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NEWS

1. COMPETITION

GERMANY JURISDICTION OVER CASES DECIDED BY THE "REGTP"

Two new decisions of the Higher Regional Court in Düsseldorf (*Oberlandesgericht*, OLG) concerning cases of preliminary injunctions, may have lasting relevance for competitors of Deutsche Telekom AG ("DTAG"), Germany's incumbent telephone company.

Both cases concerned the question of whether DTAG was obliged to issue invoices for competitors offering their services via the telephone network.

The court declared that it had no jurisdiction over these cases since the German "regulatory authority for telecommunications and the post" (*Regulierungsbehörde für Telekommunikation und Post*, "RegTP") had already adjudicated the cases. For this reason, the court remanded the cases to the Regional Court in Cologne (*Landgericht*, LG), which had originally affirmed its competency for the cases.

The RegTP regulates the former monopoly operators in the postal and telecommunication market, Deutsche Post AG and Deutsche Telekom AG. Companies disagreeing on a particular point of law may submit their case to the authority.

The court stated that all cases that have been brought before the regulatory authority may no longer be submitted to a civil court by any party involved in the proceedings. The only legal remedy against the authority's decision would be an appeal to the administrative court.

In other words: Telecommunication companies must decide beforehand whether to take their case to the regulatory authority or to a civil court. If they choose the regulatory authority the legal process is limited to the administrative courts. However, this limitation does not apply to those companies that were not party to the respective proceedings of the regulatory authority.

For more information see: www.jm.nrw.de

INDIA TRAI SUGGESTS ISPs FREE ENTRY INTO INTERNET TELEPHONY

On 20th February 2002, the Telecom Regulatory Authority of India ("TRAI") made recommendations to the Department of Telecommunications ("DoT") concerning Internet Telephony. While currently Internet Telephony is banned in India, the DoT plans to permit the same by 1st April 2002 and it will use the TRAI recommendations in formulating necessary policies.

The TRAI recommendations define Internet telephony as "an application service, which the customers of Internet Service Providers ("ISPs") can avail from their PCs capable of processing voice signals".

Under the recommendations, service providers would be free to price their services, provided they specify whether the services offered are of toll grade or non-toll grade quality.

A significant recommendation is that ISPs should be allowed to offer Internet telephony for national as well as international long distance calls without paying any additional license fee.

Basic, cellular and national long distance telephony providers could be disappointed by this recommendation, which is contrary to DoT's announcement in the year 2001, which stated that ISPs would not be allowed to offer internet telephony, unless they had regular telecom licenses and had paid the requisite entry fees. The new recommendations could adversely affect the revenues of basic, cellular and national long distance telephony providers from long distance telephonic traffic if they are adopted by the DoT.

However, the TRAI recommendations also specify that PC-to-phone calls can be made only from an Indian PC to an overseas telephone number i.e. not to a phone number in India.

This would mean that a consumer can still be barred from calling from a PC-to-phone number within India, thus protecting the huge investments made by the long distance telecom players.

A high-level panel has been set up under the TRAI chairman, comprising the Telecom Engineering Centre and the industry.

The panel's aim will be to work towards defining the level of quality required and solving inter-operability issues concerning Internet Telephony.

For more information please contact: vaibhav@nishithdesai.com

ITALY WLL AUCTION PROCEDURE

On 31st January 2002 the Italian Communications Ministry published a Decree on the auction procedure for the assignment of frequencies for wireless point-to-multipoint systems.

For each geographical area, corresponding to the territory of an Italian Region, operators may file for the assignment of seven licenses in the 24.5-26.5 GHz band and three licenses in the 27.5-29.5 GHz band. All applications must be submitted by interested operators no later than 1.00 p.m. on 22nd March 2002.

Generally speaking, the conditions operators need to meet in order to participate in the procedure are those expressly provided for by Presidential Decree No. 318/97 on license and authorisation requests. Thus operators admitted to file for a request must, *inter alia*, have a paid-in capital not lower than 10 % of the total investment required for the implementation of the wireless services and infrastructure. An operator may be assigned not more than one license per Region.

Operators admitted to file for the auction procedure for the assignment of frequencies are obliged to submit reasonable offers in line with the minimum amounts provided for in Article 16 of the Decree, which vary according to the population and/or economic territory involved (i.e. for Aosta Valley the minimum threshold varies between EUR 50,000.00 and EUR 1,000,000.00 depending on the frequencies requested, whilst Lombardy requires a minimum offer between EUR 1,800,000.00 and EUR 3,600,000.00).

In the event that the number of offers exceeds the number of the licenses to be issued, the procedure provides for a competitive bid phase, under which operators entitled to frequencies assigned to them will be selected by means of a ranking list based on the offered amounts.

The frequency assignment procedure will be carried out simultaneously for all geographical areas for which offers are filed. The Ministry will issue the individual license within 60 days of the procedure.

On filing requirements and elements for bidding, the Decree refers to the previous Decision No.400/01/CONS and to Decision No. 822/00/CONS of the Communications Authority, which also specifies the asymmetric measures and technological requirements involved.

For more information see the Italian Communications Authority web site: www.agcom.it

ITALY TI WHOLESALE OFFER FOR LEASED LINES

With Decision No. 59/02/CONS dated 20th February 2002, the Italian Communications Authority approved the entire sale offer of Telecom Italia ("TI") for leased lines.

In particular, the Decision specifies the dominant operator obligations with respect to the provision of a minimum set of accessory services in favour of competitive providers.

It must be noted that the definition of leased line is the one used and introduced with the implementation of Directive 92/44/EU and since 1994 all leased lines must be provided without discrimination to all users, with respect to availability of technical access, tariffs, delivery of services and quality.

The offer is addressed to OLO and ISP owners of infrastructure. The cost element of providing leased lines comprises the direct costs of setting up, operating and maintaining such lines.

With regard to the direct numbering circuits, the Decision sets a new standard offer package and Annex B specifies a Service Level Agreement indicating strict delivery times and penalties in the case of violation by notified operators.

In particular, the maximum delivery time for the provision of 2 Mbit/s Circuits is of 120 days and the rate of the guaranteed deliveries must not be less than 95 % of the requests coming from users requesting at least 20 circuits on a yearly basis.

Strict penalty provisions are provided in case of delay in the implementation of services provisioning, which vary according to the length of the delay. Specific provisions detail the penalties to be applied in case obliged operators fail to meet the relevant obligations of the timing, quality or execution of services.

The Decision also details the nature of assistance services to be performed, implicitly setting an intrinsic evaluation of efficient solutions for handling services by means of leased lines.

It is expected that the implementation of the Decision will increase competition in the leased lines segment.

For more information see the Italian Communications Authority web site: www.agcom.it

2. COMPUTER CRIME

EU COUNCIL OF EUROPE FACING RACISM ON THE WEB

The Council of Europe would like to establish a new criminal offence: acts of racist or xenophobic nature committed through computer systems.

Therefore, on 18th February 2002 the Council issued a draft protocol to define racist and xenophobic information and propose a legal framework intended to strengthen law enforcement against the authors or publishers of such information.

This protocol, which should be delivered by June, would be the first protocol to the Council's Convention on Cybercrime, which was opened for signature last November (see "the l.i.n.k.", issue 11).

According to the Council of Europe, no country has ratified the treaty yet. Indeed, it was criticised by privacy protection associations, notably with respect to the collection and storage of traffic data.

Moreover, last December, the Council of Europe's Committee of Ministers asked the Steering Committee on Crime Problems to draft a second protocol to the Convention on Cybercrime to cover also terrorist messages and the decoding thereof. Nevertheless, nothing will be done before a committee of experts on terrorism designated by the Committee of Ministers renders its report.

As the treaty itself has already been criticised, it is unlikely that adding further surveillance powers to the treaty will increase the current enthusiasm to adhere to it.

It is also to be noted that, in this context, a Proposal for a Council Framework Decision on combating racism and xenophobia has been issued (COM(2001) 664 final).

The Council of Europe's preliminary draft protocol can be found at [http://www.legal.coe.int/economiccrime/cybercrime/AP_Protocol\(2002\)5E.pdf](http://www.legal.coe.int/economiccrime/cybercrime/AP_Protocol(2002)5E.pdf)

The text of the Commission's proposal can be found at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXn umdoc&lg=EN&numdoc=52001PC0664&model=quichett

For more information contact: LE_GOUJEFF@vocals.com

USA ABA GUIDELINES

During testimony before the House Committee on Financial Services on 12th February 2002, the American Bankers Association (the "ABA") released an industry resource guide entitled *Identification and Verifier of Account Holders*.

The guide is the result of ABA discussions that found that administrative and system vulnerabilities have contributed to a proliferation of Internet web sites at which forms of false identification can be purchased.

The guide is intended to ensure that the information gathering process to open an account is not only reasonable, but that the information gathered is properly authenticated. It is of particular note that Section 326 of the USA PATRIOT Act requires financial institutions to verify the identity of customers so as to reduce the risk of money laundering.

It should be understood that there is no way to truly verify identities in this country because the government does not issue documentation for the purpose of establishing identity.

The ABA guide suggests that to verify the accuracy of information provided by a customer when opening an individual account, financial institutions should visibly compare a photograph, obtain a government issued identification, obtain other forms of identification from the customer, use information verification processes, and contact the customer after the account is opened.

For business accounts, the ABA guide suggests that financial institutions determine whether the business is a holding company for assets owned by affiliated organisations, what the primary activity of the company is, and whether its business is primarily domestic or international.

To verify information obtained from a business, the ABA guide recommends that financial institutions obtain a copy of the document confirming the existence of the business, obtain a financial statement, conduct a site visit, use an independent information verification process, and visit the business web site.

The ABA guide is at:
http://www.aba.com/Press+Room/byrne_testimony_021202.htm

USA CYBERCRIME GUIDELINES

Working with industry and law enforcement professionals, CIO Magazine recently published guidelines on responding to and reporting threats or attacks on information systems or data. The guidelines emphasise the importance of reporting incidents in order to identify and prosecute criminals, identify new cyber security threats, and to prevent successful attacks on critical infrastructure and economic systems.

The guidelines are intended to facilitate effective law enforcement responses to attacks on private sector computers. The guidelines note that because of the sensitive nature of information security threats, information security officers (the "ISOs") are often reluctant to share information with law enforcement or other industry groups. The guidelines recognise this concern, but encourage ISOs to better understand how law enforcement and other government agencies handle a cyber threat report with regard to the impact of an investigation on their business and how law enforcement handles sensitive information.

