AUSTRALIAN INTELLECTUAL PROPERTY JOURNAL

Volume 15, Number 1

February 2004

EDITORIAL 5

ARTICLES

The ethics – gene patenting and human health – *Adrian White*

The Australian Law Reform Commission *Inquiry into Intellectual Property Rights over Genetic Materials and Genetic Related Technologies*, which is due for completion in June 2004, provides an opportunity to assess the social impact of patent law, policy and practice. The economic, legal and scientific implications of patenting such technology have and will be the subject of comprehensive policy debate. The important fourth pillar of the debate – the ethical dimension – is sometimes treated as the "maiden aunt". Ethical issues are no less important to the integrity of a patent system – for some they are more important. "Ethics" can and should be more than rhetoric for accepting or rejecting a patent. This article assesses the reasonable parameters of an ethical exclusion from patentability for inventions related to human genetic technologies. It also distinguishes the ethics of a single patent from other ethical and other social welfare issues such as health funding and safeguarding the environment. The legal grounds for exclusion at law are considered, looking at the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights* and at experience in Europe. The article also identifies Parliament and statutory research bodies which are capable of making authoritative assessments of what are the ethical issues. Solid policies are needed on the ethical dimension of patenting to underpin innovation and investment in this sector. 6

Monopolised product shapes and factual distinctiveness under s 41(6) of the Trade Marks Act 1995 (Cth) – *Jani McCutcheon*

This article considers whether functional shapes may be registered under s 41(6) of the *Trade Marks Act 1995* (Cth) based on the generation of factual distinctiveness under a trade monopoly. The ultimate conclusion is that the trade monopoly itself should not preclude registration. The article then considers the policy implications of registering functional product shapes as trade marks. It argues that many of the policy concerns relating to the registration of such shapes are overstated and/or are not reflected in the *Trade Marks Act 1995*, and suggests legislative reform which should prevent the registration of the most undesirable trade mark monopolies. 18

The protection of traditional knowledge: Towards a cross-cultural dialogue on intellectual property rights – *Chidi Oguamanam*

This article revisits the debate over the suitability of using conventional intellectual property rights to protect indigenous knowledge. It notes that attempts to reconcile formal

intellectual property rights with indigenous knowledge are unsatisfactory, hence the search for sui generis intellectual property options. Suggestions for such options are based on formal intellectual property rights addressing only the bureaucratic, procedural and other peripheral matters. This approach ignores the narrow epistemic confines through which conventional intellectual property law reifies Western scientific narrative to the exclusion of indigenous ways of knowing. The application of the patent regime in the traditional medicine context illustrates this point. In order to realistically address the indigenous knowledge question within the intellectual property framework, the article explores the emerging cross-cultural discourse on intellectual property rights. The cross-cultural project spotlights indigenous jurisprudence and customary protocol on knowledge protection. It is premised on the realisation that all cultures have knowledge protection protocols. The thrust of the cross-cultural inquiry is local. Critically appraised, however, it does not pose significant conflict with the present global focus of intellectual property. 34

NEWS AND CURRENT DEVELOPMENTS

News from IP Australia 60

News from the Attorney-General's Department 62

Guidelines for Contributors

Submission and licence agreement instructions

All contributions to the journal are welcome and should be sent, with a signed licence agreement, to the Production Editor, *Australian Intellectual Property Journal*, Lawbook Co., PO Box 3502, Rozelle, NSW 2039 (mail), 100 Harris St, Pyrmont, NSW 2009 (courier) or by email to aipj@thomson.com.au, for forwarding to the Editor. Licence agreements can be downloaded via the internet at http://www.lawbookco.com.au/authorsupport/d_authorJournals.asp. If you submit your contribution via email, please confirm that you have printed, signed and mailed the licence agreement to the attention of the Production Editor at the mailing address noted above.

Letters to the Editor

By submitting a letter to the editor of this journal for publication, you agree that Thomson Legal & Regulatory Limited, trading as Lawbook Co., may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

Manuscript

- Manuscript must be original, unpublished work that has not been submitted for publication elsewhere.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript.
- Manuscript must be submitted electronically via email or on disk in Microsoft Word format.
- Manuscript should not exceed 10,000 words for articles or 1,500-2,000 words for section commentary or book reviews. An abstract of 100-150 words is to be submitted with article manuscripts.
- Proof pages will be sent to contributors. Authors are responsible for the accuracy of case names, citations and other references. Excessive changes to the text cannot be accommodated.
- Contributors of articles receive 25 free offprints of their article and a copy of the part in which the article is published. Other contributors receive a copy of the part to which they have contributed.
- Articles published are critically appraised or reviewed by an academic or professional peer of the author for the purpose of maintaining the standards of the journal.

Style

1. **Levels of headings should be clearly indicated (no more than four levels).**
2. **Cases:**

- Case citation follows case name. Where a case is cited in the text, the citation should follow immediately rather than as a footnote. Give at least two and preferably all available citations, the first listed being the authorised reference.
- Australian citations should appear in the following order: authorised series; Lawbook Co./ATP series; other company series (ie CCH, Butterworths); media neutral citation.
- "At" references should only refer to the best available citation, eg: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 34; 66 ALJR 408; 107 ALR 1.
- Where only a media neutral citation is available, "at" references should be to paragraph, eg: *YG v Minister for Community Services* [2002] NSWCA 247 at [19].
- For international cases best references only should be included.

3. **Legislation should be cited as follows:**
   Trade Practices Act 1974 (Cth), s 51AC. The full citation should be repeated in footnotes.
4. **Books should be cited as follows:**
   Macken JJ, O'Grady P, Sappideen C and Warburton G, *The Law of Employment* (5th ed, Lawbook Co., 2002) p 55.

- In footnotes do not use ibid or op cit. The following style is preferred:
  4. Austin RP, "Constructive Trusts" in Finn PD (ed), *Essays in Equity* (Law Book Co, 1985).
  5. Austin, n 4, p 56.

5. **Journals should be cited as follows:**
   Odgers S, "Police Interrogation: A Decade of Legal Development" (1990) 14 Crim LJ 220.
   Wherever possible use official abbreviations not the full name for journal titles.

- In footnotes do not use ibid or op cit. The following style is preferred:
  6. Sheehy EA, Stubbs J and Tolmie J, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Crim LJ 220.
  7. Sheehy et al, n 6 at 221.

6. **Internet references should be cited as follows:**
   Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co., subscription service) at [16.340], http://subscriber.lawbookco.com.au viewed 25 June 2002. Underline the URL and include the date the document was viewed.

For further information visit the Lawbook Co. website at http://www.lawbookco.com.au or contact the Production Editor.

SUBSCRIPTION INFORMATION

The *Australian Intellectual Property Journal* comprises four parts a year.

Customer Service and sales inquiries:
Tel: 1800 650 522
Fax: 61 2 8587 7200
Web: www.lawbookco.com.au
Email: service@thomson.com.au

Editorial inquiries:
Tel: (02) 8587 7000

HEAD OFFICE
100 Harris Street PYRMONT NSW 2009
Tel: (02) 8587 7000 Fax: (02) 8587 7100

ISSN 1038-1635

Typeset by Lawbook Co., Pyrmont, NSW
Printed by Ligare Pty Ltd, Riverwood, NSW