

# AUSTRALIAN INTELLECTUAL PROPERTY JOURNAL

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## ARTICLES

**Appropriation in the name of art: Is a quotation exception the answer?**  
– *Elizabeth Adeney*

The Australian Law Reform Commission is at present considering the scope of exceptions to copyright infringement. Its consideration will no doubt be influenced to some degree by the outcome in *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444; (2011) 90 IPR 50 which concerned the quotation of a musical phrase in a later musical work. This article addresses the problem of creative appropriations and the extent to which a quotation exception, consistent with Art 10 of the Berne Convention, should be incorporated into Australian law. In doing so it considers the practical application of such a quotation exception in European jurisdictions (most notably Germany) and suggests the form in which such an exception might be incorporated into Australian law. .... 142

**Plain packaging and the TRIPS Agreement: A response to Professor Gervais** – *Mark Davison*

The legality of Australia's laws on plain packaging of tobacco is currently the subject of complaints to the WTO. This article continues a debate around some key issues that will need to be addressed by the WTO in the process of adjudicating on those complaints. In particular, a key issue will be whether a right to use a trademark can be implied from Art 20 of TRIPS or from the provisions of the Paris Convention that are incorporated into TRIPS. For reasons identified, the article argues that there is no right of use which, in turn, limits the inquiry into exactly which aspects of the plain packaging legislation must be justified within the meaning of Art 20. The article also considers the nature of a justification in the context of the international trademark regime and, finally, raises an issue about the relevance of the Technical Barriers to Trade agreement to plain packaging. .... 160

**Perez v Fernandez: Australia's first decision on the moral right of integrity** – *Jani McCutcheon*

This article examines the recent Federal Magistrates Court decision of *Perez v Fernandez*, Australia's first case on the moral right of integrity. While not an in-depth consideration of the moral right of integrity, *Perez* gives some useful insights and raises some questions. This article will closely analyse and critique the decision, compare it to approaches to the moral right of integrity in the UK and Canada, and identify the useful contributions *Perez* makes to the fledgling Australian moral rights jurisprudence. .... 174

**Defining intellectual property crime** – *Michael Speck and Gregor Urbas*

Intellectual property crime is often discussed without this key term being defined. Examples show that the concept is broader than the core infringement offences found in copyright, trade marks and some other intellectual property legislation. We propose a tripartite definition as including: (a) crimes against intellectual property, (b) crimes using intellectual property, and (c) crimes incidentally involving intellectual property. This definition is based on attention to both the motivation of offenders and the targets of their activities in relation to intellectual property. We also consider the involvement of organised crime in activities associated with copyright piracy and trade mark counterfeiting, as well as some of the related illicit activities connected to intellectual property crime. It is hoped that this contribution will support the development of research, theory and practical solutions. .... 187