



NEWSLETTER

Canadian IT Law Association

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Broadcasting

The CRTC has authorized three new subscription radio services. In [Broadcasting Decision CRTC 2005-246](#) and [Broadcasting Decision CRTC 2005-247](#), the Commission approved the license applications of Canadian Satellite Radio Inc. (CSR) and SIRIUS Canada Inc. (SIRIUS Canada) for subscription radio services to be delivered by satellite and, as required to fill gaps in coverage, for terrestrial transmitters. The Commission accepted that satellite subscription services will not be available for some time in Canada via satellite facilities that are owned and operated by Canadians. Thus, in the Board's view, the "optimal solution" for providing satellite radio services to Canadians at this time was to use existing American satellite facilities. However, in accordance with the licensing framework set out in [Broadcasting Public Notice CRTC 2005-61](#), CRTC approval of the satellite-based licenses to CSR and SIRIUS Canada are subject to certain conditions in order to satisfy Canadian production and content requirements as well as to ensure support for established and emerging Canadian artists.

In [Broadcasting Decision CRTC 2005-248](#), the Commission also approved the application by CHUM Limited to offer subscription radio services entirely through terrestrial transmitters. All channels will be produced in Canada and must meet the minimums required by Commission content regulations. In addition, CHUM, as with CSR and SIRIUS Canada, must contribute a percentage of their profits to initiatives for the development of Canadian talent.

The Commission rejected the music industry's argument for anti-copying technologies. According to the CRTC Chairman, "these decisions foster the

objectives of the *Broadcasting Act* and balance the interests of Canadian consumers, the radio industry and the music industry." In his view, the licenses will "harness new technologies for Canadians and give Canadian talent exposure to listeners across Canada and indeed, North America - both through new Canadian channels and air-play on U.S. Channels." Airtime is reserved for new and emerging artists. Consumers will benefit by the added choice and diversity of programming, particularly in rural and remote areas.

Copyright Law

[Bill C-60](#), the *Act to Amend the Copyright Act* was introduced in Parliament for first reading on June 20, 2005. The Bill is intended to bring Canada into compliance with its obligations under the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*, and to update certain other provisions of the legislation.

One change to the legislation that had been sought by many industry groups was the "making available right". Section 2 of the Bill would add such a right under a new s. 2.4(1)(a) of the Act. The proposed wording is that: "a person who makes a work or other subject-matter available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them communicates it to the public by telecommunication."

The Bill would also provide for enhanced rights for performers. In particular, performers whose works are fixed in sound recordings would have rights of sale in relation to fixed copies, and a making available right. Moral rights would also be extended to performers of live aural performances or ones fixed in a sound recording. The moral rights are prospective and not retrospective. Makers of sound recordings would also benefit from a right of sale and a making available right.

Section 27 of the Act, which deals with infringement, would be amended to make it copyright infringement for someone to sell, rent, distribute, communicate to the public by telecommunication or to perform in public a work that the person “knows or ought to have known was made as a copy for private use under subsection 80(1).”

The Bill contains certain exemptions from infringement for online course delivery which parallel the exemptions for in-class course delivery. Thus, for example, it would not be copyright infringement for an educational institution “to communicate a lesson to the public by telecommunication, if that public consists only of its students enrolled in a course of which the lesson forms a part...”. The exemption is detailed, and limits are placed on its scope. For example, the institution “must destroy any fixation of the lesson within 30 days after the course of which it forms a part has ended.” The institution must also take reasonable measures to prevent any reproduction or communication of the lesson by students after the course has ended. Record keeping requirements are also imposed. Companion amendments under s. 27 would make it infringement to sell, rent, distribute, communicate to the public by telecommunication, or to circumvent technical protection measures for this kind of lesson, where the person knows or ought to know that it is a lesson.

The Bill would also amend the Act to permit educational institutions to make digital reproductions of works in a collective society’s repertoire where they have an agreement with the collective society, where it pays the same royalties for the digital reproduction, and where it takes measures to ensure that the digital work is not reproduced or communicated beyond the specific educational purposes for which the reproduction was made. The amendments would permit authors to expressly refuse to authorize the collective society to authorize the reproduction of their works in digital form.

