

**SECURITY
INTERESTS
IN
INTELLECTUAL
PROPERTY**

Editor

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Editor's Note

The analysis and opinions expressed in the papers in this volume are those of the individual authors alone, and not necessarily those of the Law Commission of Canada.

The spelling of the word "trade-mark" varies according to the context. It is to be noted that the 1985 Federal statute consolidation exercise, which produced the Revised Statutes of Canada, changed the spelling in Canada from "trade mark" to "trade-mark". In the U.S.A. and in the World Intellectual Property Organization ("WIPO"), the spelling is "trademark". In the U.K. and the EC, the spelling is "trade mark".

Unless otherwise noted, the papers presented in this book are based upon the law in effect at the date of delivery, namely November 16 and 17, 2001.

Foreword

This book is a unique compilation of 18 papers that provide a comparative examination of the issue of the use of intellectual property as security in corporate financing transactions. With one notable exception mentioned below, these papers were presented by the Law Commission of Canada ("LCC"), an agency of the Federal Government, in a conference at the University of Western Ontario on November 16 and 17, 2001.

The LCC has addressed the issue of secured interests in intellectual property for many reasons. The Uniform Law Conference of Canada, with input from the private and public sector in all provinces as well as academia and senior officials in the Federal Department of Justice, have evolved a Commercial Law Strategy that calls for an overall examination of all federal security interests. The area of intellectual property was dealt with first because it was perceived as the most tractable in some senses, and the most immediate in others, given its obvious link to the "new economy" and the concept of leveraging intellectual property. In a federal state such as Canada, these issues involve complex operational, constitutional and governance issues as between the Federal Government and the provinces. It turns out that Canada's concerns are reflected in notably comparable ways in the U.S.A., Australia and the EU, particularly the U.K. Hence, papers were sought from leading experts in these jurisdictions and this book is intended to be useful to practitioners, policy makers and academics throughout the world, even if the focus is mostly on Canada.

This book includes the very recent proposals developed by the Franklin Pierce Law Center in the U.S.A. for consideration by the United States Patent and Trademark Office. It includes up-to-date information on Australia and the rapidly evolving constitutional situation in that country. It also includes detailed information on the U.K., and the most recent nascent interest on the continent in the rest of the EU. In addition to legal analysis, there are presentations on the key issues of valuation and business strategy, as well as an economic analysis of the costs of uncertainty associated with these issues.

Given the context of the papers and the purpose for which they were written, the reader is cautioned that there may be conflicting opinions on policy issues and even the state of law. This is inevitable, given the complexity and cutting edge nature of the subject-matter and is the very reason that the LCC commenced the project. Nonetheless, the papers should be helpful on a very practical level to lawyers for lenders and borrowers in all the major jurisdictions. As usual, it is necessary to say, out of caution, that none of the authors intend their paper to serve as legal advice.

The LCC, under the leadership of Nathalie Des Rosier, is to be commended for having undertaken the project that led to this book. In the current times, it has become very difficult for governments everywhere to address commercial law concerns in a timely and wise manner. There are invariably other issues with a much higher political profile and much lower degree of legal and economic complexity than the sorting out of conflicting priorities amongst various creditors according to principles of intellectual property, bankruptcy and personal property security law or its equivalent. Resources and in-house expertise for issues of this type are often lacking in governments. Sadly, it may take one or more spectacular business failures or law suits for this matter to be given the attention it deserves.

Indeed, in the months since the conference and the submission of these papers, there has been a precipitous collapse in value of several technology based enterprises and many bankruptcies amongst intellectual property based businesses. The issues raised in this book are at least as important in difficult times as they are in periods of growth and prosperity. One can only guess at the additional costs to business required to overcome the existing uncertainties in this area, not to mention the lost opportunities.

For many in Canada, the economic shocks of the last year will provide more impetus for the updating of Canadian bankruptcy law so as to provide greater certainty with respect to licensing, as has been done in the U.S.A. Likewise, some authors and other creators of copyright may renew efforts to press for status as secured creditors in the event of the bankruptcy or insolvency of a publisher.

Therefore, all told, it is now even more essential that reform be undertaken in this field. Many would say that the American experience with its *Uniform Commercial Code* has been a critical factor in that country's emergence as the leading economy of the modern era. A small and tentative step forward appears in a recent Canadian government report published on October 3, 2002 concerning copyright revision¹ which indicates that there is some official awareness of the issue at hand that may result in some consideration in the context of revision to Canada's copyright legislation. However, given the historic difficulties inherent in Canadian intellectual property law revision generally and copyright revision in particular, the apparent lack of any priority on this issue, and the many other substantive and operational problems across the board in Canada's intellectual property framework, one should not count on this process to yield any tangible results in a measurable time frame. But it is now, even if faintly, on the Canadian government's radar screen.

