

LEGAL STUDIES

Legal Issues and Remedies

Patents

Origins, Sources and Introduction.

Intellectual Property refers to the ideas and inventions of a person and are protected using a variety of sources. IP is seen in a variety of forms including inventions, trademarks, original designs or creative application of an idea. Patents are a form of protection that are given to inventors to ensure financial returns for inventions.

Patents are a legal right given to the inventor, discoverer or innovator. They enable the founder to have the legal monopoly over the use, production and sale of his product. For a patent to be issued there must be a criteria requirements met. These have the purpose of protecting both consumers and producers they are:

- **Novelty:** Which refers to the newness of the idea, there cannot be already used or invented.
- **Non-Obvious:** Meaning there must be original thought put into the process, there must be an inventive step.
- **Industrial Application:** Refers to its demand in the market place and its ability to be applied into the real world.

Intellectual property first originated in the late 1900's with the Paris Convention 1883 closely followed by the Berne Convention of 1886. These first conventions were the framework for future conventions and the advancement of IP law. The Paris Convention was the first recognition that was given to IP, it founded ideas such as copyright and patents and gave international recognition and accessibility of patented information. The Berne Convention the followed gave greater protection to the works of the inventor; it stated that the inventor didn't have to register a patent only had to "Fix" a work. This meant that the patent was covered in all countries that had signed the Berne Convention.

Established by the Berne Convention; was the United International Bureaux for the Protection of Intellectual Property (BIRPI) which was an administrative organisation to record and protect patents. BIRPI was later transformed into World Intellectual Property Organisation (WIPO) and in 1974 became part of the United Nations. As seen in the origins raised above the main origins of regulatory bodies concerning IP law are mainly International conventions and organisations.

Domestic IP Laws. Individual, Society and the Nation-State.

In terms of IP Laws the main beneficiary is the individual. Without domestic IP laws there is no reward earned by people with an inventive, intuitive approach to the utilisation of resources. The main item of legislation that protected patents pre 1990 was the *Copyright Act 1968*, this was then reinforced and specialised in the *Patents Act 1990*. There are two patents that are offered in Australia; Standard Patents which are the average patents and last for 20 years (up to 25 for pharmaceuticals) and the Innovation patent which protects the individual for 8 years.

Protection of the individual by the use of patents was seen in the development of the orbital engine by Ralph Sarich. When Sarich invented the Orbital Engine he lodged it with IP Australia and was given the

Patent 467415, he was later approached by BHP and was rewarded by a joint venture in the Orbital Engineering Company. It can be seen from the example above the patents have been effective in protecting the monopoly that is offered by patents. In order for BHP to be able to utilise the motor they had to offer Sarich rewards for his IP.

Under Australian law there are two main areas that are important when addressing the aboriginal society's intellectual property. *The Patents Act 1990* and the *Plant Breeders Rights Act 1994* are specific to individual and businesses wishing to lodge a patent concerning the monopoly over an invention or a discovery. This however doesn't address societies such as aboriginal that have been using traditional cures for thousands of years; aboriginals can be excluded from using traditional cures. This can be resolved by placing the knowledge of plants on the public domain; this means that patents cannot be taken out due to the novelty of the idea not being present (See Origins, Sources and Intro). Because aboriginals don't anticipate rewards for the usage of plants they place them on the public domain so that teaching can still occur to future generations without violating patent rights.

Nation States are protected by patents mainly through the idea of *Traditional Knowledge (TK)*. This is an idea that revolves around the usage of certain herbs, spices and natural products with certain qualities. It protects Nations that have been using traditional cures for thousands of years from Transnational Corporations. An example of a Nation benefiting from a patent is the country of Mali. In Mali grows a wild rice which contains the gene known as *Oryza Longistaminata* which has certain qualities associated with disease resistance. This gene was isolated and patented by University of California. This patent had specific monetary benefits associated with it for the University of California. This led to the establishment of the *Genetic Resource Recognition Fund (GRRF)* which requires a certain amount percentage of funds to be paid to the people of Mali. Here patents have been effective in the protection of TK seen in the financial rewards gained by Mali.

Domestic and International Dispute Resolution Mechanisms. INCLUDE TUMERIC

World Intellectual Property Organisation (WIPO) was established in 1967; it is one of the sixteen agencies of the United Nations and has the responsibility of promoting and protecting Intellectual Property throughout the world. WIPO has the role of organising and adjudicating on international multilateral treaties that are made between countries. An example of WIPO's work is seen in the recent multilateral agreement that was made. The Patent Law Treaty 2000 which was signed by Australia in early 2009. It is the procedure that outlines the way that patents should be applied including the content of the application, the form and the process whereby patents are administered.

In Combination with the Patent Cooperation Treaty 1970 the Patent Law Treaty has given greater powers and information to nation-states concerning the process whereby patents are administered, WIPO takes patents from Nation states to protect IP across the globe. This ensures that patents that are applied for in one country don't already exist in another. The only limitation with international patent agreements is the jurisdiction of international law; due to State Sovereignty treaties aren't enforceable with sanctions by international bodies such as the UN. The enforceability however has been increased with countries such as Australia bringing the treaty into force on March 9th 2009 along with another 21 countries.

The World Trade Organisation (WTO) founded the Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPS). TRIPS was established with the primary aim of maximising the impact of Intellectual Property on growth and world trade. TRIPS essentially sets guidelines that must be met by countries in the WTO, there must be a minimum level of protection given to individuals and firms in terms of IP and maintaining consistency between member countries. This agreement is effective as countries are members of the WTO in order to gain benefits of trade. Countries that do not conform to TRIPS may face enforceable sanctions including trade bans between other member countries.

Domestically Patents are enforced by IP Australia, which is an Australian Government agency that protects intellectual property. Applications are lodged with the IP Australia and a suitable patent is applied. Domestic patents are effective as they have ramifications for domestic producers that don't observe certain patent requirements. This includes significant monetary sanctions to accommodate for lost income due to the violation of the monopoly that usually applies during the patent period. IP Australia is also responsible for conducting hearings concerning potential violations of patent requirements. Although IP Australia is effective it lacks at times due to the level of investigation that is done. If the holder of a patent feels there has been a violation it is their responsibility to initiate the hearing. This is a problem because if the patent holder is unaware of potential violation nothing will be done.