

# Principles of Intellectual Property Rights

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## 1. INTRODUCTION

In the previous draft chapter we considered the rationales for intellectual property rights (IPRs); in this draft chapter we examine the primary nature of IPRs, and some of their common characteristics. While there is a wide range of subject matters covered by IPRs to which many different policy considerations may apply, there are various principles and themes common to all IPRs.

Even though different types of IPRs can and do exist independently of one another, in this draft chapter we discuss IPRs collectively. IPRs, like property rights, provide their owners with a bundle of rights. For example, the exclusive rights provided by copyright include adaptation, reproduction, distribution, public performance, and communication rights. These rights are transmissible by assignment or licence, by will and by devolution by operation of law. Kitch noted in the previous draft chapter, however, IPRs are ‘prospects’ of which no real success is guaranteed.<sup>1</sup>

As globalisation abounds and our dependence on electronic communication technologies increases, intellectual property law does not stand still. As it happens, there is no quota on the amount of IPRs that may exist and no steadfast rules on what must be protected. In response to emerging trends and technologies, IPRs appear to be extending in scope and application. Existing forms of protection have expanded to safeguard new types of ideas. For example, business methods are able to be protected under patent law, while copyright has widened its scope of protection to cover computer software.

As new innovations and practices arise, not only do existing IPRs expand to cover emerging types of subject matter, but new kinds of IPRs are developed. Relatively recent IPRs include plant breeder’s rights and protection for the layout of integrated circuits. Developed economies have long advocated for expanded applications of existing IPRs, as well as for new forms of IPRs. Increasingly, developing economies are seeking new forms of IPRs that are relevant to their cultural and economic circumstances. For example, various countries have

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<sup>1</sup> See E. W. Kitch, ‘The Nature and Function of the Patent System’ (1977) 20(2) *Journal of Law & Economics* 265.

passed legislation that protects the traditional knowledge of their indigenous peoples.<sup>2</sup> In addition, some international IP organisations have put in place treaties and committees which aim at levelling the IP playing field.<sup>3</sup>

In addition to the countless number of ideas creators – artists, writers, inventors – who are IPR owners, there are thousands of people responsible for the registration and enforcement of IPRs.<sup>4</sup> While copyright is a form of IP protection that does not require registration, for every trade mark, patent, plant variety and design that is protected, a formal application for protection has to be made and has to be examined for satisfaction of eligibility criteria. According to 2009 statistics, the European Patent Office employs 6,818 staff, the Japanese Patent Office 2,904 and the US Patent and Trademark Office 9,716.<sup>5</sup> In order to enforce IPRs, many other people have a part to play – including lawyers, judges and technical experts. The availability of criminal sanctions for various IP infringements ensures that there is also a role for the police, customs agencies and other enforcement organisations.

In this draft chapter, we seek to understand the importance of IPRs and examine their underlying principles. We look at their common characteristics, in order to gain an overall picture of how IPRs apply and function in today's market. We then examine what effect the various features of IPRs have on the IP system, and consider the appropriateness of developing one unifying principle – based on unfair competition – that would protect all forms of creative and innovative endeavour.

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<sup>2</sup> See for example, the *Philippines Traditional and Alternative Medicine Act 1997*; and the *Protection and Promotion of Thai Traditional Medicinal Act 1999*.

<sup>3</sup> See for example, the United Nations *Convention on Biological Diversity 1992* Articles 8(j) and 10 (c); and WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

<sup>4</sup> See P. Drahos, 'Intellectual property rights in the knowledge economy' in D. Rooney, G. Hearn and A. Ninan (eds.) *Handbook on the Knowledge Economy* (2005), Edward Elgar, Cheltenham, 2005, 142.

<sup>5</sup> See *Four Office Statistics Report 2009*, chapter 2, available at <http://www.trilateral.net/statistics/tsr/fosr2009/offices.pdf>.

## 2. THE RIGHT OF EXCLUSIVITY

One of the most important aspects of any form of property is that it may be possessed exclusively. The majority of tangible assets can be possessed exclusively by virtue of the fact that they are tangible – and hence can be physically secured against access by third parties. Thus, a moveable tangible asset, such as a TV, can be possessed exclusively by locking it within a house; and an immoveable tangible asset, such as land, can be possessed exclusively by fencing it. It is, of course, the case that most, if not all, means of physical security can be overcome – that is, most tangible assets can be stolen. To counter this, the law imposes legal prohibitions on the overriding physical means of securitisation – for example, the law makes theft of another's goods a crime.

