

Intellectual Property Research
Institute of Australia

Annual Report

2017

ipria



Melbourne Law School

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Melbourne Law School

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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 and Melbourne Business 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.





Photo by Bernard Lyons

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) and is also Co-Director of the Law School's Centre for Media and Communications Law (CMCL).



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*.



IPRIA Advisory Board

In 2017 the Advisory Board comprised

- Mr Owen Malone, Intellectual Property Director, Treasury Wine Estates Limited (Chair)
- Dr Ben Mitra-Kahn, Chief Economist, 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

IPRIA Research Fellows & Associates

Research Fellows of IPRIA work on IPRIA re-search projects. In 2017 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 2017 they were:

- Professor Graeme Austin, Melbourne Law School
- 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, Swinburne University of Technology
- 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 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 2017 IPRIA staff, research fellows and associates were involved in major research projects.

ARC Discovery The relationship between firm innovation and performance and the role of the government

- Professor Beth Webster, Swinburne University of Technology
- Professor Paul Jensen, University of Melbourne
- Associate Professor Alfone Palangkaraya, Swinburne University of Technology
- Professor Jacques Mairesse, Maastricht University, Netherlands, Advanced School for Social Studies

Productivity growth in Australia has plateaued. Although Federal and State Governments employ a range of different innovation policies designed to stimulate productivity growth, little is known about the effects these programs - and of innovation more generally - on firm performance. One reason why this relationship is unknown relates to the availability of firm-level data. In this project, we take advantage of unique access to a dataset provided by the Australian Bureau of Statistics which enables us to observe the activities of every firm in Australia. Using these data and appropriate econometric techniques, this project examines the effect of a range of government policies designed to stimulate innovation and productivity growth.

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 .

The market for design: insights from interviews with Australian firms

- Associate Professor Kwanghui Lim, Melbourne Business School, University of Melbourne
- Associate Professor Don O'Sullivan Melbourne Business School, University of Melbourne
- Mr Michael R. Falk Melbourne Business School, University of Melbourne

The goal of this study was to provide insights into how the market for design operates.

We found that the formal protection of intellectual property through design rights plays a minor role in the decision making of firms operating in the market for design. This creates difficulties for buyers and sellers in transacting with each other and capturing value. We found that both buyers and sellers have adapted to imperfections in the market for design by developing reputational signals. Signals of a seller's reputation assume a heightened importance and we see strong evidence that sellers engage in strategies to manage these signals. We refer to these signals as the 5 R's: rigour, rhetoric, roster, rating and referral. Conversely, we find that signals of a buyer's reputation also assume great importance and again we see strong evidence of buyers engaging in strategies to manage these signals. We refer to these signals of buyer reputation as the 4 C's: contests, co-creation, curation and casting. Beyond influencing reputation, signals play a role in enabling buyers and sellers to influence each other's level of investment and effort in the transaction.

Our project is the first stage in mapping the dynamics and mechanisms of how the market for design operates. Our ultimate aim is to generate insights that inform how Australia might encourage the growth of design as a capability within firms.

Although formal intellectual property rights are perceived as having a limited role, our study suggests that there is a need to ensure the optimal functioning of design rights. There are clear policy implications in four other areas—in nurturing design talent, coordinating an Australian design narrative, providing recognition for the quality of Australian design and influencing demand for design within the local market.

These findings were presented at several conferences:

- UNSW Asia-Pacific Strategy, Innovation, & Entrepreneurship (SIE) Symposium. 20 Sep 2015.
- Wharton Technology & Innovation Conference. April 2015
- Design for Business Research Conference. Melbourne, May 2015
- Asia Pacific Innovation Conference, Sydney. November 2014.

The report was cited in the *Productivity Commission Issues Paper on Intellectual Property Arrangements* (Oct 2015). And,

It also received a mention by the President of Design Institute Australia in the DIA Winter 2015 newsletter (http://www.dia.org.au/media/SPARK%2034_Winter%202015_web.pdf)

This report was commissioned by IP Australia

A Global trade mark database

- Professor Beth Webster, Swinburne University of Technology,
- Professor Paul Jensen, University of Melbourne
- Professor Alfone Palangkaraya, Swinburne University of Technology
- Assistant Professor Gaétan de Rassenfosse, EPFL,
- T'Mir D. Julius, Swinburne University of Technology
- 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 Relationship Between Corporate Social Responsibility & Trademarking

- Associate Professor Kwanghui Lim, Melbourne Business School, University of Melbourne
- Associate Professor Don O'Sullivan, Melbourne Business School, University of Melbourne
- Michele Ong, Melbourne Business School, University of Melbourne

Recent years has seen an increase in focus on corporate social responsibility and accountability among firms. Such efforts have been linked to firm rhetoric and various measures have been developed based on expert panel rankings and surveys, there has been little research connecting CSR to a firm's efforts at trademarking and branding. Our study explores this relationship by analysing the trademark data of S&P 500 firms. We examine firms' trademarks for keywords that are associated with CSR behaviour, and we explore the relationship with a well-known measure of CSR known as its KLD Score. Our preliminary findings suggest that firms vary greatly in the degree to which their trademarks exhibit CSR-related keywords, although the average level of KLD-related trademarking is low among firms.

