

The Ultimate Boundary of Digital Property?

PROFESSOR BRIAN FITZGERALD

PhD By Publication Submission

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Supervisors:

Professor Charles Sampford and Dr Haig Pattapan

**PhD by Publication Introductory Statement
Professor Brian Fitzgerald**

Title: The Ultimate Boundary of Digital Property?

List of Publications

1. CONCEPTUALISING THE DIGITAL ENVIRONMENT

Publication No. 1:

“Conceptualising the Digital Environment” in *Going Digital 2000* – sole author

Publication No. 2:

“Recent International Initiatives Concerning Copyright in the Digital Era” in *Going Digital 2000* – sole author

2. CONSTRUCTING DIGITAL PROPERTY

Publication No. 3:

“Intellectual Capital and Law in the Digital Environment” (2001) 5 *Southern Cross University Law Review* 206 – sole author

a) The Role of Intellectual Property Legislation

Publication No. 4:

“Lotus Development Corporation v Borland International Inc: Is the Lotus 1-2-3 Menu Command Hierarchy Copyrightable” (1995) 6 *Journal of Law and Information Science* 277 – sole author

Publication No. 5:

“Computer Copyright: Same Words, Different Source Code: Data Access v Powerflex” (1996) 2 *Computer and Telecommunications Law Review* 120 – sole author

Publication No. 6:

(with Gamertsfelder and Gulliksen) "Marketing Your Website: Legal Issues Relating to Internet Domain Names" (1998) 21 *UNSW Law Journal* 549 – 60% my work

Publication No. 7:

"Navigating Cyberspace: Frontier Land or Legal Minefield?" 3 *Southern Cross University Law Review* 153 – sole author

Publication No. 8:

(with E Sheehan) "Trademark Dilution and the Commodification of Information: Understanding the 'Cultural Command'" (1999) 3 *Mac LR* 61 – 90% my work

b) The Role of the Common Law (particularly unjust enrichment law)

Publication No. 9:

(with Gamertsfelder) "Protecting Informational Products through Unjust Enrichment Law" [1998] *European Intellectual Property Review* 244 – joint author – 80% my work

c) The Role of Contract

Publication No. 10:

(with Evans) "UCC Draft Art 2B: The Ascendancy of Freedom of Contract in the Digital Millennium?" (1998) 21 *University of New South Wales Law Journal* 404 – 40% my work

Publication No. 11:

"Commodifying and Transacting Informational Products Through Contractual Licences: The Challenge for Informational Constitutionalism" in CEF Rickett and GW Austin (eds), *Intellectual Property and the Common Law World*, Oxford, Hart Pub, 2000, 35 – sole author

3) DIGITAL DIVERSITY AND CONSTITUTIONALISM

Publication No. 12:

“Software as Discourse: The Power of Intellectual Property in Digital Architecture” (2000) 18 *Cardozo Journal of Arts and Entertainment Law Journal* 337 – sole author

Publication No. 13:

“Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?” [2001] *EIPR* 121 – sole author

Publication No. 14:

“(Australian) Constitutional Limits on Intellectual Property” [2001] *EIPR* 103 – sole author

CONCLUSION: DIGITAL PROPERTY: THE ULTIMATE BOUNDARY

Publication No. 15:

“Digital Property: The Ultimate Boundary?” (2001) 7 *Roger Williams University Law Review* 47 – sole author

1) WAY IN WHICH APPLICANT'S WORK HAS DEVELOPED

Throughout my undergraduate studies in law I took a keen interest in politics, economics and constitutional and international law. I also worked at that time for the Crown Law Office of Queensland and gained significant experience in Public Law. After graduating I worked as a Research Associate for the High Court of Australia at the direction of then Justice William Deane (at the time when Sir Anthony Mason was Chief Justice). This time at the High Court provided new ideas and experience in relation to legal research (especially computerised legal databases), writing, reasoning and conceptual thinking. It also allowed me to see the inner workings of the highest court in the land and to work on a number of significant constitutional law opinions. During this time Justice Deane was a generous mentor and pointed out to me the importance of the legal area of Restitution and the special expertise of Professor Peter Birks at Oxford University in relation to this topic.

On receiving a Commonwealth Scholarship to Oxford I undertook a course in Restitution with Professor Birks along with courses in International Law (with Professor Brownlie), Evidence (with Professor Tapper) and Corporate Insolvency (with Professor Goode). These subjects allowed me the opportunity to ponder constitutional and political issues particularly at the international level while closely examining the way in which the law commodifies and protects "value" and "wealth".

On returning from Oxford I became a full time academic teaching Constitutional Law, Administrative Law, International Law and Advanced Civil Obligations (including the Law of Restitution). In 1996 I was involved (with Tony Blackshield and George

Williams) in compiling an innovative new casebook on Constitutional Law – *Australian Constitutional Law and Theory* (1996). I had initially presented the idea to Federation Press as an individual project and they put me in touch with Tony and George who were already progressing their own ideas and materials. The individual project became a collaborative effort. My role was to devise the first six chapters, which looked at definitional, conceptual and theoretical perspectives on constitutional law; topics which up until that time were missing from Australian Constitutional Law textbooks. The book was a great success and was generally seen as a fine example of the curriculum development and innovation that was being undertaken at Griffith University Law School at the time.

During this time (1993-1996) I also published three significant articles on restitution and unjust enrichment and a long and well-received article on proportionality and Australian constitutionalism.

In 1995-6 I was fortunate to take a Harvard Law School Scholarship along with sabbatical leave to complete a Master of Laws at Harvard University Law School. This allowed me to develop expertise in the area of informational (including intellectual) property and internet (or cyber) law. I took a course on the Law and Theory of Intellectual Property (with Professor William Fisher) and Law, Internet and Society (with Professor Charles Nesson founder of the high profile Berkman Centre for Internet and Society). I also took courses on International Law and Theory (with Professor David Kennedy) and Constitutional Law (with Laurence Tribe). My thesis under David Kennedy was published as “Trade Based Constitutionalisms: A Framework for Universalising Substantive International law” (1996-7) 5 *University of*

Miami Yearbook of International Law 131. I also undertook a course on European Community Law focussing on constitutional issues with Professor Joseph Weiler.

It was at Harvard that I was able to begin to marry my three pillars of research: constitutional law and constitutionalism, restitution and unjust enrichment and informational property.

On my return to Australia I continued teaching Constitutional Law, Administrative Law, International Law and Advanced Civil Obligations (including the Law of Restitution) but now added a new unit called “Cyberlaw”. This was one of the first Cyberlaw units to be run in Australia, although there were up to 10 such courses being offered at the large US law schools.

