



Introduction to Intellectual Property Law

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What is intellectual property?

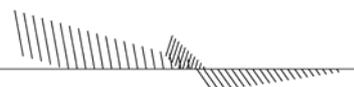


- Types of IP:
 - Copyright
 - Designs
 - Patents
 - Trade marks
 - Confidential information
- Rights over intangibles
- Who is being protected?



Where do the rights come from?

- Australia:
 - Constitutional protection
 - *Copyright Act 1968*
 - *Patents Act 1990*
 - *Designs Act 2003*
 - *Trade Marks Act 1995*
 - Also relevant: *Trade Practices Act 1974*



Where do the rights come from?

- International:
 - Initially: bilateral conventions
 - By 19th century: international conventions
 - Paris Convention 1883
 - patents, trade marks, works
 - Berne Convention 1886
 - literary and artistic works
 - Madrid Protocol 1989
 - international trade marks



Justifications for Intellectual Property Law

Incentives



Human rights



Labour theory

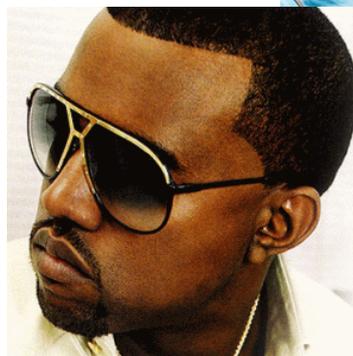


Personality rights



Copyright: Introduction

- Protects literary and artistic creations:
 - Books
 - Documents
 - Artworks
 - Music
 - Films
- Protects form of distribution as well as subject matter



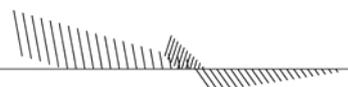
Copyright: Introduction



- Exclusive right given to an owner of a subject matter to do certain acts in relation to it:
 - Copy/reproduce
 - Communicate/publish
 - Perform in public



- Coupled with a “negative” right: others can’t do these acts



Copyright: Basic Principles

1. Copyright as intangible/incorporeal property

- *Pacific Film Laboratories v Commissioner of Taxation* [1970]



2. Protection of expression, not facts/ideas

- *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009]
- *Donoghue v Allied Newspapers* [1938]



Copyright: Does Copyright Subsist?

Question 1: do we have a protectable subject matter?

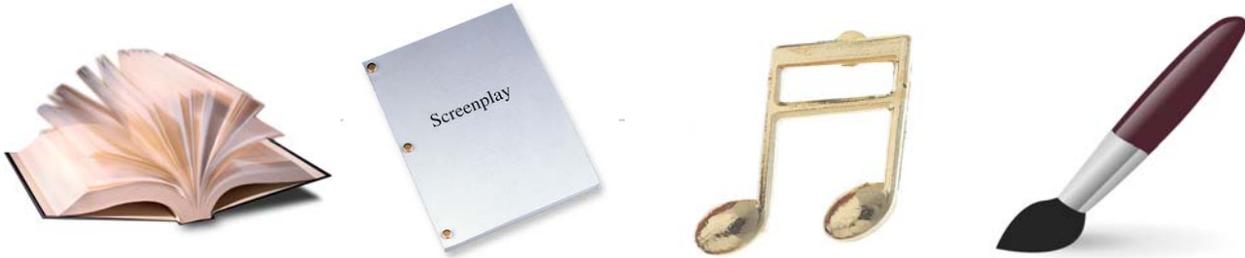
Question 2: have the criteria for protection been met?

Question 3: who owns the copyright?

Question 4: has copyright expired?

