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## Competitive Intelligence = Competitive Edge



Competitive intelligence has entered a new age of opportunity. In recent years it has received increased attention and is now accepted as vital for developing and maintaining a competitive edge in a rapidly changing global economy.

Core to this opportunity is the continuing growth of online resources, enabling a level of information access considered unthinkable only a few years ago.

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Watermark is Australian owned and a leading provider of Intellectual Asset Management services.

Our services include: Patents, Trade Marks and Designs, Intellectual Property (IP) Commercial and Litigation Legal Services, Research & Development and Tax Incentive Advisory and Business Information and IP Analytical Services.

Watermark boasts a 153 year history and employs over 110 people.

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## ‘How much is my IP worth?’

It is reasonable for the holder of any IP to ask how much that IP is worth, and it is a question that we are being asked more frequently. The question is particularly relevant for entities whose value resides primarily in their IP, such as innovative and creative start-up ventures, and small-to-medium enterprises (SMEs), which often have a valuable IP asset portfolio yet own comparatively minimal tangible assets.

Start-ups and SMEs typically require one or more injections of capital before their IP supports a commercially applied product or service. Unfortunately, they are often seen as high risk ventures.

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# Competitive Intelligence = Competitive Edge

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Of equal significance is the rapid expansion of the type of information available online. It is now possible to search, organise and analyse scientific and technical publications, patent publications and patent prosecution histories, business news, commercial information and corporate and government disclosures in an unprecedented manner.

## How can competitive intelligence assist you?

While all of these information sources are important, for many businesses developing an awareness of the patent landscape can be invaluable. According to a study<sup>1</sup> carried out by the European Patent Office, approximately 80% of scientific and technical information can only be found from patent documents, making them a unique source of technical information and competitor business strategy. Further, publication of a patent document will often be the first public disclosure of information on a particular development. Clearly, competitive advantage may be obtained if patent publications are monitored and analysed, so as to uncover activities in a particular field and, vitally, to uncover them early.

## Key outcomes from an awareness of patents

### Identify competitors and partnering opportunities

Searching and analysing patent filings can identify obvious competitors in a particular industry space. It can also identify companies with similar technology or synergic technology currently being used in other industries, which may highlight potential partners or joint venture opportunities. Gaps in a company's patent filings may signify areas where the company needs to licence or partner. Based on a competitor's granted patents you may also need a license from them to commercialise your developments.

### Determine importance of a technology to a competitor

If a patent application is filed in the name of a company and in numerous countries, then the technology is likely better funded and more important than an application filed in the name of a single inventor and filed in a single country. Further, the filing of additional patent applications in the patent family or multiple related applications may point to ongoing significant development efforts.

### Continuous monitoring of newly published patent applications

Watching the development of your competitors' technology can identify changes over time in the focus and intensity of patent filings and also identify new technologies and

future trends in the industry. As patents contain a wealth of technical information, often such information can be utilised in guiding your developments - of particular value early in a development cycle.

### Assess competitors' development efforts and direction

Foreign patent family searches can indicate geographical regions that a competitor is targeting. If these regions are changing, this may indicate the level of importance of the development or that the competitor is abandoning certain regions.

Patent information may be combined with other information released by a competitor to help identify its key focus areas. Other information includes published technical papers, technical conference presentations, corporate press releases, announcements by management and regulatory activity.

## Invest for the future

While patent searching, patent landscaping and analysis involves some financial outlay, it should be considered as a sound business investment. According to the same EPO study<sup>1</sup>, 30% of R&D investment is wasted on redeveloping existing inventions - 'reinventing the wheel'. One reason for this is the lack of awareness that something had been prior patented, often because the patent was the sole vehicle of publication. Further, the technical information in patents provides solutions to problems. Being informed of these solutions soon after their publication may provide information that can directly and immediately impact on your developments.

Therefore, while competitive intelligence is partly an exercise in due diligence, it is also an opportunity analysis. Most companies can benefit from competitive patent intelligence, whether it is focused on simply increasing awareness of the global landscape in a particular industry or specifically targeted to key competitors and their development strategies.

