

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)**

BETWEEN:

WAYNE CROOKES AND WEST COAST TITLE SEARCH LTD.

APPELLANTS
(PLAINTIFFS)

- and -

JON NEWTON

RESPONDENT
(DEFENDANT)

**MEMORANDUM OF ARGUMENT OF THE SAMUELSON-GLUSHKO
CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion For Leave To Intervene)**

PART I – STATEMENT OF FACTS

(a) Overview

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) seeks an Order granting it leave to intervene in this appeal. The issues in this appeal involving hyperlinks intersect directly with CIPPIC’s public interest mandate. This Court has previously recognized CIPPIC’s interest in issues involving hyperlinks by granting CIPPIC leave to intervene in *Dell Computer Corporation. v. Union des Consommateurs*, [2007] 2 S.C.R. 801. As an public interest Internet law clinic, CIPPIC has significant historical involvement in issues relating to the function and use of hyperlinks, as well as their impact on individual Canadians and value to online free expression.

2. This Honourable Court will decide under what circumstances, if any, the act of posting a hyperlink can constitute the publication of defamatory statements contained in the hyperlinked

content. If leave is granted, CIPPIC will take the position that for the purposes of a defamation action, the posting of a hyperlink does not constitute publication of the alleged defamatory statements contained in the hyperlinked content unless the poster of the hyperlink explicitly adopts and endorses those alleged defamatory statements. A hyperlink merely “identifies” content located elsewhere online. This “identification” does not constitute publication giving rise to liability in a defamation action any more than a footnote constitutes the publication of any defamatory statements found in the content of the documents referenced by the footnote.

3. It is CIPPIC’s position that a hyperlink posted on a website, a blog, a Twitter account or a Facebook account is not an “invitation” to read the alleged defamatory statements found in the hyperlinked content. And even if the poster of the hyperlink explicitly “invites” readers to read the hyperlinked content, that invitation does not constitute publication of the defamatory statements.

4. The hyperlink is one of the World Wide Web’s great innovations. Given the central and beneficial role played by the hyperlink in online communications, the liability proposed by the Appellants has the potential to seriously undermine and chill online freedom of expression. While CIPPIC is aware of the impact online defamation can have on the reputation of an individual, the position advocated by the Appellants in this appeal goes too far. The expansive liability proposed by the Appellants will expose all hyperlinkers to libel actions at the whims of any disgruntled plaintiff. It is in the nature of the Internet that posted articles are linked to by many and with rapidity and facility across a number of platforms (e.g., blogs, Twitter, Facebook). This rapidity and communicative force is one of the great strengths of the online world and should not serve as a foundation for exposing hyperlinkers to defamation actions for defamatory words they did not author.

(b) CIPPIC

5. CIPPIC, based at the Centre for Law, Technology and Society at the University of Ottawa’s Faculty of Law, is Canada’s sole public interest Internet law clinic.

6. Central to CIPPIC's mandate is the need to ensure balanced decision-making on legal and policy issues emerging from the intersection of law and technology.

7. As detailed in the affidavit of CIPPIC Director David A. Fewer, Internet governance issues impact on most aspects of CIPPIC's advocacy and public outreach activities. CIPPIC has been granted leave to intervene in this and other courts, testified before Committees of the House of Commons and Senate, participated in numerous quasi-judicial fora, and produced several publications and public outreach documents, all on Internet issues. CIPPIC advocates on behalf of all hyperlink users – bloggers, Tweeters, Facebook users, academic researchers and individual Canadians – each of whom will be affected by the Court's decision in this appeal. In seeking leave to intervene, CIPPIC aims to rely on expertise gained in the course of this activity in order to provide this Honourable Court with useful submissions that will be different from those of other parties.

PART II – STATEMENT OF QUESTIONS IN ISSUE

8. An applicant seeking leave to intervene before this Honourable court under section 55 of the *Rules of the Supreme Court of Canada* must address two issues established in case law and codified in section 57(2):

- (a) whether the applicant has an interest in the issues raised by the parties to the appeal; and
- (b) whether the applicant's submissions will be useful to the Court and different from those of the other parties.

Reference re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335 (S.C.C.), per Sopinka J., at para. 8
R. v. Finta, [1993] 1 S.C.R. 1138 (S.C.C.), per McLachlin, J., as she was then, at para. 5
Rules of the Supreme Court of Canada, SOR/2006-203, ss. 55, 57(2)

PART III – ARGUMENT

(a) CIPPIC's Interest In This Appeal

9. The Canadian Internet Policy and Public Interest Clinic's interest in this appeal flows directly from its mandate to participate in public policy debates on technology law issues and to advocate for balance in legal and policy decision-making on issues raised by the intersection of

law and technology. Central to this mandate is advocacy on public interest issues that impact on the normative framework that governs the Internet. The issues in this appeal are important to that framework as they will impact directly on legitimate uses of one of the World Wide Web's most basic building blocks – the hyperlink.

