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MAPPING DIGITAL MEDIA:
ONLINE MEDIA AND DEFAMATION

By Toby Mendel

OPEN SOCIETY FOUNDATIONS

Online Media and Defamation

WRITTEN BY

Toby Mendel[1]

The internet is fantastically enabling for the media, creating previously unimagined possibilities in terms of distribution, audience interaction and archiving. But it also presents new threats, including in the area of defamation law, already a significant problem for many media outlets. These include the possibility of being sued anywhere for online content, rules on liability which encourage service providers to take material down, and rules which make it risky to maintain internet archives.

Toby Mendel's paper assesses these problems against international guarantees of freedom of expression and comparative national practice, through both law and self-regulation, highlighting solutions which are more protective of freedom of expression, as well as those which are not. It also probes some new ideas, including greater reliance on the right of reply, which the internet enables, and that some spaces on the internet should be protected against any defamation liability.

1. Toby Mendel is the executive director of the Centre for Law and Democracy, an international human rights organisation based in Halifax, Canada (see www.law-democracy.org).

Mapping Digital Media

The values that underpin good journalism, the need of citizens for reliable and abundant information, and the importance of such information for a healthy society and a robust democracy: these are perennial, and provide compass-bearings for anyone trying to make sense of current changes across the media landscape.

The standards in the profession are in the process of being set. Most of the effects on journalism imposed by new technology are shaped in the most developed societies, but these changes are equally influencing the media in less developed societies.

The Media Program of the Open Society Foundations has seen how changes and continuity affect the media in different places, redefining the way they can operate sustainably while staying true to values of pluralism and diversity, transparency and accountability, editorial independence, freedom of expression and information, public service, and high professional standards.

The **Mapping Digital Media** project, which examines these changes in-depth, aims to build bridges between researchers and policy-makers, activists, academics and standard-setters across the world.

The project assesses, in the light of these values, the global opportunities and risks that are created for media by the following developments:

- the switchover from analog broadcasting to digital broadcasting
- growth of new media platforms as sources of news
- convergence of traditional broadcasting with telecommunications.

As part of this endeavour, Open Society Media Program has commissioned introductory papers on a range of issues, topics, policies and technologies that are important for understanding these processes. Each paper in the **Reference Series** is authored by a recognised expert, academic or experienced activist, and is written with as little jargon as the subject permits.

The reference series accompanies reports into the impact of digitization in 60 countries across the world. Produced by local researchers and partner organizations in each country, these reports examine how these changes affect the core democratic service that any media system should provide – news about political, economic and social affairs. Cumulatively, these reports will provide a much-needed resource on the democratic role of digital media.

The **Mapping Digital Media** project builds policy capacity in countries where this is less developed, encouraging stakeholders to participate and influence change. At the same time, this research creates a knowledge base, laying foundations for advocacy work, building capacity and enhancing debate.

The **Mapping Digital Media** is a project of the Open Society Media Program, in collaboration with the Open Society Information Program.

Contents

I. Introduction

On 31 March 2009, Saharareporters.com, an online news portal specialising in news about Nigeria, and its operator, Mr Sowore Omoyele, won a defamation case in Houston, Texas, based on corruption allegations by the portal against Paul Orhii, a senior Nigerian official. Mr Orhii, a U.S. citizen, was living in Houston when the case was first lodged. The court dismissed the case on the basis that the defendants did not "aim the Article at Texas, knowing that its effects would be felt here".[2]

Ms Chiranuch Premchaiporn, Director of Prachatai online newspaper, an important forum for debate about controversial political matters in Thailand, may not be so lucky. She has been charged with 10 counts of violating the Computer Crime Act 2007, specifically section 15 of the Act, which makes it a crime to support or consent to an offence against national security, which includes the crime of *lèse majesté*. The charges relate to material posted on Prachatai.com, even though Prachatai claims to have a policy of cooperating with the authorities in taking down illegal material. The case against her is pending in the Thai criminal courts.[3]

These cases illustrate two of the risks of publishing on the internet: one may potentially be sued anywhere in the world for defamation, and one may be held responsible for hosting content created by someone else. Omoyele was lucky, inasmuch as he was sued in a jurisdiction which is relatively protective of freedom of expression on the internet. However, even though he won the Houston case, and his lawyer worked on a *pro bono* basis, it was very disruptive in terms of time and energy, not to mention the chilling effect this sort of thing inevitably has. The outcome of Chiranuch's case remains to be seen.

In many ways, issues surrounding defamation on the internet are similar to other challenges facing those who express themselves over the internet. But defamation is the tool of choice in many jurisdictions for attacking

2. *Orhii v. Sowore Omoyele and Saharareporters.com*, Civil Action No. 4:08-CV-3557. Available at www.nigeriavillagesquare.com/articles/newsflash/us-court-dismisses-paul-orhilis-lawsuit-against-saharareporters.html (accessed 17 November 2010).