As part of our services, Watermark provides comprehensive patent searching, patent landscaping and analysis services to help clients develop their competitive edge through competitive intelligence.

**By Dr Grant Jacobsen**

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<sup>1</sup> [http://ec.europa.eu/invest-in-research/pdf/download\\_en/patents\\_for\\_researchers.pdf](http://ec.europa.eu/invest-in-research/pdf/download_en/patents_for_researchers.pdf)





# Serving evidence in an Australian patent opposition? Be diligent...

In April 2013 the Raising the Bar legislation implemented new regulations for patent opposition procedures, including changes to deadlines and extensions of time for serving evidence.

Parties involved in oppositions need to ensure their actions are diligent so that they meet the relevant deadlines or, alternatively, have a basis on which to obtain an extension of time.

Under previous regulations, an extension of time was available for serving evidence providing IP Australia was 'reasonably satisfied' that it was 'appropriate in all the circumstances'. In practice, the extension of time would be allowed if the applicant demonstrated progress in evidence preparation or that settlement negotiations were occurring. Consequently, patent opposition proceedings became protracted and could extend over a number of years.

Aiming to speed up the process, the new regulations allow:

- three months for the Opponent to file evidence in support,
- three months for the Applicant to file evidence in answer,
- two months for the Opponent to file evidence in reply.

In the event that any of these deadlines cannot be met, an extension of time can only be obtained by the relevant party if the Patent Office can answer 'yes' to the following questions based on material provided in the extension application:

1. has the party (and their attorney or agent) made all reasonable efforts to comply with all relevant filing requirements? and
2. was the failure to file the evidence in time despite the party (and their attorney or agent) acting promptly and diligently at all times to ensure the evidence is filed in time? or
3. were there exceptional circumstances that warrant the extension?<sup>1</sup>

IP Australia has now issued a number of decisions based on the new regulations.

Extensions of time have been refused where:

- insufficient information about steps taken was provided<sup>1</sup>;
- the expert was on anticipated extended holiday leave<sup>2</sup>;
- no action was taken to prepare evidence while a settlement proposal was being considered<sup>5</sup>.

Extensions of time have been granted where;

- settlement discussions have been occurring and are close to resolution<sup>4</sup>;
- experts have been identified and subsequently been found to be unsuitable or unexpectedly unavailable<sup>3</sup>.

Exceptional circumstances do not include:

- the attorney incorrectly assuming the evidence deadlines were those applicable under the previous regulations<sup>5</sup>;
- a requirement to provide further and better particulars<sup>1</sup>;
- an attorney reading and understanding the new regulations<sup>1</sup>;
- anticipated extended holiday leave or work commitments<sup>2</sup>.

The Opponent and Applicant (and their attorneys) must therefore work consistently and quickly to prepare and file their evidence. Experts must be promptly engaged and instructed, and their report(s) prepared and affidavits/statutory declarations finalised in a timely fashion. If an extension of time is required, full disclosure of all actions taken must be provided. Reasonable efforts will be determined on a case by case basis but do not include unexplained delay, delay in engaging an expert, delay in engaging a further expert (if required), delay in an expert providing evidence or delay in provision of instructions to the legal representative.

If the patent applicant decides to amend the patent claims during the opposition procedure this may lead to a stay in the proceedings and should thus be considered as a strategic option. Given the much stricter requirements now in force, it is imperative that those involved in patent oppositions take all necessary steps as early as possible to ensure deadlines are met, or alternatively to ensure there is sufficient basis on which to obtain an extension of time.

**By Carolyn Harris**

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<sup>1</sup> Julie-Anne McCarthy and Bradley McCarthy v TRED Design Pty Ltd [2013] APO 57

<sup>2</sup> Meril Limited v Novartis AG [2013] APO 65

<sup>3</sup> RTI Pty Ltd v Scantech International Pty Ltd [2014] APO 4

<sup>4</sup> Innovia Security Pty Ltd v JDS Uniphase Corporation [2014] APO 5

<sup>5</sup> Fonterra Co-operative Group Limited v Meiji Dairies Corporation [2014] APO 11