

Click on a table of contents entry to go directly to the desired title.

To return to the table of contents use Ctrl + Home or Ctrl + End.

JULY - DEC 2004

NEWS	2
1. COMPETITION	2
GERMANY BGH: Spam among competitors is anticompetitive	2
2. COMPUTER CRIME	2
SOUTH AFRICA Terrorism in the Information Age	2
3. CONSUMER PROTECTION	2
GERMANY Claim against mobile phone transmitter next to kindergarten	2
4. CONTENT OF INTERNET, AUDIO-VISUAL AND INFORMATION SERVICES	3
AUSTRALIA Internet child sex abuse offences Bill tabled	3
5. CONTRACT LAW	3
COLOMBIA Shareholders' Rights Extinguished If Not Exercised	3
6. DOMAIN NAMES	3
GERMANY Court Tightens Judgment on Use of .ag TLD	3
7. ELECTRONIC COMMERCE	4
GERMANY Court Rules Amazon Violates Book Price Maintenance Act	4
8. FINANCIAL SERVICES	4
NIGERIA Recapitalization in the Banking Industry	4
9. INTELLECTUAL PROPERTY	4
CANADA ISPs Not Liable for Copyright Infringement	4
COLOMBIA Well-Known Trade marks Must Be Registered	4
GHANA Geographical Indications Now Protected	5
GHANA New Trade Marks Act Allows Service Marks	5
ITALY New Electronic Copyright Protection	5
NIGERIA Review of Official Filing Fees	5
10. MARKET ACCESS	5
ARGENTINA New Regime to Promote the Software Industry	5
AUSTRIA Mobile Interconnection	6
11. PRIVACY	6
AUSTRALIA IIA Releases Draft Spam Code of Practice	6
FINLAND New Legislation on Privacy in Electronic Communications	7
GERMANY Illegal to Approach Passers-By for Promotional Purposes	7
GERMANY No Video Surveillance at Work Without Probable Cause	7
NEW ZEALAND Government to Legislate Against Spam	7
12. TELECOMMUNICATIONS	8
CHILE Acquisition of Bellsouth in Chile by Telefónica Móviles	8
GERMANY EU Directive on Communication	8
INDIA Allocation of Spectrum to Mobile Service Providers	9
PORTUGAL New Regulation on Personal Data Processing	9

PORTUGAL Providing electronic communications networks and service	9
PORTUGAL TMDP regulation finally approved	10
13. TRADE LAW	10
GERMANY Provider of online-auctions must ban offers of fake goods	10
FROM THE EDITOR	11
PRIVACY	11
CANADA Erratum	11
COMMENTARIES	11
1. INFORMATION SOCIETY POLICY	11
FRANCE Views about the New Law on Confidence in the Digital Economy	11
2. MEDIA	13
BRAZIL Bill on Movie and Audiovisual Activities	13
CANADA Radio station's licence not renewed	15
3. TELECOMMUNICATIONS	16
UK Recent Regulatory Developments in the UK Telecoms Market	16
EDITOR / EDITORIAL BOARD	19
TABLE OF CONTENTS BY COUNTRY	20

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With the end of the year fast approaching we are also celebrating the fifth anniversary of "the l.i.n.k.". Over the years, we have enriched your review with a better coverage as new Editorial Board Members have joined us and provided us with a coverage of their country. In addition, we have created a dedicated Web site where all past issues may be found: www.thelink.lu. Finally, we have created a search engine capable of retrieving information in a data base now comprising some 1.100 news items.

Nevertheless, we have a lot of work ahead of us as our ambition is to provide a global coverage on Information Society related legal developments with more news and more commentaries so that "the l.i.n.k." can remain a privileged source of information for you.

On behalf of the Editorial Board, let me then take this opportunity to thank you for your continued interest for your electronic publication and to convey our best wishes for 2005.

Stéphan LE GOUEFF
Editor in Chief

Erreur! Argument de commutateur inconnu.

NEWS

1. COMPETITION

GERMANY

BGH: SPAM AMONG COMPETITORS IS ANTICOMPETITIVE

In March the German Federal Court of Justice (BGH) decided that the unsolicited sending of advertisement e-mails infringes good morals of competition and constitutes an unacceptable harassment (File Number: Az. I ZR 81/01). The matter arose in a lawsuit between two Internet service providers who compete against each other. In 1998 the defendant sent over a dozen unsolicited commercial newsletters to several e-mail accounts of the plaintiff.

According to the BGH, due to the marginal operating expenses and complexity of e-mail advertisement it is likely that competitors, who until now did not use e-mail as a source of advertisement, will then imitate this behaviour as they will be forced to so in order to remain competitive.

Amongst other things, advertisement is regarded as unfair if an evident danger exists that this behaviour will broaden and multiply and at the same time lead to unacceptable harassment. Thus, a claim for an injunction pursuant to the Act against Unfair Competition (UWG) does not only encompass the sending of "spam" to the e-mail address of the plaintiff, but also to any recipient under the domain of the plaintiff without his/her prior consent.

Furthermore, the Judges determined that advertisement e-mails can only be sent if the consent of the recipient can at least be implied. Therefore the sender has to use appropriate measures to insure that wrongful sending is avoided, for example, incorrect input or saving of e-mail addresses. The Court held that the sender bears the burden of proof that s/he is permitted to send advertising e-mails to the recipient. The Lower Court had held differently, so the BGH reversed and remanded the case back.

For more information visit : www.heise.de or contact : j.heilbock@taylorwessing.com

2. COMPUTER CRIME

SOUTH AFRICA

TERRORISM IN THE INFORMATION AGE

The Protection of Constitutional Democracy against Terrorist and Related Activities Bill 12 of 2003 (the "Bill") was approved by vote of the National Council of Provinces on 24th February 2004.

The Bill provides an attack on terrorism and activities associated or connected with terrorism by classifying them as offences. The word "terrorism" remains undefined, and the definition of "terrorist activities" is extremely wide in its ambit, that being any act which is designed or calculated to cause serious interference or disruption of an essential service, facility or system. For example, this includes an electronic system, a telecommunication service, a banking or financial service, or a system used to deliver essential government services. It therefore appears that a "terrorist activity" could include virtually any unauthorised

interference with, accessing, or interception of data; computer hacking; and the creation and dissemination of computer viruses, provided that the following three requirements are satisfied:

- it must be any act committed in or outside the Republic which causes certain harm;
- it must be an act which is intended or can reasonably be regarded as intended to cause certain harm; and
- it must be an act which is committed for the purpose of advancing an individual or collective political, religious, ideological, or philosophical motive, objective, cause or undertaking.

Even if the interference with or interception of data in a particular situation does not satisfy all of the requirements for a "terrorist activity" under the Bill, it is possible that it could still qualify as an offence or be unlawful under the terms of the Electronic Communications and Transactions Act 25 of 2002 (the "ECTA"), which deals more specifically with computer-related crimes under sections 85-89.

For more information visit :

<http://www.pmg.org.za/docs/2004/viewminute.php?id=3834>

or contact : peterg@wwb.co.za

3. CONSUMER PROTECTION

GERMANY

CLAIM AGAINST MOBILE PHONE TRANSMITTER NEXT TO KINDERGARTEN

A mobile phone provider may continue to operate an aerial mast next to a kindergarten in the city of Fürth/Bavaria. A lawsuit filed by the city of Fürth against the mobile phone company was been dismissed by the administrative court in April (File number: AN 5 K 03.01040).

The Court ruled that as long as the mobile phone equipment does not exceed the legal critical values, city councils may not refuse permission for the installation of such aerial masts. The city of Fürth considered the aerial mast next to a kindergarten a health risk for children and teachers.

Two more lawsuits against mobile phone aerial masts were dismissed by that same Court. The Court held it to be the duty of the legislature to react to alleged new scientific findings regarding the danger of radiation emitted by mobile phones and to define new critical values.

Earlier, in February 2004, the German Federal Court of Justice (BGH) had to decide in two parallel proceedings, whether and under what circumstances a company can be forced to refrain from operating a mobile phone transmitter due to its electromagnetic fields (File Numbers: V ZR 217/03 and V ZR 218/03).

According to the decision of the BGH, the plaintiffs, who sued mobile phone transmitters in their neighbourhood, may only succeed if they can conclusively prove to the Court an existing health risk through electromagnetic pollution. On that account the BGH dismissed a lawsuit brought by two residents against a mobile phone transmitter fixed on a spire in the town of Bruchköbel/State of Hessen.

The Court reasoned that there is a legally binding duty to tolerate (on the part of the public) if the emissions from the equipment do not cause an adverse effect or the effect is immaterial. The Court further argued that science and research have not yet been able to prove that non-thermal effects of electromagnetic fields result in health damage.

For more information visit : www.heise.de
or contact : j.heilbock@taylorwessing.com

4. CONTENT OF INTERNET, AUDIO- VISUAL AND INFORMATION SERVICES

AUSTRALIA INTERNET CHILD SEX ABUSE OFFENCES BILL TABLED

Legislation targeting sex crimes against children perpetrated via the Internet was introduced in the Australian Senate on 25th June 2004.

The Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004, will make the use of the Internet to access, transmit or make available child pornography punishable by ten years jail.

Possession, production or supply of child pornography for the purpose of sending it over the Internet will attract a similar penalty.

The procuring or "grooming" of children under 16 for sex, where adults exploit the anonymity of cyberspace to lure children, will attract even heavier penalties of up to 15 years jail.

These offences will also allow the Australian Federal Police (AFP) to proactively police the Internet by assuming the identity of a fictitious child and interact with potential predatory adults.

Credit card skimming and Internet banking fraud, including "phishing" - where online criminals use apparently legitimate e-mails to trick people into divulging banking details - are also targeted with new federal offences contained in this Bill.

These offences will complement existing State and Territory offences and will give the Government a valuable tool to prosecute offences that have a national or widespread effect, or in some cases, an overseas aspect.

For more information visit :
http://www.darylwilliams.dcita.gov.au/Article/0,0_7-2_4011-4_119352,00.html
or contact : jgyngell@claytonutz.com

5. CONTRACT LAW

COLOMBIA SHAREHOLDERS' RIGHTS EXTINGUISHED IF NOT EXERCISED

In a recent opinion, the Superintendency of Corporations ("Superintendency") set forth the consequences of a failure by shareholders or partners of domestic corporations to exercise their rights as such. The Superintendency, the entity responsible for controlling corporations in Colombia, deemed that since shareholder status not only gives rights but also imposes obligations, the failure to use those rights

might lead to their waiver. The rights in question are within the context of one of the essential elements of the partnership agreement-the "animus societatis," or the interest and will to cooperate with the proper functioning of the agreement.