As we saw in the first draft chapter, exclusive possession of intangible assets such as ideas is problematic, precisely because they are intangible. This means they usually cannot be physically secured against access by third parties; as an economist would put it, they are non-excludable. As van Caenegem writes:

*In terms of physical property possession is 9/10ths of the law – in other words, physical control is the starting premise. Arguably the opposite applies to knowledge, as it is slippery, fuzzy and easily transferred; erecting a fence around a piece of land is much easier than around a unit of knowledge.*<sup>6</sup>

To remedy this defect, the law provides the means by which ideas can be legally secured against access by third parties. The particular means provided by the law is the grant of intellectual property rights, enforceable by the owner of the rights, with the backing of the state, against third parties by way of legal action in the courts.

In the case of Charles Dickens and the unpublished manuscript considered in the first draft chapter, the means by which the beneficiary of the residuary of the estate, Dickens' children, obtained exclusivity to the literary work embodied in the manuscript was through the IPR of copyright. Under copyright law, the owner of copyright is granted, amongst other things, the exclusive right to reproduce the work. In the absence of such a right, Georgina Hogarth, the owner of the manuscript, would in practice have had the exclusive entitlement to publish the manuscript by virtue of her physical (and legal) possession of it.

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<sup>6</sup> W. van Caenegem, *Intellectual Property Law and Innovation*, Cambridge University Press, Cambridge, 2007, 11-12.

### **3. CHARACTERISTICS OF INTELLECTUAL PROPERTY RIGHTS**

In general terms, intellectual property rights have the following common characteristics:

- The rights apply only in relation to a sub-set of all innovative/creative emanations from the human intellect – this sub-set being specific types of IP subject matter defined in the IPR laws.
- The rights apply only to those defined subject matters that satisfy a specific innovation/creativity threshold.
- The rights are specific exclusive rights that apply only in certain circumstances and are granted to IPR owners to the exclusion of all others.
- The rights are not absolute; third parties remain free to engage in certain types of activity with the IP, even without the consent of the IP owner.
- The rights are generally of limited duration.
- The rights are generally freely transferable to other parties.
- The rights are usually, but not always, created under statute.
- The rights are territorial in nature.

Each of these characteristics of IPRs is considered below.

#### **3.1. Specific subject matters**

Just as not all intangible assets are IP (licences, leases and shares, for example, are intangible assets that are not considered to be IP), not all IP is protected by IPRs. Rather, only those IP subject matters for which there is a specific legal regime obtain the benefit of the grant of exclusive rights. The various IPR regimes specify the sub-set of IP to which they are applicable. For example, only ‘inventions’ may be granted a patent, and only ‘signs’ may be registered as trade marks.

Copyright is the IP regime with the most varied protected subject matter. Copyright subject matters include literary works, artistic works (which can include drawings, sculptures, photographs and buildings), musical works, sound recordings, cinematographic films, and sound and television broadcasts. While in some jurisdictions, copyright subject matter is defined by statute in broad, technology-neutral terms, in other jurisdictions an exhaustive set of categories of works and other subject matters are protected.

### 3.2. Innovation/creation thresholds

As was mentioned in the second draft chapter, the laws that create IPRs generally specify a threshold of innovativeness or creativity that must be satisfied for the subject matter to gain the benefit of the rights. Thus, it is only inventions that are both ‘new’ and ‘non-obvious’ which may be granted protection by a patent. Likewise, it is only a literary work that is ‘original’ which will be protected by copyright law.

Innovation/creation thresholds are important for a number of reasons:

- They make all IPR owners equal. All must pass the same eligibility tests for their innovations/creations to be protected by the law.
- They provide the law with a degree of transparency and clarity. This is significant not only for ideas creators seeking to safeguard their ideas, but for ideas users as well. Rather than granting IPRs on the basis of subjective or unsystematic criteria, protection is granted on the basis of standards that are clear and comprehensible.
- They provide a sense of certainty. So long as the threshold is met, protection will be available. This allows creators and innovators to know in advance whether or not their ideas will achieve protection.

