

Fox Design Pty Ltd

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FOX DESIGN

Submission to the Advisory Council on Intellectual Property Patents and Experimental Use

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Introduction to Fox Design

Fox Design is a family company that provides industrial design consulting services and manufacturing of specialised process and energy equipment. The company employs 4 graduates from the disciplines of engineering, science and business. The core business is innovation and sale of intellectual property. The design and innovation activities are performed under performance contracts for commercial clients including state and federal government, universities and private enterprise. In most cases, the contracts are not for research and development, or 'experimental work', but for the delivery of a defined product or service. Contracts include a detailed performance specification, but arriving at the end product commonly involves some experimentation.

Perspective of Fox Design

Design engineers, in conjunction with their manufacturing supply chain, can create end-use-systems that allow a commissioning engineer to experimentally make it operate to specifications (commission) in an operating plant. Research and development, which is seen as complex and requiring experimentation by one party, may be seen as strait forward to another design engineer. The degree of experimentation that is required is dependent on the skills of the design engineer. Experimentation is sometimes the cheapest way of achieving an optimal design. At worst, experimentation is a symptom of the lack of design skill and is accompanied by wastage of time and resources. Experimentation should not be seen as an activity separate from normal commercial processes.

Understanding of current law

From my understanding of the current law, experimental use is allowable for non-commercial private use. The unresolved question is what is commercial use? I consider the use of patented concepts by a university with multi-million-dollar turnover for a research and development contract with a third party to be commercial use. I consider that a University or Co-operative Research Center (CRC), a research arrangement with a commercial entity and a university body, to be a commercial entity. Such commercial entities are not exempt from restrictions on use of patented material.

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As a direct commercial competitor with the intellectual property generated by Universities and CRCs my company, Fox Design, is subject to the same restrictions as a CRC or University facility.

The use of intellectual property in these circumstances does not differ from Fox Design's pilot plant located in an industrial facility, testing the efficacy of a particular process under an engineering design contract.

From my understanding, the current law does not provide statutory exemption for the university, nor Fox Design. However common law would allow patent holders to prevent commercial loss by unreasonable use of patented material. Commercial reality prevents immediate recourse or fear of action in the courts in relation to infringements of a minor commercial impact. The consequence of this commercial reality is similar to the minor copying provisions of the Copyright Act.

Fox Design Position on Patents and Experimental Use

No parties should be given statutory commercial advantage over others, other than as determined by the existing patent law. The markets for intellectual property should be regulated to allow competition and promote commercial activity. From my understanding of the present situation this is reasonably achieved by the current legislation. I do not support any change which provides legislative exemption from existing intellectual property rights for universities or CRCs who claim that they are acting in a manner differing from any other commercial activity.

Universities and CRC's are operating in direct competition with commercial operations such as Fox Design. Providing exemption to universities will cause immediate and tangible commercial loss to competing independent commercial entities such as Fox Design operating in the same market.