

Intellectual Property and Farmer's Rights Conference

Friday, 12 November 2004

program

- 8.30 – 9.00 **Registration**
James O Fairfax Theatre,
National Gallery of Australia
- 9.00 – 9.15 **Welcome**
Robert Burrell, Associate Director, Australian Centre for
Intellectual Property in Agriculture, The Australian National
University
- Opening Address**
Peter Reading, Managing Director, Grains Research and
Development Corporation
- 9.15 – 10.30 **Session 1 - Plant Breeder's Rights and Patent Law**
- Chair: **Robert Burrell**, Associate Director, Australian Centre for
Intellectual Property in Agriculture, The Australian National
University
- Are Plant Variety Protection Systems Anachronistic?*
Professor Mark D Janis, H Blair & Joan V White Intellectual
Property Law Scholar, College of Law, University of Iowa
- Session 2 - Farmers' Rights**
- Chair: **Robert Burrell**, Associate Director, Australian Centre for
Intellectual Property in Agriculture, The Australian National
University
- Farmers' Rights in International Law – Sparse Pickings?*
Peter Lawrence, Senior Lecturer, Faculty of Law, University of
Tasmania
- End Point Royalties – What Does it all Mean?*
Kathryn Adams, Senior Research Fellow, Australian Centre for
Intellectual Property in Agriculture, Griffith University
- 10.30 – 11.00 **Morning tea**

11.00 – 12.30 **Session 3 - Contract Law and Data Protection**

Chair: **Stephen Hubicki**, Research Fellow, Australian Centre for Intellectual Property in Agriculture, Griffith University

The Orchard: Intellectual Property and Technology User Agreements

Dr Matthew Rimmer, Lecturer, Australian Centre for Intellectual Property in Agriculture, The Australian National University

Intellectual Property, Agricultural Chemicals and Test Data Protection: The US-Australia Free Trade Agreement

Graeme Smith, Broadacre Farmer, Pastoralists and Graziers Association of Western Australia, National Farmers Federation Farm Chemical Sub Committee Member

12.30 – 13.30 **Lunch**

13.30 – 14.45 **Session 4 - Geographical Indications and Trade**

Chair: **Dr Matthew Rimmer**, Lecturer, Australian Centre for Intellectual Property in Agriculture, The Australian National University

GI's: Now and Forever

Associate Professor William Van Caenegem, Faculty of Law, Bond University

A European Union Perspective on Geographical Indications

Paul Strickland, Counsellor, Delegation of the European Commission to Australia and New Zealand

14.45 – 15.15 **Afternoon Tea**

15.15 – 16.30 **Session 5 - Gene Technology Regulation**

Chair: **Dr Charles Lawson**, Research Fellow, Australian Centre for Intellectual Property in Agriculture, Griffith University

Changing Attitudes Towards Risk and Trust

Craig Cormick, Manager, Public Relations, Biotechnology Australia

Trading in GMOs: The Impact of WTO Law

Jacqueline Peel, Lecturer, The University of Melbourne

the speakers

Professor Mark D Janis

Are Plant Variety Protection Systems Anachronistic?

This paper considers the history and future prospects of plant variety protection (PVP) systems. PVP systems have become entrenched in the world intellectual property landscape. Today, over 50 countries have incorporated UPOV-style PVP systems into their national laws, Europe has implemented Community-wide protection under the EC Regulation on Plant Variety Protection, and the TRIPs agreement has endorsed PVP protection as an alternative to patent protection for plants.

Yet, many of the central doctrinal innovations that lend PVP systems their unique character originated in the mid-twentieth century. In view of the profound changes in both technology and law that have occurred since that time, it is important to ask whether the doctrinal underpinnings of PVP systems are well-adapted to function in the current environment.

Focusing on the US experience, this seminar examines PVP systems within two slices of time: first, in the 1960s, when the US Plant Variety Protection Act was being debated; and, second, today, in an era in which the US Supreme Court has endorsed concurrent protection for plant-related innovation under both the utility patent and PVP systems. The seminar considers how technological, political, and legal/doctrinal factors may have influenced the original design of PVP systems, and how those factors might influence the future course of PVP systems.

