
Editorial

Sally Woollett

Intellectual property (IP) arises from intellectual activity in a whole range of fields, including scientific and technological endeavour. It comprises a bundle of rights, some subsisting in the work itself and some requiring registration.

Christine Emmanuel, patent and trade mark attorney at CSIRO Operations, compares buying a cheap house with the potential of IP as you can improve it and sell at a higher price. She explains (p.4): “The patent protection, and therefore the monopoly right, lasts for 20 years unless challenged in a court of law”.

Not surprisingly then, IP is big business in science and technology. Hundreds of millions

(and sometimes billions) of dollars and around 20 years of research effort are spent moving a drug from discovery to market – and even then the chance of success is relatively small. So when biotech businesses do manage to jump all the hurdles, they want to have strong control over their investment.

John Cusick, special counsel at Mallesons Stephen Jaques, says (p.6): “It is important that we protect scientists and their research to ensure that Australia keeps at the forefront of scientific development on the globe. We want to make sure that not all of our top scientists go overseas to work; rather, we want them to develop their research interests in Australia.” Cusick outlines a number of changes proposed recently by the federal government that have the aim of making the patent system more “research friendly”. These include “a special rule that allows scientific researchers to use a patented invention that is owned by another researcher if they are going to use the invention to conduct experiments to make the invention better”.

The “Raising the Bar” legislation outlined by Cusick, if introduced, “will raise industry standards on patenting and improve the efficiency of Australia’s patent system without jeopardising the introduction of new treatments for disease,” says Julian Clark, head of business development at the Walter and Eliza Hall Institute (p.11). He thinks that community concerns about gene patenting will be addressed far better by this approach than by the proposed amendment, introduced into the Senate late last year, of the *Patents Act 1990*. He says the proposed amendment “will do nothing to improve equity of access [to new medicines and diagnostic tests] and is based on the dangerous fallacy that banning patents on biological materials will make Australia a better place to live.”

ISSUES

Publisher: Guy Nolch <science@control.com.au>

Editor: Sally Woollett <issues@control.com.au>

Advertising: Guy Nolch <advertise@control.com.au>

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(ABN 46 006 591 304),
Box 2155, Wattleree Rd PO, VIC 3145, Australia
Phone: (03) 9500 0015 • Fax: (03) 9500 0255
Email: issues@control.com.au • Web: www.issues.com.au

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The purpose of the *Patent Amendment (Human Genes and Biological Materials) Bill* is to “specifically exclude biological materials and gene sequences that are identical or substantially identical to such materials as they exist in nature”. Anna Lavelle, CEO of biotechnology industry organisation AusBiotech, says (p.15): “There is little evidence to support claims that gene patents stifle research or that there is currently anything other than free and unfettered access to biological materials among the Australian research community”. AusBiotech also welcomes the “Raising the Bar” Bill.

Intellectual property consultant Luigi Palombi (p.18) says the Patent Amendment Bill won’t prevent the patenting of biotechnological processes: “The Bill will, if passed, prohibit the patenting of the end result of those processes if, and only if, they are identical or substantially identical to those that exist in nature... It merely seeks to apply, in accordance with established legal precedent, the longstanding principle of patent law: that invention is rewarded with a patent, but a discovery is not.” He believes that predictions of “unintended consequences” by critics of the proposed amendment are predicated by “self-interest and a determination to preserve the status quo”.

Joanna Jones, patent and trade mark attorney at Davies Collison Cave, sets out the wide range of rights constituting IP. She explains why each IP form is an asset and what to watch out for when considering your rights. IP “is a key component of success in today’s business world, and as such should be regarded as a valuable asset to be protected,” she says (p.26). These considerations apply both to organisations and individuals.

In her second article (p.30), Jones expands on the patent protection strategy of good laboratory notebook documentation. She compares Australia’s “first to file” system with the “first to invent” system in the US, “where a laboratory notebook may be admitted as evidence of inventive activity” when

establishing patent rights. Inadequately kept or witnessed notebooks “will be given little or no weight in establishing rights to a patent,” she warns.

Do patents alter the direction of scientific inquiry? This is the question asked by Paul Jensen and Elizabeth Webster at the Intellectual Property Research Institute of Australia (p.44). Their results “suggest that scientists are affected by the presence of patents, which is a cause for some concern if we accept that decision rights over research projects should be vested in the individual scientist”.

Brian Martin, Professor of Social Sciences at the University of Wollongong, focuses on the individual in the matter of copyright (p.33). He challenges the official rationale

– protection of the expression of an idea to encourage creative effort – by saying that “there’s no good evidence that lengthy copyright terms have any effect on the amount or quality of creative work”.

Powerful companies have most to gain from copyright,

Martin explains, and they are the ones who push to extend coverage. He says that “monopoly privilege” is a more accurate way to describe intellectual property.

Peggy Lemaux of the University of California’s Department of Plant and Microbial Biology makes some interesting comparisons between the US and Australian IP systems with regard to plant patenting and plant breeder’s rights (p.37). “Just as in the US, a plant patent is legally enforceable and gives the owner the exclusive rights to exploit the invention, in this case the plant variety, for the life of the patent,” she explains.

Lemaux describes the work of an Australian organisation, CAMBIA, one of several groups cooperating to enable the creation of genetically engineered crops by non-profit entities, among others. This can assist the retention of patent rights for use by developing countries. CAMBIA’s Initiative for Open Innovation is “dedicated to making the world’s patent systems more transparent, inclusive and navigable”.

