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NFTs and Blockchain content: some legal issues for consideration

Simon Pulman, Nancy Wolff and Sarah Odenkirk of Cowan, DeBaets, Abrahams & Sheppard LLP review the potential dangers of minting well-known brands for NFTs and what attorneys should consider in order to protect brands in the metaverse.

**INTA President:
Zeeger Vink**

Page 12



**Amazon
Protection
Policies**

Page 16



**Brands in
healthcare**

Page 22



Peter Sloane, Partner at Leason Ellis LLP & INTA Member, discusses the INTA's 2020 *IP Law Firm of the Future Think Tank Report* in an interview with *The Trademark Lawyer*

A year on from the report's publication, Peter sits down with *The Trademark Lawyer* to discuss the findings and how they sit today.

The International Trademark Association (INTA) published the *IP Law Firm of the Future Think Tank Report* in January 2021. One year later, with the pandemic still with us, it seems like a good time to take a look back at the report and assess how its predictions are panning out.

Importantly, one of the goals behind the Report was to envision what a successful trademark law practice would look like five, 10 or even 20 years down the road. With such a long horizon in mind, the Report should be read not just in terms of where things stand today, but with an eye toward using it as a road map to successfully navigating the years still ahead of us.

Can you start by telling us about yourself and your role in the IP Law Firm of the Future Think Tank?

I am a Partner at Leason Ellis LLP, an IP boutique of about 35 attorneys in White Plains, New York, and Co-Chair of its Trademark and Copyright Practice Group. INTA CEO Etienne Sanz de Acedo announced the commissioning of the Report in 2019. I was Chair of INTA's Law Firm Committee at the time. I was one of 14 INTA members invited to join the Think Tank and I was involved in writing Chapters 1 (State of the Legal Market in General) and 9 (IP Law Firm Projections for the Future) of the Report. Along with Max Kinkeldey of the Grunecker firm, I had the honor of presenting the Report to



Peter Sloane

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the INTA Board of Directors and at a Town Hall at the INTA Annual Meeting at the end of 2020.

Can you tell me why you think it is important for research such as the IP Law Firm of the Future report to be carried out?

For those of us involved in writing the Report, it was a great exercise in looking at our respective practices from a 50,000 foot level. We are so often buried in our day-to-day work that we fail to see the big picture, so the writing offered us an opportunity to step back and assess where our practices stand and where they may be heading in the future. The Report is an important opportunity for readers to gain insight from their colleagues in other firms and exposure to ideas which will help them navigate all the externalities that we collectively face in our practices, such as dealing with COVID, operating remotely, and effectively engaging millennials in the workforce.

For INTA, it is important to have commissioned the Report and others like it, such as the IP Office of the Future and the In-House Practice of the Future Think Tank Reports, in order to be at the cutting edge of thought leadership in the trademark field. This is also an ongoing initiative. INTA will update these Reports every few years so that the Association and the various stakeholders in the IP community can continue evolving and projecting themselves into the future.

Based on the report findings, how are clients controlling key decisions and what effect is this having on the practice of law?

The Report made clear that the clients have been controlling key decisions since the Great Recession of 2009, when they cut their budgets on outside legal spend and built in-house departments capable of managing their trademark portfolios. Today, clients want it all. They expect guidance from outside counsel to be pragmatic and concise. They also expect law firms to be partners who know their businesses and can focus on their exact needs. While correctly addressing the situation, the Report does not necessarily examine whether this dynamic is having a deleterious effect on the practice of law. The fact of the matter is that it takes years of training before lawyers are in position to provide such premium advice and tailored services. Associate training was not an issue addressed in any depth in the Report. One of the most important tasks for the law firm of the future is to figure out how to effectively train associates while absorbing some of the expense in order to meet continuing client expectations to lower cost. INTA may have a role to play here in partnering with law firms in training associates. The Association has formed a Professional Development Committee in the 2022-2023 term, which will identify resources and programs to cultivate the skills of IP practitioners. This seems like a great vehicle for associate training across INTA law firm members.

How is the state of the market effecting the function of the traditional IP law firm?

The Report found that law firms weather downturns better than the economy in general and it speculated that IP firms will do well and probably emerge with lower costs and the same or increased revenues. I do not believe that the Report foresaw the emergence of inflation as a factor in the markets. The increase in costs across the board has made doing business more expensive for both clients and law firms. The Great Resignation of 2022 is a factor behind inflation (along with supply chain disruptions) and a separate marketplace issue which has negatively affected the traditional IP law firm. With people leaving the workforce in droves, it has made it that much more difficult for firms to find capable and affordable attorneys and staff.

How are international markets changing and how can law firms prepare for this adjustment?

