TEACHING AND RESEARCH IN INTELLECTUAL PROPERTY LAW IN AUSTRALIA AND NEW ZEALAND

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INTRODUCTION

The teaching of intellectual property law in Australia as a separate subject in legal curricula is of comparatively recent origin. The same is also true of academic writing and research in this area. This paper attempts to give a general overview of the current situation in Australia and New Zealand, as well as some historical background. However, it does not purport in any way to be comprehensive, as gathering information in two countries that are as far flung as Australia and New Zealand is extremely difficult.

GENERAL BACKGROUND

The intellectual property laws of Australia and New Zealand are derived directly from those of the United Kingdom. Thus, in the late part of the nineteenth century, the Australian and New Zealand colonies adopted local statutes that were directly based on those that applied in the United Kingdom. When the United Kingdom revised its laws, from time to time, similar revisions took place in Australia and New Zealand. In comparatively recent years, however, differences between the laws of Australia and New Zealand and those of the United Kingdom have begun to emerge, as the latter country has become more integrated with the European Economic Community. Despite this, the decisions of English courts have always, and still do, exercise great influence in Australia and New Zealand, and the same has been true of the specialist English texts written in this area. At the same time, there has been a great increase in recent years in legislative activity in Australia and New Zealand, as well as litigation. This has been accompanied by the development of intellectual property as a separate subject in academic legal education, and the steady growth of a significant corpus of academic writing and research in the area.

Although Law Schools in Australia and New Zealand go back to the last century (the first, in Melbourne, being founded in 1857), traditionally there was no separate teaching of intellectual property law, except perhaps as a small part of other general courses in the curriculum, such as Equity, Trusts and Remedies. It appears that it was first taught separately in the University of Sydney in the late 1960s. The pioneer here was Mr. W.M.C. Gummow, now a Judge of the Federal Court of Australia, and someone who has been a prominent practitioner and writer in the area. It was subsequently established as a separate subject in the undergraduate law courses at Australian National University (1971) and Monash University (1972), and a number of other law schools followed suit shortly afterwards: the Universities of New South Wales (1976), Melbourne (1978) and Adelaide (1984). Postgraduate courses have also been or are currently offered at a number of these institutions, as well as the Universities of Queensland and Western Australia. In New Zealand, the University of Auckland was the first to offer

the subject some years ago, and the Victoria University of Wellington began to do so in the early 1980s. The University of Otago commenced teaching the subject this year and the University of Canterbury has plans to introduce it in 1988.

Prior to 1974, there had been relatively little local Australian or New Zealand writing and research on intellectual property. What there had been was largely of a practical and professional nature, consisting of occasional articles or notes in the Australian Law Journal (the leading professional journal in Australia) and some of the University Law School journals. Occasional learned papers had also been published by the Institute of Patent Attorneys, and from 1968 the Australian Copyright Council began to produce a series of informative papers dealing with copyright issues. There had also been a number of government committees which had investigated different aspects of intellectual property, and a certain amount of material had been generated by these bodies. However, the first treatise of any length to be published in Australia was a monograph by Dr. J.C. Lahore called Copyright and the Arts in Australia in 1974. This was followed in 1977 by a longer treatise on the same subject by the same author, and, since this time, there has been a steady stream of academic writing in the form of text books, monographs and periodical articles. There has also been a significant body of research that has been carried out at the behest of government committees and other bodies, and this has played a significant role in the formulation of official policy in the area of intellectual property. These matters are dealt with in more detail below.

