Inspire

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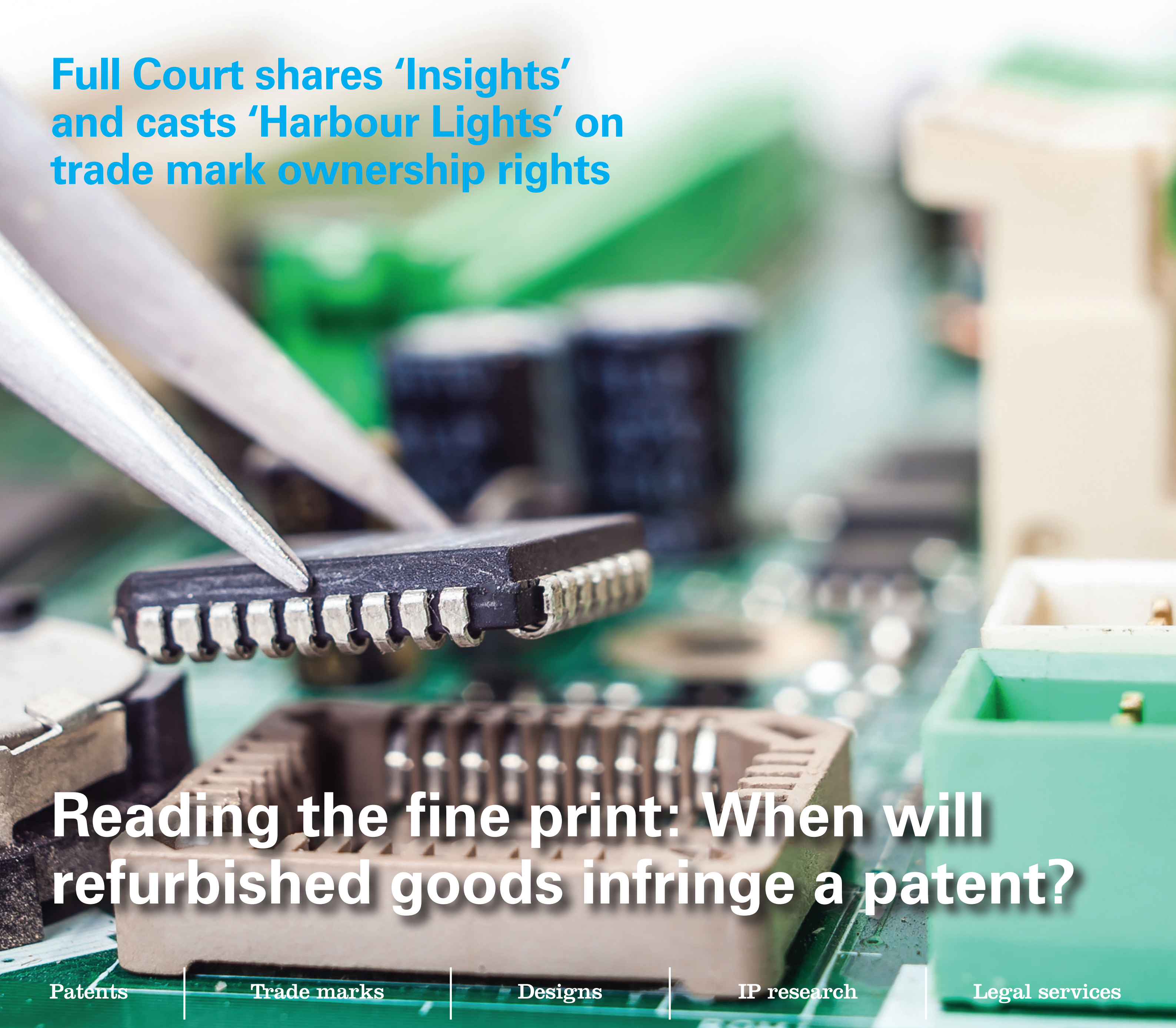
intellectual property

Listed Australian patent attorney firms put on notice to ensure transparency to clients

Importance of due diligence in IP: Lessons from Volkswagen, Apple, Inc. and Clorox Company



Full Court shares 'Insights' and casts 'Harbour Lights' on trade mark ownership rights

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Editorial

When it comes to managing intellectual property (IP), the importance of diligence cannot be overstated. In this edition of *Inspire*, Rodney Cruise discusses the importance of due diligence with respect to IP, particularly in the context of broader commercial deals (page 4). As various case studies illustrate, a failure to properly understand the IP implications of a transaction may have unexpected and costly consequences.

