Intellectual Property – Challenges for the Future

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Intellectual property (**IP**) law is based on a fundamental principle of balance, the balance between the interests and needs of the public and those of creators. This extrapolates to a balance between consumer versus innovator. Public rights versus propriety rights. Socialism versus capitalism.[1] When the legal systems that underpin IP no longer maintain the correct balance or even worse, neglect it, then respect for those systems and IP is eroded.

The Present

IP law has advanced dramatically in the last 30 years from being an obscure area of the law practised by a small group of specialists, and not commonly taught (at least in Australia), to being an area of law that is said to underpin industries worth billions of dollars.[2] For this reason it has now entered the public consciousness and is regularly the subject of debate between countries entering into trade agreements.[3] Yet its importance and relevance is increasingly under threat. Whilst the threat manifests in a number of forms, the result is essentially a lack of respect for IP law. It seems that a significant proportion of the public variously believes:

1. they will not get caught for IP infringement;
2. IP infringement does not hurt anyone;
3. IP rights simply allow holders to obtain inflated margins; and
4. IP rights place unnecessary restrictions on competing products.[4]

This lack of respect is based on a perception that the balance has shifted in favour of the rightsholders who are reaping unwarranted benefits. This perception has given rise to authorised distribution channels being avoided and calls being made for reform. A number of examples illustrate this:

1. The proliferation of counterfeit products being sold, not just in the notorious Asian markets, but even in the streets of New York outside Fifth Avenue shops selling the genuine articles.
2. The content traded on the peer-to-peer networks. Kazaa, Grokster, Limewire and Morpheus, for example, have affected the profits of music publishers, and the ready availability of distribution software, such as BitTorrent,[5] has given rise to an extensive trade in first release feature length movies.
3. The public outcry that resulted when large pharmaceutical companies sought to exercise their patent rights over AIDS related drugs in poorer African nations.[6]
4. The recent calls for reform of the United States (US) patent system, backed by reports released by the US Federal Trade Commission,[7] the National Academy of Sciences[8] and more recently a book published in November 2004 by economists Adam B. Jaffe and Josh Lerner.[9]
5. The continual bureaucratic battle in Europe over the European Union Directive on the Patentability of Computer-Implemented Inventions (otherwise known as "the Software Patent Directive").[10]

What are some of the factors that have led to this lack of respect for or faith in the IP system?

In the past, the public was content to grant publishers limited exclusive rights against copying to prevent erosion of their business.[11] Similarly, the public also appeared to be content to grant inventors a monopoly over their invention for a limited term, provided the inventors agreed to disclose the secrets of their invention for use by the public afterwards.[12] This seemed to be well suited to the limited forms of publication and artistic expression that existed at the beginning of the last century, and the industrial devices and processes developed by inventors at the same time.

Technological and political change has produced an expansion in intellectual and service based economies compared to the traditional industrial and product based economies, and has altered the landscape considerably. This change has resulted in three factors having a profound impact on the perceptions of IP rights:

1. **Digital reproduction**. Once it became possible to produce works (such as literary and musical works, and films) in digital form, to the extent that the original work could not be distinguished from a copy and the copy would not deteriorate, the value in purchasing an authorised copy declined. Consumers have been given technology that allows them to make a perfect copy for themselves and distribute it to others. Producing a perfect reproduction of many works is no longer the domain of a specialist counterfeiter.
2. **The Internet**. The communications phenomenon has allowed digital reproduction to become widespread and made it difficult to prevent. However, it has also provided a mechanism that allows the previously disenfranchised to have their arguments heard on almost the same level as those in authority, an ivory tower or an established and respected organisation.

   Web sites produced by traditional media outlets, such as the BBC, CNN and the New York Times, only present one page at a time, as does any other site produced by any other group or individual on the Internet.[13] This allows the public to present their views

without having to conduct research, gain the attention of the established media regimes or provide a balanced argument. Open source software groups[14] have been formed and the Creative Commons established.[15] The reliance on electronic messaging for communications allows information to be spread quickly across global boundaries to bring together like-minded individuals in disparate locations and positions. This allows groups to act when a law is being reviewed such that individual submissions can be delivered quickly en masse, overwhelming a single submission made by an industry organisation.[16] The validity of individual positions is then further enhanced when the traditional media begins quoting individuals' Internet sites as an authoritative source.[17]

The decentralised nature of the Internet has allowed the peer-to-peer networks to flourish to such an extent that normally there is no central promoter of piracy that content publishers can take action against. For example, in the Kazaa case,[18] it has become clear that even if an injunction is granted to prevent use of the Kazaa peer to peer client running on user's machines, there are already a number of other versions of the Kazaa client being used that allow the Kazaa network to flourish even if the authorised client is somehow extracted from all of the user machines, which is largely impossible to enforce in any event. For this reason, the music industry has resorted to taking action against users of the networks,[19] which although having some effect, clearly represents a desperate last resort and an inefficient use of legal resources.

