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November 2, 2011

Tamir Israel

Crookes v. Newton: Speculations on Intermediary Liability....

Perhaps the thorniest of emerging Internet legal and policy issues these days is the question of Internet intermediaries. It is a feature of the Internet that all online activity is intermediated through at least a few several service providers, such as ISPs, social networking sites, blog hosting sites, etc. Standing at the heart of this activity, intermediaries are uniquely placed to exert a great deal of control and surveillance over downstream users, making them a compelling target for policy-makers and aggrieved plaintiffs alike. The Supreme Court of Canada's recent seminal decision in *Crookes v. Newton* offers a general reaffirmation of the Court's continued commitment to maintaining an open Internet and a vindication for hyperlinkers. More than that, however, it offers some potential insights into how our Canadian legal system might respond with future attempts to leverage Internet intermediaries.

One common mechanism for doing so is to impose liability on them for the activity of others. Secondary liability of this kind is typically different in character from stricter liability regimes applied directly to primary actors. It includes a 'notice' element. This means intermediaries are not typically obligated to take pre-emptive actions against downstream infringing content, but must still take specific actions upon being asked to or being made aware of alleged rights infringement or face liability in their own right. Common law obligations arising from notification may include various categories of takedown requirements: a blogger taking down a 'flagged' defamatory (or, perhaps, as IP infringing) comment/post after being notified; a blogging platform taking down a blog that has been 'flagged'; a domain name registrar seizing the domain of a flagged blogging platform; or blocking access to an IP address of a flagged service. Even more aggressive responses have been undertaken by intermediaries voluntarily under threat of liability. Some have adopted a '3 strikes' policy, where 3 copyright infringement against a customer leads to disconnection, as settlement in a lawsuit initiated by rights holders.

What does all this have to do with hyperlinking? While a hyperlinker is not an intermediary, she shares many characteristics with most intermediaries, in that both play primarily facilitative roles. The intermediary provides access to content created by others, while the hyperlinker merely draws reader's attention to that content. This squarely raises the question of the extent to which we should be making individuals liable for what they do. In answering this question within the context of defamatory publication, the SCC adopted an approach that affirms a basic, but critical principle of common law — that individuals should not easily be made liable for the actions of others. As secondary responsibility is at the core of intermediary liability issues, *Crookes v. Newton* informs the Court's ultimate stance on the latter. We are likely to see the question of intermediary liability in Canada in the future, so it is worthwhile speculating on ways the *Crookes* decision may impact on that consideration.

a. Freedom of expression and the Internet

In keeping with its recent jurisprudence (see Abella, J., para. 32 for a synopsis of this trend), the majority in *Crookes* justified its decision on the grounds that existing defamation common law principles conflict with the Charter right, and should adopt to account for this. What is interesting is the manner in which the Court affirmed free expression in this case to "avoid[] a formalistic application of the traditional publication rule" [para. 25].

This 'leveraging' is evident in the following majority statement:

The Internet cannot, in short, 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. The potential "chill" on how the Internet functions could be devastating, since primary article authors would unlikely risk liability for linking to another article over whose changeable content they have no control. If, to protect the core significance of the role of hyperlinking to the Internet, we risk impairing its whole

functioning. Strict application of the publication rule in these circumstances would be like trying to force a square archaic peg into the hexagonal hole of modernity. (Abella, J., para. 36)

The Court appears to be drawing links between the right to free expression on the one hand, and the hyperlinking mechanism, the free flow of information and, more broadly, the Internet itself. The impact of the Internet as a communicative platform has recently been tied to the freedom of expression by the UN Rapporteur on the promotion and protection of the right to freedom of opinion and expression:

Unlike any other medium, the Internet enables individuals to seek, receive and impart information and ideas of all kinds instantaneously and inexpensively across national borders. By vastly expanding the capacity of individuals to enjoy their right to freedom of opinion and expression, which is an “enabler” of other human rights, the Internet boosts economic, social and political development and contributes to the progress of humankind as a whole.