The dot com boom had arrived and industry and lawyers alike wanted to know more about the new economic and legal landscape known as “cyberspace”. Along with my sister Dr Anne Fitzgerald I devised a series of seminars branded “Going Digital” which showcased complex legal issues arising in relation to digital intellectual property and electronic commerce. The seminars were unique and innovative and ended up turning into a series of essays for which I am co-editor titled *Going Digital: Legal Issues for Electronic Commerce, Multimedia and the Internet* (Prospect Publishing Sydney, 1998) (launched by Federal Attorney General Daryl Williams QC who in launching the book said – “this book provides a timely snapshot of the legal implications of the Internet for wide ranging areas of the law. I commend the publication to you all”) and then in the second edition *Going Digital 2000: Legal Issues Relating to the Internet, Software and Electronic Commerce* (Prospect Publishing, Sydney 2000) (launched by

High Court Justice Michael Kirby who later reviewed the book in the *Australian Law Journal* in very positive terms: (2000) 74 *ALJ* 329). The book has become a leading text for those advising in the Internet, digital intellectual property and e commerce areas.

As this dot com revolution was happening around me I was promoted to Senior Lecturer and then in 1998 offered the position as Associate Professor and Head of the School of Law and Justice at Southern Cross University. While this new role demanded much of my time in administration I managed to continue to publish articles, present at conferences, teach and organise conferences.

In March 1999 along with Gail Evans and my sister Anne I organised the *Australian Intellectual Property Conference: IP Rights in the Digital Age*. This was a landmark conference, which showcased three leading US Intellectual Property professors along with a host of Australian experts including three senior judges. The Conference raised legal issues the implications of which are still being considered throughout the country.

Also each December from 1998-2001 I have convened a Cyberlaw course at Southern Cross University's unique Byron Bay Summer School. In 1998 Professor Charles Nesson co-taught the course with me, in 1999 it was Professor Lawrence Lessig and in 2000 it was Professor William Fisher all at that time from Harvard University Law School. They brought with them a depth of understanding that helped me broaden my writing and research. Lessig is now regarded as one the most influential thinkers on Internet law throughout the world.

In October 1999 I was invited to present the prestigious Tenzer Lecture at Cardozo Law School Yeshiva University in New York. This was followed in October 2000 by an invitation to present in a series of high level/keynote lectures for the Ontario (Canada) wide Innovation Law and Policy Centre. The lecture was titled "Digital Property" and has led to the publication of a significant essay titled "Digital Property: The Ultimate Boundary?" in an American law journal, the *Roger Williams University Law Review*. This has been supported by my teaching a course called Digital Property at Santa Clara University in Silicon Valley USA twice in the first part of 2001. This allowed me to trial and experiment with my thoughts on Digital Property which appear in the article published in the *RWU Law Review*.

While in Canada I also presented to the leading Canadian Business School, the Ivey School of Business, on "Intellectual Capital and Law in the Digital Environment" and this has now been published in a modified version in the *Ivey Business Journal* in Canada and in a more extended version in the *Southern Cross University Law Review*.

In 2000 and 2001 I was invited by a leading international intellectual property journal *European Intellectual Property Review* to write the prestigious/high profile Opinion piece for the journal. Both pieces argued for greater understanding of diversity in the digital context and sought to posit software as an underestimated variable in the construction of knowledge in the digital environment.

Also in 2000 I co-wrote an article with my sister Anne that was published in a Japanese academic text in Japanese: "Legal Aspects Concerning Software Infrastructure of the

Internet” (in Japanese) in M Ibusuki (ed) *Cyberspace Law* (2000) Nihon Hyronsha Tokyo.

In March 2002 I published (along with my sister Anne Fitzgerald) a book titled *Cyberlaw: Cases and Materials* LexisNexis/Butterworths, Sydney. This casebook is a refinement of the materials that I have been using as the basis of my teaching in Cyberlaw over the last five years. It was launched by Justice Drummond of the Federal Court of Australia on 4 June 2002 and has received positive feedback from academics and practitioners.

To give context to my research I list my conference presentations and conferences organised over the last five years:

CONFERENCE PRESENTATIONS 1997-2003

1997

“Copyright for Multimedia: Recent International Initiatives” – Paper delivered at Qantm CMC Going Digital Seminar, Brisbane February 1997

“Rise and Fall of Australian Proportionality” Paper delivered to Constitutional Law Interest Group, Brisbane May 1997

“Legal Issues Arising from *Kruger v Commonwealth*” Paper delivered to Constitutional Law Interest Group, Brisbane October 1997

“Navigating Cyberspace: Frontier land or Legal Minefield” – paper presented to a Opening Plenary Session of the Australasian Law Teachers Conference in Sydney, October 1997

“Fundamental Legislative Principles Rationale and Meaning” – Queensland Government Seminar, Parliament House, October 1997

“ISP/On Line Liability” Qantm CMC Going Digital Seminar, Melbourne 19 November 1997

1998

“ISP Liability” Qantm Seminar Hobart April 1998

“Law and the Internet” WWW7 Brisbane April 1998

“ISP Liability” Going Digital Seminar Brisbane November 1998

1999

Imagining the Digital Environment – AIPC Conference March 1999

Laws for the Digital Millennium – Qld Law Society Conference March 1999

Paralegal, Distance and Technology Based Law Studies, International Law Deans Conference on Legal Education for the 21st Century (in Chinese), Beijing, May 1999

Law and the Digital Millennium – UWS Law Students Society (invited Keynote) May 1999

Conceptualising the Digital Environment – mp3 Forum: Digital Distribution and the Music Revolution – July 1999

Commodifying and Transacting Informational Products Through Contractual Licences: The Challenge for Informational Constitutionalism, Intellectual Property and the Common Law World Conference, Auckland NZ, July 1999

Software as Discourse: The Power of Intellectual Property in Digital Architecture – Seventh Annual Tenzer Lecture Cardozo Law School New York 1999 – October 1999

Software as Discourse: The Power of Intellectual Property in Digital Architecture – Berkman Centre for Internet and Society Harvard Law School – October 1999

Software as Discourse: The Power of Intellectual Property in Digital Architecture – Law Offices of Baker Mckenzie, Chicago – October 1999

Software as Discourse: The Power of Intellectual Property in Digital Architecture – Computer and Law Centre, Law School University of Oslo, Oslo Norway – October 1999

Software as Discourse: The Power of Intellectual Property in Digital Architecture – Institute for Information Law, Law School University of Amsterdam, Amsterdam Netherlands – October 1999

Commodifying and Transacting Informational Products Through Contractual Licences: The Challenge for Informational Constitutionalism, Allens Solicitors Sydney, November 1999

Conceptualising the Digital Environment - Law and Business for the Digital Millennium
– December 1999

Software as Discourse: The Construction of Digital Identity – 17th Annual Law and
Society Conference Byron Bay December 1999

2000

Law and Theory of Proprietary Rights in Digital Architecture (Software) – UCLA
Berkeley, Centre for Law and Technology, Berkeley CA

