



IAM: more than patents, beyond trade marks, way past IP. Fresh thinking from Watermark.

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Stay one step ahead of the competition

Filing patents can provide your competitors with useful information about your future direction. We offer advice on how to baffle your business rivals by leaving a misleading paper trail.

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Rise and shine: alternative energy sector sees growth in filings

Consistent breakthroughs in solar photovoltaic technology boosts alternative energy filings.

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It's a brave new internet world

The way that both business and users engage with the internet is changing. Users have long been familiar with .com, .org and .net which are referred to as generic top level domains (gTLDs). These gTLDs have been constant but now changes are afoot to allow for the introduction of new gTLDs. Rather than .com a new gTLD could be just about anything, for example .beach, .club or .yourbrandname. These new gTLDs are expected to come into operation in 2013.

Who can apply?

Anyone can apply to operate a new gTLD registry; however, in reality only those with significant resources will be able to afford the US\$185,000 price tag to start the process. Those large companies who see operating a registry as a beneficial business tool to improve their operations, or those that see a new registry as a money making opportunity are likely to apply.

Canon is one such company that has announced plans to operate its own registry, .canon, and believes this will allow the company to unify its online identity. By doing so, the company can ensure a common approach for all its business units, while also being comforted that consumers will always know where to go for genuine products.

In the alternative there are also plans by another organisation to introduce a .shop gTLD. This will be a commercial enterprise and presumably the owner

of the registry plans to promote the domain and encourage adoption by both those owning a shop, and also those looking to purchase goods from a 'shop'.

What does the advent of new gTLDs mean for trade mark owners?

At least for the short term .com is likely to remain the most common domain. It will take time for both businesses and consumers to adopt a new domain. However, this does not mean that trade mark owners should ignore these changes. For those companies that are considering operating their own registry they should be making plans now to ensure they have the capabilities. Even if not planning to operate their own registry, others should keep an eye on developments, and if a new gTLD is introduced that would benefit or damage their company, they should consider the business potential of registering a domain name with the Registrar of the new gTLD, or of taking steps to ensure a competitor does not.

For those companies that have issues with cybersquatting, provisions will be available to safeguard against this activity. A trademark clearing house will be established to allow trade mark owners to register their trade mark and be notified of any applications for gTLDs including their trade mark. How this process will actually work and the costs involved are yet to be determined.

Should you be interested in gTLDs or have any questions then please seek professional advice.

Paul Fong is the Co Chair of the ccTLD and IDNs sub-committees of the International Trade Mark Association



A strategy of misinformation

A great deal can be learned about your competitors' strategic direction by consulting their patents and publications.



Modern searching and database tools can, within a matter of a few hours, provide a detailed overview of the competitive patent landscape in a technical field of interest. This can afford information on your competitors' developments, what areas they have been focusing on in the past, and in what directions their future developments may be heading.

Of course, savvy competitors may learn just as much about your company's strategies by consulting your patents and publications and following your developments. Modern tools make this exercise simple and inexpensive and you should assume that savvy competitors will be aware of your every move. In light of this, anything that you publish or patent is likely going to be read by your competitors very quickly. For example, the publication of Apple Inc.'s applications and patents are regularly reported by the media in an effort to predict the arrival of new products.

However, this ease of information retrieval can be used to your advantage. As both technology and market environments can be full of uncertainties, companies may pursue patenting strategies to confuse, or even mislead, competitors that might be monitoring patents and applications to predict the emergence of new technologies.

Companies can use this strategy to confound competitors as to the technological direction the company is taking, and to the nature of planned future products and services, by filing a number of confounding patent disclosures. This strategy is often used by large corporations, particularly in highly competitive and rapidly developing technical fields. The strategy is much less prevalent in small enterprises as they do not have the financial resources necessary to file the large number of patents required to implement a useful misinformation strategy.

However, as an alternative to patent publication, making disclosures related to your developments elsewhere, such as in a trade, learned or industry journal or simply on your company website, can make it difficult for competitors to gather accurate competitive intelligence.