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’

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.

- 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

This project has resulted in a number of publications.

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,



Photo by Bernhard Lyons

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.

In the nearly 15 years since commencement of the auDRP, more than 500 complaints have been filed, and approx. 450 cases have proceeded to determination. While there has been a substantive qualitative analysis of these cases,* there has been no substantive** quantitative analysis of the cases.

Thus, we do not know the answers to important questions such whether complaints based on registered trade marks are more successful than those based on unregistered trade marks, whether complaints fail on some grounds more often than on others, and whether there are repeat players (as trade mark owners or as cyberquatters).

This project will provide answers to these, and many other, important questions. It will do so by building a database of every auDRP decision, coded across approx. 50 fields. Each auDRP decision will be read by a legally-trained RA, the response for each field will be entered into a database, the database will be interrogated to produce descriptive statistics and to identify associations, the results of the interrogation will be analysed, and the analysis will be reported in an article suitable for publication in a refereed journal.

*See Christie, ‘auDA Overview of Panel Views on Selected auDRP Questions First Edition’ (July 2014), at <http://www.auda.org.au/policies/audrp/audrp-overview/>.

**The only quantitative analysis to date consists of a simple counting of the number of cases filed, and the number of the different outcomes achieved: Roy, ‘Interne Domain Name Dispute resolution in Australia’, (2014) 36(8) *European Intellectual Property Review* 492-498.

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 late 2018/early 2019. 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 and limitations (the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled 2013) and the protection of audio visual performances (the Beijing Treaty on Audiovisual Performances 2012)

- Continuing work within the WIPO Standing Committee on Copyright and Related Rights on the matter of exceptions and limitations and the development of a new treaty on broadcasters.
- Corresponding discussions at both national and regional levels about the scope of exceptions and limitations generally, in particular the application of the "three step test" and quotation exceptions.
- Significant developments at national and regional levels in relation to the scope of the communication to the public right.
- Emerging discussions at both national and international levels about the matter of formalities.
- The beginnings of a movement in favour of broader protection of resale royalty rights
- Continuing discussion at all levels about the scope of other exclusive rights, licensing, collective administration, intermediate liability, and enforcement.
- Growing interest in private international law issues, particularly on the Internet.
- The relationship between international copyright and neighbouring rights treaties and bilateral, plurilateral and multilateral trade and investment treaties.

It is planned that this work will be ready for submission for publication in mid-2018.



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.

IPRIA Visiting scholar

Dr Ana Ramalho Assistant Professor of Intellectual Property Law



Ana Ramalho is a Portuguese national with policy and legal expertise in the field of intellectual property (IP) and European law. Currently an Assistant Professor of Intellectual Property at Maastricht University, she holds a 5-year advanced LL.B. from the University of Lisbon (1999), an LL.M. in Intellectual Property and Competition Law from the Munich Intellectual Property Law Center (2007), a Research Master in Intellectual Property Law from the University of Lisbon (2008), and a PhD in Copyright and European Law from the University of Amsterdam (2014). Throughout her career she has taken on commissioned research and consultancy on a range of international and European IP topics for several private and public institutions, including the World Intellectual Property Organization and the European Patent Office. Ana has published extensively on IP law and policy. Her publications have been cited and referenced in court cases by Courts of Appeal in Portugal, and translated into other languages due to their topicality. Her current research interests include the impact of the Court of Justice of the EU on IP law- and policy-making, and problems of IP ownership in the realm of artificial intelligence.

Research Supervision

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

Michael R. Falk is a PhD candidate at Melbourne Business School, working in the fields of strategy and innovation. A crucial role for intellectual property rights (IPRs) is enabling better coordination between exchange partners. Yet, in many markets, formal IPRs cover only a small part of what is bought and sold. Falk's research focuses on non-regulatory mechanisms of coordination. For example, he explores how power imbalance between firms may help them to coordinate in new markets. A current study looks at the role of partner and peer influences in driving firms to adopt practices that meet regulatory standards established outside the jurisdictions in which they operate.