The recent decision of the Federal Court in *Seiko Epson v Calidad* highlights the importance of patentees being diligent about the terms on which their patented goods are placed into the market (page 8). As Michelle Blythe explains, Seiko Epson was unsuccessful in its claim that the sale of refurbished printer cartridges was an infringement of its Australian patent on the basis that the goods carried an implied licence permitting unrestricted use of the cartridges by the original purchaser and any subsequent owner.

Diligence is also crucial in keeping apprised of changes in IP practice, particularly in relation to how the courts and IP Australia apply the law. Mark Williams provides an update on an apparent change in Patent Office practice in the examination of computer implemented inventions which has resulted in a number of applications being rejected as non-patentable subject matter (page 3). Margaret Ryan looks at two recent Full Federal Court decisions on the requirements for establishing ownership of a trade mark (page 10). An apparent broadening of the relevant criteria may make it easier for overseas trade mark owners to prove proprietorship rights in Australia.

Also in this edition, Alexis Keating and Malcolm Bell analyse the *Pfizer v Samsung Bioepis* appeal against the rejection of Pfizer's preliminary discovery application (page 6), Anita Brown considers the application of Australia's consumer protection laws to online review sites (page 12), and we highlight some important changes to the Code of Conduct for patent and trade mark attorneys (below).

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Listed Australian patent attorney firms put on notice to ensure transparency to clients

The Trans-Tasman IP Attorneys Board recently released a new Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018, together with Guidelines to the Code of Conduct 2018. These changes came into effect on 23 February 2018 and have the potential to impact a number of patent attorney firms that are now listed on the Australian Stock Exchange.

The new Code makes it clear that an attorney is in a fiduciary relationship with a client and owes the client a duty of loyalty, confirming that the attorney must not prefer the attorney's own interest over the interest of a client.

Australian patent attorney firms must also inform domestic and foreign clients whether they are operating as an incorporated company and, if they are, whether the company is public or private. If they are a member of a commonly owned group, such as being owned by a publicly listed holding company, the group members must also inform their domestic and foreign clients, and the public, of that fact and also of the identity of all other members of the group.

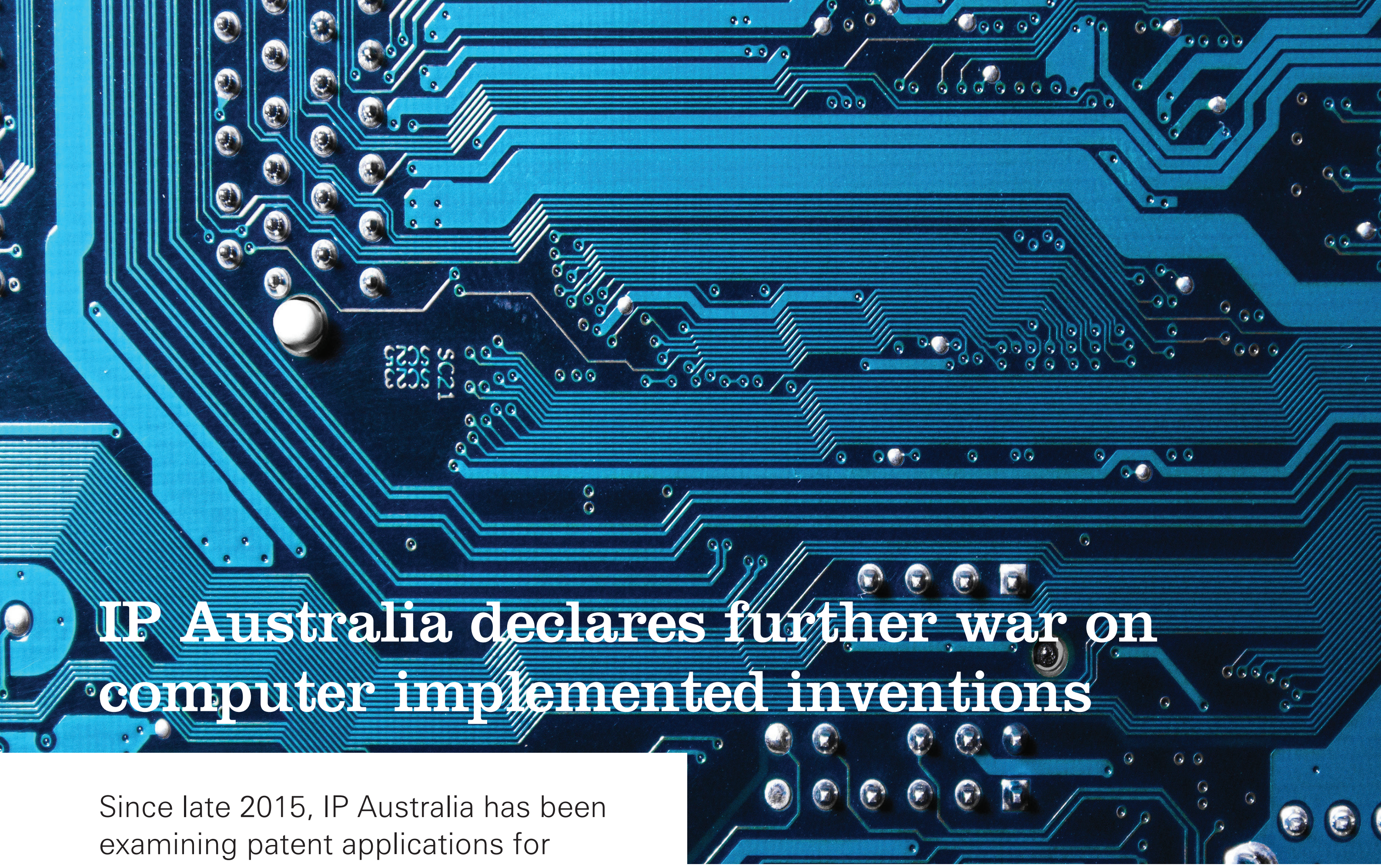
By way of reminder, the publicly listed firms in Australia are:

