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PATENTS

Contributory infringement provisions of the Australian Patents Act 1990

By Dr Rob Silberstein, Patent Attorney and Lawyer

Collins v Northern Territory of Australia [2006] 70 IPR 614

A recent Federal Court decision examined the contributory infringement provisions of section 117 of the Australian Patents Act 1990 (Cth). It focused on when a product has been ‘supplied’ to a person by a third party such that s117 may be used by a patentee to bring an action for contributory infringement against the third party and one of three possible provisions available to that patentee regarding the requisite ‘use of the product’ by that person to whom that product was supplied by that third party.

Decision

Section 117 of the Australian Patents Act 1990 (Cth) (the Patents Act) ‘seeks to strike a balance between competing interests. They are, on the one hand, the interests of protecting a patentee against infringement of the patent, and on the other hand, recognising the rights of a supplier to freely trade its products in the marketplace even where that product is or may be used by a third party to infringe the patent.’ (Justice Mansfield at [1]).

The applicant (Collins) was the registered owner of Australian patent no 742711 entitled 'Methods of Producing Essential Oils from the species of the genus Callitris' (the patent). It is a patent for producing blue cypress oil comprising the step of obtaining the oil from a mixture of the bark and the wood of the Callitris Intratropica. The respondent (Northern Territory of Australia) had permitted a company, the Australian Cypress Oil Company Pty Ltd (ACOC), to access certain land and remove quantities of trees from that land, including trees of the species Callitris Intratropica.

The applicant alleged that ACOC used timber acquired from the respondent under certain licences and then produced the allegedly infringing oil by means of a process protected by the patent. Accordingly, the applicant submitted that the respondent had contributed to the infringement of the patent in contravention of s117 of the Patents Act.

Section 117 provides:

(1) If the use of a product by a person would infringe a patent, the supply of that product by one person to another is an infringement of the patent by the supplier unless the supplier is the patentee or licensee of the patent.

(2) A reference in subsection (1) to the use of a product by a person is a reference to:

(a) if the product is capable of only one reasonable use, having regard to its nature or design – that use; or

(b) if the product is not a staple commercial product – any use of the product, if the supplier had reason to believe that the person would put it to that use; or

(c) in any case – the use of the product in accordance with any instructions for the use of the product, or any inducement to use the product, given to the person by the supplier or contained in an advertisement published by or with the authority of the supplier.

For the purpose of determining the question of contributory infringement, Justice Mansfield assumed that the patent was valid and that the allegedly infringing oil infringed the patent.

Supply of a product

There were essentially two issues that the court addressed when considering whether or not the respondent had in fact supplied a product to ACOC within the meaning of s117(1).

The process that the applicant alleged ACOC had infringed by producing the allegedly infringing oil required the use of bark and wood from the relevant species of tree. As under the relevant licences, the respondent was providing ACOC with access to the timber (as opposed to the bark and wood), one question which Justice Mansfield was asked to address was whether or not the supplying of timber to ACOC would amount to the supplying of the product within the meaning of s117(1), thereby affirming that the respondent did in fact contribute to infringement of the relevant claims of the patent.

The respondent urged Justice Mansfield to follow the view of the Full Court in Anaesthetic Supplies Pty Ltd v Rescare Ltd (1994) 50 FCR 1, in which Justice Lockhart (with whom Justice Wilcox agreed) held that it was a precondition of the operation of s117 in relation to a method claim that there be a product, the use of which would infringe the method claim. As the product alleged to be supplied by the respondent was the timber, and not the bark and wood from the timber, the respondent urged Justice Mansfield to find that it had not 'supplied a product' within the meaning of s117(1).
The other issue that Justice Mansfield considered in relation to whether or not there had been a supply of the product was the practical effect of the licences that the respondent had granted ACOC to enter upon the relevant land and to lop or clear any trees and remove any timber. Justice Mansfield appeared to favour addressing the issue of supply of the product with reference to this question rather than that concerning whether the proper operation of s117 in relation to a method claim required the use of a product that would infringe that method claim. This approach was no doubt due to the apparent difference in the views of the Full Federal Court as to how to address this latter question (compare, for example, Rescare with Bristol-Myers Goods Company v FH Holding & Co Limited (2000) (97 FCR 524)).

In relation to the licences, Justice Mansfield held that they were permissive, as ACOC was not obliged to enter upon the land, being only permitted to do so. On that basis, the judge concluded that the licenses did not amount to the supply of the timber to ACOC so as to expose the respondent to liability as a contributory infringer of the patent under s117(1).

It was open to Justice Mansfield to refrain from making any further comment, having concluded that in effect the provisions of s117 did not apply to the circumstance of this particular case. Nevertheless, as the applicant's submission centred around the operation of s117(2)(b), Justice Mansfield continued to address the question of whether or not the timber was a 'staple commercial product' within the meaning of the Patents Act.

The applicant had largely accepted that, but for one feature, the timber was a staple commercial product. The distinguishing feature was that the respondent had decided the trees were not suitable for their initially intended forestry use as timber, there were other commercial uses for the trees and they therefore retained a commercial value. In effect, they were not 'some special product not generally available in the marketplace' they remained within the meaning of staple commercial product.

As Justice Mansfield decided that the relevant product in question was a staple commercial product, his Honour was able to conclude that the activities of the respondent were outside s117(2)(b).

What does this mean for you?

It is essential to be fully informed of the laws surrounding your commercial activities. The contributory infringement provisions under the Patents Act are an important example of such laws, and it is clear that a patentee's interest may outweigh, or be outweighed by, a supplier's interest under differing circumstances. The existence of third-party patent rights should always be considered when supplying products.

PARENTS

Patent battle over ship hull design

By Chris Bird, Partner, and Marcus Dalton, Senior Associate and Patent Attorney

Stena Rederi Aktiebolag v Austal Ships Sales Pty Ltd [2007] FCA 864

This Australian Federal Court decision concerned a successful claim by a Swedish shipping company of infringement of a patent over one of its hull designs by a number of vessels produced by a Western Australian-based ship builder. The case raises some very interesting and important points of patent claim construction.

Summary of the facts and the decision

This decision, Stena Rederi Aktiebolag v Austal Ships Sales Pty Ltd [2007] FCA 864, relates to a claim by Stena Rederi Aktiebolag (Stena) of patent infringement by ship builder Austal Sales Pty Ltd (Austral) and a counter-claim of invalidity of the patent by Austal.