The Report addressed different geographical considerations amongst law firms. For example,

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it discussed how the explosive growth in China has made that country home to some of the largest firms in the global legal services market with some firms boasting thousands of lawyers. It also suggested that law firms can seek to benefit from that growth by opening offices in China or by otherwise marketing their services to potential clients in China. However, the Report does not cover the importance of political considerations in China and elsewhere in assessing how law firms should adjust to market changes.

Based on the report findings, what do you predict will change regarding client expectations for speed of services, communication, and costs?

Left unchecked, there can be little doubt that client expectations for speedy services and communications will continue to mount. The technology is there to make it happen and clients have the leverage in demanding that their outside firms embrace it. On the other hand, there may be a growing sentiment that speed is not everything and that the best advice often takes time to develop. Increasing awareness of the importance of mental health within companies may also lead clients to consider whether the need for speed is taking a toll on their outside counsel and to recognize that some delay and downtime may yield better results. Indeed, clients may come to appreciate that the drive to lower costs may not be in their interests if law firms have to sacrifice quality. For example, I have one client who offered to pay more than I was proposing to charge for a service because she recognized that the lower cost may not have been viable to the success of the relationship in the long run.

The report suggested that the staffing model for IP law firms will need to be modified to survive. Can you tell us how and why?

The Report mentioned that law firms should adopt more competitive staffing models by adding more paralegals. This may be easier said than done as the market for paralegals is intensely competitive with much greater demand than supply. This is also at odds with the prediction that paralegals are at risk from technological replacements. The balanced approach appears to be to continue to invest in people by providing competitive salaries whilst exploring how technology can be used to make those people more effective in their work.

Can you provide any examples of how some of the predictions of the report have run into real world obstacles on the ground?

The Report postulated in at least a couple of places that firms would no longer be bound by the geographic barriers long caused by the brick-and-mortar model, so that attorneys could be hired anywhere they live and they would be able to work wherever they please. Although potential obstacles like taxation and licensing were acknowledged in passing, there is still a sense in the trade that geography no longer matters. I can tell you from our own experience that there are hoops to go through in onboarding remote attorneys that require aligning our outside accountants and registering to do business in different states. Depending on the state [in the US], we also have to pay franchise taxes, workers compensation, and unemployment benefits. In considering the long-term horizon of the Report, though, these are hurdles which may come down in the future as employers put pressure on the states to minimize the costs of doing business there.

What are some of the insights provided in the Report which have yet to experience measurable change?

There was a lot of talk of the "Big Four" accounting and consultancy firms moving into the trademark space, but it's unclear whether they have made any inroads over the past year. Trademarks is not exactly the highest margin business, especially compared with mergers and acquisitions and other corporate work, so perhaps it is not surprising that they have not moved more quickly in taking up market share. Blockchain, smart IP rights, and algorithmic based dispute resolution also seem like a long way off. Changes in AI implementation are likely to be incremental and to occur behind the scenes with the work of the tech vendors like Anaqua, Clarivate, Corsearch, and Thomson Reuters.

On the other hand, NFTs were not even mentioned in the Report and yet they are keeping some trademark lawyers busy with new assets to protect, enforce, and defend against.

The report acknowledges the role technology will play in shaping the future; which technology do you find most useful in your daily work now and what are you most looking forward to implementing when available to you?

Technology has of course made remote working during the pandemic possible. The timing was fortunate for us as we went paperless several years ago. We also hired our first in-house IT administrator a couple of years ago and he has been essential to helping us operate so effectively while remote. E-mail, document

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management software, and video conferencing services are the most useful tools I use in my daily work. I spend way too much time in front of my computer typing, so it would be nice if computer enabled dictation catches on. It would be like a return to the start of my practice when I would dictate opinions on to micro-cassette tapes for my assistant to transcribe!

The report discusses how law firms should embrace the pandemic learnings to rise to the next level. What are these learnings?

The interesting thing is that while we incorporated the findings of the pandemic in the Report, I don't think any of us expected to still be in the midst of it one year later. On the other hand, the ongoing nature of the pandemic makes the findings of the Report of continuing relevance. I recommend that law firms attorneys in a management function with trademark oversight read the Report from start to finish as its actually a quicker read than it might appear. The action plan at the end of the Report provides 16 key learnings in a concise, bullet-point form.

What is your key takeaway from the report?

My key takeaway from the Report is that technology is by far and away the most crucial differentiator between those firms which will thrive in the future and those which will stagnate. However, investment in technology must be balanced with investment in those soft factors which make up the culture of the firm. This includes attracting and retaining millennials, building staff loyalty, reducing staff burnout, and strengthening the firm's brand. Diversity was mentioned no less than a dozen times in the Report, so there is no doubt that DEI [diversity, equity, and inclusion] is important to today's work force. If there is one thing we can be sure of its change, and that the successful law firm practices of the future will not necessarily look like the ones of today.

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