According to the general principles of law, rights are assumed to have been abandoned when they are not exercised. The passage of a statute of limitations leads to a full extinguishing of the rights.

Although the law does not expressly contemplate a statute of limitations on shares, the Superintendency deems that this legal construct may be applied based on the general provisions which govern judicial actions and which are a public order principle under the law.

According to the Superintendency, the period within which this type of rights must be exercised is 10 years, and a judicial authority must declare the operation of this statute of limitations. In effect, before the shareholders' or partners' rights may be deemed abandoned, the corporation, other shareholders, or interested third parties must request the judicial authorities to so declare them.

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or contact : cavelier@cavelier.com

6. DOMAIN NAMES

GERMANY COURT TIGHTENS JUDGMENT ON USE OF .AG TLD

The Moramis GmbH, a corporation organized as a Gesellschaft mit beschränkter Haftung (a "GmbH," or limited liability company under German law) lost again in an appellate decision regarding the domain name "tipp.ag." The appellate court ruled that only a corporation organized as an Aktiengesellschaft (an "AG," or share company under German law) may operate a domain with the ending "ag." The country code top level domain ("ccTLD") of "ag" stands for the Caribbean state of Antigua and Barbuda, but it may be freely registered worldwide. The registry of Antigua and Barbuda officially mentions the German abbreviation "ag" for Aktiengesellschaft as another meaning of its issued domains, and even includes several others possibilities.

In its appellate decision regarding German domains with the "ag" ending, the Higher Regional Court of Hamburg recently extended the lower court opinion. In the appellate court's opinion, the domain "ag" rightfully belongs only to those Aktiengesellschaften whose company names correspond to the Second-Level-Domain.

In 2003, the company Tipp 24 AG obtained a judgment against Moramis GmbH, which prohibited the use of the domain www.tipp.ag by Moramis GmbH. According to the judges, the web address indicates the status of the company. Moramis GmbH unsuccessfully argued that the abbreviation "ag" may also stand for a number of other abbreviations, e.g., Arbeitsgemeinschaft (work group), Anlegergemeinschaft (investment group), or, in the case of the Moramis GmbH, Abgabegemeinschaft (contribution group).

The judges of the Higher Regional Court of Hamburg affirmed and further narrowed this decision: A company may only use a domain with the ending "ag" if it is registered under the correspondent company name, as well. For example, a company with the company name Car Dealership Muller AG could not use the generic domain name www.car.ag, but could use www.cardealershipmuller.ag.

This decision contradicts prior decisions addressing the domain law. Regarding generic domain names like "auto.de,"

those prior judgments had so far held "first come, first served."

For more information visit : www.heise.de
or contact : j.heilbock@taylorwessing.com

7. ELECTRONIC COMMERCE

GERMANY COURT RULES AMAZON VIOLATES BOOK PRICE MAINTENANCE ACT

The Higher Regional Court of Frankfurt decided in two appellate actions that one who professionally sells books to ultimate consumers, and who thus must observe binding sales prices, may not offer rebates or discounts when selling new books.

Amazon offered gift coupons to new customers for the respondent bookseller's online book store in the amount of EUR 5. The Higher Regional Court of Frankfurt held that this business practice constituted a violation of the Book Price Maintenance Act. For that matter, it is irrelevant whether the bookseller sells its books at lower sales prices or deducts the amount of the gift coupon from the binding sales price.

The case of the company Buch.de, a German online book store that utilizes the bonus program "web miles," was decided similarly. At Buch.de, the buyer of a new book was credited with one bonus mile. These bonus miles could be redeemed by purchasing additional books. However, booksellers are not permitted to credit bonus miles when a buyer purchased a new book with a binding sales price and later redeemed those bonus miles by purchasing another new book with a binding sales price.

For more information visit : www.heise.de
or contact : j.heilbock@taylorwessing.com

8. FINANCIAL SERVICES

NIGERIA RECAPITALIZATION IN THE BANKING INDUSTRY

The Central Bank of Nigeria ("CBN") has conducted a review of the capital base of banks and other financial institutions in the country. On 6th July 2004, CBN governor Prof. Charles Chukwuma Soludo, issued a N25 billion capitalization directive to all Nigerian banks. As a result of this directive, on 5th August 2004, the CBN released guidelines and incentives for consolidation in the banking industry. The CBN governor clearly stated that the only permitted legal modes of consolidation are mergers and outright acquisitions or takeovers. He stated that mere group arrangements are unacceptable for the purpose of meeting the N25 billion target. He emphasized that the banking sector reform aims to strengthen the sector.

Under the guidelines, the capital base of banks will include revaluation surplus resulting from revaluation in the course of consolidation. The paid-up capital will include ordinary shares plus non-redeemable preference shares.

The incentives provided by the CBN include authorization to deal in foreign exchange, permission to take public sector deposits, recommendation to fiscal authorities for the collection of public sector revenue and prospects of

managing part of Nigeria's external reserves subject to prevailing guidelines. Additionally, the CBN stated that it is working out tax incentives in the areas of, inter alia, capital allowances, company income tax, and stamp duties. The CBN is expected to release details on these issues at the completion of its consultations with fiscal authorities. A reduction in transaction costs is also part of the incentives. Furthermore, the CBN will encourage and facilitate the establishment of an Assets Management Company ("AMC") to collaborate with other relevant agencies.

For more information visit : www.cenbank.org
or contact : lfanga@aelex.com

9. INTELLECTUAL PROPERTY

CANADA ISPs NOT LIABLE FOR COPYRIGHT INFRINGEMENT

On 30th June 2004, in *SOCAN v. CAIP*, 2004 SCC 45, the Supreme Court of Canada rendered a groundbreaking decision that will be of interest to technology lawyers internationally. The Court unanimously ruled that Internet service providers (the "ISPs") acting as intermediaries in providing access to the Internet are not liable for copyright infringement with respect to music downloaded from the Internet.

For more information visit :

<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2004scc045.wpd.html>
or contact : cmorgan@mtl.mccarthy.ca

COLOMBIA WELL-KNOWN TRADE MARKS MUST BE REGISTERED

In Colombia, title to a trademark, whether famous or not, is acquired only through registration. Accordingly, if a mark has not been registered, a criminal charge of trademark usurpation may not be brought against any person, since it is not "legally protected."

The Supreme Court of Justice (the "Court") so provided for this consequence by recently annulling a decision where a criminal judge had found a person guilty of trademark usurpation. The defendant had been copying, in a pirate laboratory, the composition, packaging and presentation of Fab, a powdered laundry detergent.

According to the Court, the Colombian Criminal Code is clear: in order for the crime of trademark usurpation to occur, the trademark must be "legally protected," and, in the case at hand, proof of neither the existence or authority of the corporation Colgate Palmolive nor of the registration of the trademark FAB in Colombia had been submitted.

Both the criminal judge and the lower court had found the owner of the laboratory guilty, deeming that the "legal protection" of the trademark "Fab" derived from its being well-known in both local and international markets. Additionally, these judges explained in their rulings that they would not absolve the accused, for this would equate permitting him to escape with "scandalous impunity" the commission of a crime in which the confidence of the users of an essential product, of common and daily use, had been intentionally betrayed.

The Supreme Court of Justice found that, despite the fact that both the company Colgate Palmolive and its products are known in the marketplace, the failure to register the trademark excludes it from criminal protection. In so finding, the Court reemphasized that the formalities applicable to trademark matters in Colombia and in the Andean Community have been stipulated for compliance.

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GHANA GEOGRAPHICAL INDICATIONS NOW PROTECTED

On 31st December 2003, Presidential assent was given to the Geographical Indications Act of 2003, Act 659, in Ghana. This Act was passed to "provide for the protection of geographical indications and related matters." The Act establishes the framework within which geographical indications may be registered and civil proceedings may be instituted to prevent the unauthorized use of geographical indications. Conveniently, the protection of a geographical indication does not depend on its prior registration. The protection provided by the Act supplements that contained in the Protection Against Unfair Competition Act of 2000.

Procedural rules for both filing applications and conducting proceedings have yet to be developed.

For more information contact : lfanga@aelex.com

GHANA NEW TRADE MARKS ACT ALLOWS SERVICE MARKS

On 29th January 2004, the new Trade Marks Act, Act 664 of 2004, entered into force in Ghana. It repealed the Trade Marks Act, Act 270 of 1965.

Service marks may be registered under the new Act. The duration of a trademark registration is now ten years, which is renewable for consecutive periods of ten years. The new Act classifies certain activities as criminal offences, such as applying a false trade description to goods, forging trade marks, and using or possessing an instrument or article to forge a trade mark.

Regulations for carrying out the provisions of the new Act had not been passed at the time of this writing. Therefore, for now, regulations passed under the repealed Act continue to apply. Since these regulations do not provide for the registration of service marks, in practice service marks still may not be registered until new regulations are enacted by Parliament.

For more information contact : lfanga@aelex.com

ITALY NEW ELECTRONIC COPYRIGHT PROTECTION

Law No. 128, of 21st May 2004, has changed the "Urbani Decree" (deriving its name from the current Cultural Affairs Minister) on copyright protection over the Internet, applicable in particular to Peer-to-Peer downloading of programs. The Law aims to protect original works and establishes new infringements of the Copyright Law by electronic means. Specifically, the Law provides, among other things:

- a modification of Article 171 of the Copyright Law, extending the protection of original works in the case of

duplication/distribution executed without permit and in view of profits;

- a new "digital stamp" (released by SIAE, the authors' and editors' society) to be displayed on protected electronic material prior to use, certifying the data of such programs;
- the mandate that a user declare compliance and fulfillment with all duties and obligations connected to copyright protection of such materials prior to electronic use;
- the appointment of a Public Security Department within the Ministry of the Interior with specific reporting duties on violations of the new Copyright Law;
- new obligations on ISPs, particularly in light of requests by judicial authorities, to provide all information in their possession to identify website operators and those responsible for alleged violations;
- obligations on individual ISPs (excluding carriers), following decisions of the judicial authorities, to implement all measures deemed necessary to impede access to website content, or to remove such content, with related sanctions in case of violation.

For more information visit : www.altalex.com

or contact : f.cugia@lexjus.com

NIGERIA REVIEW OF OFFICIAL FILING FEES

On 15th July 2004, the Commercial Law Department (the "CLD") of the Ministry of Commerce, Abuja, issued an upward review of fees payable on all categories of services rendered by the Registry of Trademarks, Patents and Design, as approved by the Minister of Commerce, Ambassador Idris Waziri.

CLD Director, Atiku.A.Kigo, stated that the review of fees was required by the dual needs to have more realistic rates, which should be in accord with current economic realities, and to assist the Registry in effecting efficient performance.

The reviewed rates came into effect on 11th August 2004.