The patent covers a hull for multi-hull seagoing vessels, and the question of infringement turned on the construction of a number of allegedly indefinite terms used in claim 1, which defines the hull by reference to particular features of shape and relative dimensions. Austal alleged that the language of claim 1 was ‘so obscure, ambiguous and uncertain in important respects’ that a proper construction was not possible, relying on the principle adopted by Justice Hely in Flexible Steel Lacing Company v Beltrico Ltd (2000) 49 IPR 331.
Justice Tamberlin addressed this issue by noting that the ‘difficulty in the application of the principle is in defining the level of clarity required in the context of a particular claim. It is not sufficient to show merely that a claim might have been better drafted or that it is capable of more than one construction’. In light of the evidence, Justice Tamberlin considered that a sensible construction of each term was possible and that the claims were therefore clear. Based on the construction of these terms, four of the six alleged infringing vessels were found to infringe.

The construction of two terms were of particular importance in the finding of infringement. These two terms related to the feature of the hull cross-section having a ‘narrow waisted part’ throughout a ‘substantial portion’ of the forward half of the hull. On the basis that the expression ‘waisted’ described a ‘discernable narrowing’, the term ‘narrow waisted’ was construed to mean a ‘significant narrowing’. This was said to be ‘a narrowing of the waisting in the order of 20% or more’. In relation to the term ‘substantial portion’, Justice Tamberlin stated that the ‘meaning of the expression can be more closely defined when assessing the circumstances and objectives of the particular design of a vessel in the particular conditions in which it is expected to operate’. Significantly, Justice Tamberlin referred to the preferred embodiment in construing this term. The preferred embodiment depicted a hull of which all of the forward half had the required ‘narrow waisted part’. The term ‘substantial portion’ was therefore interpreted to mean ‘all or almost all of’. This construction was much narrower than the definition proposed by Stena of ‘a portion of more than 50%’. Consequently, two of the alleged infringing vessels were found to fall outside of the claims.

Conclusion

The decision emphasises that the use of undefined or indefinite terms are unlikely, absent other factors, to render a claim unclear, unless no sensible construction is possible. It also serves to highlight that the danger in using such terms lies in how narrowly they might be construed, rather than in the claim lacking clarity simply because the term does not have an unambiguous definitive scope. The case demonstrates that the construction applied by the court can be uncomfortably narrow if there is not broad support of different embodiments in the specification. Accordingly, when undefined or indefinite terms are used, the specification should make abundantly clear the scope of meaning that such terms are intended to encompass.

PATENTS

The difficulties of amending an invalid patent

By Richard Hamer, Partner, and Oliver Evans, Articled Clerk

NutraSweet Australia Pty Ltd v Ajinomoto Co. Inc (No.3) [2007] FCA 966

The recent Federal Court case of NutraSweet Australia Pty Ltd v Ajinomoto Co. Inc (No. 3) [2007] FCA 966 illustrates the dangers of delaying a patent amendment application while the validity of the original patent is determined at trial.

Background

In a 2005 Federal Court decision, Justice Finkelstein held that a patent owned by Ajinomoto Co. Inc (Ajinomoto), for an invention relating to an intense sweetener composition, was invalid because of obviousness. Prior to the trial on the patent’s validity, Ajinomoto had filed an amendment application to this patent but chose to have it stood over until after the trial. In the present case, Justice Finkelstein had to consider the allowability of Ajinomoto’s amendment application after NutraSweet Australia Pty Ltd (NutraSweet) challenged it on a variety of grounds (not all of which were dealt with in the final judgment).
Findings

Justice Finkelstein stated that, according to the cases, ‘a patentee is not entitled, following a trial on validity, to bring an application to amend the invalid claims, except in very limited circumstances’. The ‘limited circumstances’ that would permit amendments to an invalid patent were not fully considered, but his Honour said that the current case was not one of them. He held that Ajinomoto should have brought on its application to amend so that it could be dealt with at or before the trial, and the course it was attempting to take was ‘simply not available’.

His Honour also held that there were two additional difficulties preventing the amendments. First, the fact that obviousness was not contested meant the claims to be added would still be invalid, and there was no precedent for such a course. Secondly, that it was inappropriate to allow an amendment of a patent that has been found to be invalid and will in due course be revoked.

Leave has been granted to Ajinomoto to appeal both his Honour’s trial decision and his decision on the amendment application.

TRADE MARKS

Special leave refused in ongoing battle by BP to register the colour green

By Vanessa Kingston, Lawyer

BP plc v Woolworths Limited [2007] HCATrans 249
(25 May 2007)

A High Court special leave application by BP has been refused, meaning Woolworths has been successful in preventing BP from registering the colour green as a trade mark.

On 25 May 2007 the High Court (comprising Justices Gummow, Hayne and Kirby) refused BP plc’s (BP) application for special leave to appeal the decision of the Full Federal Court.

The case involved BP trying to register the colour green for its service stations by way of two applications. Initially the two trade marks were accepted for registration by the Trade Marks Office; however, Woolworths then successfully opposed the registration of the trade marks. BP appealed the decision of the Hearing Officer and Justice Finkelstein overturned the decision. Woolworths then successfully appealed the decision to the Full Federal Court who held that:

• the applications were improperly amended to refer to the colour green as the ‘predominant colour’; and

• the colour green was not inherently adapted to distinguish BP’s goods and services.

In the most recent instalment, BP was refused special leave to appeal, making Woolworths the successful party in this ongoing battle. The majority, Justices Gummow and Hayne, refused leave because they were not persuaded that the alleged errors of law of the Full Federal Court in construing sections of the Trade Marks Act 1995 (Cth) had sufficient prospects of success. Justice Kirby dissented and said that he would grant special leave but only on construction of the Trade Marks Act 1995 (Cth).

The following are a number of interesting observations that can be found in the High Court transcript:

• Justice Kirby placed emphasis on the registration of similar trade mark applications in overseas countries.

• Justice Gummow noted that it is important that survey evidence be obtained by directing the minds of the people surveyed to the date of the application rather than the date that the survey is conducted.

• Comments were made by Justices Kirby and Gummow about the Cadbury colour case (concerning Cadbury’s exclusive rights in the use of the colour purple) and the possibility that it might end up in the High Court.

The case illustrates the difficulties faced in attempting to obtain registration for colour marks and it appears that we will need to wait for the Cadbury decision for further guidance on the issue.

