

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

WAYNE CROOKES and WEST COAST TITLE SEARCH LTD.

APPELLANTS

AND:

JON NEWTON

RESPONDENT

AND:

**CANADIAN CIVIL LIBERTIES ASSOCIATION, SAMUELSON-GLUSHKO
CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, BRITISH
COLUMBIA CIVIL LIBERTIES ASSOCIATION, NETCOALITION, CANADIAN
NEWSPAPER ASSOCIATION, AD IDEM/CANADIAN MEDIA LAWYERS
ASSOCIATION, MAGAZINES CANADA, CANADIAN JOURNALISTS FOR FREE
EXPRESSION, THE WRITERS' UNION OF CANADA, PROFESSIONAL WRITERS
ASSOCIATION OF CANADA, PEN CANADA AND
CANADIAN PUBLISHERS' COUNCIL**

INTERVENERS

FACTUM OF THE INTERVENERS

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ASSOCIATION, MAGAZINES CANADA, CANADIAN JOURNALISTS FOR FREE
EXPRESSION, THE WRITERS' UNION OF CANADA,
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PART I - STATEMENT OF FACTS

A. Overview

1. The Interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, Magazines Canada, Canadian Journalists for Free Expression, The Writers' Union of Canada, the Professional Writers Association of Canada, PEN Canada and the Canadian Publishers' Council (collectively, the "**Media Coalition**") comprise print, broadcast and internet media organizations and those working on behalf of and in support of journalists and freedom of expression issues more generally.

See: Affidavit of Blair Mackenzie sworn August 19, 2010 ("Mackenzie Affidavit") at paras. 5-25 - Media Coalition Record pp. 12-18

2. The organizations within the Media Coalition have come together out of concern regarding potential developments in the law of defamation affecting free expression in Canada and, in particular, its application to the internet. They have done so both to present argument and, as permitted by the Order of September 20, 2010 in which they were granted leave to intervene, to supplement the evidentiary record on this appeal given their experience with and perspective on the issues before this Court.

3. As is demonstrated by the evidence which the Media Coalition has filed, hyperlinking is both a defining characteristic of the internet and vitally important to the Media Coalition's members, as well as the readership and audiences they serve. For example:

- (a) Alfred Hermida, an award-winning journalist, a founding editor of the BBCNews.com website, and now an assistant professor at the Graduate School of Journalism at the University of British Columbia, attests in his Affidavit:

Hyperlinking is one of the defining characteristics of the internet. Hyperlinking defines much of what occurs online and how to navigate the internet. It transforms content on the internet from being a final destination to being a launching pad for the gathering and assessment of additional information.

See: Affidavit of Alfred Hermida sworn October 19, 2010 ("Hermida Affidavit") at para. 8 - Media Coalition Record p. 102

- (b) Jeff Jarvis, an associate professor and director of the interactive journalism program at the City University of New York's Graduate School of Journalism, as well as a former reporter, columnist, critic and editor, attests in his Affidavit:

Restricting the use of hyperlinking could be fatal to the architecture, the economy, and the development of the web. Further, being afraid to link to controversial material would deprive the audience of information. Now on the web, from an economic perspective, a site with no links to other material has little or no value.

See: Affidavit of Jeff Jarvis sworn October 20, 2010 ("Jarvis Affidavit") at para. 4 - Media Coalition Record p. 107

- (c) Patricia Graham, the Editor-in-Chief of both The Vancouver Sun (one of the two major daily newspapers in British Columbia) and its website vancouversun.com, attests in her Affidavit:

In 2010, if traditional media which continue to support serious and professional journalism are to compete in a manner that allows them to survive economically, they have to make use of the technological innovations that the internet offers and that users of the internet have come to expect. Hyperlinking is one of those technological innovations. The only way in which print newsrooms will survive is to become fully digitally proficient.

