

# **Creativity and Innovation: A Legal Perspective**

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## 1. INTRODUCTION

Put in simple terms, law is a social science discipline concerned with the body of rules, whether proceeding from formal enactment or from custom, that a particular state or community recognizes as binding on its members or subjects. Typically, these rules regulate the conduct of the state with respect to its members, and the conduct of the members with respect to the state and to each other. The conduct so regulated is extremely wide, and includes the production and exploitation of the products of the human intellect (“intellectual property”). Specific rules regulating the production and exploitation of intellectual property have been part of the laws of nations for many centuries. Rules governing exclusive entitlements to inventions, for example, have existed in England since the mid-16th Century (Dent 2006). By the end of the 20th Century, almost every nation state in the world had detailed intellectual property laws of common form and content, governed by international treaties.

Given the long tradition of laws regulating the creation and exploitation of intellectual property, it might be assumed that the topic of creativity and innovation would be a well-developed field within the discipline of law. In fact, this is not the case. The law’s perspective on creativity and innovation has not been the subject of any substantial consideration to date. This is demonstrated by the fact that a search undertaken in early 2010 of the LexisNexis database, the world’s largest database of legal materials, identified only four works with the words “creativity” and “innovation” in the title; and of these, only two (Sawyer 2008; Long

2009) deal in any meaningful way with the topic of the law's perspective on the concepts of creativity and innovation.

This chapter will begin to fill the lacuna of the law's perspective on creativity and innovation, in the following manner. It will start by ascertaining what meaning the law gives to the concepts of creativity and innovation and what relevance those concepts have to law. It will then explain the fundamental tenets of the only area of law – intellectual property law – in which those concepts have relevance. Next, the precise role of those concepts will be identified and elaborated. The chapter will conclude with an elucidation of the policy implications of the law's perspective on creativity and innovation.

## **2. CREATIVITY AND INNOVATION IN LAW**

### **2.1 Legal Meaning of Creativity and Innovation**

Neither creativity nor innovation is a concept with a specific legal meaning. Authoritative legal dictionaries, for example, although listing the general legal definitions of many thousands of words and phrases provide no entries for “creativity” and “innovation” (Martin and Law 2006; Hay 2007). It is a fundamental principle of law that, where a word does not have a specific legal meaning, the meaning to be given to it in law is its ‘ordinary’ meaning. The ordinary meaning of a word is evidenced by the definition of it in a dictionary. Thus, from the law's perspective, the meaning to be given to the terms “creativity” and “innovation” are the dictionary meanings of those terms.

According to the *Oxford English Dictionary*, “creativity” means “creative power or faculty; ability to create”, and “create” means “to bring into being, cause to exist”. It follows that *creativity* is the ability to bring something into being. The same dictionary defines “innovation” to mean “the action of innovating; the introduction of novelties”, and “innovate” to mean “to bring in (something new) for the first time”. Accordingly, *innovation* means the act of bringing into being something that is new. Similar definitions are found in major dictionaries in the United States of America (*Merriam-Webster Dictionary*), Canada (*Canadian Oxford Dictionary*) and Australia (*Macquarie Dictionary*). Thus, the ordinary – and, hence, the legal – meanings of these two concepts are the same across the major common law legal systems of the world.

## **2.2 Relationship in Law Between Creativity and Innovation**

It will be appreciated that there is a subtle, but very important, difference between creativity and innovation as those concepts are understood in law. This is best identified by considering the products resulting from the exercise of creativity (the ability to bring something into being) and of innovation (the act of bringing into being something that is new). The product resulting from innovation – that is, *an* innovation – is, by definition, something brought into being that has not previously existed. In contrast, the product resulting from creativity – that is, a creation – is merely something brought into being, whether or not that something has previously existed. It follows that innovation is a subset of creation; that is, all innovations are creations, but not all creations are innovations. The proof of this relationship is as follows. All innovations are creations, because all innovations have been brought into being. Not all

creations are innovations, however, because not all creations are things *newly* brought into being. Some thing may be brought into being that already existed. Such a thing, although not new (and hence not an innovation), is nevertheless a creation.

Having considered the relationship between creation and innovation, it is possible to identify the relationship between creativity and innovation. Innovation (in the sense of the *action of producing* an innovation) is a subset of the actions that result from creativity. This is because all acts of innovation result from creativity, but not all actions resulting from creativity are innovations.

