

IT.CAN NEWSLETTER

Canadian IT Law Association

www.it-can.ca

This newsletter is prepared by Professors [Robert Currie](#), [Chidi Oguamanam](#) and [Stephen Coughlan](#) of the Law and Technology Institute of [Dalhousie Law School](#).

Les auteurs du présent bulletin sont les professeurs [Robert Currie](#), [Chidi Oguamanam](#) et [Stephen Coughlan](#) de l'Institut de droit et de technologie de la [Faculté de droit de l'Université de Dalhousie](#).

Key Word Advertisement Not Trade Mark Infringement

In *Private Career Training Institutions Agency v. Vancouver Career College (Burnaby) Inc.*, the petitioner, a regulatory agency for career training institutions in BC, moves a motion before the BC Supreme Court for permanent injunction. It wants the respondent, Vancouver Career College (VCC), to be restrained from using the names of other rival career training institutions in its internet advertising. Pursuant to its strategy of keyword advertising, VCC purchased numerous keywords which included the names of rival career colleges offering similar or same programs from internet search engines, in order to enable its name and links to its website come up first among other sponsored listings, alongside the search engine's normal or organic search results when a user conducts a search on the internet. Promoted by the complaints of rival career colleges, the petitioner issued a guideline, clarifying that pursuant to its bylaws, VCC's practice amounted to misleading advertising which was prohibited. In support of the present application, the petitioner led two students in evidence, who indicated that they were misled by the results of their search which led them to VCC's website and eventually resulted in some interaction with VCC personnel even when VCC was not the institution they intended to contact. One of the students had actually enrolled in VCC and had her fees refunded when she realised that it was not her target career college. Neither lost tuition to VCC nor attended the respondent College.

In dismissing the petition, the court held that: "In the context of the present dispute, it is important to note that the advertisements that are listed in the search

results as "sponsored links" do not displace or replace the organic search results that typically appear free of charge when a user conducts an online search" (para 22). In the two cases of students alleged to have been misled, the sponsored links, including those of VCC website were clearly designated as such. The court held that the use of rivals' names in keyword advertising by VCC is an internal use and in so far as it does not communicate such use to the public, it does not amount to trade mark infringement. The court further observed that by its nature a keyword advertisement is not a practice that results in the search engine taking the online searcher directly to the respondent's website as a result of respondent's use of rivals' meta tags. Instead, what appears to the online searcher is a link to those rivals' websites as one of several options of potential interest to the user. That in itself is a good thing and does not necessarily raise the issue of a likelihood of confusion to an average consumer who is entitled to a certain amount of credit as a discerning individual.

The court found that the two student witnesses presented by the petitioner in support of the present petition did not exhibit sufficient prudence in their online dealings and were not deceived by the respondent college when they contacted it. The court further held that the "practice of using Keyword Advertising is no different than the time-honoured and generally accepted marketing practice of a company locating its advertisement close to a competitor's in a traditional media (e.g. placing Yellow Pages advertisement next to or in close proximity to a competitor's telephone number in the same directory so that the potential customers of that competitor discover there is another company offering a similar product or service and that they, the consumer, have a choice)" (para. 80)

Injunction: Defamation vs. Freedom of Speech

In *Canadian National Railway Co. v. Google Inc.*, the plaintiff moves a motion for an interim

injunction to compel the respondent to dismantle the defendant's blog which the petitioner alleges to be defamatory. The blog in issue is hosted by Google (the respondent) through its subsidiary, Blogspot. An earlier order had required the respondent to release the IP addresses of the defendants (pseudonymously John and Jane Doe) who had not been identified by their names. Subsequently, the defendants were served the present motion by way of sending a copy to the e-mail address provided. The petitioner indicated that the defendants had received the notice of the motion served on them because they had subsequently blogged on the present motion.

Even though the earlier order on the respondent did not require it to close down the website, Google proceeded to block it on a temporary basis, but indicates through its counsel that it is no longer prepared to continue to block or even remove the website in the future in the absence of a "prompt" court order. Google, however, does not oppose the present petition.

