

The US's ongoing patent revolution

The patent landscape of the United States continues to evolve. Three leading IP professionals on the front line of change discuss what it all means

By **Joff Wild**

If it is not the Supreme Court it is the Federal Circuit; and if it is not the courts, it is the US Patent and Trademark Office. And let's not forget that for most of the last 12 months, the two houses of Congress have also been in on the act. In short, the infrastructure that patent practitioners and owners have got used to and understand in the US is now under scrutiny from all sides. In many cases, this is leading to significant changes in established law and practice.

Some say that there have been too many changes to fundamental points – such as the standard of patentability and the ability to gain permanent injunctions – with not enough thought gone into examining their longer-term implications. Others are less sure, believing that the patent system had become too overbearing. What seems certain, though, is that more change is on the way.

To talk through the significant developments of the last 12 months, IAM brought together two prominent private practitioners – Douglas Cawley of McKool Smith in Dallas and Gary Hoffman of Dickstein & Shapiro in Washington DC – and one of the US's highest profile chief intellectual property officers – Damon C Matteo of the Palo Alto Research Center.

***Joff Wild:** The Supreme Court handed down its decision in the KSR and MedImmune cases last year. What affect do you think they have had?*

***Gary Hoffman:** The Supreme Court's decision in both KSR and MedImmune have*

had a substantial impact in patent litigation in the United States. In addition, the KSR decision has had an impact on the patent examination process in the United States. In KSR, the Supreme Court restated its position on the test for obviousness. The Supreme Court indicated that the test was the one set out in Graham v John Deere; but did not stop there. Instead, the court also went back and reiterated its positions in other decisions such as Anderson Black Rock and earlier decisions criticising the validity of combination patents. The Supreme Court decision in KSR has made it easier to challenge the validity of patents on an obviousness basis and as a result I believe we are seeing an increase in the amount of patent litigation here in the United States with the accused infringer being much more willing to challenge the patent instead of licensing. There also appears to be an increase in the number of trials as the chance of success on the defence of obviousness is better than what it was prior to KSR.

The PTO has put out guidelines for the examiners with respect to KSR and those guidelines on their surface primarily follow the Graham test. However, since KSR the percentage of Appeals Board decisions upholding the patent examiners' rejections of claims has substantially increased.

In connection with the Supreme Court's decision in MedImmune and the subsequent decision from the Federal Circuit in SanDisk, it has made it much easier for a person to bring a declaratory judgment (DJ) action to challenge the patent. No longer is there any need to show that the DJ plaintiff had a reasonable apprehension of being sued. One need only show that there is a dispute

between the parties as to whether or not the patent is valid and/or infringed; ie, that the parties disagree on the validity and/or infringement issues. As a result, we are seeing companies more hesitant to write letters trying to insist upon a defendant taking a licence, but instead more often filing the lawsuit first before sending the letter. In addition we have begun to see an increase in the number of DJ litigations being brought. Parties are still concerned about picking an ideal forum that they believe would be more favourable to their position and consequently do not want to risk the issue of sending a letter that could provoke a declaratory judgment action.

Douglas Cawley: KSR gave the pendulum a substantial push toward restriction of patent rights. Prior to that decision, obviousness was treated as a step-child in patent litigation. It usually presented fact issues that defeated summary judgment and juries rarely found patents obvious. After KSR, I think that juries are still sceptical of the hindsight nature of obviousness, but summary judgments are reinvigorated and I expect that the Federal Circuit will continue to scrutinize patents under section 103.

MedImmune has had the unintended consequence of chilling licensing negotiations. As Gary says, patent holders that once would have attempted to reach pre-litigation resolutions are now filing suit first to avoid the enhanced risk of declaratory judgment actions in an undesirable venue.

Damon Matteo: By unwinding the long-standing Teaching-Suggestion-Motivation (TSM) standard of obviousness applied by the CAFC in KSR, the Supreme Court seems to be rewinding time itself – back 40 years to the four Graham factors. Most patent-holders are likely to be concerned about the validity of some of their existing patents and also trying to divine how to change the way they approach patent prosecution going forward. We keep a careful eye on office actions that speak to obviousness and fold that learning into subsequent applications. In terms of patents in force, we can expect them to be more susceptible to challenge – particularly for combination patents and where the patent holder overcame an obviousness rejection by arguing there was no TSM.