The guidelines outline (i) what elements to include in an information system security plan, (ii) what types of incidents to report, and (iii) when and how to report an incident. To assist in this process, the guidelines include a list of law enforcement contact officials and agencies, including FBI and Secret Service field offices, and include a form to use to report cyber threats.

The guidelines are available at: <http://www.cio.com/research/security>

3. CONVERGENCE

PORTUGAL CONVERGENCE AND REGULATION

Following the approval of the Convergence and Regulatory Initiative, by means of Dispatch no. 863/2001, dated 26th June 2001, issued jointly by the Minister of Presidency and the Minister of Social Equipment, a public survey of convergence in the communications, multimedia and information technology sectors has now been launched. This survey is led by the *Instituto da Comunicação Social* ("ICS"), the Portuguese regulatory authority for the media, and the *Autoridade Nacional de Comunicações* ("ANACOM"), the postal and telecom regulatory authority.

The above document, which is available at ANACOM's premises for consultation and appraisal by all interested parties, is divided into four chapters: (i) a chapter establishing the legal framework of the convergence; (ii) a chapter classifying the media and telecommunications markets from a convergence point of view; (iii) a chapter analysing future implications associated with the new technologies; and finally (iv) a chapter dedicated to anticipating the problems of the future regulatory model.

The final results of the above survey will be presented to the Portuguese Government on 31st May 2002. All contributions related thereto must be made in writing, preferably in electronic format, and delivered by 15th April 2002.

The conclusions reached in this survey will be made public as soon as possible. These conclusions will be accompanied by a list identifying the authors of all contributions received, unless a prior request for confidentiality has been submitted.

For further information, please see:
<http://www.icp.pt/template20.jsp?categoryId=3730&contentId=36731>

4. DATA PROTECTION

CANADA EC DECLARES CANADIAN DATA PROTECTION LAWS ADEQUATE

In a decision adopted on 20th December 2001, the European Commission ("EC") officially declared that Canadian data protection laws provide adequate protection for personal data under UE law. Companies within the European Economic Area ("EEA") can now safely transfer personal data from the EEA to recipients in Canada who are subject to the Canadian federal Personal Information Protection and Electronic Documents Act ("PIPEDA").

Article 25 of the European Data Protection Directive 95/46/EC (the "Directive") prohibits the transfer of personal information (i.e., any information that can identify an individual) from inside the EEA to third parties in countries that do not afford "adequate levels of protection" to personal information.

On 13th April 2000, the Canadian government adopted PIPEDA, the data protection provisions of which came into effect, in part, on 1st January 2001.

The Working Party on Protection of Individuals with regard to the processing of Personal Data, established pursuant to Article 29 of the Directive, analysed and rendered its opinion on the adequacy of PIPEDA on 26th January 2001.

On the basis of this opinion, the EC officially declared the adequacy of PIPEDA on 20th December 2001.

Significantly, Canada is the first English-speaking country deemed by the EC to afford adequate protection, and is in the same advantageous position as the only two other non-EEA countries – Switzerland and Hungary – as regards the transfer of personal information from the EEA.

For more information contact cmorgan@mccarthy.ca or see:
http://europa.eu.int/comm/internal_market/en/dataprot/adequacy/canadadecisionen.pdf

GERMANY DATA EXCHANGE BETWEEN EMPLOYERS AND INSURANCE COMPANIES

The exchange between employers and compulsory health insurance companies of data concerning employee's data and payment of social security contributions can now be handled via email in Germany.

Hitherto, data exchange could only take place by filling out report forms or by saving data to computer disks and then sending the form or disk by mail, a procedure which resulted in very substantial labour costs and mailing expenses.

The new electronic data exchange service is offered by ITSG GmbH. The shareholders of the company are leading representatives of statutory health funds and insurance organisations.

The service was first offered in October 2000 for exchanging data concerning notifications of sickness and enrolment of employees only.

From January 2002 the exchange of payment reports is also included in the service. To make use of the service, employers must make use of two different software programs for data encryption. Until 31st December 2002 all new customers can obtain the required software free of charge.

The coding method is based on the established technique of using a (secret) private key code and a public key code for encryption and decryption.

The authenticity of the keys is certified by a trust centre, which is also controlled by ITSG.

For additional data protection only a limited number of persons who are required to identify themselves by ID-documents and register with the trust centre should be entrusted with the task of encrypting and dispatching of the reports.

The new service is one of the results of a project launched by the Ministry of the Economy in 1999.

The project is intended to increase efficiency by reducing bureaucracy.

The German Economy Minister, Werner Müller, anticipates that the service will be a great success due to the increased use of electronic communication, especially by small and medium-sized companies in Germany.

For more information please see: www.itsg.de and www.bmwi.de

5. DIGITAL SIGNATURE

ARGENTINA FIRST DIGITAL SIGNATURE ACT

Since 3rd January 2002, Argentina has had its first Digital Signature Law, Act No. 25.506 ("Act").

It sets out the general characteristics defining the validity and use of digital signatures, but is still waiting for the Executive Power to define, *inter alia*, the process of signing and verification, as well as details about certification entities, by 14th June 2002.

Basically, the Act states that:

- a digital signature ("DS") is created with a private key and verified by a recipient using a public key, previously registered by a legally authorised certification entity.
- a DS identifies the signor and detects any modification to the digital document.
- when law requires a hand-written signature, that obligation is satisfied by using a DS.
- digital documents (digital representation of acts, notwithstanding the type of support used to fix or store the content) shall be deemed equal to hard documents (paper).
- a DS shall not be valid and enforceable when used in (i) testaments, (ii) in acts related to family law (i.e. to adopt a child), (iii) personal acts (i.e. donation of an organ), or (v) when law provides a mandatory formality incompatible with the use of DS (i.e. documents which have to be established and signed by public notaries).

By stating that a DS is equal to a hand-written signature, and that digital documents are the same as "paper" documents, the Act amends the Argentine Civil Code.

Moreover, it also expressly amends the Argentine Criminal Code in order to punish the forging of a DS. Finally the Act establishes fines for certification entities that do not fulfil their obligations.

The Act is in full force but still not in use, as the regulation has not yet been issued. The regulation is expected to be finalised by mid June 2002.

To see the text of the Act please go to:

<http://infoleg.mecon.gov.ar/txtnorma/70749.htm>

For more information contact: gonzaloz@mille.com.ar

BRAZIL DIGITAL CERTIFICATION

In accordance with government policy to set up effective rules for digital signatures and following the creation of the Brazilian Public Key Infrastructure (*Infraestrutura de Chaves Públicas Brasileiras*, ICP-Brasil) providing for the development of a certification structure to ensure the legal validity of electronic documents, the Brazilian Post has been recently authorised by the Ministry of Communications to issue digital certificates for individuals or legal entities intending to do business on the Internet.

The Brazilian Post will issue these certificates in partnership with 72 other entities to be chosen through a bid procedure.

For more information please contact: rapdecunto@pinheironeto.com.br

GERMANY USE OF DIGITAL SIGNATURES BY FEDERAL AUTHORITIES

The German government has decided to introduce the use of digital signatures by all Federal authorities. Citizens, authorities and companies will be able to process their business transactions with the Federal authorities via the Internet. The decision is part of the "BundOnline 2005-Initiative" which requires the Federal government to offer all of its services via Internet by 2005.

This decision goes beyond the minimum standards laid down by the European Community which stipulate the use of digital signatures whenever written form is required.

The applicability of digital signatures by public authorities and commerce were examined by KPMG, which presented a study on this issue supporting the comprehensive use of digital signatures by the civil service.

The so-called "qualified digital signature" will have the same legal effect as the personal signature.

Planned arrangements concerning digital signatures also include a fundamental protection of electronic communications, especially emails, against fraudulent use, falsified identity or technical failures.

The government will provide, free of charge, all communication partners with the required software programs to verify all electronic communications sent by public authorities. To achieve maximum acceptance and economic efficiency, all authorities will be equipped with uniform standards.

The first step of the project consists in installing the software required for the new service on the 20,000 workstations of the federal government departments.

In a second step another 200,000 workstations will be equipped.

The government expects that the investment will be compensated by a reduction in costs due to faster and more efficient administrative procedures.

The new law on digital signatures and the law on the adjustment of formal requirements provide the legal basis for this modernisation.

Regulatory statutes for public authorities will be enacted within the next few months.

For more information please see:

<http://www.computerundrecht.de/docs/esicherheit-kabinett.pdf>

6. DOMAIN NAMES

CANADA .CA DOMAIN NAME DISPUTE RESOLUTION POLICY FINAL VERSION

On 29th November 2001, The Canadian Internet Registration Authority ("CIRA") issued the final version of the CIRA Dispute Resolution Policy ("CDRP") for resolving disputes concerning the bad faith registration of domain names in the .ca domain name registry.

The CDRP is modelled after the Uniform Domain Name Dispute Resolution Policy ("UDRP") established by ICANN which is used internationally to deal with similar disputes in the .com, .net and .org generic top level domains.

Under the CDRP, as with the UDRP, a proceeding is commenced by filing a complaint with an authorised dispute resolution provider selected by the complainant. A complainant must prove the following three elements under Canada's CDRP:

- the registered .ca domain name is confusingly similar to a mark in which the complainant had rights prior to the date of registration of the domain name and continues to have such rights;
- the domain name registrant has registered the domain name in bad faith; and
- the domain name registrant has no legitimate interest in the domain name.

There are however some significant differences between the two regimes.

For instance, under the CDRP, a complainant must prove the first and second elements, namely confusion and bad faith, on a balance of probabilities but, unlike under the UDRP, must only show "some evidence" of the lack of legitimate interest in the domain name by the registrant.

Second, unlike the UDRP, the CDRP defines when a domain name is "confusingly similar".

A domain name will be confusingly similar to a mark "if the domain name so nearly resembles the mark in appearance, sound or the ideas suggested by the mark as to be likely to be mistaken for the mark."

This wording is borrowed from one of the indicia of confusion listed in the Canadian Trade-Marks Act. Third, the CDRP provides a closed list of six types of activity that would qualify as a legitimate interest in a domain name.

The UDRP, by contrast, provides only three examples of how one might prove a legitimate interest in a domain name, but makes it clear that the examples are not exhaustive. Fourth, the CDRP provides a closed list of only three types of activity that will qualify as a bad faith registration of a domain name. Unlike the UDRP, bad faith use is not required, only registration.

