



Toronto Computer Lawyers Group: Developments in Computer, Internet and eCommerce Law: The Year in Review 2017-2018

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Jurisdiction/Online Remedies/Conflicts of Laws

Google Inc. v. Equustek Solutions Inc., 2017

SCC 34

- Plaintiff sues for (a) misappropriation of confidential information, (b) passing off, (c) breach of contract.
- Distributor flees to Mexico and then Argentina, and continues to sell infringing devices worldwide via an array of websites and shell companies. Court issues injunction with worldwide scope. It is ignored. Contempt order follows. It too is ignored.
- Google asked to take down infringing sites. It refuses to go beyond page-by-page removals on the google.ca platform. Court describes this as a “whack-a-mole” solution.
- Plaintiff seeks injunction against Google to enforce underlying worldwide orders.
- Google not accused of infringement.

Google Inc. v. Equustek Solutions Inc., 2017

SCC 34

- Google inadvertently facilitates irreparable harm through its search engine by leading purchasers directly to the infringing website.
- Relief may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are “mixed up” in the wrongful acts of others that they facilitate the harm based on equitable protective jurisdiction. See, also Cartier International AG & Ors v British Telecommunications Plc & Anor [2018] UKSC 28 (13 June 2018) (providing legal basis for blocking orders against ISPs).
- Since Google controls between 70-75% of global searches, wrongdoer’s ability to sell counterfeits contingent on customers being able to locate its sites through Google.

Google Inc. v. Equustek Solutions Inc., 2017

SCC 34

“The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the... injunction attained its objective was to have it apply where Google operates — globally.

There is no realistic assertion that the... order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation.” It does not violate comity.

→ **Google free to return to Canadian court if has evidence that complying with the injunction would require it to violate the laws of another jurisdiction**

→ **Moving party not required to demonstrate, country by country, that such an order is legally permissible**

Potential uses of “Equustek orders”

- Cyber security, hacking, privacy/data breaches on global scales e.g., Sony, Equifax, Yahoo, Panama & Paradise Papers, botnets.
- Theft of confidential information.
- Counterfeiters, brand infringers, passing off, online disparagement.
- Corporate impersonation/fraud including bank/credit card fraud, website phishing schemes
- Online copyright pirates – including illegal streaming & download sites.
- Defamation including against businesses.
- Illegal gambling sites.

Potential uses of “Equustek orders”

- ↪ Websites, online servers, IP addresses
- ↪ ISPs site blocking
- ↪ Search engines delisting orders
- ↪ Web hosts takedown orders
- ↪ Social media sites
- ↪ Domain name registrars
- ↪ Payment processors
- ↪ See, *Autorité des marchés financiers v. PlexCorps*, 2017 QCTMF 88, - order against Facebook to shut down accounts of Plexcorps and Plexcoin for soliciting Quebec investor in contravention of Quebec’s securities laws relying on Equustek.

Equustek Solutions Inc. v. Jack, 2018 BCSC 610

- Refusing to vary BC order based on Google LLC v. Equustek Solutions Inc. 2017 WL 5000834 (Nov 2, 2017) (U.S. court relying on Section 230 of CDA declaring BC order not enforceable in United States.)
- “The U.S. decision does not establish that the injunction requires Google to violate American law. That would be the case if, for example, the Datalink Defendants obtained an order from a U.S. court requiring Google to link to their websites. But there is no suggestion that any U.S. law prohibits Google from de-indexing those websites, either in compliance with the injunction or for any other reason. Absent the injunction, Google would be free to choose whether to list those websites and the injunction restricts that choice, but injunctions frequently restrain conduct that would otherwise be prima facie lawful. A party being restricted in its ability to exercise certain rights is not the same thing as that party being required to violate the law. I interpret the words of Abella J. as being primarily limited to the latter situation.”

Equustek Solutions Inc. v. Jack, 2018 BCSC 610

- “But even if I am wrong in that, Google has not demonstrated that the injunction violates core American values. I assume rights guaranteed by the First Amendment can be regarded as core values, but Judge Davila expressly declined to rule on Google’s submissions that its First Amendment rights were violated by the injunction. Google argues the First Amendment was engaged because it drives the policy underlying both the statute and the decision. In my view, the decision of Judge Davila should not be interpreted to mean more than it actually says, particularly as Google’s application was unopposed and the Court did not have the benefit of any contrary arguments.”
- “The effect of the U.S. order is that no action can be taken against Google to enforce the injunction in U.S. courts. That does not restrict the ability of this Court to protect the integrity of its own process through orders directed to parties over whom it has personal jurisdiction.”

Force v. Facebook, Inc. No. 16-CV-5158 **(NGG) (LB). (E.D.N.Y. Jan 17, 2018)**

- “Plaintiffs in the above-captioned action are the victims, estates, and family members of victims of terrorist attacks in Israel... They assert various claims against Facebook...based on their contention that Facebook has supported the terrorist organization Hamas by allowing that group and its members and supporters to use Facebook's social media platform to further their aims.”
- “Noting that Plaintiffs contended that Section 230 "does not apply to claims based in foreign law," the court assumed that the Plaintiffs' Israeli tort claims were properly presented and concluded those claims were barred in any event... In coming to this determination, the court examined the enumerated exceptions to Section 230's grant of immunity, and concluded that the absence of any carve-out for claims based on foreign law indicated that no such exception was intended.”
- “Finally, the court notes that the application of Section 230's affirmative defense to Israeli claims is sensible under the circumstances, as it avoids the perverse result that plaintiffs could bring claims in American courts under foreign law that would be barred if brought under federal or state law.”

**College of Optometrists of Ontario et al v.
Essilor Group Canada Inc., 2018 ONSC 206**

“In the modern day, not everything is purchased by going to a store. Increasingly, people rely on the internet not just to buy books and household products but also to buy items the sale of which is governed by regulation. This includes medicines and other health-related items, in this case prescription eyeglasses and contact lenses. At its root this case is concerned with who may regulate these sales and how they can do so.”

College of Optometrists of Ontario et al v. Essilor Group Canada Inc., 2018 ONSC 206

- “Virtually every action taken by Coastal and Clearly in connection with the preparation and delivery of eyeglasses occurs in British Columbia. Their head office, management team, finance, human resources, marketing and information technology groups are located in Vancouver. Online orders are sent to and processed in a laboratory and distribution centre located there. All order information (apart from credit card information) is stored on servers at the office in Vancouver. Eyeglasses are assembled there or a facility “outside Canada”. Contact lenses are purchased from manufacturers in the United States and supplied “mostly” from inventory stored in Vancouver. Product is shipped to customers from the distribution centre located there. The quality assurance team is in Vancouver and there is a call centre there to address questions from customers.
- The respondent takes a narrow view, one based on what, to my mind, is an old-world understanding of place and time. As the respondent sees it, the online business is based in Vancouver. It receives its orders there. The contracts of sale are made there. Even the “delivery” occurs there because the transfer of title and ownership happens at the place of shipment. Understood in this way, nothing happens in Ontario, so the regulation in place here is of no effect.”

College of Optometrists of Ontario et al v. Essilor Group Canada Inc., 2018 ONSC 206

- “With this in mind it may be worthwhile to consider the “territorial context” in which internet sales (e-commerce) takes place. For all of its ubiquitous presence in our lives, the internet remains a relatively new and decidedly different place. Perhaps the impact of the internet requires some fresh consideration. The internet does not function in a geographic context. Nonetheless, we go there. Once there, we communicate instantaneously. The delay of distance has disappeared. The path of communication on the world wide web is not necessarily direct. The message may go directly to Vancouver but it may pass through Tokyo, or some other physically distant place, first. The people communicating could just as easily be located in the next room, the next street or the next town.
- In *The Four-Dimensional Human (Ways of Being in the Digital World)* Laurence Scott attempts to describe life on the internet by reference to a fourth dimension, a popular allusion of the late nineteenth century: a place of infinite space and unknown boundaries. When we are “on the internet” we are somewhere else, separated from the limitations that govern our physical world. On the internet, territorial limits do not exist. Unlike the telephone, there is no such thing as a long-distance email or text. There is no need to actually be in the presence of the person with whom you are communicating.”

College of Optometrists of Ontario et al v. Essilor Group Canada Inc., 2018 ONSC 206

- “In this case prescription eyewear is ordered by people in Ontario. It is delivered to them in Ontario. Presumably it is to be used by them while resident in Ontario. This represents a sufficient connection to Ontario. To find otherwise would mean the eyeglasses are provided without obligation to adhere to Ontario regulation. Ordering eyeglasses is the catalyst for, and delivery is part of, dispensing the eyewear; indicating that it is at least part of a “controlled act” as defined in s. 27(2) of the *Regulated Health Professions Act*...
- As noted by the respondent in its factum, British Columbia encourages online selling to enhance competition and consumer choice. That is different from the regulatory approach in Ontario. Here, the central purpose is health care. There is no justification for imposing the purpose of health professions legislation from British Columbia on those who reside in Ontario. To my mind, that would be a questionable breach of the territorial jurisdiction defined by Canada’s federal system of government.”

Haaretz.com v. Goldhar, 2018 SCC 28

- “This appeal has to do with the rules for the assumption and exercise of jurisdiction in the context of multijurisdictional defamation claims. While these types of claims are not new, the exponential increase in multijurisdictional publications over the Internet has led to growing concerns about libel tourism and the possible assumption of jurisdiction by an unlimited number of forums.”
- “Central to a proper understanding of the conflicts rules of Canadian private international law, and to the resolution of this appeal, is an appreciation of the distinct roles played by jurisdiction *simpliciter* and *forum non conveniens*... The jurisdiction *simpliciter* analysis is meant to ensure that a court has jurisdiction. This will be the case where a “real and substantial connection” exists between a chosen forum and the subject matter of the litigation. The *forum non conveniens* analysis, on the other hand, is meant to guide courts in determining whether they should decline to exercise that jurisdiction in favour of a “clearly more appropriate” forum.” Per Côté, Brown and Rowe JJ

Haaretz.com v. Goldhar, 2018 SCC 28

- “The tort of defamation, which is a tort of strict liability, is committed where material has been “communicated” to, that is, conveyed to and received by, at least one person other than the plaintiff...In the case of Internet communications, the publication of defamatory statements occurs when they are read or downloaded by the recipient... Accordingly, the situs of Internet-based defamation is the place where the defamatory statements are read, accessed or downloaded by the third party”.
- “In order for a defendant to succeed in showing that “a given connection is inappropriate in the circumstances of the case”, the circumstances must demonstrate that the relationship between the forum and the subject matter of the litigation is such that it would “not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction””.
- “In the case at bar, the evidence fails to establish that Haaretz could not have reasonably expected to be called to answer a legal proceeding in Ontario.”

Haaretz.com v. Goldhar, 2018 SCC 28

- “Having established jurisdiction (pursuant to the jurisdiction *simpliciter* analysis), the motion judge properly considered the question of *forum non conveniens*. At the *forum non conveniens* stage, the burden is on the defendant to satisfy the motion judge that the alternative forum is “clearly more appropriate” by establishing that it would be fairer and more efficient to proceed in that forum”.
- In light of the purpose of *forum non conveniens*, I agree with Ppall J.A. that, “given the ease with which jurisdiction *simpliciter* may be established in a defamation case, in a motion for a stay, a motion judge must conduct a robust and carefully scrutinized review of the issue of *forum non conveniens*”. It is true that defamation cases involve a particularly rigid application of the rules governing the assumption of jurisdiction. As discussed above, the establishment of a presumptive connecting factor is “virtually automatic” in Internet defamation cases”.

Spanski Enterprises, Inc. v Telewizja Polska, S.A. **883 F.3d 904 (D.C. Cir. 2018)**

“Guided by the Supreme Court's methodology, we identify the "conduct relevant to the [Copyright Act's] focus," RJR Nabisco, 136 S. Ct. at 2101, by asking precisely what it is that the Act regulates. The answer is clear: the Act grants copyright holders several "exclusive rights"—among them, the right "to perform [a] copyrighted work publicly," 17 U.S.C. § 106(4)—and effectuates those rights by prohibiting "infringement," or the "violat[ion]" of those "exclusive rights". The Copyright Act "focuses," then, on policing infringement or, put another way, on protecting the exclusivity of the rights it guarantees. Here, although it was in Poland that TV Polska uploaded and digitally formatted the fifty-one episodes, the infringing performances—and consequent violation of Spanski's copyrights—occurred on the computer screens in the United States on which the episodes' "images" were "show[n]." Accordingly, because "the conduct relevant to the statute's focus occurred in the United States," this case "involves a permissible domestic application" of the Copyright Act, "even if other conduct occurred abroad."

Spanski Enterprises, Inc. v Telewizja Polska, S.A. **883 F.3d 904 (D.Col.Cir. 2018)**

- “Congress had good reason to allow domestic copyright holders to enforce their rights against foreign broadcasters who direct infringing performances into the United States. Given the ease of transnational internet transmissions, a statutory scheme that affords copyright holders no protection from such broadcasters would leave the door open to widespread infringement, rendering copyright in works capable of online transmission largely nugatory.”
- “In passing the Copyright Act, Congress bestowed on copyright holders a specific set of rights. Holding foreign actors liable for conduct that results in the domestic infringement of those rights effectuates the Act's guarantees and fully coheres with principles of extraterritoriality as articulated by the Supreme Court.”

US v Vaulin 2017 WL 3334861 (N.D.III.2017)

- Whether operator of offshore of Kickass Torrents (KAT site) was subject to criminal prosecution in the US.
- “Vaulin first argues that the indictment fails to adequately allege criminal infringement occurring in the United States, and therefore asserts that the indictment improperly seeks to inculcate him for extraterritorial infringement that cannot be prosecuted under the Copyright Act. Vaulin is correct that, as a general matter, the Copyright Act does not apply extraterritorially to reach acts of infringement that occur entirely abroad. E.g., *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1094, 1098 (9th Cir. 1994). But the core theory underlying the indictment is that Vaulin aided, abetted, and conspired with users of his network to commit criminal copyright infringement in the United States. The first paragraph of the indictment, which is incorporated throughout, alleges that “[m]illions” of Vaulin’s users resided in the United States. Indictment. The indictment goes on to allege that these users “uploaded” and “download[ed]” content, and “obtain[ed] [] desired infringed copyrighted content,”. When viewed in a light most favorable to the Government, as the Court must do at this preliminary stage, the indictment alleges acts of domestic infringement.”

US v Vaulin 2017 WL 3334861 (N.D.Ill.2017)

“Moreover, in setting out the conspiracy count, the indictment further states that Vaulin "made available and caused others to make available without authorization vast amounts of copyrighted content on KAT to millions of individuals in the United States by collecting and uploading torrent files," that KAT used a "network of computer servers from around the world, including computer servers located in Chicago, Illinois," and that various overt acts in furtherance of the conspiracy occurred in the United States. The aiding and abetting counts similarly allege that acts of infringement and acts of aiding and abetting infringement occurred in this district. At this stage, the indictment's allegations of wrongdoing occurring in the United States are sufficient, and Vaulin's motion to dismiss the indictment on this basis is denied.”