THE PRESENT SITUATION WITH RESPECT TO TEACHING

In general, the undergraduate curriculum in Australian and New Zealand Law Schools consists of a basic core of compulsory subjects and a certain number of additional subjects which may be chosen from a larger range of optional subjects. To the first category belong most of the basic subjects of a legal education in any common law system: Property, Contracts, Torts, Constitutional Law, Criminal Law, Trust and Administrative Law. Optional subjects in the second category, on the other hand, cover a wide range of additional material which is generally thought to be of less fundamental importance and where students are basically allowed to choose what interests them. To date, Intellectual Property has fallen in this second category, as a subject which is perceived as being only of marginal interest to intending lawyers. Nonetheless, this official perception is somewhat at variance with the facts: the numbers of students that have enrolled in intellectual property courses where they have been offered have usually been very high and it is also clear that prospective employers of law graduates are often very interested in the fact that they have studied the subject. In the account which follows, I concentrate mainly on the development of the teaching of intellectual property at the Universities of Melbourne and Monash, as these are the courses with which I am most familiar. I then give a brief outline of the kinds of courses that are offered at other Australian and New Zealand Law Schools. I must apologise, in advance, for the lack of detail in relation to these other courses, as it has been difficult in these cases to obtain completely accurate information concerning them.

The University of Melbourne

Intellectual property was first offered here as an optional subject in the undergraduate program under the title of "Industrial and Intellectual Property" in 1978. It was taught for two hours a week throughout the year and attempted to provide a basic coverage of all aspects of the subject. Thus, the following topics were taught: trade secrets and breach of confidence, copyright, registered designs, passing off and other common law protection for business goodwill and reputation, trade marks and service marks, patents and petty patents (utility models), exploitation of rights and the impact of trade practices controls. It soon became apparent to the teachers in the subject that there were too many topics to be covered in the time allowed and this meant that certain important areas, such as patents, received only scant attention. From 1982 on, a new subject called "Intellectual Property" was taught for two hours a week and this covered everything in the above list except for patents. The latter was now dealt with in a separate subject called "The Law of Patents and Inventions" which was taught for one hour per week throughout the year. The basis for this division was that patents was a more specialised and technical area and it was far better taught in a separate subject where more time could be devoted to it than was possible in the space of one general course. After five years of experience, this division of subject matter has, in turn, proved to have some inadequacies. On the one hand, the volume of material falling within Intellectual Property has increased enormously, notably in the area of copyright and designs, and this has had the effect that less attention can be paid to the important areas of trademarks and unfair competition. On the other hand, there are many analogies that can be drawn between copyright and patents and these are difficult to make if there is an artificial division of patents into a separate subject. For this reason, in 1987 there was a further restructuring of subjects, and in 1988 the following two new subjects will be offered: "Intellectual Property" and "Trademarks and Commercial Designations". The rationale behind this change is that the course in Intellectual Property will now deal with what may be called rights of origination, that is, rights that exist in relation to ideas, literary and artistic creations, and industrial and scientific productions, while Trademarks and Commercial Designations will be concerned with rights of marketing or distribution, that is, the rights that traders have in their trade names, trademarks, and other indicia of origin. The detail of these new courses is set out below.

Intellectual Property

(A) The nature of Intellectual Property rights: the concept of property in intangible subject matter, the economic and social justifications for protection of such rights, the approaches of different legal systems.

(B) Trade Secrets and Breach of Confidence: the meaning of "trade secret"; the elements of an action for breach of confidence; defences and remedies; the relationship between trade secrets protection and other intellectual property regimes such as patents and copyright. Two related subjects for consideration here are remedies against industrial espionage and the protection of individual privacy.

(C) Copyright: works and other subject matter (neighbouring rights) protected; conditions for protection; term of protection; the exclusive rights recognized and the infringement of those rights;

defences and remedies. Other topics studied are the ownership and exploitation of rights, through licensing and assignment, the scope for compulsory licensing and the international protection of copyright under the Berne and Universal Copyright Conventions. Some attention is also given to the impact of technological change on copyright owners, for example, the creation of new kinds of subject matter, such as computer software, and the regulation and definition of broadcasting and cable diffusion rights.

(D) Designs: the meaning of "design" and the requirements for registration under the Designs Act 1906; the procedure for registration; the term of protection, the rights granted and infringement of those rights. Attention is also given to the international protection of designs under the Paris Convention as well as the problem of the overlap between designs protection and the protection offered by the Copyright Act 1968.

