

IT.CAN NEWSLETTER

Canadian IT Law Association

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

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"Means of Telecommunication"

The Ontario Court of Appeal considered the proper interpretation of the phrase "means of telecommunication" with its decision in [United States of America v. Orphanou](#). The applicant was the subject of an extradition proceeding by the United States, where he was wanted on fraud charges. A committal order had been issued and the Minister had ordered surrender, but the application sought judicial review of the Minister's order. Among his grounds of appeal was that the extradition judge had no jurisdiction to proceed since the version of the Authority to Proceed (ATP) filed by the Attorney General at the extradition hearing was a photocopy, not the original. He argued that a photocopy of an original ATP does not constitute a proper ATP within the meaning of the *Extradition Act*.

The argument hinged around section 15(4) of the *Extradition Act*, which provides that:

A copy of an authority to proceed produced by a means of telecommunication that produces a writing has the same probative force as the original for the purposes of [Part 2 of the Act].

The application judge had concluded that this section authorized the use of a photocopy. The Ontario Court of Appeal disagreed with that reasoning, though they did conclude that a photocopy was sufficient for purposes of the hearing.

The Court of Appeal acknowledged that on one interpretation it was possible to consider a photocopy to be a "means of telecommunication". As defined in the *Criminal Code* "telecommunication" is

any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, or other electromagnetic system.

Taken literally, they acknowledged, a photocopier transmits writing or images from the item being copied to the blank piece of paper in the machine. However, prior authority and the principles of statutory interpretation led to the conclusion that what was intended by "means of telecommunication" was a sender and a receiver, and a method of transmitting information over some distance: a photocopy did not fall within that definition.

However, the Court of Appeal concluded, nothing in the *Extradition Act* specifically required that the original ATP be filed. Indeed, the existence of section 15(4) suggested that a flexible approach should be taken to the form of the ATP. AS the court noted, if a facsimile version of an ATP were acceptable, it was difficult to think of any reason that a photocopy would not also be acceptable. Accordingly they dismissed the appeal.

Text Messaging as Use of Computer Systems

The Ontario Court of Appeal concluded that text messaging constituted the use of a computer system for purposes of the *Criminal Code* prohibition on luring a child for sexual purposes with its decision in [R. v. Woodward](#). The accused had been charged with the offence after he had arranged, via a series of text messages, to meet a 12 year old girl and had sex with her. The accused argued on appeal that it had not been proven, as required, that he had communicated with her by means of a "computer system".

The relevant term is defined in the *Criminal Code* in this way:

"computer system" means a device that, or a group of interconnected or related devices one or more of which,

- (a) contains computer programs or other data, and
- (b) pursuant to computer programs,
 - (i) performs logic and control, and
 - (ii) may perform any other function.

An expert from Bell Canada had testified at trial, explaining the process used to send text message, the interconnected devices which were used, and the use of computer programs in that process. He had been unable to give a simple example of a logic function when asked to do so. The Court of Appeal held, however, that that inability to provide an example did not mean that his evidence had not established that the computer programs governing text messaging did perform logic and control functions and therefore met the definition.

Websites as Sources of Evidence

In *Ontario v. Rotbmans Inc.* the motions judge considered the admissibility of information attached to an affidavit which had been copied from a website. The background to the case was a claim by the Crown pursuant to the *Tobacco Damages and Health Care Costs Recovery Act*. The Crown was claiming \$50 billion against 14 foreign and domestic defendants, relating to the cost of health care benefits from tobacco related disease or the risk of tobacco related disease that have been paid or will be paid by the Crown for insured persons. The immediate context of the decision was an application by six of those defendants (the “jurisdiction challenging defendants”, or JCDs), claiming that the Ontario court did not have jurisdiction over them.