British Columbia (Attorney General) v. Brecknell, **2018 BCCA 5**

“The RCMP were refused a production order for records relating to a posting on Craigslist made in BC. Both a Provincial Court judge and a Supreme Court judge found no jurisdiction to grant the order because Craigslist is an American company with only a virtual presence in BC. The Attorney General appealed. Held: Appeal allowed. Production orders are effective against persons in Canada and may require those persons to produce documents located elsewhere. Craigslist’s business activities in BC are sufficient to establish it as a person in the jurisdiction. The application is remitted to the Provincial Court for reconsideration.”

SAS Institute, Inc. v. World Programming Ltd., 874 F. 3d 370 (4th.Cir.2017)

- “SAS's claims in both lawsuits revolve around WPL's acquisition of the Learning Edition, creation of a competitor product, and sales of that competing product. It is here that the similarities between the actions end, however, and WPL has not shown that SAS could have chosen to pursue the claims ultimately adjudicated in the U.S. in the U.K. instead.”
- “For those aspects of the suits that were most similar, the breach of contract actions, it is clear that the U.K. was not, in fact, an adequate forum. The parties agreed to be governed by North Carolina law. Nonetheless, the U.K. courts were bound to, and ultimately did, declare portions of the contract unenforceable based on E.U. law... As this court has recognized, while "neither a state nor a federal court can refuse to give full faith and credit to the judgment of a state court because of disagreement with the public policy basis for that decision," courts may "refuse ... to recognize a *foreign* judgment on the ground that it conflicts with the public policy of [the] state.”

SAS Institute, Inc. v. World Programming Ltd., 874 F. 3d 370 (4th.Cir.2017)

“North Carolina public policy and E.U. public policy are in clear conflict in this case. The E.U. Directive that was dispositive of the contract claims in the U.K. litigation has no equivalent in North Carolina. Instead, the United States has taken an approach that is more protective of intellectual property, and North Carolina courts have taken an approach that is more protective of the sanctity of contract, including broad deference to the parties to elect the governing law. See, e.g., Bueltel v. Lumber Mut. Ins. Co., 134 N.C.App. 626, 518 S.E.2d 205, 209 (1999). Granting the U.K. judgment preclusive effect would frustrate these policy goals by barring a North Carolina company from vindicating its rights under North Carolina law on the basis of the E.U.'s contrary policies. No principle of international comity requires this outcome.”

SAS Institute, Inc. v. World Programming Ltd., 874 F. 3d 370 (4th.Cir.2017)

The U.S. suit alleged violations of U.S. copyright, which WPL has not established could have been litigated in U.K. courts. Similarly, the U.S. suit focused only on sales of WPS within the United States, and WPL has not established that SAS could have recovered for these sales in the U.K. Ultimately, "[t]he fact that two suits involve challenges to very similar courses of conduct does not matter." Ohio Valley Environmental Coalition v. Aracoma Coal Co., 556 F.3d 177, 211 (4th Cir. 2009). The copyright claims, then, which were based on the copyright laws of different countries and on different sets of sales transactions, were not barred by res judicata.”:

British Columbia (Attorney General) v. Brecknell, **2018 BCCA 5**

- “...it seems to me that Craigslist is present in British Columbia, in a very real sense, by virtue of the way in which it conducts its business. It supplies services to British Columbians focusing on specific locations, putting buyers and sellers in those locations together. It derives revenue from British Columbians. As the chambers judge recognized, it is virtually present in British Columbia, even if it is not physically present.
- Accordingly, the question is whether its virtual presence in British Columbia is sufficient to provide a jurisdictional foundation for the issuance of a production order without having impermissible extraterritorial consequences. There is no question that there is a real and substantial connection between Craigslist and British Columbia arising from Craigslist’s virtual presence in British Columbia to conduct business. That real and substantial connection is sufficient to provide personal jurisdiction over Craigslist.”

British Columbia (Attorney General) v. Brecknell, **2018 BCCA 5**

- “...the section, properly interpreted, stipulates only that the person subject to the order must be a person in the jurisdiction. In my view, Craigslist is such a person. Second, the person must be a person who has possession or control of a document. The section says nothing expressly about where that possession or control exists...
- ...in the Internet era it is formalistic and artificial to draw a distinction between physical and virtual presence. Corporate persons, as I have noted, can exist in more than one place at the same time. With respect, I do not think anything turns on whether the corporate person in the jurisdiction has a physical or only a virtual presence. To draw on and rely on such a distinction would defeat the purpose of the legislation and ignore the realities of modern day electronic commerce.”

British Columbia (Attorney General) v. Brecknell, **2018 BCCA 5**

- “I recognize the force of this argument. Indeed, an argument much like this was accepted by the United States Court of Appeals for the Second Circuit in *Microsoft Corp. v. United States*, 829 F.3d 197 (2d Cir. 2016). In that case Microsoft, although a person actually present in the United States, was not required to produce emails that were stored on a server in Ireland. I note that the Supreme Court of the United States has agreed to hear an appeal from this case.”
- “I take some comfort in approaching the matter in this way, since there appears to be a well-established line of appellate authority in the United States that recognizes the intraterritorial validity of subpoenas directed to persons in the United States over whom there is personal jurisdiction to disclose documents in the United States even where they must be obtained from overseas... Moreover, this view of the matter was taken by certain of the dissenting justices on the petition for a rehearing of the *Microsoft Ireland* case itself.”

Nazerali v. Mitchell, 2018 BCCA 104

- “The judge granted a permanent injunction with respect to the appellants in the same terms as the interim injunction dated October 19, 2011; namely, that the appellants be “permanently enjoined from publishing on the Internet or elsewhere any defamatory words concerning the Plaintiff”.
- The appellants say there was no evidence justifying a world-wide injunction and, if an injunction is granted, it should not interfere with their freedom of expression in the United States.
- In my view, the factors relied upon by the judge justified the granting of a permanent injunction, but I do have concerns about the breadth of the injunction, both in terms of the conduct it enjoins and its application outside Canada. These aspects were not fully argued before us, with the result that the precedential weight of these reasons should be treated with some caution.”

Nazerali v. Mitchell, 2018 BCCA 104

- “The decision in the present case was issued prior to *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 (CanLII), which upheld an interlocutory injunction requiring Google to de-index all of the defendant’s websites. The majority of the Supreme Court of Canada agreed that the Supreme Court of British Columbia had in personam jurisdiction over Google and could make an order with extraterritorial effect.
- Google had argued that a global injunction violated international comity because the injunction could require it to violate the laws of another jurisdiction, including interfering with freedom of expression. The majority dealt with this argument by pointing out that Google was at liberty to apply to vary the interlocutory order.
- In the present case, the trial judge had in personam jurisdiction over the appellants because they attorned to the jurisdiction of the Supreme Court of British Columbia. However, in order to respect international comity, the injunction should have given the appellants liberty to apply to vary it as circumstances may require. As the injunction is permanent in nature, it may not be possible for the court to vary it unless liberty to apply is expressly given.”

Knight First Amendment Institute at Columbia University

***v. Trump* 2018 WL 2327290 (S.D.N.Y. May 23, 2018)**

- “In sum, we conclude that the blocking of the individual plaintiffs as a result of the political views they have expressed is impermissible under the First Amendment. While we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him.
- To be sure, we do not suggest that the impact on the individual plaintiffs (and, by extension, on the Knight Institute) is of the highest magnitude. It is not. But the law is also clear: the First Amendment recognizes, and protects against, even de minimis harms... Thus, even though defendants are entirely correct in contending that the individual plaintiffs may continue to access the content of the President's tweets, and that they may tweet replies to earlier replies to the President's tweets, the blocking of the individual plaintiffs has the discrete impact of preventing them from interacting directly with the President's tweets, thereby restricting a real, albeit narrow, slice of speech. No more is needed to violate the Constitution.”



Hyperlinks/Search Results/Computer Generated Content

Goldman v. Breitbart News Network, LLC

2018 WL 911340 (S.D.N.Y. Feb. 15, 2018)

- “The Court agrees with plaintiff. The plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have “displayed” a work within the meaning of the Copyright Act. Moreover, the Court agrees that there are critical factual distinctions between Perfect 10 and this case such that, even if the Second Circuit were to find the Server Test consistent with the Copyright Act, it would be inapplicable here.”
- “It is clear, therefore, that each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown. Most directly this was accomplished by the act of including the code in the overall design of their webpage; that is, embedding. Properly understood, the steps necessary to embed a Tweet are accomplished by the defendant website; these steps constitute a process. The plain language of the Copyright Act calls for no more.”

Goldman v. Breitbart News Network, LLC

2018 WL 911340 (S.D.N.Y. Feb. 15, 2018)

- “Defendants warn that to find for plaintiff here would “cause a tremendous chilling effect on the core functionality of the web Their amici-warn that not adopting the Server Test here would “radically change linking practices, and thereby transform the Internet as we know it.”
- The Court does not view the results of its decision as having such dire consequences. Certainly, given a number as of yet unresolved strong defenses to liability separate from this issue, numerous viable claims should not follow.
- In this case, there are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account. Indeed, in many cases there are likely to be factual questions as to licensing and authorization. There is also a very serious and strong fair use defense, a defense under the Digital Millennium Copyright Act, and limitations on damages from innocent infringement.”

The Leader's Institute, LLC v. Jackson, 2017 **WL 5629514 (N.D. Tex. Nov. 22, 2017)**

- “The plaintiffs respond simply that framing is not copyright infringement.
- But the plaintiffs are incorrect; they publicly displayed Magnovo's copyrighted works. By framing Magnovo's copyrighted works, the plaintiffs displayed the works by "show[ing] a copy" of the works via a "process." 17 U.S.C. § 101. That process was the instructing of users' web browsers to display Magnovo's copyrighted works when those users visited one of the accused TLI domain names. And the plaintiffs displayed the copyrighted works publicly. By instructing users' web browsers to display Magnovo's content upon accessing TLI's publicly-accessible websites, the plaintiffs "transmit[ed] . . . a display of the [defendants'] work . . . to the public." *Id.* Thus, by framing the defendants' copyrighted works, the plaintiffs impermissibly displayed the works to the public. See *Id.* § 106(5) (conferring on copyright owner the exclusive right to display copyrighted works).”

Adelson v. Harris, 402 P. 3d 665 (Nev. S.Ct. 2017)

- “The Second Circuit's first certified question focuses on whether a hyperlink to a news article discussing litigation, itself covered by the common law fair report privilege, suffices to render the petition a privileged fair report.... The question requires this court to determine when the fair report privilege can protect an Internet communication that draws information from an underlying report of judicial proceedings available to the public.”
- “Although the fair report privilege is most commonly asserted by media defendants, it "extends to any person who makes a republication of a judicial proceeding from material that is available to the general public.”

Adelson v. Harris, 402 P. 3d 665 (Nev. S.Ct. 2017)

- “Hyperlinks provide strong attribution because they allow direct access to underlying materials, are intuitively easy to use, and are extremely prevalent online. A reader can click on a hyperlink and immediately determine whether official proceedings are implicated...
- When the AP hyperlink is opened, an average reader would immediately realize that the petition draws upon a summary of judicial proceedings. Furthermore, as the district court noted, “[t]he hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law, because it has become a well-recognized means for an author or the Internet to attribute a source” and “the hyperlink instantaneously permits the reader to verify an electronic article's claims”.

Adelson v. Harris, 402 P. 3d 665 (Nev. S.Ct. 2017)

“The AP hyperlink, as a specific, active, and accurate attribution, provides average readers notice that the petition draws from a summary of judicial proceedings because the petition's text indicates it is based on "reports" and the hyperlink's placement and function allows for it to operate like a footnote. Therefore, we conclude that the online petition, as it existed when Adelson's complaint was filed, fell within the purview of Nevada's fair report privilege.”

Google Inc. v Duffy [2017] SASCFC 130

(4 October 2017)

“Google’s search results are published when a person making a search sees them on the screen of their computer or other device. The display of the search result is only possible because Google has developed, established and maintained the information technology capable of almost instantaneously trawling the World Wide Web and extracting the data searched for. Even though the search results are readable abstracts of material maintained electronically on the World Wide Web by others, Google’s conduct is an indispensable, proximate step in its publication to the searcher. It is Google which designs the program which authors the words of the snippet paragraph. Google’s conduct is the substantial cause of the display of the search results on the screen of the searcher’s device. The first element necessary for Google to be a publisher is therefore established...”

Google Inc. v Duffy [2017] SASCFC 130

(4 October 2017)

- “Google has republished the Ripoff Reports by abstracting sufficient material to inform the searcher of its contents, by repeating and drawing attention to the defamatory imputation, and by providing instantaneous access to it through the hyperlink. The very purpose of an internet search engine is to encourage browsing and it is designed to achieve that purpose...
- Google has knowledge of the probable content of the future search results of its search engine from the time someone notifies it of the existence of defamatory material in the results of a search which has been made for particular material. From that time its dissemination is no longer ‘innocent’. Thereafter, the only justification for the law allowing Google, as a secondary publisher, a reasonable time to ‘take down’ references to the defamatory material is the public policy favouring the dissemination of information generally. For that reason Google may be excused from liability for publications made by its search engines for such time as is reasonable necessary to block the source URL...”

Google Inc. v Duffy [2017] SASCFC 130

(4 October 2017)

“Further a bare hyperlink is unlikely to be defamatory on Abella J’s reasoning, whereas reproducing and hyperlinking a portion of defamatory text from the linked page will generally be defamatory and the party providing the link will be liable. As a general rule, that can be accepted. However, in certain circumstances, depending on both the ease with which the hyperlink can be accessed, and the information provided by the hyperlink (whether or not that information is defamatory in itself), hyper-linking can for all practical purposes constitute an incorporation of the defamatory material into the reference. If the defamatory material is incorporated into the hyperlink, the person making that reference is repeating the libel. Moreover, neutrality is not refutation. In those special circumstances the search result and hyperlink may be the electronic equivalent of handing over a text bookmarked to a certain page or line and inviting a person to read it. In that event the person providing the reference may be regarded as a secondary publisher.” per Kourakis CJ

Google Inc. v Duffy [2017] SASCFC 130

(4 October 2017)

“Turning to the question of whether the appellant published the underlying Rip-off Reports (the hyperlinked material), like the Chief Justice, I agree with the Judge’s conclusions. I also agree with the Chief Justice’s additional reasons. The deep hyperlink taken with the snippet is more than a reference. The snippet entices and the hyperlink bespeaks a willingness on the appellant’s part to transport the enticed searcher immediately to the relevant web page for more information – to publish the web page to those who, having read the snippet, want more information. In my view it is unnecessary to refer to the concepts of adoption or endorsement here. By transporting the enticed searcher to the web page upon the searcher clicking on the hyperlink contained in the search result the appellant publishes to the searcher the web page once it is opened. I agree with the analogy of handing over a bookmarked text, the invitation to provide it having been extended by the snippet and accepted upon clicking on the hyperlink.” Per Hinton J.