The Bill would allow electronic document delivery by libraries, archives or museums only where the institution “takes measures that can reasonably be expected to prevent the making of any reproduction of the copy other than a single printing, its communication, or its use for a period of more than seven days.”

A new s. 31.1 would create specific exemptions for operators of network services. The amendments would clarify that persons who perform “acts related to the telecommunication that render it more efficient”, including caching, would not infringe copyright. Further, ISPs who provide space on their servers to clients are not liable “by virtue of that act alone” for copyright infringement relating to stored works unless there is a court decision which finds that those works infringe copyright. Proposed section 40.1 would establish a “notice and notice” scheme whereby owners of copyright in works can serve notice of claimed infringement to an ISP or to a party providing “information location tools”. Formal requirements for such notice are set out. Under proposed section 40.2, a person receiving such notice must forward it immediately to the alleged infringer, and must retain, from the time of receipt of the notice, “records that will allow the identity of the person to whom the electronic location belongs to be determined.” Maximum statutory damages are fixed for failure to comply with these obligations. The maximum for failing to serve notice is \$5000, and the maximum for failing to keep records is \$10,000.

A new s. 34.01 would give copyright owners a full range of remedies against anyone who, “without the consent of the copyright owner, knowingly removes or alters any rights management information in electronic form that is attached to or embodied in any material form” in the work, performance or sound recording at issue. These remedies are available where the person removing or altering the rights management information “knows, or ought to know, that the removal or alteration will facilitate or conceal any infringement of the owner’s copyright.” Further remedies are available against anyone who deals with any material form of a work where they know or ought to know that the rights management information has been removed or altered.

A proposed s. 34.02 would also give copyright owners and moral rights holders remedies against anyone who, without their consent, “circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work...for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it”. Significantly, circumvention

for the purpose of making a private copy under s. 80(1) of the Act would not be permitted.

The Bill would also repeal the provisions of the Act which set different conditions for ownership copyright and the term of protection for photographs. If the amendments are passed, the author of a photograph will be first owner of the copyright in the photo, under the same conditions as the author of any other work. The term of protection of a photograph would be life of the author plus 50 years. Section 13(2) of the Act, which provides that the person who commissions an engraving, photograph or portrait for valuable consideration is first owner of copyright would be repealed. To counterbalance the effect of this with respect to commissioned photographs and portraits, a specific exemption would be added under s. 32.2 of the Act which would allow individuals “to use for private or non-commercial purposes a photograph or portrait that was commissioned by the individual for personal purposes and made for valuable consideration”. This exemption is subject to any contrary agreement.

Domain Names

In a recent decision under the CIRA Domain Name Dispute Resolution Policy (CDRP), sole panelist Barry C. Effler ordered the transfer of the disputed domain name from the registrant (who did not respond to the complaint) to the complainant. *Fresh Intellectual Properties Inc. v. Sweets and Treats* involved a dispute over the domain name 1800flowers.ca. The complainant had also offered its services through a website using the domain name 1800flowers.com since 1995, and held three additional registrations for similar domain names in the .ca domain which redirected to the main web site. The 1800flowers.com web site was very widely known and used. The panelist noted that the complainant had spent over 100 million dollars in marketing in connection with its marks in the past three years, and generated over 6 million US in sales from orders sent to Canadian addresses alone.

The complainant, being an American company, had to meet the eligibility requirements to bring a complaint under the policy. Paragraph 1.4 of the policy exempts complainants from the Canadian Presence Requirements for Registrants where “the Complaint relates to a trade-mark registered in the

Canadian Intellectual Property Office (“CIPO”) and the Complainant is the owner of the trade-mark.” The panelist found that this requirement was met by the fact that the complainant had held registered trademarks in 1-800-FLOWERS (and Design) and 800-FLOWERS since 1999. He ruled that the fact that the registered marks had hyphens and the disputed domain name did not, was immaterial.

