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Les auteurs de la première partie du présent bulletin sont les professeurs Teresa Scassa, Chidi Oguamanam et Stephen Coughlan de l'Institut de droit et de technologie de la Faculté de droit de l'Université de Dalhousie. Les professeurs Pierre Trudel et France Abran de le Chaire en droit des technologies de l'information et du commerce électronique L.R. Wilson de la Faculté de droit de l'Université de Montréal ont rédigé la seconde partie du présent bulletin.

Part 1

Access to Justice: Real Time Reporting

The British Columbia Supreme Court had delivered it ruling in *Wu v. Sun*. At the very first day of the trial in this case counsel for the defendants indicated that she had an injury as a result of which she had difficulty taking notes during the trial. She informed the court that she has consequently ordered Real Time Reporting so that a rough draft of the records will be available on her computer as well as final transcripts. The plaintiff counsel submitted that the same services should be available to her but at no cost to the plaintiff; instead, the defendant should bear the cost. The court observed that the central issue for determination is one of access to justice. While Real Time Reporting is considered a luxury for the most part, it is justifiable in some circumstances. It noted that "in some jurisdictions, all parties to litigation would have equal access to similar services at no cost to the parties. In British Columbia, it is regrettable that access is only available to parties who can afford such services or to counsel who can…" (¶ 3). In regard to who would bear the cost of Real Time Reporting, the court rejected the defendant's contention that such decision must await the outcome of the case. It held that the decision is one to be made immediately if not the services will not be available to the plaintiff counsel throughout the trial and any such delay will deny the plaintiff and counsel the benefit of Real Time Reporting and their ability to make consequential review of records for accuracy. In the opinion of the court, the question hereby raised is to determine which party bears the initial burden of payment of costs until the conclusion of trial when final determination of entitlement of costs and burden can be made (¶ 11). After reviewing the case authorities, the court held that the usual conditions for which the plaintiff should bear the interim cost were lacking. Specifically, it is too early in the case to determine whether plaintiff is in a position to establish a prima facie case of sufficient merit to warrant an order of interim costs. The court held that access to justice, equality and equity considerations dictate that the plaintiff be put to no considerable disadvantage because of Real Time Reporting. Accordingly, the court held that in the interim, the cost of providing transcripts for the plaintiff should be borne by the defendants.

Criminal Proceeding: Electronic Disclosure

The British Columbia Supreme Court in Kamloops had delivered its ruling in *R v. Greer*. This case involved an application by the Crown regarding its disclosure obligations in respect of two unrepresented accused and two represented accused in a criminal proceeding. The indictment contains several counts, including conspiracy to possess stolen property, forgery, utter forged documents, laundering of proceeds of crime and conspiracy to commit theft involving four of the accused. An extensive and ongoing police investigation disclosed a large number of documents that were stored in a hard drive. At the time of the action, the documents were approximately 250, 000 pages. They were organized to allow searching with Adobe Reader software that was provided to the accused by the Crown. However, a more powerful program, the Adobe Acrobat software that allows for noting-up and highlighting was not provided for the accused by the Crown.

Two of the unrepresented accused claimed that they do not have requisite computer skill to access the hard drive and that they had back problem and headaches that interfered with their ability to use the computer. Consequently, they requested a hard copy. Counsel for one of the represented accused claimed that he lacked the necessary skill to access the hard drive although he was amenable to learning. He also claimed to have difficulty typing. Consequently, the accused seeks computer training both for himself and his counsel, lap top computer for himself and his two counsel, and adobe acrobat software. In the alternative, he seeks hard copies of the document or to have the Crown bear the cost of photocopy and printing. In this present application the Crown seeks direction in regard to the manner of providing disclosure material, i.e. whether in electronic or hard copy, whether to provide computer equipment to the accused and counsel, and whether to provide formal computer instruction.

