

N° :

ZERO-KNOWLEDGE SYSTEMS INC., a legal entity incorporated under the laws of Canada, and continued under the laws of the Province of New Brunswick, having a registered office at 44 Chipman Hill, 10th Floor, P.O. Box 7289 Station "A", in the City of Saint John, Province of New Brunswick, and a principal place of business at 375 President Kennedy St., in the City of Montreal, Province of Quebec, H3A 1J5.

Plaintiff

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, a legal entity incorporated under the laws of the State of New York, having a principal executive office on New Orchard Road, in the City of Armonk, State of New York, United States of America, 10504

Defendant

MOTION TO INSTITUTE PROCEEDINGS

THE PLAINTIFF ALLEGES AS FOLLOWS:

I. THE PARTIES

1. The Plaintiff, Zero-Knowledge Systems Inc. ("ZKS"), is a legal entity that was incorporated under the laws of Canada on July 3, 1997, and continued under the laws of the Province of New Brunswick on August 20, 1999. It has a registered office at 44 Chipman Hill, 10th Floor, P.O. Box 7289 Station "A", in the City of Saint John, Province of New Brunswick, and a principal place of business at 375 President Kennedy St., in the City of Montreal, Province of Quebec, H3A 1J5.

Since 1997, ZKS has been developing and offering security technology products and services for consumers, businesses, and Internet Service Providers ("ISPs"). These products and services allow, *inter alia*, (a) individuals to retain their security and privacy while using the Internet; (b) enterprises to deal with privacy and policy compliance issues; and (c) ISPs to offer to their subscribers Internet and desktop protection, including anti-virus, firewall, parental control, pop-up/ad blocking, anti-spyware and privacy software to deal with on-line threats.

The defendant, International Business Machines Corporation ("IBM"), is a legal entity incorporated under the laws of the State of New York. It has a principal place of business on New Orchard Road, in the City of Armonk, State of New York, United States of America.

D r o i t s d e s r e f f e
Gouvernement du Québec
Palais Justice MONTREAL
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II. PRIVACY RIGHTS MARKUP LANGUAGE (“PRML”)

4. On October 31, 2000, ZKS announced its newly formed focus and offering of a collection of tools and consulting services for enterprises attempting to deal with privacy and policy issues, as more fully appears from a copy of a Press Release dated October 31, 2000 filed in the Court record as Exhibit **P-1** in support of this Motion. At that time, ZKS was a leading developer and one of the only companies focused on developing privacy tools and services for enterprises.
5. In late 2000 and early 2001, inline with its stated focus, ZKS concurrently worked on the development of (a) a software designed to automate many of the tasks involved in designing, implementing and enforcing an enterprise’s privacy policies; and (b) a standard language for writing enterprise privacy policies in a structured format, according to a given syntax.
6. ZKS’s above-mentioned efforts to independently develop a language for representing privacy policies led to the creation of the Privacy Rights Markup Language 0.9 Specification (“PRML Specification”) in June 2001. A copy of the aforementioned PRML Specification, which remained confidential and not publicly available at all material times during ZKS’ and IBM’s collaboration, as defined herein-below, is filed in the Court record as Exhibit **P-2** in support of this Motion. The PRML language facilitates privacy-specific interactions between enterprise applications to ensure that sensitive information collected by the enterprise is handled in accordance with its privacy policies.
7. The above-mentioned PRML Specification enjoys protection under the Canadian *Copyright Act* as an original literary work.
8. ZKS is the owner of the copyrights in the original literary work consisting in the PRML Specification that has been originally created by employees of ZKS, who created this original literary work in the course of their employment with ZKS and who were Canadian citizens at the date of creation.