### **2.3 Relevance of Creativity and Innovation to Law**

Neither creativity nor innovation is a concept that has any particular relevance within the general discipline of law. This reflects the fact that there is no recognised field of law that directly regulates creativity or innovation; that is to say, there is no law *of* creativity or law *of* innovation. Furthermore, with only one exception, there is no appearance of these concepts within the major fields law. The only field of law in which creativity and innovation have any relevance is the field regulating the production and exploitation of intellectual property. The nature of this field of law, and the key characteristics of the legal regimes within this field, are discussed below.

### **3. LAW AND INTELLECTUAL PROPERTY**

#### **3.1 Nature of Intellectual Property**

An informal way of defining “intellectual property” is “all those things which emanate from the exercise of the human brain, such as ideas, inventions, poems, designs, microcomputers and Mickey Mouse” (Phillips and Firth 1995, 3). This classification is consistent with the notion that the subject matters constituting intellectual property are primarily derived from human intellectual activity – hence the word ‘intellectual’ in the title.

Intellectual property is one type of intangible subject matter recognised by the law (another such type is a monetary debt owed by one person to another). An intangible subject matter is one that, although existing, can’t be touched. Intangible subject matters may be contrasted with tangible subject matters. Tangible subject matters are ones that can be touched, such as chattels and land – that is, “physical property”.

Intellectual property is similar to physical property, in that exclusive rights may be granted in relation to it, and those rights may be transferred by the owner to other persons. However, intellectual property is dissimilar to physical property in three important ways: intellectual property is non-rivalrous, inexhaustible, and non-excludable. Rivalrousness is a characteristic of physical property, whereby only one person can use the item at any one time. For example, the use of a car by one driver prevents that car from being driven by anyone else concurrently. Intellectual property, by contrast, is non-rivalrous; due to its intangible nature, it can be used

by any number of people at the same time (Arrow 1962). Consider, for example, a song: many people can sing that song simultaneously.

Exhaustibility is a characteristic of physical property, whereby its quality or condition deteriorates over time. A car, for example, wears out through exposure to the elements or use. Intellectual property, however, does not wear out. A song sung one million times is no different from a song sung only once. Excludability is a characteristic of physical property, whereby the item may be kept in the sole possession of one person. A car, for example, may be locked, and it may be placed inside a locked garage, thereby making it very difficult for it to be driven by someone other than the owner. In contrast, intellectual property is non-excludable; because of its intangible nature, it is very difficult to lock up. A song, once published or performed, is “out there” for the world to sing, even if the song’s owner does not consent to that.

Because of these characteristics, it is very difficult for someone to “possess” a piece of intellectual property as effectively as it is for someone to possess a piece of physical property. The provision of exclusive rights to intellectual property is the means by which the law makes possession of intellectual property possible. The nature of the laws that implement these intellectual property rights is explained next.

### **3.2 Characteristics of Intellectual Property Laws**

In general terms, the laws that implement intellectual property rights have the following two key characteristics: the rights apply only in relation to a sub-set of all products of human intellectual activity; and the rights apply only in relation to a sub-set of all activities that might be undertaken in respect of those subject matters (Christie 2006, 27-8). The first characteristic means that not all products of the human intellect are made “possessable” by the law. The second characteristic means that, even where a product of the human intellect is made “possessable” by the law, the entitlements of possession are not unlimited.

Not every product of the human intellect is protected by intellectual property rights. Rather, it is only those intellectual products for which there is a specific legal regime of protection, and which satisfy the ingenuity threshold requirement of the regime, that obtain the benefit of the grant of exclusive rights. In essence, only those intellectual products that are either aesthetic or functional in nature are protected. Typical examples of *aesthetic* intellectual products protected by intellectual property law are works of art, literature and music, and the shapes of consumer goods. Copyright law is the regime by which protection is provided to works of art, literature and music, while design law protects the shapes of consumer goods. Typical examples of *functional* intellectual products protected by intellectual property law are scientific and technological inventions, and trademarks (words or symbols that act indicators of origin of product). Patent law and trademark law, respectively, are the regimes by which protection is provided to inventions and trademarks.



The various intellectual property rights regimes specify the subject matters to which they are applicable. For example, the exclusive rights of copyright may only be granted in respect of “works” or “neighbouring” subject matters, and the exclusive rights of a patent may be granted in respect of “inventions”. The categories of subject matters protected by the different regimes are not mutually exclusive. For example, a computer program may be both a “work” (in particular, a literary work) for copyright purposes and an “invention” for the purposes of patent law (Christie 1994; Long 2009). In this case, the computer program will be protected under both copyright law and patent law, so long as it satisfies the ingenuity threshold requirements of each regime.

