

Co-Counsel

McCarthy Tétrault Co-Counsel:

Technology Law Quarterly

April - June 2005



150 YEARS

Always a step ahead.™

McCarthy
Tétrault

mccarthy.ca

VANCOUVER CALGARY LONDON TORONTO OTTAWA MONTRÉAL QUÉBEC NEW YORK LONDON, UK

Co-Counsel:

Technology Law Quarterly

Volume 1, Issue 2

Message from the Editor,

Welcome to the second issue of McCarthy Tétrault's *Co-Counsel: Technology Law Quarterly*. We stand at a very unique time in our history. The advance of technology – constant invention and innovation – means that law is being made daily. This is tremendously exciting for those of us who work at the intersection of Information Technology, Technology & Intellectual Property, Privacy and the law. This publication has been created to give our clients a picture of what is going on in 'tech law' and, most importantly, what it means to them. We've highlighted cases, spotted trends and made note of changes in the law that we think will be of particular interest to you.

As we said in the last issue, this publication is a bit longer than you might be used to receiving. We work in one of the most dynamic and interesting areas of law and business – one of the results of which is that there's a lot going on and a lot to talk about. But to make it easier this newsletter is simple to get through. The information has been categorized to make it easy to find. The Table of Contents can help you navigate through the sections. As well, we have linked out to other articles that are available online. And of course the contact information of the individual lawyers are in the document. They would be happy to discuss the issues raised here at your convenience.

If you would prefer to receive a paper copy of the newsletter in future, or wish to change your subscription information (including: requesting more copies, subscribing for a colleague, or removing yourself from the distribution) please contact the editor at the link below. As well, we're happy to send you a binder to keep paper copies of the newsletter as well as an annual index.

McCarthy Tétrault is proud of its position as a leader in all areas of law, and recently the 2005 *Expert Canadian Legal Directory*, a peer review publication that ranks law firms and lawyers, has noted McCarthy Tétrault as having the leading technology law practice in the country. *Co-Counsel: Technology Law Quarterly* is one more way we're working hard to retain that position of leadership.

[Sukesh Kamra](#)

Editor, TLQ

July 2005



Always a step ahead.™

McCarthy
Tétrault

mccarthy.ca

TABLE OF CONTENTS

- INTERNET/E-COMMERCE2**
 - E-contracting 2
 - Jurisdiction8
 - Regulatory.....10
 - Criminal11
 - Spam.....17

- TECHNOLOGY CONTRACTING18**
 - Outsourcing News and Developments 18
 - Technology Agreements..... 19

- TECHNOLOGY FINANCE21**
 - Venture Capital.....21
 - Tech-related M&A.....25

- INTELLECTUAL PROPERTY29**
 - Copyright.....29
 - Domain Names.....35
 - Patents36
 - Trade-marks49
 - Trade secrets50

- PRIVACY51**
 - News/Legal Developments51

- COMMUNICATIONS55**
 - Cases/Legal Developments55



E-CONTRACTING

Québec: Arbitration Clause Deemed Unenforceable

On May 30, 2005, Dell Computer Corporation (“Dell”) lost its appeal at the Québec Court of Appeal. Dell had claimed that an arbitration clause in its Terms of Sale prevented the Québec Superior Court from hearing the case for the issuance of a class action against it by Union des consommateurs and Olivier Dumoulin (“Dumoulin”). Both the Superior Court and the Court of Appeal rejected Dell’s motion and the case was allowed to proceed.

The matter arose as a result of the advertising of certain computers at a low price on Dell’s website, which proved to be an error. The advertising was in effect from April 4th to April 7th, 2003. On April 5th, Dell discovered the error and took measures to prevent users from accessing its website. Despite these measures, Dumoulin accessed the site on April 7th and ordered a computer. Dell advised Dumoulin the next day by email that it would not honour the order and that a new order at the correct price would be processed. Dumoulin requested that Dell honor the order under the terms of the initial offer. The Terms of Sale published on Dell’s website included an arbitration clause

indicating that any dispute be settled by arbitration under the Arbitration Rules of the National Arbitration Forum (“NAF”), which could be consulted on NAF’s own website, accessible by hyperlink from Dell’s website. Since Dumoulin was a consumer, the parties did not contest that the contract was governed by the Québec *Consumer Protection Act* (“CPA”). Neither did the parties contest that, despite the fact that the Terms of Sale stated that the laws of Ontario would apply, the contract was governed by the laws of Québec. Under section 1435 of the *Civil Code of Québec* (“CCQ”), an *external clause* referred to in a contract is binding on the parties. However, in a consumer contract or in a contract of adhesion, an *external clause* is null “if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.” The court concluded that the arbitration clause was an *external clause*.

The court also referred to section 2642 of the CCQ, which provides that an “arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract (...).” The court concluded that the arbitration clause could not be used against Dumoulin

because Dell had not proven that Dumoulin knew of it at the time of the formation of the contract. The court noted that the notice drawing attention to Dell's standard Terms of Sale was in small print and, according to Dell, at the bottom of the page which required at least three 'clicks' to reach. In addition, the Dell witness testified that the objective of the Terms of Sale was to not distract the attention of the user from the purchase of the product. The court also noted that reviewing the Terms of Sale was not a mandatory step before purchase of the advertised product and that the website did not have a window displaying the arbitration provision, which the user had to accept before making his purchase.

In addition, the court stressed that a mere reading of the Terms of Sale did not provide adequate information because the consumer was required to visit the NAF website. The court concluded with saying that just because the NAF website could be accessed by hyperlink from the Dell website did not impact the external character of the NAF document. It stated that Dell had to demonstrate that at the time of sale, the consumer knew of the content of these two *external clauses*: the arbitration clause and the NAF Arbitration Rules. In this case, Dell did not enjoy any presumption of knowledge on the part of the

consumer. Dell did not present any evidence on this issue and did not demonstrate that Dumoulin had knowledge of the Terms of Sale containing the arbitration clause or of the NAF Arbitration Rules. In fact, counsel for Dell did not even ask Dumoulin about this.

By way of *obiter*, the court also stated that a dispute under the CPA could be resolved by arbitration but that the parties could not use arbitration to avoid the CPA. A consumer has no power to waive the rights granted to him by the CPA. The court also addressed whether the arbitration clause could prevent the exercise of a class action and held, by way of *obiter*, that the law had recognized the validity of both avenues to allow people to settle their conflicts and that no recourse had precedence over the other. *Dell Computer Corporation v. Union des consommateurs*, [2005] QCCA 570.

McCarthy Tétrault Notes:

This case proves once more that it is very important for businesses offering products or services on the Internet to have all of the terms of their agreement brought to the attention of the consumer before the formation of the agreement. In this respect, we recommend that the agreement be prominently displayed and that the transaction not be completed

before the consumer 'clicks', thus accepting all terms of the agreement. The question of whether an arbitration clause can prevent the exercise of a class action remains an open question but we continue to recommend to our clients to include an arbitration clause in consumer contracts.

Contact Michel Racicot at
mracicot@mccarthy.ca

Canada: Study Shows Canada Reaches High In IT Profits

The Conference Board of Canada conducted a study looking at the profitability of Canada's information technology and communications industry. The study found that there was an increase of 29 per cent in profit – Canada's highest in the last five years.

The Associate Director of Industrial Outlook says that profits and margins continue to rebound from 2001 and the major reason for this is the rapid technological change and strong competitive pressures. The report indicates that the telecom sector has been hit by intense competition and falling prices. The competition is a direct result of deregulation in the industry and deregulation has increased the pace of

innovation and maintained good levels of profits. The report suggests that both the computer and electronic manufacturing industry, and the computer systems design sector should expect profitability this year, but may be hampered by weak pricing.

U.S.: Email Retention Policy Impacted by Morgan Stanley Decision

As of July 2006, all public companies will be obligated to retain all email and instant messaging documents for three years under the Sarbanes-Oxley corporate reform measures.

U.S. courts will be imposing heavy fines on companies that do not abide by this new rule. The reason for this change is the recent US \$1.45 billion decision against Morgan Stanley accused of not retaining emails and subsequently deceiving an individual over a business deal.

The impact of the decision is forcing companies to act quickly. First, all company employees should receive email retention training. Second, a proper email retention policy should be implemented. Although an excellent backup system is also now necessary, an adequate policy should be created by

companies who are without one. The effect of this decision on company email filtering policies, technologies and spam in general will be interesting to see.

As an aside, a recent study conducted by AIIM and Kahn Consulting shows that on average there are significant problems between the use and management of electronic communications. Email management is critical for business compliance operations and companies who fail to address this issue may fall into the same predicament as Morgan Stanley.

McCarthy Tétrault Notes:

As you are no doubt aware, the retention and destruction of corporate records has become a critical issue facing businesses today. While we have yet to see anything like the infamous Enron/Arthur Andersen scandal or the Morgan Stanley decision in Canada, it has become absolutely clear that every business should have a defensible, formal records retention policy in place. There are two compelling reasons for this – first, to meet the statutory requirements and, second, in the event of litigation or other legal proceedings.

To develop an effective and appropriate records retention policy, your company must appreciate what statutory requirements it is expected to meet, and

what other legal issues it may face. As a first step towards assisting our clients in their efforts to understand this evolving and often confusing area, McCarthy Tétrault has prepared a comprehensive analysis of the federal records retention laws as well as those of all 10 provinces. The analyses are broken down into the following areas – Corporate Records, Tax Records, Employment and Other Workplace Records and Protection of Personal Information (Privacy). They cover laws of general applicability to all businesses doing business in the jurisdiction.

In addition, we have also prepared an in-depth memo on special topics that every business should be aware of when designing or updating its records retention policy. This memo covers critical records retention issues raised by the federal *Income Tax Act*, the impact of the federal and provincial privacy legislation on records retention generally, litigation issues surrounding records retention including the new *Ontario Limitations Act, 2002* and special issues that arise in connection with the destruction of records.

Our team at McCarthy Tétrault has in-depth knowledge of records retention laws and regulations and can provide advice on how to gather and categorize information. We analyze the information

to determine if statutory records retention laws apply and discuss retention periods to help create a records retention policy. In addition, McCarthy Tétrault has developed a FAQ template on records retention and some helpful hints on email drafting.

For further information on our records retention services, contact Adam Vereshack at adamv@mccarthy.ca

U.S.: Supreme Court Wine Ruling Seen as Boost for E-commerce

E-commerce received a major vote of confidence when the U.S. Supreme Court ruled that a state may not prohibit out-of-state wineries from selling wine directly (e.g. by Internet and phone) to the state's residents if in-state wineries were permitted to do so.

Lawyers for the individual state governments argued the 21st Amendment which allows states broad authority to regulate sales of "intoxicating liquors." They further argued that the potential for lost taxes as well as accidental shipments of liquor to minors are possible and serious breaches resulting directly from online alcohol sales.

However, in a 5-4 ruling, the court dismissed these arguments and held that states may not prohibit direct sales of wine across state lines if they permit direct sales by local wineries. Vineyards and others in the wine industry are thrilled as the decision sets a precedent and sends a clear message to states with tough protectionist rules to find ways to alter their regulations.

McCarthy Tétrault Notes:

In Canada, issues of inter-provincial trade such as this would be dealt with according to the terms of the Agreement on Internal Trade ("AIT"), an intergovernmental agreement signed by the federal and provincial governments which came into force in 1995 and which has since been amended several times. Its purpose is to foster improved interprovincial trade by dealing with obstacles to the free movement of persons, goods, services and investments within Canada. The AIT focuses on reducing trade barriers within 11 specific sectors, one of which is alcoholic beverages. The AIT prohibits discriminatory practices in areas such as product listing, pricing, distribution and merchandising between the liquor control boards and retail outlets of the provinces and territories. Each province, territory and the federal government has an Internal Trade Representative

assigned to handle internal trade matters within their respective jurisdictions. As well, the Internal Trade Secretariat was formed to support and administer the AIT.

The AIT includes a formal dispute settlement mechanism to deal with complaints from individuals and companies as well as governments. The AIT encourages the resolution of disputes through consultations between the parties, and makes provision for progressive steps in the dispute avoidance and resolution process. Each sector of the AIT has its own dispute resolution process which permits the parties to resolve the dispute before it becomes a formal trade dispute. This process must be exhausted before moving into the general dispute resolution procedures and, if necessary, the establishment of a dispute resolution panel. It is therefore likely that in a Canadian situation like the U.S., the wineries would have laid a complaint under the AIT.

Finally, trade agreements with the European Union and the U.S. require imported alcohol to receive equal retailing treatment with domestic products. As a result of that requirement, no additional off-site winery retail stores can be opened in Ontario.