Higher Regional Court Cologne, Judgment v. 25.01.2018 - Ref . 15 U 56/17

- Principle “Misleading snippets on Google can be a personal injury.”
- "Non-Therapeutic Sex Offender Attacks Girl - Politically ...www.Q-news.net/.../nicht-therapierbar-er-sextaeter-greift-maedchen-an/, 30.11.2010 - The applicant, H, is a German citizen, born in 1945, currently in B in preventive detention “to give the impression that the plaintiff is a non-treatable sex offender who attacks girls.”
- “He argues that the contested search result, which puts his name in the so-called snippet entitled "Non-Therapeutic Sex Offender on Girl's Hand" into context, blames him for an act he did not commit.”

Higher Regional Court Cologne, Judgment v. **25.01.2018 - Ref . 15 U 56/17**

“Relevant starting point for the international jurisdiction of German courts also for using the search engine at [www. H2.com](http://www.H2.com) search results displayed is that the defendant operates a search engine that allows users worldwide to search the Internet for specific terms. The use of the search engine is possible country-specific over different domains. However, it is open to a user from Germany from a technical point of view to carry out his search on the domains of other countries, where he is indisputably presented by the search engine of the defendant but also in these cases, at least primarily German-language results. Since the defendant has not technically set up the various domains in such a way that they can only be used country-specifically, it remains the goal of the defendant's offer - to search the world for potential hits for specific search terms - from Germany via various Ways to reach. In this case, it is not the type of search (via www.H2.de or www.H2.com) that counts, but rather the content of the result found: The defendant also provides the user with a German-language result list via the search engine access www.H2.com with a search result concerning the plaintiff living in Germany and practicing his profession there.”

Higher Regional Court Cologne, Judgment v. 25.01.2018 - Ref . 15 U 56/17

- “The claimant is entitled to claim for injunctive relief...against the defendant. For the concrete compilation of the information in the disputed search result by the defendant's search engine violates...his general right of personality, the defendant is liable as a disturber for this interference and it does not interfere with a privileges under the TMG or the subsidiarity aspect.”
- “For these compiled by her own computer program compilation of the disputed search result, the defendant is liable as a direct disturber, because they - which is to demand the avoidance of an unlimited Störerhaftung crucial here - to the sufficiently concrete complaints of the plaintiff of 29.6.2014 and 20.8. 2015 unresponsive and made no corresponding restriction on a search for his name.”

Higher Regional Court Cologne, Judgment v.

25.01.2018 - Ref . 15 U 56/17

“On the other hand, this computer technology also carries certain risks, which are precisely the result of the lack of human control and the purely automated functioning of the program. The defendant has set by the programming and operation of the algorithm of the search engine, the decisive cause that in terms of purely automatic creation sporadically occasionally results can be produced that significantly affect the person concerned in his personal and social reputation. In that regard, it has opened up a source of danger which only it controls and whose risk has been realized in the case of the search results relating to the applicant. However, the defendant can not invoke the exclusion of liability on the basis of the purely automated and technical preparation of the search results, since it makes use of this technical aid for the purpose of its business activities in order to offer the user an attractive offer in the field of Internet research to be able to, which ultimately serves their earnings or profit interests. Even against this background, it does not seem appropriate to allow the defendant then on the other side, "hiding" in "runaways" in the operation of this technical tool, which lead to a personal rights violation of the person concerned, as it were behind a computer program, which alone and that alone can influence them.”

Higher Regional Court Cologne, Judgment v.

25.01.2018 - Ref . 15 U 56/17

- “In any case, in the present case, the defendants are liable for the automated processes and their consequences according to the legal concept of infringement of traffic safety obligations as action or state disruptors with regard to the (computer) technical process developed and operated by them.
- The tort liability according to § 823 Abs. 1 BGB (German Civil Code) is also subject to attributable additional risk for the injury of others by creating or continuing a third-party risk of any kind within his area of responsibility without taking precautions necessary and reasonable for him to prevent the damage of third parties as possible. The legally required traffic safety measures include those measures which a prudent and reasonable, reasonably prudent person considers necessary and sufficient to protect others from damage’.
- “In the present case, the defendant's fundamental liability in this case is in line with the postulate that the danger situation created must be responded to with the necessary but also reasonable measures (see Palandt (Herrler), BGB, 77th edition, § 1004, par. 33), limited to compliance with reactive testing and blocking obligations.”

Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19

- “The modern law of negligence remains based on the foundations set out in *Donoghue*. It is still the case today that “[t]he law takes no cognizance of carelessness in the abstract”: *Donoghue*, at p. 618, per Lord Macmillan. Unless a duty of care is found, no liability will follow. Similarly, the neighbour principle continues to animate the *Anns/Cooper* test that Canadian courts use to determine whether a duty of care exists.
- It is not necessary to conduct a full *Anns/Cooper* analysis if a previous case has already established that the duty of care in question (or an analogous duty) exists... If it is necessary to determine whether a novel duty exists, the first stage of the *Anns/Cooper* test asks whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff... Once foreseeability and proximity are made out, a *prima facie* duty of care is established.”

Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19

- “Reasonable foreseeability of harm and proximity operate as crucial limiting principles in the law of negligence. They ensure that liability will only be found when the defendant ought reasonably to have contemplated the type of harm the plaintiff suffered.”
- “In addition to foreseeability of harm, proximity between the parties is also required: Cooper, at para. 31. The proximity analysis determines whether the parties are sufficiently “close and direct” such that the defendant is under an obligation to be mindful of the plaintiff’s interests... This is what makes it just and fair to impose a duty... The proximity inquiry considers the “expectations, representations, reliance, and the property or other interests involved” as between the parties: Cooper, at para. 34. In cases of personal injury, when there is no relationship between the parties, proximity will often (though not always) be established solely on the basis of reasonable foreseeability”.



e-Commerce & Online Agreements

Douez v. Facebook, Inc., 2017 SCC 33

- “In our view, recognizing the importance of factors beyond those specifically listed in *The “Eleftheria”* is an appropriate incremental response of the common law to a different context (*Bhasin v. Hrynew*, 2014 SCC 71... Such a development is especially important since online consumer contracts are ubiquitous, and the global reach of the Internet allows for instantaneous cross-border consumer transactions. It is necessary to keep private international law “in step with the dynamic and evolving fabric of our society”...
- After all, the strong cause test must ensure that a court’s plenary jurisdiction only yields to private contracts where appropriate. A superior court’s general jurisdiction includes “all the powers that are necessary to do justice between the parties...”

Douez v. Facebook, Inc., 2017 SCC 33

- “Therefore, we would modify the *Pompey* strong cause factors in the consumer context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake. The burden remains on the party wishing to avoid the clause to establish strong cause...
- There are generally strong public policy reasons to hold parties to their bargain and it is clear that forum selection clauses are not inherently contrary to public policy. But freedom of contract is not unfettered. A court has discretion under the strong cause test to deny the enforcement of a contract for reasons of public policy in appropriate circumstances. Generally, such limitations fall into two broad categories: those intended to protect a weaker party or those intended to protect “the social, economic, or political policies of the enacting state in the collective interest”.

Douez v. Facebook, Inc., 2017 SCC 33

- In particular, unlike a standard retail transaction, there are few comparable alternatives to Facebook, a social networking platform with extensive reach... Having the choice to remain “offline” may not be a real choice in the Internet era.
- Given this context, it is clear that the difference in bargaining power between the parties is large...
- Secondly, Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values...
- As the chambers judge noted, the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person’s privacy interests. In this context, it is especially important that such harms do not go without remedy. And since Ms. Douez’s matter requires an interpretation of a statutory privacy tort, only a local court’s interpretation of privacy rights under the Privacy Act will provide clarity and certainty about the scope of the rights to others in the province.”

Douez v. Facebook, Inc., 2017 SCC 33

- “And as Facebook rightly notes, s. 15(1) of the *Electronic Transactions Act*, S.B.C. 2001, c. 10, permits offer and acceptance to occur in an electronic form through “clicking” online.” per Karakatsanis, Wagner and Gascon JJ.
- “The first argument is that the forum selection clause is unenforceable because Ms. Douez was simply invited to give her consent to the clause by clicking on it, without her attention being drawn to its specific language. In other words, she is not bound because electronic clicking without more does not indicate her agreement to the forum selection clause.
- “We cannot accede to this submission. In British Columbia, s. 15(1) of the *Electronic Transactions Act*... codifies the common law rule set out in *Rudder v. Microsoft Corp.* (1999), 1999 CanLII 14923 (ON SC) and establishes that an enforceable contract may be formed by clicking an appropriately designated online icon...
- Ms. Douez relies on *Berkson v. Gogo LLC*, 97 F. Supp.3d 359 (E.D.N.Y. 2015), at para. 22, where a U.S. district court, in the absence of legislation on electronic formation of contract, adopted a four-step procedure to determine whether a contract was formed by accepting terms of use online. In British Columbia, s. 15(1) of the *Electronic Transactions Act* answers the question, providing that clicking on a screen suffices to indicate acceptance.” per McLachlin C.J. and Moldaver and Côté JJ

Demers c. Yahoo! Inc., 2017 QCCS 4154

- “In the Facebook Decision, the Supreme Court listed the elements to be considered when determining whether there exists a strong cause not to enforce a forum selection clause within a consumer context, namely, the inequality of bargaining power of the parties in a consumer contract of adhesion and the local court’s interest in adjudicating claims involving constitutional or quasi-constitutional rights.
- The counsel for the Defendants submits that the Court should not rely on the Facebook Decision given the distinct legislative framework that exists in Québec, which already responds to many of the policy concerns raised in the Facebook Decision...
- However, the Supreme Court nevertheless stated that the contract between Facebook, Inc. and its users was a consumer contract of adhesion. In conducting its analysis, the Court found this statement to be persuasive.
- As seen above, the Québec legislature has chosen to except consumer contracts from its standard jurisdictional rules. In conclusion, the Court finds that the contract between Yahoo! Canada and the Applicant is a consumer contract and thus the waiver of the Québec jurisdiction does not apply in the present case.”

Heller v. Uber Technologies Inc., 2018 ONSC 718

“To review and accept the operative licencing agreement, the Driver clicks a hyperlink presented on the screen within the App. To click “I agree”, a Driver must scroll through the entire agreement, about 14 pages in length. After a Driver has confirmed his or her agreement, he or she is then prompted to confirm his or her acceptance a second time, prior to which the App states, in caps: “PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS.” Once a Driver has clicked “YES, I AGREE” a second time, he or she is able to access the Uber App, and their agreement is automatically sent to their “Driver Portal,” which provides access to account information.”

Heller v. Uber Technologies Inc., 2018 ONSC 718

- "The elements of a claim of unconscionability are: (1) pronounced inequality of bargaining power; (2) a substantially improvident or unfair bargain; and (3) the defendant knowingly taking advantage of the vulnerable plaintiff."
- "In the immediate case, there undoubtedly was an inequality of bargaining power, but I do not see how it can be said that Uber preyed or took advantage of Mr. Heller or the other Drivers or extracted an improvident agreement by inserting an arbitration provision. As demonstrated by the record, most grievances or disputes between Drivers and Uber can be dealt with by the dispute resolution mechanisms readily available from Ontario and that it will be a substantial dispute that entails arbitration in the Netherlands."

Heller v. Uber Technologies Inc., 2018 ONSC 718

- “A majority of the Supreme Court held that the context of a consumer contract, as opposed to a commercial agreement, may provide strong reasons not to enforce a forum selection clause having regard to such circumstances as unequal bargaining power, the importance of adjudicating privacy rights, the comparative convenience and expense of litigating in another jurisdiction, public policy concerns, and the interests of justice. Thus, a majority in the Supreme Court held that forum selection clauses in consumer contracts require a special and different treatment than how a forum selection clause will be treated in a commercial contract...
- The *Douez* judgment does not change the ancient contract law about the doctrine of unconscionability and of the majority judges concluded that Facebook’s forum selection clause was enforceable and only Justice Abella (concurring with the majority) spoke about unconscionability as the explanation for why there was strong cause to not enforce an enforceable forum selection clause.”

Meyer v Uber Technologies, Inc. 868 F.3d. 66 (2nd.Cir.2017)

The screenshot shows the Uber 'Payment' screen. At the top, there's a back arrow, the Uber logo, and the word 'Payment'. To the right is a 'PROMO CODE' field. Below this is a 'Credit Card Number' field with a 'SCAN' button. Underneath are three fields for 'MM', 'YY', and 'CVV'. Then there's a field for the country, currently set to 'U.S.' with a flag icon, and a 'ZIP' field. A large grey 'REGISTER' button is below these fields. Underneath the button is an 'OR' separator. Below the separator are two buttons: 'PayPal' and 'Google Wallet'. At the bottom, there's a line of text: 'By creating an Uber account, you agree to the [TERMS OF SERVICE & PRIVACY POLICY](#)'. The Android navigation bar is at the very bottom.

This is an identical screenshot to the one on the left, showing the Uber 'Payment' screen with the same layout and elements: back arrow, Uber logo, 'Payment' title, 'PROMO CODE' field, 'Credit Card Number' field with 'SCAN' button, 'MM', 'YY', 'CVV' fields, 'U.S.' country field with flag, 'ZIP' field, 'REGISTER' button, 'OR' separator, 'PayPal' and 'Google Wallet' buttons, and the agreement text at the bottom.

Meyer v Uber Technologies, Inc. 868 F.3d. 66 **(2nd.Cir.2017)**

- “The fact that clicking the register button had two functions — creation of a user account and assent to the Terms of Service — does not render Meyer's assent ambiguous. The registration process allowed Meyer to review the Terms of Service prior to registration, unlike web platforms that provide notice of contract terms only after the user manifested his or her assent. Furthermore, the text on the Payment Screen not only included a hyperlink to the Terms of Service, but expressly warned the user that by creating an Uber account, the user was agreeing to be bound by the linked terms. Although the warning text used the term "creat[e]" instead of "register," as the button was marked, the physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that the linked terms pertain to the action the user is about to take.
- The transactional context of the parties' dealings reinforces our conclusion. Meyer located and downloaded the Uber App, signed up for an account, and entered his credit card information with the intention of entering into a forward-looking relationship with Uber. The registration process clearly contemplated some sort of continuing relationship between the putative user and Uber, one that would require some terms and conditions, and the Payment Screen provided clear notice that there were terms that governed that relationship.”