(E) Patents and Associated Rights: the meaning of invention under the Patents Act 1952; the requirements for patentability; the procedure for obtaining a patent; the term of protection and the grounds on which extensions of term may be granted; the rights of the patentee and infringement of those rights; compulsory licensing and other controls that are imposed on patent licences; international protection under the Paris Convention, the Patent Cooperation Treaty and the Budapest Treaty for the Deposit of Micro-organisms. Consideration is also given in this section of the course to the economic and social objectives of the Patent system. Related topics include a brief consideration of the petty patent (utility model) system as set up under the Patents Act 1952 and the separate protection that is now granted to plant variety rights under the Plant Variety Rights Act 1987.

(F) Exploitation of Rights and Trade Practices Controls: this section looks at the interaction between the exploitation of the rights studied in the course and the controls that are imposed under the Trade Practices Act 1974 in order to regulate and promote competitive conduct. Comparative material from the United States of America and The European Economic Community is also considered here.

Trade Marks and Commercial Designations

(A) Passing Off: the requirements for the action; its application to the presentation and get-up of goods; recent extensions to the action.

(B) Other Torts relating to Unfair Competition: the common law actions of injurious falsehood, deceit and inverse passing off; other torts relevant to interference with economic relations.

(C) Trademarks and Service Marks: the functions of the trade mark system; the requirements for registration; the procedure for registration; infringement and defences; rectification of the Register; licensing and assignment of marks. Attention is also paid to the international protection of trademarks under the relevant international conventions.

(D) Part V of the Trade Practices Act 1974: this deals with the rights of action that are available to competitors under the consumer protection provisions of this Act to prevent misleading or deceptive conduct on the part of their rivals.

(E) Other statutory controls over the use of marks and names: particular emphasis is placed here on the Commonwealth and State legislation that regulates business and company names.

(F) The development of a general action of unfair competition: the question considered here is whether the common law is developing a general right of unfair competition, similar to that found in various continental jurisdictions.

Both the above courses will be taught for the first time in 1988. However, as the subject matter covered in both courses has been taught in one form or other since 1978 in the University of Melbourne, it is possible to make some general observations about the way in which this has occured to date. As noted above, these courses have been offered as optional subjects in the undergraduate curriculum. They have proved popular among students and, from an original enrollment of 71 in 1978, this year (1986) saw a total of 158 enrolled in Intellectual Property and 35 enrolled in the Law of Patents and Inventions (which will form part of the re-constituted subject of Intellectual Property in 1988). These numbers have meant that the mode of teaching, for the main part, been restricted to straight lecturing, although there has been an attempt in each year to use the Socratic or discussion method in teaching. From the start, the mode of assessment adopted in Industrial and Intellectual Property, and then in Intellectual Property, has been twofold: students have been required to submit a research essay of between four to five thousand words which is worth forty percent of the total marks of the subject and to sit a three hour examination at the end of the year for the balance of marks. On the other hand, the Law of Patents and Inventions has been assessed solely by a three hour examination at the end of the year and the same mode of assessment is proposed in 1988 for the new subject of Trademarks and Commercial Designations. No particular text book or casebook is prescribed for any of these subjects, but extensive printed materials of case extracts and other writing are issued to students for their private study. In Intellectual Property, these amount to about a thousand pages and in the now defunct Patents course some four hundred pages of materials were issued. The purpose of issuing such an extensive set of materials is simply to avoid pressure on limited library resources, and it is not expected that students need go much beyond these materials.

