



# INTELLECTUAL PROPERTY AND TECHNOLOGY NEWS

Perspectives • Analysis • Visionary Ideas

## THE COPYRIGHT ISSUE

ISP LIABILITY  
STREAMING TV, RADIO  
AND MORE

AUSTRALIAN HIGH COURT  
CONFIRMS THAT IINET DID  
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INFRINGEMENT

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## EDITORS' COLUMN

Welcome to our second issue of *Intellectual Property and Technology News - Asia Pacific* for 2012. In this issue, we highlight some interesting and significant developments in intellectual property (IP) law throughout the region in the last few months.

In Australia, copyright law has been in the spotlight, with the High Court deciding on whether Internet Service Providers "authorise" copyright infringement by providing the internet access used to infringe copyright, and the Full Federal Court looking at whether the provider of a service that allows users to record programs to play back later is the maker of the copy. This is an important question when determining whether the "private and domestic use" exception to infringement applies.

Legislation has also been passed to implement the most significant single set of reforms to Australia's IP laws in years, and there are substantial revisions being considered to China's advertising law. Other reforms are also being considered to contract law and regulation of the media in Australia.

During the last quarter, we have also launched a number of innovative tools and publications, including DLA Piper's newest blog, *Technology's Legal Edge*, which addresses the global issues facing companies in the areas of e-commerce and social media, IT sourcing, outsourcing, and privacy and data security. It offers readers timely legal perspectives on cutting-edge issues in these dynamic areas of law.

Also check out our first edition of *Data Protection Laws of the World*, DLA Piper's 2011/2012 Handbook offering a high-level snapshot of national data protection laws as they currently stand in 58 jurisdictions across the world.

We are also delighted to introduce you to some of the new faces in our regional team and include a Q&A with one of our newest partners, Nicholas Tyacke (see page 5).

As always, we hope you enjoy this issue and encourage your feedback and comments!

Best regards,

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## REGULATORY

The Attorney-General's Department is currently examining how Australia's contract law might be reformed in order to maximise simplicity and efficiency within modern commercial and consumer transactions. To that end, on 22 March 2012, Attorney-General Nicola Roxon released a discussion paper seeking views from businesses, consumers, legal practitioners, academics and other stakeholders on the way in which Australia's contract law could be reformed to achieve these goals. The paper:

- Gives a brief outline of Australian contract law and discusses the main drivers for reform
- Considers some of the main challenges associated with Australian and international contracting
- Compares the contract law systems of some of Australia's major trading partners
- Discusses international developments in the area of contract law
- Puts forward three possible approaches to reform in Australia, namely:
  - Restatement of the current law in a new form
  - Simplification of the current law
  - More radical reform involving significant change to the substance of Australian contract law.

The discussion paper is the first step on the pathway to reform. The Department intends to obtain ongoing input from stakeholders as the reform project develops. Information about further consultation opportunities will be made available on the Department's website.

## COPYRIGHT

In *Phonographic Performance Company of Australia Ltd (PPCA) v Commercial Radio Australia Limited (CRA)* [2012] FCA 93, the Australian Federal Court determined that simultaneous internet streaming of a radio program is a broadcast for the purposes of the *Copyright Act 1968* (Cth) (Copyright Act).

PPCA, a copyright collecting society, and CRA, an organisation representing radio broadcasters, had entered into a licensing arrangement that allowed CRA to "broadcast" (as defined in the Copyright Act) PPCA's sound recordings.

PPCA argued that broadcasting under the Copyright Act does not include internet streaming, relying on an exclusion in the *Broadcasting Services Act 1992* (Cth).

CRA argued that broadcasting under the Copyright Act does include internet streaming when the internet streaming occurs simultaneously with the broadcast of the radio program over the broadcasting services bands.

The Federal Court found in CRA's favour, holding that the exclusion that PPCA tried to rely on does not apply to a radio station simultaneously streaming its radio program over the internet.

It can be inferred from this that, if the streaming is not simultaneous, or the program is not also broadcast over the radio (for example on a FM station), the exclusion would apply.

For this reason, the decision is specific to the particulars of the case and the licensing arrangement between PPCA and CRA. However, the case highlights the difficulties in interpreting intersecting legislation and how that may impact on the exclusive rights granted under Australian copyright law, particularly in the context of converging technologies.

PPCA appealed this decision in March 2012.

## TRADE PRACTICES

You may recall that our previous issue featured an article titled *Search Engine AdWords - Buying Someone Else's Brand Name*. One of the cases discussed, *Australian Competition and Consumer Commission v Trading Post Australia Pty Limited and Google Inc.* [2011] FCA 1086, has since been appealed by the Australian Competition and Consumer Commission (ACCC) to the Full Court of the Federal Court.

To recap, the original proceedings were brought against the Trading Post, which purchased various third-party brands as

AdWords, and Google, which provides an AdWord service. The outcome of the original proceedings was that the Trading Post **had** engaged in misleading and deceptive conduct in relation to its use of Google's AdWord service (this finding has not been appealed by the Trading Post), but Google had not engaged in misleading and deceptive conduct by virtue of its provision of the AdWords service (ie publishing the AdWords and accompanying advertisements on its website).

The Full Court's decision has recently been handed down (*Australian Competition and Consumer Commission v Google Inc* [2012] FCAFC 49). The Full Court held that Google **had** engaged in misleading and deceptive conduct in respect of four "cases", by publishing or causing to be published on the Google website AdWord search results that represented, contrary to fact, that there was an association or affiliation between an AdWord and the results they led to, or information on the subject of an AdWord could be found at the website the AdWord results led to.

Google is, at the time of writing, seeking leave to appeal this decision to the High Court.

## TRADE MARKS

An Australian company's application to register the trade mark NUCKIN FUTS for prepared nut and other snack food products should soon proceed to registration following expiration of the opposition period on 12 April 2012. The application for NUCKIN FUTS was initially rejected by the Australian Trade Marks Office (ATMO) on the basis that it was "scandalous".

A scandalous trade mark is something that would, to an "ordinary" person (but subjectively assessed by the ATMO), cause



# IPT INSIGHTS

a significant degree of disgrace, shock or outrage. In this case, the ATMO claimed that NUCKIN FUTS was a spoonerism of a swear word, and was therefore offensive. The applicant argued that the swear word in question was widely accepted as part of everyday language and therefore was not offensive. The ATMO subsequently accepted the trade mark on the basis that the applicant enter an endorsement that the NUCKIN FUTS products would not be “marketed” to “children”.

