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Domain Names: US Case Allows Action for Converting Domain Name

The US District Court for the Northern District of California has issued an interesting decision regarding ownership and transfer of domain names. In *Express Media v. Ricks*, the Plaintiff ("Express") had applied for summary judgment against the defendant Ricks, on a claim for conversion of a domain name. Express had purchased the domain name express.com in 2001, and administered it through a domain-name registry called Network Solutions, Inc. The plaintiff's attorney, Tregub, was the administrative contact for the domain name, and listed in the WHOIS directory. In October 2004, persons unknown adjusted some of the WHOIS information, including a change to Tregub's listed e-mail address. Shortly thereafter, Ricks entered into e-mail negotiations with a person purporting to be Tregub, and in November 2004 he purported to buy the domain name (worth at least US$1 million) for US$150,000, which he deposited into a bank account in Lithuania. Express applied for summary judgment on its claim that Ricks had converted the domain name.

The court acknowledged earlier authority to the effect that domain names were a form of intangible property that could be transferred. Ricks argued that Express had transferred the domain name to the unknown third party, and thus had no possessory right in the domain name when Ricks purchased it. Ricks also argued that he was a good faith purchaser and thus should retain title. The court ruled against both arguments, noting that there was no evidence that Express itself had ever transferred the domain name and that this had been accomplished by the unknown party. The good faith purchaser defence could only be made out if the transfer had been voluntary, i.e. obtained by fraud. Here, the evidence indicated that the unknown party had simply stolen the domain name. In defeating all of Ricks' arguments, the court refused to rely on the contact information from the WHOIS registry as having provided any legal indication of the identity of the owner or the owner's agent, and thus any basis on which Ricks could prove that the transaction was bona fide. The court ruled that Ricks had not demonstrated that there was any triable issue on the conversion claim, and summary judgment was granted.

Electronic Discovery: Production of Hard Drives

The Alberta Court of Appeal recently released its decision in *Innovative Health Group Inc. v. Calgary Health Region*, which dealt in part with the production of computer hard drives. The decision emerged from protracted litigation between the parties, "Innovative," an operator of physiotherapy clinics, and "CHA", the regional health authority for the City of Calgary, respectively. At an earlier stage, Innovative had deposited with the Court imaged copies of its office hard drives, pending agreement or court order regarding disclosure of their contents. The hard drives contained patient information, some of which was agreed to be both relevant and material to the litigation, but also contained a great deal of sensitive and confidential information that was neither relevant nor material. On an application for production by CHR, a case management judge had ordered that: each party could make a copy of the imaged hard drives; CHR could review the contents of the drives and make copies of relevant and material records, disclosing to Innovative which it had copied; and CHR could not print or make notes of any records not relevant or material. Innovative appealed this decision to the Court of Appeal, arguing that it unnecessarily allowed CHR to have access to material that it was obliged to keep private.

The Court unanimously allowed the appeal. Writing for the Court, Justice C.M. Conrad first commented generally on the unique problems created by electronic discovery, in particular expense and the protection of irrelevant and confidential information in electronic documents and storage devices. She noted the importance of proportionality as a guiding principle, underscoring that parties are to be encouraged to consider the importance of particular evidence to the case and the costs, burden and delay that can be imposed by requiring full discovery of electronic information. In so doing, she invoked both Alberta QB Civil Practice Note 14 and Principle 2 of the Sedona Canada Principles Addressing Electronic Discovery (reported on in the 7 February 2008 newsletter).

Justice Conrad then turned to the issue of whether the hard drives had properly been ordered produced *in specie*. Noting that Alberta Rule 186 defined a "record" to include "physical representation or a record of information, data or other thing," she reasoned that a storage medium upon which data is physically encoded may in some sense be a producible record. However, what is ultimately to be produced is the relevant and material information found on the storage medium; "[a] record of this sort, therefore, can only be subject to production, *in specie*, if everything on it is relevant and material to the lawsuit and its production is not barred by privilege or some other legal impediment" (para. 32). She then noted that a computer hard drive will always contain information that is neither relevant nor material to a proceeding, such as program files, metadata and enabling software, as well as the producing party's otherwise irrelevant information. She analogized computer hard drives to both traditional storage devices, such as a filing cabinet, and "mixed storage devices," such as a diary, to conclude: "A computer hard drive, being a mixed storage facility…is not producible *in specie*. It is the duty of the party preparing the affidavit of records, however, to disclose all relevant and material information found on it" (para. 38). Disputes over relevance and materiality can be settled through inspection by the court or its experts.