Mark D Janis is Professor of Law and H Blair & Joan V White Intellectual Property Law Scholar at the University of Iowa College of Law in Iowa City, Iowa. Professor Janis teaches and writes in the fields of patents, trademarks/unfair competition, and intellectual property/antitrust. He has published numerous law review articles and is co-author of a two-volume treatise, *IP and Antitrust* (with Hovenkamp and Lemley), as well as a casebook, *Trademarks & Unfair Competition: Law and Policy* (with Dinwoodie). He is a 2000-2001 recipient of the

University of Iowa Collegiate Teaching Award. He has been named a University of Iowa Faculty Scholar for 2002-2004 to conduct research on intellectual property rights in plant biotechnology.

He earned his J.D. *summa cum laude* in 1989 from Indiana University School of Law (Bloomington), and his BS with distinction in 1986 in Chemical Engineering from Purdue University. He is a registered patent attorney. Prior to joining the Iowa law faculty in 1995, Professor Janis practiced patent law with Barnes & Thornburg in Indianapolis, Indiana.

Peter Lawrence

Farmers' Rights in International Law – Sparse Pickings?

With the entry into force of the International Treaty on Plant Genetic Resources for Food and Agriculture (PGRFA) in June 2004, it is timely to reassess the current content of 'farmers' rights' in international law. Is 'farmers' rights' merely a political catch cry of the developing countries opposed to the increasing expansion of intellectual property rights in agriculture? Or does it have specific legal content?

'Farmers' rights' has been used to refer to: i) conservation of seed varieties for the common good, ii) compensation to farmers for use of their seeds and related traditional knowledge ('access and benefit sharing'), and iii) the right to participate in relevant decision-making. More recently the 'farmers' rights' debate has focused on the right of farmers to reuse and exchange seeds in light of patents legislation extending to plants.

This paper analyses the extent to which these concepts are reflected in the current international legal framework and debate, including the PGRFA, International Convention for the Protection of New Varieties of Plants (UPOV Convention), the Convention on Biological Diversity (CBD), the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS), the World Intellectual Property Organisation (WIPO) and human rights fora. The paper concludes with an assessment of future possible directions.

Peter Lawrence is a Senior Lecturer at the University of Tasmania Law School where he teaches international environmental law and international trade law. He is a former officer of the Department of Foreign Affairs and Trade, Canberra, which included working in the International Intellectual Property Section and a posting as First Secretary to the Australian Permanent Mission to the United Nations, Geneva. Peter is an author and former member of the Editorial Committee of the Encyclopaedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law, Heidelberg Germany. He has published in the field of international environmental law and European history.

Kathryn Adams

End Point Royalties – What Does it all Mean?

There is growing trend from grantees of Intellectual Property rights over plant material to seek royalties on the harvested product rather than on the propagating material. This is for a variety of reasons which include more equitable sharing of the costs and risks of innovation and ability to obtain a return on crops grown from farm-saved seed.

Intellectual Property legislation gives the developer of a new plant variety the right to exclude others from using the protected plant material without permission. The legislation not does determine the conditions under which the grantee exercises that right. The grantee and the user then enter into a contract which sets out the conditions of use of the protected material. The current trend is towards contracts

granting permission to use the protected plant material in exchange for a payment based on the volume of harvested product - an end-point royalty.

This paper will explore the advantages and disadvantages of end-point royalties to grantees of intellectual property, growers and distributors and the interaction between statute and contract in this area. It will also look at the implications for farm saved seed and highlight some of the points made in the Australian Federal Court decision of May 2004 *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 638.