For more information contact : lfanga@aelex.com

10. MARKET ACCESS

ARGENTINA NEW REGIME TO PROMOTE THE SOFTWARE INDUSTRY

Act 25.922 (the "Act"), which was partially enacted on 7th September 2004, established a new regime to promote growth of the software industry within Argentina. In effect, the Act provides important tax benefits for a period of ten years to those entities that are included in its safe harbor.

Listed below is a summary of the Act:

- People and entities incorporated in Argentina, which are principally engaged in the software industry and which pursue one of several designated activities, may be included under the Act's safe harbor ("Software Company"). The designated activities include creating, designing, developing, producing, implementing and tuning developed software systems and their associated documentation, such as documents that are elaborated for inclusion in processors used in different goods, like consoles, telephone administration systems, mobile telephones, machines and other devices;

- The Act excludes the activity of self- or auto-development of software;
- Software is defined as the organized expression of a group of instructions or orders in any high level language, middle or machine language, which is organized in structures of different sequences and combinations and stored in a magnetic, optical or electronic mean such as discs, chips, circuits or any other similar device that may be developed in the future, for any computer or machine with processing capacity;
- The Act establishes tax benefits for those Software Companies that may be included in its safe harbor, provided that they comply with all other tax and social security obligations, as follows: federal taxes may not be increased for a period of ten years, measured from date on which a company is accepted as a Software Company under the Act; up to 70% of paid labor and social security taxes may be transformed into a Bond, which in turn may be used to pay federal taxes (basically Value Added Tax), excluding Revenue Tax; up to 60% of the revenue tax to be paid may be deducted;
- After the new regime has been in force for three years, the Software Company must comply with renowned quality standards to qualify for the safe harbor;
- The Act creates Fonsoft, a Trustee to support Software Industry development;
- The Act excludes the following activities: support, conversion, or translation of software language; the addition of functionalities or preparation of documentation for the end user; regular collection of data routines; the elaboration of market studies to commercialize software; and other activities related to software production that do not result in technical or functional progress in the software area.

For now, the Act has entered into force, but its regulation is still required in order for the law to apply. The Executive Power is currently working on regulating the Act, but we cannot anticipate a definite completion date.

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

AUSTRIA MOBILE INTERCONNECTION

As required by Article 16 of the EU-Framework Directive, the Austrian NRA (telecoms regulator) recently analyzed the wholesale call origination and wholesale call termination markets in the mobile sector and subsequently issued draft decrees for imposing remedies on market dominant operators.

In the market for access and call origination in public mobile telephone networks, the regulator concluded that no operator has significant market power. Despite the high market share of the incumbent Mobilkom Austria, amounting to approximately 42%, the regulator identified effective competition on the mobile origination market, particularly due to the homogeneity of products, high market transparency, and the lack of market restraints for competitors.

In the mobile termination market, however, the regulator found that all Austrian mobile network operators (including the third generation-operator Hutchison 3G) have significant market power.

Without considering the major differences of the operators' share on the retail market, the regulator intends to impose the same obligations on each of those operators.

These obligations include a non-discrimination provision with regard to the price and the quality of the service provided, the need to publish terms and conditions for supply, an access obligation, and a price control obligation.

As far as price control is concerned, operators will be required to charge prices based on the Long Run Average Incremental Cost ("LRAIC") of an efficient hypothetical operator.

In particular, operators with a small market share criticize that, "contrary to the well-established Austrian jurisdiction," the actual costs of the individual operators concerned shall thus not be taken into account for calculating the charges.

Furthermore, where it does not impose less burdensome obligations on smaller operators, the critics argue that the Austrian NRA would infringe upon the principle of proportionality.

The final decrees are expected to be issued in mid-October.

For more information visit : <http://www.rtr.at>
or contact : stephan.polster@dbj.at

11. PRIVACY

AUSTRALIA IIA RELEASES DRAFT SPAM CODE OF PRACTICE

The Internet Industry Association (the "IIA") has strengthened its fight against spam in Australia by releasing a draft Code of Practice for Spam.

The draft code applies to carriers, service providers, and carriage service providers.

It will complement the Spam Act of 2003 and the e-marketing code of practice that is currently being drafted by the Australian Direct Marketing Association.

Generally, carriers and service providers will have to take steps including:

- configuring their own networks to make them less susceptible to spam attacks;
- providing customer information and empowerment solutions to help them avoid spam;
- advising customers on how to make formal complaints to the regulator about businesses sending spam; and
- providing reasonable assistance to lawful investigations of illegal spam activity.

Public comments must be submitted by 30th August 2004.

Once registered by the Australian Communications Authority, the draft code will be binding on ISP's and ESP's (email service providers) in Australia under co-regulatory arrangements.

The code is aimed at defining best practice standards for ISP's and ESP's in how they manage spam within their own networks while also empowering their customers to exercise more effective control as users.

The IIA says that in drafting the code it has been particularly mindful of the ability for smaller industry players to comply.

"We recognise that most ISPs and ESPs are already making considerable efforts to manage spam on behalf of their customers.

It is important that this code is able to be easily adopted by all members of the ISP and ESP community, so we are particularly interested in having their views on their ability to implement the measures we have put forward in this draft."

For more information visit : www.iaa.net.au/spamvt.html

or contact : jgyngell@claytonutz.com

FINLAND
NEW LEGISLATION ON PRIVACY
IN ELECTRONIC COMMUNICATIONS

Finland's new Act on Privacy in Electronic Communications (the "Act") entered into force on 1st September 2004.

The Act implements EU Directive 2002/58/EC, and aims to protect confidentiality and privacy in electronic communications.

In addition, users' trust and the security of electronic services, as well as information security and development of electronic services, are promoted by the new Act.

The new Act clarifies the rules of processing confidential traffic data and location data.

Rights and obligations relating to confidential traffic data are extended to include corporations that process traffic data in their communications networks.

In addition, the new Act combats "spam" and viruses, as telecommunications operators are now able to prevent the reception of disturbing e-mails and to remove harmful programs from the e-mail traffic.

If the functions of the communications services are threatened, such filtering will be possible even without the receiver's consent.

Lastly, the new Act also sets specific rules on the use of "cookies" in computers.

For more information visit : <http://www.finlex.fi/linkit/sd/20040516>
or contact : Craig.thompson@roschier.com

GERMANY
ILLEGAL TO APPROACH PASSERS-BY
FOR PROMOTIONAL PURPOSES

The German Federal Supreme Court (the "BGH") banned the targeted approach of passers-by in public for promotional purposes. Such an act constitutes unfair competition practice, particularly where the sales promoter is not recognizable as such. Through this decision, judges in Karlsruhe affirmed a judgment for an injunction that was sought by the Deutsche Telekom against a competitor (File number:: 1 ZR 227/01).

The defendant was a company that promotes the telecommunication services of a third party provider and acts as an agent for selling pre-selection contracts between the provider and its customers. For this purpose, the defendant's employees approach passers-by on streets and squares, as well as in shopping malls, and address them individually about the "opportunity" of such a contract. Deutsche Telekom viewed this behavior as "solicitation of customers through harassment," which constitutes unfair competition practice.

Regarding the objectionable promotional practice, the BGH was more concerned about the material invasion of privacy of the passers-by and less concerned about the danger of entanglement or taking customers by surprise. Accordingly, the Court's balancing of interests weighed in favour of the interest of the passers-by in undisturbed privacy over the economic interests of the promoter.

For more information visit : www.heise.de
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GERMANY
NO VIDEO SURVEILLANCE AT WORK
WITHOUT PROBABLE CAUSE

On 29th July 2004, the Federal Labor Court decided that permanent video surveillance at work of the staff of a mail distribution center without probable cause is unreasonable and unlawful (File number: 1 ABR 21/03).

Letters were regularly reported missing at the mail distribution center, which employs more than 650 shift-working employees. It could never be determined whether and in which quantity those letters got lost at the mail distribution center -- i.e., either en route to the center, or, later, en route to the addressee. In order to minimize the number of missing letters, the employer intended to implement video surveillance. The surveillance system was to be operated by means of visible cameras installed in the main working area, for up to fifty hours per week, without probable cause to believe that a crime had been committed. The employees would not be able to discern when the surveillance system was operating. The Works Council did not consent to installing the surveillance system. According to Art. 87 Works Constitution Act (Betriebsverfassungsgesetz), the Works Council has a co-determination right if equipment is implemented and utilized to monitor the conduct or performance of employees.

While the lower courts rejected the motion of the Works Council, the Federal Labor Court ruled in its favor. According to the judges, the employer in fact has duties both to guarantee the safety of mail distribution and delivery, and to safeguard the constitutionally-protected secrecy of the post. On the other hand, video surveillance constitutes a material invasion of the right of privacy of the employees, which is also constitutionally protected. Under the given circumstances, the court's balance of the interests held that the permanent surveillance of the mail distribution center staff without probable cause was unreasonable.

For more information visit : www.heise.de
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NEW ZEALAND
GOVERNMENT TO LEGISLATE AGAINST SPAM

The New Zealand Government has indicated its intent to legislate controls on spam.

In order to assist the policy-development process, the Ministry of Economic Development has issued a discussion document. The Government is currently considering submissions and plans to introduce a bill into Parliament before December 2004.

In New Zealand, current approaches to reducing spam comprise:

- legislative or regulatory measures, which generally do not specifically address the problem of spam (e.g., the Privacy Act of 1993 and the Harassment Act of 1997);
- self-regulatory measures, such as industry codes like the email marketing standards produced by the Direct Marketing Association;
- education and awareness campaigns, including the Internet Society of New Zealand's website; and
- technical measures, such as the use of filtering systems by ISPs and users.

For more information visit : <http://www.med.govt.nz/pbt/infotech/spam/index.html>
and <http://www.stopspam.net.nz>
or contact : david.boswell@bellgully.com

12. TELECOMMUNICATIONS

CHILE ACQUISITION OF BELLSOUTH IN CHILE BY TELEFÓNICA MÓVILES

On 5th May 2004, Bellsouth Corporation ("Bellsouth") and Telefónicas Móviles S.A. ("TEM"), executed a Stock Purchase Agreement under which, for the sum of US \$5.850 million, TEM would acquire Bellsouth's assets in Central and South America, including indirectly the ownership of Bellsouth Comunicaciones S.A. (which provides mobile telephony services in Chile) and Bellsouth Chile S.A. (which provides long distance services in Chile).

