

IP Year in Review 2017 – A Year of Promises Made, Kept, and Abandoned

January 25, 2018 by [Giuseppina D'Agostino](#)

This past year marks a year where the Government of Canada engaged more than ever on the IP front. The Government of Canada's announcement of a National IP Strategy was welcome news for those interested in leveraging Canada's intangible capital. As I [noted](#) on The Agenda with Steve Paikin, it was a "hallelujah" moment for me! As promised, the Government undertook [consultations](#) for the IP strategy, which we expect will be released this year. The Government of Canada also [implemented changes](#) to the patent and trademark regimes as part of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union. The Ministers of Innovation, Science and Economic Development, and Canadian Heritage also fulfilled the statutory review obligations of the *Copyright Act*, [announcing the review](#) in December.

The Supreme Court of Canada dealt a strong blow to the so-called promise doctrine and made international precedent when it ordered Google to de-index infringing websites across the global Internet. These and the other developments noted below pave the way for an IP-busy 2018 as we await the release of the National IP Strategy, which will hopefully set the stage for Canadian advancements and benefits from emerging technologies and business practices. Here at IP Osgoode, we are set to examine the promise and challenges associated with one of these important technology areas: artificial intelligence (AI). On February 2, 2018, our AI conference, "*Bracing for Impact: The Artificial Intelligence Challenge*", will feature internationally renowned AI experts from Canada and abroad. For more information and registration, visit [here](#).

We hope you can take part in our AI conference as well as our regular suite of exciting activities and initiatives as 2018 gets further underway!

PATENTS

The patent law landscape experienced incremental changes and some profound shifts that seemed to mimic the changes of the seasons here in Canada during 2017.

It's All About the Money

The year kicked off with a chilling warning to Non-Practicing Entities (NPEs) seeking to protect patent rights through litigation. NPEs commencing patent infringement actions "without a clear theory of infringement" may be sanctioned with [elevated costs](#) for disregarding the "serious cost consequences [following from] allegations shown to be unwarranted". In *Mediatube Corp. et al. v Bell Canada*, the Federal Court of Canada was satisfied that the defendant's activities were non-infringing; and because the plaintiffs "should have known that Bell did not infringe", they were ordered to pay solicitor-client costs.

The Federal Court of Appeal reminded us in February that [an increased award of costs as high as a \\$6.5 million may be demonstrably reasonable](#) in "an extremely complex patent case involving [...] 22 allegations of invalidity, 33 days of discovery, 32 days of trial, written submission exceeding 700 pages, and the closing argument lasting three days".

The Federal Court of Appeal also decided on profit recovery for infringing activities. In *Apotex Inc. v ADIR*, the Court highlighted that the differential profit approach of recovery is to "ensure that a patentee only receives that portion of the infringer's profit that is causally attributable to the invention". Accordingly, the Court asserted that it is [germane to determine the availability of non-infringing alternatives](#) as the actual value of the "patent lies in the ability of the patentee to exclude competitors and competition" [28].

The Season of New Life and Law

In the UK, the beginning of spring was marked with a UK Patent Court decision on the interplay between IP and Competition Law. In *Unwired Planet International v Huawei Technologies*, the court tackled issues involving standard-essential patents (SEPs), as well as the [Fair, Reasonable And Non-Discriminatory](#) (FRAND) principles applicable to licensing agreements between patentees and licensees. In particular, the UK Court explained that the requirement to commit to FRAND terms in a SEP licence serves the public interest insofar as it spurs "the best and most up-to-date technical" standards to be set and inventors to "obtain a fair reward for their invention". While Canadian jurisprudence is yet to develop on what negotiations are FRAND and what are not, the [Competition Bureau's](#) guidelines forecast issues that industries might face on this matter.

Shortly after, the Federal Court of Canada released its [Trial Management Guidelines](#), which aimed at developing efficient, expedient, and proportional use of court time. A rundown of the particularly noteworthy protocols to streamline trials and court's resources is available [here](#).

The spring also ushered in a [new statute](#) as the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union received Royal Assent on the 16th of May [2017, c. 6]. It is important to note that CETA listed the ICSID tribunal as the main recourse for disputes. [Commentary](#) on how this may affect the IP environment domestically suggests that the ICSID's unappealable decisions could be a new problem for Canada, absent the requirement of certification in domestic courts. So, in addition to CETA's implications toward patent term restoration, appeals under NOC regulations, and the potential end of dual litigation — see general outline [here](#) and significance for pharmaceutical patent protection [here](#) — further developments stemming from the [ICSID](#) tribunal jurisdiction are anticipated for the new year.