In MedImmune, the Supreme Court reversed another long-standing CAFC position of requiring a licensee to breach a licence before it could file for a declaratory judgment

against the licensor challenging the validity of the licensed patent. This new latitude has many licensees and licensors revisiting their existing relationships and wondering about how to structure future ones.

Taken together, KSR and MedImmune appear as two more in a litany of Supreme Court reversals of CAFC decisions, which many feel operate against patent holders and possibly against innovation itself.

JW: The Supreme Court's decision in *Quanta Computer v LG Electronics* has now been handed down. What do you make of it?

DC: Although *Quanta* may affect some existing licence agreements, I don't think it will have a profound influence on patent rights. It certainly revitalises the doctrine of exhaustion, but I don't see the case as a significant expansion of the defence. And the court left open the possibility that many downstream licensing objectives can still be achieved by careful planning and drafting.

DM: The Supreme Court provided additional clarity around the first-sale/patent-exhaustion doctrine in its reversal of the CAFC in *Quanta Computer v LG Electronics*. That clarity seems to be in the form of sharper boundaries around licensors' ability to limit the downstream use of licensed products. In particular, the court removed any doubt as to whether patent-exhaustion applies to method/systems patents. This has potentially major implications for those whose proprietary position in a product resides in methods or systems patents. Careful reconsideration of licensing and sales programmes for these products in light of potential downstream use is in order; and possibly even rethinking the business models behind the products where it includes OEMs or other aggregators of components into a greater whole. The Supreme Court also made it clear that an after-the-sale notice does not constitute a conditional sale, and so cannot operate to limit the purchasers use. Again, this suggests establishing very clear relationships where downstream use is described and agreed by all parties.

Extending the first sale doctrine to method patents seems another blow to patent-holders and licensors. My feeling, however, is that the implications of the Supreme Court's ruling in *Quanta* can be managed and moderated with considered business strategies.



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GH: *The decision from the Supreme Court in Quanta v LG Electronics just came down in early June and it will take time to determine fully the impact of the decision on cases going forward and on companies' licensing programmes. The Supreme Court reversed the Federal Circuit and found that patent exhaustion for both the apparatus and the method did apply under the facts involved in the case. However, the court seemed to try to define narrowly the situation when the patent rights would be exhausted. In considering this decision, it needs to be kept in mind that the issue was not whether the rights under the licensed patent were exhausted but whether the rights that LG Electronics had under other patents that were directed to equipment that included the licensed component were exhausted. The Supreme Court decided that where the only reasonable use of the licensed component infringes another patent of the licensor there is an exhaustion of the other patent rights.*

The court viewed the additional patents as ones that covered a combination with the only inventive portion being in the component and not the use of the component since such use was the common intended use. On its surface, this test appears to be a reasonable and rational one, but as one tries to apply the test beyond the specific facts of the case significant questions and complications can occur. First, the decision shows the attitude of the Supreme Court towards combination patents such as also voiced in its KSR decision. Second, an invention is supposed to be defined by the claims and not by looking at the sub-elements to determine where the true essence of the invention lies. Third, what happens when the component has three different potential uses, or three different ways that it can be connected into a system and placed in operation, and each one is covered by a different patent? Are the rights in all three patents exhausted? Can one have a field of use restriction where there is only one patent covering the system using the component but different uses for the system? This was the situation in General Talking Pictures where the projector, the same basic design, could be used commercially or at home.

The court did indicate that there may still be breach of contract rights if an agreement restricting use is broken. However, this would not apply to a downstream purchaser of the product. Going forward, this decision might be interpreted fairly narrowly in which case the scope of its impact will be limited. Alternatively, it is possible to interpret some

of the language more broadly, which would lead to significant implications.

The decision could have implications not only in the patent arena but also on copyrights if the same broader logic is carried over. For example, if one buys a CD for home use under the same rationale advance, one would be free to use that CD in a commercial establishment without any additional payment for the rights to do so. This would undermine the entire programme of being able to license various commercial establishments for playing CDs or DVDs for commercial services. Similarly, following the same logic, if one sold genetic seeds then can a farmer harvest seeds from the crop to use for planting in the subsequent year, even though the seeds are protected by patents?