Registrants of .ca domain names must meet a Canadian presence requirement which CIRA has imposed in order to ensure that the domain space grows as a public resource for the social and economic development of Canadians.

For more information contact: cmorgan@mccarthy.ca or see http://cira.ca/official-doc/95.policy_final_November_29_2001_en.pdf

COLOMBIA THE .CO IS A PUBLIC INTEREST MATTER

The domain .co, although administered by a private entity, has an outstanding character of public interest.

Consequently, the *Universidad de los Andes*, its administrator since 1991, cannot, independently, define the conditions under which the domain ".co" must be administered, nor change its character of domain of the country for transforming it into a generic domain for identifying activities.

Last year the *Universidad de los Andes* initiated a process of bidding for delivering the administration of the .co and convert it into an identifying name for commercial activities.

Notwithstanding the foregoing, the Council of State prevented such transaction from taking place and explained that "only the Colombian State may regulate the conditions that favour and protect the domain .co, in the public interest aimed at guaranteeing that all Colombian citizens and the Internet community benefit from it and to avoid actions that may generate monopolisation thereof."

".CO Is the acronym of the word "Colombia" a name in which the Colombian State has the right, having adopted it in its Political Constitution for its identification vis-à-vis the community of nations, 180 years ago when Internet did not yet exist and the creation of domain names was not in sight", it added.

For more information please contact: cavelier@cavelier.com

EU REGULATION FOR .EU IMPLEMENTATION APPROVED

The European Parliament and Council have approved the Regulation on the implementation of the .eu top level domain ("TLD").

The objective of this Regulation is to establish the conditions of implementation of the .eu TLD, to provide for the designation of a Registry and establish the general policy framework within which the Registry will function. National country code TLDs are not covered by this regulation.

This regulation should contribute to the eEurope initiative by accelerating electronic commerce. The .eu TLD should promote the use of and access to the Internet networks and the virtual marketplace based on the Internet as TLDs are an essential element of the web and part of each e-mail address. The creation of a new TLD will increase choice and competition.

The Regulation should be implemented in compliance with the principles relating to privacy and the protection of personal data.

The full text of the regulation can be found at:

For more information contact: LE_GOUEFF@vocats.com

GERMANY FEDERAL COURT RULES ON THE "RIGHT TO A NAME"

According to a final decision of the German Federal Court of Justice (*Bundesgerichtshof*, BGH) in November 2001 the use of a domain name that is identical to the name of an existing company may infringe this company's right to do business under a name.

The court was called on to decide a lawsuit in which Deutsche Shell GmbH, a German subsidiary of the Royal Dutch Shell Group, sued a man named Andreas Shell in order to prevent him from using the domain www.shell.de.

The defendant had registered the domain name first and used it for private purposes as well as for doing business on an avocational basis which the Shell GmbH alleged to be an infringement of its right to the name. The Federal Supreme Court has now decided that the right to use a domain name, generally belongs to the person first registered according to the principle of priority (citation of the Court: "The early bird catches the

worm"). This principle shall apply whenever there is a legitimate interest in the use of the domain name such as the identity with the private name, regardless of whether it is claimed by a private person or a company.

However, this principle does not apply if one of the parties has an outstanding interest in the use of the domain name. In the case at issue the judges were convinced that due to the high profile of the company Shell, a multitude of Internet users would expect www.shell.de to represent that company rather than someone unknown to the public. This exception must especially be considered if there are no other means of informing interested customers of a differing domain name used by the company. In such cases there exists a legitimate interest to prevent the use of the name by anyone else. In the court's opinion it would be reasonable to expect the defendant Andreas Shell to use the domain name only with an appendix to differentiate it clearly from Shell GmbH. As a result of the suit Andreas Shell was ordered to stop the use of the domain www.shell.de but did not have to give up his right to the domain registration in favour of the Shell GmbH.

For more information see: www.bundesgerichtshof.de, court decision of 23rd November 2001, reference no. I ZR 138/99

7. ELECTRONIC COMMERCE

NORWAY IMPLEMENTATION OF DIRECTIVE ON ELECTRONIC COMMERCE

Norway is in the process of implementing Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce").

Earlier this year, a draft Norwegian Act on E-Commerce was sent to the EFTA Surveillance Authority pursuant to the procedure under Directive 98/34/EC. Upon approval, a white paper for the Draft Act will be submitted within few weeks. The Norwegian legislators have in the draft Act proposed a notice and take down procedure with regard to cashing and hosting which goes beyond what is required under the Directive on electronic commerce.

For further information on these topics, please see: www.tkql.no or contact Heidi.Aasheim@tkql.no or Arne.Ringnes@tkql.no

SOUTH AFRICA ELECTRONIC COMMUNICATIONS AND TRANSACTIONS BILL

The Electronic Communications and Transactions Bill (the "Bill"), South Africa's first piece of e-commerce legislation, was published for public comment in the Government Gazette on 1st March 2002.

The Bill incorporates many of the provisions of the United Nations Commission on International Trade Law, Model Law on Electronic Commerce, and will offer greater legal certainty not only to those people involved in e-commerce, but to everyone who relies on electronically stored information.

While the Bill has generally received a favourable response, there has been some concern raised by industry players over the increased government control in previously independently regulated areas such as the .za domain name space. A new ".za domain authority" is to be managed and controlled by a board of directors appointed by the Minister. The directors must collectively, represent various interested parties.

Individuals concerned about the confidentiality of their personal information may be disappointed to know that a data controller (a person who electronically requests, collects, collates, processes or stores personal information) is not obliged to, but may voluntarily, apply the data collection principles set out in the Bill, such as obtaining the "express written consent" of the data subject for the use and disclosure of data.

The Bill also contains provisions on the following issues:

- the limitation of liability of internet service providers who are members of a recognised representative body, and have adopted and implemented the official code of conduct of that representative body
- consumer protection for consumers who purchase goods and services through electronic transactions, including greater transparency and a "cooling-off" period of 7 days
- cyber crime and the appointment of cyber inspectors to monitor and inspect any web site or activity on an information system in the public domain.

For more information please contact: peterg@wwb.co.za

SPAIN NEW IS SERVICES AND E-COMMERCE ACT DRAFTED

INTRODUCTION

The Spanish Ministry of Science and Technology has drafted and published on its official web site the first draft of the new Informator Society Services and Electronic Commerce Act (hereinafter, referred to as the "Draft"), approved by the Ministers Council of 14th February 2002, which will now be discussed in the Spanish Parliament.

The Draft will adapt Spanish legislation to Directive 2000/31/EC referred to as the Electronic Commerce Directive, dated 8th June 2000, there being no pre-existing legislation referring specifically to this particular matter in a single harmonised text.

Earlier versions of the Draft had been available for public consultation for almost a year. Comments were received from all participants in the telecommunications sector and in response to these comments, the Draft was modified four times, the last version being dated 8th February 2002.

MAIN ASPECTS OF THE DRAFT

The main aspects of the Draft, are the following:

- the applicability of the regulation to all information society service providers ("Providers") based in Spain and also to those without a presence or base in Spain but whose presence can be considered as a "permanent establishment";
- the applicability, under some circumstances, of the regulation to some Providers, not based in Spain but based in the EU or EFTA countries and also foreign countries;
- the applicability of the principle of non-restriction and no-requirement for prior authorisation for these services;
- the obligation for Providers to communicate to the Commercial Register their domain name or names and other Internet addresses.
- the obligation for Providers to offer their general information online as detailed in article 10 (name, address, email, register number, etc.);
- the principle that Providers are not held responsible when referring to access and use of the telecom network, temporary copies of data, hosting, linking or online search engines, unless they do not come under any of the exceptions listed in articles 12 to 16, inclusive;
- the voluntary preparation of Providers' policies and codes, with certain practices promoted by the Administration with a certificate of consent.

- the prohibition of spamming and the application of the existing rules on data protection and publicity for the services provided by the Providers;
- the same validity and effectiveness for online agreements as for regular off-line agreements, those being valid instruments for contractual arrangements except for agreements relating to family and inheritance;
- the regulation of pre- and post-information to be provided by the Provider to the other contractual parties;
- the assumption that signing of contracts with consumers takes place in the habitual place of residence of the consumer and the assumption that contracts between companies and professionals are signed in the place where the Provider is established, and that disputes may be submitted to arbitration procedures; and
- the identification of infringements and penalties of the articles of the Act, to be determined by the Ministry of Science and Technology.

CMT

Resolutions referring to "principal" and "dominant" operators

The Spanish administrative regulatory body for the telecommunications market (CMT) recently published two resolutions dated 2nd and 8th January 2002, listing those operators that will be considered as "principal" in the cellular and fixed national telephony markets and to maintain the operators considered "dominant" in the fixed telephony, cellular telephony, and interconnection national markets.

The principal operators in the fixed telephony market are:

- TELEFÓNICA DE ESPAÑA, S.A.U.;
- RETEVISIÓN, S.A.U.;
- LINCE TELECOMUNICACIONES, S.A.U.;
- JAZZ TELECOM, S.A.U.; and
- ALÓ COMUNICACIONES, S.A.

The principal operators in the cellular market are:

- TELEFÓNICA MÓVILES ESPAÑA, S.A.U.
- AIRTEL MÓVIL, S.A. (VODAFONE)
- RETEVISIÓN MÓVIL, S.A.
- XFERA MÓVILES, S.A.

The dominant operator in the fixed telephony market is still the same: TELEFÓNICA DE ESPAÑA, S.A.U.

The dominant operator in the leasing of circuits market is still: TELEFÓNICA DE ESPAÑA, S.A.U.

The dominant operators in the cellular market are still:

- TELEFÓNICA DE ESPAÑA, S.A.U.; and
- AIRTEL MÓVIL, S.A. (VODAFONE).

The dominant operators in the interconnection market are still:

- TELEFÓNICA DE ESPAÑA, S.A.U.; and
- AIRTEL MÓVIL, S.A. (VODAFONE).

Resolution referring to the net cost of the universal service

The CMT also decided in its Resolution dated 31st January 2002 that the net cost for universal services for the year 2000 provided by Telefónica de España, SA to be borne by the obliged operators should be set at EUR 268,000,000.00, rather than the estimates made by Telefónica de España, SA to the CMT which have always been between EUR 486,000,000.00 and 630.000.000.00.

Report on the telecommunications market for the first semester of 2002

The CMT has also published its Report for the first semester of 2002 referring to the relevant data for the general telecommunications market, fixed communications, cellular communications, interconnection services and telematic services.

