



IP/IT Law: Judgements on Hyperlinking as Defamation and the Enforceability of Website Terms of Use

Ryan Smith

Two very interesting judgements have been delivered in the last few months overlapping in the fields of intellectual property law and information technology law. Our courts have weighed in on whether hyperlinking may constitute defamation and whether website terms of use are enforceable. The judgements offer some guidance and comfort regarding how users may interact on the internet and how internet-related rights should be considered.

1. Crookes v. Newton – Does Hyperlinking constitute Defamation?

A majority of the Supreme Court of Canada upheld judgements of the lower courts in British Columbia to rule that the mere act of providing a hyperlink on the internet did not constitute defamation.

The SCC said that a “hyperlink” is a device routinely used in articles on the internet whereby a word or phrase is identified, often with underlining, as being a portal to additional, related information. Clicking on the hyperlink connects the reader to that information. The court characterized the legal issue as whether hyperlinks that connect to allegedly defamatory material can be said to “publish” that material.

In this case, the plaintiff sued the defendant for placing hyperlinks on his website which linked to other websites which the plaintiff alleges contained defamatory information about the plaintiff. The plaintiff asserted that the defendant, by placing those hyperlinks on his website, was publishing the defamatory information.

The SCC said that in order to succeed in an action for defamation the plaintiff must prove on a balance of probabilities that the defamatory words were published, that is, that they were “communicated to at least one person other than the plaintiff”. To prove the publication element, a plaintiff must establish that the defendant has, by any act, conveyed defamatory meaning to a single third party who has received it.

The SCC agreed with the proposition advanced in US judgements that reference to an article containing defamatory comment without repetition of the comment itself should not be found to be a republication of such defamatory comment. A reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting control over the context. Communicating something is very different from merely communicating that something exists or where it exists. Hyperlinks are references. By clicking on the link, read-

ers are directed to other sources. Inserting a hyperlink gives the primary author no control over the content in the secondary article to which he has linked.

The SCC found that the features, that a person who refers to other content generally does not participate in its creation or development, serve to insulate those involved in internet communications. Although a person selecting the content to which he wants to link might facilitate the transfer of information, it is equally clear that when a person follows a link they are leaving one source and moving to another. In the SCC’s view, it is the actual creator or poster of the defamatory words in the secondary material who is publishing the libel when a person follows a hyperlink to that content. The ease with which the referenced content can be accessed does not change the fact that an individual is referring the reader to other content. A hyperlink requires some act on the part of a third party before he gains access to the content. A hyperlink expresses no opinion, nor does it have any control over the content to which it refers.

From the perspective of public policy, the SCC said that the internet cannot 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.

That being said, the SCC ruled that individuals may attract liability for hyperlinking if the manner in which they have referred to content conveys defamatory meaning, not because they have created a reference but because they have actually expressed something defamatory. This might be

found to occur, for example, where a person places a reference in a text that repeats defamatory content from a secondary source.

The SCC said that preventing plaintiffs from suing those who have merely referred their readers to other sources that may contain defamatory content and not expressed defamatory meaning about the plaintiffs will not leave them unable to vindicate their reputations.

The court found that making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content. Only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be “published” by the hyperlinker. The court said that such an approach promotes expression and respects the realities of the internet, while creating little or no limitations to a plaintiff’s ability to vindicate his or her reputation.

2. *Century 21 v. Rogers Communications*ⁱⁱ – Are Website Terms of Use Enforceable?

This case decided at the British Columbia Supreme Court ruled on many issues. I won’t spend time talking about copyright infringement, as that prohibition is well established. Rather, I will spend time discussing the finding of the court that those terms of use you see linked on many websites are enforceable.

In this case, the defendant, a wholly owned subsidiary of Rogers was sued by Century21 for accessing their website, usually automatically by way of a software program, and copying photographs and text without the

plaintiff’s consent and contrary to the website terms of use.

The Century21 website in BC features property listings belonging to Century21 brokers and agents from BC and across Canada. Users can search the website for properties by location, price, and other features. The Rogers’ website functions as a type of search engine which indexes property listings from a number of real estate sites. Users can search the Rogers’ website for properties by location, price, number of bedrooms etc.

As a result of Roger’s copying, using the content, and indexing Century21’s website, Century21’s lawyer wrote to Roger’s indicating that they did not consent to Roger’s use of Century21’s website and that their conduct was breaching the terms of use of the Century21 website. Roger’s eventually stopped indexing Century21’s website.

