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ARTICLES

Zombie marks? Ceased registrations, failed applications and citation objections under s 44 of the Trade Marks Act – *Michael Handler* and *Robert Burrell*

This article examines the potential impact of a case currently working its way through the Federal Court, Chia Khim Lee Food Industries Pte Ltd v Red Bull GmbH. One issue the court is likely to have to confront is whether a mark that has been removed from the Register on the grounds of non-use nonetheless remains a "registered" mark for the purposes of s 44 of the Trade Marks Act 1995 (Cth) if that mark was on the Register at the applicant's priority date. Red Bull will be seeking to argue that this question should be answered in the affirmative, based on a line of authority that suggests that the rights of trade mark applicants are always to be assessed as against the position at the priority date. This article demonstrates that if Red Bull's argument were to be accepted it would have dramatic and undesirable consequences for current trade mark practice and that these consequences would go well beyond concerns about the impact of unused marks on applicants for registration 206

Opening up the Australian archives on colonial trade mark registrations – *Amanda Scardamaglia*

Nothwithstanding the depth of what can be drawn from trade mark registration data, historical trade mark registrations have largely been the subject of neglect. Some work, however, has recently emerged internationally that considers historical trade mark registrations. Even so, no such work has yet emerged in Australia. This article seeks to fill this spaceby reviewing a sample of the colonial trade mark registers sourced from the National Archives of Australia. The purpose is to identify trends and key themes emerging during this defining period in Australia's trade mark history. Thus, after first providing an overview of the trade marks registered under the regime and subject to review, this article looks specifically at the colonial trade mark registration data and explores themes of trade mark intensity, the globalisation of marking and the pattern of trade marking image based marks, before concluding with some more general observations. 222

Nintendo power: Innovation through collaboration and coercion in the video game industry – *David Kandestin*

The rise of the Nintendo empire in North America owes much to its strategy in dealing with third party developers and less to its ability to protect its intellectual property through patents. This article describes the foundations of the video game industry to demonstrate that rigid control over the supply of a console's games is imperative to a video game innovator's success. Nintendo's collaborative approach in building the Famicom system indicates that information sharing is instrumental for quality game development. This article uses a framework elaborated by D J Teece to outline the characteristics of the video game industry and validate Nintendo's successful innovation strategy in the 1990s with its

Nintendo Entertainment System. Nintendo's collaborative and coercive approach to its external partners at this time illustrates that patent protection is not sufficient to ensure the commercial success of a highly technological asset – the video game console. Instead, strict licensing agreements with its game suppliers, and the use of trademarks, enabled Nintendo to release a canon of high quality games and maintain a monopoly position in the industry. This article shows how a technologically inferior newcomer overcame Nintendo's dominance by leveraging its complementary assets – a situation that validates Teece's thesis. Nintendo's eventual resurgence in the 2000s with the Wii console also demonstrates that having strong complementary assets, and a re-tooled patent strategy, is critical, despite Nintendo's inability to coerce game suppliers and its lack of the most advanced console. 252

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