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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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July 2024 Update Summary

UPDATED commentary

Sam Ricketson has written new commentary on:

Pt IV – Designs

Part IV accommodates the following commentary chapters on designs:

- Chapter 19 - Origins and rationale of designs protection from [19.0];
Chapter 20 - Meaning of design from [20.0];
Chapter 21 - Requirements for registration from [21.00];
Chapter 22 - The registration process from [22.00];
Chapter 23 - The scope of registered designs protection and other matters from [23.0];
Chapter 23A - Exploitation and international protection of registered designs from [23A.05];
Chapter 24 - Industrial designs and copyright from [24.0].

Prior to this release, all chapters contained commentary relating to the superseded *Designs Act 1906* (Cth) (the 1906 Act) and the *Designs Act 2003* (Cth).

After 2020, there will no longer be any *Designs Act 1906* (Cth) designs in force.

Therefore, the commentary relating to the 1906 Act has been removed from Chapters 19 to 23 and Chapter 23A and 24 have been reviewed also.

The commentary on the *Designs Act 1906* (Cth) has been retained in a newly created Chapter 24A “Commentary on the Designs Act 1906 (Cth)” from [24A.10]. This consolidated section of the Service will be accessible to readers desiring further background on the superseded Act and the extensive caselaw on it as useful background to the origins and operation of the *Designs Act 2003* (Cth).

May 2024 Update Summary

UPDATED COMMENTARY

Sam Ricketson has written new commentary on:

Recent Developments

Inquiry into enforcement of copyright and further copyright consultations

A fourth roundtable, chaired by the Attorney-General, was held on 4 December 2023. The topics discussed were orphan works, quotation from copyright material, use of copyright material in remote learning environments, the implications of artificial intelligence for copyright law, and the definition of “broadcast”. See [RD.2000].

Developments in Artificial Intelligence

On 5 December 2023, the Attorney-General announced that the government would now appoint the previously foreshadowed copyright and artificial intelligence (AI) reference group to better prepare for future copyright challenges emerging from AI. A first meeting of this body occurred on 22 February 2024. WIPO has also continued its consideration of AI issues with a further “Conversation on IP and Frontier Technologies” meeting that took place in Geneva on 13 and 14 March 2024. See [RD.2000] and [RD.2300].

Copyright infringement, defences and damages

Real Estate Tool Box Pty Ltd v Campaigntrack Pty Ltd [2023] HCA 38; (2023) 98 ALJR 27 involved alleged infringements of copyright in cloud-based real estate marketing software (DreamDesk) and raised the important question of how knowledge on the part of a defendant is required for it to be held liable for the authorisation of infringements of copyright by another party. See [RD.1000].

Motorola Solutions Inc v Hytera Communications Corporation Ltd [2022] FCA 1585; (2022) 172 IPR 221 involved multiple claims of patent and copyright infringement in relation to digital mobile radios. Leaving aside the patent issues, the judgment covered a wide range of copyright issues, including those of originality (particularly in relation to successive or updated versions of software), the scope of the reproduction and adaptation rights, injunctive relief and damages. See [RD.1065].

Microsoft Corporation v CPL Notting Hill Pty Ltd [2024] FCAFC 20 arose from a copyright infringement action with respect to computer software. The appellant’s appeal was based on the contention that it did not receive a fair trial. After careful examination of the transcript of evidence before the primary judge and her judgment, the Full Court held that this was an instance in which a new trial should be ordered and that it should be listed before a judge of the Federal Court, rather than sent back to the Federal Circuit and Family Court (Division 2). See [RD.1070].

THJ Systems Ltd v Sheridan [2023] EWCA Civ 1354 involved a range of issues. The particular issue on appeal of interest to Australian readers concerns the copyright status of images generated by software. The first instance judge had held that these images were original artistic works on the basis of the plaintiff's skill and labour. This finding was upheld on appeal, but with a careful correction provided by Arnold LJ to the effect that skill and labour was no longer the correct test of originality to be applied in the UK in light of European jurisprudence on this question which looked to the question of whether the alleged work was the author's own intellectual creation. See [RD.1075].

Native Extracts Pty Ltd v Plant Extracts Pty Ltd (No 2) [2024] FCA 106 involved parallel claims of breach of the equitable duty of confidence, breach of contractual obligations of confidence, breach of statutory duty of confidence and of directors' fiduciary duties, as well as infringements of copyright and breaches of the Australian Consumer Law in relation to the use of information relating to processes and techniques for the extraction of oils from officinal plants for the pharmaceutical, homeopathic, botanical and cosmetic sectors. See [RD.1800].

Aboriginal and Torres Strait Islander Visual Arts and Crafts – Government response following the Productivity Commission Study Report

The Government response following the receipt of the Productivity Commission report discussed at [RD.205] has been highly positive and proactive, particularly in relation to recommendations 6.1 and 6.2. See [RD.206].

New Resale Royalty Rights Regulations and extension to reciprocating countries

The Government has now extended the resale royalty right scheme under the *Resale Royalty Right for Visual Artists Act 2009* (Cth) to apply to 17 other countries on a reciprocal basis: see *Resale Royalty Right for Visual Artists Amendment (Reciprocating Countries) Regulations 2024* (Cth). The 17 countries are: Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom, all of which, except for the United Kingdom are European Union countries which recognise art resale royalty pursuant to an EU Directive: Resale Right Directive (2001/84/EC of 27 September 2001). This regulation commenced on 31 March 2024. See [RD.1400].