3. **Rights expansion**. Partly as a response to the first two factors, but also due to an ever increasing demand for propriety rights, IP law has continually changed (through the legislature, courts and Patent Office practice), to increase the array of rights at a creator's disposal. The copyright term has been extended to the life of the author plus 70 years.[20] The World Intellectual Property Organisation (**WIPO**) Internet treaties and their progeny[21] have introduced infringement provisions that have little to do with copying.[22] There is also a call for the introduction of further IP rights in the US.[23] For patents, we have seen an expansion from protecting simple industrial products to protecting agricultural processes, pharmaceutical compounds, methods of medical treatment, software and now biotechnological processes and genetic material. The Patent Offices have been inundated with applications for patent grant, and with limited resources at their disposal, have been routinely criticised for granting patents for inventions that others consider not worthy of patent protection.[24] As a reaction to this criticism, the Patent Offices have sought to tighten examination standards at the expense of the time it takes to obtain a patent grant.[25]

Rights expansion can be seen as a knee jerk reaction to digital reproduction and the Internet, as discussed above, but has primarily arisen due to the technical and political changes that we have experienced over the last 20 years. However, it is not difficult to see why the public may perceive rights expansion as a desperate attempt to enforce the status quo that the Internet is so effectively challenging.

What does this mean for the future?

The Future - Copyright

Although it is compelling for the copyright industries, particularly content publishing industries, to seek even more rights or draconian enforcement provisions,[26] an alternative is to use the legislative tools currently at these industries' disposal in a manner that seems fair to the public. Whilst there is clearly a criminal element involved in piracy,[27] and rights holders will need to work with the relevant authorities to take the appropriate action or introduce effective enforcement provisions, the majority of consumers would be happy to acquire works provided the price is right and the mechanism is simple. This is illustrated by the success of legitimate music download sites, the most successful of which is the I-Tunes website.[28] If consumers are given access to the works at a price they do not believe to be inflated, they will pay for downloads (both of music and of movies) provided they can fully transfer them to their other consumer electronic devices. A fair use of the downloaded copies should be allowed.[29]

The most problematic aspect for rights holders and publishers is to manage this distribution without allowing individuals to widely distribute to others without charge. Peer-to-peer network traffic presents the greatest difficulty. There are technical measures available to monitor the traffic on these networks, but these measures need to be enforced. Whilst legislative changes may be required, the greatest challenges lie in introducing authorised technical systems that support business models acceptable to content publishers and, perhaps more importantly, reaching consensus, at least amongst World Trade Organisation (**WTO**) nations, regarding enforcement. Legislative measures are pointless if only a few countries have strict enforcement regimes, while other countries allow the proliferation of sites which facilitate download of unauthorised content.[30]

Accordingly, the interests of creators and the public could be best served by:

1. Concentrating on the introduction and expansion of authorised online distribution systems. If consumers are provided with a cost effective alternative, most will not frequent the illegal systems.

2. Continuing vigilant enforcement of existing rights against pirates, counterfeiters and facilitators to try to avoid an expansion of unauthorised distribution channels. It is the distributors that should be targeted, rather than the consumers. Whilst targeting distributors is difficult and costly, with the support of the relevant regulatory authorities and the correct legislative tools, this may become easier over time. International cooperation between authorities, particularly communications authorities, also needs to be raised to a level

whereby a global enforcement regime exists.

3. International organisations, such as the WTO and WIPO, introducing a global copyright system that supports the authorised distribution channels, but more importantly focuses on the fundamental principal of balance between the interests of the public and the creators. Whilst the rights of creators need to be enforced, the public needs to be able to fairly use the works made available.

The Future - Patents

Debate on the appropriate subject matter for patent protection will never be resolved. When reviews are conducted on whether certain subject matter should or should not be covered by a patent, a clear answer almost never emerges.[31] The subject matter debate is largely pointless (particularly when it is conducted in isolation without considering other patentability requirements such as inventive step), and calls to mind the words of the Australian High Court in the often cited *National Research Development Corporation* decision:

> "To attempt to place upon the idea the fetters of an exact verbal formula could never have been sound. It would be unsound to the point of folly to attempt to do so now".[32]

Leaving subject matter aside, the primary problems that can be focused upon are:

1. The apparent ease with which patents can be obtained, compared to the difficulties encountered in challenging them.
2. The ever increasing delay in the application process.