3. See Tunsarawuth and Mendel, *Analysis of Computer Crime Act of Thailand*. Available at: http://www.law-democracy.org/wp-content/uploads/2010/07/10.05.Thai_.Computer-Act-Analysis.pdf. See also http://www.prachatai.com/english/node/2061 (both accessed 17 November 2010).

free speech,[4] so it poses a particularly severe risk to freedom on the internet. Furthermore, many areas of attention in terms of content liability over the internet involve the application of criminal norms – terrorism, child pornography, incitement to crime, hate speech and so on – which are prosecuted by States. Most defamation cases, by contrast, are brought by individuals.[5] This means that the risk of politically motivated or ill-founded defamation claims, and the corresponding threat to free speech, is much greater.[6]

This paper assesses the traditional rules for defamation in a number of areas – where jurisdiction over defamation cases may be asserted, who may be held liable, what sorts of statements attract liability, self-regulation, and when liability may be assessed – identifying problems, noting new approaches in some countries, and proposing some solutions.

4. Defamation laws are routinely identified by free speech campaigners as a most serious threat to freedom of expression. See, for example, alerts relating to defamation cases posted on www.ifex.org.

5. Defamation may also be prosecuted as a crime but, in many countries, these cases resemble civil cases, except as to the possible punishments, with the individual claiming to have been defamed bringing the case.

6. This is not to suggest that political abuse cannot occur in criminal cases, but it is less likely than in defamation cases.

II. Where: Jurisdictional Rules

It is a feature of the internet that publication anywhere is, simultaneously, publication everywhere. In this respect, publication on the internet is different from any other kind of (offline) publication, where the publisher has at least some control over the dissemination of the work. It is true that some books and even newspapers or magazines have very wide physical geographical distribution, but this tends to be reserved for major works and the distribution is specific and intentional.

Jurisdictional rules in criminal cases tend to be relatively developed, with jurisdiction depending on where the actions alleged to constitute the crime took place or on the nationality of the accused. In relation to defamation, on the other hand, the wrong has traditionally been understood as a publication which tends "to lower the plaintiff in the estimation of right-thinking members of society".[7] All that is required for this test to be met, jurisdictionally speaking, is for some individuals in the jurisdiction who know the plaintiff to have read or heard the statement(s) in question. Thus, under this traditional rule, liability might ensue in a particular jurisdiction even for a defamatory statement about the plaintiff read by just one person.[8]

This is very problematic for those who publish on the internet, as they may be sued anywhere. Courts in countries like the UK and Australia have agreed to hear defamation cases even though the jurisdictional link has been weak.[9] As a result, plaintiffs may choose to sue in a jurisdiction where they have a good chance of success, instead of where they have suffered the most harm, in a practice known as "libel tourism".

This practice is so serious, particularly in the UK, which is known to be friendly to defamation plaintiffs, that lawmakers in the U.S. have blocked enforcement of foreign decisions that do not meet the standards of the U.S. Constitution. On 1 May 2008, New York Governor David A. Paterson signed the Libel Terrorism

7. *Sim v. Stretch*, [1936] 2 All ER 1237, p. 1240 (HL).

8. Different rules apply between countries which are members of the European Union, pursuant to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which allows cases to be brought for Europe-wide damages in the State in which the defendant is domiciled or established, or in any European State for damages suffered in that State.

9. See, for example, *Berezovsky v. Michaels and Others, Glouchkov v. Michaels and Others*, 11 May 2000 (HL) and *Dow Jones & Co. Inc. v. Gutnick* (2002), 210 C.L.R. 575 (HCA).

Protection Act into law, giving New York courts the power to refuse to enforce foreign judgments that do not pass constitutional muster in the U.S.[10]

The law was largely inspired by outrage at the case of Rachel Ehrenfeld, a New York-based author who was sued for libel by Sheikh Khalid bin Mahfouz, a wealthy Saudi businessman who was discussed in Ehrenfeld's book, *Funding Evil: How Terrorism is Financed and How to Stop It*. The case was brought in the UK, even though only 23 copies of the book had been sold there. Ehrenfeld refused to defend the case and, in 2005, bin Mahfouz won a default judgment that ordered her to apologise, destroy the book, and pay a large damage award.

Recently, national legislation along the same lines as the New York Act has been adopted federally in the U.S. The Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, which President Obama signed into law on 10 August 2010, gives courts the power to refuse to enforce "unconstitutional" foreign judgments.[11]

The rules regarding jurisdiction over defamation cases brought in the United States itself derive mainly from the Supreme Court case, *Calder v. Jones*.[12] Although the case does not involve the internet, the same principles apply in internet cases. The case involved an action in California against an author and editor for an article about the plaintiff in the *National Enquirer*, a national weekly published in Florida. The plaintiff lived in California, the story was specifically about the plaintiff and the weekly had its largest circulation in California. The Supreme Court reaffirmed the established test, that jurisdiction was proper in any state in which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[13]

