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Treasurer Inventors Association of Australia(Vic)Inc.

Atten: Mrs K Collins
Secretary
ACIP

Subject: IP Discussion Paper

There seem to be a number of issues involved in this Intellectual Property discussion paper.

1. The first is the disagreement between the legal profession and Patent Attorneys and their clients over the suitability of the current system.
2. The second issue being over the structure of the system to minimize costs incurred by the legal holder of the patent.
3. The third seems to be over the inability of judges to appropriately evaluate cases involving Intellectual Property cases due to their lack of knowledge of the system.
4. The fourth issue is about not whether patenting provides the inventor/patentee with adequate protection but whether the inventor/patentee believes it provides adequate protection at a reasonable cost.

5: General:
I have also included some comments on the attitude of individual inventors.

6. Suggestions:

<u>Issue 1: Disagreement between Legal Profession and Patent Attorneys.</u>

This issue is no surprise and the mere fact that there is a problem which is being discussed in detail in this paper by several parties would seem to negate the legal professions’ attitude that the current system is satisfactory. The system probably is satisfactory from their point of view. Without being sarcastic or casting aspersions they are in the business to make money, and, from their point of view they wish to obtain the highest level of compensation possible from any dispute or else they would not should not and be in business.

<u>Issue 2: Cost minimization:</u>

The current situation favors the transgressor who is usually a substantial company and penalizes the patent holder if he is an individual or small business.

Issue 3: Case Adjudication.

There are a number of unsatisfactory aspects regarding the current adjudication system. The first being that judges are inadequately trained in Patent Law. This could be remedied as suggested by appointing a judge from the realms of Patent Attorneys. The second aspect is whether the applicant is challenging the patent or marketing a product that transgresses the patent. In challenging the patent the applicant obviously believes that the patent has potential and wishes to avoid paying the patentee licensing rights. In marketing a similar or the same product the transgressor obviously also believes that the patent has potential and wishes to avoid paying the patentee licensing rights. The most stupid aspect of this situation is that a lot of the challenging is caused by company mindsets where the company refuses to pay royalties to anyone else and often it costs more for the litigation than the royalties. Once again the holder of the patent loses even if he wins. Another point is that the judge is merely looking at transgression of the patent and in allocating damages only considers the current situation. When allocating damages in a case, it is not his responsibility to have to consider that the patentee may have been working on the invention for a number of years, may have had to collaborate with a plastics producer to provide a new type of material to meet his requirements, had to have drawings produced in enable the manufacture of dies to produce a product the manufacture of which he must also negotiate. To add insult to injury the patentee must disclose everything relevant to the patent and this information becomes public knowledge in twelve months time. Thereby providing transgressors with a free ride. The costs allocated against unsuccessful transgressors in Australia have been somewhat less than substantial.

Issue 4: Value for Money.

Does the individual inventor or SME consider that under the current system they are receiving value for money? The Australian market is miniscule in respect of product sales. To minimize production costs manufacturers must increase the number of units they produce. The result of this is that a patentee must seek protection in more than one jurisdiction adding to overhead costs. If litigation becomes an issue for the individual inventor or small business they are likely to stop inventing.

General:

The small inventor or company has a number of problems some of which are outlined here. The first is: should he patent: the second is if he patents how extensive should the patent be, i.e. local or international. The next point is what can he do if the product is substantially commercially successful. If the product is substantially commercially successful and he manufactures it himself he will almost automatically inherit substantial opposition that will appear in one of the following forms. Under the current system, the patent will be challenged by one of the larger companies and he will therefore have to fight it in court. The result of which will be to cost the patentee a considerable amount in both lost time and money. Even if he wins the initial case he will almost certainly have an appeal lodged against the decision which will put the case back in court which in most cases will result in the small inventor or company going bankrupt. The second situation involves a transgressor doing a wholesale piracy act and flooding the market with the same product that will have the same end result as the situation above. The third situation involves the opposition hiring researchers to seek information outside the patenting system as outlined in the next paragraph to negate the IP.

A point that is not discussed in your paper, and which may or may not be relevant depending on your point of view, is that the material/submissions/inventions granted patents, copyright etc constitutes a very small proportion of published information. In granting Intellectual Property rights, the IP bodies around the world only check the IP submissions and that can be difficult enough in its own right. They certainly don't check other sources. If with the limited protection that is provided,(i.e. read what funds an individual or company has available), an individual or small company is not going to get protection, then applications from individual inventors and small companies will cease which will adversely effect the income of both the legal profession and the patent attorneys.

You have stated that most of the stories of problems that have occurred are anecdotal and so I continue the trend although a copy of the publication containing this story is probably in my filing system somewhere. There was one outcome published in the daily paper some time ago where a local company had copied another companies locking fitting on an electrical connection. The judges' finding was that the invention was obvious and therefore he did not find the company in breach of the patent although it obviously was, but he did find that the offending company had inscribed patent pending on their device when they had not applied for a patent and therefore found against the offending company on that basis. My comment on this issue is that after any problem that has perplexed individuals for some time has been solved, the solution is then obvious to everybody and the comment is generally why didn't I think of that. If it wasn't considered unique and novel at the time of submission to IP then presumably IP would not have granted a patent in the first place.

Suggestions:

I should like to suggest that one possible solution prior to any case that is effected by IP claims gets to court is that IP Australia whom have initially been responsible for granting the patent, trade mark etc be consulted on whether it is their considered opinion that the IP has been transgressed upon. After all, they are responsible for making the determination in the first instance and their finding may result in withdrawal of those submissions that have been made purely for the purpose of creating litigation that happens on occasion. I should like to quote other cases where large hardware stores transgress but would probably end up in litigation myself.

Another possible solution is that when a company challenges a patent that they must specifically state the reasons for their submissions and if the challenge is considered frivolous it may be suggested that if the company pursue the challenge it will be treated with some hostility by the court.

R. G. P.
2nd Aug 2002