Letter of the Law

Putting the Content Cat Back in the Bag

People love sharing cat photos. Astonishingly, one source reports that as of March, 2016, over 87 million photos and videos were tagged "#cat" on Instagram alone.

But what happens when someone shares one of your photos or videos to social media or a web site without your consent? While cats have limited legal rights, you may have rights in copyright or trademark and such sharing can raise a number of legal issues for you, the sharer and the online platform.

If your valuable (presumably non-cat) content was shared without your consent, you first need to identify your trademark and/or copyright interests before determining how best to protect those rights. Depending on the content and context, this process may be simple or complex.

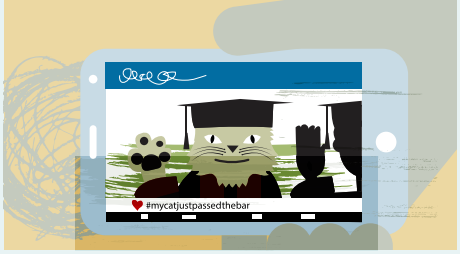
For example, if your trademark is registered, you have statutory remedies under the Trade-marks Act. But even if your trademark is not registered, you might still have common law rights preventing others from passing themselves off as you or your business. In the case of copyrighted material, you have a variety of rights under the Copyright Act to prevent others from exploiting your work for their gain—again, even if the material is not registered.

Next you must try to determine the details of the infringement: who, what, where, when and why. The issue of "where" can be particularly important as intellectual property law varies even between neighbours as close as Canada and the United States. For example, under the Digital Millennium Copyright Act, American internet service providers (ISPs) must take down allegedly infringing content after appropriate notification, after which the alleged infringer can take steps to establish their right to use the content. By contrast, Canadian ISPs are only required to forward notices of infringement to the alleged infringer.

Most social media platforms recommend that you contact the infringing account directly to request removal of your content. Advice and care at this step is crucial as an aggressive approach might be counterproductive. For businesses and content creators, public relations can be just as important as legal rights.

(Continues on page 2)

SINGLETON LEGAL COUNSEL URQUHART



(Continued from cover)

Therefore it might be better to file a complaint directly with the platform. Facebook, Instagram, YouTube, Twitter and LinkedIn have relatively straightforward online forms in compliance with applicable intellectual property regimes. These forms require details regarding the complainant, their ownership of the offending content, and the intellectual property rights being relied on as well as a link to the unauthorized content.

Social media platforms may then refer to the legislation and their terms of use—which are agreed to by all users and typically include policies to address infringing practices—to take down the infringing content. In more egregious cases, platforms take steps directly against the infringing party, up to and including termination of their account.

If these processes don't work or, if they work but the infringement is severe, then legal action may be necessary. This raises jurisdictional, service and practical issues, such as establishing the infringer's real world identity; determining the available and appropriate remedies to seek in which jurisdiction; and trying to avoid chasing infringements multiplying across platforms. These issues can create a game of whack-a-mole.

Most social media platforms and web site operators will not freely share identification information, by policy or by legal obligation, without a court order. In Canada, what's known as a Norwich order may be needed to compel an ISP, web site host or operator to disclose the user's identifying information.

From the host's or operator's perspective, infringements by users and the threat of legal actions can raise questions about how to respond in both the short- and long-term. These thorny issues only multiply when hosts operate across multiple jurisdictions.

As personal and corporate activities migrate online, navigating these legal issues and processes is increasingly important and complex. Businesses and individuals with online presences—with or without cats—will likely benefit from legal advice on how to deal quickly and efficiently with trademark or copyright infringement.

For more information on copyright in the digital age, please contact

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SU The electronic version of this article at ***www.singleton.com*** contains links to the cases mentioned above.

JOSEPHSON LITIGATION COUNSEL JOINS SINGLETON URQUHART

We are excited to announce the addition of Ronald Josephson and Warren Godfrey to our team. Both Ron and Warren are known for their tireless and effective advocacy on behalf of their clients. Their addition will enable SU to build upon our own tradition of legal excellence and exceptional client service now, and as we look to the future.