This is an important development when viewed within a growing international discourse on the interrelationship between freedom of expression, the proper role of Internet intermediaries and the need to achieve various policy objectives such as protecting reputation online. This discourse is also gravely concerned with the detrimental impact to freedom of expression that will result from saddling intermediaries with liability for the content of others. Notification-based intermediary liability will, in effect, transform allegations of wrongful restraints on speech quickly, cheaply, and typically before any judicial processing of such allegation has occurred. The reverse onus is then placed on often under-funded users to challenge this claim in court.

In his report, the UN Special Rapporteur unpacked these concerns in greater detail:

...a notice-and-takedown system is...subject to abuse by both State and private actors. Users notified by the service provider that their content has been flagged as unlawful often have little recourse or few resources to challenge the takedown. Moreover, given that intermediaries may be held financially or in some cases criminally liable if they do not remove content upon receipt of notification by users regarding unlawful content, they are inclined to err on the side of safety by over-censoring potentially illegal content. Lack of transparency in the intermediaries’ decision-making process also often obscures discriminatory practices or political pressure affecting the companies’ decisions. Furthermore, intermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences.

Our own Supreme Court flagged similar concerns (albeit in the context of copyright infringement) in its assessment of authorization-based intermediary liability in *SOCAN v. Bell*:

The knowledge that someone might be using neutral technology to violate copyright ...is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did “(g)ive approval to; sanction, permit; favour, encourage” (*CCH*, at para. 38) the infringing conduct. I agree that notice of infringing content, and a failure to respond by “taking it down” in some circumstances lead to a finding of “authorization”. However, that is not the issue before the Court. Much would depend on the specific circumstances. An overly quick inference of “authorization” would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider.

The potential impact on expression that motivated the SCC in *Crookes* is magnified significantly in the context of intermediary liability. Much as with the hyperlinker, intermediaries are chilled from communicating with others by the threat of notice-based liability. As with hyperlinker chill, fear of liability causes intermediaries to err on the side of over inclusion. Most accusations of defamation are treated as legitimate, because the intermediary (or hyperlinker) is not in a good position to assess defences such as justification (or, with respect to dealing).

The impact of intermediary chill, however, is more significant than with hyperlinkers, as it is applied wide and impacts on downstream expression as well. In a notice-takedown regime, it amounts in effect to a restraint on downstream expression. The primary speaker is prevented from making her statement because the intermediary prevents them from doing so. With notice-takedown liability, this occurs before a judicial finding of defamation has been issued as the intermediary must react quickly to avoid liability in their own right. The intermediary's approach is at odds with the Courts' hesitant approach towards issuing injunctions in defamation cases, which are viewed as an "exceptional remedy" reserved for cases where the statements at issue are "manifestly defamatory" (See *Canadian National Railway v. Google Inc.*, 2010 ONSC 3121). Far from applying a manifestly defamatory standard, notice-takedown regimes are strict liability once the notice has been received, meaning a statement that is ultimately found defamatory (but still far short of the 'manifestly' standard) will lead to liability for the intermediary. Further, as noted above, intermediaries are not remotely well-placed to make such assessments of whether a statement is manifest or not.

Where intermediary liability leads to user disconnection, it is a particularly thorny issue, as it can deny users access to an entire communications medium on the basis of one minor facet of their use of that medium. Intermediaries are increasingly pushed, under threat of liability, towards adopting voluntary disconnection policies. This raises issues of proportionality, as it involves denying users who have committed one infringement (copyright, for example) from access to an entire platform of expression:

The Special Rapporteur is cognizant of the fact that, like all technological inventions, the Internet can be misused to cause harm to others ... The Special Rapporteur emphasizes that censorship measures should never be delegated to private entities, and that intermediaries should not be held liable for refusing to take action that infringes individuals' human rights ... While blocking and filtering measures deny users access to specific content on the Internet, States have also taken measures to cut off access to the Internet entirely. The Special Rapporteur considers cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights.

Once in place, these voluntary disconnection programs are difficult to dislodge, even after liability is clarified *ex post*. As a broader 'reconsideration' of the publication rule appears imminent (Crookes points to the absence of a legislative response to defamatory intermediary liability, the buffer provided by the common law against the use of common law liability as a means of chilling free expression may potentially play a role in defining future intermediary liability or lack thereof.

b. Passive instrumentality of Internet intermediaries

Another factor relied upon by the majority in rejecting hyperlink liability is the passivity of the act of hyperlinking. Historically, even the most tangential participation in the publication chain was sufficient to attract liability. The majority in *Crookes* points, for example, to the printer's servant found a publisher in his liability for an act no more significant than the 'clamping down' of the printing press (Abella, J., para. 18).