Law and Theory of Proprietary Rights in Digital Architecture (Software) –
Intellectual Deserts Seminar Series – Sun Microsystems Palo Alto California (Silicon
Valley)

Law and Theory of the Legal Regulation of Software, International Intellectual
Property Conference, Fordham University law School New York – April 2000

Legal Issues for Doing Business on Line – Tutorial at WWW9 in Amsterdam in May
2000

Informational (including Intellectual Property) Rights in Digital Architecture – Panel
Session WWW 9 Amsterdam May 2000

Keynote Address – Law and the Internet – Ausweb 2000 – Cairns June 2000

Legal Issues for Doing Business on Line – Tutorial at Ausweb 2000 – Cairns June
2000

Propertizing Information – Digital Horizons: Law and Business for the Digital
Environment – E Commerce Seminar Cairns June 2000

Keynote Address – Law and the Internet – North American (NA) Web 2000 –
University of New Brunswick, Fredricton Canada – October 2000

Propertizing Information – Law School – University of New Brunswick, Fredricton
Canada – October 2000

Digital Property – Centre for Innovation Law and Policy – University of Western
Ontario London Ontario Canada – October 2000 (this Centre is co-hosted with
University of Toronto)

Intellectual Property Rights in Digital Architecture (including Software): The
Question of Digital Diversity? – 7th Working Conference on Reverse Engineering
(IEEE) Brisbane, 23 November 2000

2001

Commodifying and Transacting Informational Products through Contract – Australian Copyright Council Symposium – Sydney November 2001

2002

Open Source Software (Panel) – IP WEEK Santa Clara University – March 2002

2003

Digital Property – LAWASIA Conference – Delhi India January 2003

Jurisdiction and the Internet (Panel) – Amity Law School – Delhi India January 2003

Cyberlaw – Nepal Law Campus Tribhuwan University and Nepal Bar Association – Kathmandu Nepal January 2003

Theoretical Underpinning of Intellectual Property (Panel) – University of Western Ontario – London, Canada February 2003

Anti Circumvention Laws, Internet Jurisdiction and the Future of Digital Information – University of Ottawa Law School – Ottawa Canada February 2003

CONFERENCES ORGANISED

Sub-Convenor, Australian Intellectual Property Conference, Intellectual Property in the Digital Age, Coolangatta, March 1999

Co-Convenor, mp3 Forum: Digital Distribution and the Music Revolution, Parliament House Brisbane (I organised Harvard Law Professor Terry Fisher to participate in this event) July 1999

Co-Convenor, Law and Business for the Digital Millennium, Byron Bay, December 1999

Convenor – Tutorial and Panel Sessions at WWW9 Amsterdam, May 2000

Convenor – Tutorial Session - Ausweb 2k Conference - Cairns, June 2000

Convenor – Digital Horizons: Law and Business in the Digital Environment Cairns, June 2000

Program Chair – Law, Electronic Commerce and the Digital Economy – Telstra Auditorium Sydney – Run for Australian Judges sponsored by the National Office of Information Economy (NOIE) – December 2000

Program Chair – Innovation, Software, and Reverse Engineering: Technological and Legal issues – Santa Clara University Law School Silicon Valley USA – March 2001

Program Chair – Open Source Software: Business and Legal Issues – Santa Clara University Law School Silicon Valley USA - June 2001

Program Chair – Legal Issues Relating to Free and Open Source Software – QUT Law School – July 2002

I have also authored the following articles:

1993

“Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment” (1993) 2 *Griffith Law Review* 1 – sole author

“Proportionality and Australian Constitutionalism” (1993) 12 *University of Tasmania Law Review* 363 – sole author

1994

“Tracing at Law, Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment” (1994) 13 *University of Tasmania Law Review* 116 – sole author

“International Human Rights and the High Court of Australia” 1994 (1) *James Cook University Law Review* 78 – sole author

Cited by Justice Kirby in the High Court of Australia in *Kartinyeri v Commonwealth* [1998] HCA 22 [Fn 303]

1995

“Theorising About International Law Through the Liberal Paradigm” (1995) 16 *Australian Yearbook of International Law* 311 – sole author

Cited by Justice Kirby in the High Court of Australia in *Dow Jones and Company Inc v Gutnick* [2002] HCA 56 [Fn 139]

“Ownership as the Proximity or Privity Principle in Unjust Enrichment” (1995) 18 *University of Queensland Law Journal* 166 – sole author

"*Horta v Commonwealth*: A Case in the High Court of Australia Concerning the Validity of the Timor Gap Treaty and its Domestic Implementation" (1995) 44 *International and Comparative Law Quarterly* 643 – sole author

1996

"*Portugal v Australia*: Deploying the Missiles of Sovereign Autonomy and Sovereign Community" (1996) 37 *Harvard International Law Journal* 260 – sole author

"Trade Based Constitutionalisms: A Framework for Universalising Substantive International Law" (1996-7) 5 *University of Miami Yearbook of International Law* 131

1997

"Life in Cyberspace: A Simulating Experience" (1997) 3 *Computer and Telecommunications Law Review* 121 – sole author

1998

"Underlying Rationales of Fair Use" (1998) 2 *Southern Cross University Law Review* 153 – sole author

2000

"Internet Service Provider Liability (ISP) Liability" in *Going Digital 2000* – sole author

2) DEMONSTRATE CONTEMPORARY RELEVANCE OF EACH PUBLICATION

The publications examine an emerging area of law and to this end are very much contemporary pieces. My writings have been at the forefront of the development of this area of law in Australia and very well received overseas.

Many of the articles remain relevant because they touch upon issues that are yet to be (fully) resolved by lawyers, legislators and judges. For example, the High Court is yet to determine whether copyright law, the common law or a *sui generis* regime (see publication no 8) will be the appropriate vehicle to protect databases nor has the Australian parliament turned its attention to the legal regulation of technologically constructed property (see publication no 15).

The various publications have received citations by the High Court of Australia, the Copyright Law Review Committee, and academic peers, and been well received by practitioners in different parts of the world.

The fact that I have been invited to deliver two (Nos 12 and 15) of the publications as Keynote Lectures in the USA and Canada respectively, and one in Australia associated with a live link to Harvard University Law School (No 7), also reinforces their contemporary relevance at an international level.

To further highlight the contemporary relevance of my publications I list the following as a sample of the citations and acknowledgements they have received.

1. CONCEPTUALISING THE DIGITAL ENVIRONMENT

Publication No. 1:

“Conceptualising the Digital Environment” in *Going Digital 2000* – sole author

Justice Michael Kirby (2000) 74 *ALJ* 329 at 329.

