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Copyright Law

The federal government has signaled that it is about to introduce proposed amendments to the *Copyright Act* to address a variety of issues raised by the WIPO treaties. In a Statement on Proposals for Copyright Reform, the Ministers of Industry and Heritage outline a series of proposed amendments, as well as plans for future copyright reform activity.

The proposed amendments include adding a "making available" right to the economic rights of authors and the rights of sound recording makers and performers. Rights holders would also have "the ability to control the first distribution of their material in tangible form." In addition, the government proposes to make circumvention of TPMs applied to copyright material an infringement of copyright where that circumvention is done for infringing purposes. Facilitating circumvention would also be infringement, and the Statement indicates that "It would not be legal to circumvent, without authorization, a TPM applied to a sound recording, notwithstanding the exception for private copying."

Under the proposals, alteration of rights management information embedded in copyright material would constitute infringement "when done to further or conceal infringement. Moral rights protection would be extended to performers in respect of their fixed and live performances, and a reproduction right would be added for performers in relation to their sound recordings.

The proposals will also address ISP liability. The government will confirm that ISPs are exempt from copyright liability to the extent that they act as intermediaries. A "notice and notice" regime will be introduced, which will require an ISP to pass on to a customer any notice they receive regarding infringing activity by that customer. There will be an added obligation on ISPs who receive notice, to keep a record of relevant information relating to the customer and his or her activities.

The Statement addresses a range of issues relating to educational and research access to works. In particular, proposed amendments will extend exemptions available in the classroom context to distance learning contexts, and will provide for electronic delivery of materials covered by a blanket licence with a collective society.

A number of amendments will be proposed in relation to the rights of photographers. Essentially, the proposals would bring the rights of photographers as authors of copyright protected works more in line with rights available to authors of other kinds of works. More specifically, the proposals would treat the photographer as author of his or her photograph, and would extend the term of protection for all photographic works to life of the author plus fifty years. The presumption of ownership of copyright in commissioned photographs will also switch from the person commissioning the photograph to the photographer.

Two issues are specifically set aside for further consultation. The first relates to educational use of publicly available internet material, and the second relates to private copying. The Statement indicates that consultation papers will be released on these issues shortly after the introduction of the bill proposing the amendments.

Criminal Law

The Alberta Provincial Court has released its decision in *R. v. Ly* which involves the use of a Digital Recording Ammeter (DRA Meter) by police to obtain information associated with the home. A DRA Meter is a meter capable of measuring the flow of electricity and providing a graph of the cycle of electrical consumption in a residence. In this case,

the DRA Meter was attached outside the property line of the residence to a "green box" operated by a utilities company. Relying on confidential informant information and the results of the reading of a DRA Meter, police obtained a search warrant to search the residence. During the course of the search, a marijuana grow operation was discovered and over 100 marijuana plants "growing in dirt under 16,000 volt bulbs" were seized. The accused was charged with the production and possession of marijuana contrary to the *Controlled Drugs and Substances Act*. At trial, the accused filed a *Charter* notice with respect to the search of the residence arguing that the results of the search should not be admitted because his s.8 right to be secure from unreasonable search or seizure had been violated because police did not obtain a search warrant prior to installing the DRA Meter and because there is no evidence of waiver of the confidential informant privilege.

Based on the testimony of the police office who swore the Information to Obtain a Search Warrant and other expert testimony, the Court finds that the DRA Meter measures actual electrical load an a cycle of electrical usage at individual properties; certain patterns of electrical flow are consistent with marijuana grow operations; while the cycle of electrical consumption could be consistent with the growing of other types of plants, in 100% of the cases in which a DRA Meter is installed by police, the subsequent searches of residences in which the same electrical usage is registered by the DRA Meter, a marijuana grow operation has been discovered; and the DRA Meter is a tool used by police with other investigative techniques to investigate crimes associated with marijuana grow operations.

The Court first considered whether the police required a search warrant prior to installing the DRA Meter attached to the electrical supply line. The defence argued that because there is conflicting authority in Alberta on the issue of whether a DRA Meter is a privacy intrusion on individuals occupying a residence, the matter is open to judicial interpretation. The Crown argued that the Court is bound by the Supreme Court of Canada's *Tessling* decision which dealt with the use of FLIR technology by law enforcement for the same purposes. The Alberta Provincial Court went on to use the same analytical approach as that taken in *R. v. Plant* and by Binnie J. in *Tessling*, assessing the technology from an informational perspective rather than one that focuses on safe-guarding the sanctity of the home as the Ontario Court of Appeal did in *Tessling*. The essential question, according to the Alberta Provincial Court, was whether the nature of FLIR technology is "on the same plane as the information obtained from a DRA Meter" such that it must conclude there is no s.8 Charter violation.

The Court concluded that there is a "fundamental difference" between FLIR Imagining and DRA Ammeter results. The information from DRA Ammeter, unlike the information from a FLIR, is not generic. According to the Court, "the evidence is clear that FLIR Imaging is in and of itself, equivocal evidence of the existence of a marijuana grow operation" and the information obtained from the FLIR testing had to be taken with other evidence to allow police to infer the existence of a marijuana grow operation in the home. By contrast, the Alberta Provincial Court found that "the DRA Meter in and of itself, reveals private information concerning the activities of individuals inside the home" allowing the police to conclude that where the cycle of electrical consumption exists, that information, "in all cases" reveals a Marijuana grow operation inside the residence. Thus, in this case, there was "a revelation of personal information concerning the activities of individuals inside the residence" which falls within s.8 protection. Therefore, the installation of the DRA Ammeter in the absence of a warrant violated the s.8 *Charter* right of the accused. The Court went on to conclude that the search warrant would not have been issued without the warrantless DRA search.

