

Hamilton Chamber Of Commerce IP Enforcement Regimes

Issue:

Intellectual Property is a complicated issue. However, this does not mean that business groups should not properly consider the impact that any changes to IP regimes might have on all segments of the business community. Appropriate studies should be undertaken to provide answers on the questions that would affect Canadian businesses.

Background:

Both the Canadian and Ontario Chambers of Commerce in 2007 adopted positions (in the case of the Canadian chamber through a policy resolution at its annual meeting; in the case of Ontario through a special report) supporting increased enforcement of intellectual property (IP). The Hamilton Chamber of Commerce made submissions at the Canadian annual meeting, which were not accepted.

Canadian Position

The Canadian position (from the 2007 Policy Resolution Book) is as follows:
That the federal government:

1. Make counterfeiting and piracy a government wide priority and act on appropriate reforms in a timely manner.
2. Provide core-funding resources for the necessary reforms and their implementation, including the ability to search and seize suspected counterfeit goods at Canada's major ports and gateways.
3. Strengthen existing statutes, such as the Criminal Code, Copyright Act and Trade-marks Act, either individually or through a dedicated anti-counterfeiting statute.

Initiatives that should be taken in relation to this are:

- Making it a criminal offence to manufacture, reproduce, distribute and/or import or offer for sale counterfeit products;
- Amending the Criminal Code to properly define "counterfeiting" as a special criminal offence;
- Making amendments to the Federal Court Act to provide for expedited civil proceedings for cases involving counterfeit products and other IP infringement.
- Adding counterfeit and pirated goods to the proceeds of crime regime, making it possible for law enforcement officers to seize the illicit wealth of counterfeiters;
- Ratifying the two outstanding WIPO treaties that specifically deal with enforcement of intellectual property rights over the Internet;
- Making amendments to the Customs Act to allow for search and seizure of counterfeit and pirated goods and provide customs and law enforcement agencies with the ability to share information with rights holders and licensees

Ontario Position

The Ontario position (from the summary in its report) is:

1. The Federal government must strengthen current IPR protection legislative framework by:
 - a) Enacting legislation that clearly stipulates trademark counterfeiting as a specific criminal offence under the Trade-marks Act.
 - b) Amending the Criminal Code, as well as the Trade-marks and Copyright Acts where necessary, to criminalize the intentional manufacture, reproduction, distribution, importation or sale of counterfeit products
 - c) Amending the Criminal Code, as well as the Trade-marks and Copyright Acts where necessary, to criminalize the intentional possession of counterfeit goods for the purpose of sale under these acts
 - d) Implementing the World Intellectual Property Organization (WIPO) Internet Treaties to curtail Internet piracy and counterfeiting. Incur sufficiently severe penalties to deter and neutralize offenders, i.e. inclusion of jail/prison time as punishment. Allow police to seize income and property derived from copyright piracy.
2. Canada Border Security Agency (CBSA) to be given the legislative authority to conduct searches, seize counterfeit and pirated goods, and impound such goods and destroy them in accordance with due process and Canadian law.
3. Federal and provincial governments to provide additional funding and training to CBSA, police, Crown attorneys and judges specifically for the purpose of enhancing IPR protection.
4. Develop and implement effective strategies for combating IPR crime involve improvements in data collection methods and analysis of information by government, business and other stakeholders.
 - a) Public and private sector stakeholders involved in data collection methods and analysis of IPR information should adopt internationally accepted data collection methods
 - b) All IPR enforcement officials, (i.e. police and border officials) must be given access to databases
5. Federal and provincial governments to establish an IP Crime Task Force and an IP Inter-ministerial Coordination Council.
 - a) IP Task Force:
 - comprising of specialized IPR prosecutors and police officers dedicated to IP related crime
 - will coordinate enforcement and prosecution activities against counterfeiters and pirates
 - will work with border officials to address counterfeit products detected at border crossings
 - b) IP Inter-Ministerial Coordination Council:

- comprising high-level representatives from ministries involved in innovation and intellectual property rights protection (Ministry of Research and Innovation, Ministry of Economic Development and Trade, Ministry of Education and Ministry of Finance) partnered with key industry stakeholders
- will be responsible for creating policy programs to promote the protection of IP and increase innovative capacity, such as education programs targeting youth as well as an awareness campaign for businesses and consumers
- key elements of the programs are:
 - i. Exposing the dangers and risks to consumer health and safety as well as to the economy of counterfeit and pirated goods
 - ii. Highlighting the relationship between IPR crime and organized crime and/or terrorist activities
 - iii. Providing information and resources to businesses
 - iv. Creating programs designed to stimulate the commercial exploitation of IP rights

6. Businesses should adopt the Coalition Against Counterfeiting and Piracy (CACCP) Supply Chain Toolkit and ensure its six key steps are integrated into their respective business plans:

- i. Secure legitimate inputs
- ii. Verify legitimacy of customers and distributors
- iii. Manage production waste and damaged or unusable inventory
- iv. Ensure legitimacy of purchased products at retail level
- v. Monitor Brand Integrity
- vi. Outreach to law enforcement and regulatory officials

7. Private and public sector stakeholders should work in partnership with consumer protection groups and education institutions to generate greater public awareness of the impact of counterfeiting and piracy on public health and safety, as well as to the economy.