See: Affidavit of Patricia Graham sworn August 18, 2010 ("Graham Affidavit") at para. 15 - Media Coalition Record p. 4

- (d) Mark Jamison, the Chief Executive Officer of Magazines Canada (Canada's leading professional magazine industry publishing association, whose members publish over 90 percent of all Canadian magazines' paid circulations in both official languages) notes that in his view:

...in all ways hyperlinking is a basic and essential tool for publishers today, and that Canadian magazine publishers today can safely be described as fully integrated digital media companies competing in a global marketplace....all digital tools help in this competitive endeavour.

See: Mackenzie Affidavit at paras. 9, 11 - Media Coalition Record pp. 13-14

4. The context in which the members of the Media Coalition operate underlines that:

- (a) contrary to the position of the Appellants, there should be neither a presumption nor an inference of publication from the creation of a hyperlink. If the Appellants' position were accepted, there would be profound restrictions on the ability of the Media Coalition and its members to do their work and, indeed, to survive in the internet age; and
- (b) more fundamentally, a hyperlink does not amount to and should never be considered to be a form of publication.

B. Internet Use in Mainstream Media and Publishing Industries

5. Mainstream media and publishing industries are facing substantial changes in the marketplace and the technological means by which information can be (and is expected to be) disseminated. The internet – and, as will be returned to below, the hyperlinks through which it operates – are becoming increasingly predominant.

6. While print media in Canada may still have a substantial number of subscribers to and readers of their print editions, many other people locally, nationally and internationally access material on those news organizations' websites. Testifying as to her experience with The Vancouver Sun and vancouversun.com, Editor-in-Chief Patricia Graham attests:

Although maintaining a print newspaper, in recent years our organization has been transformed to a web-first, virtually round-the-clock, daily multi-platform newsroom. We now have an extensive website, www.vancouversun.com (the "Vancouver Sun Website"). Certain of the content on the Vancouver Sun Website appears in the print edition of the newspaper as well.

See: Graham Affidavit at paras. 2-4, 13 - Media Coalition Record pp. 1-4

7. The Vancouver Sun's former Managing Editor, Kirk LaPointe, attests:

Increasingly the internet has assumed a dominant role in the media. The print newspaper has become a snapshot edition of newspaper websites in some respects, and in other respects is now the location for reflection and in-depth coverage.

See: Affidavit of Kirk LaPointe sworn October 20, 2010 ("LaPointe Affidavit") at para. 4 - Media Coalition Record p. 129

8. News consumption habits are changing dramatically and rapidly, and newspaper newsrooms must adapt to consumers' demands if they are to survive.

See: Graham Affidavit at para. 13 - Media Coalition Record pp. 3-4

9. Likewise, e-publishing is becoming an increasing feature of the publishing industry. For example, the University of Alberta Press ("UAP") has now published a "born digital" book (of which a print copy was not published), and will shortly be publishing a selection of back and front list titles in ebook format. Further, in relation to electronic journals, one commentator notes:

Despite some reservations, the electronic environment is now the fastest growing arena in scholarly publishing and there is great desire and incentive for journals to be accessible online.

...

...A 2001 study found that approximately two-thirds of print journal publishers offered an online version of their journals...This number is certainly higher now.

See: Affidavit of Leticia Shamim sworn August 19, 2010 ("Shamim Affidavit") at para. 3(a), Ex. I - Media Coalition Record pp. 22, 71

C. Hyperlinking in News Media

10. The internet websites increasingly characteristic of news organizations are, in turn, significantly characterized by hyperlinks. Hyperlink use is multi-faceted, but in all respects of tremendous importance to mainstream media's ability to survive in the internet context.

(1) Uses of Hyperlinks

(a) Journalists Linking to the Same or Similar Subject Matter

11. Various journalists include hyperlinks in their articles to material which may help readers understand the issue being written about; news organizations' websites may also link to blogs written by various of their columnists, who in turn frequently insert hyperlinks to other material on the internet. Including a hyperlink allows transparency and permits audience members to

read source or competing material for themselves, on the basis of which they may come to an informed judgment (as described by Professor Hermida, the mission of a journalist is to enable citizens with the information they need to be free and self-governing). For example, many left-wing bloggers create hyperlinks to right-wing websites. Doing so permits them to identify the argument they wish to take on, with readers then being able to assess the source material and make up their own minds.