Following the agreement, TEM appeared before the Free Competition Defense Court (the "Tribunal de Defensa de la Libre Competencia") on 18th May 2004 for a ruling on whether the above-described matter would affect free competition. The agreement greatly increases the presence of Telefónica S.A. (of Spain) in the Chilean mobile telephony market, given that it controls both TEM, directly, and Telefónica Móvil de Chile S.A., indirectly (through Telefónica CTC-Chile S.A.). Furthermore, on 15th July 2004, TEM's acquisition of Telefónica Móvil de Chile S.A.'s was approved at the Telefónica CTC-Chile S.A.'s Shareholders Meeting. Consequently, TEM will control almost 50% of the Chilean mobile telephony market, as well as a similar percentage of the radioelectric spectrum available to operate in mobile telephony.

Both TEM and Bellsouth have argued that their agreement was not intended to restrict free competition, and that it will not have such an effect based on the fact that, in their opinion, the market in which the mobile telephony operates is in constant evolution. Accordingly, the participation that one company has in the market at a specific moment should be irrelevant, due to the fact that such participation is exposed to constant change, as evidenced by the explosive growth that the mobile telephony market has experienced in the last years and by the consequences that the rise of new competitors and technologies might bring. Indeed, both parties argue that the concentration of radioelectric spectrum does not jeopardize free competition, considering that the spectrum currently in competitors' hands is enough. Additionally, they have argued that Governmental authorities have the necessary means to manage the spectrum, in order to simplify the entrance of new competitors into the market, by issuing regulations that would allow implementing new technologies (such as the third generation mobile telephony, also known as 3G) to increase the possibilities of new assignments of the spectrum.

However, objection to the acquisition has been voiced by other companies which also provide mobile telephony services, such as Entel (Telecom Italia's subsidiary that operates through Entel PCS Telecomunicaciones S.A. and Entel Telefonía Móvil S.A.) and Smartcom S.A. (Endesa España's subsidiary), and also by other telecommunication companies (i.e., Telmex, Chilesat, Telsur). In their opinion, the combined facts that the subsidiary of Telefónica S.A. (of Spain), or Telefónica CTC-Chile S.A., has a dominant position in the local telephony market (about 75% of such market) and, simultaneously, its other subsidiary TEM would have almost 50% participation in the mobile telephony market in Chile, provides a condition where the Telefónica Group would be able to monopolize both markets in the country. The objectants say the monopoly would be able to carry out conduct that might affect free competition,

especially where the number of mobile telephony operators would be reduced to 3. Furthermore, they consider the concentration of 80 Mhz of the radioelectric spectrum in one operator's hands to be an important entrance barrier for the start-up of new competitors in the market. The objectants reject TEM and Bellsouth's argument in the sense that, in their view, the new technologies are not yet positioned to become potential competitors in the mobile telephony market.

On 2nd July 2004, by request of the Tribunal de Defensa de la Libre Competencia, the National Economic Prosecutor (the "Fiscal Nacional Económico") issued his report in connection with the above referenced matter, in which he analyzed the current status of the mobile telephony market in Chile. Based on the foregoing, he concluded that, although the market is subject to constant change, the exhaustion of the radioelectric spectrum available for the mobile telephony creates an unbreakable barrier for the entrance of new competitors to such market, particularly if an important portion of such spectrum is concentrated in one operator's hands, which would mean a material competitive advantage for the owner of such portion of the radioelectric spectrum. Consequently, the Fiscal Nacional Económico recommended approval by the Tribunal de Defensa de la Libre Competencia of the transaction, subject, however, to compliance with certain conditions:

(i) that the Telefónica Group sells (prior to issuance of a technical report by the Undersecretary of Telecommunications) a portion of its radioelectric spectrum, which should be carried out through a public bid, with bidding conditions previously approved by the Tribunal de Defensa de la Libre Competencia;

(ii) that all the mobile telephony operators of the Telefónica Group in Chile operate as open stock corporations or closed stock corporations subject to the regulations of open stock corporations, both subject to the supervision of the Superintendency of Securities and Insurance (the "Superintendencia de Valores y Seguros"); and

(iii) that none of the companies of the Telefónica Group acquires in the future, additional frequencies in the 800 Mhz and 1900 MHz Band, without the prior consultation and approval by the Tribunal de Defensa de la Libre Competencia.

In our opinion, these issues are greatly important to the future of the telecommunications market in Chile. The final resolution of the Tribunal de Defensa de la Libre Competencia will establish precedents related not only to free competition matters, but also to the power of a court to force an operator to sell a portion of its radioelectric spectrum and to the manner in which such sale shall be carried out, and will also determine if the new technologies are considered as true competitors or substitutes in the mobile telephony market.

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GERMANY EU DIRECTIVE ON COMMUNICATION

In April the EU Commission decided to file a lawsuit with the European Court of Justice against the six Member States Belgium, Germany, Greece, France, Luxemburg and the Netherlands, alleging failure to adopt fully into domestic law the EU Directive concerning electronic communication.

A crucial element of the EU Directive is that of No. 2002/58/EG regarding data protection for electronic communication. Those Member States who did not adopt the EU Directive by 31 October 2002 into domestic law are subject to action for breach of contract. The EU Commission has notified the affected Member States and will, based on their response, determine whether action is required.

Germany may avert a lawsuit, however, because the Bundestag agreed to amend the Act against Unfair Competition (UWG), which includes a ban on Spam.

By this measure the EU Commission intends to send a clear signal to the Member States that further delays would be unacceptable. Without a proper legal framework, investment activity is likely to slow down and both

companies and consumers will suffer the loss of the amendment's benefit.

For more information visit : www.heise.de
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INDIA ALLOCATION OF SPECTRUM TO MOBILE SERVICE PROVIDERS

The Minister for Communications and Information Technology has announced that the Government will follow international norms in allocating the 1,900 MHz spectrum to mobile service providers.

Both Global System for Mobile Communication ("GSM") and Code Division Multiple Access ("CDMA") operators are vying for this band. The Indian Government had previously allotted GSM service companies two bands for their existing operations: 800 MHz and 1,800 MHz. Their rivals at CDMA were permitted spectra in the 900 MHz and 1,800 MHz bands, with a view toward providing additional spectra for improved service quality.

Since the 1,800 MHz band has yet not been allocated to CDMA operators, however, they petitioned the Government seeking the 1,900 MHz band instead of the 1,800 MHz band for their existing Second Generation ("2G") services. Furthermore, CDMA service companies contend that they need the 1,900 MHz band because equipment for the 1,800 MHz band is neither freely available nor affordable and use of 1,800 MHz band would thus force them to raise the tariffs, eventually leading to lost subscribers. The 1,900 MHz band could not be allotted to CDMA, however, as the International Telecommunication Union (the "ITU") has earmarked this band for Third Generation ("3G") services, whether GSM or CDMA, as identified in International Mobile Telecommunications 2000 (the "IMT-2000").

The move of the Indian Government will help GSM-based cellular service providers to implement 3G services. It will increase the average spectrum per operator, which currently stands at nearly 6.2 MHz per operator, as opposed to a world average GSM spectrum per operator of at least 17 MHz, and a still higher spectrum in China. The 3G systems will provide both speech and data at very high speed; will integrate all types of services, including speech, data, audio, video, facsimile, etc., through mobile handsets; and will provide smaller call setup time and user-friendly billing based on using the channel rather than the time of call.

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PORTUGAL NEW REGULATION ON PERSONAL DATA PROCESSING

After a nine-month delay and under an EU infringement proceeding, Law 41/2004 of 18th August 2004 finally enacted in Portugal Directive 2002/58/CE of 12th July 2002, concerning the processing of personal data and protection of privacy in the electronic communications sector (the "Privacy Directive").

Closely following the Privacy Directive, the new law adapts provisions in the general law concerning personal data

processing (Law 67/98 of 26 October 1998) to the new developments in the markets and technologies for electronic communication services. Governing issues include (i) processing location data other than traffic data, which may not be used for value added services without the subscriber's or user's prior consent; (ii) the legitimacy of the so called spyware "cookies," or hidden identifiers and other similar devices that can enter the user's terminal without their knowledge in order to gain access to information or to trace the activities of the user; and (iii) restricting users' and subscribers' rights to privacy with regard to calling line identification and location data where this is necessary to allow emergency services to carry out their tasks as effectively as possible.

However, the Portuguese transposition scheme has a very peculiar detail regarding safeguards against unsolicited communications for direct marketing purposes, or "spam." In fact, the Portuguese Government chose to make a partial and previous implementation of the Privacy Directive (Article 13) by regulating this matter together with Decree-Law 7/2004, of 7th January, which implemented Directive 2000/31/EC, governing certain aspects of information society service (electronic commerce, in particular).

Another relevant aspect of the new law is the substantial increase of penalties for non-compliance with some of these provisions, imposing maximum fines of up to \$5 million.

Extraordinarily, the new law, which revokes the existing national law concerning these matters (Law 69/98 of 28 October 1998), came into force exactly one day after its publication in the Official Gazette, which is unusual considering the complexity and novelty of the new privacy regime on the electronic communications sector.

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PORTUGAL PROVIDING ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICE

The new electronic communication regime ("Regicom") in Portugal establishes that the provision of electronic communications networks or services only requires a "general" authorization and generally does not require any prior decision or act of the regulator.

Pursuant to the requirements of Regicom, the Portuguese Regulator approved, by determination of 3 May 2004, the procedures to be complied with by a party interested in beginning the provision of electronic communications networks and services, as well as the related notification model for general authorization and the corresponding form.

The new procedures are aimed exclusively at entities wishing to start their activity after the implementation of Regicom, and likewise, with necessary adjustments, to pending requests presented under the previous legal framework.

According to the law, companies wishing to provide electronic communications networks and services shall submit to the Portuguese Regulator ("Anacom") a short description of the network or service they wish to initiate and notify an estimated date for starting the activity. Among other details, the new procedures define which exhibits should be attached to the notification, as well as how and where these exhibits should be presented to Anacom.

Companies that do not have their headquarters in Portugal, but wish to provide electronic communications networks or services in the country, either publicly available or non-public, for a period longer than one year, must establish a permanent representation and comply with the provisions of Portuguese law regarding commercial registry.

The provision of electronic communications networks or services, whether publicly available or not, may also involve the allocation of rights to use frequencies and numbers.

The National Board of Frequency Allocation shall specify the cases in which the rights of use are required, as well as the allocation procedure, which may consist of a competitive or comparative selection procedure (namely, an auction or competition). The rights to use frequencies may be granted to providers of electronic communication networks or services or to entities that use those networks or services, namely to providers of radio or television broadcast content services, pursuant to applicable law. As the use of frequencies is not subject to the allocation of rights of use, the principle of full accessibility is in force.

The use of numbers of the National Numbering Plan for the provision of electronic communications networks or services depends on the allocation of individual rights of use. The rights of use for numbers may be allocated both to providers of electronic communication networks or services and to entities that use those networks or services.

Finally, both the notification concerning the desire to provide electronic communications networks and services and the requests for allocation of rights of use for frequencies and numbers must be written in Portuguese. Documents submitted in a foreign language must have a certified translation attached.