There are a number of reasons to support this policy:

- a) The estimates of piracy used in support of the Canadian and Ontario policies are unsupported by verifiable Canadian data;
- b) Most small businesses are not aware of IP issues and would likely be at a disadvantage if action were ever taken against them on any alleged IP infringement;
- c) Small businesses would have a disproportionate increase in expenses in complying with the costs that the policies would create;
- d) In Canada, many large owners of IP have 'over-reached' the protection that IP has given them to the detriment of small businesses;
- e) The proposed change in laws does nothing to favour Canadian businesses;
- f) Many IP users are funded by tax dollars (i.e. education, libraries, archives) and an increase in enforcement is likely to increase their costs, which will, in turn, lead to higher taxes which disproportionately affects small business.

Each of these points is dealt with below.

Estimate of Piracy

Current estimates generally come from the annual Business Software Alliance (BSA) report on computer software piracy. The BSA is a group dominated by large industry players such as Microsoft. In estimating the amount of piracy, BSA also generally makes estimates that "without the piracy, the employment of people in the specific jurisdiction would be increased by X thousand people".

The piracy estimates are based on other estimates of how many new computers are put into use in a jurisdiction. However, no attempt is made to reconcile any of these statistics with Stats Can information.

A major fallacy of the BSA information is that if there was no piracy there would a worldwide increase in employment in the hundreds of thousands of people. Obviously if there was no piracy, there would be no increased employment; presumably the worldwide market is already being adequately provided for by the existing employment! It is irrelevant that a certain percentage of the market is acquiring the product at no charge.

Rather than leaving this important issue to estimates generated by an industry group that has a bias in favour of over-stating the problem, it would seem to be important that an unbiased group such as Statistics Canada should be mandated to provide estimates of piracy. Until these are available, it is suggested that there should be no legislated changes.

Awareness of IP Issues

A Strategic Counsel survey (http://epe.lac-bac.gc.ca/003/008/099/003008-disclaimer.html?orig=/100/200/301/pwgsc-tpsgc/por-ef/industry_canada/2007/230-06-e/report.doc) conducted by the Canadian Intellectual Property Office in March 2007 of over 2,100 SMEs (Small and medium enterprises) showed that SMEs are generally unaware of the specifics of IP protection. Most avoid IP protection for their own assets because of the costs involved or a misunderstanding of the protection regimes available.

It would seem that an easy extrapolation to make from this is that most SMEs would also be unaware for their own business what the impact of changes in any of those IP regimes might mean.

Perhaps the most significant issue that needs to be understood is when an SME has to defend a claim that it is infringing some other person's IP rights. In most such cases, the SME is usually at an immediate disadvantage. Most IP practitioners have anecdotes from their practice experience of SMEs who although potentially right from a legal perspective have decided to settle a matter more as a cost containment issue than an acknowledgement of any legal liability.

It would appear that more information is needed in these circumstances to determine what the true impact on SMEs would be.

In the United States, for example, many small businesses that have been subject to demands of infringement for copyright infringement for software have argued that

although they had paid in the past for the use of the software, because they were unable to subsequently prove it with appropriate records, they were forced into settlements that they felt were unfair but mandated in order to keep costs manageable.

Extra Compliance Costs

Small businesses are regularly called upon to meet additional legislative and regulatory burdens. Both the Canadian and Ontario proposals provide for regimes that are likely to incur such costs. Although these costs will benefit large owners of intellectual property, it is not clear what the cost impact on businesses - and especially small businesses - will be nor what benefits business in general will enjoy.

There should be clear studies on the regulatory burden of complying with the suggested changes.

Over-reaching

As suggested above, some owners of IP have over-reached their rights.

IP includes monopoly-like rights in the fields of ideas (which are known as patents), expressions of ideas (copyrights), names and designs used to sell things (trade-marks) and business secrets (trade secrets). Although most monopolies have been outlawed since the 17th century, IP has always enjoyed a special exemption.

Why the exemption?

The answer is found in any basic text on IP: a monopoly for a limited period of time is likely to attract investment in new ideas and creative works. In return, business and society is advanced when the monopoly expires and the knowledge falls into the 'public domain' to be used by anyone.

If there has been 'over reaching' by IP owners, then society would be correct to provide limits to the monopoly rather than granting them increased enforcement rights as are suggested.

Rather than assuming over-reaching has occurred, it is suggested that the federal government ought to actually consider this as a separate issue. If over-reaching has occurred, then it is arguable that the government should be less inclined to grant extensions to the monopoly rights that IP gives.