Each intellectual property regime has an ingenuity threshold that must be met before protection is afforded to any particular piece of intellectual property. Thus, only an “original” work may be protected by copyright. Likewise, only a “new” and “non-obvious” invention may be granted protection by a patent. The particular relevance of the concepts of creativity and innovation to ingenuity thresholds in intellectual property law is considered in detail in section 4, below.

All of the intellectual property regimes provide the owner of a protected intellectual property subject matter with a number of exclusive rights. The regimes specify the uses of the subject matter that are the exclusive entitlement of the subject matter owner. For example, the exclusive rights of the owner of copyright in a work are the rights to reproduce, publish, perform, communicate and adapt the work. For a patented invention, the exclusive rights of

the patentee are to 'exploit' the invention, which includes making, using and selling the invention.

If a person exercises a specific exclusive right without the intellectual property owner's consent, that person is liable for infringement. Outside of the specific exclusive rights provided by each intellectual property regime, however, non-rights holders may use and interact with the subject matter as they like. Thus, it is not an infringement of copyright to *read* a literary work, because reading does not constitute an exercise of any of the copyright owner's exclusive rights (reproduction, publication, performance, communication, adaptation).

### **3.3 Rationales for Intellectual Property Rights**

There are various rationales for the law's provision of exclusive rights to intellectual property. These rationales have one of two bases: morality and economics. Each of these bases emphasises a different set of values.

Morality-based rationales for intellectual property rights focus on the fact that creation and innovation involve an individual's labour, intellect and personality. These rationales seek to provide individual justice in dealings between members of society. Economics-based rationales, in contrast, focus on encouraging people to invest in creative and innovative activities. These rationales seek to reward creators and innovators for making available to the

public the fruits of their investment. The various rationales have their own strengths as well as limitations, and there is a degree of overlap between each of them.

According to a *morality*-based rationale for intellectual property rights, individuals have a natural right of entitlement to the products of their intellectual activity and labour. Intellectual property rights prevent third parties from becoming unjustly enriched by ‘reaping what they have not sown’. This is based on a corrective, distributive justice between the owner and the taker. A taker who ‘reaps’ a reward that naturally belongs to a creator or an innovator should be punished.

Moral legal theorists are divided as to what it is, exactly, that entitles creators and innovators to protection over their creative and innovative products. Some believe that a moral justification for intellectual property rights is borne out of Locke’s idea that creators and innovators have natural rights over the products of their labour (Hughes 1988; Child 1990). Others are influenced by Hegel’s notion that works should be protected because they are an expression of a creator’s or an innovator’s personality (Radin 1982).

Both theoretical approaches have their weaknesses. For example, Locke’s theory that a person acquires property rights where he or she exerts labour in relation to resources applies where those resources are either held in common by the State or are unowned. But, arguably, not all creators or innovators mix their labour with resources that are held in common or unowned (Himma 2006). In response to Hegel’s theory that a person enjoys a right to the expression of

their personality, it has been noted that certain types of the intellectual property protected by the law – for example, inventions, integrated circuits and plant varieties – do not appear to reflect the personality of their producer (Hughes 1988).

The *economic* argument for intellectual property rights presupposes that without such rights, the production and dissemination of cultural, scientific and technological objects would not occur at an optimal level (Bently and Sherman 2004, 35). An economic rationale for intellectual property rights is that if creators and innovators are not given adequate legal protection over their works, many creations and innovations would not occur and society would suffer as a result. For example, an author would not invest the time and effort in writing a book to be enjoyed by millions of readers if, once the book was published, readers were free to copy it and other authors were free to plagiarise it. Likewise, a drug company would not spend many years and large sums of money developing a vaccine that saves millions of lives if, once the drug was released, its competitors were free to produce copies of it.

To provide the incentive for investment in creation and innovation, the law provides creators and innovators with exclusive rights to produce and sell the products of their creativity and innovation. This exclusivity, in turn, permits the intellectual property rights owner to commercially exploit the intellectual property for profit. Thus, the reward of exclusivity to the intellectual property resulting from creativity or innovation provides the incentive for its production.