Ben Hopper

Patents and Traditional Knowledge: A Case Study of the Impact of Patent Laws on the Production and Distribution of Miao Traditional Medicines in Guizhou's Pharmaceutical Industry

Supervisors: Megan Richardson, Graeme Austin, & Sarah Biddulph

Ben Hopper is a first-year PhD candidate and Teaching Fellow at Melbourne Law School. For the past two years, he has also been a Teaching Fellow in Harvard Law School's CopyrightX program.



He is completing doctoral research under the supervision of Megan Richardson, Sarah Biddulph and Graeme Austin. The title of his PhD project is "Intellectual Property, Development and Justice: An Empirical Approach". Building on work undertaken for his master of laws thesis at Harvard Law School, and standing apart from the myriad normative accounts of intellectual property (IP), his PhD thesis will develop an empirical account of the role of IP laws in socio-economic development. Ben is developing operationalised conceptions of IP and socio-legal methodology to examine the interaction between IP regimes, traditional knowledge practices and socio-economic development. He will then use and test this methodology in examining the role of IP laws in the traditional medicines and pharmaceutical economies of Guizhou, southwestern China. The results could have important implications for the crafting and reform of IP laws in developing regions, as well as for international IP laws.

Research Supervision

Vicki Huang

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

Supervisors: Megan Richardson & Chris Dent

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

Ozlem "Ozzie" Ozkok has a background in supply chain operations and technology. She has worked several years in diverse roles such as inventory planning, logistics software development, and supply chain information technology management. Ozzie studied in the US and obtained a dual Master's Degree in Computer Science and Information Technology Management along with an MBA. In February 2017, she progressed into the third year in her PhD in Marketing at the University of Melbourne.



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 some teaching experience and will be part of the tutoring team for Principles of Marketing in the following semesters at the University of Melbourne.

Corinne Tan

Generating Content on Social Media: Regulation by Copyright Laws, the Terms of Service and Technological Features (PhD)

Supervisors: Megan Richardson, Graeme Austin, & Sam Ricketson

Corinne began her doctoral research under the supervision of Professors Megan Richardson, Sam Ricketson and Graeme Austin at the end of 2012. She submitted her thesis at the end of 2016 and will graduate in May 2017.



Research Supervision

Corinne's thesis is titled 'Generating Content on Social Media: Regulation by Copyright Laws, the Terms of Service and Technological Features'. In her thesis, she analyses how the content generative behaviours of social media users are regulated from a copyright perspective, through comparing copyright laws with other regulatory factors on social media. These factors, being the terms of service and the technological features on social media platforms, can alter the effectiveness of the regulation of content generative behaviours by copyright laws. The aim of her research is to shed light on how specific social media platforms (for example, Facebook, YouTube, etc) affect the role laws, including copyright laws, play in securing compliance from their users. Further, Corinne hopes to stimulate more critical reflections on how laws should develop to take into account this influence of social media platforms on user behaviours.

Corinne is currently a visiting scholar at the Centre for Media and Communications Law (CMCL) and the Intellectual Property Research Institute of Australia (IPRIA) and is working on converting her thesis to a book to be published by the University of College London Press.

Events

Trade marks at the boundaries: current interdisciplinary and empirical research in trade mark law

February 20, 2017

This workshop was supported by ARC Linkage Grant No. 120100249, Testing Trade Mark Law's Image of the Consumer (CIs Weatherall, Humphreys, Burt, Kelly, Richardson, PI Burrell). The investigators acknowledge the support of the Australian Research Council and our partners, IP Australia, the Federal Court, Treasury Wine Estates and Carlton & United Breweries.

Psychology and Trade Marks Part 1: What are we measuring, and what can we learn?

What's in a name? Ratings of similarity of words and brand names

Jennifer Burt

Psychological evidence and trade mark law

Mike Humphreys

Psychology and Trade Marks Part 2: How people perceive marks

Shaping Up™: Understanding the protection of non-traditional marks in the legal system

Amanda Scardamaglia, Simon Pervan, Charles Ranscombe, Mitchell Adams

'Oro' Study

Jill Klein and Megan Richardson

Trade marks in the market

Using Discrete Choice Experiments to Measure Trade Diversion from Copycat Branding

Sarah Kelly and Spring Sampson

Is there a relationship between trademarking activity and corporate social responsibility?

Kwanghui Lim and Don O'Sullivan

The trade mark register

Have trade marks become deceptive?

Elizabeth Webster

Cluttering

Robert Burrell and Michael Handler

Trade marks and data

IP Australia's work in trade mark and related rights

Benjamin Mitra-Khan

Identifying internationally linked trademark applications using a machine learning algorithm

Stephen Petrie

Events

Next steps

What are the benefits, and the challenges, of interdisciplinary perspectives on trade mark – and what else can we do from here?

Kimberlee Weatherall

General discussion: what else could we do? What other TM-related questions could be the subject of interdisciplinary research?