Copyright: Protected Subject Matter

- Part III – **original** literary, dramatic, musical and artistic works



- Part IV – sound recordings, films, broadcasts (no requirement of originality)



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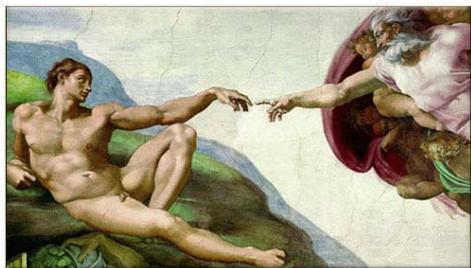
Copyright: Nature of the Right

- Different rights for different subject matter
- Literary, dramatic and musical works:
 - Reproduce in material form
 - Publish
 - Perform in public
 - Communicate online
 - Make an adaptation
 - Reproduce, publish, perform, communicate an adaptation



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Copyright: Nature of the Right



- Artistic works:
 - Reproduce in material form
 - Publish
 - Communicate



- Computer programs:
 - Enter into commercial rental arrangements



Copyright: Nature of the Right

- Sound recordings:
 - Make a copy
 - Cause to be heard in public
 - Communicate to the public (note overlap with musical work)
 - Enter into commercial rental arrangements



- Films:
 - Make a copy
 - Cause to be seen and/or heard in public
 - Communicate to the public



Copyright: Nature of the Right

- TV and sound broadcasts:
 - Make a film of a TV broadcast / copy of such a film
 - Make a sound recording of a sound broadcast / copy
 - Rebroadcast or otherwise communicate to public
- Published editions:
 - Make a perfect copy – photocopy, scan etc



Copyright: Does Copyright Subsist?

Question 1: do we have a protectable subject matter?

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Question 4: has copyright expired?



Copyright: Originality of Works

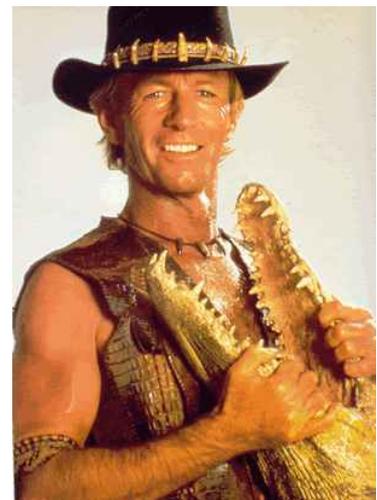


- Works (Part III subject matter) must be “original”
- Low threshold under Aus law – does not mean novel, inventive, creative
- 2 key requirements:
 - Must not be copied – must have originated with the author
 - *University of London v University Tutorial Press* [1916]
 - Must be the product of some degree of skill, labour or judgment
 - Compilations – *Desktop Marketing Systems v Telstra* [2002]
 - Derivative works - *A-One v Off Road Imports* (1996)



Copyright: Other Criteria for Works

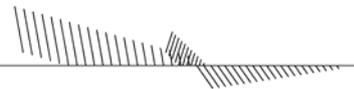
- For unpublished works:
 - Author was Aus citizen/resident when work was made
- For published works:
 - First publication was in Australia
 - Author was Aus citizen/resident when work was first published



Copyright: Other Subject Matter

- EG: Sound recordings:
 - Qualified person at the time recording was made; OR
 - Recording was made in Australia; OR
 - Recording was first published in Australia

- Qualified person:
 - Australian citizen/resident; OR
 - Australian company



Copyright: Does Copyright Subsist?

Question 1: do we have a protectable subject matter?

Question 2: have the criteria for protection been met?

Question 3: who owns the copyright?

Question 4: has copyright expired?



Copyright: Ownership of Works



- Starting point: **author is owner**
 - *Cummins v Bond* [1927]
- Exceptions to the rule:
 - Journalists
 - Commissioned works
 - Employee works



Copyright: Ownership of Other Subject Matter

- Sound recording where not live: producer (usually production company)
- Sound recording of live performance: producer + performers/employers
- Films: in theory, director; usually, director's employer
- Broadcast: broadcasting service provider
- Published edition: publisher



Copyright: Does Copyright Subsist?