Contact Danielle Bush at
dbush@mccarthy.ca

Washington: Youbet.com Allowed to Take Track Bets After All

The Washington State Horse Racing Commission approved a license for Youbet.com to accept online bets after it was accused of illegally taking millions of dollars in bets from Washington residents. The license is conditional on Youbet.com providing the state a portion of revenues and paying the state US \$400,000 for all illegal bets accepted last year. Youbet.com is the third company to receive “advanced deposit wagering” since legislation has allowed for Internet gambling on horse races. Sixteen other states in the U.S. have laws regulating Internet gambling and by regulating the activity in the state of Washington, the Commission is ensuring that the state is making a profit from the activity.

JURISDICTION

California: 'Crawler' Gathered Content from Competitor Websites and Imputed Assent to Jurisdiction

The U.S. District Court for the Northern District of California held that although a company using 'crawlers' to seek content from competitor websites did not expressly assent to the website's terms of service, the crawler's "repeated and automated" access to the site imputed assent to the terms of service, including the forum selection clause.

The companies in question are Cairo, located in California and CrossMedia, located in Chicago. CrossMedia sent a cease and desist letter to Cairo for scraping content and images from its website. Cairo immediately filed a lawsuit in court seeking declaratory judgment stating that it did not infringe any of CrossMedia's copyrights or trademarks. CrossMedia had asked the court to dismiss the action since its forum selection clause states that any dispute will be entertained in Chicago, Illinois. Cairo argued that the case ought not be dismissed since it had no agreement with CrossMedia. It argued that it never assented to the website terms of use.

The court held that Cairo's crawlers visited CrossMedia's website repeatedly and automatically several times and thus had knowledge of the terms of use. The court defined this as 'imputed knowledge' of the terms of service. It sided with CrossMedia and determined that the forum selection clause applied and dismissed the case.

Cairo, Inc. v. CrossMedia Services, Inc., [2005] WL 756610 (Cal.), online: WL.

California: Hotel Reservation Website Gives Rise to Personal Jurisdiction

The California Supreme Court rendered its decision in the context of personal jurisdiction based on the activities of a website operator. In this case, the court held that an out-of-state defendant's website was sufficient to establish jurisdiction in California. The plaintiff in the case sued a group of defendants who operated hotels in the state of Nevada because it is alleged that they charged an energy surcharge without giving notice. The defendants argued that they do not operate their business in the state of California; however, they did maintain a website where visitors were able to receive free hotel quotes and make reservations. In addition, the

defendants gave driving directions to the hotel from the state of California and touted the proximity of the hotels to California.

The California Supreme Court held that irrespective of their lack of business in the state of California, their marketing initiatives, such as free hotel quotes and driving directions specifically targeting residents of California, gave rise to personal jurisdiction.

Snowney v. Harrah's Entertainment Inc., [2005] WL 1324094 (Cal. Supreme Court), online: WL.

The court held that the plaintiff did not provide any evidence suggesting that the company sought to be listed on that specific website. The court granted the company's motion for dismissal stating that there was no purposeful availment on the part of the company.

Kalk v. Fairfield Language Technologies, [2005] WL 945715 (D. Del.), online: WL.

Delaware: Listing in Web Directory Insufficient for Personal Jurisdiction

A resident of Delaware sued his former employer in Delaware court for a dispute that arose out of the state of Florida. The company, Fairfield, asked the court to dismiss the action for lack of personal jurisdiction. Fairfield argued that they had no contacts with the state of Delaware and thus should not be subject to personal jurisdiction there. The only evidence submitted by the plaintiff was a hyperlink to the company's website found on the Delaware Immigration Directory website.

REGULATORY

Canada: Fake Canadian Drug Websites a Major Concern

Recent data released by Cyveillance suggests that almost 80 per cent of websites offering Canadian pharmacy prescription drug sales are not registered in Canada. Out of 11,000 websites surveyed, only 214 had legitimate registration in Canada. Most of the websites were hosted in the U.S., where the issue of online pharmacies has become a major problem as the high cost of prescriptions, especially brand-name drugs, becomes an obstacle. The U.S. government is not adverse to consumers shopping on the Internet for drugs so long as they do so at legitimate U.S. Internet pharmacies subject to Food and Drug Administration regulations. Unfortunately, most of the pharmaceutical websites do not require a prescription which makes the online experience faster and easier.

Québec: Internet Pharmacy Asked to Shut Down

An Internet pharmacy which sold drugs illegally has settled their case with the Québec Order of Pharmacists and has agreed to leave the province. Under the deal, the company has pleaded guilty to 93 of the 187 counts of illegally selling

prescription drugs. This is the first of three cases to come against Québec-based Internet pharmacies and investigators say there is more to come. The regulatory bodies that regulate physicians and pharmacists have warned their members against participating in online pharmacies, particularly where Canadian physicians are asked to re-write or co-sign a U.S. prescription for patients they have never seen. Meanwhile, the disciplinary committee of the Québec College of Physicians handed down a guilty verdict against a physician who co-signed U.S. prescriptions. This should set a good example for the industry and could act as a deterrent against those who continue to sell drugs illegally over the Internet.

U.S.: Millions in Assets Seized from Online Pharmacy

An online pharmacy in the U.S. selling painkillers and Viagra without a license across the U.S. has been infiltrated by the federal authorities. The authorities have seized over US \$4 million and a court has ordered the website to be shut down. The online pharmacy sold over US \$18 million in drugs, often in mislabeled bottles. Prosecutors have alleged that the company mis-packaged and repackaged prescription drugs. Consumers who did not have valid prescriptions were also overcharged.

The pharmacy also failed to provide them with the correct type and the right amount of drugs that were ordered.

U.S.: IBM to Test Health Care Data Sharing

IBM is developing a test system for sharing electronic medical data with hospitals, agencies and patients. The goal of the test system is to identify the best standards for maintaining this information. They hope this test will also help to discover any additional challenges before the deployment of the project on a global scale. The move to electronic medical records could potentially save millions of dollars a year on health care. In addition to savings, an interoperable system could improve the quality of health care by providing instant access to records. Privacy and security are also said to be on the list of goals, particularly given the recent wave of identity theft. IBM hopes to have it running and operational by year end.

CRIMINAL

Washington: More Searches Conducted at LexisNexis

Following up on the security breach at LexisNexis we reported on in the last issue, federal agents are now carrying out searches in two U.S. states in order to determine who is behind the theft of Social Security numbers and other personal information. The company estimates that at least 310,000 people had their personal information stolen. Although no credit information or medical and financial records were stolen, names, individual addresses, Social Security numbers and driver's licenses were stolen.

U.S.: Anti-Phishing Group Sets Up Central Repository

In a follow-up on last edition, the Anti-Phishing Working Group is planning to construct a central repository to help catch cyber-criminals. The intention is to create a database that can then be used for analysis, and allow for the sharing of information with other interested organizations. Their project is a result of phishing scams becoming more complex. By having one single repository with information collected from different sources, they feel they can tackle the issue

with greater authority. The Anti-Phishing Working Group was established to combat fraud and identity theft resulting from phishing. They have now aligned themselves with a broad membership base to combine efforts in addressing this important development.

U.S.: MasterCard Shuts Down 1,400 Phishing Sites

Since June 2004, MasterCard launched an ID-theft prevention program and as a result has shut down close to 1,400 phishing sites and over 750 sites suspected of selling credit card information. MasterCard works with NameProtect Inc. to detect real-time online scams as they proliferate on the Internet. They use Internet detection technology to scan web pages, domain names, spam email and other online formats to identify identity theft. Typically, once a phishing site is shut down, the operators move their operations to another Internet service provider and only ultimately give up once they have been shut down a few times. According to the Anti-Phishing Working Group, phishing scams grew by over 26 per cent since February of this year.

As an aside, a newer form of ID theft called 'pharming' has grown. In pharming, victims are directed to

spoofed websites that appear real, but are in fact exact replicas of the real site. Some anti-fraud software providers are upgrading their software to address this new wave of ID theft, particularly since pharming represents a more insidious form of violation since no action is required on the part of the victim.

International: DDOS Attacks on the Rise

A new form of extortion has made its way onto the Internet. Distributed denial-of-service ("DDOS") attacks now form one of the more common methods of extortion. The business being extorted receives an email or phone call making demands. If they refuse to abide by the threat, they are victimized within seconds with a concerted effort to disable their network or website. Most often however, the attack has already begun and the business is then contacted. To make the situation even worse, many of the companies being attacked often end up paying the extortionists rather than turn to law enforcement for fear of negative publicity. Telecom companies in the U.S., specifically MCI and AT&T, have developed anti-DDOS attacks technology. However, when businesses require multiple service providers for backup and bandwidth, the cost of obtaining the technology can become

cumbersome. At present, the rate of DDOS attacks is increasing and there does not seem to be a unified response to stop it.

U.S.: Congress Receives Failing Grade for Consumer Data Protection

In a survey conducted by iQ Research and Consulting and commissioned by Adobe Systems and RSA Security, eight out of every 10 respondents believe that Congress has done very little to protect against the theft of Social Security numbers. Over 400 people in government, consulting, policy, and media and technology were surveyed in Washington and three-quarters said little has been done to protect financial data and credit card numbers. Although Congress has begun a series of discussions, including the possibility of legislation, 68 per cent of the respondents feel they have not safeguarded against stolen credit reports, 59 per cent feel phone numbers and addresses are unprotected and 54 per cent say that tax and salary records have not been well protected either. A mere eight per cent of those contacted believe Congress will in fact adopt legislation to curb this growing problem.

U.S.: Citigroup Inc. Loses Tapes Containing Account Information

A box of tapes containing account information for over 3.9 million customers has been lost in shipment. The data contained names, addresses, Social Security numbers and account information. Although there is no word from the company as to how the information was lost or whether it was in fact stolen, this exposes customers to the possibility of identity theft.

Ohio: Designer Shoe Warehouse Loses Customer Data

Over 700,000 customers were affected when credit card information was stolen from Designer Shoe Warehouse. The Attorney General for the state of Ohio, Jim Petro, has asked a court to force the company to send warning letters to its customers. Mr. Petro said he could not understand why the company has not yet individually notified customers of the loss. He thinks immediate notification is important so that customers are careful when reviewing their accounts to ensure protection. The credit card information of more than 700,000 people was stolen and more than 1.4 million transactions were affected.

Chicago: Computers With Data on Motorola Staff Stolen

Two computers located at Motorola's human resources services provider, Affiliated Computer Services ("ACS"), were stolen. The computers contained personal information relating to Motorola employees. The information included names and Social Security numbers but no financial data. ACS claims that thieves broke into their office in Chicago and stole the computers. Motorola has had a working relationship with ACS since 2002 and has now sent all its U.S. employees a letter alerting them to the incident.

New York: Bank Security Breach Raises More Privacy Concerns

Bank employees illegally sold account information belonging to over 670,000 customers to a man doing business illegally posing as a collection agency. Bank of America and Wachovia Corp. are notifying customers of the theft. Although the banks do not believe any account fraud or identity theft has occurred, many customers at Wachovia Corp. are receiving complimentary one-year credit monitoring services as well as individual monitoring of the accounts by the bank.

U.S.: Firefox Suffers Extremely Critical Security Flaw

Two un-patched flaws were recently discovered with Firefox's Mozilla browser, the latest competitor to Internet Explorer. The exploited code is circulating on the Internet allowing attackers to take control of a user's computer system, although the Mozilla Foundation says it has altered the software installation mechanism. The news could not come at a worse time as Firefox has now gained significant market share from Microsoft because of the belief that it was less prone to security attacks.

U.S.: Anti-Spyware Bill On Table Once Again

Members of the Senate Commerce Committee are promising that unlike last year where the Anti-Spyware bill died on the Senate floor, this year will be different. The difference this year is that politicians have recognized the need for legislation to tackle the growing threat of spyware. Although states have addressed the issue with anti-spyware state laws, and the Federal Trade Commission has begun suing spyware distributors, U.S. Senators believe federal legislation is the key solution.

On a related note, the new federal spam law, the *Can-Spam Act* of 2003, has not proven to be as effective as some thought. It has not met its goal of eliminating junk email.

The urgency with addressing spyware is the manner in which spyware operates. It, unlike spam, cannot be deleted by clicking on the 'delete' button and has the potential to crash the system. If a federal law is passed this year, it will probably pre-empt all state laws and set a uniform rule.

Additionally, given the affiliation of adware to spyware, lawmakers will have to untangle the murky world of adware before enacting spyware legislation because any law designed to address the spyware issue without addressing adware will be ineffective.