Kathryn Adams is a Senior Research Fellow at the Australian Centre for Intellectual Property in Agriculture at Griffith University. She is an Agricultural Scientist and a lawyer having held senior positions in a wide range of organisations. She was the first Registrar of Plant Breeders Rights in Australia, has practiced as a solicitor and agricultural microbiologist, and has held senior positions in R&D management and investment areas, including Executive Director of the Energy R&D Corporation, Executive Director of the Forest and Wood Products R&D Corporation, Director of the Queensland Horticulture Institute and Executive Director with the Queensland Environmental Protection Agency. She is on a number of Boards, a Fellow of the Australian Institute of Company Directors and is involved in Alternative Dispute Resolution. She has particular interest in the links between public policy, law and agricultural industry development.

Dr Matthew Rimmer

The Orchard: Intellectual Property and Technology User Agreements

Drawing upon two case studies, this paper examines the sometimes fraught relationship between intellectual property rights and technology user agreements.

Part 1 considers the Supreme Court of Victoria decision in *Zee Sweet Pty Ltd v Maganom Orchards Pty Ltd & Others*. In this matter, Zee Sweet acquired an exclusive Australian licence to produce and sell peaches and nectarines from the patent holder, Zaiger Genetics. It granted to the Swan Hill firm, Maganom Orchards, a growers' licence to use the plant material to grow and sell fruit. Justice Byrne held that Maganom Orchards committed seven breaches of its growers agreement. He rejected the growers' claims that Flemings had acted unconscionably, misrepresented the Zee Sweet program and duped the growers into signing the agreements. As well as ordering the destruction of the stone-fruit trees, the court ordered that the growers pay Flemings' costs - estimated at \$750,000 - and damages for breach of contract.

Part 2 examines the United States litigation in *Monsanto v McFarling*. In this case, Monsanto argued that McFarling was in breach of its patents and a Technology User Agreement by saving seed from Roundup Ready soybeans on his Mississippi farm. McFarling contended that prohibition in his contract with Monsanto against saving seeds for planting the next season constituted an illegal restraint of trade. The District Court found in favour of Monsanto, and dismissed the arguments of McFarling. The United States Federal Court of Appeal upheld the judgment of the District Court with respect to counterclaims and defences. However, it found that the liquidated damages clause in the Technology User Agreement was invalid and

unenforceable under Missouri law as it applies to McFarling's breach of replanting of saved seed.

Such litigation raises a range of policy issues. Do patent law and plant breeders' rights set minimum standards, which must be respected by private agreements? Or can defences, such as the farmers' rights to save seed, be overridden by contract law? What conduct amounts to a breach of contract? What remedies are appropriate in such circumstances? What role, if any, is there for the operation of competition law and anti-trust law?

Dr Matthew Rimmer is a Lecturer in the Australian Centre for Intellectual Property in Agriculture at The Australian National University. He holds a Bachelor of Arts with Honours and a University Medal in literature, and a Bachelor of Laws with Honours from The Australian National University. Rimmer received a Doctorate of Philosophy from the School of Law at the University of New South Wales for his thesis 'The Pirate Bazaar: The Social Life of Copyright Law'. He has published widely on copyright law in journals in Australia, Europe, and the United States.

Dr Rimmer is a chief investigator in an ARC Discovery Project, 'Gene Patents In Australia: Options For Reform', and an ARC Linkage Project, 'Protection of Botanical Inventions'. He has published on patent law, access to genetic resources, and plant breeders' rights. His work has been featured in *Australasian Science*, the *Bio-Science Law Review*, the *European Intellectual Property Review*, and the *Journal of Law and Medicine*.

Graeme Smith

Intellectual Property, Agricultural Chemicals and Test Data Protection: The US-Australia Free Trade Agreement

If a Party requires, as a condition of approving the marketing of a new agricultural chemical product, including certain new uses of the same product, the submission of undisclosed test or other data concerning safety or efficacy of that product, the Party shall not permit third persons, without the consent of the person who provided the information, to market the same or a similar product on the basis of that information, or the marketing approval granted to the person who submitted such information, for ten years from the date of the marketing approval of the new agricultural chemical product by the Party.