The Editor was an advisor to the LCC with respect to the program and the faculty of the conference that led to this publication. This effort benefited a great deal from the advice and encouragement, above and beyond the call of duty, of Bradley Crawford, Helen Yaremko-Jarvis and Gabor G. S. Takach, in Toronto,

¹ *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act – Section 92 Report*, Industry Canada, October 3, 2002 (online: <<http://strategis.ic.gc.ca/SSG/rp00880e.html>>).

and David Allan in Australia. Professors Rod MacDonald and Rod Wood have been essential and invaluable in the best academic tradition in sharing their considerable wisdom as past and present law commissioners respectively and their great expertise on and at crucial points. Sincere gratitude is due to all of the contributors to this volume for their enthusiasm and outstanding efforts to deal with difficult issues on short notice. However, very special and unique thanks are due to Me Louis Payette of Montreal who attended the conference as a spectator and who subsequently responded graciously to our invitation to adapt a chapter of his remarkable treatise on the *Quebec Civil Code*, which had only recently published in French in its second edition and contains a very important and relevant chapter on intellectual property from the civil law point of view. This analysis is now available for the first time in English as a result of the efforts of Me Payette and Carswell and has been adapted to the context of the LCC's program, thereby filling a crucial void and providing a welcome and extraordinary bonus.

Finally, thanks are due at Carswell. Nance Fleming has, as in the past, provided her excellent editorial expertise, diplomacy and patience. Cameron Suggitt has made it his mission to give intellectual property law the publishing attention that it needs in this country. His trust and vision will be appreciated and bear dividends for years to come.

Howard P. Knopf
Ottawa
November 25, 2002

Preface

The history of commercial law is marked by transitional events such as the conferral of legal personality on corporations, the creation of mechanisms to recognize the value of “movables” as opposed to land and the development of franchising or condominium law, to name a few. As there is a shift in our economy to a more information, technological and service based industry, there are pressures to adapt the commercial law infrastructure to such new realities. We are now in a transition phase. The innovative potential of firms, the way in which they use and adapt information technology or develop new products is what makes them successful. We need a legal infrastructure that reflects this new economy, the economy of innovation and ideas.

This book is one of the first to identify the difficulties of the legal system in harnessing the power of innovation for investment purposes, both in Canada and elsewhere. That law lags behind changes in the business world is not new. However, it cannot afford to become irrelevant to the changes in our economy.

This book is a true achievement: it brings together contributions from the leaders of the Canadian intellectual property and commercial law fields as well as international experts on the question. It bridges the world of intellectual property and commercial law and that of theory and practice. Practitioners and academics from several disciplines have co-operated to make it a book that is at the cutting edge of legal development and will serve as the basis for law reform in the area.

The Law Commission is particularly indebted to the editor, Howard Knopf, for carrying this project to fruition and to all the authors and commentators who have enriched our understanding of the legal challenges faced by the new economy.

Nathalie Des Rosiers
President
Law Commission of Canada
September 10, 2002

On November 16 and 17, 2001, I had the pleasure of attending and speaking at a conference organized by the Law Commission of Canada concerning security interests in intellectual property. This forum provided the catalyst for me to learn about relevant judicial and legislative developments from the major jurisdictions around the world. The presenters were the leading experts on the subject, and there was a great deal of invaluable exchange of experience and knowledge

amongst concerned academics and practitioners. The timeliness of the event and the outstanding nature of the faculty were such that I was able to learn for the first time in detail about an important development in my own country, namely the major study from the Franklin Pierce Law Center.

In my remarks, I recounted the ebb and flow of this issue in the U.S. courts and Congress. I also dealt with the many interest groups that have a stake in these issues in the U.S.A. They include the film industry and software industries, and of course the various types of lenders. In the current post September 11, 2001 climate, I stated that it seemed unlikely that Congress would focus on this issue, especially given other intellectual property related priorities.

However, I do believe that it is important for governments in all countries that value intellectual property to consider the issue of how it can be used as security in commercial transactions. There are many uncertainties in all of the jurisdictions that have examined the issues. It would be best if these uncertainties could be resolved. The problems are particularly complex in the case of the U.S.A. and Canada, which have copyright registration systems. But, of course, the problems are not limited to copyright law at all. The issues arise in the patents and trade-marks areas as well.

I wish to compliment Nathalie Des Rosiers of the Law Commission of Canada for her initiative in tackling such an erudite and specialized issue with a limited profile but such considerable importance. I also wish to compliment Howard Knopf for assembling such an impressive expert faculty and for editing this invaluable book that resulted from this initiative. This book should be useful to practitioners, policy makers, and the judiciary in several jurisdictions for several years to come.

Hon. Marybeth Peters
Register of Copyright
United States of America
November 20, 2002

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