SU *For more information on Warren Godfrey and Ronald Josephson, please visit our website at* ***www.singleton.com****.*

WARREN GODFREY RONALD JOSEPHSON

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Letter of the Law is the quarterly newsletter of the law firm of Singleton Urquhart LLP. The articles are summaries of legal trends and may not be applicable in specific circumstances: for further information about any subject or for legal advice about specific situations, contact members of the firm. Articles and back issues are available at www.*singleton*.com.

EDITOR'S NOTE

Letter of the Law first came on the scene in 1988. It was the brainchild of Bonita Thompson Q.C. and provided an excellent platform for connecting to our clients. It also kept them informed on legal issues and apprised them of goings-on at SU.

At that time, newsletters from law firms were rare, and Bonita's pet project put us on the leading edge. In its early days, LoL ran in black and white, but it evolved to include colourful illustrations and an eye-catching layout in addition to the well-written articles that garnered praise and awards along the way.

Letter of the Law is still going strong, and with a new look coming in 2018 it will continue to deliver the excellent content our readers have come to expect. The centerspread of this issue features a look back at our publication, so please join us on a trip down memory lane.

It's always good to reflect on the past, all the more so at this time of year. We hope you take time to pause and reflect with your loved ones this holiday season. Wishing you the best in 2018 from all of US@SU!

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When Two Wills are Better Than One

ESTATE LAW

In some circumstances two wills may be better than one. The British Columbia Supreme Court recently confirmed a person is entitled to make more than one valid will — a judgment confirming the legitimacy of an estate planning strategy that's been growing in popularity, despite uncertainty whether it was acceptable under the law.

In *Berkner (Estate)*, an executor appointed by Norman Frank Berkner, who had recently died, sought a grant of probate related to Mr. Berkner's primary will. However, there was also a "secondary will", which was not before the court. Mr. Berkner held a significant portion of his wealth in Berkner Egg Farms Ltd., and the company shares were passed to his heirs by this secondary will.

Leading up to the *Berkner* decision, some estate planners had long been drafting two wills for clients who hold much of their personal value in a company. To understand why requires an explanation of the role of the probate registry, which is a branch of the Supreme Court.

To pass down certain assets, such as bank accounts and real estate held solely in the deceased's name, an executor must first obtain a grant of probate. This means the court has confirmed the executor's authority to deal with the deceased's assets for the comfort of third parties, such as banks and the Land Title Office, which will not transfer assets to heirs until the executor provides proof of a grant of probate.

Assets subject to the grant of probate are also subject to probate tax. To obtain the grant, the executor must swear an affidavit with a list of assets and the date-of-death values of those assets. That affidavit is filed at the probate registry; the probate tax payable by the estate is based on the value of assets listed in that affidavit.

Other assets, such as shares in a company, do not require grant of probate to be passed on to heirs. Many people, particularly small business owners and professionals such as doctors and lawyers practising through an incorporated company, may hold the majority of their wealth in the company.

In the *Berkner* decision, the Court confirmed it was lawful for Mr. Berkner to hold two valid wills: The primary will passed down the assets he held that required probate and the secondary will passed down his shares in the egg business. That allowed Mr. Berkner's heirs to receive their share of the egg business without paying probate fees on its value or having information such as the value of each share disclosed in an affidavit at the probate registry.

This judgment will have significant implications for many business owners, who now may organize their estate plan like this, feeling confident it's a lawful strategy.

However, some practices must be followed to ensure the plan works.

Most importantly, the primary and secondary wills must appoint different executors. That allows the executor of the primary will to swear the affidavit confirming that all known assets passed by the will, with values, are in the appended list.

However, there is one possible pitfall. Both the primary and secondary will may be subject to a will variation claim by a disappointed spouse or child. This is a statutory claim with a relatively short limitation period of 180 days that starts running from the date of the grant of probate. Once that period lapses, in most circumstances the executor may distribute the estate to the heirs.

The executor of a will that is not submitted for probate doesn't have the certainty of this short limitation period. Such wills may be vulnerable to a variation claim over an indefinite period of time because the grant of probate is never obtained.

So what happens if a claimant brings a claim long after the assets have been distributed to the heirs? As the law stands, the executor may be personally liable to return the assets or their equivalent value to the estate, subject to the claim's completion.