Book review by Philip N Argy (2000) 23 *UNSWLJ* 282 at 282: “interesting and useful contribution”

Publication No. 2:

“Recent International Initiatives Concerning Copyright in the Digital Era” in *Going Digital 2000* – sole author

Book review by Philip N Argy (2000) 23 *UNSWLJ* 282 at 284: “very worthwhile”

H. Paynter and R Foreman, “Liability of Internet Service Providers for Copyright Infringement” (1998) 21 *UNSWLJ* 579 [Fn 88]

Coco, M “Anti-circumvention: The New Song and Dance Routine” (2001) 12(4) *AIPJ* 199 [Fn 5]

2. CONSTRUCTING DIGITAL PROPERTY

Publication No. 3:

“Intellectual Capital and Law in the Digital Environment” (2001) 5 *Southern Cross University Law Review* 206 – sole author

Originated from an address to the Faculty of the Ivey School of Business in Canada in October 2000. The Ivey School of Business is the leading Business School in Canada.

a) The Role of Intellectual Property Legislation

Publication No. 4:

“Lotus Development Corporation v Borland International Inc: Is the Lotus 1-2-3 Menu Command Hierarchy Copyrightable” (1995) 6 *Journal of Law and Information Science* 277 – sole author

Publication No. 5:

“Computer Copyright: Same Words, Different Source Code: Data Access v Powerflex” (1996) 2 *Computer and Telecommunications Law Review* 120 – sole author

Publication No. 6:

(with Gamertsfelder and Gulliksen) “Marketing Your Website: Legal Issues Relating to Internet Domain Names” (1998) 21 *UNSW Law Journal* 549 – 60% my work

Publication No. 7:

“Navigating Cyberspace: Frontier Land or Legal Minefield?” 3 *Southern Cross University Law Review* 153 – sole author

Originated from a Plenary Address to the ALTA Conference at UTS in Sydney in 1997. It was associated with and followed by a satellite link, I had facilitated, to Professors Nesson and Zittrain of Harvard Law School.

Publication No. 8:

(with E Sheehan) “Trademark Dilution and the Commodification of Information: Understanding the ‘Cultural Command’” (1999) 3 *Mac LR* 61 – 90% my work

b) The Role of the Common Law (particularly unjust enrichment law)

Publication No. 9:

(with Gamertsfelder) “Protecting Informational Products through Unjust Enrichment Law” [1998] *European Intellectual Property Review* 244 – joint author – 80% my work

S. Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, (1999) Lawbook Co, Sydney Part 1 “Overreaching Themes’ Ch 1 “Introduction” [Fn 73]

W. Van Caenegem, “*Intellectual Property: Tutorial Series*” (2001) Butterworths, Sydney 14

S. Frankel, “Unfair Competition Law” in CEF Rickett and GW Austin (eds), *Intellectual Property and the Common Law World* 267 at 269, 283

c) *The Role of Contract*

Publication No. 10:

(with Evans) "UCC Draft Art 2B: The Ascendancy of Freedom of Contract in the Digital Millennium?" (1998) 21 *University of New South Wales Law Journal* 404 – 40% my work

CLRC, Issues Paper "Copyright and Contract" June 2001 [Fn 37]

A. Moens, "Streamlining the Software Development Process Through Reuse and Patents" (1999) 10(1) *JLIS* 83 [Fn's 42, 46, 47, 48]

CLRC, *Copyright and Contract* (AGPS, Canberra 2002) [Fn 949]

Publication No. 11:

"Commodifying and Transacting Informational Products Through Contractual Licences: The Challenge for Informational Constitutionalism" in CEF Rickett and GW Austin (eds), *Intellectual Property and the Common Law World*, Oxford, Hart Pub, 2000, 35 – sole author

G Austin, "Copyright Across (and Within) Domestic Borders" in CEF Rickett and GW Austin (eds), *Intellectual Property and the Common Law World*, Oxford, Hart Pub, 2000, 105 at 108, 116

3) DIGITAL DIVERSITY AND CONSTITUTIONALISM

Publication No. 12:

"Software as Discourse: The Power of Intellectual Property in Digital Architecture" (2000) 18 *Cardozo Journal of Arts and Entertainment Law Journal* 337 – sole author

Justice Kirby in *Dow Jones and Company Inc v Gutnick* [2002] HCA 56 [Fn 139]

Publication No. 13:

"Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?" [2001] *EIPR* 121 – sole author

Bygrave, L "The Technologisation of Copyright; Implications for Privacy and Related Interests" [2002] *EIPR* 51 [Fn 22]

Publication No. 14:

**“(Australian) Constitutional Limits on Intellectual Property” [2001]
EIPR 103 – sole author**

CLRC, *Copyright and Contract* (AGS, Canberra 2002) 232

CONCLUSION: DIGITAL PROPERTY: THE ULTIMATE BOUNDARY

Publication No. 15:

**“Digital Property: The Ultimate Boundary?” (2001) 7 *Roger Williams*
University Law Review 47 – sole author**

“Thank you for sending your article titled “Digital Property: The Ultimate Boundary?”. It was so beneficial for my practice and interest to receive the update of your lecture in Santa Clara since I have been in charge of enforcing internet piracy and am actually practicing the digital property issues such as Circumvention issues and First Sales Doctrine issue here in Japan.”

Hiroshi Imaizumi, LLM (Santa Clara)
Legal Officer, Intellectual Property Protection Law and Corporate Affairs
Microsoft Asia Limited (Japan)

“Many thanks for sending your article to me. Great, I have read it with tremendous interest! Cordial regards, Yours sincerely, Heinz Goddar.”

BOEHMERT & BOEHMERT
Pettenkoferstr. 20 - 22
D-80336 München, Germany
Phone: +49-89-559680

“Thanks very much for sending me a copy of your article on ‘Digital Property: The Ultimate Boundary?’. It looks good, and I think it might well be ideal to include in the pensum for our newly-started LLM program on ICT law here in Oslo.”

Dr. Lee A. Bygrave
Norwegian Research Centre for Computers and Law
P.O. Box 6706 St Olavs plass
N-0130 OSLO
NORWAY

While they are not technically part of the PhD submission it is also relevant to note the other major publications I have produced or been involved with during this time.

Australian Constitutional Law and Theory (1996) co-author with Tony Blackshield and George Williams

“Brilliant! The best Australian casebook I have ever read in any area of law”: Professor Neil Rees, then Dean of Law Newcastle University

“An excellent basis for teaching Australian constitutional law”: Dennis Rose QC

Going Digital: Legal Issues for Electronic Commerce, Multimedia and the Internet (Prospect 1998) co-editor

Attorney General Daryl Williams QC in launching the book said “this book provides a timely snapshot of the legal implications of the Internet for wide ranging areas of the law. I commend the publication to you all.”

