

Future Directions in Intellectual Property

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## **Introduction**

We have already had a range of interesting and informative presentations from distinguished speakers. So, at this stage of the proceedings it is difficult to find something to say that has not already been well said.

Under the Caretaker Conventions I am not permitted to comment on issues of political interest such as the Australia-US Free Trade Agreement – so this further constrains my possible topics.

Since the title for this afternoon's segment is: Bridging the gap: Where do we go from here? I thought it would be useful to look at what is happening in the intellectual property world of today. What are some of the major influences that will shape the future of intellectual property. What are the future directions in intellectual property.

First of all though, I would like to introduce you to my organisation.

What is IP Australia and what does it do?

IP Australia is the Federal Government agency responsible for granting rights in patents, trade marks and designs. It is a division of the Department of Industry, Tourism and Resources (ITR) but operates independently and reports directly to the Minister.

IP Australia is a self-funding agency with total revenue in 2003-04 of around \$91 million. We regard ourselves a medium-sized office. To give you some indication of what that means, we received about 22,000 patent applications, 79,500 trade mark applications in classes, and just over 5,000 design applications in 2003-04.

IP Australia has just over 780 employees of whom 212 are patent examiners and 104 are trade mark examiners.

But we don't simply grant IP rights. Like any modern organisation, IP Australia provides web-based services including: information about intellectual property and IP Australia; searchable data-bases such as the trade marks register and various patent data sets; on-line journals; on-line application forms; and related information.

We also work to raise awareness about intellectual property and its importance to innovation and competitiveness. We do this through our web-based information services, and through seminars for: small and medium enterprises; business advisers; the tertiary education sector; research institutions; the intellectual property profession; the Government sector; and secondary schools.

Intellectual property is very much an international business however, and one which is increasingly globalised – particularly in patents but also to an extent in trade marks. IP Australia's goal in this context is to help to create an international IP system that promotes innovation, investment and trade. We do this by: influencing the development of the international IP system through the World Intellectual Property Organisation; working cooperatively with other IP offices around the world; and by working with economies in our region to build their capabilities.

IP Australia provides policy advice to the Government in its areas of expertise. It is supported in this role by the Advisory Council on Intellectual Property (ACIP) which is an independent body appointed by the government to advise the Federal Minister for Industry, Tourism and Resources on intellectual property matters and the strategic administration of IP Australia. The Council was established in 1994 and its membership includes individuals from both large and small businesses, the legal and attorney professions and academia.

IP Australia was instrumental in establishing the Intellectual Property Research Institute of Australia at the University of Melbourne. The Institute undertakes high quality research to improve policy advice to Australian governments, to improve the use of IP by Australian organisations, and to enhance the debate about IP issues.

IP Australia supports the Professional Standards Board for Patent and Trade Marks Attorneys (PSB) and its Disciplinary Tribunal. The Board is a statutory body constituted under the Patents Regulations that: accredits courses; and assesses the tertiary qualifications of people seeking registration as patent and trade marks attorneys.

IP Australia is: a service provider; a policy adviser; a regulator; and an educator.

### **A Context for Thinking About the Future**

The future of IP depends on a wide range of complex factors, some of which are easier to predict than others.

To provide a basis for thinking about the future perhaps the best place to start the discussion is with what we already know — the demand for IP rights.

We can start by looking at patents. The figure shows the trend in patent applications since 1992 in Europe, the USA and Australia. From this we may conclude that there was substantial growth in patenting activity around the world in the 1990s. To illustrate this point, between 1992 and 2002 the number of patent applications filed in Europe, and the USA more than doubled. The recent strong growth has slowed but there are reasons to suspect that there will be continuing growth off this high plateau. It is worth remembering also that the strong growth of the 1990s has left patent offices with substantial backlogs of work to be processed. So even though the rate of increase may have slowed, application rates are still high and are piling onto an already substantial backlog of applications.

Lets look at the reasons for the increase during the 1990s.

There are essentially two components to the observed increase in applications. One is the increase in the number of inventions being patented. The other is the number of countries in which inventors seek patents for each invention.

The number of inventions made each year is increasing. This is not surprising, given that the money business and governments invest in research and development is increasing.

Moreover, the changing climate for public sector research means that universities and government research agencies are more likely to create commercially significant inventions than in the past. This means that an increasing proportion of an increasing research effort might result in intellectual property that its creators want to protect.

In other words, as well as an increase in the number of inventions, there may be a greater propensity to patent an invention.