McCarthy Tétrault Notes:

The sheer number of phishing, identity theft and unauthorized system invasion cases is quite alarming. And while it will be important for our law enforcement agencies to step up their efforts, there is also a very important lesson here for corporate Canada. CIOs, system administrators and senior management have to give adequate attention and funding to computer and network security. Organizations will want to be able to show, in any resulting private litigation or regulatory investigation, that they took commercially reasonable measures to protect against computer criminals.

Contact George Takach at gtakach@mccarthy.ca

CHRONOLOGY OF RECENT DATA BREACHES

DATE	NAME	TYPE OF BREACH	NUMBER
April 8, 2005	San Jose Med. Group	Stolen computer	185,000
April 11, 2005	Tufts University	Hacker	106,000
April 12, 2005	LexisNexis	Passwords compromised	Additional 280,000
April 14, 2005	Polo Ralph Lauren/HSBC	Hacker	180,000
April 14, 2005	California FasTrack	Dishonest Insider	4,500
April 15, 2005	CA Dept. of Health Services	Stolen laptop	21,600
April 18, 2005	DSW/ Retail Ventures	Hacker	Additional 1,300,000
April 20, 2005	Ameritrade	Lost backup tape	200,000
April 21, 2005	Carnegie Mellon University	Hacker	19,000
April 26, 2005	Michigan State University's Wharton Center	Hacker	40,000
April 26, 2005	Christus St. Joseph's Hospital	Stolen computer	19,000
April 28, 2005	Georgia Southern University	Hacker	"tens of thousands"
April 28, 2005	Wachovia, Bank of America, PNC Financial Services Group and Commerce Bancorp	Dishonest insiders	676,000
April 29, 2005	Oklahoma State University	Missing laptop	37,000
May 2, 2005	Time Warner	Lost backup tapes	600,000
May 4, 2005	CO. Health Dept.	Stolen laptop	1,600 (families)
May 5, 2005	Purdue University	Hacker	11,360
May 7, 2005	Dept. of Justice	Stolen laptop	80,000
May 11, 2005	Stanford University	Hacker	9,900
May 12, 2005	Hinsdale Central High School	Hacker	2,400
May 16, 2005	Westborough Bank	Dishonest insider	750
May 18, 2005	Jackson Comm. College, MI	Hacker	8,000
May 19, 2005	Valdosta State University, GA	Hacker	40,000
May 20, 2005	Purdue University	Hacker	11,000
June 18, 2005	Visa, MasterCard, American Express, etc.	Hacker	40 million

SPAM

Ottawa: Task Force Report on Spam Presented to Minister

The Government of Canada's Task Force on Spam recently presented its findings to the Minister of Industry. The report recommends new targeted legislation and rigorous enforcement on Canada's part – both on a national and international level. The Task Force was created last year to implement the government's Anti-Spam Action Plan and to consider further action. Many stakeholders took part in this project and provided input on key areas, such as legislation and enforcement, international collaboration, and public awareness.

McCarthy Tétrault Notes:

It is extremely heartening that the Task Force on Spam has recommended new, special-purpose laws to deal directly with spam, including providing for a private right of action and statutory damages. Prior to the release of the report, some influential commentators had advocated reliance on existing general laws – such as our federal privacy legislation – to deal with the spam problem. Thankfully, this view did not prevail on the Task Force, and instead a modern and fully engaged response to the spam scourge has been

proposed. Now, of course, it is up to the government to act quickly to implement the recommendations of the Task Force.

Contact George Takach at
gtakach@mccarthy.ca

Boston: Mass. Attorney-General and Microsoft Target Spammer

In a story that shows the effectiveness of collaborating to find a solution to spam, Microsoft has been investigating spam rings and providing information to the state. In this case, Massachusetts Attorney-General Tom Reilly received information concerning a spam ring leader and filed a lawsuit against what is believed to be one of the most serious spam violators seen on the Internet. This should be seen as a successful venture since it shows that various private sector entities can play a leading role in combating cyber crime.

OUTSOURCING NEWS AND DEVELOPMENTS

International: Pharma Outsourcing a New “Big Thing”

In an effort to become more financially and operationally efficient, there is some talk amongst the gurus of outsourcing that the pharmaceutical industry will be next. Canadian Pharma manufacturer, Patheon, can provide investors with one of the most comprehensive dosage-form contract platforms in the business. At present, pharma outsourcing is a relatively closed market and new entrants have a difficult time making it in, but for those like Patheon, the road looks quite promising. Reports indicate that the pharmaceutical industry can no longer afford to struggle at the drug-pricing market level and in the laboratory, so improvements through outsourcing to squeeze savings out of their existing manufacturing abilities is an important step. As a sign of things to come, Merck, Eli Lilly, Pfizer and Proctor & Gamble have already announced increased reliance on contract manufacturing organizations.

International: Report Shows Growth in Software Outsourcing

A report published by International Data Corporation suggests that China’s software outsourcing industry experienced a growth of just under 50 per cent in 2004 reaching a size of close to US \$600 million. The report indicates that the two major factors contributing to this success are China’s political stability and increased economic viability. The majority of the customers to whom the software is outsourced hail from Japan.

George Takach recently published three articles on the myths and realities of outsourcing and offshoring in a time where they present some very interesting opportunities in terms of cost savings and performance improvement. With that comes some business and legal considerations and these articles look at the business of offshoring and discusses legal strategies to deal with some of the risks involved.

1. Offshoring: Myths, Realities and Legal Issues
2. The Politics and Economics of Offshoring
3. Offshoring: Legal Issues

International: Dell Decides to Continue Outsourcing to India

Dell will hire another 2,000 or so people in India by the end of the year to take advantage of India's growing computer industry. The latest decision is to support its software development and back-office work. Dell had initially run its customer support and internal software development centers in India, but following complaints by customers in 2003, it decided to move the call centres back to the U.S. Now, however, those issues have been rectified and the idea of cheaper labour in an English-speaking country is an exciting idea for software development engineering and routine office functions. The outlook for the future seems even brighter as Dell plans to open more offices in India in the next little while.

Adam Vereshack has recently authored a book entitled A Practical Guide to Outsourcing dealing with issues that arise in outsourcing agreements. The book may be purchased through LexisNexis at www.lexisnexis.ca/bookstore.

Contact Adam Vereshack at adamv@mccarthy.ca

TECHNOLOGY AGREEMENTS

U.S.: Palamida, Black Duck Compete in Detection Software Market

With the demand for automated tools that compare intellectual property against open source code being at its peak, a market has developed for the manufacturing of these types of tools. Palamida has released its IP Amplifier 3.0, which is a search tool and a database that consists of over 38 million of the most commonly used open source files. The Amplifier Detector checks binary, source and other file types (i.e. icons, images, XML) against its Compliance Library. This tool is quite similar to the one offered by Black Duck Software introduced last year.

The reason for the explosion in the number of these tools is caused by the pressure faced by software developers to meet product-development deadlines; deadlines which are easily met by using pre-packaged code whenever possible. The reality of the business is that by using free open source software, shortcuts are created without the necessity of receiving management signoff. Cryptographic techniques help to conceal the open source origin, however, companies in violation of open

source licenses can become targets of investigations by watchdog groups like GLP-violations.org who often impose hefty financial penalties.

International: EU Will Fund Research on Open Source

The European Union has proposed a plan to conduct research on open source and has approved a funding for the project of over US \$825,000 for two years. This project is slightly different than the one performed in 2001, since it will focus on international research and not only Europe alone. The research will focus on the impact of free and open source software on skills development across the world, regional differences in software development and the respective attitudes of various governments and public sector organizations to open source. The objective of the project is to provide a better understanding of the use of open source and establish further collaboration at an international level.

McCarthy Tétrault Notes:

Use of Open Source Software (“OSS”) is growing rapidly among end-users of software but also as tools used by developers of proprietary software. Use of OSS by developers of proprietary software can present a number of risks.

We have advised a number of software development enterprises in sale or purchases of software businesses or more generally on the necessary management of the use of OSS in the context of software development, in particular, to prevent proprietary code developed with the use of OSS to itself become OSS due to the viral licensing terms of certain OSS licenses. [Michel Racicot has most recently addressed the participants at the 2005 CEO Vision in April on this topic. \(only available in French\)](#)

Contact Michel Racicot at mracicot@mccarthy.ca

VENTURE CAPITAL

Canada: Canadian Venture Capital Activity Down in First Quarter 2005

The Canadian Venture Capital Association (“CVCA”) announced in June 2005 that venture capital investments in Canadian companies in the first three months of 2005 declined to \$326 million, down 22 per cent over the same period the prior year and down 29 per cent over the fourth quarter of 2004. This decline was similar to the decline in the U.S. over the same period as reported by Thomson Venture Economics. On the bright side, the CVCA reported that more dollars were invested in new deals (as opposed to follow-on investments) as compared to amounts invested in 2004. Information technology sectors continue to receive the largest portion of dollars invested followed by life sciences and non-technology sectors.

U.S.: Americans Beating Canadians in Later Stage Venture Capital Investments

Reports indicate that domestic venture capital funds are being overtaken by U.S. rivals, with the potential that Canada will miss out on the financing boom of private companies. Fusion Capital

Partners Inc. says that May was a strong month for venture capital with levels reaching those seen during the dot-com boom. However, the CVCA has not yet released second quarter results so we really do not know what May was like.

Further, at least for Canada, investment levels are still below half of their peak for the dot-com boom. The research shows that although Canadian VCs are well represented in early round financings, there are fewer large venture funds in Canada that can handle large later stage investments. As a result, it appears that venture-financed companies are looking to large U.S.-based venture funds to lead later stage investments. Health-care companies saw a significant increase in investment in May, in which San Francisco-based Alta Partners led a US \$42.5 million Series B financing of Ottawa-based Zelos Therapeutics Inc., a company focused on the development of treatments for osteoporosis and psoriasis. Other recent large venture investments led by U.S. venture funds include Vancouver-based Celator Therapeutics which raised \$40 million as well as Ottawa-based Tropic Networks Inc. which scored the biggest tech deal, worth \$33 million from backers led by J.P. Morgan.

In a separate report, venture capital firms in the U.S. invested less during the first

three months of this year than last year. Since the dot.com bust, venture capitalists have been cautious about investing and some say that this statistic is a signal of that caution. However, even more intriguing is the curtailing on investments in the biotechnology field, often seen as a niche whose profit potential began when it lured money away from both the telecom and computer hardware sectors. This could be a direct result of the poor performance of many biotech companies, particularly due to the safety concerns raised about drugs manufactured by well-established pharmaceutical companies.

the U.S. investors. Careful planning through the use of an exchangeable share structure can often accommodate both the interests of the U.S.-based investors and the Canadian company. However, these transactions are often more time consuming and expensive to complete. Nevertheless, they can be extremely useful, and we have recently structured several of these exchangeable share, cross-border investment vehicles.

Contact W. Ian Palm at
ipalm@mccarthy.ca

McCarthy Tétrault Notes:

With the growth of participation by U.S.-based venture investors in Canadian companies, particularly in later stages of development, companies and investors must often employ more complex structures to accommodate Canadian and U.S. tax, among other issues. For example, U.S. investors often require that investments be made through a Delaware corporation rather than a Canadian resident corporation. A Canadian company will want to ensure that it retains its Scientific Research and Experimental Development tax credits and other tax incentives that might be lost in the event it is controlled by a U.S. company established to accommodate

RECENT TECHNOLOGY INVESTMENTS

COMPANY	INVESTOR	AMOUNT
Mitel	U.S. Institutional Investors	US \$55 million
Meriton Networks	VantagePoint Venture Partners; Nomura International; Desjardins Venture Capital; Newbury Ventures and others	US \$54 million
Simpler Networks	Highland Capital Partners; Kodiak Venture Partners, BCE Capital, Solidarity Fund QFL; Lothian Partners	\$25 million
Nakina Systems	VIMAC Ventures; EDC Equity; Vengrowth Capital; MMV Financial	US \$10 million
Redknee Inc.	MMV Financial Inc.; HSBC Capital (Canada) Inc.	US \$10 million
Potentia Semiconductor	VenGrowth Private Equity Partners; Kodiak Venture Partners; Teachers' Private Capita	US \$8 million
Positron Technologies	Solidarity Fund QFL	\$8 million
SIPquest	Covington Capital; Skypoint Capital	US \$6 million

COMPANY	INVESTOR	AMOUNT
Dreamcatcher Inc.	Wellington Financial LP	\$3 million
Opto Security Inc.	Business Development Bank of Canada; Innovatech Québec	\$2.4 million
VOIP Shield Systems	BrightSpark Ventures	\$2 million
Digital Payment Technologies	ENSIS Growth Fund	\$2 million
eXludus Technologies Inc.	Brightspark Ventures; Propulsion Ventures	\$1.5 million
Combat Networks	B.E.S.T. Total Return Fund	\$500,000
IP Applications	Pender Growth Fund	\$500,000

TECH-RELATED M&A

Québec: Olympus Corp. Acquires all of R/D Tech. Inc.'s Outstanding Shares

On May 31st, 2005, Olympus Corporation, through its wholly-owned subsidiary, Olympus NDT Canada Inc., completed the acquisition of all the issued and outstanding shares of R/D Tech Inc., a manufacturer of non-destructive equipment with proprietary advanced technology in the area of ultrasound defect detection and eddy current defect detection. R/D Tech Inc. is based in Québec City and has various places of business worldwide. The purchase price paid by Olympus Corporation was approximately \$117 million.

