

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Century 21 Canada Limited Partnership v.  
Rogers Communications Inc.*,  
2011 BCSC 1196

Date: 20110902  
Docket: S088463  
Registry: Vancouver

Between:

**Century 21 Canada Limited Partnership,  
Nechako Real Estate Ltd. doing business as  
Century 21 In Town Realty, Charles R. Bilash,  
Charles Bilash Personal Real Estate  
Corporation and Michael James Walton**

Plaintiffs

And:

**Rogers Communications Inc. and 2167961 Ontario Inc.  
doing business as Zoocasa Inc.**

Defendants

Before: The Honourable Mr. Justice R. Punnnett

## **Reasons for Judgment**

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Place and Date of Hearing:

Vancouver, B.C.  
May 19, 20 and 21, 2010

Place and Date of Judgment:

Vancouver, B.C.  
September 2, 2011

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[1] The ability of the law to adapt is part of its strength. Technological innovation tests that resilience. This case considers that ability as claims for breach of contract, trespass to chattels and copyright infringement meet the Internet. At the root of this lawsuit is the legitimacy of indexing publically accessible websites.

[2] The plaintiffs seek an injunction and damages against the defendants for their conduct in accessing Century 21 Canada's Website and copying photographs and text from that Website without consent.

### **Parties**

[3] The plaintiff, Century 21 Canada Limited Partnership, is a limited partnership and is the master franchisor of all independent real estate brokerage offices operated under the "Century 21" brand and trademarks in Canada ("Century 21").

[4] The plaintiff, Nechako Real Estate Ltd. ("Nechako"), does business as Century 21 In Town Realty ("In Town Realty") as a real estate broker pursuant to a Century 21 franchise agreement with Century 21.

[5] The plaintiffs, Charles R. Bilash ("Bilash") and Michael James Walton ("Walton"), are licenced real estate salespersons engaged by In Town Realty.

[6] The defendant 2167961 Ontario Inc., doing business as Zoocasa ("Zoocasa") is a wholly owned subsidiary of Rogers Communications Inc. ("Rogers").

[7] The plaintiff claims against the defendant Rogers on the basis it participated in creating, developing, maintaining and marketing the Zoocasa Website.

### **Overview**

[8] This case arises from the desire of Century 21 to allow public access to its Website, yet at the same time limit commercial access by its competitors. These competing goals have given rise to this dispute over the defendant Zoocasa's access to and use of the plaintiffs' Website and its contents.

[9] The actions of the defendants that are complained of evolved during the course of this litigation. The plaintiffs allege that Zoocasa was bound by the Terms of Use of the Century 21 Website and breached them. It is also alleged that the defendant Zoocasa breached copyright held by the plaintiffs. The claims against the defendant Rogers are that Rogers authorized the breach of copyright contrary to s. 27 of the *Copyright Act*, R.S.C. 1985, c. C-42 and, in the alternative, that Roger's induced the breach of contract by Zoocasa.

### **Terminology**

[10] While the Internet has become part of contemporary society some of the terminology involved may still not have wide exposure. As a result defining of some of the terms is necessary.

- a. ***Hyperlink***: *Computing* a link from a hypertext document to another location, activated by clicking on a highlighted word or image: Concise Oxford English Dictionary.
- b. ***Indexing***: The extraction of index terms from web pages without specific layouts or formatting: Expert Report of John Levine.
- c. ***Scraping***: A form of indexing that looks for specific information located in known positions on selected web pages with known layouts. Used particularly to build specialized websites combining information from other websites. The defendants' expert opines that there is no generally accepted definition in law in Canada of scraping but it is acknowledged to be a subset of indexing:
- d. ***Frame (Framing)***: *Computing* a graphic panel in an Internet browser which encloses a self-contained section of data and permits multiple independent document viewing: Concise Oxford English Dictionary.
- e. ***Robot.txt file***: A robot.txt file contains code that can be read by the automated software programs called robots or spiders that are used by search engines to index websites. To function they require that they

know the name of the search engines robot: Expert Report of John Levine.

- f. **Cache (Caching):** an auxiliary memory from which high-speed retrieval is possible: Concise Oxford English Dictionary.
- g. **Hosting or Host:** a computer which mediates multiple access to databases or provides other services to a network: Concise Oxford English Dictionary.
- h. **IP Address:** Computing Internet Protocol: Concise Oxford English Dictionary.

### **Facts**

[11] Century 21 developed and promotes its real estate website, which is found at the uniform (or universal) resource locator (“URL”) address [www.century21.ca](http://www.century21.ca) (the “Century 21 Website” or the “Website”). The Website is hosted by [www.WhereToLive.com](http://www.WhereToLive.com) in the state of Minnesota (“WTL”).

[12] The Century 21 Website features property listings belonging to Century 21 brokers and agents from British Columbia and across Canada. It allows users to search for properties by location, price and other features or attributes of the property. The Century 21 Website features, among other things, property listings belonging to In Town Realty and its representatives, Bilash and Walton.

[13] The goal of Century 21 in creating the Website was to create a site superior to their competitors that would give them a competitive advantage for their franchisees and salespersons. The Website features among other things property listings belonging to In Town Realty and its representatives Bilash and Walton.

[14] Century 21, Bilash, Charles Bilash Personal Real Estate Corporation, In Town Realty and Walton claim copyright protection for photographs of properties listed for sale along with prose descriptions of the properties and property details (the “Works”).

[15] Century 21 also claims copyright protection of property listings and photographs pursuant to an Assignment of Copyright Agreement with Bilash and Walton (the “Assignment”). According to Century 21, the Assignment was created to simplify this proceeding such that the claim for copyright protection may now lie with Century 21.

[16] The defendant Zoocasa created, developed, maintains and markets a website found at the URL address [www.zoocasa.com](http://www.zoocasa.com) (the “Zoocasa Website”).

[17] The Zoocasa Website includes the following content:

- a. background information regarding the municipalities or neighbourhoods in which particular property listings are located including mapping, satellite imagery, street level photography, neighbourhood descriptions, schools information, demographic information and a “walkscore” for the neighbourhood rating how conveniently amenities can be reached on foot;
- b. a hyperlink for each property listing that directs the user to the website of the listing agent or broker for that property listing;
- c. revenue-generating advertisements, including advertisements targeted to persons in British Columbia when the Zoocasa Website is accessed by users in British Columbia; and
- d. photographs, written descriptions and other information regarding residential property listings in British Columbia and across Canada;

[18] The concept behind the Zoocasa Website is to offer consumers an Internet tool that approaches house buying in the way that consumers do, with the focus not on large geographic areas, but rather on the neighbourhood. This approach provides consumers with information such as whether a listing is near a good school or how far away shopping or work would be. As a result it purports to provide a service of value to the consumer.



[19] The Zoocasa Website functions as a type of search engine, indexing property listings from a number of real estate websites and returning relevant ones in response to search queries by a site visitor such as: location, price, number of bedrooms, etc. Zoocasa then brings together different neighbourhood information together with listing "hits", including mapping, street level photography, school descriptions, neighbourhood descriptions and demographic information.

[20] Zoocasa is however a "vertical search engine", as opposed to a general one, as it is a search engine focused on one area -- real-estate listings in Canada. Initially, Zoocasa indexed and displayed to users information that included a property's address, price, number of bedrooms, a varying number of the characters of the property description and a photograph of the listing from the source website. The user could then click through to the originating site for more detailed information.

[21] In November 2008, Zoocasa changed its indexing practices to limit its indexing to truncated real property descriptions. It found that the rate of "click-throughs" increased when less information was provided.

[22] The plaintiffs, Bilash and Walton, have not given permission to the defendants to copy or use the content of their respective real estate listings. They object to the use of their content by the defendants. Century 21 has never given its consent to either Zoocasa or Rogers to index the Century 21 Website.

### **Chronology**

[23] Rogers New Ventures, a division of Rogers, commenced development of Zoocasa in the spring of 2007. In the summer of 2007, Rogers started building a search engine.

[24] Darren Phillipson, an employee of Rogers registered the domain name for the Zoocasa Website on January 19, 2007. Zoocasa was incorporated on March 28, 2008, as 2167961 Ontario Inc. and was first launched to the public in August 2008.

[25] The plaintiff Century 21 first became aware of Zoocasa in August 2008, when representatives of Rogers made a presentation to Century 21 seeking their cooperation in Zoocasa's plans. Despite Rogers' overtures, Century 21 decided not to participate or cooperate with Zoocasa. Notwithstanding that, Zoocasa proceeded to access the Century 21 Website.

[26] On September 2, 2008, Century 21 Canada's solicitors advised Zoocasa, by a letter to Rogers, that Century 21 did not consent to Zoocasa downloading or copying any material from their Website.

[27] On October 5, 2008, Century 21 placed the Terms of Use on their Website, and they have not been amended since.

[28] On October 6, 2008, Century 21's solicitors, again by letter, advised solicitors for Zoocasa and Rogers that their client did not consent to Zoocasa's activity and demanded that they remove all of their materials from Zoocasa's Website and sever all links. They also advised Zoocasa's solicitors of the existence of the Terms of Use and their alleged breach of them. Zoocasa requested further meetings with Century 21.

[29] Once again on October 17, 2008, solicitors for Century 21 advised solicitors for Zoocasa and Rogers that their client was not interested in any negotiations and that it appeared litigation was necessary to resolve matters.

[30] On November 6, 2008, solicitors for Century 21 wrote to solicitors for Zoocasa advising them that their conduct in continuing to access the Century 21 Website was putting Century 21 at risk of losing access to the Multiple Listing Service database.

[31] On November 20, 2008, Zoocasa commenced displaying truncated property descriptions instead of complete property descriptions.

[32] On December 2, 2008 Bilash, Walton and In Town Realty signed Copyright Licence Agreements with Century 21 and assigned to Century 21 the right to bring

an action for copyright infringement. On December 3, 2008, this action was commenced.

[33] On August 20, 2009, Zoocasa began “framing” indexed site information.

[34] On December 15, 2009, Zoocasa ceased framing.

[35] On February 12, 2010, Charles Bilash Personal Real Estate Corporation signed a Copyright Licence Agreement with Century 21 and assigned to Century 21 its right to bring action for copyright infringement.

[36] Zoocasa’s search engines stopped indexing the Century 21 Website in early 2010 and stopped indexing Century 21 listings on March 5, 2010, save and except for cases where individual real estate agents or salespeople requested that their listings be indexed by Zoocasa. Zoocasa now states it will not index the Century 21 Website further without the permission of Century 21.

#### **Findings Respecting Activities of Zoocasa**

[37] Initially, the Zoocasa Website indexed and linked to the Century 21 Website. It is not disputed that the Zoocasa’s robot accessed the Century 21 Website once a day. Such access included a group of requests as opposed to one request. For example, in accessing the listings of Century 21, Zoocasa would access all of the listings as part of that once a day request. The robot would then index the page for information, assess its relevance and continue to the next web page.

[38] Zoocasa took data from certain fields on the Century 21 Website and put it in certain fields in the display of the Zoocasa Website. Initially this included the full property description. As noted earlier, this practice ceased on November 20, 2008.

[39] The Zoocasa Website also included reproductions and republications of the Works in full and hyperlinks that directed their users to specific pages of the Century 21 Website that contained property listings, both with respect to the Works and with respect to property listings of other Century 21 brokers and agents.

[40] Zoocasa acknowledged that they could stop indexing the Century 21 Website by removing it from their list of websites to be indexed. It confirmed it could do so within a week. Despite the letters from solicitors for the plaintiffs, Zoocasa chose not to do so until early 2010, nearly 2½ years after Century 21 first advised Zoocasa they did not consent to Zoocasa's activities and advised them of the Century 21 Terms of Use and Zoocasa's alleged breach of these terms.

[41] It is clear that Zoocasa's operations are commercial in nature. Interestingly, Zoocasa has posted on its site Terms of Use that are similar to those used by the plaintiff. In addition, Zoocasa uses the robot.txt exclusion itself, to prevent others from indexing its site, but does not make available the name of its spider so that others can use the robot.txt exclusion to exclude Zoocasa from indexing their sites.

### **Issues**

[42] The issues in this case are as follows:

- a. Are the Terms of Use an enforceable contract between the parties?
- b. Has there been copyright infringement by the defendant Zoocasa?
- c. Has the defendant Zoocasa committed the tort of trespass to chattels in accessing Century 21's Website?
- d. Is Rogers liable for the actions of Zoocasa?
- e. Are the plaintiffs entitled to injunctive relief?
- f. Are damages recoverable for breach of copyright?
- g. Are damages recoverable for breach of contract?

**Preliminary Matters**

**Expert Reports**

[43] The parties filed expert reports with respect to certain technical matters relating to the claims. The plaintiffs filed a report from John Levine. The defendants' response report is that of Samuel E. Trosow. The plaintiffs also filed a reply report from John Levine. The defendants object to the admission into evidence of the John Levine reports.

[44] There is no dispute respecting the general principles applicable to expert reports. Expert evidence must not be argumentative, it must not consist of findings of fact or conclusions of law and the facts upon which the expert opinion is founded must be included in the report: See *Cogar Estate v. Central Mountain Air Services Ltd.*, [1990] B.C.W.L.D. 1422 (S.C.), appeal dismissed (1992), 72 B.C.L.R. (2d) 292 (C.A.); *Emil Anderson Construction Co. v. British Columbia Railway Co.* (1987), 17 B.C.L.R. (2d) 357 (S.C.) at 359-360; *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* (1988), 29 B.C.L.R. (2d) 127 (S.C.); *Goerzen v. Sjolie* (1997), 86 B.C.A.C. 44 at paras. 16-24 (C.A.).

[45] With respect to a reply report of an expert it must be limited to a response to the expert evidence to which it is a reply: *Canadian National Railway Co. v. Canada*, 2002 BCSC 1669.

**Discussion of Expert Reports**

**Report of Dr. John R. Levine**

[46] The report of Dr. John R. Levine addresses the use and operation of search engines on the Internet. The expertise of Dr. Levine is not challenged nor are his comments respecting what is effectively "trade usage" on the Internet in relation to the operation of general search engines. The defendants however do object to those portions of the report that comment on Zoocasa's alleged failure to comply with certain conventions commonly used by search engines.

[47] The first objection of the defendants is specifically to those portions of John Levine's report that characterize the conduct of the defendants. The wording they object to is contained in three paragraphs which comment on whether search engines that do not comply with the conventions are "reputable" or "legitimate". The specific paragraphs objected to are:

16. As a concrete example, Google Web Search's automated software program is known as the "Googlebot." The Googlebot crawls Internet websites to enable Google to create its index. In my experience, I have found that the Googlebot, like the spiders at all reputable search engines, respects the industry-standard protocols concerning crawling, indexing and caching web pages...

30. In my experience, it is standard industry practice that all legitimate search engines disclose the name of their web spiders, and make that information easy to find.

33. In my experience, all legitimate search engines follow the robot exclusion protocol, and manage their indices in accordance with the instructions in robots.txt. The search engines that do not follow the protocol generally are run for unethical or illegal purposes, such as collecting e-mail addresses for spamming, or looking for security holes that can be exploited by malicious software ("malware").

[48] The use of terms such as "reputable", "unethical", "illegal" or "legitimate" is, in my view, outside the scope of Dr. Levine's expertise and usurps the role of the court in determining what are issues of law and value judgments. Whether or not a practice is "legitimate" is clearly an issue requiring a legal conclusion. That is the role of the court, not the expert. Such terms raise the appearance of advocacy rather than independent expert evidence.

[49] The defendants also object to para. 36. Reference must be made to paras. 34-35 in order to place para. 36 in context:

34. Specialized search engines sometimes use a modified indexing scheme informally known as "scraping". The distinction between scraping and regular indexing is that scraping looks for specific information located in known positions on selected web pages with known layouts, while indexing uses more general techniques to extract index terms from web pages without specific layouts or formats.

35. In recent years, web scraping has become a common way to build specialized web sites combining information from other web sites, with the other sites' consent. Examples include travel price comparison web sites

such as kayak.com which scrape fare and schedule information from multiple airline and travel agent web sites to create combined listings showing the best prices and schedules.

36. In this case, it is straightforward to determine what Zoocasa is doing. Their web site contains highly structured entries for each listed property, specifically showing the address, asking price, offering agent, number of bedrooms and bathrooms, property description, and a property photograph. The only plausible ways for Zoocasa to present this level of detail is either for the listing agents to provide the data directly, or for Zoocasa to scrape the details from pages of the source web sites. Since I am informed that Century 21 is not voluntarily providing any information to Zoocasa, the Zoocasa entries for Century 21 listings must have been created by scraping. Their site also provides conventional search by keyword, which shows they are also indexing the pages they spider.

[50] The defendants submit that the words in para. 36 stating “in this case, it is straightforward to determine what Zoocasa is doing” are objectionable because there is no disclosure of what facts or materials are relied upon and, in addition, the statement purports to make determinations of fact that are properly the function of the court.

[51] The objections are well founded. I am satisfied however that the report is admissible with editing of the offending paragraphs. The editing is ordered as follows:

- a. Paragraph 16 is amended by removing the words “In my experience, I have found that the Googlebot, like the spiders at all reputable search engines, respects the industry-standard protocols concerning crawling, indexing and caching web pages ...”;
- b. Paragraphs 30 and 33 are deleted from the report; and,
- c. Paragraph 36 is deleted from the report as it makes factual determinations that are outside the purview of an expert.

#### **Report of Samuel E. Trosow**

[52] The report of Mr. Trosow was filed by the defendants. The plaintiffs do not object to its content. The report of Mr. Trosow comments on the importance of

linking and indexing to the functioning of the World Wide Web. It confirms that linking is fundamental to the operation of the web and that indexing facilitates access. He also confirms that Zoocasa links to external websites and that it indexes such sites although he notes that “Canadian jurisprudence has not yet developed specific and particular definitions for concepts such as “indexing” and the usage among various user communities varies”.

[53] In addition he opines that “scraping” is not clearly defined and is currently an informal term although he would characterize it as a subset of the broader concept of indexing. His comments on those portions of Dr. Levine’s report that have been excised are no longer of relevance. However, he does end his report by saying:

... The relevant question in my view is whether the materials are being utilized in a transformative manner in order to provide a usable and informative aid for the end-user searching for information about listings.

[54] “Transformative use” is an American concept and one that I will address later in these reasons in the context of copyright infringement and fair dealing.

### **Reply Report of Dr. John L. Levine**

[55] The defendants’ objection to the reply report is that it states that Dr. Levine has reviewed the Trosow report and the affidavits of J. R. Langlois and Michael Lee filed on behalf of the defendants but fails to respond to any matters in the Trosow report. They state that it responds only to the fact evidence of Mr. Langlois.

[56] In my opinion, the real issue is that the content of the reply report is argumentative and judgmental. Rule 11-2 (1) states:

#### **Duty of expert witness**

(1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

[57] The following principals are to be considered when assessing expert reports that are overly argumentative:



- a. Inferences which should be drawn from the proven facts are, in most situations, for the court not the experts. The report draws many inferences which are then used to support the opinions expressed: *Emil Anderson* at 32-33.
- b. It is unnecessary ... for experts to perform the court's function or for counsel to adduce arguments in the guise of evidence: *Sengbusch v. Priest et al* (1987), 14 B.C.L.R. (2d) 26, at 40 (B.C.S.C.).
- c. [An expert] may not assess the value or justifiability of the [Claimant's] claim: *Quintette Coal Limited v. Bow Valley Resource Services Ltd.* (1988), 29 B.C.L.R. (2d) 127 at 130 (B.C.S.C.).

[58] The last two sentences of paragraph 4 and all of paragraphs 5 and 6 of the Levine Reply Report are inadmissible on the basis that they are argumentative and do not fall within the purview of an expert report. Furthermore, those paragraphs dispute certain factual evidence of a witness and attempt to draw inferences and conclusions based on these facts. I do not find it necessary to deal with the defendant's contention that the reply report fails to respond to the Trosow report. Even if I were to find that the reply report was proper in form, the noted portions would still be inadmissible for the reasons stated above.

## **Contract**

### **Breach of Contract: Terms of Use**

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

contractual terms. This raises issues respecting the formation of a contract, standard form contracts and electronic contracts.

### **The Terms of Use**

[60] The relevant provisions of the Terms of Use of Century 21 Limited's Website are as follows:

#### **CENTURY 21 CANADA LIMITED PARTNERSHIP WEBSITE TERMS OF USE**

THESE TERMS OF USE CONTAIN LEGAL OBLIGATIONS. PLEASE READ THESE TERMS OF USE BEFORE USING THIS WEBSITE.

##### **Acceptance of these Terms of Use and any Revisions thereto**

Century 21 Canada Limited Partnership ("**CENTURY 21**") provides this website (the "**Website**") to you ("**You**") subject to your acceptance of the following terms and conditions of use (these "**Terms of Use**"). By accessing or using the Website You agree to be bound by these Terms of Use without limitation or qualification. If You do not agree to be bound by these Terms of Use, You must not access or use the Website.

CENTURY 21 may, at any time, without notice or liability, revise these Terms of Use by updating this posting. You should periodically revisit this posting to review any revisions to these Terms of use. If any revision is not acceptable to You, You must cease accessing and using the Website. If You continue to access or use the Website after any revisions are posted You will be deemed to have accepted those revisions.

##### **Use and Restrictions**

You may access and use the Website and the information, features and services thereon (collectively, the "**Content**") only in accordance with all applicable laws and regulations and with these Terms of Use.

Subject to these Terms of Use, CENTURY 21 grants You a non-exclusive, non-transferable, revocable licence to use the Website and the Content solely for your own personal and non-commercial use. Content may only be printed, copied or saved onto your own computer for your personal and non-commercial use.