USA

YAHOO! AND INTERNET JURISDICTION

In a decision with significant implications for anyone involved in electronic commerce, a U.S. district court held that a French court order against Yahoo! is not enforceable in the United States (*Yahoo! v. LICRA*, 169 F. Supp. 2d 1181 - N.D. Cal. 2001). In an article entitled *U.S. Court Releases Yahoo! Inc. from Compliance with French Court Order*, published on page 15 of the December 2001 issue of *Global eCommerce Law and Business Report*, Thomas P. Vartanian, Mark Fajfar and others in Washington, D.C., office of Fried, Frank, Harris, Shriver & Jacobson offer insights into the practicalities of Internet commerce and discuss the determinative issues of where and when a judgement can be effectively enforced.

The article also discusses three lessons the case offers about international electronic commerce.

The decision is at: <http://www.cdt.org/jurisdiction/011107judgement.pdf>
For more information please contact: Vartath@ffhsj.com

8. ELECTRONIC DEMOCRACY

EU

E-GOVERNMENT NETWORK LAUNCHED

In March the European Commission launched an international network linking together Member States' government intranets. This should foster information exchange between governments.

Tests have already been carried out via the new network whose infrastructure is based on a private European backbone network which provides highly secure data transfers.

The transfers include data about road accidents, social security, European job vacancies, etc.

Almost all European Union countries are connected to the European network, as well as Iceland and Norway. New candidate countries should also be connected later this year.

For more information contact: LE_GOUEFF@vocats.com

9. INFORMATION SOCIETY POLICY

CANADA

WEB SITE OPERATOR VIOLATES QUEBEC LANGUAGE LAWS

On 1st November 2001, in *Procureur Général du Québec c. Hyperinf Canada Inc.*, a case of first impression, a Quebec trial court applied the provisions of the Charter of the French Language (the "Charter") to the operation of a web site.

The court held that a Quebec-based web site operator had violated section 52 of the Charter because the elements of its web site that were analogous to "commercial advertising" had not been fully translated into French.

The Court applied the legal test for regulatory jurisdiction, established in the Supreme Court of Canada decision *R. v. Libman*, to determine whether local law applied to the operation of the web site. Pursuant to the test, local legislation and regulations apply where there is a "real and substantial link"

between the offence and the jurisdiction. Previously, the *Office de la langue française* (the "OLF"), the administrative body that oversees the application of the Charter, had adopted an informal policy whereby it applied the Charter to web sites only if the operator had a physical place of business in the Province of Quebec and if it offered goods or services to Quebec residents. The court decision would appear to broaden the application of the Charter beyond the scope of the OLF's policy.

Significantly, the web-site operator had posted a terms of use agreement that "zoned" his services, indicating that they were not available to Quebecers (in an overt attempt to avoid the application of the Charter). The operator had also established (very porous) technological means for preventing some Quebec residents from using his site. Nonetheless, the Court held that Section 52 of the Charter is a public order, and hence that the operator could not contractually circumvent compliance.

The case is significant, because it is a "first" and because it may provide guidance as to how courts apply other statutes of general application to web-site operators.

For more information contact: cmorgan@mccarthy.ca
or see: <http://aixl.uottawa.ca/%7Egqeist/hyperinfo.htm>

FRANCE COURT RULING ON SPAMMING

On 15th January 2002, a French decision regarding unsolicited emails and Internet access providers' ability to stop an Internet user from sending unsolicited emails to other Internet users was rendered in summary proceedings.

The plaintiff had contracted with Liberty Surf and Free in order to obtain access to Internet. The general terms and conditions of use of these access providers prohibited conduct contrary to Internet good practice or netiquette. However, despite such prohibition, the plaintiff had sent unsolicited emails to other Internet users. Consequently, Liberty Surf and Free, after several notices to the plaintiff, decided to cut his Internet accesses. The plaintiff summoned Free and Liberty Surf to re-establish his Internet accesses and claimed compensation for damages.

The Tribunal de Grande Instance of Paris rendered a summary judgement dismissing the plaintiff's request and ruled that internet access providers are entitled to stop their clients access to the Internet if such clients practice spam. It was judged that the plaintiff seriously disrupted the network, thus being a nuisance to Internet users whose mailboxes were too full and who had to delete commercial emails, while bearing the costs and annoyances of such updating process. In addition, the judge referred to the prejudicial effects of spamming, generally considered as an unfair practice by the rules of netiquette. Finally, it was held that the plaintiff had not stopped spamming, despite the access providers' notices of his infringement of the general terms and conditions of use.

The plaintiff was sentenced to pay damages to Free and Liberty Surf on the grounds of abusive procedure.

Since there is no specific French legislation in force preventing spamming, the Tribunal adopted a contractual approach to the issue and referred to the access providers' general terms and conditions of use. It thus admitted that sending unsolicited emails was a breach of netiquette. The French *Tribunal de Grande Instance* of Rochefort-sur-Mer in a decision dated 9th July 1999 had previously ruled that netiquette had a legal value and that users shall comply with the rules of netiquette. Moreover the Supreme Court of Ontario ruled in a judgement dating 9th July 1999 that "sending unsolicited bulk commercial email is a breach of the emerging principles of netiquette, unless it is specifically permitted in the governing contract", thus confirming the enforceability of netiquette rules.

These French decisions are in line with the French draft law on the Information Society. Article 22 of such draft Law implementing Article 6 of

Directive 2000/31/EC on certain legal aspects of information society services in the Internal Market prohibits commercial electronic communications sent to addressees who have specified their objection. In addition, it institutes an obligation for any person sending unsolicited commercial emails to expressly and clearly specify the nature of the promotional message (discounts, premiums and gifts, promotional competitions and games) so that the addressee may unambiguously identify it as a commercial message. Moreover, the addressee shall have the possibility to refuse the promotional mail and shall be informed of the procedure to follow.

The French decisions are also in accordance with the Proposal Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector that adopts a similar opt-in approach, prohibiting spamming except with respect to subscribers who have indicated that they are willing to receive unsolicited emails for direct marketing purposes.

For more information please contact: fperbost@kahnlaw.com
or slipovetsky@kahnlaw.com

10. INTELLECTUAL PROPERTY

AUSTRIA COURT RULING ON COPYRIGHT IN WEB SITES

In its decision 4 Ob 155/01 z, dated 10th July 2001, the Austrian Supreme Court decided on the protection of an Internet appearance under Austrian copyright law. The plaintiff, a web designer, developed a web site for the purpose of advertisement for the rental of houses in the Caribbean and claimed copyright protection for the web site as a whole as well as for its components.

The Supreme Court examined whether the web appearance was to be qualified as a database, i.e. a collection of independent works, data or other material arranged in a systematic or methodical way and individually accessible by electronic or other means, and as such protected by section 40f subsection 1 of the Austrian Copyright Act. The Court held that an Internet appearance is the combination of a number of web sites linked to each other, each of them consisting of data such as pictures, graphics, music and text. Irrespective of whether such data are protectible as work under Austrian copyright law, the Court decided that each web site as such may be protected as work under copyright law. It cannot by itself, however, be qualified as a database, because its components (i.e. pictures, graphics, text, etc) are not individually accessible. The collection of web sites, which are linked to each other, can, however, constitute a database within the meaning of a Copyright Act, if its components, i.e. the individual web sites, are arranged in a systematic or methodical way and are individually accessible (by a mouse click). Due to this systematic and methodical arrangement the Court decided that the internet appearance in the case at hand was original (because it constituted the web designer's own intellectual creation) and consequently granted copyright protection.

For more information see: www.medien-recht.com

CANADA SIGNIFICANT DECISION ON COMPUTER PROGRAM COPYRIGHT

On Friday 1st March 2002, Ontario's Court of Appeal released its decision regarding the entitlement to copyright in computer program software in the

case involving Delrina Corporation (carrying on business as Carolian Systems) v. Triolet Systems Inc and Brian Duncombe. McCarthy Tétrault LLP successfully represented Brian Duncombe and Triolet Systems Inc. in the first appellate level decision in Canada dealing with ownership of copyright in computer software.

In the mid-1980s, Duncombe wrote the software for a performance monitor program for Carolian Systems (since acquired by Delrina). After leaving Carolian and forming his own company, Triolet Systems, he developed a performance monitor for Hewlett Packard and wrote the software for Triolet's program.

Carolian Systems sued Duncombe and Triolet, claiming that in creating his own programs, Duncombe had copied its software, therefore infringing on Carolian's copyright. Carolian obtained an interlocutory injunction that in effect, prevented Triolet and Duncombe from entering the lucrative market for performance monitors from 1987 until the conclusion of the trial in 1993. After trial, Triolet and Duncombe received a finding that they had neither copied Carolian's software nor infringed its copyright, despite Duncombe being the author of similar programs for Carolian and Triolet. A separate trial was held in 1998 to determine the damages suffered by Triolet and Duncombe as a result of the injunction. They were awarded damages of approximately CAD 6,9 million. Together with interest and legal costs, the total amount of the award is approximately CAD 12 million. The Court of Appeal upheld both the liability and the damages judgements in full.

The outcome of this judgement will be significant for Canada's technology industry as it compels technology companies to acknowledge that there are considerable limitations to the entitlement to claim copyright for computer programs and software. The court reasoned that, because the computer programs were not purely artistic creations, but designed to accomplish a technical and commercial purpose, much of their content would be expected to be similar rather than unique. This functional purpose diminishes the extent to which copyright can attach to either program.

For more information contact bsookman@mccarthy.ca or see: <http://www.ontariocourts.on.ca/decisions/2002/march/delrinaC30375.pdf>

COLOMBIA ON THE WAY TO ACCEPT TM EXTRA- TERRITORIALITY PRINCIPLE

According to a declaration by the Supreme Court of Justice (Supreme Court of Justice of Colombia, 8th February 2002), commercial globalisation and liberalisation have made the principle of trademark territoriality traditionally applied in Colombia unworkable.

This body explained that international treaties signed by Colombia to protect intellectual property should no longer be interpreted on the basis of this principle, because this has propitiated international piracy of trademarks.

The Court made this statement on reviewing and declaring null a ruling of the Appellate Court of Bogotá. According to this court, the owner of French trademark Louis Vuitton had no rights in the mark in Colombia because another person had registered it in this country.

The owner of trademark Louis Vuitton in France took this ruling to the Supreme Court of Justice, considering that it was violating his commercial rights due to a wrongful interpretation of the Colombian-French Convention of 1901, approved under Decree 597 of 1904.