If the type of estate plan as contemplated in *Berkner* continues to grow in popularity, the courts or legislature may have to address that issue. Until then, executors distributing assets passed on by a secondary will may consider obtaining releases from all possible claimants. In any event, obtaining legal advice is a wise move.

For more information on secondary wills and your estate plan, please contact

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The electronic version of this article at ***www.singleton.com*** contains a link to the case mentioned above.

Letter of the Law—29 Years Strong

The tradition of *Letter of the Law* dates back nearly 30 years. During that time, we've seen a lot of things come and go. To start, in looking back at authors' photos over the years, you can see that trends in clothing and hair have certainly come and gone. Now LoL has been published long enough for some styles to have come full circle!

But what has stayed the same is our commitment to providing a quality publication our readers find valuable and engaging.

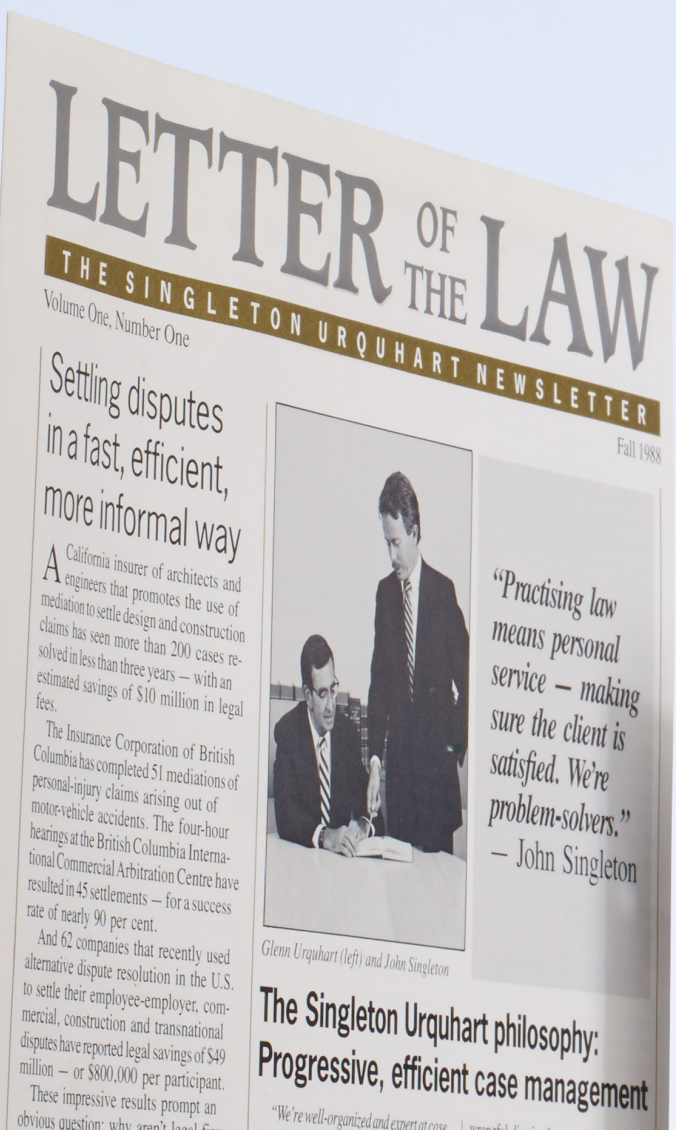
Over the years, we've covered recent cases and timely legal topics, all in an approachable style to keep readers reading. We also try to stay abreast of current affairs and changes to legislation—anything that could affect our clients' business so they can stay one step ahead.

We're grateful to all of our supporters, past and present, including clients, friends, colleagues and members of the bench.

This is the last issue of *Letter of the Law* that you'll see with the current design, so here's a snapshot of its past. But we're proud to continue the tradition of excellence by starting 2018 with a fresh, new look and feel that will make it even more compelling while keeping up with the latest trends.