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PORTUGAL TMDP REGULATION FINALLY APPROVED

One of the innovations introduced by the Portuguese Electronic Communications Law is the Municipal Fee for Rights of Way ("TMDP"). It establishes that the installation, crossing or passing over by telecoms systems, equipment and other resources of locations which are part of public or private municipal domain may be subject to TMDP. Several months after the deadline set by law, the regulation that established the procedures for the collection and delivery to municipalities of the TMDP was finally approved by the Portuguese regulator (Anacom).

This municipal fee is a percentage levied on each invoice for publicly available electronic communications at fixed location, issued to end-users at the relevant municipality. The percentage will be approved annually by each municipality before the end of December of the preceding year and shall not exceed 0,25%.

The new regulation requires the companies and municipalities to cooperate in establishing appropriate information support which must be kept updated. The purpose of the cooperation regime is to minimize those situations in which TMDP might apply. These might occur because of the wide variety of networks and services in the market and the large number of forms for providing the same services. Therefore, operators must provide, on the invoice, all necessary information so that the municipality is able to verify the basis on which the charge is levied and the percentage and calculation of the tax. The relevant address for TMDP is the facility site of the end-user, which may not always be the same as the billing address or the collecting address.

It is worth noting that municipalities are to approve the percentage to be applied for the year 2004 within 90 days from the publication of REGICOM. The end of such 90 day period occurred on 11 May 2004 and since no approval was granted within this deadline, we believe that collection of TMDP during the current year will not happen.

The percentage for the following year must be approved by the end of December 2004, so the municipalities have less

than one month to complete that; otherwise, TMDP will not be a reality in the next year either.

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13. TRADE LAW

GERMANY PROVIDER OF ONLINE-AUCTIONS MUST BAN OFFERS OF FAKE GOODS

In March the German Federal Court of Justice (BGH) decided that a claim for injunction may not only be enforced against sellers of fake branded products but also against platform providers for third-party auctions on the Internet.

The auction houses, however, are not liable for damages. Furthermore there is no pre-auction duty to inspect whether the object of the auction is a fake or genuine.

The matter came up when Swiss watch-maker Rolex filed a lawsuit against online auction house Ricardo. In order to confine roaring trade in fake Rolex watches, the watch-maker wanted the Court to order Ricardo to prevent such offers.

The action for injunction and for damages was granted by the District Court, but the Higher Regional Court as Appellate Court reversed the judgment (File number: Az. 6 U 12/01).

Rolex filed an appeal with the BGH and was partially successful. According to the Judges, the "liability privilege" pursuant to the Teleservice Act (TDG) is also applicable to online auction houses.

They are classified as host-service providers and are not deemed responsible for third party content which they merely store electronically.

The BGH held that the TDG only excludes a claim for damages but not a claim for injunction.

Thus Rolex (as well as any other manufacturer of branded products) may demand a blocking of illegal offers from online auction houses if the companies operating auction platforms have actual knowledge of the offered fake products.

Furthermore, the Judges denied the existence of a duty to control the offers for possible trademark infringement before posting the offer.

Such a control, the court held, could not be required in an automated process. The BGH did not decide whether the provider of auction platforms can be expected to install filter programs to prevent known trademark infringement in the future. The Higher Regional Court did not include this possibility in its ruling and therefore the BGH remanded the case back to the Higher Regional Court.

In the case at bar, the highest German civil court took a stand concerning Internet auctions for the second time. In November 2001 the BGH had decided, in a leading case, that Internet auctions are binding and that the seller is obligated to sell the offered goods even if for a much lower bid than expected.

For more information visit : www.heise.de
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FROM THE EDITOR

PRIVACY

CANADA ERRATUM

A reference in the article "Alberta Privacy Law found Substantially Similar under PIPEDA", published in Issue 26 of "the I.i.n.k." was published in error.

The Order referred to in the article was formally adopted and registered by the Governor in Council on 12th October 2004 (not on 10th April 2004, as was indicated in the article).

Also on 12th October 2004, the Governor in Council adopted and registered a similar Order regarding the British Columbia Personal Information Protection Act, declaring that it too met the "substantially similar" test.

Accordingly, henceforth unless the matter relates to a federal work, undertaking or business, the two provincial acts will supersede PIPEDA in respect of intra-provincial private sector data protection matters in those provinces.

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COMMENTARIES

1. INFORMATION SOCIETY POLICY

FRANCE VIEWS ABOUT THE NEW LAW ON CONFIDENCE IN THE DIGITAL ECONOMY

by Sabine LIPOVETSKY (slipovetsky@kahnlaw.com)
and Fabrice PERBOST (fperbost@kahnlaw.com)

On 21 June 2004, the French Law on Confidence in the Digital Economy (the "Law") was enacted in order to implement the European Directive of 8 June 2000 relating to electronic commerce, and part of the European Directive of 12 July 2002 concerning personal data processing and privacy protection in the electronic communications sector.

The Law deals with four major themes: Freedom of Communication via Digital Networks, Electronic Commerce, Security in the Digital Economy and Satellite Systems.

Since the matters treated by the Law are very broad, we have chosen to limit our analysis to four particularly interesting points:

- Obligations imposed on web content editors;
- Liability of Internet Service Providers;
- Acceptance of an electronic offer as regards contracts entered into online; and
- Spamming.

OBLIGATIONS IMPOSED ON WEB CONTENT EDITORS

Web content editors offering online communication services to the public have to make various information available to

the public, depending on whether or not they act as professionals.

As regards professional content editors, the web site must contain the following information in order to allow identification of:

- individuals: name, forename, address, telephone number and, if necessary, registration number with the Trade and Companies Register;
- legal entities: corporate name, telephone number, share capital, address of registered office and, if necessary, registration number with the Trade and Companies Register ;
- name of publishing director and, if necessary, person in charge of the editorial ;
- name, corporate name, address and telephone number of the hosting provider.

As regards non-professional content editors, there is no obligation relating to identification. They are only obligated to disclose the identity (name, corporate name and address) of their hosting provider, provided that the content editor gave the hosting provider all information requested from professional editors.

If this obligation of information is not complied with, web content editors incur sanctions of up to one year imprisonment and a 75,000 Euro fine (article 6-VI-1°).

If the web content editors are legal entities, they may be charged with a 375,000 Euro fine, and may additionally be sentenced to a banning from practising for 5 years and/or an obligation to display or publish the court order (article 131-38 and 131-39 of the French Criminal Code).

LIABILITY OF INTERNET SERVICE PROVIDERS

The Law modifies the rules applicable to the liability of Internet Service Providers, that either provide access to the Internet (access service providers), or ensure the storage of information on the Internet (hosting providers). Some of these rules apply to all service providers, whereas other are specific to respectively access service providers or hosting providers, depending upon their activity.

General Principle

In order to implement the Directive on electronic commerce into French domestic law as faithfully as possible, the Law refers to the concept of "neutrality".

Upon the second reading, the Senators removed the prior obligation of hosting and access providers to monitor the contents of web sites. The Law expressly provides that access service providers and hosting providers are not under a general obligation to control information which they pass on or store, nor are they under a general obligation to look for facts and circumstances revealing illicit activities.

However, judges are entitled to impose a particular monitoring obligation on an Internet Service Provider, provided that such measure is targeted and temporary.

Liability of Hosting Providers

According to the Law, a hosting provider is defined as a person ensuring storage of data for the person to whom the service is provided.

A hosting provider may not be held liable, whether civilly or criminally, for the stored activities or information, unless the provider was aware of their unlawful nature (or of facts and circumstances pointing to such nature) or if, as soon as it became aware of this, it did not take prompt action to withdraw the data or to prevent the access to such data.

Hosting providers (individuals) which do not comply with the obligations described above may incur criminal sanctions of up to one year imprisonment and a 75,000 Euro fine.

Legal entities may be charged with a 375,000 Euro fine, and may additionally be sentenced to a banning from practising for 5 years and/or an obligation to display or publish the

court order (article 131-38 and 131-39 of the French Criminal Code).

Hosting providers are deemed warned if they receive a notification including the following information: date of the notification, identification of the author and of the addressee of the notification, description of facts and exact localisation, reasons why the content should be removed (grounded on law and facts) and either a copy of the mail sent to the content editor requesting him to retrieve, suspend or modify the illegal content or evidence that the content editor could not be contacted.

If no warning is received, hosting providers are not considered having had knowledge of the possible unlawful nature of these contents. Moreover, in its decision of 10 June 2004, the Constitutional Council indicated that hosting providers may incur liability only if the information denounced as illicit by an Internet user appear to be "obviously" of such nature or if their withdrawal is ordered by a judge.

These provisions do not apply whenever the unlawful contents have been created by a person acting under the control or authority of its hosting provider.

The false denunciation of an activity as being illegal, when the notifying person knows that the information is not illegal, is punishable by one year imprisonment and a 15,000 Euro fine.

Specific Liability of Caching Providers

The Law operates a clear distinction between hosting and caching. Caching is defined as an automatic, intermediary and temporary storage, aiming to make further transfer of data more efficient. Caching providers are submitted to a different liability mechanism.

The Law states that any person that provides caching services for web site contents may incur civil or penal liability in only two specific cases:

- If it modified the content, did not comply with their access conditions and update related requirements, or impeded a lawful and common use of the technology employed to obtain the data concerned; or
- If it did not take prompt action to withdraw the stored contents or to prevent the access to such contents, as soon as it was actually aware of the fact that the contents initially transmitted were withdrawn, or that access to such contents was blocked, or that judges decided to withdraw from the network or to block access to the contents initially transmitted.

The incurred sanctions are the same as those described above for hosting providers.

Liability of Access Service Providers

The access service provider is defined as the person whose activity is to provide the public with access to on-line communication services. He may be held liable, whether criminally or civilly, if he actually requests the contentious transmission, or if he modifies or selects content subject to transmission.

The incurred sanctions are the same as those described above for hosting providers.

ACCEPTANCE OF A CONTRACT CONCLUDED IN ELECTRONIC FORM

Regarding entering into contracts in electronic form, prior to the enactment of the Law reference was made to general pre-electronic contract law principles. Pursuant to these principles, the acceptance of an offer, for the contract to be concluded, must generally result from the outright agreement of the offeree. Whenever the offeree opposes reservations or modifies in any way the offer, this is no longer considered an acceptance, but constitutes a counter-offer.

The European Directive 2000/31/EC dated 8 June 2000 gave no specific details about the way an offer has to be accepted. However, it is clearly stated in article 11-2 that "Member States shall ensure that, except when otherwise agreed by parties that are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order", but there is no specific requirement for the implementation of a double click procedure.

