



New Zealand Hosts Law and Technology Workshop for the Pacific



The Law Development Section continues its work on the promotion of the Commonwealth's eGovernance model Laws. In collaboration with the Governance and Institutional Development Department (GIDD), a workshop was held for the Commonwealth Pacific Region in November 2004. The workshop considered various issues under the relevant model laws such as the admissibility of electronic evidence in court proceedings; party autonomy in electronic commerce; prosecution of crimes committed in cyberspace etc. Other non-legal but relevant issues deliberated include the milestones involved when a country embarks on eGovernance implementation.

Many of the participating countries are yet to enact relevant laws whilst some are at various stages of

policies, strategy and legal development. They welcomed the Commonwealth model laws as an excellent starting point. They were confident that with the appropriate assistance from and co-operation between the Secretariat and other bodies such as the Forum Secretariat, the AUSAID and the NZAID, member countries' technological objectives would be realised. One of the major recommendations made at the meeting was the need for the Secretariat to work with Universities within the region to develop education on technology to enhance local skills.

The countries represented were Cook Islands, Fiji Islands, Kiribati, New Zealand, Niue, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Tonga.

Contents

New Zealand Hosts Law and Technology Workshop for the Pacific 1
Developments in Law and Technology 2-3
Experts Confer on Commonwealth Draft Model Bill on Competition 4
Feature—Consumer Protection under Competition Law 5
Other Developments 6-7
Upcoming Activities 8

AUSTRALIA PASSES SURVEILLANCE LAW

The Government has given the police the power to install spyware and 'Trojans on suspected criminals' computers under the new Surveillance Devices Act. The new law allows both federal and state police to use key logging and tracking software when investigating offences that carry a maximum sentence of three years. Some critics have expressed doubts about the effectiveness of spyware, especially with criminals who are technologically conscious and are competent with IT security practice. Some also wondered how the police will install spyware on the machine.

AUSTRALIA—REGULATOR DEVELOPS SPAM REPORTING SYSTEM

The communications regulator has teamed with ISP Pacific Internet to run what it claims to be a world's first spam reporting trial. Announcing the trial, acting Australian Communications Authority (ACA) chairman Alan Horsley said the initiative would help the ACA "identify the biggest and worst spammers with just one click".

The trial will allow Pacific Internet users to report spam via either the ACA's website or a Microsoft Outlook plug-in developed by software company Spammatters.

"When they receive spam, these customers will be able to use the software to forward it directly to the ACA's forensics database system for collection, research, analysis and action," Mr Horsley said.

The database would automatically extract information from messages, including the header and message body, which would allow them to be used as evidence in court, he said. "The database system reduces the need for manual spam investigations and is able to process and analyse very large amounts of spam."

CANADA – FILES BRIEF IN RIM CASE

The federal government has stepped into the middle of a high-stakes patent infringement battle between Research in Motion Inc. (RIM) and a U.S. company, claiming a recent U.S. Court ruling against the creator of the iconic BlackBerry communications device threatens to chill innovation by Canadian firms and give extra-territorial reach to U.S. patent law.

At stake are not only millions of dollars worth of royalty payments on the sale of BlackBerry handhelds in the U.S. every month, but also issues of how old laws for guarding intellectual property are applied in a new era when technology is increasingly blurring national boundaries and economies.

In what legal experts say is an unusual move, the Canadian Department of Justice filed an amicus curiae brief with a U.S. Federal Appeals Court on January 13, urging it to grant RIM's request for a re-hearing before all 15 judges of the Federal Appeals circuit.

In December, three Federal Appeals Judges upheld a ruling that RIM, of Waterloo, Ont., infringed on the intellectual property of NTP Inc. a patent holding company based in Virginia, USA. But the Court also sent the case back to a District Court because of a

Judge's mistake in defining some of the technology involved in the claim.

In August, 2003, the U.S. District Court for the Eastern District of Virginia, awarded NTP \$53.7-million in damages as well as a royalty of 8.6 per cent on BlackBerry sales in North America. It also awarded an injunction that would prevent RIM from making, selling or servicing its devices in the United States. That injunction was stayed during the appeal.

If the request for the new hearing before the full slate of Appeal Judges is granted, it would give RIM "a new shot" at its case, with a dozen Judges hearing details of the case for the first time getting a chance to weigh in. Said a source familiar with the proceedings "This is an important case with the potential for far reaching implications."

Under U.S. law, the territorial reach of a patent is limited and generally only enforceable if the infringement occurred in the U.S. RIM argued that because parts of the alleged infringement occurred on its relay and routing system that is based in Canada, U.S. patent law should not apply.