Richard Hamer
Partner

Oliver Evans
Articled Clerk

Vanessa Kingston,
Lawyer
TRADE MARKS

Review of ambush marketing legislation

By Kylie Virtue, Senior Associate

The Federal Government has recently conducted a review of Australian federal ambush marketing legislation.

The Australian Government has defined ambush marketing as the unauthorised association of businesses with the marketing of high-profile events without paying for the marketing rights. It attempts to heighten a brand’s awareness through indirect association with an event, individual or team in the minds of consumers in order to reap the same benefits as an official sponsor – which inevitably undermines the value of the sponsorship. Views about the practice range from admiration for its clever entrepreneurialism to cynicism at its opportunism to accusations that ambush marketing is downright ‘parasitic’ and tantamount to theft.

In March 2007, the Australian Government announced that IP Australia and the Department of Communications, Information Technology and the Arts (DCITA) were to be responsible for conducting a review of Australian federal ambush marketing legislation (AML), in the form of:

• Chapter 3 of the Olympic Insignia Protection Act 1987 (the OIPA); and

The OIPA was enacted in 1987 to prevent the unauthorised and deceptive use of Olympic insignia, namely the Olympic rings symbol, the Olympic motto and up to ten registered designs. In 2001, the OIPA was amended by the addition of a new Chapter 3 (Olympic Insignia Protection Amendment Act 2001). Chapter 3 regulates the commercial use of certain Olympic expressions for advertising or promotional purposes, where such use would suggest a sponsorship or sponsorship-like association with Olympic bodies, athletes, teams and events: the OIPA section 30.

The M2006 Act restricted the use of key words, phrases and images associated with the Melbourne 2006 Commonwealth Games to preserve their financial integrity.

The AML Review was intended to provide information and advice to Government about the effectiveness of AML and its impact on various stakeholders with a view to considering the incremental benefits of AML (beyond existing laws). The AML Review is being conducted by Frontier Economics and the Intellectual Property Research Institute of Australia (IPRIA) for IP Australia and DCITA.

An issues paper was released on 23 March 2007 and the deadline for public submissions closed on 20 April 2007. Stakeholders were asked to address such issues as the effectiveness of AML in: preventing and reducing the types and severity of ambush marketing; improving legal protection against ambush marketing; providing greater security for sponsors and preserving financial integrity of events; promoting easier (and less costly) enforcement of AML rights; and balancing the interests of different stakeholders. Comments were also sought on whether the AML had produced any unintended or unforeseen benefits or adverse effects.

It is understood that IPRIA’s report was submitted to IP Australia and DCITA on 24 May 2007, but the timing for release of its findings is unknown. It remains to be seen what, if any, further changes to the AML are to be recommended; and, in particular, whether the Government will be prepared to target ambush marketing more broadly and effectively, such as has been done recently at a state level in both Victoria and Queensland, and also in South Africa for the 2003 Cricket World Cup and the United Kingdom for the 2012 London Olympic Games.

Kylie Virtue
Senior Associate
LEGISLATIVE DEVELOPMENTS

Major Events (Aerial Advertising) Act 2007 (Victoria)

By Wendy Burnett, Senior Associate

Specific Victorian major sporting events such as the AFL Grand Final, Australian Formula One Grand Prix, Australian Motorcycle Grand Prix, Australian Open Tennis championships, the Boxing Day cricket test, Caulfield Cup Day, Cox Plate Day and the Melbourne Cup Carnival are now the subject of specific legislation designed to regulate, manage and control aerial advertising at major events in Victoria. Other major events may be added on the recommendation of the relevant Minister.

Unauthorised commercial aerial advertising is prohibited during a certain time in relation to a specified event if that advertising is within sight of the particular venue where the event is being conducted and the content of the advertising can be seen by the human eye without the aid of optical apparatus (not including spectacles or contact lenses).

Aerial advertising includes specified acts such as skywriting, banners and displays on aircraft (other than normal markings and livery) but excludes emergency situations, news reporting and persons who have authority to engage in aerial advertising at one venue that can be seen from another venue.

Aircraft includes an airship, a blimp, a hot-air balloon, a helicopter or an ultra-light aircraft.

Authorisation for aerial advertising can be obtained from the Secretary (Department Head of the Department for Victorian Communities), or a person to whom the Secretary has delegated that power. No authorisation will be given that adversely affects the organisation, conduct or commercial arrangements relating to the event, and the Secretary must consult with the event organisers prior to authorising aerial advertising.

The Minister, Secretary or the event organiser may apply to the Supreme Court, County Court or Magistrates’ Court for an injunction restraining a person from engaging in conduct in breach of this Act. A person who suffers damages as a result of a breach of this Act must bring an action within three years. The penalty for breaching this Act is more than $250,000 for a corporation and more than $40,000 in the case of an individual (in addition to any damages awards).

Wendy Burnett
Senior Associate
Moral rights for performers

By Tim Golder, Partner, and Laijing Lee, Articled Clerk

We look at new performers’ moral rights – what they are, when they arise and how to avoid infringement.

Moral rights were introduced for authors in 2000 and have now been extended to performers. Performers’ moral rights provisions were introduced in 2004 by the US Free Trade Agreement Implementation Act 2004 (Cth) but only came into effect when the WIPO Performances and Phonograms Treaty (WPPT) came into force with respect to Australia on 26 July 2007.

Performers now have: the right to be attributed (or credited) for their performance; the right against false attribution of their performance; and the right of integrity against derogatory treatment of their performance. Moral rights for performers arise in a live performance (so far as the performance consists of sounds) or in a sound recording of a live performance. Only persons who contribute sounds to a performance have moral rights in their performance. This includes the conductor of a musical work but excludes a mime artist.

Some examples of when performers’ moral rights may arise are:

- live televised broadcasts; live or recorded radio broadcasts (including voice-overs and reading of advertisements); online content that may be streamed or downloaded (eg online advertisements, videoblogs on YouTube, podcasts); and commercially released CDs. However, certain performances do not attract performers’ moral rights, ie a reading of the news; a performance of a sporting activity; a participation in a performance by members of an audience; and certain performances by teachers and students in the course of educational instruction.

Right of attribution

When a live performance is communicated to the public (eg broadcast on radio or put online) or staged in public (eg an orchestra or concert), or when a sound recording of a live performance is communicated to the public or a copy of the sound recording is made, a performer in the performance has the right to be attributed for his or her performance. If the performer has not made it known how he or she would like to be identified, a ‘reasonable’ form of identification may be used. Where a performance is presented by a group of performers, identification by using the group name is sufficient (eg The Wiggles).