You must not, directly or indirectly, print, copy, reproduce, save onto your own computer, modify, translate, merge with other data, frame in another website, post on another website, or otherwise use the Content for any public, commercial or non-personal purpose. You must not, directly or indirectly, display, post, disseminate, distribute, publish, broadcast, transfer, sell or sublicense the Content to another individual or entity. The prohibited uses expressly include but are not limited to "screen scraping", "database scraping" and any other activity intended to collect, store, re-organize, summarize or manipulate any Content (whether via an automatic program or a manual process).

...

**Intellectual Property Rights**

The Website and all of the Content (including the organization and layout of the Website and all software used in connection with the Website) are, and at all times remain, the property of CENTURY 21, its franchisees, brokers, sales people and/or licensors. The Website and all of the Content are protected by intellectual property rights owned by CENTURY 21, its franchisees, brokers, sales people and/or licensors. You agree to abide by all intellectual property notices, information and restrictions on, or displayed with, the Content. Note that any Content owned by CENTURY 21's franchisees, brokers, sales people or licensors may be subject to additional restrictions.

...

The display of the Content, the CENTURY 21 IP and the Third Party IP on the Website does not convey or create any licence or other rights in any of the Content, the CENTURY 21 IP or the Third Party IP. You acknowledge and agree that You do not acquire:

1. any ownership rights in any of the Content, the CENTURY 21 IP or the Third Party IP;
2. any right to use any of the Content, the CENTURY 21 IP or the Third Party IP for commercial purposes including sale, resale, licence or sublicense; or
3. any right to reproduce, distribute, display, post, disseminate, publish, broadcast, or transfer any of the Content, the CENTURY 21 IP or the Third Party IP.

Use of any of the Content, the CENTURY 21 IP or the Third Party IP, without the prior written consent of CENTURY 21, or the applicable franchisee, broker, sales person, licensor or third party, is strictly prohibited.

...

**Links to the Website on Third Party Websites**

If You want to include a link to the Website on your website (the “**Third Party Link**”), You must:

1. provide CENTURY 21 with prior written notice describing the nature and features of your website and the proposed appearance and location of the Third Party Link; and
2. obtain the prior written consent of CENTURY 21 to establish the Third Party Link and abide by any terms and conditions required by CENTURY 21 as part of its consent.

CENTURY 21 may at any time, in its sole and absolute discretion, revoke its consent to establish a Third Party Link, with or without cause, upon reasonable notice to You. Upon exercise of this right by CENTURY 21, You must immediately remove all of your links to the Website and must cease all use of the CENTURY 21 IP. If You refuse or neglect to remove all of your links to the Website or to cease using the IP, You acknowledge that such refusal or neglect will result in immediate and irreparable damage to

CENTURY 21 and that CENTURY 21 shall be entitled to relief in the way of temporary and permanent injunctions and such other and further relief as a court may deem just and proper.

...

**Guarantees**

You represent and warrant that:

...

3. You will use the Website only for your personal and non-commercial use and only as authorized by these Terms of Use.
4. You are fully able and competent to enter into, and abide by, these Terms of Use.

...

**Plaintiffs' Argument**

[61] The plaintiffs submit that the legal principals developed with respect to the law of contract remain intact and have adapted to new technology such as the Internet. They submit that Terms of Use displayed on a website can constitute a binding contract between the owner of the website and its users. They rely on established principles of contract law that they say are applicable to electronic contracts. They state that the Terms of Use found on the Century 21 Website constitute the terms of a contract between Century 21 and those who, with notice of the Terms of Use, choose to use the Century 21 Website.

**Defendants' Argument**

[62] The defendants submit that visitors to the Century 21 Website are not required to read or agree to the Terms of Use. They state that they are not prominently displayed. They allege they are an attempt to impose a unilateral contract. They argue that Zoocasa never agreed to the Terms of Use and that there was no consideration.

[63] The defendants submit that the Terms of Use did not create an enforceable agreement prohibiting Zoocasa from indexing the Century 21 Website. They state that the issue at bar is whether any contract is ever formed at all, something that

does not turn on notice. In Zoocasa's submission affirmative agreement is required even if they had notice of the terms.

## **Discussion**

### **Law of Contract**

[64] It is trite law that creation of a contract requires that there be an offer, acceptance and consideration to form a valid and binding contract. Over time as business practices evolved, so too has the determination of what is an offer, what is acceptance, what constitutes consideration and when a contract is formed. Hinds J., in *Beatty v. First Exploration Fund 1987 & Co.* (1988), 25 B.C.L.R. (2d) 377 at 383 and 385 (S.C.), noted:

...

The law has endeavoured to take cognizance of, and to be receptive to, technological advances in the means of communication. ...

...

The conduct of business has for many years been enhanced by technological improvements in communication. Those improvements should not be rejected automatically when attempts are made to apply them to matters involving the law. They should be considered and, unless there are compelling reasons for rejection, they should be encouraged, applied and approved. ...

...

[65] While *Beatty* addressed the use of faxed documents, the observations of Hinds J. apply no less to the law of contract when applied to the technology of the Internet.

[66] G.H.L. Fridman, *The Law of Contract in Canada* (Toronto: Thomson Carswell, 2006) at 13 states:

#### **(a) The essence of a contract**

Agreement is at the basis of any legally enforceable contract. The absence of assent prevents the creation of a binding contract. There must be a substratum of agreement, or *consensus ad idem*. For example, in the case of a contract for the sale of land at the minimum there must be *consensus ad idem* on the parties, the land description and the price. Such agreement must be clearly manifested, expressly or by implication. "In order to bring a contract into existence there must be a communication of the parties' intention by means of outward expression." It is necessary not only to show an intention in

the party to be charged to agree, but also to show an expression of that intention. An inward intent will not suffice. But how does the law determine the existence and nature of a party's intent? In the words of Sirois J. of Saskatchewan in *Butheil v. Caledonia No. 99/ R. M.*: "The law judges of the intention of a person by his outward expression only and it judges of an agreement between two persons exclusively from those expressions of their intentions, which are communicated between them". Hence the requisite agreement may be established by the conduct of the parties subsequent to the alleged contract. [Citations omitted.]

[67] And at page 84:

...there must be, as Lennox J. said in *Loranger v. Haines*, "reciprocal undertakings". So if one party is neither giving anything, nor is promising to do or give anything, there is no consideration for the other party's act or promise. What is meant here by the expression "value" must not be taken in a literal, entirely materialistic sense. In most instances, of course, it will be money or money's worth that is involved. But it is not so exclusive. Consideration means something which is of some value in the eyes of the law. It must be real. This could include some act, or promise of an act, which is incapable of being given a monetary value, though it has value, some benefit, in the sense of advantage for the party who is the present or future recipient or beneficiary of the act.

[68] Examples of the law addressing changing methods of contracting are the "ticket" cases that arose in the late 18th century. As public transportation developed the practical matter of establishing the terms of the agreement arose. The House of Lords in *Hood v. Anchor Line (Henderson Bros.)*, [1918] A.C. 837 (H.L.), stated that "if it is found that the company did what was reasonably sufficient to give notice of conditions printed on the back of a ticket, the person taking the ticket would be bound by such conditions".

[69] Hall J., in *Schuster v. Blackcomb Skiing Enterprises Ltd. Partnership* (1994), 100 B.C.L.R. (2d) 298, [1995] 3 W.W.R. 443, at para. 14 (S.C.), provides a useful history and analysis of the "ticket" cases. He states:

14 It is to be noted that these were all what I think could properly be described as "ticket" cases but the principles that were there developed continue to be applicable today and in my judgment appear usually to turn on the question of the efficacy of notice to the customer. ...

[70] The plaintiffs argue that such cases stand for the principle that no outward manifestation of acceptance, beyond taking the service with notice of the conditions, is necessary to form a contract provided notice of the contractual terms has been sufficient.

[71] The defendants assert that the “ticket cases” do not address the issue of whether a contract was formed at all. That is, they start from the proposition that the parties know they are entering into a contract and then the issue addressed is whether they have sufficient notice of the terms of the contract. They know that they have the option of accepting the service offered and entering into an agreement or rejecting the offered service. Despite the fact that in ticket cases most consumers likely do not read the fine print they do know that they are entering into an agreement. They know that they are purchasing a service. The defendants submit that what the ticket cases really address is the issue of notice of the terms of a contract. They submit that in the world of the Internet there is no awareness that accessing a website forms a contract.

[72] While the ticket cases deal with notice of contractual terms, the principles applicable can, in my view, be equally applied to the issue of contract formation in the sense that the formation of a contract requires that a party have knowledge or notice of an offer in order to accept it or reject it.

[73] If notice of the terms is sufficient, the issue in principle then becomes whether or not the terms are accepted by confirmation either by express agreement or by implied conduct. Communication of acceptance to the offeror is normally fundamental to the formation of a contract. However, the key issue is whether there is a bargain. Has the offeree accepted the terms in a manner which is “equivalent to acceptance”: Waddams, S.M., *The Law of Contracts*, 6th ed. (Canada Law Book Inc.: Aurora, Ont., 2010) at 66-69. Conduct may constitute acceptance: Waddams at 75. In this case the defendant had clear notice of the terms hence the nub of the dispute between these parties is whether there has been communication by the defendant Zoocasa of their acceptance of an offer.

[74] The defendants submit that, in the case of electronic communications, the option of acceptance or rejection of the contractual terms does not exist. They assert that a contract is not formed merely because they perform an activity that they have the right to do without a contract. They submit for example that in looking at a billboard no contract is formed. This latter example, however, ignores the fact that a billboard does not make an offer capable of a response. It is static while a website can make an offer that is capable of being responded to. It also ignores the fact that a website consists of multiple pages whereas a billboard does not. There is nothing the observer of a billboard does that is capable of indicating consent. The observer merely views the billboard. A user of a website can respond by accessing deeper layers (pages) of the website.

[75] Fundamental to the defendants' argument is their assertion that a public website gives a right to access it without any contract. This begs the question before this Court, which is: can accessing a publically available website result in the formation of a contract? In addition, is there a distinction between merely accessing a website and the taking of subsequent steps to use the information on that website? The defendants' argument that a website is like a billboard, while perhaps a reasonable analogy to the first page of a website, ignores the active nature of an Internet website. A more apt analogy is that a website is like a book and the first page is simply the cover page or table of contents.

[76] The defendants' position also implies that, by permitting public access to a website, the owner of that website loses any proprietary claims they may have in the information contained therein, other than those arising under copyright law.

[77] The manner in which the web has developed with freely available access may differentiate a user's expectations of the web from the user of a service such as a bus, train or aircraft. While the expectation of a user may be that access is free and without restrictions, the Internet and its use is an evolving entity. As such, expectations change as does the sophistication of the user. In addition, it is not the users' expectation that is determinative. What they assume to be the case does not



take precedence over the existence of an offer, notice of that offer and the act of acceptance. An erroneous expectation, even with legal advice, does not prevail.

[78] The defendants say that the Terms of Use on the Century 21 Website did not create an enforceable agreement between Zoocasa and Century 21 under which Zoocasa was contractually bound not to index the Century 21 Website. They submit that:

- i. The Terms of Use are not structured to create a consensus *ad idem*, the basic and indispensable requirement for a contract, and that as a matter of fact there never was agreement that the Terms of Use were binding.
- ii. There is a lack of consideration.
- iii. The Terms of Use are not capable of creating an enforceable agreement.

[79] The defendants state that the plaintiffs' position amounts to saying: "If you do something you have a right to do, I will say that you accepted a contract with me, even though I know you don't assent to the contract". They assert that a contract cannot be imposed in this way. This argument however starts from the erroneous proposition that the defendants have an unrestricted right of access.

[80] The issues therefore are whether there was an offer, whether there was consensus or agreement, whether there was consideration, and whether an enforceable contract was created by Zoocasa accessing the Century 21 Website.

### **Was a Contract Formed?**

[81] There is limited Canadian jurisprudence on the subject of electronic contracts.

[82] Sookman, *Computer, Internet and Electronic Commerce Law, loose leaf* (Carswell: Toronto, Ont., 1989) at 10.3 states:

One of the issues relevant to determining where and when an electronic contract has been concluded is to establish what constitutes an "offer" in an electronic commerce transaction. An "offer" is an intimation, by words or conduct of the willingness to enter into a legally binding contract, and which in its terms expressly or impliedly indicates that it is to become binding on the

offeror as soon as it has been accepted by an act, forbearance or return promise on the part of the person to whom it is addressed. An offer is effected when it is communicated to the offeree and a wide variety of communications means may be used to make an offer including communications by mail, telegram, telex, fax and telephone. There are also no apparent reasons why offers may not be made electronically such as by electronic mail, or to an information processing device set up to receive contract offers. [Citations omitted.]

[83] A consideration of Canadian and US authorities respecting the electronic formation of contracts reveals that courts have grappled with the changes in contract formation brought about by electronic communications including such matters as software licences and contracts created over the Internet. Those changes have produced new descriptions of contracts such as “shrink wrap” agreements, “click wrap” agreements and “browse wrap” agreements.

### **Shrink Wrap Agreements**

[84] The earliest cases addressed the issue of software licensing agreements which purported to bind purchasers by virtue of their purchase and use of the software.

[85] A seminal case that considered shrink wrap agreements is *ProCD, Inc. v. Zeidenberg*, 86 F. 3d 1447 (Court of Appeals, 7th Cir. 1996), where a purchaser of a CD-ROM containing a telephone directory was held bound by the shrink wrap agreement. The court, at para. 2 noted that:

( ... The “shrinkwrap license” gets its name from the fact that retail software packages are covered in plastic or cellophane “shrink wrap,” and some vendors, though not *ProCD* have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer “end user license,” but we prefer the more common term.) ...

[86] In *ProCD* the outside of the box indicated that the purchase was subject to a licence and the licence appeared in the manual enclosed with the software. The licence also appeared on the computer when the software was used. The user had the opportunity to read the licence and accept its terms before using the software. The court held the terms were binding. In doing so they commented on other

transactions where the consumer makes purchases before receiving the detailed contractual terms such as a traveler purchasing an airplane ticket.

[87] In *North American Systemshops Ltd. v. King* (1989), 68 Alta. L.R. (2d) 145, 97 A.R. 46, at 155 (Q.B.), the Alberta Court held that a shrink wrap licence was not enforceable because the vendor did not properly notify the purchaser of any restriction on the use of the product:

In the case at bar, the plaintiff manifestly did not bring home to the defendants, or any of them, that there were restrictions on the purchase. None of the simple, cheap, obvious methods to do this were used by the plaintiff. No implied restrictions were necessary to the sale; therefore the court should not, in the absence of explicit instructions brought to the notice of the purchaser, introduce any implied restrictions into the contract of sale.

[88] The result in *North American Systemshops Ltd.* turned on the lack of notice of the Terms of Use. The preponderance of authority in the US, provided notice is adequate, is that such an arrangement can result in an enforceable agreement.

### **Click Wrap Agreement**

[89] As technology evolved purchases of software occurred over the Internet with no box or physical medium being purchased. This led to the concept of the “click wrap” agreement. In such a situation the user indicates their agreement by clicking on an “I Agree” box.

[90] In *Rudder v. Microsoft Corp.* (1999), 106 O.T.C. 381, 2 C.P.R. (4th) 474 (Ont. S.C.J.), Winkler J. upheld a click wrap agreement. At paras. 16 -17, Winkler J. stated:

16 It is plain and obvious that there is no factual foundation for the plaintiffs' assertion that any term of the Membership Agreement was analogous to "fine print" in a written contract. What is equally clear is that the plaintiffs seek to avoid the consequences of specific terms of their agreement while at the same time seeking to have others enforced. Neither the form of this contract nor its manner of presentation to potential members are so aberrant as to lead to such an anomalous result. To give effect to the plaintiffs' argument would, rather than advancing the goal of "commercial certainty", to adopt the words of Huddart J.A. in *Sarabia*, move this type of electronic transaction into the realm of commercial absurdity. It would lead to

chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium.

17 On the present facts, the Membership Agreement must be afforded the sanctity that must be given to any agreement in writing. ...

[91] In *I. Lan Systems, Inc. v. Netscout Service Level Corp.*, 183 F. Supp. 2d 328 (Dist. Court, D. Mass. 2002), the terms of the agreement appeared on the website after the purchase was made. The plaintiff was found to have consented to the agreement when it clicked the “I Agree” box. At 338 the court stated: “If *ProCD* was correct to enforce a shrink wrap licence agreement, where any assent is implicit, then it must also be correct to enforce a click wrap licence agreement, where the assent is explicit”.

### **Browse Wrap Agreement**

[92] The final form of agreement referred to is a “browse wrap” agreement. A browse wrap agreement does not require that the purchaser indicate their agreement by clicking on an “I Agree” button. All that is required is that they use the product after being made aware of the product’s Terms of Use.

[93] In *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (Dist. Court S.D.N.Y. 2000), aff’d 356 F.3d 393 (2d Cir. N.Y. 2004), *Register.com*’s website contained their Terms of Use which stated that if the user accessed the database then the user agreed to the terms. The defendant submitted that simply making a query of the database was insufficient to indicate their consent. *Register.com* involved commercial parties where the defendant Verio accessed the plaintiff’s computers daily and saw the Terms of Use each time they did so and admitted that they were aware of the terms. Verio conceded that its use of the data for solicitations by mail and telemarketing breached *Register.com*’s Terms of Use. *Registrar.com* notified Verio that they were in breach of *Register.com*’s Terms of Use. Verio argued that it was not bound because the notice was provided after the transaction occurred, not before. The United States Court of Appeals for the Second Circuit found that this argument would only succeed if Verio accessed *Register.com*’s computers

infrequently. The court held that Verio had notice of the terms because of its numerous daily queries and the presence of the Terms of Use after each query.

[94] The Second Circuit Court of Appeals in *Register.com* held, at 403, that an express statement of agreement is not always required in either paper or online contracts:

...

We recognize that contract offers on the Internet often require the offeree to click on an "I agree" icon. And no doubt, in many circumstances, such a statement of agreement by the offeree is essential to the formation of a contract. But not in all circumstances. **While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.** ... [Emphasis added].

...

The court held that by taking the benefit of the information on *Register.com*, Verio accepted the offer of contract.

[95] In *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299, 21 B.L.R. (3d) 104 (Ont. S.C.J.), the defendant sought to stay the action on the grounds that there was an agreement between the parties that provided for arbitration of all claims. The disputed agreement stated it was subject to amendment and that notice of amendments would be provided. The court held that notice of the amendments was sufficient and that, pursuant to the agreement, continued use indicated consent. As a result, conduct can imply consent.

[96] The court also commented on the electronic environment as follows at paras. 32-33:

[32] I am also mindful, in reaching my conclusion on this point, of the fact that we are dealing in this case with a different mode of doing business than has heretofore been generally considered by the courts. We are here dealing with people who wish to avail themselves of an electronic environment and the electronic services that are available through it. It does not seem unreasonable for persons, who are seeking electronic access to all manner of

goods, services and products along with information, communication, entertainment and other resources, to have the legal attributes of their relationship with the very entity that is providing such electronic access, defined and communicated to them through that electronic format.

[33] I conclude, therefore, that there was adequate notice given to customers of the changes to the user agreement which then bound the plaintiffs when they continued to use the defendant's service. Consequently, I find that there is an arbitration agreement between the parties.

[97] In *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (Dist. Court E.D. Cal. 2000), Pollstar's website contained a notice that use of the website was subject to a licence agreement and that proceeding to retrieve any further information from the website was agreement to be bound by the terms of the licence agreement. On a motion by the defendant to dismiss, the court held that the licence was arguably valid and enforceable. They noted that this was so even though the notice was in small gray print on a gray background.

[98] However, not all browse wrap agreements have been enforced. The defendants rely on *Specht v. Netscape Communications Corp.*, 306 F. 3d 17 (Court of Appeals, 2nd Cir. 2002). In *Specht* the court rejected a browse wrap agreement for downloading software where the purchaser could download the software without seeing the notice of Terms of Use. The Terms of Use were only accessed if the purchaser scrolled down the page. There was no reason for them to do so, given they could access and download the software without needing to view the portions of the web page where the Terms of Use were posted.

[99] *Specht* is a notice case. Presumably, if the notice of the terms had been prominently placed such that the notice was adequate, then the agreement would have been enforceable.

[100] The *Specht* decision held that there are two requirements that must be met before a contract is found: first, that notice of the Terms of Use is clearly given; and, second, that there is clear assent to those terms by the user.

[101] In the case at bar, the plaintiffs do not disagree that notice is required. They submit however, that acceptance of such terms does not require an express

statement of agreement such as clicking on an “I Agree” button in order to access the Website or download information or software.

[102] The Appeal Court in *Register.com* distinguished *Specht* as follows at 402:

...

Verio, however, cannot avail itself of the reasoning in *Specht*. In *Specht*, the users in whose favor we decided visited Netscape’s web site one time to download its software. Netscape’s posting of its terms did not compel the conclusion that its downloaders took the software subject to those terms because there was no way to determine that any downloader had seen the terms of the offer. There was no basis for imputing to the downloaders of Netscape’s software knowledge of the terms on which the software was offered. ...

...

[103] The real issue is whether the electronic nature of the transaction meets contractual requirements. In *Specht* the United States District Court Judge A. Hellerstein stated at 587:

Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King’s Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet. Formality is not a requisite; any sign, symbol or action, or even wilful inaction, as long as it is unequivocally referable to the promise, may create a contract.

...

[104] The plaintiffs rely on *Canadian Real Estate Association v. Sutton (Québec) Real Estate Services Inc.*, [2003] J.Q. No. 3606, 2003 CanLII 22519 (Que. C.S.), in which Terms of Use were found to be enforceable for the purposes of an interlocutory injunction. The court emphasized that the respondent was aware of the Terms of Use and had its own browse wrap Terms of Use. In granting the injunction, the court stated at para. 44(g):

**44** ...

- g. Sutton sait que des conditions d’utilisation s’appliquent et elle-même en impose aux utilisateurs de son propre site;

[TRANSLATION: Sutton knows that the user conditions apply and it even imposes similar user conditions on users of its website;]

...