Reshaping IP's Fabric: Privatisation Versus Public Domain in the Era of Artificial Intelligence

Dr Ana Ramalho Assistant Professor of Intellectual Property Law

University of Maastricht

Chair **Michael Pattison** Principal Michael R Pattison, Australian Lawyer

Discussant **Associate Professor Kwanghui Lim**

Date: 1 March

Venue: Melbourne Business School, BTR, 200 Leicester St, Carlton, Victoria



Michael Pattison and Associate Professor Ana Ramalho

Events

This workshop addressed the challenges that artificial intelligent systems (AIS) might pose to traditional concepts of copyright authorship.

In many jurisdictions – including Europe and Australia - authorship seems to be somewhat connected to the conditions for protection, which might imply that, absent a human author, a work will not be original and therefore not copyrightable. This may leave many works that would otherwise be copyrightable without protection, thereby causing legal uncertainty; but it also raises questions about whether protection should at all be available, and about whether copyright is fit for purpose in face of technological progress in the area of AIS.

The workshop explored whether the current legal framework can accommodate AIS as creators for purposes of copyright protection, and then followed to consider the more normative question of whether AIS' creations should be copyright protected, or rather belong in the public domain. Dr Ramalho concluded by suggesting a model for the legal regime of works created by AIS.

Ana Ramalho is a Portuguese national with policy and legal expertise in the field of intellectual property (IP) and European law. Currently an Assistant Professor of Intellectual Property at Maastricht University, she holds a 5-year advanced LL.B. from the University of Lisbon (1999), an LL.M. in Intellectual Property and Competition Law from the Munich Intellectual Property Law Center (2007), a Research Master in Intellectual Property Law from the University of Lisbon (2008), and a PhD in Copyright and European Law from the University of Amsterdam (2014). Throughout her career she has taken on commissioned research and consultancy on a range of international and European IP topics for several private and public institutions, including the World Intellectual Property Organization and the European Patent Office. Ana has published extensively on IP law and policy. Her publications have been cited and referenced in court cases by Courts of Appeal in Portugal, and translated into other languages due to their topicality. Her current research interests include the impact of the Court of Justice of the EU on IP law- and policy-making, and problems of IP ownership in the realm of artificial intelligence.

This workshop was hosted by the Melbourne Business School and supported by the EU Centre on Shared Complex Challenges.

The EU Centre on Shared Complex Challenges is co-funded by the European Commission and The University of Melbourne



European Union Centre on Shared Complex Challenges



THE UNIVERSITY OF MELBOURNE



Events

IP Developments in Europe | Melbourne & Sydney Seminars

Dr Ana Ramalho Assistant Professor of Intellectual Property Law

University of Maastricht

Host: **Matthew Swinn** Partner at King & Wood Mallesons, Melbourne; **Cate Nagy** Partner at King & Wood Mallesons, Sydney

Melbourne | 2 March

Where: King & Wood Mallesons, Level 50, Bourke Place, 600 Bourke Street, Melbourne

Sydney | 13 March

Where: King & Wood Mallesons, Level 61, Governor Phillip Tower, 1 Farrer Place, Sydney

These seminars provided an overview of recent IP developments in Europe, namely the state-of-play of the unitary patent (especially considering the imminent Brexit); the Trade Secrets Directive; the new Trademark Regulation; and the proposed Directive on copyright in the Digital Single Market.



Associate Professor Ana Ramalho at King & Wood Mallesons, Melbourne

Specific IP issues discussed in more detail and included:

- The ground for refusal of registration due to functionality of the sign (based on both the new Trademark Regulation and the recent Rubik's cube case);
- Articles 11 and 13 of the proposed Directive on copyright in the Digital Single Market (which refer to a new exclusive right for press publishers and to the use of protected content by information society service providers, respectively); and

Events

- The right of communication to the public as interpreted by the Court of Justice of the European Union in relation to hyperlinking (especially in cases Svensson and GS Media).



**European Union Centre on
Shared Complex Challenges**

**KING & WOOD
MALLESONS**

The EU Centre on Shared Complex Challenges is co-funded by the European Commission and The University of Melbourne

The Digital Map: Copyrightability of Spatial Data

Dr. Marlena Jankowska, Assistant Professor, Faculty of Law and Administration, University of Silesia, Poland

Date: 21 March

Venue: Melbourne Law School

Significant changes in the nature of Spatial Data Infrastructure (SDI) have created new legal uncertainties that have not yet received sufficient attention from the legal profession in Europe. The practice of using SDI has nevertheless shown that there are many legal issues worth noting, especially concerning intellectual property rights. On that subject, what we have to confront in the doctrine of copyright law is the balance between the competing principles of accessibility of public information against the principles of copyright protection. At the same time, the technological challenge stimulates doubts about copyright protection even more, as it is not certain whether SDIs are copyrightable at all. As there are many standpoints in that matter, it has to be answered whether U.S. and European legal regulations, as well as the technical framework of creating the digital data and databases (e.g. the ISO standards), can strip away the creative element from the work. It should also be noted that the current legal standpoint on maps is a vague one that leaves many unanswered questions. Should we, for example, assume that an idea may only be copyrightable if it is individualized, creative and has been articulated in some form? Do we need to re-imagine the relationship between factual content (e.g. geographical information) and a creative form of expression (e.g. a cartographic map)? Additional challenges emerge when we consider the relationship of the above to space law.

