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Announcements

Bates Barristers, a Toronto litigation boutique specializing in complex commercial litigation, public law, and appeals, including class actions, is providing *pro bono* services to CIPPIC. The current focus of Bates Barristers' assistance is CIPPIC's project on unfair terms and methods in electronic contracting. Bates Barristers joins Deeth Williams Wall LLP and Fogler Rubinoff LLP as *pro bono* counsel to CIPPIC.

CIPPIC has been awarded \$50,000 by the Office of the Privacy Commissioner of Canada to conduct research into the impact of digital rights management technologies on the privacy of individual users. This study will be conducted over the fall and winter.

CIPPIC has also obtained funding from the Ontario Research Network for Electronic Commerce (ORNEC), matching law firm *pro bono* assistance, for our project on unfair terms and methods in electronic contracting. CIPPIC is collaborating on this project with Professor Warren Thorngate of Carleton University, who will conduct lab studies on consumer behaviour and awareness in the context of online contracting.

Summer Internship Program



(L-R clockwise): François Senécal (UMtl), Jordan Lamontagne (UofT), Peter Dostal (Dal), Adam Houston (UVic), Ambrese Montagu (UWO), David Lam (uOttawa).

Six law students from six different universities completed another successful summer internship with CIPPIC this year. Over the course of twelve weeks, they worked on a variety of cases and projects, including:

- preparing CIPPIC's application for leave to intervene and argument in the *Dell* case;
- researching and analyzing unfair terms and practices in electronic contracting;
- researching "network neutrality" in the Canadian context;
- researching and advising on issues of intermediary liability for online defamation;
- researching the implications for consumer liability of new online credit card authentication mechanisms;
- researching the implications of anti-circumvention laws for open source programs;
- drafting industry "best practices" with a view to eliminating spyware;
- preparing a complaint under s.9 of the *Competition Act* about misleading advertising by a domain name registrar;

- preparing a complaint to the Privacy Commissioner under PIPEDA, about cross-border data sharing;
- preparing a submission to ICANN on WHOIS policies;
- participating in an international colloquium on "The Human Rights of Anti-Terrorism";
- advising clients on various legal issues including website policies and liabilities; domain name disputes, compliance with privacy laws and competition laws, recourse in the case of online fraud; and
- updating and preparing FAQs and resources on various issues of public interest.

The summer program once again featured weekly presentations by outside experts and uOttawa faculty members. Speakers this year were:

- Aaron Freeman LL.B. and David McKie CBC News: *Access to Information Law and Practice in Canada*;
- Dr. Valerie Steeves, Assistant professor, Department of Criminology, University of Ottawa: *Popular Culture and Resistance : Representations of Surveillance in the Matrix*;
- Craig McTaggart, Senior Regulatory Legal Counsel TELUS: *Net Neutrality*.;
- Ren Bucholz, Policy Coordinator, Americas, EFF: *Activism on the Electronic Frontier*.;
- Richard Simpson, Director General, Electronic Commerce Branch, Industry Canada: *Federal government policy and law-making on electronic commerce issues*;
- Dr. Ian Kerr, Canada Research Chair in Ethics, Law & Technology, University of Ottawa: *What's the Frequency Kenneth? Verichip, Smart Networks & Moral Dummies*;
- Honourable Marlene Jennings, M.P.: *An MP's Handbook on How to Influence the Legislative Process through Non-violent Guerilla Warfare*;
- Craig Forcese, Assistant Professor, Department of Common Law, University of Ottawa: *Intelligence Sharing and the Limits of Privacy*;
- Neil Schwartzman, Consultant and Chair, CauceCanada: *Phishing : The beginning of the end of the Online Economy*.

Recent Advocacy

CIPPIC has been granted leave to intervene in a Supreme Court of Canada appeal, to be heard December 13, 2006. The case, **Dell Computer**

Corp. v. Union des Consommateurs et Dumoulin, involves the validity of a pre-dispute binding arbitration clause (denying the option of class actions) in online terms of service that were not actively brought to the attention of the consumer by Dell. CIPPIC is arguing that such clauses are contrary to public order under Quebec law, and therefore invalid. We are also arguing that online terms of service must be actively assented to by consumers in order to be enforceable by vendors. Lawyer and professor Mistrale Goudreau is leading CIPPIC's intervention in this case.

Our **application for judicial review** in the Federal Court of Canada challenging the Privacy Commissioner's determination that she lacks jurisdiction to investigate a US-based data-broker, is proceeding. Articling student Jennifer Seligy assisted staff counsel David Fewer in preparing and filing CIPPIC's Memorandum of Fact and Law. The court hearing date has yet to be set, as of August 15, 2006. For more information, see CIPPIC's Privacy Projects webpage, under "Court Cases".

In July, CIPPIC filed a **formal complaint** with the Privacy Commissioner of Canada against the "Big Six" Canadian banks, regarding allegedly unlawful disclosures of personal banking information to the U.S. government by SWIFT, a Belgium-based clearinghouse for international bank transfers. Under federal data protection law, banks are responsible for personal information that they outsource for processing purposes. The Privacy Commissioner of Canada subsequently took the unusual step of filing a commissioner-initiated complaint against SWIFT itself.