Right against false attribution

Acts of false attribution include where a stager of a live performance (which is staged in public or communicated to the public) falsely states or implies to an audience immediately before, during or immediately after the live performance, that a performer or a group of performers will perform, is performing or performed in the live performance. It is also an act of false attribution to insert or affix (or authorise the insertion or affixing of) a person’s name on a sound recording of a live performance so as to falsely imply that the person is a performer on that sound recording, or to deal in or communicate that sound recording to the public knowing that that person is not a performer on that sound recording.

Right of integrity against derogatory treatment

A derogatory treatment of a performance is the doing of anything in relation to a live performance or a sound recording of a live performance that results in a material distortion or alteration, or the mutilation, of the performance which is prejudicial to the performer’s reputation.

Implications

As a safeguard against infringement, contracts with performers should now include a consent clause to the effect that the performer consents to all or any acts or omissions that may otherwise infringe the performer’s moral rights. The Copyright Act 1968 (Cth) provides that it may be reasonable in some circumstances to not attribute a performance or to subject a performance to derogatory treatment. For example, where a radio disc jockey identifies himself on a radio program, it may be reasonable for the radio station to not identify him in the broadcast of that radio program. However, the defence of ‘reasonableness’ may not always be available. Therefore, if a sound recording of a person’s speech is to be materially distorted or altered so as to be prejudicial to the speaker’s reputation, the speaker’s consent should be obtained.

Tim Golder
Partner

Laijing Lee
Articled Clerk
Copyright Tribunal approves increase in licence fees for recorded music in nightclubs and at dance parties

By Jim Dwyer, Partner, and Matt Vitins, Law Graduate


The Copyright Tribunal recently approved an increase in licence fees for recorded music played at nightclubs and dance parties, broadly accepting an application by the Phonographic Performance Company of Australia in which it was argued existing licensing schemes undervalued recorded music.

The Phonographic Performance Company of Australia Limited (PPCA) is a collecting society that represents the interests of owners of copyright in sound recordings. Its members include record companies. The PPCA is authorised by its members to provide licences covering almost all commercially released sound recordings in Australia.

The copyright that subsists in a sound recording includes the exclusive right to cause the recording to be heard in public. Bars, clubs, fitness centres and so forth will therefore typically require a licence over the recorded music they play in their venues. If a wide selection of music is played, agreements need to be reached with a correspondingly wide range of copyright owners – and this threatens to be impractical. Collecting societies such as the PPCA offer a response to this problem by aggregating rights and offering a ‘blanket’ licence over a library of sound recordings. Licence fees are collected by a single body and distributed among the record companies and they in turn account to their recording artists under their respective recording contracts.

In 2004, the PPCA came to the view that existing licensing schemes for nightclubs and dance parties undervalued recorded music, and this view was ultimately pressed before the Copyright Tribunal of Australia (the Tribunal). Sections 154-157 of the Copyright Act 1968 (Cth) provide that a licensing scheme may be referred to the Tribunal for its review. The Tribunal's reference in effect asked the Tribunal to fix what it felt was a fair market price for playing the sound recordings being licensed. Several respondents were joined as parties to the reference. Among others, the Australian Hotels Association, Clubs Australia, Clubs NSW and Mardi Gras Limited opposed the scheme put forward by the PPCA.

In July 2007, the Tribunal published its decision approving the staged introduction of new tariffs. Before the Tribunal's decision, the licence fee for nightclubs was 7.48 cents per person per night of operation, based on the capacity of the venue. The licence fee payable for dance parties was 19.8 cents per person, based on estimated attendance. Relying heavily on a report prepared by the Allen Consulting Group, the PPCA argued that these rates did not reflect the value of the sound recordings to club owners and event operators. The Tribunal was broadly persuaded and set the new rate for nightclubs at $1.05 per person; and dance parties at $3.07 per person.

It appears the Tribunal's decision may conclude only the first installment in the review of these licensing schemes. Earlier this month, the Australian Hotels Association initiated an appeal in the Federal Court.
COPYRIGHT

Surveyors' plans – state fails to prove Crown copyright

By David Yates, Partner, and Vanessa Kingston, Lawyer

Copyright Agency Limited v State of New South Wales [2007] FCAC 80

The Full Federal Court recently rejected the New South Wales Government's claim that it owned copyright in surveyors' plans.

Background

The case was brought in the Copyright Tribunal by the Copyright Agency Limited (CAL), whose members include surveyors. CAL applied to the Tribunal for orders under sections 183(5) and 183(A) of the Copyright Act 1968 (Cth) in respect of a number of surveyors' plans and the State of New South Wales' 'dealings' in respect of them. Sections 183 (5) and 183(A) provide a mechanism by which the Tribunal may hear and determine the remuneration for doing any act comprised in relation to copyright material for the services of the Crown. The Tribunal heard the application, evidence, submissions and made findings. Following the determination, the parties requested that the Tribunal refer the matter to the Federal Court to determine certain questions of law concerning whether copyright existed in the surveyors' plans. The Full Federal Court (comprising Justices Lindgren, Emmett and Finkelstein) unanimously rejected the New South Wales Government's claim that it owned copyright in the surveyors' plans.

Findings

The Full Federal Court stressed that, when considering the issue of Crown copyright, it is important to understand the relevant legislation under which the works are created and its history. For surveyors' plans, this includes the Real Property Act 1900 (NSW), Conveyancing Act 1919 (NSW), Surveyors Act 1929 (NSW) and the Surveying Regulation 2006 (NSW).

The court held that:

- the subject plans were not made or first published by or under the 'direction and control' of the state within the meaning of s176 and s177 of the Copyright Act even though their preparation was subject to rigorous statutory requirements; and
- even though the Government's use and supply of the subject plans fell under s183 of the Copyright Act, the Government had an implied licence from the surveyors to use and supply the plans.

Justice Finkelstein made a number of statements about Crown copyright including:

As regards to work made by the Crown, we are necessarily dealing with a fiction. Generally for copyright purposes a work is made by its author. What s 176 contemplates is that, in certain circumstances, the act of the author in making a work is to be attributed to the Crown. An attribution of this kind is a concept well known in the law.