Indeed, the Appellate Court deemed that this Convention should be interpreted in the light of territoriality, and therefore, the trademarks should meet all the legal requirements established in the other country in terms of protection.

The owner of trademark Louis Vuitton, in turn, claimed that the Convention should be interpreted under a more open extra-territoriality criterion that would accept the protection of trademarks registered in another country.

The Supreme Court of Justice accepted Louis Vuitton's interpretation. It stated that the wording of the Convention should be interpreted taking into account "prevailing economic conditions, given that provisions must be interpreted according to the reality of the times in which they will be applied, which implies a valid extra-territoriality projection that renders compulsory the granting of the claim; otherwise the efficacy of the treaty would be denied.

For more information please contact: cavelier@cavelier.com

EU HARMONISED RULES FOR INVENTIONS USING SOFTWARE PROPOSED

In February the European Commission unveiled a proposal for a directive on the protection by patents of computer-implemented inventions (the "Proposal").

The purpose of the Proposal, which follows extensive consultations undertaken since 1997, is to harmonise the way in which national patents laws deal with inventions using software and to thus implement a clear and uniform legal environment for enterprises.

The proposal achieves this goal by distinguishing between different types of inventions namely between the operations involving the use of a computer program and computer programs "as such".

The former which imply a "technical contribution", i.e. which contribute to the "state of the art" in the technical field concerned, would be eligible for patents under the Proposal.

On the other hand, any invention that was concerned solely with the nature of data or the way in which a particular application operated on data would not make a technical contribution and so would not be protected by a patent.

The requirement for a "technical contribution" is fully consistent with the European Patent Convention.

However, as certain inconsistencies remain between the two texts the Commission will consider taking action to resolve this problem once the directive is adopted.

The Proposal will be submitted to the EU's Council of Ministers and the European Parliament for adoption under the so-called 'co-decision procedure.

The full text in English of this Bill can be access at: http://www.europa.eu.int/comm/internal_market/en/indprop/com02-92en.pdf

For more information contact: LE_GOUEFF@vocats.com

GERMANY STUDY ON SOFTWARE PATENTING

With the prospect of future trend-setting decisions on the European level the Federal Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Technologie*, BMWi) has presented a study regarding the need for changes in regulation of software patenting. The study conducted by the *Fraunhofer* - Institute for Systems and Innovation Research and the Max-Planck-Institute for Foreign and International Patents comes to the conclusion that radical changes in existing regulation-models are currently not necessary in Germany. Therefore, it recommends not following the US model of patenting software.

The study analyses the current situation of the German software industry and its demands with respect to future legal policy. Furthermore, all relevant decisions of US-American courts as well as German courts regarding patenting of software were taken into account in the study. The study's main conclusion is that developments in the software area are mainly influenced by the particular dynamics of the segment and the software market. Even though novelties and new products do not appear to be more frequent than in other industries, innovations and developments in general seem to be more prevalent and important than in other service sectors.

According to the study, industrial property rights are still not very common in the German software industry, but are increasingly gaining in importance. Small companies, in particular, still lag behind in their ability to deal with intellectual property rights.

Another question raised by the study concerning the patentability of software programs could not be answered clearly due to contrary decisions of German courts. Currently, the patentability of computer programs can only be affirmed for programs connected with engineering sciences. Even if the study sees strategic benefits in software patenting with respect to international competition, it does not recommend following the American trend in laying down rules for patentability. On the other hand, the existing legal basis is unsatisfactory. Therefore, the authors of the study believe legal regulations should be introduced that codify general guidelines determining the criteria for software patentability. In consideration of future changes in legal, economic and technical circumstances these guidelines should be revised and updated each year.

Recently, the European Commission has announced that inventions based on software should be trademarked by standardised European law. This proposal has now been codified in a proposal for an EC Directive, the preparation of which took more than 5 five years of negotiations and consultations. The directive has still to be approved by the European council of ministers and the European parliament and is expected to be enacted as law within the next few months.

For more information see: www.bmwi.de, www.n-tv.de/2944959.html and <http://europa.eu.int>

LEBANON EURO-MED PARTNERSHIP: MAJOR OVERHAUL IN IP LAW

In the course of February 2002, Lebanon initiated the Agreement to join the European/Mediterranean (Euro-Med) Partnership.

Obviously, Intellectual Property related issues were amongst the most discussed concerns of both Lebanon and the EU. The outcome of these negotiations was the undertaking by Lebanon to ensure adequate and effective protection of intellectual, industrial and commercial rights in conformity with the highest international standards, including effective means of enforcing such rights. The parties, however, took into consideration the particularities of the Lebanese legal system, as well as grace periods that would be required to achieve the stated goals.

In general, the said protection will be provided through a series of measures, so that by the end of the fifth year after the entry into force of the Partnership Agreement, Lebanon shall have ratified the revisions of:

- the Paris Convention for the Protection of Industrial Property;
- the Bern Convention for the Protection of Literary and Artistic Works; and
- the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.

- Moreover, and by the end of the fifth year after the entry into force of the Partnership Agreement, Lebanon will have acceded to the following multilateral conventions:
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome 1961);
- Patent Co-operation Treaty (Washington 1970, amended in 1979 and modified in 1984);
- Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1977 modified in 1980);
- Protocol to the Madrid Agreement concerning the International Registration of Marks (Madrid 1989);
- Trademark Law Treaty (Geneva 1994);
- International Convention for the Protection of New Varieties of Plants ("UPOV") (Geneva Act of 1991); and
- Agreement on trade-related Aspects of Intellectual Property, Annex 1 C to the Agreement establishing the World Trade Organisation ("TRIPS", Marrakesh 1994).

Also, both Lebanon and the EU will make every effort to ratify the following multilateral conventions at the earliest possible opportunity:

- WIPO Copyright Treaty (Geneva 1996); and
- WIPO Performances and Phonograms Treaty (Geneva 1996).

Finally, it should be mentioned that, in addition to the above measures which are intended to provide protection for owners of Intellectual Property rights, Lebanon must bring substantial modifications to its legislation in order to comply with European requirements related to ensuring free competition, as understood through Article 81 of the Rome Treaty (Article 35 of the Partnership Agreement).

For more information please contact: leila@alemlaw.com

THE NETHERLANDS KAZAA FILE SWAPPING SOFTWARE DECISION

In issue 12 of "the l.i.n.k.", we described the Dutch court order of Thursday 29th November 2001.

Transfer of assets

After this court order Kazaa unexpectedly sold its main assets to Sharmar Networks, an Australian based company, which now operates the Kazaa service.

Enforcement proceedings

Kazaa disputed the execution of the court order.

The President of the Amsterdam court has decided that since the continued existence of Kazaa's web site has at least also the effect that potential users of this software can provide themselves with that software via the web site, the maintenance of that web site implies in any case the threat that the number of users of Kazaa's system will increase, hand in hand with the number of infringements of copyrights of third parties.

This alone justifies a ban on the use of the web site, unlike Kazaa's statement that Buma/Stemra abuses its rights by forcing Kazaa at this moment to close down its web site.

It also considers that, in contrast the opinion held by Kazaa, the applicator of the system of IP-mapping, which makes the web site of Kazaa only accessible to computer users in foreign countries, will not result in no more copyright infringements taking place in the Netherlands by means of Kazaa's system. Any foreign potential user can therefore make use of the repertoire represented by Buma/Stemra in the Netherlands, namely by fetching the required software on the web site of Kazaa in the Netherlands and, with the help of it, using the copyright-protected works that are offered in this country.

None of this alters the fact that the order given by judgement of 29th November 2001 also has an effect with regard to copyright owners who are not represented by Buma/Stemra. However, this is the inevitable effect of the worldwide Internet, and of the system of Kazaa that makes use of it.

The president of the Amsterdam court rejected Kazaa's claims.

Article 50-6 TRIPs (article 260 Code of Civil Procedure)

Furthermore, Kazaa claimed that the restrictions of the order of 29th November 2001 must be lifted, as Buma/Stemra did not initiate proceedings on the merits of the case in time, as required under article 50-6 TRIPs (and article 260 of the Dutch Code of Civil Procedure). The President of the Amsterdam Court lifted the restrictions as of 18th February 2002.

Since the day after the decision Kazaa's web site has been providing software to download music-files.

The oral hearing in appeal proceedings (of the 29th November 2001 judgement) took place on 27th February 2002. Judgement is expected to be rendered on 28th March 2002.

We hope to come back to this in the next issue of "the l.i.n.k."

For more information please contact: martine.de.koning@kvdl.nl

11. MEDIA

BRAZIL

FOREIGN INVESTMENT BARRIERS TO BE LIFTED

On 26th February 2002, the House of Representatives approved, at its second reading, the proposal for an amendment to article 222 of the Brazilian Constitution, which would permit foreign investment in journalistic and broadcasting companies up to the limit of 30 % of the corporate capital.

The proposal is now before the Senate, where it must be approved in two rounds at the plenary session before being enacted.

For more information please contact: rapdecunto@pinheironeto.com.br

NEW ZEALAND

DISCUSSION ABOUT DIGITAL BROADCASTING

In December 2001, the New Zealand Government released a discussion document on digital television (the "Discussion Document") to solicit views on the implications of digital broadcasting in New Zealand. The Discussion Document recognises that over the next decade digital broadcasting will replace analogue format, and asks what role the Government should have, if any, in facilitating this transition. The Discussion Document is not a detailed technical discussion of digital television broadcasting.

In the Discussion Document, issues relating to digital television are broadly categorised as follows:

- Availability of digital signals (including whether the Government should prescribe which technology or technologies should be used, what spectrum should be allocated to make digital services possible, how and when spectrum should be made available, and whether the Government should set a switch-off date for analogue broadcasting);
- Viewer access to digital content (including whether the Government should require "open access" reception systems and whether minimum coverage levels should be mandated); and
- Implications for related Government policies (including the Government's strategy for the state broadcaster Television New

Zealand, non-commercial and regional television broadcasting, the promotion of local content and special interest programming, and broadcasting by Maori – New Zealand's indigenous people).

The Discussion Document is a useful overview of the current state of the New Zealand television industry, the various technology choices, spectrum allocation problems and competition law issues in relation to digital television. The Discussion Document also briefly summarises the policy decisions made in Australia, Canada and the United Kingdom.

The Government has sought responses from interested parties to a number of questions which will be taken into account as the Government develops policy in this area.