As part of its case on the motion, the Crown had filed an affidavit by a law clerk, Fabian Esprit. The Esprit affidavit deposed that the affiant had downloaded documents from several public websites, most importantly the Legacy Tobacco Documents Website maintained by the Legacy Tobacco Documents Library, and had attached those documents. Attached to the affidavit were Briefs of Documents relating to each of the JCDs which totalled twenty-four volumes containing hundreds of documents. The Crown argued that the information was all admissible,

despite being hearsay, because the Ontario rules of court allowed hearsay in that context. The motions judge, however, refused to admit the evidence based simply on the affidavit.

The Legacy Website from which most of the documents had been drawn consisted of documents which had in turn been taken from a depository of documents in Guildford, England. That depository had been created as a result of as part of a settlement of an action brought against the tobacco industry by the Attorney General of Minnesota. The legacy Website had been created at the University of California, San Francisco, in response to what it described as access problems at the Guildford depository. It was meant to be a centralized, indexed archive of documents procured from the Guildford Depository.

The motions judge had two difficulties with accepting the evidence based on the affidavit. The first difficulty was that the affiant had not sworn to his belief. More importantly, the judge held:

he provides no basis for me to infer any such belief. He does not state that he has any personal knowledge about the Legacy Website, the Legacy Tobacco Documents Library, the University of California or anyone connected with the website, the Library or the University. He does not state that he reviewed the Legacy Information or had contact with anyone at the Library or the University. He does not state why he considers the website, the Library or the University to be a reliable source of information. He states only that he downloaded the information about the Legacy Website and the Library - from the Legacy Website.

Further, the judge noted, the evidence was not merely hearsay, but double hearsay. The affiant had described the nature of the Legacy website, but all of that information was drawn from the Legacy website itself. The motions judge held:

[38] Mr. Esprit obtained the Legacy Information from the Legacy Website. The Legacy Information was written by an unidentified author. That author was told by others about difficulties in accessing documents from the Guildford Depository. That author was also

told by others that they obtained documents from the Guildford Depository and sent them to the University. The Crown cannot rely on double hearsay to establish that the Documents on the Legacy Website came from the Guildford Depository which in turn came from the JCDs.

[39] Given the critical role that the Documents will play on the Jurisdiction Motions, the proper source of any information about the Legacy Website, the origin of the Documents and their connection to the Guildford Depository and the JCDs is someone with personal knowledge of those matters.

The motions judge therefore did not admit the documents on the basis upon which they were proffered, as attachments to the affidavit. Rather, she engaged in a document by document analysis of various exceptions to the hearsay rule, finding individually for each document whether it was or was not admissible.

Ontario Court Justice laments the “Dark Ages of document management”

In what would otherwise be a mundane decision on an award of costs, Justice D. M. Brown of the Ontario Superior Court of Justice recently took the opportunity to comment on the contrast in the use of technology between the Court and its litigants, highlighting the lamentable state of court technology. In *Harris v. Leikin Group*, 2011 ONSC 5474, Brown J. was considering the proper determination of costs in a complicated piece of multi-party litigation in which electronic discovery costs were submitted by the prevailing party. Previous case management decisions had determined how electronic documents were to be disclosed and exchanged, though electronic documents could not be readily used by the court itself. Neither the quantum nor the appropriateness of such a costs award was really debated, but the Court commented that though the *Rules of Civil Procedure* are silent with respect to costs associated with electronic discovery, they are properly recoverable in the ordinary course, particularly when ordered to be produced and exchanged in such a manner in the course of case management.

[45] Turning to the present case, I accept the parties’ submissions that the electronic document management disbursements incurred by First Capital constitute a “disbursement reasonably necessary for the conduct of the proceeding” within the meaning of Item 35 of Part II of Tariff A to the Rules of Civil Procedure, and I allow their recovery. Since no objection was taken by the plaintiffs to the other disbursements claimed by First Capital, I award it disbursements of \$62,174.71.

With that matter resolved, the Court commented upon the “Dark Ages of document management” in which the Court resides.

