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EDITORIAL 67

ARTICLES

Section 18 of the Designs Act 2003: The neglected copyright/design overlap provision – *Janice Luck*

This article critically analyses s 18 of the Designs Act 2003 (Cth). This section operates to limit the prior art base against which the newness and distinctiveness of certain designs based on artistic works protected by copyright are assessed. Section 18 together with ss 75 and 77 of the Copyright Act 1968 (Cth) are copyright/design overlap provisions, ie, provisions regulating the borderline in Australia between copyright law and designs law when artistic works are commercially exploited as industrial designs. However, there is considerable uncertainty as to the meaning and scope of many parts of s 18, a situation which has been aggravated by legislative failures to amend s 18 when s 77 of the Copyright Act has been amended. This article traces the history of s 18, undertakes a detailed analysis of the provisions in the section and makes recommendations for amendment of its provisions and for changes or at least clarification to parts of the Designs Examiners' Manual of Practice and Procedure. 68

Plain packaging and the TRIPS Agreement: A response to Professors Davison, Mitchell and Voon – *Daniel Gervais*

The issue of plain packaging is at the very core of the intersection between trade law, intellectual property and public health. Unlike the issue of export of generic pharmaceuticals, which was addressed in the World Trade Organization by the adoption of a specific Declaration and notification system, it seems that plain packaging will be addressed by the WTO Dispute-Settlement Body. A report prepared by the author in 2010 discussing the intellectual property aspects of plain packaging was critiqued by Professors Davison, Mitchell and Voon in several publications and submissions, including a recent book. In this article, the author responds to those critiques, reiterating the importance of the issue and analysing developments since 2010, including the adoption of the Australian plain packaging legislation. 96

"Public rights" in copyright: What makes up Australia's public domain? – *Graham Greenleaf* and *Catherine Bond*

Previous studies have advocated a broader approach to the copyright public domain, but have rarely attempted to define this broader notion, or to enumerate what it would cover. Starting from the attempts to define or categorise that have been made, this article proposes a definition of the copyright public domain, as the public's ability to use works without seeking permission and on equal terms. It then examines how the definition can be used to justify a set of categories of "public rights" (15, as it turns out) that are sufficient to describe the copyright public domain in the Australian legal jurisdiction. They fit the proposed definition and, it is argued, are congruent with our intuitions of what a broader

and more modern notion of the public domain should contain. To what extent both the definitions, and the categories, will be useful in analysis of public domain other than Australia's remains to be seen. 111