Book review by Philip N Argy (1998) 21 *UNSWLJ* 635

Going Digital 2000: Legal Issues for Electronic Commerce, Multimedia and the Internet (Prospect 2000) co-editor

Launched by High Court Justice Michael Kirby

Book review by Philip N Argy (2000) 23 *UNSWLJ* 282

Book review by Justice Michael Kirby (2000) May Issue *ALJ* 329 – at 331
“For those in the field, and those who see its potential for lawyering in Australia, it is essential reading”.

Listed in Forder, J & Quirk, P “Electronic Commerce and the Law” (2001) Wiley and Sons [Chapter 7: Copyrights (under further reading)]

Cyberlaw: Laws Relating to the Internet, Digital Intellectual Property and E Commerce (Lexis Nexis/Butterworths, Sydney 2002) – co-author

Book Review by Leif Gamertsfelder (2002) 76 *ALJ* 652

Book Review by Graham Bassett (2002) 6 *Southern Cross University Law Review* 220

Book Review by Graham Bassett (2002) 50 *Computers and Law Journal* 14

Book Review by Jaelle Berkovits (2002) 22 *University of Queensland Law Journal* 152

Justice Kirby in *Dow Jones and Company Inc v Gutnick* [2002] HCA 56 [Fn’s 125, 126, 127 134, 135, 136, 138, 142]

3) MAKE CLEAR THE WAY IN WHICH PUBLICATIONS MAKE A ORIGINAL SCHOLARLY CONTRIBUTION TO KNOWLEDGE

Each article is designed to progress thinking on the particular topic. As a series of articles they have sought to integrate conceptual ideas and to cut across boundaries bringing different types of legal principles together. Many of the articles represent the first Australian academic writing on the topic and are in response to recent legal developments. A number of them have been published internationally, in Europe and the USA.

LIST OF PUBLICATIONS

1. CONCEPTUALISING THE DIGITAL ENVIRONMENT

Publication No. 1:

“Conceptualising the Digital Environment” in *Going Digital 2000* – sole author

A pragmatic view of the legal landscape and regulatory structures of cyberspace in the context of recent developments

Contribution to Knowledge, No. 1:

This piece of writing provided technological and contextual definition to cyberspace and examined the impact this would have on the existing legal system. While introductory in nature it was vital to understanding the deeper legal issues arising in the digital environment. It was a pioneering piece in that it allowed academics, students, lawyers, and other professionals the ability to analyse challenging legal issues in a broader framework. The crucial point being that key aspects of an information society had arrived and the law needed to understand and respond to these developments.

Publication No. 2:

“Recent International Initiatives Concerning Copyright in the Digital Era” in *Going Digital 2000* – sole author

An easy to understand overview of the then recent international approaches to protecting information in the digital environment. One of the first writings on this topic in Australia.

Contribution to Knowledge, No. 2:

This piece of writing surveyed the initial response of international law to the digital environment. Its great value was in providing a concise and coherent overview of the key provisions of the WIPO *Copyright Treaty* (1996) and explaining the function and application of international law in this instance. It drew links back to the World Trade regime and to the TRIPS agreement and finished off by showing how the international initiatives were being transformed into Australian law through the Digital Agenda reforms. A pioneering piece that was a vital building block to understanding broader issues.

2. CONSTRUCTING DIGITAL PROPERTY

Publication No. 3:

“Intellectual Capital and Law in the Digital Environment” (2001) 5 *Southern Cross University Law Review* 206 – sole author

A unique article examining the notion of intellectual capital and the regulatory measures used to harvest it. One of the first legal articles in Australia to consider the notion of intellectual capital.

Contribution to Knowledge, No. 3:

The significant contribution of this article was in explaining the notion of intellectual capital to a legal audience and how it might shape the development of law, and in outlining in a concise way, the process for constructing digital property through statutory and common law, contract and technology. This article brought to the fore the notion that it was not simply intellectual property law that was involved in this discussion and that rights in informational value would also arise through contractually created regimes and technological measures.

a) The Role of Intellectual Property Legislation

Publications No. 4 and No. 5:

“Lotus Development Corporation v Borland International Inc: Is the Lotus 1-2-3 Menu Command Hierarchy Copyrightable” (1995) 6 *Journal of Law and Information Science* 277 – sole author

A concise overview of the law relating to copyright in computer programs from a US perspective.

“Computer Copyright: Same Words, Different Source Code: *Data Access v Powerflex*” (1996) 2 *Computer and Telecommunications Law Review* 120 – sole author

A concise overview of the law relating to copyright in computer programs from an Australian perspective.

Contribution to Knowledge, Nos. 4 & 5:

Both of these articles are in the same mould, albeit one covers US law and the other Australian law. While they are largely descriptive they provided much needed analysis of key issues facing the protection of software. Both articles were at the forefront of the discussion of these issues and provided a clear guide to understanding this difficult yet fundamental issue of digital property, namely the degree to which copyright law would protect software code and software functionality.

Publication No. 6:

(with Gamertsfelder and Gulliksen) "Marketing Your Website: Legal Issues Relating to Internet Domain Names" (1998) 21 *UNSW Law Journal* 549 – 60% my work

A pragmatic overview of the legal issues involved in protecting domain names as informational property. One of the first of its kind in Australia.

Contribution to Knowledge, No. 6:

This pioneering article explained the role of domain names and the way in which they had the potential to conflict with the interests of trade mark holders in informational value. At the time, and to this day, the topic of domain name allocation was of great interest to Internet users and to lawyers advising in the relation to website issues. This article provided a detailed and scholarly account of the issues while highlighting the informational value at stake and the mechanisms for legally protecting that value.

Publication No. 7:

"Navigating Cyberspace: Frontier Land or Legal Minefield?" (1999) 3 *Southern Cross University Law Review* 153 - sole author

A detailed overview of issues facing legal regulation of the internet. One of the first Australian articles to do so and in such detail.

Contribution to Knowledge, No. 7:

An article that looked broadly at legal issues facing the Internet. A pioneering academic article that considered a broad range of internet law issues with clarity and depth, particularly issues relating to copyright, ISP liability, domain name allocation and database protection. It grew out of a Plenary Session of the Australian Law Teachers Conference (ALTA) in 1997 and was a template for later books and articles on the topic in Australia. It was widely available before publication.

Publication No. 8:

(with E Sheehan) "Trademark Dilution and the Commodification of Information: Understanding the 'Cultural Command'" (1999) 3 *Mac LR* 61 – 90% my work

A concise article on the commodification of information through trademark law. It is one of the first articles in Australia to fully explore the ambit of s 120 (3) of the *Australian Trade Marks Act* (1995).

