Introduction to Intellectual Property

This chapter will explain what intellectual property law is, the areas of law covered, the rationale for intellectual property law and the international context.

What is Intellectual Property?

Intellectual Property (IP) is a unique kind of legal ‘property’. Unlike physical property, which can be seen and touched, intellectual property is also known as ‘intangible property’ because it does not always take physical form. Intellectual property rights aim to protect the intellectual and creative efforts of individuals and organisations.

IP plays an important role in fostering and rewarding originality, innovation and creativity in our economy. The legal system for protecting IP helps to identify and acknowledge ownership rights in creations. These ownership rights add economic value to creations and help to provide competitive advantage in the market. For example, these rights allow an IP owner to charge a fee to someone who wants to use or copy their creation or invention.

IP does not protect ideas

It is important to note that intellectual property does not protect an idea or a concept.

It is only when an idea is developed into a form of expression or into an invention that it becomes intellectual property. The law protects the way in which the idea is expressed, or a tangible invention that embodies the idea, rather than the idea itself.

For example: Copyright law will protect the way that a book, such as a Harry Potter novel, is written, but will not protect the idea behind the story, such as the idea of a school for teenage wizards and witches.

Songs, logos, theatrical plays and scientific inventions are all examples of things intellectual property can protect.

Other things that do not qualify for intellectual property protection include

- facts
- pure data
- mathematical equations.

Why not?

Because these things should be free for all people to use. Also, facts exist independently of any one person – they have not been ‘created’ or ‘invented’ by anyone.

Types of IP

Video overview by Nic Suzor on the different types of Intellectual Property

The term ‘intellectual property right’ is a broad term and branches out into different types of rights. Each of these IP rights protect different forms of intellectual property. The most common types of IP are: copyright, trade marks, industrial designs, and patent law.

In this video, Rob talks about the rights he considered to protect the IP in a safety helmet he designed. Watch the video for an overview of the different types of IP as applied to a business context

Copyright

The term ‘copyright’ refers to the legal rights vested in the creators and publishers of an artistic, dramatic, musical or literary work, as well as sound recordings, films and broadcasts. From the moment a work comes into existence, copyright grants its creator an automatic right to copy, publish, perform and distribute the work.
The main objective of copyright is to promote creativity and provide incentives to people who invest their time and talent in creating works of cultural and economic significance.

Copyright law does not make any judgments about the aesthetic or cultural quality of a work. Thus, a ‘literary work’ simply refers to something in writing – a book, for example, does not need to qualify as high literature to receive copyright protection. An instruction manual for a new computer may receive protection as a literary work.

Over time, copyright has evolved in its scope and application. It also covers computer programs, radio and TV broadcasts, cinematographic films (i.e. movies) and sound recordings.

Patents

A patent is a legal right granted to protect new and useful inventions. An invention might be a product (such as a machine), a process (such as a method for extracting one chemical from another), or a new technical solution to an existing problem. Some software inventions may also be protected by a patent.

The objective of patent law is to recognise inventors for their inventions and encourage development of new technologies in every field.

Trademarks

A ‘trademark’, as the name suggests, is a unique mark with which a trade or business can identify itself in the market. We commonly think of these marks as ‘logos’. A trademark helps a business to distinguish its goods and/or services from competitors in a marketplace. A trademark may consist of a letter, number, word, phrase, sound, smell, shape, logo, picture, movement, aspect of packaging, or a combination of these. While it is possible to acquire a trademark over something like a colour or smell, it is extremely rare.

Once registered, a trademark gives the owner a legal right to:

- use the trademark in relation to its goods or services, permit others to use the mark, or sell the mark
- stop competitors from using a same or confusingly similar trademark.

The meaning and function of a ‘trademark’ is different from that of a ‘company name’, ‘business name’ and a ‘domain name’ or URL. A business may choose to adopt the same trademark as its company name, however, registering a business name or a domain name would not give the owner the right to stop others from adopting a same or similar company or business name.