120+ publications & 4 managing editors

In the past 29 years, LoL has gone to print more than 120 times. Since LoL was started by Bonita Thompson Q.C. in 1988 with help from two of Canada's most respected writers and editors, Paul and Audrey Grescoe, we've had a few people throw their hat in the managing editor's ring. Bonita was managing editor until 2000. Jeffrey Hand recalls his first stint sometime in the late 1990s. Then Kate McLean took over for the next few years. In 2003, David Perry stepped into the role until, in 2012, he passed the baton back to Jeff, who remains managing editor today, some 25 years after his first kick at the can.


LETTER OF THE LAW

THE SINGLETON URQUHART NEWSLETTER

Volume One, Number One

Fall 1988

Settling disputes in a fast, efficient, more informal way

A California insurer of architects and engineers that promotes the use of mediation to settle design and construction claims has seen more than 200 cases resolved in less than three years – with an estimated savings of $10 million in legal fees.

The Insurance Corporation of British Columbia has completed 51 mediations of personal-injury claims arising out of motor-vehicle accidents. The four-hour hearings at the British Columbia International Commercial Arbitration Centre have resulted in 45 settlements – for a success rate of nearly 90 per cent.

And 62 companies that recently used alternative dispute resolution in the U.S. to settle their employee-employer, commercial, construction and transnational disputes have reported legal savings of $49 million – or $800,000 per participant.

These impressive results prompt an obvious question: why aren't legal

"Practising law means personal service – making sure the client is satisfied. We're problem-solvers." – John Singleton

Glenn Urquhart (left) and John Singleton

The Singleton Urquhart philosophy: Progressive, efficient case management

"We're well-organized and expert at case


LETTER of the LAW

VOLUME EIGHT, NUMBER

New House o damages for

Hot off the bench: A decisio the English House of Lord dramatically limited the scope damages recoverable from those provide negligent information.

In three appeals (*South Au Asset Management Corporation Montague Ltd.*, *United Bank of PLC* v. *Prudential Property Serv Limited*, and *Nykredit Mortgage* v. *Edward Erdman Group Ltd.*), Court was called upon to deter liability of appraisers who had their client lenders with a negli over-valuation of real estate se loan advances. It was proven th lenders had known the true val security, they would not have a the loan. In each case, a fall in estate market after valuation in the losses which the lender eve suffered.

Before the House of Lords the Court of Appeal held that lenders were entitled to recove difference between the unpaid amount—including interest— amount realized on the securit the appraiser, according to the Appeal, who bore the whole ri loan transaction, which would occurred if it weren't for the ap negligence. The appraisers we accordingly liable for increase due to a fall in the market pric underlying securities after the

Expert evidence: in criminal and civil cases Page 2

Fire investigation: experts' liability exposure examined Page 4

VOLUME THIRTEEN, NUMBER FOUR

Letter of the

SINGLETON URQUHART

Season's Greetin

Excellence is key

The high standards for editorial content set by Bonita and the Grescoes continued for 14 years under the steady hand of Mark Budgen, an accomplished editor, writer and journalist. The mantle then passed to today's award-winning editor and project manager, Glenda Bartosh. *Letter of the Law* has also been recognized three times by Printing Industries of America with the Premier Print Award for newsletters, which recognizes the highest quality printed pieces from around the world.

Visually appealing—and entertaining

The unique look and feel of *Letter of the Law* have been courtesy of different artists over the years. Our current design and illustration style, which have been in place since 2008, is the work of artist John Belisle of Signals Design Group. John's work has distinguished many projects, perhaps most notably Canada Post's special edition stamps for the 2010 Winter Olympics. We were also lucky enough to feature original cartoons by well-known Canadian writer and political cartoonist, Geoff Olson.

Geoff's work has been featured in various high-profile publications over the years, and we're proud LoL is among them. *Letter of the Law* has never been shy about having some fun, too. Some of the earliest photographs featured Canadian actor Jackson Davies of the classic television series, The Beachcombers, depicting topics in a comical, tongue-in-cheek way.

We're looking forward to introducing the next installment of *Letter of the Law* in the New Year!

Data Rooms: Integral to a Purchase & Sale Transaction

This is the third installment in a series of articles providing practical information about all things business.

Electronic data rooms are integral to the due diligence process when negotiating the purchase and sale of a business. Sharing data electronically can streamline the process and be cost-efficient if managed well.