The government had prepared the amicus curiae brief because of concerns that the decision could, among others "negatively impact on the integrity of the operations of Canadian intellectual property laws."

INDIA—eBAY EXECUTIVE APPEALS AGAINST SENTENCE

The head of eBay's Indian subsidiary (Baazee.com) launched an appeal in December against his jail sentence in connection with the online auction of sex video involving teenagers. Mr Avnish Bajaj who is the CEO of India's most popular shopping portal was arrested following the sale of images showing classmates at a New Delhi high school engaged in oral sex. This violated India's Information Technology Act of 2000 which makes it a criminal offence to publish, transmit, or cause to publish any information in electronic form, which is obscene. He was refused bail and sent to jail for a week.

eBay, the mother company based in the United States, argued that Mr Bajaj should not have been jailed as the sex video sale took place without the knowledge of company. It was submitted that the

seller violated the company's policies and Baazee.com took appropriate action in removing the item from its site as soon as it became aware of it.

Mr Bajaj's arrest and sentence were viewed by some as unnecessary and "a gross overreaction". In particular, the court was said to be responding to demands from wealthy Indians whose children attend the school where the scandal erupted. It was also noted that there had been considerable pressure on the police from social conservatives to identify and arrest anyone involved in lewd video and its wide distribution. That Mr Bajaj's arrest was unnecessary was also supported by the fact that he cooperated with the police in their investigation of the case.

In a statement issued by eBay (US), the company stated that the video clip itself was not shown on the site and the seller offered to email the clip to the buyer directly. Industry officials and legal experts in India are now calling for the clarification of law which, at present, appear to be ambiguous about who should be held responsible for such offences.

SOUTH AFRICA – MOVE TO ENACT TOUGH CHILD PORN LAWS

The President is to sign into law new child pornography measures which is said to have implications for ISPs, cybercafés among others. Amendments will also be made to the Film and Publications Act, and will compel all citizens to report anyone involved in the production and selling, or in possession of child pornography. The minimum sentence for anyone found guilty will be increased from 5 to 10 years. The amendments come amid several high-profile child pornography cases in the country.

The current Film and Publications Act - which makes the importation, production, possession and distribution of child pornography an offence - has been described as "vague", allowing witnesses to such "horrific and appalling" crimes to keep quiet. Also inserted in the new Act is a clause calling for the arrest of South Africans who commit or trade in child pornography elsewhere in the world. The impact of this on extradition process is yet to be assessed.

Experts Confer on Commonwealth Draft Model Bill on Competition



Members of the Pacific Expert Group Meeting

Regional experts met in December 2004 in the Pacific region to consider the draft Commonwealth Model Bill on Competition. This meeting represents the second in the series of regional meetings organised to review the draft Model Bill which was referred at the last meeting of Commonwealth Law Ministers in 2002. The first of the meeting, organised for the Commonwealth Asia region took place in Singapore earlier in the year. Samoa hosted this Pacific Expert Group.

The meeting discussed the salient features of a competition law. This included the abuse of a dominant position; identifying cartel activities; the significance of transparency, particularly when granting exemptions from the ambit of a competition law and the importance of consumer protection as it was believed that it is consumers who drive competition. The gathering commended

the approach of the model bill in creating a separate body with powers to administer the law. In commenting on the Commonwealth Model Bill, the Experts also had the opportunity to consider the views expressed by the Commonwealth Asia region.

The objective of the meeting is to ensure that the final bill submitted is reflective of the instructions of Law Ministers which mandate that the interests of small and developing jurisdictions with vulnerable sectors should not be excluded from the ability to effectively compete in their economies. Such interests would of course be protected within an environment which promotes a robust competition atmosphere.

Countries represented at the meeting were Cook Islands, Fiji Islands, Kiribati, Papua New Guinea, Samoa, Tonga and Tuvalu.

Consumer Protection Under Competition Law

The manifestation of competition has considerably weakened the common law principle of caveat emptor (i.e. buyers take responsibility for what they purchase). Competition is the foundation of an efficiently working market system. It is an integral part of a country's economy as it results in the best possible choice of quality, lowest prices and adequate supplies to consumers.

Among the other advantages provided by competition is the ability to serve as a means of accelerating growth and development. Providing protection for the consumer forms part of this. Consumers are often poorly served and tend to suffer high levels of detriment. Therefore, as part of promoting an efficient competition law and policy it is important to ensure that consumers are aware of their rights and responsibilities. Competition thus serves as the best guarantee for consumer protection.