The economic theories, too, have weaknesses. Some commentators question whether an incentive is necessary for the production and dissemination of at least some types of *aesthetic* intellectual works. If people enjoy the creative process and consistently express themselves in an artistic way, wouldn't they continue to do so irrespective of intellectual property protection? Also, some question whether there is enough done on the part of the creator to justify the reward of intellectual property protection. As has been noted, "...copyright's threshold is set at a very low level and thus catches works which are created for their own sake, such as letters, holiday photographs, and amateur paintings" (Bently and Sherman 2004, 34). Furthermore, rewarding a creator or innovator with a monopoly to control the exploitation of his or her creation or innovation creates problems, as a monopolist tends to discourage use of a good by overpricing it. The dilemma is that without the legal monopoly provided by intellectual property rights not enough creations or innovations will be produced for society's benefit, but with the legal monopoly provided by intellectual property rights too little of those creations or innovations will be used by society (Cooter and Ulen 1998, 135).

## **4. CREATIVITY AND INNOVATION IN INTELLECTUAL PROPERTY LAW**

### **4.1 Threshold Requirements of Ingenuity**

As was noted above in the discussion of the nature of intellectual property rights, the laws that create intellectual property rights specify a threshold of ingenuity that must be satisfied for the subject matter to gain the benefit of the rights. Unless a particular piece of intellectual property satisfies the relevant threshold, the law does not provide any protection in respect of

it. It is in relation to these ingenuity thresholds that the concepts of creativity and innovation have relevance in law.

Copyright law is primarily directed to the protection of aesthetic subject matters, such as works of art, literature and music. For such a subject matter to be protected under copyright, it must be “original”. The concept of originality in copyright law varies around the world (Ricketson and Creswell 2002, 7.35). Some countries, notably Continental European countries, understand originality to mean that aspect of the work that reflects the ‘personality’ of the author. Other countries, notably common law countries (United States, United Kingdom, Canada, Australia) adopt a somewhat lower standard. In these other countries, a reflection of authorial personality is not required; it will usually be sufficient that the subject matter resulted from some “independent effort” by the author – that is, the subject matter was not merely a copy of another work (Christie 2006, 30). Thus, the lowest common denominator of originality in copyright law is that the work be “not copied”.

Patent law, by contrast, is primarily directed to the protection of functional subject matters, such as products and processes. For a product or process to be protected by a patent, it must be both “new” (novel) and “inventive” (non-obvious). The characteristics of novelty and non-obviousness are judged against the ‘prior art’. The ‘prior art’ is all information publicly available anywhere in the world, at the time of filing the application for a patent. It therefore includes all the information made public by the publication of documents and by the doing of acts in public (Christie 2006, 33).

The prior art invalidates an invention for lack of novelty if it discloses all features of the invention in clear and unmistakable terms. Prior art invalidates an invention for obviousness if it discloses features from which the invention differs only in obvious ways. Put the other way around, an invention is “new” if it does not exist in the prior art, and an invention is “inventive” if it is not obvious to a person skilled in the relevant prior art.

#### **4.2 Scopes of Legal Protection**

The scope of protection provided by an intellectual property regime is essentially a factor of the exclusive rights provided to an owner of a protected work and whether or not a causal connection is required for infringement. As noted earlier, both copyright law and patent law provide specific exclusive rights. There is a significant difference in the scopes of protection provided by copyright law, on the one hand, and by patent law, on the other hand. This significant difference is in respect of the *causal connection* requirement for infringement. This difference is explained below.

In copyright law, an exercise of the exclusive rights of the copyright owner will only be an infringement if there is a causal connection between the work protected by the exclusive rights of copyright and the subject matter in respect of which those rights have been exercised. Put more simply, there will only be an infringement if there is a causal connection between the protected work and the thing that allegedly infringes copyright in that work. In respect of the fundamental exclusive right of copyright, the reproduction right, the necessary

causal connection for infringement is that the protected work has been *copied*. Thus, there is no infringement if the protected work is reproduced other than by copying – such as by chance or by derivation from a common source. That is to say, independent reproduction of the work is a defence to a claim of copyright infringement.

This characteristic of copyright law is illustrated by the following example. Person A and person B (whether contemporaneously or not) both make a sketch drawing of the Eiffel Tower. Both produce their drawing by looking at the Tower from the same location and, as a result, the two drawings are almost identical looking. Both drawings are protected by copyright, because they are both original – neither is copied from the other. Person C observes person A's drawing, and makes a copy of it. Person C's drawing looks almost identical to both person A's drawing and person B's drawing. Although person C's drawing is almost identical to the drawings of both person A and person B, person C has infringed only person A's copyright. Person C has not infringed person B's copyright, because person C did not copy from person B's work.

