Session 3: How the Internet is changing the Practice of IP Law

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Brett's expertise: a. o. servicing clients in the artificial intelligence and machine learning, financial services, emerging technologies, data analytics, wireless telecommunications

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How the Internet is Changing the Protection and Enforcement of IP

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Agenda

1. Case study
2. Infringement in a cloud system
3. Disclosures on the Internet
Case Study – Drone Delivery System

Diagram showing drones connected to a central AI system via a cloud network.
Features to Claim

- Using local data sources to determine delivery windows, routes, weather, traffic, customer availability, shared deliveries, cancellations, new orders in real time.
- Collecting data and sending to cloud-based AI system.
- Using AI system to generate delivery instructions.
- Using AI system to sending delivery instructions to drones in the field.
- Using AI system to instruct deployment of more drones as needed.
- Using AI system to instruct drones to transfer packages in the air.
- Using local servers to collect feedback from local drones in real-time
Challenges

• Data collection occurs in many jurisdictions.
• Drones travel across borders.
• Drones instructed by AI system, located in a central location.
• AI system not necessarily in same jurisdiction as data collection servers.
• “Invention” includes features in drone and features in AI system.
How Do We Capture Infringement?

• Claim from perspective of single “actor”.
• Can we claim data collector activities?
• Method(s) or system(s) or both?
• Jurisdictional issues – where is inventive activity actually occurring?
• Detectability – does drone execute all operations in a single jurisdiction? (method vs. system claim)
Divided Infringement

- Akamai Technologies, Inc. v. Limelight Networks, Inc., 797 F.3d 1020 (Fed. Cir. 2015)
- Looked at proper legal standard for determining patent infringement liability when multiple actors are involved in carrying out the claimed infringement of a method patent and no single accused infringer has performed all of the steps (i.e. “divided” infringement).
- Court held that one actor could be held liable for the acts of another actor: "when an alleged infringer conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance."
- Court also held that where multiple: "actors form a joint enterprise, all can be charged with the acts of the other[s], rendering each liable for the steps performed by the other[s] as if each is a single actor."
Example claim

• Everyone involved:

1. A method for instructing delivery of objects using a drone, comprising:
   connecting to local data sources at local server;
   sending local data to AI system;
   analyzing local data at AI system, to generate global delivery profile;
   generating, at AI system, delivery instructions;
   determining, at AI system, target drone(s);
   sending instruction(s) to drone(s);
   receiving, at drone(s), delivery instruction(s);
   executing, at drone(s), at least one in-air operation to coordinate delivery;
   and
   delivering, by drone(s), at delivery destination.
Example claim (con..)

• Multiple Actors:

1. A method for instructing delivery of objects using a drone, comprising:
   connecting to local data sources at local server;
   sending local data to AI system;
   analyzing local data at AI system, to generate global delivery profile;
   generating, at AI system, delivery instructions;
   determining, at AI system, target drone(s);
   sending instruction(s) to drone(s);
   receiving, at drone(s), delivery instruction(s);
   executing, at drone(s), at least one in-air operation to coordinate delivery;
   and
   delivering, by drone(s), at delivery destination.
Example claim (con..)

• Drone perspective:

1. A method for delivering objects using a drone, comprising:
   - receiving, at the drone, delivery instruction(s), the delivery instructions sent by an AI system to target drone(s), the delivery instructions based on a global delivery profile generated from local data analyzed by the AI system, the AI system having received the local data from a local server.
   - executing, at the drone, at least one in-air operation to coordinate delivery;
   - and
   - delivering, by the drone, at delivery destination.
Example claim (con..)

• **AI System perspective:**

1. A method for instructing delivery of objects using a drone, comprising:
   - receiving local data at AI system, the local data having been collected by a local server connecting to local data sources;
   - analyzing local data at AI system, to generate global delivery profile;
   - generating, at AI system, delivery instructions;
   - determining, at AI system, target drone(s);
   - sending instruction(s) to drone(s) to enable drone(s) to execute at least one in-air operation to coordinate delivery and to deliver at delivery destination.
Example claim (con..)

• Data collector perspective:

1. A method for collecting data to enable drones to be instructed to perform deliveries, comprising:
   - connecting to local data sources at local server;
   - collecting local data from the local data sources;
   - sending local data to AI system to enable AI system to analyze local data to generate global delivery profile, to generate delivery instructions, to determine target drone(s), and to send instruction(s) to drone(s); and to enable drone(s) to receive delivery instruction(s), execute at least one in-air operation to coordinate delivery, and deliver at delivery destination.
Internet and Digital Disclosures

At a recent round table meeting of business executives, & long after formally introducing Tim Cook of Apple, I quickly referred to Tim + Apple as Tim/Apple as an easy way to save time & words. The Fake News was disparagingly all over this, & it became yet another bad Trump story!