[105] The 67th District Court of Texas, in *American Airlines Inc. v. FareChase Inc.*, No. 067-194022-2 (Tex. 67th District Court, Tarrant County, Texas, Mar. 8, 2003), on a temporary injunction application, found that the defendant had violated *American Airline's* Terms of Use which prohibited use of their website for commercial purposes and that *American Airlines* had a probable right of recovery. The defendant FareChase used software to obtain copies of *American Airlines* flight schedules, seat availability and fares by giving users access to *American Airline's* computer system and website. Such access was contrary to the Terms of Use. FareChase continued to access the data despite notice to cease and desist. The court granted an interim injunction restraining the defendant's access to the plaintiff's website.

[106] Initially in *Ticketmaster Corp. v. Tickets.com, Inc.*, 54 U.S.P.Q. 2d (BNA) 1344 (C.D. Cal. 2000) the California District Court refused a preliminary injunction against Tickets.com where the defendant had not been required to click an "I Agree" button. The plaintiff's website stated that going beyond that webpage was acceptance of their Terms of Use. Later however, after the plaintiff's website was modified to make the Terms of Use more prominent and to include a warning that proceeding further bound the user, the court denied the defendants motion for summary judgment having found that the matter of the contract claim should proceed to trial. The court in *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 U.S. Dist. Lexis 6483 (C.D. Cal. 2003) at para. 6 stated:

... a contract can be formed by proceeding into the interior web pages after knowledge (or in some cases, presumptive knowledge) of the conditions accepted when doing so.

[107] As noted in the authorities referred to above, the law of contract requires that the offer and its terms be brought to the attention of the user, be available for review and be in some manner accepted by the user. Such an analysis turns on the



prominence the site gives to the proposed Terms of Use and the notice that the user has respecting what they are agreeing to once they have accepted the offer. To establish a binding contract consideration will also be given to whether the user is an individual consumer or a commercial entity and in addition a one-time user or a frequent user of the site.

[108] Browse wrap agreements have the advantage of being readily available for perusal by the user. Their enforcement requires a clear opportunity for the user to read them which, given the nature of computer and the Internet, is likely to be a better opportunity than that available to the user of a product with a standard form contract presented at the time of purchase. A properly enforceable browse wrap agreement will give the user the opportunity to read it before deeming the consumer's use of the website as acceptance of the Terms of Use. In the case at bar, notice is not an issue given the defendant has acknowledged it was aware of the Terms of Use and what conduct was deemed to be acceptance. In addition, the defendant Zoocasa relies on similar Terms of Use on its own Website. The defendants have also acknowledged that the Century 21 Website Terms of Use are industry standard.

### **Public Policy Issue**

[109] The defendants submit that to accede to the plaintiffs' arguments, respecting the binding nature of the Terms of Use, would be contrary to public policy as it would have negative effects on the operation of the Internet. The defendants suggest that accepting use of a website as conduct that serves as acceptance sufficient to form a contract would imperil the operation of the Internet as it currently functions. The concerns expressed are that this would have a chilling effect on the function and structure of the Internet in Canada. They state that the plaintiffs' claims are vague and would lead to results contrary to the public interest.

[110] The defendants concerns, at first blush, appear to have some substance. That is, it would seem inappropriate that by users simply accessing a website which

contains terms and conditions they will be bound contractually as a result, despite not having overtly agreed to such.

[111] The defendants' argument implies that all information that is made available on the web must be available to all without contractual restrictions. They go so far as to state that the existence of the Internet depends upon it and indexing and linking are essential to the operations of the World Wide Web. I do not accept that submission.

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

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

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

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

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

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

[117] It is important for commercial efficacy that contract terms can be agreed upon as easily in the electronic world as in the world of paper. In my opinion, the defendants' suggestion that the Internet would be crippled by enforcing Terms of Use is incorrect. To render Terms of Use unenforceable would impair the utility and health of the Internet as creator's products would not be capable of contractual protection. If offerors could not place information on the Internet without some measure of control, its utility would be diminished.

[118] The defendants argue that what Century 21 provides, in making their Website available to the public, (as opposed to an internal "Intranet"), is merely a grant of access to the site. The defendants' argument may be correct in part; however, when a user accesses a main page that merely places the user at Century 21's door. Entry is an additional step and one that website owners clearly control and users can undoubtedly choose to take.

[119] Taking the service with sufficient notice of the Terms of Use and knowledge that the taking of the service is deemed agreement constitutes acceptance sufficient to form a contract. The act of browsing past the initial page of the website or searching the site is conduct indicating agreement with the Terms of Use if those terms are provided with sufficient notice, are available for review prior to acceptance, and clearly state that proceeding further is acceptance of the terms.

[120] While courts may in the future face issues such as the reasonableness of the terms or the sufficiency of notice given to users or the issue of contractual terms exceeding copyright (or Parliament may choose to legislate on such matters), none of those issues arises in the present case for the following reasons:

- i. the defendants are sophisticated commercial entities that employ similar online Terms of Use themselves;

- ii. the defendants had actual notice of Century 21 Canada's Terms of Use;
- iii. the defendants concede the reasonableness of Century 21 Canada's Terms of Use, through their admissions on discovery and by their own use of similar Terms of Use.

[121] By October 6, 2008, the defendants knew that the Century 21 Website had Terms of Use, and had read those Terms of Use as solicitors for Century 21 had, by letter dated October 6, 2008 to the defendants' solicitors, attached a copy of them. The defendants also knew by October 6, 2008 that Century 21 was taking the position that the Zoocasa Website was breaching those Terms of Use. The website notice and adequacy of such notice is therefore irrelevant.

#### **Was There Consideration?**

[122] The defendants also argue that in offering access to their Website, Century 21 is not giving any promise of benefit and undertakes no burden and as a result there is no consideration. I do not find this in fact to be the case.

[123] Clearly the databases created by developers of websites have value. Information has value. The evidence in this case is that Zoocasa has spent over \$6 million on its Website. Century 21 has expended over \$6,345,849.59 from 2006 to December 31, 2009. Zoocasa's actions in accessing the Century 21 Website and copying photographs, property descriptions and other information affirms that there is value. Presumably if the information was without value Zoocasa would not seek it or use it. In my opinion there is consideration for the contract as Zoocasa obtained the benefit of the information displayed on the Website.

#### **Selective Litigation**

[124] The defendants further claim that acceding to the plaintiffs' claims for breach of contract would encourage selective and differential treatment of website visitors undertaking the same activity, who may not even be aware of the existence of the Terms of Use. Their concern appears to be that the plaintiffs are claiming against

them when they are only doing what any other visitor to the Century 21 Website does, yet no others are being sued.

[125] Firstly, the evidence does not support such a proposition. It has not been shown that others are in violation of either the Terms of Use or the copyright of the plaintiffs. Even if that were the case, it is the plaintiffs' right to decide who to pursue, not that of the defendants. Secondly, Zoocasa is distinguishable from the common consumer as they have a commercial purpose and are a sophisticated consumer.

[126] There can be a myriad of reasons for a plaintiff to initiate an action in one instance and not in another. The decision is theirs.

### **The Automated Nature of Web Indexing**

[127] Does the fact that Internet search engines access sites such as those of Century 21 using search engines, crawlers and robots change the legal situation? In my view it does not.

[128] The involvement of a machine in the contractual process was considered by Lord Denning long before the ubiquitous presence of personal computers and the Internet. In the 1970 decision *Thornton v. Shoe Lane Parking*, [1971] 1 All E.R. 686 (C.A.), the plaintiff parked his car in an automatic car park, purchased a ticket from a dispenser and parked. Lord Denning stated at 689:

...

... The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it; but it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way. The offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. ...

...

[129] A machine or a computer and the software that runs it has at some point been constructed and programmed by an individual. As noted by Sookman at 10.5:

... an electronic agent, such as a computer program or other automated means employed by a person, is a tool of that person. Ordinarily, the employer of a tool is responsible for the results obtained by the use of the tool since the tool has not independent volition of its own. When computers are involved, the requisite intention flows from the programming and use of the computer.”

I agree with this statement. Liability is not avoided by automating the actions in question.

[130] In this instance, the defendant Zoocasa has acknowledged that, prior to indexing the Century 21 Website, the layout of that site was reviewed by an employee. In other words, the initial access was in fact not automated and an individual programmed the automated indexing. J. R. Langlois, the president of Zoocasa stated that:

“When Zoocasa first indexes a website, a Zoocasa employee reviews the website, looks at the architecture of the site, and sets parameters for locating the desired items. Once the indexing has been set up, it is automatically repeated daily.”

This was done to insure that particular information such as price, description, address, bedrooms, bathrooms and the agent and broker information was included.

[131] While the Terms of Use were not posted when Zoocasa initially set up the automated indexing of the Century 21 Website, they were subsequently made aware of those terms.

**Was a Contract Formed Between the Plaintiff Century 21 and the Defendant Zoocasa?**

[132] Zoocasa acknowledges it became aware of the existence of the Terms of Use after they were brought to their attention in October 2008. Mr. Lee, a representative of Zoocasa, admitted that by October 6, 2008, they knew that the Century 21 Website had Terms of Use and had read the Terms of Use. As a result, there is no issue respecting sufficient notice of the Terms of Use or their provisions. The defendants also acknowledge that the Century 21 Website Terms of Use are industry standard. They were also aware that if they did not agree to the Terms of

Use then they should not use the Website. They knew as well that if they accessed the Website the Terms of Use purported to form a contract. Notwithstanding these admissions, the defendants state that at no time did they agree to be bound by the Terms of Use.

[133] As a result, notice of the Terms of Use, knowledge of their content and their purported effect are not in issue. The sole issue is whether, with that notice and knowledge, Zoocasa's acts of accessing the Century 21 Website, formed an agreement.

[134] As previously discussed, where notice of the Terms of Use is established along with the knowledge that using the Website will serve as agreement to the Terms of Use, then I am satisfied that agreement is proven. As noted in the browse wrap cases, the act of proceeding further into the website is sufficient to communicate agreement. I find that Zoocasa's conduct formed a contract. It is not a case of a contract being imposed without their assent.

[135] However, the defendants also state that for there to be an enforceable contract there must be certainty over the terms of the contract. They note that the Terms of Use purport to allow Century 21 to unilaterally amend the Terms of Use from time to time and to terminate the agreement unilaterally at any time without notice and in its sole discretion. They state that if Century 21 takes no steps to obtain affirmative agreement to any such amendment or its process, then there is no enforceable agreement. In substance they rely on the principle that one party cannot arbitrarily and unilaterally end an agreement or change the terms of an agreement.

[136] Century 21 confirms that there have been no changes to the Terms of Use that were posted on their Website on October 5, 2008. The Terms of Use are also not capable of retroactive change. Given there have been no changes since the Terms of Use were first posted, the plaintiffs rely on the Terms of Use posted on October 5, 2008. As a result of the foregoing, I do not need to further consider the issues that arise from unilateral changes without further notice.

[137] The defendants also state that certain terms of the purported agreement are uncertain. They specifically identify the use of the word “scraping”. As noted earlier, the experts differ on the precise meaning of “scraping”. They do appear however to agree that it is a type of indexing. Dr. Levine defines it at para. 34 of his report as follows:

Specialized search engines sometimes use a modified indexing scheme informally known as “scraping”. The distinction between scraping and regular indexing is that scraping looks for specific information located in known positions on selected web pages with known layouts, while indexing uses more general techniques to extract index terms from web pages without specific layouts or formats.

[138] Century 21 does not dispute that the term is not well defined. Given my findings that Zoocasa has copied both property descriptions and photographs, regardless of whether the act of indexing was of a general nature or involved scraping, is not relevant to the issues in dispute. As a result, I do not need to delve further into whether it is presently capable of precise definition.

### **Allegations of Breach of Terms of Use**

[139] The Terms of Use prohibit a user from doing the following with content from the Century 21 Website:

- a. “copy” the content;
- b. “reproduce” the content;
- c. “save [the content] onto your own computer”;
- d. “merge with other data”;
- e. “frame in another website”;
- f. “post on another website”;
- g. “use the Content for any public, commercial or non-personal purpose”;
- h. “display” or “disseminate” the content to another individual or entity;
- i. “screen scraping” or “database scraping” and “any other activity intended to collect, store, re-organize, summarize or manipulate any Content (whether via an automatic program or a manual process)”;



- j. “accessing” the Century 21 Website in breach of the Terms of Use; and
- k. maintaining a link to the Century 21 Website after Century 21 has given notice that it has revoked its consent for such a link.

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

- a. “copied” content from the Century 21 Website;
- b. “reproduced” the content of the Century 21 Website, such as property descriptions, on the Zoocasa Website;
- c. “saved” and stored the content onto Zoocasa’s computer servers;
- d. “merged” the content taken from the Century 21 Website with other data on the Zoocasa Website;
- e. “framed” the Century 21 Website within the Zoocasa Website for a period of time;
- f. “posted” the content on another website being the Zoocasa Website;
- g. “used” the content for a “commercial” purpose;
- h. “displayed” and “disseminated” content taken from the Century 21 to the public on the Zoocasa Website;
- i. “accessed” the Century 21 Website for a commercial purpose;
- j. “maintained” a link to the Century 21 Website after Century 21 has given notice that it had revoked its consent for such a link.

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

### **Copyright**

[142] Copyright is a creature of statute. In *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 at 372-373, Estey J. commented:

...

... copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute. This creature of statute has been known to the law of England at least since the days of Queen Anne when the first copyright statute was passed. It does not assist the interpretive analysis to import tort concepts. The legislation speaks for itself and the actions of the appellant must be measured according to the terms of the statute.

...

[143] Sections 5 and 27 of the *Copyright Act* - R.S.C., 1985, c. c-42, provide that:

5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country; ...

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

### **Plaintiffs' Position**

[144] The plaintiffs base their claim for copyright infringement on property descriptions and photographs. Copyright in the property descriptions and in the photographs lies with Bilash and Walton. However, each of Bilash and Walton licenced to Century 21 "use of the Works to promote the business of Century 21 Canada, including, without limitation, use on the Century 21 Canada's Website". In addition they assigned their right of action for copyright infringement to Century 21. As a result, Century 21 seeks damages for copyright infringement. In the alternative, if the Copyright Licence Agreements are not effective, then judgment is sought in favour of Bilash and Walton for copyright infringement.

### **Defendants' Position**

[145] The defendants say that the plaintiffs are proposing to apply an extreme reading of copyright law. They argue that Zoocasa's indexing and linking is not an

infringement of copyright because linking and indexing by search engines on the Internet are integral to the functioning of the Internet. They further argue that policies that seek to impede linking across the Internet threaten the open nature of this system and public policy should discourage attempts to impose such impediments.

[146] The defendants also take issue with who among the plaintiffs is entitled to advance a claim for breach of copyright.

### **Ownership of Copyright and Copyright Licence**

[147] The Copyright Licence Agreement dated December 2, 2008, licences Century 21 to use the Works of Nechako, Bilash and Walton (the “December Assignment”). The Works are defined as including photographs of properties offered for sale along with their descriptions and other details. It also assigns to Century 21 the right to bring an action for copyright infringement regarding the Works. Similar terms are found in the Copyright Licence Agreement dated February 12, 2010, between Century 21 and Charles Bilash Personal Real Estate Corporation (the “February Assignment”).

[148] Century 21 does not assert that they have a claim in copyright. Their claim is based upon the licences granted by the December Assignment and the February Assignment (the “Assignments”) along with the assignment of the right to bring an action for copyright infringement.

[149] Section 13 of the *Copyright Act* provides:

#### **Ownership of Copyright**

**13.** (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

#### **Assignments and licences**

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the

right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

Ownership in case of partial assignment

(5) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, with respect to the rights so assigned, and the assignor, with respect to the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and this Act has effect accordingly.

Assignment of right of action

(6) For greater certainty, it is deemed always to have been the law that a right of action for infringement of copyright may be assigned in association with the assignment of the copyright or the grant of an interest in the copyright by licence.

Exclusive licence

(7) For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.

[150] In order for Century 21 to bring an action for copyright infringement with respect to the Works, the plaintiffs must establish who owns the copyright in the Works, whether the copyright has been validly assigned and the effective date of such assignment.

[151] The defendants challenge the plaintiffs' assertions respecting who owns the Works on the basis that the plaintiffs did not indicate who specifically owned the Works until late in the day. They note as well that the further amended statement of claim advances several alternative assertions as to the ownership of the copyright in the Works and holds out Bilash and Walton as but two possible owners of copyright in the Works in addition to Bilash Corporation, In Town Realty and Century 21.

[152] In the case of Mr. Walton, he writes his own property descriptions and takes his own pictures. On the day this action was started Walton entered into the December Agreement.

[153] The defendants challenge the Agreements and describe that challenge as follows:

First, the “Works” are not defined with any specificity whatsoever. They are simply described as “certain works produced in connection with properties listed for sale in British Columbia by Bilash and Walton” which are said to “[i]nclude photographs of the properties listed for sale, property descriptions, and other property details.”

Second, the Works are not even attributed to one person, but rather to Bilash, Walton, and Nechako Real Estate Ltd.

Third, there is no apparent provision for future-created works. Accordingly, it would appear that the only Works in respect of which Walton could assign a right to bring an action would be those created before December 2, 2008.

Fourth, there is no fixed term of the Agreement.

[154] With respect to the first two objections, the specific Works and the ownership in those Works is a matter of evidence. In *E.W. Savory Ltd. v. The World of Golf Ltd.*, [1914] 2 Ch. 566 at 568, the copyright holder in that case gave a written assignment to the plaintiffs for “five original card designs inclusive of all copyright” and “four golfing subjects”. The defendants, much like the case at bar, challenged the validity of the assignment on the basis that the description of the subject-matter was not sufficient to validly assign copyright. Neville J. held that the court could admit parol evidence to identify the subject-matter of a contract and found that the copyright over the subject-matter that the plaintiffs claimed had been infringed was in fact the same subject-matter referred to in the assignment agreement. In the case at bar the agreement states that it covers properties listed by Bilash and Walton in British Columbia. In my view that description combined with the listings identified in the statement of claim and established by the evidence is sufficiently specific to identify the subject-matter of the assignment.

[155] With respect to the lack of a provision relating to future created Works the agreement does not address the issue of past, present or future works. Copyright in a non-existent (future) work cannot be assigned, just as you cannot transfer property in non-existent land or goods. However, on the authority of *Performing Right Society v. London Theatre of Varieties*, [1924] A.C. 1 at 13 (HL) when a work that is not yet created is assigned, parties are treated in equity as promising to assign the future copyright once the work is created. At that point, the promisee becomes the equitable assignee and the beneficial owner of the copyright, and the promisor is

the equitable assignor with a bare legal title: David Vaver, *Intellectual Property Law* (Irwin Law: Toronto, Ont, 1997) at 245. The power of assignment is not confined to an assignment of the legal property, but will apply to the transfer of any interest, whether legal or equitable: *Performing Right Society* at 18. As a result, the assignment of future created works is still valid in equity as between the parties provided it is made for valuable consideration. As soon as the works are created the copyright is validly assigned to the assignee.

[156] See also *Ward, Lock & Co., Ltd. v. Long*, [1906] 2 Ch. 550, where the court held that there can be an assignment in future works in the form of an agreement to assign.

[157] As a result, unless specified otherwise, the assignment agreement applies generally to the Works produced relating to the properties listed by Bilash and Walton.

[158] With respect to Bilash, they also challenge the agreement for similar reasons but in addition address the fact that Bilash did not write the property descriptions in issue. Rather the property descriptions in which he claims copyright were written by his employee Ms. Gray.

[159] Section 13(3) of the *Copyright Act* provides as follows with respect to works created by an employee in the course of his or her employment:

**13.** (3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

[160] Ms. Gray had a written contract of employment with Bilash whereby, until January 1, 2009, Bilash personally paid Ms. Gray's salary. It is not disputed that until January 2009 copyright in the property descriptions resided in Bilash as

Ms. Gray's employer. After January 2009, Ms. Grey continued to work for Bilash as his employee absent a written agreement.

[161] However, in January 2009 Mr. Bilash incorporated a company. The evidence is that the corporation did not enter into an employment agreement with Ms. Gray. The only employment agreement was that between Bilash personally and Ms. Gray. However, Bilash also stated that he intended to declare her income for tax purposes as being paid from the corporation.

[162] What I take from the evidence is that Bilash incorporated the company with the intention of running his real estate business through his corporation but, as is often the case, he did not formalize this change in relation to his own employment agreement nor the employment agreement with Ms. Gray. The evidence does not indicate if the corporation paid Ms. Gray from a corporate bank account. The evidence of Bilash in response to whom paid her salary was, "Well, when the taxes are going to be done, I mean, she's going to be taxed as an employee for Bilash Corporation."

[163] I conclude that, at the time of hearing, Ms. Gray's existing employment agreement had not yet been cancelled or varied. Bilash remained her employer. As a result I am satisfied that Bilash retains copyright in Ms. Grey's work.

[164] This finding would normally result in the conclusion as well that the assignment of copyright made by Bilash to Century 21 remains validly assigned. At first blush this may appear to have changed on February 12, 2010, when Bilash Corporation entered into the February Agreement with Century 21. That Agreement however specifically provides that "Bilash Corporation may be the owner of copyright ...". It is therefore only an assignment of such copyright as Bilash Corporation may own.

[165] With respect to the photographs, Bilash stated that he hired the photographers. However, he also stated he carried on business through his

corporation. He did not state his corporation hired the photographers. He did acknowledge that his company paid them.

