rammed, jammed & bifurcated:

the convergence and divergence of intellectual property and competition policy in the digital environment

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2012

CERTIFICATE OF AUTHORSHIP/ORIGINALITY

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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Abstract

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This thesis is directed to the intersection between intellectual property (IP) and competition policy in the digital environment. The policy debate to which this thesis contributes is the controversy as to whether a forced licensing of intellectual property rights (IPRs) will advance or inhibit innovation and creativity with a corresponding effect on consumer welfare. In the Australian context the debate is focused on whether s. 46 of the *Competition and Consumer Act* 2010 (as the successor to the *Trade Practices Act* 1974) should be applied to remedy refusals-to-license IPRs.

This thesis argues that the optimum model to achieve the balance between the protection of the incentive to innovate or create and the competition policy of promoting competitive markets, including IP product markets is a model that provides for narrow IP protection (that focuses on the scope of the grant of the IPRs) with the application of competition policy (that treats the exercise of IPRs in the same way as the exercise of other property rights). Such a model is argued as not resulting in an expansive scope for the application of s. 46 as the High Court in the *NT Power v PAWA* (2004), described *'the notoriously difficult task of satisfying the criteria of liability'* of s. 46. This thesis considers the scope of copyright protection in the digital environment in relation to the impact of *IceTV v Nine Network* (2009) in which the High Court re-evaluates the concepts of 'originality' and 'substantial reproduction', and as a consequence, address what members of the High Court described as the public interest '*in maintaining a robust public domain in which further works are produced.*' The focus of this thesis is on the digital environment and includes consideration of the role of the access control technology protection measures in the *Copyright Act* 1968 (Cth) and their possible use to subvert the proper balance between IP and competition policy, the IP doctrines that identify the boundaries of the IPRs and the specialist doctrines that address any attempt to 'overreach' or 'misuse' of IPRs.

This thesis investigates the intersection of IP law and competition policy in the digital environment by adopting an approach that integrates property rights theory and the economic justification for IPRs with emerging economic analysis for digital telecommunication networks. The analysis of competition policy in respect to the digital environment incorporates the emerging economic analysis as to: Schumpeterian 'creative destruction'; contestable market theory; 'network externalities' or 'network effects' that apply to digital technologies; the nature of two-sided markets; and the theory of raising rival's costs as it applies to asserting IPRs.