Ramos v Uber Tech., Inc. 2018 NY Slip Op 28162 (May 31, 2018)

- “The third screenshot displays the last step, denominated "ADD PAYMENT" where the applicant would input their credit card details or PayPal information. Below the input fields for the credit card information is the following text: "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy." To finish the process the applicant must click on a button labeled "DONE." The applicant could before clicking the button labeled "Done" review the Terms & Conditions.
- Brauchli claims that the phrase "Terms & Conditions and Privacy Policy" on the third screenshot is displayed within a rectangular box. He further claims, without any explanation, that its placement inside the rectangular box indicates that it is a clickable button. If the button is clicked the individual would be taken to a screen that contains other clickable buttons, including buttons entitled "Terms & Conditions" and "Privacy Policy." If the Terms and Conditions button is clicked, the Terms & Conditions in effect at the time would be displayed.”

Ramos v Uber Tech., Inc. 2018 NY Slip Op 28162 (May 31, 2018)

“The language in the last screenshot, which states that "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy" is on its face ambiguous for the following reasons. A registrant may reasonably believe that the phrase Terms and Conditions pertains to letting Uber use the registrant's facebook account or email and mobile number for sending bills and receipts, as stated in the first screenshot. Additionally, the instructions on the third screenshot does not contain any language or any indication advising the applicant that clicking on the words "Terms & Conditions and Privacy Policy" will take the applicant to another screen purportedly containing Uber's terms and conditions. In fact, an applicant may complete the registration process after completing the third screenshot and hitting the "DONE" button without ever seeing or even being aware that a separate screen contains Uber's terms and conditions. The Court does not agree with Bauchli's contention that the framing of the phrase "Terms & Conditions and Privacy Policy" within a rectangular box gives reasonable notice to anyone that it is a clickable button.”

Ramos v Uber Tech., Inc. 2018 NY Slip Op 28162 (May 31, 2018)

“The Court finds after assuming the accuracy of Brauchli's claims regarding the registration process that a registrant may complete the process without seeing or even being aware that there are other clickable buttons leading to a screenshot containing Uber's terms and conditions, inclusive of the subject agreement to submit to arbitration. The above referenced screenshots and registration process do not compel the registrant to see the subject terms and conditions and does not compel the registrant to indicate in some fashion its acceptance of the subject terms and conditions, such as, by clicking an acceptance button.”

Applebaum v Lyft, Inc, 263 F.Supp. 454 (June 26, 2017)



The screenshot shows the 'Add phone number' screen in the Lyft app. At the top, the status bar displays 'Carrier', signal strength, '10:57 AM', and battery level. Below the status bar is a navigation bar with a back arrow and the title 'Add phone number'. The main content area features a text input field with a phone icon on the left, the placeholder text 'Phone', and a US flag icon on the right. Below the input field, the text 'We'll send a text to verify your phone' is displayed. Further down, there is a checkbox followed by the text 'I agree to Lyft's Terms of Service'. At the bottom of the screen is a large pink button labeled 'Next'.

Applebaum v Lyft, Inc, 263 F.Supp. 454 (June 26, 2017)

- “The issue is whether the mobile application screen adequately communicated all of the terms and conditions of the purported agreement and whether the purchaser received reasonable notice of those terms....
- Evaluating the totality of the circumstances, a reasonably prudent consumer would not have been on inquiry notice of the terms of the February 8, 2016 Terms of Service. Lyft's registration process...did not alert reasonable consumers to the gravity of the “clicks,” namely, that clicking the Box and then the pink “Next” bar at the bottom of the screen constituted acceptance of a contract, including an arbitration agreement, governing the parties' obligations going forward. Instead, the design and content of the registration process...discouraged recognition of the existence of lengthier contractual terms that should be reviewed.
- Initially, the text is difficult to read: “I agree to Lyft's Terms of Service” is in the smallest font on the screen, dwarfed by the jumbo-sized pink “Next” bar at the bottom of the screen and the bold header “Add Phone Number” at the top.”

Applebaum v Lyft, Inc, 263 F.Supp. 454 (June 26, 2017)

***** T-Mobile 11:38 AM 99%

Terms of Service

Before you can proceed you must read & accept the latest Terms of Service

Lyft Terms of Service

Last Updated: September 30, 2016

These terms of service constitute a legally binding agreement (the "Agreement") between you and Lyft, Inc. ("Lyft," "we," "us" or "our") governing your use of the Lyft application, website, and technology platform (collectively, the "Lyft Platform").

PLEASE BE ADVISED: THIS AGREEMENT CONTAINS PROVISIONS THAT GOVERN HOW CLAIMS YOU AND LYFT HAVE AGAINST EACH OTHER CAN BE BROUGHT (SEE SECTION 17 BELOW). THESE PROVISIONS WILL, WITH LIMITED EXCEPTION, REQUIRE YOU TO SUBMIT CLAIMS YOU HAVE AGAINST LYFT TO BINDING AND FINAL ARBITRATION ON AN INDIVIDUAL BASIS, NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY CLASS, GROUP OR REPRESENTATIVE ACTION OR PROCEEDING. AS A DRIVER, YOU HAVE AN OPPORTUNITY TO OPT OUT OF ARBITRATION WITH RESPECT TO CERTAIN CLAIMS AS PROVIDED IN SECTION 17.

By entering into to this Agreement, you expressly acknowledge that you understand this Agreement (including the dispute resolution and arbitration provisions Section 17) and accept all of its terms. IF YOU DO NOT AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS

I accept

Applebaum v Lyft, Inc, 263 F.Supp. 454 (June 26, 2017)

- “courts have consistently found scrollwrap agreements enforceable because they present the consumer with a “realistic opportunity” to review the terms of the contract and they require a physical manifestation of assent.”
- “the September 30, 2016 Terms of Service were presented on a screen titled “Terms of Service,” where, given the content and design of the screen, there could be no doubt as to what that phrase signified. The screen explicitly stated: “Before you can proceed you must read & accept the latest Terms of Service.” The Terms of Service were set out on the screen to be scrolled through. No subtle hyperlink was needed. The Terms of Service begin with the warning: “These Terms of Service constitute a legally binding agreement ... between you and Lyft, Inc.” Before proceeding, the user was required to click on a conspicuous bar that said: “I accept.””

Cedrom-SNI inc. c. Dose Pro Inc., 2017 QCCS

3383

- “La Presse, Le Soleil and Le Devoir post conditions of use on their website. They provide that when the user browses the newspaper website, he agrees to be bound by the terms of use. These conditions prohibit the reproduction, distribution and transmission of the content of the websites for commercial purposes...
- It is clear that the defendants obtain the titles and primers from the plaintiffs' sites and make commercial use of that content. It is equally clear that the defendants have become aware of the conditions attached to the use of the websites, this being clear from the correspondence they received in May 2016 and which are explicit on the conditions of use.”
- From the foregoing, the Tribunal concludes that, in appearance, the conditions of use of the La Presse, Le Devoir and Soleil websites prevent the commercial use of its content. The evidence establishes that the defendants were aware of these conditions and continued despite their reproduction. There is therefore a clear legal appearance in favor of the plaintiffs on this aspect.”

Adtrader, Inc v Google LLC 2018 WL 876950 **(N.D.Cal. Apr 19, 2018)**

- “Google may add to, delete from or modify these Terms at any time without liability. The modified Terms will be posted at www.google.com/ads/terms. Customer should look at these Terms regularly. The changes to the Terms will not apply retroactively and will become effective 7 days after posting. However, changes specific to new functionality or changes made for legal reasons will be effective immediately upon notice....”
- “The September 2017 AdWords Agreement contains a new arbitration clause. In relevant part, section 13 states that: “This agreement to arbitrate ...includes...claims that arose before Customer or Advertiser first accepted any version of these Terms containing an arbitration provision”.
- “F. 30-day opt out period...A Customer or Advertiser who does not wish to be bound by this Dispute Resolution Agreement (including its waiver of class and representative claims) must notify Google as set forth below within 30 days of the first acceptance date of any version of these Terms containing an arbitration provision (unless a longer period is required by applicable law).”

Adtrader, Inc v Google LLC 2018 WL 876950 **(N.D.Cal. Apr 19, 2018)**

- “Clicking the URL "adwords.google.com/nav/arbitration" in § 13(F) takes customers to a webpage that allows them "to select how they wish to resolve disputes with Google." After entering their customer ID, they can select "opt out of arbitration" and click "submit." The customers' choice to opt out does not affect their ability to use AdWords.”
- “As such, the evidence is clear that advertisers can freely opt out of the Dispute Resolution Agreement without their accounts becoming deactivated. Plaintiffs provide no contrary evidence. Hence, an advertiser's decision to decline the September 2017 AdWords Agreement to avoid being subject to the new arbitration provision is a voluntary choice given that he or she can easily opt out from that provision as discussed above. Any harm stemming from such a decision is self-inflicted and does not constitute irreparable harm.”

Norcia v Samsung Telecommunications America, LLC 845 F.3d 1279 (9th.Cir.2017)

“...a contract is ineffective where the customer does not receive adequate notice of its existence...

Samsung gave a brochure entitled "Product Safety & Warranty Information." Such a brochure indicates that it contains safety information and the seller's warranty, which constitutes the seller's "affirmation of fact[s] or promise" relating to the Galaxy S4 phone... A reasonable person in Norcia's position would not be on notice that the brochure contained a freestanding obligation outside the scope of the warranty. Nor would a reasonable person understand that receiving the seller's warranty and failing to opt out of an arbitration provision contained within the warranty constituted assent to a provision requiring arbitration of all claims against the seller, including claims not involving the warranty. Because "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious,"... Norcia was not bound by the arbitration provision even if the in-the-box contract were otherwise enforceable under California law."

Tabet c. Equityfeed Corporation, 2017 QCCS 3303

- “Executed with the intention of being legally bound by the following:
 - **Name:** Aymane Tabet
Company:
Address: 250 Saint Joseph Boulevard East, apt 406
Montreal, QC H2T 1H7
 - **Name:** Stephan Touizer
Company: Equityfeed Corporation
Address: 5485 Pare Blvd, Suite 204
Montreal, QC H4P 1P7
- **Signed On:** July 25th, 2010”

Tabet c. Equityfeed Corporation, 2017 QCCS 3303

- “First, the authors Pierre Trudel, Guy Lefebvre and Serge Parisien remind us that the signature essentially fulfills two functions: the identification of the signatory and the expression of his will to adhere to the content of the signed act. In other words, it must leave no doubt as to the signatory's identity and willingness...
- “The Tribunal shares Professor Ducharme's analysis and opinion. Obviously, the simple typed name of a person in an electronic document as a paper document, can not, by itself, the conditions of Article 2827 C.cQ . and fulfill the important identification function pursued by the signature, in particular.”

Tabet c. Equityfeed Corporation, 2017 QCCS 3303

- **17.** The information in a document that must be retained as evidence, whether an original or a copy, may be transferred to a medium that uses a different technology .
- However, subject to section 20, in order for the source document to be destroyed and replaced by the document resulting from the transfer while retaining its legal value, the transfer must be documented so that it can be demonstrated, if necessary, that the document resulting from the transfer contains the same information as the source document and that its integrity is ensured...
- Obviously, in this case, the document *Collaboration Agreement* does not comply with the requirements of the CCQ , or those of the Act .
- As the Applicant did not retain and do not know the exact URL where to find the document and states that the laptop that contained the electronic document no longer exists, it becomes impossible in demand] as in defense of remedying this defect, to verify the origin of the document and "*that the information has not been altered and that it is maintained in its entirety, and that the medium which bears this information gives it stability and the desired permanence* [38] . "

Technology Contracting

Gonzalez v Agoda Company Pte Ltd [2017]

NSWSC 1133 (28 August 2017)

- Did an online service contract to provide a booking service or hotel room, and if the latter, was it responsible for a personal injury sustained in use of room?
- “Section 60 of the ACL relevantly provides:... If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.
- Section 61(1) of the ACL relevantly provides:... If: (a) a person (the supplier) supplies, in trade or commerce, services to consumer; and (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer; there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.”

Gonzalez v Agoda Company Pte Ltd [2017]

NSWSC 1133 (28 August 2017)

- “...The Site does not constitute and should not be regarded as a recommendation or endorsement of (the quality, service level or rating of) any Hotel listed on the Site. We hereby expressly disclaim any representation, warranty or undertaking in relation to the quality, status or adequacy of any Hotel listed on the Site.”
- “...TO THE EXTENT PERMITTED BY LAW, IN NO EVENT SHALL AGODA...BE LIABLE TO ANY PERSON OR ENTITY WHATSOEVER FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, COMPENSATORY, CONSEQUENTIAL OR PUNITIVE DAMAGES OR ANY DAMAGES OR LOSSES WHATSOEVER, INCLUDING BUT NOT LIMITED TO (WHERE RELEVANT CAUSED BY)...ANY (PERSONAL) INJURY...ATTRIBUTABLE TO THE HOTEL (ITS EMPLOYEES, DIRECTORS, OFFICERS, AGENTS, REPRESENTATIVES OR AFFILIATED COMPANIES)...REGARDLESS OF THE FORM OF ACTION, WHETHER BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE.”

Gonzalez v Agoda Company Pte Ltd [2017]

NSWSC 1133 (28 August 2017)

- “That leaves one with the submission of Agoda that the terms contended for by Ms Gonzalez are not to be implied into the contract on any basis. I think that that submission has a great deal of force; because of my lack of certainty of its correctness, on all of the evidence placed before me, I am not affirmatively satisfied that I should dismiss the contract claim now.
- The same may be said with regard to the claim pursuant to the ACL: whilst I strongly tend to the view that Agoda was indeed providing the service of supplying hotel room bookings, and not hotel rooms, the issue remains, to my mind, contestable. And that characterisation is the fulcrum upon which the application of the ACL turns. For that reason, I would stay my hand in dismissing that part of the claim as well.”

Hiam v Homeaway.com, Inc 887 F.3d 542 (1st.Cir, 2018)

- “The parties agree that VRBO.com (short for "vacation rentals by owner") is a website-based business that allows property owners to advertise their vacation rentals to the public. VRBO.com acts like a searchable online bulletin board; it allows property owners to list their properties, but HomeAway does not itself own or manage any properties, nor does it make itself a party to any contracts between property owners and renters.”
- “Nothing in this arrangement implies that HomeAway checked out the listing before receiving a claim under the Guarantee. And if there were any doubt on this point, the website's terms and conditions (by which all "Registered Traveler[s]" agree to be bound) would eliminate it. HomeAway states in those terms and conditions that "[w]e have no duty to pre-screen content posted on the Site by members, travelers or other users." HomeAway also "specifically disclaim[s] any and all liability arising from the alleged accuracy of the listings" and advises customers that they are "solely responsible for verifying the accuracy of . . . content and descriptions.”