Patent regimes themselves have undergone major changes that have encouraged an increase in patenting. For example, new types of inventions such as software, genetic, and business methods have been deemed patentable by some patent offices. In addition, the ability of patent holders to protect and enforce their rights has also increased. We have witnessed the strengthening of patent regimes in the world's major economies and many have called the past 20 years the pro-patent era.

This shift to knowledge as the basic resource of business and competitiveness has been going on for a long time. The cost of the material content of a product is often small when compared to the cost of developing the knowledge that manufacturers have either directly incorporated into their product.

The number of inventions being patented is certainly increasing. However, an increase in the number of inventions cannot, by itself, account for either the extent or the pattern of the growth. An equally important factor is that each invention is being patented in an increasing number of countries.

There are a number of reasons why this is happening.

One is that as trade barriers fall and trade increases, more firms are starting to export. More firms are exporting and are seeking IP rights in their target markets. The globalisation of manufacturing activity, with firms carrying out different parts of the production process in different countries, is also contributing to this trend. Trade is growing at a faster rate than GDP, so more of world output is being sold in countries other than that in which it was made.

Another reason for the increase in foreign patenting is that the number of countries in which people can seek IP protection is increasing. There are three reasons for this. One relates to the outcome of the world trade negotiations and the implementation of TRIPs. Countries that did not have IP systems or had systems that did not meet TRIPs' standards are now introducing them.

Another reason for patenting in more countries is that the number of countries is increasing. In 1946 there were 74 independent countries today there are 193. This raises important issues, especially when you think about the costs of applying in each of a number of countries.

The third reason is that more countries are reaching the stage of economic development at which patenting can become worthwhile. Moreover, with globalisation and freer capital movements, the number of countries in which an inventor might choose to manufacture is also increasing.

Invention and patenting are only part of the IP story. Product differentiation and reputation are becoming increasingly important to firm competitiveness. Major corporations are recognising that brand names (protected by registered trade marks) are one of their most important long term assets. It is not surprising that trade mark applications have been increasing rapidly world wide.

The next figure shows trends in trade mark applications world wide. Again, the future looks good, at least with demand. We can see a very rapid increase through the 1980s and 1990s with some notable volatility.

In interpreting these figures we need to remember that a firm can sell a range of goods and services under a single mark and that they can renew trade marks indefinitely. This contrasts with the single invention covered by a patent and its limited term.

It is interesting to take a look at the reasons for this phenomenal growth.

One of the most important developments of the last Century has been the emerging power of brands.

Increasing trade mark applications reflect the increasing importance of brand name management to differentiate products - as well as the increase in the number of products and services appearing on the market.

It is now possible to register trade marks in shapes, textures, colours, and aromas in many economies. While the numbers are fairly low and while many IP offices are still working on how to deal with these marks, the fact that new marks are possible increases the range of possibilities.

The dot.com boom led to rapid growth in trade marks – and a corresponding downturn as the boom turned to bust.

And since trade mark application rates are a general indicator of business expectations about the future, the prolonged generally positive economic outlook has led to substantial growth in trade mark applications.

### **Driving Influences in the IP System**

The development of the world IP system and the way in which national IP offices are changing is being driven very largely by the nature of demand for patent and trade mark rights. This is likely to gain more momentum as the People's Republic of China emerges as a major force in the IP world. While I am not able to report on the magnitude of this impact, it is a current subject for analysis at IP Australia.

With increasing numbers of applications on top of already substantial backlogs national IP Offices are taking various steps to deal with their workload. They are for example:

- recruiting more patent and trade mark examiners;

- introducing various IT solutions such as electronic case file management to improve efficiency;
- working bilaterally with other IP Offices to overcome redundancy in the system;
- working multilaterally to simplify and harmonise the IP system.

But, of course it is not just about demand. The IP world is at the same time becoming far more complex. I would like to touch on some of the factors that are contributing to this complexity.

One of the most significant developments in the IP world in recent years has been the linking of intellectual property rights with trade. The vehicle for this linkage was the TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights). The TRIPS Agreement is administered by the WTO, and you will no doubt be aware that the WTO has become the scene of substantial debate and negotiation on international IP issues as they relate to trade.

The TRIPS Agreement sets out minimum standards of IP protection and enforcement that member states are expected to provide. Member states are free to determine the appropriate method of implementing the provisions of the Agreement within their own legal systems and practice. Member states are also free to confer more extensive protection – the so-called TRIPS Plus, unless this is specifically prohibited by the agreement

Australia became a party to TRIPS on 1 January 1995 when the Agreement first came into force. Developing member states were given until 1 January 2000 to implement the provisions of TRIPS, and the least developed economies have until 2006 to become TRIPS compliant.