[166] It is clear from the affidavit and discovery evidence that Bilash has a layman's appreciation of the impact of incorporation which I infer was done primarily for tax purposes. He appears to operate on the basis that his accountant at the end of the year determines what is corporate and what is personal. No documentary evidence was produced indicating any written agreement respecting the photographs as apparently none exists. Nor was there evidence that Bilash informed those photographers that they were now dealing with his company, not him.

[167] I conclude on the balance of probabilities that Bilash personally continued to contract with the photographers and that this arrangement did not change.

[168] On the basis of my conclusion respecting the employment status of Ms. Gray and Bilash's practice with respect to hiring photographers, I find that after Bilash incorporated, the copyright in the property descriptions created by Ms. Gray and the copyright in the photographs Bilash hired to be taken, remained that of Bilash. Bilash Corporation has no copyright to assign.

[169] Given these findings the nature and effect of the December and February Copyright Licence Agreements must be considered.

### **Copyright Licence Agreement**

[170] As noted earlier in preparation for these proceedings and in order to enable Century 21 to claim for copyright infringement, Bilash, Walton and Bilash Corp. each executed a Copyright Licence Agreement (the "Agreements") that purport to assign their interest in copyright to Century 21.

[171] The operative portion of each of the Agreements reads as follows:

#### **Permitted Uses**

During the term of this Agreement, Century 21 Canada may:

- (i) use the Works to promote the business of Century 21 Canada, including, without limitation, use on Century 21 Canada's website; and



(ii) subject to the consent of [copyright holder], which consent shall not be unreasonably withheld, use, copy and reproduce, incorporate, adapt and otherwise utilize the Works, in whole or in part, and any derivatives thereof. If any derivative work based upon the Works is created by or for Century 21 Canada for its use, [copyright holder] shall be entitled to own the copyright therein and the derivative work shall be subject to the terms of this Agreement.

Assignment of Right of Action

[Copyright holder] assigns to Century 21 Canada the right to bring an action for copyright infringement with respect to the Works.

[172] The Agreements are described as “Copyright Licence Agreements”. An issue arises between the purported licence to use the Works and the effect of the assignment of the right of action for copyright infringement.

[173] As noted in John McKeown, *Fox Canadian Law of Copyright*, 3d ed. (Carswell: Scarborough, Ont., 2000) [*Fox Canadian Law of Copyright*] at 380:

The fact that the document describes the grantor as the licensor and the grantee as the licensee may be immaterial if the intent to be gathered from the document as a whole is that it is to operate as an assignment and not a licence. Frequently, the terms are used indiscriminately. The court must look to the substance of the transaction, not its form. [Citations omitted.]

[174] An assignment is a transfer of a right such that the assignee is the owner of the legal interest in the right and the assignor is left without any control over the right transferred, except for moral rights. Under a licence, the licensee is given permission to do certain acts which might otherwise constitute infringement of the licensor’s rights and does not involve any change of ownership in the copyright: *Marquis v. DKL Technologies Inc.* (1989), 24 C.I.P.R. 289 (C.S. Que.); *Fox Canadian Law of Copyright*, at 380.

[175] In this instance, the terms of the licence simply grant to Century 21 the use of the Works. It is not even an exclusive use. The copyright holder clearly retains the copyright including any other use or derivative use of the Works. In addition, the use of the Works is pursuant to the ongoing consent of the party which holds copyright, rather than an outright assignment of the copyright in the Works. As a result, I am of the view that what Bilash, Walton and Bilash Corporation purport to grant as an assignment is in fact a licence.

[176] What then is the effect of the assignment to Century 21 of the right to bring an action for copyright infringement with respect to the Works?

[177] The right to assign a right of action arises from s. 13 of the *Copyright Act* ss. 6 and 7 which I will repeat for convenience:

Assignment of right of action

(6) For greater certainty, it is deemed always to have been the law that a right of action for infringement of copyright may be assigned in association with the assignment of the copyright or the grant of an interest in the copyright by licence.

Exclusive licence

(7) For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.

[178] The right is procedural and grants to the licensee the authority to enforce the rights of the copyright holder to the extent they are granted under the terms of the assignment or exclusive licence.

[179] The licence in this instance is not exclusive as it fails to state such. It simply grants a right to Century 21 to use the Works. Century 21 does not possess a proprietary interest or the grant of an interest in the infringed works. As a result, Century 21 can only enforce licencing, not copyright, infringement to the limited extent granted to it by the licence. In this case, that is the right to use the Works. However, as the licence that Century 21 holds is not exclusive, the assignment of the right of action to enforce copyright infringement is moot.

[180] The claims for copyright infringement therefore lie with Bilash and Walton, not Century 21. The claim of Century 21 for copyright infringement is dismissed.

### **Discussion of Copyright**

[181] The initial issue is whether the property descriptions and photographs used by the plaintiffs are entitled to copyright protection. The work must have some “literary character”. The work must provide “information, instruction or ... literary enjoyment” and the “author must bestow some brainwork upon a work and that a work must not be a ‘mere collection of copies of public documents’”: John McKeown,

*Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. looseleaf (Toronto: Carswell, 2003), at s. 7:4 [Fox].

[182] In *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, at paras. 16-17 the Supreme Court of Canada discussed what kind of work is entitled to copyright protection:

16 For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

17 In reaching this conclusion, I have had regard to: (1) the plain meaning of "original"; (2) the history of copyright law; (3) recent jurisprudence; (4) the purpose of the *Copyright Act*; and (5) that this constitutes a workable yet fair standard.

[183] Works used for commercial purposes are also entitled to copyright protection. For example, an advertisement inserted in a newspaper has been held entitled to copyright protection: *Fox Canadian Law of Copyright* at s. 4:6; *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), [1985] 1 W.W.R. 112, 28 A.C.W.S. (2d) 371, (B.C.S.C.). In *Slumber-Magic*, McLachlin J. stated at 115:

...

The question is whether the plaintiff had copyright in the brochure? In my opinion, it did. The defendants suggest that there is no copyright in the brochure because it used ideas and elements which are also found in the brochures of other competitors. That, however, does not defeat a claim for copyright. It is well established that compilations of material produced by others may be protected by copyright, provided that the arrangement of the elements taken from other sources is the product of the plaintiff's thought, selection and work. It is not the several components that are the subject of the copyright, but the overall arrangement of them which the plaintiff through his industry has produced. The basis of copyright is the originality of the work in question. So long as work, taste and discretion have entered into the

composition, that originality is established. In the case of a compilation, the originality requisite to copyright is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation: *Ladbroke (Football) Ltd., v. William Hill (Football) Ltd.*, [...] [1964] 1 All E.R. 465 (H.L.). ...

[184] In *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465, at 469 Lord Reid said:

... Copyright gives the exclusive right to do certain things including "reproducing the work in any material form",... and reproduction includes reproduction of a substantial part of the work. ... Broadly, reproduction means copying, and does not include cases where an author or compiler produces a substantially similar result by independent work without copying. If he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken. One test may be whether the part which he has taken is novel or striking, or is merely a commonplace arrangement of ordinary words or well-known data. So it may sometimes be a convenient short cut to ask whether the part taken could by itself be the subject of copyright. **But, in my view, that is only a short cut, and the more correct approach is first to determine whether the plaintiff's work as a whole is "original" and protected by copyright, and then to inquire whether the part taken by the defendant is substantial.** A wrong result can easily be reached if one begins by dissecting the plaintiff's work and asking, could section A be the subject of copyright if it stood by itself, could section B be protected if it stood by itself, and so on. To my mind, it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, it has often been recognised that if sufficient skill and judgment have been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright. [Emphasis added].

[185] The property descriptions describe particular real properties. They are created to market the property to potential buyers. It is apparent they are written for each property in a manner to highlight the positive aspects of the properties. There is also the evidence of Bilash and Walton that there is some level of skill involved in writing an effective property description. I am satisfied that the property descriptions are the product of skill and judgment. As a result they meet the threshold for copyright protection.

[186] Section 13(2) of the *Copyright Act* provides as follows with respect to photographs:

13. (2) Where, in the case of an engraving, photograph or portrait, the plate or other original was ordered by some other person and was made for valuable consideration, and the consideration was paid, in pursuance of that order, in the absence of any agreement to the contrary, the person by whom the plate or other original was ordered shall be the first owner of the copyright.

[187] With respect to the photographs in question, the requirement for originality is low and can arise from the choice of subject matter, the creation of the scene, the angle of the photograph or other factors: *Fox Canadian Law of Copyright* at s. 10:11(c). Again, I am satisfied that they satisfy the originality requirements of the *Copyright Act* and they are entitled to copyright protection.

[188] Bilash deposed that he retained a professional photographer to take photographs of each property that he was hired to market as the listing agent. Ms. Gray arranged for photographers to take photographs of the property. Bilash ordered and paid for the original electronic files of the digital images so that he could copy and use them as he saw fit in his marketing campaigns, as opposed to ordering just prints of the photographs. Prior to January 1, 2009, the money to pay the photographers came from Bilash's personal account. From January 1, 2009, onwards, the money to pay the photographers came from the account of Bilash Corporation.

[189] I am satisfied that Bilash owns copyright in the photographs pursuant to s. 13(2) given he ordered them, they were made for valuable consideration, he paid for the originals and there was no agreement between him and the photographers to the contrary.

[190] Walton owns the copyright in the five property descriptions written by him which are the subject matter of his claim. Bilash owns the copyright in the property descriptions written by his assistant Ms. Gray as she was his employee: s. 13(3) *Copyright Act*. With respect to the photographs ordered and paid for by him he also owns the copyright in them: s. 13(2) *Copyright Act*.

### **Infringement of Copyright**

[191] Section 2 of the *Copyright Act* defines "infringing" as: "in relation to a work in which copyright subsists, any copy, including any colourable imitation, made, or dealt with in contravention of this *Act*."

[192] Section 27(1) of the *Copyright Act* prohibits copyright infringement as follows:

It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

[193] Section 3(1) in turn provides the owner of copyright with the sole right to do the following:

For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or **reproduce the work or any substantial part thereof in any material form whatever**, ...

...

and to authorize any such acts. [Emphasis added]

[194] In order to find copyright infringement, a plaintiff must prove copying of the work or a substantial part thereof and access to the copyright protected work: *Kantel v. Grant*, [1933] Ex.C.R. 84 at 96. Determining whether a substantial part of the work has been taken is a question of fact: *King Features Syndicate Inc. v. Lechter*, [1950] Ex.C.R. 297; *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257, (F.C.T.D.) at para 35. For example, in *Hawkes Son Ltd. v. Paramount Film Service Ltd.*, [1934] Ch. 593 (C.A.) a film reproduced 20 seconds of the 4 minute long Colonel Bogey March. The portion reproduced was the principal air of the march. The court held that given the portion reproduced was clearly recognizable as the Colonel Bogey March what was reproduced was, in the words of Slessor, L.J., "a substantial, a vital, and an essential part". He also noted that "other matters beyond mere quantity may and have to be looked at."

### **Has There Been Infringement?**

[195] Zoocasa admits that it copied the property descriptions and photographs belonging to Bilash and Walton onto its servers. It also admits that it indexed the

Century 21 Website and that it indexed all the property listings found within the Website. That indexing included the URL, price, MLS description, address, province, city, bedrooms, bathrooms, lot size, listing style, year built, status, taxes, storeys, agent name, agent email, agent title, agent website, broker name, broker email, broker phone, broker address, broker website and image URL.

[196] For each property listing that it indexed until approximately November 20, 2008, Zoocasa copied, among other things, the full property description and one photograph onto its servers. That information was stored in Zoocasa's database. After November 20, 2008, Zoocasa displayed a truncated portion of the description but continued to copy the whole description and a photograph onto its servers.

[197] Given the admissions of Zoocasa all of the listings of Walton and Bilash were accessed as described. The plaintiffs have chosen to rely on a total of 128 Works consisting of 29 property descriptions and 99 photographs that were copied. While Zoocasa disputes that certain of the 128 Works were in fact copied by their company, I am satisfied based on the evidence of Bilash, Walton, WTL and the notices to admit that at least 29 property descriptions and 99 photographs were copied. Zoocasa's disagreement appears to be based on their inability to match certain of the property descriptions to their records rather than a denial that the Works were copied.

[198] The breakdown of those 128 Works are that 24 of the property descriptions and 99 photographs are owned by Bilash and 5 property descriptions belonging to Walton were copied. The defendants assert that they did not display a substantial portion of the plaintiffs' Works. They refer to "snippets" having been copied. While that may be the case once they reverted to truncated property descriptions, the previous copying of the complete written property descriptions cannot, in my view, be described as a "snippet".

[199] What is substantial is not simply a question of quantity. Other factors relevant to the question of whether the taking was "substantial" are the importance of the

part, the nature of the work and the use of the work to compete with the copyright holder.

[200] An example of a property description characteristic of those copied is:

175 W 39th

A Stunning Cambie Bungalow home with basement that is the perfect for any family without breaking the bank!!

This is a gorgeous completely renovated home, located in the fantastic Cambie neighborhood just steps to the Queen E Park, Oakridge Shopping Centre, walking distance to the new Canada Line.

Major renovations include new drain tiles, new electrical/wiring, new roof, new double paned windows, new exterior and interior paint, new backyard & fence with 700 sq ft large cedar entertaining deck, permanent outdoor kids play area and much more.

Beautifully finished living spaces including a brand new chef's kitchen with superior quality Jenn Air appliances including built in fridge, gas stove, dishwasher, trash compactor, built in microwave, industrial quality canopy hood fan plenty of solid wood shaker style cabinetry and granite countertops.

Enjoy your view to the deck and children's play area through the large double windows.

The French doors off both the kitchen and dining room area open to the fantastic cedar deck with glass railings.

Completely new bathrooms with custom imported tumbled marble stonework; oversize soaker jet tub; Italian travertine flooring and chrome fixtures.

Other features of this home include re-finished solid oak flooring throughout, recessed pot lighting on both levels; cozy gas fireplace with a travertine surround and solid wood mantle; original cove ceiling in the living room; all brand new double paned windows with white trims; designer color scheme throughout with solid wood 8 inch baseboards and new smooth ceiling finish.

Main level features the huge master bedroom with tons of custom built closet space. Follow the open railed staircase which leads you downstairs to 2 spacious bedrooms with cream Berber carpets there is also a perfect wine cellar space; a great family room; den area; brand new bathroom; laundry room with side by side Maytag appliances and a separate entrance to the backyard.

This wide lot has an excellent level front yard with great landscaping for a clean contemporary look. The entire street has great curb appeal and is a very quiet family neighbourhood. Approximately \$250,000 spent in renovations; all you need to do is move in. Please call for price.



[201] In my view, such property descriptions were a substantial portion of each real estate listing page on the Century 21 Website, not only with respect to quantity but also in their overall significance respecting the property listing described.

[202] An example of the truncated property description which Zoocasa commenced using in November 2008 is:

212-819 Hamilton St, Vancouver, B.C. V6Z 6M2 \$285,000 - 1 Bed, 1 Bath - Great Newly Updated Jr 1 Bedroom at 819 Hamilton. This is a great West facing 1 bedroom suite which has lots of great. ...

[203] I find that the practice of Zoocasa, from its inception until November 2008, of indexing and copying the entire property description was, in the words of Slessor, L.J. in *Hawkes*, “the indexing and copying of a substantial, a vital, and an essential part” of the plaintiffs’ Works.

[204] The continued copying of the entire property description to the Zoocasa server is a violation of copyright. The truncated versions of the property description in my view do not infringe copyright as they do not meet the criteria for substantial copying sufficient for copyright infringement.

[205] With respect to the photographs, Zoocasa was not merely copying a thumbnail image as in the case of *Kelly v. Arriba Soft Corporation*, 336 F. 3d 811 (USCA, 9th Circuit, 2003), but rather the entire photograph. This was a clear violation of copyright.

### **Defences to Copyright Infringement**

[206] Section 29 of the *Copyright Act* creates an exception for copyright infringement known as the fair dealing exception. Once it has been shown that copyright has been infringed without permission of the copyright holder, the defendant may plead relief under the fair dealing provisions of the *Copyright Act*. The *Copyright Act* creates a two-part test for determining if fair dealings are exempted from copyright infringement. First, the dealing must be fair and second, it must be done for the purpose of research, private study, criticism, review, or news

reporting all of which must be without motive or gain. The leading case in Canada concerning fair dealing is *CCH* cited above at para. 181.

[207] In *CCH* at paras. 9-10, the Supreme Court of Canada discussed copyright infringement as follows:

9 In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive: see *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, at para. 5; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at p. 373. In interpreting the scope of the *Copyright Act*'s rights and remedies, courts should apply the modern approach to statutory interpretation whereby "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

10 Binnie J. recently explained in *Théberge, supra*, at paras. 30-31, that the *Copyright Act* has dual objectives:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator ... .

The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature.

In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals.

[208] The Supreme Court of Canada, in *CCH*, at para. 53 adopted from the appeal decision of Linden J.A. in the Federal Court of Appeal and in *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.) at 1027, "as well as the doctrine of fair use in the United States" certain factors to be considered when assessing fair dealing identified as follows:

...

- (1) the purpose of the dealing;
- (2) the character of the dealing;
- (3) the amount of the dealing;
- (4) alternatives to the dealing;

- (5) the nature of the work; and
- (6) the effect of the dealing on the work.

...

[209] These factors are neither essential nor exhaustive. Not all of these factors will arise in every instance and in some contexts there may be factors other than those listed that will be relevant to a determination of whether the dealing was fair.

### **The Application of the Principles of *CCH***

#### **Fair Dealing**

[210] Both parties refer to American authorities. In doing so the comments of Estey J. in *Compo* at 367, and relied upon in *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34 at para. 72, must be kept in mind:

- 72 ...  
... United States court decisions, even where the factual situations are similar, must be scrutinized very carefully because of some fundamental differences in copyright concepts which have been adopted in the legislation of that country.

[211] Zoocasa admits to indexing the Century 21 Website and that up to March 4, 2010, it indexed all of the property listings and a photograph for each of the listings on the Century 21 Website.

[212] The defendants have pleaded that their copying of the plaintiffs' Works constitutes "fair dealing" under the *Copyright Act*. Section 29 of the *Copyright Act* provides an exception from infringement for "fair dealing":

- 29 Fair dealing for the purpose of research or private study does not infringe copyright.

[213] To qualify for the fair dealing exception, the defendant must prove that the dealing was for a permitted purpose such as research or private study and that the dealing was fair: *CCH* at para. 50.

[214] The court in *CCH* further commented on fair dealing as follows at paras. 48 and 50-52:

48 Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."

...

50 In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

51 The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research." Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

52 The *Copyright Act* does not define what will be "fair"; whether something is fair is a question of fact and depends on the facts of each case. See McKeown, *supra*, at p. 23-6. Lord Denning explained this eloquently in *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027:

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of

libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.

### **Purpose of the Dealing**

[215] The plaintiffs' assert that Zoocasa's purpose or motive is purely commercial. It generates money from advertising including advertising on the pages of property descriptions on which the plaintiffs' listings and data appeared. This they say can result in a finding that its use "may not be as fair": *CCH* at para. 54.

[216] Zoocasa argues that the purpose of the dealing will be fair if it is for one of the allowable purposes under the *Copyright Act*, namely research, private study, criticism, review, or news reporting. They note that in *Society of Composers, Authors, and Music Publishers of Canada v. Bell Canada et al.*, 2010 FCA 123 [SOCAM] at paras. 17-20, the Federal Court of Appeal held that "research" included "the action or instance of searching carefully for a specified thing or person" and that commercial research by a consumer qualified as research. Further, the purpose of the dealing in question was to be considered from the point of view of the person for whom the dealings were intended. They argue that the plaintiff is focusing on the purpose of profit as opposed to the purpose for which the dealing was intended.

[217] Zoocasa states that in providing search results and "snippets" of the copyrighted Works to the users to determine if they wish to access the source website they are engaging in an activity that falls within the scope of "research" as contemplated by the *Copyright Act*. That is, it enables individuals to research real property listings.

### **Discussion of Purpose of the Dealing**

[218] It is not disputed that Zoocasa's motive is commercial. While apparently not yet profitable, it is endeavouring to generate income by selling advertising space on the web pages on which the plaintiffs' listings and data appear.

[219] Century 21's primary purpose is to list and sell real property. Their Website is not simply a vehicle for advertising; rather it is to promote their property listings to potential buyers.

[220] The Supreme Court of Canada in *CCH* states that research, even if commercial in nature, may be fair. However, as noted by the Supreme Court of Canada, at para 54, "some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes." Also, as quoted in *CCH* at para. 52 from *Hubbard*, "[i]f they are used to convey the same information as the author, for a rival purpose, that may be unfair".

[221] Additionally, the Federal Court of Appeal in *SOCAN* at para. 22, held that when assessing if a dealing was fair the dealing must be considered "from the point of view of the person for whom they are intended: the consumer of the subject-matter of the copyright." The issue in *SOCAN* was whether 30 second previews of musical works available on the Internet were subject to royalty payments. The court agreed with the Copyright Board's decision that the length of each preview in proportion to the length of the completed work was considered fair as the user's objective was research, in that case, the seeking and finding of a desired musical work.

[222] The commercial aspect is therefore not determinative but is one of the factors to be taken into account. The nature of the commercial aspect however can vary. When the intended use of copyrighted material is to generate revenue in competition to the copyright holder the use may be less fair. However, if the purpose produces a value to the public interest that may be more fair. If however the first factor, that of revenue to the user outweighs any public benefit, then the use may not be fair.

### **Character of the Dealing**

[223] The plaintiffs emphasize that custom or practice in a particular trade or industry is relevant in determining whether or not the character of the dealing is fair:

*CCH*, at para. 55. The plaintiffs place considerable emphasis on Zoocasa's failure to abide by the Robot Exclusion Standard.

