



Nobody Can Link to This Article: Considering the Legal Issues Involved in the Pan Am Games Website’s Terms of Use Prohibition on Linking without Permission

July 13, 2015

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Major sporting events are an exciting time for those living, working, and running businesses in the host city. Significant investments are made bringing events to cities. Branding and advertising are important in building up the event’s identity and public anticipation. Protecting the value associated with brand to maintain the value of sponsorship and endorsement opportunities is no doubt important, and understandably organizers are cautious to maintain control over brand use.

With the Pan Am games set to open in Toronto this weekend, some controversy has erupted over the Terms of Use for the games’ official website Toronto2015.org, which outright prohibits any linking to the site without written permission from the game organizers. We thought we’d take a closer look at the practical and legal issues involved.

The website terms state:

Links to this Site are not permitted except with the written consent of TO2015™. If you wish to link to the Site, you must submit a written request to TO2015™ to do so. Requests for written consent can be sent to branduse@toronto2015.org. TO2015™ reserves the right to withhold its consent to link, such right to be exercised in its sole and unfettered discretion.

These types of prohibitions are not uncommon (which may come as a surprise to some), and many websites include such blanket prohibitions against linking. Linking is a common activity, and has been recognized by the Canadian Supreme Court as being of “core significance” to the functioning of the Internet. Unlike framing a website—where the content of one website appears “framed” by another website—linking is generally considered an innocuous activity. There was a time when “deeplinking” was a hot topic in the legal community, and some thought that providing a link other than to the homepage of the website carried more risk. The issue seems to have died down, with deeplinking also now being a common activity, and with the tiny URL becoming ubiquitous

Turning back to the Pan Am website, the Terms of Use do indeed require permission for linking activities in any context. Practically speaking, however, they are likely intended to be aimed at linking in a commercial context (in fact, another section of the Terms of Use specifically gives permission to download or copy content from the site for “your personal use”). This is because events, like the Pan Am games, need to be extra cautious to guard against “ambush marketing”—marketing strategies that attempt to capitalize on an event without being an official sponsor. A blanket prohibition may also be included to cover the unforeseen, and give games organizers the option to enforce such terms if the need arises.

A balanced and measured approach to brand enforcement is advisable. Today, most businesses know that aggressive enforcement can quickly go viral, which is likely to escalate, not contain a problem. Also, it is important not to forget, that practically speaking, most websites exist to build publicity and awareness—website owners want people to link to them in social media, and for the website to be mentioned in newspapers. Linking is generally good for marketing and profile.

It seems unlikely that Pan Am games organizers would take action against people linking to the Toronto2015 website in social media for example, even if the links are associated with content to criticize to games. The reality is that enforcing the



Terms of Use to remove a link is not going to stop the associated commentary or criticism. Enforcement against businesses in a sponsorship category that are not an official sponsors carries a different set of issues and analysis, and enforcement in those contexts generally (not just against links to the PanAm site) may be likely.

If a website tries to enforce a term prohibiting linking, would a court find the term enforceable? From a legal perspective, policies and terms like those on the Pan Am games website are called “browsewrap agreements”, and they are generally considered to be enforceable contracts. Courts have long recognized the need to respect and enforce website Terms of Use. For example, in *Century 21 Canada Limited Partnership v Rogers Communications Inc.*, 2006 BCSC 1196 (“Century 21”) at paras 114–120, the Court held the Terms of Use were *per se* enforceable and that enforceability of such terms was necessary to ensure the “utility and health of the Internet”—the choice of a party to do business on the Internet “should not mean they relinquish their rights to control access to their business assets and information”. Similarly, in *Kanitz v Rogers Cable Inc.* (2002), 58 OR (3d) 299 (Ont SCJ) at paras 32–33, the Court commented on the electronic environment as follows

I am also mindful... of the fact that we are dealing... with a different mode of doing business... 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. 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.

Another recent case from BC, *Douez v Facebook, Inc.*, 2015 BCCA 279, enforced Facebook's Terms of Use, and in particular, a clause requiring that claims and disputes be brought in California courts. In that case, the Court of Appeal found that claims against Facebook made under the British Columbia *Privacy Act* need be brought in California instead of BC.

But it isn't settled whether a blanket prohibition against linking would be itself enforceable, and there are no Canadian cases that we are aware of where an individual has been sued for breaching the terms by linking to a site. Further, obiter at para 120 in *Century 21*, discussed above, strongly suggests that, like all contractual terms, it is an open question whether specific Terms of Use are *always* enforceable, and the Court acknowledged the reasonableness of terms, the sufficiency of notice given to users, or the website owner's contractual terms exceeding the website owner's rights (in the case, copyrights), could be at issue in future cases. However, given that the parties were sophisticated commercial entities, had actual notice of the Terms of Use, and conceded the reasonableness of those Terms, the Court found none of those issues arose in *Century 21*.

Whether public policy would result in a broad term prohibiting all linking without permission not being enforced is also a live question. The Canadian Supreme Court has recognized the “core” importance of linking to the operation of the internet and making information available (see *Crookes v Newton*, 2011 SCC 47 at para 36). That case involved whether a link to defamatory content amounted to “publishing” the content. In its reasons, the Supreme Court noted the symbiotic relationship between Internet linking and freedom of expression:

The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential “chill” in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning.

Also, there is a good argument that those who just link, but don't browse, cannot be bound by the terms—if you don't “browse”, how can a browsewrap agreement bind you? In *Century 21*, at 108, the Court held:

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 sum, the legal issues involved in Terms of Use prohibiting users from linking to a website reach beyond mere contract and implicate other policy and public relations issues, including free expression. While courts in Canada typically uphold and enforce Terms of Use (or website browsewrap agreements), the enforceability of particular terms will be fact dependent. Practically speaking, organizers of major sporting events are likely motivated to include terms restricting or prohibiting linking to their websites by the risk of ambush marketing and loss of control over their commercial product. They are less likely to be interested in stopping those who link to the site for non-commercial and personal purposes. In the context of enforcing against a business trying to associate itself with the games, the prohibition against linking is likely enforceable. Less clear is whether the term would be enforceable against personal, non-commercial use, even involving critics

UPDATE: Presumably in response to the controversy surrounding the prohibition against linking to the Pan Am Games website, the prohibition was removed from the Terms for the website – in the spirit of uninhibited linking see <http://www.toronto2015.org/terms-of-use>. The terms now prohibit "use of or embedding of content" without written consent. This new prohibition is still not limited to commercial uses. Let's see whether some controversy will remain over non-commercial use of "content" from the website, such as event results, medal count of countries, etc.

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