> Xenith IP Group Limited
> QANTM Intellectual Property Limited
> IPH Limited

Members of the listed holding group are to be regarded as having a single body of clients, meaning that the potential for conflict must be considered across the member firms, unless the firms are "operating independently". The Guidelines explain that "client facing" attorney services such as the provision of advice and the prosecution of applications, should not be provided by staff common to multiple firms if those firms want to remain as independent operations.

Phillips Ormonde Fitzpatrick is proudly independent and privately owned, and is not part of a listed operating entity. POF provides end-to-end IP services through three organisations: Phillips Ormonde Fitzpatrick, Phillips Ormonde Fitzpatrick Lawyers and IP Organisers.

If you have any questions about these changes to the Code of Conduct, please email us at attorney@pof.com.au.



IP Australia declares further war on computer implemented inventions

Since late 2015, IP Australia has been examining patent applications for computer implemented inventions in light of the Full Court judgment in *Commissioner of Patents v RPL Central Pty Ltd* (2015) FCAFC 177 (RPL Central), but as of mid-2017, we have seen a new interpretation of this judgement become Patent Office practice.

For better or worse, the law as we knew it relating to computer implemented inventions was settled in December 2015 in the RPL Central decision. RPL Central confirmed that a scheme or idea implemented on a generic computer, using standard software and hardware, is unpatentable. RPL Central also provided a series of signposts to patentability, although not a checklist and not binding, which we reported in 2016.

The RPL Central judgment also made mention of the approach taken in other jurisdictions noting that in the United Kingdom a 4-step test, known as the 'Aerotel' test, was used. Although these comments were largely obiter, in mid-2017 the Australian Patent Office updated their manual of practice and procedure to indicate that the 'Aerotel' approach was appropriate in determining eligibility of computer implemented inventions under Australian law.

This appears to be an attempt by IP Australia to create law in this area. IP Australia attempted something similar almost ten years ago - where they dictated that a "physical effect must be central to the operation of the computer" for patentability of computer implemented inventions, straying from the Federal Court judgment in *Grant v Commissioner of Patents* (2006) 154 FCR 62. This was an incorrect position on the law, which was ultimately rectified in RPL Central.

As a result of this change of practice, a number of Australian Patent Office decisions have been issued over the last eight months citing the 'Aerotel' test to reject computer implemented inventions.

Two applicants, Rokt Pte Ltd, with an invention related to an engagement offer associated with advertising, and Todd Martin, with an invention related to GPS tracking of athletes, have appealed the Patent Office Decisions regarding the patentability of their computer implemented invention to the Federal Court of Australia. These matters are expected to be heard in mid-2018.

The outcome of these Federal Court cases may determine whether Australia moves to a United Kingdom approach or maintains an approach, which is a combination of Europe and the United States, as per the judgement in RPL Central.

