

# AUSTRALIAN INTELLECTUAL PROPERTY JOURNAL

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applies to three-dimensional embodiments of an artistic work. This article summarises the courts' findings in relation to s 44C and identifies some issues arising from the court's interpretation of "label". It then concentrates on the obiter findings in relation to the design/copyright overlap provisions. The article closely explores the reasoning of the Full Court, identifies and discusses unresolved questions, and argues that the application of the overlap defence to articles such as embroidered labels is contrary to the policy underpinning the defence. .... 39

**Contributory infringement under s 117 of the Patents Act 1990 (Cth): What suppliers need to know – Justin Wheelahan**

"Use" means different things in the Patents Act 1990 (Cth), depending on whether the alleged use is in the context of secret use, or contributory infringement. Secret use requires the patentee to reap some commercial benefit amounting to a de facto extension of the patent term. The meaning of a use that would infringe in s 117(1) has been amplified by referring to the various uses of the product described in s 117(2): only use; intended use; and instructed use. Arguably, "reason to believe" in s 117(2)(b) implies actual knowledge, and s 117(2)(c) requires that an instructed use must knowingly induce infringement. This interpretation gives effect to IPAC's recommendation that the supply of a staple commercial product must be accompanied by an inducement to infringe in order to attract liability, it acknowledges the distinction IPAC drew between knowing goods will infringe and knowing they may possibly infringe, and it is consistent with the level of knowledge required for accessory liability at common law. This has significant consequences for suppliers of goods who plead innocent infringement, because lack of knowledge of an infringing use is arguably a complete defence to contributory infringement. .... 53

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    - <sup>2</sup> Hayton, n 1, p 286.
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