However, as the majority points out, this principle has slowly eroded over time. The Court referred to two UK cases, one against an ISP and one against a search engine and a web host, in concluding: "[I]n recent UK jurisprudence has emerged suggesting that some acts are so passive that they should not be held to be sufficient for publication." (see paras. 21; also 89-90).

In *Metropolitan International Schools Ltd. v. Designtecnica Corp.*, [2009] EWHC 1765, Justice Eady, sitting as Queen's Bench held at paras. 63-64, consistently with *Crookes*, that where intermediary conduct is limited to merely 'facilitating access' or is 'passively instrumental' with respect to allegedly defamatory content, liability has not occurred regardless of whether the plaintiff has requested a takedown or not. Liability remains with the primary author, in such scenarios, and it appears that factors such as 'passivity' and 'instrumentality' are key factors in defining the scope of liability. Knowledge and control appear to play a significant (but not sufficient) role in assessing the level of passivity, with both factors being necessary, if not sufficient. However, legislative regimes such as Chile's recent copyright law have recognized that intermediaries can only

to have ‘knowledge of infringement’ after they are provided with judicial notice of infringing content and ‘passivity’ are to be adopted as a new touchstone for publication-based liability, the question of whether they qualify as sufficient ‘control’ remains open.

c. Defamatory vindication & control

This focus on primary as opposed to secondary authors as the proper home for vindication also played a significant role in shaping the majority decision. In refusing to apply the traditional publication rule to hyperlinkers, it held:

[40] Where a defendant uses a reference in a manner that in itself conveys defamatory meaning to the plaintiff, the plaintiff’s ability to vindicate his or her reputation depends on having access to a remedy against that defendant. In this way, individuals may attract liability for hyperlinking in a manner in which they have referred to content conveys defamatory meaning; not because they created a reference, but because, understood in context, they have actually expressed something defamatory...

[41] 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 plaintiff does not leave them unable to vindicate their reputations. As previously noted, when a hyperlinker creates a link, he or she gains no control over the content linked to. If a plaintiff wishes to prevent further publications of the defamatory content, his or her most effective remedy lies with the person who actually created and controls the content.

[42] 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. Such an approach promotes expression and reflects the realities of the Internet, while creating little or no limitations to a plaintiff’s ability to vindicate his or her reputation.

While the majority left to another day the question of what constitutes ‘hyperlinking in a manner that conveys defamatory meaning’ (a concurring opinion by McLachlin, C.J. and Fish, J., suggests an ‘endorsement’ while the majority may have opted for something more rigorous), the concept that responsibility rests on the primary author is consistent with the normative underpinnings of defamation, if not its historical tenets. A finding of defamation is not solely a compensatory regime. A declaration that the author of a statement was ‘wrong’ offers the plaintiff vindication:

This case involves international defendants and activities, suggesting caution and restraint. However, I agree with the motion judge that even if the Ontario judgment is unenforceable in the United States, a judgment would have significant value to Black as a vindication of his Ontario reputation. *Breedon*, 2010 ONCA 547, (Ont. C.A.), leave to appeal to S.C.C. granted.

Normatively speaking, it is difficult to see how refusing to remove a comment made on a blog upon which you have blocked access to one of the trillions of websites to which an ISP facilitates access is an act that calls for ‘vindication’. Absent liability, many if not most Internet intermediaries premise their takedown decisions on their desire to facilitate interactions on their platform, not necessarily on their approval or disapproval of a particular comment. In any case, as pointed out above, intermediaries are not very well placed to assess the defamatory nature of such content (particularly where complex legal concepts such as justification, fair comment, and the like must be considered).