The panelist found that the contested domain name was confusingly similar to the complainant’s registered trademark. With respect to bad faith, the panelist found that the Registrant’s web site offered links to other web sites, including those of competitors of the complainant. He found it reasonable to infer, given the complainant’s goodwill in its marks and its marketing campaigns, that consumers who typed in 1800flowers.ca were expecting to be directed to the complainant’s web site. He was prepared to infer in the circumstances that the registrant registered the name “primarily for the purpose of disrupting the business of the Complainant”. Finally, the panelist ruled that the registrant had no rights or interests in the disputed domain name.

Internet Pharmacy

In *Behr v. College of Pharmacists of British Columbia*, the applicant pharmacist sought a declaration that a prescription issued by a third party practitioner was not authentic pursuant to s.38(1) of the College of Pharmacists by-laws. Section 38(1) requires that pharmacists ensure that all prescriptions are authentic and contain the required information, including the signature of a physician licensed to practice medicine in Canada. The applicant alleged that foreign patients locate British Columbia pharmacists who operate and advertise on the Internet and deliver their American prescriptions to them. These pharmacists arrange for the authorization of practitioners so that the prescriptions may be filled and delivered back to their clients. The applicant claimed that there is no true relationship between the patient and the physician and the dispensing pharmacist is aware of this and thus, the prescription is improper or not “authentic” and the pharmacist fills it any event. The respondent argued that s.38(1) was intended to refer to forged prescriptions and has never

been interpreted to mean that a pharmacist must investigate the physician-patient relationship. The respondent further claimed the applicant does not operate an “internet pharmacy practice” and is not affected as a pharmacist in any meaningful sense and is speculating that certain professional practices are improperly carried out by pharmacists in the manner in which they carry on Internet pharmacy practice. The Court noted that there appeared to be a disagreement between the applicant and the respondent College of Pharmacists of British Columbia about how professional practice in the area of Internet pharmacy should be regulated, but as an “interested observer” the applicant was not a person whose legal rights had been infringed by the respondent’s policy in respect of the By-law’s interpretation, or with respect to the manner in which it regulated internet pharmacy generally.” The Court found that the applicant does not own, manage or work in a pharmacy providing Internet pharmacy services and because the applicant’s legal rights had not been infringed, the application was dismissed.

Privacy

THE PRIVACY COMMISSIONER OF CANADA HAS RELEASED the [EKOS Report, Canadians, Privacy, and Emerging Issue](#). Key findings in the report commissioned by the federal Privacy Commissioner include 70% of Canadians expressing a high sense erosion of their privacy and the protection of personal information; while many were not familiar with privacy laws, most agreed on the need for strong laws to protect their personal information; 90% of Canadians insist their informed consent must be obtained for cross-border sharing of personal information; and most Canadians are willing to allow companies to track their consumer patterns in return for discounts, but want to be notified about the privacy implications in advance.

THE MOST RECENT [PIPEDA FINDING](#) INVOLVED A complaint against a movie theater chain for its handling practices of personal information of its customers who use accessibility equipment. The complainant alleged that the company’s practices in relation to collection and use, safeguards, accountability, openness and retention were all in violation of the *Act*. First, the Assistant Commissioner found that it was reasonable for the company to

require personal information as a condition for the supply of the equipment given the purposes of ensuring against loss, theft or damage. She was satisfied that providing the customer name, address and telephone number, as well as a piece of identification for verification purposes was not asking for more than required to meet its legitimate purpose. Directing the customer to the company’s web site for more detailed information on the purposes for collecting the personal information was, in the Assistant Commissioner’s view, “a reasonable effort” to explain the purpose and in compliance with Principle 4.3.2. Second, to ensure customer personal information was not accessible to others, the company changed its procedures to properly safeguard the information in accordance with Principle 4.7. Third, the company took steps to improve employee education and managers’ knowledge of their privacy implications and thus, the accountability complaint was resolved. Fourth, the Assistant Commissioner found that the company was meeting its obligations under Principles 4.8 and 4.8.1 by making its policies and procedures readily available and therefore, the openness complaint was not well-founded. And finally, the Assistant Commissioner found that the company was keeping information unnecessarily contrary to Principles 4.5 and 4.5.2 because different theatres had different retention schedules. However, the retention complaint was resolved after the company implemented a new policy where personal information will not be retained after the borrowed equipment has been returned and the sign-out sheet containing the information will be given back to the customer.

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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