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24 (16 May 2018)

- “This Licence sets out all of the terms as agreed between MWB and Licensee. No other representations or terms shall apply or form part of this Licence. All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.”
- Shelanu Inc. v. Print Three Franchising Corp., 2003 CanLII 52151
 - “At the trial, the existence of the oral agreement and thus the intention of the parties was in issue. The trial judge relied on the parties' subsequent course of conduct to infer that they did not intend to continue to be bound by the exclusion clauses in the agreement. The trial judge found that Print Three had orally agreed to the surrender of a franchise by Shelanu on a previous occasion, and had allowed Shelanu to change locations and to lease space directly without anything being in writing. Where the parties have, by their subsequent course of conduct, amended the written agreement so that it no longer represents the intention of the parties, the court will refuse to enforce the written agreement. This is so even in the face of a clause requiring changes to the agreement to be in writing. See *Colautti Construction Ltd. v. City of Ottawa* (1984), 1984 CanLII 1969 (ON CA), 46 O.R. (2d) 236, 9 D.L.R. (4th) 265 (C.A.), per Cory J.A.”

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24 (16 May 2018)

“There are at least three reasons for including such clauses. The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them. These are all legitimate commercial reasons for agreeing a clause like clause 7.6. I make these points because the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy. Yet there is no mischief in No Oral Modification clauses, nor do they frustrate or contravene any policy of the law.”

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24 (16 May 2018)

“The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. **In England, the safeguard against injustice lies in the various doctrines of estoppel.** This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. **At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself”.**

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24 (16 May 2018)

- “The same point may be made in a purely English context by reference to the treatment of entire agreement clauses, which give rise to very similar issues. Entire agreement clauses generally provide that they “set out the entire agreement between the parties and supersede all proposals and prior agreements, arrangements and understandings between the parties.”... Such clauses are commonly coupled (as they are here) with No Oral Modification clauses addressing the position after the contract is made. Both are intended to achieve contractual certainty about the terms agreed, in the case of entire agreement clauses by nullifying prior collateral agreements relating to the same subject-matter.”
- “The true position is that if the collateral agreement is capable of operating as an independent agreement, and is supported by its own consideration, then most standard forms of entire agreement clause will not prevent its enforcement... But if the clause is relied upon as modifying what would otherwise be the effect of the agreement which contains it, the courts will apply it according to its terms and decline to give effect to the collateral agreement.”

Calligo Limited v Professional Business Systems CI Ltd [2017] JRC 159 (02 October 2017)

- *"This sales purchase - SOW001 ("Order") is subject to the following terms and conditions:*
 - *Calligo's standard terms and conditions for the supply of cloud services published at <http://www.calligo.net/licences> (or such other web address notified by Supplier to the Client from time to time) and as amended from time to time in accordance with the provisions of the terms and conditions..."*
- Immediately above the signatures of Mr Box and Mr Le Tiec on SOW001 are the words *"in witness whereof, the parties have executed this order as of the date set forth above"*... Mr Box recalls that Mr Le Tiec signed the document quickly but that to his mind was hardly surprising at it had been provided to Mr Le Tiec in advance. PBS were not provided with Calligo's standard terms and conditions as these were available on the website and it was standard practice not to provide them in paper form."

Calligo Limited v Professional Business Systems CI Ltd [2017] JRC 159 (02 October 2017)

- "In our view, a reasonable person would assume that PBS would have familiarised itself with the STCs at some stage in the process leading up to the signing of the SOWs. The express reference to the STCs within the SOWs in the prominent position immediately above the signature of the parties, would also indicate that the STCs were incorporated by reference...
- Accordingly we also find that the STCs of Calligo form part of the contract. They were referenced in every iteration of SOW001 and in SOW002 and we cannot think that Mr. Le Tiec did not know that he would be bound by them. Whether or not he read them in detail we cannot say but the evidence that we heard was to the effect that it is normal practice that terms and conditions are referenced by way of a hyperlink and in our view Mr Le Tiec would have been aware of this."

Career Step, LLC v TalentMed Pty Ltd (No 2)

[2018] FCA 132 (28 February 2018)

4.1 Software and Instructional Materials. In order to facilitate the successful implementation of the Course and the products and Services, Career Step shall provide proprietary software and instructional materials to OzeTrainer and its students enrolled in the Course. OzeTrainer recognizes that such software and instructional materials are proprietary and confidential in nature and constitute trade secrets of Career Step. OzeTrainer shall not disclose, copy, transfer, licence, decompile or otherwise use such confidential information for any purpose other than the sales and marketing of the Course and the Products and Services unless they obtain the prior written consent of Career Step. OzeTrainer will use its best endeavours to ensure that its students will not disclose, de-compile or otherwise use such confidential information for any purpose unless they obtain the prior written consent of Career Step. (emphasis added)

Career Step, LLC v TalentMed Pty Ltd (No 2) **[2018] FCA 132 (28 February 2018)**

“In my opinion, the expression “such confidential information” does not impose a superadded requirement that the proprietary software and instructional materials be confidential, but is descriptive of the proprietary software and instructional materials the subject of the clause. In any event, I find that the proprietary software and instructional materials answer the description of confidential material as the students were granted access only through payment and if the proprietary software and instructional materials had been in the public domain TalentMed would not have entered into the agreement to be supplied with them.”

Career Step, LLC v TalentMed Pty Ltd (No 2) **[2018] FCA 132 (28 February 2018)**

4.2 Non-Disclosure. By its acceptance of the Course and the Products and Services made available to it by Career Step pursuant to this Agreement, whether disclosed or communicated to OzeTrainer concurrently with the execution of the Agreement or in the future, OzeTrainer acknowledges the confidential and proprietary nature of the Course and the Products and Services and further acknowledges Career Step as the originator and owner thereof. OzeTrainer agrees that it, including its employees, agents and independent contractors, shall not disclose the Course and the Product and Services, or information with respect thereto, which is not in the public domain, to third parties with our (sic) the prior written consent of Career Step.

Career Step, LLC v TalentMed Pty Ltd (No 2)

[2018] FCA 132 (28 February 2018)

- “I find that TalentMed used those instructional materials for a purpose other than the sales and marketing of the Course and the Products and Services and did so without obtaining the prior written consent of Career Step. The purpose was to supply content to TalentMed’s own course materials to replace Career Step’s.”
- “However, in relation to cl 4.2, I do not accept Career Step’s submission that TalentMed had breached this clause by including parts of Career Step’s material in TalentMed’s v1 and v2 courses and provision of those courses to its students since, as I have said, I do not regard the students as “third parties” within the meaning of the clause. I therefore find that TalentMed has not breached cl 4.2 in relation to either TalentMed v1 or TalentMed v2.”

Broker Genius, Inc. v Volpone 2018 WL 2175552 (S.D.N.Y. May 11, 2018)

- “We [i.e., Broker Genius] grant you a limited, conditional, no-cost, non-exclusive, non-transferable, non-sub-licensable license to view or use this Site or Apps and its Content as permitted by these Terms, as a condition precedent, you agree that you will not:
- Reproduce, modify, display, publicly perform, distribute or create derivative works of the Site or Apps or the Content”
- “The assent was recorded by Broker Genius in a spreadsheet with the user's email address and a timestamp and a server automatically generated three identical emails to: (1) Broker Genius's vice president of sales, (2) "sales@brokergenius.com," and (3) the email address the new user entered during registration.... Part of the registration process was a phone call between the new user and a Broker Genius employee; if the new user had not yet completed the steps to create the account including assenting to the Terms of Use, the new user would be required to do so during the phone call.”

Broker Genius, Inc. v Volpone 2018 WL 2175552 (S.D.N.Y. May 11, 2018)

- “As for how to interpret the contractual term “derived,” both sides apply the same definition from the Merriam-Webster Dictionary: “something that originates from something else.” (Koskinen Report 4; Martin Report 4.) Beyond that, the parties have not favored the Court with any view, argument, or authority on how the Court should interpret the contract in this breach of contract case.[14]”
- “Although federal copyright law has a well settled framework for determining whether one computer program is derived from another, it does not necessarily follow — and neither party asserts — that the parties here intended to import that copyright law framework into the prohibition against creating and distributing derivative works in the Terms of Use. Indeed, since the provision does not limit itself to copyrighted — or even copyrightable — elements, it may offer Broker Genius a broader scope of protection. Furthermore, Broker Genius expressly grounds its motion for a preliminary injunction on its breach of contract and unjust enrichment claims — not any copyright claim.” (footnote 14)

MediaLinx Printing Ltd. v. United Parcel Service Canada Ltd., 2018 ONSC 2946

- “Section 4. Exclusions of Warranties and Limitations of Damages.
- THE LICENSED PROGRAM IS PROVIDED TO CUSTOMER AND LICENSED ON AN “AS IS” BASIS. THERE ARE NO EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABLE QUALITY OR FITNESS FOR A PARTICULAR PURPOSE, WHETHER ARISING BY LAW OR BY STATUTE OR FROM COURSE OF DEALING OR USAGE OF TRADE. UPS ITS AGENTS AND SUPPLIERS SHALL IN NO EVENT BE LIABLE TO CUSTOMER FOR ANY DAMAGES, INCLUDING ANY INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, LOST PROFITS OR DAMAGED DATA, LOST SAVINGS OR OTHER SUCH DAMAGES ARISING OUT OF THE POSSIBILITY OF SUCH DAMAGES, REGARDLESS OF THE FORM OR CAUSE OF ACTION, WHETHER IN CONTRACT OR IN TORT, INCLUDING NEGLIGENCE OR FOR ANY CLAIM BY ANY OTHER PERSON OR ENTITY.”

MediaLinx Printing Ltd. v. United Parcel Service Canada Ltd., 2018 ONSC 2946

- “In Tercon, the Court at paras. 121-23, provided the framework for analyzing the applicability of an exclusion clause:
- (a) As a matter of contractual interpretation, does the exclusion clause apply to the circumstances as established by the evidence in the case?
- (b) If the exclusion clause applies, was the clause unconscionable at the time the contract was made, as might arise from situations of unequal bargaining power between the parties?
- (c) If the exclusion clause is held to be valid and applicable, should the Court nevertheless refuse to enforce the clause because of the existence of an overriding public policy concern?”

MediaLinx Printing Ltd. v. United Parcel Service Canada Ltd., 2018 ONSC 2946

- “On the first enquiry, the Exclusion Clause in the Software Agreement specifically excluded liability for lost profits from use of the “Licensed Program,” regardless of the form or cause of action, including breach of contract or negligence. The mark-up was enabled through the Cost Centre Calculator function in UPS Worldship, software provided by UPS under the Software Agreement. The alleged lost profits resulted from MediaLinx’s use of a Licensed Program. Giving the Exclusion Clause its “natural and true construction” based on the ordinary and grammatical meaning of the words used, I find that the Exclusion Clause applies to MediaLinx’s claim for lost profits from the deletion of the mark-up.
- In order to avoid the application of the exclusion clause, MediaLinx claims that the deletion of the mark-up took place when the UPS technician attended to upgrade the computer system from Windows XP to Windows 7, and that the changes involved were to the hardware and Microsoft software, and not to a “Licensed Program”. This argument is not supported by the evidence. The mark-up capacity was within UPS Worldship, not in Windows. If it was deleted, this would have been in the UPS software. Moreover, this argument is contradicted by the evidence of MediaLinx’s affiant, Mr. Lacaria, who recognized that the mark-up was still in place after the Windows upgrade, and that the mark-up was deleted when a subsequent technical issue was addressed remotely. In his affidavit, Mr. Lacaria specifically states that the mark-up was tested and worked after the upgrade.”

MediaLinx Printing Ltd. v. United Parcel Service Canada Ltd., 2018 ONSC 2946

- “The Exclusion Clause is broad, but not unconscionable on its terms. It excludes liability for lost profits, including for breach of contract or negligence, but is not so broad as to encompass wrongful or intentional conduct by UPS employees. Moreover, it was not so obscured as to escape attention: see *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 1997 CanLII 4452 (ON CA), 34 O.R. (3d) 1, at 11. The Exclusion Clause is the only provision of the one-page Software Agreement in upper case letters.
- In respect of unequal bargaining power, the Carrier Agreement and Software Agreement are clearly contracts that were drafted by UPS and presented to MediaLinx. While it is unlikely that MediaLinx could have bargained significantly with respect to the specific terms, other than applicable shipping rates, MediaLinx was not in a position of having no choice but to accept UPS’s terms. As UPS noted, MediaLinx could have gone to one of UPS’s competitors, including FedEx, with whom it contracted after the relationship with UPS came to an end. Moreover, there is no evidence that MediaLinx attempted, but was unable, to negotiate the terms of the Software Agreement or the Exclusion Clause.”

Computer Associates UK Ltd v The Software Incubator Ltd [2018] EWCA Civ 518 (19 March 2018)

- The appeal concerns the question as to whether a licence to use electronically supplied software amounts to the "sale of goods" under the Commercial Agents (Council Directive) Regulations.
- There is real force to Mr Dhillon's submission that the judge's conclusion would have unjust and unanticipated potential consequences in that it could lead to: i) the creation of proprietary rights which may, in the case of an insolvency of an IT company, enable a customer to assert a preferential position to the disadvantage of other creditors or adversely affect lenders who have drafted loan agreements and security rights on the basis of the law as previously understood; ii) the recognition of information as property which the law does not appear to have hitherto done; and iii) the creation of a new offence under the law of theft.

Great Minds v Fedex Office and Print Services, Inc (2nd.Cir, Mar. 21, 2018)

“We find that Great Minds' public license does not explicitly address whether licensees may engage third parties to assist them in exercising their own noncommercial use rights under the license. We hold that, in view of the absence of any clear license language to the contrary, licensees may use third-party agents such as commercial reproduction services in furtherance of their own permitted noncommercial uses. Because FedEx acted as the mere agent of licensee school districts when it reproduced Great Minds' materials, and because there is no dispute that the school districts themselves sought to use Great Minds' materials for permissible purposes, we conclude that FedEx's activities did not breach the license or violate Great Minds' copyright.”

Oracle USA, Inc v Rimini Street, Inc. **(9th.Cir.Jan. 8, 2018)**

“The ultimate question as to whether Rimini...violated the state computer laws by downloading content from Oracle's website was submitted to the jury, which found in favor of Oracle.... "in response to an increased volume of mass downloads through the use of automated tools, and other server and database pressures, Oracle America changed its website's Terms of Use to specifically prohibit the use of `any software routines commonly known as robots, spiders, scrapers, or any other automated means to access [the site] or any other Oracle accounts, systems or networks," a change which "prohibited the use of previously allowed automated downloading tools...Rimini... "began reusing automated tools on the website in violation of the Terms of Use (terms which it had to specifically agree to when logging on to the website) in order to download full libraries of support documents and files for entire software products lines—each involving hundreds of thousands of different files."