[224] The defendants emphasize that the focus of the inquiry at this stage is "how the Works were dealt with". They state that the plaintiffs, in focusing on the remark in *CCH* that it "may be relevant to consider the custom or practice in a particular trade or industry", are ignoring the analysis required by *CCH*, that is, how were the Works dealt with?

[225] They assert that the Robot Exclusion Standard is irrelevant to the fair dealing analysis because all it does is permit indexing or permit indexing of some pages and not others or does not permit indexing at all.

### **Discussion of Character of the Dealing**

#### **Transformative Use**

[226] In the US the concept of "fair dealing" is described as "fair use". The defendant argues that American jurisprudence has developed four factors similar to those listed in *CCH* the first of which is the "purpose and character of the use". In doing so they place particular emphasis on the US concept of "transformative use".

[227] In *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007), the Ninth Circuit Court of Appeals considered the public importance of search engines and the "transformative" nature of their use of copyrighted material. *Perfect 10* involved a copyright owner's efforts to stop an Internet search engine from facilitating access to infringing images.

[228] The Court in *Perfect 10* stated at para. 1164:

...

... A work is "transformative" when the new work does not "merely supersede the objects of the original creation" but "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message". ...

...

[229] In considering whether the use of thumbnails by search engines was transformative the court commented at para. 1165:

...

Google's use of thumbnails is highly transformative. In *Kelly*, we concluded that Arriba's use of thumbnails was transformative because 'Arriba's use of the images serve[d] a different function than Kelly's use-improving access to information on the [I]nternet versus artistic expression. Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. Just as a "parody has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one," a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work." ... [Citations omitted].

[230] Zoocasa argues that by indexing the property listings in question, they transformed them from advertisements of properties for sale into an electronic reference tool, or a signpost, indicating where the property listing could be found. They say that the character of use in creating the signpost is entirely different from the purpose of the property listings in question. They submit, for example, that brokers or real estate salespeople create property listings to advertise properties for sale while Zoocasa creates an electronic reference tool to enable consumers to better find those advertisements. In essence, they characterize their approach as a more focused search engine. What they call a vertical search engine.

[231] With respect to the photographs at issue, Zoocasa created a lower resolution thumbnail image that served as a link to the original property listing. With respect to the property descriptions, Zoocasa created a copy on its server and then later reproduced a portion of it, calculated to provide a visitor with just enough information to decide whether or not to click through to the original listing.

[232] This issue of transformative use is addressed by the United States Court of Appeals, Second Circuit in *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2nd Cir. 1994) at 923:



2. *Transformative Use.*

The District Court properly emphasized that Texaco's photocopying was not "transformative." After the District Court issued its opinion, the Supreme Court explicitly ruled that the concept of a "transformative use" is central to a proper analysis under the first factor, see *Campbell*, 114 S. Ct. at 1171-73. The Court explained that though a "transformative use is not absolutely necessary for a finding of fair use, ... the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.* S. Ct. at 1171.

The "transformative use" concept is pertinent to a court's investigation under the first factor because it assesses the value generated by the secondary use and the means by which such value is generated. To the extent that the secondary use involves merely an untransformed duplication, the value generated by the secondary use is little or nothing more than the value that inheres in the original. Rather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the same intrinsic purpose as the original, thereby providing limited justification for a finding of fair use. See *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir.) (explaining that a use merely for the same "intrinsic purpose" as original "moves the balance of the calibration on the first factor against" secondary user and "seriously weakens a claimed fair use"), *cert. denied*, 493 U.S. 883, 107 L.Ed. 2d 172, 110 S. Ct. 219 (1989)

In contrast, to the extent that the secondary use "adds something new, with a further purpose or different character," the value generated goes beyond the value that inheres in the original and "the goal of copyright, to promote science and the arts, is generally furthered." *Campbell*, 114 S. Ct. at 1171, see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L.Rev. 1105, 1111 (1990) [hereinafter Leval, *Toward a Fair Use Standard*]. ...

[233] As a result, Zoocasa asserts that the character of the dealing supports a finding of fair dealing by Zoocasa.

[234] In my opinion, the difficulty that arises from the defendants' emphasis on "transformative use" is that what may be transformative, and as a result fair use in the US, may still be copyright infringement in Canada. For example, The US *Copyright Act of 1976*, 17 U.S.C. s. 107 [US Copyright Act] refers to "fair use of a copyright work, for purposes such as criticism, comment, news reporting, teaching, scholarship or research". The nature of this defence in the US is very broad and is essentially a codification of a judge-made rule. In comparison, Canadian copyright law is rooted in the *Copyright Act* which specifically grants to the creator rights to the

reproduction of the entire work or a substantial portion of the work: *Copyright Act*, s. 3. Under the Canadian *Copyright Act*, the exceptions or defences to copyright are more narrowly defined and extensively listed (although the list is not exhaustive) such as the purpose of the dealing is for research, private study, criticism, review or news reporting: see ss. 29, 29.1 and 29.2 of the *Copyright Act*. Canadian courts have not recognized “transformative use” as a characteristic of fair dealing.

### **Failure to Comply with Robot Exclusion Standard**

[235] The plaintiffs state that the failure to comply with the Robot Exclusion Standard overshadows any finding that the character of the dealing is fair. They state that the Robot Exclusion Standard is evidence of custom or practice in the search industry and as a result applies to a consideration of the character of the dealing. They state that in fact the defendants’ failure to abide by the Robot Exclusion Standard is decisive.

[236] The defendants, however, submit that consideration of the Robot Exclusion Standard as a factor in the fair dealing analysis is misconceived and that whether or not a website owner wishes the contents of the site to be found by search engines is not the issue and is irrelevant to the analysis. This despite the fact that Zoocasa itself uses the Robot Exclusion Standard on its Website.

[237] The defendants argue that an analysis of the authorities cited by the plaintiffs reveal that none of the cases incorporate the Robot Exclusion Standard issue into the four factors considered in the US concept of fair use. The issue arises in those cases in the context of implied licence or an additional factor of good faith.

[238] They note that the issue is not custom or practice respecting indexing, rather the plaintiffs rely on *CCH* where the court stated that the focus of the inquiry at this stage of analysis is “how the works were dealt with”. The defendants state that the plaintiffs, in focusing on the remark that it “may be relevant to consider the custom or practice in a particular trade or industry”, ignore the emphasis on the purpose of the inquiry.

[239] It is not disputed that the Robot Exclusion Standard is a “kind of *de facto* standard” in the industry that governs relations between websites and automated processes. Nor is it disputed that it permits websites to opt out if they do not want to be indexed. It also permits selective opting out where some search engines are permitted, some are not and indeed where only certain pages are permitted to be indexed.

[240] The major search engines such as Google, Bing and Yahoo! make the information required to opt out from their search engines publicly available. The defendant does not participate in this industry standard nor do they provide such information if requested. In fact, they do not have a “branded” Internet robot although the evidence is there is no technical reason why they could not.

**Discussion of the Robot Exclusion Standard as a Characteristic of Fair Dealing**

[241] Mr. Levine, the plaintiffs’ expert, explains the Robot Exclusion Standard in his expert report in this way:

- a) the Robot Exclusion Standard is the industry standard governing how search engines and website owners interact;
- b) the Robot Exclusion Standard provides a mechanism by which a website operator can choose to opt out of a specific search engine(s), while still remaining accessible to other search engines; and
- c) the Robot Exclusion Standard requires that a search engine disclose the name of its “robot” so that website operators can use either a robots.txt file or meta tags to opt out of being searched by that search engine.

[242] In *eBay v. Bidder’s Edge Inc.*, 100 F. Supp.2d 1058 (N.D. Cal. 2000) the United States District Court defined the Robot Exclusion Standard as follows at 1161:

The eBay site employs “robot exclusion headers”. ... A robot exclusion header is a message, sent to computers programmed to detect and respond to such headers, that eBay does not permit unauthorized robotic activity. (*Id*) Programmers who wish to comply with the Robot Exclusion Standard design their robots to read a particular file, “robots.txt,” and to comply with the control directives it contains. ...

[243] Zoocasa acknowledges that it was aware of the Robot Exclusion Standard and that it is widely followed in the marketplace and among search engines. It was also aware that the Robot Exclusion Standard allows a website to opt out of being indexed by all search engines or just specific search engines by inserting the appropriate line of text in the robots.txt file. As noted earlier, Zoocasa itself implements the Robot Exclusion Standard and enjoys the benefits of using the standard.

[244] Century 21's Website has a robot.txt file and uses it to indicate to specific search engines that Century 21 does not want them to index the Century 21 Website. However, Century 21, through its website operator, has not been able to use its robot.txt file to block Zoocasa because it does not know the name of Zoocasa's robot or spider. That information is required before a site can be blocked. Zoocasa has refused to provide the name of its robot. On this application Zoocasa indicated for the first time that it does not currently have a "branded" Internet robot. Zoocasa has not explained why it does not given how widespread the standard is in the industry.

[245] The Robot Exclusion Standard is an accepted industry standard that permits search engines to function by allowing them to copy content from websites without obtaining the prior consent of potentially many millions of websites, and it also allows individual website operators to opt out of being indexed if they wish.

[246] The plaintiffs assert that American courts have recognized the Robot Exclusion Standard as striking the appropriate balance in determining what use is "fair" for the purposes of the fair dealing exception (or the "fair use" exception, as it is known in the United States). In particular, they rely on *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (Dist. Court, D. Nev. 2006), and *Parker v. Yahoo!*, 2008 U.S. Dist. LEXIS 74512, (E.D. Pa. 2008).

[247] In *Field*, the plaintiff claimed for copyright infringement against Google alleging that Google's caching of the plaintiff's web pages breached copyright. The plaintiff knew that he could use a meta tag to instruct Google not to provide a cached

link. The plaintiff also created his own robots.txt file and set it to permit all robots to access his website and to index all of the pages on his website. Google removed the cached links as soon as it was served with the lawsuit. Based on these facts and the expert evidence of John Levine, who is also the plaintiffs' expert in the case at bar, Jones J. found that the plaintiff's conduct could be reasonably interpreted as a grant of a licence to Google to index and cache his website.

[248] Jones J. commented about the use of industry standard protocols between website owners and search engines as follows:

17. Given the breadth of the Internet, it is not possible for Google (or other search engines) to personally contact every Web site owner to determine whether the owner wants the pages in its site listed in search results or accessible through "Cached" links. ...

18. The Internet industry has developed a set of widely recognized and well-publicized industry standard protocols by which Web site owners can automatically communicate their preferences to search engines such as Google. ... Google provides instructions for Web site owners to communicate their preferences to Google at <http://www.google.com/remove.html>. ...

19. A principal way for Web site owners to communicate with Google's robot is by placing specific instructions in "meta-tags" within the computer code (called HTML) that comprises a given page. When the Googlebot visits a page, it reads through this code. If it encounters meta-tags, it follows the instructions provided. Thus, for example, a site owner can place the following meta-tag within a page to tell Google's robot not to analyze the page or include it in Google's Web index and search results: ...

...

22. Web site owners can also communicate with search engines' robots by placing a "robots.txt" file on their Web site. ... For example, if the Web site owner does not want robots to crawl the owner's Web site, the owner can create a robots.txt file with the following text: "User-agent: \* Disallow: /" ... The above text tells the robots that they should not crawl the owner's Web site ... If Google's robot encounters a robots.txt file with the above text, then it will not crawl the Web site, and there will be no entry for that Web page in Google's search results and no cached link ... The Internet industry has widely recognized the robots.txt file as a standard for controlling automated access to Web pages since 1994. ...

[249] In *Parker*, the US District Court of Eastern Pennsylvania followed *Field* and found that a website owner, who, despite knowing about the electronic protocols to

prevent indexing and caching (including robots.txt), failed to object to the infringing conduct was granting a licence for the infringing use.

[250] In *Parker*, Yahoo! continued to display works even after the commencement of the lawsuit. The court held that initiation of a lawsuit itself may constitute revocation of an implied licence if there was no consideration for the licence. In *obiter*, the court also said that continuing to display works after the commencement of the lawsuit may constitute direct copyright infringement.

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

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

[253] In my opinion the Robot Exclusion Standard addresses how the copyrighted material was acquired, not how it was used. How the works in question come into the possession of a party is quite irrelevant to a consideration of fair dealing which is concerned with the use of the works, not their manner of acquisition. The manner of

acquisition may have relevance to other claims such as bad faith in damage claims but in my view does not assist in a fair dealing analysis.

### **Alternatives to Dealing**

[254] The determination of fairness includes consideration of “non-copyrighted equivalent of the work that could have been used instead of the copy-righted work ... [and] ... whether the dealing was reasonably necessary to achieve the ultimate purpose”: *CCH*, at para. 57.

[255] The plaintiffs’ analysis regarding this issue is that the dealing was not reasonably necessary to achieve the ultimate purpose because if the industry can function with sites being entitled to opt out of being indexed, then there are alternative sources of information. In this case, the fact that Zoocasa did at one time and now once again does not index those sites that do not want to be indexed is alleged to be evidence that there are alternative non-copyrighted equivalents to the Century 21 Works.

[256] The defendants submit that this factor involves a determination of whether or not there was an alternative to the dealing with the infringed work. That is, was there a non-copyrighted equivalent of the work in question available? They submit that in this case, there was no non-copyrighted alternative if they were to accurately index actual listings.

[257] They further state that the plaintiffs’ analysis is flawed as the issue, in their view, is not whether to index sites that do or do not want to be indexed, but rather, the issue is whether there was an alternative non-copyrighted source of the work in question. Fair dealing is premised on a lack of consent. However, the lack of consent is not relevant to the analysis itself.

[258] According to the evidence of Mr. Lee, Zoocasa, in September 2008, operated on the basis that target websites could opt out of being indexed. However, shortly thereafter they abandoned that policy and in the case of the plaintiffs continued to index their site and information despite knowing they did not wish to be indexed.

They have now returned to the earlier policy of allowing websites to opt out of being indexed. Mr. Lee stated “now that the business focus of Zoocasa has been refined, it is apparent that it is not part of Zoocasa’s business model to index sites that do not wish to be indexed”. The fact that Zoocasa was once and is now able to function adequately without indexing websites that do not wish to be indexed demonstrates that there are alternatives to dealing with infringed works. The practice of all major search engines allowing websites to opt out of being indexed also supports a finding that there are viable alternatives to Zoocasa’s previous practice of copying content despite the website operator’s objections.

[259] The issue, in my view, is whether alternative information is available. It is apparent that if given the choice, Zoocasa would prefer to have access to the Century 21 Website. Their business plan is premised on linking to as many real estate listings as possible.

[260] Alternatives to the dealing was defined by the Supreme Court of Canada in *CCH* at para. 57, as “non-copyrighted equivalent of the work that could have been used instead of the copy-righted work ... [and] ... that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose.”

[261] It appears therefore that the test is whether there is a non-copyright equivalent of the work. However, the test is premised on the determination that an equivalent was necessary to accomplish what was intended.

[262] In this instance, the evidence respecting non-copyrighted equivalents of the Works is that the public is free to access the information sought through individual real estate agents of Century 21. In addition, it appears that the manner of obtaining the copyright work, although preferred by Zoocasa, was not reasonably necessary to achieve its ultimate purpose given they can source the material elsewhere. I find that Zoocasa had alternatives to the dealing that they chose not to pursue in order to minimize time and expense. As a result their dealings with respect to this factor were not fair.



### **Amount of the Dealing**

[263] The court in *CCH*, at para. 56, articulated the principles used to guide courts when determining whether the amount of the dealing was fair. In this regard the court said:

56 Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement. As the passage from *Hubbard* indicates, the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs: see Vaver, *supra*, at p. 191. The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

[264] In *Hubbard*, *supra* at 1027, the English Court of Appeal considered the scope of the defence of fair dealing in relation to criticism or review of literary works. Lord Denning made the following remarks:

...

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. ...

...

[265] Substantial taking is not always measured by the quantity of matter reproduced from a copyrighted work, though that may be a significant factor: *Horn Abbot Ltd. v. W.B. Coulter Sales Ltd.* (1984), 77 C.P.R. (2d) 145 (F.T.D.) (The "Trivial Pursuit" case). Courts will also look to the quality of matter reproduced. In *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 97 F.T.R. 259 (F.T.D.),

at para. 35, the court held that assessing whether or not a taking is substantial may depend upon a number of factors such as:

...

- (a) the quality and quantity of the material taken;
- (b) the extent to which the defendant's use adversely affects the plaintiff's activities and diminishes the value of the plaintiff's copyright;
- (c) whether the material taken is the proper subject-matter of a copyright;
- (d) whether the defendant intentionally appropriated the plaintiff's work to save time and effort; and
- (e) whether the material taken is used in the same or a similar fashion as the plaintiff's.

[266] Zoocasa, throughout all times in issue, copied the whole of Century 21's property descriptions onto its servers. Until approximately November 20, 2008, they also displayed those full property descriptions on their Website. After November 20, 2008, they displayed truncated descriptions on their Website. They also copied and displayed the whole photographs that are the subject of this claim. The plaintiffs submit this amount of dealing militates against a finding of fairness.

[267] Zoocasa submits that it only takes a portion of the data from the property listings it indexes. They emphasize that the property description must be looked at as part of a whole. They assert that the amount taken may be more or less fair depending on its purposes. As a result, the quantity of the work dealt with will not be determinative of the fairness. They state that given the sole purpose of indexing the property listings in question was to better publicize them and further their purpose of advertising property for sale, that even if the court considers that a substantial portion of the Works or the property listing has been dealt with, the dealing is nonetheless fair.

[268] The copying of basic information such as the property address and the legal description is in my view not copyright infringement. However the copying of the property description created for the purpose of encouraging property sales goes

beyond such basic information. The written description of the property contains the key information concerning the property. It is a description of the property in prose form while the remainder of the site consists of basic information such as lot size, property taxes etc. In addition, the repeated daily access and indexing of such information militates against a defence of fair dealing. This is not a situation of a one-time copy being taken. It is conduct consisting of repeated actions by the defendants. In my view the amount of dealing exceeds what is fair.

### **Nature of the Work**

[269] In regard to the nature of the work, the court in *CCH* at para. 58, stated:

58 The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work -- one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair. See *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch. D.), at p. 264.

[270] The plaintiffs submit that this relates to unpublished confidential work, neither of which factors are present in the case at bar and as a result this factor is not relevant.

[271] The defendants however state that the nature of the Works, in this case a property description and a property listing, is significant on the basis that the Works exist solely in order to publicize property for sale. They argue that the plaintiffs' position rests on a restrictive interpretation of the statement in *CCH* that dissemination of an unpublished work might be more fair, while the dissemination of a confidential work might be less fair: *CCH* at para 58.

[272] However, *CCH* reveals that the Supreme Court of Canada appears to favour "wider public dissemination of the work" where the work in question is unpublished but not confidential. In the case at bar the work is published on the Century 21 Website for advertising purposes. As a result this favours fair dealing.

### **Effect of the Dealing on the Work**

[273] The court in *CCH* described this factor as follows:

59 ... If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. ...

[274] Zoocasa submits that the copying is fair because its Website is intended to drive traffic to the Century 21 Website. The evidence indicates that less than 1% of the Century 21 Website traffic comes from Zoocasa's site. This however is not the real issue. Zoocasa competes with the Century 21 Website for Internet users who are searching for properties for sale. Zoocasa's own marketing materials state that it "helps reduce the time and effort" required to search for properties online by allowing the user to avoid having to use individual realty websites such as the Century 21 Website.

[275] Although the primary purpose of Century 21's Website is to facilitate real estate sales and Zoocasa's primary purpose is to gain profit from advertising such listings, the Zoocasa Website clearly competes with the Century 21 Website in the market for Internet users seeking to search for properties for sale. Both Century 21 and Zoocasa use the copied material in the same way. That is, to facilitate searches by users for real properties.

[276] As a result, this factor favours a finding that the dealing is not fair.

### **Conclusion on Fair Dealing**

[277] The Supreme Court of Canada in *CCH* discussed how to assess the fair dealing factors as follows at para 60:

60 To conclude, the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing. In some contexts, there may be

factors other than those listed here that may help a court decide whether the dealing was fair.

[278] The preparation of the property descriptions and the photographs, as I have noted, required some level of skill. The fact that they had value is indicated by the fact that the Zoocasa availed itself of them. In *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601 at 610 Peterson J. noted that “there remains the rough practical test that what is worth copying is prima facie worth protecting”.

[279] Based on my conclusions above regarding the elements of the test for fair dealing, and given it is a matter of impression, in my view the actions of Zoocasa during the time that they copied and displayed the whole of the property descriptions and a photograph were, in my opinion, not fair.

[280] In this case, the Robot Exclusion Standard is not an additional element because it addresses only the manner in which access was gained not the issues relevant to fair dealing.

**No Relief for the Defendants under Section 39 of the *Copyright Act***

[281] At para. 27 of their amended statement of defence, the defendants plead reliance on s. 39 of the *Copyright Act*. Section 39(1) provides as follows:

39. (1) Subject to subsection (2), in any proceedings for infringement of copyright, the plaintiff is not entitled to any remedy other than an injunction in respect of the infringement if the defendant proves that, at the date of the infringement, the defendant was not aware and had no reasonable ground for suspecting that copyright subsisted in the work or other subject-matter in question.

[282] The defendants are unable to shelter under this provision for two reasons. First, the defendants were put on notice by September 2, 2008, that Zoocasa’s indexing of the Century 21 Website was contrary to the *Copyright Act*. Secondly Mr. Lee on behalf of Zoocasa admitted on discovery that Zoocasa understood there is copyright protection in the prose that people write and the photographs that people take.

**Trespass to Chattels**

[283] The plaintiffs submit that by continuing to access the servers used to host the Century 21 Website after Century 21 demanded that Zoocasa cease doing so, Zoocasa committed the tort of trespass to chattels.