III. ENTERPRISE PRIVACY MARKUP LANGUAGE (“EPML”)

9. ZKS held its first conference in relation to privacy and policy issues for enterprises on November 19-21st, 2000, in the City of Montebello, Province of Quebec. At that conference, Steven Adler, who was the Privacy leader for IBM’s Global Services Privacy group at that time, approached Austin Hill, who was President of ZKS at that time, and expressed IBM’s interest in working with ZKS to develop the marketplace for enterprise privacy tools. Also at that conference, IBM represented to ZKS that it was, along with its various business groups, working on privacy tools and technologies, but that IBM was interested in benefiting from ZKS’ expertise and leadership in the privacy industry to help grow the marketplace for privacy tools.
10. Following the above-mentioned conference, representatives of IBM, including Steven Adler, and representatives of ZKS, including Austin Hill and Warren Levitan, who was ZKS’ Director of Business Development at that time, engaged in discussions regarding partnership opportunities in the privacy industry; and in February 2001, IBM and ZKS entered into a Confidential Disclosure Agreement (“CDA”), which was formed in Montreal, to provide protection for information to be exchanged between them. A copy of the aforementioned CDA is filed as Exhibit **P-3** in support of this Motion.
11. After a series of correspondence and meetings between IBM’s and ZKS’ representatives, IBM and ZKS verbally agreed in June 2001 to collaborate on further developing the PRML Specification with the intention of jointly submitting a standard language for writing enterprise privacy policies to a standards organization for approval and adoption. The aforementioned agreement to collaborate was formed in Montreal, and ZKS thereafter disclosed, by e-mail

and through its server located in Montreal, the PRML Specification to IBM under the cover of the CDA and relevant Supplements thereto. Copies of the relevant Supplements are filed in a bundle as Exhibit **P-4** in support of this Motion.

12. During the course of the aforesaid collaboration, the vast majority of the work was conducted in Montreal by ZKS, who engaged more than one million Canadian dollars (\$1,000,000.00 CAD) in direct costs and professional fees to further develop the PRML Specification.
13. The above-mentioned collaboration to further develop the PRML Specification, the evolution of which has systematically been documented by ZKS in its "Canon project" archive that is stored in ZKS' server located in Montreal, led to the creation of the Enterprise Privacy Markup Language 1.0 Specification ("EPML Specification") on February 4, 2002, as more fully appears from a copy of the EPML Specification dated February 4, 2002 filed in the Court record as Exhibit **P-5** in support of this Motion. Copies of the documents contained in ZKS' "Canon project" archive are filed in a bundle as Exhibit **P-6** in support of this Motion.
14. In accordance with their intention of jointly submitting a standard language for writing enterprise privacy policies to a standards organization for approval and adoption, ZKS and IBM expressly agreed not to disclose, transmit or use the EPML Specification in any manner without the joint written consent of ZKS and IBM, as expressly stated in the following copyright notice appearing on the front page of the EPML Specification: *"This copyrighted material is proprietary and confidential to Zero-Knowledge Systems Inc. ("ZKS") and International Business Machines Corp. ("IBM"). All rights reserved. Any disclosure, transmission or usage of any kind of this material without the joint written consent of ZKS and IBM is strictly prohibited."*
15. The above-mentioned EPML Specification enjoys protection under the Canadian *Copyright Act* as an original literary work.
16. ZKS and IBM are the co-owners of the copyrights in the original literary work consisting in the EPML Specification that has been jointly created by employees of ZKS and IBM, who created this original literary work in the course of their respective employment with ZKS and IBM. ZKS' employees were Canadian citizens at the date of creation.
17. The above-mentioned collaboration ended in February 2002 because the parties were unable to formalize a written agreement.