There may be practical reasons for maintaining some form of intermediary liability. The Court stresses that hyperlinkers have no control over the underlying content — indeed, once the linked content is reached, the hyperlink is immediately stripped of any defamatory import. This is different for intermediaries, who exercise control over the originating content and restrict access to it. But, stripped of the need for ‘vi-

what is left are practical considerations and these may well be outweighed by the detrimental impact expression that may ensue from imposing liability.

d. Section 230 of US CDA ‘creation or development’

In reaching its decision on the scope of hyperlinking liability, the Supreme Court also relied on part of the U.S. Communications Decency Act, a provisions which grants immunity to all Internet intern any (allegedly) defamatory content where were not involved in its creation or development (*Crookes*: 103). The premise underlying s. 230 is that online intermediaries should not be held responsible for others:

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diverse political discourse, unique opportunities for cultural development, and myriad avenues for interactive activity...None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. (*Zeran v. America Online Inc.*, 129 f. 3d 327 (4th Circ

While Canadian common law does not currently reflect CDA s. 230, the Court’s willingness to adapt third party liability in order to prevent excessive chill of expression may bode well for those concerned broader question of Intermediary liability and, more generally, for those concerned with online speech. Court subjects the “one writer/any act/one reader paradigm” to “further scrutiny” in the future.

Tamir is staff lawyer with the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic at the University of Ottawa Faculty of Law, where he conducts research and advocacy on various digital related topics, with a focus on online privacy and anonymity, net neutrality, intellectual property, internet liability, spam, e-commerce, and consumer protection generally. He is a Member of the Advisory Board of Privacy International and lectures on Internet regulation matters at the University of Ottawa's Faculty of Law & Postdoctoral Studies.

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5 Comments on “Crookes v. Newton: Speculations on Intermediary Liability....”

1. *Antonin I. Pribetic* says:

[November 2, 2011 at 3:24 pm](#)

What does all this have to do with hyperlinking? While a hyperlinker is not an intermediary, she shares essential characteristics with most intermediaries, in that both play primarily facilitative roles.

In my view, hyperlinkers may be intermediaries; the question is whether the website, blog, or provides access to third party content via hyperlinks.

Lilian Edwards and Charlotte Waelde, in "Online Intermediaries and Liability for Copyright Infringement" (Keynote paper presented at the WIPO Workshop on Online Intermediaries and Copyright, Geneva. World Intellectual Property Organisation (WIPO)) at pp. 5 note:

The different issues of policy raised by these different classifications of authorship and content were largely not teased out systematically in the early jurisprudence, leading to differing regimes being imposed both in different legal systems and within the same legal system but in differing scenarios, depending on the type of offending content in question. Case law also referred unsystematically to "ISPs", "bulletin boards", "online publishers" and similar terminology.

This lack of harmonisation in the emerging case law led to calls from industry for some rescuing certainty in the form of special statutory regimes from as early as the mid 1990s. As discussed below, over time, the debate over liability for online intermediaries came to be less as tied to different types of content – libel, pornography, material infringing copyright, material invading privacy – and more as a holistic problem of whether intermediaries or the Internet should in general be made responsible for the content they made accessible to the public, transmitted or stored.

2. *Kent Mewhort* says:
November 2, 2011 at 4:49 pm

Antonin, I think Edwards and Waelde are referring to the differences between different types of content, not to the fundamental differences between linking and hosting. As they note in the immediately preceding paragraph, there are many different levels of involvement in the context of "hosting" content, from commercial hosts, who contractually provide web-accessible disk space, to bulletin board operators; the operators usually play a considerably more passive role. Even in the case of P2P networks and Waelde describe, participants in that context are still most certainly involved in the actual transfer of data.

In contrast to these situations, hyperlinking provides "access" to content about as much as giving a map to your house provides access to all of your belongings within. The URL in a hyperlink is just an address. As the SCC correctly held in *Crookes*, you would need to go much further than merely providing an address to create liability or become an intermediary.

3. *Antonin I. Pribetic* says:
November 2, 2011 at 5:44 pm

Kent,

I believe you missed my point.