Justice Conrad then acknowledged that there will be some situations where a hard drive could be ordered produced for inspection by a party's expert, where there is "strong evidence" that the producing party "is deliberately trying to thwart the discovery process by not disclosing relevant and material information" (para. 39). Even in such circumstances, however, the courts should ensure that measures are in place to protect irrelevant, immaterial and privileged information that may be contained on the hard drive. In the case before the Court, she ruled that the chambers judge's order had "turned the whole process of production on its head," since it allowed CHR to examine all of the information to determine what was relevant and material (para. 42). She further noted that, on the record, there was no evidence that Innovative was trying to thwart the discovery process, nor any evidence that separating out the relevant and material information would be particularly onerous. The Court overturned the chambers judge's order, simply indicating that "Innovative has the obligation to produce relevant and material information…" (para. 52).

Hate Speech and the Internet

The Canadian Human Rights Commission (CHRC) has engaged Professor Richard Moon of the University of Windsor to conduct launched a policy review of how best to address hate messages on the internet. The CHRC had concluded that advances in technology, combined with growing public interest in the issue had made it necessary to consider how the *Canadian Human Rights Act* (CHRA) should be amended in order to deal effectively with the issue.

Section 13 of the *Canadian Human Rights Act* was amended in 2001 to prohibit the use of the internet or other communication tools for hatred purposes or discrimination. It allows the CHRC to deal with complaints regarding the communication of hate messages by telephone or on the internet. The CHRC has launched this review primarily to determine whether the balance struck between protecting against hate speech and allowing freedom of expression in new electronic media was properly struck at the time of those amendments.

The review will consider:

- existing statutory and regulatory mechanisms, and whether they are appropriate as they stand or require change;

- the mandates of human rights commissions and tribunals, as well as other government institutions presently engaged in addressing hate messages on the internet;
- whether other governmental or non-governmental organizations might have a role to play and if so, what that role might be;
- Canadian human rights principles such as those contained in the *Canadian Human Rights Act* and the *Canadian Charter of Rights and Freedoms*;
- mechanisms used in other countries; and,
- Canada's international human rights obligations.

Professor Moon will make recommendations on the most appropriate mechanisms for addressing hate messages on the internet. He will look in particular at section 13 of the *Canadian Human Rights Act* and the role of the CHRC. The report is expected to be ready this fall.

Privacy: Class Action for Loss of Customer Data

The Regina *Leader-Post* is reporting that a class action has been launched against various Daimler Chrysler companies, as well as the United Parcel Service of both Canada and the U.S., regarding the loss of customer data. The statement of claim has been filed on behalf of four named persons from four different provinces and "all other individuals… whose personal information was transferred to the defendants and has been lost by the defendants." The action alleges negligence against the various defendants regarding a data tape containing confidential customer information which was lost, and apparently delivered mistakenly to a third party, between January and May 2008. The defendants are alleged to have disclosed the possible loss of information to the affected customers, and the claim states that the defendants were negligent in the manner in which the information was stored and transported. The proceeding has not yet been certified as a class action. Acting for the plaintiffs is the Merchant Law Group, who have recently launched a large number of class actions on a wide variety of claims.

Telecommunications: Application of *Competition Act* "Abuse of Dominance" Provisions to Telecommunications Industry

The Competition Bureau (the Bureau) has issued an information bulletin dealing with the manner in which the "abuse of dominance" provisions in sections 78 and 79 of the *Competition Act* might apply to the telecommunications industry. The abuse of dominance provisions deal with complaints that a firm with market power has engaged in a practice of anti-competitive acts. The Competition Bureau has noted the increasing potential relevance of these provisions to the telecommunications industry as a consequence of deregulation.

Nominally telecommunications are regulated by the Canadian Radio-television and Telecommunications Commission (CRTC). However, there have been changes in the nature of the technology underlying that industry, the actors within it, and the approach to regulation. The Competition Bureau noted:

> Over the past twenty years, the telecommunications industry has migrated from a monopoly service delivery model to a more competitive sector with multiple suppliers. Since the early 1980s, Industry Canada has licensed multiple suppliers of mobile and fixed wireless telecommunications services and the CRTC has opened almost all telecommunications markets to competition. In addition, the CRTC has forborne from economic regulation of most telecommunications services, including terminal equipment; toll; mobile wireless; interexchange private lines; retail Internet; international services; wide area networking; local exchange services in most urban areas; and certain other data services.