His Honour stated that what was lacking in the present case was the 'authority to give the direction to prepare the work to control the manner in which the work is prepared.'
COPYRIGHT

Electronic program guides

By Jackie O’Brien, Partner, and Stephen Tang, Lawyer

Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172

In Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172, the Federal Court recently found that Nine's copyright in its television schedules was not infringed by IceTV's electronic program guide.

Background

This case centred on copyright in an electronic program guide (EPG) for free-to-air television. An EPG shows details about the programs to be screened by television stations, including the start and end times, the program title, classification information and a brief synopsis of each program. Unlike a paper television guide, however, an EPG can show program information in many different arrangements.

EPGs are particularly important to consumers who use a personal video recorder (PVR) or media centre computer. By having access to scheduled television programming in advance, users can program these devices to record their selected shows automatically.

IceTV's product, the IceGuide, is the only Australian EPG for all free-to-air channels. It operates on a subscription basis. Nine claimed that the IceGuide infringed copyright in the weekly television program schedules produced by Nine.

Findings

While Justice Bennett found that television guides – whether in paper or electronic format – are literary works protected by the Copyright Act 1968 (Cth), her Honour also found that the IceGuide EPG did not infringe Nine's copyright in its program schedules.

Some important facts and findings of this case were:

• IceTV had created its television schedules from scratch, rather than copying the schedules from other publications. Initially, this involved having an IceTV employee watch television for 300 hours (a process he described as 'torture') and record the program information and times to form a fresh template by independent inquiry. This was critical to the finding of no infringement.

• Although Nine's weekly television schedule attracted copyright, it was never made directly available to IceTV. Nine's original television schedules were sent to 'aggregator' companies, who took the schedules provided by each free-to-air network, together with last-minute changes, and compile a unified guide. These aggregated guides were separate compilations with their own copyright. However, to the extent that the aggregated guides included Nine's skill and labour of producing its weekly schedule, Nine retained copyright in that aspect.

• IceTV's process of updating the schedules was done by reference to published aggregated guides (e.g. at HWW Pty Limited's <yourtv.com.au>, a business recently acquired by NineMSN). The many 'slivers' of time/program information IceTV took from aggregated guides to update its IceGuide did not amount to copying a substantial part of the Nine's copyrighted weekly schedule.

• IceTV did not copy the 'arrangement or form' of Nine's weekly schedules. The IceGuide EPG was significantly different in form and its content and could be arranged in many different ways.

• Finally, IceTV staff wrote their own synopses for each show in its IceGuide EPG. It did not use the program synopses provided by Nine in its schedules. There was therefore no issue of IceTV having infringed on Nine's copyright in the synopses.

Implications

The court's finding of no infringement highlights, on the facts of the case, a number of well-established principles of copyright law. First, this decision affirms that copyright subsists in a compilation such as a TV guide where 'labour and skill' was invested in selecting and arranging the information. As such, copyright subsisted in each of the television guides produced by Nine, the aggregator companies and IceTV.

Secondly, the decision provides a useful example of how infringement can be avoided by the independent formulation of a work. Even though the end result was very similar (IceTV's EPG was 99 per cent accurate when compared to Nine's guides), the process by which they were created was different. IceTV did not copy Nine's schedules.

Thirdly, the court upheld the principle that there is no copyright in individual elements of a compilation. That is, single pieces of information about a television program's title or start time would not be protected by copyright.

Finally, infringement will only occur if a 'substantial part' of a copyrighted work has been taken. Whether this is the case depends on various factors, including the similarity of the works and the extent of the copying. Each case will be different.
Justice Bennett was not required to consider other practical effects of EPGs, especially their role in allowing users to skip and remove ads from their recorded programs. This feature is popular among users of the TiVo PVR in the United States, which will enter the Australian market next year. Copyright issues will be only one of many legal and commercial issues that arise with the development of new media technologies.

COPYRIGHT AND CONFIDENTIAL INFORMATION

An award of additional damages for an extraordinary case of copyright infringement

By Tim Golder, Partner, and Jessica Latimer, Lawyer

TS&B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No 3) [2007]

A recent Federal Court case about copyright infringement also considered the possible existence of an implied licence and the proper calculation of damages.

TS&B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No 3) [2007] FCA 151 is primarily a case about copyright infringement but consideration was given to the possible existence of an implied licence and the proper calculation of damages.

TS&B had a successful business with a long history of supplying shop-fittings. TS&B had a large catalogue of intellectual property assets essential to the running of the business, which included manufacturing and design drawings and a customer management database.

Receivers moved in on TS&B and three of its managers took steps to avoid likely redundancies – they established a new shop-fitting business, 3Fold Resources Pty Ltd (3Fold). The three managers met with several of TS&B’s large clients to introduce the new 3Fold business.

Defence

TS&B argued that the ex-employees had procured, that 3Fold copied and reproduced TS&B’s copyright assets and confidential customer information. The respondents conceded that there had been copying of the drawings, although they denied that customer-related data had been used. However, principal clients of 3Fold had been provided with identical fittings and services to those previously provided by TS&B. The respondents argued that agreements between TS&B and its clients evidenced a licence in favour of those clients exploiting copyright in certain drawings created for them by TS&B.

Justice Finkelstein concluded that agreements with those clients did not support such a conclusion.

Existence of an implied licence

The court also considered whether an implied exclusive licence was granted by TS&B in favour of its clients for use of the drawings. Justice Finkelstein thought it possible to conclude that where a client had made direct payment for the preparation of isometric drawings (from which manufacturing drawings are created) rather than for a package of shop-fitting goods or services, it was possible that the client could use those drawings without infringing copyright. Furthermore, evidence showed that TS&B’s clients believed the isometric drawings could be reproduced and used for their own means and that, on occasion, the isometric drawings had been provided to alternative manufacturers. This conclusion was not extended to the manufacturing drawings.
Calculation of damages

The applicant initially submitted a damages estimate based on the amount of work that TS&B would have received from its clients had 3Fold not carried out similar work for those clients. However, the accounting reports prepared by the applicant incorporated lower than anticipated profit that was generated by TS&B, an assumption that was unrelated to the respondents’ breaches of copyright.