Data rooms are used to facilitate sharing what is usually an extensive amount of information during the due diligence process. A vendor shares with a purchaser the material features, obligations, liabilities and assets of the business it is purchasing, including material contracts, service agreements, employee information, leases, insurance contracts, financial statements, corporate governance documents, and intellectual property.

Key to the process is that the information shared in a data room informs what goes into a purchase agreement and, most importantly, the disclosure schedules. Failure to disclose the necessary information about the company and the business could result in a claim for breach of the purchase agreement or misrepresentation.

That said, populating a data room is time-consuming and continual. Updates are often made daily.

Consider the individuals involved: data rooms are often managed by the sales broker and your other advisors should be involved early on, especially your legal counsel and accountants. Therefore, it is important to organize the data room early in the transaction. Consider creating a table of contents that is updated by those responsible for the management of the data room. As well, deficiencies in your documentation may need to be fixed, and all parties will want ample time to deal with them. Disorganization regarding the disclosure of data and maintenance of the data room could affect the deal, potentially putting it at risk.

Also, think about the tactical advantage of a data room. Each deal is unique, and impressions made at the beginning often influence the remainder of a transaction. Data rooms should not be considered *pro forma*. Rather, do some pre-planning. How would the purchaser want to view the information? Does the purchaser have a particular need or sensitivity that would be beneficial for you to address at the outset?

You should also consider what information is being disclosed and when. First and foremost is the importance of having a well-prepared confidentiality and non-disclosure agreement. As described in our previous installment, you may want to consider scaling access granted during the due diligence process to reduce the risk of disclosing valuable information too early in the process (see *Letter of the Law*, Fall 2017).

When it comes to the purchase agreement, ensure your agreement sets a date and time where no more changes to the data room can be made; a closing document should be a copy of the data room as of that date and time.

A well-thought-out, organized data room is extremely beneficial to all parties involved with a transaction. With some pre-planning and coordination among your advisors, a data room can be a strategic, streamlined part of your purchase and sale transaction.

In our next article, we will discuss purchase price adjustments in purchase agreements.

For more information about data rooms and due diligence, please contact

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US@SU

OUT & ABOUT

On November 2, **JEFF HAND** spoke at the International Academy of Mediators conference in Austin, Texas on the topic of conducting multi-party mediations in construction disputes.

BETSY SEGAL and her crew of Masters women rowers won a silver medal at this year's prestigious Head of the Charles Regatta in Boston, MA. Taking advantage of the trip out east, Betsy also attended the Cyber Insurance Track of the Cyber Risks Insights Conference in New York. Watch for future insight and client alerts on cyber insurance from Betsy.

FLAMENCO FUN

The women of **SU** hosted friends and clients of the firm at a fun event at Cityside Winery in November with great entertainment provided by the talented Flamenco Collective. **SU** thanks everyone who donated toiletries to the Lipstick Brigade, which was co-founded by **MELANIE SAMUELS**. The donations will go to a women's shelter in the Downtown Eastside this holiday season. Check out the photos online at www.singleton.com!

Claire Immega *enjoyed a celebratory lunch with Victoria Wicks, prize winner of the* **Singleton Urquhart** *UBC Law Torts Prize. Claire was a previous winner of the prize.*

Appealing Arbitral Awards—A New Option Outside the Courts

ARBITRATION

An arbitration conducted by an experienced, skilled arbitrator using effective rules of procedure can reach a binding resolution with confidentiality, flexibility and efficiency—and at reduced cost. However, even arbitral awards made in British Columbia can be appealed to the courts, albeit on limited grounds.

While finality is an attractive aspect of arbitration, in some instances even the limited opportunity to appeal an award may be a welcome option to a seriously aggrieved losing party. Or both disputing parties may recognize—in advance of an arbitration—that the legal issues in the dispute are so important to their businesses or ongoing relationship that the right to appeal a flawed award offers significant comfort.

An appeal of an arbitration to the courts can cause significant delay and cost. By way of example, a recent B.C. arbitral award, *Teal Cedar Products Ltd. v. British Columbia*, wended its way back and forth through our appellate courts—taking six long years from the date of the arbitral award until final confirmation of the arbitrator's award by the Supreme Court of Canada.