The last development of the season provided an important lesson from a business perspective regarding IP transfer agreements. In *Composite Technologies Inc. v Shawcor Ltd.*, poor management of IP rights and poorly conceived transfer agreements proved to be a hindrance to enforceability. The Federal Court also delivered an important lesson around patent infringement when it announced the Public Judgement and Reasons in *Dow Chemical Company v. Nova Chemicals Corporation*, awarding *Dow Chemical* the largest patent infringement monetary award in Canadian history: \$644,623,550 and pre-judgement interest.

Utility, Enforceability, and NOCs

Two hot-button issues from the Supreme Court of Canada heated up the start of the summer. One involved the decision that did away with the Promise Doctrine, and the other pertained to a global takedown order imposed on an online intermediary (Google) that may change the future of IP enforcement.

In the first, *Astrazeneca Canada Inc. v Apotex Inc.*, the Court effectively abolished the Promise Doctrine on utility. [Previously](#), all explicit promises of utility made by a patentee had to be fulfilled for the patent to be valid. The Court nonetheless deemed this requirement "unsound" and "not good law". For the Court, "depriv[ing] such an invention of patent protection if even one 'promised' use is not soundly

predicted or demonstrated is punitive and has no basis in the *Act*”. So, in bringing the common-law more into accord with the statutory requirements for patentability, the Court revamped the legal test for utility, requiring that the patentees demonstrate, essentially, what the subject-matter of the invention is, and how it is useful in serving a practical purpose.

The second case, *Equustek Solutions Inc. v Google Inc.*, played an important role in increasing IP enforcement outreach in the Internet era. It provides the courts with a more effective measure to protect IP rights. Specifically, the precedent allows an IP owner to obtain a court order against search engines — such as Google in this case — for the removal, on a global scale, of search results (websites) that facilitate infringement of IP rights. It will be interesting to observe whether or not this decision affecting online intermediaries such as Google will gain momentum to address the problem of unreachable wrongdoers, or will conversely be deemed a too heavy burden to non-infringing actors that are a mere part of the whole online network.

The end of summer featured the Canadian Government’s proposed amendments to the Notice of Compliance (NOC) Regulations. The amendments seek to update the pharmaceutical patent litigation regime in Canada, enabling Canada to meet its obligations under CETA. A discussion of the most significant changes to Canada’s NOC Regulations can be found [here](#). The changes will apply to proceedings in which Notices of Allegation (NOAs) were served on or after September 21, 2017 — the come into force date of the revised NOC Regulations.

Promptly after, the Federal Court released its guidelines for actions under the amended NOC Regulations to promote efficiency in light of the strict timelines — 24-month timeframe for a proceeding to be completed and a decision rendered — imposed by the new rules. The guidelines set out procedural rules to be observed for proceedings under the amended NOC Regulations. Some key points worthwhile to look at were outlined [here](#).

A Not-So-Obvious Future

Lastly, the winter months saw an unsettling of the Canadian law of obviousness. In *Ciba Specialty Chemicals Water Treatments Limited v SNF Inc.*, the Federal Court of Appeal deemed the “inventive concept” set out in the *Sanofi* case an “unnecessary satellite debate” in the analysis of obviousness. After being unintentionally reworded over the years — see *Eli Lilly Canada Inc. v Mylan Pharmaceuticals ULC*, — the current test for obviousness seems to place emphasis on the construction of the claims of a patent as a more useful approach, at least until a clearer definition of the “inventive concept” is developed by the Supreme Court.

TRADEMARKS

2017 saw a number of notable Canadian court decisions in the realm of trademark law. Outside of the courts, other developments will also shape the IP landscape going forward.

Consumer Criticism Gets a Bit Riskier

In a case dealing with consumer criticism of a brand — *United Airlines, Inc. v. Jeremy Cooperstock* — the Federal Court returned a decision favourable to brand-owners. The plaintiff, United Airlines, sued the defendant, Jeremy Cooperstock, for trademark and copyright infringement, depreciation of goodwill, and passing off, over his “gripe site” [www.UNTIED.com](#). The court characterized the website as a “consumer criticism website where visitors can find information on the Plaintiff, submit complaints about the Plaintiff, and read complaints about the Plaintiff dating back to 1998 in the database of complaints.” The website included an altered United Airlines logo.