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The importance of due diligence in IP: Lessons from Volkswagen, Apple, Inc. and Clorox Company

IP often receives little or no attention among the extensive and time sensitive legal, financial and business aspects of corporate transactions. More often than not, IP experts are provided with a list of trade marks, patents and designs at the last minute and are asked to determine if there are any IP issues that cannot be resolved or that significantly reduce the value of the IP. This can be an extremely costly mistake, as illustrated by the well-known brands Volkswagen, Apple and Clorox Company.

What is IP due diligence?

IP due diligence is a review of the IP owned and used by an organisation, in order to appraise value and IP-related risks. It is usually triggered by corporate transactions, such as:

- Mergers or acquisitions
- Internal restructuring
- Initial Public Offerings (IPOs)
- Joint ventures
- Capital raising and investment
- Significant licensing arrangements.

IP due diligence seeks to answer three main questions which impact on value and risk management:

- Am I getting everything I need to run the business the way I want to?
- Am I getting everything I think I am paying for?
- Am I going to run into any problems later which devalue my purchase, investment or licence?

The costly mistakes of Volkswagen, Clorox Company and Apple, Inc.

Volkswagen learnt the importance of IP due diligence the hard way, in its multi-million dollar acquisition of the Rolls-Royce company in 1998. Volkswagen purchased the plant, machinery, dies and automobile designs from Rolls-Royce. After the deal was completed, Volkswagen learned that the Rolls-Royce trade mark was owned by a related entity, Rolls-Royce Aircraft, and the purchased Rolls-Royce company only held a non-transferrable licence to use. The upshot was that Volkswagen could build a car that was to all intents and purposes a Rolls-Royce, but they could not brand it accordingly. The trade mark rights were then purchased by BMW at a significantly cheaper price than what Volkswagen paid. BMW came out smiling, while Volkswagen was unable to use the Rolls Royce brand it thought it had purchased.

It is also essential to confirm that there are no limitations on use of IP rights which will impact the purchaser's intentions for the asset or the business. In the 1990s, the Clorox Company purchased the PINE-SOL trade marks from American Cyanamid, which it intended to use in relation to a wide range of cleaning products. However, the trade marks were purchased subject to a trade mark settlement agreement entered into some 30 years earlier with the owner of the LYSOL trade mark. The agreement restricted the type of cleaning products that could be sold. Clorox subsequently brought antitrust litigation in the United States aimed at voiding the terms of the settlement agreement, and lost that action at great cost. Clorox could continue the existing business, but could not expand in the way it had anticipated, and the value of the acquisition was diminished significantly.

Where a transaction involves cross-border issues, IP due diligence must be conducted with particular care and expertise, as IP laws differ from country to country. Apple, Inc. learned this in 2012 after it thought that it had purchased the iPad trade mark from Proview, a Chinese monitor manufacturer. Proview claimed that the division of Proview that Apple had dealt with did not have the rights to assign trade marks in China and the purported assignment was invalid. The Chinese court found in Proview's favour and issued an injunction forcing resellers in China to remove iPads from their stores. Apple ultimately settled with Proview for USD60 million.

Process of IP due diligence

The IP due diligence process itself takes into account things such as whether the IP is driving the deal, the business' plans for the IP in the future, the objectives of the parties, and the value of the deal. Depending on the agreed scope, the investigations may look at a combination of the following:

- Identification of IP
- Ownership, including a review of historic chain of title to ensure that the business has the rights it purports to have and whether they are encumbered in any way
- Review of IP-related agreements, such as in relation to employment, consultancy, funding, collaboration, and settlements
- Review of in-bound and out-bound licensing agreements
- Any third party challenges to the IP
- Freedom to operate searching
- Scope, validity and enforceability analysis.

It's important to note that an organisation does not need to wait for a trigger event before conducting IP due diligence. Due diligence can form part of a broader IP audit process to firm up IP assets and to develop an efficient IP management process. IP-savvy organisations conduct regular audits without the stress of time sensitive transactions, to ensure any defects or gaps can be filled, assets are being used to their best potential to build value and revenue, and the organisation is best placed when transactions do arise.

The POF Group is uniquely situated to assist in all aspects of IP due diligence through its lawyers, Phillips Ormonde Fitzpatrick Lawyers, patent and trade mark attorneys at Phillips Ormonde Fitzpatrick, and our specialised search and investigations company, IP Organisers.

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Pfizer v Samsung Bioepis appeal: Full Court confirms low threshold test for preliminary discovery

Where a patentee believes a competitor may be infringing one of its patents, but lacks sufficient information to decide whether to start proceedings, preliminary discovery may be used to force the competitor to disclose relevant documents. Sometimes described as a 'fishing exercise', preliminary discovery is not geared at finding proof of a case already known to exist, but rather to ascertain whether a case exists at all.