Article 17.10.1 (b) of the Australia-United States Free Trade Agreement

This paper will focus on Article 17.10.1 (b) of the Australia-United States Free Trade Agreement, which deals with the data protection of agricultural chemicals. In particular, it will consider the changes to 'off-patent' Agricultural and Veterinarian Chemicals, which now will be protected for an additional 10 years over and above their patented rights. These changes will have a devastating effect on the independent generic chemical companies which provide competitively priced chemicals to farmers. The reforms proposed in the Free Trade Agreement will delay the entry of generic chemical companies into the market hence allowing the large

multinational companies to enjoy a competitive free environment for an additional 10 years, which will result in lack of competition, reduced innovation and higher costs of chemicals for farmers, who are the end users. This paper disputes the claims that this proposed time frame for data protection is consistent with the reforms already being developed by the government. The data protection proposal prior to the Free Trade Agreement was strongly opposed by the Pastoralists and Graziers Association and the Generic Agricultural Chemical Association, who are two key stakeholders in the legislation. It is contended that the important issue of data protection should have been left out of the Free Trade Agreement.

Graeme Smith is a Broadacre Farmer and a member of the Pastoralists and Graziers Association and the Generic Agricultural Chemical Association.

The Pastoralists and Graziers Association (PGA) of WA has a large and growing grain producer membership in Western Australia, represented by the PGA Western Graingrowers Committee (WGG). Currently the PGA have about 1900 individual members in the Western Australian wheatbelt area producing 2 million tonnes of wheat. The PGA is a full member of the National Farmers Federation (NFF) and have been at the forefront of policy development nationally as well as locally.

The Generic Agricultural Chemical Association (GACA) was formally established in March 2004 with 15 inaugural members made up of businesses involved in the generic agricultural chemical industry. Members include manufacturers, resellers, importers, distributors and drum recyclers. Another 70 potential members have indicated their interest in joining the GACA in the coming year.

Associate Professor William Van Caenegem

GI's: Now and Forever

The protection of registered geographical indications of origin (GI's) has an immediate impact on rural and agricultural producers. But recent policy developments, international agreements and ongoing negotiations also have long term implications. The potential ramifications of operational GI registration systems, and those now being deployed around the world, are far-reaching. The broad scope of protection and the relationship with registration of trade marks are a case in point. GI registration requires a completely new mindset which is unfamiliar even to lawyers familiar with the defence of commercial reputations.

This paper will examine just how different the legal protection regime for registered GI's is, illustrate its impact by reference to recent events, and attempt to gauge the future impact of the growth in GI protection.

William Van Caenegem is an Associate Professor of Law in the Faculty of Law at Bond University. He studied Law in Belgium and the UK. As well as being on the staff of the Belgian Minister of Defence in Brussels, he worked at law firms in Belgium and Brisbane.

He is interested in comparative and international law, intellectual property law, evidence and comparative criminal procedure. He has been a stipendiary researcher

at the Max-planck Institute for Comparative Intellectual Property Law in Munich, FRG. He held the inaugural CAL/ANU Copyright Fellowship during 1995, and was a Visiting Scholar at the Centre for Commercial and Property Law at QUT. He has been a consultant for the WA Law Reform Commission in the area of comparative criminal procedure, and has also undertaken work in this area for AUSAID in Cambodia.

He is an Executive Committee Member of the Centre for Intellectual Property Studies, of which he was a founder member. He has published in the areas of foreign law, intellectual property law, legal philosophy and criminal procedure. He is a past Vice-President of the Australian Society for Legal Philosophy. He is a Barrister-at-Law of the Supreme Court of Queensland.

Paul Strickland

A European Union Perspective on Geographical Indications

This paper will explain how and why GIs are protected in Europe, and stress how this protection benefits both producers and consumers. It will consider the level of protection provided by the WTO TRIPs Agreement and will argue that the protection currently provided is inadequate in that it places costly and unnecessary burdens on producers, and risks misleading consumers. This seminar will then set out the reasons why the EU supports beefing up the Agreement by: a) having a multilateral register of GIs for wines and spirits, and b) extending the extra protection already afforded to wines and spirits under the TRIPs Agreement to other products such as certain hams, cheeses, teas etc. – a policy steadfastly opposed by Australia. This talk will be illustrated with numerous examples of what the EU considers to be widespread abuse of GIs - and not just European GIs - around the world.