7:12 AM - 11 Mar 2019
11,388 Retweets 51,649 Likes
Internet and Digital Disclosures

• General Issues:

1. Dates
   – Undated content
   – Updating/changing dates
   – Authenticity of date stamps

2. Information Contents
   – Edited content
   – Contributions on different dates
   – Automatic updates
   – Automated information creation

3. Availability
   – Hidden content
   – Obscure content
   – Searchability
   – Indexing
Internet and Digital Disclosures

• Information Disclosure Issues:
  – Dynamic content (e.g., video)
  – Documenting dynamic content
  – Establishing date
  – Unreliability of citing URLs
  – Getting back to content later

• Prior Art Issues:
  – Not everything is found in a search engine
  – Difficulty in searching social media
  – Documenting for IDS
Internet and Digital Disclosures

• Tips, and Tricks:
  – Capture frames of a video to generate static document
  – Record at least “accessed” date when you find disclosure
  – Wayback machine

• Possible (Future) Solution:
  – Blockchain to date stamp and provide authentic record of disclosure
Questions?

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Internet Evidence in Support of IP Claims

Coleen Morrison
November, 2019
USPTO – Specimens

➢ Most prominent issue today involving Internet derived evidence in our daily practice involves specimens of use before the USPTO.

➢ In ~ 2016 USPTO became aware of rampant abuse of evidence to support a claim of use.

➢ Launched a pilot programme to combat flawed evidence.

➢ Applicants were digitally modifying or otherwise mischaracterizing use in a substantial number of cases.

➢ FICPI met with UTPTO - comment at the time was that they were shocked at results of investigation.
Result:

USPTO acquired software to spot digital alteration of specimens (eg EOTJTP)

Allowed interested parties to notify regarding specimens (not inter partes)

Change to representation rules EVERYONE (including foreign domiciled applicants) requires US representation

In one day in August shortly before the change believed almost 2000 potentially flawed applications filed
INTERNET-DERIVED EVIDENCE IP CASES
ADMINISTRATIVE & COURTS

Hearsay: Not first-hand Someone else’s facts
A statement made:
1. out of court: and
2. to prove the truth of the matter asserted

What is behind the objection?
1. It’s not “best” evidence
2. Inability to “test” the evidence via cross-examination
Case Study

The Maple Sugar Shack:

➢ is a restaurant in the tiny area of the Atlantic Provinces of Nova Scotia
➢ Achieved incredible notoriety by Canadian standards…
INTERNET-DERIVED EVIDENCE IP CASES

There are any number of celebrity Chefs stopping by to make strudel and all other manner of delicious food.
INTERNET-DERIVED EVIDENCE IP CASES

…and more…
INTERNET-DERIVED EVIDENCE IP CASES
FACT PATTERN

Case Study

➢ MAPLE SUGAR SHACK trademark has been registered since 2011

➢ But recently patrons have been complaining on-line that the “restaurant in Toronto is not as good”

➢ MAPLE SUGAR SHACK looked into the matter and learned that another restaurant called Maple Sug’r Shak has opened in Toronto

➢ MAPLE SUGAR SHACK Challenged
INTERNET-DERIVED
EVIDENCE IP CASES

Welcome to the case of:

MAPLE SUGAR SHACK Ltd. v Maple Sug’r Shak Inc.

Fact Situation 1:  Online Reviews from Customers Evidencing Confusion

MAPLE SUGAR SHACK Ltd. (senior rights holder) has located a customer who left an on-line review saying:

“I thought the Toronto restaurant was a sister restaurant of the NS establishment. But looking more closely the spellings are different so I don’t think they are related”

The review page is entered as evidence.
INTERNET-DERIVED EVIDENCE IP CASES

Admissible with Probative Value?

US- Probably ok if authenticated

➢ Even if confused is recognised by declarant going to “state of mind”

Canada Opposition Board –
➢ Probably ok. Not for truth of contents
➢ Necessity + Reliability (Reasoned Approach)

Canada Federal Court ?
Signals that maybe hearsay rules will be strictly applied… at least in Pharma cases
_Pfizer Canada Inc. v. Teva Canada Limited_ (2016) FCA 161

➢ In that case a damages award was overturned because the witness attesting to damages did not have first hand knowledge
➢ Strict interpretation of rules of evidence
INTERNET-DERIVED EVIDENCE IP CASES

Fact Situation 2 – Mistakes in E-mails etc.

