The Cover Note

SPRING 2012 - Volume 5 Issue 2

EDITORIAL

Barry F. Lorenzetti

It's been said many times, both the Internet and globalization have had a great impact on businesses as well as our lives.

Suppliers, competitors and clients of many organizations are no longer situated only locally or regionally - many companies have experienced first hand the impact of ash clouds in Europe, tornadoes in the US or the Tsunami in Japan. As for the Internet well, it's totally changed the way many services are offered: Think about it; you probably bank online, make purchases online and you readily use it to get information on just about any topic, from health issues to news. Furthermore, the Internet has made it possible for businesses to reach out to a worldwide audience of readers, followers, clients and contributors, as well as enabling individuals to communicate, comment, exchange and share material.

In this context, one cannot but be struck by the fact that the issues related to intellectual property (IP) take on a whole new meaning. Apart from the traditional matters regarding protection of the proprietary material itself (registration, patent, pursuit of third party offenders) vital to attracting investments, securing leverage and protecting market share for your company, the geographical/jurisdictional (legal and regulatory changes) and accessibility angles have been added. In other words, more than ever, your IP strategy requires close teamwork between your R&D, production, finance, IT and legal departments.

The impact of globalization and the Internet being relatively new realities it has taken a few years for laws and regulation to begin to be adapted to the situation and judgments are also slowly emerging. For example, the upcoming Unitary European Patent and Unified Patent Court and the NewzBin2 affair in the UK.

The IP picture is also impacted by the trend of increased regulatory measures and the consequences of the continuing worldwide financial situation where some countries are trying to streamline the process to obtain patents (for example, the US in 2011) and Courts are looking to reduce expenses related to IP protection suits (recently, Canada – New rules of the Federal court, Masterpiece Inc. v Alavida Lifestyles Inc and BBM Canada v Research in Motion Limited).

All in all, it would be safe to consider that for the foreseeable future, the IP field will remain highly dynamic, if only due to the confusion that seems to have resulted from the need to transpose the application of the rules onto the web space. In this spirit, for our main article, we have asked Xavier Beauchamp-Tremblay, lawyer and Trade-mark Agent at Norton Rose to answer a few questions. As for our employee benefits column, David Vanasse updates us on Pooled and Voluntary Retirement Savings Plans. ♦

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In this issue

INTELLECTUAL PROPERTY

QUESTIONS AND ANSWERS WITH XAVIER BEAUCHAMP-TREMBLAY,

LAWYER, TRADE-MARK AGENT, NORTON ROSE CANADA

A. What are the common pitfalls in intellectual property?

It may be a good idea to start with the basics in intellectual property ("IP"). The three most important categories of IP rights are patents, copyrights and trademarks.

I would say there are three major types of risk with regard to IP:

- theft (or counterfeiting) of one's company IP by a third party;
- invalidation of an IP right;
- the fact that one's company should be guilty, whether consciously or by omission (even on purpose) of IP infringement.

Everyone knows that intellectual property can be violated by a third party, invalidated or that the risk of taking a more aggressive stance on counterfeiting is that we ourselves become defendants in a counterfeiting case.

On the other hand, when we speak of "traps", I guess we are talking about more insidious risks and I have identified two that are relevant to the problems created (or at least exacerbated) with cloud computing and social media:

1. ***Inadvertent disclosure of an invention by the careless use of cloud computing***

Cloud computing provides businesses with new ways to collaborate and are fantastic productivity tools.

Although it is not necessarily more careless to entrust its data to a third-party provider in the cloud than to manage the electronic data oneself, recent security problems experienced by some companies doing business in the cloud clearly show that there is a risk of disclosure of data shared in the cloud.

We all know a patent can only be granted for an invention if it has never been disclosed publicly. Therefore, you should use caution if the key technology for the future of your business is floating around in the clouds.

Some specialty providers offer companies the necessary guarantees and have ways to compensate for the loss or theft of such data, but beware of free services available to the general public like Dropbox or Google Docs. As great as they are for managing non-confidential documents, the fact that they are free means that the providers offer no guarantees and cannot be held liable. Their terms and conditions are very clear on this.

2. ***Unintentional violation of a trademark or copyright in connection with advertising campaigns such as "user generated content"***

Competitions organized and promoted via social media sites have become immensely popular among advertisers. Often, participants are asked to provide the content (photos, videos, product ideas) that is then used to fuel an ad campaign or "social media" activities of the brand owner.

The first danger lies in not obtaining clear consent from the participants to use the content submitted.

Then, there is also a risk that a selected entrant simply copied to create the content, in which case the advertiser who uses the winner's content in a subsequent advertising campaign could himself be found liable for the violation of third party intellectual property.

It is essential, therefore, to obtain clear consent for all uses that are contemplated and clear representations and warranties to the effect that the participant has the rights needed to share the content he provides to the business.

Still, despite the representations and warranties that an individual could offer, it is quite possible that the individual's assets are not sufficient to compensate third parties injured by the illegal use of their intellectual property in a mass advertising campaign, in which case the company could be responsible for the difference.