### 3.3. Specific exclusive rights

All of the IP regimes provide specific exclusive rights. The specific exclusive rights of each IP regime are the parallel of specific IP subject matters. Just as not every idea is a form of protected IP, not all uses of protected IP fall within the exclusive rights of IPR owners.

The specific exclusive rights of each IP regime are important as they determine the select privileges granted to IPR owners. These privileges are provided to IPR owners to the exclusion of all others. If another person exercises a specific exclusive right, or authorises another to do so, without the IPR owner’s consent, that person is liable for IPR infringement. Outside of the specific exclusive rights provided by each IP regime, however, non-rights holders may use and engage with protected IP subject matter as they like.

Thus, while copyright is infringed when someone reproduces a book without the copyright owner’s permission, it is not infringed when someone reads a book without the copyright owner’s permission – because reading, unlike reproduction, is not an exclusive right of the copyright owner. The exclusive right of an owner of a registered trade mark is to use the

same or a confusingly similar mark *as a trade mark* – that is, as an indication of the source of goods or services provided in trade. A person does not infringe a registered trade mark by using the mark in ways other than as a trade mark. Hence, Andy Warhol is not guilty of trade mark infringement for using the Campbell's Soup trade mark in his paintings, because he is not using it as a trade mark.

### 3.4. Limitations on exclusive rights

The exclusivity provided by IPRs is not, as a rule, absolute. Rather, certain activities in relation to the protected IP remain free for all to undertake, even though the IPR owner does not consent. In patent law, for example, it is generally recognised that uses of an invention for 'experimental purposes' are not within the exclusive entitlements of the patent owner. Likewise, in copyright law, certain uses of a work are considered 'fair uses' or 'fair dealings' and thus permitted without the consent of the copyright owner.

Limitations on exclusivity of rights are important as they allow ideas to be used, modified and developed for the good of society. It usually is more beneficial to society if ideas are available for all, rather than just a select few, to access. If ideas are 'locked up', study of and research on those ideas are constrained, and criticism and review of those ideas is limited. As we saw in the second draft chapter, there must be a balancing of interests between ideas creators and ideas users.

As one legislative review committee has noted:

*[T]he goal of the intellectual property system is to provide a sufficient incentive for socially useful investment in creative effort. This requires that compensation flowing to rights owners be enough to encourage investments whose social benefits exceed their costs. Over-compensating rights owners is as harmful, and perhaps even more harmful, than under-compensating them.*<sup>7</sup>

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<sup>7</sup> Intellectual Property and Competition Review Committee (2000), *Review of Intellectual Property Legislation under the Competition Principles Agreement*, 34.

### 3.5. Limitations on duration of rights

Most IPRs do not subsist indefinitely; rather, they last for a set period of time. In the case of patents, for example, the duration of the patentee's exclusive rights is usually 20 years from the date of filing the application for the patent. The duration of copyright protection ends, in general, 70 years after an author's death. Some IPRs, however, may last indefinitely. An example is trade mark registration: the exclusive rights provided by registration continue so long as the registration is maintained, and there is no limit on how long that may be.

The degree to which an IPR owner is given exclusive control over the relevant subject matter is usually in inverse proportion to the duration of protection awarded.<sup>8</sup> Though an owner of copyright in a work is granted a rather long period of protection, that protection is not in relation to the idea of the work itself, but only in relation to the work's expression of the idea. Thus, generally it is not an infringement of copyright to produce a new work that is 'inspired' by a poem or a painting; rather, there is infringement only if the poem or the painting is 'reproduced'.

In contrast, while the duration of protection provided by a patent is much shorter than that provided by copyright, the degree of protection awarded is stronger. As McKeough, Stewart and Griffith point out:

*In the case of a patent, the owner is given control over the idea behind the patented process or product, to the extent that idea is disclosed in the patent specifications. The patentee's monopoly is an absolute one, at least as far as commercial use is concerned. Nobody may exploit the invention during the term of the patent, even if they arrive at the same idea through independent research.*<sup>9</sup>

While registered trade mark protection may exist indefinitely, the right provided by registration is not particularly strong. The registered trade mark owner does not have a monopoly over all uses of the trade mark. Rather, exclusivity is confined to preventing others

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<sup>8</sup> See J. McKeough, A. Stewart and P. Griffith, *Intellectual Property in Australia* (3<sup>rd</sup> edition), Butterworths, Sydney, 2004, 31.