For full text of the Discussion Document see:

<http://www.med.govt.nz/pbt/broadcas/digitaltv/>

For more information contact: david.boswell@bellgully.com

12. NUMBERING

BELGIUM

MOBILE CALL INTERCEPTION

The Ministerial Decree of 31st January 2002 provides for the specific details of the mobile call interception obligation for mobile operators. The mobile call interception service is a precursor of mobile number portability.

The mobile call interception service obliges any mobile operator to allow a mobile user changing from one Belgian mobile network to another, to activate a system by which all callers to an old mobile number can obtain the new mobile number by dialling a free number (0800). The call interception service must be activated within 24 hours after the user's request and offered without charge for three months after the user has left the mobile network.

The Ministerial Decree further provides that all traffic related charges (such as interconnection charges) for calls from fixed operators to mobile numbers for which a call interception service has been activated and to the free 0800 number on which new mobile numbers can be obtained, are at the mobile operator's charge.

The Ministerial Decree entered into force on 20th February 2002. The obligation to offer the free call interception service expires with the entry into force of the mobile number portability.

The Ministerial Decree can be retrieved via the search engine of the official Belgian gazette on <http://moniteur.be>.

For more information please contact: gerrit.vandendriessche@altius.com

13. PROTECTION OF PRIVACY

BELGIUM

MP3 WEBSITE SCANNING CONTRARY TO PRIVACY LAWS

IFPI Belgium, an association representing the interests of the Belgian phonographic industry, used a software tool to detect and identify Napster users offering illegal MP3-songs of Belgian artists via the Napster system. With the software tool, IFPI Belgium could obtain the IP numbers of such Napster users. IFPI Belgium transferred these IP numbers to Belgian ISPs.

who then requested their subscribers to stop offering illegal music and to delete all illegal music from their hard disk. If the Napster user continued offering illegal MP3 files, IFPI Belgium filed complaint with the judicial authorities.

The Belgian privacy commission recently published an advice (44/2001) in which it is of the opinion that this "pursuit" of Napster users by both IFPI Belgium and ISPs is contrary to Belgian privacy laws. According to the privacy commission, IP numbers are to be considered as personal data and information with respect to intellectual property infringements is to be considered as judicial data.

The commission therefore upheld the ruling that IFPI Belgium should limit the processing to personal data that are publicly available on the Internet (such as nicknames and names and dates of downloaded files) and start legal proceedings on the basis of these data. IFPI Belgium should refrain from processing personal data in a general way without any link to a judicial procedure. The privacy commission is further of the opinion that the communication of personal data by the ISPs to IFPI Belgium outside the scope of a judicial procedure, is also illegal.

The privacy commission's advice can be retrieved via the privacy commission's database on http://194.7.188.126/cgi_juris/jurv.pl.

For more information contact gerrit.vandendriessche@altius.com

14. TAX

BRAZIL NEW TAX RATES FOR TELECOM AND COMPUTER PRODUCTS

On 14th December 2001, the Federal Executive Branch issued Decree No. 4056 changing the rates of the Tax on Manufactured Products (*Imposto sobre Produtos Industrializados - IPI*) due on telecommunications and computer products. The Decree provides for different tax rates ranking from 0 % to 15%.

For more information please contact: rapdecunto@pinheironeto.com.br

EU LEGAL FRAMEWORK FOR THE USE OF ELECTRONIC INVOICING

A Council Directive 2001/115/EC of 20 December 2001 has amended the Sixth Directive 77/388/EEC on the harmonisation of the application of Member State's law relating to turnover taxes. The Directive establishes a legal framework for the use of electronic invoicing to enable tax administrations to continue to perform their controls. In order to ensure that the internal market functions properly, the Directive draws up a list, harmonised at community level, of the particulars that must appear on invoices for the purposes of value added tax.

It establish a number of common arrangements governing the use of electronic invoicing and the electronic storage of invoice, as well as for self-billing and the outsourcing of invoicing operations.

For more information see: <http://europa.eu.int>
or contact: LE_GOUEFF@vocats.com

15. TELECOMMUNICATION

AUSTRIA REGULATION OF MVNO

In two decisions dated as of 28th January 2002 (Z 18/01 and Z 25/01), the Austrian regulatory authority *Telecom-Control-Kommission* developed the regulatory framework for the entry of Mobile Virtual Network Operators ("MVNOs") to the Austrian GSM-market.

The regulator defined an MVNO as an operator offering a mobile service without an allocation of the necessary frequency spectrum. The MVNO gains access to such frequency spectrum on the basis of a National Roaming Agreement with an established mobile network operator.

The two cases handled by the regulator concerned the question of whether a licensed UMTS-operator is entitled to request interconnection with GSM mobile operators in order to offer GSM-services (too).

Although the regulator found that a MVNO couldn't be qualified as an operator of a network (neither in the mobile, nor in the fixed network area), it nevertheless granted the interconnection request.

The regulatory authority based its decision on section 49a paragraph 9 of the Austrian Telecommunications Act ("TKG") under which licensed UMTS-operators who do not (also) hold a GSM-license have an enforceable right to access GSM-frequencies (via a National Roaming Agreement) after they have started their UMTS network operations and have reached a UMTS network coverage of at least 20%.

Even though the wording of this provision only covers the conclusion of a National Roaming Agreement, the regulator assumed a brought interpretation of this clause and held that it also entitles the MVNO to request interconnection of its core network with the mobile networks of third operators.

Otherwise, according the regulator, such third operators could prevent the MVNO's entry into the GSM-market.

This reasoning of the regulator is questionable, since the authority did not refer to the above outlined conditions of an MVNO's right to request access to GSM-frequencies, i.e. the commencement of UMTS-network operator and a UMTS network coverage of 20%.

In the cases at hand, the applicant MVNO had in fact not even started with the construction of its UMTS-network.

The regulator therefore patently did not take into account the legislator's primary purpose behind section 49a paragraph 9 TKG which is to intensify competition in the UMTS infrastructure area. Therefore, in the opinion of the MVNO's opponent parties in the cases at hand, the regulator was not empowered to issue the interconnection order before the MVNO had fulfilled its UMTS infrastructure obligations as set out in sec 49a paragraph 9 TKG.

The full text of the decisions can be accessed at www.rtr.at

BELGIUM INTRODUCTION OF UMTS POSTPONED

Pursuant to the UMTS licenses granted to the three Belgian mobile operators (Belgacom Mobile, Mobistar and KPN Orange), UMTS should be introduced by mid-September 2002.

The mobile operators requested the Belgian government to postpone the introduction of UMTS. The mobile operators argued that the September 2002 deadline could not be reached because of the delay in the supply of

the UMTS network, the absence of suitable UMTS handsets and the delay in obtaining the necessary permits for building antenna sites.

The Belgian minister of telecommunications allowed the three operators to postpone the introduction of UMTS until September 2003. All obligations with respect to the rollout of network coverage were also postponed for one year.

Meanwhile, the fourth UMTS license that was also available for auctioning has still not been granted to any operator.

For news concerning the Belgian telecommunications market, please check the web site of the Belgian national regulatory authority at www.bipt.be or contact gerrit.vandendriessche@altius.com

BRAZIL WIRE LINE INCUMBENTS TO OBTAIN COMPLIANCE CERTIFICATES

The wire line incumbents privatised in 1998 undertook to fulfil certain universalisation targets by no later than 2003.

Until the targets were met, the incumbents, their controlling, controlled and affiliate entities could not be granted a license to perform any kind of telecommunications services.

This restriction could be lifted, however, if the 2003 targets were met by the end of 2001.

Accordingly, speeding up the compliance with the universalisation targets became a matter of key importance for groups like Telefonica and Telecom Italia wanting to expand their presence in Brazil in the wire line, wireless and data transmissions business.

Compliance must be certified by Anatel by means of a procedure that includes submission of a report for comments by the public. Telefonica and Sercomtel were the first wire line incumbents to obtain a compliance certificate from Anatel (Acts No. 23.395 and 23.578 of 2002, respectively).

Telefonica, which operates in the Brazilian State of São Paulo as *Telecomunicações de São Paulo S.A. – Telesp*, may now apply for domestic and international long distance licenses originated in that State (see issue 12 of "the l.i.n.k." for additional information on new wire line licenses in Brazil). Telemar and Embratel are two other incumbents seeking certification from Anatel. Brasil Telecom, an incumbent in which Telecom Italia holds a controlling interest, has chosen not to bring its 2003 targets forward to 2001.

For more information please contact: rapdecunto@pinheironeto.com.br

EU NEW REGULATORY FRAMEWORK FOR E-COMMUNICATIONS SERVICES

The European Union's Council of Ministers approved on 14th February 2002 most of the texts constituting the new regulatory framework for electronic communications services.

The following directives and regulation are in the scope of the new regulation:

- Framework Directive;
- Access and Interconnection Directive;
- Authorisation Directive;
- Universal service Directive;
- Data protection Directive;
- Consolidated Directive on Competition in the market for communications services; and
- Regulation on unbundled access to the local loop.

All these texts, except the directives concerning data protection and local loop unbundling were approved.

Now, Member States have 15 months to implement the approved package into their national laws, helped with some guidelines and recommendations the Commission will shortly issue with respect to the implementation of this new package.

This new framework consolidates various existing directives into a single package that applies to all telecommunications and Internet services in the European Union.

This package is the result of the Commission's proposition, in July 2000, of a set of measures for a new regulatory framework for electronic communications networks and services. The set consists of 7 directives whose final purpose is to set forth coherent and harmonised rules for electronic communications networks and services in order to ensure that a minimum of services are available to all users at an affordable price and that the basic rights of consumers continue to be protected.

The texts can be found at the following addresses:

- Framework Directive:
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#reg;
- Access and Interconnection Directive:
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#acc;
- Authorisation Directive:
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#auth;
- Universal service Directive:
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#us;
- Data protection Directive:
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#dp;
- Consolidated Directive on Competition in the market for communications services:
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#art86; and
- Regulation on unbundled access to the local loop:
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#ull.

For more information please contact: LE_GOUEFF@vocats.com

HONG KONG NEW CODE OF PRACTICE FOR IN-BUILDING SYSTEMS

On 8th February 2002 the Telecommunication Authority ("TA") issued a new Code of Practice relating to the powers that the TA has granted to fixed telecommunications network ("FTNS") operators to install and provide in-building telecommunications systems ("IBTS").