In its ruling the court held that "[t]he Crown is obligated to make meaningful disclosure but has a discretion on how to do that. That discretion is reviewable by the court" (¶ 9). According to the court, as much as the accused must be able to reasonably access the material, reasonable access depends on how the disclosure is organized and on the circumstance of the defence. Where disclosure is reasonably accessible the court will not interfere with the Crown's discretion on how the material is organized. The court observed the cost of producing hard copy would be $25, 000 to $30,000 per copy and that it would take an unreasonable amount of time to produce hard copy. It noted that even so, cost should not take priority over the accused's right to full disclosure. He found, however, that "[t]here is no evidence to indicate that the computer equipment is prohibitively expensive and beyond the ability of the defendants or counsel to acquire". The cost of software for noting-up and highlighting "are really overhead costs for a lawyer who takes on a case with this many documents and this much evidence" (¶ 27). In regard the unrepresented accused, the court did not find their claims credible since they are known to use computers. Referring to one of the accused, the court held that it was "not satisfied that he cannot use computer as would be required although he may have to use good screen and have it properly set up" (¶ 30). In upholding the sufficiency of electronic disclosure the court ruled that training assistance should be availed counsel and accused and a help line set up for them. For the court, the obligation of the Crown is to provide disclosure in a form accessible to the accused and not in the form that is easiest for counsel to use for trial or in a manner of their preference. As general matter, the court noted: "I am sympathetic to counsel who find they are required to deal with new technology and acquire new skills. However, we must do the same in order to meet the demand of a changing world" (¶ 39).

Defamation and Breach of Fiduciary Duty

The Saskatchewan Court of Appeal has delivered its decision in *Hall v. Macpherson Leslie and Tyerman (MLT)* LLP [2007] S.J. No. 3 (no hyperlink available). In this case, the law firm of MLT acting on behalf of Regina Public School Board (the Board) alleged in a statement of claim that Brian Farr and YAS-Youth Athlete Saskatchewan Inc (YAS) had libeled the Board via certain e-mails. Also, the board claimed that information in YAS website "continues to wrongly communicate to the community at large that [the Board], its schools and staff support YAS program" (¶ 4). The defamation by association is linked to one of the incorporators of YAS, Denis Hall, who was convicted previously of two charges of having sexual intercourse with females aged 14 to 16 and two charges of indecent assault of females who were members of a church female basketball team that Hall coached. MLT also claimed an injunction to prevent further libelous publications and damages. In subsequent amendment, MLT alleged additional defamatory publications by Hall who was then added as a defendant.

In their statement of defence, YAS and Hall denied that the publications complained of were defamatory. They filed a counterclaim against the Board, its Chairman and the law firm of MLT. The counterclaim alleged that MLT acted for Hall when he pleaded guilty to the two charges of having sexual intercourse with underaged females and two charges of indecent assault. In its attempt to pressure YAS and Hall to cease communications/association with the Board, MLT caused to be published in Saskatchewan newspapers in Regina and Saskatoon several libelous

statements, specifically citing YAS head coach and co-founder, Denis Hall, and the fact of his conviction in 1981 of having sexual intercourse with teenage girls he was coaching" (¶ 9). This was notwithstanding that MLT knew that Hall served a concurrent 18 month's sentence and was subsequently granted pardon by National Parole Board. According to the counterclaim, MLT's action constituted torts of breach of fiduciary duty, intimidation, conspiracy to injure, abuse of process, injurious falsehood and unlawful interference with economic interest. The chambers judge agreed with MLT's application that the counterclaim disclosed no cause of action and found that the firm was named therein because it was doing its job as counsel for the Board and that the counterclaim was intended to annoy or embarrass the Board with the hidden motive of removing MLT as the Board's counsel.

On the Appeal, the Court of Appeal rejected the finding of the chamber's judge. It held that "since MLT acted for Hall in the criminal proceedings which played a prominent part in the subsequent proceedings it took on behalf of the Board against Hall, it cannot be said either that the pleadings in this respect disclosed no cause of action" (¶ 19). It held that on the authorities, Hall had the right to bring action for damages for breach of fiduciary duty. The Appeal Count found that other torts pleaded in the counter claim did not reveal a viable cause of action. It noted, however, that "some of the facts pleaded with respect to torts other than breach of fiduciary duty may be relevant to the alleged breach of fiduciary duty" (¶ 36).