Justice Phelan held that Cooperstock provided “services” through the website and that the marks were “being used or displayed in the advertising or performance of services pursuant to s 4(2) of the *Trade-marks Act*.” He also found that there was a likelihood of confusion. As a result, the defendant was found to have infringed s. 20(1)(a).

The defendant was also found liable for passing off: the court found significant goodwill attached to the United marks, that there was confusion and the likelihood of confusion, and that the plaintiff suffered damages or was likely to suffer potential damages.

The court held that Cooperstock “intentionally attempted to attract the Plaintiff’s online consumers to his own website for notoriety” and therefore depreciated the goodwill associated with the United marks, contrary to s. 22. Of note, the Defendant was also found to have infringed copyright in the marks and Justice Phelan dismissed the fair dealing defence of parody.

Whereas previous decisions such as *Michelin v. Canadian Auto Workers* and *BCAA et al. v. Office and Professional Employees’ Int. Union et al.*, had held that trademark owners’ rights to control the use of their mark in the context of criticism were limited, the *United* case demonstrates that brand critics must be careful in their use of brands’ logos and trademarks. While consumers’ ability to inform and criticize must be protected, “[i]n this case, the Defendant sailed too close to the wind — and he was put up on the rocks.”

Why Seek an Injunction Anywhere Else?

In *Sleep Country Canada Inc. v. Sears Canada Inc.*, the plaintiff Sleep Country was successful in its motion for an interlocutory injunction. Sleep Country sought to restrain Sears from using the slogan “THERE IS NO REASON TO BUY A MATTRESS ANYWHERE ELSE”, which it argued was confusing with its own slogan “WHY BUY A MATTRESS ANYWHERE ELSE?” Sleep Country alleged that Sears’ use of the slogan was causing harm to Sleep Country as “a result of confusion between the two slogans, as well as depreciation of the goodwill and loss of distinctiveness of Sleep Country’s registered trade-marks.”

The court considered the tripartite *RJR-MacDonald* test for issuing such an injunction: a serious issue has been raised, the party seeking the injunction will suffer irreparable harm if the injunction is not granted, and the balance of convenience favours the seeking party. The key issue on the motion was irreparable harm, which the court found was established by Sleep Country’s “concrete and non-speculative evidence.” Justice Kane held that lost sales, loss of distinctiveness, and depreciation of value of the slogan would lead to irreparable harm, and that the harm could not easily be quantified. The balance of convenience was also found to favour Sleep Country.

It has traditionally been quite difficult for trademark owners to obtain interlocutory injunctions. The *Sleep Country* case indicates that the courts may be relaxing the onus on trademark owners to prove irreparable harm, particularly in cases where confusion is quite apparent.

Notably, the Quebec Superior Court in *Irving Consumer Products Limited v. Cascades Canada ULC* denied the plaintiff a similar injunction because “the Court cannot come to the conclusion that it is clear that the use by Cascades new Fluff trademark will cause confusion with the Royale trademarks.” *Irving* dealt with the allegation that Cascades’ fluffy bunny was confusing with Irving’s furry Royale kittens. The court concluded that “the use of white furry animals is not unique to the packaging for living’s products” and that any harm would be quantifiable. Contrasted with *Sleep Country*, in which it was held that any harm would be too difficult to quantify, *Irving* shows that it may still be difficult for trademark owners to obtain interlocutory injunctions.

Injunctions Go Global

In a case that dealt with trade secrets and passing off, *Google Inc. v. Equustek Solutions Inc.*, the Supreme Court affirmed the effectiveness of an extra-territorial injunction granted by the lower courts. The issue on appeal was “whether Google can be ordered, pending a trial, to globally de-index the websites of a company which, in breach of several court orders, is using those websites to unlawfully sell the intellectual property of another company.”

The court concluded that the injunction was the only way to mitigate the harm to Equustek pending the resolution of the underlying litigation. The case therefore stands for the availability of an extra-territorial injunction as an equitable remedy in Canadian courts: “Where it is necessary to ensure the injunction’s effectiveness, a court can grant an injunction enjoining conduct anywhere in the world.”