Last year, we reported on the *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCA 285 decision (the primary decision). Here, the primary judge dismissed an application by the applicant, Pfizer Ireland Pharmaceuticals (Pfizer), for preliminary discovery of documents under control of its competitor, Samsung Bioepis AU Pty Ltd (SBA). Recently on appeal, the Full Federal Court overturned the primary judge's decision, ordering that SBA provide preliminary discovery on terms to be determined by the primary judge. The appeal decision, *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193, clarifies the correct approach to an application for preliminary discovery – an approach far more favourable to applicants than that taken by the primary judge.

Background

Pfizer manufactures Enbrel, an autoimmune medication, where the active ingredient is etanercept. Pfizer holds a number of process patents claiming aspects of the manufacture of etanercept (but not etanercept itself). Pfizer became aware that SBA was producing a product, called Brenzys, which is 'biosimilar' to Enbrel and contains etanercept. Pfizer suspected that SBA was infringing up to three of Pfizer's patents in manufacturing Brenzys, but lacked information as to SBA's manufacturing processes. Pfizer, therefore, sought preliminary discovery of documents provided by SBA to the Australian Register of Therapeutic Goods, which were likely to provide details of SBA's manufacturing process. SBA contested the application.

In the Federal Court, preliminary discovery is governed by Rule 7.23 of the *Federal Court Rules 2011* (Cth). To obtain preliminary discovery, sub-rule 7.23(1) (a) requires that:

> "… the prospective applicant … **reasonably believes** that he or she **may** have the right to obtain relief in the Court from the prospective respondent whose description has been ascertained."
> (emphasis added)

Pfizer's view as to possible infringement was formed by its General Counsel, acting on advice of Pfizer's in-house scientist, Dr Ibarra. The primary judge considered extensive evidence on affidavit given by both Dr Ibarra and experts for SBA.

Ultimately, however, His Honour refused Pfizer's application for preliminary discovery, finding that Pfizer's view on possible infringement did not "rise above speculation". His Honour held that this was insufficient to satisfy the requirements of Rule 7.23.

Pfizer appealed the decision.

The appeal decision

The Full Court overturned the primary decision, emphasising that Rule 7.23 does not require the prospective applicant to reasonably believe that there is a right to relief. Rather, what must be shown is a reasonable belief that there may be a right to relief. The Full Court further confirmed that the reasonable belief requirement is two-limbed; first, the prospective applicant must demonstrate a subjective belief; and secondly, it must show that the belief is a reasonable one, objectively viewed (at [107]).

In this case, the relevant enquiry was whether Dr Ibarra's views so lacked foundation that reliance on them by Pfizer's General Counsel did not demonstrate that he reasonably believed that Pfizer may have a right to obtain relief (at [70]). Unlike the approach taken at first instance, and as Chief Justice Allsop noted (at [81]), "It was not a matter of which body of expert evidence to prefer; rather, it was whether Pfizer reasonably believed that it may have a right to relief." The Full Court considered that Pfizer's General Counsel did have a basis upon which to reasonably believe that Pfizer may have a right to relief, being Dr Ibarra's advice. The appeal was therefore upheld.

Conclusion

Patentees may now face a substantially easier task in obtaining preliminary discovery, in light of this decision. For one, it highlights the difficulty in successfully contesting the presence of reasonable belief. Indeed, as Perram J noted (at [121]), even showing that some aspect of the material on which the belief is based is contestable, or even arguably wrong, will rarely defeat a claim for preliminary discovery. Secondly, the Chief Justice discouraged the running of these summary applications as "mini-trials", involving broader fact finding than required by the rule (at [2]). In light of these comments, a shift towards simpler applications for preliminary discovery, involving less expert evidence, may follow.