It will be understood from this example that the essence of the exclusive right provided by copyright law is a right to *prevent copying*. Put simply, copyright provides a “copying” right – hence the name copyright. Under a copying right, *independent reproduction* of the protected subject matter is *not* prohibited.



The position under patent law is quite different. The exclusive rights of a patentee are infringed by one who makes the patented invention without the patentee's consent, whether or not there is a causal connection between the invention so made and the patented invention. Thus, infringement of a patent can occur *without copying*. That is to say, independent production of a patented invention is not a defence to infringement (Dufty and Lahore 2006).

This characteristic of patent law is illustrated by the following example. Person A invents a golf club with a double-sided head, such that it can be used by both left-handed and right-handed players. The invention is granted a patent because it is both new and inventive (not obvious) compared with the prior art (pre-existing golf clubs, which have only a single-sided head). Person B sees person A's invention and copies it. Unaware of both person A's invention and person B's copy of the invention, person C develops a similar golf club with a double-sided head. Both person B and person C infringe person A's patent, even though only person B copied person A's invention.

It will be appreciated from this example that the essence of the exclusive right provided by patent law is a right to be the *sole supplier* of the patented invention. Put simply, patent law provides a "monopoly" right. Under a monopoly right, any reproduction – *including independent reproduction* – of the protected subject matter is prohibited.

### **4.3 Role of Creativity and Innovation**

Having considered and compared the threshold requirements in, and the scopes of protection provided by, copyright law and patent law, it is now possible to observe the relevance of the concepts of creativity and innovation in law. The relevance of these concepts is in the role they play as ingenuity threshold requirements in intellectual property law, particularly copyright and patent law.

The ingenuity threshold requirements in copyright law and in patent law operate to determine whether or not a particular subject matter may be granted protection under that regime. Given that the scopes of protection provided by copyright law and by patent law are fundamentally different, it follows that the ingenuity threshold requirements operate to determine which scope of protection is provided to an intellectual property subject matter that is one to which both regimes apply – such as a computer program. Where the subject matter is merely “original”, only the copying right protection under copyright is available. Where, however, the subject matter is “new” and “inventive”, the monopoly right protection under patent law is also available.

The threshold requirement of “originality” in copyright law equates very closely to the concept of “creativity” in law. As noted previously, the ordinary, and thus the legal, meaning of “creativity” is the ability to bring something into being, whether or not the thing brought into being already exists. That is to say, creativity requires independent effort, but creativity does not require novelty or inventiveness. This is, in essence, the same as the ingenuity

requirement of originality in copyright law, which requires that the work be independently created (i.e. “not copied”).

In contrast, the ingenuity threshold requirement of “novelty” and “inventiveness” in patent law equates very closely to the concept of “innovation” in law. The ordinary, and thus the legal, meaning of “innovation” is the act of bringing into being something new. Whether or not something is new is relative; newness can only be determined by comparison. The necessary comparison is with those things that already exist. Thus, the concept of innovation is, in essence, the same as the ingenuity requirement of novelty and inventiveness in patent law, which requires that the invention be new and non-obvious compared with the prior art.

Drawing all this together, it will be seen that the concepts of “creativity” and “innovation” have a profound, and a significantly different, effect in law. The concept of “creativity” is one that justifies the grant of *copying* rights in respect of intellectual property subject matters. In contrast, the concept of “innovation” is one that justifies the grant of *monopoly* rights in respect of such subject matters. This consequence is captured in Table 1, below.

**Table 1: Creativity and Innovation in IP law**

	<b>Creativity</b>	<b>Innovation</b>
Legal meaning is:	the ability to bring something into being	the action of bringing something new into being
Equates to threshold requirement in:	copyright law	patent law
Results in IP protection scope of:	copying rights	monopoly rights

**5. POLICY IMPLICATION**

Taking into account all of the above, the policy outcome of the law’s perspective on creativity and innovation is clear: different types – and, more importantly, different strengths – of legal protection are provided for the exercise of different types of intellectual ingenuity. Where mere creativity (the lower level of ingenuity) has been exercised, a lower level of legal protection is provided (typically through the copying rights of copyright). Where, however, innovation (the higher level of ingenuity) has occurred, the law provides a stronger level of protection (typically through the monopoly rights of a patent).