[284] Zoocasa argues that such an action cannot be maintained for two reasons. First, the tort does not apply in Canada to the act of accessing computer systems. Second, the plaintiff has no possessory interest in the servers that are used to host their Website.

**Discussion**

[285] Trespass to goods is defined as in Halsbury's Laws of Canada, *Torts*, 1st ed. (LexisNexis: Markham, Ont. 2007) at 150 as:

**Trespass to goods.** "Chattel" or "goods" refers to tangible personal property, as opposed to real property or intellectual property. Any direct touching of another person's chattel constitutes a trespass to goods, unless such touching is justified by law....The plaintiff does not have to establish ownership of the goods, merely that he or she was in possession of the goods at the material time. ...

[286] This raises the issue of whether Century 21 is in possession of the servers from which its Website is operated to a degree sufficient to support the tort of trespass to chattels. In *1162994 Ontario Inc. v. Bakker*, [2004] O.J. No. 2565 (C.A.), at para. 20, the court stated:

**20** Possession is a difficult concept to define. Both in common and legal parlance, it connotes some form of control over the thing said to be possessed: e.g. D. Dukelow, B. Nuse, *The Dictionary of Canadian Law* 2nd ed., (1995) Carswell at p. 916; *The Shorter Oxford English Dictionary*, Vol. II (1973) p. 1635. Clearly, possession in s. 86(1)(b) is not limited to immediate physical control. For example, a tenant who locks up a rental unit and leaves on an extended vacation, continues to exercise sufficient control over that rental unit so as to qualify as a "tenant in possession" for the purposes of s. 86(1)(b). In my view, possession of a rental unit refers to some form of control over that unit as demonstrated by factors such as access to, use of, or occupation of the unit.

[287] Black's Law Dictionary, 6th ed. (West Publishing Co.: St. Paul, Minn., 1990) at 1163 defines "possession" as follows:

"The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. ..."

[288] *Marsh v. Kulchar*, [1952] 1 S.C.R. 330, 1 D.L.R. 593 (S.C.C.), at 334-335, also considered the meaning of possession:

...

The word "possession" in English law is, as has often been pointed out, a most ambiguous word. As most often used, however, it imports actual physical possession. ... When a motor car is stolen from the owner, the thief takes actual physical possession, and thus takes it out of the possession of the owner, although the right to possession remains with the latter. That this is the idea in contemplation of the statute is shown by the use of the phrase, "or otherwise...taken out of his possession." ...

...

[289] Any claim by the plaintiff to possession of the computer system that supports its Website is based on its agreement with WTL. The plaintiff entered into an agreement with WTL dated July 27, 2006 (the "WTL Agreement"). I assume for the moment that any claim the plaintiff has to trespass with respect to its Website involves the servers on which the Website content, listings, property descriptions and photographs are located. As a result, the provisions of the agreement must be considered.

[290] The WTL Agreement states that WTL provides "Internet-based software services to the real estate industry". The definitions applicable to the trespass issue are as follows:

- a. "Hosting Services" means electronic access to, hosting of and management of the C21 CA Website, including but not limited to WTL Supplied Software, C21 CA Content and Third Party Provider content on servers controlled by WTL or its Third Party Providers.
- n. "WTL Technology" means WTL's (or its licensors' or suppliers') proprietary technology, including but not limited to WTL's industry-specific products, the Services, WTL Supplied Software and other software, tools, database designs, algorithms, user interface designs, architecture, class libraries,

objects and documentation, network design, know-how, training documentation, support documentation, source code, content and other information or materials supplied or provided by WTL as part of the Services.

[291] The relevant provisions of the WTL Agreement are:

3. Hosting Services:

a. Hosting. WTL agrees to provide, and C21 CA agrees to take and pay for, Hosting Services for the WTL Technology and the C21 CA Content during the term in accordance with this Agreement.

f. Infrastructure. WTL agrees to provide the Hosting Services via commercially accepted infrastructure, including servers, security and bandwidth scalable in excess of the needs of the Website.

6. WTL Technology:

a. WTL hereby grants to C21 CA a nonexclusive license during the term of this Agreement to use the WTL Technology solely for the purposes of using the Website and the Services. Subject to such license, WTL (and/or its licensors and/or suppliers) will retain all rights in all WTL Technology. ...

[292] Through the WTL Agreement, WTL granted Century 21 a licence to use WTL Technology for its Website and the corresponding services. They do not have any grant of licence respecting the infrastructure which includes the servers. That is simply the technology used by WTL to provide hosting services.

[293] In this instance it is alleged that the trespass occurred on the WTL servers. Century 21 relies on *eBay* for the assertion that American courts have held that accessing a website without authorization constitutes a trespass to chattels. In that case *eBay* sought a preliminary injunction against Bidder's Edge on the ground of trespass to prevent Bidder's Edge from crawling its website. Bidder's Edge operated an aggregation site that scraped content from several auction sites and posted that content to its own site. In some respects this is similar to the activities of Zoocasa which accumulates real estate listings from multiple sites.

[294] The court, in granting *eBay*'s application for an interlocutory injunction, found that the right of Bidder's Edge to use *eBay*'s personal property, even if the use was negligible, was not a right recognized by law and held as follows at 1070:

...



... eBay's servers are private property, conditional access to which eBay grants the public. eBay does not generally permit the type of automated access made by BE. In fact, eBay explicitly notifies automated visitors that their access is not permitted....eBay repeatedly and explicitly notified BE that its use of eBay's computer system was unauthorized. The entire reason BE directed its queries through proxy servers was to evade eBay's attempts to stop this unauthorized access. ...

...

[295] The tort has traditionally been applied to physical interference with a chattel. The issue then becomes whether or not electronic access is "physical" or whether it needs to be "physical" for the tort claim to succeed. In *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559 (Cal: Court of Appeals, 4th Appellate Dist., 3rd Div. 1996), the court held that electronic access is sufficient and stated at 1566-1567:

Trespass to chattel, although seldom employed as a tort theory in California (indeed, there is nary a mention of the tort in Witkin's Summary of California Law), lies where an intentional interference with the possession of personal property has proximately caused injury. (See, e.g., *Itano v. Colonial Yacht Anchorage* (1968) 267 Cal. App. 2d 84, 90 [72 Cal. Rptr. 823].) Prosser notes trespass to chattel has evolved considerably from its original common law application--concerning the asportation of another's tangible property--to include even the unauthorized use of personal property: "Its chief importance now," according to Prosser, "is that there may be recovery ... for interferences with the possession of chattels which are not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered. Trespass to chattels survives today, in other words, largely as a little brother of conversion." (Prosser & Keeton on Torts, *supra*, § 14, pp. 85-86, fn. omitted; see also *Zaslow v. Kroenert* (1946) 29 Cal. 2d 541, 551 [176 P.2d 1] ["Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of ... the personal property, the owner has a cause of action for trespass" to chattel, but not for conversion].) [Citations omitted].

[296] It is not at all clear that Canadian law supports the proposition that electronic access to a computer system is a physical act involving some degree of force. As noted by G.H.L. Fridman, *The Law of Torts in Canada*, 2d ed. (Carswell: Toronto, 2002) at 125: "Trespass involves a physical act *vis-a-vis* the object in question". However, given my findings below respecting Century 21's claim to a possessory interest in WTL's website servers it is not necessary to resolve this issue.

[297] Even assuming that in Canada, as has been found in the US, that electronic signals are sufficiently tangible to trespass there must still be a physical object that is trespassed upon: *Thrify-Tel, Inc., supra*; *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (Dist. Court, SD Ohio 1997); *eBay, supra*; and *Intel Corp. v. Hamidi*, 1999 WL 450944 (Cal. Sup. Ct., 1999).

[298] In Canada, the physical trespass of a chattel is a requirement necessary to plead the tort of trespass: Fridman, *The Law of Torts in Canada*, above at para. 297 at 121-123.

[299] The chattels in question are the servers of WTL or its third party suppliers. Century 21 under its agreement with WTL has no possessory interest in those servers. As a result, an essential element of the tort of trespass to chattels is not present. Any potential claim for trespass to chattels would be that of WTL. They are not a party to this action. Century 21's claim respecting trespass to chattels is dismissed.

### **Liability of Rogers**

[300] The plaintiff advances its claim against Rogers on several grounds. They claim that Rogers is liable for authorizing the breach of copyright pursuant to s. 27(1) of the *Copyright Act*. They also claim that Rogers is liable for inducing Zoocasa's breach of contract arising under the Terms of Use and finally that Rogers is guilty of the tort of inducing breach of contract.

[301] The plaintiffs base Roger's liability on allegations that Rogers has gone beyond the role of shareholder and investor and has directly supported and promoted the Zoocasa Website. The plaintiffs make this claim on the basis of Rogers' initial role in developing Zoocasa and its ongoing support for the company.

[302] In particular, the plaintiffs cite the involvement of Rogers' employees in developing the Zoocasa idea, Website and search engine before Zoocasa was incorporated on March 28, 2008, and in advancing the Zoocasa project by leveraging relationships that Zoocasa had with the industry.

[303] The plaintiffs further cite Rogers' ongoing support for the project, noting that Rogers is the sole provider of funding and support for the development and maintenance of the Zoocasa Website. The plaintiffs note several instances where Rogers' employees, acting in their capacity as such, actively promoted the Zoocasa Website to Century 21. The plaintiffs also cite the fact that Zoocasa's three directors are all officers of Rogers.

### **Defendants' Position**

[304] The defendants deny that Rogers can be liable as asserted by the plaintiffs and say that the Zoocasa Website is operated by a separate legal entity, all employees are now those of the numbered company and any decisions about indexing and listing are made by Zoocasa, not Rogers. The defendants say that Rogers is a shareholder of Zoocasa and is not liable for the actions of Zoocasa. They deny that Rogers authorized the conduct of Zoocasa.

### **Rogers Involvement in Zoocasa**

[305] Rogers has actively participated in Zoocasa's business. Michael Lee and Barry Choi developed the idea for the Zoocasa project in the spring of 2007 while they were both employees of Rogers and before Zoocasa was incorporated.

[306] The work to build the search engine for the Zoocasa Website began in late summer of 2007, before Zoocasa was incorporated. Rogers, not Zoocasa, registered the domain name for the Zoocasa Website. Rogers also lent employees to Zoocasa for the development of the Zoocasa Website and leveraged relationships that Rogers had with the industry, both of which helped to advance the Zoocasa project. The initial programming for the Zoocasa Website was completed by Rogers' employees.

[307] In addition, Zoocasa has three directors, all of whom are officers of Rogers. Rogers is also the sole provider of funding and support for the development and maintenance of the Zoocasa Website having contributed \$2.1 million in 2008 and \$2.2 million in 2009.

[308] Rogers also supports the Zoocasa Website by providing services in kind (i.e., using other business units to drive traffic to the Zoocasa Website). Rogers has also provided legal services to support the Zoocasa Website as Rogers and its external counsel drafted the terms of use for the Zoocasa Website.

[309] Even after Zoocasa was incorporated on March 28, 2008, employees of Rogers continued to be actively involved in promoting the Zoocasa Website. On July 4, 2008, Darrell Cox of Rogers sent an email to Barbara Fromm of Century 21 to introduce her to the Zoocasa Website. He identified himself in the email as Director of Business Development, Rogers Communications Inc., and stated as follows:

As per my voice mail, I'd love to get the time with you to discuss a real estate vertical search website we have developed. ... From a Rogers perspective we want to drive brand awareness with consumers who will soon be in the market for cable, home phone and/or broadband services.

[310] When Mr. Phillipson and Mr. Cox met with Century 21 in the summer of 2008, they presented themselves with their Rogers business cards as being, respectively, Manager, Business Development, Rogers Communications Inc., and Director, Business Development, Rogers Communications Inc.

[311] Darren Phillipson, who was actively involved in developing and promoting the Zoocasa Website, was never officially an employee of Zoocasa. He was at all times an employee of Rogers. Mr. Cox also worked on the Zoocasa project while an employee of Rogers to "help support the venture", as did Mr. Lewin for a period of time.

[312] On October 16, 2008, C.B. Ross, a representative of Rogers Wireless who had no position with Zoocasa, sent two emails to Ms. Fromm of Century 21, in which he underscored Rogers' direct involvement in the development and maintenance of the Zoocasa Website.

[313] Direct conduct by Rogers continued thereafter directly in the operation of the subsidiary. On January 13, 2009, Mr. Cox, writing in his capacity as Director of

Business Development, Rogers Communications Inc., from Roger's head office in Toronto, sent an email to Sherry Chris, a representative of the owner of the Century 21 brand in the United States, in which he attempted to arrange a meeting between representatives of Rogers and Century 21 USA to discuss the Zoocasa Website.

## **Discussion**

### **Roger's Alleged Authorization of Copyright Infringement**

[314] Is Rogers liable for copyright infringement by authorizing Zoocasa's infringement? The plaintiffs' submit that s. 27(1) of the *Copyright Act* prohibits anyone from doing that which only the owner of the copyright owner has the right to do. Pursuant to s. 3(1), only the copyright owner has the right to "authorize" the reproduction of a work.

[315] Liability for contravening s. 3(1) through authorizing violations of copyright is found in s. 27 of the *Copyright Act*.

**27.** (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

[316] The meaning of "authorize" in this context was reviewed by the Supreme Court of Canada in *CCH* at para. 38 where the court stated as follows:

38 "Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182, at p. 193; *De Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "[g]ive approval to; sanction, permit; favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: *CBS Inc. v. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Ch. D.), at pp. 823-24. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak, supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons

who committed the copyright infringement: *Muzak, supra*; *De Tervagne, supra*; see also J. S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at p. 21-104, and P. D. Hitchcock, "Home Copying and Authorization" (1983), 67 C.P.R. (2d) 17, at pp. 29-33. [Emphasis added]

[317] It is not disputed that Rogers, through its employees and representatives, directly supported and promoted the Zoocasa Website. However, the plaintiff submits that in addition Rogers has directly sanctioned, approved, countenanced, favoured, and encouraged the Zoocasa Website. They submit that liability for authorizing copyright infringement can arise from acts that are less than direct and positive, including a sufficient degree of indifference.

[318] Zoocasa relied on Rogers for development and support of its Website, search engine and "spider" or "robot". However, the court in *CCH* made it clear that "a person does not authorize infringement by authorizing the mere use of equipment". Therefore, the question then becomes whether Rogers authorized Zoocasa's alleged copyright infringement?

[319] The relevant principle is stated in *de Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (T.D.) at para. 49, where the Federal Court cited P. D. Hitchcock's article "Home Copying and Authorization" (1983), 67 C.P.R. (2d) 1983, at 17-49:

**49** The position of Kellock J. may be summarized as follows: "[i]n order to 'authorize' a person must sanction, approve or countenance more than mere use of **equipment that might possibly be used in an infringing performance but, on the other hand, a person need not go so far as to grant or purport to grant the right to perform**" ... .

[320] In *CCH*, the Supreme Court of Canada rejected the claim that the Law Society of Upper Canada authorized copyright infringement by providing self-service photocopiers in the Great Library at Osgoode Hall in Toronto, stating as follows:

**43** First, there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. ... Although the Court of Appeal assumed that the photocopiers were being used to infringe copyright,

I think it is equally plausible that the patrons using the machines were doing so in a lawful manner.

[321] Similarly, and in the context of the Internet, the Supreme Court of Canada in *SOCAN* at paras. 122-123, expanded on this issue:

122 Of course there is a good deal of material on the Internet that is not subject to copyright, just as there was a good deal of law-related material in the Great Library at Osgoode Hall that was not copyrighted in the recent *CCH* appeal. In that case, as here, the copyright owners asserted that making available a photocopier and photocopying service by the Law Society of Upper Canada implicitly “authorized” copyright infringement. ...

123 The operation of the Internet is obviously a good deal more complicated than the operation of a photocopier, but it is true here, as it was in the *CCH* case, that when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute to the Internet Service Provider, based solely on the provision of Internet facilities, an authority to download copyrighted material as opposed to non-copyrighted material.

[322] In *SOCAN*, the court approved the decision of the Copyright Board that an institution’s knowledge that the means provided may be used to infringe copyright does not, in and of itself, constitute authorization. The Copyright Board had stated as follows:

124 On this point the Board concluded as follows (at p. 458):

Even knowledge by an ISP that its facilities may be employed for infringing purposes does not make the ISP liable for authorizing the infringement if it does not purport to grant to the person committing the infringement a license or permission to infringe. An intermediary would have to sanction, approve or countenance more than the mere use of equipment that may be used for infringement. Moreover, an ISP is entitled to presume that its facilities will be used in accordance with law.

[323] The Court in *SOCAN* continued:

124 ... This conclusion is generally consistent with the decision of this Court in the *CCH* case”, although I will point out that copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system and fails to take remedial action.

[324] However, the court did not have to consider the possibility that knowledge of a copyright infringement coupled with failure to take remedial action might constitute implicit authorization:

127 The knowledge that someone *might* be using neutral technology to violate copyright (as with the photocopier in the *CCH* case) is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did “(g)ive approval to; sanction, permit; favour, encourage” (*CCH*, at para. 38) the infringing conduct. I agree that notice of infringing content, and a failure to respond by “taking it down” may in some circumstances lead to a finding of “authorization”. However, that is not the issue before us. Much would depend on the specific circumstances. An overly quick inference of “authorization” would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory “notice and take down” procedure as has been done in the European Community and the United States.

128 In sum, I agree with the Court of Appeal that “authorization” could be inferred in a proper case but all would depend on the facts.

[325] Where a party supplies equipment but does not have control over how the equipment is to be used, that party does not “authorize” the copyright infringement. In *Vigneux v. Canadian Performing Right Society Ltd.*, [1943] S.C.R. 348, reversed [1945] UKPC 1, A.C. 108 (P.C.), the defendants supplied a phonograph to a restaurant and, in exchange for a monthly rental, provided records. The Privy Council found this did not constitute the defendants “authorizing” the restaurant owner’s public performance of the works in question as they did not give the alleged performance nor have control over the machine. As stated by Lord Russell at 123:

...

... They had no control over the use of the machine; they had no voice as to whether at any particular time it was to be available to the restaurant customers or not. The only part which they played in the matter was, in the ordinary course of their business, to hire out to Raes one of their machines and supply it with records, at a weekly rental of ten dollars.

...



[326] In *Muzak*, referred to above, Kellock J. cited with approval the above passage from *Vigneux*. In *Muzak* the court held that merely furnishing electronic transcriptions of musical works, arranged so as to be performed on transcription turntables, did not authorize the use of these works in a manner which violated the owner's copyright. This could not be construed as authorization because, as in *Vigneaux*, *Muzak* did not have control of the actual performances.

**Did Rogers Authorize More Than “Mere Use of Equipment”?**

[327] In my view, Rogers, in providing the means by which to establish the Zoocasa idea, Website and search engine, did no more than “authoriz[e] the mere use of equipment which could be used to infringe copyright.” As in *SOCAN*, the technology in question is “neutral technology” in the sense that there are plausible legal uses for tools which index, list and link websites. Indeed, the evidence suggests that allowing for automatic indexing is an industry standard provided that the site being indexed can reasonably exercise a right to “opt-out” if this is desired.

[328] Furthermore, the situation is akin to that in *Vigneux* and *Muzak* as there is no evidence that Rogers exercised specific control over the manner in which the tool operated. In particular, there is no evidence that Rogers controlled which sites Zoocasa's “robot” or “spider” accessed or the process by which the tool's administrator prevented the collection information from parties who did not want such information collected. The evidence is that the tool that Rogers assisted Zoocasa to develop was able to exclude specific websites upon request.

[329] However, if implicit authorization can be established based on knowledge by Rogers of the alleged infringement and the support offered despite this knowledge the presumption that it only authorized Zoocasa to index, list and link websites in accordance with the law, may be rebutted by evidence that “a certain relationship or degree of control existed” between Rogers and Zoocasa.

[330] This then leads to the question of whether there was such a relationship or degree of control between Rogers and Zoocasa so as to rebut the presumption that the activity was only authorized in so far as it is in accordance with the law.

**Exercise of Control by a “Parent” Company over Its Subsidiary**

[331] Ordinarily, control exercised by Rogers in its capacity as a shareholder in Zoocasa would not make Rogers liable. Recognition of such control would pierce the corporate veil. As stated by the British Columbia Court of Appeal in *Edgington v. Mulek Estate*, 2008 BCCA 505, a case involving a breach of contract, control by a shareholder of a corporation is expected and that on its own is not sufficient to disregard the separate legal personality of the corporation:

[20] ... Parties to transactions employ the use of corporate vehicles for a reason, as they are entitled to do. Shareholders, despite being in a position of control, do not, as a rule, incur liability for the breach of their corporation's contractual obligations. It is not a matter of control; the shareholders of a closely held company like Westpark invariably have control of the company.

[21] The separate legal personality of the corporation will not be lightly disregarded. As recognized in *Big Bend Hotel Ltd. v. Security Mutual Casualty Co.* (1980), 19 B.C.L.R. 102 at 108 (B.C.S.C.), respect for the corporate form is strict:

On the whole, Canadian and English courts rigidly adhere to the concept set out in *Salomon*, supra, that a corporation is an independent legal entity not to be identified with its shareholders.

[22] There are certain circumstances in which what the authorities state to be the “corporate veil” will be “pierced” or “lifted”, or where the separate legal personality of the corporation will be disregarded. Such circumstances generally arise where the corporate form has been abused - that is, it has been used for fraudulent or illegitimate purposes (see *Big Bend Hotel*).

[332] In *Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co.*, (1978), 89 D.L.R. (3d) 195 at 202-203 (F.C.A.), 2 A.C.W.S. 486, the Federal Court of Appeal stated, in the context of patent infringement, that a corporation's shareholders are not considered to have authorized an infringement by that corporation:

...