Domain Names

In *The Black & Decker Corporation v. J. Chapnik Trust*, sole panelist Stefan Martin considered a dispute over the domain name blackanddecker.ca. The Complainant is the owner of a number of word and design trademarks featuring the words Black & Decker. Martin ruled that the domain name was confusingly similar to the Complainant's marks. He noted that the fact that the marks contained an ampersand and the domain name did not was explained by the fact that a domain name cannot include an ampersand, and that the word "and" is its domain name equivalent. He also found that the registrant had no legitimate interest in the domain name. The domain name had not been used in connection with any wares, service or business. Instead, it was 'parked' at an internet portal so as to permit the registrant to benefit from referral fees for internet traffic. He also accepted the Complainant's allegation that the name had been registered in bad faith. Martin noted that the registrant's registration "has prevented the Complainant from registering the ".ca" domain name for its trade-marks. He also accepted evidence submitted by the Complainant that the registrant had registered at least 6 other domain names corresponding to third party trade-marks. He also accepted that parking a site at an internet portal was a form of competition with the Complainant that also disrupted its business. Martin ordered the transfer of the registration for "blackanddecker.ca" to the Complainant.

Judicial Review

The Ontario Superior Court has delivered its ruling in *Apotex Inc v. Ontario (Minister of Health and Long-Term Care)*. In this case the applicant applied for judicial review of the process by which the respondents lowered to 50% the price the government paid for generic drugs under the respondents' free/subsidized drug regime for some eligible individuals or population group. According to the appellant (Apotex) and the intervenor, Canadian Genetic Pharmaceutical Association, the government enacted a different set of regulations from the one it proposed and subjected to public consultation. They argued that the initial government proposal was for a lesser price reduction. According to the appellant, the procedure adopted by the government did not satisfy the requirement of the Ontario Transparent Drug System for Patients Act, S.O. 2006, c. 14 (Bill 102) which provides for public consultation by the minister before the making regulations. The Act requires the minister to publish notice of proposed regulation on the website of the ministry and in any other format that the minister considers advisable. The notice in respect of the regulation that the applicant in this case is challenging was published in the Ministry's website and contains the following statement: "All comments and submissions received during the comment period will be considered during the preparation of the final regulations. Comments and submissions received after the comment period will not be considered. The content,

structure and form of the proposed regulations are subject to change as a result the comments process is the discretion of the Lieutenant Governor in Council, who has the final decision on the content of the regulations". The court found that from evidence the appellant knew that government was considering a 50% price reduction and that it had participated in the public consultation process in which it expressed reservation over the proposal. In any case, the notice posted on the Ministry's website, especially the portion reproduced above complies with the Act's requirement having satisfied its relevant provisions. According to the court, the Lieutenant Governor in Council did not exceed its jurisdiction in changing the method by which a reduction of 50% of the fee charged by the brand-name products was achieved" (¶ 37).

Privacy

The Office of the Privacy Commissioner of Canada has released a recent summary of its findings in a case involving a complaint against an airline. An individual had complained that he had been denied access to his personal information by the airline. The individual had been banned from flying with the airline based on information regarding a specific event. The Complainant sought access to the information and had also initiated litigation against the airline.

The airline ultimately provided the information more than a year after the initial request. By contrast, PIPEDA requires that a request for access must be responded to not later than 30 days following the request (s. 8(3)). The Assistant Commissioner was not satisfied with the way in which the requests for information had been handled by the airline. In her view, the request for information was not responded to in a timely manner, and the information was ultimately only provided in the context of the litigation and not under the terms of the Act. She asked the airline company to "acknowledge its obligations under the Act to respond to such requests, notwithstanding any legal action that may be taking place concurrently." The airline refused, taking the position that once litigation is commenced, it is the rules and procedures of discovery that must be followed and not the provisions of the Act. The OPC decided to pursue the matter through an application to the Federal Court under s. 15 of the Act. The airline subsequently agreed, before the matter proceeded to court, to accept and implement the recommendations of the Assistant Commissioner.

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The Office of the Information and Privacy Commissioner for British Columbia has released Order P06-06, which deals with a complaint by former employees of the Tsatsu Shores Homeowners Corporation regarding the treatment of their personal information by their employer.

