

on Technology



FRASER MILNER CASGRAIN LLP

March 2002

BUSTED! - The Effect of Bankruptcy on License Agreements

With the recent downturn in the technology sector of the economy, both licensors and licensees should be aware of the impact that insolvency or bankruptcy may have on a license agreement.

The fact that a licensor becomes a bankrupt does not result in the termination of a license agreement. The trustee merely assumes the position of the debtor/licensor and will continue to be bound by the license agreement. Unlike their American and British counterparts, Canadian trustees do not have a statutory right under the *Bankruptcy and Insolvency Act* (the "BIA") to disclaim or reject contracts. However, it appears that the courts will consider permitting a licensor to terminate a license agreement under the *Companies Creditors Arrangement Act* (the "CCAA"). Accordingly, if a licensor pursues a re-organization under the CCAA it is likely that it will be able to terminate a license agreement if doing so would be in the interests of the debtor/licensor. In this case the licensee may be left with nothing more than an action for damages and the right to vote against the plan of arrangement.

If a licensee becomes a bankrupt, the licensee will be protected from legal proceedings by its creditors. Although most license agreements provide for termination upon the bankruptcy or insolvency of the licensee, under both the BIA and the CCAA such termination provisions will not, for the most part, be effective. Thus, the licensee can continue to carry on its

business with the benefit of its license agreements while it attempts a re-organization under either the BIA or the CCAA. Licensors should therefore not rely on termination provisions based solely on insolvency and bankruptcy events; other events of default should be included in the termination provisions as well.

For further information concerning this article, please contact Tom Reaume (613-783-9610) or Laurent Bartleman, Articled Student (613-783-9643) of our Ottawa office.

Sovereignty and the Borderless Internet

According to a recent U.S. case, other countries may not be able to prohibit internet content that is illegal in their countries, if such content originated and is lawful in the U.S.

Yahoo!, an internet service provider based in California, operates websites and services under the URL www.yahoo.com, including an automated auction site which allows anyone to post an item for sale. These sites use the English language and target users who are residents of the U.S. and utilize the servers based in and operated under the laws of the U.S. Yahoo! subsidiaries operate regional sites (such as Yahoo.fr in France) which use the local region's primary language, target the local citizenry and operate under local laws. In May, 2000, La Ligue Contre le Racisme et L'antisemitisme filed a complaint against Yahoo! in the French courts arguing that the yahoo.com auction site violated the French criminal code (which prohibits the exhibition of Nazi propaganda and artifacts for sale) because a French citizen was able to access Nazi artifacts on yahoo.com directly, or

through a link on yahoo.fr. The French court agreed and ordered Yahoo! (the U.S. parent) to take all necessary measures to dissuade and “render impossible” any access to the Nazi artifact auction service by a resident of France. Yahoo! subsequently applied to the U.S. courts for a declaration that the order of the French court was unenforceable in the United States against Yahoo! on the basis that the French order was a violation of Yahoo!’s constitutional right under the First Amendment to freedom of speech.

In November, 2001, the U.S. court agreed and declared the French order unenforceable in the United States. Given the dominance of U. S. internet service providers, one must wonder whether the determination of what constitutes permissible information on the internet may ultimately be determined by the constitutional values of the United States.

For further information concerning this article, please contact Gail L. Harding (403- 268-7139) of our Calgary office.

New Quebec Legislation on Technology-based Documents

On November 1st, 2001, Bill 161 or *An Act to establish a legal framework for information technology* (the “Act”) came into force in Quebec. This law is in harmony with the *Model Law on Electronic Commerce* adopted in 1996 by the United Nations International Commission on International Trade Law (UNCITRAL) and with its *Draft on Uniform Rules on Electronic Signature*, Quebec is thereby joining ranks with the legislatures of Manitoba, Yukon, New Brunswick, Saskatchewan and Ontario.

The main objective of the *Act* is to dispel ambiguity as to the legal value of documents in any technological medium, whether electronic, magnetic, optical, wireless or other. The legal value of such a document is subject, however, to the preservation of its integrity throughout its life-cycle, including its transfer, consultation, transmission and archiving. The integrity of a document is ensured “if it is possible to verify that the information it contains has not been altered and has been maintained in its entirety, and that the medium used provides stability and the required perennality to the information”. The *Act* creates a presumption of integrity, thus placing the burden of proof upon the party who contests

the integrity of the document. In this regard, users of electronic communications, in particular the intermediaries offering e-commerce services, may be wise to review their technology. The second objective of the *Act* is to define a linking process between a person and a document. Such a link is established by any process that allows the identity of the person and the document to be confirmed, and where necessary, its source and destination. Furthermore, the validity of an electronic signature is now explicitly recognized as creating such a link. The *Act* also permits contracting parties to use regulated certification services for the authentication of certain aspect of a transaction.

Finally, the *Act* addresses the issue of the liability of Internet service providers. A service provider is not responsible for the illegal activities of a user who stores or transmits documents on the provider’s communication network until the provider becomes aware of such illegal activities. It should be noted that the *Act* states that the provider is not required to monitor his network.

For further information concerning this article, please contact Stefan Martin (514-878-5832) or Sophie Douville (514-878-5862) of our Montreal office.

Contact Information

Calgary

Laura Safran	403-268-7318	laura.safran@fmc-law.com
Corina Dario	403-268-3049	corina.dario@fmc-law.com

Edmonton

Michael Obert	780-423-7238	michael.obert@fmc-law.com
Roger Kuypers	780-423-7100	roger.kuypers@fmc-law.com

Montreal

Stefan Martin	514-878-5832	stefan.martin@fmc-law.com
Barbara Farina	514-878-8819	barbara.farina@fmc-law.com
Neil Katz	514-878-8883	neil.katz@fmc-law.com

Ottawa

Tom Houston	613-783-9611	tom.houston@fmc-law.com
Peter Cooke	613-783-9642	peter.cooke@fmc-law.com

Toronto

Michael Beairsto	416-862-3412	michael.beairsto@fmc-law.com
David Ujimoto	416-863-4484	david.ujimoto@fmc-law.com

Vancouver

Blair Horn	604-443-7116	blair.horn@fmc-law.com
Alexander Levine	604-443-7146	alexander.levine@fmc-law.com