Government laws and policies (in areas such as trade, industry or regulatory reforms) sometimes impede competition and hence consumer welfare. However, some Commonwealth Member Countries have taken steps to ensure that consumers are protected. Such protection can be found in their laws which include the Competition Act 1998 and the Enterprise Act of 2002 (both of the UK), the Competition Acts of South Africa (1998), India (2002) and Singapore (2004). The Commonwealth Draft Model Bill on Competition has also taken this approach as a sizeable part of it is devoted to consumer protection.

The above noted, it is submitted that umbrella legislation is not enough. Specific regulations dealing with consumer protection need to emanate from the main competition law to give protection in areas such as misleading advertising. Vulnerable consumers must also be given specific protection, including those who purchase on-line. An example is the Consumer Protection (Distance Selling) Regulations 2000 of the UK which require a supplier to provide a buyer with detailed information including those relating to the buyer's right to cancel.

In developing competition law and policy, the role of the Competition Commission – a body usually set up to administer competition laws and policies – cannot be overstated. The powers of that body must include making the markets work well for consumers. This is part of the objective of the abovementioned laws. Its functions would include competition advocacy, awareness and consumer education, among others. These are undertaken in collaboration with stakeholders and other institutions. This way, consumers are assisted in making informed choices. Well-versed consumers help to maintain high standards among businesses and help them become more competitive.

As noted earlier, it is acknowledged that conflicting issues will arise and need to be addressed – particularly where foreign direct investment are concerned and in which countries will take varying approaches and impose significantly different levels of protection for consumers.

Consumer laws are intended to be a potent weapon in the hands of buyers as they often go beyond the traditional legal remedies available for breach of warranty. They are meant to protect consumers from matters such as unfair or deceptive practices. Under such specific laws, consumers tend to win punitive damages which could amount to many times the amount they lost – unlike an ordinary lawsuit where a plaintiff would normally be able to recover only his or her actual loss. As such it is recommended that only a strong competition law and a vigorous enforcement atmosphere can ensure the transformation of a country's economy and promote competition which will serve the consumer well.

New Zealand's Commerce Commission has recently conducted an industry-wide investigation and is taking steps to prosecute 5 banks on allegation of lack of disclosure under its Fair Trading Act (see page 6). The protection of the consumer is clearly spelt out in the Commonwealth Draft Model Bill on Competition and it is hoped that on adoption by Law Ministers in October this year, Member Countries on implementation are properly able to reflect this.

INDIA—VICTORY FOR INDIAN FARMERS AS EPO REVOKES PATENT ON INDIAN WHEAT

The European Patent Office (EPO) has revoked the patent of a company called Monsanto which claimed to have invented Indian Nap Hal wheat. The patent was revoked following a legal opposition to the patent filed by Greenpeace. Greenpeace was able to prove that contrary to the claims of Monsanto, the wheat which exhibits a special ingredient to improve the quality of baking was developed by Indian farmers. The patent was revoked in total. Ashesh Taval, Scientific Advisor to Greenpeace welcomed the development.

NEW ZEALAND—COMMERCE COMMISSION PROSECUTES FIVE BANKS FOR BREACH OF FAIR TRADING ACT

Following an industry-wide investigation, the Commerce Commission has begun legal action under the Fair Trading Act against five banks for failing to disclose currency conversion fees that are charged on transactions in foreign currency. These transactions especially relate to credit cards used by foreigners to conduct transactions in New Zealand dollars. It was alleged that in quoting the exchange rate for currency conversion, the banks often fail to state that such an exchange rate includes embedded and undisclosed conversion fees which in some cases can add up to 2.5 percent on the New Zealand dollar cost of the overseas currency transactions for cardholders.

In the Commission's view it is vital to provide full and accurate information to customers. Such information is expected to include the fees charged and whether or not the exchange rate in their credit card statement includes fees. Such disclosure would create an incentive for credit card providers to compete on the level of fees charged to customers, thereby creating the potential to reduce costs associated with foreign currency transactions to the benefit of consumers.

UK—COMPETITION COMMISSION BLOCKS POTENTIALLY ANTI-COMPETITION ACQUISITION

The UK's Competition Commission has blocked a deal that would have reduced from four to three the number of competitors in the market for glass wool insulation products. Knauf Insulation's hopes of acquiring rival Superglass Insulation were scuttled when the Commission concluded that the deal would have removed an independent competitor from a highly concentrated market. The decision, which was made on 22 November, follows a referral by the Office of Fair Trading on 17 June. Although it considered alternatives to blocking the deal, the Commission concluded that the merger would have given the combined company a large share of the markets for loft insulation wool and the type of wool used to fill cavities once a wall has been built.

