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Cybercrime: British Hacker On the Edge of Extradition to the U.S.

The media has lately reported on the latest development in the long-running saga of British hacker Gary McKinnon. McKinnon is the subject of an extradition request by the United States, which wishes to try him on charges that he hacked into the computer systems of both the Pentagon and NASA and allegedly did US$700,000 worth of damage. McKinnon, who has Asperger's syndrome, reportedly does not deny the hack but says he was seeking government data on extraterrestrial life. On 26 November 2009 Home Secretary Alan Johnson confirmed the extradition order issued against McKinnon, denying that extraditing him would infringe his human rights. The decision rejected arguments made by McKinnon's lawyers that he should not be extradited to the U.S. when he could be prosecuted in the U.K. for the crime, particularly given that he faces a decades-long sentence in the U.S. as opposed to the likelihood of a non-custodial sentence if he were tried in the U.K. McKinnon's counsel are reportedly seeking judicial review of the Home Secretary's decision.

Domain Name Disputes

"havaianas.ca"

In *Sao Paulo Alpargatas S/A v. Luca's World Inc.*, sole CIRA panelist David Allsebrook heard a dispute regarding the domain name havaianas.ca. The complainant ("Sao Paulo") is a Brazilian company engaged in the worldwide manufacture and marketing of footwear, particularly its HAVAIANAS brand sandals. It has registered the trademark HAVAIANAS in 126 countries, including Canada. In January 2003 it entered into a distribution agreement with the registrant ("Luca's"), and the agreement is set out in some detail in the text of the decision. Luca's, which registered the domain name in order to fulfill the distribution agreement and market the sandals, did not respond to the complaint. While no reason was given for lack of response, the Panelist noted that the distribution agreement was terminated by notice from Sao Paulo in mid-2006. This was followed by a series of communications between counsel for Sao Paulo and Luca's, which resulted in the President of Luca's agreeing via hard copy mail to transfer the domain name to Sao Paulo. At the time of the complaint the transfer had nonetheless not gone through, though Sao Paulo alleged that Luca's had categorically refused to transfer the domain name.

The Panelist first found that, pursuant to 3.4 of the CIRA Policy, the domain name was "confusingly similar" to the HAVAIANAS mark held by Sao Paulo, given that they were identical save for the .ca suffix. However, he held that there was no evidence that the registration had been made "in bad faith" pursuant to any of the criteria for bad faith in 3.7 of the Policy, particularly given that the domain name was parked and that the only use which had been made of it was for Luca's to market Sao Paulo's product, as contemplated by the distribution agreement. He declined to find, as urged by Sao Paulo, that the written agreement to transfer the domain name was an implied admission of bad faith. He also found that Luca's had a "legitimate interest" in the domain name, given that it had been used when Luca's was a licensor of the mark in question, pursuant to 3.6(a) of the Policy.

Panelist Allsebrook then spoke to the unusual circumstances of the case, and decision-making procedure, as follows:

> The [sic] is clearly more going on between the parties than is revealed by the Complainant. This procedure is not suited to inquire into

> lengthy or conflicting evidence. Any findings made here are based upon the carefully expurgated submissions of one party, silence from the other, and unsworn submissions, untested by cross-examination. Care should be taken in placing any reliance on findings made under those constraints (para. 43).

In the result, despite the evidence that Luca's had agreed to the transfer of the domain name to Sao Paulo, the Panelist declined to order this on the basis that the Panel had no power to do so under the Policy, given that Sao Paulo had not demonstrated two of the three required criteria to make an order of transfer. The complaint was dismissed.

Electronic Libel: Malice and Defence of Qualified Privilege

The British Columbia Court of Appeal has delivered its judgement in *Smith v. Cross*. In that case, the Plaintiff (Respondent) was a long term member of board of school trustees (the Board) in Abbotsford, BC where he served as a vice-Chair and Chair at different times. During his tenure as the Board Chair, a particular teacher became a subject of several disciplinary actions by the Abbotsford School District for cases involving alleged sexually inappropriate conducts. However, without regard to statutory and procedural requirements, the school district failed to report its experience with the teacher to the Board which has responsibility for ultimate discipline of erring teachers. It was not until the same teacher became a subject of a complaint of paedophilic activities in another school district that the Board got to know of his previous activities in Abbotsford. The development was reported in the press which left the impression that the Board was involved in a cover up regarding the activities of the erring teacher.