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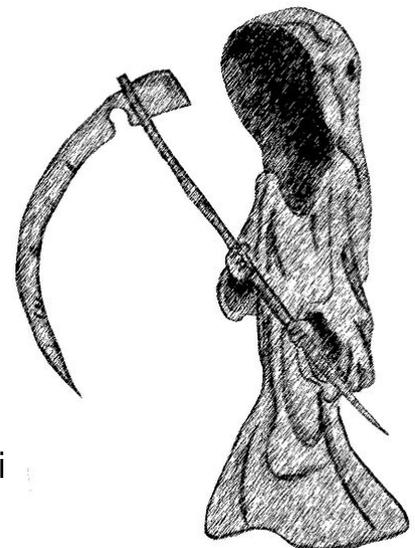
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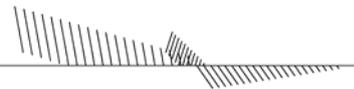
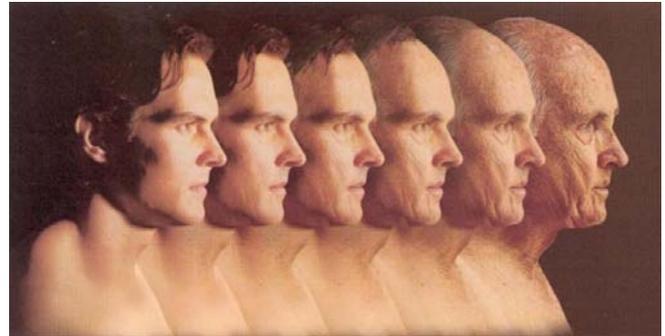
Copyright: Duration of Copyright for Works

- General rule: **life of the author + 70 years**
- If not published, performed, broadcast, sold before death: 70 years from first time this occurs
- Unpublished works have unlimited copyright
- Anonymous/pseudonym? 70 years from publicati



Copyright: Duration for Other Subject Matter

- Sound recordings: publication + 70
- Films: publication + 70
- Broadcasts: broadcast date + 50
- Published edition: publication + 25



Copyright: Who Administers Copyright?

- Copyright Tribunal
- Collecting societies:
 - APRA
 - Screenrights
 - CAL
 - PPCA
 - Viscopy
 - CCLI



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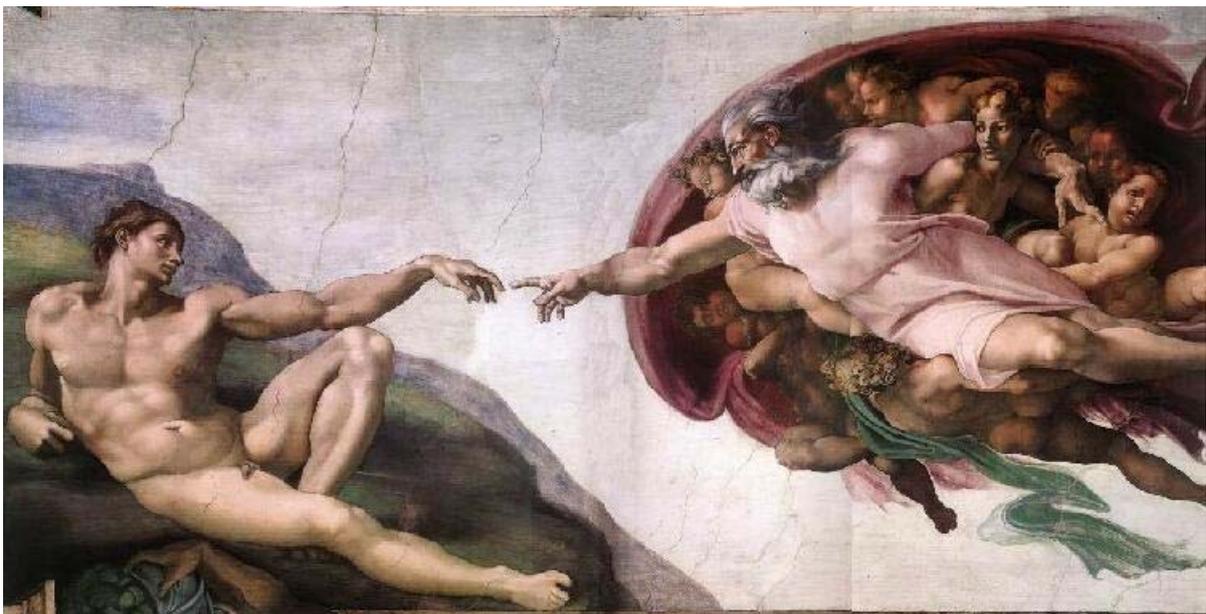


