

# Journal of Equity (JOE)

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*(editorial and articles included in this part are linked to the two LexisNexis platforms)*

### CONTENTS

**Editorial** 131

[LexisNexis AU](#) | [Lexis Advance](#)

#### Articles

Ongoing patent infringement: Is injunctive relief an inevitable outcome?  
— *Justice Stephen Burley and Angus Lang* 132

[LexisNexis AU](#) | [Lexis Advance](#)

Consider a case where a court makes a finding of patent infringement for a small feature in a complex product, such as a smartphone. Should an injunction inevitably be granted where that breach is ongoing? Australian courts to date have not had to answer this problem. In normal cases of patent infringement it would be, although the basis for the normal approach is not clear. In this article we propose a theoretical framework for the normal approach that lies in an analogy being made between the grant of relief in respect of 'special property' and injunctions in patent cases. We then extend that analogy to propose a limited circumstance in which an injunction for ongoing patent infringement might be refused based on principles of unjust enrichment. The article commences with consideration of the approach taken in the United States (US) and the United Kingdom (UK) to similar problems, before concluding that neither offers a solution applicable in Australian law, and then turning to the 'special property' analogy.

Equitable relief in transnational intellectual property disputes  
— *Ben Chen* 151

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This article explores the nature and availability of equitable relief in transnational intellectual property disputes. These disputes can present acute challenges, such as the multiplicity of proceedings and the limited effectiveness of municipal judicial orders in a globally interconnected world. Equity has a history of responding to these challenges and providing appropriate solutions. The experience of courts of equity and the principles that they have developed continue to offer valuable guidance for the resolution of transnational intellectual property disputes in modern times. To some extent, settled equitable doctrine can also alleviate concerns of 'exorbitance'.

Equity and monetary remedies for patent infringement:  
The development of the account of profits  
— *Ben Kremer*

168

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The remedy of the account of profits for patent infringement is often described as an equitable money remedy. Although this statement is broadly true, it is not usually appreciated that significant aspects of the modern remedy were not developed at general law but arose as a result of statutory reform. Tracing the development of the account of profits for patent infringement also reveals an early instance of fusion in which common law courts were given power to grant relief hitherto exclusively the domain of Chancery.

Reconsidering the need for defences to permit disclosures of  
confidential copyright material on public interest grounds  
— *Michael Handler*

195

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This article assesses the adequacy of the Australian legal framework governing unauthorised disclosures of confidential copyright material on public interest grounds. In Australia, in contrast with the United Kingdom (UK), courts are unlikely to recognise the existence of a non-statutory 'public interest defence' to copyright infringement or a 'public interest defence' to breach of confidence. Instead, it has been argued that a number of equitable doctrines and principles — the iniquity rule, clean hands, and the principles for the grant of injunctive relief — can do much the same work as the UK defences. This article critically analyses the role that the three abovementioned doctrines and principles have played and might play in facilitating 'public interest' disclosures, and seeks to revisit the case for defences to both breach of confidence and copyright infringement that would permit such disclosures. First, it shows that there are some types of disclosure that would be likely to be permitted by public interest defences in the UK but which would be restrained in Australia because of the limits of the three abovementioned equitable principles and doctrines and the current scope of the exceptions in the Copyright Act 1968 (Cth). Second, it makes a case that greater attention needs to be paid to the possibility of bringing Australian law into closer alignment with the position in the UK. It is argued that it would be problematic to expect the iniquity rule, clean hands and the principles governing injunctive relief to be stretched too far to deal with the full range of disclosures that might be caught by public interest defences, and that some of the concerns that have been expressed about the unstructured nature of public interest defences have not been borne out in practice in the UK over the past 40 years.

Bars to relief  
— *The Hon William Gummow AC*

227

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This article considers the statutory basis of the equity powers of the Federal Court, the content of the term 'intellectual property', the expression 'defensive equity', the 'defence' of delay and laches, unclean hands, and the development of the anti-suit injunction as a defensive weapon in multinational intellectual property litigation.