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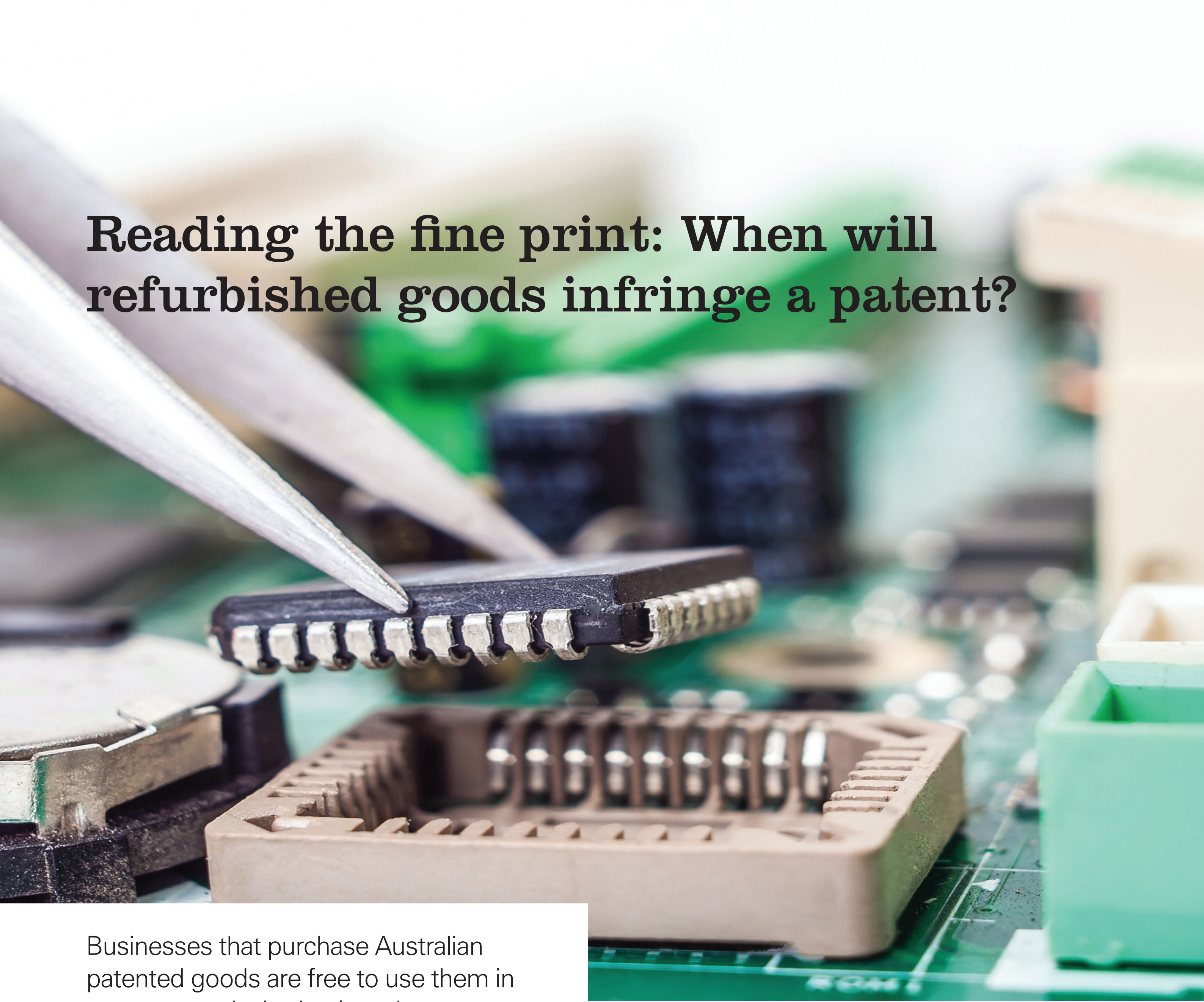
Reading the fine print: When will refurbished goods infringe a patent?



Businesses that purchase Australian patented goods are free to use them in any manner desired unless the patentee imposes conditions at the time of sale. However, does this still apply when the purchased goods are modified in the course of refurbishment and resold? This issue was recently considered by the Federal Court in the patent infringement decision of *Seiko Epson Corporation v Calidad Pty Ltd* [2017] FCA1403.

Seiko is a Japanese company that manufactures and sells Epson branded printer cartridges, the features of which are protected by Australian Patent Nos. 2009233643 and 2013219239. Ninestar Image (Malaysia) SDN BHD, a third party to the proceedings, acquires used or discarded Epson cartridges and refills them with ink overseas for subsequent sale to Calidad, who imports and sells them into Australia. In the course of refurbishment, Ninestar makes modifications to the cartridges that enable use with Epson branded printers.

There was no dispute that the cartridges imported and sold by Calidad into Australia fell within the scope of at least some of the claims of Seiko's patents.

Control of patented products after sale

In this decision, the Court upheld the legal principle in *National Phonograph Co of Australia Ltd v Menck* [1911] 12 CLR 15 (Privy Council) – that the rights of owners to use products embodying an invention are protected by an implied licence unless conditions are imposed by the patentee at the time of sale.