<sup>9</sup> J. McKeough, A. Stewart and P. Griffith, *Intellectual Property in Australia* (3<sup>rd</sup> edition), Butterworths, Sydney, 2004, 31.



from using a substantially identical or deceptively similar mark, and even then only in relation to the same or similar goods or services in respect of which the trade mark is registered.

### 3.6. Transferability of rights

IPRs are assets like other property rights. Accordingly, they may be transferred to other parties at the will of the owner. The rights may assigned – that is, transferred absolutely from one person to another. An assignment of an IPR is the equivalent of selling title to land. Alternatively, the IPRs may licensed – that is, granted for a limited duration, but not absolutely transferred. Granting a licence to an IPR is the equivalent of leasing land. As discussed in the second draft chapter, IPRs are valued because they increase the ease with which IP is traded.

An assignment transfers ownership of an IPR. Assignments must generally be in writing and signed by an assignor. An IPR owner may assign his rights in a work in a number of ways.

Ted writes a book. Ted may assign to Amanda the right to produce a play based on the book, he may assign to Bill the right to produce a television series based on the book, and he may assign to Cathy the right to produce a film based on the book. Amanda, Bill and Cathy are all IP owners of the limited rights respectively assigned to them.

As was stated in the case of *Albert & Sons Pty Ltd v Fletcher Construction Co Ltd* regarding the assignment of copyright in a work:

*The combination of ways in which he may assign his rights is almost endless ... there may be a multiplicity of rights all stemming from the original work but all different and all capable of separate assignment ... It thus becomes a matter of some precision to determine which person is for the moment the owner in which country of which particular aspect of the copyright in a work.*<sup>10</sup>

While an IPR owner may assign his rights to a number of different entities in a number of different ways, once the assignment takes place he relinquishes all interest in the protected IP subject matter. As Ricketson and Richardson note:

*[O]nce a right is assigned, the assignor has no future power to control the way in which the work is exploited, apart from any contractual undertakings which will not*

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<sup>10</sup> [1976] RPC 615.

*be binding upon subsequent assignees of the right. This may also have dire consequences for an author with respect to such matters as the payment of royalties.*<sup>11</sup>

A licence is a grant by the IP owner of permission to another person to do an act that would constitute an IP infringement if done without permission. In contrast with an assignor, a licensor retains an interest in the IPR. The licensor retains ownership of the IPR and may exercise control over the way the IPR is exploited by imposing conditions (e.g., as to method of use) and restrictions (e.g., in relation to sub-licensing).

Licences may take various forms. They may be:

- **Exclusive** – under such a licence, the licensor permits the licensee to use the protected subject matter to the exclusion of all others. This means that the licensor cannot grant any other licences in relation to the protected subject matter and cannot exploit the protected subject matter him/herself. An exclusive licensee is entitled to sue for infringement of copyright.
- **Sole** – such a licence is similar to an exclusive licence, but the licensor reserves the possibility that he/she may exploit the rights in question.
- **Non-exclusive** – under such a licence, the licensor retains the right to grant the same rights to other licensees.
- **Implied** – a licence may be implied from conduct, it may be implied by law to particular classes of contract, or it may be implied as necessary to provide ‘business efficacy’ to a particular arrangement between parties.

As with assignments, the exclusive rights of copyright can be separately licensed. A licence of rights may be limited by time and/or by place of exercise of right.

### 3.7. Statutory basis of rights

The majority of IP rights are created by statute – that is, by legislation enacted by parliament. The statutes usually are titled by the name of the IPR – hence, the *Copyright Act*, the *Patents Act*, etc. Each of these statutes consists of a number of provisions that are applied and developed by the judiciary. In essence, all statutes follow the same rules. As Drahos notes:

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<sup>11</sup> S. Ricketson and M. Richardson, *Intellectual Property: Cases, Materials and Commentary* (3<sup>rd</sup> edition), Butterworths, Sydney, 2005, 491.