In June, CIPPIC filed comments with the Internet Corporation for Assigned Names and Numbers (ICANN) regarding **ICANN's policy on WHOIS databases**. WHOIS databases contain names and contact information for domain name registrants. Current ICANN policy is to make this information public via publicly accessible, online WHOIS databases. CIPPIC expressed concern that, while this approach provides a high level of transparency and accountability, it does so at the cost of legitimate privacy interests. We advocate an approach such as that taken by CIRA, the Canadian Internet Registry Agency, that balances accountability and privacy concerns.

In May, CIPPIC coordinated the release of an **open letter** by a group of high-profile public-interest oriented organizations and privacy and civil liberties experts to the Ministers of Canadian Heritage and Industry. The letter, supported by a Background Paper, expresses concerns over how proposed changes to Canadian copyright law implicate privacy, freedom of expression and civil liberties. It focuses on dangers to privacy posed by the extension of legal protection to "digital rights management" (DRM) technology. In separate letters of support, the Privacy Commissioner of Canada, Jennifer Stoddart, the Information and Privacy Commissioner for British Columbia, David Loukidelis, and Dr. Ann Cavoukian, Ontario's Information and Privacy Commissioner, each wrote to Minister of Canadian Heritage Bev Oda and Industry Minister Maxime Bernier to express their concern with the privacy implications of DRM technology.

In the course of responding to client inquiries, CIPPIC has engaged in discussions with two online services about deficiencies in their stated privacy policies. In both cases, our intervention led to significant changes to the policies so as to clearly limit the site's collection, use and/or disclosure of user information in ways that better respect the privacy of website users.

Current Projects and Cases

Copyright Law Reform

CIPPIC continues in its role of providing Canadians with accurate and up-to-date information on copyright law reform in Canada. CIPPIC will be calling on the Conservative government to ensure that any successor bill to C-60 is balanced, adopting C-60's strengths while addressing its weaknesses and omissions.

Privacy

CIPPIC intends to participate actively in the Parliamentary review of PIPEDA scheduled for this fall. We are preparing a submission to the Privacy Commissioner of Canada in response to her "PIPEDA Review Discussion Document", based on the results of our compliance assessment study as well as our experience advising clients and attempting to exercise individual rights under PIPEDA.

We are awaiting a court date for our application for judicial review in Federal Court of the Privacy Commissioner's determination that she lacks jurisdiction to investigate a Abika.com, a US-based data-broker. This case could establish an important precedent on jurisdiction under PIPEDA, as well as on the scope of the Privacy Commissioner's investigatory powers.

We are monitoring the government's "Lawful Access" proposals to give law enforcement agencies greater search powers and to require ISPs to reconstruct their systems so as to facilitate police wiretaps. The CIPPIC website provides information and analysis on these initiatives, with a view to ensuring that public debate on these issues is balanced and well-informed. We are also working with OnlineRights.ca to facilitate public input to government, and to encourage ISPs to adopt privacy-friendly policies regarding the collection, monitoring and disclosure of user information.

This fall and winter, CIPPIC will be studying the privacy impacts of digital rights management technology. The results of this study will be reported in spring, 2007.

Identity Theft

CIPPIC is leading a multi-researcher project examining and assessing legal and policy approaches to the problem of identity theft. The project is part of a larger ORNEC-funded interdisciplinary initiative involving researchers from four Ontario universities, divided into four clusters (defining and measuring ID theft, technology solutions; management approaches, and legal/policy approaches). CIPPIC's research and analysis is being conducted by Wendy Parkes, a lawyer and part-time CIPPIC research associate, with the assistance of Thomas Legault, a third year law student. We expect to publish working papers, website FAQs, and recommendations for policy makers, in fall 2006.

Spyware

CIPPIC is an active member of the Anti-Spyware Coalition (ASC), an alliance of leading North American technology companies, academics and public interest groups united in the battle against computer spyware. The ASC is currently working on a "best practices" document to assist software

developers in avoiding deploying technologies that will be likely identified by anti-spyware software as potentially unwanted.

CIPPIC continues to monitor the Canadian landscape for spyware developers and distributors that may be violating Canadian laws, and to investigate, with the help of engineering/computer science colleagues, suspected cases of spyware.

Unfair Terms in Online Consumer Contracts

CIPPIC is continuing its research into the consumer contracting practices of Canadian businesses, with a view to identifying unfair terms and practices, comparing their treatment under different legal regimes, and proposing changes to Canadian laws. CIPPIC's legal research and analysis will be backed up by behavioural lab studies to be conducted by Dr. Warren Thorngate of Carleton University, as part of this ORNEC-funded project. Our pro bono law firms are assisting with this project.

Publications

In a report released May 1st, CIPPIC provided the results of the first ever Canadian survey assessing the compliance of retailers with Canadian data protection laws. The results show widespread non-compliance with federal laws requiring openness, accountability, consent, and individual access to personal data. The report, ***Compliance with Canadian Data Protection Laws: Are Retailers Measuring Up?***, highlights common deficiencies in corporate data management policies and practices, and concludes that more incentives are needed for private sector compliance with data protection laws in Canada.