See: Hermida Affidavit at paras. 9, 11, 16 - Media Coalition Record pp. 103-104; Graham Affidavit at para. 19 - Media Coalition Record p. 5

12. Further, as noted by one author:

Links enable transparency.

In theory, every statement in news writing needs to be attributed. "According to documents" or "as reported by" may have been as far as print could go, but that's not good enough when the sources are online.

I can't see any reason why readers shouldn't demand, and journalists shouldn't supply, links to all online resources used in writing a story. Government documents and corporate financial disclosures are increasingly online, but too rarely linked. There are some issues with links to pages behind paywalls and within academic journals, but nothing that seems insurmountable.

Opinion and analysis pieces can also benefit from transparency. It's unfair - and suspect - to critique someone's position without linking to it.

See: Shamim Affidavit Ex. E - Media Coalition Record p. 46

(b) News Organizations Linking to Different Subject Matter

13. In other cases, a new organization may include a link to an article on subject matter that the linking news organization simply does not cover. Today mainstream media are facing significant economic issues; in this context, the use of hyperlinks allows members of the media to focus on what they do best or what is local, and supply a full-range news platform by providing hyperlinks to articles on other issues. In the words of one commentator, links permit a particular media organization to do what it does best and to "link to the rest":

The link changes the structure and economics of a news organization. Every paper doesn't need its own golf writer when it's easier and cheaper to link to better tournament coverage at sports sites - freeing up resources

that could be better used locally. Every paper doesn't need a local movie critic when movies are national and we are all critics. Papers should not devote resources to the commodified news we already know. They need to find new efficiencies, thanks to the link.

See: Hermida Affidavit at para. 11 - Media Coalition Record p. 103; Jarvis Affidavit Exs. A, B - Media Coalition Record pp. 109, 123

14. Entertainment-related stories are now among the types of coverage that the audience expects of mainstream media. At this point, mainstream media rely to a significant extent on outside sources to satisfy this interest. Hyperlinking may also occur in this context for copyright reasons, in order to provide attribution to the original source of certain material.

See: Graham Affidavit at para. 20 - Media Coalition Record p. 6

(c) Automatic Hyperlinking

15. Certain of the hyperlinking on some news organizations' websites is done automatically, through services which automatically insert related hyperlinks, generally to other newspaper websites and a pool of other pre-determined sources; in this process, no one from the linking news organization may see or approve the specific hyperlink before its insertion on the website. The hyperlinking in this case is between news stories and other sources which include the same key words.

See: Graham Affidavit at para. 19 - Media Coalition Record p. 5; Hermida Affidavit at para. 16 - Media Coalition Record p. 104; Jarvis Affidavit at para. 2 - Media Coalition Record p. 107

(2) Hyperlinks and Mainstream Media Survival

16. The inclusion of hyperlinks on news organizations' websites both reflects reader expectations and, indeed, increases the likelihood of potential readers locating the linking site.

17. As to reader expectations, the most valuable sites on the internet have been described as a "superhub". They create value and allow citizens to become more informed by providing them with links to access more information on a related topic or issue, or information on topics or issues which that site would not otherwise cover. Correspondingly The Vancouver Sun, for example, receives complaints and inquiries asking why it does not provide more links to external websites. Further, links assist news organizations in addressing another audience demand:

immediacy in the dispatch of information. Hyperlinking is one means of speeding up the provision of access.

