# AUSTRALIAN INTELLECTUAL PROPERTY JOURNAL

Volume 21, Number 4

December 2010

EDITORIAL ..... 185

ARTICLES

**Expressive form over function? The role of intent in copyright protection: IceTV and recent cases** – *Samantha Christie*

Copyright laws potentially provide legal protection for all manner of creations, generally speaking regardless of the merit of the creation or its functionality. This article examines what recent cases, including the recent High Court decision in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, have said about this seemingly uncontroversial proposition. It is argued that recent case law on artistic and literary work copyright show that the functionality of what one has created, together with the intent of the author/creator, may affect its ability to attract the protection of Australia's copyright laws. The result of this judicial enquiry into the intent of the creator, it is argued, is that meritorious expression may play a role in a finding of copyright protection for (at least) functional creations, notwithstanding that merit (for example artistic merit or literary merit) is not a statutory or common law requirement for any type of copyright work other than works of artistic craftsmanship. If this line of reasoning is followed, it is argued that copyright may be less amenable to functional creations. ..... 186

**Tie-ins in the Patents Act 1990 (Cth), s 144: Perhaps it's time to modernise?** – *Dr Charles Lawson*

The *Patents Act 1990* (Cth) limits certain dealings involving tie-ins with patent protected products and processes, and the *Competition and Consumer Act 2010* (Cth) (formerly named the *Trade Practices Act 1974* (Cth)) limits certain exclusionary, collusive, limiting and exclusive dealings. With the overlap between the *Patents Act 1990* (Cth) and the *Competition and Consumer Act 2010* (Cth), the question is whether two schemes are necessary or whether a single scheme might be more appropriate. This article reviews the legislative history, interpretation and policy justifications for the *Patents Act 1990* (Cth) limitations, concluding that two different schemes addressing the same regulatory problem are inefficient, and that the more specific *Patents Act 1990* (Cth) provisions should be repealed in favour of a single generally applicable, pro-competition scheme in the *Competition and Consumer Act 2010* (Cth). ..... 202

**Statutory damages in copyright** – *Andrew Trotter*

There is growing pressure around the world for countries to introduce statutory damages in copyright. By calculating damages with reference to the extent of the infringement rather than the extent of the loss suffered, these systems aim to compensate plaintiffs even where actual loss is difficult to prove, and to punish and discourage copyright infringement. However, the experience of the United States in particular raises doubts over the desirability of these schemes. This article examines the development of and theory behind statutory damages, drawing a contrast with the current Australian system, to reach

two main conclusions: that the most appropriate role for damages in copyright is compensatory; and that our current system is more suited to this role than any of the proposed models of statutory damages. ..... 219

**VOLUME 21 – 2010**

Table of Authors ..... 241
Index ..... 243