The complainants objected to the fact that the employer had collected complaints from its residents about them. The respondent noted that it did not solicit complaints, but that it would ask residents to put verbal complaints in writing. Commissioner Loukidelis ruled that these letters constituted personal information about the employees, and that they were collected for purposes related to their employment. However, he noted that to satisfy the Act, which permits the collection of personal information about employees in certain circumstances, the information that is collected must be "reasonably required" to establish, manage or terminate an employment relationship. According to s. 4(1) of PIPA, the reasonable necessity of the information will be judged according to "what a reasonable person would consider appropriate in the circumstances." Commissioner Loukidelis framed the issue in this case as "whether an organization can, where its employees' duties involve interacting with customers or clients of the organization, receive complaints or commendations about the job performance of individual employees." (at para 14) He concluded that "in this case, PIPA authorized the organization to collect and use information that it received – whether solicited or unsolicited – about the complainants' job performance without consent of the complainants." (at para 15) Nevertheless, he noted that the information collected and retained by the employer would have to be related to the employees' performance and duties, and not related to other extraneous matters.

The complainants also objected to the disclosure of personal information by the employer. The information was disclosed in minutes of the respondent's board meetings. Commissioner

Loukidelis noted that "It is one thing for the minutes of a meeting of a board of directors to contain personal information for which the directors have a reasonable need to know and another for those minutes to be made available to residents and others." (at para 20) He recommended that in future, discussions involving the personal information of employees or residents should be conducted in private, and the minutes of any such private discussions should not be circulated outside the board.

One of the complainants also objected to a notice that was posted in the building, stating that at that employee's request, "the Board has removed the resident keys from his possession, as he did not want the responsibility and with his limited works schedule he is not always available to provide this service in the case of an emergency, which was the original purpose." (at para 25) Commissioner Loukidelis found that this note was "innocuous", and that such personal information that it did contain was employee information, the disclosure of which was authorized under s. 19(2)(b) of the Act.

The complainants also objected to the respondent's initial response to requests they made to have their personal information corrected or annotated. The respondent initially refused to act on these requests, although it subsequently changed its position and made the annotations and corrections. Commissioner Loukidelis found that the initial refusal "clearly fell below the 'reasonable effort' standard." (at para 31)

Section 33 of PIPA requires an organization to "make a reasonable effort" to ensure that the personal information that it collects "is accurate and complete". The complainants argued that the failure of the respondents to complete their performance evaluation meant that it had not made a reasonable effort to ensure their personal information was accurate and complete. Commissioner Loukidelis was of the view that: "The organization must make a reasonable effort to ensure that the personal information in the evaluation is complete, but s. 33 does not require it to complete the job performance evaluation in the manner that the complainants suggest." (at para 35)

The Commissioner also found that the keeping of the employees' personal information in an unlocked filing cabinet in a locked room fell below the standard of security required in the Act. He found that there was nothing to show that the room was only accessible to a restricted number of persons.

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In Order P06-05, Commissioner Loukidelis considered another complaint under PIPA. The complaint was brought by three individuals who had worked as contractors for Langley CruiseShipCenters Ltd. (the 'organization'). Their complaint centred around the way in which the organization had used email and emailed documents.

The complainants made a number of allegations including that a private investigator had been hired by the organization to hack into their email accounts, that their emails were shown to third parties, that after their termination their email accounts and addresses were used by the company for marketing purposes, and that the private investigator taped a conversation with one of the complainants and followed the other two.

The organization admitted to hiring the private investigator after they became concerned about the activities of the independent contractors. Based on the information gathered by the investigator, the organization concluded that the independent contractors were making improper use of the organization's facilities and equipment to establish competitive business locations. The sole shareholder of the company then dismissed the contractors, and was accompanied by the private investigator at the exit interviews.

Commissioner Loukidelis noted that PIPA does not create a freestanding right of privacy, and that "personal information" within the meaning of the Act must be involved before the Act will apply. He noted that there was a "fair amount" of personal information in the emails viewed by the organization, but that there was also contact information of the complainants and other business contacts, which does not count as personal information within the meaning of the Act. Further, many of the emails contained information about the complainant's business activities. Commissioner Loukidelis characterized this information as "work product information" which is excluded from the definition of personal information under PIPA. He made this characterization notwithstanding the fact that some

of the business related correspondence was not with respect to the business of the organization, but with respect to the complainant's own business undertakings. He noted that the definition of "work product information" in PIPA is not limited to information that is "prepared or collected as part of responsibilities or activities related to an individual's employment or business relationship with the organization in question." (at para 29)