Consider a specific scenario in which you have developed a particular technology and applied for patents; however, you wish to minimise your competitors' ability to determine in which specific direction you are heading. You could consider publishing detailed accounts of certain variations of the technology in an industry journal highlighting their advantages, but refrain from discussing, in any specific fashion, the particular variation you are developing for commercial use. In complex technologies, this can cause your competitors to commit valuable time and resources attempting to figure out exactly what you are doing and where you are heading.

Advantageously, publishing this way requires a fraction of the financial resources required to misinform through the use of patent filings.

While publishing the information after the publication of your patent application can effectively deflect a competitor from your preferred direction, publishing the information prior to the publication of your patent application, but after the filing of your patent application, is significantly more powerful. As the normal time from filing a patent application to publication of the application is 18 months, timely published information just after patent filing can mislead your competitors into believing your strategic direction is heading in a particular direction whereas, in reality, you are concentrating your commercial efforts in another direction. It will be 18 months before your competitors see your patent application and by then they may already have expended significant effort in assessing your misinformation. Such a strategy can provide valuable competitive advantage.

The consideration of the use of such strategic publications should form part of a broader intellectual asset strategy and the advice of an IP professional should be sought to ensure that the content and timing of the publications makes sense in respect of the particular matter in question.

Dr Grant Jacobsen

Gene Patents Bill knocked out (for now)



On 21 September 2011, the Senate Committee handed down its Report into the 'controversial' private member's Patent Amendment (Human Genes and Biological Materials) Bill 2010, with its sole recommendation being that the Senate not pass the Bill. A dissenting report prepared by the original supporters of the Bill can also be found in the Report. The Bill is intended to exclude genetic and biological materials from patent protection.

This is a significant decision, a positive outcome and endorsement for the Australian biotech industry, Australia's research/academic institutions and overseas biotech companies who patent in Australia.

The decision not to recommend the Bill to the Senate was based on several key factors, two of which were:

- the proposed Bill did not represent an effective solution to the problems caused by patents over human genes and biological materials
- the proposed amendments in the Bill, whilst directed at a specific issue, could result in a significant number of unintended consequences, and not just for gene patents and biological materials, but also across the entire patent system and a range of industries.

It was the Committee's opinion that the complex issues raised during the inquiry would be better addressed, although not completely resolved, through the proposed amendments of the Raising the Bar Bill, rather than removing an area of patentable subject matter.

The Committee also recognised that other reforms may be needed in the future, to address issues relating to patentable subject matter, general ethical considerations and equitable access to healthcare, which were all discussed in the inquiry. As such, the Committee has indicated that it will maintain a 'watching brief' in relation to the impact of gene patents in Australia.

Dr John Golding

Bank on it

IAM: advising you Watermark has changed banks

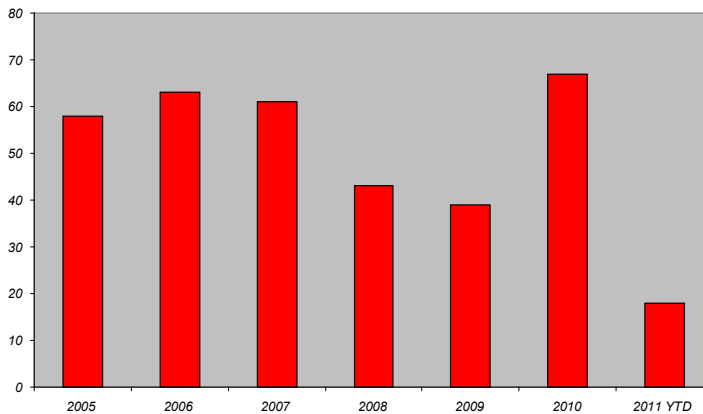
Watermark has new banking details. We have recently emailed or sent letters to your Finance Department advising them of our new bank account details for payments. Details can also be found at the 'Fresh News desk' on our website: www.watermark.com.au/FreshNews

Please ensure your records are updated accordingly.



Colour trade marks and successful retailing strategy

Under Australian trade mark law it is possible to register a colour as a trade mark for your goods and services, which can include product and packaging colour. One of the challenges facing colour trade mark registration is that the colour must be capable of distinguishing an applicant's goods from those of other traders, hence the relative proportion of colour trade marks lodged in Australia to all other types of marks remains low. The graph below shows colour trade mark filings at the Australian Trade Marks office from 2005 to 2011 (YTD).








