

## > Australian Intellectual Property year in review 2020

2020 was a year like no other, but in the midst of it all there was a great deal happening in the Australian intellectual property space. While the race for a COVID-19 vaccine saw unprecedented levels of collaboration between governments, industry and academia, which in turn put IP rights in the spotlight, the year also brought with it a number of significant cases and legislative developments.

Here is our snapshot of the highlights of 2020 and the key developments to watch in 2021.

### 2020 Highlights

#### Copyright & Designs

- > In a case about whether a new song infringed the rights to John Paul Young's 1978 song 'Love is in the Air', an Australian court for the first time decided that the sung sound of lyrics formed part of the musical copyright work, and that the human voice was a musical instrument.
- > In a case concerning software copyright, the Federal Court held that the software code was a work of joint authorship of nine developers and that the small quantity of code copied (0.07% of 175,293 lines) was not a 'substantial part', meaning there was no infringement.
- > Following controversy about a copyright licensee levying charges for the use of the Australian Aboriginal flag, a committee of the Australian Senate recommended that an independent Aboriginal committee should have custodial oversight over the copyright in the flag.

#### In 2021

We expect that proposed amendments to copyright and designs legislation will have a widespread impact if passed into law. This includes the introduction of a grace period for design registrations and a corresponding prior use exemption; and for copyright, a fair dealing exception for non-commercial quotation, and an expansion of the statutory licensing scheme.

#### Trade marks

- > Enforcing a descriptive trade mark was a costly mistake. In *Urban Alley Brewery Pty Ltd v La Sirene Pty Ltd* [2020] FCAFC 186, the Full Court held that 'URBAN ALE' merely describes craft beer made in an inner-city location, resulting in cancellation of the registered trade mark.
- > The Full Court upheld the Federal Court's finding that use of 'DOWN-N-OUT' amounted to infringement of American burger chain IN-N-OUT's registered trade marks in *Hashtag Burgers Pty Ltd v In-N-Out Burgers, Inc* [2020] FCAFC 235, proving that a 'cheeky' nod to a trader based overseas can stray into actionable trade mark infringement.
- > The Federal Court held that goodwill is inseparable from the business to which it adds value and cannot be separately assigned. The dispute between Kraft and Bega concluded with the High Court rejecting an appeal late in 2020.

#### In 2021

We expect further judicial guidance on the key concepts of deceptive similarity and reputation. Look out for judgments in the 'Big Jack' and 'Botox' cases.

#### Patents

- > Patentees' rights are exhausted upon sale of a patented product. The High Court's decision in *Calidad Pty Ltd v Seiko Epson Corporation* [2020] HCA 41 has overturned the long-standing 'implied licence' principle in Australia.
- > A mere scheme does not become patentable subject matter merely by being implemented by a computer, the Full Court held in *Commissioner of Patents v Rokt Pte Ltd* [2020] FCAFC 86.
- > Legislative changes introduced by the *Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures) Act 2020* include abolition of innovation patents; a new 'public interest' test to compulsory licences; a new objects clause in the Patents Act; and a new ground of Crown use in emergencies.

#### In 2021

We expect a final flurry of innovation patent applications prior to the 25 August 2021 deadline for filing new applications. Publication of the patents accessibility review's report is expected to prompt proposals for change to the Patents Act.

#### Franchising

- > The Franchising Code of Conduct (the **Code**) was amended in relation to motor vehicle new vehicle dealerships. The changes relate to significant capital expenditure, end-of-term arrangements and dispute resolution.
- > An exposure draft of further, more general amendments to the Code was released, including enhanced disclosure requirements, increased penalties, an extended cooling off period and dispute resolution changes, among other amendments.
- > Franchisor, Back In Motion Physiotherapy, made an undertaking to the Australian Competition and Consumer Commission (the **ACCC**) regarding potentially unfair contract terms, reinforcing the regulator's commitment to investigating such activity in the small business space.

#### In 2021

Franchisors will need to review their franchising documents once amendments to the Franchising Code are finalised. We anticipate the approach to franchise-related bargaining will change once collective bargaining receives ACCC approval at some point in 2021.

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### Allens' 2020 highlights

#### Prevnar

Represented Wyeth in defending patents relating to its pneumococcal conjugate vaccine in the Federal Court.

#### Tiger Woods

Represented Tiger Woods Enterprises SA in successfully defending a trade mark opposition against the trade mark TGR.

#### Infosys

Represented the global technology company in a software dispute with Qudos Bank involving allegations of copyright infringement and breach of confidence.

#### Under Armour

Represented Under Armour in connection with the Australian and New Zealand aspects of its trade mark dispute with Ageas Inc involving the logo for Ageas' Hotsuit apparel.

#### Sony Interactive Entertainment (SIE)

Acted for SIE in a preliminary discovery application in the Federal Court in relation to leaked content of an unreleased PS4 game.

#### Bendigo and Adelaide Bank (BEN)

Represented BEN in a Full Federal Court appeal challenging a decision revoking BEN's trade mark for COMMUNITY BANK and allowing a credit union to register COMMUNITY FIRST BANK and COMMUNITY FIRST MUTUAL BANK.

#### Ford Motor Company

Acted successfully for Ford in opposing an application by Tallevine Pty Ltd to the Administrative Appeals Tribunal against a decision of the Registrar of Trade Marks. The matter resulted in orders leading to Tallevine's conflicting trade mark application lapsing.

#### Cytec

Represented Cytec in Federal Court proceedings appealing an opposition of Nalco's accepted patent application relating to a means of reducing scale build-up during the Bayer process used to manufacture alumina from bauxite ore. This was the first time the Federal Court has considered the scope of the grace period provisions for patents.

#### Australian Olympic Committee (AOC)

Represented AOC in Federal Court proceedings against Colonial Leisure Group involving design infringement and misleading and deceptive conduct arising from the use of branding on beer cans.

#### Automotive franchising

Advised automotive franchisors on compliance with the motor vehicle amendments to the Code, including timing and content of updates to franchise agreements and disclosure documents.

### We wish you a safe and prosperous 2021

As always, please reach out to anyone on the Allens team should you need any assistance.



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### A selection of our 2021 rankings

**TOP TIER** in Intellectual Property  
Chambers Asia Pacific 2021 and  
Legal 500 Asia Pacific 2021

**TOP TIER** in trade mark contentious,  
patent contentious and copyright &  
related rights in Managing IP  
Australia 2020

**TOP TIER** in trade mark enforcement  
and litigation in World Trade Mark  
Review Australia 2020



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