

Introduction

Across Intellectual Property

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This book looks across the field of intellectual property law, pulling out and examining some key strands. At the same time, it acknowledges that this is a field of tremendously broad and expanding reach. At the very least, it covers the well-established but still-developing regimes of copyright, patent, designs and trade mark law. These are typically supplemented by trade secrecy, passing off and other laws which can loosely be said to protect intellectual endeavour and enterprise from proscribed forms of ‘unfair competition’ or misappropriation. And the law’s scope of operation is also far greater, potentially covering the grant of rights over all information generated through human and even artificial intelligence. So what will intellectual property (IP) encompass in the twenty-first century and will there continue to be a common field?

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 several 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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We are inspired in this undertaking by the work of our distinguished colleague and friend Sam Ricketson, whose long career of scholarship, legal education, advocacy and law reform in Australia and internationally has made him a towering figure in the field of IP. Legal biographer Christopher Sexton, wrapping up an interview with Ricketson published in *Intellectual Property Forum* in 2004, posited that '[a]fter a quarter of a century of commitment to the research, publication, teaching and now practice of intellectual property law, he remains the pre-eminent modern pedagogue in the field' in Australia. One and a half decades later, we add to that an acknowledgement that Ricketson has achieved an international reputation among the IP law community of the highest order.

Perhaps because he draws on such a wealth of experience, Ricketson's scholarship on IP law is notable for, among other things, its breadth – it reaches across regimes, across jurisdictions, across disciplines and across professions, evincing comparisons with other legal luminaries, including William Cornish, David Vaver, Jim Lahore and Ann Duffy who helped establish IP as an academic field in the 1970s, 1980s and 1990s. Yet uncommonly even for its time, Ricketson's oeuvre deals with all key areas of IP law, and he has authored major works on both national law and international treaties. His work is informed by the practice of other disciplines, especially history, and it is engaged with beyond the academic profession, notably in the reform and the practice of IP law.

This collection of essays, by leading scholars and practitioners from a range of countries, is dedicated to Ricketson's achievements and reflect his breadth of expertise and application. The publication builds on a one-day workshop, held in December 2017 at Melbourne Law School and hosted by four of Ricketson's immediate colleagues at the University of Melbourne, now the editors of this volume. The chapters, coming out of the workshop in response to the book's theme of 'across intellectual property', are presented in the volume's four parts, which move across IP regimes, jurisdictions, disciplines and professions.

Part I Across Regimes

Uncommonly for contemporary intellectual property academics, Sam Ricketson has produced key works across the spectrum of IP regimes. In the first part of the book, five authors explore what can be learned about IP laws by looking beyond the boundaries of individual regimes.

Andrew Christie revisits a fundamental question: What is it, exactly, that IP regimes protect? His answer is that it is not quite what the conventional view holds it to be. Christie distinguishes materiality from tangibility and asserts that it is the presence of the former (perceptibility

by a human sense), not the absence of the latter (perceptibility by touch), which is the defining characteristic of IP subject matter. Because they share a common defining characteristic, there is the potential for different IP regimes to provide rights in respect of the same thing. Graeme Dinwoodie considers how the courts in Europe have addressed the overlap of trade mark protection with the protection provided by the copyright, patents and designs regimes. Observing that the result is denial of trade mark protection, he supplies what the courts have failed to provide: a justification for such a result, and doctrinal principles to achieve a better outcome. This leads into the chapter by Robert Burrell, who explores the justification for having a system for registration of trade marks while also providing protection for unregistered trade marks. He suggests that, contrary to the US approach, registered trade marks could – and probably should – be provided with stronger, but narrower, protection than is provided to unregistered trade marks.

The need to understand the specifics of how individual IP regimes operate can blind one to their commonalities. David Brennan exhorts us to consider matters of shared history. From recognising the logical and chronological connections between the key copyright and patent cases on the significance of the act of publication, he postulates a synergistic development of the two laws from the late eighteenth century through to the mid-nineteenth century. Brennan suggests that the distinction drawn today between the two regimes was, at an earlier time, embryonic. Finally, Elizabeth Adeney considers the experience of transplanting legal norms from one regime to another – specifically, the adoption of civilian law-derived moral rights into the copyright statute of a common law jurisdiction (Australia). She observes an extraordinarily elaborate implementation, wherein abstract civilian law doctrines are replaced by exhaustive statutory rules. Whether such a transplantation should be considered a success remains to be seen.

Part II Across Jurisdictions

The spatial metaphor in this book's title *Across Intellectual Property* is especially apt in the context of the chapters in Part II. For a scholar to be truly *across* intellectual property requires deep engagement with the topic across geopolitical boundaries – with all that this entails, including sensitivity to geopolitical influences on domestic and international law as well as an appreciation of distinctions between discrete domestic IP jurisdictions. The subject now makes little sense without the study of substantive and enforcement obligations and disciplines that straddle international boundaries. Since the entry into force of the Agreement

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on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1996, these are now firmly anchored in the international trade regime. Much of Sam Ricketson's work exemplifies scholarly engagement with IP across jurisdictions in this sense, including his 1986 text on the Berne Convention (joined in the second edition by Jane Ginsburg), the 2015 treatise on the Paris Convention and in numerous articles and reports. This understanding of the subject is reflected in the chapters in this part.

This part begins with the pressing current question of whether copyright protection requires a human author in the context of new challenges posed for IP by works created by artificial intelligence (AI). In fact, this was a question that Ricketson had studied, as Jane Ginsburg observes in her chapter. She explains how his views on whether a human author was required sprang from his detailed understanding of the disciplines imposed by the Berne Convention itself. In her chapter on the influence of Australian copyright law and scholarship on Singaporean law, Ng-Loy Wee Loon sees the various influences of public international law on thinking about domestic issues within one nation (Australia) influencing judges in another nation (Singapore) on this very same question.

