INTRODUCTION

MARK DAVISON*, DAVID LINDSAY** AND ANN MONOTTI***

This special issue of the *Monash University Law Review* is dedicated to an exploration of contemporary issues in the volatile area of intellectual property law. The influences of globalisation of trade and the constant development of new technologies impose pressures on the law to keep pace with those changes in ways that enhance innovation. These influences and developments are far reaching and affect almost every facet of intellectual property law. The result is that our laws are in an almost perpetual state of review as policy makers grapple with the challenges to keep laws current.

Monash Law School has considerable academic strength and reputation in both research and teaching of intellectual property law so the guest editors warmly welcomed the invitation from the Review to devote a special issue to this area of law. Our principal aim was to publish high quality articles that grapple with complex and significant problems across three areas in which there is constant change: copyright, patents and trade marks law. We invited contributions from internationally renowned national and international scholars with whom we collaborate or attract to teach in our Master of Laws postgraduate program. All our authors responded enthusiastically to the invitation and readily accepted our invitations to contribute articles to this special issue.

Copyright law is the area of intellectual property law that has been most affected by technological change, as digital technologies and the internet have increased access and threatened traditional legal protection. This has resulted in considerable changes to the law, including both statute and case law.

The article by Bernt Hugenholtz is a critical analysis of the legislative attempts at copyright harmonisation in the European Union ('EU'). Hugenholtz maintains that the harmonisation process has not sufficiently taken account of the territorial nature of copyright. In particular, the article points to the mismatch between the law that applies to the distribution of physical goods, where rights are exhausted on the first sale in the EU, and the law that applies to copyright-related online services, where clearances are required for distributions in each of the EU Member States. Hugenholtz concludes that, if the EU is serious about a single market for content services, harmonisation should be replaced by a project for developing a uniform European Copyright Law.

David Lindsay's article focuses on the landmark Australian High Court decision in *IceTV Pty Ltd v Nine Network Australia Pty Ltd,*[1] and on the implications of that decision for the protection of factual works, including databases. Lindsay argues

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1 (2009) 239 CLR 458 ('*IceTV*').

that the reasoning in the two judgments delivered by the Court has created much uncertainty, and given rise to significant new legal questions regarding authorship of informational works under Australian law. The article concludes that these uncertainties can only be satisfactorily addressed by frankly acknowledging some of the problems with the judgments in *IceTV*.

The article by Leanne Wiseman, which details the international and national legal responses to the emergence of photocopiers in the 1960s and 1970s, highlights the importance of a nuanced appreciation of history to understanding current controversies concerning digital reproduction. As Wiseman explains, important lessons can be learned from the failed attempt to develop an international photocopying treaty. Significantly, despite this failure, discussions at the international level assisted in the development of practical solutions at the national level, suggesting that 'success' cannot always be measured by the enactment of a binding legal instrument.

The second group of articles investigates contentious and contemporary issues that have arisen from the grant of patent monopoly powers to encourage and reward investment in invention and innovation.

David Brennan's article critiques reforms in the *Intellectual Property (Raising the Bar) Act 2012* (Cth) that are being introduced to deal with problems associated with unduly broad claims in a patent specification. He identifies weaknesses in the UK law on which these reforms have been based and proposes an alternative solution that focuses attention on product claim scope.

Ann Monotti reviews the impact for universities and academic employee inventors of the Full Federal Court decision in *University of Western Australia v Gray* regarding ownership of those inventions.[2] She argues that a 'disconnect' between law and policy provides a reason for government to review its policies and if necessary to develop and codify the principles in the *Patents Act 1990* (Cth) to ensure consistency in approach and outcome.

Finally, Sam Murumba explores the challenges that face intellectual property and human rights laws as their penetration of each other's domains results in rapid proliferation of intersections and entanglements. His article argues that resolution can be found both in the nature of legality and in recent scholarly insights into commensurability, comparability, and balancing of norms and interests in law.

The third group of articles relates to trade marks and related issues.

Robert Burrell and Michael Handler provide an insightful examination of the presumption of registrability of trade marks that is contained within the Australian legislation and the subject of recent amendment of the provisions relating to distinctiveness of trade marks. Their examination gives considerable pause for thought about what the purpose and actual practical effect of the presumption may be.

2 (2009) 179 FCR 346.

Mark Davison's piece on parallel importing of trade marked products traces the history of the treatment of this issue and considers the legislative objectives. He then assesses the extent to which those objectives have been achieved and suggests some ways to increase the prospect of achieving them.

Jacqueline Lipton and Mary Wong provide an interesting analysis of some of the freedom of expression implications of ICANN's new gTLD processes. Their commentary on this issue discusses the issue of balancing trade mark interests with other speech interests in the new context of a regulatory environment where trade mark owners can create their own gTLD or potentially block creation of a gTLD.

Geoffrey Scott and Karen Maull provide a comparative analysis of the legal protection of the use of fictional characters and products under passing off and similar legal principles such as unfair competition law. Their discussion ranges across a large range of jurisdictions and provides considerable insight into the competing matters taken into account by courts.