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# Changes to Keyword Advertising



Have you been monitoring your internet traffic and noted a drop-off in the last few months? Worse still, have you not been able to explain this drop off? Your SEO strategies seem sound, your product is still a market leader, and market conditions are such that you expected traffic to increase. The answer may be a low-key amendment which Google recently made to their Adwords policy.

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## Copyright in the Spotlight – Australia Considers Law Reform for the Digital Economy

Digital technologies facilitate an unprecedented ease of reproduction and dissemination once works have been created or captured in digital formats.

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## Congratulations

Intellectual Asset Magazine (IAM) continues to present industry leading guides that aim to identify the top practitioners of intellectual property law in key jurisdictions around the world.

**Watermark congratulates Carolyn Harris and Peter Hallett on being named in IAM Patent 1000: The World's Leading Patent Practitioners 2013. We also congratulate Mark Summerfield and Marnie Williams on being named in IAM Strategy 300: The World's Leading IP Strategists.**

## Australia China Business Week Melbourne

Watermark were proud sponsors of the Australia China Business Week (ACBW) in Melbourne on 19 June. Our Principal, Mr Ray Tettman (pictured below, left) was also a guest panelist participating in a discussion about 'The China Market: online, offline, retail and B2B'.

The ACBW has become a premier event strengthening business relationships between Australia and China. The presentations and networking functions are attended by delegates, visitors and government officials from both countries. This gathering helps facilitate connections for people seeking to do business between Australia and China, and educates them on the business landscape, legal issues and economic environment of each country.

The ACBW is also held annually in Shanghai as well as Sydney. Watermark will also be sponsoring ACBW Sydney on 29 August, and we look forward to seeing some of our East Coast clients there.



Courtesy Australia China Business Forum ©



# Changes to Keyword Advertising

## From page 1

Previously, Australian trade mark owners were able to use complaint procedures managed by Google if another party used their registered trade mark in an Adwords campaign. For example, if Coca-Cola purchased PEPSI as an Adwords keyword, then Pepsico could complain to Google to stop the practice. This was a relatively simple process, which assisted trade mark owners.

From 23 April 2013 Google amended its policies to no longer restrict the purchase of keywords to generate Adwords. Any party is now free – as far as Google's policies are concerned – to purchase any keyword as part of an Adwords campaign. This is so, regardless of whether or not the keyword purchased is a registered Australian trade mark of a competitor. That is, under the new Google policies there are no longer restrictions on, for example, Coca-Cola purchasing the trade mark PEPSI in an Adwords campaign on behalf of Coke, and vice versa.

So if your business relies on internet traffic generated from search engines, and in particular from Google, then these changes may be particularly relevant to you. If your internet traffic does fall then it may be worthwhile to investigate whether your competitors are purchasing your trade marks for their Adwords campaigns. Of course, for good competitor intelligence it may be valuable to monitor what your key competitors are doing in this regard even if your website hits are not affected.

While Google is no longer concerned with one party using another's trade mark in Adwords campaigns, depending on the circumstances and actual use, action may still be available under Australian Consumer Law or the Australian Trade Mark Act. It is also worth noting that the recent changes do not apply to the use of trade marks in the promotional text displayed with the sponsored link. Businesses faced with these issues should consult with their advisers for possible options.

**Paul Fong**

## Reining In Parallel Imports - Is This Goodbye to Discounted Genuine Goods?

The price of goods sold in Australia compared to that in the rest of the world has become a significant political and consumer issue. A recent court decision has restricted the circumstances under which the parallel import of authentic goods into Australia is allowed, much to the delight of authorised distributors yet to the disappointment of consumers seeking a more competitive market.

### What is Parallel Importing?

Parallel importing occurs when a trade mark is legitimately applied to authentic goods overseas, by or with the consent of the trade mark owner, and those goods are then imported into Australia without the consent of the Australian registered owner of that same mark.

The Australian registered trade mark owner or authorised distributor often finds the parallel importation of legitimate goods objectionable as they are sold in competition with goods specifically designated for sale in Australia, often at a lower price. Moreover, parallel imports often exploit the goodwill of the Australian registered owner or authorised distributor.

