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## **LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES** **VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS**

### **"Before and After Designers Guild: Another Look at Appellate Deference in New Zealand's Copyright Law"**

*Victoria University of Wellington Legal Research Paper No. 1/2019*

**GRAEME W. AUSTIN**, Victoria University of Wellington

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This paper considers how Designers Guild has affected New Zealand's copyright law, using as its springboard two decisions of the New Zealand Court of Appeal: one before and one shortly after the Supreme Court's apparent endorsement of the approach to appellate deference that was adopted by the House of Lords. The paper argues that the special characteristics of New Zealand's copyright law — including the dominant use of copyright as a vehicle for protecting the designs of functional products —

should provoke some further scrutiny of whether deference to trial courts' findings on the substantiality of copying continues to be appropriate.

## "Anglo and E.U. Frameworks for Certification and Collective Trade Marks"

*Cambridge Handbook on International and Comparative Trademark Law (Ginsburg and Calboli eds.), Forthcoming*

*Victoria University of Wellington Legal Research Paper No. 2/2019*

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Ordinary trademarks promise consistent quality. This promise is the quid pro quo for the trademark proprietors' right to control the goodwill symbolized by the mark. Subject to external regulatory controls (safety standards, truth in labeling laws, etc.), it is largely up to the trademark proprietor to set those standards. If a firm wants to attach its brand to a chocolate product containing low levels of cocoa butter, that is its prerogative. It will be motivated to do so if consumers signal their approval with purchases. Certification trademarks, in contrast, promise consumers consistency with a pre-defined set of standards. This chapter, to be published in the Cambridge Handbook on International and Comparative Trademark Law (Ginsburg and Calboli eds.) discusses certification and collective marks in the Anglo tradition. The Anglo tradition will be illustrated by the provisions in the U.K. Trade Marks Act 1994, but reference will be made to the laws of other common law jurisdictions where there are salient distinctions. The chapter also outlines the new European Union framework. It discusses some of the important characteristics of these marks, focusing on the application of the distinctiveness standard for certification marks as well as any relevant controls on the administration of this species of trademark. Finally, the chapter briefly considers infringement issues. It concludes with some brief reflections on the social role of certification trademarks as "private governance" vehicles.

## "Trademarks & Private Environmental Governance"

*Notre Dame Law Review, Vol. 93, No. 2, 2017*

*Victoria University of Wellington Legal Research Paper No. 3/2019*

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This Article examines the relationship between private environmental governance and trademark law. Over the past two decades, green trademarks and other forms of private governance have flourished in tandem with the retreat from national and international public law modalities of environmental regulation. The rising political opposition to environmental regulation partly accounts for this change. Also relevant is the rise of globalization, which due to jurisdictional and trade constraints has diminished the effective regulatory control countries have over products sold in their markets.

Private environmental governance is premised on consumers "voting with their wallets" by selecting products that reflect not just their instrumental preferences but also their values. The potential of this form of private governance has not been realized, however, in part because consumers are often overwhelmed by information from multiple green trademarks with different standards or criteria. The resulting congestion of market information has undermined the communicative function of green trademarks that is essential to enabling consumers to make environmentally responsible choices.

For a variety of reasons, trademark law is premised on a narrowly prescribed role for trademarks that is poorly adapted to facilitating information-based forms of private governance. Instead, intramural battles over the scope of trademark rights—ignited by overreaching corporate branding strategies—have elevated a reactionary turn in trademark theory that reduces trademarks solely to identifying the specific source of a product or service. We argue that the normative ends of private environmental governance should factor into, though by no means determine, trademark policy.

## "EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire"

*UNSW Law Journal, Volume 39(2)*

*Victoria University of Wellington Legal Research Paper No. 4/2019*

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This article concerns the interpretation of the defence of fair dealing 'for the purpose of parody or

satire', a defence that was added to the Australian Copyright Act 1968 (Cth) in 2006. The Copyright Act 1968 (Cth) provides no definition of 'parody or satire'; no cases have considered the meaning of parody or satire in this statutory context; and official sources provide little interpretive guidance on the meaning of these terms. It considers this defence in the light of recent cases from the Court of Justice of the European Union and from the United States. (2016) 39 University of New South Wales L J 684.

## "Entertaining Foreign Copyrights"

*Forthcoming in Sam Ricketson and Megan Richardson, eds., Research Handbook on Intellectual Property in Media and Entertainment*

*Victoria University of Wellington Legal Research Paper No. 5/2019*

**GRAEME W. AUSTIN**, Victoria University of Wellington

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This paper discusses the implications of the UK Supreme Court's decision in *Lucasfilm*, focusing on the issue of jurisdiction over cases involving foreign infringement of intellectual property rights. Part II focuses on the implications of *Lucasfilm* in the context of cross-border infringement cases. Part III discusses cross-border ownership problems, a topic that was not raised in the context of *Lucasfilm*.

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Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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