This transaction follows a series of recent acquisitions made by R/D Tech in order to consolidate its position as a leading provider of non-destructive testing equipment. In September 2003, R/D Tech acquired the assets of NDT Engineering Corporation based in Seattle, WA. On January 1st, 2004, they bought Panametrics, Inc., located in Waltham, Massachusetts, a subsidiary of General Electric. And finally, on November 1st, 2004, R/D Tech Inc. acquired all the non-destructive test assets of Staveley Sensors, Inc., Staveley Instruments Inc. and Staveley NDT

Technologies, Inc. Prior to the Staveley acquisition, in June 2004, R/D Tech Inc. sold its Power Generation division to Zetec, Inc. for an amount of approximately \$55 million.

McCarthy Tétrault Notes:

McCarthy Tétrault acted for R/D Tech Inc. in all the above-mentioned transactions and related financing matters with a team led by François Amyot that includes, among others, Philippe Boivin (Intellectual Property and M&A), Mathieu Laflamme (M&A), Jean-François Dolbec (Labour) and Yves Comtois (Competition).

Contact Philippe Boivin at
pboivin@mccarthy.ca

Contact Francois Amyot at
famyot@mccarthy.ca

Contact Mathieu Laflamme at
mlaflamme@mccarthy.ca

Contact Jean-François Dolbec at
jfdolbec@mccarthy.ca

Contact Yves Comtois at
ycomtois@mccarthy.ca

U.S.: New Labour Rules Impact Tech Professionals in Computer Industry

Electronic Arts (“EA”) made a decision to reclassify some of its employees as hourly workers eligible for overtime but not bonuses or stock options. As a result, many tech professionals have made it clear that they are being taken advantage of and decided to sue for what they claim to be violations of overtime rules. The U.S. Federal government recently revamped overtime rules, but many, including the Association of Support Professionals, say that the rules are very confusing and incomprehensible. Industry leaders are fearful that overtime litigation will threaten the economic viability and entrepreneurial spirit of technology companies, especially in Silicon Valley. Employees claim that for those who work on contracts, overtime pay is very attractive, but a growing number of them suggest that tech companies are violating the overtime pay law. Many feel they work 80-hour weeks yet get paid for almost half. Lawsuits have been started against EA, Sony Computer and Vivendi Games.

One of the biggest problems is understanding and interpreting the overtime rules. The requirement is that employers must pay overtime to those employees who work beyond 40 hours in a work week, except for computer

employees who earn a certain amount of salary per week and are employed as a computer systems analyst, programmer, software engineer or similarly skilled worker in the field. However, this exception was changed last year by: (a) raising the salary threshold, but also (b) dropping the requirement that in order for computer programmers to be exempt, they must do work that requires the consistent exercise of discretion and judgment. Thus, this requirement makes the exemption applicable to less-skilled employees.

McCarthy Tétrault Notes:

We regularly advise our clients in this area. Although not a new issue, the recent U.S. lawsuits underscore the importance of proper due diligence and appropriate representations and warranties for investors in and purchasers of technology companies, particularly (though not exclusively) for those based in the United States. Specific enquiries relating to the overtime policies and practices of such companies and addressing them appropriately (through appropriate representations, indemnities, holdbacks or purchase price adjustments) before committing to a transaction will avoid headaches down the road.

Canadian employers are also well-advised to keep an eye on this issue. Employment standards law in each of Alberta, Ontario

and Nova Scotia exempts information technology professionals from entitlement to overtime pay. Great care must be taken to ensure that an employee falls within the definition before making the decision to apply the exemption. Little guidance is offered by the Ontario Ministry of Labour, for example, which comments that “employment as an information technology professional would be characterized by the exercise of professional judgment requiring the application of specialized knowledge in accordance with technical standards,” and that, “formal educational attainment or the absence thereof is not determinative of whether the employee will be exempt.” Certainly, the U.S. experience to date suggests that this is an area open for conflict between Canadian employers and their IT employees.

Contact David Ma at
dma@mccarthy.ca

Contact S. Daniel Black at
dblack@mccarthy.ca

Detroit: Compuware Acquires Adlex

Adlex, the Massachusetts based firm that provides larger companies with management and evaluation of their technology services, will be sold to Compuware for US \$36 million. The deal will close later this year and would send the 80 plus employees packing from Massachusetts to Michigan. Adlex is a pioneer of service delivery management technology allowing ISPs the ability to diagnose and manage the quality of service. Compuware is a software and business service company that uses the Vantage product line, but says that the Adlex purchase will only complement its current product line.

U.S.: Cisco Systems Acquires VoIP Vendor Sipura Technology

Cisco has agreed to pay US \$68 million in cash and options to purchase Sipura Technology for integration into its Linksys group division. This is Cisco’s first acquisition for Linksys, the home and small-business network vendor. The core technology is analog terminal adapters that allow users to connect conventional phones to a broadband service to use VoIP. Linksys is a leading vendor of consumer VoIP gear in the U.S. and has a client relationship with Vonage and AT&T. Although the deal is

subject to standard regulatory approvals, it is estimated that the deal will close by the end of July this year.

U.S.: MCI-Verizon Deal Not Done Yet

One of MCI's largest shareholders is urging the other shareholders to vote against the merger with Verizon.

Deephaven Capital Management has initiated a new campaign to stop the deal by sending proxy cards to other shareholders asking that they vote against it. Deephaven believes that a deal with Qwest would be in the best interest of the company. Qwest was in a long battle with Verizon but withdrew from the process citing bad faith on the part of MCI. They argued that negotiations were skewed in Verizon's favour all along. Qwest has not indicated if it will re-enter the process should the opportunity arise. No date has been set for a shareholder vote.

McCarthy Tétrault Notes:

It is a safe prediction that a fairly robust tech M&A market will continue for at least the balance of 2005. First of all, the opportunities for tech companies to achieve sizeable organic growth are diminishing. Sure, there are still some wonderful new opportunities, but for the most part the market for tech products

and services is fast maturing. Therefore, consolidation is the order of the day. And fortunately, balance sheets are quite strong – and M&A deals are fairly attractively priced – thus making the funding of acquisitions quite easy. If you have been thinking about making that strategic or even transformational, let alone 'tuck in' acquisition, now might be a very good time to do so.

Contact George Takach at
gtakach@mccarthy.ca

COPYRIGHT

Ottawa: Government of Canada Introduces New Copyright Bill

In an attempt to tackle the ever popular Internet downloading, the Government of Canada has tabled a bill designed to address the issue. In what is said to be a move to toughen copyright laws in Canada, the bill will make it illegal to hack or break into digital locks that prevent the copying of movies and software. In addition, the bill will set up a complaints process where a rights holder can complain to the Internet Service Provider who would then notify the customer and warn them of copyright infringement. Copyright holders have been lobbying for something like this for years, but yet say the proposed bill is still not tough enough.

McCarthy Tétrault Notes:

Among the many proposed changes to the *Copyright Act* is the 'making available right.' In conformity with the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*, the exclusive communication right of artists, sound recording makers and performers would now include the right to control the making available of their material. Rights holders will be able to exercise their rights against unauthorized file-

sharing and pursue legal action against individuals who make private copies of sound recordings that are either uploaded or further distributed.

As for Technological Protection Measures ("TPMs"), any circumvention of TPMs will now itself be deemed infringement if the objective is to infringe copyright. The legitimate access provision in the *Copyright Act* will not be disturbed; however, copyright will be infringed by individuals who, for infringing purposes, enable or facilitate circumvention or who, without authorization, distribute copyright material from which TPMs have been removed, save for purposes of security testing or reverse engineering.

Along the same lines, any alteration or removal of rights management information already embedded in copyright material, when specifically done to either conceal infringement or further infringe, would itself constitute infringement.

The bill also addresses specific protection for Internet Service Providers ("ISPs"). They are exempt from copyright liability so long as they perform the function of intermediaries. Examples include: acting as mere conduits of information, caching and hosting activities and information location activities. ISPs will be required to retain sufficient information for a

fixed period of time in order to identify subscribers of peer-to-peer file sharing, to address, among other things, a new ‘notice and notice’ process introduced as part of the bill.

To protect the privacy of individuals, only court-issued orders can lead to the disclosure of the identity of a subscriber.

Contact Barry Sookman at
bsookman@mccarthy.ca

Professional Notes: Toronto Computer Lawyers Group – A Year in Review

Barry Sookman gave a presentation to the Toronto Computer Lawyers Group on issues relating to Internet law, including Internet and ISP liability, online defamation and e-commerce law generally. Other topics covered include: patent liability, copyright law and reform, including insight into private copying and TPMs, as well as a discussion on privacy law.

Please click to view Barry Sookman’s presentation entitled: [“Toronto Computer Lawyers Group: A Year in Review”](#)

Canada: Federal Court Of Appeal Renders Decision in CRIA Case

In a long awaited decision, the Federal Court of Appeal rendered its judgment in the Canadian Recording Industry Association’s (“CRIA”) appeal of a Federal Court, trial division, decision. This decision barred CRIA from being given the names and identities of 29 Internet users accused of file sharing on the Internet.

BMG Canada Inc. et al v. John Doe & Shaw Communications et al., [2005] FCA 193.

McCarthy Tétrault Notes:

The decision is an important one as it sets clear rules to permit the disclosure of names and identities of file sharers. These rules allow for the balancing of privacy interests of users and the right to disclosure. CRIA welcomed the decision as it clarified the steps involved when seeking the identity of alleged file sharers.

In particular, the court found that artists should be encouraged to show their talents and not be robbed of their efforts. Modern technology should not become an obstacle to the incentive to create, and by sending the message that the value of music ought to be recognized, the court confirmed that Canada is not and should not become a piracy haven.

By providing a roadmap setting out the evidentiary requirements needed before proceeding against alleged file sharers, the court sets a precedent that large scale music swappers will be held accountable for their actions.

With this decision in hand, CRIA will be better equipped to act in the interest of the artist knowing that their work will not be threatened. Others in the music industry welcomed the decision since the good news will only promote legitimate online music services and the artists they support.

Contact Barry Sookman at
bsookman@mccarthy.ca

U.S.: Supreme Court Rules Against Grokster

The U.S. Supreme Court ruled unanimously against Grokster in one of the most anticipated Internet file-sharing decisions. The court held that online peer-to-peer software providers can be held liable for inducing users to swap files illegally. Software providers who provide the means to share copyrighted music and movies can be liable for infringement when it has knowledge of infringement and takes affirmative steps to cause it to occur.

McCarthy Tétrault Notes:

All nine judges agreed that when a device is distributed with the objective of promoting copyright infringement, the distributor will be found liable for third party acts of infringement. The case will now go back to California District Court to prosecute Grokster and StreamCast for unlawful intent or inducement. This case reviewed a much earlier decision of the Supreme Court, the famous 1984 Sony Betamax ruling (“Sony”) regarding the VCR and time shifting, where the court determined that substantial non-infringing uses can protect a technology’s creators from being held liable for copyright infringement.

The court in Grokster provided limited guidance, however, on what level of activity can constitute a substantial non-infringing use. On this point, there are two sets of judges who wrote differing opinions. The first set held that even if the Grokster and StreamCast software enabled a large number of non-infringing files to be copied, this does not necessarily mean that the products themselves have substantial non-infringing uses and are therefore immune from liability. In fact, they held that there was sufficient evidence that both Grokster’s and StreamCast’s products were used to infringe and that

substantial non-infringing uses were likely not to develop over time.