10. As hyperlinks are an increasingly common and essential component of online discourse, this Court's decision will have a far-reaching impact on Internet related activity and potentially grave consequences for internet users if the Appellants' position is adopted by this Court. Given the direct relation between this appeal and CIPPIC's mandate, CIPPIC has a direct stake in this appeal.

(b) Useful and Different Submissions

11. The 'useful and different submission' criteria is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter.

Reference re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335 (S.C.C.), per Sopinka J., at para. 12

12. The majority of CIPPIC's advocacy – ranging from testimony before legislative bodies, to intervention in various judicial and quasi-judicial proceedings, to academic research and writing, to public outreach and advocacy – has had online or Internet components. CIPPIC has gained expertise in the nature of online issues as well as in the balancing exercises that are often required when existing principles must be applied to online activity. CIPPIC has significant historic involvement in the online activities engaged in this appeal and has participated as an Intervener before this Honourable Court on the nature of hyperlinks with respect to online contracts in *Dell Computer Corporation v. Union des Consommateurs*.

13. Additionally, CIPPIC's proposed submissions do not raise any concerns that have traditionally led this Honourable Court to refuse intervention. CIPPIC intends to rely on its expertise and mandate to represent the broad public interest as it applies to all hyperlink users, extending beyond online bloggers. CIPPIC does not intend to expand the issues under appeal beyond those raised by the existing parties.

Reference re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335 (S.C.C.), per Sopinka J., at para. 12

(c) CIPPIC's Proposed Submissions

14. If granted leave to intervene, CIPPIC will submit that for the purposes of a defamation action, a hyperlink cannot on its own amount to the publication of defamatory statements contained in the hyperlinked content. It will be CIPPIC's position that the poster of the hyperlink must explicitly adopt and endorse the defamatory statements before that person can be held liable for publishing those linked defamatory statements.

15. While CIPPIC acknowledges that the online environment poses distinct challenges for the protection of reputation, a decision that posting a hyperlink constitutes publication would not strike the appropriate balance between the competing values of freedom of expression and reputation. A hyperlink merely "identifies" an article located at another website. This "identification" does not constitute publication giving rise to liability in a defamation action.

16. Furthermore, it is CIPPIC's position that a hyperlink posted on a website, a blog, a Twitter account or a Facebook account is not an "invitation" to read the alleged defamatory statements found in the hyperlinked content. Regardless, even where coupled with an explicit invitation to follow the hyperlink, that invitation no more amounts to publication of defamatory statements than an analogous invitation to read a printed article. Recognition of a rule that a hyperlink is an "invitation" to read the alleged defamatory statements found in the hyperlinked content would also have serious implications for the off-line world since a print reference to such content (in, for example, a newspaper), draws the same degree of attention to that online content as an online hyperlinked reference does, yet no liability would ever attach to the printed media without more.

17. The hyperlink is one of the World Wide Web's great innovations. Given the central and beneficial role played by the hyperlink in online communications, the liability proposed by the Appellants has the potential to seriously undermine and chill online freedom of expression. The

position advocated by the Appellants in this appeal goes too far in favour of reputation over freedom of expression.

18. The expansive liability proposed by the Appellants will expose each individual who links to an online publication to potential liability and potentially expose all hyperlinkers to libel actions at the whims of any disgruntled plaintiff. For instance, an article on a popular web-site such as the *New York Times* may be linked by thousands of readers on a utility such as Twitter. A plaintiff could, under the Appellants' proposed rule, legitimately commence defamation actions against any one of those thousands of readers as "publishers" of defamatory statements contained in the *New York Times* article and force the onus of proving a defence onto each – a chilling scenario. It is in the nature of the Internet that posted articles are linked to by many and with rapidity and facility across a number of platforms (e.g., blogs, Twitter, Facebook). This rapidity and communicative force is one of the great strengths of the online world and should not serve as a foundation for exposing hyperlinkers to defamation actions for words they did not author. CIPPIC submits that this Court should have grave concern about imposing the strict liability regime that follows from a finding of defamatory publication onto third party hyperlinkers who have not explicitly adopted and endorsed the defamatory words in question.

