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TOPICS OF INTEREST

IP and competition law: Two sides of the same coin? – *Matt Sumpter* 52

ARTICLES

Plain packaging in Australia: Not necessarily compatible with TRIPs – *Sarah Bennett*

In light of the Australian Government's announcement that legislation mandating plain packaging of tobacco products will be implemented in 2012, the tobacco industry has demonstrated its intention to fiercely defend its use of trademarks on tobacco packaging. This article begins by assessing the Bill released in 2011 and examining its effect on manufacturers and consumers of tobacco products in the context of the suite of reforms implemented to reduce smoking. It then examines the compatibility of the legislation with several provisions of the TRIPs Agreement and considers more specifically the scope of Art 20 and whether plain packaging is justified for the protection of public health. The article argues that plain packaging measures should be found incompatible with TRIPs, particularly in the context of the Australian legislation, and that alternative measures should be taken to reduce smoking. Finally, however, it concludes that the conflicting evidence as to the efficacy of plain packaging, as well as Australia's position as the first nation to implement the measure, may not result in a finding of incompatibility with TRIPs. 66

When sweat turns to ice: The originality threshold for compilations following IceTV and Phone Directories – *Jani McCutcheon*

This article critically considers the treatment of originality by the High Court in IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458 and the Federal Court in Telstra Corp Ltd v Phone Directories Co Pty Ltd (2010) 264 ALR 617; [2010] FCA 44, and the implications those judgments have for compilation copyright under Australian law, particularly compilations of facts. These cases significantly diminish, if not destroy, copyright subsistence in factual compilations in a fundamental reversal of pre-existing law. The cases demonstrate a radical shift away from the acceptance in Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd (2002) 119 FCR 491 of "mere sweat of the brow" as a qualifier for originality, and reject as irrelevant, skill and effort in selecting content which is "anterior" to the expression of the work. The primary focus of the article is on the IceTV test that skill and effort be "directed to" the expression of the work. The test is applied to different examples of skill and effort involved in selecting, collecting, verifying and arranging the content of compilations, and this article argues that the test was incorrectly applied in both IceTV and Phone Directories. The article concludes by contending that the lacuna in protection, while prompted by sound policy objectives, is undesirable in leaving considerable investment and effort unrewarded, and should be remedied by Parliament. 87