JW: *The In re Bilski case gives the Federal Circuit the opportunity to revisit the patentability of business methods and software. What do you expect to come out of the case?*

DM: *When you consider the five questions addressed under In re Bilski, you get a sense of why the CAFC took the unusual step of an en banc hearing. The questions begin narrowly focused around one claim of a single business method patent application, but quickly expand into questioning the very foundation of business method patents; both statutory and case law (State Street and AT&T).*

What is largely at issue here are the standards under which a process is patentable under 35 USC § 101, with particular emphasis on the purely abstract versus the concrete. Of the two ends of that spectrum, my suspicion is that the court will come down more closely aligned with the need for a demonstrable measure of concreteness (by virtue of some physical connection, device or transformation) in order to render an invention patentable. On that basis, I think the court may well revisit both State Street (which made possible business method patents) and/or AT&T (which removed the requirement for physical elements or limitations for process claims). In fact, In Re Comiskey has already nudged AT&T backwards. If this proves true, it may limit patentability of some processes/methods – in particular in areas such as the financial services domain (where, in fact, the Bilski application originated) which are an increasingly active area both from an R&D and patenting perspective.

GH: *The Federal Circuit in taking In re Bilski apparently felt the necessity to address the scope of the patentability of business methods because of the criticism that has been levied against such patents both in the marketplace as well as comments made by the Supreme Court. In taking the case in en banc the Federal Circuit invited and received numerous amici briefs from groups with a wide diversity of interests and opinions. At this point, it is difficult to make any prediction about the outcome. However, my best guess is that the Federal Circuit will require that business method and software patents have a direct involvement with some degree of technology. This level of involvement may be as simple as requiring the use of the method on a computer or in the operation or control by some piece of equipment. The patenting of business methods that do not involve any equipment or at least the storage of information on a disk so that the software can be run on a computer is very likely to be eliminated from being entitled to any patent protection.*

DC: *I'd be surprised if the Federal Circuit abandons State Street and business method patents; but like Damon and Gary, I do think the circuit will restrict the reach of business methods, perhaps by emphasizing a requirement that they be implemented by an identified technology. Although they've gotten a lot of bad press, applications in this class have a tiny issuance rate, so I think the business method problem is more perceived than real.*

JW: *Some have said the patent litigation is running out of control in the US. How do you respond to such an assertion?*

GH: *While patent litigation went up slightly in 2007 from the levels of 2006, it is no higher than it was in 2005. All litigation in the United States has become much more expensive, particularly with the new electronic discovery obligations. Whether the litigation is in the field of patents, antitrust, environmental, securities or any other area, it costs a lot of money. There is the concern among numerous companies that all litigation is running out of control. In addition, with the current recession the amount of litigation is likely to increase. Historically, during a recession, parties have been much less willing to take licences and have been more interested in litigating matters; either as the patent owner looking*

for additional sources of revenue, or as a defendant unwilling to pay the cost of a licence as this cannot be passed on to consumers.

There is the problem of patent trolls increasing the amount of litigation; although different parties will argue about the definition of what constitutes a troll. I have heard one definition from one company that anyone who sued their company was, in their minds, a patent troll, even if the patent owner suing them was a major competitor.

DC: *If anything, patent litigation probably lags behind the true importance of this type of property to our economy. Our productivity was once tied to manufacturing, but most of that has moved abroad and will continue to do so. Today, America's greatest asset is innovation, and patents are the principal legal vehicle that protects it. As usual, the judicial system struggles to keep up with new economic developments, just as it did with anti-trust, products liability, mass torts, oil and gas, and a host of other legal and economic issues. At the district court level, the judicial system is vastly more comfortable with patent litigation than it was 10 years ago and this expertise will continue to evolve.*

DM: *I don't see patent litigation as out of control as much as it is out of alignment. To some measure, perception is out of alignment with reality. But having said that, reality could use a little re-alignment of its own. The perception that litigation has run amok is in large part driven by a few high-profile, overly-high dollar damage awards. Awards such as Microsoft v Alcatel-Lucent at US\$1.5 billion (though this was overturned and the appeal on that is now being heard), Rambus v Hynix at US\$307 million figure prominently in building this perception. To paraphrase that famous – albeit apocryphal – caricature by Senator Dickerson, "a few hundred million here, a few hundred million there, and pretty soon we're talking about real money". Real money, yes. Real and pervasive trends, not necessarily. Let's also not forget that over 95% of all infringement cases settle. So by definition we're looking at a very small sample within a small sample.*

In response to this perception, however, patent litigators advancing patent assertions have begun to feel the courtroom walls closing in on them. A number of recent cases have limited (correctly or incorrectly, which is yet different debate) the ability of



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patent holders to extract value from patent assets through assertion. In the aftermath of these court decisions and the still unknown form of patent reform in Congress, I imagine we will see a more difficult path to victory and also a reduction in the resulting awards/settlements.