On the issue of waiver of the confidential informant privilege, the Court concluded that there is no conflict of interest and the Crown's decision "with respect to editing out is a decision which cannot be retrospectively reviewed by the Court in these circumstances."

Finally, the Court considered whether the evidence obtained should be excluded under section 24(2) of the *Charter*. The Court first determined that the evidence is conscriptive. In assessing the seriousness of the *Charter* breach, the Court found that while the search was deliberate, the police acted in good faith. In light of this conclusion, the Court concluded that it would be "the exclusion of the

evidence which would be more likely to bring the administration of justice into disrepute." Therefore the s.24(2) application was dismissed.

Domain Names

A recent CIRA decision dealt with the registration of the domain name sleepcountrycanada.ca. The Complainant was the owner of the registered trade mark "Sleep Country Canada", and had used it continuously since 1996. It had also done business in Canada under the trade name Sleep Country Canada Inc. since 1994. The registrant, who did not respond to the complaint, had created a web site which provided links from words related to mattresses or beds, and also contained some "sponsored" links.

Sole panelist Denis Magnusson ruled that the registrant's domain name was confusingly similar to the complainant's trademark. He took the view that his conclusion would be the same whether he applied a straight comparison test, as has been done in certain other CIRA decisions, or whether he applied the classic trademark law test for confusion. Magnusson also found bad faith, noting that the links to competing businesses from the site brought the registrant within the definition of "competitor" in para 3.7(c) of the CDRP, and finding that the use of the domain name in conjunction with a web site offering products from competitors would disrupt the business of the Complainant. Noting that 3.7(c) required a finding that the disruption of the complainant's business be the "primary purpose" of the registration, Magnusson found it "reasonable to infer the Registrant's intention in registering a domain name from the use to which the Registrant puts the domain name after Registration." (at para 21) Magnusson concluded that the registrant had no legitimate interest in the domain name.

Privacy

In *British Columbia Government and Service Employees' Union v. British Columbia* (Minister of Health Services), the B.C. Union unsuccessfully challenged the decision to outsource the administration of most aspects of the health care insurance scheme of the Province of British Columbia to an American-linked company, Maximus, raising concerns about the disclosure of sensitive personal information as a result of being required to hand over client databases to the FBI under the USA Patriot Act. The Supreme Court of British Columbia concluded that there had not been a breach of either ss. 7 or 8 of the Charter or of the British Columbia Freedom of Information and Protection of Privacy Act. The plaintiff's petition to stop the privatization of the provincial Medical Services Plan (MSP) was dismissed.

In *R v. Hogg*, 2005 MBQB 65 (not yet available online) Scurfield J. of the Manitoba Court of Queen's Bench considered an application by CTV to copy and broadcast a videotaped statement given by the accused to the police. He subsequently pleaded guilty to aggravated assault charges, and was given a conditional sentence of two years less a day. While the videotape was filed as an exhibit at the preliminary hearing, only a transcript of the statement was filed at the sentencing hearing. CTV had already applied for and received a copy of that transcript, but was seeking access to the videotape so as to use it as part of a planned program on conditional sentences. The accused objected to the release and use of the videotape, arguing it would violate his privacy rights and would harm the administration of justice in the province.

Scurfield J. acknowledged that "the potential impact of broadcasting the videotape on Mr. Hogg's current privacy rights is substantially greater than merely quoting from the transcript." (at para 23). He noted that "Broadcasting technology has the power to dramatically magnify the invasion of Mr. Hogg's privacy." (para 24). Not only would it combine voice and image with his words, it would do so in a context which would allow individuals to make their own copies. Nevertheless, Scurfield J. balanced these privacy concerns against the fact that the accused had been convicted of a serious and violent offence, that resulted in a public debate about the legitimacy of conditional sentences. He concluded that "his privacy concerns alone would not be sufficient to justify a restriction on CTV's right to copy and broadcast the videotaped statement." (at para 26)

However, Scurfield J. nevertheless ruled against releasing the videotape on the basis that to do so would harm the administration of justice. He noted that courts have urged police to videotape all contact

with accused persons, with only limited success, and that the administration of justice was better served in an environment where such contacts were recorded. He noted that "it is only rational to conclude that both police officers and accused persons may be reluctant to engage in a process that could result in their voice and image being projected outside of a public courtroom." (at para 43)

Telecommunications

The CRTC has released a decision establishing new consumer safeguards for 1-900 services. The new protection measures include the requirement that 900 content providers must make all possible charges known at the outset of a call, set new limits on some charges, require telephone companies to make first time 900 call blocking available at no charge, mandate uniform billing practices and consumer awareness billing inserts, and prohibit practices such as linking toll-free numbers to billable 900 services.

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Anne Uteck and Teresa Scassa at it.law@dal.ca.

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Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec les professeurs Anne Uteck et Teresa Scassa à l'adresse suivante : it.law@dal.ca

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