



AUSTRALIA

Peter LeGuay
Cowley Hearne



Country Report

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Peter LeGuay

Cowley Hearne Lawyers Pty Ltd

www.cowleyhearne.com.au

1. Legislation:	Copyright Amendment (Parallel Importation) Bill 2002
Topic:	Parallel importation and commercial distribution of computer software products
Who:	Federal Government of Australia
When:	March 2002
What Happened:	This Bill proposes to enable parallel importation and commercial distribution of computer software products including interactive computer games, books, periodical publications (journals, magazines) and sheet music.
Comment:	The Bill is substantially the same as the one introduced in 2001. It has been read a second time and debate has been adjourned.

2. Case Report:	Kenman Kandy Australia Pty Ltd v Registrar of Trademarks (includes corrigendum dated 18 September 2002) [2002] FCAFC 273
Topic:	Shape Marks
Where:	Full Court of the Federal Court of Australia
When:	28 August 2002
What happened:	Kenman Kandy Australia Pty Ltd (“Kenman Kandy”) applied for and was refused registration of the shape of its “millennium bug” sweet as a trademark under the <i>Trademarks Act 1995</i> (Cth). The law relating to the registration of shape trademarks in Australia is still

	<p>relatively new, such registration only having been possible with the coming into operation of the 1995 Act. This case considered whether the shape of the goods in question was inherently adapted to distinguish them from the goods of other traders.</p> <p>The millennium bug was a confectionary manufactured by Kenman Kandy. It comprised of a central body which resembled a section of a sphere with a curved upper surface and a flat lower surface, with two oval “eyes” on the body and three short stylised “legs” on either side of the body. It was described by the Federal Court as a ‘friendly over-fed spider with six stumpy legs’. The principal examiner (and the single judge hearing the matter at first instance) maintained that the claimed sign had “little or no inherent adaptation to distinguish the applicant’s goods in the market place”.</p>
Comment:	<p>On appeal the Full Federal Court overturned the decision of the judge at first instance, finding (2:1) that the shape could be registered, as registration of the bug shape as a trademark would not give the appellant a monopoly over all bug or insect shapes – only this particular shape and any substantially identical or deceptively similar shape.</p>

3. Topic:	Formation of Australian Domain Name Administrative Body
Who:	auDA - .au Domain Administration
When:	September 2002
What Happened:	<p>.au Domain Administration (auDA) is the non-profit Australian company that was recognised by ICANN in September 2001 as the appropriate body to manage the .au domain. auDA has also been endorsed by the Australian government.</p> <p>auDA has the following functions as the manager of the .au domain:</p> <ul style="list-style-type: none"> •development and implementation of domain name policy; •licensing of 2LD registry operators; •accreditation and licensing of registrars; •implementation of consumer safeguards; •management of the Whois searching database; •facilitation of the .au Dispute Resolution Policy (auDRP); and

	<ul style="list-style-type: none"> •representation of Australia at ICANN and other international fora.
Comment:	<p>auDA's New Names Advisory Panel has released two discussion papers regarding proposals for the introduction of new second level domains (2LD's) including geographic domains. auDA is also scheduled to release approximately 1,370 generic domain names that were not allocated during the 2001 auction process.</p>

4. Case Report:	Desktop Marketing Systems v Telstra Corporation Limited [2002] FCAFC 112
Topic:	Copyright Infringement
Where:	Full Court of the Federal Court of Australia
When:	15 May 2002
What Happened:	<p>Telstra sued Desktop Marketing Systems for copyright infringement in respect of its White and Yellow Pages telephone directories. The infringements were constituted by reworkings by Desktop Marketing Systems of that data in the form of CD-ROMs. The defendant had argued non-subsistence by reason of absence of any creative spark in the creation of the works in suit. Therefore, the court stated that copyright will subsist in a compilation in 2 situations:</p> <ol style="list-style-type: none"> 1. if there has been sufficient intellectual effort in the selection or arrangement of the information; or 2. if the author has engaged in sufficient work or incurred sufficient expense in gathering the information, even if there is no creativity involved in the selection or arrangement. <p>The trial Judge and the Full Court held that industrious collection was enough to warrant copyright subsistence.</p>
Comment:	<p>The Full Court judgments are notable as each judge canvasses foreign authorities, and concludes that the North American approach is not appropriate for Australia.</p>

5. Case Report:	Cassidy & Anor v Medical Benefits Fund of Australia & Anor (No. 2) [2002] FCA 1097
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Topic:	Misleading and Deceptive Conduct/Advertising
Where:	Federal Court of Australia
When:	9 September 2002
What Happened:	<p>This case addressed alleged misleading or deceptive conduct in the television, newspaper and billboard advertisements for private health insurance leading up to the commencement of the Federal Government's "Lifetime Health Cover" initiative. MBF represented that it would waive certain waiting periods, that consumers could "join today, claim tomorrow" and transfer from another health fund and receive immediate cover. The issue was that the waiting periods being waived did not refer to pregnancy and yet images of pregnancy were used in the advertising with small print used to disclaim application of the offer to pregnancy.</p> <p>The Federal Court found that the advertising was misleading and deceptive and that the witnesses who gave evidence were induced to join MBF as a result of reliance upon the misleading and deceptive television advertising.</p> <p>The action was also commenced against MBF's advertising agency with the Australian Competition & Consumer Commission by claiming that the agency:</p> <ol style="list-style-type: none"> 1. knew the text and content of the advertisements as published, 2. knew the features of the advertisements and the circumstances of publication which gave rise to the published matter conveying the representations complained of, and 3. knew the facts by reference to which the applicant alleges the representations were misleading or false, i.e. knew that waiting periods did apply in the case of pregnancy. <p>The Court commented that it believed that advertising agents are the gatekeepers. Whilst the Court agreed that there was no doubt that an agency's reliance upon others may mitigate penalty, the Court found that it was no defence to a conclusion that the agency was knowingly concerned in a contravention of the <i>Trade Practices Act 1974</i> (Cth).</p>
Comment:	<p>MBF must now publish advertisements both on television and in newspapers circulating in the area where the television advertising was screened which will not merely remind the public that MBF had engaged in conduct which was misleading, but also alert consumers to the importance of questioning advertisements, and the insurance industry of the importance that their advertising not mislead or deceive consumers.</p>

6. Topic:	International action against marketers of abdominal toning devices
Who:	Australian Competition and Consumer Commission
Where:	Federal Court of Australia
When:	May 2002
What Happened:	<p>The ACCC and the US Federal Trade Commission have filed separate legal proceedings against the marketers of electronic abdominal exercise devices as part of a cooperative international enforcement effort.</p> <p>The ACCC's complaint relates to the promotion of an abdominal toning belt called the "Abtronic". The ACCC alleges that the marketing company Danoz Direct Pty Ltd (the Australian distributor of the products), its director and a number of other individuals have engaged in misleading and deceptive conduct in promoting the Abtronic's firming and slimming capabilities.</p> <p>Advertisements and "infomercials" for the Abtronic, aired repeatedly on Australian television, claimed the belt would give users flat stomachs, toned muscles and enable them to lose their "love handles" all without any exercise. The ads further claimed that the belt would give the results of up to 600 sit-ups in just ten minutes, without any effort.</p>
Comment:	<p>The US action also involved allegations of deceptive claims about the Abtronic, as well as two similar products called the "AB Energizer" and "Fast Abs". Canadian authorities are also reported to be investigating these abdominal toners following filing of the US and Australian complaints.</p>