Even assuming that the information regarding the complainants' independent business activities was not "work product information", Commissioner Loukidelis would have found that its collection was authorized under the legislation. He found, in light of the material before him, that "the organization had cause to investigate and was investigating whether the complainants had breached their agreements when it reviewed and copied their email communications." (at para 38) He also found that the organization had reason "to expect that, had it sought consent to collection, use or disclosure of personal information, seeking their consent would have compromised the availability or the accuracy of the personal information in the emails." (at para 38) Thus the collection of this material was consistent with the exception in PIPA relating to material collected for the purposes of investigating the breach of an agreement. He noted that the agreement between the complainants and the organization required them to keep the organization's business information confidential. He noted that other personal information contained in the emails, relating to, for example, health and social activities was "collateral personal information". He was of the view that it would be "difficult to see how the organization could reasonably have reviewed and copied the emails without also capturing other personal information." (at para 39) Thus he concluded that the collection of the personal information "was reasonable in the circumstances for the purposes of the organization's investigation." (at para 39)

2ième partie

Adoption des modifications à la loi québécoise sur la protection du consommateur

La *Loi modifiant la Loi sur la protection du consommateur (LPC) et la Loi sur le recouvrement de certaines créances* a été sanctionnée le 14 décembre 2006. Ce texte introduit dans la LPC un nouveau régime à l'égard des contrats conclus à distance se fondant sur le Modèle d'harmonisation des règles régissant les contrats de vente par Internet convenues par les provinces dans le sillage de l'Accord sur le commerce intérieur. De nouvelles règles sont édictées à l'égard des informations qu'un commerçant est tenu de transmettre au consommateur avant la conclusion du contrat à distance. Des règles visent aussi les délais de transmission du contrat au consommateur et les mécanismes de rétrofacturation en cas de défaut par le commerçant de rembourser le consommateur. La loi interdit au commerçant d'insérer dans un contrat assujetti à la LPC une clause ayant pour effet d'obliger le consommateur à soumettre un litige éventuel à l'arbitrage.

- *Loi modifiant la Loi sur la protection du consommateur (LPC) et la Loi sur le recouvrement de certaines créances* (projet de loi no 48 sanctionné).

Après le projet de loi 83 : un nouveau réseau de la santé

Dans le livre *Après le projet de loi 83 : un nouveau réseau de la santé*, trois auteurs traitent plus particulièrement de l'impact des nouvelles technologies sur le réseau de la santé.

- Mylène BEAUPRÉ, *Réflexions sur l'encadrement juridique de la télésanté* : L'étude présente les principaux éléments de la régulation de la pratique de la télémédecine en faisant état des limites du droit national. On examine également la relation médecin-patient, notamment le droit du patient à la confidentialité dans le contexte télémédical. Enfin, l'étude examine le droit relatif à l'imputabilité consécutive à une faille de sécurité lorsque cela engendre un préjudice au patient.
- Christiane LEPAGE, *La protection de l'information confidentielle dans le contexte de la 'réingénierie'*: Les nouvelles dispositions législatives sur l'accès et la circulation de l'information relative aux soins de santé sont analysées. On passe en revue les nouveaux cas d'accès aux renseignements contenus au dossier de l'usager sans son consentement. Il est question des responsabilités des services régionaux de conservation de certains renseignements de santé ainsi que de la gestion des ressources informationnelles et la sécurité de l'information.
- Pierre TRUDEL, *Aperçu du cadre juridique des services d'hébergement de données de santé* : On présente le régime juridique des services régionaux de conservation de certains renseignements aux fins de la prestation de services de santé institués par la *Loi modifiant la Loi sur les services de santé et les services sociaux*. Au préalable, il est fait état des caractéristiques des lois organisant le partage d'informations personnelles et des aspects à suivre de près de ces dispositions. L'étude décrit ensuite les dispositions de la législation sur les services de santé et des services sociaux qui régissent les centres de conservation de renseignements de santé.
- Barreau du Québec, *Après le projet de loi 83 : un nouveau réseau de la santé*, Cowansville, Éditions Yvon Blais, Service de formation continue du Barreau du Québec 2006, Volume 260, 2006.