Copyright: Infringement

- Direct: exercising one or more of the owner's rights without permission
- Indirect: allowing somebody else to infringe
- Substantial part
 - *Hawkes & Son v Paramount* [1934] – quantitative test
 - *Ladbroke v William* – importance to the plaintiff's work, degree of literary skill or judgment
 - *Half Court Tennis Pty Ltd v Seymour* (1980) – originality of part
 - *Zeccola v Universal City Studios* – are the changes material?



Copyright: Substantial Part



Copyright: Substantial Part



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Copyright: Substantial Part



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Copyright: Infringement by Reproduction

- Causal connection
 - *Corelli v Gray (1913)* – independent generation is ok
- Substantial similarity
 - *Walt Disney v H John Edwards Publishing* – prima facie evidence of copying, but can be refuted with evidence of IG



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Copyright: Indirect Infringement

Roadshow Films Pty Ltd v iiNet Limited [2010] FCA 24

1st suit against an internet service provider ISP for authorisation of copyright infringement that proceeded to hearing and judgment.

iinet
connect better

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Copyright: iiNet - Background

- 34 applicants representing the major film and TV companies in US, Aus; involved the Australian Federation Against Copyright Theft (**AFACT**).
- Action brought at end of 2008 against iiNet, 3rd-largest ISP in Aus
- Claim: iiNet “authorised” copyright infringement by failing to prevent its users from engaging in P2P file-sharing (downloading movies using the BitTorrent system)

- International context?



Copyright: iiNet - Federal Court Decision

- 636 paragraphs – almost 200 pages
- Q1: did iiNet users infringe copyright? FC: **YES**.
- Q2: did iiNet authorise those infringements? FC: **NO**.

Copyright: iiNet - Federal Court Decision

- iiNet did not “**authorise**” the infringing acts of its users because:
 1. iiNet did not provide the “means” of copyright infringement
 2. factors in s101(1A) of the Act did not point to authorising infringement
 3. iiNet did not “sanction, approve, countenance” copyright infringement



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Copyright: iiNet – Federal Court Decision

- (a) the extent (if any) of the person's **power to prevent the doing of the act** concerned;
- (b) the nature of any **relationship existing** between the person and the person who did the act concerned;
- (c) whether the person took any other **reasonable steps to prevent** or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.



Copyright: iiNet – Federal Court Decision

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Copyright: iiNet – Federal Court Decision

- Safe Harbour provisions (would have protected iiNet)
- Telco Defence (would not have protected iiNet)
- AFACT lost and was ordered to pay costs in the range of \$4 million.



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Copyright: iiNet - Federal Court Decision

- AFACT failed to convince the court that ISPs should bear responsibility for copyright infringement on the internet
- AFACT appealed the Federal Court's decision
- iiNet cross-appealed on Telco Defence
- Arguments on appeal?



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Copyright: Creative Commons

- World wide project that encourages copyright owners to allow others to share, reuse and remix their material legally.
- Offers range of free licenses that creators can use to manage their copyright in the online environment
- May 2008 – Nine Inch Nails announced album *The Slip* to be released under a Creative Commons licence
- “All rights reserved” → “some rights reserved”



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Confidential Information: Overview

- Awkward fit because not a type of property
- If you have CI and someone receives it they may come under an equitable obligation to keep the information confidential
- In commercial terms, usually dealt with by way of contract. Otherwise: must go back to first principles
- Trade secrets: chemical formulae, mechanical techniques, etc



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Confidential Information: Elements

Coco v Clark [1969]

1. Can you point to info that has the necessary quality of confidence about it?
2. Was the information imparted in circumstances suggesting an obligation of confidence? (reasonable person test)
3. Was there unauthorised use of the information?