The first problem is due to a combination of factors, ranging from legislative and procedural restraints that vary from jurisdiction to jurisdiction to the extent of Patent Office resources available to handle applications received. Most countries have adopted strict, and in some cases convoluted, legislative provisions governing the type of material that can be used to assess whether a patent claim is novel or obvious, and in some cases the test itself is prescribed.[33] The constraints generally lead to possibly relevant material being excluded from the assessment of patent claims, such as evidence of standard industry practice, which normally would not be considered to be part of the public domain. When examining patent applications, the Patent Offices need to remain within the constraints, and are also limited by the resources they have at their disposal. A patent examiner tends to rely on any documentary material available from accessible databases (such as patent literature databases and journal databases) when seeking to establish that a claim may not be valid, and is unable to rely upon the expertise and knowledge of those in the relevant industry. Furthermore, some industries are less prolific than others in producing papers and articles on their work.

The mechanisms available for third parties to become involved in the examination process is also limited. Some countries provide *ex parte* procedures to allow the submission of relevant prior art material to assess the novelty of an application to the examiners, but this normally involves the submitting party taking no further part in the process. Similar problems exist for re-examination procedures provided after grant. Post grant or post acceptance *inter parte* opposition procedures are available in some countries,[34] but compared to the cost involved in an applicant prosecuting an application to acceptance, the procedures can prove costly and difficult for opponents. In other countries, no action can be taken during the examination process, and the only *inter parte* procedure available is an action before a court.[35]

The issue of Patent Office resources and their ability to handle the current large number of patent applications is a factor in both of the problems outlined above. The US Patent Office currently receives about 300,000 patent applications a year and is struggling to complete examination within four years.[36] There has also been continual criticism regarding the quality of the patents that have been granted in the US.[37] Some have suggested that one solution would be to abolish examination altogether and simply allow patents to be automatically granted and subsequently challenged by third parties if necessary.[38] Imposing more patent monopolies of doubtful validity on the public hardly seems a sensible course to adopt if respect is to be regained for the patent system. This also could be considered an abrogation of the government's responsibility to only grant exclusive monopolies for a limited term when warranted. To regain respect, the patent system should be changed to ensure that only worthwhile patents are granted. This means fewer, but more revered, patents. The most logical way this can be achieved is to reinvigorate the Patent Offices and allow greater cooperation with interested parties. Possible steps that can be taken to achieve this include:

1. Ensuring more funds and resources are devoted to patent examination.[39]
2. Removing restraints on how novelty or obviousness of a claim is assessed, so that this can be done on the basis of anything previously known or used.
3. Publishing applications early. A period of three months will allow examiners to actively conduct investigations and inquiries to assess the validity of a claim. This may also involve a discourse with sanctioned industry organisations.
4. Allowing oppositions to be taken by any party before the Patent Office at any time following publication.
5. Invoking strict time limits and limiting the number of allowable patent claims to try to dispose of applications in a shorter period of time, preferably one year. The time limits can be enforced by imposing monthly fees on applicants and third parties for delays. There are difficulties in imposing similar penalties on the Patent Office for delays on its behalf, but this could be invoked by providing a reduction in fees at grant.

Whether any of the above is sufficient, or even workable, would be interesting to see.

1 C Evans, *Does Open Source Represent a Revolutionary Alternative?*, 13 April 2002, http://www.netfreedom.org/news.asp?item=183; C Nederkoorn, *A comparison of Marxist Communism and the Open Source Software movement*, http://www.pintmaster.com/essays/marx.html; *Open Source equals Socialism* http://c2.com/cgi/wiki?OpenSourceEqualsSocialism.

2 *Patents – Smart Assets*, The Economist, 19 February 2005: IBM alone earns over $US 1.2 billion by licensing and assigning patents.

3 An example is the recently negotiated Australia-US Free Trade Agreement: http://www.dfat.gov.au/trade/negotiations/us.html .

4 Point 4 is a repeated argument of the Open Source community. For example, reference can be had to the recently reinvigorated debate on the OASIS patent policy: http://news.com.com/OASIS+patent+policy+sparks+boycott/2100-7344_3-5585711.html.

5 C Thompson, *The BitTorrent Effect*, Wired, January 2005, p 151.

6 E Becker, *In Reversal, US Nears Deal on Drugs for Poor Countries*, New York Times, 28 August 2003; in response to the public criticism the WTO negotiated an accord providing an exemption for the importation of generic medicines.

