

# focus

## on Technology



FRASER MILNER CASGRAIN LLP

July 2003

### CANADIAN COPYRIGHT REFORM

Canadian copyright law is about to change. Due to complexities in interpreting existing copyright provisions as they apply to digital media, changes in online business models, international commitments and reforms in other countries, the Canadian government has embarked on a copyright reform process.

The Minister of Industry released its report *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* on October 3, 2002, in which issues identified for reform are categorized into short, medium and long term. Among the contested issues for review in the short term are legal protection of technological protection measures, access and education issues and internet service provider (ISP) liability.

Creating a legal prohibition against circumventing technical measures designed to protect access and/or use of copyrighted works raises the concern that this will create a shift in the balance between protecting the rights of the copyright holders and protecting the interests of the public in terms of access to information and legitimate uses of works (such as fair dealing rights). In balancing these interests, the government is faced with the task of predicting how digital markets for copyrighted works will develop and how access to digital works will change as a result of technical protection measures.

Related to these access issues are concerns about online license provisions that effectively override statutory exceptions. The Government is considering whether to implement a statutory override provision, such that certain exemptions would override contractual terms to the contrary.

The ability of an internet service provider (ISP) to defend against liability for copyright infringement is another issue for debate. The structure established by the new U.S. legislation (the *Digital Millennium Copyright Act*) has resulted in what some would term an interim injunction without judicial process or much of an evidentiary burden. The results are less than satisfactory: content providers may be faced with false allegations of infringement and have access to their sites prohibited for an interim period, while copyright holders whose rights are being infringed by rogue content providers have no ability to stop infringers from moving the infringing works to another service provider.

Another reform being considered is extension of the copyright term to the life of the author plus 70 years (rather than the current 50 years), as is being implemented in the United States and by the European Union. While favourable to the content holders, this reform would result in limiting the public domain by extending the exclusive protection to the works afforded by copyright law.

These copyright reform matters have been referred to the Standing Committee on Canadian Heritage. Unless the timeframe is extended, the Committee will respond by early October 2003.

*For more information on the topic, please contact Corina Dario in our Calgary office at (403) 268-3049.*

### **LIMITATION OF LIABILITY IN CROWN PROCUREMENT CONTRACTS**

On May 8, 2003, the Treasury Board approved a new policy related to "Limitation of Liability in Crown Procurement Contracts". The new policy, to be implemented by September 1, 2003, addresses long-standing concerns that the information management and information technology (IM/IT) industry has had with the Crown's standard limitation of liability clause included in all Crown procurement contracts. In the past, many in the industry have been reluctant to bid on procurement opportunities because they were unwilling to accept the risks resulting from the Crown's standard limitation of liability clauses.

The new Treasury Board policy was drafted in response to these concerns. The new policy creates a special authority for IM/IT procurement contracts to either limit or indemnify third-party economic losses. This authority applies to the supply of IM/IT goods, services, solutions and solution based business requirements with a significant IM/IT component. The authority is granted for a five year period from the date of approval, however, it will be reviewed in year four prior to any requests for continuation beyond the end of year five.

*For more information on this topic, please contact Tom Reaume in our Ottawa office at (613) 783-9610.*

### **NEW DEVELOPMENT IN COMMERCIAL ARBITRATION LAW FOR INTELLECTUAL PROPERTY MATTERS**

Who would have guessed that Caillou, the friendly cartoon character, so loved by children worldwide, would play a major role in the development of arbitration law in Canada (see *Éditions Chouette (1987) inc. v. Desputeaux*, 2003 SCC 17)? In November of last year, Stefan Martin and Sébastien Grammond, both of the FMC Montreal office, pleaded at the Supreme Court of Canada that copyright ownership and disputes were issues that can be subjected to the authority of an arbitrator. The Supreme Court agreed and rendered a unanimous decision to that effect.