This decision demonstrates that trade marks that may have caused offence in the past may now be acceptable to the ordinary person and available for registration, especially in circumstances where an applicant restricts use of a trade mark to a particular market. Other trade marks currently registered in Australia that may be considered scandalous include FCUK, RICH BITCH, POMMIEBASHER and UNFKNBLVBLE!

## COPYRIGHT

It was a short-lived victory for rights owners when the National Rugby League (NRL), the Australian Football League (AFL) and Telstra Corporation (Telstra) succeeded in their appeal to the Full Federal Court against Singtel Optus (Optus). Optus has announced that it will be appealing this decision.

The case relates to Optus’ subscription television services, TV Now, which permitted subscribers to record free-to-air television programs and play them back at a later time on a compatible Optus mobile device. The service provided by Optus undermined Telstra’s rights deals with the NRL and AFL, under which Telstra had paid each of the sporting bodies a significant sum to acquire a licence to the free-to-air broadcasting rights.

In its defence, Optus argued that there was no copyright infringement since the TV Now system complied with the “time shifting” exception under the Copyright Act. This permits a person to make a recording of a broadcast, solely for private and domestic use, in order to watch the program at a later, more convenient time.

At first instance, Justice Rares agreed with Optus and held that the TV Now system did not infringe copyright. Even though Optus was providing the technology that facilitated the recording, Justice Rares held that it was

ultimately the subscribers who made the recordings when they clicked the “record” button on their mobile devices.

On appeal, the Full Federal Court had two questions to consider:

- 1 When subscribers used the TV Now system to record a program, who, for the purposes of the Copyright Act, was the maker of the copy?
- 2 If Optus’ act in making such a copy would otherwise constitute an infringement of the copyright of the AFL, NRL or Telstra, could Optus rely on the “private and domestic use” defence of s 111 of the Copyright Act?

On the first question, the Court held that the “maker” of the copy was either Optus or, its preferred view, Optus and the subscriber jointly.

On the second question, having found that Optus was either the sole maker or joint maker of the recorded program, Optus could not rely on the defence of “private and domestic use”.

While the Court acknowledged that its interpretation of the Copyright Act could be viewed as inconsistent with the principle of technological neutrality, it decided that it was not its role to interpret the Copyright Act in order “to secure an assumed legislative desire for such neutrality”.

As a final remark, the Court accepted “that different relationships and differing technologies may well yield different conclusions to the “who makes the copy” question”.

We will keep you informed of developments.

## TELECOMMUNICATIONS

The duopoly currently enjoyed by Hong Kong’s free-to-air television broadcasters, TVB and ATV, is about to come to an end as three interested parties submit applications to the Broadcasting Authority (BA) for new free-to-air television licences. At present, within Chinese free-to-air television services, TVB dominates with a market share of 79%, while ATV takes a modest 21%. For the English channels, TVB leads the market with a 75% share and ATV occupies the remaining 25%.

Many have commented that there has been deterioration of the overall quality of free-to-air television in Hong Kong over the past few years. One survey revealed that 47% of Hong Kong viewers find the quality of free-to-air programming “just so-so”, while 21% criticised it as “disappointing” or “very disappointing”. This is largely blamed on the lack of competition in the local broadcasting industry.

It is hoped that this situation is about to change as the BA makes recommendations to the Chief Executive in Council on the potential new entrants into the industry.

The authorities have indicated that it is the government’s policy to encourage competition, investment and adoption of innovative technologies to promote the sustainable development of the local broadcasting industry. Indeed, all three applicants for the FTA television licence have undertaken to contribute to the industry by way of investment and recruitment after obtaining the licence. As there is no limit on the number of FTA television licences that may be issued by the Chief Executive in Council, it is widely speculated that at least one, if not all, of the three applicants will be granted licences.

# Q&A

WITH NICHOLAS TYACKE



Nicholas is a Partner in the firm's Life Sciences and Intellectual Property & Technology practices. He is a dual-qualified (Australia and the United States) specialist intellectual property (IP) litigator. Nicholas offers a level of experience unique to the Australian market, having spent many years litigating IP disputes in both the US and Australia.

## WHAT ARE YOUR KEY AREAS OF PRACTICE?

Patent law in the life sciences and technology sectors and copyright and trade mark law, as they relate to the internet and cutting-edge technologies.

## WHERE HAS THE PRACTICE OF IP LAW TAKEN YOU?

Around the world. My love of IP law first took me to New York, where I obtained a Masters of Law from Columbia University. I then worked as a patent litigator at the New York office of Fish & Neave, one of the top specialist patent litigation firms in the US, for several years. While at Fish & Neave, I acted for many Fortune 500 life science and technology clients, including in one matter that went to the US Supreme Court. Since returning to Australia, IP law has then taken me to the UK, much of Europe, Singapore and New Zealand, as well as many return visits to the US.

## WHAT ARE THE MOST NOTABLE CASES/MATTERS YOU HAVE WORKED ON?

It's hard to choose, but three of my favorites would be:

1. Defending Sharman Networks - the distributor of the peer-to-peer software Kazaa® - in what was at the time Australia's largest ever copyright infringement litigation. This was counterpart litigation to the Grokster case heard by the US Supreme Court, and was the first major Australian case to give detailed consideration to the application of copyright law to the internet.
2. Acting for Eli Lilly & Company as part of a global team involved in multi-jurisdictional patent infringement and revocation proceedings. In the Australian proceedings, I acted for Eli Lilly in successfully resisting a challenge to the patent term extension of one of the patents-in-suit, successfully amending the claims of that patent in the course of litigation and successfully obtaining an interlocutory (preliminary) injunction enjoining the marketing of two generic competitors' products. The proceedings established an important set of guiding principles in Australia for determining when an interlocutory injunction will be granted in pharmaceutical patent infringement cases.
3. Directly advising the then Australian Prime Minister on the legislation to implement the pharmaceutical and patent aspects of the Australia-US Free Trade Agreement. In doing so, I was able to call on both my US and Australian experience to advise from both perspectives.

## WHAT IS YOUR FAVOURITE THING TO DO OUTSIDE OF WORK?

As much as I loved practicing law in New York, I always felt the call of Australia's beaches, the best beaches in the world. Since returning to Australia, I have been blessed with two sons. My favourite thing to do outside of work is to spend time at the beach with them and my wife.

