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Non-use Not Necessarily Detrimental

Pioneer Computers Australia Pty Limited v Pioneer KK

The Federal Court recently handed down its decision concerning an appeal from a decision of the delegate of the Registrar of Trade Marks in respect of an application for removal of two registrations for the trade mark "PIONEER" and device in the name of Pioneer KK on the basis of non-use.

The decision deals with various matters including whether the removal application was defective, whether the Applicant was a person aggrieved, whether use of the trade marks occurred in respect of the removal goods and services, and importantly, the exercise of the discretion of the Registrar/Court to allow trade marks to remain on the Register in circumstances where use of the trade mark in respect of the removal goods/services has not been made out.

Background

Pioneer Computers Australia Pty Limited ("PCA") traded as a manufacturer and vendor of computer products and services since 1996. Pioneer KK was the well known Japanese manufacturer of audio and audio-visual products.

The removal goods included computers, computer peripheral devices and other computer products. The removal services comprised the installation, maintenance and repair of office machines and equipment, data processing apparatus and computers.

In the proceedings before the Trade Marks Office, the Registrar concluded that both registrations should be preserved in respect of the removal goods and the removal services. On appeal, PCA challenged the conclusion of the Registrar that there had been use of the trade marks in respect of computer peripherals and the decision of the Registrar to exercise the discretion under section 101(3).

Summary of Outcome

PCA relied upon both of the removal grounds under section 92(4) for the purpose of the Trade Mark Office proceedings and the appeal. That is, a lack of intention in good faith to use the trade mark on the day of applying for registration, with no use at any time up until one month before filing the removal application (being the ground provided for under section 92(4)(a)), and no use of the trade mark for a continuous period of three years ending one month before filing the removal application (being the section 92(4)(b) ground). The Court considered that the removal applications were defective insofar as the 92(4)(a) ground was concerned, because the supporting statutory declaration did not refer to Pioneer KK's intention to use the marks (as required by the regulations applicable at the time of filing).

In finding that PCA was a person aggrieved (a requirement under section 92(1) as it stood at the time of filing of the non-use application), the Court took into account Pioneer KK's previous threat of proceedings against PCA for trade mark infringement. Although PCA had not sold or supplied all of the removal goods or removal services under the trade mark "PIONEER" at any time (which Pioneer KK relied upon to argue that PCA was not a person aggrieved in respect of all of the removal goods and removal services), the Court noted that Pioneer KK had demanded a complete cessation of the use of the trade mark "PIONEER".

The Court found that Pioneer KK had demonstrated use of the second "PIONEER" trade mark during the relevant period in respect of computer peripherals, but not in respect of the balance of the removal goods and removal services. Although there was no use of the first "PIONEER" trade mark during the relevant period, the Court found that the differences between the two marks did not substantially affect their identity. It was therefore necessary for the Court to consider whether to exercise its discretion under section 101(3) to allow the trade marks to remain on the Register even though the removal grounds (being non-use in this case) had been established in respect of the removal goods (save for computer peripherals) and the removal services.

In exercising its discretion under section 101(3) to allow both of the "PIONEER" trade marks to remain registered in respect of the removal goods, the Court took into account the following matters:

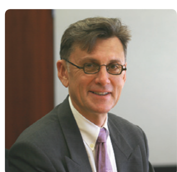
- » The convergence of computer products and audio visual products and the concept of brand extension, both of which were found to have resulted in some actual confusion (as between PCA and Pioneer KK) and be likely to give rise to confusion if the removal goods were sold under or by reference to the trade mark "PIONEER" by companies other than Pioneer KK.
- » The established use of the Pioneer KK marks in respect of audio-visual products

and multimedia devices. In that regard, section 101(4) was introduced in 2006 to provide that use of a trade mark in respect of similar goods or closely related services or similar services or closely related goods could be taken into account in the exercise of the discretion under section 101(3). Although the relevant period in this case pre-dated the introduction of section 101(4), the Court held that Pioneer KK's use of the trade mark "PIONEER" on closely related goods (being audio-visual products and multimedia devices) could be taken into account in considering whether to exercise its discretion under section 101(3). In other words, the Court was of the view that the introduction of section 101(4) in 2006 simply clarified the position concerning section 101(3).

With regard to the removal services (for which no use had been established during the relevant period), the Court did not consider that the above concepts of convergence and brand extension supported the exercise of the discretion in favour of maintaining the removal services.