The second set of judges held that the Sony case produced evidence that showed authorized copying of copyrighted works in significant enough numbers, thus creating a substantial market for non-infringing use of the VCR. In the Sony case, approximately nine per cent of authorized time-shifting was non-infringing. This relatively limited authorized copying was deemed substantial. In the Grokster case, about 10 per cent of files (including free electronic books, public domain and authorized software and licensed music videos) were held to be non-infringing, thus meeting the nine per cent threshold established in the Sony case. In addition, given the evidence produced in court, this second set of judges pointed to a future market for non-infringing uses of Grokster-type peer-to-peer software. Their point rested on the idea that since this type of software allows for the exchange of many different types of digital files, including non-copyrighted material, and because there is evidence that illustrates more non-copyrighted information is being stored in 'sharing format', it would seem likely that lawful sharing of files will become prevalent in the future. Legitimate non-infringing uses include use for research information, historical recordings, educational materials and

open content under the creative commons. In essence, as the home-video rental industry developed over time after the Sony decision, now-unforeseen non-infringing uses may well develop for peer-to-peer software.

Contact Barry Sookman at bsookman@mccarthy.ca

U.S.: President Bush Signs Family Entertainment and Copyright Act

This legislation makes it much easier for federal prosecutors to go after counterfeiters who make works available before their public release. This was an important step for the government to take in order to tackle the piracy in the industry since more than 90 per cent of illicit DVDs come from unauthorized recording in a movie theater. The protection of intellectual property rights is necessary to ensure that all involved in the creation, production and presentation of the movie are not denied compensation. The law now recognizes that those who use a video device to record a movie could face between three and six years in jail.

U.S.: Wal-Mart Goes After Student-run Parody Website

This story began earlier this year when Daniel Papasian launched a website (www.walmart-foundation.org) for an art class at Carnegie Mellon University called “Parasitic Media”. The class teaches students about the political uses of satire in the media.

Papasian chose to make his project about the Wal-Mart Foundation. Two days later, lawyers representing Wal-Mart Stores Inc. and Wal-Mart Foundation sent a cease and desist notice to the Web host of Papasian’s site requesting to disable public access to it. The retail giant claimed Papasian violated copyright law and the *Digital Millennium Copyright Act* by copying large amounts of content and graphics from its websites.

After four days in service and 400 visitors, the site was closed and the student was forced to redesign his website.

Daniel Papasian acknowledged using Wal-Mart’s graphics on his website, but he believed he could use the images as part of a parody. The parody site reopened five days later. Papasian removed the offending graphics and he added, at the place of the images, the word “censored”. The new home page even explained the current litigation he was involved in with Wal-Mart.

McCarthy Tétrault Notes:

In Canada, parody raises issues in copyright, trade-mark and constitutional law related to freedom of expression. The issues related to parody have not been often addressed by Canadian courts. Most of the cases involving parody have been decided in the context of labour disputes.

One of the most famous cases in Canada involved the Michelin tire company. In this case, the defendant union, organizing a campaign to become bargaining agent, distributed leaflets depicting the “Bibendum” (the Michelin tireman) in the act of stomping on the head of a worker standing below. The defendant was arguing that parody is a form of “criticism” under section 27 of the *Copyright Act* (now section 29) and thus, an exception to copyright infringement. The court refused the defendant’s submission, concluding that parody is not “criticism” for the purpose of the *Copyright Act*. Such exception to copyright infringement should be strictly interpreted.

A similar result was reached in a case involving the British Columbia Automobile Association (“BCAA”). The other party, the union, which had a labour dispute with the BCAA, set up a website reproducing the color scheme, page layout, navigation features and

other aspects of the graphic design of the BCAA website. As a defense, the union argued that it copied elements of the BCAA website in order to ‘criticize’ and claimed the benefit of section 29.1 of the *Copyright Act* relating to fair dealing. The court mentioned that it was not necessary to discuss the scope of these statutory provisions relating to fair dealing since the defendant’s use did not satisfy the fair dealing defense. Indeed, the defendant website did not contain criticism of the BCAA website and did not, as required by the *Copyright Act*, mention the source and author of the BCAA website.

Note that in both the Michelin and BCAA cases, the plaintiffs were also arguing that the defendants’ conduct was also infringing their trade-mark rights. These claims were dismissed on the ground that the plaintiffs were not able to demonstrate that the defendants were using the trade-marks as “use” as defined in the *Trade-Marks Act*.

On the other hand, the Québec Court of Appeal, in a case where the defendant used the characters and other aspects of a popular sitcom in a pornographic video, stated that parody may, in certain circumstances, be a defense of fair dealing, pursuant to section 29.1 of the *Copyright Act*. The court warned that parody shall not be used as a shield to avoid intellectual effort in order to

benefit from the notoriety of the parodied work. In that case, the court concluded that the defense of fair dealing was not available to the defendant since the defendant’s work was not made to critique the original sitcom, but rather with the objective to gain maximum visibility in a video which would not have enjoyed such notoriety otherwise, while avoiding the effort to create an artistic or literary work.

The recent Supreme Court decision in *CCH v. Law Society of Upper Canada* may give an additional argument to those suggesting that parody is included in the notion of criticism set out in section 29.1 of the *Copyright Act*. Indeed, in that judgment, the court held that in order to maintain the proper balance between the rights of a copyright owner and users’ interest, the fair dealing exception must not be interpreted restrictively. Moreover, the court concluded that the term “research” used in section 29 shall receive a large and liberal interpretation.

The extent to which parody is permitted in Canada still remains unclear. Obviously, the parody defense will remain a question of fact and the success of such a defense will depend on the circumstances of each particular case. The following factors should probably be considered in assessing whether or not the parody constitutes a fair dealing defense: the purpose of the parody, the

character of the dealing, the amount of the dealing and importance of the work allegedly infringed, alternatives to the dealing, the nature of the original work, effect of the parody on the parodied work and whether the parodists acknowledge the source of the parodied work. Finally, even though it might be helpful to consider American precedents in that field, one should be prudent before applying such cases to the Canadian context since the concept of “fair dealing” contained in the Canadian *Copyright Act* is different from the concept of “fair use” contained in the U.S. *Copyright Act*.

Contact Philippe Boivin at pboivin@mccarthy.ca

DOMAIN NAMES

U.S.: Supreme Court Rejects Nissan’s Appeal

In a follow-up from a development we wrote about in the last edition, the U.S. Supreme Court has rejected an appeal from Nissan Motor Company alleging that a man from North Carolina who uses www.nissan.net and www.nissan.com to sell ads is diverting consumers who seek the automaker’s website. The court made no additional comment on the case, which returns to

U.S. District Court over additional issues. Uzi Nissan registered the domain names in 1994 and 1996 to advertise a computer sales and service business. Nissan Motors argues that Mr. Nissan is unfairly profiting from its brand name recognition. The Supreme Court did not agree and did not add anything to the issue of cybersquatting, which left unchanged the U.S. Ninth Circuit Court of Appeals decision that Nissan Motors failed to meet the requirements of the federal cybersquatting law.

International: Morgan Freeman Wins Cybersquatting Case

An international arbitrator of the World Intellectual Property Organization has ruled that Mighty LLC, the operator of a Nevada-based website with the Internet domain name www.morganfreeman.com, has misused the celebrity’s trademark to lure Internet users to its website. The arbitrator held that there was clear evidence of bad faith on the part of the operator. Ownership of the domain name is to be transferred within 10 days unless Mighty LLC launches a court case challenging the decision.

**International: WIPO
Recommends Uniform IP
Protection When Regulating
Name Registrations**

In a move designed to stop unauthorized registration of domain names in all new generic top-level domains, WIPO has recommended a uniform IP protection mechanism. This was part of the recommendations put together by the Arbitration and Mediation Center which said that this protective measure would complement the process followed by the Uniform Domain Name Dispute Resolution Policy. WIPO's report was prepared in response to the Internet Corporation for Assigned Names and Numbers' request to develop a strategy for the expansion of the domain name system. One of the main features of this protection would be to offer intellectual property owners the option of registering their protected identifiers during a specified period before opening registration to the general public.

PATENTS

**Canada: Bill C-29 Receives
Royal Assent**

On May 5, 2005, Bill C-29, an Act to Amend the Patent Act was given Royal Assent. The date on which it will come into force is expected to be within about six months' time.

Bill C-29 has been enacted to permit the correction of mis-payment of fees on the "Small Entity" scale, sometimes referred to as the "Dutch Industries" issue, after the *Dutch Industries Ltd., v. Canada (Commissioner of Patents)* case. In *Dutch Industries*, the patentee mistakenly paid maintenance fees on the "small entity" scale when the patentee was no longer a "small entity". When this came to light several years later, the patentee submitted top-up payments to the Commissioner of Patents to correct the error. This was in accord with patent office practice. However, the Federal Court held that the Commissioner lacked the statutory authority to accept the late payments, and that the patents had become irrevocably abandoned.

McCarthy Tétrault Notes:

This legislation is of particular interest to smaller technology companies that may have paid fees to the patent office as "small entities" in the past. The practice

of accepting “top-up” fees had been followed by the Canadian Patent Office for many years, without regard to whether the “top-up” had been paid during the statutory one year reinstatement period, and had been relied upon in good faith by the profession generally. The Patent Office estimated that underpayment of fees had been made in roughly 7,000 cases. While many of these files may be unremarkable, some may be of considerable value, such as the patents in the recent *Johnson & Johnson v. Boston Scientific* case, for which more than \$3.6 million had been paid in license fees.

By way of legislative response, C-29 provides to all patentees a grace period ending one year after the date on which C-29 comes into force in which to correct any mis-payment of fees based on an incorrect assertion of small entity status by paying the difference between that amount paid on the small entity scale, and the large entity amount that was payable.

First, it may be noted that this remedy is a “one-time-only” remedy. C-29 does not establish a permanent “top-up” regime. Therefore, any applicant or patentee must be sure to review the history of their payments to the Canadian Patent Office and make any correction in good time.

This one-time dispensation stands in contrast to the permanent remedy provided in the U.S. under 37 CFR 1.28(c). The U.S. remedy is available at any time for the correction of mis-paid fees. Notably, where 37 CFR 1.28(c) requires that the mis-payment on the small entity scale must have been made “in good faith”, there is no such requirement of good faith in C-29. A discussion of the U.S. regime is given in the recent case of *Ulead Systems Inc., v. Lex Computer & Management Corp.*, where failure to pay a large entity fee set off a series of events leading to the forfeiture of damages for patent infringement of US \$15 million.

Second, C-29 applies not only to the payment of maintenance fees, but to any fee incorrectly paid on the small entity scale. It also applies to “top-up” payments made before the date of coming into force, as well as in the one-year period following the date of coming into force. The “top-up” fee must be accompanied by an explanation of what the payment is for.

Third, C-29 appears to permit correction of errors beyond those of the *Dutch Industries* fact situation. For example, it appears that even if a large entity gave instructions that a maintenance fee be paid, and the fees were mistakenly paid on the small entity scale, a “top-up” fee may be paid, and the file rescued. This

appears to apply even if the applicant had never asserted an entitlement to small entity status.

Fourth, C-29 does not require the payment of a reinstatement fee in addition to the “top-up” fee.

Fifth, the definition of “small entity” under the Act remains problematic. The basic rule is that a “small entity” is an entity that employs 50 or fewer employees, or that is a university. However, small entity status is lost if rights in the invention are transferred or licensed, whether directly or indirectly, to an entity that is not a “small entity”. It is not clear that this definition necessarily excludes, for example, the granting of a security interest to a bank that provides an operating loan to the small entity. It is quite possible for a small entity to lose its small entity status without necessarily being aware of it. The loss of small entity status may not become apparent until well after the one-year reinstatement period has expired.

American owners of Canadian patents may wish to note when reviewing entitlement to “small entity” status that the Canadian definition is not the same as the U.S. definition of “small business concern” under 13 C.F.R. 121.

The total difference in fees between small entity and large entity payments

over the 20-year life of the patent may be of the order of \$2,000. A patentee may well question whether such a small benefit justifies the risk taken by the patentee that an assertion of small entity status may be incorrect. Smaller technology companies should particularly think twice about asserting small entity status, given that they can grow very quickly, thereby making the status problematic for them subsequently.

In light of the enactment of C-29, all owners of Canadian patents or patent applications would be well served by reviewing, before the expiry of the one-year grace period, all Canadian cases for errors in payment.

Contact Ken Bousfield at
kbousfield@mccarthy.ca

[U.S. : Update on the U.S. Patent Reform Act of 2005](#)

On June 8, 2005, a bill entitled the Patent Reform Act of 2005 (P.R. 2795) was introduced to the U.S. Congress. If enacted into law as the bill currently stands, this reform initiative would represent the most substantial overhaul to U.S. patent laws since the current U.S. patent statute was passed by Congress in 1952. The bill follows on the heels of two detailed studies recommending patent law reform, one from the Federal

Trade Commission in 2003 and another from the National Research Council of the National Academies in 2004.

