

February 2, 2012

Alert

Technology & Intellectual Property

Key IP and IT Trends for 2012

By Barry Fishley

We expect that 2012 will see the following key trends in the areas of intellectual property (IP), information technology (IT) and data protection.

Cloud Computing Is Here To Stay

Following the increased uptake in cloud computing in 2011, this year will see greater emphasis on operational issues surrounding cloud computing such as privacy, compliance and governance.

Cloud computing is increasingly seen as a key part of many organisations' technology strategy. They are beginning to tune into the benefits of cloud computing, including the possibility of being able to seamlessly change IT without having the time and expense of setting up and configuring new systems; together with the potential of realising lower infrastructure costs, obtaining greater scalability and increased flexibility. In fact, according to Gartner, *"By 2015, low-cost cloud services will cannibalize up to 15% of top outsourcing players' revenue."*

In 2012, due to ever increasing demand for their services, the number of cloud computing providers is likely to grow dramatically. The cloud's ability to lower costs as a result of the "utility billing model" may seriously impact the traditional software business model and consequently the profit margins of the big IT players, as storing software on servers in their own data centres shifts storage and operational costs and creates lower margins compared to selling physical software packages. In addition to the standard infrastructure and platform services it is envisaged that the demand for ancillary services covering administration and migration will increase. However, against this backdrop operational issues such as security and reliability are likely to be given greater prominence, with cloud providers becoming more willing to negotiate their standard contractual terms to address such issues.

Related to the development of the cloud, it is also envisaged that RAID technology ("redundant array of independent disks") – those data storage schemes that can divide and replicate data among multiple physical drives as a means to improve data reliability and input/output performance technology – will continue to grow in importance and profitability in 2012.

"Big" Data

While a few argue that the use/exploitation of "big" data has peaked, many practitioners believe that it is still in very early stages of development and 2012 will be the year of big data. By "big" data we mean structured and unstructured data for which traditional analytical tools are inadequate because of either volume or variety and the conversion of

such data into business advice for enterprises. Many of the promises associated with "big" data are similar to those promised for "data mining" in the early 2000s, but just as networks and processing power have allowed cloud computing to come into its own, "big" data appears poised to achieve much more widespread adoption.

If put to use properly, the use of "big" data is becoming a key way for organisations to outperform their peers and the experts agree that big data is going to be a key competitive advantage in 2012. For example, a retail business may be able to use "big" data to link people, locations, topics and products on social media so as to accurately predict a spike in demand for certain products at certain locations.

According to the McKinsey Global Institute report, "*We estimate that a retailer embracing big data has the potential to increase its operating margin by more than 60%*". The report also states that there are examples of companies capturing market share in financial services and insurance sectors.

Cyber Security

The increase in data and information that is stored in digital form is continuing to grow exponentially as many digital storage and communication processes now utilise the Internet. Clearly, this trend provides numerous cost-saving efficiencies and opportunities for organisations, but also gives rise to significant security, governance and, potentially, reputational issues. At one end of the scale, these risks emanate from low-

level hackers seeking unauthorised access for little more than the "sport" of it and the associated publicity. At the other end of the scale, there exists much more sophisticated entities such as organised crime syndicates, governments and companies seeking to assimilate competitive intelligence. As a result, 2012 will see a marked increase in resources (both financially and in terms of executive management time) that organisations must devote to safeguarding digital storage systems from hackers and other cyber-criminals.

Cookies

In the UK, the amnesty for using cookies which do not comply with last year's change in the law expires in May 2012. From this date, the UK's Information Commissioner's Office (ICO) will have the power to enforce the new regulations on consent to use cookies (whether by opt-in, pop-ups, personalisation setting or specific or informed consent each time). We expect to see high profile fines imposed. In the US, it seems likely that there will be more attention paid to tracking tools, such as Flash cookies and "supercookies."