As a result, the two registrations remain on the Register, the removal services being excised from the second registration.

The Court's exercise of its discretion under section 101(3) was conditional upon Pioneer KK providing an undertaking not to take action against PCA for past or future use prior to 31 July 2009 of the trade mark "PIONEER".



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Dependent or Not?

Dependent claims need not narrow scope of invention in Australia

The Australian *Patents Act 1990* requires that a complete specification for a non-provisional patent application end with at least one claim defining the invention, and each claim must be clear, succinct, and fairly based on the matter described in the specification. Further, the claims must relate to one invention only (divisional applications may be required if there is more than one invention). These are the substantive legislative restrictions imposed on the nature and scope of claims per se in Australia. The patents legislation does not prescribe the characteristics of an independent claim, a dependent claim, and a multiple dependent claim. Instead, the rules concerning the drafting of such claims have developed through judicial precedents, although in some respects they are merely conventions.

In *Austal Ships Sales Pty Ltd v Stena Rederi Aktiebolag* [2008] FCAFC 121, the Full Court of the Federal Court held that "[t]here is no requirement of [Australian] patent law that [dependent] claims narrow the scope of earlier [base] claims, even though, as a matter of practice, this is often the case." At issue were claims concerning the hull structure of a multi-hull, catamaran-type ship. Independent claim 1 recited that "the width of the hull at the water line is substantially greater in the after body of the hull than in the foreward body of the hull and continually decreases in a forward direction". However, dependent claim 7 referring back to any one of claims 1 to 5 recited that "the width of the hull at the water line is substantially constant in the case of the sternward quarter part of the vessel and then narrows towards the prow of the vessel." Thus, independent claim 1 required that the hull width at the waterline continuously decrease in a forward direction, but dependent claim 7 contradicted this aspect of claim 1 by requiring that the same hull width be substantially constant in part. The Full Court stated that "Claim 7 is an alternative to claim 1, insofar as [independent claim 1] is limited by [the hull width continually decreasing in a forward direction]." The Full Court stated that the relevant integer of independent claim 1 and dependent claim 7 spoke of different concepts.

This is a notable point of distinction concerning claim drafting for Australia in contrast to requirements for dependent claims in the United States and Europe. The U.S. legislation permits a claim to be drafted in independent, dependent or multiple dependent form, but a claim cast in dependent form is construed to include all of the limitations of its base claim and must specify a further limitation of the subject matter claimed in the relevant base claim. Thus, in the U.S., a dependent claim must be narrower than its base claim; otherwise, a dependent claim that does not narrow the scope of the invention is invalid. Under the European Patent Convention (EPC), a dependent claim includes all the features of its base claim and a reference to the base and then states the additional features which it is desired to protect. Thus, a dependent claim that would otherwise be improper in the U.S. and Europe may be valid and enforceable in Australia. Notably, the Australian Patent Office Manual of Practice and Procedures does not reflect this decision of the Full Court of the Federal Court of Australia and states that a dependent claim will warrant an objection if the dependent claim extends beyond the scope of its base claim and does not include all the features of the invention defined by the base claims.

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Australian Case Report

Sigma Pharmaceuticals (Australia) v Wyeth

In the recent Australian Federal Court decision of *Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth* [2009] FCA 595, Wyeth were successful in preventing Sigma's launch of a generic version of EFEXOR-XR™ (venlafaxine hydrochloride), the leading antidepressant in Australia in terms of units sold and value of sales.

The decision of Justice Sundberg granted Wyeth an interlocutory (pre-trial) injunction restraining Sigma from continuing its launch of its generic version of EFEXOR-XR™, pending final determination of infringement/revocation proceedings in respect of Wyeth's method of treatment patent claims.

Despite Sigma establishing a *prima facie* case of invalidity for lack of inventive step (obviousness) and not meeting the threshold requirement of an "invention"[1] , as well as Sigma's preparedness to undertake that it would not apply for PBS listing, maintain full and complete accounts and sales records, retain all sales proceeds apart from disbursements in a separate account and would not discount or provide material benefit to purchasers by "bundling" EFEXOR-XR with other pharmaceuticals, Justice Sundberg found that the balance of convenience favoured the grant of interlocutory relief to Wyeth pending final determination at trial.

Notably, Wyeth argued that if Sigma's product entered the market and Wyeth later succeeded at trial it may lead to a reduction in the beneficial effect of the medication as changes in the appearance of the medication may cause confusion and, as a result, missed doses or discontinuance.