7 FTC, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, Oct 2003: http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

8 S Merrill, R C Levin and M B Myers, *A Patent System for the 21st Century*, 2004, The National Academies Press, ISBN 0309089107.

9 A B Jaffe and J Lerner, *Innovation and Its Discontents: How our Broken Patent System is Endangering Innovation and Programs*, November 2004, Princeton University Press.

10 L McLaughlin, *European Union Struggles with New Rules for Software Patents*, IEEE Software, Sept/Oct 2004, pp 101 to 104; P Mellor, *EU Squabble Over Software Patent Bill*, Australian Financial Review, 22 February 2005, pg 34.

11 The Statute of Anne 1709 introduced limited copyright rights primarily to protect booksellers and publishers from piracy.

12 The Statute of Monopolies 1623 abolished all monopolies, except those for inventors of any manner of new manufactures for up to 14 years in return for dedication of the invention to the public.

13 The use of blogs and forums, such as Slashdot (http://slashdot.org) and Crikey (http://www.crikey.com.au) are challenging the traditional media control on information.

14 For example, http://www.opensource.org/, http://www.fsf.org/ and http://www.linux.org/groups/index.html

15 http://creativecommons.org

16 An example is the street protests organised in Brussels and the signatures collected by the Foundation for a Free Information Infrastructure (http://www.ffii.org) for the Software Patent Directive.

17 For instance, the European Commission (http://europa.eu.int/idabc/en/document/3930/194) refers to articles by Zdnet (http://news.zdnet.co.uk/business/legal/0,39020651,39189032,00.htm) who rely on positions taken from the sites of anti-patent campaigners.

18 *Universal Music Australia Pty Ltd & Oths v Sharman License Holdings Ltd*, NSD 110 of 2004, FCA; J Davidson, *The riddle of the digital world*, Financial Review, 14 December 2004, pg 26.

19 http://www.riaa.com/news/newsletter/022805.asp

20 The term was previously life plus 50 years.

21 WIPO Copyright Treaty 1996, WIPO Performances and Phonograms Treaty 1996, US Digital Millennium Copyright Act HR 2281, and Australia's Copyright Amendment (Digital Agenda) Act 2000 (Cth).

22 For example, circumvention of technical protection measures in the WIPO Copyright Treaty 1996.

23 Inducing Infringement of Copyrights Act of 2004, S.2560.

24 An example of a response is the almost hysterical media reports on the Amazon "one-click" patent.

25 The wait time is now almost 5 years for the US Patent Office and 6 years for the European Patent Office for some technologies.

26 Consider the extensive copyright legislation currently before the US Congress, http://www.copyright.gov/legislation/archive/.

27 J Howe, *The Shadow Internet*, Wired, January 2005, pp 155-159.

28 http://www.itunes.com.

29 The Australian Government is currently considering introducing a general "fair use" provision: J Lee, *Copyright laws under review*, 15 February 2005, *The Sydney Morning Herald.*

30 J Borland, *Legal Reprieve for Russian MP3 Site?*, CNet Networks, Inc., 7 March 2005.

31 Compare the differences in recent reviews in Australia (http://www.acip.gov.au/library/ bsreport.pdf), New Zealand (http://www.med.govt.nz/buslt/int_prop/patentsreview/cabinet/part1/section6.html) and the UK (http://www.patent.gov.uk/about/consultations/conclusions.htm) on business method patents.

32 *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252 at 271.

33 For example, in Australia only the common general knowledge of those skilled in the art considered separately or together with only certain types of prior art documents can be used to assess obviousness.

34 For example, Europe, Australia, Japan (Invalidity Trial before the Patent Office) and New Zealand.

35 The US is one such jurisdiction.

36 http://www.uspto.gov/web/offices/com/annual/2004/040201_patentperform.html

37 Gary L Reback, *Patently Absurd*, 24 June 2002, • http://www.forbes.com/asap/2002/0624/044.html; J Gleick, *Patently Absurd*, 12 March 2000, http://www.nytimes.com/library/magazine/home/20000312mag-patents.html;

S L Garfinkel, *Patently Absurd*, July 1994, http://www.wired.com/wired/archive/2.07/patents_pr.html.

38 The Australian Government's response that led to the introduction of innovation patents in Australia, http://www.ipaustralia.gov.au/patents/what_innovation_review.shtml , and comments made by F Gurry, Assistant Director General WIPO, FICPI Berlin 2003 (http://www.ficpi.org/libraryframe.html).

39 In the US, approximately $638 million over 10 years and $100 million in FY2004 of US Patent Office revenue was diverted to other government agencies. The US President proposes to suspend this practice in the FY2005 budget. Fees could be levied to ensure that resources are adequate.