In holding California to be a proper jurisdiction, the Court noted: "California is the focal point both of the story and of the harm suffered." Furthermore, the statements were expressly aimed at California and the defendants should "reasonably anticipate being haled into court there".[14] Interestingly, the Court rejected the idea that the First Amendment, protecting free speech, was relevant to the matter of jurisdiction, holding that the necessary protection was instead to be found in the substantive rules relating to defamation.[15]

In Canada, the Ontario Court of Appeal case of *Bangoura v. Washington Post* sets the key rules for jurisdiction in defamation cases.[16] In that case, the plaintiff, Bangoura, settled in Ontario in 2000, and in 2003 he sued the *Washington Post* for two articles published in 1997, when Bangoura was living in Nairobi, and which

10. See: http://www.state.ny.us/governor/press/press_0501082.html (accessed 17 November 2010).
11. Available at: http://www.govtrack.us/congress/billtext.xpd?bill=h111-2765 (accessed 17 November 2010). There is some case precedent to suggest that Canadian courts would also refuse to enforce a foreign judgment which was contrary to the Canadian Constitution. See *Beals v. Saldanha*, [2003] 3 S.C.R. 416.
12. 465 U.S. 783 (1984).
13. *Ibid.*, p. 788.
14. *Ibid.*, pp. 789–90.
15. *Ibid.*, pp. 790–1.
16. (2004), 235 D.L.R. (4th) 564. The Canadian Supreme Court denied leave to appeal in the case, so that the Court of Appeal decision was final.

related to previous activities by Bangoura, when he was posted to the Ivory Coast with the United Nations. The full articles remained available through a paid subscription on the *Post*'s website, and summaries were available for free. The Court applied a "real and substantial connection" to the jurisdiction test, holding that the fact that the defendant had moved to Ontario some years after the piece was published was not enough to create a sufficient link, and that the publishers could not have foreseen such a move when the piece was published.

There is now broad cross-party agreement in the UK that the law on defamation needs to be substantially revised. A draft Defamation Bill designed to stimulate discussion on reform provides that for statements also published outside the jurisdiction, courts in the UK should only take jurisdiction where the plaintiff has suffered substantial harm from the defamatory statements in the UK, taking into account publication elsewhere.[17]

There are clearly problems, from a freedom of expression perspective, with the possibility of being made liable wherever content uploaded on the internet may happen to be read. The media could have to adopt a lowest common denominator approach to criticism, based on what may attract defamation liability in the least freedom of expression friendly jurisdictions. The (then) three special international mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression – issued a Joint Declaration in 2005 focusing on the internet. They had this to say regarding jurisdiction over internet content:

> Jurisdiction in legal cases relating to Internet content should be restricted to States in which the author is established or to which the content is specifically directed; jurisdiction should not be established simply because the content has been downloaded in a certain State.[18]

17. Section 13. The Bill is available at: http://inforrm.files.wordpress.com/2010/05/draft-bill.pdf (accessed 17 November 2010).
18. Adopted 21 December 2005. Available at: http://www.osce.org/documents/rfm/2005/10/26809_en.pdf (accessed 17 November 2010).

III. Who: Liability Rules

Under traditional defamation rules, everyone who assists in the dissemination of a statement is potentially liable. To mitigate the harsh effect of this, many countries recognise a defence of *innocent publication*, whereby those who merely disseminate, as opposed to create, defamatory statements – such as newsagents, booksellers and newspaper boys – are not liable unless they are aware of the defamatory content. Thus, under UK common law, applicable in many Commonwealth countries, the defence of "innocent dissemination" was recognised as far back as 1900.[19] The common law defence extended to both those who were not aware of the statements and those who reasonably believed that the statements would not attract liability in defamation (for example because they were true).

Many countries do not, however, recognise an innocent publication defence, as evidenced by the conviction in Italian courts of senior Google officials for a video uploaded to the now defunct Google Video service. The case arose out of the posting on the service of a highly disturbing video by four teenagers, showing themselves bullying a disabled schoolmate. Google removed the video within hours of being notified by Italian police, but the executives were still charged with criminal defamation and violation of privacy. Although eventually cleared of the defamation charges, they lost on the privacy charges.[20]

In some countries, the rules may impose other obligations on service providers than liability as such, sometimes with serious implications for freedom of expression. In Argentina, there have been over 100 cases in recent years against Google and Yahoo!, relating to search engines pointing users to material that is potentially defamatory and an invasion of privacy (usually in relation to celebrities' names or images being used by websites offering sexual services). In most of these cases, courts have granted preliminary injunctions requiring Google and Yahoo! to sever links to the offending material, often calling on them to block access to "similar sites" as well.[21]

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19. See *Vizetelly v. Mudie's Select Library Ltd.*, [1900] 2 QB 170.

20. See Harris, *Deep Impact: Italy's Conviction of Google Execs Threatens Global Internet Freedom*. Available at: http://www.huffingtonpost.com/leslie-harris/deep-impact-italys-convic_b_474648.html (accessed 17 November 2010).