There is a very important consequence of the law providing different strengths of protection depending on the level of ingenuity exercised. This consequence concerns the effect of the differing strengths of protection on the activities of subsequent, or “follow-on”, creators and innovators – that is, on those who seek to build on pre-existing creations and innovations. By providing different strengths of protection, the law imposes different degrees of constraint on

follow-on creators and innovators depending on the level of ingenuity exercised by earlier creators and innovators. In particular, the constraints imposed on follow-on creators and innovators are greater where the earlier producers of intellectual property have exercised greater levels of ingenuity.

The reason this consequence arises is because a monopoly right can be exercised against a wider range of persons than can a copying right. In particular, a monopoly right can be exercised against those who reproduce the protected subject matter independently as well as by copying it, whereas a copying right can only be exercised against those who reproduce the protected subject matter by copying it. Thus, independent reproduction will not save a follow-on creator or innovator from infringement of the legal protection provided to an earlier producer of intellectual property who has been innovative, not just creative – that is, who has not just brought something into existence, but who has brought into existence something that is new (not previously existing).

The question that arises in respect of this consequence is whether it is justifiable to constrain follow-on creators and innovators more in respect of past innovations than in respect of past creations. To answer that question one must consider the impact of the different degree of constraints from two perspectives: that of the follow-on creator/innovator and that of the earlier creator/innovator. From the perspective of the follow-on creator/innovator/creator two factors may be noted. First, the *duration* of the higher degree of constraint is significantly shorter than is the duration of the lower degree of constraint. The duration of the exclusive rights of a patent is 20 years from the date of filing of the patent application. In contrast, the

duration of the exclusive rights of copyright is, in general, 70 years from the death of the creator of the copyright work. Secondly, the *likelihood* of the higher degree of constraint being imposed on the follow-on creator/innovator is significantly lower than is the likelihood of the lower degree of constraint being imposed. This is simply a function of the ingenuity threshold. In general terms, while the exercise of ingenuity is likely to result in something being brought into existence, it is much less likely that the thing being brought into existence is new. Thus, the exercise of ingenuity is much less likely to result in the production of intellectual property to which the higher degree of protection applies. Accordingly, it is much less likely that follow-on creators/innovators will have imposed on them the higher degree of constraint than the lower degree of constraint.

From the perspective of the original creator/innovator it may be noted that the law provides a much more valuable *reward* – whether seen as an entitlement under a morality-based rationale for intellectual property protection, or as an incentive under an economics-based rationale for intellectual property protection – for the exercise of the higher level of ingenuity. The more valuable entitlement, and the stronger incentive, of a monopoly right is available only where the intellectual ingenuity involved goes beyond mere “creativity” and amounts to “innovation”.

These three factors, in combination, would seem to justify the policy outcome of differing strengths of protection, with consequential differing degrees of constraint on follow-on creators/innovators, for the exercise of different levels of ingenuity. The negative impact of the higher degree of constraint on follow-on creators/innovators is balanced by the fact that

the higher degree of constraint is less likely to arise than is the lower degree of constraint; and by the fact that when the higher degree of constraint does arise, it lasts for a shorter period than does the lesser degree of constraint. Furthermore, there is a valid justification for providing the higher degree of constraint in those situations where it does arise. The justification is to reward innovators for exercising the higher degree of ingenuity. This justification is valid because, while it is beneficial to society that things be created, it is clearly more beneficial to society that at least some of the things being created are *new* to society. Without the creation of new things, society would not advance culturally or economically. Thus, it is justifiable to provide a more valuable entitlement, and a stronger incentive, for innovation compared with mere creativity.

## **6. CONCLUSION**

The legal perspective on creativity and innovation is simple, but profound. Neither creativity nor innovation has any particular relevance in law, except in respect of the role those concepts perform in intellectual property law. Intellectual property law provides protection to aesthetic and functional emanations of the human intellect, by granting exclusive rights over them to those responsible for producing them. These rights both recognise the moral entitlements of creators and innovators over their intellectual property, and provide an incentive to creators and innovators to produce intellectual property.

In intellectual property law, creativity and innovation are alternative thresholds of intellectual ingenuity that must be satisfied for intellectual property subject matter to gain protection.

Where an intellectual property subject matter results from the exercise of creativity, the law provides the protection of a copying right. Where, however, the subject matter results from a higher degree of intellectual ingenuity, such that it amounts to an innovation, the law provides the stronger protection of monopoly rights. This outcome reflects a policy that the production of *new* things is more valuable to society than the mere production of things.



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