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EDITORIAL 125

ARTICLES

The new frontier: Country brands and their legal status under Australian trade mark law – Heather A Forrest

This article asks two inter-related but separate questions: first, whether a country name can on its own be a brand; and second, whether Australian law recognises and protects private property rights in so-called “country brands” as trade marks. In order to answer the former, the broad concept of a brand must first be explored in an analysis of representative views from the perspective of each broad group involved in the branded environment. These are then evaluated against the notion of the country brand. Having determined that the relevant question is not whether but how country brands achieve legal status through recognition as trade marks, the criteria for registration of a trade mark are then discussed. These criteria are applied to country brands along with a consideration of other related legal issues faced by applicants of trade marks constituting country names. The relatively few registered trade marks solely constituting country names without other accompanying words or images on the Australian register support a conclusion that although registration is now possible, significant obstacles remain.

127

The uncertainties, baby: Hidden perils of Australia’s authorisation law – Rebecca Giblin

As digital copying and online distribution become increasingly prevalent, the issue of when a technology provider can be held liable for its users’ infringements grows commensurately more important. In Australia, such liability is imposed through the tort of authorisation, which provides that a defendant will be liable if it “sanctioned, approved or countenanced” a third party infringement. Despite its significance however, some of the principal elements of the doctrine remain unclear. After tracing the origins and development of authorisation in Australia, this article explores the main uncertainties that plague the law today. With reference to the BitTorrent file-sharing software, the article then explicitly highlights the ways in which those uncertainties may affect the provider of a useful technology that has both non-infringing and infringing uses. The underlying theme of the article is that, by failing to unequivocally dismiss the increasingly expansionist arguments that are being raised in this context, courts are inadvertently promulgating a de facto expansion of the Australian authorisation law. It concludes by arguing that, unless courts start concertedly addressing the law’s uncertainties and ambiguities, the law will continue to have a more dampening effect on technological innovation in Australia than courts or the legislature ever intended.

148

Patent attorney privilege in Australia: Options for reform – Elizabeth Hall, Chris Dent and Andrew Christie

Patent attorney privilege is a key aspect of the working relationship between a client and her or his patent attorney. The capacity to withhold communications from a court, should

litigation arise, facilitates the provision of full and frank advice to the client. The privilege in Australia arises from s 200(2) of the Patents Act 1990 (Cth) – a provision that has been held to not protect communications with patent attorneys not registered under the Patents Act. Given the increasing internationalisation of the patent system, this limitation may impact directly on the system’s operation. This article considers a number of issues relating to the existence of the privilege in Australia and overseas, and raises a number of specific options for the reform of patent attorney privilege in Australia. 178

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