

# IT CAN NEWSLETTER/BULLETIN

Canadian IT Law Association

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Part 1 of this newsletter is prepared by Professors [Anne Uteck](#) and [Teresa Scassa](#) of the Law and Technology Institute of [Dalhousie Law School](#). Part 2 of this newsletter is prepared by Professors [Pierre Trudel](#) and [France Abran](#) of the L.R. Wilson Chair in Information Technology and Electronic Commerce Law, Université de Montréal.

Les auteurs de la première partie du présent bulletin sont les professeurs [Anne Uteck](#) et [Teresa Scassa](#) 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 la 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

### Copyright Law

THE U.S. TRADE REPRESENTATIVE (USTR) has released a "Special 301" annual report on intellectual property protection in 90 countries. The report notes that the Bush administration "is determined to ensure the adequate and effective protection of intellectual property and fair and equitable market access for U.S. products". Canada is one of the countries highlighted in the report. Although not on the "Priority Watch List", Canada does feature on the "Watch List". The report urges Canada to ratify the WIPO Internet Treaties and to amend its copyright legislation to provide "adequate and effective protection of copyrighted works in the digital environment." The *BMG v. John Doe* case (currently under appeal before the Federal Court of Canada) is indirectly referenced as a reason why Canada needs to take immediate steps to ratify the WIPO treaties. The report also indicates that the USTR is not happy with the proposed amendments to Canada's *Copyright Act*. The Report takes the view that the proposals relating to technological protection measures and ISP liability "would appear to be a departure from the requirements of the WIPO Internet Treaties as well as the international standards adopted by most OECD countries in the world." The USTR would prefer to see Canada adopt "copyright legislation that provides comprehensive protection to copyrighted works in the digital environment, by outlawing trafficking

in devices to circumvent technological protection measures, and by establishing a "notice-and-takedown" system to encourage cooperation by ISPs in combating online infringements." The Report also urges greater enforcement efforts to address piracy and counterfeiting, and greater cooperation between Canadian and U.S. law enforcement officials with respect to intellectual property rights infringement. The Report implies that Canada's IPR system is not consistent with an "advanced level of economic development."

THE DEPARTMENT OF THE ATTORNEY-GENERAL of Australia has issued an "Issues Paper" titled *Fair Use and Other Copyright Exceptions*. The paper is intended to generate comments on the approach that should be followed to copyright exceptions in Australia. The debate focuses on whether it is preferable to have broad U.S.-style "fair use" exceptions in the copyright legislation, or whether specific exceptions (more consistent with the Canadian approach) should be used.

### Privacy

SEVERAL NEW *PIPEDA* FINDINGS BY the Privacy Commissioner of Canada have been released. Findings of particular interest include, #292 involving a former employer obtaining and changing account information of an Air Canada frequent flyer member. The individual complained that Air Canada, which at the time owned and operated Areoplan, had disclosed his personal information without his knowledge and consent. The complainant discovered that someone had called Air Canada requesting information about the complainant's travel, requested and paid for a copy of the his Areoplan statement and changed his e-mail address on his Areoplan account to his former employer. When contacted, Air Canada changed his e-mail address back and suggested he place a password on his account and contact security. At the suggestion of Air Canada security, the complainant filed a written complaint and contacted the police. Following a police investigation, it was determined

that the complainant's former employer could not be charged because he did not misrepresent himself or pretend to be the complainant. The complainant then contacted Air Canada security but no further action was taken. The former employer admitted that he had spoken to an agent and obtained information about the complainant's travel from Areoplan's computerized telephone information system. No personal identification number or password was required for either, although the agent was supposed to authenticate the caller.

In her deliberations, the Assistant Privacy Commissioner notes first that she "was disturbed by Air Canada's lack of cooperation with respect to this complaint" which caused an "excessive delay concluding this complaint" which she considered "entirely unacceptable."

The Assistant Privacy Commissioner concluded that the complaint was well-founded. On the whole, she found that "there was a clear lack of diligence on the part of Air Canada with respect to its handling and protection of customer information." There were no adequate safeguards in place for its teleprompt system and while there were some safeguards in place when speaking with an agent, in this case, the agent did not follow them. As a result, the complainant's personal information was disclosed without his knowledge and consent in contravention of Principles 4.7, 4.7.1 and 4.3. The automated system has since been changed, but according to the Assistant Commissioner, "the most serious privacy breach occurred when the agent was speaking to the former employer." Further, Air Canada's handling of the complaint, after being contacted by the complainant, did not in any way meet its requirements under Principles 4.10.3 and 4.10.4.