Also released May 1st was a companion report in which CIPPIC exposes the many ways that detailed personal information about consumers is gathered and traded in the marketplace. ***On the Data Trail: How Detailed Information About You Gets Into The Hands Of Organizations With Whom You Have No Relationship*** is the first report of its kind, illuminating an otherwise ill-understood industry and highlighting a number of questionable practices.

Both reports are accessible in electronic form from CIPPIC's website (see "CIPPIC Publications" or

"Privacy Projects"). Hard copies may be ordered by contacting CIPPIC.

Philippa Lawson published two articles in *The Lawyers Weekly* this past spring/summer: "Costco case highlights tension between government requests and customer privacy" (March 10, 2006), and "Study finds widespread breaches of privacy legislation at companies" (July 14, 2006). Another article, "Reports shed light on data brokerage industry and retailer compliance with PIPEDA", appeared in the May 2006 edition of *Canadian Privacy Law Review*.

Staff Counsel David Fewer published a piece titled "Slouching Toward WIPO: Canada's Reluctant Consideration of the 1996 WIPO Internet Treaties" (23(2) *E-Commerce Law & Strategy* (June 2006)). The article considers Canada's deliberate approach to legislating protections for technological protection measures and digital rights management technologies.

Events

On May 18th, CIPPIC hosted a workshop in Ottawa on the risks of online activity for those coping with domestic violence, and the ways in which vulnerable people can protect themselves online. The workshop featured presentations by experts from the U.S. National Network to End Domestic Violence and the Danish National Organization of Women's Crisis Centres, and was attended by many local professionals and activists working with victims of domestic violence.

On May 16th, CIPPIC (as part of the Anti-Spyware Coalition) co-hosted a one-day conference in Ottawa at the Chateau Laurier Hotel entitled "Developing International Solutions for Global Spyware Problems". The event focused on the international dimensions of the struggle against spyware and other potentially unwanted technologies, and addressed the continuing search for solutions to those problems. Representatives from the Canadian and US governments, as well as private companies and consumer advocates, made presentations and discussed issues and approaches to dealing with potentially harmful technologies.

On June 14, CIPPIC hosted the Information Commons Interest Group of the Canadian Library

Association for a one-day Pre-Conference event on copyright policy. Titled, "Copyright in Libraries: the Digital Conundrum", the event boasted copyright experts from across Canada's academic and library community.

Presentations

Graduate student Jeffrey Vicq, articling student Jennifer Seligy and Philippa Lawson made a presentation entitled "Northern Exposure: Lessons from Canada's National Privacy Law Regime", to the 16th annual conference on Computers, Freedom & Privacy (CFP2006), in Washington D.C., on May 3, 2006.

Philippa Lawson made a number of other presentations this past spring/summer, including:

"Hot E-Commerce Issues – The Latest View from CIPPIC", presentation to the Ontario Bar Association, Information Technology and E-Commerce Section, June 21, 2006.

"Lawful Access", presentation to a workshop on Information Rights and Organizational Accountability, University of Toronto, June 16, 2006.

"Taking Customer Privacy Seriously", presentation to the Canadian Wireless Telecommunications Association Annual Conference, Toronto, May 17, 2006.

"Compliance with Privacy Laws: Issues, Lessons, and Best Practices for Data Brokers and Retailers", presentation to The Canadian Institute, Toronto, May 11, 2006.

"Consumer Information as Commodity: A Glimpse into the Canadian Data Brokerage Industry and an Assessment of Retailer Compliance with Data Protection Laws", presentation to Queen's University Surveillance Project researchers, April 17, 2006.

David Fewer gave a number of talks and presentations over the first half of 2006, including:

The Anti-Spyware Coalition", presentation to APECTEL33, Calgary, Alberta, April 24, 2006.

"Canada's Choice: Copyright Law and the Internet" Flash in the Can Festival, Toronto, Ontario, April 21, 2006.

Panelist, "Shades of Grey – Can Self-Regulatory Efforts Help Bring Clarity to Advertisers, Consumers, Software Makers and Anti-Spyware Companies", Anti-Spyware Coalition Public Workshop, Anti-Spyware Coalition Public Workshop: "Developing International Solutions for Global Spyware Problems", May 16, 2006.

"Digital Music: The Canadian Copyright Policy Debate", presentation to the Information Commons Interest Group of the Canadian Library Association, June 14, 2006.

Staff Changes

CIPPIC was sorry this summer to say good-bye to two wonderful colleagues: our administrative assistant, Annie Binet, moved to the Toronto area to be with family, and our 2005-2006 articling student, Jennifer Seligy, completed her articling term.

On the other hand, we are delighted to welcome Anik Chartrand as our new administrative assistant, and Tara Berish as our articling student for 2006-2007. Tara's position is one of six Public Interest Articling Fellowships funded by the Law Foundation of Ontario.

Canadian Internet Policy and Public Interest Clinic

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