See: Hermida Affidavit at paras. 17-18 - Media Coalition Record p. 105; Graham Affidavit at para. 19(d) - Media Coalition Record pp. 5-6; LaPointe Affidavit at para. 6 - Media Coalition Record pp. 129-130

18. Hyperlinking also makes it more likely that readers will locate the linking site. This is critically important, as news organizations and their websites compete in an international (and increasingly search engine-driven) marketplace. While some of the audience of The Vancouver Sun's website, for example, comes from readers who are aware of and go directly to that website, nearly one-half of all its traffic arrives through online search engines (such as Google) as a result of personal searches conducted by consumers. Achieving a higher "ranking" by those online searches engines increases the likelihood of consumer visits to the site. While the details of the algorithm that Google uses in ranking sites are unknown to the Media Coalition, it appears in part to reward a site's contribution to the overall culture of the internet through its provision of links: a site's inclusion of hyperlinks enhances the likelihood of a higher ranking.

See: LaPointe Affidavit at para. 9 - Media Coalition Record p. 130; Graham Affidavit at para. 19(e) - Media Coalition Record p. 6

19. As referenced earlier in this factum, The Vancouver Sun's Patricia Graham has attested that if traditional media which continue to support serious and professional journalism are to compete in a manner that allows them to survive economically, they have to make use of the technological innovations that the internet offers and that users of the internet have come to expect. Hyperlinking is one of those technological innovations. The only way in which print newsrooms will survive is to become fully digitally proficient.

See: Graham Affidavit at para. 15 - Media Coalition Record p. 4

20. The survival of mainstream media, and their ability to make money, will allow professional publishers the funds with which to retain, train and pay serious journalists. Ad hoc, unpaid journalists have an important platform on the internet, but they cannot replace serious, career journalists. If this Court associates liability with hyperlinking, mainstream media will stop or curtail the activity that puts them at risk. Bloggers and "Tweeters" (a category returned to below) will not, and mainstream media will not be able to compete.

21. Associate professor and commentator Jeff Jarvis writes, in urging that news organizations do what they do best and “link to the rest”:

Citizen journalism is fine, and it’s great that vigilant readers are keeping journalist, and politicians, on their toes. But when’s the last time it prodded the bureaucracy into action to fix a problem or correct an injustice? That’s what watchdog journalism, with the veteran reporters and vast resources like that of the Washington Post, does so well. And that’s why the Mainstream Media is still an essential part of the brave new world of journalism in the Internet age.

....

...What I’m saying above is that we want MSM to do *more* of this....

See: Jarvis Affidavit Ex. A - Media Coalition Record p. 109

22. Further, news organizations such as The Vancouver Sun, which now compete with media worldwide, would be at a competitive disadvantage if this Court rendered the judgment that the Appellants seek. If this Court found that hyperlinking presumptively constitutes publication, for example, this would put Canadian mainstream media at risk. Notably in the United States, 47 U.S.C. §230(c)(1) provides that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. No similar legislative provision exists in Canada. If hyperlinks were considered to be publication in Canada, Canadian sites would be constrained in their attempts to attract the same audience.

See: LaPointe Affidavit at para. 10 - Media Coalition Record p. 130

D. Hyperlinks in the Publishing Industry

23. Hyperlinking is also increasingly utilized in the (non-news) publishing industry, as part of its increasing recourse to the internet.

24. In the publishing industry, hyperlinks are most commonly used as references in addition to or in place of traditional bibliographic notations. Of course, many references to online publications, and the URLs at which they can be found, are already made in the footnotes of print editions of scholarly publications. On the internet, that reference may be in the form of a link. Indeed, if a print book is published as an ebook, the default setting in InDesign, an industry

standard design software, automatically creates an active hyperlink which the book publisher would have to deactivate in order to prevent the hyperlink from being used.

See: Affidavit of Robert Peter Milroy sworn October 20, 2010 ("Milroy Affidavit") at para. 4 - Media Coalition Record p. 142; Shamim Affidavit at para. 3(b) - Media Coalition Record p. 23

25. Robert Peter Milroy, the Director of The University of British Columbia Press (the "UBC Press"), attests that the sixteenth edition of *The Chicago Manual of Style* (Chicago: University of Chicago Press, 2010) (universally considered to be the definitive North American reference work for authors, editors and publishers) is reflective of the use of hyperlinks as forms of documentation:

1.102 *Links to citations and outside resources.* In full-text electronic articles, text citations typically link to references, notes, or items in a bibliography...allowing readers to move from the text citation to the cited item and back to the text. Reference lists and bibliographies may also contain links to resources outside the article...