Justice Sundberg appeared to accept this argument (at [65]):

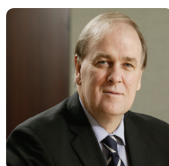
"It is not in the public interest that vulnerable people, those with mental health issues, including depression, and elderly patients with a variety of medications, be subjected to confusion as a result of the refusal of interlocutory relief."

With this latest decision, patentees of pharmaceutical inventions have had a 75% success rate[2] in obtaining interlocutory injunctions in the Federal Court of Australia since 2006.

....

[1] Specifically, that the claimed methods of treatment amounted to no more than a new use of a known substance for which its known properties make it useful. It should also be noted that claims to methods of medical treatment are patentable subject-matter in Australia.

[2] *Merck & Co Inc v GenRX Pty Ltd* (2006) 70 IPR 286 – granted (FOSAMAX™); *Roche Therapeutics Inc v GenRX Pty Ltd* (2007) 71 IPR 456 – refused with undertakings (DILATREND™ and KREDEX™); *Interpharma Pty Ltd v Commissioner of Patents* (2008) 79 IPR 261 – granted (EBEGEMCIT™); *Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth* [2009] FCA 595 (3 June 2009) – granted (EFEXOR-XR™). Not including matters resolved by the giving of undertakings and consent orders.



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The recent case of *LED Technologies Pty Ltd v Elecspess Pty Ltd* [2008] FCA 1941 is one of only a few design infringement cases decided under the (relatively new) *Designs Act 2003*. This decision covers a wide range of issues under the new design laws including authorship, quality of representations (drawings), validity, infringement and damages.

Authorship

The plaintiff was the registered proprietor of a number of design registrations for LED lamp assemblies for motor vehicles. Authorship of the design was challenged by alleging that specifics of the final products marketed by the plaintiff were designed by their manufacturer in China, and thus, the authors named in the registration were in error. However, the Court found that the author was the "person whose mind conceives the relevant shape, configuration, patent or ornamentation applicable to the article in question and reduces it to visible form". The Court also found that the original drawings provided by the (named) author to the Chinese manufacturer were sufficient to establish authorship of the design.

Drawing Quality

Whilst the applications were filed with line drawings of reasonable quality, those drawings were subsequently replaced during the application phase by photographic representations of arguably poorer quality. Interestingly, the Court found that each design was "reasonably clear and succinct… and (whilst the) drawings are not perfect or that they could be better or clearer… each design does appear with reasonable clarity, and without necessity for unreasonably prolonged or complicated series of deductions." The Court also found that representations contained in the electronic records of IP Australia were able to be magnified to illustrate details that would not ordinarily be visible, and further that the official record includes the file records of IP Australia which may not be reproduced on the electronic records (in this case the original informal drawings).

Well Designed

Federal Court supports designs registered under the Australian Designs Act

Validity

The validity of the designs was questioned on the basis of prior art. Design registrability requires a test of both newness and distinctiveness. Newness is a simple test of fact of whether there is an identical design somewhere in the prior art. No prior publication was identified. The Court held though that distinctiveness is assessed by comparing the design individually to each relevant piece of prior art, and not by comparing the design in question to the prior art base as a whole. This appears (under the provisions of the 2003 Act) to be in contrast to the decision of *Control v. Meco McCallum* [1996] FCA 475 where the defendant in design infringement proceedings was able to form a mosaic of the prior art to teach each and every feature of the registered design under the, now superceded, *Designs Act 1906*.

The Court also discussed the standard of a "informed user" and said that such a person:

1. is reasonably informed, not an expert but more informed than an average consumer;
2. is of an average standard however expert evidence may still be adduced in Court to assist the Court in applying the informed user concept; and
3. focuses on visual features and is not concerned with internal features or features that are not visible to the naked eye.

Infringement

In considering the issue of infringement, the Court had the benefit of a statement of newness and distinctiveness associated with the design registrations. For each registration, the same statement was used and stated as follows:

> "separate clip-in lenses, base to take a variety of 2, 3 or 4 combination lenses, tail and indicator, reverse LED lenses, no visible screws".