This example illustrates the kind of frustration and consternation some parties and their legal counsel have experienced looking to benefit from a final, binding arbitral award but, instead, ended up in a long, judicial appeal process, much as they could have in litigation.

To quell these concerns, retain the benefits of arbitration, and provide additional value to its clients, the British Columbia International Commercial Arbitration Centre revised its Domestic Commercial Arbitration Rules of Procedure, effective September 15, 2016. The purpose was to provide a new process which the centre's clients can use to appeal an arbitral award to a tribunal. The three-member appeal tribunal will be appointed by the centre from its panel of skilled, experienced arbitrators, several of whom are distinguished retired judges.

By having the BCICAC administer the arbitration under its rules, the parties may be able to define the scope of any appeal of an arbitral award at the time they enter into a commercial agreement, allowing the process to remain private and confidential.

Parties entering into new commercial agreements containing arbitration clauses may wish to consider whether and how they access this new arbitral appeal process. Intentions should be carefully worded to leave open any options they wish to have in future, and to help to avoid the costs and delay of going to court.

As for those with existing arbitration clauses in their commercial agreements, it may still be possible for the parties to access the BCICAC's arbitration appeal services by having the centre administer their arbitration under its rules.

Hopefully, this new arbitral appeal process will assist businesses to continue to reduce the time and costs associated with resolving their business disputes while retaining the ability to challenge any arbitral award that is seriously flawed.

For more information on appealing arbitral awards, please contact

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Articling student **KAITLYN KEUFLER** assisted with the research for this article.

The electronic version of this article at ***www.singleton.com*** contains links to the case and rules mentioned above.

Landlords: Look Out for Stringent New Privacy Rules

Choosing good tenants is a crucial decision for residential landlords. The wrong tenant can cause a myriad of headaches and serious financial loss. As well, all professional landlords know that getting rid of a bad tenant can be long, painful, expensive process.

Therefore, landlords often use a "the-more-information-the-better" approach when vetting potential tenants. Credit checks are *de rigeur* for many residential landlords in Vancouver, and some ask for more. Landlords are warned, however, that some such practices are on the wrong side of the law, and that the government might soon be cracking down on them.

In August, the Office of the Information and Privacy Commissioner announced that it is investigating whether landlords in British Columbia are requesting too much personal information from prospective tenants.

The OIPC reports that in today's increasingly tight rental market, prospective tenants feel pressured to provide whatever information a landlord requests. According to the OIPC, there has been at least one instance in which a landlord has actually demanded an applicant's medical data.

More commonly, some landlords request information such as credit card details or social insurance numbers for the sake of running credit checks to determine whether a tenant is financially capable of supporting the rent. This is no doubt a way of taking some of the guesswork out of screening potential tenants. However, landlords need to be aware that they may be falling afoul of privacy legislation in the process.

Under the *Personal Information and Protection Act*, landlords may only collect and use personal information as is reasonably necessary to decide whether to rent to a prospective tenant. For example, the OIPC advises that landlords should not be requesting that applicants provide social insurance numbers, credit card information, T4 slips or banking records.

Although landlords may, on occasion, request to see an applicant's credit score, this is only permissible when the landlord has reasonable grounds to request it. Indeed, the OIPC maintains that this cannot be a routine request. Instead, tenants can obtain and provide a copy of their credit report rather than allowing landlords to run credit checks themselves.

Landlords have additional obligations under the *PIPA* regarding the retention and safekeeping of personal information collected from prospective and current tenants, including ensuring that no one has unauthorized access to completed applications, and keeping all tenancy applications for at least a year.

If the OIPC makes a finding of systemic privacy violations by landlords, it may take further steps to ensure privacy compliance.

Landlords are advised to keep a close watch on the OIPC investigation and, in the meantime, ensure that their policies are compliant with best practices to avoid complaints and penalties.

For more information on landlords' privacy obligations, please contact

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The electronic version of this article at ***www.singleton.com*** contains a link to the *Act* mentioned above.

ALL OF US AT SINGLETON URQUHART WISH YOU A HAPPY HOLIDAY AND PROSPEROUS NEW YEAR