In Australia, the parallel importation of authentic goods has been allowed if the importer could satisfy a statutory defence that the trade mark was applied to the goods by, or with the consent of, the Australian trade mark owner.

### Reigning in the legitimacy of parallel imports

A recent appeal decision involving Paul's Retail Pty Ltd (trading as Paul's Warehouse) and Lonsdale Australia Limited (the Australian registered owner of the Lonsdale sportswear trade marks) defined and further clarified the circumstances where parallel importation is allowable<sup>1</sup>.

The case stemmed from a licence granted to Punch GmbH (Punch) by Lonsdale Sports Limited (Lonsdale UK) which permitted Punch to use various Lonsdale trade marks in Europe, as well as to manufacture goods and apply the Lonsdale marks to those goods in China. Punch was not licensed to use the trade marks in Australia.

Nearly 300,000 items of goods manufactured under Punch's licence in China were later imported into Australia where they were offered for sale at Paul's Warehouse. Paul's Warehouse stood accused of trade mark infringement because of this activity.

In the initial judgment, the lower court found that Paul's Warehouse infringed Lonsdale's trade mark because it was not the Australian registered trade mark owner (Lonsdale Australia Limited) that had applied, or consented to the application of the Lonsdale trade marks in China. Rather, if there was any consent, the consent was by Lonsdale UK. This meant that Paul's Warehouse could not rely on the statutory defence to infringement.

The appeal court agreed that Paul's Warehouse infringed the trade mark, but applied different reasoning. It instead looked into the terms of the licence between Lonsdale UK and Punch. Punch applied the Lonsdale marks

under a licence to manufacture. Lonsdale UK contractually limited Punch's use of the trade marks to Europe. Consequently, under the licence, Punch could not 'consent' to the application of the marks in relation to goods sold in Australia, so the statutory defence was not triggered. The appeal court accordingly did not need to consider whether Lonsdale Australia (the actual trade mark owner in Australia) was the party that gave consent.



### Parallel importers now have heavier obligations than before

The decision restricts the scope of legal parallel importation. Going forward, importers must:

- verify the authenticity of goods coming into Australia to ensure the goods are not counterfeit as they did before, but also
- check conditions imposed by the trade mark owner/licensor upon the entity from which the goods are received.

Additional warranties should be considered in agreements with those off shore suppliers to ensure the importers are not unwittingly caught in the Paul's Warehouse situation.

Similarly, it would be wise for owners/manufacturers seeking to maximise their income from the sale of licensed goods, to ensure that licences granted are watertight in narrowing the geographic scope of rights afforded to their licensees.

**Leanne Oitmaa and Ward Olivete**

<sup>1</sup> Paul's Retail Pty Ltd v Lonsdale Australia Limited [2012] FCAFC 130



# Copyright in the Spotlight - Australia Considers Law Reform for the Digital Economy

## From page 1

The Australian Law Reform Commission (ALRC) is currently grappling with the new challenges faced by copyright laws in the digital world, and has recently released a discussion paper seeking comment on a range of proposed reforms.

### Copying in the digital age

Established models for the production and consumption of content are undergoing a radical disruptive transformation.

For example, at the end of a musical performance, an artist can make their work available online for immediate purchase and download. Popular free-to-air broadcasts of local content or global cultural events, such as the Eurovision Song Contest, operate across multiple platforms allowing consumers to view the free-to-air broadcast and, moments later, purchase content through iTunes or e-commerce retailers.

Cloud computing is rapidly increasing in popularity. Submissions received by the ALRC highlight the issues posed by cloud computing in Australian copyright law. Consumers are 'backing up data, and format shifting their music and film collections, to the cloud. Apple iCloud is one cloud service potentially outside existing private copying provisions in the Copyright Act.'<sup>1</sup>

In the publishing industry, traditional contract models and concepts such as 'subsidiary rights' are becoming outdated with the rise of electronic formats. The Australian Society of Authors has sought to address this by preparing industry recommended contract terms for use by authors when negotiating for electronic formats.