Source: *The Age*, May 8th 2011, "Seeing red over olive ciggie packs"

Only about 40% of colour trade marks lodged between January 2005 and April 2011 have been examined and successfully registered.

Companies prepared to invest in a well planned prosecution strategy for protecting a colour trade mark and who are successful, are given a potentially powerful, long term monopoly on the identity of their business, product or service.

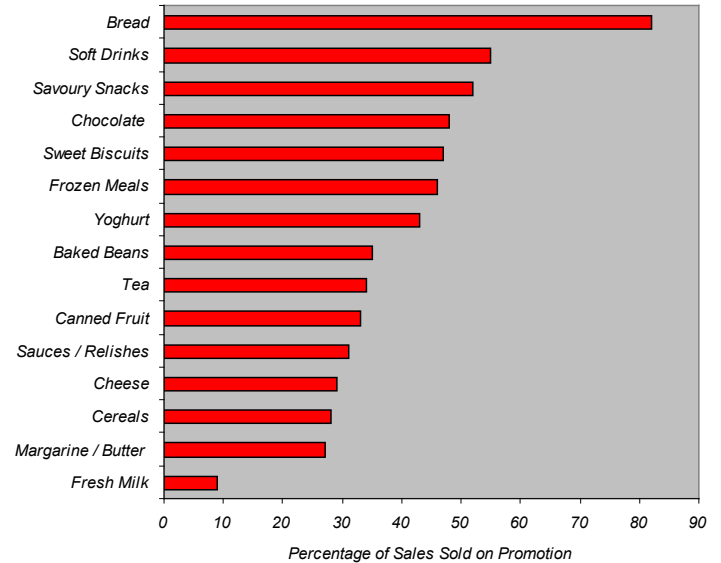
Recent examples are shown below.

Cadbury	Mars	Kimberly-Clark	San Pellegrino	Zespri Group
				
#1120622 Class 30 Chocolate	#1365687 Class 31 Cat food	#1159874 Class 5 Hygiene products	#1111473 Class 32 Bottled water	#999971 Class 16 & 31 Kiwi fruit

Source: *The Australian Financial Review*, April 18th 2011, Basket Case

Why owning a colour trade mark can be so important

A recent study by a prominent Australian Investment Bank showed that for 15 staples sold in major retail stores, the average % of sales of these products sold on promotion was almost 40%, as shown in the chart below.



Source: *The Economist*, December 18th 2010, You Choose

Promotional costs used to drive sales, are sometimes shared between brand owner and retailer. However, in recent years, with the rise of retailers 'own brands' the level of promotional discounting has often come at the expense of brand owners margins.

Ned Coten, director of Melbourne based creative agency, Acorn Brand Design, says having a strong colour centric brand image can be one component used to offset such discounting. "It is critical for FMCG brand owners to use all tools available to create a distinct brand identity. Having a colour trade mark is one of the most powerful."

Colours and consumer perception

In recent weeks the Federal Government has controversially touted a plan that all cigarettes are to be sold in plain 'olive green' coloured packaging. Various lobby groups representing fruit and vegetable growers have reacted unfavourably, believing that the equity built up in their own packaged goods, will be adversely affected by the new laws.

Watermark lodges and successfully prosecutes hundreds of trademarks each year for local and international clients looking to create a distinct identity for their business, product or service.

If you'd like to tap into this experience please contact us.

Adam Perkins





Alternative energy technologies: patenting trends in Australia

Research and development in the energy sector has perhaps never been so important. With different organisations pouring resources into increasing the efficiency of existing technologies, and the development of all-new techniques to harness energy resources, it is perhaps unsurprising that patents make up key assets of the sector.

In Australia, growth in the number of filings in classes relating to alternative energy is higher than that of total patent filings. This implies that alternative technology is an area of high research activity. Overall, the last three years has seen patents in the alternative energy sector grow compared to the overall slow down in Australian patent filings.

The graph below shows both:

- the number of patents filed in each technology field during the 12 months to June 2011, and
- the relative change in filings from the previous 12 month period.