JW: How can companies engaged in litigation manage its cost while ensuring they have the best chance of prevailing?

DC: I think the most important factor is appropriate staffing of the case. Too many lawyers on a matter is the quickest route to racking up excessive bills. These days, the management of documents is also crucial to controlling costs. The number of documents in big cases has become overwhelming, but at the same time mismanagement of documents has often become case-dispositive. There are lots of choices about how documents are managed, all of which can affect both cost and outcome.

DM: The best litigation is often the one you avoid. Careful planning when building your technology/IP/market position can often obviate expensive and distracting infringement litigation. In fact, I've found my ability to avoid litigation steps up dramatically with the amount of preparation I do in anticipation of litigation. That is true from the offensive and defensive side of the fence. I can think of a number of assertions that would never have been advanced if they had effectively assessed their counter-assertion risk.

In my experience, the best way to manage litigation is to have a considered strategy for how you plan to take the matter forward, which balances prospects for victory with exposure, time and cost. To oversimplify greatly, envision a flow-chart or decision-tree of the litigation, with threshold events, decision points and everything (internally and externally) called into service to achieve your objective. Consistent with the notion of break-points, I often have several levels of objectives and with them several scenarios for victorious disengagement from the process. A realistic concept of what victory is at the onset and under the changing conditions of the process is key – to managing the litigation proper, costs, exposure and expectations (which more than anything can drive a litigation and attendant costs further than they should reasonably go).

GH: What Damon says is interesting because too often when litigation begins, companies lose sight of what its purpose is. All litigation involves a business dispute. One needs to understand the business objectives, the goals, the risks and the potential rewards. What is the patent owner hoping to achieve when bringing the litigation and what is the cost of getting there? At the same time, what does the accused infringer hope to achieve and what is the cost of defending the lawsuit versus trying to resolve it? Are there creative ways where both parties can find a solution to the dispute so as to enhance both parties businesses?

Too often outside counsel runs amok and has no concept of the objectives that the company wants to achieve. At the end of the day, many companies are not concerned with whether or not trial counsel can mark another notch in counsel's belt by winning before the jury, but instead the companies are more concerned about whether the litigation ended with a beneficial business outcome. Consequently the first step in managing any litigation is to understand and to have both inside and outside counsel agree on what are the objectives to be achieved, and then to do a cost-benefit analysis to make sure that the objectives and the activities stay on target.

In addition, a number of companies are filing for re-examination to attack the patents on which they are being sued. More patents are being challenged in the USPTO; more patents are being stricken or amended during the re-examination process and the process has slowed down to a point where it can take several years to come through the re-examination process. If the litigation is stayed during that time period, the accused infringer can obtain substantial benefits in either negotiating an advantageous solution or at least postponing the day of reckoning.

JW: Turning now to the USPTO; the office's director, Jon Dudas, has reported the latest quarterly patent approval rate stands at 44%. Does this indicate higher quality patents are now being issued by the office?

DM: I think the short answer is that allowance rates are only part of the quality equation and not always completely revealing. On the positive side, there are a number of visible and effective measures designed to improve quality already implemented and coming on-line at the USPTO. These include patent quality checks,

training in the form of mentoring and more formalised education – such as new KSR training – as well as (re)certification of examiners. While there are other things outside of the USPTO that have an impact on the allowance rate, I feel the quality of patents has, in fact, objectively improved over the last few years. Having said that, there is still room for improvement – on both sides of the patent prosecution equation.

GH: I agree. The drop in the allowance rate of patents is indicative of an improvement in the quality of the examination. Some people contend that the decrease in the allowance of new patents is only indicative of poor quality patents being filed that should have never been filed and that these are the patents that are not making it through the patent office. Over the past 40 years, I have always seem some ridiculous patents issue every year; from the bar of soap patent with a religious carving, to the patent on the method of swinging on a swing, to the process for combing one's hair to cover a bald spot. These types of patents, which clearly should never be issued at all, have always existed to a limited degree and probably always will. The real reason for the decrease in allowance rate is that the examiners are rejecting more applications and the process is becoming tougher, especially since the Supreme Court's decision of KSR.