The defendants' failure to enter appearance, despite being served the present motion, in the court's view, does not automatically entitle the petitioner to the injunction it is seeking. According to the court, "It is not easy to obtain an injunction in response to defamation. We respect the principle of freedom of speech and are careful when asked to limit the freedom of anyone to express their views" (para. 8)

In the circumstances of this case, the possible basis for the court to grant this kind of injunction which is rarely given can be found by the Supreme Court of Canada's direction in *Canada (Human Rights Commission) v. Canada Liberty Net* (1998) where the court endorsed the test in *Rapp v. McClland & Stewart Ltd.* (1982). According to the Court, injunction can be granted if the words used in the alleged defamation "are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal ... But "where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue" (para. 9).

After an extensive analysis of the text of the blog, the court concluded that the words used in the blog were manifestly and generally defamatory of the petitioner. In granting the injunction, the court notes

that "[n]o indication is forthcoming of any intention to justify the statements I have found to be clearly defamatory. In the absence of this, there can be no basis to accept a defence of justification and such finding for the Court of Appeal to overturn ... the simple fact is that, in the circumstance, the words are defamatory" (para. 32)

Possession of child pornography not proven

The Ontario Superior Court of Justice has affirmed the accused's acquittal on possession of child pornography charges in *R. v. Garbett*. The accused had initially been approached by police because his name was on a list of people who had purchased child pornography. He said that he had cancelled the subscription when he realised it was not the adult pornography he had been looking for. However, in a statement to police, the accused had said that he had looked at child pornography, as well as adult pornography, and expected that the police would find child pornography on his computer. In particular he said that he had downloaded videos which were child pornography.

The police copied over 110,000 image files and video files from the accused's computer. At trial, evidence concerning 48 image files alleged to be child pornography was led. The trial judge had found that the Crown did not prove that the accused knew of the existence of 47 of those of those 48 image files. Thirty of those files had been found in unallocated clusters on unallocated space on the hard drive: the Crown's forensic expert had acknowledged in cross-examination that he could not determine whether these images were ever viewed by the accused nor when the file were created, accessed, or downloaded. Sixteen files had been categorised as lost files. The times these files had last been touched by the operating system was identical for the fourteen for which such information could be retrieved, based on which the trial judge found it reasonable to infer that these files had not been viewed or saved since those times. He further concluded that this result was consistent with the possibility of those files having been inadvertently downloaded, and so did not establish knowledge on the part of the accused. One image existed only as a temporary internet file, which had been automatically created by the browser, and

so this did not establish that the accused had seen it or intended to save it.

The Crown argued on appeal that these conclusions on the part of the trial judge were speculative, and similar to the error made a trial judge in *R. v. Panko* (see the [IT.Can newsletter of October 18, 2007](#)). In that case the trial judge had rejected the inference that the accused knew of 91 images which were on his desktop, holding that they might have been downloaded unintentionally. In this case, the trial judge's conclusions were based on specific evidence about the nature of the computer hard drive given by the Crown's expert and were not mere speculation. The appeal court judge found that none of the inferences were unreasonable, and were consistent with the approach to inferring knowledge of files on a hard drive articulated by the Supreme Court of Canada in *R. v. Morelli* (see the [IT.Can newsletter of March 26, 2010](#)).

In this case, however, the Crown had also offered the accused's statement that the police would find child pornography videos on his computer as proof of knowledge. The trial judge had discounted that statement, concluding that the accused was mistaken about what constituted child pornography. The trial judge had noted that the accused had, in his statement, distinguished in places between pictures and videos, and had said that the police would find child pornography videos on his computer. The Crown had introduced 48 images (out of the 110,000 files they had copied) they alleged were child pornography, but had not introduced any evidence concerning child pornography videos. The trial judge had considered the evidence presented by the Crown's forensic expert, from which he concluded that deleting a file from a computer did not make it unrecoverable. The evidence also showed that the police were able to extract a number of videos from the accused's computer. Given that no videos of child pornography had been introduced at trial, therefore, the trial judge had a reasonable doubt that there had ever been child pornography videos on the computer. The trial judge concluded that the accused had been mistaken in thinking that the videos he had viewed were child pornography.