# THE PEOPLE'S REPUBLIC OF CHINA ADVERTISING LAW

## SUBSTANTIAL REVISIONS UNDER WAY

By Richard Wageman and Belinda Tang

### LEGISLATIVE BACKGROUND

The advertising industry in China has grown rapidly over the past decade. New types of advertising products have been developed, such as pop-up advertisements on websites and viral marketing on Weibo. However, the existing People's Republic of China (PRC) Advertising Law (中华人民共和国广告法) (enacted in 1994 and brought into effect on 1 February 1995) is lagging behind current practices. This lag is evidenced by an increasing number of non-compliant advertisements being released on new media in China, with consumers suffering the consequences.

In 2000, representatives to the National People's Congress submitted a proposal to revise the PRC Advertising Law. However, it took until 2004 for the State Administration for Industry and Commerce (SAIC), the regulatory authority that oversees the Chinese advertising industry, to initiate a review of the PRC Advertising Law and for the Chinese Government to list it for revision in the legislation strategic plan of the 11th Standing Committee of the National People's Congress.

In 2009, the SAIC circulated a Draft Revised PRC Advertising Law (Draft Revised Law) to various industry organisations to solicit feedback. To date, the PRC State Council has not issued any formal notification indicating when a further revised PRC Advertising Law will be issued, although it is anticipated that this will occur in 2013 or 2014.

Based upon provisions covered in the 2009 Draft Revised Law, it seems likely that any revised advertising law will address the issues discussed below.

### JOINT LIABILITY OF OTHER PARTICIPANTS IN THE ADVERTISEMENT

In recent years, it has been common to see entertainers or celebrities being invited to recommend certain products or services in advertisements. A number of such advertisements have contained false information or exaggerated the effects of the products or services being advertised. This has seriously misled and caused material damage to consumers.

To address this issue, the Draft Revised Law applies to individuals or entities that certify, recommend or verify content in advertisements, who are referred to as "Other Participants".

The Draft Revised Law requires Other Participants to verify the content of the advertisement, make recommendations based on factual evidence and not recommend any products or services that they have not used themselves. In addition, the Draft Revised Law specifically prohibits any individual or entity from making recommendations or verifying a claim when advertising medicines, medical equipment, food, health food, medical services or financing services. If an Other Participant in an advertisement violates these requirements, they are subject to fines and can be held jointly liable for any damage caused to consumers.



### COMPARATIVE ADVERTISING

The Draft Revised Law also includes detailed provisions on comparative advertising. In addition to the general principle that comparative advertising should not damage a third party's reputation or goodwill, it also requires that comparative advertising be based on factual evidence and not adopt any unfair or non-scientific comparative methods. Furthermore, the Draft Revised Law stipulates that advertisers of certain products and services, including medicines, medical equipment, health food, food additives, tobacco, wine, pesticide, veterinary drugs and medical services, will be prohibited from making any comparative advertising claims.

### FALSE ADVERTISING

In the existing PRC Advertising Law, the definition of false advertising is very general and vague, which has caused great difficulties for advertisers. The Draft Revised Law addresses this issue by providing a list of examples of what authorities would deem to be false advertising, including:

- Material inconsistency between the representations made in the advertisement and actual facts, especially in relation to factors that have a major impact on a consumer's determination of whether or not to purchase the products or services, such as the product's function, composition, quality and purpose, where it was manufactured and expiry date
- Concealing key information or providing misleading information about the products or services
- False statements concerning the prizes or rewards that may be obtained upon purchasing a product or service

- Fabricating the experience of Other Participants with the products or services in the advertisement
- False statements that the products are out of stock or part of a significant sale.

The Draft Revised Law also increases the penalties for false advertising to three to five times the advertising fee received by the advertiser and provides that the advertiser, the advertising operator, the advertising publisher and Other Participants to the advertisement can be held jointly liable for damage caused to consumers as a result of the false advertisement.

### ADVERTISING FOR SPECIAL PRODUCTS OR SERVICES

Due to the special nature of certain products and services, such as healthcare products, tobacco, wine and investment-rewarding services, the Draft Revised Law introduces more stringent and detailed rules to regulate advertising in these areas. These include:

- **Healthcare:** The Draft Revised Law contains several new provisions on healthcare advertising, including a detailed list of prohibited advertising content for prescribed and non-prescribed medicines, medical equipment, medical services and other healthcare products that are not deemed to be medication, including cosmetics, healthcare food, sterilising products, sanitising products and beauty services.
- **Tobacco and wine:** In addition to traditional advertising channels, the Draft Revised Law prohibits tobacco advertising from being published through or using the internet, telecommunications, audio and video. It also imposes restrictions on the advertising of wine products. Hospitals and schools have been added to the list of venues where tobacco advertising would be prohibited.
- **Investment-rewarding products and services:** In recent years, advertisements promoting financial investment in the recruitment, real estate, financial management, sale of collections, securities investment, consultancy and loan consultancy business sectors have increased dramatically in China. The Draft Revised Law prohibits these advertisements from

containing forecasts of rewards, risk-free commitments and/or recommendations by specialists or beneficial parties.

### OBSERVATION

With the rapid and diversified development of the advertising industry in China, advertisements impact every aspect of people's day-to-day lives. From the actions of the Chinese regulatory authorities over the past several years, it is clear that there is an effort being made to address current advertising issues. However, this is a difficult task that will take a few more years to finalise. Therefore, advertisers and mass media organisations should carefully monitor the Chinese Government legislative process to ensure that their long-term advertising strategies are in line with new advertising requirements.

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## TECHNOLOGY'S LEGAL EDGE™

### A Technology, Privacy and Sourcing Blog

DLA Piper's newest blog, Technology's Legal Edge™, addresses the global issues facing companies in the areas of e-commerce and social media; IT sourcing; outsourcing; and privacy and data security. We offer timely legal perspectives on cutting-edge issues in these dynamic areas of law. Contributing to the blog are members of DLA Piper's leading global Technology, Sourcing and Commercial practice. Recent posts include:

- How tech startups can protect IP – a Bloomberg interview with Mark Radcliffe
- Australia reforms privacy law – new legislation to be presented to Parliament
- FTC issues final privacy report – sets forth best practices, calls for legislation

We hope this blog will become a practical resource for your business.