As a further consideration, the Assistant Commissioner commented on the changes that have been made to the automated system noting her concerns about the accessibility of the information that is still on the system.

In [Finding #296](#), an individual complained that the language of a credit card application form outlined overly broad collection, use and disclosure practices and therefore did not meet the consent requirements and further, that the bank was inappropriately monitoring the purchasing history

of cardholders. The form stated that personal information was any information that related to an individual, but did not include the categories of personal information that is collected. The bank's purposes for collecting the personal information included development and maintenance of business relationships with its customers; analyze and manage its business; administer customer billing, accounting services and security measures; monitor customer purchasing history; evaluate customer's credit standing; comply with legal and regulatory requirements; and (optional) to promote and market products and services. The bank indicated that it was not possible to limit its collection activities to personal contact and financial information because each time a customer uses a credit card, the bank collects information about the financial transaction (amount of the purchase, type of product purchased and time and location of purchase). Also, in certain circumstances, the bank is required by law to collect more than personal contact information.

In response to the complainant's concern regarding the language of consent in the application form, the bank stated that it provides a privacy code addressing these concerns with a more detailed description of its disclosure policy. The bank also has a declaration that is part of the account agreement form which sets out a customer's privacy rights. According to the bank, if a customer has particular concerns that the bank is collecting more information than is necessary for its purposes, an access request could be made. The complainant was also concerned with a consent clause that referred to the sharing or exchange of reports and information with "credit reporting agencies, credit bureaus and/or any other person, corporation, firm or enterprise with whom the customer has or proposes to have a financial relationship." Of particular concern to the complainant was the requirement that he consent to the monitoring of his purchasing history which he viewed as "tantamount to corporate surveillance" especially if it was being done for secondary purposes. The bank's purposes for monitoring customer purchasing history were to identify a credit risk; detect fraud risks; and to fulfill regulatory responsibilities.

The Assistant Commissioner found that the purposes for collecting, using and disclosing personal

information to be appropriate as meeting the reasonableness standard under subsection 5(3). However, she was not satisfied with the language used to describe the scope of information collected and disclosed because a customer should not have to make an access request to find out what information is collected. The bank should provide examples of the kinds of information collected and the rationale for the collection of each type of information. Similarly, the Assistant Commissioner believed the purposes for monitoring customer purchases were appropriate, but the language on the application form and other privacy-related documents was not clear as to why it was being done. Therefore, the bank was not providing meaningful consent. She concluded that the complaint with respect to the purposes for collection, use and disclosure were not well-founded, but the complaint regarding the language of consent was well-founded going on to make recommendations to reflect this finding. And finally, the Assistant Commissioner went on to point out that in other similar complaints, banks have been advised that new applicants for a credit card should be able to opt-out immediately, at the time of application, from all secondary uses of their personal information and application forms should clearly state consent and disclosure policies with respect to sharing credit information with credit bureaus.

In [Finding #297](#), the OPC considered two complaints arising from the collection and use of personal information from unsolicited e-mail without the knowledge and consent of the individual. Section 2 of *PIPEDA* defines personal information as information about an identifiable individual, but excludes the name, title or business address or telephone number of an employee of an organization. In both Findings, the Assistant Commissioner held that because a business e-mail address is not specified in s.2, it was an individual's personal information for the purposes of the *Act*. In Complaint A, the Assistant Commissioner held that the organization could not rely on the consent exceptions under s.7 because collecting and using personal information from the employee directory for the purposes of solicitation, namely, the sale of tickets by a sports organization, was not related to the purpose for which the employer made the employee directory publicly available. The Assistant Privacy Commissioner took the same view of web sites of law firms. Therefore,

the organization collected the complainant's business e-mail address and used it for marketing purposes without his consent contrary to Principle 4.3 and thus the complaint was well-founded. Similarly, in Complaint B, two complaints were filed against an organization selling a product and the marketing company acting on its behalf using a business e-mail for solicitation purposes. The marketing company was found to be in contravention of Principle 4.3 when it collected and used an individual's business e-mail without her knowledge and consent, but the complaint against the seller organization was not well-founded. The seller organization did not collect or use the complainant's e-mail address and only obtains personal information if the potential client expresses an interest in the product and because the complainant had not expressed any interest, no information was shared with the seller. The Assistant Commissioner did advise the seller, however, that ignoring the privacy practices of organizations that act on its behalf exposes them to a "risk that its business reputation will be tarnished."