Among the other trademark cases decided by Canadian courts this year, *Group III International Ltd v. Travelway Group International Ltd.* and *Diageo Canada Inc. v. Heaven Hill Distilleries Inc.* are of particular interest. In *Travelway*, the Federal Court of Appeal held that owning a registered mark is not a complete defence to infringement – the respondent’s registered mark was held to infringe that of the applicant’s. In *Diageo*, the Federal Court held that Heaven Hill’s Admiral Nelson rum products infringed Diageo’s registered Captain Morgan marks. The court considered the plaintiff and defendant’s trade dress and found the Captain Morgan trade dress to be a distinguishing guise and therefore enforceable under the Trade-marks Act. The court also found that the goodwill associated with the Captain Morgan mark had been depreciated.

Other Changes to Trademark Law

Canada’s updated *Trademarks Act* is set to come into force in early 2019. In June 2017, the [Canadian Intellectual Property Office \(CIPO\)](#) published for comment the first draft of the new *Trademark Regulations*. Comments were accepted until July 21, 2017 and will be taken into consideration when revising the draft regulations. Among the notable changes coming in 2019 are Canada’s accession to the *Madrid Protocol*, the *Singapore Treaty*, and the *Nice Agreement* and its classification system. Also significant will be the removal of the use requirement at the time of registration.

COPYRIGHT

2017 continued many of the debates and cases started from the previous year. While some decisions received accolades, others received outright criticism. As was the case in 2016, fair dealing questions came to the fore and hit close to home at York University.

Fair Dealing and Post-Secondary Education

In a much anticipated decision, the Federal Court ruled against York University in *Access Copyright v York University* and directed the university to pay an interim tariff to Access Copyright. In 2011, York University opted out of the Access Copyright licence due to increasing tariffs and implemented its own copyright guidelines. Crucially, the York University guidelines allowed students enrolled in a class or course to receive a single copy through a coursepack or via a posting on an online learning management system if the copying was done in accordance with “fair dealing”. However, the Federal Court held that York University did not have any right to opt-out of tariffs and that the university’s guidelines were arbitrary and not compliant with section 29 of the *Copyright Act*. Among other things, the guidelines operated under the assumption that the use of 10% of a copyright-protected work was “fair dealing” but did not provide an explanation. Quantitatively, this threshold might seem to restrict copying of an entire text. But, as [others have noted](#), qualitatively, the parts copied may constitute the “core” of the work, making such use “unfair,” and conceivably allow for the reproduction of the entirety of a work if multiple sections are used across courses and faculties. Further, the court emphasised the school’s failure to comply with the guidelines and therefore, enforced the interim tariff. [Some have commented](#) the inclusion of “education” as a fair dealing purpose played little role in this decision. While much attention on the case framed the important issues with respect to fair dealing, [others](#) note that the case was not about copyright infringement, but rather whether tariffs imposed by the Copyright Board of Canada are mandatory for post-secondary institutions that use copyright-protected material licensed by Access Copyright. York University indicates it will [appeal](#) the decision so these questions will continue in 2018 and beyond.

Anti-Circumvention and Technological Protection Measures

Setting precedent in 2017, in *Nintendo of America Inc. v. King* the Federal Court applied substantive rules on the anti-circumvention of technological protection measures (TPMs), which were introduced in the *Copyright Act* 2012. The Federal Court expressed its willingness to enforce the TPMs and protect against circumvention in the digital age. The case involved a corporation named Go Cyber shopping (2005) Ltd., which sold and installed circumventing devices enabling users to play potentially hundreds of [illegally downloaded games without purchase](#). The Federal Court in the suit filed by *Nintendo*, awarded \$12.7 Million as damages and held that Go Cyber “authorized” copying by providing instructions to download header data without the consent of *Nintendo* constituting infringement. [Michael Geist](#) suggests that by adopting “a broad interpretation of a technological protection measure”, the court confirmed Canadian copyright law’s tough stance on copyright piracy.