Designs

A design right aims to protect the outward appearance or aesthetic appeal of a product. It covers shapes, ornamentation, configuration and pattern. Designs differ from patents in that they cover how a product looks, rather than how it works.

To qualify for registration, a design must have a commercial application or use, and must be new and distinctive compared to what has gone before. Once registered, the law gives the owner the sole right to commercially use, license or sell the design. Design registration lasts for 5 years, with the opportunity to renew registration up to 10 years.

For designers to get protection, a design must be registered before any manufacturing starts. One-off artistic designs for things like fashion, art, and furniture will often be automatically covered by copyright law and do not require design registration unless they are mass produced

(50 or more items). Once a design is mass-produced or once the owner registers for design protection, copyright in the artist design is lost.

Sources of IP law

In addition to the four main categories of IP discussed above, there are also a few other rules and sui generis laws for particular types of subject matter. These include rights such as plant breeders rights, circuit designs, and geographical indicators. The table below sets out the key Australian sources for intellectual property law.

Intellectual Property Area	Rights	Source of Law in Australia
Copyright	to copy and distribute creative works and productions	*Copyright Act 1968* (Cth)
Trade marks	to use words and symbols to identify your goods and services in trade	*Trade Marks Act 1995* (Cth)
Patents	to commercially exploit an invention	*Patent Act 1990* (Cth)
Design	to apply a shape or pattern to a creation	*Design Act 2003* (Cth)
Plant Breeders' Rights	to commercialise and control new plant materials	*Plant Breeder's Rights Act 1994* (Cth)
Circuit designs	to copy, exploit, and create circuitry in accordance with the layout	*Circuit Layouts Act 1989* (Cth)
Geographical Indicators		
Trade secrets		Common law (Breach of Confidence)

Why do we have Intellectual Property?

Intellectual property law, and especially copyright and patent law, is thought to have a predominantly instrumental function. It provides creators of new work (whether it is inventors of patents or authors and publishers alike), with certain incentives in order to encourage the creation of new expression. It does this by granting creators control over certain uses of their creations for specified periods of time, limiting who may exploit, or make use of the creations. Each specific area of intellectual property law confers exclusive rights to the creator or owner. The exclusive rights vary between the types of intellectual property law, however, the concept of exclusive use of the creations remains the same.

There are several views concerning the purpose of intellectual property law. One view is that intellectual property encourages creativity and innovation by allowing creators to profit from their work. This view is most notable in the area of copyright and is reflected in the wording of many copyright laws. For example, the “Copyright Clause” of the *United States Constitution* states that Congress may grant authors copyright protection for their works for a limited time in order to “promote the progress of science and useful arts”. [1)] Similarly, the stated purpose of the *Statute of Anne*, the first copyright statute in England, was to “encourage learning”. [2)] Another view is that intellectual property law ensures that creators are paid fairly for their effort. A third view suggests that a creative work is an expression of the personality of its creator and should be protected from being used without the creator's permission.

Although intellectual property law grants creators many exclusive rights, it also limits these rights in many important ways. Most of these limitations are quite specific, but a few are broad. These limits are important in order to ensure that law is balanced - that the monopoly granted by intellectual property's exclusive rights does not place excessive limitations on the public's freedom to learn, express themselves and build upon existing cultural works.

The Economic (Utilitarian) Justification

The most common justifications for intellectual property is the utilitarian justification. According to the US Constitution, intellectual property law exists, “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries“. [3)]

Video overview of The Utilitarian Justification for Intellectual Property.