IV. ILLEGAL ACTIVITIES OF IBM

18. Since at least as early as March 3, 2003, without acknowledging ZKS' contribution and without license, authority or consent of ZKS, IBM has published on the Web site of the IBM Zurich Research Laboratory located at URL www.zurich.ibm.com/security/enterprise-privacy/epal/ the Enterprise Privacy Authorization Language 1.1 Specification – a standard language for writing enterprise privacy policies, which incorporates a substantial part of the EPML Specification. A copy of the Enterprise Privacy Authorization Language 1.1 Specification published on the aforementioned Web site since March 3, 2003 is filed in the Court record as Exhibit **P-7** in support of this Motion.
19. Further, on November 10, 2003, without acknowledging ZKS' contribution and without license, authority or consent of ZKS, IBM submitted to the World Wide Web Consortium ("W3C"), for approval and adoption, the Enterprise Privacy Authorization Language 1.2 Specification ("EPAL Specification") – a standard language for writing enterprise privacy policies, which also incorporates a substantial part of the EPML Specification. A copy of IBM's submission request, which includes the EPAL Specification and the XML Schema of EPAL, and

which was published on the W3C Web site located at URL www.w3.org/Submission/2003/07 on December 1, 2003, is filed in the Court record as Exhibit **P-8** in support of this Motion.

20. Upon and pursuant to the aforementioned submission request, IBM granted to the W3C, without license, authority or consent of ZKS, a perpetual, non-exclusive, royalty-free, world-wide right and license under any of its copyrights in the EPAL Specification to copy, publish and distribute the content of the EPAL Specification.
21. Further, upon the aforementioned submission request, pursuant to the W3C Document License, a copy of which is filed in the Court record as Exhibit **P-9** in support of this Motion, the W3C granted to all third parties the permission to copy and distribute the EPAL Specification in any medium, for any purpose, and without fee or royalty, provided that they include on all copies of the work the following copyright notice: "Copyright © 2000-2003 International Business Machines Corporation".
22. In none of the aforementioned public disclosures of EPAL does IBM make any reference to EPML or PRML, or acknowledge ZKS' contribution consisting in the joint creation of the EPML Specification.
23. By its conduct and aforementioned actions:
 - (a) IBM has infringed ZKS' copyrights in the EPML Specification by granting a license to the W3C in the EPAL Specification, contrary to the provisions of the Canadian *Copyright Act*;
 - (b) IBM has breached its subsisting obligation, which arose from the above-mentioned joint collaboration, not to disclose, transmit or use the EPML Specification, in any manner, without the written consent of ZKS, contrary to article 1458 of the *Civil Code of Quebec*;
 - (c) IBM has breached its subsisting implicit obligation, which arose from the above-mentioned joint collaboration, to act in a diligent manner and in good faith with respect to ZKS' contribution consisting in the joint creation of the EPML Specification, which contribution was gained as a result of the parties' joint collaboration to develop a standard language for writing enterprise privacy policies, contrary to article 1458 of the *Civil Code of Quebec*.
24. By reason of IBM's conduct and actions as described above, ZKS has lost and IBM has received considerable world-wide attention and publicity as well as world-wide industry recognition for its contribution in relation to EPAL, to the exclusion of ZKS, which has substantially diminished ZKS' and correlatively increased IBM's business opportunities and access to customers in the privacy industry.
25. As a result of IBM's aforesaid copyright violations and breach of obligation, ZKS has the right to ask this Honourable Court for a permanent injunction, enjoining IBM from their unlawful activities, and ordering IBM to compensate ZKS in the manner set forth in the *Copyright Act*, including compensation for (a) ZKS' damages, the amount of which are presently evaluated at seven million Canadian dollars (\$7,000,000.00 CAD), subject to ZKS' right to perfect these damages at trial, which damages consist in ZKS' lost costs and professional fees engaged in relation to the above-mentioned joint collaboration, lost profits and business opportunities, lost industry recognition and lost publicity; (b) the profits realised by IBM as a result of the aforementioned infringement, the amount of which cannot be established as of this date by ZKS who reserves its right to establish said amount at trial; and (c) ZKS' legal fees and extra-judicial disbursements.
26. Unless enjoined by this Honourable Court, IBM will continue its present course of conduct. More specifically, IBM will continue to wrongfully reproduce the

EPAL Specification without acknowledging ZKS' contribution and will continue to unlawfully license the EPAL Specification without ZKS' consent. As a direct result of the actions of IBM, ZKS has already suffered irreparable harm, damages and sustained lost profits, and IBM has realised unlawful profits; and ZKS will continue to suffer such irreparable harm, damages and lost profits, to the benefit of IBM, until IBM's actions are enjoined.