I'm not speaking to the active/passive dichotomy. I'm referring to the blanket statement that hyperlinking does not fall under the rubric of online intermediary liability, implying that only ISPs, commercial websites and ad revenue-producing blogs are considered intermediaries.

consider the OECD DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY COMMISSION FOR INFORMATION, COMPUTER AND COMMUNICATIONS POLICY REPORT: THE INTERNET INTERMEDIARIES IN ADVANCING PUBLIC POLICY OBJECTIVES: Forging partnerships for advancing policy objectives for the Internet economy. Part II (DSTI/ICCP(2010)22-June 2011, which notes that:

"The notions of intermediary and content provider are increasingly blurred, especially on participative networking sites, raising the question of how legal frameworks should respond. Depending on the specific roles and services provided by intermediaries, when question

regarding liability limitations are assessed, attention may be paid not just to the intermediary's knowledge, but also to its neutrality and the financial gain derived from hosting or linking activities. These considerations can require a more subjective case-by-case assessment of whether they qualify for a limitation of liability, and may increase uncertainty for intermediaries and other interested parties operating in an ever-changing environment.

- There are questions about whether new types of intermediaries or intermediaries whose numbers have increased (search engines, social networking sites), and perhaps others yet to emerge need

distinct safe harbours. In addition to different categories of intermediary activity (hosting, conduit, linking, etc.), there are questions about whether small and large intermediaries need different rules for their role in addressing illegal activity on their platforms.

- Rules limiting their liability can encourage co-operation by Internet intermediaries, thus promoting the Internet as a trusted medium for commerce and speech.

(at p.6)

The OECD Rapporteurs add,

Many intermediaries do not operate in traditional market contexts

Although much of the focus of this report is on major market players that operate as intermediaries in some way, *it is important to recognise that a majority of online intermediaries operate in a non-financial or a minimally financial context. Any individual who operates for his or her friends or local community (using, for example, a blogging platform such as blogger.com) can be considered an Internet intermediary operating a platform that helps enable communication. Indeed, blogs "give access to, host, transmit and index content originated by third parties", as do websites that allow users to post comments (including websites of NGOs, governments, news sites, etc.).*

...

Although some individual and non-commercial blogs and websites also run simple advertisements, the presence of ads does not transform the site into a commercially focused operation. The focus and goal of these sites is generally not to maximise ad revenue, but to provide a communication forum for a select group of people.

Thus, any consideration of liability, incentives or other obligations on intermediaries must take into account the fact that many intermediaries are non-commercial sites operated by individual or small organisations that lack the resources to comply with many legal or liability-based constraints.

(at pp.26-27)

4. *John G* says:

November 2, 2011 at 7:34 pm

So – is there room for legislation in this area (ideally at least uniform across Canada) or should it be left for the courts to make up their minds, influenced by arguments such as those above?

5. *Tamir Israel* says:

November 2, 2011 at 11:19 pm

Antonin — you are correct that my statement was overbroad, and on 2 fronts. First, as Kent pointed out, a search engine (P2P or otherwise) is primarily a collection of hyperlinks, but I would not consider it an intermediary as it is a platform whose role it is to facilitate access to other resources in a particular manner. Second, as you say, non-commercial blogs may take on qualities that qualify as intermediaries.

computer services. Indeed, the link posted by John Newton was in a post on his own largely non-commercial blog, meaning he is an intermediary in his own right, in other contexts such as when monitoring comments on his posts.

As Ms. Perset notes in your 1st OECD excerpt, this blurring raises issues, making it difficult to immunization does not include scenarios where the intermediary is non-neutral and directly creates content. I differ, however, with the view that non-commercial intermediaries require different principle. Immunity for commercial and non-commercial intermediaries alike, in the s. 230 CI would be desirable.

John — there is certainly room, I think, for coordinated legislative action, unless we wish to try courts :) The copyright bill attempts to put in place notice-notice liability for ISPs and search engines (where a search engine is a 'provider' of an substantially infringing service, there is no immunity and somewhat problematically, where the intermediary 'authorizes', it might also lose its immunity for defamation, I think that is Provincial, but I think Provinces have coordinated successfully in these matters such as this. A legislative response would be cleaner, and could better account for nuances that could be more comprehensive, clarifying, for example, intermediary obligations in the discovery process. The SCC said precisely this in *SOCAN v. Bell* when it called for a legislative response in Copyright line directly AFTER the excerpt above). Also, who knows how long this will take to sort in these matters they will go a different direction.

Finally, I should note that, of course, intermediary liability issues are not 'new', but rather have been contentious since day 1. But there has been, it seems, renewed international energy recently in these matters.

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