... There is no reason why the small, one-man or two-man corporation should not have the benefit of the same approach to personal liability merely because there is generally and necessarily a greater degree of direct and personal involvement in management on the part of its shareholders and directors. This view finds support, I believe, in the cases. It has been held that the mere fact that individual defendants were the two sole shareholders and directors of a company was not by itself enough to support an inference that the company was their agent or instrument in the commission of the acts which constituted infringement or that they so authorised such acts as to make themselves personally liable. *British Thompson-Houston Company Ltd. v. Sterling Accessories Ltd.* (1924), 41 R.P.C. 311; *Prichard & Constance (Wholesale) Ltd. v. Amata Ltd.* (1924), 42 R.P.C. 63. It is the necessary implication of this approach, I think, that not only will the particular direction or authorisation required for personal liability not be inferred merely from the fact of close control of a corporation but it will not be inferred from the general direction which those in such control must necessarily impart to its affairs. ...

...

[Emphasis added]

[333] The “personal liability” of the shareholder referred to in *Mentmore* should be identified with liability of shareholders generally -- regardless of whether the shareholder is a natural person or another corporation.

[334] In my view, I can only consider Rogers’ control of Zoocasa as shareholder if, in the present circumstances, the corporate veil can be pierced when dealing with a subsidiary corporation. The law with regard to when the court should look behind a subsidiary corporation and place liability on the parent company is stated in *International Trademarks Inc. v. Clearly Canadian Beverage* (1999), 47 B.L.R. (2d) 193, 85 A.C.W.S. (3d) 306, at paras. 10-11 (B.C.S.C.):

[10] The test in these circumstances is that set out in *Aluminum Co. of Canada Ltd. v. Toronto*, [1944] 3 D.L.R. 609 (S.C.C.), Rand J. at 614:

The question, then, in each case, apart from formal agency which is not present here, is whether or not the parent company is in fact in such an intimate and immediate domination of the motions of the subordinate company that it can be said that the latter has, in the true sense of the expression, no independent functioning of its own.

[11] This test was discussed with approval in *Harrington v. Dow Corning Corp.*, [1998] B.C.J. No. 831, (2 April 1998), Vancouver C954330 (B.C.S.C.) by Mackenzie J. (as he then was):

The test for an alter ego or agency relationship sufficient to impose liability on a parent company is a stringent one. The subsidiary must be under the complete control of the parent to an extent that it has no independent functions of its own. It exercises no discretion independently of the parent: *Aluminum Company of Canada v. The Corporation of the City of Toronto*, [1944] 3 D.L.R. 609 (S.C.C.); *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.); *Hunt v. T & N PLC*, [1989] B.C.J. No. 2173, November 29, 1989, B.C.C.A., Vancouver Registry CA011399.

(See also: *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1481, citing the above.)

[335] The evidence does not establish that Zoocasa was “under the complete control” of Rogers and had “no independent functioning of its own.” As a result, the court is not entitled to consider control exercised by Rogers in its capacity as a shareholder of Zoocasa. The corporate veil is not pierced.

#### **Relationship of Control between Rogers and Zoocasa**

[336] As stated in *CCH*, the presumption that the activity was only authorized to the extent that it conforms with the law may be rebutted if “a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement” can be shown.

[337] In *CCH*, the court determined that the Law Society of Upper Canada lacked sufficient control over the Great Library’s patrons to permit a finding that it authorized the infringement. In particular, the court stated that the Law Society and Great Library patrons “are not in master-servant” or “employer-employee relationship.”

[338] For the proposition that a relationship of control must exist in order to rebut the presumption of lawful use, the court in *CCH* cited, *inter alia*, *Muzak, de Tervagne* and P. D. Hitchcock’s, “Home Copying and Authorization” (1983), 67 C.P.R. (2d) 17, at 29-33.

[339] In *de Tervagne*, the Federal Court once again relied upon P.D. Hitchcock's analysis of *Muzak* for this principle:

**53** According to Hitchcock, this is primarily a question of fact which depends on the circumstances of each case. The first factor to be considered is the degree of control that the defendant exercised over the infringer. That control must be such that he or she could prevent the infringement from being committed. The second factor is that a reasonable person would be led to conclude that the defendant sanctions, approves or countenances the infringements, and that the defendant should have known that his or her words, actions or inaction would be seen as such by a reasonable person. It is Hitchcock's opinion that such authorization may be express or implied.

[340] In *de Tervagne*, the court analyzed English and Australian jurisprudence and concluded that:

**60** ... the degree of control exercised by the defendants over the people who committed the infringement was determined on the basis of the master-servant or employer-employee relationship that existed between the parties.  
...

Older Canadian case-law suggests that a principal-agent relationship can also serve to rebut the relevant presumption: see *Canadian Performing Right Society v. Ming Yee*, [1943] 4 D.L.R. 732 (Alta. Dist. Ct.).

[341] As a result, the necessary relationship to establish Rogers' liability under this category is one of "master-servant", "employer-employee" or "principal-agent".

[342] Although, the plaintiffs plead that Rogers, "through its employees and representatives, directly supported and promoted the Zoocasa Website", the plaintiffs did not plead that any of the above categories of relationship existed between Zoocasa and Rogers. Nor does the evidence establish the necessary relationship. As a result, the plaintiffs have failed to rebut the presumption that Rogers only authorized Zoocasa to use the Zoocasa Website in accordance with the law.

**Inducing Breach of Contract**

[343] The plaintiffs also submit that Rogers is liable for inducing Zoocasa's alleged breach of contract. The test for this tort was recently stated by the Ontario Court of Appeal in *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322 at para. 26, as follows:

...

- 1) [The plaintiff] had a valid and enforceable contract with [a third party];
- 2) [The defendant] was aware of the existence of the contract;
- 3) [The defendant] intended to and did procure the breach of the contract; and
- 4) As a result of the breach, the plaintiff suffered damages.

...

[344] A similar test was articulated in *Super-Save Enterprises Ltd. v. Del's Propane Ltd.*, 2004 BCCA 183. However, the main difference was that the court required that the "defendant was or can be assumed to have been aware of the existence of the contract." This requirement is discussed further below.

[345] Although not addressed in the plaintiffs' submissions, if the plaintiffs succeed in establishing all of the elements of the tort, the defendants can still show legal justification for their action. I will discuss justification after addressing the elements of the tort.

[346] As discussed above, Rogers' liability for the tort of inducing breach of contract can only arise from its corporation-to-corporation relationship with Zoocasa. To take into account Rogers' role as the sole shareholder in Zoocasa would be to pierce the corporate veil. Indeed, the Alberta Court of Appeal has affirmed this position in the specific context of a shareholder alleged to have induced a breach of contract: *Brae Centre Ltd. v. 1044807 Alberta Ltd*, 2008 ABCA 397 at para. 1.

## **Discussion**

### **Elements of the Tort of Inducing Breach of Contract**

#### **Existence of a Valid and Enforceable Contract**

[347] As I noted earlier in my reasons, the Terms of Use are a valid and enforceable contract between Century 21 and Zoocasa. This element of the test is met.

#### **Awareness of the Existence of the Contract**

[348] The plaintiffs state that Rogers was aware of the existence of this contract as a result of correspondence that Century 21 sent to Rogers consisting of four “cease and desist” letters sent either to Rogers or to their solicitors.

[349] The knowledge requirement for the tort of inducing breach of contract includes situations where knowledge of the contract can be assumed. In this regard, the Alberta Court of Appeal in *Royal Bank of Canada v. Wilton et al.* (1995), 123 D.L.R. (4th) 266, 28 Alta. L.R. (3d) 1, at 272, adopted the explanation of the “knowledge” requirement given in N. Klar, *Tort Law* (Carswell, Toronto 1991) at 436:

...

... it follows that the defendant's knowledge of the existence of a contract, and its terms, is an essential element of the cause of action. It has been held that knowledge of the precise terms of a contract is not required, as long as the defendant had "the means of knowledge" yet deliberately disregarded them. A party who induces another to terminate its contract with the plaintiff, without regard to whether this can lawfully be done, runs the risk that the contract will be breached as a result of this inducement.

...

See also: *Posluns v. Toronto Stock Exchange and Gardiner* (1964), 46 D.L.R. (2d) 210 at 268, (Ont. H.C.J.).

[350] As a result, the plaintiffs are required to prove that the defendants were aware of the contract or had “the means of knowledge” to be aware of the contract. The

plaintiffs are not required to establish that the defendants were aware of the contract's precise terms although they would need to know the nature of the contract and that it prohibited indexing without permission.

**The Defendant Intended To and Did Procure the Breach of the Contract**

[351] This element of tort has two requirements. First, that Rogers possessed the necessary intention to procure the breach of contract. Second, that Roger's action in fact resulted in the breach of the contract.

[352] With regard to the "intention" requirement, the court in *Drouillard*, at paras. 29-30 stated the following:

[29] To satisfy the third element of the tort, the procurement of the breach must be intended and direct. In Professor Lewis N. Klar's text *Tort Law* (Toronto: Carswell, 2003) at 612, he states:

In order to succeed, a plaintiff must prove that the defendant intended to procure a breach of contract. In this respect, intention is proven by showing that the defendant acted with the desire to cause a breach of contract, or with the substantial certainty that a breach of contract would result from the defendant's conduct.

[Citations omitted]

[30] In John G. Fleming's text *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 761, he notes that to be liable under this tort the defendant must have acted with the "necessary knowledge and intent of procuring a breach of contract,": Fleming continues at 761-62:

Merely that the breach was a natural consequence of his conduct is not sufficient: he must have intended it. Not that he need have actually known the precise terms of it or that his object could be accomplished only through its breach. If - turning a blind eye - he went about it regardless of whether it would involve a breach, he will be treated just as if he had knowingly procured it. Indifference is equated with intent.

[353] In order to prove that the defendant intended to procure a breach of contract, the plaintiff must show that the defendant acted with the desire to cause a breach of contract, with substantial certainty that a breach of contract would result from the defendant's conduct or with indifference to whether the contract would be breached: *Thermo King Corp. v. Provincial Bank of Canada* (1981), 130 D.L.R. (3d) 256 (Ont.



C.A.); *Dirassar v. National Trust Co.* (1966), 59 D.L.R. (2d) 452 (B.C.C.A.); *Emerald Construction Co. Ltd. v. Lowthian*, [1966] 1 W.L.R. 691 at 704 (Eng. C.A.).

[354] As a result, the plaintiffs must establish that Rogers desired to cause Zoocasa to breach its contract with Century 21 or acted with substantial certainty that a breach of contract would result or, at a minimum, that Rogers was indifferent to whether a breach would result as a consequence of its actions.

[355] As stated in *Garry v. Sheritt Gordon Mines Ltd.* (1988), 45 D.L.R. (4th) 22, [1988] 1 W.W.R. 289 at 335 (Sask. C.A.), the requirement that the defendant's actions "in fact resulted in the breach of the contract" is a straightforward question of causation. The standard to be applied is whether the breach is "fairly attributable to any such pressure, persuasion or procurement on the part of the ... defendants": *D.C. Thomson & Co. v. Deakin*, [1952] Ch. 646 at 686 (Eng. C.A.).

[356] As a result, if the plaintiffs are able to establish that Rogers intended to procure the breach of contract, they must still establish that Zoocasa's breach of contract is "fairly attributable" to the actions Rogers is alleged to have taken in support of Zoocasa.

[357] The plaintiffs submit that Century 21 has established all the elements of the tort because:

- i. Century 21's Terms of Use constitute a binding contract with those who access the Century 21 Website;
- ii. Rogers knew that Zoocasa was accessing the Century 21 Website, and that there were Terms of Use that governed the access to that Website;
- iii. Rogers intended to and did procure Zoocasa's breach of the Terms of Use. Rogers was fully aware of Zoocasa's conduct and of Century 21's objection to that conduct. Specifically, Rogers was aware from the correspondence it received that Century 21 took the position that

Zoocasa's conduct amounted to a breach of the Terms of Use. Rogers played an active role in promoting, facilitating and enabling the conduct by Zoocasa that breached the Terms of Use contract;

- iv. Century 21 has suffered damages as a result of Zoocasa's breach of the Terms of Use;
- v. The initial development of Zoocasa was carried out by the Rogers New Ventures unit; and
- vi. Rogers is therefore also liable for the tort of inducing Zoocasa's breach of that contract;

[358] The defendant Rogers states that:

- i. The indexing and linking activities are those of Zoocasa, not Rogers;
- ii. Rogers is a shareholder only and as such not liable for the actions of Zoocasa;
- iii. The fact that Rogers set up Zoocasa in its initial stages and that Roger's employees assisted it is irrelevant to the question of whether Rogers authorized the activities complained of; and
- iv. The plaintiffs' initial letters of complaint were against Zoocasa, not Rogers, indicating they were aware it was a separate entity.

**Discussion of Intent to Procure Breach of Contract and Authorize Copyright Infringement**

[359] The argument of the plaintiffs is that the authorization of copyright infringement and inducing breach of contract do not raise the issue of piercing the corporate veil. The liability of Rogers is alleged to arise from its position as the only shareholder of Zoocasa and its active participation, support and control over it.

[360] To establish that Rogers authorized copyright infringement or induced breach of contract the plaintiffs must establish more than the level of involvement of Rogers that they have shown. The fact that Rogers funded, supported and assisted with the development of Zoocasa does not establish that Rogers authorized Zoocasa to infringe copyright or to breach the contract.

[361] The plaintiffs assert that liability for authorizing copyright infringement can arise from facts that are less than direct and positive and that such liability can be established by a “sufficient degree of indifference”.

[362] While Rogers level of involvement in the planning, creation, funding and promotion of Zoocasa has been established the evidence does not establish that Rogers intended that Zoocasa breach copyright or Century 21’s Terms of Use. Nor does the evidence support a finding that Rogers turned “a blind eye”. I am not satisfied that the plaintiff has, on the balance of probabilities, succeeded in proving that Rogers is liable for Zoocasa’s copyright infringement or breach of contract.

### **Injunctive Relief**

#### **Century 21’s Claim for Injunctive Relief**

[363] Century 21 seeks an injunction preventing the defendants from accessing the Century 21 Website.

[364] Zoocasa states that an injunction is not required because in September 2008, it declared that it would not index a website that did not want to be indexed.

[365] However, on discovery, Mr. Lee, on behalf of Zoocasa, stated that while the defendant Zoocasa has agreed not to access the Century 21 Website generally, they intend to resume accessing the Website where individual realtors give their consent.

[366] While individual realtors have certain rights with respect to the text and the photographs, it is Century 21 which controls the Terms of Use upon which users can access their Website. It would be a breach of the Terms of Use if Zoocasa indexed

that portion of the Century 21 Website respecting individual realtors who have consented as such access also requires the consent of Century 21.

[367] However, the defendant notes that on discovery Century 21 stated that it had no objection to Zoocasa indexing and linking to any property listing on century21.ca where the realtor in question gives consent. A close reading of the discovery evidence reveals that Century 21 does not object to brokers or salespeople giving permission for the indexing of data by Zoocasa "... if they send the data ... to Zoocasa". Likewise a letter from solicitors for Century 21 indicates that the plaintiff does not object to Zoocasa obtaining information directly from their brokers but at no time has Century 21 consented to such material being accessed through its Website.

[368] Century 21's concern is that the apparent policy of the defendant Zoocasa has changed and may change again. Given that fact, they seek an injunction to ensure that the plaintiffs' contractual rights respecting the Terms of Use are protected.

[369] Given my findings respecting copyright infringement, Century 21's claim for an injunction can only be based in breach of contract and cannot be enforced as a remedy for copyright infringement. An injunction is an equitable remedy and is within the court's discretion. Before granting an injunction the court must first consider whether damages or an injunction, or both, are the appropriate remedy for breach of contract.

[370] In *North West Community Video Ltd. v. Telecommunications Workers Union*, [1978] 2 W.W.R. 289, at 296 (B.C.S.C.) MacDonald J. adopted the words of A.L. Smith, L.J. in *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch 287 at 322-323, respecting the granting of a permanent injunction:

...

In my opinion, it may be stated as a good working rule that --

(1) If the injury to the plaintiff's legal rights is small,

- (2) And is one which is capable of being estimated in money,
  - (3) And is one which can be adequately compensated by a small money payment,
  - (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:
- then damages in substitution for an injunction may be given ...

...

[371] A.L. Smith, L.J. then said at p. 323:

...

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. ... Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception. ...

...

[372] In situations where damages are an adequate remedy, injunctions will be inappropriate to restrain actionable wrongs: *London & Blackwall Railway Co. v. Cross* (1886), 31 Ch. D. 354 at 369. In the same manner, injunctions should not be granted in situations where the plaintiff can be fully compensated by an award of damages or where the wrongdoing has ceased and there is no likelihood of its recurring: *Proctor v. Bayley*, (1889) 42 Ch. D. 390.

[373] However, where the defendant wrongfully interferes with the claimant's rights as an owner of property, and intends to continue that interference, the claimant is *prima facie* entitled to an injunction: *Hilton v. British Columbia (Ministry of Transportation and Highways)*, [1986] B.C.J. No. 1077 at para. 18 (S.C.) citing *Pride of Derby and Derbyshire Angling Association v. British Celanese Ltd*, [1953] Ch. 149 at 181; *Canadian Pacific Limited v. Paul et. al.*, (1983), 2 D.L.R. (4th) 22 at 40, (N.B.C.A.).

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

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

[376] Century 21 is therefore entitled to a permanent injunction restraining Zoocasa, by itself, its servants, agents, affiliates, subsidiaries, or otherwise from accessing the Century 21 Website in contravention of the Terms of Use posted on the Century 21 Website.

#### **Bilash and Walton's Claim for Injunctive Relief**

[377] The notice of motion also seeks injunctive relief on behalf of Bilash and Walton. I am not inclined to grant injunctive relief on the claims advanced by Bilash and Walton as there is no indication that Zoocasa is or will continue to infringe the copyright of Bilash and Walton.

#### **Damages for Breach of Contract**

[378] On September 2, 2008 solicitors for Century 21 advised Zoocasa that the plaintiff did not consent to their proposed access to and use of their Website. Despite that knowledge, Zoocasa proceeded to access the Website.

[379] In order to award damages, I must first determine what damages have been established.

[380] Century 21's evidence is that they suffered loss, inconvenience and expense as a result of having to deal with Zoocasa's actions. Employees spent time dealing with the problems created by the Zoocasa Website. The evidence of Mr. Lawby of Century 21 was that he had spent approximately 18 hours dealing with Zoocasa's breach of the Terms of Use, not including time spent preparing for and attending for

discovery and that his staff had spent another six hours also dealing with the same matters. His evidence was that his time, and that of his staff, was valuable and that dealing with Zoocasa's breach has been a cost to the plaintiff's business.

[381] In addition, Zoocasa's actions caused problems for Century 21 with respect to its relationship with what is called the REB4 Boards being a group consisting of the the Real Estate Board of Greater Vancouver, Fraser Valley Real Estate Board, the Chilliwack and District Real Estate Board, and the Calgary Real Estate Board.

[382] Time and legal expenses were incurred when Century 21 was required to consult with legal counsel to protect their proprietary interest in the listings and photographs contained on their Website. Additionally, their Website operator WTL spent time dealing with the Zoocasa Website which resulted in an opportunity cost to Century 21 as WTL had less time to spend developing and promoting the Century 21 Website. WTL estimated the Zoocasa actions used approximately 70 hours of staff time that would have otherwise been devoted to expanding, improving and promoting the Century 21 Website.

[383] Century 21 also claims loss specifically arising from Zoocasa's practice for a time of framing from the Century 21 Website within its own Website. As noted earlier, framing involves the practice of displaying information from one website within another in a manner that has the appearance of making the framed site's content that of the framing website. The result is confusion for the user as to the source of the content. It also permits the website that is doing the framing to claim attribution for the page viewing giving it an advantage in terms of how websites are ranked by search engines. The framing commenced in August 2009 and ceased after the matter was raised at the discovery of Mr. Lee on December 14, 2009.

[384] The defendants state that no damages of any substantial character have been established. As a corporation they state Century 21 has not shown any actual monetary loss. They specifically note the following:

- a. There is no evidence of specific harm suffered by Century 21 as a result of time spent on the Zoocasa issue;
- b. No estimates of the loss is given other than hours spent which, as a result, fails to provide a basis for calculating the appropriate measure of damages;
- c. The legal costs incurred in writing to the REB4 Boards have not been provided;
- d. Mr. Lawby of Century 21 estimates he spent 18 hours dealing with Zoocasa's breach but does not provide details as to what he did for those 18 hours. As a result the court cannot determine whether or not the time spent was actually caused to be spent by Zoocasa's actions nor can the court determine whether they were necessary or not;
- e. The REB4 claim respecting third party linking involved a letter sent by REB4 to WTL, not Century 21;
- f. WTL asserts that staff spent 70 hours on the Zoocasa breach but provides no evidence of how that delayed certain activities respecting Century 21's Website nor evidence of the actual damage suffered by the delay of certain other activities to be performed for the benefit of Century 21. There is no evidence of what the delay was or its impact;
- g. WTL fails to specify what issues relating to the Zoocasa Website were dealt with. Nor does the evidence establish if the issues arose from indexing or some other matter.

[385] As a result the defendants state the court cannot determine appropriate damages even if the breach is proven.



[386] I am satisfied that Zoocasa breached Century 21's Terms of Use and in doing so caused loss, inconvenience and expense to Century 21. They may have done so in the belief that such Terms of Use were not binding. However, I have determined that such belief was incorrect. An award of damages is therefore appropriate.

[387] In *Pinewood Recording Studios Ltd. v City Tower Development Corp.*(1996), 31 C.L.R. (2d) 1, 67 A.C.W.S. (3d) 71, Pinewood J. described the assessment of damages as follows:

169 A Judge approaching this task of assessment is to be reminded of the comments by McEachern C.J.B.C. in *Begusic v. Clark, Wilson & Co.* (1991), 57 B.C.L.R. (2d) 273 at 290 (B.C.C.A.):

The assessment of damages is not a precise science; it is not even a calculation.