**THE FEDERAL PRIVACY COMMISSIONER RECENTLY** appeared before a Senate Special Committee to discuss the *Anti-Terrorism Act*. In her [Opening Statement](#), Ms. Stoddard provided an overview of the Office of the Privacy Commissioner of Canada's [Position Statement on the Anti-Terrorism Act](#). The Commissioner acknowledges the "reality of the threat that the *Act* was intended to address" but suggests the *Act* goes too far in granting "extraordinary broad powers" and calls for greater "proportionality of the measures adopted" to combat terrorism. In the Commissioner's view, the *Act* significantly impacts informational privacy rights by broadening the surveillance powers of security and intelligence and law enforcement agencies; constraints on the use of surveillance have been weakened; and government accountability and transparency have been reduced. Ms. Stoddard goes on to highlight the key recommendations in the Position Statement designed to strike a balance between achieving national security objectives without unnecessarily encroaching on privacy rights. The recommendations include contained surveillance and increased oversight over activities of law and intelligence agencies; creation of a security-cleared special advocate position; continued review of the *Anti-Terrorism Act* and *Public Safety Act*; development

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of a privacy management framework; strengthened reporting requirements to Parliament; and “a long overdue reform of the *Privacy Act*.”

**IN A RECENT INVESTIGATION REPORT** BY the Alberta Information and Privacy Commissioner, Edmonton police were found to have improperly used police computer systems to gather information about a newspaper columnist and the former head of the city’s police commission in contravention of the *Freedom of Information and Protection of Privacy Act*. The Report does not address what kind of information was being sought, who was seeking it, when the incidents happened or how many times it may have occurred, but finds that police officers and a civilian employee of the Edmonton Police Service, had accessed police databases with no legitimate law enforcement reasons for doing so. The information on the database typically includes home addresses, date of birth and personal descriptions and according to Commissioner Work, this kind of information is protected under the *Freedom of Information and Protection of Privacy Act* and can only be used for the purpose for which it was collected or for a use consistent with that purpose.



## 2<sup>ème</sup> partie

### Clause d'arbitrage sur la page d'accueil d'un site web – Défaut de consentement

La question examinée dans cette décision est celle de savoir si un consentement valable a été donné à une clause d'arbitrage du seul fait d'avoir utilisé un site web. La défenderesse est l'hébergeur du site web de la demanderesse. Elle plaide l'exclusion de la juridiction du tribunal se fondant sur une clause d'arbitrage contractuelle exclusive contenue, non pas au contrat d'hébergement original, mais par un ajout à la page d'accueil de son site web.

L'acceptation de la clause contractuelle par l'hébergé doit être clairement exprimée, sans équivoque, non par clause négative, ou prévoyant acquiescement tacite en cas d'utilisation du site. Ici, la demanderesse n'a pas donné son consentement à la clause puisqu'elle n'avait pas à lire le texte des amendements pour continuer à utiliser le site web. De même, elle n'était pas forcée d'accepter en cliquant sur une icône bien définie à cet effet, ou même pour lire le nouveau contrat.

*Aspencer1.com Inc. c. Paysystems Corporation*, C.Q., 500-22-101613-043, 31 janvier 2005, <http://rejb.caij.editionsyvonblais.com>.

### Outrage au tribunal – site web

En novembre 2004, les intimés ont été trouvés coupables d'outrage au tribunal pour ne pas avoir fermé le site Internet [www.rebellionweb.com](http://www.rebellionweb.com) suite à une injonction en août 2004.

Le tribunal considère qu'il n'est pas approprié de contrer une décision de justice en attaquant, via un site Internet, un organisme et les gens qui y travaillent par des propos haineux et qui tentent de les ridiculiser. Outre de ne pas avoir fermé le site avant le jugement, les intimés ont continué d'être irrespectueux et désobligeants à l'égard de la requérante. Le tribunal condamne les intimés à des amendes et un de celui-ci à dix jours d'emprisonnement pour lui faire comprendre l'importance de respecter les décisions des tribunaux.

