



# PROTECTING YOUR PROPERTY: IP LAW IN 2020 AND BEYOND

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# Protecting your property: IP law in 2020 and beyond

The legislation around intellectual property, trade marks and patents plays a critical role in the modern business landscape – but it's not always well understood by the wider public. Some of the leading voices in the industry outline what legal professionals can do to bring greater awareness to the importance of these matters

**INTELLECTUAL PROPERTY** law exercises a significant amount of power within the legal system, yet it doesn't tend to attract the same level of public attention as, say, criminal law. While there are periodic high-profile cases that attract media interest – typically involving large sums of money or public disputes over prominent brands – these are the exception rather than the rule. Nonetheless, it's crucial for lawyers to effectively communicate the importance of this legislation to business clients.

“I think it's fair to say there's a lack of understanding of IP among businesses in Australia and New Zealand generally,” says Mark Hargreaves, principal at AJ Park. “They're not always clear on what IP rights are, how they work or when they should be filing. Misunderstanding in the media contributes to a degree – articles often refer to trade marks as copyright and copyright as patents, and so on. The terms are often being used interchangeably in the public eye, which adds to the confusion. In the US, businesses tend to be a bit more IP-savvy.”

This can translate into real-world problems from businesses who aren't up to date with the appropriate legislation. Companies often seek to claim exclusive rights to a



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Gus Hazel, James & Wells

# IP AND TRADE MARK LAW

## CONSOLIDATION IN THE IP INDUSTRY



According to Mark Hargreaves, principal at AJ Park, the consolidation of IP firms has been one of the most notable trends in the last few years across Australia and New Zealand.

“Consolidation probably reflects the maturing of the Australian and New Zealand IP market,” he says. “There’s not necessarily strong growth and expansion in filing numbers at the moment, so getting scale is important. It’s important for staff attraction, retention and establishing strong foundations for the future – particularly with an eye to the growth of the IP industry across South East Asia.”

Fundamentally, Hargreaves says, the day-to-day work for IP lawyers hasn’t changed a great deal. A few more boutique firms have arisen, but for the most part, employees are still doing similar work for similar clients – just under fewer banners. Whether this trend will continue into the future is something he’s watching with considerable interest.

descriptive brand name when often this cannot be done, notes Kellie Stonier, principal at Griffith Hack.

There is an increasing trend of marketing teams creating brand names that are descriptive of the goods or services provided by a company, rather than creating an invented or unique word, explains Stonier. This approach is popular because it allows consumers to more easily understand what goods and services are being offered.

But there’s an issue with that approach – trade mark law only protects distinctive marks, or marks that are capable of being distinguished through use. Often, companies invest significant funds in a marketing campaign around a mark that is not distinctive, only to realise later that they can’t protect it or prevent others from using it.

“The key to a strong and protectable trade

mark is to create and invest in a mark that has distinctiveness,” Stonier says.

Unfortunately, IP strategy is often an afterthought, says Gus Hazel, partner at James & Wells. Many businesses only consider their IP position strategically after a threat, dispute or missed opportunity.

“Leaving IP strategy or even not bothering to explore protection until ‘later’ can increase the risk of making costly mistakes or losing the ability to own your innovations exclusively,” Hazel says. “When a business works on its IP strategy from the beginning and integrates it into the broader business strategy, we find they tend to make better investment decisions and capture more value from their work. Often, it is a matter of just

reports that emerge are sometimes contradictory. This has wider business implications for anyone looking to file for protection.

“Companies need a level of certainty when launching brands and new products and an efficient procedure to record their rights,” Stonier says. “These possible delays and inconsistencies need to be factored into the timing of any brand or product launch.”

Indeed, it’s possibly indicative of other issues; Australia has also seen a number of recent Federal Court cases where the validity of a registered trade mark was challenged.

“The consequences of these errors can be numerous,” Stonier explains. “It could result in the removal of your trade mark from the register and potentially the loss of priority or



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stepping back and asking, ‘What are we creating here, and are we doing the best we can with it?’”

Hazel also cautions against simply viewing IP protection as too expensive.

“As a litigation lawyer, I can guarantee that prevention is much cheaper than the cure,” he says. “Getting IP protection and dealings organised may cost a bit in the short term but will save much, much more in the long term.”

### Navigating the IP landscape

As with any field of law, there are issues that present challenges to clients and lawyers alike. For example, Stonier highlights examination periods for trade marks in Australia; while IP Australia is working hard to improve examination timeframes and consistency, the wait is currently around six months, and the

rights to a third party. It can make enforcement of your trade mark rights against others difficult or not possible. If you have used the flawed Australian registration as a basis for an international application under the Madrid Protocol, it could put the international application at risk if the Australian registration is challenged within the first five years.”

Hazel notes that differences in the laws between Australia and New Zealand do allow for a greater number of actions around infringement in New Zealand, particularly in relation to industrial copyright.

“The Australian and New Zealand governments are continuing to work on harmonising the law to promote closer economic integration and allow their respective IP offices to work together and become more efficient in the longer term,” Hazel explains. “It’s an ongoing project.”

