Blake, Cassels & Graydon LLP October 2011

Blakes Bulletin

Information Technology/Intellectual Property

Court Enforces Terms of Use Against Website Scraper

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A Canadian decision has held that website terms of use can be binding on Internet users, even where those users were not required to click on an "I Agree" or equivalent icon. *Century 21 Canada Limited Partnership v. Rogers Communications Inc.* provides valuable guidance to website operators and sheds light on Internet contract formation, copyright infringement and trespass to chattels in the context of unauthorized website "scraping."

BACKGROUND

Century 21 related to a dispute between the operators of two real estate websites. The ZOOCASA website, operated by a wholly owned subsidiary of Rogers (Zoocasa), offered users a search function for homes that included information about prices, locations, rooms and nearby amenities. The dispute arose because Zoocasa used "spiders" to access the Century 21 real estate website repeatedly, and to copy text and images from it for display on its own website, a process known as "scraping." Zoocasa also linked to the Century 21 website. These activities were expressly prohibited by the Century 21 terms of use (Terms), which appeared as a link on the bottom of the Century 21 Canada home page.

Century 21 sued Zoocasa and Rogers for breach of contract, copyright infringement and trespass to chattels. Justice Robert Punnett of the Supreme Court of British Columbia dealt with each of these three issues.

BREACH OF CONTRACT

According to established principles of contract law, assent is required for an agreement to be binding. The law will not hold a party to a bargain that it never accepted. The defendants compared the Terms to a billboard on the highway – not only is the user likely to overlook its contents, but there is no way to manifest assent to its terms.

Although assent is a necessary feature of an enforceable agreement, it does not need to be in the form of a traditional signature. For example, prior decisions have held that the act of removing shrink-wrap from a software package can constitute assent to the terms of an end-user licence. Similarly, an Internet user can bind itself to an agreement by simply clicking on an icon indicating "I Agree," "Accept," or words to that effect. The validity of these "click-wrap agreements" is now enshrined in most provincial statutes, including Ontario's *Electronic Commerce Act*.

However, the Century 21 website did not require a click-wrap assent. The Terms provided that the mere act of accessing the website beyond the home page constituted agreement to the Terms. The court held that "[t]he act of browsing past the initial page of the website or searching the site is conduct indicating agreement with the [Terms] if those [Terms] are provided with sufficient notice, are available for review prior to acceptance, and clearly state that proceeding further is acceptance of the [Terms]." The court found that all of these conditions were satisfied by Zoocasa and a browse-wrap agreement was formed.

In addition to the necessary conditions set forth above, the court suggested that it might be more eager to enforce a browse-wrap agreement where: the agreement is displayed very prominently on the website; the terms of the agreement are reasonable; the user is a commercial entity; the user is a frequent visitor; and/or the user operates a website that has its own browse-wrap agreement.

COPYRIGHT INFRINGEMENT

The descriptions and photographs on the Century 21 website were authored by its member real estate agents. These agents held copyright in the works and only provided Century 21 with licences to reproduce the works on its website. As the licences were not exclusive, Century 21 did not have any proprietary interest in the copyright, and therefore could not enforce copyright in the works. Century 21's claim for copyright infringement failed. However, the agents could assert copyright.

The photographs and full-text property descriptions were clearly the product of "skill and judgment," the threshold test for copyright protection. The court found the defendants to have infringed 128 separate copyrighted

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works belonging to two real estate agents in the photographs and full-text descriptions.

Surprisingly, the court did not also hold Zoocasa liable for truncated three-line descriptions, which the defendant called "snippets," that Zoocasa also displayed. The court said that the truncated descriptions were not substantial enough to constitute infringement.

Zoocasa argued that its activities qualified under the "fair dealing" defence to copyright infringement. To qualify for the defence, the activities in question must be fair and carried out for one of a limited number of purposes, such as research. Zoocasa argued that its web harvesting techniques were, in fact, a form of commercial research. After taking into account a number of factors considered in assessing whether or not the dealing was fair, the court concluded that Zoocasa's activities did not constitute fair dealing.

TRESPASS TO CHATTELS

Century 21 also pleaded the tort of trespass to chattels. This tort is based on a person physically interfering with the possessions of another. Century 21 argued that by electronically accessing the servers used to host its website, Zoocasa had physically interfered with its possessions.

Courts in the United States have held that accessing a website electronically without authorization is sufficiently "physical" to constitute trespass to chattels, but the issue has never been determined in Canada. The court dismissed the claim without ruling on the "physicality" of access by electronic signals for the purposes of the tort. The court simply observed that the Century 21 website relied on third-party servers and, therefore, did not possess or own the chattels. Without this, the claim for trespass to chattels necessarily failed.

REMEDIES

As Century 21 was successful in establishing breach of the Terms and the agents succeeded on their copyright infringement claim, the court granted a permanent injunction against Zoocasa, barring it from any renewed scraping activities. The court awarded $1,000 for the breach of contract, in the absence of evidence of loss, and only statutory damages for the copyright infringement.

Statutory damages under the *Copyright Act* can range from $500 to $20,000 per infringement, but a court may reduce the damages in some circumstances. The court said that, given the circumstances, even the minimum was grossly out of proportion to the infringement. The court therefore ordered damages in the sum of $250 per infringement, resulting in a total statutory damage award of $32,000.

The parent company Rogers did not incur any liability as Century 21 was unable to rebut the presumption that Rogers only authorized Zoocasa to perform its functions in accordance with the law.

IMPACT OF DECISION

Century 21 is an important case for website operators. An operator should ensure that any terms of use are featured prominently on the first page of the site and ensure that users are forced to navigate past the first page to access any useful information. The terms should also clearly indicate that proceeding past the first page will constitute acceptance of the terms of use.

The case is also instructive for would-be scrapers. If a business collects and disseminates content from other websites without authorization, it may be liable for copyright infringement, breach of contract or even trespass to chattels. Although the latter point remains undecided in Canada, at the very least, *Century 21* suggests that a trespass claim might succeed if the website operator hosts its website on its own servers. In addition, in appropriate cases, scrapers may incur liability under personal information legislation or for violations of trade-mark rights.

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