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# AUSTRALIAN HIGH COURT CONFIRMS THAT IINET DID NOT AUTHORISE COPYRIGHT INFRINGEMENT

By Nicholas Tyacke and Nicholas Cole

During April, in an eagerly anticipated decision, the High Court of Australia unanimously held that Internet Service Provider (ISP) iiNet had **not** authorised the infringement of copyright in the appellants' films by its customers.

## BACKGROUND

In November 2008, 34 film and television studios (collectively Roadshow), with the assistance of the Australian Federation Against Copyright Theft (AFACT), commenced proceedings in the Federal Court of Australia against iiNet alleging that it had authorised the infringement of copyright in Roadshow's films by its customers. The Federal Court held that iiNet had not authorised that infringement. The Full Federal Court, in a 2:1 judgment, dismissed the appeal from that decision. That decision was then appealed to the High Court.

## THE HIGH COURT'S DECISION

In a unanimous decision, by way of two separate judgments, the High Court dismissed the appeal from the Full Federal Court.

## ROADSHOW ARGUMENTS

French CJ, Crennan and Kiefel JJ identified the circumstances that Roadshow relied on to support their argument that iiNet had authorised its customers' infringing acts as including:

- The provision by iiNet to its customers (and to other users of those customers' accounts) of access to the internet, which can be used to access BitTorrent peer-to-peer file sharing networks (BitTorrent System)
- The infringement of the copyright in Roadshow's films by customers of iiNet, who made the films available online in whole or in part using the BitTorrent System

- The knowledge by iiNet of specific infringements, as drawn to its attention by notices from AFACT
- The technical and contractual power of iiNet to terminate the provision of its internet services to customers infringing copyright
- The failure by iiNet to take reasonable steps to warn identified infringing customers to cease their infringements and, if appropriate, to terminate the provision of its services to them.

Gummow and Hayne JJ, in turn, characterised Roadshow's case as:

*"in essence, ... iiNet authorised the ... [i]nfringements of its customers by 'standing by' and 'allowing [this] to happen without doing anything about it'".*

## THE LAW

In reaching its decision, the High Court reaffirmed that, in determining whether there has been authorisation of copyright infringement in a film, a court must take into account the factors identified in section 101(IA) of the *Copyright Act 1968* (Cth) (Copyright Act). As applied to the facts of this case, this required the court to consider the:

- Existence and extent of iiNet's power to prevent its customers' infringement
- Extent to which reasonable steps to prevent that infringement included warnings, suspension or termination of those customers' accounts

- Impact of the nature of the contractual relationship between iiNet and those customers on those factors.

The High Court noted further that those factors must be considered in the context of section 112E of the Copyright Act, which states that an ISP is not to be taken to have authorised copyright infringement of a film merely because it provided facilities for making the film available online by an infringer.

## DETERMINATION OF KEY QUESTIONS

### Did iiNet have the power to prevent infringement by its customers?

The High Court reaffirmed that the power to prevent primary infringement is a requirement for a finding of authorisation of that infringement. It considered iiNet's technical and contractual power to prevent its customers infringing another's copyright and held that iiNet did have a limited, indirect power to prevent infringement in that it could terminate the contractual relationship that it had with its customers.

### The High Court found that iiNet:

- Had no technical power to prevent a customer from using the BitTorrent System to download Roadshow's films, or to control or alter any aspect of the BitTorrent System (including BitTorrent System clients)
- Did not assist its customers to locate BitTorrent System clients or .torrent files
- Cannot monitor the steps taken by its customers using the BitTorrent System



- Cannot filter the communication of infringing material over its internet service
- Did not have any power to prevent its customers from using other internet services.

Due to this, the Court found iiNet had no direct power to prevent a copyright infringement but could only achieve that result indirectly by terminating the contractual relationship it had with its customers.

**Did reasonable steps to prevent infringements (after receipt of AFACT notices) include warnings and subsequent suspension or termination of the accounts of identified customers?**

The High Court held that both the nature of the internet and of the BitTorrent System and the absence of an industry code of practice adhered to by all ISPs needed to be taken into account in assessing whether iiNet took reasonable steps to prevent copyright infringement by its customers, given its indirect power to prevent that infringement.

Considering these factors, the Court noted that threatening to terminate, or terminating, the account of an accused infringer would have done little to prevent continuing infringement as that customer could merely obtain internet access from another ISP, and continue using the BitTorrent System to infringe another's copyright.

The Court also referred to the fact that the AFACT notices did not approximate the standard of evidence expected to be filed in a civil proceeding for copyright infringement and that, if iiNet were to terminate the account of a customer accused of copyright infringement based on an AFACT notice, it could be exposed to liability for breach of contract.

French CJ, Crennan and Kiefel JJ concluded that the AFACT notices did not provide iiNet with a reasonable basis to send notices to customers accused of copyright infringement threatening to suspend or terminate their accounts, stating that the inference to be drawn from iiNet's failure to send such notices in the circumstances:

*“was not the indifference of a company unconcerned with the infringement of the appellants' rights ... [but rather] that iiNet was unwilling to act because of its assessment of the risks of taking steps based only on the information in the AFACT notices.”*

**IMPLICATIONS ARISING FROM THE CASE**

The case confirms that a party, such as an ISP, will not be liable for authorising copyright infringement by a third party, including its customers, where it does not have the power to prevent that infringement. The case also indicates that there are a number of factors to be considered when assessing the reasonableness of the steps taken or not taken by a party to prevent infringement. These include:

- Whether that party had a reasonable basis for taking those steps (such as whether an infringement notice provided sufficient information to give a reasonable basis for terminating an infringing customer's account)
- The effectiveness of those steps to achieve that result (such as whether that infringing customer could continue infringing by merely changing to another ISP)
- The legal risk it might face if it took those steps (such as whether the ISP may potentially face contractual liability for wrongfully terminating a customer's account on the basis of a notice of infringement).

The implications from the case, so far as an ISP's role in reducing the volume of copyright infringement occurring by means of the internet is concerned, was directly addressed by French CJ, Crennan and Kiefel JJ, who concluded that the:

*“concept and principles of the ... tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer filesharing ...”*

See the box titled “Where to from here” to find out more about how their Honours comments may result in changes to the Australian legal landscape.