*Agence nationale d'encadrement du secteur financier c. Coopérative de producteurs de bois précieux Québec Forestales*, C. S. 765-17-000304-040, 22 mars 2005, EYB 2005-88996, <http://rejb.caij.editionsyvonblais.com>.

### Véracité et exactitude d'un document art 403 C.p.c.

Dans le cadre d'une poursuite relativement à la diffusion sur Internet d'une bande vidéo, les demandeurs soumettent une requête pour rejet d'un écrit dont ils ont été mis en demeure de reconnaître la vérité et l'exactitude en vertu de l'article 403 C.p.c. Le tribunal accueille la requête en s'appuyant sur l'interprétation de Léo Ducharme dans *L'administration de la preuve*, 2<sup>e</sup> édition, pp. 182-183. La Cour conclut donc qu'il n'est pas concevable que l'article 403 C.p.c ait pour objet de faire reconnaître la véracité ou l'exactitude d'un écrit, en l'occurrence ici une conversation enregistrée et traduite par la suite. Une pareille interprétation reviendrait à rendre la preuve par oui-dire librement admissible.

*Raza c. Caron*, C.S., 400-17-000536-033, 15 février 2005, EYB 2005-86535, <http://rejb.caij.editionsyvonblais.com>.

### Demande de non-lieu – Preuve du lieu de l'infraction

L'Ordre des pharmaciens du Québec reproche à Prescriptions 4US Inc. d'avoir illégalement vendu des médicaments via un site web. Sans décider sur le caractère suffisant de la preuve quant au lieu de l'infraction, le tribunal refuse de prononcer le non-lieu demandé par les accusés au motif qu'il y a là une preuve admissible *prima facie* du lieu de l'infraction.

*Ordre des pharmaciens c. Prescriptions 4US Inc.*, C.Q., 500-61-176333-038, 17 février 2005, EYB 2005-88710, <http://rejb.caij.editionsyvonblais.com>.

### Droit au respect de la vie privée – droit du travail

L'appelant prétend que les intimés ont violé son droit à la vie privée étant donné qu'on a procédé à

l'interception d'une conversation téléphonique et à la fouille de son véhicule.

La Cour est d'avis que l'interception de la conversation téléphonique ne constitue pas une atteinte à la vie privée puisqu'elle a eu lieu sur les lieux du travail, pendant les heures de travail; les attentes légitimes de vie privée sont forcément moins élevées dans ce contexte. De plus le contenu de la conversation, des propos qui manifestent des intentions louches, ne se rattache pas à la vie privée de l'appelant. Quant à la fouille du véhicule de l'appelant, la preuve révèle que son véhicule lui servait de bureau et qu'il en laissait les portes déverrouillées, et parfois même ouvertes. Les attentes de vie privée de l'appelant ne pouvaient être élevées dans ces circonstances. L'appel est rejeté.

*Ste-Marie c. Placements J.P.M. Marquis Inc.*, C.A., 500-09-013561-030, 18 mars 2005, EYB 2005-88296, <http://rejb.caij.editionsyvonblais.com>.

## **Commission d'accès à l'information – mémoire sur la Loi sur le Centre de services administratifs**

Le président de la Commission d'accès à l'information (CAI), Me Jacques Saint-Laurent, a présenté devant les membres de la Commission des finances publiques le mémoire de l'organisme concernant le projet de loi no 85, *Loi sur le Centre de services administratifs*.

Le Centre de services administratifs se verra confier un vaste mandat. Il a pour mission de fournir ou rendre accessibles aux organismes publics les biens et les services administratifs dont ils ont besoin dans l'exercice de leurs fonctions, en matière de ressources humaines, financières, matérielles et informationnelles. Le mémoire de la CAI formule des commentaires quant à l'assujettissement du Centre de services administratifs et de ses filiales à l'application de la Loi sur l'accès. Puis il examine l'impact du projet de loi sur la protection des renseignements personnels en ce qui concerne la centralisation de renseignements personnels, l'utilisation des renseignements personnels à des fins non prévues, les communications de renseignements

personnels entre organismes et les obligations de transparence.

*Mémoire de la Commission d'accès à l'information sur le Projet de loi no 85, Loi sur le Centre de services administratifs*, avril 2005, <http://www.cai.gouv.qc.ca>.

