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## SOFTWARE AND THE CHARTER OF THE FRENCH LANGUAGE

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On January 1, 1998, certain provisions of Bill 40, an Act to amend the Charter of the French Language, came into force. Pursuant to the bill, all computer software must be available in French except where no French version exists.

Under the new provisions, all computer software must be available in French, including game software and operating systems. This applies to software that is sold separately or installed on a computer, except where no such French version exists. In the event that a French version exists, a version in a language other than French may be marketed, provided that the French version can be obtained on terms no less favourable and that it has technical characteristics that are at least equivalent. The French version may be marketed at a higher price only if such difference is justified by higher production or distribution costs.

The onus of demonstrating that no French version exists, or that pricing issues are encountered by the supplier, squarely rests with the supplier invoking the exception.

Where any software product is to be marketed in Quebec, the legislation will continue to require that the inscription on its packaging be in French or if in combination with another language, the French inscriptions must be of equal prominence. Furthermore, all documents supplied with the product, including instructions for use and warranty certificates, must be in French.

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## DIGITAL SIGNATURE ON THE INTERNET

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The ultimate goal of posting and advertising products on the World Wide Web is to conclude a sale. With a click of the mouse a contract is entered into, and a sale is concluded. What is the probative value of such electronic or digital signature?

The Civil Code of Québec indicates that a contract is formed by the sole exchange of consents between persons having capacity to contract (Article 1385), such consents to be expressed by the execution of a writing by the parties. Moreover, a signature is the affixing by a person, on a writing, of his name or the distinctive

mark which he regularly uses to signify his intention (Article 2827). Where the data respecting a juridical act are entered on a computer system, the document reproducing them makes proof of the content of the act if it is intelligible and if its reliability is sufficiently guaranteed (Article 2837). The reliability is presumed when the entry of data on the computer system is carried out systematically and without gaps and the computerized data are protected against alterations (Article 2838).

Once the parameters for the acceptance of an electronic signature are identified, the ways in which such parameters may be transferred to the digital world of the Internet or any other network must be examined. An electronic signature may be valid when used on a reliable computer system that certifies the source of data on the network. The use of a public key cryptography system enables the sender to create an electronic signature. Complementary keys used for electronic or digital signatures are arbitrarily termed the "private key" which is used by the signer to create the digital signature, and the "public key", which is more widely known and is used by a relying party to verify the digital signature.

This concept of public and private keys is useful only if it is considered to be reliable in accordance with the provisions of the Civil Code of Québec. Therefore, it is important that the public keys be kept at a central location and that the encryption technology selected by the parties be secure. The user of such system must be assured that the private keys are indeed held by the persons that claim to hold them, and that private and public keys including messages have not been altered.

Currently, both the public and private sectors are working on the establishment of a certification process, with varying degrees of success. Through this process, the recipient obtains a certificate from a certification authority which confirms the digital signature on the sender's message.

The certification authority is typically a trustee third party which administers certification in the digital signature system. The certificate contains the public key and the name of the sender and is digitally signed by the certification authority. Until such process is in place it appears that commercial transactions on the Internet will continue to be perceived with apprehension by the general public.

The legislator has taken the lead by offering to the market the appropriate legal framework to permit electronic commerce with digital signatures; the industry must now establish on a reasonable commercial basis a system that is sufficiently reliable to satisfy all legal constraints and reduce the fears of the general public.

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## **LINKING WEB SITES: A NEW LEGAL WRANGLE**

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The exponential growth of the World Wide Web over the last few years has been fuelled by the creation of a network that provides easy access to an enormous amount of information. The expression "Surfing the Net" refers to the possibility for users to consult one home page after another by the mere click of a mouse on a hypertext link, a process which is similar to opening Pandora's Box.

Businesses have come to realize the far-reaching impact of the Web and are elaborating different ways to master its capabilities. For example, some have created a home page on their web site and have embedded therein hypertext links enabling web users to easily access information within such or other various sites and from different computers around the world. This process eliminates the need to input long Internet addresses every time a web location is to be accessed. However, in their eagerness for profit, certain web site creators have gone too far, and legal

disputes in the U.S. and the United Kingdom have begun to hold the attention of the Internet industry.