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**WHERE TO FROM HERE?**

For all the benefits that digital technology delivers, the reality is that it also makes it easier for copyright infringement to occur on a massive scale. For content owners, the challenge is to find effective ways of reducing such infringement, be it by technical, legal and/or commercial means.

Below is our snapshot of key potential reforms/developments in this area:

- **Legal reform:** In their judgment, French CJ, Crennan and Kiefel JJ refer to the legislative solutions employed in other jurisdictions for addressing this issue, citing specifically the *Digital Economy Act 2010* (UK) and the *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ). Potentially, Parliament will respond to the iiNet case with reforms of this nature.
- **Development of an industry code:** The High Court also acknowledged the futility of iiNet terminating the account of a customer accused of infringing copyright in the absence of an ISP protocol that would prevent that customer from shifting to another ISP. Content owners and ISPs may thus continue to work together to establish industry codes that address issues such as copyright infringement in an effective manner.
- **Further court action:** Content owners could revert to taking direct action against internet users who share their content without authorisation, as they have done in the United States, rather than attempting to hold ISPs liable for authorising that infringement.
- **Commercial:** Content owners may continue to develop new business models that reduce the reasons for copyright infringement. This may include content owners working with ISPs to implement such business models.
- **Technical:** Though technical solutions envisaged to date, such as filtering, have not proved effective, technology may well play a role as a solution to this problem of digital copyright infringement.

# THE INDEPENDENT INQUIRY INTO THE MEDIA AND MEDIA REGULATION

By Nicholas Cole and Ada Wong

**The Independent Inquiry into the Media and Media Regulation (Media Inquiry), conducted by Ray Finkelstein QC, handed down its report at the end of February 2012 (Report).**

The Media Inquiry was given the task of investigating:

- The effectiveness of the current media codes of practice in Australia and their application to all forms of media platforms
- The impact of technological change on the media business
- Ways of strengthening the independence and effectiveness of the Australian Press Council, including the handling of complaints
- Any related issues pertaining to media regulation, codes of practice and the public interest.

The Media Inquiry is an adjunct to the wider Convergence Review, which was established in late 2010 to inform the Federal Government (Government) about regulatory and policy changes that will be required following the establishment of the National Broadband Network. Together, the Convergence Review (which is due to report later this year) and the Media Inquiry will result in one of the most comprehensive reviews of the policy and regulatory frameworks that apply to the production and distribution of content in Australia.

## THE REPORT

The most important recommendation of the Media Inquiry is the establishment of a News Media Council (NMC) to set journalistic standards for news media across all platforms (print, online, radio and television). The new body would take over the functions of both the Australian Press Council (APC) and the news and current affairs standards functions of the Australian Communications and Media Authority (ACMA).

## KEY FINDINGS AND RECOMMENDATIONS

### Standard setting

The Report found that the multiplicity of codes (such as the journalists', publishers' and APC's codes) is unnecessarily complicated for professionals and the public. Instead, it recommends the development of two types of standards based on existing codes:

- Non-binding aspirational principles
- More detailed standards that are similar to the Media, Entertainment and Arts Alliance's code and the APC's standards.

### Complaint handling

The Report was concerned that existing complaint handling processes are slow and cumbersome. Accordingly, it recommends the NMC adopt complaint handling procedures that are timely, efficient and inexpensive when journalistic standards are breached. The Report states that the NMC should resolve complaints within two or three days of being received using formal or informal discussions with the relevant media outlet.

The NMC would have the power to:

- Publish its decision or determination
- Require a news media outlet to publish an apology, correction or retraction; or
- Afford a person a right to reply.

However, the NMC would not be given the power to require journalists to breach the confidentiality between themselves and their sources of information.

While the NMC would not have the power to impose fines or award compensation, non-compliance with a NMC determination could result in the NMC applying to a court for compliance or a determination.

### Issues of independence

In response to a problem of underfunding for the APC and general lack of resources to enable it to properly perform its tasks, the Report recommends that funding for the NMC should be provided by the Government. However, this proposed solution has not

received support from media outlets who believe that Government funding of the NMC would compromise its ability to function as a truly independent body of review.

### Membership

The Report recommends that members of the NMC be drawn from the public (with no connection to the media) and the media, or those who have worked in the media, with equal male and female representation.

### Quality control

Another role for the NMC would be to research media conduct and trends and report declines in both the production and delivery of quality journalism.

## RESPONSES TO THE MEDIA INQUIRY

While the Report states that the proposed NMC "is about making the news media more accountable to those covered in the news, and to the public generally", the response to the Report from the media generally has not been favourable. In particular, the concept of a Government-funded body with the responsibility of regulating journalistic standards for the news media across all platforms has been met with strident opposition on the grounds that it poses a potential limitation to freedom of speech.

## CONCLUSION

While the Media Inquiry may have discharged its task of reviewing the effectiveness of current media codes of practice in Australia, it has not proposed solutions acceptable to media outlets. Given that Australia is due for a general election in 2013, if the Government undertakes the reform agenda proposed by the Report, it will either be brave or foolhardy. Any attempt to implement reform is likely to be met with strong opposition from the same media outlets that the Government will be looking to for support during an election year. In the final analysis, it may be that the recommendations arising from the Report will never be implemented.

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Nicholas Cole is a special counsel in our Sydney office with extensive experience in the film and television industries, especially in media financing. You can reach him at [nicholas.cole@dlapiper.com](mailto:nicholas.cole@dlapiper.com)

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## THE BAR HAS BEEN RAISED

By Nicholas Tyacke and Anna Shelton-Agar

The most significant single set of reforms to Australia's intellectual property (IP) laws in years are now in place. The *Intellectual Property Laws Amendment (Raising the Bar) Act 2012 (Act)* touches every piece of intellectual property legislation in Australia, amending the *Patents Act 1990 (Cth)* (Patents Act), *Trade Marks Act 1995 (Cth)* (Trade Marks Act), *Copyright Act 1968 (Cth)* (Copyright Act), *Designs Act 2003 (Cth)* (Designs Act) and *Plant Breeder's Rights Act 1994 (Cth)* (Plant Breeder's Rights Act). However, the effects of the Act will be most keenly felt in the areas of patent law and trade mark law. This article provides a high level review of the key reforms in the area of patent law.

The Act includes six Schedules, each of which addresses a different aspect of IP law reform (see page 13 for further details).