Obligations of Internet Service Providers

The ongoing conflict between [Toronto-based communication giant Rogers Communications and Voltage Pictures](#) reached the Supreme Court after the decision of the Federal Court of Appeal (FCA) in 2017. Rogers filed before the Supreme Court to consider the scope of the Internet service provider’s (ISP) obligations under the notice and notice system. The FCA ruled that ISPs can disclose the alleged offender’s identity for free. The decision surprised the industry because it would be easier for copyright holders to [threaten consumers for infringement](#) [hoping](#) that they come to financial settlements.

Data protections

Affirming the trial court’s ruling on the copyright protection of seismic data, the appeal in the Alberta case of *Geophysical Service Incorporated (GSI)* was dismissed and appeal by GSI to the Supreme Court was denied. On Appeal, GSI argued that Section 101 of *Canada Petroleum Resources Act* “CPRA” should be interpreted properly. [The Court of Appeal held](#), “The correct interpretation of “disclose” also confers on these Boards the legal right to grant to others both access and opportunity to copy and re-copy all materials acquired from GSI and collected under the Regulatory Regime”.

This decision will ensure copyright protection of seismic data by simultaneously providing a framework to access it.

Canadian content and Copyright-related Reviews

In 2017, the Federal Government also adopted initiatives to protect Canadian creators and introduced a policy framework to extend Canadian content worldwide. On September 28, Mélanie Joly, Minister of Canadian Heritage, announced *Creative Canada- A Vision of Canada's Creative Industries*. Later in the year, on December 13, the Government officially announced the Parliamentary Review of the Copyright Act, as mandated by the 2012 Copyright Modernization Act. The government also [launched consultations](#) to reform Copyright Board of Canada in August.

U.S. Developments

In the U.S., perhaps the biggest copyright case of 2017 was *Star Athletica LLC v Varsity Brands Inc.* The case dealt with the issue of whether copyright could subsist in the “pictorial, graphic, or sculptural features” of a “design of a useful article” – in this case, cheerleading uniforms. Ultimately, the U.S. Supreme Court held that such design features as the arrangement of lines and shapes on cheerleading uniforms were eligible for copyright protection, so long as they were separable from the useful article in question. In other words, if the impugned designs were imagined in abstraction – say for example if they appeared on a canvass – and thus eligible for copyright protection, then they would be equally eligible for copyright protection as part of a useful article. Therefore, while copyright cannot protect the shape, cut, or dimensions of cheerleading uniform, those design features that are separable from the functional object may be eligible for copyright protection. And while such a holding is not entirely novel, the *Star Athletica* decision likely sets a valuable precedent for lower courts that have struggled with the extent to which copyright protects the design features of a functional object.

Fair use was also a hot topic in U.S. courts in 2017, with a variety of interesting outcomes in cases across creative media. In *Lombardo v Dr. Seuss*, a raunchy parody of the Dr. Seuss classic “How the Grinch Stole Christmas” was held to be the kind of transformative work that qualifies as fair use. Meanwhile, in *Penguin Random House v Colting*, a U.S. district court judge held that unauthorized children’s versions – or “KinderGuides” – of classic books by Hemmingway, Kerouac, and the like did not constitute fair use, but rather infringing use. In music, Drake’s use of a spoken word sample from jazz artist James Oscar Smith was held to be fair use in *Smith v Cash Money Records*, and in film, a Star Trek fan-fiction movie was held to be a derivative work and not fair use in *Paramount Pictures v Axanar Productions*.

Copyright Around the World

Internationally, toymaker Lego was successful for the first time in a [copyright suit](#) against manufacturers in China of some near-identical toys. 2017 also saw China clearly establish its growing importance on the international copyright stage, with [increasing numbers for copyright licensing](#) deals in the book industry and increasing pressure on [music companies active in China](#) to meet international standards with respect to copyright licensing. Meanwhile in the E.U., courts held that [online platforms may be liable for copyright infringement](#) if they perform an essential role in facilitating piracy of copyright-protected material, and that the [sale of devices that allow pirated material to be view on TV screens](#) may constitute copyright infringement.

IP OSGOODE

In 2017, IP Osgoode celebrated one of our very own, [Professor David Vaver](#), who has been a guiding force in the Canadian intellectual property (IP) landscape for the past 40 years. IP Osgoode and Osgoode Hall Law School hosted a special symposium entitled, “[Intellectual Property: Fuel for the Fire or Shelf Life of a Banana?](#)” in celebration of Prof. Vaver’s [appointment as a Member of the Order of Canada](#) in recognition of “his leadership in intellectual property law as a scholar and mentor”.