19. Imposing potential liability on an individual for defamatory words of third parties is particularly problematic where the individual in question is not an essential part of the distribution process of those words. A book seller, for example, is held to have published defamatory words of others only where the book seller is made aware of these words before selling the book in which they are contained. Intermediaries such as book sellers who form integral parts of the publication infrastructure have been subjected to notice-based liability across various areas of law, including copyright, defamation, and even criminal. Although the book seller is a necessary and essential part of the distribution network for a book, the hyperlinker is not an essential part of the distribution process. The on-line *New York Times* article remains visible and widely accessible to anyone with internet access, without the existence of a hyperlink. Hyperlinkers are not essential to the distribution process and thus have no element of control over the initial defamatory publication. If given leave, CIPPIC will submit that hyperlinkers are

categorically distinct from intermediaries and a notice-based publication scheme such as that advocated by the Appellant is not appropriate.

20. The hyperlink plays a central and beneficial role in online discourse. Hyperlinking is the online equivalent of footnoting in books or articles. As with traditional references, the person who posts a hyperlink will in many cases simply provide citations to a publication and not repeat any content at all. Further, in most cases the hyperlinker will be unaware of the alleged defamatory statements in the hyperlinked content. In contrast, the act of actually incorporating portions of a second article into a primary article is a selective and critical one – one must decide which specific portions of the secondary article to incorporate and how to characterize those elements. This is not and cannot be the case with the mere posting of a hyperlink in the primary article.

21. Hyperlinks operate like any other reference – by identifying a source of information for the reader. This is the sole function of a hyperlink and nothing more. The hyperlink does not “incorporate” the defamatory statements into the primary article as argued by the Appellants. There are, in fact, numerous online utilities such as Twitter and Facebook, social bookmarking sites such as reddit and Digg, and hyperlink collections such as Pearltrees that will often contain hyperlinks alone, with no context to import the object of the hyperlinks into. While the posting of a hyperlink in these utilities will identify the content being referred to, they cannot be said to incorporate that content into the primary article. Where hyperlinks appear alone in such utilities, without context, they are little more than a reading list shared with friends or others. Indeed, a user is as likely to link to an article he/she disagrees with as to one with which he/she agrees. However, given the limited room for contextual comments offered by many of these utilities, endorsement or disapprobation will often be difficult to incorporate into the linking activity itself. Yet, once such activities are viewed as ‘publication’ as advocated by the Appellants, these hyperlink users become exposed to potential liability as publishers of defamatory statements written by third parties, a most chilling scenario.

22. It is further unclear how, under the Appellant's proposed publication rule, an individual posting a hyperlink to an article will not also be a publisher of any tertiary content hyperlinked through the secondary article as well. If the Respondent's article incorporates the defamatory article through a hyperlink, it would appear that any further article that draws attention to the Respondent's article by way of hyperlink would be a 'defamatory publication' to the same extent. Where does the liability end? Attaching such an onerous potential burden to the innocuous act of posting a hyperlink would have serious and chilling repercussions for online discourse.

23. CIPPIC will rely on its institutional experience dealing with online communications, liability and rights protection in order to argue that there is no valid justification in the 21st Century to impose liability on a person who posts a hyperlink to a website that contains alleged defamatory statements unless there is also an explicit adoption and endorsement of the defamatory statements that are linked.

24. CIPPIC respectfully submits that it has met the test for intervention before this Honourable Court. Its interest in this case flows directly from its public interest mandate, which is focused on issues of online discourse and related activity. CIPPIC's submissions informed by its historical involvement and expertise in the field of online communications, will be useful and different from those of the parties to this appeal.

PART IV – COSTS

25. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

PART V – ORDER SOUGHT

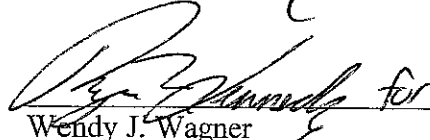
26. CIPPIC respectfully requests an Order from this Honourable Court:

- (a) granting CIPPIC leave to intervene in this appeal;
- (b) permitting CIPPIC to file a factum of no greater length than 20 pages;

- (c) permitting CIPPIC to present 20 minutes of oral argument at the hearing of this appeal; and
- (d) such further or other Order as deemed appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 17th day of August, 2010

 for
Richard G. Dearden

 for
Wendy J. Wagner
Counsel for the Moving Party, CIPPIC

PART VI – LIST OF AUTHORITIES

1. *Dell Computer Corporation v. Union Des Consommateurs*, [2007] 2 S.C.R. 801
2. *R. v. Finta*, [1993] 1 S.C.R. 1138
3. *Reference Re. Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335