The utilitarian perspective of intellectual property stems from the idea that expression is a “public good” and that creators therefore cannot prevent others from using their expression without legal intervention. This idea is supported by the unique “non-rival” nature of expression as an intangible good - that is - one person's use does not diminish or interfere with the use by another. However, the inability to exclude others may present problems for creators and the production of public goods. If a creator of a public good is unable to exclude others from using it, she or he will be unlikely to recoup the time and/or monetary investment in creating it. This may cause creators, or those funding creation such as publishers, record labels or movie studios, to stop spending resources on cultural production because they cannot profit from it. Intellectual property seeks to prevent this from happening by making expression excludable in order to allow producers to commercialise their creations and recover their costs. Intellectual property law does this by providing a set of “exclusive rights” to creators and inventors.

In order to make the production of public goods more profitable, intellectual property makes access more expensive. The law must then strike a delicate balance between encouraging the creation and dissemination of works by providing incentives and recognising the public interest in greater access to expression. The law must also recognise the needs of future authors who often build upon the past expression. Because of this, the stronger intellectual property protection is, the more expensive future production becomes.

Video overview of The IP Balance.

The Natural Rights Justification

While the natural rights view is not explicitly recognised and often even disclaimed, intellectual property is also supported by a justification that authors *deserve* property rights in their expression. This view is based in a Lockean argument that authors deserve property in the fruits of their labour. However, this view has been challenged strongly by prominent figures such as Thomas Jefferson:

"If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature".

Or Benjamin Kaplan:

"[I]f man has any 'natural' rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown".

The natural rights justification is still contested today.

International Context and International Agreements

Intellectual property was not always central to international trade. As technology and trade developed so did the need to incorporate intellectual property into trade agreements and ensure there were international standards for dealing with intellectual property related matters when engaging in international trade. Below is a short timeline of the history of international intellectual property regulation. The timeline outlines when intellectual property and trade became intertwined.

Year	Agreement	Effect
1873	The impetus for international protection	Creators refused to attend the International Exhibition of Inventions in Vienna, Austria, because they were afraid their ideas would be stolen and exploited in other countries.
1883	The Paris Convention	*The Paris Convention for the Protection of Intellectual Property* is the first major international treaty designed to help the people of one country obtain intellectual property protection in another country. It applies mainly to patents, but also covers trade marks and industrial designs. It was first agreed on in 20 March 1883. It has now been incorporated into the *TRIPS* Agreement.
1886	The Berne Convention	*The Berne Convention for the Protection of Literary and Artistic Works* aims to give creators the right to control and receive payment for their creative works on an international level. This agreement applies to copyright.
1893	BIRPI is established	The *United International Bureaux for the Protection of Intellectual Property* (*BIRPI*) was an international organisation set up in 1893 to administer the *Berne Convention for the Protection of Literary and Artistic Works* and the *Paris Convention for the Protection of Industrial Property*. The BIRPI is the predecessor of the *World Intellectual Property Organisation* (*WIPO*).
1947 - 1949	*General Agreement on Tariffs and Trade* (*GATT*)	In 1947, the *General Agreement on Tariffs and Trade* (*GATT*) is signed, following decades of economic instability with the Great Depression and World War II. The Agreement was negotiated during the United Nations Conference on Trade and Employment and was the outcome of the failure of negotiating governments to create the *International Trade Organisation* (*ITO*). The idea behind *GATT* was to set up basic trade rules and reduce tariffs between countries.
1970; 1974	*The World Intellectual Property Organisation* (*WIPO*)	The Convention establishing the *World Intellectual Property Organisation* (*WIPO*) comes into force (on 26 April 1970) and *BIRPI* is thus transformed to become *WIPO*. The newly established *WIPO* is a member state-led, intergovernmental organisation, with its headquarters in Geneva, Switzerland. *WIPO* has two main purposes: (1) to provide legal and technical assistance, particularly to developing countries, to develop IP regimes; and (2) to administer the multilateral IP agreements.
1986 - 1994	The Uruguay Round	The *Uruguay Round* was a round of multilateral trade negotiations conducted within the framework of the GATT. The round began in 1986, but negotiations stalled in 1991 when the US refused to agree to anything unless intellectual property was included within the negotiations. The *Uruguay Round* concluded in 1994 with the signing of the *Marrakesh Agreement*, which established the *WTO*. Members also agreed to the Dispute Settlement Understanding (DSU), which is annexed to the Marrakesh Agreement.