Online materials are uncovered indicating that some customers have sent e-mail messages to bob@maplesugarshack.com not bob@maplesugrshak.com

Does this support a claim of confusion?

US
Probably not.
Incorrect spellings of names not confusion

Canada TMOB no juris. but if pleaded, evidence and argued…possibly.
Greater emphasis on actual confusion possibly bc more being found?
Canada Fed Ct? Less likely
Fact Situation 3 – Statement Other than from Customers

MAPLE SUGAR SHACK evidences a web posting by a prominent Internet food blogger, Julian Crumb saying this about the restaurant:

Of the nearly 1000 restaurant reviews this blogger has commented upon, the Maple Sug’r Shack recommendation is the one I provide with the greatest hesitation. First of all, I caught sight of the celebrity chefs in the kitchen. All one can say is….no, no, no!! Kindly send them back to their desks at prominent IP firms where they can fulfill their original mandate of being talented Patent Attorneys. I sincerely believe them to be good at these tasks...but cooking- not so much…even if that strudel did smell pretty good when they made it in Vienna at the FICPI Forum!

US
No. Should be consumers, not others
*Tavern Corp v. Dutch Kills Cenrraal (2015)*

Canada
Possibly the Board, if not formally then “flavor”? Fed Ct. tougher
Best argument might be that if someone sophisticated in the field is confused all the more likely ordinary consumers will be confused.
Fact Situation 4 – Unreliable Comments

The Plaintiff locates the following on-line post referring to the Toronto Restaurant:

*The talent and abilities of THE MAPLE SUG’R SHACK celebrity chefs is exceeded only by their good locks, sharp wit and general fitness for anything and everything …Everest next, saving humanity? Bringing countless new members to the CET?*

**US**
Ha! We have a case to rely on. Our courts have said re on-line rants: He/She “appears to be someone so easily confused that even Trademark law cannot protect her [him]” As such, we can disregard such ravings.

**Canada**
No such luck ….trademark law protects everyone, but this is probably not reliable
Fact Situation 5 – Wayback Evidence

In spite of allegations otherwise, the Plaintiff evidences web pages from the Wayback Machine showing that the Maple Sug’r Shack website only became active 2 years ago in 2017 well after the MAPLE SUGAR SHACK trademark came into use.

US – jurisprudence both ways- outcome uncertain, more about authenticity than hearsay. One circuit tends to accept if Wayback employee authenticates, another want plaintiff to authenticate info relating to its own site.

Canada – Principled approach Necessity + Reliability. Board tends to accept

Australia (2019) – Plaintiff argued not business records bc not records of pl or def. Court agreed that business records exception does not apply to Wayback Machine findings but admitted the evidence anyway. Can disregard where evidence not in despite or its application would cause unnessar expense or delay. Accepted reliability
Fact Situation 6

The Plaintiff:
Evidences that a Google search of “Sugar + Shack + Restaurant + Canada” yields a first 10 results all linking to the Plaintiff in support of a claim that its mark is very distinctive

US
Not convinced about significance of Google findings, maybe to prove similar channels of trade
Quai Corp v. Mattel (2011)
Grouping v. Groupon supra
In re St. Helena Hospital (2014)

Canada
Hey! We’ve not really developed our law enough, but could it make sense to look at this?
So Could it Make Sense to Look to Search Engines?

US- No (see previous commentary)
Canada- hmm let’s think about this??

The raison d’etre for search engines is to link searchers (customers) to what they are looking for (products or services). These search engine companies have vast resources that are aimed at doing this well and getting customers to the site they are looking for.

Note: trademarks are shortcuts to link products/services to owner.

Therefore does a search engine do a reasonable job at showing what happens in the commercial world to link trademarks to customers?

Can search engines do a better job than judges relying somewhat on speculation?
INTERNET-DERIVED EVIDENCE

Search engine

✓ Algorithms predicts what on-line sites consumers associate with a mark
  ✓ Page rank counts number and quality of hits
  ✓ Importance of linking site
  ✓ Downgrade recycled content
  ✓ Prioritizes natural links
  ✓ Assess time at site (do they return quickly to listing)
  ✓ AI by linking words found together- e.g butterfly stroke
✓ Cost free and neutral survey?
✓ Search engines introduces commercial component which court cannot necessarily do well
✓ Motivated to provide consumers with the info they want

Perhaps this evidence should be accorded high probative value?
Thank-You for participating!

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