Since 1983, two further courses relating to intellectual property have been offered at a postgraduate level in the Melbourne University Master of Laws coursework programme. These are "Copyrights and Designs" and "Trademarks and Commercial Designations". These are advanced courses, and presuppose that a basic knowledge of these areas has already been acquired at an undergraduate level. Copyright and Designs has been taught in two years (1983 and 1987) and Trademarks and Commercial Designations has been taught only once (1984). The subject matter for each course is variable, as only selected topics are studied. For example, in the Copyright and Designs course in 1987, the following topics were studied: theoretical justifications for copyright protection; the categories of works protected; the right of reproduction in a material form and its derivatives (distribution, lending, droit de suite); the right of dissemination in a non-material form and its derivatives (broadcasting, cable diffusion and satellite transmission); enforcement of copyright (criminal sanctions, compulsory licenses and levies, collecting societies); controls over abuses of copyright; international protection of copyright under the Berne and Universal Copyright Conventions; neighbouring

rights; the registered designs system, and the overlap between copyright and designs. Unfortunately, due to shortage of resources, neither of these postgraduate courses will be offered in 1988, and it is uncertain whether either will be offered in 1989.

Monash University

The subject of "Industrial and Intellectual Property" was first offered in this University in 1972. This was in the form of a year long subject that was taught for two hours each week and covered every topic. By 1975, it was clear that there was insufficient time to achieve this purpose, and it was increased to three hours of teaching per week. In the following year, there was a complete reorganization and three separate subjects were created with the following titles: "Patents and Inventions", "Copyright and Designs" and "Trademarks and Commercial Designations". Each of these is now taught over a semester (half-year) and for two hours per week. Unfortunately, due to lack of resources, it has been impossible to offer all three subjects in any one year. Enrollments in the courses have been uniformly high and it is clear that there is a steady student demand for them. Monash has also offered intellectual property subjects as part of its Master of Laws coursework programme for over a decade. Originally divided into two subjects, in recent years three separate subjects bearing the same names as those in the undergraduate course have been offered. As with the undergraduate courses, these are not offered in every year.

The Australian National University

A general course entitled "Industrial and Intellectual Property" has been offered in this Law School since 1971. It is taught for a full year with two hours of classes per week. To date, it has only been offered in each alternate year, but it is proposed that in the future it should be offered yearly, if possible. It is a general course, as is indicated by this syllabus description which appears in the Faculty Handbook:

> "This subject is concerned with the protection offered forward by the law to new products and processes and to their marketing. It involves the study of the statutory protection provided by the legislation relating to copyright, patents, trademarks and designs. The course includes the study of the law relating to unfair competition and the protection of trade secrets."

The University of Sydney

This Law School was the first to teach the subject of intellectual property in Australia and has done so since the late 1960s. At present, two subjects are offered. The first of these is called "Industrial and Commercial Property" and is taught throughout the academic year in two classes per week. To the best of my information, it is offered annually, and, like the course at the Australian National University, is a general course. The following subject description appears in the Faculty Handbook:

> "This course introduces the ways in which and the extents to which both the common law and statute protect rights in intangible commercial property. It also deals with aspects of the law concerning the control of monopolies and restrictive trade practices, particularly in relation to dealings in industrial and commercial property.

> Special attention is given to injurious falsehood, passing off, the law of trade secrets, and to the statutory protection given by the trademarks, patents, designs and copyright legislation.
>
> The course emphasizes the practical aspects of the subject and the problems encountered in practice."

The second course which is taught is called "Industrial and Commercial Property (Extended)". This couse covers the same areas as the first course, but with the additional requirement that students submit a research essay.

The University of New South Wales

This Law School has also offered a general course since the mid 1970s. According to the Faculty Handbook description, it covers:

> "Areas of the law relating to concepts of intangible property including the law of patents, trademarks, trade designs, copyright, confidentiality, passing off and the protection of business reputation."

It is taught in one semester (half year) for two hours per week. Student enrollments have generally been high, and, due to the number of staff members interested in the subject, it has usually been taught in the two or three separate streams of thirty to forty students each.

The University of Adelaide

A general course in "Intellectual and Industrial Property" was first offered in this Law School in 1984. More recently, it has been divided into two subjects of "Intellectual Property" and "Industrial Property" but only Intellectual Property is presently taught. Two further subjects are offered at a postgraduate level: "Intellectual Property (General Principles)" and "Intellectual Property (Selected Issues)."