The French legislature decided to go further in the protection of Internet users and in more particularly e-consumers, by setting up as a principle of a double click mechanism for the expression of acceptance.

Under a new Chapter VII of the French Civil Code, entitled "Contracts concluded in electronic form", a new Article 1369-2 provides that for the contract to be validly concluded, the offeree must have had the opportunity to check the details and the total price of his order, and to correct any mistake he may have made, prior to confirming his order as the expression of his acceptance. The offeror must acknowledge receipt of the offeree's order without undue delay and by electronic means. The order, the confirmation of the offer acceptance and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to have access to them.

The new legislation thus imposes on online service providers a duty to develop a double click mechanism. The first step consists in ensuring that the offeree is properly given means to cautiously check his/her order before accepting the offer. The second step is the offeree's confirmation of his order, which is designed to express his acceptance with certainty, and consequently give full effect to the transaction.

This procedure may be excluded by parties who enter into a contract as professionals. In addition, according to new Article 1369-3 of the French Civil Code, this double click mechanism does not apply to contracts exclusively concluded by exchange of e-mail.

REGULATING THE DISPATCH OF UNSOLICITED COMMERCIAL COMMUNICATIONS

An important change was brought by the Law regarding the regulation of unsolicited commercial communications, notably by e-mail (so-called "spamming").

Existing Spamming regulations (outside France) are of two different types. The "opt in" systems impose on anyone practising commercial solicitations by electronic mail to obtain their addressees' consent prior to any such mailing. The "opt out" systems allow businesses to directly canvass Internet users, who are nevertheless provided with the right to express their opposition after the fact.

Before the enactment of the Law, both the French Code of Post and Telecommunications and the French Consumer Code made reference to the opt-out system, thus exempting online service providers to obtain the users' consent prior to sending them commercial communications by e-mail.

With respect to e-mail, the European Directive 2002/58/EC gave the Member States the choice of the system they wanted to set up, whether "opt-in" or "opt-out".

The French legislature decided to implement an "opt-in" system. Article L. 33-4-1 of the French Code of Post and Telecommunications and Article L. 121-20-5 of the French Consumer Code were modified by adding e-mail to the list of communication means subject to an "opt-in" of the addressees. These Articles now provide that "direct marketing made by use of automatic calling systems, facsimile machines, or electronic mail, using in any way the details of a person who has not given his or her prior consent to receive direct solicitations is forbidden".

As regards advertising sent by electronic mail, the Law uses the same definition of "electronic mail" as provided in the European Directive 2002/58/EC: "any text, voice, sound or image message sent over a public communication network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient". It appears from the materials of the Law that such wide definition is intended to cover the sending of advertising not only by use of e-mails, but also for example by means of SMS or MMS.

However, the Law provides for a restrictive exception to the necessity to obtain the prior consent of the recipient to receive electronic mail, subject to restrictive conditions:

- the electronic contact details must have been obtained directly from the recipient, in the course of the provision of services or the sale of products;
- the electronic contact details must have been obtained in accordance with French data protection legislation;
- the communication must be sent by the same natural or legal person;
- the communication must relate to similar products or services;
- the addressee must have the possibility to oppose, free of charge and in an easy manner, the use of its electronic contact details every time an e-mail is sent.

2. MEDIA

BRAZIL BILL ON MOVIE AND AUDIOVISUAL ACTIVITIES

by Raphael de CUNTO
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From the outset of the Lula Administration, there have been heated discussions on the legislation governing movie and audiovisual works as well as on the role played by the National Movie Agency (Agência Nacional do Cinema - ANCINE), created under Provisional Measure 2228-1 of September 6, 2001 ("MP 2228-1"). Last week, as a result of this controversy, the Ministry of Culture disclosed a Bill on its website that seeks to establish the means for control and inspection of movie and audiovisual activities, as well as the mechanisms that will stimulate their development. The changes proposed for the sector are extensive.

The Bill will be submitted to public consultation for sixty (60) days before it is debated in the Brazilian Congress.

From the time it was published in the media, this Bill stirred up controversy in the sector, and fierce discussions regarding the constitutionality of several of its provisions, mainly those providing for control of content. It is clear, at least for the Ministry of Culture, that the Bill involves development of a Brazilian audiovisual project, an issue relegated to a secondary plane during the last few years but which is essential in view of the weight audiovisual content bears in formation of the Brazilian cultural identity.

The position taken by the Ministry is that to implement this national audiovisual project it must face the challenge of maintaining production capacity while revising legislation on the sector, making it more flexible so that new services and state-of-the-art technology can emerge. In order to face this challenge, the Ministry adopted several basic premises, the most relevant of which is that technological platforms (physical networks) will now be regulated separately from content production and distribution services. The Ministry now intends to regulate the entire production and distribution audiovisual chain, collect funds, foster

development of local economic agents and collaborate in forming a Brazilian cultural identity.

The draft law contains elements of the General Telecommunications Law ("LGT"), such as the introduction of fundamental principles establishing that the doctrines of national sovereignty, social function of property, free initiative, free competition, consumer protection, among others, should be observed in the economic relations governing movie activities. Moreover, as is the case of the LGT, the Bill establishes the principle of free and fair competition, entitling the public authorities to intervene to correct any distortions.

STRUCTURAL CHANGES

The name of the Higher Movie Council was changed to Higher Movie and Audiovisual Council, which will no longer be responsible for establishing the Brazilian movie policy. The draft law confers authority on the Ministry of Culture for developing and applying the Brazilian movie and audiovisual policy, and the Higher Movie, Audio and Video Council will now be responsible for formulating proposals for policies and general guidelines. Moreover, it will no longer be incumbent on ANCINE, but rather on the Ministry of Culture: (i) to institute programs to foster Brazilian movie, audiovisual activities; (ii) to stimulate the participation of Brazilian movie, audio and video works in international festivals; and (iii) to approve and control performance of co-production, production, distribution, marketing, exhibition and infrastructure projects carried out with public funding and tax incentives.

The Brazilian Movie and Audiovisual Agency (Agência Nacional do Cinema e do Audiovisual - ANCINAV) has been created to replace ANCINE. The scope of ANCINAV's authority will now extend to the following activities that were never attributed to ANCINE: (i) to resolve conflicts of interest between commercial companies engaged in movie and audiovisual activities within the administrative sphere; (ii) to guarantee users and consumers' rights; (iii) to propose to the Ministry of Culture and to the Higher Movie and Audiovisual Council measures considered necessary for guaranteeing and observing the constitutional and legal principles related to social communication; (iv) to take competition protection measures in relation to movie and audiovisual activities and propose that the Administrative Council for Economic Defense - CADE file administrative proceedings in this regard (v) to regulate the list of programmers and distributors of audiovisual content in order to stimulate competition.

ANCINAV's structure is similar to that of other agencies, and a Board of Directors, has been created comprising five members chosen by the President of the Republic and formally appointed upon approval of the Federal Senate. The term of office of the Board of Directors is four years.

New Concept of Audiovisual Content

The Bill extinguishes the current definitions of audiovisual works, and now generically refers to them as audiovisual content. Audiovisual Content is defined as the "product of fixing or transmitting images with or without sound, so as to create the impression of movement, irrespective of the processes used to capture them, the technology employed, the initial or subsequent physical medium used to fix or transmit them or the means employed to disclose, reproduce, transmit or broadcast them." ANCINAV will regulate the various modalities of audiovisual content.

Any individual or legal entity that directly or indirectly exercises an activity classified as audiovisual, that is, any activity involving the offer of movie works and other audiovisual content, as for example, the commercial exploitation of any kind and purpose, by any means, as well as provision of goods and services specifically geared for audiovisual production, will be subject to the provisions of

the Bill, and will be defined as a person engaging in movie and audiovisual activities.

As one can note, the definition of a person engaging in movie and audiovisual activities is considerably broad, encompassing various entities that were not subject to the Provisions of MP 2228 in the past, but which in some way engage in audiovisual activities (even if not commercially).

The definition "engaged in movie and audiovisual activities" includes telecommunications service providers, which were mentioned in one of the titles of book III of the Bill. In order to regulate such activity, the Bill divides telecommunications service providers into two categories:

- those for which the audiovisual content is an inherent part of their activity, such as image and sound broadcasting companies and pay electronic mass communication services, including providers of Cable TV Services, MMDS Services, Pay Television and Audio Signal Distribution Services and of Special Pay TV Services; and
- other telecommunications services, which do not include audiovisual content as their inherent activity but transmit such content to their subscribers.

Therefore, it is clear that the legislator's intention was to include within the scope of this law, several telecommunications service providers that were not previously subject to MP 2228-1. Such inclusion, among other aspects, will subject them to content control to which all persons engaging in audiovisual activities will be subject. According to the Bill, ANCINAV, may establish that telecommunications providers' observe the principles applicable to content production and programming, among which: (i) preference for educative purposes; (ii) promotion of national and regional culture and stimulus for independent production; (iii) regionalized cultural, journalistic and artistic production; and (iv) respect for ethical and social values.

SYSTEM FOR CONTROL OVER THE ACTIVITY

Partially following the provisions of PM 2228, the Bill has maintained an Information and Monitoring System for Movie and Audiovisual Activities, including, among others, the obligation that movie theaters have an income-control system and that technical copy and reproduction services be performed in laboratories installed in Brazil. Besides maintaining such obligation, the scope of the Bill was extended to include dubbing and subtitles services in the list of services that should be carried out at the laboratories installed in Brazil.

All persons engaged in audiovisual activities must submit periodical reports on the offer of movie works, and register with ANCINAV. All titles, chapters or episodes of audiovisual works must also be registered with ANCINAV before being marketed.

Works produced with public funds must be filed at the Brazilian Movie Archives and eight (8) years after the first exhibition date, the holders of copyrights on the work must assign the exhibition rights to educative channels that are maintained with public funds.

Changes in the Contribution for Development of the Brazilian Movie and Audiovisual Industry - CONDECINE

Assessment

The triggering event for CONDECINE will henceforth be:

- engagement in the marketing of movie and video works, including programming, distribution, licensing, exhibition, operation and disclosure per market segment for which they are intended (i);
- payment, credit, employment, remittance or delivery to producers, distributors or intermediaries abroad of amounts related to income stemming from marketing of

movie or audio and video works for commercial purposes (ii);

- sales of tickets to consumers in movie theaters and other exhibition locations (iii);
- in a single stage, the sale or assignment for lease on the home video market (iv); and
- acquisition, including by exchange, of advertising space to disclose advertising works (v).

Item (i) above deals with the so-called fixed CONDECINE, which is paid every five years in for movie or audiovisual works, a single time for availability for movie theaters and once every twelve months for advertising works. The bill proposes an increase in the fixed CONDECINE for certain market segments, more specifically, with regard to audio and video long-feature films for the movie theater market and foreign advertising movie or audio and video works in all markets.