Droit international privé et contrat de vente cyberspatial

L'ouvrage vise à vérifier l'utilité et l'efficacité des notions de frontières et de territorialité dans le monde cyberspatial. On démontre que la nouveauté engendrée par la technique, même si elle n'est que relative, ne manque pas de remettre en question de nombreux concepts. En particulier, le juriste se voit obliger de repenser et réévaluer ses connaissances héritées d'un univers où les

repères découlaient principalement de l'écrit et du papier. Ainsi, s'agissant du contrat cyberspatial, il est certain que celui-ci demeure un contrat mais il présente plusieurs traits particuliers : c'est un contrat « transmondial » et, sauf preuve contraire, un contrat d'adhésion. L'auteure observe que les raisons qui peuvent justifier les limitations de la liberté contractuelle dans le monde traditionnel n'existent plus dans le cyberespace. On ne peut plus étiqueter les cybernautes de « consommateurs ». Le contexte cyberspatial laisse plutôt des proposants et des adhérents contractuels vers lesquels les législateurs auraient intérêt à se tourner. Enfin, l'auteure conclut que certains concepts du droit international privé doivent être abandonnés car ils ne répondent plus à la réalité d'un monde dématérialisé. Les facteurs de rattachement doivent évoluer en phase avec les moyens techniques.

- Sylvette GUILLEMARD, *Le droit international privé face au contrat de vente cyberspatial*, Québec, Centre d'étude en droit économique, Éditions Yvon Blais et Bruylant, 2006.

Obligation pouvant être contractée via Internet

Marchesseault a eu accès à CARDonline, base de données relatives au monde des médias appartenant à Rogers, dans le cadre de l'exécution d'un mandat pour Québécor. Pour avoir accès à CARDonline, un usager doit nécessairement payer la cotisation annuelle et compléter l'inscription incluant l'acceptation des termes du contrat d'usage ou de licence interdisant, entre autres, de copier le matériel en tout ou en partie. En dehors de l'exécution de son mandat, il aurait copié un ensemble de ces données pour usage personnel puis ouvert un site Internet compétiteur à CARDonline. Rogers demande l'émission d'une injonction interlocutoire.

Le tribunal conclut que Rogers a un droit clair qui découle du contrat de licence ou d'usage et de l'application d'une protection découlant de la *Loi sur le droit d'auteur*. Marchesseault savait ou ne pouvait ignorer que l'information de CARDonline était protégée et que l'usage de pareille information était régi par les clauses du contrat auquel il avait consenti ayant lui-même appuyé sur la case « I agree » du site au moment de l'enregistrement. Selon le tribunal, *une obligation peut être contractée via Internet par le fait de peser sur une touche qui s'appelle « I agree » ou «J'accepte », alors que ce geste est requis pour accéder à une étape ultérieure. Lorsqu'une personne pose ce geste, cela fait naître pour cette personne des obligations*. De plus, la base de données de CARDonline constitue une compilation au sens de l'article 2 de la *Loi sur le droit d'auteur*. Le tribunal est d'avis qu'une injonction est nécessaire pour empêcher un préjudice sérieux à laquelle le jugement final ne pourrait remédier. En effet, s'il était permis à Marchesseault d'utiliser sa base de données, contaminée en raison de la violation des obligations auxquelles il avait souscrit, cela causerait un préjudice sérieux puisque qu'elle constitue le cœur de CARDonline.

- *Rogers Media Inc. c. Marchesseault*, 2006 QCCS 5314 (IIJCan), 23 octobre 2006.

Lutte contre le racisme et la xénophobie sur Internet- Europe

Le racisme et la xénophobie n'ont pas commencé avec Internet. Mais le médium cyberspatial confère une efficacité accrue au discours haineux. Cet article expose la réponse du droit face au phénomène. On relève que les règles juridiques doivent tenir compte de la spécificité du médium. Dans le cadre du respect des principes de liberté d'expression, des solutions découlant de l'application du droit pénal mais aussi des réglementations spécialisées ont été mises en application en Europe. Des solutions fondées sur la corégulation et l'autoréglementation, notamment au niveau de certains intermédiaires, ont également été appliquées avec des résultats encourageants.

- Yves POULLET, « La lutte contre le racisme et la xénophobie sur Internet », [2006] 125 *Journal des tribunaux*, no. 6229, 17 juin 2006, Dossiers Droit & Nouvelles technologies.