21. See CELE, *Emerging Patters in Internet Freedom of Expression: Comparative Research Findings in Argentina and Abroad*. Available at: http://mediadevelopmentresearch.com/wp-content/uploads/2010/01/InternetandFoE_CenterforStudiesonFreedomandExpression.pdf (accessed 17 November 2010).

In the United Kingdom, the common law rule has been specifically amended to take the internet into account. The Defamation Act 1996 now provides protection to those responsible for several types of actions in respect of electronic publications, including "processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form".[22] This clearly covers most activities of internet service providers (ISPs) and other intermediaries, including search engines and those who host user-generated content (UGC) (generically referred to herein as providers). But providers are still responsible where they do not take reasonable care, or where they know or have reason to know the material is defamatory.

Media outlets which host UGC will arguably have a more difficult time showing they have acted reasonably than other sites. Ironically, this standard may actually lead to greater liability for media outlets which exercise some responsibility over what they carry than for more automated websites, because the former are more likely to be deemed to have known, or to have had reason to know, that the material was defamatory.[23]

In Slovenia, most media do not engage in pre-moderation of UGC. They have, however, resorted to other means to limit their liability for internet content, albeit more commonly in the context of hate speech than defamation. Most resort to blocking the user names and IP addresses of repeat offenders, and most also close the comment option for news stories on certain issues. While this is the simplest option for media outlets, it is also the most intrusive from a freedom of expression perspective.[24]

The EU Directive on Electronic Commerce provides some protection, carefully tailored to internet providers (and covering other sorts of liability than just defamation).[25] It provides absolute protection, upon meeting certain conditions, to those who merely act as conduits for information over the internet. For providers who cache material "temporarily", protection is provided, again subject to certain conditions, provided they remove or disable access to the material upon obtaining actual knowledge that the information has been removed or disabled at the source, or that a court of administrative authority has ordered this. Importantly, providers that host content are protected against liability unless – if they have actual knowledge of illegal activity or, in respect of claims for damages, of facts from which the illegal activity is apparent – they do not act expeditiously to remove the information. However, providers shall not, in respect of the above, be required to monitor content which they transmit or store.[26]

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22. Available at: http://www.uk-legislation.hmso.gov.uk/acts/acts1996/pdf/ukpga_19960031_en.pdf (accessed 17 November 2010).

23. See *Kaschke v Gray and Hilton*. Available at: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2010/690.html&query=kaschke+and+hilton&method=boolean (accessed 17 November 2010).

24. Document on file with the author.

25. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:NOT (accessed 17 November 2010).

26. Articles 12–15.

Media which host UGC content may, to the extent of that service, be considered to fall within the scope of this definition, so that they are required to take down that content expeditiously as soon as they become aware of its illegality, or of facts pointing to this.[27] This sort of rule is commonly referred to as a "notice and take down" provision. However, at least according to a court in the UK, even very minor actions in relation to content – such as recommending, promoting or deleting certain posts – may take them outside the scope of "host" protection for the purposes of this Directive.[28] On this standard, few media outlets would find protection in the rule.

The Council of Europe's Declaration on Freedom of Communication on the internet establishes similar standards: no liability for mere transmission; liability for failure to remove expeditiously illegal material they store, once they become aware of it; and no obligation to monitor content.[29]

For media hosting UGC, a notice and take down approach means that once a claim of defamation has been presented to the outlet, they will be held liable should that claim be upheld. Given the extreme complexity of defamation law in most countries, the potential costs of losing a case, and the sometimes low level of risk that media are willing to assume in relation to UGC – taking into account that they often cannot vouchsafe for its pedigree – it is very likely that mere notice will in most cases lead to the removal of the material, regardless of whether it is actually illegal. This rule thus effectively grants a strong measure of censorship power to the general public.

There is clearly some sensitivity to this in the European regimes. For example, Principle 6 of the Council of Europe Declaration states:

> When defining under national law the obligations of service providers as set out in the previous paragraph, due care must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information.

This is buttressed by the Explanatory Memorandum, which provides:

> Member States should, however, exercise caution imposing liability on service providers for not reacting to such a notice. Questions about whether certain material is illegal are often complicated and best dealt with by the courts. … Perfectly legitimate content might thus be suppressed out of fear of legal liability.

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27. Radio and television broadcasters are explicitly excluded from the definition. See EU Directive 98/34/EC, Article 1(2), as amended.
28. *Kaschke v Gray and Hilton*, note 23.
29. Adopted 28 May 2003. Available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf(2003)007_en.pdf (accessed 17 November 2010).

