



PROTECTING YOUR INTELLECTUAL PROPERTY IN 2021

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Intellectual property law, including patents and trade marks, is essential to a functioning globalised economy. As 2021 gears up, three industry leaders discuss what they see as the key issues at the forefront of IP legislation



PRACTITIONERS OF intellectual property law are faced with a conundrum. The innovations that bring in business through patent applications can also outdate the laws that govern the process.

Matthew Hayes, principal at AJ Park, says the basic tenets of IP law have not changed much during his career. However, the ever-accelerating march of technology constantly creates challenges.

“The proliferation of software, technology like AI, and the rise of machine learning has left the law lagging in areas around patentability of software and protectability of the inventions, or copyright works generated by machines,” he says.

Gus Hazel, partner at James & Wells, says most established IP regimes have shown remarkable adaptability to new challenges over the centuries, but still agrees with Hayes.

“The onward march of technological development has always created challenges for the law, including intellectual property,” he says. “This is inevitable because new technologies and social developments require laws to develop, through judge-made case law and legislation.

“The question is whether older legal regimes are able to sufficiently adapt – new

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Gus Hazel, partner, James & Wells

wine in old bottles – or whether entirely new, sui generis regimes are required for particular areas.”

Leanne Oitmaa, principal at Griffith Hack, says that in Australia, government policy is adding to these issues by making the patent process more complicated and costly.

“It has become more difficult to obtain patents, both from a policy point of view and cost, due to the government having a perception that patents were too easy to obtain,” Oitmaa says.

“Our economy has become more digital,

but this is the area facing greatest difficulties in patenting, so the approach and/or policy needs to change to reflect new technologies.”

She hopes the pendulum will swing back to better accommodate patents in the computer technology and software space.

Oitmaa says the phasing out of innovation patents is a sign that the government’s patent policy has gone in the wrong direction.

“Innovation patents have been a tool for both small and large players, but they are now being phased out, with the final innovation patent able to be filed in August 2021.”

THE CHALLENGE OF ENCOURAGING HOME-GROWN INNOVATION



For Leanne Oitmaa, principal at Griffith Hack, one of the biggest IP challenges in Australia is encouraging more innovation. Reliance on traditional industries, she says, is a big part of the issue.

“Perhaps governments could provide incentives for innovation, rather than our economy relying predominantly on mining and agriculture.”

Oitmaa says Australia’s private investment habits also need to change.

“This could also involve the investment community, who traditionally have been more risk averse than those overseas.”

Even when innovations are home-grown, Oitmaa says they often migrate overseas.

“Too many Australian-conceived innovations move overseas to gain support. We have some of the best universities and research institutes and many great Australian companies, yet our main source of patent filings is from overseas.”

Oitmaa hopes to see changes incentivising more home-grown innovations in Australia and a consequent growth in the country’s IP filing system.

Hazel says this has created a surge in the number of filings.

“In Australia, filings for innovation patents quadrupled over the last 12 months, starting roughly around the COVID breakout in March/April. This is a rush to get an innovation patent before the system begins to wind down. The rush before closing if you like.”

Hazel says Australia hit an all-time high in relation to trade mark filings in 2020, despite COVID and lockdowns. In both Australia and New Zealand, trade mark Classes 5 (mainly pharmaceuticals) and 10 (mainly medical,

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UPDATING OLD CODES



"In New Zealand we are long overdue for an overhaul of our Copyright Act 1994 and Plant Varieties Act 1987,"

says Matthew Hayes, principal at AJ Park.

"There are reviews underway by the Ministry of Business Innovation and Employment, but we're yet to see further outcomes following Issues Papers that were published in November 2019."

He says an ongoing dispute over culture rights is likely to influence these revisions and any future changes to copyright law.

"Interrelated to those reviews is the ongoing WAI-262 claim before the Waitangi Tribunal concerning who controls and owns traditional Maori knowledge, arts and cultural work in New Zealand," Hayes explains.

Hayes says New Zealand is not the only country facing these legislative issues, pointing to similar copyright reviews in Australia.

"I don't think the challenges we face are unique, but how we respond to them will most certainly have a uniquely New Zealand flavour."

dental and veterinary instruments) showed significant increases in filing activity.

"The take-home message from both is that IP activity is significantly up, even during a pandemic, and one assumes in many cases because of the pandemic," Hazel says.

Surprises and international concerns

Oitmaa says one surprising change in the IP industry that's playing out now is firms moving from a traditional partnership structure to a corporation.

"This has seen a growth in small IP practices from those who wish to maintain the traditional partnership model, and the creation of large, publicly listed IP groups," she says.

"From a client perspective this has created little, if any, change, but from a practitioner

level it has significantly changed the landscape," says Oitmaa.

"It hasn't changed the way we practise, but it has given practitioners a greater choice of where and how they wish to work."

Whatever the landscape, one concern for Hazel is the enforcement of existing IP laws.