### GRANTING A PATENT: WHAT ARE THE KEY CHANGES RELATING TO PATENTABILITY?

#### Inventive step (Non-obviousness)

One of the requirements for an invention to be protected by an Australian standard patent is that it possesses an inventive step. An invention will satisfy this requirement if a person skilled in the relevant art would not, at the priority date, have considered the invention obvious in light of:

- The "common general knowledge" in the field, together with
- Pertinent "publicly available" information.

Under current law, the relevant "common general knowledge" is limited to that which exists in Australia, and "publicly available" information is limited to information that the skilled person could be reasonably expected to have "ascertained, understood and regarded as relevant". The Act will remove these limitations.

#### Usefulness (Utility)

To be patentable in Australia, an invention must be useful. Under current law, an invention will not satisfy this requirement if it does not work or fails to deliver on the promises made in the patent specification.

The Act amends the Patents Act in this regard, and states that an invention will not be "useful" unless a "specific, substantial and credible use" for the invention (so far as is claimed) is disclosed in the complete specification. According to the Explanatory Memorandum, this amendment is intended to bring the Australian law of utility more in line with the meaning of "useful" in US patent law.

#### Sufficiency

Under current law, a patent specification must "describe the invention fully, including the best method known to the applicant of performing the invention". A description satisfies this requirement if it enables a skilled person to produce something (even if it does not enable the skilled person to produce everything) falling within the scope of a claim without the exercise of inventive ingenuity or undue experimentation.

The Act amends the Patents Act to require that a specification disclose the invention in a manner that is clear and complete. According to the Explanatory Memorandum, this amendment is intended to be interpreted in the same way as corresponding provisions have been interpreted in the UK and EU. In those jurisdictions, a specification must disclose enough detail to allow a skilled person to fully perform the invention (not just something falling within the scope of a claim).

#### Fair basis

Australian patent law requires that each claim in a patent be "fairly based" on the matter disclosed in the patent specification. This requirement is satisfied if the scope of the claims is consistent with "what the body of the specification read as a whole discloses as the invention".

The Act replaces the fair basis requirement with a support requirement. This amendment is intended, in addition to requiring that there be appropriate "basis" in the body of the specification for each claim, to require that the scope of a claim does not exceed what is justified by the extent of the information provided to support that claim. According to the Explanatory Memorandum, this amendment is intended to align Australian law with the support requirement in the law of jurisdictions such as the UK.

### WILL THE "NEW" HIGHER PATENTABILITY STANDARD APPLY TO MY PATENT OR PATENT APPLICATION?

The transitional provisions state that the:

- **"Old" lower patentability standard** will be applied to standard patents granted before 15 April 2013 and innovation patents certified before 15 April 2013. The "old" standards will also be applied to patent applications filed before 15 April 2013 for which:
  - Examination has been requested before 15 April 2013 (in the case of standard or innovation patent applications); or
  - The Commissioner of Patents has decided to examine the patent application before 15 April 2013 (in the case of innovation patent applications).
- **"New" higher standards** will be applied to standard and innovation patent applications for which examination has not been requested or innovation patent applications which the Commissioner of Patents has not decided to examine before 15 April 2013.

Whichever standard applies to a patent or patent application will apply to that patent or patent application throughout its entire lifespan.

### WHAT TO DO?

Applicants wishing to enjoy the lower standard of patentability, and thus stronger validity over the life of their patent, should file their patent applications and request examination of that patent application before 15 April 2013. Applicants should also bring forward Patent Cooperation Treaty (PCT) national phase and Paris Convention patent application filings so that examination can be requested before 15 April 2013.

## DO THE NEW INFRINGEMENT EXEMPTIONS APPLY TO PAST CONDUCT?

- No. These new exemptions only apply to acts done on or after 16 April 2012.

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### WHAT ARE THE KEY CHANGES RELATING TO PATENT INFRINGEMENT?

The Patents Act currently includes a “springboarding” provision, which provides that exploitation of an invention solely for the purpose of obtaining regulatory approval of goods intended for therapeutic use will not amount to infringement.

- The Act introduces two additional exceptions to patent infringement:
  - An amendment that broadens the “springboarding” provision referred to above to any exploitation of a patent connected with obtaining regulatory approval (not just of goods intended for therapeutic use)
  - An experimental exemption that exempts acts done for experimental purposes related to the subject matter of the invention. “Experimental purposes” are defined to include determining the properties of the invention, determining the scope of a claim relating to the invention, improving or modifying the invention, determining the validity of the patent or of a claim relating to the invention and determining whether the patent for the invention would be, or has been, infringed by the doing of an act.

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### WHAT ARE SOME OF THE OTHER KEY PATENT LAW CHANGES?

**When examining patent claims to determine whether they define a patentable invention, an examiner does not currently:**

- Assess whether the utility requirement is satisfied; or
- Consider prior use when assessing novelty and inventive step.

The Act amends the Patents Act to:

- Make lack of utility a ground for refusal of a patent application
- Permit examiners to consider prior use when assessing novelty and inventive step.

**Non-infringement declarations are currently uncommon in Australia because the party seeking the declaration must:**

- Itself have a patent that claims the proposed matter for which it seeks the non-infringement declaration
- Pay the legal costs of all parties (unless the court orders otherwise).

The Act amends the Patents Act so that:

- The party seeking a non-infringement declaration does not need to own a patent
- Costs will be awarded in the usual manner, that is, the winning party will be entitled to their costs unless the court thinks fit to order otherwise.

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### FINAL THOUGHTS

The Act will impact every piece of IP legislation in Australia, with the most significant and far-reaching impact being to the Patents Act. As such, the scope of the changes brought about by the Act is too great to cover in a single article. Please contact the authors if you wish to discuss any of the key patent law reforms outlined above in more detail or if you would like to know more about the changes to the Trade Marks Act, Copyright Act, Designs Act or Plant Breeder’s Rights Act.