It is unclear how national lawmakers might, in practice, do this. The proposals for defamation law reform in the UK do little to address the problems with notice and take down, apart from stipulating some general procedural rules for the system.[30] Some guidance in this regard might be gained from South Korea's Supreme Court, which has analysed the problem as follows:

> In a case where a person seeks to make an ISP responsible for libel for resting defamatory material upon its internet site, it must be proved that the ISP failed, for no justifiable reason, to delete the messages from its electronic bulletin board, although it had a duty to do so. In determining whether the ISP is obligated to remove the defamatory posting, the court must examine, in the aggregate, the purpose and contents of the internet posting, the posting's duration and methods, the degree of reputational injury from the posting, the relationship between the message posters and the defamed, the parties' reciprocal responses to the posting or the injured party's demands for deletion of the posting, the nature, size, and for-profit or not-for-profit operation of the Internet site, the degree of the site's accessibility, the time frame for the ISP's actual knowledge or possible knowledge of the posting, and the technical and financial difficulties in deleting the posting. Unless special circumstances exist, the ISP cannot always be under an obligation to eliminate the defamatory material posted by a third-party service user just because it learned or could have learned of the posting.[31]

In some other countries, the law is even more protective of freedom of expression, in recognition of the special nature of the internet. In the United States, the Telecommunications Act, 1996 (commonly referred to as the Communications Decency Act) provides clear protection for both providers and users:

> 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.[32]

This has consistently been applied to UGC hosted by media outlets, even when exercising basic editorial functions such as deciding whether or not to publish content or removing content.[33] However, where material is edited so as to introduce a defamatory meaning, liability may still attach. This may also be the case where the media outlet somehow encouraged the defamatory statement, for example by posing leading questions.[34]

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30. See section 9.
31. Official Gazette of the Supreme Court of Korea, 1 August 2003, 2002 Ta 72194, 2003, p. 183.
32. Section 509 of the Act, which added a new section 230 to the Telecommunications Act, 1934. See sub-section (c)(1). An information content provider is defined as anyone who is responsible for the creation or development of information. The exemption from liability in section 230 does not apply to Federal criminal rules or to intellectual property laws. Available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:s652enr.txt.pdf (accessed 17 November 2010).
33. See: http://www.citmedialaw.org/legal-guide/immunity-online-publishers-under-communications-decency-act (accessed 17 November 2010).
34. See *Fair Housing of Council of San Fernando Valley v. Roommates.com*, No 04-56916, D.C. No. CV-03-09386-PA (9th Cir. 2008), where a website was held liable for drop-down forms which promoted discrimination. Available at: http://www.ca9.uscourts.gov/datastore/opinions/2008/04/02/0456916.pdf (accessed 17 November 2010).

Brazil is also moving to develop strong rules of protection for intermediaries against liability for content on the internet. A Bill on Brazilian Internet Law Framework (Marco Civil) is being developed through an interesting collaborative project between the Ministry of Justice and civil society organisations. The Bill would protect both internet connection providers and those who hold the power of moderation over UGC from liability for internet content, unless they refused to take down the content after being ordered to do so by a court. The court order must identify the party bringing the case, the "infringing" content, the relationship between the party bringing the case and the infringing content, and the legal justification for calling for removal of the content. Furthermore, where possible, the third party must notify the party responsible for the content of this action, thereby providing them with an opportunity to defend their content.[35]

The special mandates addressed the problematic nature of notice and take down provisions in their 2005 Joint Declaration:

> No one should be liable for content on the internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content.

One possibility that might be explored further is a *notice and notice* approach, whereby upon being put on notice of a possible defamatory statement, the provider would be required to inform the person responsible for primary dissemination. That person would then have the option either of defending his or her speech (which may involve shedding anonymity) or of agreeing to take the material down.[36]

35. Articles 19-23 of the Bill. See: http://www.a2kbrasil.org.br/wordpress/lang/en/2010/04/draft-bill-propostion-on-civil-rights-framework-for-internet-in-brazil/ (accessed 17 November 2010).

36. This might be accompanied by other protections, such as an obligation on the provider to provide access to the primary disseminator, where this actor refuses to take down the material, although this can also be problematic and the implications need to be thought through carefully.

IV. What: Defamation Standards

There are a number of defences to a claim of defamation, including that the statement was true or that it belonged to a class of protected (privileged) statements (such as statements in court). In many jurisdictions, it is a defence to establish that the defendant acted with reasonable care, or with some other degree of care, in publishing the material. In many countries, this defence is limited to statements on matters of legitimate public concern or about public figures.

In the United States, which has the strongest variant of this rule, the plaintiff must show that the defendant acted with malice, or with reckless disregard for the truth, in publishing statements about a public figure, defined broadly.[37] Indian courts have articulated similar rules.[38] Courts in other Commonwealth countries have taken more of a "reasonable publication" approach,[39] as has the European Court of Human Rights.[40] In some European jurisdictions, the question focuses more on whether the statement was made in good faith.[41]

Application of these tests, particularly the reasonable publication test, is extremely context dependent. Indeed, it is very difficult to draw any clear line of reasoning through the many European Court cases which hinge on this, other than to note that collectively they represent an overall reasonableness test. In the Reynolds case in the UK, Lord Nicholls applauded the "elasticity" of common law in this area, and elaborated 10 non-exclusive factors to be taken into account in determining whether, in all the circumstances, the statements ought to be protected. These include the seriousness of the allegation, the source of the information and steps taken to verify its accuracy, the status of the information, the degree of public concern in the matter, the urgency of the matter, whether comment was sought from the plaintiff, and the tone of the article.[42]

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37. See *New York Times Co. v. Sullivan*, 376 US 254, 279 (1964) (US SC).