*The relevant statute specifies criteria of eligibility for protection, a set of exclusive rights that attach to the protected subject-matter, rules on duration of protection, infringement of rights, exceptions to infringement and rules that relate to the licensing of the exclusive rights.*<sup>12</sup>

In some cases, however, IPRs arise not by statute but by the ‘common law’ or by ‘equity’ – that is, by the unwritten law recognised and developed by judges on a case-by-case basis. Examples of these IPRs are the entitlements to bring an action seeking a court order to restrain a ‘breach of confidence’ and a ‘passing off’. In some jurisdictions, such as the United States of America, the courts have also recognised a right of publicity. This is the right of an individual to control and profit from the commercial use of his/her name, likeness and persona.

### 3.8. Territorial rights

As was discussed in the first draft chapter, IPRs are territorial in the sense that they do not operate outside of the national territory where they are granted. IPRs exist by virtue of national IP systems.

A New Zealand IPR may be enforced or challenged in New Zealand only. Infringement of a New Zealand IPR must be pursued according to New Zealand law, in a New Zealand court. A New Zealand IPR is not effective outside New Zealand. Thus, a New Zealand IPR cannot be infringed by acts that occur in Australia.

For ideas creators whose ideas are the subject of transnational trade, the principle of territoriality is problematic. If IPRs only have effect in the country in which they are enacted, what is an IPR owner to do if her protected IP is misused in another country? The international IP system seeks to overcome this difficulty. As we saw in the first draft chapter, there are a range of international treaties that regulate protection of IP internationally. There are also numerous agreements at the bilateral and regional levels that make provisions for IPRs. Through a combined effect of the principles of national treatment, minimum standards, international recognition and rights of priority, IPR owners are able to protect and enforce their exclusive rights in countries other than their own.

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<sup>12</sup> P. Drahos, ‘Intellectual property rights in the knowledge economy’ in D. Rooney, G. Hearn and A. Ninan (eds.) *Handbook on the Knowledge Economy* (2005), Edward Elgar, Cheltenham, 2005, 141.

However, according to various commentators, the principle of territoriality is becoming more difficult to enforce in today's digital environment.<sup>13</sup> Owing to a range of electronic and online communication technologies available, IP is able to cross geographical borders in seconds with the simple click of a mouse. The uploading, downloading, retrieval and distribution of material from the Internet may occur anywhere. In this context, it is often difficult to know what nation's laws apply for the creation and infringement of IPRs.

As Vaver notes:

*A Canadian may upload her writings or artwork electronically onto an Internet server located in Germany. From there, the material may be downloaded by another user located in Canada, Uganda, or Thailand. What law applies to the uploading: Canadian, German, or both? What law applies to the downloading: German, Canadian, Ugandan, Thai, or some combination?*<sup>14</sup>

#### **4. SHOULD THERE BE ONE COMMON CHARACTERISTIC OF IPRs?**

The above eight principles are common to most IPRs. Accordingly, one could say that the IP system appears consistent and cohesive. However, others argue that IP law is disjointed. In the eyes of these commentators, there are no common IPR principles because intellectual property is comprised of a number of different regimes, each of which protects a different subject matter in a different way.

Some commentators believe that the law should develop a unifying principle for the protection all forms of creative endeavour, based on 'unfair competition'. Although it is difficult to identify the exact moment when competition changes from fair to unfair, fair competition can be seen as each competitor struggling with, but not against, his opponents for supremacy. Unfair competition, on the other hand, can be seen as misappropriation of the fruits of a competitor's labour – that is, 'reaping without sewing'. As was mentioned in the

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<sup>13</sup> See, for example, P.E. Gellar, 'International Intellectual Property, Conflicts of Laws, and Internet Remedies' (2000) 22 *European Intellectual Property Review* 125; D. Vaver, *Intellectual Property*, Irwin Law, Ontario, 1997, 14; G.W. Austin, 'The Territoriality of United States Trademark Law' in Peter Yu (ed.), *Intellectual Property and Information Wealth*, Praeger Press, New York, 2007.