The proposed legislation is said to be intended to improve the overall quality of patents being issued in the U.S. and to address certain patent procurement and enforcement practices which many in the high technology industry have complained of as being disruptive or abusive. Under the current patent regime, for instance, some have felt, over the last decade especially, that an increasing number of questionable patents are being asserted by their owners, and that the litigation process in the U.S. does not readily admit challenges to patents on a cost effective basis. In particular, some of the reforms in the bill are aimed at driving down the costs and complexity involved with enforcing and litigating patents, both for patent owners and accused infringers.

McCarthy Tétrault Notes:

First-to-File Regime and Inventor Grace Period

The bill heralds the long awaited adoption of a first-inventor-to-file principle as part of U.S. patent law, bringing the U.S. in conformity with the patent laws of the industrialized world. This proposal is accompanied by a one-year grace period for inventor derived

disclosures, not unlike the current grace period available under Canadian law. This reform necessarily leads to the abolition of the highly technical patent interference practice in the U.S., which is proposed to be replaced with what is expected to be a more streamlined and simplified inventor's rights contest under the bill.

The bill also provides for the filing of a patent application by a person other than an inventor, where the inventor has assigned or is under an obligation to assign the invention to such person. The latter proposal is also consonant with the patent procurement practices of many other countries.

Best Mode Requirement and Patent Misconduct

The bill proposes to eliminate the requirement for a patent applicant to disclose the "best mode" of the invention sought to be protected by patent. This is in line with the laws of most other countries but not with those of Canada, which retains a statutory best mode requirement. Another main thrust of the bill is that of codifying the law relating to misconduct in replacement of the common law defence of unenforceability. The new statutory unenforceability defence being proposed in the bill is based upon fraud that results in the patent applicant obtaining one or more invalidated claims.

Accompanying these reforms is the statutory introduction of a duty of candor and good faith applicable to parties adverse to a patent or patent application.

The repeal of the best mode requirement and the codification of the law relating to patent misconduct will eliminate two highly subjective elements of the law of patentability. These are thought to have contributed to the protracted discovery practices often times prevailing in U.S. patent lawsuits. Along the same lines as the foregoing are various amendments being proposed by the bill to remove the numerous “deceptive intent” restrictions found throughout the U.S. patent statute.

Continuation Applications and Expansion of Publication Requirements

The bill authorizes the Patent and Trademark Office to limit, by regulation, the circumstances pursuant to which a patent applicant may be entitled to file continuation applications. Past abuses associated with continuation applications and dealt with by the U.S. courts have included the practice of having continuing applications pending in the Patent Office for inordinate periods of time and out of public view, during which market developments are monitored for the purpose of modifying the claims of the yet-to-be issued patent

accordingly. This practice was particularly problematic in the fast-paced high technology industry. These types of abuses are thought to be further addressed by the introduction in the bill of an expanded publication requirement that applies to all U.S. filed applications and not just to “domestic only” applications as is now the case. The expanded publication requirement as being proposed will make the contents of such applications available to the public for searching and consultation purposes, thereby providing notice of the possible claims that a patent applicant might eventually be entitled to protect. This should alleviate some of the potential for the abusive continuation application practices described above.

Post-Grant Oppositions, Re-Examination and Pre-issuance Prior Art Submissions

The bill introduces a post-grant opposition proceeding which is available within nine months after the grant of a patent or within six months after receiving notice from a patent holder alleging infringement. The scope of patent invalidity issues that can be dealt with under the new opposition proceedings is broader than that associated with existing re-examination proceedings. This will be of particular interest to high tech companies, given that various e-commerce and Internet

business method patents have given rise to numerous re-examination proceedings in the past, with varying degrees of success. Also introduced by the bill is an expanded concept of pre-issuance submissions of documentary prior art against pending patent applications. The pre-grant submission period is extended to a period of at least six months' duration following publication of the application, instead of the existing two-month period, provided a notice of allowance has not yet issued for the target application. Moreover, the bill permits the submitting party to make a statement as to the relevance of the prior art being brought forward, a practice not currently permitted. Many patent attorneys currently refrain from placing prior art before U.S. examiners on the basis of a risk that the art will not fully be appreciated. The introduction of a relevance statement for prior art submissions is therefore expected to promote the more prevalent use of this defensive technique.

Related to the foregoing proposals is the removal of an estoppel provision that applies to current *inter partes* re-examination proceedings insofar as it relates to issues that "could have been raised by a party". This current estoppel provision is thought by many to have contributed to the lack of effectiveness of these existing proceedings, which are

now being expanded to apply to patents issued from applications filed on any date. The new opposition proceeding likewise contains a measured estoppel provision to promote its use as an alternative to patent litigation, and provides for broader grounds of review than are available in existing re-examination proceedings.

Prior User Rights

The bill proposes to expand the defense of prior user, as first enacted in 1999. The bill provides that prior user rights will be expanded beyond the limited subject matter of business methods to all categories of patentable subject matter and without a one-year restriction as measured from the filing date of an asserted patent. The critical date for assessing the prior user defense under the bill is more advantageously that of the date of filing of an application from which the asserted patent is granted.

Willful Infringement Reforms

Perhaps the most important area for patent reform is that relating to charges of willfulness in patent infringement matters and the spectre of treble damages faced by the great majority of defendants in U.S. patent lawsuits. The bill proposes to increase the predictability of patent infringement litigation outcomes by heightening the requirements for proving

willfulness. For instance, it is proposed that willfulness will be established after written notice is provided to a patentee that alleges acts of infringement in a manner sufficient to give the infringer a reasonable apprehension of suit on the asserted patent. This must include a particular identification of the asserted claims in relation to each product or process the patent owner alleges infringes the patent. An infringer is also provided with a reasonable opportunity to investigate an allegation of infringement. The bill proposes that for any period of time during which the infringer had a good faith belief that the asserted patent was invalid, unenforceable or would not be infringed, a court shall not find willful infringement. The good faith belief in question can be predicated on reasonable reliance on the advice of counsel. The decision by the infringer not to present evidence of such advice of counsel is proposed to have no relevance to determining willful infringement. The latter codifies the findings in the *en banc* decision of the U.S. Court of Appeals for the Federal Circuit in *Knorr-Bremse Fuer Nutzfahrzeuge GmbH v. Dana Corp.*

Alfred Macchione has been closely following the developments in the U.S. and the foregoing provides only a brief and simplified summary of the main provisions of the Patent Reform bill, which currently stands in hearings before the House of Representatives

Subcommittee on Courts, the Internet and Intellectual Property.

Contact Alfred Macchione at amacchione@mccarthy.ca

U.S.: eBay Wins Stay in MercExchange Case

In a decision of the U.S. Court of Appeals for the Federal Circuit, eBay was unsuccessful in avoiding a finding of willful infringement previously rendered against it by the U.S. District Court for the Eastern District of Virginia. A total of three patents had been asserted at trial by MercExchange. At issue in the case was a fixed-price purchasing feature found on eBay's website, allowing customers to purchase items for a fixed and listed price without auction. Also at issue was an Internet website operated by Half.com, which is a wholly-owned subsidiary of eBay. The Half.com website allows users to search for goods posted on other Internet sites and to purchase those goods. All of the asserted patents involved business methods and systems for transacting in goods electronically. The jury had found eBay liable for US \$10.5 million for direct infringement and US \$5.5 million for induced infringement. Half.com was held liable by the jury for US \$19 million in direct infringement. The District Court had also ruled in favour of the defendants to

hold one of the asserted patents invalid for lack of enablement. A permanent injunction in favour of MercExchange was denied at trial, notwithstanding affirmative findings by the District Court of validity and infringement.

On appeal, eBay's liability for direct infringement was affirmed but the finding of induced infringement was reversed. The Appeals Court also found that the patent successfully asserted in the District Court against Half.com was invalid for anticipation, and it therefore reversed the judgment at trial in that regard. The end result is that eBay remains liable for infringement with damages of US \$10.5 million.

MercExchange was successfully able to cross-appeal the District Court's finding of invalidity of one of the originally asserted patents. On this aspect of the case, the Appeals Court entered a remand for further proceedings. This means that eBay may possibly face further liability for infringement in due course. The Appeals Court also reversed the denial of the permanent injunction as found at trial.

McCarthy Tétrault Notes:

Of note in the judgment above was the District Court's expressed concerns over the granting of injunctive relief in respect of business method patents. In reversing

the denial of the permanent injunction as had been determined at trial, the Appeals Court found no reason to depart from the general rule that U.S. courts will issue permanent injunctions against patent infringement, absent exceptional circumstances.

Alfred Macchione has been following this case closely and its impact on the U.S. patent reform process.

Contact Alfred Macchione at amacchione@mccarthy.ca

U.S.: Appeals Court Grants New Patent Trial to Microsoft

In a case involving one of the largest patent infringement damage awards granted by a U.S. jury, the Court of Appeals for the Federal Circuit decided to vacate a District Court judgment that had rejected challenges to the validity and enforceability of an Internet browser patent that Microsoft was found to have infringed. In the recent *Eolas Technologies Incorporated v. Microsoft Corporation* case, the Appeals Court remanded the case for further evaluation of obviousness, anticipation and inequitable conduct issues. The ruling by the Appeals Court may possibly result in the Eolas patent being struck down by the District Court on its reconsideration of these issues.

Previously, a jury had found that Microsoft infringed certain patented browser technology developed by the University of California and exclusively licensed to Eolas. It awarded US \$520.6 million in damages against Microsoft. Affected in the lawsuit are the ubiquitous Microsoft products Windows® and Internet Explorer®.

The Eolas patented technology allows for small interactive programs such as plug-ins, applets and scripts to be embedded into web documents. A re-examination of the Eolas patent is currently pending before the U.S. Patent and Trademark Office (“PTO”). A ruling favourable to Microsoft in the PTO would absolve Microsoft from the damages obligation in the infringement lawsuit.

McCarthy Tétrault Notes:

An interesting legal issue in the Appeals Court judgment is its treatment of section 271(f) of the U.S. patent statute, which in certain instances prohibits the supply from the U.S. of the uncombined components of a patented invention, in such manner as to actively induce their combination outside of the U.S. The provision in issue was enacted in 1972 to counteract a decision of the U.S. Supreme Court which had ruled that the practice of manufacturing unassembled components of patented products in the U.S., and their shipment for completed assembly in a foreign country, was not an

infringing activity under the then-existing law. In the current situation, Microsoft produced exact duplicates of the infringing software on a golden master disk, as is common in the software industry. The golden disks were thereafter shipped to foreign locations, where the software in question was incorporated as an operating element of computer systems for sale abroad.

The Appeals Court affirmed the District Court’s view to the effect that section 271(f) applied to software on a golden master disk as a “component” within the meaning of the provision. The court held on appeal that every form of invention deserves the protection of section 271(f), and that software code certainly qualifies as an invention eligible for patenting under existing law. The Appeals Court therefore resisted the creation of different rules of infringement for different categories of inventions. In addition to the District Court and Appeals Court decisions in *Eolas*, two other U.S. District courts have recently ruled against Microsoft on the applicability of section 271(f) to software exported out of the U.S. on golden master disks.

Contact Alfred Macchione at
amacchione@mccarthy.ca

U.S.: Microsoft and Toshiba Cross-License Digital Consumer Electronics

Following up on their decision in December 2003, Microsoft continues to cross-license its patents, this time with Toshiba. The pact covers computer and consumer electronics products technology and allows both companies to freely use a number of each others' patents. This agreement follows several other cross-licensing deals, including Sony with Samsung and Microsoft with Siemens and SAP. One of the reasons behind the cross-licensing is the security against patent infringement, particularly in a time where patent infringement lawsuits have become increasingly popular.

U.S.: Jury Finds Cisco Did Not Infringe StorageTek Patent

After three grueling weeks of trial, a federal jury in California ruled that Cisco did not infringe StorageTek's patent on the net flow feature acceleration technology. StorageTek, a maker of data-storage systems, argued that Cisco infringed their patented technology used in transporting data packets over networks. Cisco's main argument was that the technology was

obsolete. The jury stated that there was no evidence to suggest infringement in dismissing the US \$322 million suit. As an aside, StorageTek recently agreed to be purchased by Sun Microsystems.

U.S.: Rambus, Samsung Sue Each Other Over Patents

Rambus has begun a lawsuit against Samsung alleging the world's largest memory manufacturer violated its SDRAM patent in the U.S. (the most common type of memory) as well as other types of memory. Samsung is a licensee of these types of memory and under the agreement has an obligation to pay Rambus royalties. Rambus decided to terminate their license agreement with Samsung and sue. Even though Samsung has been a valuable licensee, too many issues have surfaced that require Rambus to seek court action.