38. See *Rajagopal v. State of Tamil Nadu*, (1994) 6 Supreme Court Cases 632.

39. See, for example, *Lange v. Australian Broadcasting Corporation*, (1997) 71 ALJR 818 (HCA), *Lange v. Atkinson*, (1998) 4 BHRC 573 (NZ CA), *Jameel v. Wall Street Journal*, [2006] UKHL 44 and *National Media Ltd v. Bogoshi*, 1998 (4) SA 1196 (SCA).

40. See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93.

41. For example in the Netherlands. See 6 March 1985, *Nederlandse Jurisprudentie* 1985, 437 (*Herrenberg/Het Parool* case), noted in Dommering, E., "Unlawful publications under Dutch and European law - defamation, libel and advertising" (1992) 13 *Tolley's Journal of Media Law and Practice* 262, p. 264.

42. *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609, p. 625. The flexibility of the test has, however, been criticised as judges may disagree over what is reasonable, so that the standard provides little guidance and security to the media. See, for example, a criticism on this basis of the case of *Flood v Times Newspapers Ltd*, [2010] EWCA Civ 804; [2010] WLR (D) 187, available at: http://inforrm.wordpress.com/2010/07/28/opinion-flood-v-times-libel-ruling-and-reynolds-privilege-by-siobhan-butterworth/ (accessed 17 November 2010).

Application of the reasonableness test to the internet raises a number of issues, which remain largely unresolved in law due to the paucity of cases. Where a traditional media outlet disseminates its offline content also via the internet, it seems appropriate to apply similar standards to assess reasonableness for this content (after all, the same content must pass a reasonable test offline). But what about a traditional media outlet that uses new, internet-enabled tools to provide additional content online, including UGC? Should it control (censor) this material up to the standard of its mainstream content? Or should it be understood that what is considered to be "reasonable" in the lively context of UGC on the internet is a more relaxed standard. When Lord Nicholls referred to the "status" of the information in Reynolds, he was thinking of positive status features, such as it coming from a trustworthy source. But what about threshold issues in the other direction? Is it in the public interest to require UGC to meet the same standard as edited content, even though it is created by non-journalists and will presumably be taken less seriously? Is there a vanishing point below which a statement is not serious enough to sustain a defamation case?

Also, how are we to understand the concept of legitimate public concern which triggers the reasonableness assessment in the first place? Should it apply to the specific content of the statements (i.e. whether they address a matter of public concern)? Or should the very forum that is being enabled (i.e. the opportunity for public debate and participation) be taken into account as a matter of public interest? In the latter case, should courts take into account the risk that imposing overly strict defamation standards may effectively kill off the forum?

There is some indication that the assessment of reasonableness may be reassessed on a continuous basis, as publication over the internet is also continuous. In at least one case from the UK, a court took into account the fact that in the interval since a "reasonable" statement was originally published, new information had become available. It was thus no longer reasonable to make the statement and the internet archive needed to reflect this, for example through a warning or update.[43] This hardly seems realistic, since it would mean that media outlets would need to continuously monitor updates on every story they had ever published.

The internet also throws up some new scenarios in which reasonableness may fall to be assessed. For example, in a recent case in France, Google and its chief executive, Eric Schmidt, were convicted of defamation due to the fact that Google's "suggest" feature linked an individual who had been convicted of "corruption of a minor" with the terms "rapist", "rape" and "satanist".[44] The case is on appeal, but it does demonstrate how the reasonableness standard may need to be further adapted to accommodate internet-enabled forms of communication.

43. *Flood v Times Newspapers Ltd*, 16 October 2009, Queen's Bench (the reasonableness holding in the decision was reversed on appeal, and the original publication held to be liable).

44. See http://www.businessinsider.com/outrageous-french-court-convicts-eric-schmidt-of-defamation-over-google-suggestions-2010-9 (accessed 17 November 2010).

V. How: Self-Regulation

Self-regulation has been widely promoted as a means to control harmful content on the internet. Thus, the Council of Europe's Declaration on Freedom of Communication on the Internet generally promotes self- and co-regulation (Principle 2), the Committee of Ministers' Recommendation R(2001)8 is specifically about self-regulation,[45] and Recommendation R(2004)16 extends the right of reply to (edited) online media.[46]

It seems unlikely that self-regulation will be directly relevant to defamatory content on the internet. Some tools discussed in the context of internet self-regulation, such as filtering,[47] and content descriptors and related content selection tools, are not effective against defamatory content, whatever their ability may be to screen out pornography, child abuse, hate speech, inappropriate advertising for children and such like. This is because it is not possible to identify terms that capture defamatory content.