The court said that the terms of use for the Century21 website were located at the bottom of the home or first page. (I think here the court meant that a hyperlink to the terms of use was at the bottom of the home or first page.) The terms of use were not drawn to the attention of users in any active way. The Century21 website did not require that the user acknowledge reading and agreeing to the terms of use before accessing the website. The terms state that upon accessing the website the user was bound by them. The act of accessing the remainder of the website was agreement by the user to the contractual terms. In summary the court said that in respect of accessing the Century21 website in light of the terms of use issues were raised respecting the formation of a contract,

standard form contracts and electronic contracts.

The court stated that there was limited Canadian jurisprudence regarding electronic contracts. Roger’s acknowledges that it became aware of the existence of the terms of use of the Century21 website after they were brought to their attention. Roger’s also acknowledged that the terms of use of the Century21 website are consistent with industry standards. Therefore, the court held that knowledge of the Century21 website terms of use are not in issue. The sole issue was whether with that notice and knowledge an agreement was formed when Rogers accessed the Century21 website.

The court stated that the law of contract requires that the offer and its

Andrea M. Hill



Working with you
to help your clients.

Commercial Litigation
Employment Law



www.esblawyers.com

Suite 1201 - One King Street West
HAMILTON, ON

905-523-5666



ahill@esblawyers.com



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.

The court said that “browse wrap agreements” (meaning agreements that do not require that the purchaser indicate their agreement by clicking on an “I agree” button but rather simply permit a user to use the product after being made aware of the product’s terms of use) 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 current case, the court said that notice is not an issue given that Rogers has acknowledged it was aware of the terms of use and what conduct was deemed to be acceptance.

The court held that 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 an agreement is proven. After such fact, the act of proceeding further into a website is

sufficient to communicate agreement. The court found that Rogers’ conduct formed a contract. It was not a case where a contract was imposed on Rogers without their consent. The court held that Century21’s terms of use constitute a binding contract between the parties, that Rogers had actual knowledge of the terms of use, and in continuing its action after notice of the terms of use breached those terms.

i 2011 SCC 47

ii 2011 BCSC 1196 ■

Ryan Smith is a lawyer and trademark agent at Ross & McBride LLP. He practises in the areas of corporate, trademark, and copyright law. Ryan can be reached at (905) 572-5812 and rsmith@rossmcbride.com.

New Clients Await

Firms practicing in all areas of law are invited to display marketing material in the new Legal Resource Room at Hamilton General Hospital.

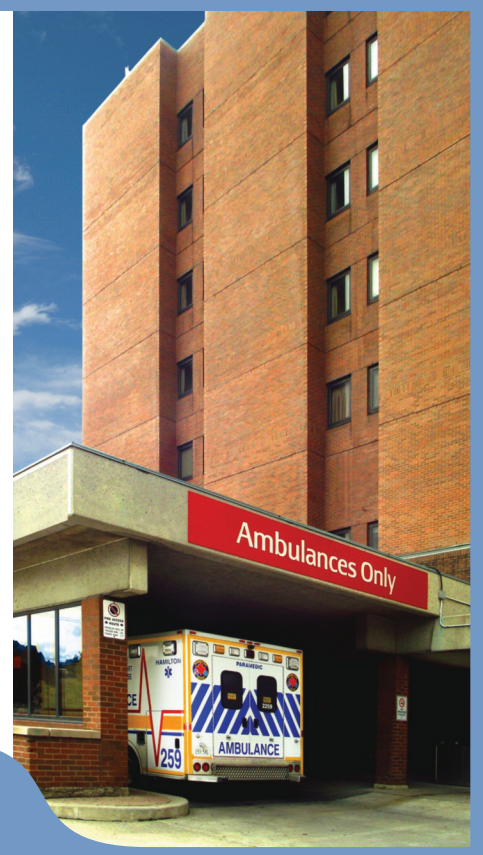
The Legal Resource Room is:

- An information hub for those in need of legal advice or representation
- Accessible to patients and family members
- Conveniently located in the main lobby at Hamilton General Hospital
- A respectful way to promote your firm’s services to potential clients

Brochure space is rented on a first-come first-served basis, reserve your place today.



For more information contact:
Lacey Kempinski, Development Officer
Hamilton Health Sciences Foundation
(905) 521-2100 ext. 46473 or kempinski@hhsc.ca



HEALTH CARE, TRANSFORMED.