As a result, rather than being governed exclusively by a set of special regulations for the industry, telecommunications is increasingly being governed by more general rules such as those in the *Competition Act*. The Competition Bureau therefore issued its Bulletin as a way of maintaining predictable enforcement policy, explaining how they

see the abuse of dominance provisions applying to telecommunications.

Under section 79(1) of the *Competition Act*, a finding that a firm has abused its dominant position requires proof of three things: that one or more persons substantially or completely control a class or species of business; that those persons have engaged in a practice of anti-competitive acts; and that the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

The Bureau noted that there were particular reasons these provisions could be relevant in the telecommunications context:

> Generally, the telecommunications industry is a network industry with large sunk costs and significant economies of scale, density, and scope, implying that some firms are likely to have larger market shares than might be typical in non-network industries. Interconnection, both among competitors in the same market and across market boundaries (i.e., call termination), is widespread and in many respects necessary for firms to compete. Proper definition of the relevant market in the telecommunications industry poses particular challenges because the sector is dynamic, shaped by constant and rapid technological change. Finally, certain acts are more likely to be the subject of an abuse of dominance complaint in the telecommunications industry, given the nature of the sector.

The Bulletin considers a number of issues, including the definition of the relevant product and geographic markets, as well as the Bureau's approach to assessing market power, to identifying an act as anti-competitive, and to determining whether a practice has had the effect of preventing or lessening competition substantially in a market. The Bulletin also considers the remedies that can be ordered to address an abuse of dominance.

Of particular note is the discussion of the nature of anti-competitive acts in the telecommunications industry. A dominant firm might be in a position to undertake a number of strategies that raise the costs or reduce the revenues of a rival. These might include creating artificial switching costs, acquiring control of suppliers of an input needed to compete, or inducing suppliers of an input needed to compete to not supply a rival. The Bureau also noted the particular dangers of predatory or targeted pricing, which is the practice of offering certain customers a significantly better price than charged previously or usually offered to other customers in the market, in order to either win or retain the customer in the face of a more competitive offer:

> In the context of telecommunications to the extent that the dominant firm can identify customers who have switched to competitors, it may have an incentive to "win back" the customer by offering a better price. In these cases, it is necessary to determine whether the dominant firm has the information necessary to target customers, whether doing so would significantly deviate from its current pricing structure, and whether the practice increases barriers to entry. If there are fixed and sunk costs associated with customer acquisition, then the effect of targeted pricing can result in exit from, or may deter entry into, the market as these costs are not recovered by the entrant. In addition, if an entrant expects to face targeted pricing, it may not find it worthwhile to sink the costs necessary to enter the market as a whole.

The Bulletin also noted potential issues with bundling. Bundling normally benefits consumers, the Bureau noted, but could be a problem in some circumstances:

> Bundling could prompt concerns if it is used as a means to raise the costs for rivals or, in the alternative, as a means by which to engage in predation. In terms of raising rivals costs, a practice of bundling may meet the competition law definition of tied selling. In this context, if it is shown that the practice is impeding entry or expansion of firms offering some or all of the bundled services, or is having some other form of exclusionary effect, it could constitute an anti-competitive act. By way of example, a long-term contract that is required in conjunction with the sale of a bundle could constitute an anti-competitive act if it is designed to raise rivals' costs.

The Bureau also noted that with regard to remedy it potentially had the power to order access to certain facilities or services, or to make orders specifying formulas for setting prices. However, they added, the Bureau is not a binding price regulator in access disputes and recommended third-party mediation or arbitration over issues of reasonable access costs.

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 Robert Currie, Chidi Oguamanam and Stephen Coughlan 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 Robert Currie, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca

Avertissement : Le Bulletin IT.Can vise à informer les lecteurs au sujet de récents développements et de certaines questions à portée juridique. Il ne se veut pas un exposé complet de la loi et n'est pas destiné à donner des conseils juridiques. Nul ne devrait donner suite ou se fier aux renseignements figurant dans le Bulletin IT.Can sans avoir consulté au préalable un conseiller juridique.