B. Are the problems really exacerbated by the advent and popularity of social media and if so, how?

In addition to the two examples mentioned in Question A, which are clearly illustrations of exacerbations that may be caused by social media on existing intellectual property risks, we need to remember that it is a medium that moves very quickly and is therefore very difficult to keep up with. Companies used to have absolute control over what was communicated externally to a potentially wide circulation. A small team within the company controlled all communications and the company website was updated by the company itself.

Before social media, or at least the web, it was (more) difficult for an individual to reach a large number of people with his words.

Today, any Internet user (whether an employee who "tweets" without his bosses' permission about a critical issue concerning his company or a third party that defames a company executive by posting an embarrassing video) can create content that could go viral and be seen by thousands of people.

C. What advice would you give to a risk manager regarding intellectual property (how to avoid traps for their organisation)?

I think the number one rule of caution is not to see social media (or new information technology) as a phenomenon that is above the law because it is new.

In principle, the same laws and regulations that apply to the normal activities of companies (advertising, contracts, document management, etc.) also apply when these activities are conducted through social media, and are of course adapted to the medium.

Advertising is a good example. In the "pre-web" or even "pre-web 2.0" world, advertising was a fairly simple one-way

BFL CANADA Risk and Insurance Inc.
45 Westwind Drive
Hammonds Plains, NS B3Z 1K6
Tel: 902-864-4982
Fax: 902-864-0200

2590 Laurier Blvd, Suite TBC 600
Quebec City, QC G1V 4M6
Tel: 418-658-6337
Fax: 418-654-2045

2001 McGill College, Suite 2200
Montreal, QC H3A 1G1
Tel: 514-843-3632
Fax: 514-843-3842

BFL CANADA Risk and Insurance Services Inc.
2685 Queensview Drive, Suite 101
Ottawa, ON K2B 8K2
Tel: 613-722-7798
Fax: 613-722-7829

181 University Avenue, Suite 1605
Toronto, ON M5H 3M7
Tel: 416-599-5530
Fax: 416-599-5458

BFL CANADA Insurance Services Inc.
175 Carlton Street, Suite 205
Winnipeg, MB R3C 3H9
Tel: 204-594-0260
Fax: 204-594-0259

877 Henderson Highway
Winnipeg, MB R2K 2L8
Tel: 204-661-2446
Fax: 204-663-0344

1167 Kensington Crescent NW, Suite 200
Calgary, AB T2N 1X7
Tel: 403-451-4132
Fax: 403-313-3365

5185 South Ridge Drive
Kelowna, BC V1W 4Z4
Tel: 250-863-8859
Fax: 778-477-0011

1177 West Hastings Street, Suite 200
Vancouver, BC V6E 2K3
Tel: 604-669-9600
Fax: 604-683-9316

1-866-688-9888

communication of a corporate message to consumers. However, in web 2.0, communication with consumers is often two-way, with the brand communicating directly with its "fans". Although they may seem more relaxed on the surface, these new types of communications are still (in general) a form of advertising and are therefore subject to all laws and standards relating to "regular" advertising.

Because social media is a new phenomenon, it does not mean that legislation is not applied and that anything goes. On the contrary, on top of the usual regulations, one must consider the regulations of "providers" of social media services like Facebook and Twitter.

If we take the example of contests again, organizers who launch a contest through social media (via a Facebook page for example) must not only respect the usual rules governing contests, but must also comply (or risk sanctions by Facebook) with Facebook's own rules regarding contests, which are surprisingly detailed.

The same thing applies to cloud computing services: the new tools (often free) that are made available to us by the likes of Google, Apple and Dropbox are appealing in their simplicity and user friendliness, but as with any non-web provider, certain verifications must be made.

For example, before allowing the use of such a service, a manager should know what guarantees (in most cases, when a service is free, there are no guarantees) are provided to preserve the confidentiality of data that are hosted via such services.

Consequently, a good manager should make every effort to understand, or surround himself with people who understand the "less virtual" obligations of the business and at the same time are very familiar with social media.

My second piece of advice relates to the need to understand that, due to the particular nature of social media, the company's message no longer necessarily comes from a single perfectly controlled source. Therefore, be sure to have the right teams in place to respond quickly and in accordance with company policies.

Too often, I attend conferences on the legal impacts of social media (or inversely, the impact of social media on legislation) where social media issues focus on the problems related to official company blogs (and other pages). The problem is that a major "difficulty" with social media (this difficulty of course, is also what makes them so rich) is the fact that any employee who actively uses social media, even in a personal context, can publish content that may have consequences for his employer.

The obvious example is the publication of a trade secret in a careless tweet, but one can imagine an engineer whose job is to develop new products on account of his employer, who candidly (and privately) blogs about his day's work on his personal website, without knowing it gives ammunition to potential intellectual property infringement suits.