New South Wales Institute of Technology

A general course entitled, "Industrial and Intellectual Property" is offered here as a later year option. According to the subject description it is:

> "Intended to introduce and provide an understanding of the ways in which the legal system recognizes, protects and regulates the exploitations of exclusive rights and certain intangible industrial intellectual 'property'".

It covers selected aspects of the field in depth, but the basic structure is as follows: confidential information, patents, designs, trademarks and trade names, and copyright.

University of Queensland

No undergraduate subject is offered here, but there is a postgraduate option called "Industrial and Intellectual Property" which is offered in the Master of Laws coursework programme.

University of Western Australia

No undergraduate subject is offered here, but there for the first time in 1987 there is a unit in the Master of Laws coursework programme which is entitled "Industrial and Intellectual Property".

University of Tasmania

There is no subject offered either at the undergraduate or postgraduate level here, but there is a small component on intellectual property which is part of a larger subject called "Information Law" which is offered in the Bachelor of Laws programme.

University of Auckland (New Zealand)

An optional course called "Copyright, Patents, Trademarks and Unfair Competition A" is offered in the later years of the undergraduate curriculum for one hour per week. The material covered in the course is described as follows:

> "Studies in the content and impact of copyright, patents, designs, trademarks, confidential information and 'unfair competition' in New Zealand and elsewhere. The course will endeavour to trace the development of the tort of passing off up to the present day. The provisions of the Trademarks Act 1953 (registration and trademarks, infringement etc.), the law of copyright and the provisions of the Copyright Act 1962 and the 1985 amendment will be studied. Also included will be a resume of the Designs Act 1953, the Patents Act 1953, and aspects relating to the registration of designs, acceptance of patents and the infringement of designs and patents. The law relating to confidential information (and trade secrets) will be covered. There will be reference to the need for reform (particularly in relation to copyright law), the Commerce Act and (more particularly) the Fair Trading Bill".

The University of Victoria, Wellington (New Zealand)

A half subject called "Intellectual Property" is offered in this Law School as part of the undergraduate curriculum for two hours per week for one semester.

The University of Canterbury, Christchurch (New Zealand)

A new subject called "Intellectual Property" is to be offered as part of the Bachelor of Laws curriculum in 1988. It will cover all aspects of subject and will be taught for two hours per week.

The University of Otago, Dunedin (New Zealand)

A half subject called "Intellectual Property" was first offered in this Law School as part of the Bachelor of Laws curriculum in 1987. It is intended to cover the whole area, but in its first year the main emphasis has been upon copyright and breach of confidence. It is hoped that more teaching time can be allocated to the subject in the future.

WRITING AND RESEARCH IN INTELLECTUAL PROPERTY

As noted at the beginning of this paper, academic writing in the area of intellectual property was scarce in Australia until the early 1970s. There were the occasional comments and notes published in various professional journals, but, for the most part, the various United Kingdom texts were the only writings available. This position began slowly to change from 1974 on, beginning with the publication in that year of Copyright and the Arts in Australia by J.C. Lahore. This was followed, in 1977, by the publication of a full-length commentary by the same author entitled, Intellectual Property in Australia: Copyright. In 1980, the same author published a second treatise which covered the remaining areas of intellectual property: this was called, Intellectual Property in Australia: Patents, Trademarks, Confidential Information, Unfair Competition. This last-mentioned text followed the format adopted in many American text books, that is, it was a loose leaf service with the text being published in successive stages as well as being continuously updated. Texts and commentaries by other authors soon followed. The most important of these were Australian Trademark Law and Practice (1982) by D.R. Shanahan and The Law of Intellectual Property (1984) by S. Ricketson. A number of specialist monographs have also been published, of which the most important has been The Commercial Exploitation of Personality (1986) by S. Murumba. As far as undergraduate teaching has been concerned, the most significant development has been the publication in 1987 of a book of cases and materials by M.L. Blakeney and J. McKeough. This is entitled Intellectual Property, Commentary and Materials.