A more limited case of over-reaching has taken place in the field of digital protection methods (DRMs). These are practical implementations that prevent legitimate users and owners of music and the like from further copying that music. Even though copyright has traditionally recognized that owners of a work are entitled to make backup copies of that work, DRM systems prevent that legal right from being exercised. Obviously more study on the subject would be useful to determine if IP owners have over-reached on their legal rights in the past.

Encouragement of Canadian Businesses

Even though the music industry has traditionally been an advocate of increased IP protection, the Canadian Music Creators Coalition, which includes artists such as Avril

Lavigne, Sarah McLachlan and the Barenaked Ladies, has been opposed to increase protection. Why would those who would appear to most directly benefit from increased protection in Canada be against it?

In part, the answer is that there is nothing in increased protection that would benefit Canadian artists and performers. They point to the fact that the recording industry in Canada is dominated by multi-national companies where far more money is exported than brought in.

There has been no consideration of how IP laws can be used to benefit Canadian companies.

Although the United States is today well known as the strongest supporter of intellectual property rights, in the mid 19th century, it was in fact one of the largest infringers of such rights. Because it was in its national interests to do so, British authors such as Dickens saw most of their works copied without any return in the United States. Why cannot Canada in fact benefit its own cultural industries by similar policies in the 21st century?

The issue warrants a great deal of study and, no doubt, there are international and national ramifications that must be considered. However, when international balance of payments data is taken into account, Canada is a net importer of IP with a consequent national cost in the billions of dollars.

Publicly funded IP Uses

Many uses of intellectual property are funded by the public purse. For example, educational institutions and libraries are two of the largest buyers of copyright licensing in Canada. Some nations provide a blanket exemption to any payments for copyright use (i.e. Singapore) for these types of uses. Why should the Canadian taxpayer have to fund these expenditures?

A study should be made of the pros and cons of providing blanket exemptions for certain types of public uses of IP.

Comments on Greater Protection of Intellectual Property Required in Canada

It is unclear how intellectual property protection affects business in general. Although a number of narrowly focused companies (such as movie and music companies; drug manufacturers and branded consumer goods companies to pick three) certainly have a lot to gain from intellectual property protections which emulate American laws, there are potentially unintended consequences that might arise.

For example, in the copyright field, we are concerned that Canadian SMEs are being pursued for licensing fees related to music being played in Hair Salons and other traditionally acceptable places (see Globe and Mail, July 20, 2007: Pay up for playing CDs, group tells hair salons) even though Canadian recording artists and producers are seen as being in support of online file sharing. (Lavigne's label defends right to pirate: Nettwerk defends online piracy, Feb 16, 2006: www.hour.ca/news/news.aspx?ilDArticle=8418)

Canada's foremost copyright expert Michael Geist clearly notes that many of the facts

presented in support of increased protection are taken out of context and urges adoption of Canadian solutions to any actual - rather than perceived - problems. (See: www.michaelgeist.ca: Putting Canadian "Piracy" in Perspective)

In the trade-mark arena, we are concerned that Canadians might be subjected to the same challenges facing the Town of Katonah in New York State where Martha Stewart is attempting to secure exclusive trade-mark rights to the town name (See: Businessweek, July 4, 2007 Katonah vs. Matha Stewart). A Hamilton based organization had a similar situation when it successfully opposed Bell Canada's application in 1995 to register THE NET as a trade-mark (see: <http://www.efc.ca/pages/thenet.html>).

In addition, there is concern that increased powers to detain goods under the Customs Act could lead to delayed international shipments.

Finally in the case of patent laws, the Research In Motion case stands as a warning to Canadian companies about needing to know how even activities which take place in Canada might be considered infringement of a patent issued only in the United States.

Intellectual Property is clearly a complicated subject where unintended consequences of any change may adversely affect Canadian businesses. The Hamilton Chamber suggests that there ought to be further study of the needs of Canadian businesses (particularly SMEs) before adopting any changes to the counterfeiting provisions of intellectual property law.

RECOMMENDATIONS:

While the Hamilton Chamber of Commerce agrees that amendments to the Copyright Act are desirable, we still urge the federal government to consider the following before introducing any new legislation with respect to making changes to the enforcement regime for any form of intellectual property (IP):

- a) Verify the quantum of unlawful copying in Canada through the independent collection of statistics based on facts arising in Canada;
- b) The impacts and benefits that any changes will have on all businesses in Canada including small businesses;
- c) The financial and administrative burden that will be created for businesses - and especially small businesses - to ensure that they can successfully and inexpensively defend unsupported allegations of infringement;
- d) A consideration of how IP enforcement regimes can - within international and national limits - favour and encourage Canadian businesses;
- e) A consideration of how IP enforcement regimes will affect the costs of educational, archival and library uses of IP in Canada and how those costs paid by public funds can be reduced.