Dr. Marlena Jankowska is an Assistant Professor in the Faculty of Law and Administration at the University of Silesia in Katowice in Poland, as well as an experienced attorney specializing in intellectual property, new technologies and geoinformation law. She also directs the Institute of Intellectual Property based in Katowice, Poland.

Events

OAIC & University of Melbourne - Privacy and Data Event

Timothy Pilgrim PSM Australian Information Commissioner and Australian Privacy Commissioner

Dr Monika Zalnieriute Melbourne Law School Postdoctoral Fellow

James Horton Datanomics

Chair Professor Megan Richardson Melbourne Law School

Date: 28 March

Venue: Melbourne Law School

The Australian Information and Privacy Commissioner, Timothy Pilgrim, led a legal, social policy and rights panel at the University of Melbourne. Commissioner Pilgrim was joined by human rights scholar and advocate, Dr. Monika Zalnieriute, and technology advisor, James Horton. This free event was hosted by the Office of the Australian Information Commissioner (OAIC) and the University of Melbourne.

University of Melbourne's privacy law expert and CMCL Co Director, Professor Megan Richardson, MC'd the interactive panel and will took questions from the floor and from the live Twitter feed #ppnMelbourne. Privacy professionals, academics and students with an interest in privacy rights were encouraged to attend and join the discussion.



Dr Monika Zalnieriute, James Horton, Timothy Pilgrim, Professor Megan Richardson

Events

Website blocking injunctions: lessons from the UK and EU

Dr Jaani Riordan

Date: 12 April

Venue: Melbourne Law School

As Australian courts begin to apply s 115A of the Copyright Act 1968 (Cth), it is timely to consider the experience of the English and European courts in relation to website blocking injunctions.

This presentation considered the evolution of blocking remedies in the European Union, including:

- emerging practices in relation to jurisdiction, discretion, costs, and safeguards;
- the extension of blocking remedies to new categories of wrongdoing under the courts' inherent jurisdiction;
- the new phenomenon of 'live' blocking orders which target infringing transmissions of live sports broadcasts; and
- practice and procedure in blocking applications



Dr Jaani Riordan

Dr Jaani Riordan is a barrister at specialist intellectual property chambers 8 New Square in London, and has appeared in major blocking cases including *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658 and *Football Association Premier League Ltd v British Telecommunications plc* [2017] EWHC 480 (Ch). He is the author of *The Liability of Internet Intermediaries* (OUP, 2016).

This seminar was presented in conjunction with the Science & Technology Law Association, Melbourne Law School.

The Case against Excluding Tobacco from International Investment Agreements and the Search for Better Policy Options

Professor Bryan Mercurio

Date: 24 April

Venue: Melbourne Law School

In recent years, critics of bilateral investment treaties and investment chapters in trade agreements have attacked these agreements on the grounds that they threaten a state's sovereign "right to regulate" and limit the "policy space" of governments. The worry is that investment rules will prevent governments from adopting domestic legislation or regulations designed to promote policies that are in the public interest (referred to as "regulatory chill"). This concern is not new, but the proliferation of investment disputes in recent years has brought it into focus, and the criticism has intensified. The sensitivity of environmental and health-related cases, coupled with the lack of consistency among arbitral tribunals, threatens to derail the entire regime, with many calls to abolish the system of investor-state dispute settlement (ISDS). The system is facing a legitimacy crisis and is under serious threat. Governments have responded to the criticism in a number of ways. One such way, seen in two agreements (both involving Australia), have essentially excluded or "carved out" an entire industry – tobacco – from ISDS, in an effort to better protect a sub-set of measures taken for the promotion of public health from challenge. This presentation focused on the substantive reforms – greater drafting precision, and carve outs and exclusions from the use of ISDS. Carve outs and exclusions are problematic for a number of reasons, and unnecessary to achieve the goal of preserving policy space. Instead of blanket carve outs and exclusions, the presentation proposed that governments instead continue improving the treaty text so as to protect legitimate public welfare measures, such as the environment and public health. In particular, that broader "general exceptions" provisions should be utilized and would be helpful in this regard. Such provisions have a long history in international trade law, and already appear in a few investment treaties. The use of general exceptions provisions in IIAs should be expanded, and are more effective and appropriate than carve-outs and exclusions for preserving domestic policy space. When combined with more precise drafting of the obligations, general exceptions can go a long way towards addressing the criticisms of IIAs.