The chairman of the Competition Commission Paul Geroski, said that the Commission concluded that "the merger would be anti-competitive, and would lead to customers paying higher prices." Knauf and Superglass manufacture glass wool products that are used in loft and cavity wall insulation. There are two other major manufacturers of glass wool in the UK market - British Gypsum-Isover and Rockwool.

NIUE GOVERNMENT ISSUES NEW FISHING LICENSES

The Niue government has issued four licenses for New Zealand long-liners to fish inside the territorial waters. Kim Gordon, the general manager of Reef Group, which has established a fish processor on the island, says six more boats from New Zealand are also applying for licenses to fish in Niue waters.

She said the license spells out how close to the shore boats can fish, and that a Niuean must be trained as part of the crew.

Ms Gordon said if all ten licenses are approved, it will inject millions of dollars into the Niue economy. "I'm very excited," Ms Gordon said. "The people who are coming on board are very committed to the long term future of Niue as well, and for them, they're committed to making this a sustainable fishery."

PACIFIC—HIGH LEVEL SUPPORT FOR REGIONAL COURT

There is high level support for a call by the Secretary-General of the Pacific Islands Forum to establish a regional Court. Fiji's Chief Justice, Daniel Fatiaki, says the region suffers from a lack of resources and insufficient judicial staff, so the call by Greg Urwin is timely.

Mr Fatiaki says the Court, although regional, would apply national laws so this would overcome issues of sovereignty and control of a country's justice system. But, he says Mr Urwin's proposal for a specialist regional Court dealing with constitutional and land matters could run into issues. "The Court would be more problematic if it tried to deal with land matters because land tenure in the islands are really quite disparate,"

Mr Fatiaki said. "They are very, very different. Our land tenure systems are really quite different so it would be difficult to find uniformity to it." Mr Fatiaki said, however, there are common points constitutionally so a regional Court on those issues could work.

NEW ZEALAND SUPREME COURT

The Secretariat has been part of the efforts being made to support the establishing and strengthening of regional and/or final Appellate Courts. As part of its ongoing work in this area on, the Head of the LDS, Cheryl Thompson-Barrow and the Legal Officer, Margaret Bruce visited the Supreme Court of New Zealand in November 2004. Both were warmly welcomed by Justice Gault, representing the Chief Justice the Rt. Hon Dame Elias, GNZM. Justice Gault and his colleague judges explained the operations of the Court and, among others provided advice on ways of administering similar courts. The discussion also included the possibility of establishing mutual cooperation between the Supreme Court and other Courts, especially fledgling ones such as the Caribbean Court of Justice (CCJ) with a view to sharing experiences and support.

TRINIDAD AND TOBAGO— MOVE TOWARDS CSME

The government of Trinidad and Tobago has also moved towards the implementation of the CSME with the presentation of a bill to give effect to the revised Treaty of Chaguaramas including the CSME. The legislation aims to remove the remaining restrictions to trade among CARICOM members.

JAMAICA—PARLIAMENT APPROVES OF CSME LEGISLATION

KINGSTON, Jamaica, CMC - The Jamaica parliament has approved four bills facilitating the January 5 implementation date of the CARICOM Single Market and Economy (CSME), even as Opposition Leader Edward Seaga said the initiative was yet another attempt at a West Indies Federation.

UK—PATENTS ORDER COMES INTO FORCE

The Patents Act 2004 (Commencement No. 2 and Consequential, etc. and Transitional Provisions) Order 2004 (SI 2004/3205) came into force on 1 January 2005. This Order brings into force the provisions in the 2004 Act which do not relate to EPC 2000 or need significant changes to the Patents Rules. These provisions include:

- remedies in entitlement proceedings, which removes unfairness in the remedies available to the successful party in a dispute over entitlement to a patent application;
- restrictions on filing abroad, which removes the requirement to seek permission from the Patent Office in almost all cases, except where such application has a bearing on military or security issues;
- compensation of employees for certain inventions, which remove an artificial distinction between benefit from the patent and benefit from the patented invention.

Provisions of the 2004 Act which need substantial changes to the Patents Rules 1995 before being commenced will be brought into force after public consultation on the proposed rules changes. This is expected to take place later this year.

Upcoming Activities

14-18 February 2005

Commonwealth Seminar on BioDiversity
Male, Maldives

29 March-2 April 2005

Commonwealth Regional Workshop on
Law and Technology for the Eastern and Southern Africa Region
Cape Town, South Africa

4-8 April 2005

Expert Group Meeting for the Africa Region to
Examine the Commonwealth Draft Model Bill on Competition
Victoria, Seychelles

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