See: Milroy Affidavit at para. 7 - Media Coalition Record p. 143

26. As do the audiences of news organizations, the publishing industry's customers consider hyperlinking to be a valuable service. One author notes:

...Swan and Brown...surveyed over 1,200 scholars around the world to obtain their views on electronic publishing and the usefulness and added value of additional electronic features. They found that linking from citations to cited articles was rated as the most valuable added feature (rated as "very important" or "important" by 88% of responders)...

See: Shamim Affidavit Ex. I - Media Coalition Record p. 71

27. Against this backdrop, Magazines Canada's Mark Jamison noted – in a passage cited earlier in this factum – that in all ways hyperlinking is a basic and essential tool for publishers today, and that Canadian magazine publishers can today safely be described as fully integrated digital media companies competing in a global marketplace. All digital tools help in this competitive endeavour.

See: Mackenzie Affidavit at paras. 9, 11 - Media Coalition Record pp. 13-14

E. Hyperlinks in Social Media

28. Hyperlinking in the mainstream media and publishing industry does not exist in isolation. Hyperlinking is widespread in less formal media such as “Twitter” and “Facebook”, which variously feed into reader expectations and create fora to which dissatisfied readers of mainstream sources may depart. At the same time, if this Court associates liability with hyperlinking, the chilling effect this will likely have on mainstream media and publishing is unlikely, in practical terms, to transcend into these fora and prevent any perceived harms that hyperlinking may have.

29. Social media services such as “Twitter” (twitter.com) and “Facebook” (www.facebook.com) are increasingly popular, with more than 125 million Twitter users and 500 million Facebook users. Respectively:

- (a) “Twitter”, which is a social networking website, involves the posting by users of “Tweets” (posts) of up to 140 characters. “Tweets” predominantly consist of short statements and hyperlinks from one person to those who “follow” (receive the “Tweets” of) that person. Those followers then “ReTweet” those posts to their followers, spreading their impact. Various organizations, including governments and businesses, are increasingly using “Twitter” to share and disseminate information, converse with audiences and elicit content from communities. Various of these “Tweets” contain hyperlinks.
- (b) “Facebook” also permits lengthier posts to “Friends” in networks each user builds with the permission of others. Its content is primarily hyperlinked to other internet sites.

See: LaPointe Affidavit at para. 11 - Media Coalition Record p. 131

F. Hyperlinking Does Not Connote Endorsement of or Agreement with Linked Content

30. Hyperlinking does not connote endorsement of or agreement with linked content. Not only would such a connotation be contrary to the public’s expectations specifically of journalists

and publishers (such as UAP or the UBC Press) who may use hyperlinks in their work, but more generally it would be contrary to the nature of hyperlinking and the internet.

(1) No Endorsement or Agreement by Journalists

31. As Professor Hermida attests, as part of journalists' mission (to enable citizens with the information they need to be free and self-governing), they must write about matters with which they do not agree. A journalist who writes about the Harmonized Sales Tax (HST), for example, does not necessarily agree with it, nor do readers expect the journalist to, even where no disclaimer is included in his or her article; journalists typically do not take a position either way. Likewise, when a journalist provides a hyperlink (as journalism students are now being taught to do), doing so is not agreement with or an endorsement of the linked content. While the choice of destination to which to provide a hyperlink may involve the exercise of judgment (for example, the person who provides the hyperlink may think that supplying a link to the New York Times on an issue of American politics is more useful to his or her readers than providing a link to a small newspaper outside the United States), that does not constitute agreement with or endorsement of the hyperlinked material.