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Nicholas Tyacke, based in Sydney, is a partner in our Intellectual Property & Technology and Life Sciences Teams. He specialises in patent, copyright and trade mark law, with a focus on technology. You can reach him at [nicholas.tyacke@dlapiper.com](mailto:nicholas.tyacke@dlapiper.com)

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Anna Shelton-Agar is a Sydney-based solicitor who specialises in the field of intellectual property. You can reach her at [anna.shelton-agar@dlapiper.com](mailto:anna.shelton-agar@dlapiper.com)

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# SNAPSHOT OF RAISING THE BAR REFORMS

# IN THE SPOTLIGHT

SCHEDULE	SUMMARY	COMMENCES
1	<p>Addresses concerns that the threshold for granting patents in Australia is lower than in the major patent systems around the world.</p> <p>Amendments to the Patents Act relate to:</p> <ul style="list-style-type: none"> <li>■ Inventive and innovative step, utility, sufficiency and fair basis requirements</li> <li>■ The examination process</li> <li>■ The requirements for amending a patent.</li> </ul>	15 April 2013
2	<p>Introduces two new exemptions to patent infringement for acts done for:</p> <ul style="list-style-type: none"> <li>■ Experimental purposes</li> <li>■ The purpose of gaining regulatory approval.</li> </ul>	16 April 2012
3	<p>Seeks to reduce delays in processing patent and trade mark applications by:</p> <ul style="list-style-type: none"> <li>■ Tightening the rules for filing divisional patent applications or for converting patent applications to divisional status</li> <li>■ Tightening the rules regarding patent amendment and withdrawal of patent applications</li> <li>■ Streamlining the trade mark opposition process.</li> </ul> <p>The Schedule also removes certain criminal penalties from the Patents Act.</p>	15 April 2013
4	<p>Makes possible the incorporation of patent and trade mark attorney firms.</p> <p>Extends privilege afforded to the clients of patent and trade mark attorneys to:</p> <ul style="list-style-type: none"> <li>■ Clients of foreign patent and trade mark attorneys</li> <li>■ Communications with third parties in circumstances where lawyer-client privilege would normally apply.</li> </ul>	15 April 2013
5	<p>Makes substantial changes to the customs seizure provisions of the Trade Marks Act and the Copyright Act.</p> <p>Replaces the current criminal offence provisions in the Trade Marks Act and creates two offence levels: summary and indictable.</p> <p>Provides for the award of additional damages for “flagrancy” of trade mark infringement.</p>	15 April 2013
6	<p>Contains miscellaneous amendments to all Australian IP legislation, with the stated purpose of simplifying the IP system, including:</p> <ul style="list-style-type: none"> <li>■ Giving the Federal Magistrates Court jurisdiction over design and trade mark matters</li> <li>■ Amending the Patents Act in relation to secret use, grace periods, entitlement, PCT applications, priority, omnibus claims, disputes between patent applicants, modified examination, postponement and revocation of acceptance, non-infringement declarations, whole of contents novelty and the copyright infringement exemption in relation to patent documents open to public inspection.</li> </ul>	<p>Copyright infringement exemption – 16 April 2012</p> <p>All other amendments – 15 April 2013</p>



Melinda Upton adds significant trade mark and brand protection experience to our Asia Pacific practice.

Melinda has joined DLA Piper’s Sydney office, adding her in-depth knowledge of the global intellectual property (IP) landscape, across a wide range of sectors, to our leading Asia Pacific IPT team.

Melinda has extensive experience across all aspects of brand protection, exploitation and enforcement, both in Australia and globally. She is a regular presenter on protecting and maximising the value of brands, addressing issues such as trade mark protection and enforcement, IP policy, corporate branding strategies, marketing and advertising, social media and other IP issues.

Melinda was recently appointed to the parallel imports committee of the International Trade Mark Association.

When not advising clients on their brand protection strategies, Melinda is a member of the MS Angel’s committee, a group of dedicated business women focused on raising funds to help MS research in Australia.

# RECENT DEVELOPMENTS IN CHINESE PATENT LAW

By Yan Zhao

**In recent years, many patent practitioners have experienced difficulty in amending Chinese patent applications, either voluntarily or in response to action taken by the Chinese Patent Office. One reason for this is that proposed amendments may be rejected by Chinese examiners under Article 33 of the Chinese Patent Law on the basis that such amendments are “beyond the original disclosures” made in the application.**

Such rejections can be frustrating, especially since an examiner’s reasoning is very often merely a statement that “the amended technical solution is not recited in the original description and claims, nor can it be directly and unambiguously derived from the information contained therein” or that “an ordinary person skilled in the art cannot predict that all of the technical solutions covered by the amended claim will achieve the same technical effect as that of the exemplified one.”

This issue has been considered in some recent decisions of the Chinese Supreme People’s Court (SPC), which may have a significant impact on this aspect of patent prosecution in China.

## BACKGROUND

Article 33 of the Chinese Patent Law states that “an applicant may amend his patent application documents, provided that the amendment to the invention or utility model patent application documents does not exceed the scope specified in the original written descriptions and claims, or that the amendment to the design patent application documents does not exceed the scope shown in the original drawings or pictures.”

Rule 51 of the Implementation Regulations of the Chinese Patent Law further states that an applicant has two opportunities to make voluntary amendments to a Chinese patent application before the application enters into substantial examination. Amendments made during the examination stage are restricted to those required by the examiner’s opinions.

The Chinese Patent Examination Guidelines state that the scope of original disclosure in a patent application shall include those that:

- Are recited in the original specification and claims
- Can be directly and unambiguously derived from the information contained in the original specification, claims and drawings.

In practice, it appears that the examiners usually require a literal recitation of the amendments in the original disclosure and may impose an Article 33 rejection if this is not the case.

As such, it has become extremely difficult to expand the scope of patents by amending claims after filing. Many examiners hold the view that such amendments automatically justify an Article 33 rejection.

## RECENT DECISIONS OF THE SPC

### *In re Simcere Pharmaceutical Group (Zhixingzi 17/2010)*

This case concerned a Chinese patent which originally claimed a ratio of ingredients in the range of 1 : 10-50. This was amended during prosecution to 1 : 10-30 and then again, in response to an invalidation claim, to a specific ratio of 1 : 30. This amendment was refused on the basis that it went beyond the scope of the original claim and the Chinese Patent Reexamination Board (Board) consequently decided that the patent was invalid.

The patentee challenged the Board’s decision in the Beijing First Intermediate People’s Court, arguing that the amended ratio should be accepted as one technical solution out of those represented by the “1 : 10-30” range, and that therefore no new matter had been added. However, the Court held that the amendment went beyond the original disclosure in that the ratio “1 : 30” belongs to a new, generalised technical solution, and that an ordinary person skilled in the art could not predict all of the technical solutions

covered by the ratio that could achieve the same technical effect as that of the disclosed combination. Accordingly, the Court upheld the Board’s decision.