The purpose of such litigation is to protect intellectual property and any potential advertising revenue from a particular web site. The home pages that attract more viewer traffic have therefore become the advertisers' preferred locations.

In the Scottish case of *Shetland Times Ltd. v. Dr. Jonathan Wills and Zetnews Ltd.*<sup>1</sup>, the plaintiff sued for copyright infringement and sought an interim injunction to protect its web site which provides an information service. The plaintiff perceived such service as a tool for the selling of advertising space on its home page.

For their part, the defendants operated their own web site and a reporting service entitled "The Shetland News", where a number of advertisements appeared. Exact reproductions of a number of headlines appearing in the plaintiff's web site found their way to the defendants' home page. Any Internet user accessing the defendants' web site and clicking on the headline hypertext link was directly brought inside the site of the plaintiff. As such, these users had access to the plaintiff's headlines while bypassing the plaintiff's front page and accordingly missing any advertising material which appeared on it, much to the detriment of the plaintiff's advertisers.

On the question of infringement, the court stated that the plaintiff had a *prima facie* case that any incorporation of the headlines initially found in the plaintiff's web site into the defendants' web site constitutes infringement. Based on such findings, the interim injunction was granted.

A similar action was filed in the United States District Court, Southern District of New York, on February 20, 1997, by the Washington Post Company & al. against Total News Inc. & al.<sup>2</sup>

In its complaint, the Post alleged that: (1) the unauthorized hyperlinking enabling the defendants to usurp the content of any one of plaintiffs' web sites and causing each of plaintiffs' web sites to appear in a window on defendants' site constituted misappropriation; (2) the use of the trademarks Time, Sports Illustrated, Entertainment Weekly, Fortune, Money and Life in connection with advertisements that have been purchased by the defendants and used on plaintiffs' respective sites without approval likely caused confusion and deceived consumers as to the origin of the content and advertising on defendants' web site constituted an infringement of trademark; (3) the use of plaintiffs' marks likely caused consumers to mistakenly believe that some or all of the defendants had an affiliation with plaintiffs, or that the totalnews.com web site was sponsored or approved by the plaintiffs, or that defendants were otherwise associated with, or had obtained permission, from plaintiffs, all of which resulted in unfair competition.

The action was subsequently dismissed and an agreement was submitted to the court for approval<sup>3</sup>. Through such agreement, the defendants permanently agreed not to directly or indirectly cause any of the plaintiffs' web sites to appear on a user's computer screen with any material supplied by, or associated with the defendants or any advertiser. In particular, the defendants agreed to permanently cease framing plaintiffs' respective web sites, as that practice was described in the complaint. However, the plaintiffs did agree: (1) that the defendants were entitled to establish a link between the totalnews.com

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<sup>1</sup> Refer to <http://www.shetland-news.co.uk/opinion.html>

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<sup>2</sup> No. 97 Civ.1190 (S.D.N.Y. filed Feb. 20, 1997)

<sup>3</sup> Refer to <http://www.ljx.com/internet/totalse.htm>

web site or any other web site and any plaintiffs' web site, provided that the link to plaintiffs' web sites were only hyperlinks consisting of the names of the linked sites in plain text as opposed to the use of the specific trademarks; (2) that the defendants were not entitled to use on any web site, as hyperlinks or in any other way, any of plaintiffs' proprietary logos; (3) that the defendants could not link in any manner reasonably likely to imply affiliation with, or endorsement or sponsorship, by any plaintiff, cause confusion, mistake or deceit, or impair plaintiffs' marks. Ultimately, the agreement recognized the right to link within very specific parameters.

A third case between Ticket Master Corporation and MicroSoft Corporation raised similar issues. A judgment in this case is anticipated in the near future.

These cases illustrate that linking, if it gives rise to trademark or copyright infringement liability will be sanctioned. To our knowledge, there are currently no Canadian cases dealing with such issues. Such issues will likely be submitted to the courts shortly.

Until this issue is resolved, it would be appropriate for the creators of web sites to create links that lead the user to the home page of the linked site, and have the URL of the linked site appear on the user's browser after the link is established. Such rules of conduct should enable the continued use of "linkage", which represents a major feature of the World Wide Web. Otherwise, the Web might lose its appeal as a fast and efficient information retrieval system.

*Daniel Paul*

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