Contribution to Knowledge, No. 8:

This article examined the extent to which section 120 (3) *Trade Marks Act* (1995) would protect the value of trade mark holders especially in the context of domain name allocation. Its contribution was that it filled a gap in the literature (also met around the same time by an article by Professor Ricketson) and focussed on the degree to which the "pulling power" "commodification value" or "psychological attraction" of the mark could be protected in law particularly in the digital environment in relation to domain names.

b) The Role of the Common Law (particularly unjust enrichment law)

Publication No. 9:

(with Gamertsfelder) "Protecting Informational Products through Unjust Enrichment Law" [1998] *European Intellectual Property Review* 244 – joint author – 80% my work

An innovative marrying up of unjust enrichment law and informational property rights that received a lot of positive response.

Contribution to Knowledge, No. 9:

The idea that data could be protected by the common law had been touched upon but not as openly and forcefully argued in terms of unjust enrichment law as in this piece. This article provided the opportunity for courts and governments throughout the common law world to consider the use of existing common law concepts as a way of protecting the value added to data. It did so by introducing the Birksian paradigm of unjust enrichment law and then developing a framework through which value added to data might be protected. A drawing together of different areas of law to provide a persuasive solution while opening up an appreciation of the touchstone of digital property: namely unjust enrichment.

c) *The Role of Contract*

Publications No. 10 and No. 11:

(with Evans) “UCC Draft Art 2B: The Ascendancy of Freedom of Contract in the Digital Millennium?” (1998) *21 University of New South Wales Law Journal* 404 – 40% my work

A unique article looking at the role of contract in constructing informational property rights. Once again one of the first articles in Australia to touch on this topic.

“Commodifying and Transacting Informational Products Through Contractual Licences: The Challenge for Informational Constitutionalism” in CEF Rickett and GW Austin (eds), *Intellectual Property and the Common Law World*, Oxford, Hart Pub, 2000, 35 – sole author

A detailed analysis of the role of contract in commodifying digitised information. One of the first Australia articles to look at this topic in this detail.

Contribution to Knowledge, Nos. 10 & 11:

These two pieces focussed on the growing importance of contractual licences to digital property rights. Building on the notion that in many informational transactions, including those relating to software, “the licence is the product”, these writings sought to highlight through reference to legal developments in the US, key issues relating to information licensing. In particular these two writings highlighted the growing conflict between copyright and contract law which and has recently been thoroughly examined by the Australian Copyright Law Review Committee. These pieces drew attention to the fact that we need to pay more attention to the power of the contractual licence in the digital environment and laid the platform for further discussion of the issues in Australia.

3) DIGITAL DIVERSITY AND CONSTITUTIONALISM

Publication No. 12:

“Software as Discourse: The Power of Intellectual Property in Digital Architecture” (2000) 18 *Cardozo Journal of Arts and Entertainment Law Journal* 337 – sole author

A unique conceptualisation of software as discourse drawing on social theory that is different from anything that has gone before. It brings together issues of constitutionalism, informational property rights and rights in software. Presented and well received throughout the world.

Contribution to Knowledge, No. 12:

Initially delivered as the Seventh Annual Tenzer Lecture at Cardozo Law School in New York, this was the first article to posit the notion of “software as discourse”; the argument that software is integral to communicative activity in the digital environment and plays a central role in the construction of our identity, particularly our digital identity. The article explained how legal rights in digital property such as software would provide significant power over the way we communicate in the digital environment. Written in the shadow of the Microsoft antitrust litigation and the explosion of software patenting the article provided contemporary examples to highlight the application of the theory. The great advancement of this article was to show that software is not simply a series of 1’s and 0’s but that it has an incredible discursive capacity which is in part mediated by law.

Publication No. 13:

“Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?” [2001] *EIPR* 121 – sole author

An innovative article positing the notion that rights in digital informational products have a significant impact on our digital diversity. This article is one of the first to conceptualise the notion of digital diversity, especially in the legal context.

Contribution to Knowledge, No. 13:

This article added to the store of knowledge by conceptualising a notion of “digital diversity” and explaining its relevance through legal principles.

Publication No. 14:

**“(Australian) Constitutional Limits on Intellectual Property” [2001]
EIPR 103 – sole author**

An overview of the constitutional limits to legislating intellectual property. One of the first articles to fully analyse this issue in light of the High Court decision in *Grain Pool of WA v The Commonwealth* [2000] HCA 14.

Contribution to Knowledge, No. 14:

This article highlighted the limits of intellectual property rights through discussion of the *Grain Pool* case. It represents a useful contribution to the understanding of the legislative limits of intellectual property law and was recently cited in the CLRC’s *Copyright and Contract Report* on this very point.

CONCLUSION: DIGITAL PROPERTY: THE ULTIMATE BOUNDARY

Publication No. 15:

“Digital Property: The Ultimate Boundary?” (2001) 7 *Roger Williams University Law Review* 47 – sole author

An extensive piece drawing together the key themes of unjust enrichment, information law and constitutionalism. Building on the writings of prominent US legal scholars it adds to the scholarship by setting up a framework for analysing the construction of digital property rights.

Contribution to Knowledge, No. 15:

The significant contribution of this long article is that it provides a framework for understanding digital property against a context of theory and practice. It is a “conceptualising moment” in which much of the argument of earlier work is drawn together to provide a framework for understanding this new landscape. This article provides not only a scholarly argument but also the beginnings of a pedagogical framework for legal understanding. This is not surprising as the article grows out of my teaching of the subject – Digital Property – at Santa Clara University Law School during the first half of 2001. In summary, in reading this article one will be given a framework for or the steps to understanding the process of constructing digital property. As far as I understand, this is unique and not offered by any other legal article.

4) PROVIDE A THEMATIC OVERVIEW WHICH CONVERTS INDIVIDUAL PUBLICATIONS INTO AN INTEGRATED WORK

The general theme of this body of scholarship is the depth, scope and extent of legal rights in digitised information: digital property.

The use of the word “property” may appear as provocative to some and perhaps hides the fact that many informational rights are no more than contractual user rights. However I believe the term draws attention to the fact that the property law of the next generation will not focus simply on land or real property. As Professor Sampford has pointed out to me, the Griffith University LLB curriculum that he devised in the early 1990s included aspects of intellectual property in the unit on Property Law. My work seeks to take this insight further by focussing on digital property as a pedagogical category in its own right and by providing a framework for better understanding the construction and distribution of “digital property”; a term that encompasses much more than traditional intellectual property law.

One of the key questions we are facing in the digital world is the extent to which information should be “propertized”. There are significant debates over whether information should be ‘open/free’ or ‘closed/proprietary’. This is a debate about what might be called the public domain or the digital commons versus the propertizing of information. My research considers aspects of unjust enrichment law, constitutionalism and information and intellectual property law in an attempt to better analyse and structure argument and debate on these issues.

My culminating argument is that in an era of increasing consumption of digitised information as an economic, cultural and social resource we need to better understand the creation of exploitation and user rights to information against a context of digital constitutionalism. This argument is more fully explained in my most recent and extensive article “Digital Property The Ultimate Boundary?”