The chapters by Kathy Bowrey, Rebecca Giblin and Antony Taubman each engage with the implications of the internationalization of intellectual property through public international law instruments. Situated in a particular historical context – the possibility in the late nineteenth century that Canada might leave the Berne Convention – Bowrey's chapter details how arguments derived from the universal rights of authors were advanced in order to serve commercial interests of foreign publishers. Giblin explores the geopolitical context in which the Berne Convention is now situated and the influence on that context on possibilities for change. Taubman's chapter engages with ways that the intersection of two legal jurisdictions – IP and trade – influences current understanding of the scope of international law obligations. Melissa de Zwart's chapter takes the theme of IP across jurisdictions to a new frontier, exploring the role of IP in the exploration of outer space. Her analysis exposes the combined relevance of both private intellectual property rights and public law initiatives.

As Richard Garnett's chapter explains, the internationalisation of IP is not just a matter of public international law. Private parties also have a stake in the protection and enforcement of IP rights across international borders. Cross-border disputes between private parties that involve IP rights is the province of private international law. Garnett's chapter examines the ways that IP and private international law are coming together in the context of these disputes.

Part III Across Disciplines

Sam Ricketson's scholarship is deeply informed by history, illustrating an important value of legal research that reaches beyond contemporary doctrine. The chapters in this part take aspects of Ricketson's scholarship into wider analyses within and beyond law, reflecting diverse strands of intellectual property research that have developed markedly in recent decades.

Isabella Alexander considers challenges of undertaking legal historical research in IP, taking Ricketson's historical work as a starting point. Whether conducting IP history or the history of IP law, there are challenges of research and methodology; challenges of interpretation; and challenges relating to the purpose, relevance and audience for such historical research. All of which is to underline the value in well-conducted historical research in IP and IP law.

In a turn to the present, Graeme Austin notes that human rights have increasingly reached across IP since the start of the twenty-first century, creating a large and varied body of research. Austin highlights some opportunities this presents, exploring connections between IP and human rights within the law school curriculum, connecting students with wide-ranging interests and evaluating ideas that commonly structure each domain.

Focussing more particularly on the human right to privacy, David Lindsay analyses how judicial reasoning engages with copyright and privacy law in the pre-trial discovery of allegedly copyright-infringing internet users. Approaches in the UK, Canada and Australia suggest the discretionary power to order disclosure of a user's identity is influenced by the different ways in which these common law courts understand and balance rights. Lindsay argues there is a need for judicial approaches to move beyond the relatively unstructured multi-factorism that has been seen in rights-based analysis in these cases to consider more explicitly the values and interests underlying the rights in question.

Likewise, in her chapter, Megan Richardson argues that considerations of privacy and personality should be taken more seriously when assessing one aspect of trade mark law which has been surprisingly little considered to date – namely, the registration of a person's name or likeness as a trade mark without that person's consent. Her historical analysis focused on the late nineteenth and early twentieth centuries suggests that practical differences in the protection offered to celebrity and non-celebrity names and images continues to this day.

Rochelle Cooper Dreyfus and Susy Frankel then examine the broader question of cases in which trade marks can erode cultural identity

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through racial disparagement. They contrast legal approaches to disparaging marks in the United States and New Zealand and suggest the latter offers an important guide to accommodating both freedom of expression and respect for cultural identity, potentially even for US law.

Finally in this part, Emily Hudson and Andrew Kenyon examine IP scholarship's empirical turn. They consider framing questions (concerning research quality, limits and implications) that might be useful for empirical IP research, problems observed in some empirical analyses of IP law and lessons from empirical research in other disciplines. The aim is not to provide any simple checklist for IP researchers but to offer prompts to conducting, understanding and using empirical research more carefully in IP scholarship.

Part IV Across Professions

While the chapters in the earlier parts pay testament to the importance of rigorous and wide-ranging scholarship in the field of IP broadly understood, the chapters in Part IV reflect on the significant contribution that IP scholars and their scholarship can make to the practice and profession of IP law, including in ways that extend well beyond the parameters of what we might consider to be a normal academic role.

In the first chapter of this part, Ann Monotti points to the value of a rigorous and critical academic perspective when it comes to crafting university IP policies. In their chapters, Mark Davison and David Llewellyn, in very different ways, point out how well-crafted textbooks provide understanding and illumination to teachers, students and scholars and others at 'the coal face of everyday practical problems and endeavours' as Ricketson phrased it in an article published in the Australasian practitioner journal *Intellectual Property Forum* in 2004. Then follow two chapters from those working at the coal face, the first from former judge of the Federal Court of Australia, Peter Heerey and the second from Queen's Counsel and art law expert, Colin Golvan, pointing to the value of expert evidence in court proceedings and appreciation of how the issue of authorship is approached from a practitioner's perspective (including that the law may understand authorship quite differently from authors themselves).

These chapters are among the most personal in the volume, testifying warmly to Ricketson's generosity and influence over many years in areas that may not be immediately evident to outside observers or indeed to universities focussed on measuring more obviously academic outputs. They reflect an older generation of IP scholars, lawyers and judges who were there when IP was being established as a field of serious scholarly

and practical significance and who are still looking to make meaningful contributions to the field which they helped shape according to their own lights.

The collection concludes with a *Laudatio* by Jill McKeough, a more personal final paper addressing Sam Ricketson, which emphasises his gracefulness in sharing insights about IP teaching and scholarship across IP academics and his constructive support for law reform endeavours.

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