The Court acknowledged that the alleged infringement contained two visible screws but even though the design emphasised "no visible screws", the Court held that the presence of the screws "does not create a different visual appeal. The screws are the same colour as the flat strip or landing between each lens and sit low in the socket. They are not "visual" screws as one would describe the screws in some prior art…where the screws are chrome in colour and protruding." The Court found that the alleged infringement was "substantially similar in overall impression" and a witness in the proceedings acknowledged that the alleged infringements were closer to the registered designs than they were to the prior art. Infringement was therefore found. The decision also included clarification as to what is primary and secondary infringement.

Conclusion

The 2003 Act was touted as being one that would provide better scope for designers to enforce their intellectual property rights. This appears to have been well supported by the Court in this instance. In the author's opinion, the registered proprietor was fortunate that the Court accepted the quality of the representations as registered, and even further that the Court sought to consider the representations as originally filed, which arguably were not on the "Register". Also, the Court disregarded the apparent express limitation of "no visible screws" in the Statement of Newness and Distinctiveness whilst at the same time acknowledging the presence of visible (albeit almost hidden) screws in the alleged infringement.

Nevertheless, the decision is most encouraging for prospective design registrants.

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An Icy Reception

High Court Overrules the Full Federal Court's decision in "IceTV"

In April 2009, the High Court of Australia reversed the Full Federal Court's decision in the IceTV case and reinstated the first instance decision of Justice Bennett.

IceTV compiled an electronic program guide ("EPG") by first having its content manager watch television over a period of three weeks in August 2004 to record the time and title of programs broadcast – a process which he described under oath as "torture".

IceTV then updated the EPG from week to week by comparing its original data with program information available in published television guides and amending the "time and title" information for Nine's programming schedule where there was a discrepancy.

The Nine Network Australia Pty Limited ("Nine") sued IceTV for infringement of copyright in its weekly schedules which it provided to "aggregators" for inclusion in the published television guides used by IceTV.

The parties agreed that the weekly schedules were literary works, being compilations, and that Nine was the owner of copyright subsisting in the weekly schedules.

The High Court later commented that this concession led to insufficient consideration of the role of the authors of the weekly schedules and the "originality" of those authors in creating the weekly schedules.

During the proceedings, there was no allegation that by facilitating the recording of broadcasts and skipping of advertisements IceTV had contravened any provision of the Broadcasting Act or otherwise engaged in any unlawful conduct including breaching copyright in the television broadcast or the television programs themselves.

At first instance, Justice Bennett of the Federal Court held that there was no infringement, but her decision was reversed by the Full Federal Court which held that IceTV had copied a substantial part of the weekly schedules by copying the time and title information, since that information was a "central element of [Nine's] business as a television broadcaster."

The Full Court adopted the position that the "quality of what is taken must be assessed by reference to the interests protected by the copyright" and that in "the case of a literary work, including a compilation, the quality relevant for the purpose of substantiality is the literary originality of what has been copied."

However, the High Court found that the authors of the weekly schedule had little choice in the particular form of expression of the time and title information as that expression is "essentially dictated by the nature of the information" and that that expression "lacks the requisite originality…
for the part to constitute a substantial part."

Consequently, the High Court held that the part of the weekly schedule alleged to have been reproduced by IceTV (the time and title information) was not a substantial part of the weekly schedules and therefore did not infringe.

The High Court commented that rewarding skill and labour in respect of compilations without any real consideration of the productive effort directed to coming up with the particular form of expression of information, i.e., the author's original input, can lead to error.

The High Court held that the skill and labour devoted by Nine's employees to programming decisions was not directed to the originality of the particular form of the expression of time and title information.

Although a form of expression may be original even if business considerations dictated the decision to adopt a particular form, the critical question for the High Court was "whether skill and labour was directed to the particular form of expression of the time and title information, including its chronological arrangement."

The legal ramifications of this decision include the dilution of the "sweat of the brow" doctrine, by which copyright may subsist in a compilation simply through industrious collection of data as a reward for the hard work that went into collecting the facts.
During the proceedings, the Australian Digital Alliance Ltd made an appearance as a friend of the court and asked the High Court to find that, contrary to the decision by the Full Court in Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd, there must be a creative spark or exercise of skill and judgment before a work is sufficiently original for the subsistence of copyright.

In response to the Digital Alliance's request, the High Court commented that the reasoning in Desktop Marketing with respect to compilations may be out of line with the understanding of copyright over many years and that the emphasis in Desktop Marketing on "labour and expense" *per se* and on misappropriation must be treated with caution.

As Australia has no separate database right, the High Court's decision could weaken the protection available in Australia for compilations of facts since, of course, there is no copyright in facts.