The nature of digital technology means that one of the necessary steps involved in many on-line activities is for the computer to make a temporary copy of the relevant content to digital memory. This activity infringes the reproduction right under the Australian Copyright Act 1968 and requires permission to be obtained from the copyright owner unless it falls within one of the exceptions provided by the Act.<sup>2</sup>

Digital technologies represent new and exciting

frontiers for creators and rights holders. Yet new digital platforms also facilitate piracy on an unprecedented scale, with infringing copies able to be reproduced and disseminated at a 'viral' rate, such as by using peer-to-peer file sharing systems. One of the issues facing copyright owners and creators is how to detect infringements and enforce rights in the face of these new technologies.

Copyright owners have formed alliances, attempting to hold internet service providers liable for infringing activities of their users, with decidedly mixed results. Internet service provider iiNET recently escaped liability in Australia for authorising infringement by customers who were illegally downloading films using peer-to-peer technology. The High Court found<sup>3</sup> that iiNET was not able to prevent customers from illegally downloading films using peer-to-peer technology and could only terminate its service contracts with those customers.

Australian Courts have recently considered cloud-based personal video recording services in *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)*<sup>4</sup>. Optus operated a service called 'TV Now', which enabled consumers to record free-to-air broadcasts, such as AFL or NRL matches, on Optus' servers, for later viewing, e.g. on portable electronic devices. The Federal Court, on appeal, rejected Optus' attempt to rely on the existing 'time-shifting' exception, which has long permitted consumers to record programs using personal recording devices, for later viewing.

### Proposed Reforms

The ALRC is reviewing the current exceptions and statutory licences in the Copyright Act to determine whether they are sufficient in the digital environment or if new exceptions are needed. The discussion paper *Copyright and the Digital Economy*<sup>5</sup> was released on 5 June 2013 and the final report is due by 30 November 2013.

Not-for-profit organisation, The Australian Digital Alliance, has recommended a broad 'fair use' exception that would extend to cloud-based services such as the Optus TV Now service in line with other jurisdictions. The rationale is to prevent

innovation being stifled and a decline in investment in Australia's digital economy<sup>6</sup>.

The ALRC's proposed 'fair use' exception will involve a consideration of whether use by third parties of copyright material is likely to be fair. The indication is that where there is a finding of a commercial use by the third party, this is not likely to favour a finding of fair use<sup>7</sup>.

### What is 'fair use'?

When considering whether there has been a 'fair use', the test will be to consider the following four 'fairness factors', adopted from US law:

- the purpose and character of the use – was it commercial or transformative?
- the nature of the copyrighted work – is it creative and has it been published?
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole – how much has been taken?
- effect upon the market for or value of the copyrighted work<sup>8</sup>.

While the proposed 'fair use' exception is a welcome attempt aimed at reducing the risk of Australia missing out on new transformative technologies, it remains to be seen if it will be accepted in the present form and whether – in the ALRC's words – it "asks the right questions of new business models that use copyright material."<sup>9</sup>

### Andrea Allan

<sup>1</sup> Submissions by the Australian Digital Alliance and Australian Libraries Copyright Committee to the Australian Law Reform Commission, November 2012, Ch. 3 Cloud Computing at p. 15

<sup>2</sup> Kimberlee Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform: A Policy paper prepared for discussion by the Australian Digital Alliance (April 2011)*, cited at p. 15 of the Submissions by the Australian Digital Alliance and Australian Libraries Copyright Committee to the Australian Law Reform Commission, November 2012, Ch. 3 Cloud Computing

<sup>3</sup> *Roadshow Films Pty Ltd v iiNet Ltd [2012] 16 HCA*

<sup>4</sup> [2012] FCA 34

<sup>5</sup> <http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>

<sup>6</sup> Technology neutrality and consumer copying, <http://digital.org.au/content/positions-key-issues>.

