

Use of Internet as evidence in court begins

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For Law Times

Now that the Internet has made its debut in a Canadian court, lawyers are trying to figure out how big a role it will be allowed to take on in providing reliable trial evidence.

Is it destined for a starring part? Or will it be relegated to occasional cameos?

At the same time, practitioners are looking at some recent court decisions, hoping to discern just what the rules are likely to be when it comes to assessing other forms of electronic evidence.

What are the courts going to want to know about computer-generated evidence (particularly computer-enhanced evidence) before they will accept such "electronic proof?"

When the Federal Court ruled last September in a trademark infringement case involving *ITV Technologies Inc. v. WIC Television Ltd.* (2003 FC 1056), it immediately started to make ripples. And it wasn't only because the trial judge applied traditional trademark principles to the Internet domain.

What was also important, in the view of some lawyers, was that the judge allowed the use of the Internet at trial. And she made some significant statements about the value of the Internet as evidence, and about the relative merits of different classes of Web sites.

"It's an important first step in Canada," says information technology lawyer Peter D. Ruby, of Goodmans LLP in Toronto. "It's our first real significant

analysis of Internet evidence."

Significant because Justice Danièle Tremblay-Lamer allowed the Internet to be used for demonstrations, for cross-examining witnesses, and to retrieve electronic versions of documents.

Beyond that, she offered wide and deep praise for its value to her in deciding *ITV Technologies Inc. v. WIC Television Ltd.*

In a series of findings that lawyers say are important in determining how the Internet might come to be used at trial, Tremblay-Lamer said:

- Web sites developed and maintained by an organization contain more reliable information than so-called "unofficial" Web sites, which contain content about the organization but which are maintained by people or businesses not connected with the organization;
- when considering the contents of a Web site, what is found on the Internet is the original, and provides "better evidence" than a print copy; and,
- the digital library of Web sites (www.archive.org) provides an accurate representation of Web sites as they existed in the past.

Ruby says the decision to allow the Internet to be used in court could have important implications.

He says that in some cases, Internet libel, for example, lawyers might want to illustrate that the Internet often contains a different kind of dialogue than exists in other, conventional media.

"One way to prove that would be to take a judge to a chat site, to show that the discourse is



ITV v. WIC was an important first step in the use of the Internet in courtrooms, says Peter Ruby.

different in those sites," he says.

Or, he says, a judge trying to determine damages in such a case might find it useful to see exactly where and how the defamatory material was published.

"Is it in big, red letters? Is it flashing?"

Going online in court might even give a judge useful information about a Web site's relative importance, based for example on how high it ranks on a list established by a major search engine like Google.

Ruby says while the use of the Internet in court and the reliability of Internet evidence are sure to be further debated, the *ITV/WIC* case has already made some litigators "worry a little less" about how such evidence is going to be viewed.

"It will make people more comfortable using electronic evidence in the courtroom."

Two more recent cases though, one in the U.S. and one in Ontario, are raising the question of how much of a test courts will apply when determining the reliability of computer-generated evidence.

In the Canadian case, the test used was a limited one; in the U.S. case, the court created a more rigid standard for determining the authenticity of the computer-generated evidence.

In the Ontario case, *R v. Jamieson*, the Superior Court of Justice made a ruling on a videotape that had been digitally enhanced, and which was being presented as evidence against a nanny charged with aggravated assault of a child in her care.

The court heard that because the videotape created by a so-called "nanny camera," showed dark images, it had been taken to an audio-video technician, who used computer technology to create a new tape that had better contrast and brightness. The technician also added a time stamp to the computer-enhanced videotape.

The court ruled that both the original and enhanced videotapes were admissible because "they accurately and fairly represent the information they purport to convey."

Ruby says that ruling, which "puts the test at just one line," will likely be of limited value in sorting out what the courts will do with such evidence.

"With digitally enhanced tapes, you can compare one with the other," he says, so it was relatively easy to assess the evidence.

Other questions about computer-generated or computer-enhanced evidence could be much more difficult.

In the recent U.S. case, *State of Connecticut v. Swinton*, a court established a more rigid test for establishing the foundation for admitting computer-generated evidence.

In that case, the appeal of a murder verdict, the court was dealing with two pieces of computer-enhanced evidence. One was photos of bite marks that had been enhanced using an imaging processing software program called Lucis. The other was an image of the defendant's teeth, overlaid on photos of the bite marks. That image was created using the popular software program, Photoshop.

In establishing the test, the court commented that computer-generated evidence is becoming commonplace, and that the technology is rapidly changing.

It said it didn't therefore want to make rules relating to particular programs or applications, which might quickly become obsolete.

So it said for computer-generated evidence to be accepted, it had to pass a six-part test:

- the computer equipment is accepted in the field as standard and competent and was in good working order;
- qualified computer operators were employed;
- proper procedures were followed in connection with the input and output of information;
- a reliable software program was utilized;
- the equipment was programmed and operated correctly; and
- the exhibit is properly identified as the output in question. **LT**

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