Digital Property

As a starting point it must be remembered that information is a non rivalrous resource. In contrast to real property or tangible personal property, the user of information by one person does not necessarily diminish user by another. For example I can sing the same song as a million others at the same time without any diminution in my user rights. However I cannot drive my car at the same time as a million other people. Therefore in order to fence off and commodify information and to give incentive to create informational product the law (e.g copyright law) steps in to create exclusive rights in the creator or inventor to exploit that product to the exclusion of others. In this regard law acts like a form of infrastructure; my point being that in the digital environment law is infrastructure.

The development of the Internet and the ability to perfectly and cheaply copy information and transmit it in an instant around the world has seriously challenged the ability of law to fence off information. As a result we have seen a greater reliance on contractual licences to structure digital property entitlements and most recently the development of technological measures such as digital rights management systems to technologically structure digital property entitlements.

This body of work examines the legal boundaries of digital property. Firstly it explains the digital landscape and sets the context for discussing the creation of entitlements in the digital environment. It then overviews the role of intellectual property statutes and the common law of unjust enrichment in the structuring of digital property. It moves on to consider the role of contract and technology in the creation and distribution of digital property concluding with a call for the development of a set of core values to regulate new technological forms of structuring digital property.

THE WORK

(i) Context

“Conceptualising the Digital Environment” is an introductory chapter explaining the operation of the key communication and distribution tool in the digital environment namely the Internet. It also highlights the difficulties associated with fencing off digital content (capturing value) and the importance of contractually created entitlements. It concludes with a case study of issues facing digital entertainment products and the power of new technologies such as mp3 to circumvent established means of commodifying music.

“Recent International Initiatives Concerning Copyright in the Digital Era” overviews the role of international law in structuring digital property and focuses on international developments designed to meet the challenges of the digital

environment. It highlights the background to international developments and makes clear the significant role international law has to play in this area.

Summary Point: To understand the notion of digital property we must understand its technological and international context.

(ii) Constructing Digital Property

“Intellectual Capital and Law in the Digital Environment” introduces the different modalities for constructing digital property entitlements in the context of the notion of “Intellectual Capital” (IC). The concept of IC is used as a tool for better understanding the ways in which law operates to structure informational value. It explains that statutory and common law along with contract and technology are the key modalities employed to facilitate the realisation of wealth from information.

Summary Point: In understanding the ambit of digital property we must fully appreciate the modalities through which it is constructed.

(iii) Statutory Law

“*Lotus Development Corporation v Borland International Inc: Is the Lotus 1-2-3 Menu Command Hierarchy Copyrightable*” and “*Computer Copyright: Same Words, Different Source Code: Data Access v Powerflex*” are two shorter pieces that explain the protection of software code through copyright law, highlighting the move that was afoot and still is in full swing to protect software code through patent law more so

then copyright law. The key theme emanating from the two articles is that software code can be protected as a literary text under USA law since 1980, under Australian law since 1984 and as stipulated in Article 10 of the *TRIPS Agreement* (1994), however the courts have continued to narrow that protection so that unless literal copying of code occurs the courts will be reluctant to protect what is being copied in copyright law. Copying of function, the courts suggest is the domain of patent law.

“Marketing Your Website: Legal Issues Relating to Internet Domain Names” examines the concept of domain names and the process of domain name registration. It highlights the legal debates that arose once it was realised that domain names could be extremely valuable. In particular the article looks at the way in which statutory trademark law could be used to claim value in relation to domain names.

“Navigating Cyberspace: Frontier Land or Legal Minefield?” covers a broad range of issues relating to copyright and trademark law. It posits the digital environment as a challenging context for the protection of informational value, overviews the international developments and looks closely at domain name issues.

“Trademark Dilution and the Commodification of Information: Understanding the ‘Cultural Command’” continues the theme of the protection of domain name value and questions the extent to which 120 (3) *Trade Marks Act* (1995) can protect the “pulling power” of a trade mark in the domain name context.

Summary Point: These four articles highlight the significant role statutory laws (particularly intellectual property law) will play in commodifying informational value. They also show that existing statutory law has been challenged by new forms of

informational value (e.g. Internet domain names) and that there will be competing demands for informational value.

(iv) The Common Law

“Protecting Informational Products through Unjust Enrichment Law” drew on my earlier studies of “Unjust Enrichment” at Oxford University and presented a unique view of how we might protect data in the digital environment. The US Supreme Court in *Feist Publications v Rural Telephone Service Company* 499 US 340 (1991) in the early 1990s had explained that the collection of raw data *per se* could not be protected in copyright law and this led database compilers around the world to lobby for greater protection of raw data through a *sui generis* regime. The European Union adopted such a regime in the *Directive on the Legal Protection of Databases* (1996) and the USA has been considering the idea for some time, however opinion is divided. This led me to think about ways the existing law might protect the compilation of raw data; the so-called sweat of the brow of actually compiling raw data. The database compilers were concerned that they were spending million of dollars collating data and without adequate intellectual property protection their investment could not be realised in the market place.

Using the common law concept of unjust enrichment revived in Australia through the decision in *David Securities Pty Ltd v Commonwealth Bank* (1999) 175 CLR 353 I argued that information in its raw state has a public value but once we add other effort (labour) to that information, we may have a Lockean style claim to a legal right over the value added to information. The value added could be conceptualised in terms of

the collection and subsequent presentation of the information in an accessible and understandable format. The article was very well received because it presented a unique way of thinking about this issue. More recently there has been an Australian court decision which follows the principle of that article but finds the answer not in unjust enrichment law but in the definition of “compilation” under the Australian *Copyright Act: Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112. It might be suggested that copyright law is the wrong vehicle for protecting such value in this day and age and in this regard it will be interesting to see if the decision is reconceptualised in the future.

Summary Point: We should not forget the potential of the common law to structure digital property, nor should we forget that unjust enrichment is a fundamental principle of law, especially information law.

(v) The Role of Contract Law

“UCC Draft Art 2B: The Ascendancy of Freedom of Contract in the Digital Millennium?” charts the rise of contract as a key form of distributing digital property and overviews the development of a specialised transactional law for software in the US (at that time known as Art 2B now titled *Uniform Computer Information Transactions Act* (UCITA)). The article highlighted the growing conflict between statutory public domain rights and the freedom to contract out of or restructure those rights. It argued that we need to instil values into the informational contracting process and examined whether the notion of unconscionability might provide an answer. This very important issue has since been considered by the Australian

Copyright Law Review Committee in an extensive report on *Copyright and Contract* released in October 2002 in which this article is cited.

“Commodifying and Transacting Informational Products Through Contractual Licences: The Challenge for Informational Constitutionalism” continued the examination of contract as a tool for structuring digital property rights and questioned the values inherent in such a process.