IBTS include telecommunications equipment, cables and relevant facilities in, over or upon any common parts of a building for the conveyance of telecommunications and broadcasting services to the occupiers of the building.

The Code of Practice states the requirements and practice that the FTNS operators should comply with and adopt for the access to buildings, the installation works, and the maintenance of IBTS once installed. It applies to the FTNS operators who have been granted with authorisation by the TA to access buildings under section 14 of the Telecommunications Ordinance.

The Code of Practice deals with several issues such as the communications required with the building management prior to and during

installation and maintenance, the information that may need to be given to the Office of the Telecommunications Authority ("OFTA") relating to the equipment to be installed, guidelines for general best practice in relation to installation and maintenance works, the technical requirements for installed equipment, and the degree of sharing of the installed equipment that should be practised by FTNS operators.

The TA has indicated that OFTA must on request be informed of ongoing installation works and may conduct sample inspection of the installations from time to time. OFTA may request rectification of non-complying works found on such inspections, if appropriate.

The Code of Practice is subject to amendments by the TA from time to time following consultation with the affected FTNS operators.

For further information please contact dae@jsm.com.hk

HONG KONG GUIDELINES FOR SPACE STATION CARRIER LICENCES

The Telecommunications Authority ("TA") on 1st February 2002 issued, in Hong Kong, Guidelines relating to applications for Space Station Carrier Licences. These are required for the establishment, maintenance, possession or use of (i) earth stations for telemetry, tracking, control or monitoring of space objects; and (ii) space stations for radio-communications, and/or for telemetry, tracking and control of space objects. It should be noted that a space station need not be manned to fall within the licence requirements.

Applications for Space Station Carrier Licences would normally only be accepted from companies registered in Hong Kong. In addition, the information required for a Space Station Carrier Licence application includes details of the applicant's financial capability and backing, managerial strength, technical competence, and details of the proposed technologies to be employed. The applicant may be required to pledge a performance bond before grant of a licence, the form, amount and conditions of which will be determined by the TA based on each applicant's circumstances. Licences will be granted for a 20-year period, upon payment of an application fee, and an annual renewal fee will be charged. Any existing Space Radio-communication Telemetry, Tracking, Control and Monitoring Station ("TTC&M") licences (the predecessor to the Space Station Carrier Licence) will remain valid until the expiry date of the licence, or until the satellite is retired. Upon expiry, the licensee will need to apply for a Space Station Carrier Licence to replace the TTC&M licence, or alternatively a TTC&M licensee may apply for a replacement Space Station Carrier Licence at any time prior to expiry of the TTC&M licence.

JSM is able to provide advice on, and assistance with, applications for Space Station Carrier Licences or replacement of existing TTC&M licences.

For further information please contact dae@jsm.com.hk

IRELAND FRAMEWORK FOR NEW SMS SERVICES

On 28th January 2002, Irish Telecommunications Regulator, the ODTR, issued a paper on the provision of new and enhanced SMS services following a consultation process which commenced in October 2001. 9,000 new 5 digit short codes will be made available in two phases to operators and service providers on a lottery basis. These codes will facilitate higher quality and more rapid services. It is envisaged that new services will include:

- event-driven content;
- travel information;

- business and commerce applications;
- ring tone downloads;
- gaming;
- competitions; and
- location information.

Response to consultation can be viewed on the ODTR web site at www.odtr.ie, "A Framework for Value-Added Text Messaging (SMS) Services"

IRELAND NEW BILLS BEFORE THE PARLIAMENT

There are two bills relating to telecommunications before the Parliament:

- Digital Hub Development Agency Bill 2002
The Bill provides for the establishment of the DHD Agency. The main function of the Agency is to promote and facilitate the development of a defined area in Dublin (the "Digital Hub") as a location for digital enterprises and related activities. This will also entail the formulation of strategies to encourage digital enterprises to locate in the Hub and the procurement by the Agency of the technical and communications infrastructure. In addition the Agency will prepare a Development Plan estimate the cost of its implementation, identify possible funding options and oversee and manage the implementation of the Plan.
- Communications Regulations Bill 2002
The main purposes of this Bill are to create a Commission for Communications Regulation, dissolve the Office of the Director of Telecommunications Regulation and transfer its functions to the Commission, increase penalties for breach of certain offences and provide for the improved management of public roads opening for the purpose of laying telecommunications infrastructure.

These bills may be viewed on the Irish Government Web site at: www.gov.ie/oireachtas/frame.htm

MEXICO DRAFTING OF NEW FEDERAL TELECOMMUNICATIONS LAW

The Ministry of Communications and Transportation through the Under-secretary of Communications Mr. Jorge Alvarez Hoth, has been active in the parliamentary conference that has been arranged within the Mexican Congress by representatives of the three major political parties to listen to the industry's concerns on the issues that, from their perspective, need to be addressed by the legislators in the drafting of the new law. Foreign investment, universal service, dominant carrier regulations and the autonomy of the Mexican Federal Telecommunications Commission ("COFETEL") have been at the top of the agenda for several months.

The parliamentary conference is now involved in seeking to contract independent counsel to review the draft that will be submitted to Congress and seek to eliminate any loopholes or inconsistencies that may give way to the filing of *amparos* (i.e. the protection of the Federal justice for the violation of constitutional rights) against the application of the new law, once the same is enacted.

For more information see: www.cdhcdgob.mx
or contact: aam@bstl.com.mx

MEXICO

MEXICO TO APPEAR BEFORE A WTO PANEL

On 13th February 2002, the United States asked a dispute settlement panel to rule on a U.S. complaint that Mexico has failed to open its cross-border telecommunications market. The fundamental argument put forward by the U.S. is that the Mexican government has taken several measures to stifle price competition in cross border telecom services as reflected by the international settlement rates between the two countries. The Mexican government has been officially notified of the procedure that could commence as early as April of this year. On the merits of the U.S. claim, Mr. Jorge Arredondo, President of the Mexican Federal Telecommunications Commission ("COFETEL") has indicated that settlement rates are not part of the commitments that the Mexican government assumed before the WTO on telecom services. In support of this position, officials of ex-President Zedillo's administration, have expressed that the U.S. has no merits to its claim and that, in fact, Mexico has lost between USD 600 and 800 million in the past five years as a result of the continuous drop in settlement rates between the two countries. Others in the industry even argue that a claim should be filed by Mexico against the U.S. before the WTO Panel as the latter has not allowed Telmex entry into the U.S. market.

For more information see: www.cft.gob.mx
or contact aam@bstl.com.mx

NIGERIA

PRIVATISATION OF NIGERIAN PTT RUNS INTO TROUBLED WATERS

The privatisation of Nigeria's PTT, Nigerian Telecommunications Limited ("NITEL"), seems to have run into troubled waters with the inability of the Preferred Bidder, Investors International (London) Limited ("IILL"), to pay the outstanding 90% successful bid amount. IILL had emerged in November 2001 as the Preferred Bidder, with the bid sum of USD 1.317bn for its planned 51% equity stake in the Company. 10% of this amount – USD 131,700,000.00 – was paid within the regulation time of 2 weeks from the execution of transaction documents, leaving the outstanding balance, due and payable within 90 days thereafter.

Unfortunately, on the due date of 11th February 2002, IILL defaulted on the payment of the outstanding balance and requested an extension period of 6 weeks from Nigeria's privatisation agency, Bureau for Public Enterprises ("BPE"), within which to make good its obligation. BPE duly granted the request and Nigerians are currently anxiously waiting to see whether or not IILL will pay the outstanding balance of USD 1,185,300,000.00 on the due date of 27th February 2002. The Information Memorandum for the sale is not quite clear on what the penalty would be should IILL default again on its payment obligations, but BPE says that it is working on several back-up scenarios in that event.

Meanwhile, the Nigerian Communications Commission ("NCC") is proceeding full steam ahead with its licensing programmes for Fixed Wireless Access and a Second National Operator ("SNO") licence.

The SNO licensing programme was, at the instance of BPE, sequenced by the Federal Government of Nigeria to come after the conclusion of NITEL's partial privatisation.

With the hiccups in the NITEL privatisation, some have suggested that the SNO licensing project should be deferred accordingly.

So far, there is nothing to suggest a deferred timetable for the programme and going by the published schedule, interested organisations for the SNO licence will submit their Application documents on Tuesday 26th March 2002 – a day before the IILL payment deadline.

For more information please contact: paul@paulusoro.com

UK

LOCAL LOOP UNBUNDLING

On 11th February 2002, OfTel published a review of the charges for metallic path facilities and internal tie circuits. With effect from 31st December 2001, OfTel established charges for BT's copper loops and related facilities. These charges will cease to apply from 31st March 2002. The review sets out OfTel's proposals to continue in effect its original decision establishing local loop charges.

OfTel's review examines the take-up of loops by other operators. BT argued that the limited take-up meant that the OfTel price for loops did not allow it to recover its costs.

Although the take-up of local loop services has not been substantial, OfTel considers that now the regulatory framework for the unbundling of the local loop is in place, take-up should increase.

OfTel has decided, subject to consultation, to continue in effect the charges as originally determined. The issue of cost recovery will be reconsidered when more information is available but OfTel sees no reason on the current charge levels why BT would not eventually recover its costs.

If, however, this situation changes based on new information, OfTel will examine again the possibility that BT may ultimately be under-recovering for its costs.

Further information on local loop unbundling in the UK can be found at: <http://www.olswang.com/telecoms>

UK

RECIPROCAL CALL TERMINATION RATES

On 5th March 2002, OfTel issued a final direction relating to a dispute between various operators and BT concerning reciprocal call termination charges payable by BT. BT proposed a new agreement for reciprocal charging, made on 13th July 2001, which distinguished between single-switched status operator ("SSO") where calls are routed directly to an end-user and multi-switched status operator ("MSO") where calls are routed via a number of switches to an end-user.

MSO termination rates had not yet been agreed and BT proposed that it would pay to MSO operators the lower SSO rates until agreement was reached.

The direction provides that the operators who complained, such as C&W and Telewest, who are MSOs, should not be required to sign the new agreement. Once agreement is reached, the termination rate can be applied retrospectively from the date of agreement. A number of other operators, who were mainly SSOs, were also disputing BT's proposals or had not responded to them. The direction requires these operators to sign up to BT's proposals.

Further information on reciprocal termination rates in the UK can be found at: <http://www.olswang.com/telecoms>

UK

BT CELLNET AND VODAFONE: REMOVAL OF MARKET INFLUENCE

On 5th March 2002, OfTel issued a draft decision to remove the determination of Market Influence applicable to each of BT Cellnet and Vodafone. Based on OfTel's review of the UK mobile market, OfTel considers that BT Cellnet and Vodafone no longer have sufficient market

influence to justify continuing in force the obligations that attach to having Market Influence.

