

AUSTRALIAN INTELLECTUAL PROPERTY JOURNAL

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EDITORIAL 5

TOPICS OF INTEREST

The trouble with legislating exclusions from the concept of invention 6

ARTICLES

Separating Sony sheep from Grokster (and Kazaa) goats: Reckoning future business plans of copyright-dependent technology entrepreneurs – *Jane C Ginsburg* and *Sam Ricketson*

Many national copyright systems have by statute or caselaw (or both) established rules engaging or excusing liability for facilitating or “authorising” copyright infringement. Taken as a group, they share a goal of insulating the innovator whose technology happens, but was not intended, to enable its adopters to make unlawful copies or communications of protected works. The more infringement becomes integrated into the innovator’s business plan, however, the less likely the entrepreneur is to persuade a court of the neutrality of its venture. The US Supreme Court’s 2005 decision in *Grokster* and the 2005 Australian Federal Court holding in *Universal Music* established that businesses built from the start on inducing or authorising infringement will be held liable; judges will frown on drawing one’s start-up capital from other people’s copyrights. Thus, these rulings may advise pro-active measures to prevent infringement from becoming a business asset. As a result, even businesses not initially built on infringement, but in which infringement comes to play an increasingly profitable part, may find themselves liable unless they take good faith measures to forestall infringements. This article addresses the judge-made rules of secondary liability for copyright infringement in the US and similar statutory rules in Australia, and evokes the possible emergence of an obligation of good faith efforts to avoid infringement. The article then turns to the statutory regimes in the US and Australia of safe harbours established for certain internet service providers and criticises the unduly (and perhaps inadvertently) narrow scope of the beneficiaries of the Australian regime. The article concludes with some recommendations for reform of the Australian provisions. 10

Quantum of obviousness in Australian patent laws – *Charles Lawson*

This article examines obviousness in the context of the Patents Act 1990 (Cth) – the quantum of advance beyond the existing knowledge and information that must be satisfied before a patent is granted and upheld as valid. The article concludes that the current High Court authority has lowered the quantum to almost a per se rule so that the quality of obviousness will almost never be relevant in assessing patentability. Some possible solutions are discussed. 43

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