LINKS AND LIBEL

Why hyperlinking is not publishing, and why that matters: implications of the 2011 Crookes v. Newton decision

By Peter Jacobsen

Crookes v. Newton had the potential to set the publishing world on its ear, and so it was one of those rare Canadian cases that had the international legal community buzzing in anticipation. The issue was whether the act of creating a hyperlink to defamatory material constituted publication, thus making the person who created the hyperlink liable in damages along with the person responsible for the defamatory website the link leads to.

The implications were enormous. Had the Supreme Court of Canada (SCC) found the hyperlinker liable in the circumstances, it would have imposed an enormous burden on authors to vet every hyperlinked reference to ensure it was free of defamatory material.

Not surprisingly, the SCC found that merely hyperlinking to defamatory material is not publication, and, in and of itself, does not constitute defamation. However, the case is not without its subtleties.

What is interesting is that while the majority held that individuals could not be found liable for repeating the defamatory words, two of the judges (including the chief justice) thought it necessary to dissent, in part to make the point that referring to the contents of a hyperlink with approval could be defamatory. Thus, just because the Court found that hyperlinking did not constitute publication, this does not mean that all hyperlinking is legally acceptable.

They also made the point that a defamatory meaning will be discerned from "all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented."

The Court was clear that it was only dealing with those hyperlinks that require the user to click the hyperlink to access the information—called "shallow" or "deep" hyperlinks in the trade. It left to another day the dilemma caused by emerging technology where "automatic hyperlinks" display the information with virtually no actions taken by the user. The question will be whether inserting "automatic hyperlinks" constitutes publication.

As it stands, simply inserting a hyperlink into "a publication," will not constitute a defamatory publication, but may be seen as defamatory if the author cites the contents of the hyperlink with approval and states, for example, that it contains true fact. For example, if the author of an article provides a hyperlink to a defamatory article that alleges someone is dishonest, and the author writes "go to this site to read the truth," the author may be found to have "published" a defamatory statement and be held liable in defamation. Consequently, care should be taken when an author goes so far as to refer to a hyperlinked material as telling the truth, expressing a correct opinion about someone or citing the hyperlink with approval.

In short, the Court has cleared up the simple question but has yet to deal with its more complex next-generation offspring.

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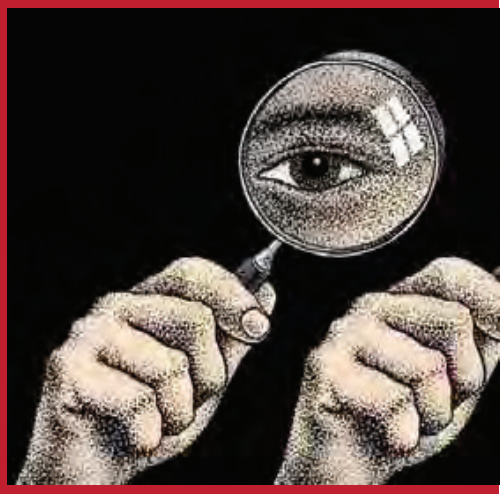

ABOVE: Editorial cartoon by Jugoslav Vlahovic, courtesy of the International Editorial Cartoon Competition of the Canadian Committee for World Press Freedom (CCWPF).