<sup>7</sup> ALRC Discussion Paper 'Copyright and the Digital Economy', *Whose Purpose?*, paragraph 5.42 at p. 106

<sup>8</sup> *Ibid* at p. 91

<sup>9</sup> *Ibid* at p. 108

## Are you ready to claim your R&D tax benefits?

As the close of the financial year approaches, companies are now turning their efforts to preparation of their tax return and the lodgement of their Research & Development tax incentive claim for 2013 for a hopefully fast return of the benefit.

The self assessment tax system requires all taxpayers to maintain appropriate records of their business transactions and with an increased focus on substantiation under the R&D tax incentive scheme, it is important for companies to be 'compliance ready'.

Making a successful claim for the R&D Tax Incentive is also subject to these substantiation requirements, and documentation to verify your claim should be available for review upon request.

Companies need to collate the documents supporting their 2013 R&D claim and also need to make sure systems are in place to capture the R&D information for the coming year.

Registration of claims for the R&D incentive can take place up to 10 months after the financial year

in which R&D activities took place. For companies looking to claim for the 2013 FY finishing June 30, lodgement can take place up to April 2014 however to obtain the benefit sooner, companies need to register their R&D activities with AusIndustry as soon as possible. Once a Registration Number is received from AusIndustry, companies can include the R&D tax schedule in their tax return. It is important to note that companies need to lodge the activities with AusIndustry prior to lodging the R&D expenditure in their tax return.

In reviewing registered R&D claims via an audit, both AusIndustry and the ATO would expect to see documentation to evidence that:

- the activities, as disclosed in registrations, actually took place
- the activities satisfy the requirements of the definition of R&D activities, and
- the amounts incurred on those activities have been accounted for and claimed correctly.

For your R&D activities, AusIndustry would expect

to see documents relating to background searches, tests and experiments which have been carried out, all of the important results of the experimentation, and conclusions. Companies need to ensure they maintain documentation of the experiments taking place. This might be in the form of reports or emails, external test results and analysis of outcomes.

Documenting the R&D process and its results has never been more important. This is therefore an ideal time to review and update your procedures for the new Tax Incentive for the upcoming year, and to make sure that the type of documentation that you produce and maintain is adequate for this purpose.

Now is also the time to review your existing documentation created during the R&D process, to ensure that you are not one of the claimants which falls short of the 'compliance ready' requirements.

If you need assistance with this or any other aspect of claiming the R&D tax incentive please contact Kate Mahady ([k.mahady@watermark.com.au](mailto:k.mahady@watermark.com.au)) or Cleo de la Harpe ([c.delaharpe@watermark.com.au](mailto:c.delaharpe@watermark.com.au)).



## 2013 – a year of change in the IP world

This year is likely to be considered momentous for Intellectual Property practitioners and users around the world. We have already seen the implementation of the final stages of the America Invents Act (AIA) in the USA, and the signing of the Unified Patent Court Agreement in Europe which should pave the way for the introduction of a European patent with unitary effect (Unitary Patent). Closer to home 'Down Under', in April the 'Raising the Bar' Act became law in Australia and New Zealand could soon have a new Patents Act.

### USA – America Invents Act

On 16 March 2013, the USA moved from a 'first to invent' to a 'first inventor to file' patent system. This brings the USA substantially into line with most other countries with first to file patent systems. Some other changes introduced by the AIA include:

- Retention of the one-year grace period but only in relation to disclosures personal to the inventor, with a narrower shield relating to a third-party disclosure.
- Expansion of the prior art base to include public uses, sales, offers for sale, etc. anywhere in the world.

### Europe – Unitary Patents and the Unified Patent Court

A Unified Patent Court Agreement signed by 25 states of the European Union (EU) in February could see the new Unitary Patent System starting as early as 2014, though it will more likely start in 2015 or 2016. Briefly, the main features of the Unitary Patent are:

- A European Patent with Unitary Effect is a single European patent granted by the European Patent Office covering 25 countries of the European Union, with only Spain and Italy initially opting out.
- The European Unitary Patent will operate alongside the current system, with national patents still available as an alternative.
- The cost of obtaining and maintaining a European Unitary Patent is likely to be similar to the cost for a European patent validated in about 4-5 countries.
- European Unitary Patents will be litigated exclusively in a new Unified Patents Court.
- While large companies may benefit from the new system, SMEs may be better off obtaining national patents in selected European countries of particular interest.