Seiko contended that such implied licenses do not travel with patented goods that have been discarded by their owners. The Court disagreed noting that *National Phonograph v Menck* supports the principle that subsequent owners may assume that they acquire the patented goods without limitation, and that a full licence has been given.

Secondly, Seiko contended that the Epson cartridges contain certain in-built restrictive conditions on the

operation of the memory chip, which act to limit the implied licence and give notice to the purchaser. Again, this submission was not accepted as the Court considered that Seiko's design of the memory chip related to digital attributes of the goods, which could not amount to notice of restrictive conditions of use. Moreover, the Court noted that Seiko could have provided express and visual wording of the restrictive conditions, but chose not to.

The Court ruled that Calidad was the beneficiary of an implied licence of the type recognised in *National Phonograph v Menck* because the Epson cartridges were sold without restriction. Importantly, this was regardless of the fact that the patented goods were first sold outside of Australia.

Do modifications affect implied licences?

Even if an implied licence existed, Seiko asserted that the modifications made by Ninestar in refurbishing the Epson cartridges were beyond any permissible right to repair a patented product, and so the implied licence was extinguished. However, the refurbishment and refilling of the Epson cartridges was not performed in Australia.

Accordingly, the relevant question becomes not whether the refurbishment is an infringement, but "… at what point has an owner of the embodiment made changes to it such that the implied licence arising from a sale sub modo is extinguished?".

Since no authority had directly addressed this topic, the Court developed a new test for considering this question, namely:

> "… whether the product, insofar as it is an embodiment of the invention as claimed, was **materially altered**, such that the implied licence can no longer sensibly be said to apply."

The Court held that this involved a factual inquiry of the significance of the modification work done on a product and how the modifications in question relate to the features of the patented product that are defined by the claim.

Patent infringement

There were nine categories of Calidad products that were said to allegedly infringe Seiko's patents.

Some of the modifications included electronically resetting the memory chips or other physical modifications of the cartridges. The Court found that there was no 'material alteration' of these products meaning that the implied licence was not extinguished.

Other modifications included physically replacing the memory chip on the cartridges. The Court held that removing and/or replacing a component of the product that is a feature of the invention as claimed may be a material alteration that would extinguish the implied licence, and result in patent infringement.

Conclusion

An implied licence is conferred upon the sale of patented products that allows unrestricted use by purchasers and subsequent owners, unless the Patentee imposes conditions at the time of purchase. The implied licence can continue, even when the patented goods are modified and resold as long as the refurbished goods are not a material alteration of the original product as an embodiment of the invention.

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Full Court shares 'Insights' and casts 'Harbour Lights' on trade mark ownership rights

Overseas trade mark owners seeking to challenge an Australian trade mark application similar to their own will often need to rely on a claim to being the true owner of the mark in Australia. A number of recent decisions applying a more liberal interpretation of the requirement of 'substantially identical' under section 58 of the *Trade Marks Act 1995* may make such a claim easier to establish.

One ground for overseas trade mark owners opposing an application for a similar trade mark in Australia, is that the applicant is not the owner of the trade mark. This requires establishing that the applicant's trade mark is 'substantially identical' to the overseas trade mark, a test which has until recently been very strictly applied.

Previous law

The test of 'substantially identical' involves a side-by-side comparison of the marks. In *Carnival Cruise Lines Inc v Sitmar Cruises Ltd* (1994) 31 IPR 375, the Federal Court held that the test required a "total impression of similarity to emerge from a comparison between the two marks" so that ownership of one mark extends to ownership of the other. The Court considered that 'Fun Ship' and 'Funship' would be substantially identical. Adding the definite article 'the' or using a plural form would not prevent marks from being 'substantially identical', however, 'Fun ship' would not be 'substantially identical' to 'Sitmar's Funship' or 'Fairstar the Funship'.

A new approach

The first hint of change to this strict approach was the High Court decision in *E & J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) HCA 15. Here, the word mark BAREFOOT itself was held to have been used despite it being accompanied by a stylised device of a bare foot. The bare foot device was considered an addition to the registered trade mark that did not substantially affect its identity. The test for use, while not exactly the same as that for 'substantially identical', is related. This decision came as a surprise to many Australian trade mark lawyers but it could be explained on the basis that the barefoot device was simply an illustration of the word BAREFOOT.

In two recent decisions, the Full Federal Court seems to have taken a broader approach to what constitutes 'substantially identical'. In *Accor Australia & New Zealand Hospitality Pty Ltd v Liv Pty Ltd* (2017) FCAFC 56, it was held that the word mark HARBOUR LIGHTS had been used by use of the logo, seen on the following page. This was because either the five stars were not a device or, even if they were, they were an addition that did not substantially affect the identity of the words HARBOUR LIGHTS. The Court dismissed the words A NEW STAR SHINES at the bottom of the logo as being so small as to be de minimis.