Summary Point: Contract is vitally important in defining digital property as property/user rights in this area are very much wrapped up in the user rights allowed under the contractual licence. Some say the “licence is the product.” In this sense understanding the ambit of the contractual licence and its ability to modify public domain rights is of great importance.

(vi) Digital Diversity and Constitutionalism

“Software as Discourse: The Power of Intellectual Property in Digital Architecture” originally delivered as a public lecture at Cardozo Law School, Yeshiva University in New York, brought to light a very innovative and unique theory that software is integral to the way we communicate and present information in the digital environment and that the intellectual property rights we bestow in software have a deep impact upon the diversity and style of communication in the digital environment, if not our digital identity. The article integrated theoretical discussion about discourse theory with recent case law and legislative developments to examine how “software as discourse” would be affected both those legal developments.

“Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?” proposed the notion that digital diversity was contingent upon the legal rights created in digital architecture. Looking at reverse engineering as a foundational principle of digital diversity the article argued that we need to better appreciate the way in which intellectual property rights in software impact upon and shape that diversity.

“(Australian) Constitutional Limits on Intellectual Property” examined the constitutional boundaries of creating digital property rights in light of the High Court decision in the *Grain Pool* case. No property right can be absolute because the flip side of an exclusive right is access or user. This article searched for a constitutional definition of digital property.

Summary Point: The power of legal rights to shape digital identity is enormous. This series of articles seeks to explain how the boundaries of digital property go to the very heart of how we live.

(vii) Conclusion: Digital Property: The Ultimate Boundary

“Digital Property: The Ultimate Boundary?” represents a framework through which the early writings can be viewed as a cohesive body of scholarship. It examines the way in which digital property is constructed and the need to instil values of reward, access and user in this process.

The article grew out of a Keynote Address to the Innovation Law and Policy Centre in Canada, was refined and further developed by teaching a course on Digital Property at Santa Clara University Law School in the middle of Silicon Valley in early 2001 and by a conference presentation on the topic at an E Commerce Forum at Roger Williams University, Bristol, Rhode Island in April 2001.

The article traverses the modalities of regulating and bestowing property rights in the digital environment as well as raising issues about the constitutional limits of digital property and access rights to digital property. It also introduces the notion of digital constitutionalism which is something that will be further developed in coming years as we grapple with the notion of technology and contract regulating digitised information.

The fear that technology might soon be able to perfect a way of distributing information that would emasculate our current public domain rights gave me, along with a number of largely US based scholars, motivation to further consider these issues. My approach was to define the process of commodifying digitised information and in doing so to closely examine the regulatory mechanisms (legislation, contract and/or technology) being employed. In undertaking this form of analysis I drew upon the seminal work of Stanford University Law Professor Lawrence Lessig and in particular his book *Code and Other Laws of Cyberspace* (1999).

The process of commodifying or closing off informational resources is in itself an issue of constitutionalism that requires us to better conceptualise a constitutionalism for the digital environment. For instance moving to a technological based enforcement

mechanism removes review by a public institution, namely a judge, and questions the very nature of information entitlements. We need to focus on how values that have been promoted through legislation and judicial implementation in the past will be enforced in the future.

Summary Point: We need to understand how digital property is constructed to better understand entitlements to exploit and use such property. My aim has been to provide a detailed framework through which to understand this process.

5) MAKE CLEAR THE APPLICANTS CONTRIBUTIONS TO ALL JOINTLY

AUTHORED PUBLICATIONS

(stated above)

6) REPUTATION

Over the last six (6) years my reputation in the area of Cyberlaw, Information Law and Constitutionalism in the Information Society has continued to grow. This is evidenced by invitations to present Keynote Addresses and also through the positive reception of my publications. The invitations to address conferences include:

- Plenary/Keynote to the Australian Law Teachers Association (ALTA) Conference in Sydney in 1997 – “Navigating Cyberspace: Frontier Land or Legal Minefield?”
- Seventh Annual Tenzer Lecture at the Benjamin N. Cardozo Law School, Yeshiva University in New York in October 1999 – “Software as Discourse: The Power of Intellectual Property in Digital Architecture”. Prior to my giving the lecture, it had been delivered by prominent US law professors and judges that were experts in the Intellectual Property area. It was a very great honour to be asked to deliver the lecture.
- Keynote at the AusWeb 2000 Conference – “Law and the Internet”. This is a major technology and industry conference in Australia, which was held in Cairns in July 2000.

- Keynote Address on “Digital Property” at University of Western Ontario Law School, London Canada, in a year long series involving eight very high profile international speakers, for the Centre for Innovation Law and Policy based at the University of Toronto in Toronto, Ontario Canada - in October 2000
- Keynote Address – “Law and the Internet” – North American (NA) Web 2000 Conference – University of New Brunswick, Fredricton Canada, October 2000
- I have also been invited to write opinion pieces for the prestigious *European Intellectual Property Review* in 2000 and 2001.

In terms of my professional reputation I was appointed Head of the School of Law and Justice at Southern Cross University in 1998 and worked very hard to raise that school’s profile, especially in the area of information law and intellectual property law. As part of this I coordinated the teaching of a nationally profiled course on Cyberlaw in Byron Bay over the summer term of 1998, 1999, 2000 and 2001. This course attracted students from all over the country and guest presenters of the highest calibre including three Harvard Law Professors.

In 1998 I was also named QUT Law Alumni of the Year for “exceptional professional achievement and contribution to the community”.

During the first half of 2001 I was appointed as a Visiting Professor at Santa Clara University Law School in the heart of Silicon Valley and taught a specialist elective called “Digital Property”. During this time I also organised two specialist conferences, which were run at Santa Clara University. Santa Clara is ranked in the

top ten (10) US Law Schools in the area of Intellectual Property and Information Technology Law.

In May 2001 I was also appointed as a judge in the prestigious Tech Museum Awards (Tech Museum is a US national monument in San Jose in the middle of Silicon Valley) in the area of Digital Equality and in August 2001 was asked to be an expert referee for the Canadian Foundation on Innovation on a multi million dollar grant application to develop an International E Commerce Centre in Ottawa Canada.

In January 2002 I was appointed Professor and Head of the School of Law at QUT overseeing one of the largest undergraduate law programs in the country and a sizeable and innovative masters program with a strong law and technology stream.

In August 2002 I was invited to address the Judges of the Supreme Court of NSW at their annual conference on issues relating to law and technology.

Also throughout 2002 I have been involved in a number of media stories relating to digital property issues including appearances on the national television show the Today Show on Channel 9 in March and December 2002, and being featured on the ABC Radio National's Law Report in July 2002.

Summary Point: My reputation as a leading scholar in this area is evidenced by citation of my work in the High Court of Australia and by Law Reform bodies, publication of my works internationally, invitations to speak at national and international conferences, requests for media interviews at a national level, and my professional standing in the legal academy and profession.