post-Patent Expiry: ACCC v Pfizer, Patents and Competition Law' *30 Australian Intellectual Property Law Journal* 1

A. Duke (2019), 'The Repeal of Section 51(3) of the Competition and Consumer Act: A Mistake in Need of Correction' *University of New South Wales Law Journal* (unconditionally accepted, forthcoming (the article will be published in volume 43(1))

V. Huang (2019), 'An empirical investigation of 20 years of trade mark infringement litigation in Australian courts' *41 Sydney law review* 1.

V. Huang (2019), 'Empirical analysis of Australian trademark infringement decisions: implications for the U.S. trademark use debate, 35 *Santa Clara computer and high technology law journal* 3.

P.H. Jensen, 'Experiments and evidence-based public policy: Methods, implementation and challenges' *Australian Journal of Public Administration* (forthcoming)

O. Ozkok, J. Bell, J. Singh and K. Lim (2019), 'Frontline knowledge networks in open collaboration models for service innovations', *AMS Review*

G. Rassenfosse, P. Jensen, T. Julius (2019), A, Palangkaraya, B. Webster, (2019 forthcoming) 'Are foreigners treated equally under TRIPS?' *Journal of Economics and Law*.

# Exciting new research program involving University of Melbourne researchers (commencing 2020)

## Improving automated decision making

9 October 2019

Minister for Education Dan Tehan today announced today that the Morrison Government was providing \$31.8 million to establish a research centre to investigate responsible, ethical, and inclusive automated decision making.

The Australian Research Council (ARC) Centre of Excellence for Automated Decision-Making and Society will be based at RMIT University and led by Professor Julian Thomas.

“Automated decision making is the process where machines make decisions without human involvement,” Mr Tehan said.

“This technology is being used in self-driving cars or algorithms that are used to make medical diagnosis and business decisions.

“This technology has great potential to transform the efficiency of industry, as well as public and private services, however, as with all technology, it is prudent to explore how to mitigate any possible risks.

“Our Government is funding research into automated decision making to ensure this technology provides the best possible outcomes for society and industry.

“Researchers will formulate world-leading policy and practice, inform public debate, and train a new generation of researchers and practitioners.”

Minister for Industry, Science and Technology Karen Andrews said the new Centre of Excellence will play an important role in making sure Australians benefit from cutting-edge technology.

“Automated decision-making, like all technology, is making a significant difference to the way we work and the way we live, and it’s important that we get the settings right,” Ms Andrews said.

“It’s easy to fear technology when it comes to how it will impact industry and jobs, but embracing technology like this and investing in this Centre of Excellence will grow our economy and create Australian jobs.”

Researchers from RMIT University will collaborate with experts at seven Australian universities including the University of Melbourne, and 22 academic and industry partner organisations from Australia, Europe, Asia and America. Together they will provide an additional \$39.3 million in cash and in-kind support to the centre.

Professor Megan Richardson will lead the Centre of Excellence node for the University of Melbourne.

More information about the ARC Centres of Excellence program is on the ARC website.

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