<sup>14</sup> D. Vaver, *Intellectual Property*, Irwin Law, Ontario, 1997, 14.

first draft chapter, unfair competition according to the *Paris Convention for the Protection of Industrial Property 1883* constitutes ‘any act of competition contrary to honest practices in industrial or commercial matters’.

Article 10*bis* of the *Paris Convention* prohibits three specific types of unfair competition:

- (i) *all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;*
- (ii) *false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;*
- (iii) *indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.*

As noted by Dworkin, in its present formulation ‘unfair competition’ is concerned with:

*the property interests and goodwill of rival traders. Most of the legislation and activity is concerned with the protection of the consumer.*<sup>15</sup>

According to various commentators, a unifying principle based on unfair competition should be developed, to underpin the protection of all forms of creative or innovative activity. The creator, in addition to the consumer, should be protected. Suggestions for this unifying principle include ‘misappropriation of valuable intangibles’<sup>16</sup> or ‘misappropriation of commercial intangibles’.<sup>17</sup> Others prefer a unifying principle of preventing ‘unfair copying’.<sup>18</sup>

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<sup>15</sup> G. Dworkin, ‘Unfair Competition: Is the Common Law Developing a New Tort?’ (1979) 1 *European Intellectual Property Review* 241, 246.

<sup>16</sup> M. Spence, ‘Passing Off and the Misappropriation of Valuable Intangibles’ (1996) 112 *Law Quarterly Review* 472.

<sup>17</sup> A. Terry, ‘Unfair Competition and the Misappropriation of a Competitor’s Trade Values’ (1988) 51(3) *Modern Law Review* 296. See also G. Dworkin, ‘Unfair Competition: Is the Common Law Developing a New Tort?’ (1979) 1 *European Intellectual Property Review* 241; M. Pendleton, ‘Challenging Law’s Traditional Refusal to Protect Information per se for Fear of Stifling Innovation, Competition and Access’ (2002) 51 *Intellectual Property Forum* 32; R. Callmann, ‘What is Unfair Competition?’ (1940) 28 *Georgetown Law Journal* 585.

McKeough, Stewart and Griffith argue that such a principle would perform two functions:

*The first and less ambitious function could simply be to fill in gaps left by the existing regimes, catching situations in which there has been an unjustified appropriation of the fruit of a person's creative or commercial effort, yet no established intellectual property right has been infringed. The second and more far-reaching function would not merely be to supplement the individual regimes, but to consolidate and replace at least some of them.*<sup>19</sup>

According to the second function, the law should abandon its current piecemeal approach of granting new IPRs or expanding the application of existing IPRs to fit new subject matters. Instead, the law should adopt a general scheme that does not specify subject matters or thresholds of protection but rather focuses on methods of unauthorised exploitation that result in disincentives to create or innovate.<sup>20</sup> This would also provide the law some leeway to account for emerging innovations and practices. As Brett writes, such a principle would 'mean that the courts could adapt more quickly to the needs arising from the rapid development of new technologies – all of which require some protection from unfair exploitation in their growth period in particular.'<sup>21</sup>

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<sup>18</sup> See C. Fellner, *The Future of Legal Protection for Industrial Design*, ESC, Oxford, 1985, 199-201; J. Lahore, 'Intellectual Property Rights and Unfair Copying: Old Concepts, New Ideas' (1992) 12 *European Intellectual Property Review* 428; W. Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 *Virginia Law Review* 149.

<sup>19</sup> J. McKeough, A. Stewart and P. Griffith, *Intellectual Property in Australia* (3<sup>rd</sup> edition), Butterworths, Sydney, 2004, 32.

<sup>20</sup> See J. Lahore, 'Designs and Petty Patents: A Broader Reform Issue' (1996) 7 *Australian Intellectual Property Journal* 7; D. S. Karjala, 'Misappropriation as a Third Intellectual Paradigm' (1994) 94 *Columbia Law Review* 2594.

<sup>21</sup> H. Brett, 'The Danger of Throwing the Baby Out with the Bathwater – The Reform of UK Copyright Law and the Protection of Designs' (1981) 6 *European Intellectual Property Review* 163, 165. See also H. Brett, 'Unfair Competition – Not Merely An Academic Issue?' (1979) 11 *European Intellectual Property Review* 25.