"There's a need to enforce the laws in place, to make nation states accountable for fair implementation of their obligations, and for there to be real and painful consequences for failing to provide and enforce protection."

He says the finger is often pointed at China as the home of copying and knock-offs.



"Too many Australian-conceived innovations move overseas to gain support" *Leanne Oitmaa, principal, Griffith Hack*

"To a certain extent that has been true, but to be fair, being the world's largest manufacturer of mass-produced goods makes it unsurprising it has also been the place where most copying has taken place."

Hazel says China's attitude towards enforcement of IP law appears to have changed as it has become more of an innovator and less of a follower.

Learning from other countries

Oitmaa says getting IP protection in Australia for innovations related to computers and software is harder than ever.

"The policy being applied at IP Australia has radically reduced the number of patent applications being accepted for computer-related inventions, which extends to telecommunications, gaming and software."

She says this lessens confidence in the IP system and prevents businesses from investing in R&D in Australia.

Oitmaa says that in the US this is also a downward trend, but not to the same degree as in Australia. Meanwhile, in Europe...

"Europe has traditionally had a firm policy on computer-related inventions – in particular, software – but we are seeing clients now able to obtain patents for computer-implemented inventions in Europe, yet the same technology is assessed as non-patentable in Australia," she says.

Oitmaa suggests that Singapore could offer Australia a model for improving its IP system.

"Singapore has had a strong innovation policy and robust IP protection system for decades, resulting in it being ranked first in Asia for Best Protection of IP in the *Global*

Competitiveness Report 2015–2016," Oitmaa says. "Protection of computer-related inventions and software is part of this strength."

For Hazel, there are some simple modifications to Australia's current IP law that would be easy to enact.

"For example, software is largely protected by copyright law, but the period of protection is out of balance and excessive compared to the pace of development in the field – this could be easily amended for such specific areas," he says.

Hazel notes that, similarly, New Zealand has what is effectively an unregistered design right. He says this uses copyright law to provide useful and fair protection from copying for industrially applied works, including furniture, machine parts and fashion items.

"In Australia the law has taken a different approach and left gaps for many innovators and ongoing difficulties in the area of copyright/design overlap," Hazel explains.

"The two countries could learn from their respective experiences in these areas

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ELUSIVE SECOND-TIER PATENT SYSTEM



Gus Hazel, partner at James & Wells, says Australia's

legislators have made two unsuccessful attempts in the last 50 years at a second-tier patent system – “first with ‘petty patents’ and then ‘innovation patents’. The first is gone and the second is now going – both deemed a failure,” he says.

“The understandable desire has been to create a second tier of patent-like protection for advances that don’t meet the traditional requirements of inventive step, etc., or justify a 20-year period of protection,” Hazel explains.

He says the logic of a second-tier system is compelling but very difficult to devise in a practical, economical and well-balanced way that’s suitable for innovators and users of technology.

“I doubt we will see another attempt in the near future, but the rationale of a second-tier patent system will not disappear entirely and may bubble back,” Hazel says.



“The proliferation of software, technology like AI, and the rise of machine learning has left the law lagging” **Matthew Hayes, principal, AJ Park**

to inform law reform and try to harmonise their approaches.”

Hazel says that as a legal practitioner in both countries he can see the positives of both approaches and an opportunity for a stronger and more economically sensible IP system with limited and relatively straightforward reforms.

Pragmatic IP for 2021

Oitmaa’s IP wish list for 2021 includes the adoption of a more robust innovation policy by the Australian government and an increase in patent filings. However, she sees little change happening in the next six to 12 months.

“The government has bigger issues at play with COVID-19, and while it would be great to see a robust innovation policy being adopted – both federally and at state level

– to encourage home innovation and help the economy get back on track, this is likely a low priority.”

Hazel says that this year and into the future, IP law is always going to be playing catch-up.

“All indications are that the pace of technological development will increase, and the impetus will be for the pace of law reform to try to keep up.”

He suggests that reviews of IP laws could be scheduled more regularly as a way of limiting the gaps between technical developments and responses to them.

In this environment – in which legislation is failing to keep up with industry needs and technological change – Hayes encourages pragmatism.

“I think the key is continuing to help clients identify what brands, ideas or inven-

tions they need to protect in order to have successful and competitive businesses, and then finding ways to help them protect those ideas and inventions in creative ways, even in situations where the law isn’t keeping pace,” he says.

“It’s also about helping them to develop strategies to both commercialise and, where necessary, enforce those rights in a commercially pragmatic way.” **AL**

The team at AJ Park are very sad to announce that their friend and colleague Matthew Hayes recently suffered a catastrophic medical event while out surfing and tragically passed away at the end of January.

Matt was only 43 years old and a loving husband and father of two boys. He was also highly regarded by colleagues and clients alike and a passionate mentor to junior lawyers. Matt brought a huge amount of energy and enthusiasm to his role as practice group leader of AJ Park’s litigation and commercial team. Our thoughts and sympathies go out to Matt’s family and many friends.