On the trade mark front, in March the EU Commission issued proposals to amend the Community Trade Mark (CTM) Regulation. The aim is to streamline and harmonise registration procedures and make the fee structure more flexible, with reduced costs for a registration in a single class.

### Australia – Raising the Bar

The majority of provisions in the 'Raising the Bar' Act, which amended all of Australia's IP laws, came into effect in April. The most significant changes were in the patents area with standards of patentability, including the test for inventive step, being raised from 15 April 2013. This led to a deluge of requests for examination and new

applications with examination requests being filed before the change in law.

Other changes introduced by the 'Raising the Bar' Act include:

- A reduction in the acceptance period for patents from 21 to 12 months.
- The 'fair basis' requirement for patents being replaced by a requirement for 'support in the description'.
- Modified examination and omnibus claims abolished.
- Streamlining Opposition procedures for both patents and trade marks.
- Strengthened provisions relating to customs seizure of counterfeit goods the subject of trade marks or copyright.

It is likely to be some time before we fully see the effect of the changes in examination of patents, due to the backlog of applications to which the old law still applies. However, if you have an Australian application that you would like examined sooner rather than later, expedited examination can be requested voluntarily.

### UK – The Patent Box and other changes

In April, the Patent Box scheme giving tax incentives for companies creating and developing patented inventions came into effect. The Patent Box is a scheme designed to encourage innovation in the UK, by allowing a reduction in corporation tax based on profits related to patented inventions.

The Australian government also provides R&D tax incentives, with generous benefits for eligible R&D activities.

Watermark Advisory Services has people with R&D tax expertise who are dedicated to assisting companies in claiming R&D tax benefits.

There will be other changes in IP in the UK when the Intellectual Property Bill 2013-2014 becomes law. Among the changes will be stronger protection for owners of UK and European Registered Designs, and some changes to unregistered design rights.

### Singapore

Draft amendments to the Singapore Patents Rules have just been announced. The most significant change is a move from a self-assessment system to a positive grant system. Presently, a Singapore patent can be granted on the basis of a positive or negative examination report. Following the amendments, only patent applications with positive examination results can proceed to grant.

### Summary

The IP world is constantly changing and 2013 will see more significant changes in many countries than most other years. Watermark Intellectual Asset Management has experts with a vast experience in IP laws, not only in Australia but also in many foreign jurisdictions, who keep abreast of these changes to assist companies large and small in formulating appropriate IP strategies to maximise the value from their intellectual assets.

### Roger Green



Part of  
your  
team

### Meet Carol Kane

"I love my job! Every day I see new ideas, innovations, creativity and the enthusiasm that comes with them. Throughout my career, I have been fortunate to witness an endless stream of ingenuity and resourcefulness. As



I also play an important role in the protection and management of intellectual assets, when I see creativity and innovation become commercial reality, I feel a sense of ownership. This drives me to look out for the asset, observe how it's being used commercially, and generally take an interest that's wider than just protection. I've always thought that as IP professionals, our role is to do more than just protect IP.

This is something I have mused over during my career. I questioned whether I could give advice that was relevant and practical to business, when I had a limited understanding of business itself. All patent and trade mark attorneys are technically competent in the law, but I had to wonder whether all attorneys were able to give advice relevant to their client's business.

Having identified an area that I thought could vastly improve client service, I began an MBA with one of Australia's premier business schools.

My experiences and current studies have enabled me to better understand and advise on IAM in a new light. IP is much more than a patent or a trade mark. It's an integral and evolving part of business. **IAM: a fighter.**

Carol Kane is a Patent and Trade Marks Attorney of Watermark.  
Contact Carol on [c.kane@watermark.com.au](mailto:c.kane@watermark.com.au)