

Australian Intellectual Property Journal

Volume 32, Number 1

2021

EDITORIAL – *General Editor: David Lindsay* 3

ARTICLES

Related Rights of Press Publishers and Their Limitations under the EU Directive on Copyright in the Digital Single Market – *Elżbieta Czarny-Drożdżejko*

This article analyses the new European Union (EU) Directive on related rights of press publishers. These are the rights granted to publishers to reproduce press publications for public consumption. It covers five basic issues: press publisher as rights holder, permissions for a person or an entity to use press publications, scope of exclusive rights granted to press publishers, “fair use”, and protection of authors of works in a press publication. Due to the unclear wording of Art 15 of EU Directive 2019/790, the burden of its interpretation, mainly concerning the exceptions to a press publisher’s exclusive rights, has already been transferred to the Court of Justice of the European Union. As a result, this article argues that there is the distinct possibility of EU Member States, who have already adopted this Directive, in future, being subject to different and less acceptable interpretations of the Directive to the ones they originally agreed to. 4

Onus, Presumptions and Registrability under New Zealand Trade Mark Law – *Rob Batty*

Where the onus lies when establishing whether a trade mark is eligible for registration is not expressly addressed in New Zealand’s *Trade Marks Act 2002 (2002 Act)*. The legislative background suggests the *2002 Act* was intended to establish a presumption of registrability in favour of a trade mark applicant. Decisions before the Intellectual Property Office and the courts have not been consistent or clear about where the onus lies and how, if at all, a presumption of registrability affects this question. This article analyses the evidence literature, the historical background to the *2002 Act*, existing New Zealand case law, as well as the approach taken under United Kingdom and Australian trade mark law. Drawing on such analysis, the article puts forward a reasoned explanation of where the onus lies during the examination of a trade mark application, in opposition proceedings and on appeal. The article concludes that the onus lies on the trade mark applicant to establish its trade mark is eligible for registration. 25

Contracting Out, Fair Dealing, and Public Policy: The Australian Perspective – *Alexander Sloan and Lucy Craddock*

Copyright’s fair dealing exceptions enable easier access by users to copyright works. However, as in any market-oriented environment, they are susceptible in practice to contractual erosion. Whether contractual provisions that purport to oust a user’s fair dealing privileges are effective at law is unsettled, not the least due to legislative silence. The issue is a complex one that meets at the intersection of the law, economics, and social policy. While not a black and white issue, it is submitted that the historical development of the fair dealing exceptions supports the position that fair dealing exceptions cannot be excluded by contract. 45