In the US, we expect to see increased FTC and state attorney general focus on efforts to use flash cookies or similar technology to circumvent contractual or statutory privacy protections as well as an increase in consumer litigation involving unauthorized transfer of consumer information by App developers who circumvent privacy protections imposed by the device developer. As

an example, the FTC recently entered into a settlement with the online advertiser ScanScout, resolving charges that ScanScout deceptively represented that consumers could opt out of online monitoring and receiving targeted ads by changing their browser settings to prevent the receipt of cookies, when in fact consumers could not prevent ScanScout from collecting data about their online activities or serving them targeted video advertisements because ScanScout's use of flash cookies to collect such data was unaffected. (*In re ScanScout, Inc.*, FTC File NO 102 3185.)

More broadly, tools used to track and monitor online and offline behaviour (such as use of partial credit card numbers for tracking purposes) appear likely to be the focus of increasing regulatory oversight and litigation, as exemplified by California Supreme Court decision holding that retailer Williams-Sonoma's use of credit card and ZIP code information to track customer purchases violated California law.

Big Changes in Data Protection Regulation

Regulatory action from the ICO is set to intensify in 2012 following on from the introduction of tougher enforcement powers in 2010 which allow the ICO to issue fines of up to £500,000 for breaches of data protection laws.

In addition, the European Commission has just published its proposals to reform EU data protection laws – the first change since 1995 – the key piece being a draft EU General Data Protection Regulation (the Regulation). This,

along with a new Police and Criminal Justice Data Protection Directive, is intended to replace the current data protection regime. As the draft proposals are in the form of a Regulation rather than a Directive, it would be directly binding in all EU members states once approved (in contrast to a Directive, which must be imposed by national implementing laws), thereby imposing a single, EU-wide, set of laws. Key changes include:

- **Extension** – the Regulation will extend to organisations established outside the EEA if their data processing relates to either (i) the offer of goods/services to individuals within the EU; or (ii) the monitoring of the behaviour of individuals within the EU. Hence, large foreign entities which directly target EU individuals will be brought within the ambit of European data protection laws;
- **Consent** – all data subject consent is to be explicitly provided, either by a statement or clear affirmative action;
- **Binding corporate rules (BCRs)** – the Regulation gives legislative recognition to the implementation of BCRs;
- **Enforcement** – breaches of the legislation could result in a fine of up to Å1m or 2% of annual worldwide turnover;
- **Procedure** – updated and expanded rules regarding mandatory notification of data and security breaches to apply to data processors, as well as controllers, across all sectors;
- **Right to erase data** – a right of data portability (enabling data subjects to receive data

held about them in electronic format), a “right to be forgotten” and a “right to object”, all of which are likely to increase the administrative burden imposed on data controllers; and

- **Administration** – maintenance of specific documentation for both data controllers and processors to be kept and furnished to data protection authorities on demand and compulsory appointment of data protection officers where entities have 250 or more employees or regularly and systematically monitor data subjects.

The draft legislation must be approved by the EU members states and ratified by the European Parliament prior to becoming law and thus is unlikely to come into force much before 2014. Expect to see fierce lobbying and debate in the coming months as businesses and industries debate the pros and cons of this proposed significant change in the data protection landscape.

Increase in Litigation by Rights Holders

In the UK, an appeal for judicial review of the divisive Digital Economy Act 2010 is currently taking place. Once the outstanding issues relating to compliance with EU Directives have been resolved, we can expect to see an increase in enforcement of copyright holders' rights including a system of notifications to subscribers informing them of their infringement.

Additionally, in light of recent litigation, 2012 is likely to see the film industry and other rights-holders making more claims

against Internet service providers hosting or transmitting infringing content.

In the US, while the controversial SOPA (Stop Online Piracy Act) and PIPA (PROTECT IP Act) have been withdrawn from the legislative agenda, it seems likely that rights holders will seek to have these acts re-introduced with perhaps some of their more controversial elements softened. In any event, the firm “safe harbors” provided to service providers under US law may be subject to legislative revision in the next year.