Projet de loi sur la protection des consommateurs en ligne – France

Le ministre français de l'économie a déposé à l'Assemblée nationale un projet de loi modifiant le droit de la protection des consommateurs. Au

nombre des dispositions, il y a celles visant au renforcement des droits des consommateurs dans les contrats de fourniture d'accès à Internet. Ainsi, des mesures sont prévues afin de réduire les difficultés liées à la rupture de l'abonnement aux services de fourniture d'accès à Internet. La durée du préavis de résiliation serait encadrée et limitée impérativement à dix jours à compter de la réception par le fournisseur de la demande de résiliation, y compris pour les contrats en cours. De plus, on propose un délai de restitution des sommes versées au titre d'avance ou de dépôt de garantie par l'abonné. Le fournisseur du service aurait un délai de dix jours pour restituer ces sommes à compter du paiement de la dernière facture ou du retour des objets garantis par le dépôt (modem, décodeur…). La sanction de cette obligation, dissuasive, consiste à majorer les sommes dues par le professionnel de 50 % en cas de retard.

- *Projet de loi en faveur des consommateurs,* n° 3430, déposé le 8 novembre 2006.
- FORUM DES DROITS SUR INTERNET, *Analyse du projet de loi en faveur des consommateurs*.

Protection des mineurs sur Internet – France

L'Assemblée nationale a adopté le 5 décembre 2006 un projet de loi relatif à la prévention de la délinquance. Un des articles concerne spécifiquement la protection des mineurs dans l'univers numérique. Le projet de loi crée l'infraction de « proposition sexuelle sur Internet » (*grooming*) qui est *le fait pour un majeur de faire des propositions sexuelles à un mineur de quinze ans ou à une personne se présentant comme telle en utilisant un moyen de communication électronique*. Le Forum des droits sur Internet souligne l'intérêt de ce dispositif mais suggère que la version finale précise davantage certains éléments constitutifs de l'infraction, tels que la notion de « proposition sexuelle » dont les contours sont incertains, et ce afin de ne pas incriminer une simple intention. Le projet de loi institue aussi une procédure permettant aux agents et officiers de police judiciaire de s'infiltrer électroniquement pour surveiller le réseau et propose le renforcement de la signalétique de protection des mineurs et de la lutte contre les jeux d'argent.

Ce projet de loi doit maintenant être étudié par le Sénat.

- Assemblée nationale, *Projet de loi relatif à la prévention de la délinquance*, 5 décembre 2006.
- FORUM DES DROITS SUR INTERNET, *L'Assemblée nationale adopte le projet de loi relatif à la prévention de la délinquance*, 7 décembre 2006.
- Arnaud DIMEGLIO, *La France veut durcir sa position en matière de pornographie enfantine. Le grooming sera puni*, Droit & Nouvelles technologies, 26 décembre 2006.

Action politique en ligne – France

La liberté d'expression s'exerce au quotidien au travers des outils de l'Internet et la vie démocratique repose sur le respect du droit et des règles de civilité.

Le Forum des droits sur l'Internet a publié *Politiquement Web*, un guide pratique à l'usage du citoyen qui souhaite participer, s'exprimer et débattre à la web campagne d'avril 2007. Ce guide, articulé autour de trois rubriques (s'informer, participer, voter), met à la disposition de l'internaute citoyen des informations et des conseils pratiques relatifs aux différentes formes d'action politique afin qu'il puisse pleinement profiter des potentialités de ces nouveaux services : Comment utiliser les listes de diffusion, les fils RSS ou les enquête en ligne pour se tenir informé de l'évolution de la campagne ou des actualités? Défendre ses idées en créant un blog politique : quelles sont les obligations et les responsabilités? Comment s'inscrire sur les listes électorales? Comment participer financièrement ou bénévolement à la web campagne? Les règles du code électoral s'appliquent-elles à mon blog? etc.

- FORUM DES DROITS SUR L'INTERNET, *Politiquement web-Guide pratique à l'usage de l'internaute citoyen*, 12 décembre 2006.