Paul Strickland has been Counsellor and Deputy Head of Mission at the European Commission's Delegation to Australia and New Zealand since August 2002. Prior to that, he spent thirteen years at the Commission's headquarters in Brussels, much of the time in the Directorate-General for Trade where he led a team carrying out anti-dumping investigations worldwide. Before his posting to Canberra, he spent two years as Deputy Head of the Unit dealing with the international aspects of public procurement and intellectual property (including GIs), and was Lead Negotiator for the Commission at the WTO discussions on transparency in government procurement.

Craig Cormick

Changing Attitudes Towards Risk and Trust

Many attitudes towards uses of gene technology in agriculture are underpinned by attitudes towards trust and risk. This presentation will look at changed public attitudes towards uses of gene technology, both by growers and the community, and will look at the key drivers of those attitudes, particularly the rapid changes in trust and risk perception that have occurred over the past three years.

Craig Cormick is the Manager of Public Awareness for the Government agency Biotechnology Australia. He has previously worked as a science journalist and has taught public relations and writing at university. He is widely published on drivers of public attitudes towards biotechnology, and is a regular commentator in the media and at industry and research conferences, both in Australia and overseas, on causes of public concern towards applications of biotechnology.

Jacqueline Peel

Trading in GMOs: The Impact of WTO Law

Genetically modified organisms (GMOs) and their use in agriculture, have been the topic of significant debate both here in Australia, and internationally. Australia has recently developed a new regulatory regime for licensing GMOs grown as agricultural crops which is administered by the Australian Gene Technology Regulator. Internationally there are also various legal requirements potentially applicable to GMOs, including environmental biosafety regulations and laws under the World Trade Organisation (WTO).

This paper will examine the implications of WTO law for trade in GMOs, focusing on the requirements of the WTO's *Sanitary and Phytosanitary Measures Agreement* (SPS Agreement). The SPS Agreement is likely to be the main WTO Agreement relevant to trade in GMOs given the focus of GMO regulation on risks to human health and the environment. The Agreement sets out various requirements that must be met by national regulations dealing with GMOs in order for the restrictions which they impose on trade to be internationally justifiable. Disputes between countries over the application of the SPS Agreement (such as the current US-EC dispute over the so-called European 'moratorium' on approvals for new GM crops) are settled through the WTO dispute settlement process. Decisions issued by the final body in the WTO dispute settlement process – the Appellate Body – are binding on the parties to the dispute and play a significant role in shaping WTO Members' understanding of their obligations under WTO laws like the SPS Agreement.

The SPS Agreement, and its interpretation in WTO disputes, raises a number of questions for trade in GMOs. What is necessary in order for national GMO regulations based on health and environmental concerns to comply with international trade law requirements? Does WTO law restrict the capacity of domestic systems to regulate GMOs in a precautionary manner? In Australia, such questions are relevant both for the domestic biotechnology industry and GM growers concerned about access to overseas markets for GMOs or GM-derived products, and for organic growers, consumers and environmental interests whose focus is on ensuring the integrity of national systems dealing with the potential risks posed by GMOs.

Jacqueline Peel is a senior lecturer in the Faculty of Law at the University of Melbourne. She holds a Bachelor of Science/Bachelor of Laws with Honours and a University Medal from the University of Queensland, and a Master of Laws from New York University. In 2003-2004 Ms Peel spent a further period at New York University, this time as an Emile Noël Research Fellow with the Law School's Jean Monnet Center, and as the recipient of a Hauser Research Scholarship. Ms Peel's research at NYU focused on the role of science in WTO decision-making concerned with the

regulation of environmental risk. She has published in the field of domestic and international environmental law, including on issues relating to the intersection of trade and the environment and the role of the 'precautionary principle'. Her work has been featured in the American Journal of International Law, the European Journal of International Law and the New York University Environmental Law Journal, and she is the author of a book on the precautionary principle to be published by Federation Press next year.