27. The present action is well founded in fact and in law.

WHEREFORE, MAY IT PLEASE THIS HONORABLE COURT:

- A) **GRANT** the present action;
- B) **DECLARE** that the EPML Specification, as defined herein, is an original literary work in which copyrights subsist;
- C) **DECLARE** that the Plaintiff and the Defendant are the co-owners of the copyrights subsisting in the EPML Specification, as defined herein;
- D) **DECLARE** that the Defendant was not entitled to grant to the W3C, without license, authority or consent of the Plaintiff, a license under any of its copyrights in the EPAL Specification, as defined herein, to copy, publish and distribute the content of the EPAL Specification; and in consequence **DECLARE** that the license granted by the Defendant to the W3C, to copy, publish and distribute the content of the EPAL Specification is null, invalid and unenforceable;
- E) **DECLARE** that by granting a license to the W3C to copy, publish and distribute the content of the EPAL Specification, as defined herein, the Defendant has infringed the Plaintiff's copyrights in the EPML Specification, contrary to Sections 3 and 27 of the Canadian *Copyright Act*;
- F) **ISSUE** an order permanently enjoining the Defendant, by itself or through its shareholders, directors, officers, employees, and agents, or any of its subsidiaries, or any other entity under its authority or control, or in privity with it, or through any person having cognizance of the present order, from otherwise infringing, directly or indirectly, in whole or in part, the copyrights in the EPML Specification, as defined herein;
- G) **DECLARE** that by its activities, the Defendant has breached its obligation, which arose from the joint collaboration, as defined herein, not to disclose, transmit or use the EPML Specification, in any manner, without the written consent of ZKS, contrary to article 1458 of the *Civil Code of Quebec*;
- H) **DECLARE** that by its activities, the Defendant has breached its implicit obligation, which arose from the joint collaboration, as defined herein, to act in a diligent manner and in good faith with respect to the Plaintiff's contribution in the EPAL Specification, as defined herein, which contribution consists in the joint creation of the EPML Specification, contrary to article 1458 of the *Civil Code of Quebec*;
- I) **ISSUE** an order permanently enjoining the Defendant, by itself or through its shareholders, directors, officers, employees, and agents, or any of its subsidiaries, or any other entity under its authority or control, or in privity with it, or through any person having cognizance of the present order, to immediately cease displaying, producing or reproducing, in any material form whatsoever, directly or indirectly, in whole or in part, the EPAL Specification, as defined herein, without the Plaintiff's consent;
- J) **ORDER** the Defendant to pay to the Plaintiff the sum of seven million Canadian dollars (\$7,000,000.00 CAD) for all damages suffered owing to the illegal acts of the Defendant; all profits realised by the Defendant as a result of its illegal

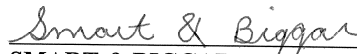
activities; as well as legal fees and extra-judicial disbursements which the Plaintiff has had to make and will have to make in order to have judgement rendered in this action; including pre-judgement and post-judgement interest;

K) **RENDER ANY OTHER ORDER** that this Honorable Court may deem just in the circumstances.

THE WHOLE, with costs, including interest, and the additional indemnity pursuant to article 1619 of the *Civil Code of Quebec*.

Respectfully submitted,

Montreal, June 8, 2004



SMART & BIGGAR

1000, de la Gauchetière St. W.