Insight into research trends in the field can be readily obtained from this data.

Fuel cells and biofuels represent areas of research that have been in active development for a number of years, and as a consequence the IP environment is well populated. The number of filings over the last two years has decreased in these categories.

Solar photovoltaic (Solar PV) is a well known solar energy technology. As with fuel cells, there has been active research in Solar PV technologies for some time, but in contrast there have been constant breakthroughs and increases in performance. Overall patent filing rates have remained strong over the last 24 months. Dye-sensitized solar cells (Solar DSSC) are the new kids on the block when it comes to solar energy technology. As this technology area is relatively new, the overall number of patent filings in Australia is still quite low, however, there is already evidence that it will be an energy technology of the near future.

The intellectual property landscape for energy technologies is for the most part dominated by large international firms, and this is as true for alternative energy technologies as for traditional energy technologies. The strength of the competition for a small firm entering the patent race can appear daunting. However, whether you are a small start up firm or a multinational looking to develop your energy patent portfolio, it is clear that it is necessary to be in the race rather than merely an onlooker. Watermark has the expertise and drive to assist you in maximising your patenting potential in what is an exciting and dynamic industry.

Jeremy Robinson

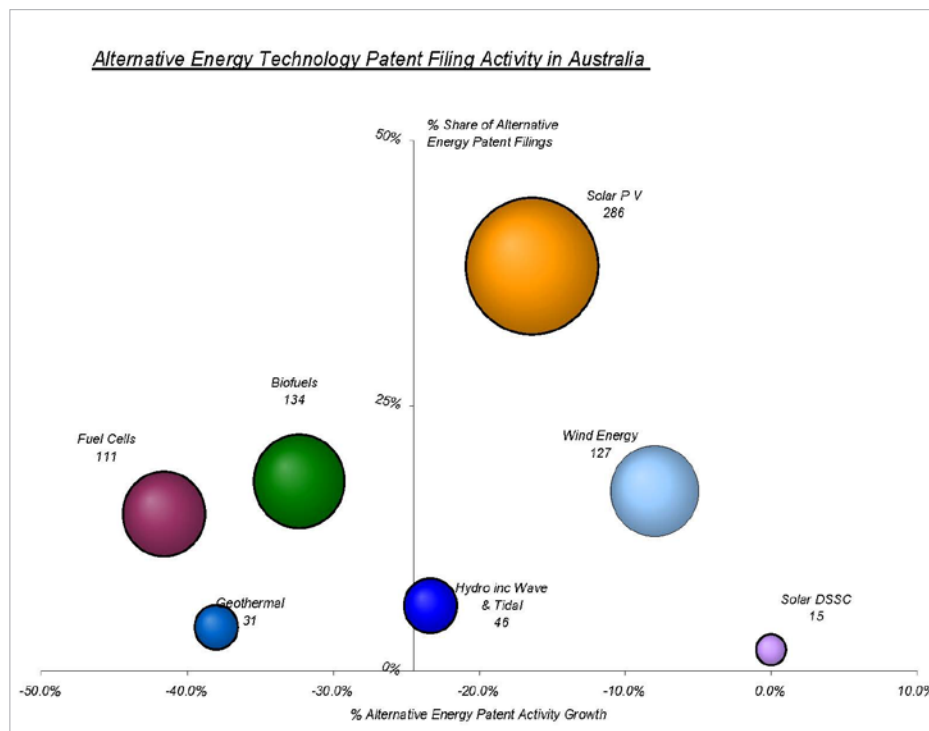


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Meet Ward Olivete

“As a lawyer in the USA, I’ve helped my clients meet their commercial objectives in many ways including drafting contracts and licensing agreements, prosecuting IP applications, asserting IP rights and providing advice in regard to competitive intelligence and IP strategies. And while I enjoy each of these tasks, I’m downright enthusiastic to roll up my sleeves and become an impassioned advocate should a matter turn contentious.”

* Ward is currently undertaking studies which will enable him to practice as a registered lawyer in Australia.



Source: IP Australia



Ward Olivete is a US Lawyer and registered Patent and Trade Marks Attorney. Contact Ward on w.olivete@watermark.com.au