[46] Before concluding, I am struck by the irony involved in a judicial discussion of the recoverability of disbursements for electronic document management. Over the past decade in Ontario we have spent considerable time and energy revising our Rules of Civil Procedure and developing guidelines and precedents to incorporate the best practices for e-discovery. At conference after conference judges and masters of this court exhort counsel to educate themselves in the Sedona Canada Principles. Yet, can we as a court accept the work product derived from parties nicely organizing and exchanging their litigation-related documents in electronic format? We cannot. As I have stated in previous decisions, the Superior Court of Justice of Ontario labours in the Dark Ages of document management. Our court is unable to accept electronically the documents created and used by the parties who litigate before us unless, in exceptional cases, the parties are willing to bear the costs of running parallel document filing systems, such as those used in many receiverships and CCAA proceedings.

[47] A most dangerous disconnect exists between what we as a court are telling litigants to do in managing their electronic litigation documents and what we as a court can accept from those who litigate before us. Earlier this year, in a paper presented at a Law Society of Upper Canada conference, I wrote:

The absence in the Superior Court of Justice of a modern information technology system to accept and manage court documents, and to track and schedule court cases, is both an embarrassment and a scandal.

...

Without moving away from the court's current "paper culture" to one using electronic documents and without providing the judiciary with a modern IT case management system to track and schedule cases, I have difficulty seeing how tangible improvements in Ontario's civil justice system can occur in the face of fixed judicial resources.[8]

Justice Brown's commentary was rounded out with a statement directed more to the Court administration than any particular litigant:

It is now apparent that those who manage this court's document intake system do not intend to introduce e-filing in the foreseeable future. In my view, that is unacceptable. In an age when those who use our courts create electronically the documents by which they conduct their business and personal affairs, for a court such as ours to continue in its inability to communicate with its users by electronic means risks creating a serious gap between the public and their courts, thereby endangering the legitimacy of our court system. I think the judges of our court must continue to point out this most serious problem until such time as those who administer this Court take the necessary steps to fix it.

BC Court opines on fundamentals of online law: e-contracts, terms of use, trespass to chattels and copyright

In *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196, the British Columbia Supreme Court was given the opportunity to opine on a range of legal issues related to online competition, online contracts, breach of contract, trespass to chattels and copyright. The case involved the master franchisor

for Century 21 real estate brokerage offices operated across the country under that brand and a handful of its brokers. Century 21 alleged that Rogers Communications was engaged in a range of objectionable practices related to copying, indexing and reproducing content from the plaintiffs' websites the "Zoocasa" website, which was operated by a Rogers subsidiary.

The Century 21 website provided public access to information about the listings of the company's brokers and had a "terms of use" that purported to prevent others from commercially exploiting this information. The plaintiffs alleged that Zoocasa was bound by the Terms of Use of the Century 21 Website and breached them by spidering the site with its search engine and then breached the plaintiffs' copyright on the content. With respect to Rogers itself, it was alleged that it authorized the breach of copyright contrary to s. 27 of the *Copyright Act*.

Zoocasa operates as a search engine and a directory of properties, providing information about not only properties but also neighbourhoods and other information relevant to purchasers, culled from other sources. At around the time of the launch, representatives of the defendant met with Century 21 to seek their cooperation in building their service. Century 21 ultimately declined to participate. Despite this, Zoocasa began to index the Century 21 site and did not cease when directed to do so by a letter from counsel. Shortly thereafter, Century 21 placed a terms of use on their website that purported to deny permission to Zoocasa and another cease and desist followed. For some time, Zoocasa "framed" content from the Century 21 website and the litigation commenced.

With respect to the effect of the **terms of use**, the Court noted as follows:

[59] On October 5, 2007, the plaintiff, Century 21, posted Terms of Use on their Website. They were located on the main Century 21 Website at the bottom of the home or first page of the Website. They were not drawn to the attention of users in any active way. The Century 21 Website did not require that the user acknowledge reading and agreeing to the Terms of Use before accessing the Website. The terms stated that upon accessing the Website the user was bound by them. That

is, the act of accessing the remainder of the Website was agreement by the user to the contractual terms. This raises issues respecting the formation of a contract, standard form contracts and electronic contracts.