The high profile ECJ ruling on the Premier League broadcasting cases, which seemingly overturned established practice of licensing media rights on a exclusive territory basis, will impact negatively upon sports rights bodies and older rights holders that have sold rights to broadcast on a country-by-country basis. These decisions will affect not only the exploitation of live football rights but also the distribution of music, films, TV, e-books and other forms of content on the Internet. Unless some other justification for territorial licensing can be found, 2012 will be spent searching for new business models and many existing licensing arrangements, including geoblocking practices, may be held to infringe European laws.

Net Neutrality

There is a battle brewing, which will gain ground in 2012, that will pit companies that are using vertical integration to bundle content creation with distribution access against pure content distributors reliant upon others for connectivity (such as online streaming service providers).

Content owners will increasingly strike deals with consumer electronics manufacturers for availability of content over the Internet directly to televisions in an effort to bypass incumbent cable and satellite television providers. The battlefield will be net neutrality, the contentious term which acknowledges that there should be no restriction on Internet access and no discrimination as to the type of data passing across networks by Internet service providers. The likely outcome of the battle will encompass litigation, regulation (particularly in the US where the ISP market is rather less competitive than in the EU) and potential further merger and acquisition activity.

Electronic and Mobile Money

The use of Near Field Technology enables secure payment mechanisms including storing e-money in the mobile "wallet" to spend or using the wallet as a virtual credit card which will eliminate the need to carry cash. It is expected that near field communication (NFC) will transform the way we shop, pay, save, and interact with other mobile device users and even with physical objects. This technology is currently used successfully on the JR East rail network in Japan. In addition, technologies such as the "Square Card Reader" which enables individuals to process credit card transactions using an inexpensive device connected to a smart phone, may facilitate an increase in micro-transactions and a conversion of transactions that would traditionally be settled with cash to ones settled using credit or debit cards.

In the UK, the new technology brings with it financial regulation in the form of the Electronic Money Regulations 2011 and the Payment Services Regulations 2009.

It is highly likely that 2012 will see an increase in both the investment and use of mobile money and e-money. Gartner estimates that 50% of smart phones will have NFC capability by 2015; it will be interesting to see if the concept of "e-wallets" finally begins to take global hold as the required security technology matures.

Tablets

As the popularity of tablets continues (and households begin to incorporate multiple units), the technology will continue to eat into laptop sales and hybrids (incorporating, for example, keyboards) will become a realistic option. This may well see even more "patent wars" being waged between the globally-recognised big players and new upstarts (and even against online sellers). Currently, almost all of the tablet providers are involved in litigation with each other in some form, showing similarities with the deluge of litigation seen in the smart phone market.

The effect of such large-scale legal action may have a net negative effect in both raising costs (as legal costs flow down to the end-user) and inhibiting innovation in the sector (as more time is spent addressing legal concerns rather than investing in R&D). Indeed, the level of the disagreement between certain manufacturers led the European Commission Vice President Joaquin Almunia to voice concerns

regarding the damaging use of IP rights as an instrument to restrict competition.

Voice Control User Interfaces

As 2011 brought with it the use of voice control user interfaces in smart phones and games consoles, voice control user interfaces will become more prevalent and will spread to personal computers and other applications in 2012. However, as has been witnessed in the tablets sector, this is likely to lead to a new raft of patent infringement filings as competitors jostle for market share.

Television Companies

The television market will soon be changing, with possible new visions of television sets being offered, (which may well incorporate voice control user interfaces). Cable companies will need to "evolve or die" as linear programming becomes less and less popular and more people turn to new forms of consuming content.

This type of paradigm shift typically leads to increased IP litigation as companies struggle to compensate for lost profits and seek to legally assert their patents to boost the value of their IP; further, companies must act to license new IP rights covering their new technology space.

If you would like more information about the contents of this Alert, or about Weil's Technology & Intellectual Property practice, please speak to your regular contact at Weil, or to:

Michael A. Epstein	(michael.epstein@weil.com)	+1 212 310 8432
Barry Fishley	(barry.fishley@weil.com)	+44 20 7903 1410

©2012. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations which depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list or if you need to change or remove your name from our mailing list, please log on to www.weil.com/weil/subscribe.html, or send an email to subscriptions@weil.com.