## **Impact des technologies de l'information sur le droit**

La *Revue du Notariat* publie les actes du colloque qui s'est tenu à Montréal le 8 octobre 2004 dans le cadre des Dix-septièmes entretiens du Centre Jacques Cartier. Le colloque, qui avait pour titre *L'impact des technologies de l'information sur l'évolution des principes juridiques*, a été organisé conjointement par la Chaire du notariat, la Chaire L.R. Wilson sur le droit des technologies de l'information et du commerce électronique de l'Université de Montréal et la Faculté de droit et science politique de l'Université de Lyon II. On y retrouve les textes suivants :

- Pierre TRUDEL, *Notions nouvelles pour encadrer l'information de la Loi concernant le cadre juridique des technologies de l'information*
- William DROSS, *L'encadrement des technologies par le droit : nécessité et source de changement*
- Isabelle de LAMBERTERIE, *L'établissement et la conservation des actes authentiques électroniques en droit français*
- François BROCHU, *La publicité des droits à l'ère d'Internet*
- Jérôme SALANSON, *Technologies nouvelles et perspectives notariales françaises*
- Séverine CABRILLAC, *La signification électronique et la transmission certifiée : illustration des efforts d'adaptation d'une profession réglementée aux nouvelles technologies*
- Jean-Louis NAVARRO, *L'impact de l'écrit électronique sur le droit de la preuve français*

- Claude FABIEN, *L'impact des technologies de l'information sur le système de preuve du droit civil québécois*
- Bertrand SALVAS, *Pratique du droit et outils électroniques : les embûches de la technologie*
- Denise BROSSEAU, *Commerce électronique et pratique notariale*
- Marie-Christine PIATTI, *Commerce électronique et propriétés intellectuelles*
- Vincent GAUTRAIS, *Les contrats de cyberconsommation sont presque tous illégaux!*

*Revue du notariat.*

## Dispositifs techniques de protection des œuvres – France

La Cour d'appel de Paris a interdit le recours à une mesure technique de protection mise en place sur les vidéogrammes vendus sur supports numériques (DVD). De tels dispositifs empêchent l'exercice des prérogatives découlant de l'exception légale de copie privée.

*M. Stéphane P., UFC Que-Choisir c/ Universal Pictures Video Fr, SEV, Films Alain Sarde, Studio Canal, CA Paris, 22 avril 2005.*

Voir : P.AMBLARD, *La Cour d'appel de Paris confirme l'exception de copie privée sur support numérique*, Juriscom.net, 29 avril 2005.

D. MELISON, *Quand le vice se cache sous les mesures techniques de protection*, Juriscom.net, 9 mai 2005.

## Le Spamming...en 24 questions et réponses

Un dossier réalisé par Didier Gobert, expert au Service public fédéral économie, pme, classes moyennes et énergie de Belgique propose une analyse de la problématique du spamming en contexte belge et européen. Un ouvrage qui donne l'heure juste sur les mécanismes mis en place en Europe afin de contrer les abus du courriel. Disponible en français et en anglais.

Didier GOBERT, "[Le spamming en 24 questions & réponses](#)", *Droit & Nouvelles technologies*, 11 Mai 2005.

## À signaler

Y. COOL, F. de PATOUL, D. DE ROY, H. HAOUIDEG, P. LAURENT. E. MONTERO, *Les logiciels libres face au droit*, Bruxelles, Cahiers du Centre de recherches informatique et droit (CRID), Bruylant, 2005.

F. FÉVRIER, [Site Internet syndical : la liberté d'expression se heurte à l'obligation de discrétion](#), *Droit & Nouvelles technologies*, 9 mai 2005.

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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](mailto:it.law@dal.ca) if they relate to Part 1 or Pierre Trudel at [pierre.trudel@umontreal.ca](mailto:pierre.trudel@umontreal.ca) if they relate to Part 2.

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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 la première partie du présent bulletin, veuillez contacter les professeurs Anne Uteck et Teresa Scassa à l'adresse électronique [it.law@dal.ca](mailto:it.law@dal.ca) ou en ce qui concerne la deuxième partie, veuillez contacter Pierre Trudel à [pierre.trudel@umontreal.ca](mailto:pierre.trudel@umontreal.ca).

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