Suite 3400

Montreal, Quebec, H3B 4W5

Telephone: (514) 954-1500

Facsimile: (514) 954-1396

Me François Guay

Me Alain Adam

(Reference: 86592-1)

Solicitors for the Plaintiff

**TO: SUPERIOR COURT OF QUEBEC
DISTRICT OF MONTREAL**

-and-

INTERNATIONAL BUSINESS MACHINES CORPORATION

New Orchard Road

City of Armonk, State of New York

United States of America 10504

N° :

ZERO-KNOWLEDGE SYSTEMS INC., a legal entity incorporated under the laws of Canada, and continued under the laws of the Province of New Brunswick, having a registered office at 44 Chipman Hill, 10th Floor, P.O. Box 7289 Station "A", in the City of Saint John, Province of New Brunswick, and a principal place of business at 375 President Kennedy St., in the City of Montreal, Province of Quebec, H3A 1J5.

Plaintiff

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INTERNATIONAL BUSINESS MACHINES CORPORATION, a legal entity incorporated under the laws of the State of New York, having a principal executive office on New Orchard Road, in the City of Armonk, State of New York, United States of America, 10504.

Defendant

NOTICE TO THE DEFENDANT

Take notice that the plaintiff has filed this action in the office of the Superior Court in the judicial district of Montreal.

To file an answer to this action or application, you must first file an Appearance, personally or by advocate, at the Montreal Courthouse, located at 1 Notre-Dame Street East, within 10 days of service of this motion.

If you fail to file an Appearance within the time limit indicated, a judgment by default may be rendered against you without further notice upon the expiry of the 10-day period.

If you file an appearance, the action will be presented before the Court on July 13, 2004, at 9 o'clock a.m., in room 2.16 of the courthouse. On that date, the court may exercise such powers as are necessary to ensure the orderly progress of the proceeding or the court may hear the case, unless you have made a written agreement with the plaintiff or the plaintiff's advocate on a timetable for the orderly progress of the proceeding. The timetable must be filed in the office of the court.

In support of its Motion to institute proceedings, the plaintiff discloses the following exhibits:

P-1: Copy of a Press Release dated October 31, 2000;

P-2: Copy of the PRML Specification dated June 2001;

P-3: Copy of the Confidential Disclosure Agreement ("CDA") entered between Zero-Knowledge and IBM in February 2001;

P-4: Copies of the Supplements to the Confidential Disclosure Agreement

("CDA");

P-5: EPML Specification dated February 4, 2004;

P-6: Copies of the documents contained in ZKS' "Cannon project" archive;

P-7: Enterprise Privacy Authorization Language 1.1 Specification published on the Web site of the IBM Zurich Research Laboratory;

P-8: EPAL Specification and the XML Schema of EPAL, published on the W3C Web site on December 1, 2003;


P-9: Copy of the W3C Document License.

These exhibits are available upon request.

Requisition of transfer for small claims division

If the amount that is claimed against you does not exceed \$7,000.00, excluding the interests, and if, as a plaintiff, you could have presented such claim at the small claims division, you may obtain from the registry officer that the claim be treated according to the rules set out in Book VIII of the Code of Civil Procedure (L.R.Q., c. C-25). If you fail to submit this requisition, you may be liable to pay costs higher than those set out in Book VIII of this Code.

Montreal, June 8, 2004.


SMART & BIGGAR
Solicitors for the Plaintiff

17 JUN 2004

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17-020978-043

NO. 17-020978-043
DISTRICT OF MONTREAL
PROVINCE OF QUEBEC
CANADA

SUPERIOR COURT

13/7

ZERO-KNOWLEDGE SYSTEMS INC.

Plaintiff

-V.-

INTERNATIONAL BUSINESS MACHINES
CORPORATION

Defendant

MOTION TO INSTITUTE PROCEEDINGS
AND NOTICE TO THE DEFENDANT

ORIGINAL

Me François Guay (86592-1)
Me Alain Adam

SMART & BIGGAR
1000, rue de la Gauchetière west, Suite 3400
Montreal, (Quebec) H3B 4W5
Tel.: (514) 954-1500
Fax: (514) 954-1396

03384

Re: \$ 735.-

SRH-110