



Talking monkeys

What is it that makes otherwise intelligent people appear to be Neanderthals when it comes to IP?

One of the most successful entertainers of our time, Michael Crichton, is the author of *Jurassic Park* and 14 other best-selling novels. His latest, *Next*, deals with the destruction wrought by gene patents. Thirteen of his novels have been made into films, several of which he directed, and he is creator of one of the most successful series on television, *ER*. He is the only artist to have running simultaneously a number one film, novel and television series.

However, there is another, darker side to this Hollywood success story. Dr Crichton, a Harvard-trained MD who did post doctoral work at the Salk Institute and has taught anthropology at Cambridge University, has been mixing IP fact with fiction.

In a recent op-ed piece in *The New York Times*, which I urge you all to all read (<http://www.nytimes.com/2007/02/13/opinion/13crichton.html?ex=1172552400&en=c09a391fb5085528&ei=5070>), he vents his spleen about the societal dangers of providing exclusivity for gene-related inventions. What he writes is clearly the product of a creative mind run amok; or, perhaps, he is seeking to encourage controversy in support of a personal agenda, namely book sales.

Pirates of the human genome

"Gene patents are now used to halt research, prevent medical testing and keep vital information from you and your doctor," Dr Crichton writes. "Gene patents slow the pace of medical advances on deadly diseases. And they raise costs exorbitantly; a test for breast cancer that could be done for \$1,000 now costs \$3,000."

He tells the reader that this is "because the holder of the gene patent can charge whatever he wants, and does. Couldn't somebody make a cheaper test? Sure, but the patent holder blocks any competitor's test. He owns the gene. Nobody else can test for it."

Apparently, this is all the fault of the USPTO: "This bizarre situation has come to pass because of a mistake by an underfinanced and understaffed government

agency. The United States Patent Office misinterpreted previous Supreme Court rulings and some years ago began — to the surprise of everyone, including scientists decoding the genome — to issue patents on genes."

But, according to Crichton it gets even worse: "In addition, a gene's owner can in some instances also own the mutations of that gene, and these mutations can be markers for disease... Today, more than 20 human pathogens are privately owned, including haemophilus influenza and Hepatitis C."

I blinked after reading the above statements and emailed a few people for a reality check. Gene-related inventions are and should be patentable; if the patents covering some of them were granted in error, the courts will invalidate them. If they are not, they are sure to inspire a lot of important research in adjacent areas.

This was the response about the editorial that I received from Bruce Lehman, former United States Commission of Patents and Trademarks: "I have read several of his novels, and while entertaining, they are hardly serious literature. I don't think he knows anything about patent law. You are correct that the patent does not cover the actual genes in the body — there must be a utility to the patent. Certainly, using knowledge of a gene to develop a test for a disease is something that involves the kind of R&D that should be supported by the patent system. The testing procedure could be novel and non-obvious and, therefore, appropriately patentable. There seems to be a disturbing trend lately to think that it is immoral somehow to get paid for inventions that result from R&D in the health sciences. To the extent that patients cannot afford new treatments, that is not a patent issue — but a safety net issue that needs to be addressed with remedies such as the new (US) Medicare Part D system."

Out of control

Irving Rappaport, former chief patent counsel at Apple, National Semiconductor and Medtronic, provides similar perspective: "I read Crichton's most recent book, *Next*, which deals with patents. I thought it was one of his poorer books. The story line has talking

monkeys and birds around which he weaves a fantastic, but highly unbelievable, tale about how gene research gets out of control and affects unrelated families across the country. He did go to medical school, about 40 years ago, and then became a writer. Someone must have put a bee under his bonnet about gene-related patents and he has gotten on a high horse to speak to the masses based on little experience in the patent field. His article shows the dangers of a layman talking about a field of which he knows nothing. He should stick to writing novels and TV shows, for which he has some ability. Maybe his latest book sales are down and he is looking for some free publicity to pump them up."

In response to Dr Crichton's op-ed, John F Duffy, a research professor at George Washington University Law School, said in a letter to the editor that "gene patents have the same affect as all patents: they temporarily increase prices to provide greater incentives for discovery. It would be no less true and no less hyperbolic to speculate that you, or someone you love, could die if genes became unpatentable because the necessary genetic research would not be done in time."

Copy and sell

A final sobering thought came from op-ed responder David P Lentini, a patent attorney in San Francisco: "Gene patents are vital to the biotechnology and pharmaceutical industries. Why would anyone risk the billions needed to transform basic science into lifesaving products if someone else could simply copy those products without risk? I doubt that Michael Crichton would let others copy and sell his novels and movies for no cost."

From my perspective, the greater threat to our well-being is less likely to come from gene patents than from entertainers, politicians, healthcare professionals, and the like, with a little knowledge and too much imagination. Dinosaurs 1, humans 0.

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