Market Influence is addressed by Condition 56 in the standard form Mobile Public Telecommunications Operator. The concept relates to the market position in the relevant market of the licensee. The consequence of a finding of Market Influence is that the licensee will be required to do the following: supply airtime to independent service providers; provide separate accounts; to refrain from showing undue preference or undue discrimination in providing services; and publish terms and conditions, including pricing information. If a Market Influence determination is removed, these obligations will cease to apply to the licensee.

The draft decision is currently the subject of public consultation, which will end on 20th March 2002. Once Of tel has considered any responses to its draft decision, it will make a final decision.

Another consequence of Of tel's review of the UK mobile market was its proposals to adopt price controls for mobile termination rates for all the UK mobile operators. The proposed licence condition which, when in force, would have brought into force the price controls in each licence was not agreed by the licensees. As a result, the proposal has been referred to the Competition Commission under the procedure provided in the UK Telecommunications Act 1984. The Commission is currently investigating the proposals with the aim of producing an issues list, upon which views will be sought.

Further information on the proposed removal of the market influence determination currently in place for BT Cellnet and Vodafone can be found at: <http://www.olswang.com/telecoms>

16. WEB SITES

LU LUXEMBOURG'S LEGAL PORTAL LAUNCHED

Legilux.lu, the legal portal of the Grand-duchy of Luxembourg's Government was officially presented by the Communication Minister in March.

The *Service Central de Législation* (laws central service) was committed to set up this web site, part of the eLuxembourg programme, in collaboration with the *Service des Médias et des Communications* (Media and Communications Service), the *Centre Informatique de l'Etat* (State's Computing Centre) and the *Ministère de la Fonction Publique et de la Réforme Administrative* (Public Service and Administrative Reform Ministry).

The aim of this initiative is to provide free and easy access to all available legal information in Luxembourg for everyone.

Under its current structure, legilux.lu partly regroups data from the *Service Central de Législation* web site, www.scl.etat.lu, and from its two subordinate sites, www.etat.lu/memorial and appl.etat.lu:8895/mesoc/mesoc.home.

The data from these sites were substantially enriched with data from the *Service Central de Législation* itself and from other ministries.

The following information can be found on legilux.lu:

- MEMORIAL (Grand-duchy of Luxembourg's official gazette), *Mémoria* A data from 1990, Official address list, Administrative Code, Environmental Code, Penal Code, etc.);
- MESOC (companies and associations database);
- publications' catalogue;
- draft laws; and
- other useful links and information.

Electronic versions of these documents are available in Adobe Acrobat Reader[®] format and searchable through full-text or key-word type search engines.

In a second phase, which should take place in early 2004, the *Service Central de Législation*, in collaboration with the *Centre Informatique de l'Etat* and a specialised company will enhance the web site to make *Mémoria*'s texts from 1945 available, to keep data up to date day-to-day and make the site more ergonomic.

It is interesting to note that in its final phase, legilux.lu will offer advanced search possibilities, hypertext links to acts, execution decrees and subsequent amendments, as well as co-ordinated texts for important regulations.

For more information contact: LE_GOUEFF@vocats.com

COMMENTARIES

CHILE PERSONAL DATA PROTECTION

by Alfonso Silva (asilva@carey.cl)
and Claudio Magliona (cmagliona@carey.cl)
from Carey y Cia. Ltda.

Personal Data protection in Chile is governed by Law No. 19,628 published in the Official Gazette on 28th August 1999 (the "**Law**"). The Law regulates the processing by public organisations or by private individuals or entities of Personal Data contained in automatic or non-automatic records or data banks, including any operation or group of operations or technical procedures that permit the recollection, storing, recording, organisation, elaboration, selection, extraction, comparison, interconnection, dissociation, communication, assignment, transfer, transmission or cancellation of Personal Data or any use of the same.

Under the Law, Personal Data is defined as "that related to any information concerning identified or identifiable individuals". The Law does not protect legal entities.

SUMMARY OF MAIN PROVISIONS

General Rule

The processing of Personal Data may only be performed when (i) authorised by the Law, by other applicable legal provisions or by an express authorisation of the individual to whom the Personal Data refers (the "**Data Subject**"); (ii) the rights which the Law grants to the Data Subject and the full exercise by it of the fundamental rights provided for in the Political Constitution of Chile are duly respected and (iii) the purposes of the Personal Data processing are allowed by Chilean laws and regulations.

Data Processing without Data Subject Authorisation

The Law authorises Personal Data processing without the authorisation of a Data Subject when: i) the Personal Data are processed by public organisations regarding matters within their respective legal authority and subject to the rules set out in the Law; ii) the Personal Data originate or are recollected from sources available to the public when such data are: x) of an economic, financial, banking or commercial nature, y) contained in listings relating to a class of persons and limited to indicating information such as the fact of belonging to such a group, the person's profession or business activity, education degrees, and address or date of birth, or z) necessary for direct response commercial communications or direct sale of goods and services; iii) the Personal Data are processed by private legal entities for their exclusive use or the exclusive use of their associates and entities which are affiliated to them, for statistical or rate setting purposes or other purposes of general benefit to such private legal entities.

Under the Law "sources available to the public" are defined as "any records or compilations of personal, public or private data to which unrestricted or unclassified access is afforded to any applicant".

Specific Purposes/Accurate and Up To Date Information

Personal Data may be used only for the purposes for which they were compiled, unless they originate or have been compiled from sources available to the public, and Personal Data shall be accurate, up to date and truthful as to the real situation of the Data Subject.

Party Responsible For a Data Record or Data Bank ("Data User")

The party responsible for a data record or data bank is the individual or private entity or the public organisation that must take decisions regarding the processing of Personal Data included therein. The Data User shall perform the deletion, rectification or blocking of data, as applicable, without

any need for the Data Subject to request him/her to do so. In addition, persons who work in the processing of Personal Data, both at public and private organisations, are obligated to keep such data confidential whenever such data originate or have been compiled from sources not available to the public; such persons shall also keep confidential all other data and information related to the data bank. The aforesaid obligations shall not cease when such persons terminate their activities in such work.

Regulatory Body/Registration

The Law does not provide for a regulatory body dealing with Personal Data banks. However, Personal Data banks managed by public agencies must be registered with the National Civil and Identification Register and Personal Data banks managed by private individuals or entities are not subject to any registration or authorisation requirements.

Sensitive Data

Sensitive Personal Data may only be processed if the Law allows it, the consent of the Data Subject has been obtained or such data are necessary for the determination or granting of health benefits to which the Data Subject is entitled. Under the Law, sensitive Personal Data is defined as "any personal data that refer to the physical or moral characteristics of an individual or to facts or circumstances of his/her private life or intimacy, such as personal habits, racial origin, ideologies and political opinions, religious beliefs and convictions, physical or psychological health and sex life.

Personal Data Related to Judgements for Crimes

Public organisations that process Personal Data related to judgements for crimes, administrative violations or disciplinary measures may not disclose such data after the respective statute of limitations for the exercise of the competent action with respect thereto has operated, or the penalty or punishment has been fulfilled or the statute of limitations with respect thereto has operated, except in cases where such information is requested by the courts of justice or other public organisations within the scope of their respective legal authority. These courts and organisations shall keep all such information confidential or secret.

Credit Data

Data Users may only disclose information related to obligations of an economic, financial, banking or commercial nature when such information appears on protested bills of exchange and promissory notes, bank checks protested for lack of funds, checks drawn against a closed bank account or other causes; or, additionally, in case of non-compliance with obligations arising from mortgage loans, or loans or credit granted by banks, finance companies, mortgage loan management companies, savings and loan associations, public organisations and Chilean state-owned companies subject to general legislation, and companies that manage credit granted for purchases of commercial buildings. Information on other monetary obligations, which must be determined by the President of the Republic by means of a Supreme Decree, may also be disclosed. However, no disclosure may be made once 7 years have passed from the time the monetary obligation became due or 3 years after its payment or expiry, as the case may be.

Right to Information or Access/Right of Modification, Blocking, or Elimination/Opt Out.

Any person has the right to demand information on all Personal Data pertaining to him/her, the source of such data and recipients thereof, the purpose for which such data are stored and the identification of all persons and organisms to whom or which such data are transmitted regularly, from whoever is responsible for a data bank dealing publicly or privately in the processing of Personal Data. In case any Personal Data is incorrect, inaccurate, misleading or incomplete and it is so proven, such Data Subject shall have the right to have such data modified accordingly, and may additionally demand that Personal Data referring to him/her be deleted whenever the storage thereof lacks any legal grounds, or such Personal Data have become obsolete. The same demand for deletion or blocking of

data, as applicable, may be made whenever persons have voluntarily provided their Personal Data, or said Personal Data are used for commercial communications and such persons do not wish such data to remain on the respective records and wish it to be removed therefrom either permanently or temporarily.

The above mentioned rights may not be limited by means of any act or agreement.

Exemptions

Notwithstanding the rights mentioned above, information regarding Personal Data and the modification, cancellation, or blocking of such data may not be requested whenever the fulfilment of such request would impede or hinder the due performance of the regulatory and enforcement functions of the public organisation requested to do so or would affect the confidentiality or secrecy afforded or prescribed by provisions of law or supplementary regulation, national security or national interest. Modification, cancellation or blocking of Personal Data stored under lawful binding instructions may not be requested except in those cases contemplated by the applicable law.

Remedies. Habeas Data.

The Law provides that a Data Subject may file a claim before ordinary courts whenever rights regarding his Personal Data are breached. This claim is subject to a fast procedure. There is a possible fine ranging from USD 60 to USD 600.

International transfers of Personal Data

The Law does not restrict international transfers of Personal Data as long as general provisions under the Law are followed.

FINAL COMMENTS

The Law implies a substantial progress in domestic computer legislation and in the protection of individuals' rights with respect to the abuse of personal information. Notwithstanding the foregoing, a potential amendment to the Law must be considered in order to create an independent government agency that will keep a record of public and private data banks and will have the authority to regulate and control and require those responsible for databases to enforce concrete security measures intended to avoid leaks, depending on the nature of the data.

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	MP3 website scanning contrary to privacy laws	PROTECTION OF PRIVACY
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Country	Title	Category
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Country	Title
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