The symposium included a distinguished set of participants drawn from Prof. Vaver’s network of former students, colleagues and research collaborators, and highlighted four main themes of Prof. Vaver’s extensive scholarship: overlap and redundancy in the IP system, legislation and reform, users’ rights, and the importance of history. The luncheon keynote speaker, The [Honourable Marshall Rothstein](#), CC, QC (Supreme Court of Canada, 2006 to 2015), who was introduced by The [Honourable Roger T. Hughes](#), QC (Federal Court of Canada, 2001 to 2016), provided a heartwarming speech that gave the audience a glimpse into Prof. Vaver’s early life and career.

To mark the year Prof. Vaver received the Order of Canada, IP Osgoode [unveiled the IP Osgoode David Vaver Medal of Excellence in Intellectual Property Law](#) medal. The medal will be awarded yearly to an Osgoode student in the graduating class who merits special recognition for outstanding achievements in the area of intellectual property law. The student’s achievements extend beyond academic excellence, and can include significant contributions to research in intellectual property and related areas or exceptional commitment and enthusiasm through their participation in intellectual property-related extra-curricular activities.

Following the previous year’s successful partnership with Norton Rose Fulbright LLP, the IP Osgoode Innovation Clinic continued to grow in 2017. On behalf of IP Osgoode, Professor D’Agostino entered into an exciting [collaboration agreement](#) with the International Law Research Program at the Centre for International Governance Innovation (CIGI) to support the Innovation Clinic. The IP Osgoode-CIGI partnership stems from a mutual desire to facilitate the discovery, dissemination and application of new knowledge concerning practical IP law training of law students and the desire to facilitate the provision of basic IP legal services to early stage innovators and start-ups. IP Osgoode hired Dr. [Joseph Turcotte](#) as the first full-time Innovation Clinic Coordinator. The addition of a full time coordinator has allowed for a substantial increase of the Clinic’s carriage of client files and expanded the Innovation Clinic’s outreach beyond the York University and Osgoode Hall communities as well as the Toronto and York Regions into the Waterloo Region and throughout Ontario.

The partnership also supports Prof. D’Agostino’s research project, which consists of a critical evaluation of the Innovation Clinic model as well as clinic models elsewhere, and identifying potential opportunities for developing a sustainable network of clinics in Canada and beyond. The research and report will further dialogues between industry, law schools, law societies, the Canadian Intellectual Property Office (CIPO), levels of government, and other relevant stakeholders regarding the creation of a network of IP law clinics across Canada. This work will be published in 2018 and help inform and support CIPO and federal government initiatives to increase IP awareness, accessibility, and education in Canada.

Top 10 most read 2017 IPilogue articles

1. [Intellectual Property Strategy For Artificial Intelligence](#)
2. [IP Year in Review 2016 – An Honourary IP Osgoode Year!](#)
3. [Algorithmic Accountability: Prof. Frank Pasquale’s Thoughts on Artificial Intelligence in the Law](#)
4. [IP Intensive: From Tariffs to Bouncy Castles—A Semester at SOCAN](#)
5. [Just Laugh It Off: Trademark Parody and the Expansion of User Rights](#)
6. [Running Out of Hoptons: Craft Beer Trademarks in North America](#)

7. [Privacy by Default: A Privacy and Cyber-security imperative in the IoT and Big-Data Age](#)
8. [Broken Promises: Utility Standards and Patent Applications in Canada](#)
9. [As Netflix Goes Global, CanCon Must Broaden Its Appeal](#)
10. [Announcing the Winner of Canada's IP Writing Challenge 2017](#)

Giuseppina D'Agostino is the Founder & Director of IP Osgoode, the IP Intensive Program, and the Innovation Clinic, the Editor-in-Chief for the IPilogue and the Intellectual Property Journal, and an Associate Professor at Osgoode Hall Law School.

With contributions from Stephen Cooley (IPilogue Editor & Osgoode JD Candidate) and Haramrit Kaur (IPilogue Editor and Osgoode Professional Development LLM (Canadian Common Law) Candidate) on Copyright, Sebastian Beck-Watt (IPilogue Senior Editor & Osgoode Graduate) on Trademarks, and Bruna Kalinoski (IPilogue Editor & Osgoode LLM Graduate) on Patents.

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