The Supreme Court was faced with interpreting section 37 of the *Copyright Act* (R.S.C. 1985, c-C-42) which assigns jurisdiction of copyright issues to the Federal Court concurrently with the provincial courts. Further to the fact that s. 37 does not expressly prohibit arbitration, the Court reasoned that both the federal and the Quebec provincial legislature recognize that parties can select the private justice system, specifically by referring to s. 2638 and 2639 of the *Civil Code of Quebec* (S.Q. 1991, c-64) ("**C.C.Q.**") and the federal *Commercial Arbitration Act* (R.C.S., 1985, c.17). In this case, the applicable arbitration system was established in the *C.C.Q.* and the *Civil Code of Procedure* (R.S.Q.,c. C-25) ("**C.C.P.**"). Article 2639 *C.C.Q.* expressly provides that the parties may not submit a dispute over a matter of public order or the status of persons to arbitration while art. 946.5 *C.C.P.* provides that a court can refuse ratification of an award where the matter in dispute cannot be settled by arbitration or is contrary to public order. Hence, the Supreme Court was faced with analysing copyrights as analogous to public order matters. Noting that copyrights encompass moral rights, the Supreme Court rebutted the Court of Appeals' analysis that since moral rights may not be assigned, according to s. 14.1 of the *Copyright Act*, that they must be treated as a person's status or personality matters which therefore must be "removed from the jurisdiction of the arbitrator". The Court stated that the primary objective of the *Copyright Act* was for "protecting and transmitting the economic values associated with this type of property and with the use of it", that moral rights may be waived and thirdly that Quebec legislation recognized the legitimacy and validity of using arbitration in copyright transactions. Furthermore, the Supreme Court established that Québec's arbitration proceedings will only be submitted to judicial review when their outcome is against public order as their autonomy would otherwise be jeopardized.

This case reinforces the legitimacy and autonomy of commercial arbitration proceedings for all intellectual property disputes where no federal or provincial provision expressly prohibits them.

*For more information on on this topic, please contact Sophie Douville in our Montréal office at (514) 818-5862.*

## CONTACT US

For more information, please contact any one of the following members of our National Technology Law Practice Group.

### Montréal

Dean Chenoy	514-878-5838	dean.chenoy@fmc-law.com
Pierre Dondo	514-878-8877	pierre.dondo@fmc-law.com
Sophie Douville	514-818-5862	sophie.douville@fmc-law.com
Barbara Farina	514-878-8819	barbara.farina@fmc-law.com
Neil Katz	514-878-8883	neil.katz@fmc-law.com
Stefan Martin	514-878-5832	stefan.martin@fmc-law.com

### Ottawa

Tom Houston	613-783-9611	tom.houston@fmc-law.com
Tom Reaume	613-783-9610	tom.reaume@fmc-law.com
Eric Smith	613-783-9632	eric.smith@fmc-law.com

### Toronto

Gillian Akai	416-862-3432	gillian.akai@fmc-law.com
Michael Beirsto	416-862-3412	michael.beirsto@fmc-law.com
Andrea Feltham	416-367-6816	andrea.feltham@fmc-law.com
Colin Ground	416-863-4571	colin.ground@fmc-law.com
Tom Lo	416-863-4507	tom.lo@fmc-law.com
Don Luck	416-863-4564	don.luck@fmc-law.com
Rachael Solursh	416-863-4569	rachael.solursh@fmc-law.com
David Ujimoto	416-863-4484	david.ujimoto@fmc-law.com

### Edmonton

Dana Bissondatt	780-423-7184	dana.bissondatt@fmc-law.com
Dwight Bliss	780-423-7262	dwight.bliss@fmc-law.com
Colleen Cebuliak	780-423-7136	colleen.cebuliak@fmc-law.com
Craig McDougall	780-423-7398	craig.mcdougall@fmc-law.com
Robert Roth	780-423-7228	robert.roth@fmc-law.com
Michael Obert	780-423-7238	michael.obert@fmc-law.com
Tom Sides	780-423-7138	tom.sides@fmc-law.com

### Calgary

Corina Dario	403-268-3049	corina.dario@fmc-law.com
Kristine Eidsvik	403-268-7077	kristine.eidsvik@fmc-law.com
Gail Harding	403-268-7139	gail.harding@fmc-law.com
Sean Ralph	403-268-7101	sean.ralph@fmc-law.com
Laura Safran	403-268-7318	laura.safran@fmc-law.com
Gord Tarnowsky	403-268-3024	gordon.tarnowsky@fmc-law.com

### Vancouver

Blair Horn	604-443-7116	blair.horn@fmc-law.com
Sara McCracken	604-443-7106	sara.mccracken@fmc-law.com
Richard McDerby	604-443-7147	richard.mcderby@fmc-law.com

This newsletter is designed to supply brief details of recent legislative or other initiatives of interest and some commentary. The summaries and comments provided are, of necessity, brief and should not be relied upon as legal advice. We encourage you to contact any member of this group at any of our offices for further details or advice in the context of a particular situation.