

QUÉBEC'S UPDATED CIVIL CODE ADDRESSES IP AND RELATED RIGHTS

Laurent Carrière and Brahm G. Segal*
LEGER ROBIC RICHARD, Lawyers,
ROBIC, Patent & Trademark Agents
Centre CDP Capital
1001 Square-Victoria- Bloc E – 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel. (514) 987 6242 - Fax (514) 845 7874
www.robic.ca - info@robic.com

Decades of debate in the provincial legislature and internally within Québec's bifurcated legal profession - lawyers coexist with notaries, who act in certain non-contentious matters, including the drafting of security agreements - have culminated in the enactment of the Civil Code of Québec ("the Code"), which, came into force on January 1, 1994, replacing the patchwork Civil Code of Lower Canada, originally adopted in 1866 and much amended ever since, as Québec's new law of general application governing property, persons and the relation between the two.

Like any province or territory, Québec could not introduce legislation purporting to create substantive intellectual property rights without arrogating to itself legislative powers which the constitution has attributed to the federal Parliament (i.e. patents and copyrights) or which have been occupied historically by Parliament (i.e. trademarks). Still, the Code, unlike its predecessors, specifically defines "rights of intellectual or industrial property" as a form of moveable property and acknowledges that such rights may be alienated separately from the revenue they produce (Arts. 458, 909).

The Code additionally provides for the possibility of granting or receiving a security interest known as a conventional hypothec (assimilable to a chattel mortgage) on certain property including "patents and trademarks" (Art. 2684). It is not clear why copyrights were excluded from the list of property that may be hypothecated to secure an obligation. Judicial interpretation is also called for to determine whether the word patents in Art. 2684 includes registered industrial designs and whether trademarks is restricted to registered, as opposed to common law, trademarks. On its face, Art. 2684

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Lawyer and trademark agent Laurent Carrière is a senior partner in the lawfirm LEGER ROBIC RICHARD, g.p. and in the patent and trademark agency firm ROBIC, g.p.; Brahm G. Segal is a lawyer with the same firms. Publié en Juillet 1994 dans Update/Résumé de la Section nationale de propriété intellectuelle de l'Association du Barreau canadien (vol. 3, no 2, pp. 10-12). Publication 171.002.

does not extend to pending applications for the issuance of a patent or for the registration of a trademark.

Trade secrets are the object of two novel provisions which promise to attract much attention. Art. 1612 expressly allows the owner of a wrongfully disclosed trade secret to claim damages related to the cost of acquiring, perfecting and using the trade secret, while lost profits "may be compensated for through payment of royalties". However, pursuant to Art. 1472, the discloser may be exonerated from liability for the owner's economic loss upon proving that disclosure favored "considerations of general interest and, particularly...for reasons of public health or safety". In its official commentary to the Code, the Ministry of Justice cites as hypothetical examples of the successful invocation of Art. 1472, disclosures concerning a cure for cancer or the AIDS virus, or a corporate whistle-blower's revelation about the dangerous effects of a product available to the public.

Also of note is the codification of personality rights, which are held by both individuals and bodies corporate, are inalienable (Art. 3); but subject to being licensed; and, in the case of individuals, may be transmitted to their heirs (Art. 625) who may sue, or carry on a pending suit, for damages resulting from a breach of personality rights (Art. 1610). Among the enumerated acts which may be considered an appropriation of personality rights is the use of a person's "name, image, likeness or voice for a purpose other than the legitimate information of the public" (Art. 36(5)). And pursuant to Art. 56, a person who uses a name other than his own is liable for any resulting confusion or damage. Art. 56 also enables the spouse and close relatives of a person whose name is wrongfully used to object to such use and demand redress for the damage caused.

Finally, licensors of trademark rights should note that under Art. 1880 of the Code, it will no longer be possible to grant perpetual licences : the new maximum term is 100 years; any stipulation exceeding that term will be reduced to 100 years.

The interplay between these new provisions and the pre-existing federal laws regarding substantive intellectual property rights bears watching. Surely Québec's legislative initiative will also fuel discussion in other provincial assemblies and the IP bar at large. Eventually, we might see a movement toward the harmonization of laws within the federation that affect personal property security as well as privacy and publicity (i.e. personality) rights.

Sections of the Civil Code of Quebec dealing specifically with intellectual property are listed hereinbelow. One should remember, however, that the

CCQ, as the *jus commune*, covers almost every facet of the "Property and Civil Rights in the Province". It follows that it interacts/intersects with the day-to-day operation of the federal so-called "I.P." statutes", *i.e.* the exercise of those rights of property in the intangibles such as ownership, assignment, license or legal devolution thereof.

On trouvera ci-après une énumération sommaire des articles du Code civil du Québec traitant nommément de propriété intellectuelle. Il est toutefois utile de rappeler que le CCQ, à titre de droit commun, couvre pratiquement tous les aspects de la «propriété et des droits civils dans la province» et, conséquemment, est d'application constante dans l'exploitation des intangibles.

3	Inaccessibilité des droits de la personnalité Inalienability of personality rights
35-37	Respect de la réputation et de la vie privée Respect of reputation and privacy
55-56	Utilisation du nom et responsabilité en cas de confusion Use of name and liability for confusion
305-306	Emploi de noms par la personne morale Use of names by the legal person
316-317	Soulèvement du voile corporatif Lift of the corporate veil
321-324	Obligations et inhabileté des administrateurs Obligations and disqualifications of directors
458	Propriété matrimoniale des droits de propriété intellectuelle et de leurs revenus Matrimonial ownership of intellectual property and their revenues
625	Transmissibilité à cause de mort des recours pour violation des droits de la personnalité Transmission to the heirs of the rights of action for breach of personality rights
909	Propriété des droits de propriété intellectuelle et de leurs revenus Ownership of intellectual property and their revenues

1309-1310	Obligations de l'administrateur du bien d'autrui Obligations of administrator
1457-1458	Conditions de la responsabilité Conditions of liability
1472	Divulgence permise de secrets commerciaux Disclosure of trade secrets exempted of liability
1610	Transmissibilité aux héritiers du droit à des dommages résultant de la violation des droits de la personnalité Transmissibility to the heirs of the rights to damages resulting from the breach of personality rights
1612	Responsabilité et dommages pour violation de secrets commerciaux Liability and damages for breach of trade secrets
2088	Obligation de loyauté du salarié Obligation of loyalty of employees
2089&2095	Clauses de non-concurrence Non-competition clause
2684	Hypothèque mobilière des brevets et marques de commerce Moveable hypothec of patents and trade marks
2837-2840	Recevabilité en preuve de données et dossiers informatiques Admissibility in evidence of computer data and records
2925	Prescription générale de trois ans pour atteinte à un droit personnel General three years prescription to enforce a personal right
2929	Prescription d'un an pour diffamation One year prescription in action for defamation
3135	Introduction de la règle du forum non conveniens Acceptance of the rule of forum non conveniens

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