The continuing development of TRIPS will bring more economies into the world IP system. More developing economies and later the least developed will be joining. It is true to say however that there is continuing debate about major public policy issues such as access to medicines and the link between IP and development. In fact, this week the General Assemblies of the Member States of WIPO will consider arguments from a number of developing economies for the creation of a much stronger IP and development agenda for WIPO.

While the TRIPS Agreement sets out minimum standards for IP laws it does not achieve substantive harmonisation of IP laws.

The difficulties in negotiating at the multilateral level have driven some economies to negotiate bilateral agreements. These generally include some IP provisions and are aimed at facilitating trade between signatories. In addition to the Australia-US FTA, Australia has entered into FTAs with Singapore and Thailand and is studying the feasibility of FTAs with the People's Republic of China, Malaysia, ASEAN. FTAs are also being considered with Japan, New Zealand and Egypt.

Since FTAs generally include provisions relating to IP rights, bilateral trade agreements such as these will become increasingly important to the way in which IP laws evolve in the future.

Much of what I have said so far considers the demand for existing kinds of industrial property rights. However, there is already much debate about the need to modify existing rights, to create new rights, or to have new and different protection systems to safeguard other forms of intellectual property.

For example, there has been considerable discussion on matters relating to indigenous peoples' IP rights, traditional knowledge and folklore.

It is also worth questioning whether an 'undifferentiated, one size fits-all' patent system is adequate for today's knowledge intensive industries. For example, are different kinds of rights, or rights having different terms, necessary for different sectors of activity? How does or should this relate to the speed of technological development or the potential pervasive influence of a technology?

Moreover, as firms develop integrated IP management strategies, the distinctions between some forms of IP right are becoming less clear. Obvious areas of overlap can relate to copyright, trade marks and designs. However, overlap may occur with other areas. These include product labelling, country of origin labelling, business or company names, geographical indications, and Internet domain names.

Technological change affecting service delivery is also going to affect some aspects of the IP system, and will certainly affect enforcement and enforcement options.

The Internet, by its very nature, has a global reach. A trade mark used on the Internet may therefore have a greater impact and even a greater value than a trademark used in traditional marketing and retail environments. This is because it is potentially visible wherever Internet access is available. Essentially it will have a global reach – whether this is the desire or intention of the supplier or not.

In looking at the future of IP we can expect to see more public debate on the nature and scope of rights and their impact on individual firms, the economy and the public. While IP was once peripheral to a firm's major concerns it is now becoming an essential and even central element of their business development strategies.

Similarly, while governments have previously seen IP as a low profile and somewhat technical issue, this is no longer the case. If you need any convincing about this, you have only to think about the TRIPs agreement and the debate surrounding the Australia-US FTA.

Perhaps the major consequence of the increased profile for IP is that governments and business are both looking at the IP system more critically than they have in the past. Because it is so important, both groups want it to work well.

Governments are also searching for ways to simplify the system. One reason for this is that they are responding to pressure from business. I have already noted that more firms are developing IP or seeking rights for their IP. Moreover, as the number of countries in which a firm seeks rights increases, business is becoming more aware of the redundancy built into the existing system, particularly with patents.

A firm applying in several countries for a patent for a single invention ends up paying several IP offices to carry out much the same work. This is expensive and, from the firm's point of view, seems unnecessary. At a time when freer trade is putting all firms under pressure to cut back on all their costs, the IP system can seem archaic, inefficient and parochial. From a business perspective IP offices that insist on repeating work that other offices have already carried out are apparently serving their interest, rather than that of their clients.

It is not surprising that governments are urging IP offices to engage in international processes that might help make the IP system cheaper, simpler and easier to use. There is a great deal of international activity in this area. Multilateral, regional and bilateral meetings are grappling with ideas such as providing full faith and credit for work carried out by other offices, mutual recognition, and harmonisation.

These issues are not new of course. Neither are they going to go away. Business and government are both looking for progress. IP offices are having to address these issues and work out what is in the national interest.

### **Concluding Comments**

I have tried to give you some indications of the factors that might influence the future of IP. I have not tried to guess what that future might be, except to say IP will become increasingly important to business and that this will make governments and the public take an ever greater interest.

What the impact of all these factors will be, we have to wait and see. What we can say is that IP will become ever more important and that this importance will itself create challenges, opportunities and uncertainty for the IP system.

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