Year	Agreement	Effect
1995	*World Trade Organisation* (*WTO*)	The *WTO* comes into effect on 1 January 1995, replacing the *GATT* system. This is widely regarded as the most profound institutional reform of the world trading system since the *GATT* was established.
1995	*TRIPS*	The *Agreement on Trade-Related Aspects of Intellectual Property Rights* (*TRIPS*) is an international legal agreement between all the member nations of the *WTO*. It sets down minimum standards for the protection of intellectual property.
2001	The Doha Declaration	The Doha Development Round commences in 2001. The Doha Declaration on the *TRIPS* Agreement and Public Health is adopted by the WTO Ministerial Conference on 14 November 2001.
2004/2005	*Australia-US Free Trade Agreement* (*AUSFTA*)	On 18 May 2004, the *Australia – United States Free Trade Agreement* (*AUSFTA*) is signed. This is a preferential trade agreement between Australia and the United States modelled on the *North American Free Trade Agreement* (*NAFTA*). The Agreement came into effect on 1 January 2005.
2013 and beyond	The Trans-Pacific Partnership Agreement	The *Trans-Pacific Partnership Agreement* (*TPP*) was negotiated between twelve countries that border the Pacific Ocean: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. These countries represent approximately 40% of the world's economic output, making the *TPP* the largest trade agreement in history. However, before negotiations were finalised, on 23 January 2017, when US President Donald Trump took office, he signed a presidential memorandum to withdraw the United States from *TPP* negotiations. While other *TPP* countries, including Australia, have stated that they plan to continue *TPP* negotiations, the future of the agreement looks uncertain without US involvement.

Intellectual property law has been relatively harmonised worldwide. There are a number of agreements regarding intellectual property law in general, and more specific agreements that apply to certain areas of intellectual property. The World Intellectual Property Organisation (WIPO) is an international agency, established in 1967 which administers treaties such as the *Paris Convention on the Protection of Industrial Property 1883* and the *Berne Convention for the Protection of Literary and Artistic Works 1886*, *WIPO Performances and Phonograms Treaty* and *WIPO Copyright Treaty*. It is WIPO's obligation to administer intellectual property matters and there are approximately 22 intellectual property treaties under its administration. Whilst WIPO administers the treaties, it does not have the requisite power to ensure compliance of the treaties. As a result of this, the *World Trade Organisation Agreement* was enacted, specifically the part that deals with intellectual property, the *Trade Related Aspects of Intellectual Property Rights 1994* (*TRIPS*).

TRIPS is an international agreement which identifies 5 minimum standards for intellectual property that all members of the WTO must adhere to. Further, each WTO member is required by *TRIPS* to enforce these standards.

There are also a number of bilateral intellectual property law agreements. These agreements are often entered into to ensure that the countries who deal in trade together have similar or compatible intellectual property laws. Some of the most notable trade agreements are:

- *Australia-United States Free Trade Agreement* (*AUSFTA*)
- *Korea-Australia Free Trade Agreement* (*KAFTA*)
- *Japan-Australia Economic Partnership Agreement* (*JAEPA*)
- *China-Australia Free Trade Agreement* (*CHAFTA*)
- *Anti-Counterfeiting Trade Agreement* (*ACTA*)
- *Trans-Pacific Partnership* (*TPP*)
- *Trans-Atlantic Trade and Investment Partnership* (*TTIP*)

- *Trade in Services Agreement* (*TISA*)

One controversial aspect of trade agreements is the use of investor-state dispute settlement (ISDS) clauses. In the case of many treaties, if there is a dispute between the parties, *TRIPS* can be used to enforce the standards of trade. However, in instances where an ISDS is included in contracts, individual investors can bring arbitration proceeding against a nation. This process can be very costly and may involve significant delay.