L'envoi de courriels sanctionné pour contrefaçon de la marque Hotmail – France

Une entreprise s'est servie d'une fausse adresse Hotmail pour l'envoi de courriels de prospection commerciale. Dans une décision rendue le 18 octobre 2006, le Tribunal de grande instance de Paris a jugé que l'emploi du signe « hotmail.com » comme suffixe de l'adresse ayant servi à l'envoi de messages non sollicités représentait un acte illicite dans un contexte commercial. Le tribunal relève que « dans l'hypothèse où le courrier électronique constitue une publicité commerciale, le signe critiqué se trouve utilisé à titre de marque dans la vie des affaires ». Il ajoute qu'un internaute moyen peut être conduit à penser que « le courrier électronique envoyé depuis une adresse possédant un tel suffixe a bien été expédié grâce au concours de la société Microsoft Corporation ».

- *Microsoft Corporation c. E Nov Developpement*, Tribunal de grande instance de Paris, 3e chambre, 3e section, 18 octobre 2006, disponible sur Legalis.net et aussi : www.juriscom.net/jpt/visu.php?ID=880
- Xavier JORELLE, *Le droit des marques entre dans la lutte contre le spam*, Juriscom.net, 8 janvier 2007.
- Microsoft, *Microsoft traque la contrefaçon de marque par imitation et le hacking déloyal*, communiqué de presse.

Commentez cet article au Blogue de IT.CAN

Le défaut d'informer clairement les acquéreurs de baladeurs numériques de l'impossibilité de lire des fichiers autres que ceux proposés par une entreprise est assimilé à de la tromperie – France

Le Tribunal de grande instance de Nanterre a conclu que Sony a commis un délit de tromperie en ne délivrant pas une information claire, précise et immédiatement accessible sur l'impossibilité de lire, à partir de son baladeur numérique NW HD1, d'autres fichiers musicaux que ceux achetés sur sa plateforme de téléchargement Connect. Pour le tribunal, le fait de subordonner la lecture des fichiers mis à disposition à l'achat d'un produit dédié constituait une vente liée. Mais la décision ne va pas jusqu'à enjoindre Sony de cesser l'utilisation des mesures techniques de protection qui rendent incompatibles des fichiers avec un baladeur autre que celui de Sony, car « l'autorité judiciaire n'ayant pas à se faire juge de la licéité de mesures de cette nature et ce d'autant, que rien n'interdit de commercialiser un produit ou une prestation de services avec une mesure technique de protection à condition que le consommateur acheteur en soit clairement et loyalement prévenu ».

- *UFC Que Choisir c. Sony*, Tribunal de grande instance de Nanterre, 6ème chambre, 15 décembre 2006, disponible sur legalis.net.

Commentez cet article au Blogue de IT.CAN

Force probante d'un constat de présence sur Internet et mémoire cache non vidée – France

Afin de faire la preuve d'un acte de contrefaçon sur Internet, les titulaires d'un droit ont demandé à un huissier d'établir un constat. Mais le fournisseur d'accès de l'huissier offrait un service de serveur proxy. Étant donné qu'un tel serveur permet

l'enregistrement dans la mémoire cache des pages consultées par l'internaute afin d'y accéder plus rapidement, il n'était plus possible d'établir que l'information litigieuse était réellement en ligne à la date et à l'heure du constat. La possibilité subsiste que le constat ait porté plutôt sur une page présente dans la mémoire du serveur proxy. Pour cette raison, le tribunal a estimé que le constat n'établissait pas que la page litigieuse était réellement en ligne au jour où il a été rédigé.

- *Net Ultra c. AOL France*, Cour d'appel de Paris, 4ème chambre, section B, 17 novembre 2006.

Commentez cet article au Blogue de IT.CAN

À signaler

- *Lemelin c. Greyhound Canada Transportation Corp.*, 2006 QCCQ 11887 (IIJCan), 26 septembre 2006. (le fait pour le transporteur d'afficher une limite de responsabilité entre autres sur Internet ne correspond pas à une dénonciation claire et non équivoque aux voyageurs car ceux-ci n'ont pas l'obligation de naviguer sur Internet avant de voyager)

- Pierre TRUDEL, «The Development of Canadian Law with Respect to E-Government », in J.E.J. PRINS, *Designing e-Government*, Kluwer Law International, 2007, 113-164.
- Pierre TRUDEL, «Canada : non renouvellement controversé d'une concession radio », [2006] no 4 *Media Lex*, 175.
- Philippe LE TOURNEAU, *Contrats informatiques et électroniques*, 4e éd., Paris, Dalloz, 2006.