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EDITORIAL 3

ARTICLES

Infringement of a patent by authorisation: Clear or muddy waters? – *Ann L Monotti*

This article examines the scope and meaning of the statutory tort for infringement of a patent by authorisation and concludes that its current meaning does not reflect Parliament's intentions. The lack of judicial consideration of the legislative origins of the sections that introduced accessorial liability into the *Patents Act 1990* (Cth), namely ss 13(1) and 117, has resulted in inappropriate analogies with copyright law. Those analogies have led to a meaning that is uncertain, complex and vulnerable to interpretation in ways that expand patentees' rights against those who facilitate infringement. When authorisation under s 13(1) is construed with reference to s 117 and the legislative origins of both sections, it becomes clear that no change was intended to be effected by s 13(1). The only changes to extend a patentee's rights that were expressly foreshadowed appear as contributory infringement under s 117. Therefore, a return to those origins can resolve the present uncertainty and complexity by construing infringement by authorisation using the common law principles of accessorial liability. 5

The patentability of human embryonic stem cells in Australia and Europe: Section 18(2) reconsidered in light of Brüstle v Greenpeace eV – *Ella O'Sullivan*

Following the controversial decision of the Court of Justice of the European Union in *Brüstle v Greenpeace eV*, the patentability of human embryonic stem cells in Europe is in doubt. In contrast, in Australia there has been no judicial consideration of the patentability of human embryonic stem cells, but in the absence of a similar ethical patent law exclusion it might be supposed that such inventions are currently patentable. Notwithstanding this, s 18(2) of the *Patents Act 1990* (Cth) excludes "human beings and the biological processes for their generation" from the scope of patentability. This article considers the current European and Australian positions regarding human embryonic stem cells and asks if any guidance can be gleaned from the European experience. 18

Biotech patents in Australia: Raising the bar on the generally inconvenient exception – *Belinda Huang*

The *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) offered a rare opportunity to remedy the absence of ethical safeguards in Australia's patent system. With reference to the "value neutral" philosophy of patent law, this article critically examines why Parliament failed to introduce an ethical exclusion against patentability in recent legislative changes, and the ramifications of such inaction. It is proposed that the Federal Court should exercise its judicial discretion, by interpreting the "generally inconvenient" proviso – under s 6 of the *Statute of Monopolies 1623*, as adopted under s 18(1) of the *Patents Act 1990* (Cth) – to weigh up the ethical impact of granting commercial monopolies over biotechnological inventions. In this way, the court can finally restore

some balance between promoting innovation and protecting the interests of the Australian public, and thus begin to address the ethical issues reignited by *Cancer Voices Australia v Myriad Genetics*. 40

Privacy in the context of piracy: The forgotten issue in the hunt for online copyright pirates – *Dan Jerker B Svantesson*

As is well known, the *iiNet* case related to whether ISPs can be held liable for the alleged online copyright piracy of their subscribers. However, the case is interesting for several reasons. For example, the *iiNet* case is illustrative of the obvious fact that the hunt for online copyright piracy gives rise to several important privacy issues. The reverse is also true; that is, the *iiNet* case shows that the fundamental human right to privacy is a factor to be taken into account in the application of relevant copyright law. Using the *iiNet* case as an example, this article seeks to highlight how privacy is affected by, and affects, the application of copyright law in the context of online copyright piracy – a question that, so far, has gained limited academic attention. 59