Confidential Information: Defences

- Public interest defence:
 - National security
 - Public health
 - Administration of justice
 - Fabric of society
- Broader approach in UK, narrower in Australia
 - ***Woodward v Hutchins (UK)*** – court accepted that it was in the public interest to expose the false image of pop stars



Designs

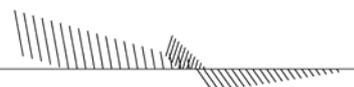


- Protects the shape/visual features of a product
- Limited exclusive right to sell products with particular visual features
- Very important in fashion industry but also important more generally



Patents: Overview

- Protects inventions:
 - New products
 - New processes
 - New manufacturing methods
 - New operating methods
 - Methods
- Bargain between inventor and society
- Two types: standard patents and innovation patents



Patents: Overview

- Not automatic like copyright – obtaining a patent can be very time consuming (often 3-5 years)
- *Patents Act 1990*
- Apply through the Patents Office
- Most standard patents last 20 years
- Innovation patents are easier to get, last 8 years



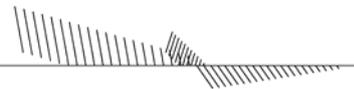
Patents: Overview

- Priority Date
- Once an application is made, the specification becomes open for public inspection – this is part of the bargain
- Parties lose all confidentiality
- Most standard patents last 20 years
- Innovation patents are easier to get, last 8 years



Patents: Inventiveness and Manner of Manufacture

- Must have an “inventive” step for SP, “innovative” step for IP, determined by comparing to the prior art as at priority date
- **NRDC v Commissioner of Patents [1959]** – “manner of manufacture”
 - “Vendible products and processes for their production”
 - Must offer some material advantage
 - Produces a useful physical result in relation to a tangible entity
 - Requirement of utility in practical affairs
 - Artificially created state of affairs with clear economic significance



Patents: Subject Matter

- “Generally inconvenient”
 - Danger to the public
 - Prevents undertaking of normal activities
- “Contrary to law”
 - No lawful use
 - This is rarely used, only in the clearest of circumstances
 - **Hwang [2004]**
- Foods or medicines (mere admixtures) – discretion
- Discoveries



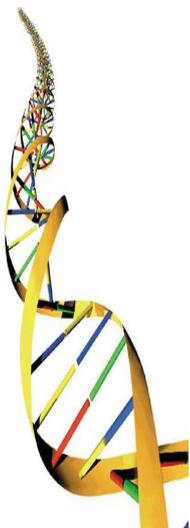
Patents: Subject Matter

- Aus law relatively lenient
- Micro-organisms
 - Not naturally occurring MO
 - BUT processes using MO, MO with technical intervention are OK
- Plants and animals
 - Standard patents but not innovation patents
 - *Plant Breeder's Rights Act 1994* (dual protection)



Patents: Gene Patents

- **Parliamentary Inquiry Into Gene Patents**
 - Public outcry - Genetic Technologies tried to exercise rights over tests for 2 gene mutations linked to breast cancer



Inquiry considered impact of patents over human and microbial genes, non-coding sequences, proteins, and their derivatives

Looked at impacts on healthcare, medical research, wellbeing of Australian people, measures for mitigating risks

Report “Strongly rejects” IP Australia’s reasoning that genetic information can be an invention (but no outright ban)



Trade Marks: Overview

- Protection of brands/indicators of origin
- Trade mark can be registered or unregistered
- To register, traders apply to the TMs office in Canberra, TMs are governed by the *Trade Marks Act* and are protected throughout Aus.
- Can also get international protection – [Madrid Protocol](#).
- Mark must be used or the TM will not be approved / be cancelled



Trade Marks: “Inherent Distinctiveness”

Potential problems:

- Descriptive or laudatory
- Geographical terms
- Foreign words
- Misspelled words
- Phonetic equivalents
- Coined words and phrases
- Slogans
- Personal names
- Shapes and colours



Trade Marks: “Factual Distinctiveness”

- Can bring evidence to show that with time, the mark has become strongly associated with your brand
- Will involve survey evidence, market research, etc.
- *The College of Law Pty Ltd [1999]*



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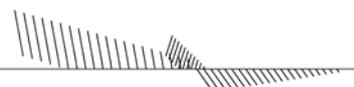


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Questions / Comments?



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