Item (ii) deals with CONDECINE assessed on the remittance of amounts abroad. The rate was maintained at 11%.

Items (iii), (iv) and (v) describe new events of CONDECINE assessment. In these cases the taxpayers will be, respectively, (a) the exhibition service provider (with joint and several liability with the owners of the movie theaters and other exhibition locations); (b) the distributor of movie and audio and video works for the home video market; and (c) the advertiser of movie or audio and video advertising work or its legal representative (with joint and several liability with the broadcasting or telecommunications service provider).

The rates will be respectively: (i) 10% on the ticket value (deducted from the part ratable to ISS, PIS and COFINS assessment); (ii) 9% on the unit amount charged by the distributor; and (iii) 4% on the amount paid to the service provider, less the amount paid to advertising agencies (the taxpayer may deduct the CONDECINE amount plus 50% as operating expense when ascertaining income tax).

In the events set out in items (iii) and in (iv), CONDECINE will be payable up to the fifth business day of the month following the monthly ascertainment period. In relation to item (v) the contribution will be due on the payment date by the advertiser to the broadcasting or telecommunications service provider.

Exemptions

The bill eliminates the exemption previously granted to foreign sports and journalistic movie and audio and video works. The bill affords this exemption only to Brazilian works or sports movie or audio and video works aired by image and sound broadcasting companies. This exemption, however, does not apply to paid television.

The following works are no longer exempted from CONDECINE on the title or chapter of the work: (i) advertising works aired in municipalities with a number of inhabitants defined by regulation; (ii) audiovisual works produced by image and sound broadcasting companies and electronic mass communication companies to be exhibited in their own market segment; and (iii) movie works included in international programming.

The following works are now exempted from CONDECINE on the title or chapter of the work: (i) advertising of movie and audio and video works in the movie theater and home video segments; low-cost Brazilian advertising movie and audio and video works produced and aired locally, as per regulations; (ii) movie and audio and video works included in international programming that retransmits image and sound broadcasting services provided in other countries or similar works exclusively intended for international transmission.

International programmers, which are subject to CONDECINE at a rate of 11%, may still invest a portion of the sum to be remitted in independent productions. Such portion has been raised from 3% to 6% of the payment value,

and the period for using such funds has been reduced from 270 days to 180 days.

The bill also changes the wording of article 3 of Law 8685/93 with regard to the possibility of deducting 70% of Withholding Income Tax ("IRF") for investment in Brazilian works, so that such benefit also be extended to payers of IRF assessed under article 72 of Law 9430/96 (this provision is the legal basis of article 709 of the Income Tax Regulations, Decree 3000/99, which determines that the rate of 15% be applied to remittances relating to acquisition of rights on any movies or events).

NEW INCENTIVE FUNDS

The bill provides for two new funds to be defrayed with the revenues from CONDECINE assessed at a higher rate. These are: the Fund for Monitoring of Movie and Audiovisual Activities and the National Fund for the Development of Brazilian Movie and Audiovisual Activities. In addition to these two new funds, the bill creates the Program for Support of Brazilian Audiovisual Activities (Prodav).

The Brazilian Movie and Audiovisual Industry Financing Fund and other incentives such as the Program for Support of the Brazilian Movie Development (Prodecine) and the Additional Income Premium were maintained.

FOREIGN INTEREST CONTROL

In addition to allowing for control over the programming aired by companies engaged in audiovisual activities, the bill also provides for control of foreign investment.

One form of controlling foreign investments arises from the change in the definition of a Brazilian company, which according to the Bill is now defined as that "organized under the laws of Brazil, with principal place of business and management in Brazil, the majority of the voting capital of which is held, directly or indirectly, by Brazilian nationals, who must actually and legally exercise editorial, selection and programming direction duties and have direction powers over the company's operation and corporate activities."

Another form of control derives from the possibility of the government authorities' imposing by law limits on foreign interest in the capital of companies engaged in movie and audiovisual activities, and establish regulations to oversee corporate control and control transfer of companies engaged in movie and audio and video activities.

OTHER IMPORTANT CHANGES

The Bill maintained the so-called "screen quota," which requires that companies that own or lease movie theaters exhibit Brazilian long-feature movie works. Such obligation, however, was extended to companies distributing movie works to the home video market, which are now required to include Brazilian works among their titles and to launch them on the market.

Companies providing broadcasting services and telecommunication companies must establish annually a commitment with ANCINAV and the Ministry of Culture for exhibition of Brazilian long-feature audiovisual works, Brazilian audiovisual works intended for children and adolescents, Brazilian audiovisual works of independent production and regional production.

Moreover, the companies providing broadcasting and other telecommunications services should set aside for ANCINAV three (3) minutes of their programming to include advertising and promotional pieces for Brazilian movie works, according to the regulations.

The companies providing audiovisual telecommunications services, characterized as pay mass communication services, should offer programming channel, mainly composed of independently produced Brazilian movie and audiovisual works, pursuant to the regulations.

The draft bill proposes revocation of MP 2228-1 and Law No. 10454 of May 13, 2002 ("Law 10454/02"), which affects the judicial measures that were proposed against such acts, since the period under effectiveness of the new law will not be their subject matter.

CONCLUSION

The Ministry proposed a clear separation between content and platform, leaving the second, that is, technology, to the Ministry of Communications and Anatel. It is curious that the Ministry considers that it is "freeing the ties" that bind legislation on the sector, when, in fact, it imposes stringent control over an enormous gamut of sectors, entities and activities that range, theoretically, from Internet to videogames. In a certain way, under this bill the Ministry intends to apply to simply every movie and audiovisual activity the Constitutional precepts of social communication that, today exclusively apply to journalistic and broadcasting companies. On the other hand, in its attempt to regulate the sector, the wording of the Bill restricts the constitutional freedom of thought, creation, expression and information when it suggests that, although "freedom", is the rule the public authorities may create exceptions.

In view of the extension of the changes that the Ministry intends to introduce the debate should not be limited to a mere 60 days.

CANADA

RADIO STATION'S LICENCE NOT RENEWED

by Michel RACICOT
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On July 13, 2004, the Canadian Radio-television and Telecommunications Commission ("CRTC") rendered its decision, Broadcasting Decision CRTC 2004-271, not to renew the broadcasting licence for the French-language commercial radio station CHOI-FM Québec, held by Genex Communications Inc. ("Genex").

For those who are aware of the Howard Stern morning program and the regulatory controversy it has created in the United States and Canada, the issues in Decision CRTC 2004-271 will be familiar.

The CRTC decision follows an application by Genex, the licensee, for the renewal of the broadcasting licence for the French-language commercial radio programming undertaking CHOI-FM Québec, which expires on 31 August 2004. In Canada, broadcasting licences are typically granted seven year terms. Where licensees fail to meet the terms and conditions of their licence, the CRTC sometimes accords only a short-term, two year "administrative" renewal by way of sanction. This decision by the CRTC not to renew the licence, due to violations of content-related licensing conditions, is a first in Canada.

CHOI-FM has had a long history of controversial radio programming. In some ways similar to the Howard Stern show, various CHOI-FM hosted talk-shows are deliberately polemic and in some cases, offensive, following the "shock jock" model. The following transcript provides an example. Commenting on a news story about the mistreatment of a patient in a psychiatric hospital, host Jean-François Fillion stated the following on CHOI-FM on 8 May 2003: "[translation] Why don't they just pull the plug on him? He doesn't deserve to live. The guy's a freaking burden on society." A few minutes later, a worker from the treatment centre called the host and said that the wing in which the serious cases, like the one being discussed, was referred to by staff as "the zoo." After that call, Mr. Fillion added, "[translation] What I think they should do in the zoo is fill up the rooms, and then there'd be a switch, and once every four

months, they press the button and just a little bit of gas comes out, and then you go in and pick it all up and put it in bags." Other on-air comments deemed to be offensive included repeated sexist references to the physical and mental attributes of a local television personality and the suggestion that many African students, studying in Quebec, were sons of dictators, plunderers and "annibals".

Following a public hearing in 2002, the CRTC issued a short-term licence renewal for CHOI-FM, Broadcasting Decision CRTC 2002-189, 16 July 2002 (Decision 2002-189). This decision renewed CHOI-FM's licence for a period of only 24 months due to the licensee's repeated failure to comply with Canadian broadcasting regulations regarding, among other things, abusive comment, the submission of logger tapes, the broadcast of French-language vocal music and the condition of its licence related to sex-role portrayal. The CRTC also noted the licensee's failure to meet the objective set out in section 3 of the Broadcasting Act that programming be of high standard.

These findings were based, notably, on the CRTC's analysis of 47 complaints it had received since CHOI-FM was acquired by Genex in February 1997. These complaints concerned the broadcast of abusive comment, offensive on-air contests, personal attacks and harassment on a daily program aired by CHOI-FM during peak morning hours.

The CRTC noted in its decision that it gave Genex numerous warnings of the possible consequences of its actions (including the administrative renewal and numerous explicit warnings to the effect that continued breach of the station's licensing conditions might result in non-renewal of the licence). Nevertheless, the station continued to air programming that violated both industry and CRTC imposed norms of acceptable content.

Ultimately, in view of the licensee's perceived inflexible behaviour, its lack of acceptance of its responsibilities and the lack of any demonstrated commitment to rectify the situation, the CRTC concluded that Genex would not comply with the Broadcasting Act, the Regulations and its Code of Ethics if its licence were to be renewed. The CRTC also concluded that the measures available to it, such as another short-term renewal, the issuance of a mandatory order, or the suspension of the licence, would not be effective in overcoming the problems that had been identified. Consequently, the CRTC denied the application by Genex for renewal of the licence of radio programming undertaking CHOI-FM Québec and ordered it to cease broadcasting by August 31, 2004.

The decision raises important issues related to the limits of freedom of expression. The CRTC stated that it recognized the importance of the principle of freedom of expression, which both protects those who express their views and those who hear them. According to the CRTC, the freedom of expression of broadcasters is counterbalanced by the right of listeners to programming that complies with the Broadcasting Act and associated regulatory requirements. In the CRTC's view, remarks which are abusive and that risk exposing an individual or a group to contempt or hatred contravene the objectives of the broadcasting policy for Canada set out in section 3(1) of the Broadcasting Act.

That policy declares that the programming should be of high standard and that the Canadian broadcasting system should, through its programming, reflect the circumstances and aspirations of Canadian men, women and children, including equal rights, linguistic duality and the multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society. Those principles are reinforced by sections 15 and 27 of the Canadian Charter of Rights and Freedoms (the "Charter").