JW: Do you believe the current backlog at the USPTO is a major problem? If so, how would you solve it?

DM: Despite ongoing hiring and other measures, the USPTO has been unable to eliminate the backlog. It's unlikely, and inefficient, for the USPTO to attempt hiring its way out of the backlog, but there are still meaningful gains to be made in process efficiencies/tools. The USPTO is working on some of them now, such as full-faith-and-credit for inter-office searches, which promises to save considerable time. Going forward, additional process and other efficiency gains need to be aggressively sought out and exploited. The USPTO should also continue experimenting with market-mechanisms where cost and benefit are more closely aligned in the prosecution process.

Yet, even additional hiring and process magic don't promise to eliminate the backlog completely. Patentees shoulder at least

some of the responsibility. Poorly prepared or inadequately searched applications add drag to an already over-loaded system at the USPTO. Some patentees also try to game the system with endless continuations to leverage unduly a priority date and this pendency-by-design also adds to the backlog. And, there are also natural lag-effects – inventors and/or attorneys have their own backlog of other things to deal with, so there's a latency between receiving an office action and acting on it. It's the combination of all of these effects that creates the backlog and only by addressing them all can we completely address the backlog.

GH: The current backlog in the USPTO is a major problem. Patents have a lifespan of 20 years from the date of filing. If it takes five years plus to obtain the patent one quarter of the life of the patent has been eliminated. More importantly, if the patent enters into re-examination and that process takes three to five years, and any litigation is stayed during that time period, then as a result, not only is a significant portion of the time period of the patent lost, but that time period may be the most profitable and effective time period for the patent and the technology disclosed and claimed in the patent. This problem is growing and at the current time, and despite what Damon says it is unclear that the USPTO has the willingness or capability to turn the issue around.

JW: While most in the US patent bar seem to be bitterly opposed to the office's new claims and continuations rules – now being litigated in a federal court – some seem to have less problems with them. Where do you stand on this?

GH: The new claims and continuations rules are a horrible idea and merely an attempt to shift the burdens and problems that the USPTO has onto the users of the patent system. Director Dudas clearly stated that a primary driving reason for the continuation rules was simply to cut down on the number of applications being filed. Similarly, the restriction on the number of claims is to force the examination to be simplified and to give the examiners less work to do. We should not be trying to solve the problems in the office by denying applicants substantive rights. We clearly have a problem with the backlog, but let's address that problem and not strip potential patent owners of the right to which they would otherwise be entitled.



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Damon C Matteo is charged with the direction of all aspects of PARC operation which touch intellectual capital. He has successfully completed transactions representing organisations in the US, Europe, and Asia, ranging in size from Fortune 500 companies to start-ups, as well as universities and national laboratories. Aside from their strategic benefits, a number of these transactions were themselves each valued at over US\$100 million.

Mr Matteo was recently appointed to the US Patent Office Advisory Committee, which operates like a board of directors (overseeing operations, goals, performance, budget and user fees and the like) for the office.

DM: Not surprisingly, we're looking at divergent perspectives and interests in this debate. I have no problem with polarised discussions, provided they help us get to a reasoned and effective solution. In support of the USPTO, I think they were trying to advance a solution to what they see as the intersection of at least two problems: backlog and perceived abuses of the current claims/continuation system. Much has been made of the fact that continuations now comprise in the order of 30% of the USPTO workload. True enough, but to my thinking limiting claims/continuations, at the possible jeopardy of patent quality, is not the solution. I'm also willing to admit there's a fair amount of responsibility for pendency/poor quality patents on both sides of the argument. Which makes it all the more important to make sure we're addressing the real, fundamental problems here. Perhaps that's why I am also inclined to agree with the district court in *Tafas v Dudas* that the proposed rule changes are "substantive rules that change the existing law and alter the rights of the applicants".

Having said that, in the interests of timely responsiveness to economic and other factors, I would fully support legislative change that provided the USPTO with the ability to craft and implement processes/rules designed to achieve broad legislative objectives.

JW: If enacted, would the Patent Reform Act make a fundamental difference to the US patent landscape?