Note that Canadian jurisprudence has confirmed that settings of a personal profile on "private" social media (whereby content is only accessible to "friends" of the account holder) does not prevent the content from being transmitted to a third party in the event of litigation.

It is therefore vital that companies adopt the right policies. All too often, however, these policies are set aside once they have been communicated, and nothing is done to carry them out, or ensure that adequate mechanisms are in place to respond quickly and in accordance with policy. It is as if a wall exists between the legal department who (more often than not) writes the policies, and the marketing, communication and information technology teams.

As a recent case in point, the Superior Court ruled against a company for allowing members of the public to publish defamatory comments following a blog post. But the company was not at fault for not having a policy (the policy in place was adequate) or failing to act properly under the circumstances, but rather for not applying its own policy.

It is important to implement a policy and set the parameters for the use of social media; except that things go so fast on these platforms that if the right teams (often multidisciplinary) and procedures are not in place, it is quite possible that the policy will never be implemented and effective. ♦

UPDATE ON THE POOLED REGISTERED PENSION PLAN (PRPP) AND VOLUNTARY RETIREMENT SAVINGS PLAN (VRSP)

David Vanasse, President
BFL CANADA Consulting Services Inc., Montreal

This is an update to the previously published article in which I presented the arrival of a new type of pension plan in Canada, that is:

- the Pooled Registered Pension Plan (PRPP) at the federal level
- the Voluntary Retirement Savings Plan (VRSP) in Quebec

The governments of the two major Canadian provinces (Ontario and Quebec) recently filed their budget with diametrically opposed conclusions as to the new pension schemes:

Ontario has a number of reservations about the federal model as it is currently proposed. For example, each province would also be required to establish an effective system of licensing and regulation; the cost of regulation must be reasonable as it would be absorbed by the participants of the PRPP.

Although Ontario will continue to collaborate with the other provinces and the federal government to develop the current model, it believes that the implementation of innovative measures with regard to pensions should be linked to the enhancement of the CPP/QPP as part of a comprehensive approach.

As for Quebec, it is going ahead with its "distinct" project, the VRSP. Thus, the changes proposed in the recent budget are consistent with proposed changes to the 2011 Canadian Income Tax Act regarding PRPPs.

We do not believe that the other provinces will be ready to offer a plan, like Quebec, on January 1, 2013, but rather on January 1, 2014.

Below is a summary of the VRSP's main characteristics:

Obligation to provide a VRSP - five or more employees: All companies with five or more employees that do not already offer a pension plan will be required to provide their employees with the VRSP. Companies that already have a registered pension plan or a RRSP in place are not affected by this.

Employers will have from January 1, 2013 to January 1, 2015 to comply with this obligation.

Automatic enrollment and contribution rates: Employees with at least one year of continuous service will automatically be enrolled in the VRSP by their employer, with the possibility to opt out within 60 days after enrollment. The employee shall determine his own contribution rate but a default rate is scheduled as follows:

- 2% in 2013, 2014 and 2015;
- 3% in 2016;
- 4% from 2017.

No obligation for the employer to contribute: Employers may choose to contribute or not.

Other features:

Tax treatment of contributions: VRSP contributions for both employees and employers will be tax deductible.

Withdrawal of contributions: Contributions made by an employee will not be locked in and may be withdrawn at any time while employer contributions (if paid) will be locked in until age 55, after which they may be withdrawn by the employee.

Choice of investments: By default, the contributions are paid into a target date fund. In addition, administrators can provide up to five other VRSP investment options.

Administration and monitoring: An administrator must provide a single VRSP plan to all its clients. The administrator can be a financial institution (e.g. insurance company), with a permit issued by the Autorité des marchés financiers (AMF). The Régie des rentes du Québec will be responsible for overseeing these plans and ensuring that management fees will be comparable to pension plans of similar size.

In summary, the VRSP could become a great investment vehicle provided that contributions are sufficiently significant to allow insurers to offer a low cost product - but will that be the case? Furthermore, based on the responses of Ontario and Quebec and of the other provinces to follow, we need to watch out for the harmonization of rules of these new pension schemes. Stakeholders have been demanding improved harmonization of current plans for several years now - but the different jurisdictions do not seem to be listening. As an employer, you will want to analyze all the options with the help of an independent consultant to guide you. We will keep you informed of any developments from the other provinces with regard to the PRPP once they have taken a stance. ♦

BFL CANADA Consulting Services Inc.
2590 Laurier Blvd, Suite TBC 600
Quebec City, QC G1V 4M6
Tel: 418-658-6337
Fax: 418-654-2045

2001 McGill College, Suite 2200
Montreal, QC H3A 1G1
Tel: 514-937-4188
Fax: 514-937-5585

181 University Avenue, Suite 1605
Toronto, ON M5H 3M7
Tel: 416-599-5530
Fax: 416-599-5458

1177 West Hastings Street, Suite 200
Vancouver, BC V6E 2K3
Tel: 604-669-9600
Fax: 604-683-9316

1-866-688-9888

Send comments or suggestions to publications@BFLCANADA.ca