The Defendant (Appellant) is a community activist, who had in the past vied for election into the Board without success. One of his children, a daughter, was taught by the teacher at the centre of the crisis. The daughter had complained to her father (the Defendant) in the past of the unwelcome remarks made to her by the teacher. In response, to the lapse in the handling of the teacher's case, the Defendant authored three e-mails that were critical of the Board and the Plaintiff which the Defendant circulated to a number of people, including members of the Board and members of the Legislative Assembly. In sum, the e-mails accused the Plaintiff of breaking the law, lying and of protecting a pedophile. He attacked the political standing of the Plaintiff who was then running for an elective office as a municipal councillor. Pointedly, in one of his e-mails, he wondered: "How can a man who broke the law by not reporting ... who lied in the press about a pedophile and later admitted that he lied, be in charge of a police force?" (para 17).

In his defence to the Plaintiff's action for libel, the Defendant pleaded qualified privilege, truth, and fair comment. The trial judge found that some of the sentences were untrue while acknowledging that the safety of students was a matter of public interest that justified fair comment. The court, however, held that the untrue portions of the e-mail were not published honestly or fairly, but with reckless indifference to their being true or false and, consequently, they established express malice on the part of the Defendant. In the present appeal, the court held that such qualified privilege which the Defendant held "can be defeated by a finding of malice on the part of the defendant or by a finding that the limits of the privilege were exceeded" (para 30). The Defendant admitted at trial that he did not believe that the Plaintiff was a person who protected child molesters. Even though the trial judge did not explain how he came by the conclusion that the publications were made with reckless indifference, it does not render the finding unreasonable. The court held that malice is a state of mind. That determination is customarily made by the trier of fact whose decision ought to be accorded deference. The court found that the failure of the Board to handle the erring teacher's case appropriately was, in part, because of dereliction of duty on the part of the school district. Moreover, the responsibility of the Board pursuant to statue was collective and does not lie exclusively on the plaintiff as an individual, contrary to the overall tone of the defendant's e-mail. In dismissing the Appellant's appeal, the court of Appeal held that the finding of malice was justified. After that finding is made, it was not necessary to inquire whether the defendant's dominant motive was proper or improper.

Injunction: Unreliability of "Canada's Most Reliable Network"

The British Columbia Supreme Court has delivered its ruling in an application for injunction in *Telus Communications Co. v. Rogers Communications Inc.* The applicant, Telus, alleges that the respondent's claim in its advertisement and general marketing campaigns to be "Canada's Most Reliable Network", which the applicant seeks to enjoin was false and misleading and in contravention of s. 52(1) of the *British Columbia Competition Act*. Following the launch, in 2007, of its advanced third-generation (3G+) High Speed Packet Access (HSPA) technology which it overlaid on top of its existing GSM/EDGE network, Rogers gained significant advantage over its two other market rivals (Telus and Bell Mobility), especially in regard to its data transmission capability. It secured "the exclusive ability to market the iconic iPhone" (para 10) putting it ahead of the curve in the industry. Rogers sustained this market niche by running a highly successful advertising campaign in which it self-describes as both "Canada's fastest and most reliable network". In furtherance of this success, in November 2009, Rogers launched its 2009 fourth-quarter advertisement (which it developed in August 2009). The advertisement was scheduled to run until Dec 28, 2009. It is essentially based on the claim that Rogers is "Canada's Most Reliable Network". In this latest campaign Rogers dropped the claim to being Canada's fastest network. The advertisement is accompanied in selected cases with footnotes, in very tiny prints, that explain the technical basis for the claim. In the meantime, since 2008, Telus and Bell Mobility have teamed together to construct a new national wireless network which deployed most advanced HSPA/HSPA+ technology. Telus launched this new network on November 5, 2009.