See: Hermida Affidavit at paras. 9-12 - Media Coalition Record pp. 103-104

(2) No Endorsement or Agreement by Book or Magazine Publishers

32. In the print context, publishing a book with a bibliographic reference to a passage in *Mein Kampf* does not lead anyone to consider the book's author or publishing house to be publishing the work of Adolph Hitler or endorsing that work or its content. Rather, as Mr. Milroy (the Director of the UBC Press) believes in light of his extensive publishing experience, it would be universally accepted that they were referring to its existence as part of intellectual discourse. The same should transcend to the internet context. As Mr. Milroy continues in his Affidavit:

Were we to provide a URL and/or an active link to that material, we would be continuing in the process of providing a reference. Doing so should not be construed as publishing that material or advocating for or against it. Further, even if the text of the work that we were publishing did take a position in one direction or another with regard to the material references, the referenced material would still be universally understood to be the work of another author/publisher.

See: Milroy Affidavit at para. 5 - Media Coalition Record pp. 142-143

(3) No Endorsement or Agreement More Generally: Nature of Hyperlinks

33. More generally, as Professor Hermida attests, at this point the internet is fairly well established. Internet users know that when they click on a hyperlink, they are likely going to a different website with a different author, with no expectation that the publisher of the linking website agrees with, endorses or otherwise has vetted the contents of the linked site. This is just as users of a television remote control know that when they click the “channel” button they are changing to a different television station. Indeed, this may be reinforced by differences in the appearance and layout of the linked content.

See: Hermida Affidavit at para. 13 - Media Coalition Record p. 104

G. Fact Checking Linked Sites

(1) Checking at the Time the Link is Created

34. Hyperlinking does not and, practically speaking, cannot, be taken to mean that the person who provides the hyperlink has carried out the investigations that would be expected of the author of the linked material in order to determine that it is not defamatory or otherwise subject to legal censure. If the person providing the hyperlink is required to carry out those investigations, this will defeat the ability to use hyperlinks.

See: Hermida Affidavit at para. 12 - Media Coalition Record pp. 103-104

35. Were hyperlinking to be construed as publication in the context of scholarly publishing, Mr. Milroy of the UBC Press attests that the fact checking and legal review that would be necessitated prior to publication of some books would be overwhelming in terms of time and cost, and would result in delayed publication or books with fewer references than readers would legitimately expect to be provided with.

See: Milroy Affidavit at para. 6 - Media Coalition Record p. 143

36. Further, as noted earlier in this factum, some hyperlinks are created through the use of automatic hyperlinking services (which are based on algorithms related to word usage), rather than the application of human judgment to the creation of that specific link. In those circumstances, no one may know before insertion of the hyperlink that an occasion for fact-checking even arises.

See: Hermida Affidavit at para. 12 - Media Coalition Record pp. 103-104

(2) Monitoring Changing Sites

37. The content of websites and articles to which hyperlinks are provided may change between the time the link is created and the time the link is accessed. Hyperlinks generally link to the context of the website or article at the time the link is accessed by a reader, not the content as it stood when the link was created.

See: Graham Affidavit at para. 17 - Media Coalition Record p. 4

38. Changes to the website to which a link is created may be continual and extensive. For example, The Vancouver Sun's website (using it here as an example of a website to which others may link) is updated thousands of times a day with stories, photos, audio and video. Much of that content updates developing stories. Some of the updates involve locally generated content from The Vancouver Sun's newsroom, but much of it involves non-local content through news services and other providers. The site itself is a complex taxonomy of sections, microsites on particular elements of those sections, topic pages within those elements and individual story pages. Managing the site involves a sizeable team manually publishing some of the content and an extensive automated network that publishes the balance of the content.

See: LaPointe Affidavit at para. 8 - Media Coalition Record p. 130; Graham Affidavit at para. 17 - Media Coalition Record p. 4; Mackenzie Affidavit at para. 14(e) - Media Coalition Record p. 15

39. Because of how frequently the location and content of material on websites to which links are created may change, some linking organizations prefer to reference the URL of the home page of the website rather than the specific page of the website on which the particular article or other work at issue was found, in order to avoid "failure" of the link.