Liv Pty Ltd appealed to the High Court on this point, arguing that the *E & J Gallo* case was wrongly decided, and/or that the case was being taken too far so as to allow pictorial elements in logo trade marks to be disregarded too easily. The High Court rejected Liv's application, saying its prospects of success were poor.

In *Pham Global Pty Ltd v Insight Clinical Imaging Pty Ltd* (2017) FCAFC 83 the following two trade marks were held to be 'substantially identical'.

This decision also surprised many Australian trade mark lawyers. The Full Court emphasised that the comparison between the two marks must assess the essential elements of each mark or their "dominant cognitive cues". In this case, those cues were a circular device evoking an eye to the left of the word 'Insight'. In comparing the two marks, the differences between them were considered slight and the descriptive words 'Clinical Imaging' and 'radiology' were disregarded.

The decisions in *Accor v Liv* and *Pham* have been raised in several trade mark oppositions, including *Juno Pharmaceuticals Inc v Juno Therapeutics Inc* [2017] ATMO 160, where it was stated that Pham did not change the test for substantially identical "in any significant manner".

Whether these decisions will result in a change in how the Trade Marks Office applies the test remains to be seen. However, it may mean that some oppositions on the basis of prior trade mark ownership by an overseas trader may have greater prospects of success.

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POF welcomes new addition to POFL, Alexis Keating

POF is delighted to extend an official welcome to our newest lawyer in POFL, Alexis Keating. Alexis has joined our Melbourne office, bringing with her six years of experience in the legal industry across general commercial litigation, property law and criminal law.

Alexis holds a Bachelor of Laws (Honours) and a Bachelor of Science, with a major in Biology and a minor in Biological Chemistry. She has assisted with a broad range of litigation matters across both trial and appellate courts, as well as with the drafting of numerous transactional documents.

On joining POF, Alexis says "IP has always held a certain allure for me. That I get to navigate it all alongside so many seasoned industry experts is just the icing on the cake!" In her downtime, Alexis enjoys travelling, dining out and scouring local markets for hidden gems.

We look forward to seeing the unique strengths that Alexis will bring to POFL.

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Online review sites: The good, the bad and the ugly

Analysis from consumer advocacy group CHOICE has found that around 15% of all online reviews are fake. Yet consumers regularly rely on review platform sites such as TripAdvisor, Zomato and Product Review to decide where to sleep, where to eat and what to buy. They expect these platforms to provide full and frank consumer feedback.

Shoppers need to watch out for reviews that seem to be from different people, but are suspiciously similar, and spikes in positive or negative reviews that are contrary to earlier feedback. Businesses should also be aware that fake reviews and manipulation of reviews may breach the law.

Two Australian businesses were recently prosecuted over their use of online reviews. In the first case, the Court found that the operator of a serviced apartment chain breached the Australian Consumer Law by minimising negative reviews on the online accommodation review site, TripAdvisor. The site offers 'Review Express' whereby guests allow an accommodation operator to give their details to TripAdvisor. TripAdvisor then emails the guest for a review of their stay.

The operator had deliberately tried to minimise the number of negative reviews by not providing TripAdvisor with guest email addresses or invalidating email addresses by adding extra letters so that the guest never received the review request from TripAdvisor. This often happened when guests experienced poor amenities, like a broken lift or no hot water.

By minimising the number of negative reviews, a more favourable impression of the accommodation was created on TripAdvisor than was actually the case. The Court found this likely to mislead the public as to the nature, characteristics and purpose of those services.

In another case, a building business was fined AUD380,000 for misrepresenting that its review websites were independent and affiliated with the impartial review platform www.productreview.com.au. It also held back negative reviews. A manager involved in the design and operation of the sites was fined AUD25,000 for his role in the misrepresentations.

CHOICE recommends consumers do their research and check reviews about a business from different sources. The Australian Competition and Consumer Commission warns against:

- Encouraging family and friends to write reviews about your business without disclosing their personal connection.
- Writing reviews when you have not experienced the good/service or do not genuinely hold the opinion expressed.
- Soliciting others to write reviews if they have not experienced your good/service.

Businesses concerned about possible breaches of the misleading or deceptive conduct provisions of the Australian Consumer Law whether through the use of reviews or otherwise, should seek legal advice from Phillips Ormonde Fitzpatrick Lawyers.

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