Justice Finkelstein outlined the factors relevant to identifying the amount of work TS&B were likely to have been awarded but for the copyright infringement by 3Fold (given increased competition in the market by the establishment of the 3Fold business). First, the 3Fold business increased competition in the shop-fitting market, which would have affected the amount of work obtained by TS&B. The level of competition created by 3Fold’s existence in the market depended on whether 3Fold would have obtained its own drawings and data by legitimate means and how much time it would have taken to prepare the drawings without direct copying. Justice Finkelstein found that 3Fold, being a start-up company, would not have developed its own drawings for eight to 12 months and that competition with TS&B during that period was necessarily reduced. Secondly, evidence was tendered that showed that TS&B’s principal clients increasingly preferred non-exclusive arrangements for shop-fitting services, further limiting the amount of work that could reasonably be anticipated to have been given to TS&B. Justice Finkelstein awarded damages of $200,000 to TS&B, which he described as a ‘necessarily imprecise’ figure given the balancing of the above factors.

Additional or ‘punitive’ damages of $50,000 were awarded in accordance with the Copyright Act 1968 (Cth) on the basis that the respondents’ behaviour was an ‘extraordinary case’, where the respondents had knowingly engaged in copyright infringement (among other things) ‘despite warnings by the receivers, letters of demand … and even an order of the court requiring them to desist’.

Conclusion

In light of the TS&B decision, businesses should consider:

• whether their clients may have an implied licence to reproduce and exploit works created for that client;
• whether contracts governing the creation of copyright-protected works for clients sufficiently address intellectual property issues, and specifically a client’s rights to reproduce and exploit those works;
• whether work created for one client may be re-used and adapted for another client or whether that work was created with a common understanding that it was to be used only for the client who originally commissioned the work; and
• whether, when a business commissions works to be created for it, the right to use and/or own intellectual property in those works has been sufficiently addressed.

COPYRIGHT AND CONFIDENTIAL INFORMATION

Good result for employers seeking to prevent disclosure of trade secrets by past employees

By Peter Beacroft*

BlueScope v Kelly [2007]
FCA 517

A recent Federal Court decision serves a reminder of the circumstances in which organisations can take action to protect themselves against the disclosure of their confidential information.

A former employee of BlueScope Steel Limited and his private company have been ordered to pay BlueScope Steel and its US joint venture partner, Castrip LLC, more than $600,000 for disclosing confidential information that the former employee had acquired during his employment with BlueScope Steel. Injunctions restraining further disclosures were also granted.

The proceedings commenced in February 2002 after BlueScope Steel successfully obtained and executed Anton Piller (‘search and seize’) orders against several former employees. The searches revealed that a large quantity of information had been disclosed to an Italian steel manufacturing company relating to a $300 million
research and development project (Project M) undertaken by BlueScope Steel over a number of years.

The respondents did not deny the disclosure of information, but argued that the information was either in the public domain or had become part of the skill and knowledge acquired by the former employee in the course of his employment, which he was permitted to use for his own benefit. This argument was rejected by Justice Emmett of the Federal Court, who accepted BlueScope Steel’s submissions that:

• the information disclosed by the respondents was confidential, because the specific and intricate details it included were obtained ‘from Project M experience and material’ and could not have been ‘estimated by reference to public information’; and

• a term in BlueScope Steel’s employment contract with the respondent, which prohibited the employee disclosing information related to Project M to anyone other than his employer, was binding on him: following the reasoning in Faccenda Chicken Ltd v Fowler [1985] FSR 105.

The respondents were ordered to account for the profit that they derived by the wrongful use and disclosure of the confidential information. They were also ordered to pay the applicants’ costs of the proceedings.

The judgment reminds us of the following two pre-requisites for a successful action for breach of confidence:

• there must be information:
  • which is confidential;
  • which has the necessary quality of confidentiality; and
  • which is provided to a person in circumstances in a manner that imports an obligation of confidence, and
• there must be a threatened or actual disclosure of that information.

The decision is an encouraging reminder to organisations that they can take action to protect themselves against the disclosure of their confidential information, provided that such protection complies with restraint of trade principles and does not impinge on the right of former employees to use general skills and knowledge they acquire during the course of their employment.

* Peter is a former Lawyer with Allens Arthur Robinson

COPYRIGHT AND CONFIDENTIAL INFORMATION

Comment – Douglas v Hello! – exposing the use of unauthorised photos

By Stephen Tang, Lawyer

Douglas v Hello! Ltd [2007] UKHL 21

On the topic of copyright and confidential information, the UK House of Lords has handed down its decision on the use of unauthorised celebrity photographs.

The House of Lords found that by publishing the photos, Hello! magazine was liable for a breach of confidence. A majority of the Law Lords held that:

• photos of the wedding were confidential because they were taken at a private function and were commercially valuable;

• an obligation of confidence arose because considerable steps were taken to prevent those attending the wedding taking and distributing photos; and

• the obligation of confidence was breached by the publication of the unauthorised photos in Hello! to the detriment of the authorised publisher, OK!

The House of Lords therefore reinstated the High Court’s original award of £1 million in damages.

It did not matter that the confidential information was of a personal nature. This appeal was not about privacy and personality rights, but the nature of confidential information within a commercial dispute.

Stephen Tang
Lawyer
DESIGNS

Norm Engineering v Digga Australia – clarity in copyright-design overlap

By Marina Lloyd Jones, Senior Associate

Norm Engineering v Digga Australia No.2 [2007] FCA 761 (18 May 2007)

Only weeks after the High Court’s Burge v Swarbrick decision (see IP Bulletin – July 2007), the Federal Court has delivered a judgment in a case involving the copyright-design overlap, giving some clarity to this difficult area.

The facts

The applicant manufactured earthmoving equipment, including a bucket designed to be attached to a ‘bobcat’ tractor. Unlike standard buckets, the applicant’s ‘4-in-1’ bucket (the bucket), could separate in certain sections in a jaw-like movement. The applicant alleged it owned copyright in a number of drawings (the drawings) of components of the bucket (the components) as ‘artistic works’. According to the applicant, the respondent had infringed copyright in the drawings by:

- creating its own drawings (2D copying); and
- using those drawings to create its own bucket (3D copying)\(^1\).

The drawings were found to have been created before 17 June 2004, the date on which amendments to the Copyright Act 1968 (Cth) were effected by the Designs (Consequential Amendments) Act 2003 (Cth) (the Amendments). However the infringing conduct was alleged to have started before 17 June 2004 and continued afterwards, and the provisions both before and after the Amendments had to be considered.