Most general self-regulatory and co-regulatory systems for the internet do not address issues such as defamation, and focus instead on more potent internet evils such as harm to children and the dissemination of criminally obscene materials. Thus, the self-regulatory Internet Watch Foundation in the UK focuses on protection of children and criminally obscene adult material, as do the co-regulatory codes developed by the Internet Industry Association in Australia.[48]

Even the more tailored self-regulatory regimes for the traditional media, which often apply to their internet activities,[49] do not address the question of defamation, as opposed to issues like privacy, harassment and

45. Recommendation R(2001)8 on Self-Regulation Concerning Cyber Content (Self-Regulation and User Protection Against Illegal or Harmful Content on New Communications and Information Services), 5 September 2001. Available at http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2001)008&expmem_EN.asp (accessed 17 November 2010).

46. Recommendation R(2004)16 on the right of reply in the new media environment, 15 December 2004.

47. See, for example, Council of Europe Recommendation R(2008)6 on measures to promote the respect for freedom of expression and information with regard to Internet filters.

48. See, for example: http://www.iia.net.au/images/content_services_code_registration_version_1.0.pdf.

49. For example, the UK Press Complaints Commission's Editor's Code states: "It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists, in printed and online versions of publications." This is restricted to edited material. It would thus not include an unmoderated UGC forum, but would at some point start to apply as the newspaper exercised greater editorial control over the content.

protection of children. These codes do normally impose obligations on media outlets to strive for accuracy in news and current affairs, but this is different from defamation.[50]

The right of reply, in contrast, is particularly focused on content which is defamatory or otherwise breaches (or affects) a "personal right".[51] Although controversial in some respects,[52] a right of reply is seen as a favoured remedy in some places, as it represents a "more speech" solution to "bad speech". Thus, the both the American Convention on Human Rights[53] and Council of Europe Recommendation R(2004)16 call for this remedy, and a positive obligation to provide for it has been recognised by the European Court of Human Rights.[54]

Subject to it being appropriately circumscribed,[55] a self-regulatory right of reply is a good way to address defamatory content, and many self-regulatory codes for the traditional media provide for it. In some ways, a right of reply is a remedy that is particularly well-suited to the internet environment, where providing an opportunity to reply is relatively easy, with comment forums and other analogous approaches being well established. As noted, a right of reply is not without controversy,[56] but it may also be able to provide some form of redress while preserving valued features of the internet, such as freedom to communicate and anonymity.

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50. See Toby Mendel, "Illegal or Just Wrong?: Reflections on Legal and Self-Regulatory Rules". Available at: http://www.ichs2010.org/programme.asp?room=16 (accessed 17 November 2010).

51. See, for example, Principle 1 of Recommendation R(2004)16.

52. In the U.S., for example, a mandatory right of reply in the print media has been held to be unconstitutional. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

53. 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978. See Article 14.

54. See *Vitrenko v, Ukraine*, Application No. 23510/02, Decision of 15 December 2008, para. 1.

55. See ARTICLE 19, *Memorandum on the draft Council of Europe Recommendation on the right of reply in the new media environment*, August 2003. Available at: http://www.article19.org/pdfs/analysis/council-of-europe-right-of-reply.pdf (accessed 17 November 2010).

56. See EDRI, Right Of Reply In On-Line Media, http://www.edri.org/edrigram/number11/recom-coe-right-of-reply (accessed 17 November 2010).

VI. When: The Multiple Publication Rule

Under traditional defamation law, a defendant is liable for each separate instance of publication of a defamatory statement (known as the multiple publication rule). In a notorious 1849 case from the UK, the Duke of Brunswick sued in relation to a back-issue of a newspaper that his servant had obtained from the newspaper's office 17 years after publication.[57] Theoretically, the rule also applies to other sorts of archival material, including libraries, but the issue has come up very rarely.

However, material that is available over the internet is constantly available, and in a relatively accessible way, leading to more frequent claims regarding historical statements. This has implications in terms both of the statute of limitations,[58] and of archiving.

Another case from the UK, *Loutchansky v Times Newspapers Ltd.*, involved (in part) a claim regarding internet publication, as the statute of limitations had passed for the paper publication.[59] The domestic courts held that the multiple publication rule as applied to internet content was not offensive from either a statute of limitations or archival perspective. On the latter, the UK Court of Appeal stated, surprisingly, that it "[considered] that the maintenance of archives is a comparatively insignificant aspect of freedom of expression".[60] Regarding limitations, the ruling effectively meant that one might sue as long as the material was available via an internet archive.

The case was appealed to the European Court of Human Rights, which upheld the decision of the UK courts.[61] The European Court specifically recognised the "substantial contribution made by internet archives to preserving and making available news and information." Noting the importance of limitation periods, the Court stated: "limitation periods for libel actions [are] intended to ensure that those who are defamed move quickly to protect their reputations in order that newspapers sued for libel are able to defend claims

57. *Duke of Brunswick v. Harmer* (1849) 14 Q.B. 185.

58. The limitation period is the time period in which an action must be taken for defamation. In the UK, for example, this is 12 months for a defamation action. See sections 5(2) and 5(4) of the Defamation Action 1996.