The court found that technologically, the new wireless network which Telus and its ally are now operating brings them at par with Rogers. Consequently, the court held that there is no basis for Roger's continued claim to be "Canada's Most Reliable Network". The technological basis for the comparison that led to that claim is no longer in existence. The technology has since changed as it is wont to. According to the court, "in this industry, technological advancement is the norm" (para 30).

The court rejected the argument by Rogers that reliability is matter of track-record which Rogers has established and which Telus has yet to establish given the newness of its network. The court found that "It is not whether Rogers is lying ... the question is whether its representation is misleading in a material respect. What is misleading depends on context". (para 29). The court further held that "there is no evidence that anyone at Rogers believes that Rogers' HSPA/HASPA+ network is more reliable than Telus's HSPA/HSPA+ network" (para 36). Even though Rogers had the technical competence to know the implications of Telus's new technology, Telus took steps to provide Rogers notice of its concerns about the misleading advertisement. But Rogers continued to use it.

The court concluded that Telus has established that it has a strong case against Rogers. On balance of convenience, the court held that it would weigh equally on both parties, but the court's sympathies readily identify with an overriding public interest, i.e. preventing the public from being continuously misled by Rogers' advertisement campaigns. Roger has no basis to sustain its advantage (advertisement) beyond its "technological expiry date" (para 49). The court also held that leaving the status quo is no option as "damages are unlikely to provide an adequate remedy to either party" (para 44). Consequently, the court adjourned the matter for three days within which period it urged counsel to consider the reasons for the judgment and then to make submission regarding the details of the injunction by, among other things, taking into consideration the need to frame the injunction in narrow terms and the question of reasonable time within which Rogers should bring its advertisement into compliance.

Privacy: Privacy Commissioner Rejects Complaint re Monitoring Employee Movement

The Office of the Federal Privacy Commissioner recently rejected a complaint by a transit driver regarding the collection of information about his work-related activities. The complainant was a bus driver for a company contracted by a municipality to provide transport services for mobility-restricted

customers. The buses were installed with two types of technology to which the complainant objected: a mobile data terminal (MDT) which is used to keep the drivers and dispatchers informed as to when pick-ups and drop-offs have been completed, and records the names and addresses of each client transported; and a global positioning system (GPS), which records the vehicle's exact location and which the municipality said was used for route scheduling and service adjustments—specifically to track the vehicle for emergency purposes, and to determine whether the vehicle has arrived at a client's address and waits the requisite three minutes for the client to board. The driver complained that the technology was being used to "to keep track of his time throughout the day; to make sure he does not take a break or lunch; to time every pick-up and drop-off, and; to track his route and travel time." He also argued that the customers' privacy rights were being violated because their names, addresses and destinations were viewable by the driver and any other person.

The Assistant Privacy Commissioner determined that it was reasonable for the municipality to assume that it had the drivers' consent for the installation and use of the technology, given that all drivers were advised in advance that it would be used and none complained in a timely way. She further noted that while there was "personal information" as defined in *PIPEDA* being collected, it was not sensitive information and the municipality had a legitimate interest in collecting it in order to be able efficiently to deliver the transport service. The practice was held not to be particularly privacy-invasive, particularly in that it predominantly collected information the amount and type of which had been previously collected via paperwork. The information was also not being used for driver discipline, but to ensure that the transit company was living up to the service levels to which it had contracted. Similarly, it was reasonable for the municipality to assume that it had the implied consent of the customers for the collection of their information, given that it was needed to provide the service at all. There was no evidence that the information was being used for employee management purposes, as alleged by the complainant driver. She ultimately concluded that the use of technology was demonstrably necessary to, and effective in meeting, a commercial need; that the loss of privacy was proportional to the benefit gained; and that there was no less privacy-intrusive means of achieving "these improvements in safety and services." The complaint was ruled not well-founded.

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.

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