The patentee then appealed to the Beijing High People’s Court, which held that the amendment did not go beyond the original disclosure, nor did it add any technical features not already included within the patented claims.

The Board then filed a petition with the SPC, arguing that the Court’s decision should be made on the basis of the originally published patent application instead of the issued patent.

The SPC refused the Board’s request that the case be reviewed, stating that neither of the amendments to the ratio went beyond the original disclosure. The SPC further clarified that whether an amendment goes beyond the original disclosure should not be dependent on whether “all of the technical solutions covered by the amended claim will achieve the object of the present invention”.

### *Yali Zheng et al. vs. Seiko-Epson Ltd. et al. (Zhixingzi 53/2010)*

The question before the SPC in this case was whether the amended term “storage device” went beyond the original disclosure of “semiconductor storage device” under Article 33. The Board held that the amendment was beyond the original disclosure, but this decision was overturned by the Beijing High People’s Court.

In its decision, the SPC supported the Court’s decision and held that:

- One legislative purpose of Article 33 is to ensure that applicants have an opportunity to improve the quality of their patent applications by making amendments in light of newly identified prior art or evolving technology (though such amendments must not go beyond the original disclosure); and
- If the derived content is obvious to an ordinarily skilled person in the art, such content shall be regarded as within the scope of the original disclosure.

The SPC also clarified that Rule 51 allows an applicant to broaden the scope of patent

protection through voluntary amendments to the claims. This essentially abolishes the examiners' rigid views towards such expansions, which are widely accepted in many other jurisdictions.

#### CONCLUSION AND DISCUSSION

It seems that the SPC holds a much more liberal view than the Chinese Patent Office regarding amendments made to patent applications after filing. Should the approach reflected in the SPC's recent decisions be adopted by the Chinese Patent Office, patent practitioners will likely encounter fewer Article 33 rejections in the future, which will certainly be of significant benefit to patent proprietors.

Having said this, however, patent practitioners should bear in mind that it may take time for the Chinese Patent Office to take on board the SPC's opinions and

to adjust its guidelines accordingly, especially given that there is often some discrepancy between judicial and administrative views on various patent issues. Nevertheless, the SPC's recent decisions indicate that seeking judicial review may be an appropriate way forward for patent applicants whose proposed amendments are rejected by the Chinese Patent Office under Article 33.

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Partner Yan Zhao, based in Shanghai, specialises in patent prosecution and litigation work as well as other general IP work. He is admitted as a lawyer in China and New York and as a patent attorney in China and Singapore. You can reach him at [yan.zhao@dlapiper.com](mailto:yan.zhao@dlapiper.com)

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## IN THE SPOTLIGHT



**Robynne Sanders brings her patent litigation practice to our DLA Piper Melbourne office.**

Robynne is a leading intellectual property lawyer focusing on patent litigation, but with considerable experience in brand protection, trade marks and IP commercialisation.

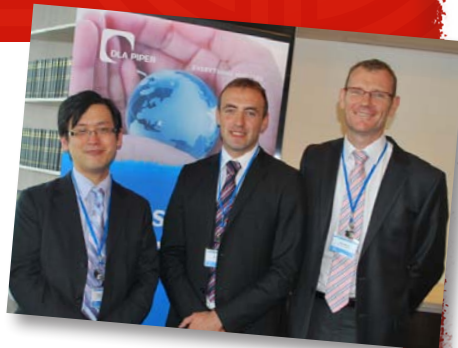
Robynne joins DLA Piper after many years working with boutique patent attorney/intellectual property law firms in Sydney and Melbourne and strengthens DLA Piper's Melbourne offering in the areas of patent law and litigation, particularly in the engineering, manufacturing and material sciences sectors.

In addition to her experience in IP litigation, Robynne is a registered patent and trade mark attorney in Australia and New Zealand and holds a science degree majoring in organic and environmental chemistry.

When not advising clients on patent law, Robynne relishes the opportunity to assist clients in the fashion and jewellery industries – what better way for a Melbournian to stay at the forefront of fashion!

## DATA PROTECTION ACROSS ASIA PACIFIC

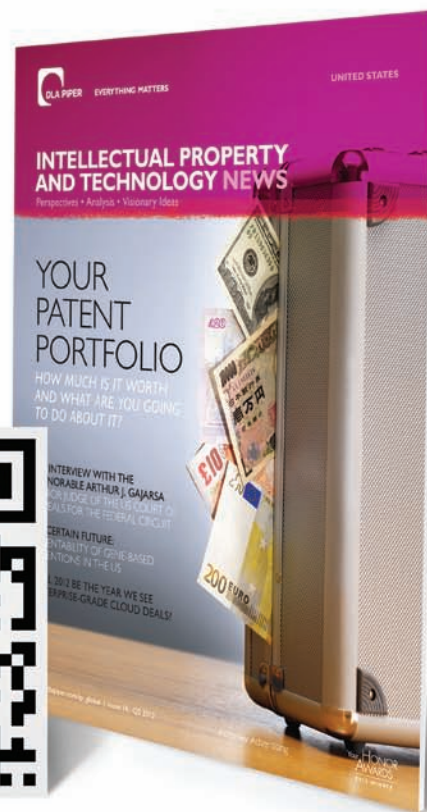
**ON 14 JUNE 2012, OUR INTELLECTUAL PROPERTY & TECHNOLOGY TEAM HELD A LUNCH SEMINAR ON "DATA PROTECTION ACROSS ASIA PACIFIC" IN OUR NEWLY REFURBISHED OFFICE IN SINGAPORE.**



Matt Glynn (Singapore), Chris Edwards (Singapore) and Arthur Cheuk (Hong Kong) provided an introduction to data protection regimes in Asia Pacific. It was extremely well attended by key industry members, with one attendee commenting "the seminar was informative with an excellent overview of the various components of data protection, it was to-the-point and precise". The attendees enjoyed our office's newly renovated facilities.

The next Asia IPT monthly seminar will be on "Win-Win outsourcing in globally recessed economic conditions – the Opex imperative" on 8 August 2012.

If you want to join our IPT events, please contact **Lorraine Yang** at [lorraine.yang@dlapiper.com](mailto:lorraine.yang@dlapiper.com).



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