The Plaintiff, not surprisingly, argued that the terms of use were binding upon all users of the website, including the Defendants, while the Defendants argued no contract was formed. It argued that no user is required to read them, nor agree to them. The link to the terms of use was not prominent and that there was no consideration for any contract that might be formed. The Court, in considering the issue, canvassed a range of mostly American authorities and noted:

[112] The World Wide Web industry itself has recognized that the owners of websites have the right to restrict access to some or all of the information on their site. For this reason protocols designed to enable a search engine to determine what it is permitted to be included and what it is not have been created. Implicit in such standards is the recognition that the information on the Internet is not open to all. In addition, it is an acknowledgment that restrictions do not in fact inhibit or negatively affect the operation of the Internet to an unacceptable degree.

[113] In *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, (2008) 18 Alb. L.J. Sci & Tech 69 at 121, Ty Tasker & Daryn Pakcyk, the authors state:

“Further, there is no blanket presumption of open, public access to a web site just because it is accessible via the World Wide Web”.

[114] The evolution of the Internet as an “open” medium with its ability to hyperlink, being key to its success, does not mean it must function free of traditional contract law. It is simply the manner of contracting that has changed, not the law of contract. The acceptance of click wrap and browse wrap agreements acknowledges the right of parties to control access to, and the use of, their websites.

[115] Just because a party chooses to do business on the Internet should not mean they relinquish their rights to control access to their business assets and information. The defendants’ submission would deny that right to the plaintiff Century 21. In turn, that would decrease their motivation to create and operate their Website.

[116] In my opinion, a publically available website does not necessarily give a right of access free of any contractual terms. Depending on the circumstances, a contract may be formed.

With respect to the immediate facts at issue, the Court observed that the Defendant was a sophisticated entity that had similar terms of use on its own website, that the Defendant had actual notice of the terms of use and that it conceded in discovery that the terms were reasonable. With respect to the argument put forward that there was no consideration, the Court noted that the benefit of the information contained on the website was adequate.

The fact that the Defendant used automated means to peruse the Plaintiffs’ website and copy data from it was not material. Electronic agents are able to enter into contracts and the use of a spidering search function did not change calculus. In addition, the Court noted that an individual had first studied the structure of the Century 21 website and its data in order to optimise the data collection. Referring to the terms of use itself, the Court concluded:

[140] I find that Zoocasa has breached each of the above provisions. The evidence of the plaintiffs and the admissions of Zoocasa support findings that Zoocasa has, at the times in question, done the following:

- a. “copied” content from the Century 21 Website;
- b. “reproduced” the content of the Century 21 Website, such as property descriptions, on the Zoocasa Website;
- c. “saved” and stored the content onto Zoocasa’s computer servers;
- d. “merged” the content taken from the Century 21 Website with other data on the Zoocasa Website;

- e. “framed” the Century 21 Website within the Zoocasa Website for a period of time;
- f. “posted” the content on another website being the Zoocasa Website;
- g. “used” the content for a “commercial” purpose;
- h. “displayed” and “disseminated” content taken from the Century 21 to the public on the Zoocasa Website;
- i. “accessed” the Century 21 Website for a commercial purpose;
- j. “maintained” a link to the Century 21 Website after Century 21 has given notice that it had revoked its consent for such a link.

[141] I find that Century 21’s Terms of Use constitute a binding contract between the parties, that Zoocasa had actual knowledge of the Terms of Use and in continuing its actions after notice of those Terms of Use, Zoocasa breached those terms.