59. [2002] 1 All ER 652. Available at: http://www.bailii.org/ew/cases/EWCA/Civ/2001/1805.html (accessed 17 November 2010).

60. *Ibid.*, para. 74.

61. *Times Newspapers Ltd (Nos. 1 and 2) v. the United Kingdom*, Application Nos. 3002/03 and 23676/03, 10 March 2009.

unhindered by the passage of time and the loss of notes and fading of memories that such passage of time inevitably entails", but also that this had to be balanced against the right of individuals to defend their reputations.[62] Given that the case was lodged only 15 months after the original publication of the statements, the European Court held that allowing the case to proceed did not represent an unreasonable restriction on freedom of expression. It remains unclear how the Court would have dealt with a longer period of delay.

Once again, we find more protective rules in the U.S., in this case dating back to 1952. The Uniform Single Publications Act, 1952, provides that "any one edition of a book or newspaper, or any one radio or television broadcast, exhibition or a motion picture or similar aggregate communication is a single publication." This means that once material has been published once, further dissemination is no longer a new publication. The standard has been adopted by most U.S. jurisdictions and it is now clear that the rule also applies to internet publication.[63] This effectively rules out separate liability for internet archives. There is currently a debate in the UK about how to address this issue.[64] The proposed Defamation Bill provides for a single publication rule.[65]

62. *Ibid.*, paras. 45-6.

63. DLA Piper, *Single Publication Rule Governs Online Publications*, 14 July 2004. Available at: http://www.dlapiper.com/us/publications/detail.aspx?pub=1087 (accessed 17 November 2010).

64. See Ministry of Justice, *Defamation and the internet: the multiple publication rule*, 16 September 2009. Available at: http://www.justice.gov.uk/consultations/docs/defamation-consultation-paper.pdf (accessed 17 November 2010).

65. Section 10.

VII. Conclusion

Where traditional defamation rules are applied to the internet, they can have a seriously negative impact on freedom of expression. This flows directly from the positive characteristics of the internet: its global reach, its enormously enabling capacity to increase access to information, and its strongly democratising impact on the ability to communicate.

The internet, as a fundamentally new communications medium, requires a fundamentally new approach to the regulation of defamatory content. New rules and systems are needed, and this task must be approached with something like the degree of imagination, innovation and energy that has created the internet itself. To date, far too little effort has been put into this important task. Indeed, only a few states have developed new rules to create an appropriate balance between fostering the powerful enabling potential of the internet and protecting reputations.

In some cases, solutions seem relatively straightforward. If we do not apply a single publication rule to the internet, we will effectively wipe out statutes of limitation and make archiving a legally dangerous activity. Other issues are more complex. Clear limits on the scope of jurisdictional liability for internet content are necessary. At a minimum, strong requirements of connection to a jurisdiction should be imposed. But it may be necessary to go beyond that and apply rules more analogous to the criminal setting, limiting jurisdiction to locations where the author is established, the material is uploaded, or to which the material is mainly directed.

The question of who is liable for defamatory content is also complex. If we restrict this to the primary author, it may be difficult to obtain redress, due to the relative ease of hiding one's identity on the internet. On the other hand, if we accept a notice and take down rule, this will effectively grant a power of censorship to the general public. Innovation is needed. The idea of applying a notice and notice system, described above, may offer a way forward.

Finally, the question of standards for defamation on the internet is an area for further inquiry. There is a certain logic to simply applying the same standards, so that what attracts liability offline also does so online. But perhaps a more forward-looking approach is needed here too. Perhaps we need to accept that the communication possibilities of the internet are fundamentally changing the game. Perhaps we should argue for an end to defamation liability on the internet altogether, and instead explore more powerful versions of the right of reply. Perhaps the internet really can vindicate, once and for all, Justice Brandeis's famous dictum that the answer to bad speech is more speech.

Mapping Digital Media is a project of the **Open Society Media Program** and the **Open Society Information Program.**

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The Media Program works globally to support independent and professional media as crucial players for informing citizens and allowing for their democratic participation in debate. The program provides operational and developmental support to independent media outlets and networks around the world, proposes engaging media policies, and engages in efforts towards improving media laws and creating an enabling legal environment for good, brave and enterprising journalism to flourish. In order to promote transparency and accountability, and tackle issues of organized crime and corruption the Program also fosters quality investigative journalism.

Open Society Information Program

The Open Society Information Program works to increase public access to knowledge, facilitate civil society communication, and protect civil liberties and the freedom to communicate in the digital environment. The Program pays particular attention to the information needs of disadvantaged groups and people in less developed parts of the world. The Program also uses new tools and techniques to empower civil society groups in their various international, national, and local efforts to promote open society.

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For more information:

Open Society Media Program
Open Society Foundation

4th Floor Cambridge House, 100 Cambridge Grove
London, W6 0LE, United Kingdom

mappingdigitalmedia@osf-eu.org
www.mappingdigitalmedia.org
www.soros.org/initiatives/media

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