From a commercial point of view, this decision could threaten the revenues derived by free to air television broadcasters in Australia.

IceTV's EPG was promoted as helping viewers to program their media centre or personal video recorder in advance to record television

The Value of Dependent Claims

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programs for viewing at a time more convenient to the viewer ("time shifting"), which of course would allow the viewer to skip through commercials during playback.

The majority of Nine's revenue is currently derived from advertisements broadcast during television programs and, during the litigation, Nine's counsel explained that Nine's commercial interest in the litigation was directly related to the loss of revenue that might be occasioned by the "skipping" of advertisements.

With Australia's migration to digital TV, personal video recorders, including Foxtel's IQ device and the TIVO device, are becoming more common.

As consumers increasingly engage in time shifting with the assistance of EPGs like IceTV's EPG, and skip through commercials when doing so, Nine and other free to air broadcasters are likely to find their major revenue stream under threat.
This may see the increase of banner advertisements superimposed over the television programs or perhaps an increase in product placement advertisements in the broadcasters' own productions.

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The Full Court of the Federal Court of Australia has recently handed down its decision in the Australian round of litigation relating to Lundbeck's patent for the antidepressant Escitalopram (marketed as LEXAPRO and CIPRALEX).

Escitalopram is the (+)-enantiomer of the antidepressant drug known as Citalopram (marketed as CELEXA and CIPRAMIL), which was claimed and prior published in a patent also owned by Lundbeck. The patent-in-suit claims Escitalopram and its non-toxic acid addition salts, pharmaceutical compositions containing them, and a claim to two processes for preparing Escitalopram.

The decision relates to appeals and cross-appeals arising from three separate proceedings concerning the validity of the compound and pharmaceutical composition claims of Lundbeck's patent for Escitalopram, the alleged infringement of the process claim, and the validity of an extension of the term of the patent.

A detailed summary of the decision at first instance, which included a fourth proceeding that was not appealed, can be found at:

http://www.sprusons.com.au/epublications/newsalerts/alphapharm.html

Importance of Dependent Claims

Ultimately, this Australian patent litigation demonstrates the value of including meaningful dependent claims during drafting, prosecution, or by amendment before litigating.

Much of the decision is concerned with the proper construction of claim 1, which is in the following terms:

1. (+)-1-(3-dimethylaminopropyl)-1-(4'-fluorophenyl)-1,3-dihydroisobenzofuran-5-carbonitrile and non-toxic acid addition salts thereof.

and specifically whether or not claim 1 encompasses "the purified or isolated (+)-enantiomer, or the (+)-enantiomer whether alone or as part of a mixture, or the (+)-enantiomer as present in a racemate?" Bennett J found that "claim 1 is to the pure or isolated or separated (+)-enantiomer" (at [160]).

However, as commented on by Emmett J (at [66]), much of this argument might have been rendered academic by the inclusion of one or more dependent claims with a qualifying phrase such as, for example, "substantially pure", "substantially free of the (-)-enantiomer", or by the inclusion of an explicit level of purity.

A similar point can be observed in respect of claim 5, which was directed to a pharmaceutical composition in unit dosage form wherein the active ingredient is present in an amount from 0.1 to 100 mg per unit dose. Bennett and Middleton JJ affirmed the decision at first instance to revoke claim 5 for lack of utility (usefulness) as the primary judge had accepted evidence that the minimum useful dose of Escitalopram is 5mg, and the maximum is 40mg. However, a further dependent claim with a narrower range of unit dose might have been valid.

Novelty

By 2:1 majority, the Full Court affirmed the decision at first instance that claim 1 to Escitalopram, and its non-toxic acid addition salts, is novel over both the earlier Lundbeck patent claiming Citalopram, and a journal article that predicted the R-enantiomer of Citalopram would be far more potent than the S-enantiomer[1], as neither disclosure contained "clear and unmistakable directions to obtain the enantiomers" (at [194] per Bennett J).

It is important to note that whether or not a claim to any resolved enantiomer will be held to be novel in the light of a prior disclosure of its corresponding racemate will depend on the particular facts of the case.

Infringement of the Process Claim

The Full Court reversed the controversial decision at first instance that process claim 6(b) for obtaining Escitalopram had been infringed by Alphapharm's importation

Continued on page 8 ...

...Continued from page 7

of Escitalopram prepared according to the claimed process, but for the "evanescent substitution" of the cyano-diol appearing in structures (II) and (II)' of claim 6(b) with a bromo-diol, which is later replaced in the compound by a cyanation process.