Oracle USA, Inc v Rimini Street, Inc. **(9th.Cir. Jan. 8, 2018)**

- “We hold that taking data using a method prohibited by the applicable terms of use, when the taking itself generally is permitted, does not violate the CDAFA...”
- “But the key to the state statutes is whether Rimini was authorized in the first instance to take and use the information that it downloaded...”
- “Because it indisputably had such authorization, at least at the time it took the data in the first instance, Rimini did not violate the state statutes. This result is consistent with our decision in *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1069 (9th Cir. 2016), cert. denied, 138 S. Ct. 313 (2017)...”

Privacy

Toronto Real Estate Board v. Commissioner of Competition, 2017 FCA 236

- “Many brokers operate sections of their websites where their clients can log in and view information, called “virtual office websites” or VOWs. TREB’s data feed delivers information to brokers to populate these sections of their websites. Importantly, not all information in the MLS database is included in the data feed. Certain data is excluded (the “disputed data”). However, TREB’s VOW Policy contains no restriction upon how its members can communicate the same disputed data to their clients through other delivery mechanisms. Consequentially, some information cannot be shared with clients in a VOW, but can be shared with them by other methods, such as in person, by email, or by fax.”
- “While the Listing Agreement used by TREB provides consent to some uses of personal information, TREB asserts that had the Tribunal examined it more closely, it would have found that the Listing Agreement did not provide sufficiently specific wording to permit disclosure of personal information in the VOW data feed. Specifically, TREB contends that the consents do not permit the distribution of the data over the internet, and that is qualitatively different from the distribution of the same information by person, fax, or email.”

Toronto Real Estate Board v. Commissioner of Competition, 2017 FCA 236

”PIPEDA requires that individuals consent to the collection, use, and disclosure of their personal information (sch. 1, clause 4.3.1). This consent must be informed (sch. 1, clause 4.3.2). Amendments in 2015 to this principle specified that for consent to be informed, the person must understand the “nature, purpose and consequences of the collection, use or disclosure of the personal information” (s. 6.1).”

Toronto Real Estate Board v. Commissioner of Competition, 2017 FCA 236

- “The Listing Agreement used by TREB for the Use and Distribution of Information clause reads:
 - The Seller acknowledges that the database, within the board’s MLS System is the property of the real estate board(s) and can be licensed, resold, or otherwise dealt with by the board(s). The Seller further acknowledges that the real estate board(s) may, during the term of the listing and thereafter, distribute the information in the database, within the board’s MLS System to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others; market the Property, at its option, in any medium, including electronic media; during the term of the listing and thereafter, compile, retain and publish any statistics including historical data within the board’s MLS System and retain, reproduce and display photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions which may be used by board members to conduct comparative analyses; and make such other use of the information as the Brokerage and/or real estate board(s) deem appropriate, in connection with the listing, marketing and selling of real estate during the term of the listing and thereafter.”

Toronto Real Estate Board v. Commissioner of Competition, 2017 FCA 236

“The Listing Agreement contains a clause governing the “Use and Distribution of Information”. TREB focuses on the consent to the collection, use, and disclosure of information for the purpose of listing and marketing of the Property itself but omits that part of the consent (in the same clause) that says the real estate board may “make such other use of the information as the Brokerage and/or real estate board(s) deem appropriate, in connection with the listing, marketing and selling of real estate during the term of the listing and thereafter.”” (emphasis added)

Toronto Real Estate Board v. Commissioner of Competition, 2017 FCA 236

“PIPEDA only requires new consent where information is used for a new purpose, not where it is distributed via new methods. The introduction of VOWs is not a new purpose—the purpose remains to provide residential real estate services and the Use and Distribution of Information clause contemplates the uses in question. The argument that the consents were insufficient—because they did not contemplate use of the internet in the manner targeted by the VOW Policy—does not accord with the unequivocal language of the consent.”

Note: Section 6.1 analysis?

OPC Guidelines for obtaining meaningful consent May 24, 2018

- OPC will begin to apply these guidelines on January 1, 2019.
- “Meaningful consent is an essential element of Canadian private sector privacy legislation. Under privacy laws, organizations are generally required to obtain meaningful consent for the collection, use and disclosure of personal information. However, advances in technology and the use of lengthy, legalistic privacy policies have too often served to make the control – and personal autonomy – that should be enabled by consent nothing more than illusory. Consent should remain central, but it is necessary to breathe life into the ways in which it is obtained.
- Building on previous publications examining the current state of consent, including challenges and potential solutions, this document sets out practical and actionable guidance regarding what organizations should do to ensure that they obtain meaningful consent.”

OPC Guidelines for obtaining meaningful consent May 24, 2018

→ **Must do:**

- To obtain meaningful consent and meet their related obligations under Canadian privacy law, organizations must:
 - Make privacy information readily available in complete form, while giving emphasis or bringing attention to four key elements:
 - What personal information is being collected, **with sufficient precision for individuals to meaningfully understand** what they are consenting to.
 - With which parties personal information is being shared
 - For what **purposes** personal information is being collected, used or disclosed, **in sufficient detail for individuals to meaningfully understand what they are consenting to.**
 - Risks of harm and other consequences

OPC Guidelines for obtaining meaningful consent May 24, 2018

- Provide information in manageable and easily-accessible ways.
- Make available to individuals a clear and easily accessible choice for any collection, use or disclosure that is not necessary to provide the product or service.
- Consider the perspective of your consumers, to ensure consent processes are user-friendly and generally understandable.
- Obtain consent when making significant changes to privacy practices, including use of data for new purposes or disclosures to new third parties.
- Only collect, use or disclose personal information for purposes that a reasonable person would consider appropriate, under the circumstances.
- Allow individuals to withdraw consent (subject to legal or contractual restrictions).

OPC Guidelines for obtaining meaningful consent May 24, 2018

- “**Form of consent:** Obtain explicit consent for collections, uses or disclosures which generally: (i) involves sensitive information; (ii) are outside the reasonable expectations of the individual; and/or (iii) create a meaningful residual risk of **significant** harm.”
- “**Consent and children:** Obtain consent from a parent or guardian for any individual unable to provide meaningful consent themselves (the OPC takes the position that, in all but exceptional circumstances, this means anyone under the age of 13), and ensure that the consent process for youth able to provide consent themselves reasonably considers their level of maturity.”

OPC Guidelines for obtaining meaningful consent May 24, 2018

Should do

- Allow individuals to control the amount of detail they wish to receive, and when.
- Design or adopt innovative and creative ways of obtaining consent, which are just-in-time, specific to the context, and suitable to the type of interface.
- Periodically remind individuals about the consent choices they have made, and those available to them.
- Periodically audit privacy communications to ensure they accurately reflect current personal information management practices.
- Stand ready to demonstrate compliance – in particular, that the consent process is understandable from the perspective of the user.

OPC Guidelines for obtaining meaningful consent May 24, 2018

In designing consent processes, consider:

- Consulting with users and seeking their input;
- Pilot testing or using focus groups to evaluate the understandability of documents;
- Involving user interaction / user experience (UI/UX) designers;
- Consulting with privacy experts and/or regulators; and/or,
- Following established best practices or standards.

OPC Guidance on inappropriate data practices: Interpretation and application of subsection 5(3), May 2018

- The OPC will begin to apply this guidance on July 1, 2018.
- “An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.”
- “Subsection 5(3) of PIPEDA is a critical gateway that either allows or prohibits organizations to collect, use and disclose personal information, depending on their purposes for doing so. It is the legal boundary that protects individuals from the inappropriate data practices of companies. It separates those legitimate information management practices that organizations may undertake in compliance with the law, from those areas in which organizations cannot venture, otherwise known as “No-go zones”.
- “Subsection 5(3) requires a balancing of these interests “viewed through the eyes of a reasonable person.””

OPC Guidance on inappropriate data practices: Interpretation and application of subsection 5(3), May 2018

- “...the following factors for evaluating whether an organization’s purpose was in compliance with subsection 5(3):
 - The degree of sensitivity of the personal information at issue;
 - Whether the organization’s purpose represents a legitimate need / *bona fide* business interest;
 - Whether the collection, use and disclosure would be effective in meeting the organization’s need;
 - Whether there are less invasive means of achieving the same ends at comparable cost and with comparable benefits; and
 - Whether the loss of privacy is proportional to the benefits.

OPC Guidance on inappropriate data practices: Interpretation and application of subsection 5(3), May 2018

→ **No Go Zones:**

- 1. Collection, use or disclosure that is otherwise unlawful.
- 2. Profiling or categorization that leads to unfair, unethical or discriminatory treatment contrary to human rights law
- 3. Collection, use or disclosure for purposes that are known or likely to cause significant harm to the individual
- 4. Publishing personal information with the intended purpose of charging individuals for its removal
- 5. Requiring passwords to social media accounts for the purpose of employee screening
- 6. Surveillance by an organization through audio or video functionality of the individual's own device

R. v. Marakah, 2017 SCC

- “The issue is whether the courts below erred in holding that an accused can never claim s. 8 protection for text messages accessed through a recipient’s phone because the sender has no privacy interest in the messages if they are not contained within his or her own device. The question is whether Mr. Marakah could have had a reasonable expectation of privacy in those messages.”
- “I conclude...that for the purpose of determining whether s. 8 is capable of protecting SMS or other text messages, the subject matter of the search is the electronic conversation between the sender and the recipient(s). This includes the existence of the conversation, the identities of the participants, the information shared, and any inferences about associations and activities that can be drawn from that information”.
- “Whether Mr. Marakah had a subjective expectation of privacy in the contents of his electronic conversation with Mr. Winchester has never been in serious dispute. Mr. Marakah’s evidence was that he expected Mr. Winchester to keep the contents of their electronic conversation private:”

R. v. Marakah, 2017 SCC

- “Electronic conversations, in sum, are capable of revealing a great deal of personal information. Preservation of a “zone of privacy” in which personal information is safe from state intrusion is the very purpose of s. 8 of the Charter... As the foregoing examples illustrate, this zone of privacy extends beyond one’s own mobile device; it can include the electronic conversations in which one shares private information with others. It is reasonable to expect these private interactions — and not just the contents of a particular cell phone at a particular point in time — to remain private.”
- “I conclude that the risk that Mr. Winchester could have disclosed the text messages does not negate Mr. Marakah’s control over the information contained therein. By choosing to send a text message by way of a private medium to a designated person, Mr. Marakah was exercising control over the electronic conversation. The risk that the recipient could have disclosed it, if he chose to, does not negate the reasonableness of Mr. Marakah’s expectation of privacy against state intrusion.”

R. v. Marakah, 2017 SCC

“I conclude that Mr. Marakah’s subjective expectation that his electronic conversation with Mr. Winchester would remain private was objectively reasonable in the totality of the circumstances. Each of the three factors relevant to this inquiry in this case, place, capacity to reveal personal information, and control, support this conclusion. If the place of the search is viewed as a private electronic space accessible by only Mr. Marakah and Mr. Winchester, Mr. Marakah’s reasonable expectation of privacy is clear. If the place of the search is viewed as Mr. Winchester’s phone, this reduces, but does not negate, Mr. Marakah’s expectation of privacy. The mere fact of the electronic conversation between the two men tended to reveal personal information about Mr. Marakah’s lifestyle; namely, that he was engaged in a criminal enterprise... This the police could glean when they had done no more than scrolled through Mr. Winchester’s messages and identified Mr. Marakah as one of his correspondents. In addition, Mr. Marakah exercised control over the informational content of the electronic conversation and the manner in which information was disclosed. Therefore, Mr. Marakah has standing to challenge the search and the admission of the evidence, even though the state accessed his electronic conversation with Mr. Winchester through the latter’s iPhone. This conclusion is not displaced by policy concerns.”

R. v. Marakah, 2017 SCC

“I conclude that in this case, Mr. Marakah had standing under s. 8 of the Charter. This is not to say, however, that every communication occurring through an electronic medium will attract a reasonable expectation of privacy and hence grant an accused standing to make arguments regarding s. 8 protection. This case does not concern, for example, messages posted on social media, conversations occurring in crowded Internet chat rooms, or comments posted on online message boards. On the facts of this case, Mr. Marakah had a reasonable expectation of privacy in the electronic conversation accessed through Mr. Winchester’s device; different facts may well lead to a different result.”

R. v. Jones, 2017 SCC 60

- “To be clear, the issue here is whether the sender of a text message has a reasonable expectation of privacy in records of that message stored in the service provider’s infrastructure. The further question of whether or not it is reasonable for that expectation to persist when the information is in the hands of the intended recipient is the focus of the Marakah appeal.”
- “TELUS implicitly acknowledges that, as a normative matter, it is reasonable to expect a service provider to keep information private where its receipt and retention of such information is incidental to its role of delivering private communications to the intended recipient. That is intuitive. One would not reasonably expect the service provider to share his text messages with an unintended recipient, or post them publicly for the world to see.”

R. v. Jones, 2017 SCC 60

- “Like the service provider in *Spencer*, the service provider here is subject to the provisions of PIPEDA, which strictly limit its ability to disclose information (see, e.g., ss. 3 , 5(3) and 7 of PIPEDA). As *Spencer* demonstrates, those limitations operate regardless of whether or not the target of the search is a subscriber of that particular service provider.”
- “The application judge’s finding that “[t]here is nothing to suggest that Telus was contractually bound to keep any of the records confidential” militated against the appellant’s s. 8 standing. I agree that this factor operates against the appellant. But in my view, it does so only to a limited extent. When considered in light of the totality of the circumstances, it does not defeat the appellant’s claim for standing.”