Justice Greenwood found that the respondent had infringed, both through 2D copying and 3D copying, three of the applicant’s drawings of components: for the outside mounting bracket, the inside mounting bracket, and the pivot mechanism. It had further infringed, through 2D copying, the drawing of the front assembly of the bucket.

From the drawing board to reality – 2D to 3D copying

For the pre-Amendments conduct in issue, the respondent relied on section 77(2) of the Copyright Act to ‘defend’ its otherwise infringing conduct, arguing that the applicant was prevented from enforcing its copyright in the drawings because it had industrially applied to articles (the components) a design (not being registered or registrable under the Designs Act 1906 (Cth)) corresponding to the artistic work in the drawings, and those articles had been sold or hired (or offered for sale or hire). Prior to the Amendments, a ‘corresponding design’, in relation to an artistic work, meant a design that, when applied to an article, resulted in a reproduction of that work, but did not include a design consisting solely of features of two-dimensional pattern or ornament applicable to a surface of an article\(^2\). The defence therefore required a design (not consisting solely of features of two-dimensional pattern or ornament applicable to the surface of an article) which, when applied to an article, resulted in a reproduction of the artistic work.

Design

In relation to the pre-Amendments conduct, the applicant responded that the components were not ‘designs’ within the meaning of the Designs Act, and thus there could be no corresponding design, nor any role to play for s77. The term ‘design’, while not defined in the Copyright Act, was defined in the Designs Act as ‘features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye’\(^3\). Justice Greenwood confirmed that, for the pre-Amendments conduct, this definition applied equally to s74 and s77 of the Copyright Act\(^4\), noting the requirement of:

some aspect of visual appeal to the eye. It may well be that the features of shape serve a functional purpose or assist in making function efficacious but these attributes will not disqualify the features of shape or orientation as a design...’if there was room for choice by the designer’\(^5\) [at 225].

It was therefore not an infringement of copyright in an artistic work to reproduce the work by applying features of shape, pattern or configuration derived by selection by a designer (notwithstanding functional considerations) to an

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1 Under s21(3)(a) of the Copyright Act, an artistic work in two-dimensional form is deemed to have been reproduced if a version is produced in three-dimensions.
2 Section 74 Copyright Act.
3 Section 4. A ‘design’ does not include a method or principle of construction.
4 Greenwood J at 224, citing Hosokawa Micron International v Fortune (above) at 396; Shacklady v Atkins (1994) 30 IPR 387 at 394 and CIPEC v First Melbourne Securities Pty Ltd [1998] FCA 560 at (82).
5 (Hosokawa per Gummow J at p 429–430).
article that, when so applied, are capable of being judged by the eye in the finished article [at 226]. In his Honour’s view, while all drawings demonstrated such features, only the shape of the inside and outside mounting brackets, and the front assembly drawing, had been selected to ‘make the component look better and function more efficiently’ and satisfied the ‘visual appeal’ requirement [at 229]. The features of shape exhibited by the pivot mechanism drawing were almost entirely dictated by utilitarian concerns. There was therefore no relevant ‘design’ and the pivot mechanism drawing retained copyright protection. On the other hand, there was a ‘design’ corresponding to the other drawings, and the respondent was able to avail itself of the s77 ‘defence’ in relation to them. Despite changes to the language of s77(2) under the Amendments, the final position in relation to the 3D copying of each of the drawings was no different under the post-Amendments version of the sub-section.

Plan-to-plan copying: 2D to 2D

Pre-Amendments

The respondent also attempted to bring plan-to-plan copying within the scope of the pre-Amendment s77(2): it was argued it did not infringe copyright by ‘applying’ (drawing) the corresponding design to an ‘article’ (a piece of paper). In rejecting this interpretation, Justice Greenwood cited _Amalgamated Mining v Warman International Ltd_ 6, which confirmed that s77 does not apply to plan-to-plan copying because the article to which the corresponding design is applied must be an ‘article of manufacture’, which does not include a sheet of paper [at 238]. The s77 ‘defence’ of which the respondent had availed itself in relation to 3D copies therefore did not extend to their two-dimensional equivalents.

Justice Greenwood noted that the pre-Amendment position therefore gave rise to a ‘counter-intuitive anomaly of a respondent being free to apply the applicant’s industrially applied corresponding design to articles of manufacture yet being constrained by infringement of copyright in the applicant’s artistic work in making a two-dimensional drawing as a step along the way to the application of the corresponding design to articles of manufacture’ [at 237]. This anomaly was addressed by the Amendments.

Post-Amendments

The Amendments replaced the notion of ‘application of’ a corresponding design to an article with the concept of ‘embodiment in’ a product. ‘Embody in’, in relation to a product, includes woven into, impressed on or worked into the product’. In other words, the new wording removes any chance of arguing that plan-to-plan copying falls within s77(2). Provision is now expressly made for such copying in s77A, which was inserted to provide a defence for making a two-dimensional drawing which is:

(a) derived from a three-dimensional product that embodies a ‘corresponding design’ relating to the artistic work; and

(b) created in the course of, or incidental to, making a product where such product does not itself infringe copyright.

For conduct after 17 June 2004, the respondent’s drawings were thus saved from infringing the applicant’s copyright in the drawings for the outside and inside mounting brackets and the front assembly drawing.

![Marina Lloyd Jones Senior Associate](image)

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7 Section 74(1) in the definition of ‘corresponding design’.
Beware of making unjustified threats of infringement proceedings

By Justine Beaumont, Special Counsel

In World of Technologies (Aust) Pty Ltd v Tempo (Aust) Pty Ltd [2007] FCA 114 (14 February 2007), the Federal Court awarded significant damages against a company that had threatened to commence proceedings for infringement of a registered design before the Registrar of Designs certified the successful examination of the design.

Both parties to this proceeding were importers and wholesalers of household appliances. A dispute arose between them over a bagless vacuum cleaner manufactured in China. World of Technologies (Aust) Pty Ltd (WOT) claimed to have a contract for the exclusive distribution rights for the vacuum cleaner in Australia as a result of a series of dealings between it and the Chinese manufacturer. WOT applied for, and achieved, a design registration in Australia in relation to the vacuum cleaner. The application was made with the knowledge of the manufacturer, although it was made in WOT’s own name and not that of the manufacturer.