A day later, Samsung sued Rambus seeking the court to declare their patents invalid and unenforceable. Samsung claims that Rambus is using information it obtained as a member of a memory chip standards-setting body in order to receive additional patents and enforce them against the members of the body. It also accuses Rambus of shredding important documentation related to this. These lawsuits come on the heels of

Rambus agreeing to settle its claim against Infineon in late March 2005 after Infineon agreed to pay Rambus royalties (for more on this March 2005 lawsuit, please refer to the article found in our inaugural [Technology Law Quarterly](#)).

New York: Partial Jury Hung In Yahoo! and FindWhat.com Patent Suit

FindWhat.com says that the three-year long patent infringement case between itself and Yahoo! subsidiary Overture has ended in a hung jury. Yahoo!, however, asserts that the jury has found FindWhat.com to be infringing on most of the patent claims, but has not reached a conclusion on a few remaining issues. Yahoo! contemplates resolving the remaining issues in the post-trial briefing scheduled by the court. The technology in dispute is the 'bid-for-placement' technology. In essence, both FindWhat and Overture are financially rewarded by using a pay-per-click business model that uses an automated bidding system and places company listings on their search engines. Overture was granted a patent that determines where and how results are positioned on a search list, thus forcing FindWhat to pay Overture licensing fees to continue to use the technology. However, FindWhat claims that Overture's patent is illegal since the

patent application was not filed less than a year after public use or disclosure of the invention. Furthermore, FindWhat notes that the judge has yet to rule on the patent issue because of inequitable conduct committed by Overture.

U.S.: Google Wants Patent on Ranking News

Google has applied for a U.S. and international patent on the ability of its news website to rank news based on the quality of the source. The current process ranks the stories by popularity and timeliness. The reason for the application has more to do with the manner in which news is now captured on the Internet. With the proliferation of weblogs and other commentary sites, postings from these sites often supersede other more reliable sources, and the concern becomes particularly obvious when some of the postings on the weblogs carry biased or inaccurate claims. Although some web commentators are worried that such a patent would create a bias towards mainstream news sources, Google says the factors which determine the ranking, such as the breadth of coverage, number of bureaus the news source operates, circulation stats and network traffic to the source, will not only help in finding accurate information, but will also be useful for its 'search results' application.

U.S.: Novell Acquires B2B Patents

Novell has acquired some very important business-to-business e-commerce patents from the now bankrupt Commerce One. The company intends to use them to protect its open source offerings. Experts in the industry don't believe that Novell owning the patents will do much to protect open source from frivolous abuses of patent law. In fact, some believe the manner in which these patents were purchased highlights the problems with the U.S. patent system; instead of encouraging innovation and fostering technological advances, these patents are being treated like commodities and only patent reform will prevent anti-innovative and anti-competitive acquisitions of patents.

San Francisco: HP, EMC Settle Patent Infringement Case

After over four years of litigation over mutual patent infringement suits between Hewlett-Packard ("HP") and EMC Corp., they have reached an apparently amicable settlement. At the start, EMC sued StorageApps for patent infringement in 2000. When HP acquired StorageApps in 2001, it also became a defendant in the suit. At the

end of the trial, HP lost. Then, in 2002, HP sued EMC for infringement of seven patents relating to providing power to storage systems. EMC countersued for infringement of its patents relating to software that moves data between storage systems and relating to storing data from mainframes. As part of the settlement, neither company admitted any wrongdoing, but HP will pay US \$325 million to EMC. However, HP may pay down the settlement amount through purchases of EMC products. The agreement also contemplates a five-year patent cross-license agreement between both companies.

McCarthy Tétrault Notes:

The tech patent cases noted above are just the tip of the iceberg in the U.S. in terms of the total number of cases, and settlement negotiations, involving patents relating to software, hardware and Internet business methods. And it is incorrect to think this issue is restricted to the U.S. Many of these U.S. patents have counterparts in Canada and Europe. In any event, the work we do in this area tells us that Canadian companies have to consider patents (both their own patents and patents of their competitors) especially when their markets extend beyond Canada. For example, you need to carefully consider the advantages – and disadvantages – of

searching for your competitors' patents. Such searches may not be the best approach as, oddly, they may reveal a patent which your own product or process may be infringing. In order to avoid the spectre of enhanced damages, you may then be obligated to substantively review the patent against your product or process. In short, you will want experienced patent lawyers guiding you through this thicket of legal and technical issues.

Contact Bob Nakano at
bnakano@mccarthy.ca

Contact Alfred Macchione at
amacchione@mccarthy.ca

including China, India, Russia and Mexico are guilty of trademark counterfeiting. The report also indicates that the Canadian government should adopt a 'notice-and-takedown' system to encourage ISPs to combat online copyright infringement. The good news is that the report suggests that significant progress has occurred in the software industry. The USTR and agencies of other governments have worked together to help curb the use of illegal software. Countries that have made remarkable advances in this area include China, France, Greece, Israel and the U.K.

U.S.: Annual 'Special 301 Report' Issued by USTR

The United States Trade Representative ("USTR") issued its annual report on the protection of intellectual property rights. The report examines the adequacy and effectiveness of IP rights protection across the world. The report indicates that China's intellectual property rights ("IPR") protection measures are lagging behind due in large part to their internal counterfeit and piracy problems, as well as their exporting of pirated goods. The report also highlights Ukraine as a trouble spot given their significant level of media piracy. Several countries,

TRADE-MARKS

International: WIPO
Will Update Treaty on
Trade-mark Applications

In an attempt to make the administrative procedures for national and regional trade-mark applications more streamlined, WIPO has prepared a draft text agreed to by members of WIPO's Standing Committee on the Law of Trade-marks, Industrial Designs and Geographical Indications. The Trade-mark Law Treaty ("TLT") currently has 33 member countries on board with the goal to successfully introduce standards regarding administrative formalities in procedures before the various trade-mark offices. Some of the recommendations include electronic filing, provisions regarding the recording of trade-mark licenses, relief measures when time limits have been missed and the establishment of an assembly of the contracting parties. A proposal has been agreed to and will be presented at the diplomatic conference in March 2006.

corresponding changes required to existing legislation. Such required changes would include the adoption of the Nice Classification System (mandatory with adherence to the TLT) and the reduction of the term of trade-mark protection from 15 to 10 years. More importantly, in the context of these changes, CIPO wishes to stimulate further discussion on the need to re-examine the concept of use and associated requirements under current Canadian legislation to provide an administrative framework consistent with the TLT. These proposed changes are particularly relevant to Canadian technology companies given their significant sales outside of Canada – and their corresponding need to protect their brands globally.

Véronique Wattiez-Larose closely monitors the progress of the TLT negotiations and the reaction of the Canadian Intellectual Property Office thereto.

Contact Véronique Wattiez-Larose at vwlarose@mccarthy.ca

Recently, the Canadian Intellectual Property Office ("CIPO") issued Proposals for comment relating to the modernization of the Trade-Marks Act. The documents include a discussion on Canada's adherence to the TLT and the

TRADE SECRETS

California: Apple Files Brief in Trade Secrets Case

Apple Computers filed its briefs in a California appeals court seeking to subpoena email records from a website that leaked important confidential product information. The Santa Clara County Superior Court ruled that Apple was allowed to subpoena records of the website PowerPage, which leaked the product information about a music hardware device code to be launched by Apple.

The Electronic Frontier Foundation has asked the court to overturn the decision based on PowerPage's First Amendment rights. On the other hand, Apple and members of its industry, such as Intel, argue that innovation would be hampered if it were legal to obtain trade secrets and post them on the Internet. Apple is asking the court to differentiate between journalist First Amendment rights and cases where reporters are conduits of stolen information. They argue that the latter is the case in the lawsuit at hand.

In another development, Apple has settled with the second of three men accused of leaking pre-release versions of Mac OS X Tiger onto the Internet. In this case, three men were alleged to have

leaked trade secret information on the Internet. Apple has settled with two of the three men, with settlements including the return of any information they received as a member of Apple's Developer Connection and an injunction preventing them from possessing any proprietary Apple information.

NEWS/LEGAL DEVELOPMENTS

U.S.: Hearings on the Reform of the USA Patriot Act

According to a secret vote held recently by the Senate Intelligence Committee, the *USA Patriot Act* will be expanded to provide the F.B.I. with new powers to demand documents from companies without the normally required court order. Administrative subpoenas will be granted to the F.B.I. for terrorism and clandestine intelligence cases without any prior judicial review. The F.B.I. can declare the subpoenas be secret and punish those who disclose its existence.

Although there continue to be some discussions on the final form of the expanded law, any scaling back of the *Act* seems unlikely. Both Senate and House of Representative members have scheduled meetings to discuss the expiration of various provisions of the *Act*. Many of the provisions set to expire at the end of the year relate to computer and Internet surveillance. In an attempt to avoid a repetition of the rapid-fire enactment of the *Patriot Act* in 2001, politicians are scheduling several hearings to promote transparency. The details that have surfaced to date at these meetings include how many times the

Act has been invoked, information concerning the use of library Internet connections in the month of July 2001, and the frequency with which section 215 of the *Act* (which allows secret orders to obtain records from anyone, where the recipient is gagged and any disclosure can lead to imprisonment) has been used. This section is set to expire at year end.

Canada: Impact of the USA Patriot Act in Canada

Once personal information about Canadians is transferred outside Canada, the laws of the country to which the information has been transferred will generally apply to determine when government agencies and authorities can obtain access to that personal information. Similarly, data located within Canada accessed by U.S. authorities pursuant to a U.S. court order or otherwise is an issue of particular relevance. There are circumstances where data is transferred outside Canada for safekeeping or processing, or where it might be transferred outside Canada where the provider of disaster recovery services to the outsourcer is located outside Canada.

Generally, people feel a loss of control over what happens to their personal

information, especially if sensitive information is disclosed abroad. This is particularly true where the division between the role of the state in protecting Canadian data versus its role in protecting Canada from foreign national security threats becomes blurred. Information technology allows for easy data transfers, but the very ease of such transfers has sparked privacy concerns. Governments are collecting information and merging smaller databases into larger data banks of information about individuals for purposes related to national security.

The issue has become the subject of public debate in Canada especially in relation to the U.S. “*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*”. The USA Patriot Act is anti-terrorism legislation that took shape as a direct result of the September 11, 2001 events. Its primary objective is to expand the powers of various law enforcement agencies to gather intelligence through amendments to the U.S. *Foreign Intelligence Surveillance Act* (“FISA”) originally enacted in 1978.

In British Columbia, complaints by unions concerned with the current practice of outsourcing the B.C. Medical Services Plan to the U.S. prompted the B.C. Privacy Commissioner to release a

report on the effect of the USA Patriot Act on public sector outsourcing after gathering comments from interested stakeholders. The report examined the privacy implications of the USA Patriot Act and its effect on B.C.’s *Freedom of Information and Protection of Privacy Act*. In addition, the USA Patriot Act has raised concerns for Canadian companies who have affiliates located in the U.S.

For more on this analysis, please see our Legal Update entitled [Impact of the USA Patriot Act in Canada](#)

Contact Michel Racicot at mracicot@mccarthy.ca

Contact Barry Sookman at bsookman@mccarthy.ca

Contact Matthew Peters at mpeters@mccarthy.ca

Canada: Privacy Commissioner Urges Changes to Anti-Terrorism Act

The Privacy Commissioner of Canada has asked a Senate Special Committee to examine the appropriateness and effectiveness of the extraordinary powers granted under the *Anti-terrorism Act*. She has asked that greater accountability and more transparency be provided to balance the rights of Canadians against

the intrusive nature of the Act. Although the Commissioner is aware of the gains in security the Act provides, she has to ensure the justification meets the sacrifice of our privacy rights. The Commissioner has proposed several recommendations to the committee, including a reform of the *Privacy Act*, in order to strike the appropriate balance between national security objectives and the protection of privacy rights of Canadians.

Canada: Equifax Sends Personal Information to Stranger

A man in Lindsay, Ontario says he received a fax containing personal information on three Canadians residing in Ontario and Québec. The information included social insurance numbers, driver's licenses and credit card information. The man was himself sending a fax to Equifax in an attempt to correct his personal information when suddenly he received a fax from them. Equifax has confirmed that a fax was sent out in error and is investigating the matter.

U.S.: Real ID Act Approved by Senate

The U.S. Senate passed the *Real ID Act*, which now requires only the signature of the President before it becomes law. President Bush has repeatedly said that this law will stop illegal immigrants from obtaining drivers' licenses. The Act's main mandates take effect in May 2008, in which Americans will be required to obtain federally approved ID cards with machine readable technology. Anyone who is found without the card will not be permitted to open a bank account, enter federal buildings, or travel by air or train. Privacy activists denounce the Act and say it creates a National ID Card system. They fear further ID thefts since the card only adds to other pieces of identification available for theft.