Elsewhere in *Begusic*, Chief Justice McEachern referred to the well known instruction of Lord Blackburn in *Livingstone v. Rawyards Coal Company* (1880), 5 App. Cas. 25 at 39 (H.L.) wherein he said the measure of damages should be:

... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[388] Century 21's claim for damages for breach of contract consists of both a general damage claim founded in damages for breach but also includes as part of the damages claimed expenses incurred in dealing with the consequences of the breach. The latter is normally addressed through the issue of costs.

S. M. Waddams, *Law of Damages*, 3d ed., (Canada Law Book: Aurora, Ont., 1997) at 314 states:

Litigation costs are not generally considered to be part of the law of damages ... . However, some cases have permitted recovery, not as costs but as damages, of the expense of investigating the defendant's wrong. Such recovery has been allowed in cases of breach of contract and of inducing breach of contract, and nuisance, and there seems no reason why recovery should not be supported wherever investigatory costs can be anticipated as a natural and probable consequence of the defendant's wrong.

[389] Waddams relies on *Acme Investments Ltd. v. York Structural Steel Ltd.* (1974), 9 N.B.R. 2d 699, 1 A.P.R. 699 (N.B.C.A.), a breach of construction contract case where the New Brunswick Court of Appeal stated:

**31** While the plaintiff is clearly entitled to the cost of correcting deficiencies in the defendant's work on the principle of reinstatement I do not think the plaintiff is precluded from recovering any other expense reasonably incurred in ascertaining the extent of the defendant's breaches of contract and the cost of correcting them. In *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. Coulson & Co. Ltd. (Third Parties)*, [1949] 2 K.B. 528, Asquith, L.J., said at p. 539:

- “(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: *Sally Wertheim v. Chicoutimi Pulp Company*, [1911] A.C. 301).
- (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. [\*page715]
- (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
- (4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v. Baxendale*, 9 Exch. 341."

**32** In my opinion reasonable person in the position of the defendant would be taken to know there was a serious possibility that in the "ordinary course of things" an owner who had reason to believe a building contract was improperly performed by the builder would seek the assistance of a professional engineer to ascertain the deficiencies and the cost of correcting them. In its factum the plaintiff submits that the award of \$ 30,000.00 is reasonable. In my opinion the cost of such services as are reasonable would not be less than that sum and I would accordingly not disturb the award.

[390] In my view, it was reasonably foreseeable that breach of the Terms of Use would cause the plaintiff to incur certain expenses arising from the breach.

Century 21 is entitled to damages for such loss as part of their claim for general damages for breach of contract.

[391] Century 21 also claims that as a result of Zoocasa framing their Website from August 20, 2008 to December 14, 2009, they have suffered damages. However, the evidence in support is limited to the assertion that framing causes confusion to the user as to the source of content and results in the framer being able to claim attribution.

[392] While Century 21 has established that it suffered loss for breach of contract, they have not provided evidence of the value of that loss. Presumably they could have done so given the nature of some of the damages claimed. For example, the time spent by Wheretolive.com has not been supported by any values, the legal fees incurred to respond to REB4's communications have not been disclosed, nor has the value of the time spent by Century 21 staff dealing with the Zoocasa breach been quantified.

[393] In such a situation should the court order damages?

[394] Just because the loss is difficult to establish does not mean damages will not be awarded. However, that assumes there are difficulties in quantifying the loss, not the situation where the plaintiff has chosen not to lead specific evidence on the issue.

[395] An award of damages for breach of contract where proof of damage is minimal can be addressed by an award of nominal damages although nominal does not necessarily mean that the damages will be small: *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2004 BCSC 1464, (where a nominal award was \$1,000) var'd on other matters 2007 BCCA 22, var'd on other matters 2008 SCC 54. However, in *McGee v. Clarke*, [1927] 1 W.W.R. 593 (B.C.C.A.) and *State Vacuum Stores of Canada Ltd. v. Phillips et al*, [1954] 3 D.L.R. 621 (B.C.C.A.) both courts relied on the dictum of Lord Halsbury in *The "Mediana"*, [1900] A.C. 113 at 116 (H.L.) and held that nominal damages are not the same as small damages.

However, it seems evident from the context in *The “Mediana”* that Lord Halsbury meant that compensatory damages might sometimes be small, not that nominal damages should be large.

[396] I find that Century 21 has not proven damages of any substantial character. In my view however an award of nominal damages is appropriate. Such damages need not be small: *Green et al. v. Stanton* (1969), 6 D.L.R. (3d) 680 at 691-692 (B.C.C.A.). As stated in *Green*:

It has been long established that because damages cannot be calculated with certainty is no reason why an award should not be made, and that a Judge must do the best he can to arrive at a proper figure. Notwithstanding the deficiencies in the evidence and the failure of the respondents to produce, or to even attempt to produce, evidence of how their income was affected, I am prepared to say that some loss must have been sustained. But whether it be trivial or substantial cannot be determined from the evidence. The onus was on the respondents to at least give some realistic base for pecuniary compensation, and it is not the obligation of the appellant to "account" for any profits he might have made, as was apparently thought proper by the learned trial Judge.

The large amount awarded, calculated at \$750 per month, appears to me to be based on pure conjecture speculated on an unfortunate misinterpretation of the only evidence dealing with damages. In my respectful view, the respondents are entitled to damages, but they must be nominal in the absence of anything upon which to properly assess them. Nominal damages need not be small, and in recent times more than token damages are often given. I would set aside the award of damages in the amount of \$14, 927.42 and substitute therefore the sum of \$1,000.

[397] In my view, based on the lack of evidence of loss and expenses incurred relating to the actions of Zoocasa, an award in the sum of \$1,000 in favour of Century 21 would be appropriate.

### **Damages for Copyright Infringement**

#### **Position of the Parties**

[398] On May 18, 2010, the plaintiffs delivered an election to claim statutory damages pursuant to s. 38.1 of the *Copyright Act*. Section 38.1 provides as follows:

**38.1** (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all

infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

*Where defendant unaware of infringement*

(2) Where a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award to less than \$500, but not less than \$200.

[399] In seeking statutory damages for each individual Work, the plaintiffs Bilash and Walton claim for a total of 128 individual Works (29 property descriptions and 99 photographs) and submit that \$500 per infringement is appropriate for total statutory damages of \$64,000.

[400] With respect to property descriptions, 24 belong to Bilash and five to Walton. All 99 photographs belong to Bilash.

[401] The plaintiffs further argue that the defendants cannot be said to have acted in good faith for the purposes of s. 38.1, and, for this reason, a significant award of damages is appropriate. They assert that a significant award is also needed to deter not only the defendants but others who might adopt a similar online business model.

[402] The defendants state that if statutory damages are warranted that they should be assessed at the lowest possible quantum. They submit there is no evidence of bad faith, no need to deter other infringements of the copyright in question and finally that the court has a discretion to order a per work award of statutory damages below \$200.

[403] The president of Zoocasa, J. R. Langlois, in his affidavit of May 13, 2010, deposed that Zoocasa was in a “learning process concerning some aspects of the real estate industry. In particular, the question of rights in respect of property listing data is very entangled in Canada.” He stated that:

This leads to complex issues as different parties - the realtors, MLS, and the website operators such as Canada 21 - assert various kinds of rights with

respect to the on-line property listing data. These complexities had not been apparent to Zoocasa originally.

By July 2009, Zoocasa had learned a considerable amount about the complex structure of the real estate industry in Canada, but had not turned this knowledge into a fully-conceived business plan.

Since July 2009, Zoocasa has evolved considerably in its understanding of both the data issues and the business issues.

[404] In other words, Zoocasa apparently entered into the market without due consideration of the legal issues surrounding copyright and intellectual property generally. Counsel for Zoocasa also referred to the conduct of both parties leading to this litigation as stubborn.

[405] I am not satisfied that Zoocasa's intransigence was rooted in bad faith. Rather, it appears to have its roots in entering into a new area with a new business model and a lack of appreciation of the legal issues arising. In *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 at 191-198, aff'd on appeal (1992), 112 N.S.R. (2d) 180 (N.S.C.A.), the trial judge articulated the doctrine of good faith performance in the following terms:

The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" - a conduct that is contrary to community standards of honesty, reasonableness or fairness. The insistence on a good faith requirement in discretionary conduct in contractual formation, performance, and enforcement is only the fulfillment of the obligation of the courts to do justice in the resolution of disputes between contending parties.

[406] In *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38 at para. 14 (C.A.), Kerans J. accepted the trial judge's observations regarding implied contractual terms of good faith and corresponding bad faith. To this end Kerans J. held that "the duty to act in good faith extends beyond the duty to avoid acting for bad motives". At trial, the trial judge held and Kerans J. accepted that:

14 ...

In Canada, the test ... does not include the need for the plaintiff to show that the defendant intentionally acted in bad faith.

... the common law duty to perform in good faith is breached when a party acts in bad faith, ...

[407] The obligation of good faith is an obligation not to act in relation to the contract so as to nullify the bargain objective or benefit owing to the other party: *Mannpar Enterprises v. H.M.T.Q.*, 1999 BCCA 239; *Schluessel et al v. Maier et al*, 2001 BCSC 60. Once the contract has been entered into, the parties must perform their respective obligations in good faith: *Gateway Realty Ltd.* above.

[408] However, failure to act in good faith does not necessarily imply that a party has acted in bad faith. Bad faith conduct is conduct that is contrary to community standards of honesty, reasonableness or fairness. It is also conduct where a party acts in a manner that substantially nullifies the contractual objectives or causes significant harm to the other, contrary to the original purposes or expectations of the parties: *Mesa Operating Ltd. Partnership*.

[409] Good faith conduct on the other hand holds that the parties should pursue their mutual contractual objectives. From this perspective, the good faith obligation is different from the obligation to act reasonably in that the interests of the party acting in good faith are not subordinate to any other party. Rather, the party acting in good faith cannot act in ways that are abusive, unfair or dishonest: *Peel Condominium Corp No. 505 v. Cam-Valley Homes* (2001), 196 D.L.R. (4th) 621 (Ont. C.A.); *Mason v. Freedman*, [1958] S.C.R. 483.

[410] I cannot find that Zoocasa acted dishonestly, unreasonably or unfairly toward the plaintiffs. Although Century 21 alleges that Zoocasa's refusal to operate by the Robot Exclusion Standard indicates bad faith, I do not find it to be so. Rather, Zoocasa believed that a website that does not want to be indexed could simply block their IP address. As I mentioned earlier, Zoocasa appears to have entered into a new market without due appreciation for the standardized protocols of the industry.

While Zoocasa may have been negligent in educating themselves regarding industry and community standards, I cannot find that they acted in bad faith.

### **Discussion of Damages for Copyright**

[411] Subsection 38.1(5) of the *Copyright Act* provides a list of relevant factors for the court to consider in exercising its discretion when awarding statutory damages. Those relevant factors include:

Factors to consider

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

- (a) the good faith or bad faith of the defendant;
- (b) the conduct of the parties before and during the proceedings; and
- (c) the need to deter other infringements of the copyright in question.

The analysis of Taylor J. in *Pinewood Recording Studios Ltd.*, discussed above, is still relevant to damages for copyright infringement.

[412] Additionally, in *Microsoft Corporation v. PC Village Co. Ltd.*, 2009 FC 401, the Federal Court considered the factors listed in s. 38.1(5) of the *Copyright Act*. The defendants were found to have infringed Microsoft's copyright in its Microsoft Office software programs. In assessing statutory damages, the court emphasized that the defendants had ignored cease and desist letters from Microsoft. The court held that an award of statutory damages must be sufficiently high to deter future infringements by the named defendants and others: at paras. 34 and 39. The court awarded \$10,000 per infringement.

[413] The plaintiffs submit that in the present case, as in *Microsoft*, the defendants ignored repeated cease and desist letters from the plaintiffs and continued to infringe copyright even after the litigation had started. They state that the defendants also made a public pronouncement that they did not index websites that did not want to be indexed and allowed that pronouncement to remain publicly accessible long after they knew it was no longer true.



[414] In reply the defendants submit that there is no evidence of bad faith and that in fact Zoocasa held an honest belief in its ability to index a publicly available website, particularly where that website encouraged other search engines to do what they viewed as the same thing. They also note that the effect of their actions was to promote the plaintiffs' listings and hence their business. In addition, the defendants have voluntarily stopped indexing the plaintiffs' Website and have agreed to not index it further save for realtors or brokers who provide their consent.

[415] The plaintiffs have relied on the cease and desist letters sent to the defendants in September and October 2008. The defendants argue that those letters were sent by counsel for Century 21, not Bilash or Walton, and at the time Century 21 had no ownership in copyright nor a basis to claim for infringement. Century 21 was entitled to seek compliance with their Terms of Use. The cease and desist letters of September 8, 2008, was restricted to notice of copyright infringement. The October 6, 2008, letter gave notice respecting alleged breach of both copyright and contract.

[416] However, the defendants' argument focuses on the legitimacy of the letters and ignores the fact of notice. Surely the point is that notice alerts them to a potential claim which may or may not be proven valid at a future date. To ignore a claim however is to run the risk of potential liability if breach of contract or ownership of copyright and its infringement is eventually proven.

[417] The defendants also rely on s. 38.1(2) of the *Copyright Act* which states:

Where defendant unaware of infringement

(2) Where a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award to less than \$500, but not less than \$200.

Special case

(3) Where

(a) there is more than one work or other subject-matter in a single medium, and

(b) the awarding of even the minimum amount referred to in subsection (1) or (2) would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement,

the court may award, with respect to each work or other subject-matter, such lower amount than \$500 or \$200, as the case may be, as the court considers just.

[418] Since the defendants were put on notice in the fall of 2008 that copyright subsisted in the property descriptions and photographs, the defence set out in s. 38.1(2) of the *Copyright Act* does not assist them. Section 38.1(3) however is potentially available to the defendants.

[419] In *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 584, the Federal Court found that the overarching mandate of a judge assessing statutory damages in lieu of loss of profits is to arrive at “a reasonable assessment in all of the circumstances in order to yield a just result.”: para. 37. Pursuant to s. 38.1 3(b), the court has the power to order a per-work award of statutory damages of below \$200 “where the awarding of even the minimum amount referred to in ss. 38.1 (1) or (2) would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement.”

[420] As the court noted in *Telewizja* at paras. 38 and 39:

[38] Such a mandate clearly flows from the structure of section 38.1 which provides an initial range per work of statutory damages from a minimum of \$500 to a maximum of \$20,000 per work.

[39] This initial range may be cut back in two circumstances: first, in the case of an innocent defendant, which is not the case here, and second, in the case where there is more than one work in a single medium and where awarding the minimum per work would yield a total award that is grossly out of proportion to the infringement.

[421] There are a number of factors that may be relevant in considering the applicability of 38.1(3). In this case the length of the infringement was relatively short, there was no evidence that a high award is required to deter others. The defendant stopped the activity and I have not made a finding of bad faith on the part of Zoocasa. In addition, the nature of the infringement, the fact that the copyright serves a commercial purpose, and that there was, in the eyes of the defendants, a

benefit to the plaintiff, supports a lesser award. Of most importance is that the actual damages claimed are not substantial. The evidence of Bilash and Walton on discovery was as follows:

Bilash

539 Q Now, Mr. Bilash, I've asked your counsel for particulars of the damages claimed and for documents related to damages, and I want to ask you, do you assert that you've suffered any damage that you can identify by reason of the indexing of any properties on Zoocasa?

A Have I suffered any damage from Zoocasa indexing my properties? That's the question?

540 Q Yes.

A I guess I don't know if I have, but I don't know if I've gained anything either.

Walton has, similarly, said:

280 Q But is it fair to say so far as your knowledge goes, it hasn't had any sort of impact on your business as a salesperson?

A Like I said, I don't know. It may have. It may have not.

281 Q But you don't -- you can't identify for me any impact that it's had on your business?

A Correct.

[422] Due the temporary nature of online property listings, the plaintiffs are unable to provide evidence of each and every instance of Zoocasa's copyright infringement of their photographs and property descriptions. However, the plaintiffs have adduced evidence that Zoocasa infringed copyright in no less than 99 photographs and 29 property descriptions.

[423] The defendants dispute the number of infringements claimed. However, they base that on factors such as not locating the property description, only finding properties under the MLS copies or not matching the property descriptions on the Zoocasa pages. I am not satisfied that the defendants have shown that the number of infringements differs from those established by the plaintiffs.

[424] Zoocasa acknowledges indexing the Century 21 Website during the periods alleged and the evidence of the plaintiffs respecting the properties listed on the site

during those periods. I am satisfied that the plaintiff has established that the defendant Zoocasa infringed copyright of the plaintiffs with respect to at least 29 properties of which Bilash was the original owner of 24 and Walton was the original owner of 5 of the infringed listings.

[425] Likewise, with respect to the 126 photographs claimed to have been copied I am satisfied that at least that many were copied by Zoocasa. The 99 photographs for which copyright infringement are claimed are those that are the property of Bilash.

[426] Statutory damages provided for in s. 38.1, are set at \$500.00 per infringement, this would result in a statutory damage award of \$64,000. However, given the circumstances of this case including Zoocasa's apparent unintentional infringement such an award is grossly out of proportion to the infringements. I therefore order damages in the sum of \$250 per infringement resulting in a total statutory damage award of \$32,000.

[427] Bilash, as the holder of copyright to 24 real property descriptions and 99 photographs is entitled to damages of \$30,750. Walton, as the holder of copyright to 5 real property descriptions is entitled to damages in the sum of \$1,250.

### **Punitive Damages**

[428] Punitive damages are awarded where the conduct of a party is egregious and deterrence is appropriate. Such damages can be awarded for breach of contract and, as well, for infringement of copyright. The act does not prohibit such an award: *Pro Arts, Inc. v. Campus Crafts Holdings Ltd.* (1980), 28 O.R. (2d) 422 at 441 (H.C.J.).

[429] The plaintiff describes the conduct of the defendants as “calculated and deliberate”. They say that the defendants are “sophisticated commercial entities that employ similar Terms of Use on their own websites.” They point to the continued indexing and copying of the Century 21 Website after notice that the plaintiffs

objected and the awareness of the defendant Zoocasa that their right to do so was in issue. They also note from the discovery of Mr. Lee on behalf of Zoocasa:

693 Q Now, this one has been printed off more recently. And can you confirm that what is happening here is what we talked about earlier; there is framing going on. Correct?

A This was brought to my attention yesterday. Yes.

694 Q And so the Century 21 link is framed by a Zoocasa page? Is that fair?

A Yes.

695 Q And, taking a look at the url, do you recall you said that whether there is a problem with attribution will depend on the source url for the frame and which domain it's under. So, which domain is this Century 21 listing we are looking at on the second page under?

A Zoocasa.

696 Q Okay. Thank you. Would you agree with me that Zoocasa is doing here what its terms of use would prohibit others from doing?

A Yes.

697 Q Let me show you a series of some other similar listings. These are marked as Exhibits 21, 22 and 23. Take a moment and look through those. Just for the record, 21, 22 and 23; Exhibits 21, 22 and 23 are the Plaintiffs' numbers beginning 232, 237 and 242 respectively.

EXHIBIT NO 21: Plaintiffs' document 232.

EXHIBIT NO. 22: Plaintiffs' document 237.

EXHIBIT NO. 23: Plaintiffs' document 242.

MR. VESELY:

698 Q Have you had a chance to look through those three exhibits?

A Yes.

699 Q I appreciate you haven't done those searches yourself but do they appear to you, from your knowledge of the Zoocasa web site, to be in each case the Zoocasa property description page with the broker or agent page that one would find when one clicked on the link?

A Yes.

700 Q In each case, the broker listing page is framed with a Zoocasa domain url. Correct?

A Yes.

701 Q When did Zoocasa begin using framing?

A I don't know the answer to that. I only was made aware of this yesterday.

702 Q Does it raise concerns for you?

A I have asked them to look at this.

703 Q Have you asked them to look at this because it raises some concerns for you?

A Yes.

704 Q And could I leave it as an outstanding request to determine when framing began?

MR. MARTIN: Yes.

[430] I note that Zoocasa, which had begun framing the Century 21 Website on August 20, 2008, ceased doing so immediately after Mr. Lee's examination for discovery on December 14, 2009.

[431] The defendants' position is summarized by them as follows:

- a. Zoocasa held an honest belief in its ability to index a publicly available website;
- b. Zoocasa believed that it was only doing what the plaintiffs already did which was to actively encouraged other search engines to search its site;
- c. Zoocasa believed that in doing so, it was only serving to promote the plaintiffs' listings, and thus, their business.

[432] Punitive damages are granted where the conduct of the plaintiff is particularly egregious. I am not satisfied that in the circumstances of this case the conduct of the defendant was particularly egregious. In my opinion the conduct of the defendant Zoocasa, while deliberate, was not of a nature that warrants punitive damages.

**Summary**

[433] In summary:

- a. The claim of Century 21 for damages for copyright infringement is dismissed;
- b. The claim of Century 21 for damages for breach of contract is granted. The sum of \$1,000 is awarded;
- c. All claims against Rogers are dismissed;
- d. The claim of Century 21 for damages for trespass are dismissed;
- e. Century 21 is granted a permanent injunction against Zoocasa;
- f. The plaintiff Bilash is entitled to statutory damages for breach of copyright in the sum of \$30,750;
- g. The plaintiff Walton is entitled to statutory damages for breach of copyright in the sum of \$1,250;
- f. The plaintiffs Century 21, Bilash and Walton are entitled to interest pursuant to the *Court Ordered Interest Act*.

[434] If the parties cannot agree on costs they are at liberty to apply.

“Punnett J.”