

2011 was a year of links, locks and bots

HI-TECH

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FOCUS ON YEAR IN REVIEW

This past year saw its share of advances in the technology sector, and Canadian law worked hard to keep up. Here are four developments in technology law and how they affect Canadians.

1. Delinking from defamation

Can one publisher be another's keeper? Not according to the Supreme Court of Canada, which recently decided that providing a hyperlink to a site that contains libel does not expose the publisher of the hyperlink to a defamation claim (*Crookes v Newton*, [2011] S.C.J. No. 47).

"If you say nothing defamatory, providing a hyperlink to another site that may doesn't make you responsible for what's on the other website," says Wendy Matheson, a partner with *Torys LLP* in Toronto.

She argued the *Crookes* case on behalf of the Canadian Civil Liberties Association.

"The court basically said that if hyperlinkers became publishers in the manner that was being requested, it would create a presumption of liability as the publisher for everything you link to. The court described that as untenable," she says.

"Hyperlinks are extremely important on the Internet. Our concern was that if there was liability associated with those choices, that liability would detract from the benefits of the Internet."

The court included some language to take future link technology into account, especially if the reader doesn't need to take any action to read the material being linked to.

2. Mi casa no es Zoocasa

Every moment of every day, bots visit websites all over the Internet doing a variety of things. Google's bots, for instance, scan websites to help Google index the web, making searches much faster than they would otherwise be.

Not all bots are as welcome as Google's though. Take *Zoocasa.com*, a Rogers subsidiary that lists real estate online à la Multiple Listings Service. *Zoocasa* sends bots to scrape listings off other sites to aggregate on *Zoocasa.com*.

Century 21, which also maintains a real estate listing site, claimed this scraping constitutes copyright infringement. Rogers, through *Zoocasa*, claimed this scraping was covered by fair use.

"The court said what Zoocasa did was a violation of the terms of use of the Century 21 website," says Richard Stobbe, an associate at Field Law's Calgary office and an expert in the field. He added that Century 21 received an award he calls "low-end."

Even though Century 21's terms of use are passive (i.e. you don't have to click through or indicate that you accepted them to use the site), the court claimed Zoocasa must have known those terms were there since Zoocasa has similar terms on its site.

"That was interesting," Stobbe says. "The court upheld the terms of use without the user having clicked through them."

Stobbe also says that Century 21 tried to argue that Zoocasa's bots trespassed onto Century 21's servers to scrape its content. The court didn't buy this argument since the servers hosting Century 21's web assets belong to a web host, not the real estate company.

Zoocasa.com still offers real estate listings. "One of their defences was that they simply aggregated listing data from realtors who agreed to the data compilation, but Century 21 was clear that the data that formed the basis for the lawsuit was not from willing participants," Stobbe says. "So the data is a mixed bag."

3. Can the law encourage better customer relations?

Commercial electronic messages (CEMs) differ from spam in that nobody knowingly gives consent to receive spam. But even though people might sign up to receive CEMs, they can also become unwanted, so the Canadian Radio-television and Telecommunications Commission (CRTC) published proposed Electronic Commerce Protection Regulations over the summer to better regulate their usage.

Christine Carron, a senior partner at Norton Rose OR's Montreal office, figures business may benefit from these regulations.

"Under the bill, people must give one of two kinds of consent to receive CEMs: express or implied," she explains. "Implied consent centres around an existing business relationship within the two years preceding the message."

"This would force businesses to stay in touch with their customer base," Carron continues. "Every time there's a purchase or a contract, you get an extra two years."

While businesses can understand the need for most of the regulations, Carron scratches her head over all the information companies need to send in a CEM as required by a section in the CRTC draft regulation, including: the physical and mailing address; a telephone number providing access to an agent or a voice messaging system; an email and web address of the person sending the message and, if different, the person on whose behalf the message is sent; any other electronic address used by those persons

"Why do you need all this information?" Carron asks. She adds that subsequent sections attempt to lighten the burden, stating that the information can be on a web page and not necessarily in the CEM.

She hopes these sections do not mar the final regulations. "You might have separate email addresses for suppliers, customers and other people," she argues. "Do you include all these different addresses in your CEMs?"

4. Fourth time lucky?

For the fourth time since 2005, legislation aimed at modernizing Canada's Copyright Act is making the rounds. The revisions contained in Bill C-11 are meant to better balance the rights of content consumers with those of producers, whose interests seem to be perpetually at odds.

Critics of the proposed revisions have zeroed in on the bill's protection of digital locks, or technical protection measures,

which producers embed in their creations to prevent unauthorized access and activities, especially copying.

The bill "makes it an infringement of copyright to circumvent digital locks," says Alexandra Stockwell, an associate in Stikeman Elliott LLP's Ottawa office.

Most people don't notice digital locks. They just use their DVDs, video games and other electronic purchases as the publishers intended. But some people want to perform activities that they view as legitimate and that call for circumvention of locks.

"If a producer puts technological protection measures on a product, it's now an infringement to circumvent that and make a backup copy," Stockwell says.

She has also heard of instances where people bought DVDs in places such as Europe. "They don't normally work on Canadian DVD players," she explains. "Making that foreign-bought DVD work on a Canadian player could be a legitimate reason to circumvent digital locks."

If the digital locks disagreement can be worked out, Bill C-11 should result in modernization of Canadian copyright legislation, Stockwell says. "For example, there's a time-shifting provision. People record programs to watch later. Nobody considers that a crime."

Stockwell admits that such activity dates to the era of VCRs. "It's taken a long time to get legal recognition of what people actually do."

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