R. v. Jones, 2017 SCC 60

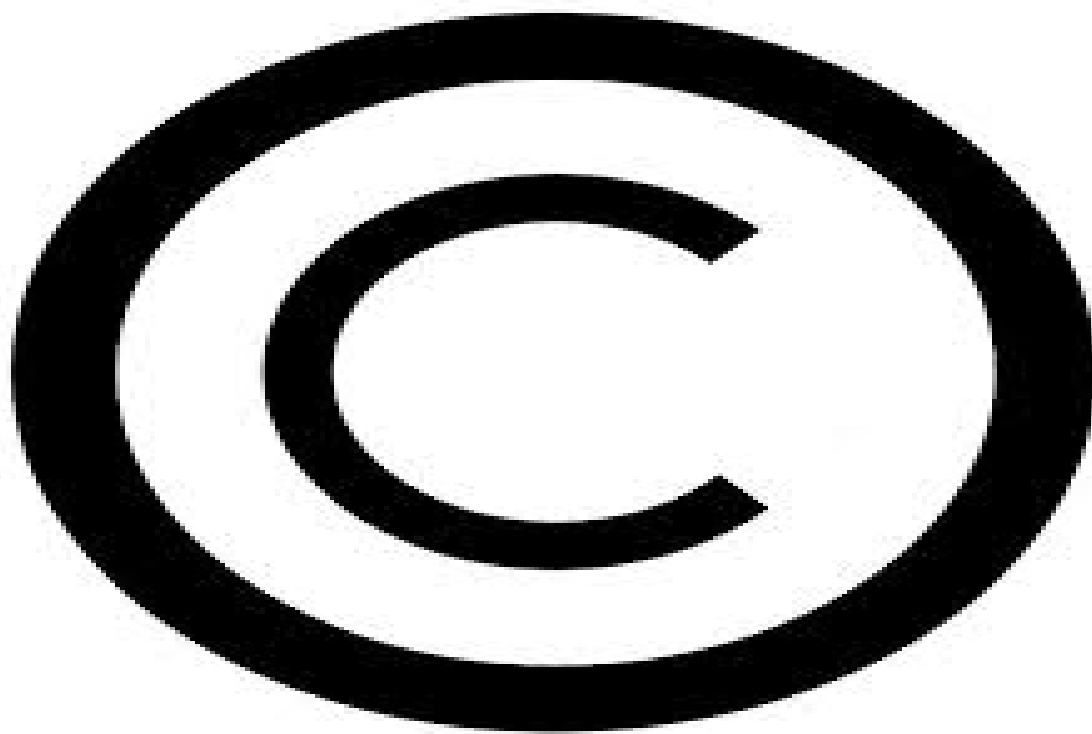
- “In short, the state action in this case respected Part VI’s distinction between the interception of communications in ss. 184 to 192 and the disclosure of previously intercepted and stored communications as contemplated by s. 193. Based on the evidence, it also respected the requirement in TELUS that a Part VI authorization be obtained for text messages that are still in the transmission process. Law enforcement cannot receive authorization to effectively intercept future communications through the “backdoor” of the general search and seizure regime in s. 487 of the Code. But law enforcement could — and did, in this case — lawfully obtain records of historical text messages by means of a Production Order under s. 487.012 of the Code (as they can still do now under s. 487.014).”
- “Production orders must therefore be carefully circumscribed to ensure that authorized police techniques comply with s. 184(1) . A production order must not authorize, or potentially authorize, the production of any text messages that are either not yet in existence or are still capable of delivery at the time the order is issued. This should be clear from the face of the order. Where the technique at issue is an intercept within the meaning of s. 184(1) , then the application is properly rejected and a Part VI authorization must be obtained. A production order should not be used to sidestep the more stringent Part VI authorization requirements.”

Draft OPC Position on Online Reputation

- ↪ “It is clear that Canadians need better tools to help them to protect their online reputation...”
- ↪ These measures include the right to ask search engines to de-index web pages that contain inaccurate, incomplete or outdated information; removal or amendment of information at the source; and education to help develop responsible, informed online citizens.
- ↪ “Two key mechanisms identified for enhancing one’s control over their online reputation – both of which can be found within PIPEDA – are de-indexing and source takedown.”
- ↪ Also, Towards Privacy by Design: Review of PIPEDA, Report of the Standing Committee on Access to Information, Privacy and Ethics. Feb, 2018.
- ↪ Savage v Data Protection Commissioner [2018] IEHC 122
- ↪ NT 1 & NT 2 v Google LLC [2018] EWHC 799 (QB) (13 April 2018)

GDPR





Oracle America, Inc. v Google LLC 886 F.3d 1179 (Fed.Cir.2018)

- “On this record, factors one and four weigh heavily against a finding of fair use, while factor two weighs in favor of such a finding and factor three is, at best, neutral. Weighing these factors together, we conclude that Google's use of the declaring code and SSO of the 37 API packages was not fair as a matter of law.
- We do not conclude that a fair use defense could never be sustained in an action involving the copying of computer code. Indeed, the Ninth Circuit has made it clear that some such uses can be fair. See Sony, 203 F.3d at 608; Sega, 977 F.2d at 1527-28. We hold that, given the facts relating to the copying at issue here—which differ materially from those at issue in *Sony* and *Sega*—Google's copying and use of this particular code was not fair as a matter of law.”

Oracle America, Inc. v Google LLC 886 F.3d 1179 (Fed.Cir.2018)

- “We conclude that allowing Google to commercially exploit Oracle's work will not advance the purposes of copyright in this case. Although Google could have furthered copyright's goals of promoting creative expression and innovation by developing its own APIs, or by licensing Oracle's APIs for use in developing a new platform, it chose to copy Oracle's creative efforts instead. There is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform.
- Even if we ignore the record evidence and assume that Oracle was not already licensing Java SE in the smartphone context, smartphones were undoubtedly a potential market. Android's release effectively replaced Java SE as the supplier of Oracle's copyrighted works and prevented Oracle from participating in developing markets. This superseding use is inherently unfair.”

Cedrom-SNI inc. c. Dose Pro Inc., 2017 QCCS

3383

- “The editors' testimony confirms that the title, as well as the primer, are thought and worked by their authors and it is not a coincidence, if the title and the primer are found in the publication of the newspaper.”
- “The Tribunal is satisfied that this use infringes the plaintiffs' copyright. It is possible, according to the evidence developed in a trial that this conclusion does not hold, but at the interlocutory stage a flexible interpretation of Article 3 (1) of the LDA , and the evidence received, confirm this.”
- Court concluding the use is not for an allowable purpose or fair.

Fox News Network, LLC v TVEyes, Inc. 883 F.3d 169 (2nd.Cir.2018)

- “We conclude that TVEyes's service is not justifiable as a fair use. As to the first factor, TVEyes's Watch function is at least somewhat transformative in that it renders convenient and efficient access to a subset of content; however, because the function does little if anything to change the content itself or the purpose for which the content is used, its transformative character is modest at best. Accordingly — and because the service at issue is commercial — the first factor favors TVEyes only slightly. The second factor is neutral in this case. The third factor strongly favors Fox because the Watch function allows TVEyes's clients to see and hear virtually all of the Fox programming that they wish. And the fourth factor favors Fox as well because TVEyes has usurped a function for which Fox is entitled to demand compensation under a licensing agreement.
- At bottom, TVEyes is unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to use, without payment or license. Having weighed the required factors, we conclude that the balance strongly favors Fox and defeats the defense of fair use.”

Cedrom-SNI inc. c. Dose Pro Inc., 2017 QCCS

3383

- “Dose Pro offers its clients, for remuneration, press reviews. According to the evidence, clients receive three times a day, five days a week, and once on Sunday, an email containing the press review. The service can cover up to 25 employees from the same company.
- In general, La Dose Pro reproduces the title of the article, the identity of the newspaper or media that published it, and the date and time of publication. Under the heading, there is a paragraph that some witnesses refer to as “ *lead* ”, which is the beginning of the article. The mailing also contains for each title and leader, an electronic link which allows the recipient, if he / she wishes, to go to the full article on the newspaper's website.”

Naruto v Slater 888 F.3d 418 (9th.Cir.2018)

- “ if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing. The Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute. Therefore, based on this court's precedent in *Cetacean*, *Naruto* lacks statutory standing to sue under the Copyright Act.”
- “Several provisions of the Copyright Act also persuade us against the conclusion that animals have statutory standing to sue under the Copyright Act ...("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). For example, the "children" of an "author," "whether legitimate or not," can inherit certain rights under the Copyright Act. See 17 U.S.C. §§ 101, 201, 203, 304. Also, an author's "widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest." *Id.* § 203(a)(2)(A). The terms "children," "grandchildren," "legitimate," "widow," and "widower" all imply humanity and necessarily exclude animals that do not marry and do not have heirs entitled to property by law.”

PropertyGuru Pte Ltd v 99 Pte Ltd [2018]

SGHC 52

- “The plaintiff’s claim to ownership of the watermarked photographs rests on...the fact that the plaintiff enhances the photographs posted on its website, such as by resizing them, altering the light balance and softening the edges of the images, and by adding the watermark...
- the alterations to the original photographs in the form of resizing, tweaking the light balance and softening the edges did not result in images substantially different from the original photographs... I do not mean to say that digital editing of a photograph can never result in an altered image which is an original work in its own right. The technical possibilities for editing an image are now fairly advanced. Conceivably, a photograph might be so substantially altered, in a manner which obviously required much skill and labour of an artistic nature as to qualify for copyright protection. On the facts of this particular case, however, the original and watermarked photographs are, if not for the watermark, virtually indistinguishable.”

MEI Fields Designs Ltd v Saffron Cards And Gifts Ltd & Anor [2018] EWHC 1332 (IPEC) (06 June 2018)

- “MFD submits in response that the junior designers assisted in the production of Mrs Fields’ greeting cards, but that they simply turned her designs into a digital form which could then be used for printing. Mrs Fields described this as no more than a mechanical process.”
- “Mrs Fields was unable to digitise her work for sending to India. She therefore worked with employees of Metropolis to digitise the work. In my judgment, this was no more than operating a scanner: the employees assisting Mrs Fields scanned the images and cleaned them up – they did not use sufficient skill, labour or judgment when doing so to qualify as joint authors.”

Rearden LLC v The Walt Disney Company **293 F.Supp. 963 (N.D.Cal.2018)**

“This action centers on the MOVA Contour Reality Capture Program ("MOVA Contour" or "MOVA"), which — as the name suggests — is a program for capturing the motion of the human face to create images used in motion pictures. Unlike previous motion capture technologies, the MOVA Contour Program "precisely captures and tracks the 3D shape and motion of a human face to sub-millimeter precision. The MOVA Contour system captures "an actor's performance frame-by-frame, and then creates original Contour Program output files based on the performance, frame-by-frame." ... The output files can be used for many different applications, such as "retargeting" the actor's face onto another real or fictional face.”

Rearden LLC v The Walt Disney Company **293 F.Supp. 963 (N.D.Cal.2018)**

- “The Court does not find it plausible that the MOVA Contour output is created by the program without any substantial contribution from the actors or directors. Unquestionably, the MOVA program does a significant amount of work to transform the two dimensional information captured on camera into three dimensional Captured Surface and Tracking Mesh outputs. But this cannot be enough, since all computer programs take inputs and turn them into outputs... Here, Rearden must allege that the MOVA program has done the "lion's share of the work," and in particular "the lion's share of the creativity" in creating the outputs. See Torah Soft, 136 F. Supp. 2d at 283.
- Rearden has not met this burden. Here, unlike in Torah Soft, where the user merely inputs a word into the program, MOVA Contour's user inputs a two dimensional camera capture that may range from Dan Stevens' "facial expressions of all the scenes we had done on previous days" to the "subtle and dynamic motions performed by the actor [Josh Brolin playing Thanos in Guardians of the Galaxy]" to "Brad Pitt's 44-year-old face." Defendants' role in creating the end-product is not so `marginal' that the output reflects the program's contents.“ See Design Data Corp, 847 F.3d at 1173.

Toronto Real Estate Board v. Commissioner of Competition, 2017 FCA 236

- “The Tribunal considered a number of criteria relevant to the determination of originality... Those included the process of data entry and its “almost instantaneous” appearance in the database. It found that “TREB’s specific compilation of data from real estate listings amounts to a mechanical exercise”. We find, on these facts, that the originality threshold was not met.
- In addition, we do not find persuasive the evidence that TREB has put forward relating to the use of the database. How a “work” is used casts little light on the question of originality. In addition, we agree with the Tribunal’s finding that while “TREB’s contracts with third parties refer to its copyright, [...] that does not amount to proving the degree of skill, judgment or labour needed to show originality and to satisfy the copyright requirements””.

Toronto Real Estate Board v. Commissioner of Competition, 2017 FCA 236

- “In *Tele-Direct* the Court found a compilation not to be original in part because it was done in accordance with “commonplace standards of selection in the industry” (paras. 6 - 7). Although *Tele-Direct* predates *CCH*, the proposition that industry standards may be relevant to the originality analysis is a legitimate, residual consideration (see e.g. *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, [2011 FC 340 \(CanLII\)](#) at paras. 34, 39, 65, 77, 182–188, 92 C.P.R. (4th) 6, aff’d [2012 FCA 226 \(CanLII\)](#) at paras. 37–38, 107 C.P.R. (4th) 1 (*Harmony FCA*); *Geophysical Service Inc. v Encana Corp.*, [2016 ABQB 230 \(CanLII\)](#) at para. 105, 38 Alta. L.R. (6th) 48 (*Geophysical*)).
- Applying the guidance of the Supreme Court in *CCH*, it is important to view adherence to industry standards as, at best, one factor to be considered amongst many. In *Geophysical*, Eidsvik J. explained there is no steadfast rule that “there is no entitlement to copyright protection ... where the selection or arrangement is directed by accepted and common industry practices”.

Technomed Ltd & Anor v Bluecrest Health Screening Ltd & Anor [2017] EWHC 2142 (Ch) (24 August 2017)

- “Technomed claims no rights in XML as a language: rather, it claims rights in data formats written in the XML language....
- Ms Heal submitted, and Mr Hill accepted in his written closing submissions, that the XML Format is not entitled to protection as a computer program (citing the Court of Justice in *C-406/10 SAS Institute Inc v World Programming Limited* [2012] RPC 31 and Arnold J in *SAS Institute Inc v World Programming Limited* [2013] EWHC 69 (Ch)). But Mr Hill submitted that the XML Format is entitled to protection as a literary work, in support of which he cited Arnold J at para 41 of *SAS Institute*. Ms Heal accepted in her written closing that the XML Format could be a literary work so long as it meets the intellectual creation test...
- Given my finding that the XML Format is a literary work protectable by copyright, I turn now to whether or not that copyright work was infringed. As noted above, by the defendants' own evidence, Technomed's XML Format was provided by Bluecrest to Express. So Express had the opportunity to copy it. The experts agreed that Express used the same schema as Technomed. Express has not put forward any evidence to establish independent creation. I therefore find that Express copied Technomed's XML Format, infringing its copyright.”

Technomed Ltd & Anor v Bluecrest Health Screening Ltd & Anor [2017] EWHC 2142 (Ch) (24 August 2017)

“Ms Heal submitted that no copyright could subsist in the Explanatory Materials because copyright does not protect ideas which are banal or commonplace in the field. In my judgment, that rather misses the point. The test for subsistence of copyright, which I have set out above, only requires the literary work (as is the case here) to pass a low threshold of originality... It is, in any event, not sufficient to defend a copyright infringement claim to say that the literary work is "derived from the standard texts, familiar to all in the field". It does not matter if the literary work contains no original thought. What matters is that the words used are a product of the author's intellectual effort. As Mr Hill put it, the Explanatory Materials undoubtedly involved non-negligible intellectual expression by Mr Hashemi. That is all that is required. I find that copyright subsists in the Explanatory Materials.”

