

Client Alert.

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Corporate Websites: Be careful who you're linking with

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The English High Court has opened up the possibility that, even if a website is not itself defamatory, if it hyperlinks to a different website which *is* defamatory, the operator of the originating website could still be liable for alleged defamatory postings on the hyperlinked website. This represents a further reason to be cautious about linking to external sites from a corporate website. The case also illustrates the issues faced by internet service providers (ISPs) in establishing defences to liability claims under UK law.

The case which triggered this ruling is *McGrath v Dawkins and others [2012]*. The case arose after Chris McGrath self-published a book called *The Attempted Murder of God: Hidden Science You Really Need to Know* under the name "Scrooby". In an attempt to market his book, McGrath posted a purported review of a book by Professor Stephen Hawking on Amazon UK's website criticising Professor Hawking's book and plugging his own book. This "review" generated a lot of comments and one of the most active participants in the thread was a Mr Jones. He exposed McGrath as the author of the Scrooby book and, in the context of a heated online debate with McGrath, criticised him with such words as "fraud" and "phony" and characterised him as a "creationist". Jones then opened a thread on the richarddawkins.net website on the same topic.

McGrath brought a defamation action, not only against Jones but also against Professor Richard Dawkins himself, the Richard Dawkins Foundation for Reason and Science and against Amazon UK. The defendants applied for a summary judgment ruling against McGrath. The Dawkins Foundation relied in part on the point that it was not responsible for publication of the allegedly defamatory comments on the .net website because a U.S. company, rather than the Foundation, operated the website. Amazon claimed the protection of the fairly typical ISP defences under Section 1 of the Defamation Act 1996 and regulation 19 of the UK e-commerce regulations.

THE STATE OF PLAY ON HYPERLINKS

One of the questions to be considered by the court was whether McGrath was entitled to bring a defamation claim against the Richard Dawkins Foundation as it did not operate the .net website (in fact, it was operated by a U.S.-based sister company). The UK website, richarddawkins.org, had no open-access forum. The reason behind this was specifically to protect the assets of the UK website operator from liability for defamation for third party contributions. The U.S. company would have been potentially liable for publications accessible in the UK but UK libel judgments are, in effect, unenforceable against U.S. assets for constitutional reasons (the very reason why McGrath sued the UK company, rather than the U.S. sister company).

McGrath accepted that the servers and registration of the .net website were located in the U.S. but still contended that the .net website was run from the UK. In its judgment, the court accepted McGrath's contention that, if you clicked on the "Home" button of the .org website, you were directed to the .net website and to the index of the relevant forum without any notification to the user that he/she had been switched to a different website. The court noted that UK law on liability for hyperlinks is currently uncertain and held that it was appropriate for the question of liability to be considered at trial, thereby raising the possibility that the Foundation could be considered liable for Jones's posts.

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Whilst we await a full trial on the issues, this is a reminder that website operators should be mindful of their potential liability for defamatory statements when including hyperlinks on their website. This is particularly the case where the website includes links to a group company's website or a website that is closely connected to the originating website's business. In such circumstances it would be prudent, at a minimum, to make it clear to users when they are being re-directed to a third party website.

ISP LIABILITY

The other interesting side to this case is the scope of ISP liability to which Amazon may have been exposed as a result of the posting of allegedly defamatory comments on its website.

Under UK law, there are a couple of areas that ISPs can look to for protection:

- Section 1 of the Defamation Act 1996 provides that a person has a defence to an action for defamation if they: are not the author, editor or publisher of the statement complained of; take reasonable care in relation to its publication; or do not know, and have no reason to believe, that their actions caused, or contributed to, the publication of a defamatory statement. To protect intermediaries such as ISPs, companies providing equipment, systems or services to enable electronic communication are excluded from the definitions of "author", "editor" or "publisher".
- Regulation 19 of the UK e-commerce regulations also protect ISPs by providing that an entity which hosts information provided by a recipient of the online service will not have any liability arising from its storage of the information as long as it has no actual knowledge of any unlawful activity or information; and if, on obtaining actual knowledge of the unlawful information or activity, it acts expeditiously to remove or disable access to the material.

Unfortunately for Amazon in this case, defendants generally face a harder task to establish the Section 1 defence to a claim under the Defamation Act, compared with the ISP liability defence under the e-commerce regulations. So it proved in this case because Amazon succeeded with its Regulation 19 defence but not with the Defamation Act defence.

It was accepted by the court that Amazon was not an editor or publisher of the comments – partly because the posting of comments was part of an automated process. But the very automation of the process meant that it was unclear whether Amazon had taken reasonable care in respect of the publication of the comments on its website. The court held that, on the evidence so far before it, it was insufficiently clear that Amazon had taken reasonable care for it to succeed on a strike-out application in relation to McGrath's Defamation Act claim.

For a related discussion on liability for third party defamatory statements published online, please see our article "Can You Shoot the Messenger? Social Media and liability in the UK for defamatory third party content", which was published in our April 2011 edition of Socially Aware.

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