England: Tony Blair Introduces Identification Card Plan

In an attempt to tackle identity theft, fraud and illegal immigration, Prime Minister Tony Blair is trying to get other political parties involved in his initiative to start a national ID Card plan. The government wants to set up a National Identity Register, containing a biometric library of every British citizen. Opposition parties agree that the ID plan

is contrary to British traditions and shows a lack of respect for democracy. Mr. Blair believes that his plan will be a safeguard protecting his people from terrorism and crime without affecting Britain's economic political stability.

Canadians will be interested in watching the outcome of both the American and U.K. experience since we are in the midst of deciding whether an identification card regime should be adopted here in Canada. There have been several ongoing Committee debates and more Canadian citizens are stepping forward and having their voices heard.

U.S.: New Rule on Destruction of Consumer Data

Effective June 1st, 2005, a new federal rule in the U.S. requires all businesses and individuals to destroy consumer information obtained from credit bureaus and other individuals in regards to hiring employees, renting apartments, purchasing cars and granting credit, etc.. This new rule came into effect as a response to the growing number of identity theft cases. The Federal Trade Commission requires that personal information, even in electronic format, be erased, burned, shredded or destroyed in a manner that the information can no

longer be read. Although no time line has been set for when the data must be destroyed, privacy advocates have applauded the new rule.

U.S.: Wiretaps Up in 2004

The number of court-authorized wiretaps in the U.S. has risen by over 19 per cent last year as authorities have been asked to catch increasingly tech-savvy criminals. The method of communicating criminal activity has grown from word of mouth and telephone to Internet-enabled devices and VoIP. In terms of numbers, terror-related investigations under the *Foreign Intelligence Surveillance Act* reached 1,754. Warrants and non-terrorist federally approved wiretaps for criminal investigations reached 730 applications (an increase of 26 per cent) and state judge applications reached 980 (an increase of 13 per cent). Nine out of every 10 targeted portable devices, such as cell phones, Internet-enabled devices and pagers. Although more wiretaps were authorized, the length of time in which a wiretap could occur decreased in 2004 from 44 to 43 days.

CASES/LEGAL DEVELOPMENTS

Canada: CRTC Hands Down Major VoIP Ruling

On May 12, 2005, the Canadian Radio-television and Telecommunications Commission (“CRTC”) released its long-awaited decision regarding the regulatory framework for Voice-over Internet Protocol (“VoIP”) telephone services. In Telecom Decision CRTC 2005-28, the CRTC welcomed the advent of VoIP and took steps to accommodate its particular limitations, for example in 911 functionality ([see note on this important topic later in this issue of the publication](#)). The CRTC recognized that VoIP can help achieve competition in the local telephony market – a market that has seen only modest competitive inroads since it was first opened to competitive entry in 1997.

McCarthy Tétrault Notes:

Among other key rulings, the CRTC determined that local VoIP services are inherently similar to other local telephone services, and thus should be treated in like manner for most regulatory purposes. Hence, the CRTC rejected arguments by the incumbent local exchange carriers (“ILECs”) that VoIP-based local telephone service is, by

itself, highly competitive and thus should be exempt from regulation. This means that, unlike CLECs (e.g. non-dominant carriers and cablecos), ILECs must obtain prior CRTC approval for the pricing of their local VoIP services. The ILECS are also subject to certain other rules, such as limits on targeted marketing of customers that take a competitive local telephone service, that are intended to foster competition. That said, the CRTC recognized that such measures are likely to be time-limited. The CRTC has started a proceeding to determine the approach to forbearance from regulation of the ILECs’ VoIP and other local telephony services as competition in that sector becomes increasingly robust.

Contact Lorne Salzman at lsalzman@mccarthy.ca

Canada: CRTC Hands Down Satellite Subscription Radio Decision

The CRTC has announced that it will grant radio licences to three entities for the broadcasting of multi-channel audio distribution services. SIRIUS Canada Inc. and Canadian Satellite Radio Inc. have been granted subscription radio licences delivered by satellite and terrestrial transmitters, while CHUM Limited (on behalf of a partnership with

Astral Media Radio Inc.) will be allowed to offer multi-channel subscription radio services through terrestrial transmitters without a satellite component. The result for Canadians will be significant additional audio programming for the broadcasting system and more choice and diversity for consumers.

McCarthy Tétrault Notes:

The CRTC placed conditions on the two entities who will offer subscription radio via satellite, including the requirement that at least eight channels be Canadian, at least 60 per cent of the Canadian channels be music channels, at least 50 per cent of the material on the Canadian channels be “original” content and at least 85 per cent of the spoken word content on the Canadian spoken word channels must be Canadian. Each Canadian service can be linked with up to nine U.S. services from the SIRIUS Satellite Radio Inc. service, and at least three of the first eight, and no less than 25 per cent of the Canadian channels in the future must be in French. The objective of these conditions is, among other things, an attempt to prioritize the Canadian content requirements as they apply to this emerging technology. The conditions placed on CHUM Limited's terrestrial transmitters are different. For example, the CHUM service will provide 50 radio programming channels, all

produced in Canada. No more than 10 per cent of the material on any of those channels would consist of programming that was originally broadcast on over-the-air radio stations. A minimum of 25 per cent of those channels will be in the French language. In terms of the actual satellite facilities, the CRTC determined that the optimal solution for providing satellite services would be to build on existing services provided by the U.S., albeit under Canadian ownership and control as required by the *Broadcasting Act*. In arriving at this conclusion, the Commission noted that, at the present time, Canada has no satellite facility capable of distributing digital satellite radio broadcasting, nor has it secured the required spectrum resources with the International Telecommunications Union. Nor is it likely to in the foreseeable future. Several groups have indicated that they will appeal the satellite radio decisions to the Federal Cabinet.

Contact Grant Buchanan at
gbuck@mccarthy.ca

**Canada: CRTC/FCC Ruling
Requires 911 Service for
Internet Phones**

911 service was introduced in the U.S. by AT&T in 1965 and over 200 million calls are made to 911 in the U.S. and Canada each year. Basic 911 service consists of routing 911 calls to a designated Public Safety Answering Point (“PSAP”), which connects a 911 caller to the required emergency services agency (police, fire and/or ambulance). The PSAP agent typically sees the caller’s telephone number, but not the caller’s location information. Thus, Basic 911 service is only effective if the caller can communicate his/her location to the PSAP agent. Enhanced 911 service (“E911”) includes certain additional features and capabilities, including Automatic Location Information (“ALI”) functionality, and certain call control features. With the advancement of technologies, the 911 service had to be adapted from the original wireline applications offered by incumbent local exchange carriers (“ILECs”), such as Bell, to competitive local exchange carriers (“CLECs”), wireless service providers, providers of competitive pay telephone services, resellers of various telecom services, etc.

The advent of VoIP services presents new challenges to the availability of the 911 service. VoIP services are typically

defined as voice communication services using the Internet Protocol that use telephone numbers conforming to the North American Numbering Plan (“NANP”) and provides subscribers with universal access to and from the public-switched telephone network (“PSTN”). VoIP services can be used in a variety of ways: (i) fixed with a local number, (ii) fixed with a number that does not correspond to a local number, and (iii) nomadic (i.e. where the caller does not make/receive calls from a fixed location).

The CRTC in Canada and the FCC in the U.S. have recently issued decisions on the obligations of providers of VoIP services to offer a 911 service. In both cases, the regulatory agencies have stated that they are addressing the matter separately and in advance of issuing decisions on other aspects of VoIP services given the magnitude of the public safety issue.

In Canada, in Telecom Decision CRTC 2005-21 issued on April 4, 2005, the CRTC directed Canadian carriers offering fixed local VoIP service to provide 911/E911 services, where it is available from the ILEC. This must happen within 90 days from the date of the decision (six companies have requested and obtained an additional 45 days to comply with the decision). The CRTC directed Canadian carriers offering local VoIP services on a nomadic

basis or with a telephone number that is not native to any of the exchanges within a customer's PSAP serving area, to implement an interim solution within 90 days from the date of the decision which provides a level of service functionally comparable to Basic 911.

In light of the public safety issue related to the limitations on 911/E911 service provided by local VoIP services, the CRTC also directed Canadian carriers to provide customer notification regarding any limitations, before service commencement, and during service provision, and to obtain from their customers express consent to such limitations. The CRTC also directed Canadian carriers, as a condition of providing telecommunications services to local VoIP service providers, to include in their service contracts or other arrangements, the requirement that they abide by all the directions set out in the Commission's decision. With respect to funding of the provincial 911 networks, the CRTC considered that the ILECs' current provincial 911 tariffs should apply to local VoIP service providers in the same manner as they apply to other carriers and resellers. Finally, the CRTC requested that the CRTC Interconnection Steering Committee ("CISC") address certain technical and operational issues and set out a timeline to guide the CISC process.

In the U.S. on May 19, 2005, the FCC adopted, but did not release until June 3, 2005, a First Report and Order and Notice of Proposed Rulemaking. In this Order, the FCC required providers of VoIP services to supply 911/E911 capabilities to their customers and indicated that the providers could satisfy this requirement by interconnecting indirectly through a third party, such as a CLEC, or interconnecting directly with the Wireline E911 Network or through any other means that allows a provider to offer 911 service. The FCC also required them to provide E911 from wherever the customer may be, whether at home or away.

The FCC requirements apply only to 911 calls placed by users whose Registered Location (the most recent information obtained by the VoIP service provider that identifies the physical location of an end user) is in a geographic area served by a Wireline E911 Network. Within 120 days after the effective date of the Order, VoIP service providers must, as a condition to providing service to a consumer, provide him/her with E911 service and transmit all 911 calls, as well as Automatic Number Identification ("ANI") and caller's Registered Location for each call, to the PSAP, designated state-wide default answering point, or other appropriate local emergency authority that serves the caller's Registered Location.

As of 120 days after the effective date of the Order, VoIP service providers must: (1) obtain from each customer, prior to the initiation of service, the physical location at which the service will first be utilized; and (2) provide their end users one or more methods of updating their registered location, including at least one option that requires use only of the Consumer Premises Equipment necessary to access the VoIP service. As with the CRTC, the FCC required the VoIP service providers to specifically advise every subscriber, both new and existing, prominently and in plain language, of the circumstances under which E911 service may not be available or may be in some way limited by comparison to traditional E911 service and to obtain and keep a record of affirmative acknowledgement by every subscriber of having received and understood the advisory and to distribute to its existing subscribers warning stickers or other appropriate labels warning subscribers if E911 service may be limited or not available.

In addition, all service providers must submit a letter to the FCC detailing their compliance no later than 120 days after the effective date of the order.

Contrary to the CRTC, the FCC declined to rule on funding of 911 services. The FCC declared that it did not expect the rules adopted by its Order

to impose substantial implementation costs on PSAPs and that the rules would neither contribute to the diminishment of 911 funding nor require substantial increase in 911 spending by state and local jurisdictions. In its Notice of Proposed Rulemaking (“NPRM”), the FCC also seeks comments on what additional steps the Commission should take to ensure that providers of VoIP services provide ubiquitous and reliable E911 service and raises a number of issues to be addressed.

McCarthy Tétrault Notes:

Contrary to the situation in Canada, where the CRTC has directed Canadian carriers to abide by the directions set out in the CRTC decision and include such in their service contracts with VoIP service providers, the FCC imposes many obligations on the VoIP service providers without giving them any new rights to facilitate their compliance. For example, there is no requirement that CLECs interconnect with VoIP service providers nor do ILECs have any obligations to VoIP service providers and VoIP service providers have no right of access to emergency facilities, such as 911/E911 call centres, while most of these facilities are owned by ILECs.

[Michel Racicot](#) was involved in representing the interests of the Association des centres d'urgence 911 du Québec (“ACUQ”)

(Québec Association of PSAPs) in this proceeding. Over the years since 1993, Michel has represented the Montréal Urban Community, the Union of Québec Municipalities and other parties in all material 911 proceedings before the CRTC.

Contact Michel Racicot at
mracicot@mccarthy.ca

International: OECD
Releases Broadband
Statistics

The OECD recently published their report on broadband and the statistics indicate a rapid growth in 2004. Although Korea continues to lead the way, the growth has been particularly large in Europe. A host of new services, including voice-over-IP and video over broadband are the main features of the expansion of broadband. Among some of the highlights: broadband subscribers in the OECD reached 118 million in 2004, adding over 34 million subscribers; the OECD penetration rate reached 10.2 subscribers per 100 inhabitants, which is up 2.9 subscribers per 100 inhabitants; and DSL is the leading broadband platform in over 25 OECD countries.