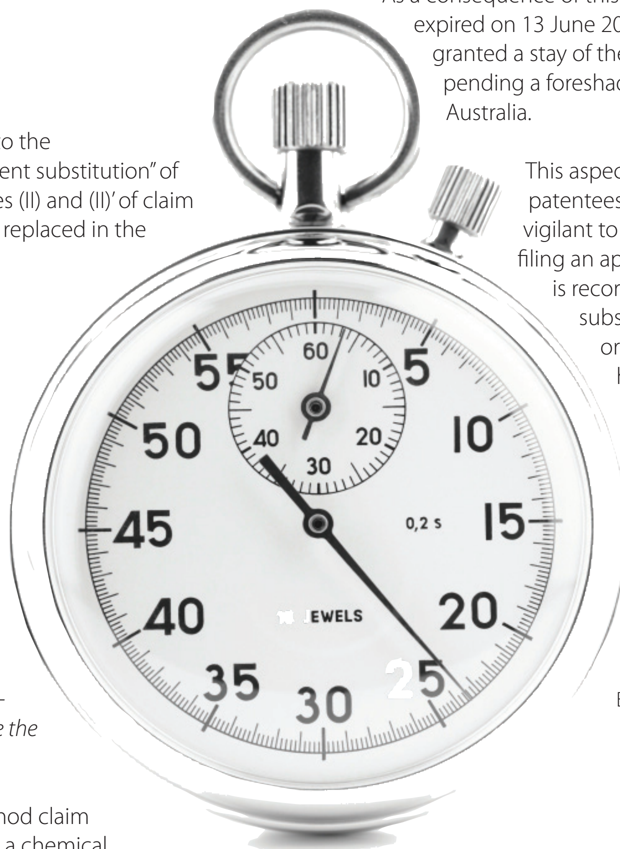
Emmett J (with whom Bennett and Middleton JJ agreed) found that (at [93]):

"The author of Claim 6(b) clearly had in mind the existence of a convention whereby a substitutable element could be represented by the symbol "R". The failure to use that symbol instead of the symbol "NC" signified that the cyano-diol was an essential integer of the method disclosed by Claim 6(b). It follows that a method that involves substitution of the bromo-diol for the cyano-diol does not infringe the method disclosed by Claim 6(b)."

Accordingly, where a process or method claim includes one or more steps involving a chemical structure, any substituents that do not materially affect the way the process or method works should be kept as general as possible, with the inclusion of more specific dependent claims.

Extension of Patent Term

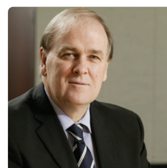
Bennett and Middleton JJ affirmed the decision at first instance that, for the purposes of obtaining an extension of patent term, the first inclusion on the Australian Register of Therapeutic Goods (ARTG) of goods that "contain" the (+)-enantiomer Escitalopram, was the earlier registration of its racemate, Citalopram.



As a consequence of this decision, the patent-in-suit should have expired on 13 June 2009. However, Lundbeck have been granted a stay of the order for removal of the extension pending a foreshadowed appeal to the High Court of Australia.

This aspect of the decision reiterates the need for patentees of pharmaceutical substances to be vigilant to ensure that the relevant deadline for filing an application for extension of patent term is recorded and acted on, and that any other substances, whether intended to be present or not, that are contained in goods which have been registered on the ARTG, do not also give rise to deadlines for making an application for extension of patent term.

[1] In fact, Escitalopram is the S-enantiomer of Citalopram, although this, of itself, was not the determining reason that the journal article did not constitute an anticipation of Escitalopram.



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Spruson & Ferguson wins the 2009 BRW Client Choice Awards

We are pleased to announce that Spruson & Ferguson has been voted the **Best Patent Attorney and Trade Mark Firm** in Australia in the 2009 BRW Client Choice Awards. This achievement is the result of "the largest study of the clients of professional services in the world" and was conducted by Beaton Consulting.

We would like to extend our thanks to all of our clients and associates who participated in the survey, for helping us to achieve this great result. Providing our clients with the best quality service and expertise has been, and will remain, our absolute priority.

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Spruson & Ferguson produces two electronic bi-monthly newsletters:

Trade Marks E-news – a breakdown of important issues for trade marks and branding in Australia

Biotech E-news – a review of important issues in the Australian biotechnology industry

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