During the last ten years there has also been a great expansion in the periodical literature dealing with various aspects of intellectual property. For the most part, these articles have appeared in the general University Law Reviews and professional journals. However, a notable phenomenon has been the growth of several specialist journals. The most important of these are the Copyright Reporter published by the Copyright Society of Australia and the Intellectual Property Forum published by the Industrial and Intellectual Property Society. Another significant publication has been the regular Bulletin of the Australian Copyright Council. There has also been a regular chapter devoted to developments in intellectual property which has been published in the Annual Survey of Australian Law since 1976. In addition, in 1984 the University of New South Wales Law Journal devoted a special issue to the subject of intellectual property and a number of important articles were contained in this issue.

Yet another significant development in the past five years has been publication of two regular series of reports of court decisions. The first of these, edited by J.C. Lahore, is called Intellectual Property Reports and contains decisions from Australian and New Zealand courts as well as from a number of other courts throughout the British Commonwealth and the United States of America. The second series, which is called Australian Intellectual Property Cases, is published by Commercial Clearing Houses Limited and contains only Australian decisions. However, it also contains legislation and amendments thereto, and, as an indication of the rapid growth in intellectual property litigation in Australia in the past decade, it is noteworthy that it has now reported over three hundred cases. Both series contain reports of the decisions of the Australian Patent Office and Trade Mark and Designs Registries (and those from New Zealand, in the case of the Intellectual Property Reports). It goes without saying that both sets of reports have become indispensable research tools for academics and practitioners working in the areas of intellectual property in Australia and New Zealand.

Another development which should be noted here is the steady growth of conferences and seminars on various aspects of intellectual property. As far as Australia is concerned, the main impetus for these activities has arisen from professional groups such as the Copyright Society of Australia and the Industrial and Intellectual Property Society. There have also been a series of conferences organized by government departments and other government committees. Nonetheless, there has been a small but significant contribution made to these conferences by academic teachers and researchers. The papers delivered at a number of these conferences and seminars have been published, and comprise yet another important component of the published literature on intellectual property in both countries.

Finally, mention must be made of the work that has been carried out by several government committees, notably the Industrial Property Advisory Committee and the Copyright Law Revision Committee. Both bodies have published reports of some significance, and the Industrial Property Advisory Committee, in particular, has made extensive use of academic researchers, both legal and non-legal. In this regard, its most important work has been in relation to the patents system, culminating in the publication of a report in 1984. This was accompanied by a number of important supporting papers prepared by academic lawyers from Monash University and academic economists from the University of Queensland.

Details of many of the publications referred to above are provided in the select bibliography which is appended to this paper.

CONCLUDING COMMENTS

The purpose of this papaer has been to provide an outline of the present state of teaching and research in Intellectual Property in Australia and New Zealand. It will be seen that our activities in this area are of comparatively recent origin. However, as witnessed by the increasing amount of litigation concerning intellectual property and its growing importance in everyday commercial activity, it has now attracted a considerable amount of academic interest in Australian Law Schools. The interest extends beyond Law Schools to a number of economists who have made interesting and provocative contributions, notably in the area of patents. There is also considerable interest in Australia in developments in intellectual property that are occurring overseas, particularly in the Asia and the Pacific region. Intellectual property rights have an important part to play in the operation of international trade and investment, and this is certainly one of the reasons why interest in the whole area has increased so significantly in Australia and New Zealand in the past decade.

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Key to abbreviations

Adel. L.R.	Adelaide Law Review
Aus. Bus. L.R.	Australian Business Law Review
A.C.L.	Australian Current Law
A.L.J.	Australian Law Journal

E.I.P.R.	European Intellectual Property Review
Fed. L.R.	Federal Law Review (Australia National University)
L.I.J.	Law Institute Journal (Victoria)
M.U.L.R.	Melbourne University Law Review
Mon. Uni L.R.	Monash University Law Review
N.Z.L.J.	New Zealand Law Journal
Syd. L. Rev.	Sydney Law Review
U.N.S.W.L.J.	University of New South Wales Law Journal
U.W.A.L.R.	University of Western Australia Law Review
V.U.W.L.R.	Victoria University of Wellington Law Review

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