Bryan Mercurio is Professor, Associate Dean (Research) and Vice Chancellor's Outstanding Fellow of the Faculty of Law at the Chinese University of Hong Kong (CUHK). Specializing in international economic law, Professor Mercurio focuses the intersection between trade law and intellectual property rights, free trade agreements, dispute settlement and increasingly international investment law. Professor Mercurio is the author of one of the most widely used case books on WTO law (Hart Publishing, 2012, 2nd ed, with S. Lester and A. Davies) and editor of the leading collection on bilateral and regional trade agreements (Cambridge University Press, 2nd ed, 2016, with S. Lester and L. Bartels). Prior to relocating to Hong Kong in 2007, Professor Mercurio taught in the faculty of law at the University of New South Wales (UNSW) and as visitor at universities in Australia and North America. He has also worked in government and private practice, and maintains an active trade consultancy. He has held visiting positions at a number of institutions in Asia, Europe and the United States and is currently a Senior Fellow at the Melbourne Law School.

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Look what they've done to my data: issues in privacy, security and data protection

Date: 10 May

Venue: Melbourne Law School

This panel discussion with the Victorian Privacy and Data Protection Commissioner David Watts took place at the University of Melbourne. Commissioner Watts was joined by big data, information security and artificial intelligence experts Abigail Payne, Vanessa Teague, and Pompeu Casanovas. This free event was hosted by the Victorian Office of Commissioner for Privacy and Data Protection and the University of Melbourne.



Professor Megan Rikhardson, David Watts, Vanessa Teague, Abigail Payne, Pompeu Casanovas

David Watts Commissioner for Privacy and Data Protection, Victoria. With a background in law, the Commissioner has practiced in both the private and public sectors, specialising in information technology, information privacy, intellectual property, governance and regulatory systems. In 2016 David was selected to lead a global study on big data and open data that will culminate in a paper presented to the UN General Assembly in October next year.

Abigail Payne Director and Ronald Henderson Professor, Melbourne Institute of Applied Economic and Social Research, Faculty of Business and Economics, 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 is a cryptographer with an interest in cryptographic protocols that support

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a free and democratic society. Her main research interest is in electronic voting protocols, which aim to protect individual vote privacy while providing verifiable evidence of a correct election result.

Pompeu Casanovas of Universitat Autònoma de Barcelona (UAB), is Director of Advanced Research, former Director of the Institute of Law and Technology, and Professor of Philosophy and Sociology of Law at the UAB Law School. He has 20 years of experience conducting research on legal sociology, pragmatics and AI and law, including as principal investigator of over 50 national, European, and international projects.

The Future of Patent Law

The Honourable Randall Rader

Date: 16 May 2017

Where: King & Wood Mallesons, Level 50, 600 Bourke Street Melbourne

The Honourable Randall Rader, formerly Chief Judge of the US Court of Appeals for the Federal Circuit, spoke on The Future of Patent Law in Melbourne on 16 May 2017.

In a world where IP doctrines and policies are changing rapidly in the two leading economic markets -- China and the US -- intellectual property retains a prominent component of market success. Thus learning the future of patent law changes may have important implications for businesses and law firms alike.

The Honourable Randall Rader was appointed to the United States Court of Federal Claims in 1988. In 1990, he was nominated to a seat on the United States Court of Appeals for the Federal Circuit. In 2010, he became Chief Judge of the Federal Circuit. In 2014, he retired.

While on the circuit, he served as a law professor, having taught patent law and advanced intellectual property courses at the University of Virginia School of Law, Georgetown University Law Center, Washington, DC, the Munich Intellectual Property Law Center, and The George Washington University Law School, Washington, DC. He is the co-author of a casebook on patent law used at over sixty-five law schools.

CMCL & IPRIA ECR Workshop (by application)

Privacy, Politics and Law: in Conversation with Prof. Paul De Hert

Professor Paul De Hert Vrije Universiteit Brussels

Date: 2 October

Where: Melbourne Law School

The CMCL, IPRIA and Melbourne Law School was excited to announce that Professor Paul De Hert (Vrije Universiteit Brussels) – a renowned privacy scholar and organizer of the largest privacy conference in the world Computers Privacy and Data Protection - would conduct an interdisciplinary workshop for PhD candidates and Early Career Researchers. We invited applications from interested PhD candidates and Early Career Researchers from any faculties to apply (early career researchers are those who have been awarded a PhD in the last 5 years). Professor De Hert read and commented on the work of 8 participants from

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across Australia and New Zealand. Places were also made available for ten non-presenting participants who participated in the discussion. Selected presenting participants from outside of Melbourne were provided with hotel accommodation while in Melbourne.