# IP AND TRADE MARK LAW

## MARKET COMPETITION VERSUS IP LAW



According to Gus Hazel, partner at James & Wells, there has long been a struggle between IP and competition law. "IP owners benefit from exclusive rights to an innovation, brand, etc.," he explains. "They are in many ways monopoly rights, and competition law is largely anti-monopoly."

But recently, there have been legislative reviews and changes in Australia and New Zealand that would make conduct involving intellectual property rights no longer automatically exempt from certain principles in competition law.

"There's some uncertainty as to how this will work in practice and what might now amount to a breach of competition law," Hazel says. "We recommend that businesses with a potentially dominant position in their market space by reason of their IP seek advice about their position."

### Patents and innovation

IP activity can be a leading indicator of the general health of a country's innovation – and in turn its wider economy, Hargreaves notes. Patents can offer insight into the level of inventions and innovations that are occurring across the country as businesses and individuals strive to register their concepts before they bring them to a wider market.

"Although increased investment in IP doesn't necessarily mean we're being more innovative, it does seem that volumes of locally generated IP continue to stagnate – bar some notable exceptions," Hargreaves says. "International filings still make up the vast bulk of IP filed in Australia and New Zealand."

Hargreaves believes that there are a number of contributing factors – for one, larger companies in both Australia and New Zealand tend not to be as IP-intensive as other countries. But another is due to the rise



**"The challenge will be how IP law and IP lawyers evolve in the years ahead as technology change moves faster and faster" Mark Hargreaves, AJ Park**

of software as a service (SaaS) companies in New Zealand. It's an innovative sector, but it doesn't necessarily lend itself to filing patents.

"Patents protect an invention," Hargreaves explains. "By contrast, SaaS businesses don't usually rely on a single factor or invention for their competitive advantage – the features and functions included in their products aren't necessarily new, they're just packaged differently and delivered via the internet."

Patents represent other opportunities for businesses, too. Hazel notes that some businesses have valuable IP but can't or don't want to leverage it themselves, usually due to their

stage, size or focus on other core business. Licensing can be a great opportunity to reach new markets and/or monetise intangible, underused assets.

Additionally, trade mark and patent trends can provide wider market insights. "Trade mark and patent searches can also provide valuable information and intelligence on which markets competitors are filing in and what technology they are focusing their efforts on," Hazel says. "This can help make better choices about investments going forward, such as by identifying gaps or at least avoiding crowded or low-profit market spaces."

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## THE SOCIAL EFFECTS OF IP LAW



While IP law can sometimes seem abstract in its day-to-day impact, it's crucial to remember that the effects of the surrounding legislation are not confined strictly to business issues. Kellie Stonier, principal at Griffith Hack, points to existing New Zealand trade mark structures, including an advisory committee, aimed at preventing the misappropriation of Māori text and imagery. There is also an increased focus in Australia on protecting the traditional knowledge and intellectual property created by First Nations peoples.

"It's no longer socially acceptable for companies to leverage off First Nations peoples without appropriate benefit sharing," Stonier explains. "It could be potentially damaging to a brand owner to adopt culturally significant words as brand names or Indigenous artistic works in marketing materials when there is no legitimate connection or appropriate arrangement with First Nations peoples."

### Emerging trends and changing needs

Given the ways in which precedent influences IP law, there's no doubt it will undergo further evolution in the coming years. Additionally, processes will need to shift to ensure the field keeps pace with wider technological developments.

Stonier notes that IP Australia is already considering how artificial intelligence might improve the efficiency of the trade mark registration process.

"It's likely that AI can assist in certain procedural tasks and minimise timeframes during the registration process," she says. "Investigation into the opportunities that might arise through the use of AI will continue over the next few years."

There's also a real appetite for faster and cheaper dispute resolution processes, Hazel

adds. Currently, for many disputes, the only option with teeth is court proceedings, and for many disputes, the expense and time involved with such proceedings simply can't be justified. This can leave parties at a very unsatisfactory dead end.

"Many in the field want to see either a small claims court or IP disputes tribunal introduced, or a streamlined arbitral process, similar to domain name disputes procedures," Hazel explains.

While such a system might not be as robust and thorough as court proceedings, it would provide greater accessibility to dispute resolution, particularly for small and medium-sized businesses, at an acceptable cost and without significant delay.

Hargreaves sees potential issues for patent law in terms of getting new faces into the industry. While practising as an IP lawyer requires a legal degree, patent law also requires prospective candidates to have a science or engineering specialty. Numbers

within the industry are currently holding steady, but Hargreaves believes the profession needs to be prepared for a potential decline in the future.

"It's more expensive to train people up than it has been in previous decades," he explains. "Additionally, there are far more outside job opportunities for engineers in particular – startups and large corporates are always on the lookout for new recruits. It's a bit of a marketing issue on our industry's part, I think."

Still, he remains optimistic on the whole. "As an industry, I think we're heading in the right direction, and we have evolved over the years as new waves of technology emerge," Hargreaves says. "The challenge will be how IP law and IP lawyers evolve in the years ahead as technology change moves faster and faster. IP law is an important feature of the legal system and the wider economy, and the more people who are aware of its importance, the better." **AL**