According to the CRTC: "The regulation prohibiting abusive comment that tends or is likely to expose a person or a group to hatred or contempt is necessary not only to avoid harm to

the persons targeted, but also to ensure that Canadian values are respected for all Canadians. The broadcast of remarks that could expose individuals or groups to hatred or contempt can attract individuals to its cause and in the process create serious discord between various groups in Canadian society to the detriment of all of Canadian society. This harm undermines the cultural, political and social fabric of Canada which the Canadian broadcasting system is expressly meant to safeguard, enrich and strengthen. It also undermines the multicultural and multiracial nature of Canadian society, which the programming of the Canadian broadcasting system should reflect. Protection from the harms of abusive comment is for the benefit of all Canadians."

The CRTC concluded that the broadcast of abusive comment that could expose a person, group or class of persons to hatred or contempt based on race, religion, colour, ethnic origin, sex, mental disability or other grounds referred to in section 3(b) of the Regulations is incompatible with the standards and values of the Canadian broadcasting system and the values in the Charter. The purpose of section 3(b) is to prevent the real harms that such remarks can cause, harms that undermine the objectives of the broadcasting policy set out in the Act, and that have been recognized by the courts.

The licensee is widely expected to seek leave to appeal the decision to the Federal Court on the grounds, among other things, that the CRTC's decision erred in law by imposing unacceptable restrictions on the right of freedom of expression.

For more information visit :

<http://www.crtc.gc.ca/archive/eng/decisions/2004/db2004-271.htm>

3. TELECOMMUNICATIONS

UK RECENT REGULATORY DEVELOPMENTS IN THE UK TELECOMS MARKET

by Colin LONG
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WHOLESALE LOCAL ACCESS / LOCAL LOOP UNBUNDLING (THE "LLU")

In early May, OFCOM published their market review of wholesale local access. The review clearly indicates that OFCOM see LLU as their key tool for opening up competition at the network layer of the broadband market.

Key outcomes from the review include:

- continued obligations on BT in the areas of providing access, LLU, non-discrimination, cost-orientated charging, and publication of a reference offer;
- separation of the non-cost aspects of LLU (OFCOM have recognised that these aspects must be dealt with and are a significant challenge to matching European best practice);
- requiring BT to pool its LLU operational support costs with its equivalent DSL set-up costs;

OFCOM intend to release more detail on the LLU approach to charging, which is expected to be adopted after future consultation.

LEASED LINES / PARTIAL PRIVATE CIRCUITS (THE "PPCS")

The major development in this area was publication of the SMP Market Review for leased lines and symmetric broadband origination in early August.

There were few surprises, with the highlights being:

- at the retail level, BT has significant market power ("SMP") in low bandwidth leased line market (up to 8Mbit/s) and continued obligations relating to the provision of a minimum set of leased lines, a prohibition on undue discrimination, and the transparency of pricing and terms;
- at the wholesale level, BT was also found to have SMP in low and high bandwidth broadband origination markets (PPCs) up to and including 155Mbit/s and in all trunk segments;
- obligations proposed on each of the wholesale markets including the publication of reference offers, cost-orientated pricing, a prohibition on undue discrimination, and accounting separation;
- similar regulatory obligations proposed relating to the technical interconnection equipment and services provided by BT (these are primarily related to customer sited handover ("CSH"), In-span handover ("ISH"), and LLU Backhaul).

At the same time as publishing this market review, OFCOM also published their price control statement for BT's provision of PPC terminating segments. The new RPI-X control applies for four years, but it does not apply to certain related technical services, such as Radio Base Station ("RBS") backhaul and Local Loop Unbundling ("LLU") backhaul products and services.

CARRIER PRE-SELECT ("CPS")

On 30th July, OFCOM released a statement, "Addressing the local call disadvantage," dealing with the tromboning costs faced by CPS operators originating or terminating calls on the same or adjacent digital local exchanges ("DLEs").

The consultation was triggered by BT's announcement, in March 2004, that it was withdrawing standard residential line rental and transferring all relevant customers over to "Together 1" -- a move that put even greater pressure on the competitiveness of CPS providers.

OFCOM have quantified the inherent call disadvantage as being 0.354ppm more than BT for a call originating and terminating at the same DLE, or 0.204ppm more for calls terminating at an adjacent DLE.

The consultation was concluded such that OFCOM have:

- established a new routing option for CPS operators that enables them to route those calls which originate and terminate at the same DLE or directly-connected DLE, to do so on an end-to-end basis (described as Same/Adjacent-DLE or "SAD") calls;
- proposed to modify the CPS Functional Specification to provide for these changes;
- setup a new methodology for charging CPS operators for SAD calls on the same basis as BT Retail;
- clarified the interconnection arrangements required to qualify for the new form of CPS for SAD calls.

In an unrelated development in the area of CPS, OFCOM have also proposed to strengthen the customer protection measures related to CPS after problems associated with premium rate internet dialers. The review will centre on expanding the powers of the premium rate industry regulator, ICSTIS.

VOICE OVER IP ("VOIP") / VOICE OVER BROADBAND ("VOB")

OFCOM have been reviewing the various regulatory issues thrown up by VoIP. As part of this review, OFCOM have looked at the numbering arrangements appropriate for VoB.

While not covered in detail, OFCOM expressed their concern about the need to require service providers who use VoB to inform consumers about any limitations on access to emergency numbers using their service. OFCOM have also proposed allocating the corporate number 056 to VoB; this number would also be included in the CPS "all calls" option.

There is a forthcoming consultation regarding publicly available telecommunications services ("PATS") which will begin in September and cover the consumer and numbering issues in particular.

SPECTRUM TRADING

Spectrum trading continues to develop. On 6th August 2004, OFCOM released a Statement on their settled approach to implement trading from December 2004.

- Trading will be facilitated by "Trading Regulations" published by OFCOM for different frequencies -- the first of which is expected in November allowing for trading to begin in some frequencies from December;
- Simultaneously, OFCOM will liberalise spectrum licences to give them a rolling term, look to remove non-spectrum licence conditions and to allow for some forms of shared use of spectrum;
- OFCOM will continue to charge "administrative incentive pricing" on both tradable and non-tradable spectrum;
- OFCOM expect that the spectrum market may include a greater role for intermediaries and the more flexible hiring of spectrum.

CONSULTATION ON BT PRICING OF SERVICES FOR BUSINESS CUSTOMERS

OFCOM released a statement in late May which concludes a consultation begun by the former regulator, OFTEL, in October 2003, on the discounted packages being offered to business customers by BT. The statement confirms that OFCOM only intends to regulate retail markets when regulation of upstream wholesale markets is not effective to protect competition (in fact, OFCOM have been reducing retail regulation steadily already over the last 12 months through the SMP market reviews).

The Statement also concludes that:

- BT should be permitted to offer discounted bundles but only where the terms of the discounts are published and made available to all comparative customers;
- all bundles must comply with an implicit price-cost test (or net revenue test) to prevent leveraging from an SMP market to a non-SMP market;
- identical tests will apply to contracts awarded by tender and contracts awarded by other means; and

- OFCOM believe that, at least for the next 12 months, it is unlikely that they will allow any other bundling of services by BT across markets where it has SMP and those where it does not.

OTHER REGULATORY DEVELOPMENTS

In relation to other recent developments, OFCOM have consulted on:

- their approach to the calculation of administrative charges (OFCOM inherited the approach adopted during the transition period from Oftel and has received criticism from various companies, leading them to take another look);
- the retail uplift for NTS and the PRS bad debt surcharge (these were established following a market review of the relevant wholesale call origination, conveyance and transit market in November 2003);
- setting the margin between BT's IPStream and their ATM interconnection products (the "Datstream" family of products);
- changes in the structure of BT's product management, policy and planning ("PPP") charges;
- general administrative matters including their approach to determining penalties and criteria for promoting effective co-regulation.

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TABLE OF CONTENTS BY COUNTRY

NEWS ITEMS

Country	Title	CATEGORY
ARGENTINA	New Regime to Promote the Software Industry	MARKET ACCESS
AUSTRALIA	Internet child sex abuse offences Bill tabled	CONTENT OF INTERNET, AUDIO-VISUAL AND INFORMATION SERVICES
	IIA Releases Draft Spam Code of Practice	PRIVACY
AUSTRIA	Mobile Interconnection	MARKET ACCESS
CANADA	ISPs Not Liable for Copyright Infringement	INTELLECTUAL PROPERTY
CHILE	Acquisition of Bellsouth in Chile by Telefónica Móviles	TELECOMMUNICATIONS
COLOMBIA	Shareholders' Rights Extinguished If Not Exercised	CONTRACT LAW
	Well-Known Trade marks Must Be Registered	INTELLECTUAL PROPERTY
FINLAND	New Legislation on Privacy in Electronic Communications	PRIVACY
GERMANY	BGH: Spam among competitors is anticompetitive	COMPETITION
	Claim against mobile phone transmitter next to kindergarten	CONSUMER PROTECTION
	Court Tightens Judgment on Use of .ag TLD	DOMAIN NAMES
	Court Rules Amazon Violates Book Price Maintenance Act	ELECTRONIC COMMERCE
	Illegal to Approach Passers-By for Promotional Purposes	PRIVACY
	No Video Surveillance at Work Without Probable Cause	PRIVACY
	EU Directive on Communication	TELECOMMUNICATIONS
	Provider of online-auctions must ban offers of fake goods	TRADE LAW
GHANA	Geographical Indications Now Protected	INTELLECTUAL PROPERTY
	New Trade Marks Act Allows Service Marks	INTELLECTUAL PROPERTY
INDIA	Allocation of Spectrum to Mobile Service Providers	TELECOMMUNICATIONS
ITALY	New Electronic Copyright Protection	INTELLECTUAL PROPERTY
NEW ZEALAND	Government to Legislate Against Spam	PRIVACY
NIGERIA	Recapitalization in the Banking Industry	FINANCIAL SERVICES
	Review of Official Filing Fees	INTELLECTUAL PROPERTY
PORTUGAL	New Regulation on Personal Data Processing	TELECOMMUNICATIONS
	Providing electronic communications networks and service	TELECOMMUNICATIONS
	TMDP regulation finally approved	TELECOMMUNICATIONS
SOUTH AFRICA	Terrorism in the Information Age	COMPUTER CRIME

FROM THE EDITOR

Country	Title	CATEGORY
CANADA	Erratum	PRIVACY

COMMENTARIES

Country	Title	CATEGORY
BRAZIL	Bill on Movie and Audiovisual Activities	MEDIA
CANADA	Radio station's licence not renewed	MEDIA
FRANCE	Views about the New Law on Confidence in the Digital Economy	INFORMATION SOCIETY POLICY
UK	Recent Regulatory Developments in the UK Telecoms Market	TELECOMMUNICATIONS

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