Professor Paul De Hert's work addresses problems in the area of privacy & technology, human rights and criminal law. Currently he is expanding his scope of interest including research on issues with regard to the human rights status of the elderly and the principle of neutrality in a democratic state. To satisfy his multiple curiosities de Hert teams up regularly with other authors. A human rights approach combined with a concern for theory is the common denominator of all his work. He is Co-Director of the Research group Law Science Technology & Society (LSTS), Director of the Research group on human rights (HUMR), and Director of the Department of Interdisciplinary Studies of Law (Metajuridics).

This Workshop was part of the CMCL and IPRIA Interdisciplinary Workshop Series.



Workshop participants w/ Professor Paul de Hert and Professor Megan Richardson

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Trade Marks & Free Speech: Perspectives on The Slants Case

Date: 9 October

Venue: Melbourne Law School

Rochelle Dreyfuss Pauline Newman Professor of Law and Co-Director, Engelberg Center on Innovation Law & Policy at New York University School of Law

Susy Frankel Professor of Law and Director of the New Zealand Centre of International Economic Law at Victoria University of Wellington

Vicki Huang Lecturer in IP law at the Faculty of Business and Law, Deakin University

Dan Rosen Professor of Law at Chuo University Law School, Tokyo

The Hon Justice Julie Dodds-Streeton QC Judge in Residence, Melbourne Law School

The US Supreme Court's decision in *Matal v. Tam*, 582 U.S. ____ (2017) has been described as rocking the IP world (or alternatively deeply controversial) in holding the Lanham Act's "disparagement clause" unconstitutional. The unanimous verdict was issued on an application by Simon Tam of the Asian-American rock band The Slants seeking to "reclaim" the derogatory term "The Slants" by registering it as the band's trade mark. As Justice Alito put it, speech that disparages may be hateful but under the First Amendment judges protect the freedom to express "the thought that we hate."

In this seminar we heard perspectives from four trade mark academics and a former Australian federal court judge on the meaning, significance and implications of the decision for trade mark, branding and language practices.



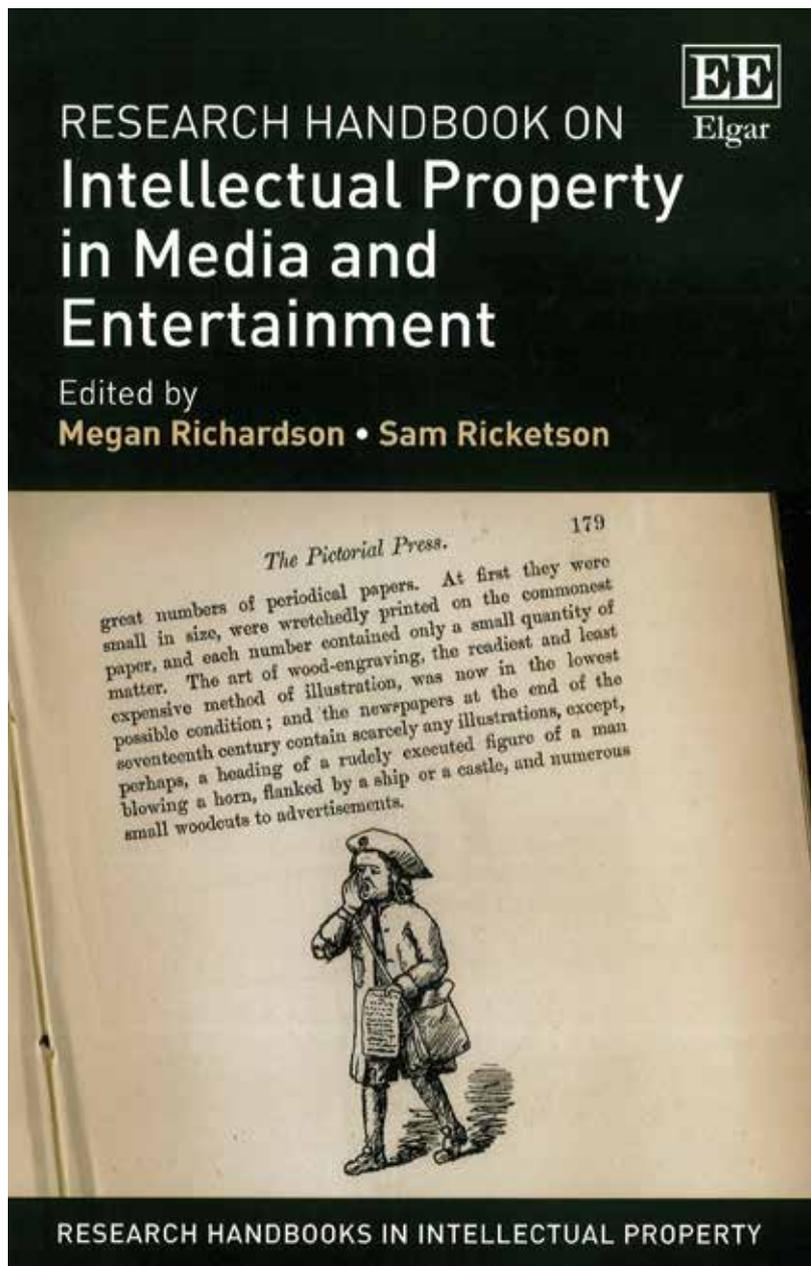
Professor Megan Richardson, Professor Dan Rosen, Vicki Huang, Professor Susy Frankel and Professor Rochelle Dreyfuss