The manufacturer also supplied Tempo (Aust) Pty Ltd (Tempo) with large quantities of the same vacuum cleaner for distribution in Australia, albeit under a different brand name from the name used by WOT. On the facts, the court found that there was no contract giving WOT exclusive distribution rights and, in any event, a claim made by WOT against Tempo for inducement to breach such a contract, was not made out. WOT also claimed that Tempo infringed its registered design by advertising and selling the vacuum cleaner in Australia (although shortly after the trial commenced, WOT abandoned this claim).

Tempo cross-claimed on two bases:
- WOT’s registered design lacked novelty and should be revoked; and
- the letter of demand sent by WOT’s solicitors to Tempo contained unjustified threats of infringement proceedings under the Designs Act 2003 (Cth).

The court held that the design was invalid due to prior publication of representations of the vacuum cleaner in a brochure, on Tempo’s website and in artwork emailed to an advertising agency. This was despite the fact that the design as registered included representations of the vacuum cleaner viewed from all angles and the prior publications showed the vacuum cleaner from only one perspective.

The court also upheld the ‘unjustified threats’ claim because the letter of demand from WOT’s solicitors pre-dated the issue of the certificate by the Registrar of Designs by around two months. The design registration procedure is slightly different from the procedure for patents and trade marks in that designs can be registered with only a formalities check but cannot be enforced until they have been examined and successfully certified.

The court awarded damages in the sum of approximately $214,000 for WOT’s unjustified threats. More than half of this sum comprised the gross profit that Tempo would have derived from a retailer’s order for units of the vacuum cleaner, which was not fulfilled as a direct result of the letter of demand. The balance of the damages comprised profits on estimated lost sales following the letter of demand. The court implied that its assessment of damages may have been greater if Tempo had called evidence from its retailers to explain what they might have done in terms of ordering the relevant vacuum cleaner had Tempo been in a position to sell it.

This case is a reminder of the importance of a proper analysis of intellectual property rights prior to making any claim of infringement. There are equivalent provisions in the trade marks and copyright legislation to the prohibition against unjustified threats contained in the Designs Act.

Justine Beaumont, Special Counsel
Federal Court Victoria – Rocket Docket on a trial basis

By David Yates, Partner, and Jon Gottschall, Senior Associate

The Victorian Registry of the Federal Court recently introduced a process for expediting litigation on the new ‘Fast Track List’ (often referred to as the ‘Rocket Docket’). Other branches of the Federal Court are likely to follow suit.

The Rocket Docket

The Rocket Docket was established by the ‘Fast Track List Directions’ (Directions) on 2 May 2007. These Directions operate in conjunction with the normal rules of court but modify many of the steps in litigation by streamlining the process and causing parties to advance their case earlier.

The Rocket Docket currently operates only in Victoria. Other states are likely to introduce the process if it proves a success. Intellectual property cases, apart from patent cases, are eligible for the Rocket Docket, as are many commercial matters. Cases can be listed on the Rocket Docket at the request of the parties or a judge.

Some aspects of the procedure are explained below.

One size fits all

The Rocket Docket provides speed at the expense of flexibility.

In normal litigation, slippage in timetables may be tolerated without significant consequences for the parties, particularly in larger cases (despite the court’s frustration with delay). However, timetabling of cases in the Rocket Docket will be closely managed by the court. If parties fail to comply with deadlines, serious consequences will often follow.

Case summaries

The Rocket Docket dispenses with normal pleadings and replaces them with ‘Case Summaries’. Whereas pleadings set out the material facts of a case and the relief sought, case summaries are to incorporate aspects of the parties’ submissions, which would not ordinarily be disclosed until at, or just before, trial. The early disclosure of the parties’ cases is to help avoid unnecessary argument and may encourage the parties to settle their disputes.

Evidence and facts

The Rocket Docket includes a process for managing the scope of factual disputes. At the ‘Scheduling Conference’, the parties are required to propose lists of witnesses and outline the facts in dispute.

At the ‘Pre-trial Conference’ (ie after the exchange of affidavits or evidence summaries), the parties must identify agreed facts and those remaining in dispute. The list of witnesses is finalised at that stage and the parties will not be allowed to call others.

Discovery

The scope of discovery in the Rocket Docket is to be reduced by limiting the range of documents the parties must discover. The prescribed categories of documents are:

- documents on which a party intends to rely (ie those that a party would otherwise exhibit or tender in the course of its case); and
- documents that have ‘significant probative value’ adverse to a party’s case.

The expression ‘significant probative value’ is not defined but it appears intended to be more limited than the normal discovery requirements.

Trial

At the pre-trial conference, the judge will determine the total duration of the trial and will allocate the parties blocks of time in which to make their submissions and examine witnesses. The trial will be conducted in a ‘chess clock’ style in which the parties’ use of allocated time is enforced.

Judgment

The Directions state that the court will endeavour to deliver judgment on matters in the Rocket Docket within six weeks. However, judgments may be delivered more quickly in urgent cases.

Conclusion

The Rocket Docket is set to offer parties the opportunity to obtain a determination of disputes more quickly than with the usual trial process, and hopefully at a lower cost. However, the process involves new concepts and procedural steps with which practitioners may not be familiar (eg case summaries and the concept of ‘significant probative value’). We will continue to monitor how parties and their lawyers handle these new steps and keep you updated on progress.
LITIGATION

Federal Magistrates Court of Australia – an efficient and cost-effective alternative

By David Yates, Partner, and Nadine Bairle, Lawyer

The Federal Magistrates Court general federal law jurisdiction, which currently includes trade practices and copyright and which is soon to include trade marks and design matters, provides an efficient alternative to intellectual property litigation in the superior courts.

The Federal Magistrates Court was established by the Federal Magistrates Act 1999 (Cth).

The court's general federal law jurisdiction is concurrent with the jurisdiction of the Federal Court in a number of areas, including trade practices (consumer protection, unconscionable conduct and unfair practices) and copyright. The court's jurisdiction also extends to matters not otherwise within its jurisdiction that are associated with matters in which its jurisdiction is invoked. In April 2007, the Federal Government announced that the court's jurisdiction will be extended to trade mark and design matters.

The court's stated objective is to provide a more accessible, efficient and cost-effective alternative to litigation in the superior courts. The court aims to allocate first hearing dates within four weeks of the date of filing and to finalise cases within six months of the date of filing.

The authors are currently representing applicants in proceedings that were commenced in the court on 9 July 2007. The applicants were allocated a first directions hearing on 24 July 2007 at which an interlocutory hearing was fixed for 3 September 2007. The authors' experience with the court to date has certainly accorded with its stated objective.
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