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Update Summary

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**THE LAW OF INTELLECTUAL PROPERTY:
COPYRIGHT, DESIGNS AND CONFIDENTIAL
INFORMATION
Ricketson & Creswell**

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UPDATED COMMENTARY

June Update Summary

Recent Developments

Sam Ricketson has written new commentary on:

Developments in Artificial Intelligence

A distinction might be drawn between works created with the aid of computers – hence capable of protection as original works (due to the need for human authorship in relation to original works) – and works that are created by computers with the absence of any human authorship or direction other than in some quite indirect fashion – and hence not protected.

The author flags that even though the issue of artificial intelligence (AI) is not a very recent development, the implications of AI systems for intellectual property rights generally, and in particular copyright and patents, have only recently begun to be addressed. The author reference how WIPO and the European Parliament have addressed the issue to date.

The author flags that the rapid development and growth of AI systems poses significant policy and legal challenges to traditional conceptions of intellectual property rights, in particular copyright and designs. See [RD 2300].

New National Cultural Policy

An announcement from the Department of Infrastructure, Transport, Regional Development, Communications, and the Arts to Public Lending Right (PLR) and Educational Lending Right (ELR) claimants on 4 April 2023 advised that claims to this extension to the PLR and ELR can be made from 3 April 2023 through the Department's Lending Rights online service and that title claims for the 2023–2024 program will be extended to 30 June 2023. Claims submitted after this date will be processed in a future program year: PLR Modernisation Notification 2023–2024. See [RD.2200].

TikTok and APRA AMCOS agreement

The author discusses implications of the recent ban by the Australian Government of use of TikTok on government-owned devices. See [RD.1500].

Proposed international diplomatic conference on new designs treaty

The proposal for the Diplomatic Conference is to be found in WIPO Document SCT/46/2, which directs that the conference should be held no later than 2024 and further directs the relevant standing committee of WIPO (The Standing Committee on the Law of

Trademarks, Industrial Designs and Geographical Indications) to meet in the second half of 2023 to close any existing gaps in the treaty. See [RD.1900].

Criminal Offences and Border Seizure

The author has reviewed the chapter on “Criminal Offences and Border Seizure”, in particular:

Delivery of material to the national library – Extension of legal deposit requirements to digital materials under Division 3, Part X, Copyright Act 1968

The purpose of the legal deposit scheme is “to preserve Australia’s published cultural heritage, consistent with the National Library’s mandate to build a comprehensive collection of library material relating to Australia and the Australian people”. The author lists the essential elements of the scheme. See [13A.490].

March Update Summary

Proprietary rights: ownership and exploitation

Sam Ricketson has substantially updated the chapter on “Proprietary rights: ownership and exploitation”, in particular:

Licences – Implied licences – Express or implied licence?

The recent High Court decision *Realestate.com.au Pty Ltd v Hardingham* (2022) 97 ALJR 40; [2022] HCA 39 (14 December 2022) canvasses a number of important issues relating to copyright, including copyright subsistence in photographs and floorplans and consideration of the terms of an oral licence given by the copyright owner and exclusive licensee of certain photographs and images that were supplied to real estate agencies to use in their sales and leasing promotions of particular properties. These were then uploaded by the agencies to a website operated by a third party where they could be readily accessed for purposes of historical comparison. The principal issue in the case was whether this further use of the photographs or images fell within the scope of an implied or inferred oral licence of the copyright in those photographs or images. The final outcome was that the third parties were able to use the material uploaded to their website without infringing copyright. See [RD.1005] and [14.435]-[14.441], in particular [14.441].

Ownership of copyright – Works – Where the author is an employee – “Contract of service”

In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR; 60 ALJR 194; [1986] HCA 1, the High Court indicated that both organisation and control should be regarded as relevant factors, among others, but it was the totality of the relationship between the parties that a court needed to consider in determining whether it was one of employment or of independent contract. In *Construction, Forestry, Maritime, Mining and Energy*

Union v Personal Contracting Pty Ltd (2022) 96 ALJR 89; 398 ALR 404; [2022] HCA 1, the High Court appeared to have confirmed its approach, with the issues of control and the conduct of one's business in the case of the putative employee, and the extent to which the latter is integrated into the putative employer's business being crucial to the analysis that is required.

The desire of employers to transform employees into independent contractors and thereby avoid the obligations of the employment relationship that arise under general law may lead to unexpected consequences so far as ownership of copyright material created while performing these contracts is concerned. Given the High **Court's emphasis** on the terms of the contracts in question, where the contract is found not be one of service, in the absence of any modifying agreement (as allowed under s 35(3) of the Copyright Act 1968 (Cth)), copyright ownership will remain with the contractor.

See [14.95].

Assignment and transmission of copyright – Assignments – Transmission by testamentary disposition and by operation of law – Bequests of unpublished work: s 198

Section 198 refers to manuscripts and artistic works that remain "unpublished" at the time of the author's death, meaning that the provisions of s 29 on the meaning of "published" will be applicable, rather than the wider concept of "made public" that applies in the context of term of protection under s 29A (and which is reflected in the formulation used in s 240(2)). Accordingly, manuscripts of literary, dramatic, or musical works that may have been performed or broadcast at the time of the author's death will not be covered. See [14.320].

Assignment and transmission of copyright – Assignments – The particular case of commissioning arrangements: assignment or licence?

In the absence of entitlement to an assignment, the position may be that the putative assignee is only a licensee of the copyright, which may in turn give rise to a dispute as to the scope of that licence. See [14.336].

Recent Developments

The author has further written new commentary on:

Inquiry into enforcement of copyright – announcement by Attorney-General

The author analyses the Copyright enforcement review, Issues paper as released in mid-December, please refer to [RD.2000].

New National Cultural Policy

On 30 January 2023, the Minister for the Arts, Tony Burke MP released the policy document Australia's Cultural Policy for the next five years: Revive: A Place for every story, a story for every place. See [RD.2200].

Indigenous copyright – Productivity Commission inquiry into Aboriginal and Torres Strait Islander Visual Arts and Crafts

In November 2022, the Productivity Commission's final report was handed to the Federal Government. The author recaps the report's findings and discusses the recommendation to establish a new "cultural rights legislation". See [RD.205] and also [14.132].

The author references IP Australia's ongoing review of the scope for stand-alone legislation dealing with Indigenous knowledge and references IP Australia's Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge at [RD.210].

Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd (2022) 292 FCR 512; 167 IPR 411; [2022] FCAFC 112 (6 July 2022)

This case involved alleged infringements of copyright in cloud-based real estate marketing software that had originally been created and developed by the third respondent (Semmens). On appeal to the Full Federal Court, the main issue was whether the respondents had authorised the copyright infringements of Mr Semmens, with particular attention being directed at certain email correspondence between the parties. The appeal was upheld by a majority of the court. See [RD.1000].

Author's news update – digital platforms, Google, Facebook and mandatory code

The author analyses the Treasury's News Media and Digital Platforms Mandatory Bargaining Code: Code's first year of operation report as released in November 2022 and discusses further developments surrounding the ACCC's overall review of its digital platforms inquiry and the Treasury's related Digital Platforms: Government consultation on ACCC's regulatory reform recommendation consultation paper. See [RD.100].