Publications

Publication Spotlight

Research Handbook on Intellectual Property in Media and Entertainment,

This book was co-edited by Professor Megan Richardson and Professor Sam Ricketson, Melbourne Law School for the Research Handbooks in Intellectual Property series, general editor Jeremy Phillips, Edward Elgar, UK.



Publications

Selected Publications

Edited Book

Austin, G. (2017) *International Intellectual Property and the ASEAN Way Pathways to Interoperability*. Cambridge University Press.

Richardson, M. & Ricketson, S. (ed.) (2017) *Research Handbook on Intellectual Property in Media and Entertainment*. Edward Elgar Publishing Ltd.

Research Book Chapters

Austin, G. Common Law Pragmatism: New Zealand's Approach to Secondary Liability of Internet Service Providers. *SECONDARY LIABILITY OF INTERNET SERVICE PROVIDERS*. Springer. 2017

Austin, G. Cooperation through Conflict of Laws: The Justiciability of Cross-Border Copyright Infringement. *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*. Cambridge University Press. 2017

Austin, G. Entertaining Foreign Copyrights. *Research Handbook on Intellectual Property in Media and Entertainment*. Edward Elgar Publishing Ltd.

Richardson, M. & Ricketson, S. (2017) Introduction. *Research Handbook on Intellectual Property in Media and Entertainment*. Edward Elgar Publishing Ltd.

Richardson, M. & Dinwoodie, G. (2017) Publicity Right, Personality Right, or just Confusion?. *Research Handbook on Intellectual Property in Media and Entertainment*. Edward Elgar Publishing Ltd.

Ricketson, S. (2017) Intellectual Property in News? Why Not?. *Research Handbook on Intellectual Property in Media and Entertainment*. Edward Elgar Publishing Ltd. 2017

Journal Articles Refereed

Austin, G. Trademarks and Private Environmental Governance. *Notre Dame Law Review*. 93. 2017

Christie, A. Private international law principles for ubiquitous intellectual property infringement - a solution in search of a problem?. *Journal of Private International Law*. 13. 2017

Duke, A. The Geographic Dimension of Markets: Some Observations. *Competition and Consumer Law Journal*. 25. 2017

Palangkaraya, A., Jensen, P.H. and Webster, E. (2017). "The effect of patents on trade", *Journal of International Economics* 105, 1-9.

Richardson, M. & Bosua, Rachele. & Clark, K. & Webb, J. & Ahmad, A. Towards responsive regulation of the Internet of Things: Australian perspectives, *Internet Policy Review*, 6 (1),

Publications

Journal Articles Unrefereed

Soh, P., Lim, K., Subramanian, A., How Do Technological and Market Relatedness of Corporate Venture Capital Investments Affect Strategic Outcomes? *Asia Pacific Innovation Conference*. New Zealand, Dec 2017.

Ruanyi, Lim, K., Tsai, Y., draft presented at the 2017 Management Education and Learning Writers Workshop, *Academy of Management Conference PDW*. USA, Aug 2017.

Lim, K., O'Sullivan, D., (2017), Is There a Relationship between Corporate Social Responsibility and Trademarking Activity?, *Trademarks Conference*, University of Melbourne, Feb 2017.

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The institute's main areas of expenditure in 2017 were related to its public seminars, hosting a research visitor, and casual administrative and research assistance.

IPRIA's accounts are incorporated in the University of Melbourne's operations and are subject to University of Melbourne financial policies and procedures. Overall responsibility and financial management of the IPRIA account lies with the Centre Directors and is subject to a financial governance framework overseen by the Manager of Finance, Planning and Strategy.

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