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The interlocutory injunction dilemma in patent infringement and invalidity disputes – *Dr Charles Lawson*

Interlocutory injunctions pose a dilemma for patent law and practice as they require a court to assess the parties' submissions and make decisions before all the issues are thoroughly argued. While the relevant legal principles are settled, there remains some uncertainty for intellectual property owners (or licensees or assignees) maintaining their statutory privileges and protecting their broader commercial interests in exploiting their privileges (such as market share, brand, good will, reputation etc). This article examines interlocutory injunctions where there is both an alleged infringement of a Patents Act 1990 (Cth) "standard patent" and a challenge to patent invalidity, to explore the potential of interlocutory injunctions as a tool to promote, encourage and coerce patent owners to provide access to, and disseminate, their patent protected products, method and processes while respecting core exclusive rights. 73

Falling between two stools: Presumptions under the Copyright Act 1968 (Cth) – *Luke Pallaras*

Until recently, the presumptions in Pt V Div 4 of the Copyright Act have remained somewhat neglected: they have seldom been invoked and have rarely been the subject of controversy. However, the recent Federal Court of Australia decision of *Telstra v Phone Directories* invites a reconsideration of the operation of, and the aims underlying, these presumptions. Gordon J's brief analysis of the presumptions in this case contains a series of questionable propositions. In response, this article draws upon the academic literature relating to presumptions generally and the legislative history of the Pt V Div 4 presumptions to argue that Gordon J's analysis of these issues exhibits a number of flaws. In doing so, the article seeks to clarify the correct approach to applying these presumptions and suggests a number of approaches to overcoming the confusion caused by their current drafting. 100

Editorial

The second part of the Journal for 2010 features pieces exploring practical, doctrinal and policy questions that exist today in patent and copyright law.

Charles Lawson, a regular and valued contributor to the Journal, explores the question of interlocutory injunctive relief in patent litigation. As readers may know, it is common for many intellectual property court disputes to go no further than a hearing for an interlocutory injunction. This is especially so in patent cases. After setting out the development since the 1960s of an Australian High Court position on the principles governing discretion in this area, Lawson offers his analysis of a series of quite recent patent cases. Through those cases, he identifies latent matters of underlying economic policy that may offer powerful predictive value in assessing the likelihood of success in an application for interlocutory injunctive relief.

The focus of Luke Pallaras's article is directed at the case of *Telstra v Phone Directories*, and the treatment therein of certain presumptions found in the *Copyright Act 1968*. Gordon J's first-instance decision is currently the subject of appeal. Pallaras challenges the correctness of the trial judge's approach to the presumptions, including Gordon J's holding that a party which relies on a presumption, and simultaneously leads evidence of a fact presumed, loses the benefit of the presumption. In offering his analysis Pallaras offers the reader a detailed account of both the history of the copyright presumptions, and the policy of such evidentiary presumptions more generally.

Michael Fraser rounds out the part with a topical piece. It comprises the text of his important address in April 2010 which sketched out a suggested architecture for what he describes as "National Content Network" (NCN) to in part complement the much-discussed National Broadband Network (NBN) currently being rolled-out in Australia. Underlying Fraser's NCN concept is a stated desire to supply a civilised and market-based means of generating quality content for the betterment of everyone.

David Brennan

Topics of interest

UTS SPEAKS: NATIONAL CONTENT NETWORK – ACCESS

Dig?

In the early days, Australia rode the sheep's back and we exported our primary produce. In the 20th century we developed our industrial manufacturing base. And then as Australian manufacturing faced low cost base competition from developing countries, we moved up the value chain, where we have a competitive advantage, to produce and export elaborately transformed manufactures. The world is sending us a message, "Shut up and dig". But although we still rely heavily on exporting primary resources, the future is in moving further up the value chain, playing to our strengths, our knowledge based industries, especially to build our original creative online services. Our knowledge and creative content services will drive innovation, sustainable growth, trade and progressive change for Australia.

Now it's early days in making an information society and building a knowledge economy.

We use information and communications technology every day, in ways that we had not imagined 10 years ago. But technology is no substitute for policy. We'll have to get the settings right to grow our knowledge based industries. The way we order the communications, media and intellectual property rights infrastructure will shape our society and determine our prosperity for many years after we have dug up all our rocks and shipped them to China.

The question is will we *manage* the new technology or will it manage us?

ACKNOWLEDGMENT

My paper here represents the thinking of Professor Gobinda Chowdhury and me. We found that we had come to the same conclusions independently, he from Information and Knowledge Management and I from rights management and so we combined forces.

TECHNOLOGY

Millions travel the world by jet aircraft. We carry powerful communication and copying devices. We live in a global digital communications network, connecting billions of people.

THE INFORMATION SOCIETY

We are hungry for cultural products and knowledge services and trade.

GROWTH OF THE WORLD WIDE WEB

The web brings Australia close to the world. It dissolves the tyranny of distance, as did the railway tracks, steamships and telegraph in the industrial age.

Access to the web is growing rapidly. There are 1.7 billion people online, 26% of the world, growing 380% since 2000¹.

Over the next five years, 460 million people in emerging countries will go online. The growth will be highest among consumers and small businesses,

In 2007, Australia, a country of more than 20 million people who want to connect, spent nearly \$23 billion on information technology (IT), 3.0% of gross domestic product (GDP).

THE FOUR FOUNDATIONS OF A CREATIVE ECONOMY

Australia must harness the information and communication technologies to build an information society and a knowledge economy.

We must set the right conditions for quality content to flow to consumers. A secure market for content that responds to demand would attract creativity, investment and consumers.

¹ Miniwatts Marketing Group, <http://www.internetworldstats.com/stats.htm> (viewed 23 March.2010).