SCOPE OF SECTION 2.4(1.1) OF THE COPYRIGHT ACT – MAKING AVAILABLE, Copyright Board, August 25, 2017

- “... subsection 2.4(1.1) of the Act deems the act of placing a work or other subject-matter on a server of a telecommunication network in a way that a request from a member of the public triggers the transmission of that work or subject matter, including in the form of a stream or download, whether or not such a request ever takes place, to be a communication to the public by telecommunication...
- The introduction of subsection 2.4(1.1) of the Act did not have the effect of overturning ESA. The interpretation we adopt here is not in conflict with the meaning of paragraph 3(1)(f) of the Act as described in that decision.
- The act of making a work available to the public remains a communication to the public by telecommunication regardless of whether the subsequent transmission is a download or a stream. It remains distinct from any subsequent act of transmission; the two acts do not merge and become a single, larger act.”

Bell Canada v Adam Lackman dba TVADDONS.AG 2018 FCA 42

“Pursuant to paragraph 3(1)(f) and section 27 of the Copyright Act, the appellants, as creators and distributors of television programs, have the sole right to communicate these works to the public by telecommunication and to authorize such act. There is clearly a strong prima facie case that the respondent, by hosting and distributing infringing add-ons, is making the appellants’ programs and stations available to the public by telecommunication in a way that allows users to access them from a place and at a time of their choosing, thereby infringing paragraph 2.4(1.1) and section 27 of the Copyright Act.”

Bell Canada v Adam Lackman dba TVADDONS.AG 2018 FCA 42

“It is also important to recall that the purpose of paragraph 2.4(1)(b) is to protect innocent disseminators. Again, I fail to understand how the respondent can cloak himself in the shroud of an innocent disseminator, when his website clearly targets those who want to circumvent the legal means of watching television programs and the related costs. By using the infringing add-ons that are promoted as being “the best”, “most popular” and “all free”...users can stream various types of television content from streaming sites immediately and for free. I do not think that Parliament envisioned this type of activity when paragraph 2.4(1)(b) was enacted.”

Keatley Surveying Ltd. v. Teranet Inc., 2017

ONCA 748

- “Section 12 of the Copyright Act does not limit publication to “first publication” in Canada. Instead, s. 12 refers to any work that is “published” under the direction or control of the Crown and provides for a period of copyright measured from the Crown’s “first publication” of the work. The question of whether the Crown has copyright under s. 12 of the Copyright Act, unlike its Australian counterpart, does not depend on whether the work has been previously published in Canada.
- In summary, I would hold that the extensive property-related rights bestowed on the Crown by the land registration scheme in Ontario compel the conclusion that the publishing of those plans, by making copies of the plans available to the public, is done under the “direction or control of Her Majesty.” Section 12 of the Copyright Act declares that the copyright in the registered or deposited plans of survey belongs to the Crown.”

The logo for Fair Play Canada is centered on the page. It consists of the words "FAIR" and "PLAY" stacked vertically in a large, bold, white, sans-serif font. The letter "Y" in "PLAY" is stylized with a white triangle pointing to the right, which serves as the tail of the letter. Below this, the word "CANADA" is written in a smaller, white, sans-serif font, with each letter separated by a small gap.

**FAIR
PLAY**

C A N A D A

Union Des Associations Européennes De Football v British Telecommunications Plc & Ors [2017] EWHC 3414 (Ch) (21 December 2017)

- “First, the need for such orders has been emphasised by further evidence which has become available since then as to the scale of the problem of illicit streaming. By way of example, in a report entitled Cracking Down on Digital Piracy published by the Federation Against Copyright Theft in September 2017, the UK Intellectual Property Office was quoted as saying that it believed that, at a conservative estimate, a million set-top boxes with software added to them to facilitate illegal streaming had been sold in the UK in the last couple of years.”
- Secondly, as noted in *FAPL v BT II* at [5], the evidence filed by FAPL in that case demonstrated that the order made in *FAPL v BT I* was very effective in achieving the blocking of access to the Target Servers during Premier League matches and that no evidence had been found of overblocking. The evidence filed in support of the present application is that the order made in *FAPL v BT II* has also been very effective and there is still no evidence of overblocking.”

***Voltage Pictures, LLC v. John Doe*, 2017 FCA 97** **(leave to appeal to Supreme Court granted, Case 37679)**

- “the internet service provider must maintain records in a manner and form that allows it to identify suspected infringers, to locate the relevant records, to identify the suspected infringers, to verify the identification work it has done (if necessary), to send the notices to the suspected infringers and the copyright owner, to translate the records (if necessary) into a manner and form that allows them both to be disclosed promptly and to be used by copyright owners and later the courts to determine the identity of the suspected infringers, and, finally, to keep the records ready for prompt disclosure.”
- “At present, no regulation has been passed. Thus, internet service providers such as Rogers cannot charge a fee for the discharge of their subsection 41.26(1) obligations, as significant as they are.”

Cartier International AG v British Telecommunications

PLC [2018] UKSC 28 (13 June 2018)

- “Website blocking orders clearly require more than the mere disclosure of information. But I think that it is clear from the authorities and correct in principle that orders for the disclosure of information are only one, admittedly common, category of order which a court may make against a third party to prevent the use of his facilities to commit or facilitate a wrong. I therefore agree with the view expressed by Briggs LJ in his dissenting judgment in the Court of Appeal that the website blocking order made in this case could have been made quite apart from the power derived from European law, on ordinary principles of equity.”

Cartier International AG v British Telecommunications

PLC [2018] UKSC 28 (13 June 2018)

- “It follows that in principle the rights-holders should indemnify the ISPs against their compliance costs. .. The indemnity must be limited to reasonable compliance costs. The evidence is that the compliance costs resulting from any one order are in fact modest. It is not suggested, nor is there any basis for suggesting that they are excessive, disproportionate or such as to impair the respondents’ practical ability to enforce their trade marks. ..
- It is critical to these conclusions that the intermediary in question is legally innocent. The appellants in this case are legally innocent because they are “mere conduits”. Different considerations may apply to intermediaries engaging in caching or hosting governed by articles 13 and 14 of the E-Commerce Directive, because these operations involve a greater degree of participation in the infringement, which is more likely to infringe national laws protecting intellectual property rights if the conditions of immunity are not satisfied.”





CASL

Compliance and Enforcement Decision CRTC

2017-367 (Oct 19, 2017)

- “In particular, the Commission determines that
- it has the jurisdiction to answer the constitutional issues raised by CompuFinder, and there is a sufficient factual foundation to address these issues;
- CASL is intra vires the federal Parliament’s legislative powers to enact;
- the statutory regime prohibiting the sending of commercial electronic messages without consent, subject to certain exceptions and exemptions, violates section 2(b) of the Canadian Charter of Rights and Freedoms (the Charter), but the infringement is justified under section 1;
- the impugned provisions of CASL do not, in themselves, result in the application of section 11 of the Charter to a person who has been issued and served with a notice of violation under CASL; and
- no violation of section 7 or 8 of the Charter has been established.

Accordingly, CompuFinder’s constitutional challenge of CASL has not succeeded.”

Compliance and Enforcement Decision CRTC

2017-367 (Oct 19, 2017)

- “...the Commission must inquire into whether the impugned provisions of the law minimally impair the Charter right or freedom. The question is whether there are less harmful means of achieving the same legislative goal.”
- “The Attorney General did not directly respond to each specific allegation of the law’s overreach. Instead, its main response to the overbreadth arguments raised by CompuFinder is that the Act does not impose a total ban on the sending of CEMs. Persons wishing to send commercial messages are not barred from using the Internet or email to advertise. In addition, the exceptions and exemptions to the general prohibition contained in section 6 of CASL act as levers that further limit the infringement of freedom of expression.”
- “...the Commission agrees with the Attorney General that the expression limited by CASL is substantially lessened as a result of its exceptions and exemptions. These exceptions, when taken as a whole, significantly narrow the application of section 6 and, as a result, on a balance of probabilities, the impugned provisions do not impair free expression more than necessary to achieve the objectives of CASL. In these circumstances, the limitations on the sending of CEMs are not unreasonable in light of their legislative purpose.”

Compliance and Enforcement Decision CRTC **2017-368 (Oct. 19, 2017)**

- “CompuFinder did not provide any further evidence to support its view that the employee who had previously taken the company’s course or the employee who approved payment for it created, or had authority to create, a relationship on behalf of the university, or intended to do so. In the Commission’s view, the mere fact that an organization paid for training on behalf of one of its employees is not sufficient to demonstrate that the organization had, or intended to create, a relationship that would allow for a complete exemption from section 6 of the Act that would permit the company providing the training to directly solicit every other employee.
- This invoice might be considered evidence of an existing business relationship with the specific employee who attended that training session, and such a relationship could create implied consent to send CEMs to that employee, pursuant to paragraph 10(9)(a) of the Act.”

Compliance and Enforcement Decision CRTC

2017-368 (Oct. 19, 2017)

“For some of the messages sent by CompuFinder, the publication requirement was not met. For example, CompuFinder sent messages to an employee of an Ontario-based cable company, but the hyperlink that CompuFinder provided to support that it had implied consent was to a third-party directory website. The publication of the address on that website appeared to be a reproduction of a portion of a cached webpage from another source. General information on that site regarding its information-gathering practices did not give any indication that the listings were user-submitted. Conspicuous publication requires that the person to whom the message is sent publish, or cause to be published, the address in question. The reproduction of a person’s contact information by a third party on its own initiative does not satisfy this requirement.”

Compliance and Enforcement Decision CRTC 2017-368 (Oct. 19, 2017)

“In another case, CompuFinder sent messages to an address associated with the operator of a Quebec-based martial arts school, which was also published in an online directory. In that instance, information on the site in question appeared to confirm that the database was driven by submissions from individual users. However, the site’s terms of use contained a disclaimer to the effect that users of the directory were not to send unsolicited CEMs to the addresses found in the directory. Therefore, the requirements of implied consent were not satisfied in this case either.”

Compliance and Enforcement Decision CRTC

2017-368 (Oct. 19, 2017)

- “The more significant issue with CompuFinder’s unsubscribe practices, however, was that a number of its messages (87 of the remaining pool of 317) contained two unsubscribe links, rather than one. One of these links appeared to function, and the other was observed by the designated person to produce an error when accessed...
- In the Electronic Commerce Protection Regulations (CRTC), the Commission prescribed in subsection 3(1) that “the unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act must be set out clearly and prominently.” The Commission further prescribed in subsection 3(2) that “the unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act must be able to be readily performed.”
- The 87 messages identified above did not meet these standards. While they contained a functioning unsubscribe link, many of them also contained a second unsubscribe link that did not function.”

Compliance and Enforcement Decision CRTC

2017-368 (Oct. 19, 2017)

- “The Commission considers that the magnitude of the AMP set out in the notice of violation does not appropriately reflect the Commission’s assessment, as set out above, of the applicable factors set out in section 20 of the Act and would not be proportionate to the violations of the Act in the circumstances...
- Having taken the investigation report and CompuFinder’s submissions into consideration in its review of the prescribed factors, the Commission determines that a total penalty of \$200,000 [from \$1.1 million] is appropriate, in light of the circumstances of the case, and is reasonable and necessary to promote CompuFinder’s compliance with the Act.”

Undertaking: 9118-9076 QUÉBEC INC. and 9310-6359
QUÉBEC INC. (514-BILLETS) (15 Mar. 2018)

- “Both corporations are responsible for sending commercial electronic messages (CEMs), mainly in the form of text messages (or SMS, for “Short Message Service”), promoting their commercial activities...
- The investigation alleged that [514 Billets] sent or caused or permitted to be sent CEMs between 1 July 2014 and 20 January 2016, without the recipients’ consent and without setting out the prescribed information enabling the recipients to easily identify and contact the sender.
- More specifically, the majority of CEMs sent were requests for consent, offering the recipients the opportunity to receive future commercial offers. These messages presented the following format: “ Would you like offers for discount tickets for [...] ” while sometimes including a short list of proposed event categories.”

Undertaking: 9118-9076 QUÉBEC INC. and 9310-6359
QUÉBEC INC. (514-BILLETS) (15 Mar. 2018)

- “According to section 4 of the *CRTC Regulations*, a request for consent must include a number of pieces of information, including the name, mailing address, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person seeking consent or, if different, the person on whose behalf consent is sought, as well as a statement indicating that the person whose consent is sought can withdraw their consent. With respect to text messages and other communication methods with a limited number of characters, subsection 2(2) of the *CRTC Regulations* provides that the information may be posted on a Web page that is readily accessible by the person by means of a hyperlink set out in the message.
- The information required for a request for consent was not indicated in the CEMs sent by 9118-9076 QUÉBEC INC. and 9310-6359 QUÉBEC INC, nor did they include a link to a Web page where the information could have been found.”

Undertaking: 9118-9076 QUÉBEC INC. and 9310-6359

QUÉBEC INC. (514-BILLETS) (15 Mar. 2018)

- “As part of the undertaking, [514 Billets] jointly and severally agreed to pay \$100,000 in compensation for the alleged violations. A \$25,000 amount was paid to the Receiver General for Canada, in accordance with subsection 28(3) of the Act. An additional \$75,000 amount will be paid out to 514-BILLETS customers in the form of 7,500 discount coupons with a \$10 value each.
- In addition to this monetary compensation, [514 Billets] have agreed to put in place a compliance program. This compliance program includes the review and revision of current compliance practices, the development and implementation of corporate policies and procedures designed to ensure compliance with the Act, the delivery of employee training, the implementation of adequate disciplinary measures in the event of non-compliance with internal procedures, the establishment of a thorough complaint monitoring and resolution structure related to CEMs sending, as well as various other monitoring and audit measures, such as mechanisms for reporting to CRTC staff concerning the program’s implementation.”

INDU Committee Report (December 2017)

- RECOMMENDATION 2 “The Committee recommends that the Government of Canada clarify the definition of “commercial electronic message” to ensure that the provisions as enacted in the Act and its regulations are clear and understandable for parties subject to the legislation and do not create unintended cost of compliance. In particular, the status of administrative and transactional messages should be clarified.”
- RECOMMENDATION 3 “The Committee recommends that the Government of Canada clarify the provisions pertaining to “implied consent” and “express consent” to ensure that the provisions as enacted in the Act and its regulations are clear and understandable for parties subject to the legislation and do not create unintended cost of compliance.”

INDU Committee Report (December 2017)

- RECOMMENDATION 4 “The Committee recommends that the Government of Canada clarify the definition of “electronic address” to ensure that the provisions as enacted in the Act are clear and understandable for parties subject to the legislation and do not create unintended cost of compliance.”
- RECOMMENDATION 6 “The Committee recommends that the Government of Canada clarify whether electronic messages listed under section 6(6) of the Act fall under the definition of “commercial electronic message.””

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