DC: It's hard to say, depending on what the next version will look like. It appears that resolving this year's impasse will require rethinking the provisions relating to apportionment of damages, venue and several other issues. As time passes, I think the view is growing that the system is correcting itself through the courts and the PTO, and that the need for significant legislative change has diminished from the perception of two to three years ago. Nevertheless, I expect that the big IT companies will continue to militate for legislation favourable to their industry.

GH: There are so many variations in the Patent Reform Act at this time. It is difficult to say how much of an impact it would have on the US Patent landscape. Many of the provisions though would have a substantial impact and it could be a fairly negative

impact. Other provisions, however, such as first-to-file would have a much more limited impact. I personally have no problem with the idea of an opposition proceeding in the PTO. However, there should be a limited time period for the opposition proceeding to occur. Other provisions, though, that would transfer more of the burden onto the patent applicant and heighten the likelihood of finding inequitable conduct even without any intent to deceive could have a significant negative impact on the patent arena. At this point, it looks like there is little likelihood that the Patent Reform Act will pass this year in the current Congress, especially with the November elections around the corner. If no action is taken, then the bills will need to be re-introduced in the new Congress in 2009 and could be delayed substantially.

DM: Gary's right – on 5th May, the Senate removed the bipartisan Patent Reform Act from its calendar, so it would appear that Congress is content to do no yard work on the patent reform landscape this year. It's unclear exactly what form the Act will take when it is reintroduced (or replaced), but if it can avoid undue dilution the Act may indeed have a significant effect – for better or worse. Two of the key areas where I expect to see impact are:

- **Harmonisation:** in the interests of harmonization – an increasingly important element of intellectual property regimes – I believe the Act will retain the provision for a transition to first-to-file.
- **Infringement/damages:** though slightly different in their current forms, both HR1908 and S1145 provide prescriptive three-tiered approaches to rendering reasonable royalties. Both bills also modify the requirements around wilful infringement, making it harder to establish wilfulness. Together, the changes to 35 USC § 284 seem designed to limit unreasonable damage awards, and put wilfulness further out of reach – and with it, treble damages. This would amplify the dampening effect of recent court decisions on realising value from patents assets.

JW: Have the many recent changes in the patent landscape made it easier or harder to be a patent owner in the US that it was five years ago?

GH: The changes that have occurred

primarily in the patent landscape over the past five years have been due to various decisions from the Supreme Court and the institution of a variety of new rules in the USPTO. It has become harder both to obtain patents and to be successful in enforcing them. At the same time, rules in all federal litigation, such as the electronic discovery rules, have made litigation much more expensive for patent owners. However, the rewards are much greater, with larger damage awards being handed down by the courts. At the same time, as it is now much harder to obtain an injunction, unless both companies are direct competitors, the number of trials has increased because the fear that the defendant has about going to trial and losing has significantly decreased with little or no risk of an injunction.

DC: I agree with Gary. The breadth of patent protection has constricted in the last five years, mostly as the result of Supreme Court decisions. It's also more difficult to get patents issued today than it was then. The silver lining in this cloud for patent holders is that patents now being issued are probably of higher quality than five years ago and I expect that this will partially offset the retrenchment resulting from the Supreme Court's activity in the patent space.

DM: Giving the appearance of conscious design, the litany of recent court decisions operate in concert to constrain both the patent itself (KSR, possibly *In Re Bilski* and so on) and its expression in the marketplace (MedImmune, E-Bay, *Microsoft v AT&T* and so on). The intent behind the design, I believe, is a so-called return to normality; addressing ostensible shortcomings of the patent system and attendant abuses in the marketplace.

My concern here, however, is that another operation of law – the law of unintended consequences – may well have a dampening effect over much of that productive intent. These recent changes in the patent landscape will make it more difficult for some classes of patent holders, but have had less impact on others. For example, SMEs and universities often rely more heavily on licensing to realise value from their research investments, especially beyond their own market reach where much of the value may reside. These small entities also need a healthy assertion regime, in particular one that does not disadvantage on-practising entities as surrogates (*E-Bay* and *Propat v RPost*), which are often their

only viable path given financial constraints.

If you agree these changes make it more difficult for small entities to capture value from patents, then you also have to wonder what kind of a chilling effect it will have on their innovation and its dissemination into the marketplace. Even well intentioned change comes at a price. Whether these recent changes are worth the cost is as yet unclear. Let us hope so.