With respect to alleged **copyright infringement**, the Plaintiffs argued that the property descriptions and photographs were subject to copyright, originally owned by two brokers. Each of them licensed the works to Century 21 and assigned to the company the right to sue for damages. The Defendants argued that Zoocasa’s indexing and linking did not amount to any infringement of copyright because linking and indexing by search engines on the Internet are integral to the functioning of the Internet. They further argue that policies that seek to impede linking across the Internet threaten the open nature of this system and public policy should discourage attempts to impose such impediments.

The Court first concluded that the property descriptions and the photographs are the subject of skill and judgement, so are property subject to the protection of the *Copyright Act*. The Court further concluded that the indexing and copying of the property descriptions and the photographs amounted to infringement of the owner’s copyright, but the Court noted the reproduction of truncated versions of the description may not amount to a substantial copying enough to lead to the conclusion of infringement.

The Defendants attempted to argue that their actions amounted to “fair dealing” and therefore were not liable for infringement. The Plaintiff argued that because the Defendants did not follow the “Robots Exclusion Standard”, which is a de facto standard by which website owners notify automated searching programs how they wish their content to be treated, the dealing could not be characterised as fair. The Court canvassed a range of US authorities and concluded that the fairness of the dealing does not turn on this question:

[251] In the case at bar, Zoocasa has failed to abide by the Robot Exclusion Standard, despite acknowledging it as an industry standard and using it itself. As a result, Zoocasa, in choosing not to embrace the industry standard, has made itself vulnerable to claims of copyright infringement. Zoocasa explains that it was of the view that any site that did not want to be accessed could simply block the Zoocasa IP address. They understood that all websites log visitors IP addresses and it is a technically easy task to block certain addresses. Unbeknownst to them the operator of the plaintiff Century 21’s Website did not log such addresses. In addition, as was stated in eBay, blocking IP addresses is an inefficient and ineffective means of controlling access from unwanted robotic searches. Zoocasa implicitly acknowledged on discovery that it does not attempt to avoid or evade IP blocking.

[252] The issue of fair dealing only arises where there is no consent to the activity complained of. The fact that consent has not been given, or has been refused, whether orally or in writing or in a robots.txt file, is only the starting point for a fair dealing analysis. It is not the end point for an analysis of fair dealing. The test is the character of dealing not the dealing without consent.

Overall, the Court followed the criteria set out in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 and concluded that Zoocasa’s dealing was not “fair”.

The Plaintiff sought relief for **trespass to chattels**, alleging that the accessing of the Century 21 website was itself tortious. The court dismissed this pleading on the basis that Century 21 was not the owner of

the servers from which the website is served, but is merely party to a hosting agreement that does not give it any possessory interest in the computers. Thus, the claim was bound to fail.

Among the relief sought by the Plaintiffs was a **permanent injunction** to enjoin the Defendants from accessing the Century 21 website in violation of the terms of use. Though the Defendants had stopped indexing the site and had said it would not do so again, the Court granted the injunction:

[374] An injunction may also be necessary in circumstances where the breach of contract cannot be fairly compensated through a monetary award. A defendant cannot buy the privilege of infringing the claimant's rights.

[375] In my view, the plaintiff is entitled to injunctive relief given the difficulty of assessing damages, Zoocasa's past conduct and their apparent view that with the consent of Century 21 brokers they can access the Century 21 Website in violation of the Terms of Use.

[376] Century 21 is therefore entitled to a permanent injunction restraining Zoocasa, by itself, its servants, agents, affiliates, subsidiaries,

or otherwise from accessing the Century 21 Website in contravention of the Terms of Use posted on the Century 21 Website.

On the question of damages for breach of contract, the Court awarded the nominal sum of \$10,000. The two plaintiffs who were authors of the works in question were awarded around \$32,000 between them. The actions against Rogers, as parent company of Zoocasa were dismissed for reasons expounded upon in the Court's decision but not discussed in this summary.

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 Professor Robert Currie, Director of the Law & Technology Institute, at robert.currie@dal.ca.

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Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec le professeur Robert Currie à l'adresse suivante : robert.currie@dal.ca

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