The appeal court judge found that this conclusion was not unreasonable. In particular, the appeal court noted that the trial judge had had a reasonable doubt whether the person in the 48th picture was under

the age of eighteen, and therefore had found that the one image of which the accused did have knowledge was not in fact child pornography. This conclusion, the appeal court held, added support to the trial judge's conclusion that the accused was mistaken in thinking that what he had downloaded constituted child pornography.

Rotary Dial Telephone Service

The Canadian Radio-television and Telecommunications Commission has ordered Bell Canada to reimburse customers who were improperly charged for touch tone service despite having rotary dial telephones. Bell Canada's General Tariff states that individual line services must be equipped for touch-tone service. However, customers who were already subscribed to rotary dial residential individual line services installed before 8 March 1993 are entitled to remain on rotary dial service until the customer moves to a different premise. The Consumers' Association of Canada and Canada Without Poverty had filed an application with the CRTC after customers who were grandfathered to have rotary dial service began to be charged the monthly \$2.80 fee for touch tone service.

Bell acknowledged that it had unintentionally begun to charge the touch tone service fee to some grandfathered clients in the course of a revenue assurance program, in which it updated its billing to extend the charge to customers who ought to be paying it (specifically, residential customers subscribing to individual, two- and four-party line service who received Touch-Tone service). The consumer groups argued that Bell ought to be required to return the fees collected, and also to notify all customers who had been unjustly charged for Touch-Tone service, providing an explanation of grandfathered service, as well as an explanation of other aspects of the rate cap. In addition they sought costs. Bell proposed that it would send a letter to all individual line customers that subscribed to their telephone service prior to 8 March 1993, and all two- and four-party line customers that were charged for Touch-Tone service as part of the revenue assurance program. Bell Canada submitted that it was these subsets of customers that might include customers who continue to be eligible for grandfathered rotary dial service but who might have been inadvertently provisioned with Touch-Tone service.

Bell also indicated that it had begun to provide additional training to its service representatives concerning grandfathered rotary dial services.

The CRTC found ordered Bell to reimburse customers who had been improperly charged, and found its approach to rectifying the problem acceptable. It also directed that the consumer groups should apply in the manner provided for in the *CRTC Telecommunications Rules of Procedure* if they wished to obtain an order for costs.

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Robert Currie, Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca.

Disclaimer: The IT.Can Newsletter is intended to provide readers with notice of certain new developments and issues of legal significance. It is not intended to be a complete statement of the law, nor is it intended to provide legal advice. No person should act or rely upon the information in the IT.Can Newsletter without seeking specific legal advice.

Copyright 2010 by Robert Currie, Chidi Oguamanam and Stephen Coughlan. Members of IT.Can may circulate this newsletter within their organizations. All other copying, reposting or republishing of this newsletter, in whole or in part, electronically or in print, is prohibited without express written permission.

Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec les professeurs Robert Currie, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca

Avertissement : Le Bulletin IT.Can vise à informer les lecteurs au sujet de récents développements et de certaines questions à portée juridique. Il ne se veut pas un exposé complet de la loi et n'est pas destiné à donner des conseils juridiques. Nul ne devrait donner suite ou se fier aux renseignements figurant dans le Bulletin IT.Can sans avoir consulté au préalable un conseiller juridique.

© Robert Currie, Chidi Oguamanam et Stephen Coughlan, 2010. Les membres d'IT.Can ont l'autorisation de distribuer ce bulletin au sein de leur organisation. Il est autrement interdit de le copier ou de l'afficher ou de le publier de nouveau, en tout ou en partie, en format électronique ou papier, sans en avoir obtenu par écrit l'autorisation expresse.