See: Milroy Affidavit at para. 8 - Media Coalition Record p. 143

40. There would not be sufficient time or resources in the newsroom of a linking organization like The Vancouver Sun or in other linking organizations (such as the Canadian Journalists for Free Expression) in order continuously to monitor the websites to which hyperlinks are created.

See: LaPointe Affidavit at para. 7 - Media Coalition Record p. 130; Graham Affidavit at para. 18 - Media Coalition Record p. 5; Mackenzie Affidavit at para. 14(d) - Media Coalition Record p. 15

PART II – ISSUES ON APPEAL

41. Does a hyperlink constitute publication of the linked website?

PART III – ARGUMENT

42. Hyperlinks are inherent to the internet, and to the ability of members of the Media Coalition to compete and fulfil their mandates in the internet age. The Media Coalition asks that the Court consider, in its deliberations:

- (a) the prominence and importance of hyperlinking to the mainstream media, in terms of bringing content to its customers, and in terms of the mainstream media's economic survival and continued relevance, both within Canada and elsewhere;
- (b) the practical reality of the digital world that foreign (US) mainstream media, with which the Canadian mainstream media competes directly, is not burdened with potential liability for hyperlinking;
- (c) the digital readership's view that hyperlinking does not mean that the owner of the site adopts, endorses, or in the print "world" publishes the content of the site linked to;
- (d) the practical reality of the digital world that Canadian bloggers, "tweeters" and users of other social media such as Facebook will not likely review for defamation or other issues when hyperlinking to other materials.

43. The Media Coalition submits that:

- (a) contrary to the position of the Appellants, there should be neither a presumption nor an inference of publication from the creation of a hyperlink. Acceptance of the Appellants' position would place profound restrictions on the ability of the Media Coalition and its members to do their work and, indeed, would threaten their ability to survive; and

- (b) further, and more fundamentally, given their nature and use hyperlinks do not amount to, and should never be considered to, be a form of publication.

44. The law of defamation developed in the context of other forms of communication. It must recognize and adapt to the forms of communication that are now increasingly in use.

45. The differences in context reinforce the difficulty of drawing analogies, for the purpose of liability, between hyperlinking and the types of activities (*e.g.*, drawing attention to a placard) discussed in the case law on which the Appellants seek to rely. Those on all sides of the case have, at various times, pointed to analogies but in the end all analogies fail. There is nothing tidy about hyperlinking – it is a new, massively used invention which has exploded in the last few years, including by way of its increasing use in social media.

46. User expectations in the internet context are far different than, for example, the reader's expectations of a local print newspaper publisher. The latter may publish a handful of letters to the editor in a given week. On the internet, most people read material with some scepticism, and may well embark on reading that material disposed to believe that its content is unreliable. In any event, no one would think the linking person has done an investigation into whether the linked material is defamatory or otherwise legally censurable. In the context of letters to the editor, such an investigation might be assumed. There might be few such letters, the newspaper in which they were published might be the only game in town, and readers might think that the newspaper publisher was alive to the issues.

47. The letter to the editor, once reproduced in the pages of that newspaper, maintains its existence even if the original letter sent to the newspaper publisher were destroyed. By contrast, the hyperlink fails if the linked content is removed; hyperlinked content has no existence independent of the site to which the link is made. Also, hyperlinked content often changes without the knowledge of the person who had linked to it.

48. To attribute to hyperlinking the rubric of publication, developed in the context of far different activities, would be contrary to its nature, destructive of free expression, and profoundly contrary to the interests of those organizations, such as the members of the Media Coalition, who now depend on the internet for the ability to reach and attract their audience, and to survive.

PART IV - ORDER SOUGHT CONCERNING COSTS

49. The Media Coalition does not seek costs and asks that no costs be awarded against it.

PART V- ORDER SOUGHT

50. The Media Coalition respectfully submits that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: November 15, 2010



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