

DEFAMATION IN CYBERSPACE

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ABSTRACT: *The paper presents an analysis of defamation in cyberspace. Can a nation apply its own rules of law without diminishing the freedoms available to citizens of other states for publication in their home countries? Can it be regulated, should it be regulated, and if so why? All the questions will find answers. We also will present the solutions of many national courts on defamation through Internet. It is difficult to have unanimous consensus, because defamation on the internet has become one of the hot topics of internet law.*

KEYWORDS: *Defamation, internet, publication, court, law*

JEL CLASSIFICATION: *K00, K13*

1. INTRODUCTION

The use of the Internet has rapidly expanded over the past few years. For example, the Garter Group estimates that there were approximately ninety Internet Service Providers linking users to the Internet in 1993 compared to the more than 3000 providers that exist today. Studies disagree about the number of Internet users because it is a difficult quantity to measure¹. However, one estimate is that 1.97 billion users currently (internet users worldwide June 2010) access the internet with the number expected to grow to 2 billion in few years. Another area which marks the growth of Internet use is the increased number of domain name registrations.

The technological innovations have simplified our lives allowing us to accede rapidly to information and to communicate remotely in real time, a fact that once was unimaginable but in the same time they might constitute a real danger because the legal system fails to deal with these phenomena with the same rapidity by which they develop. The information revolution has caught unprepared the states in what concerns the system of law. Preoccupying now for all the modern societies is not only how to use efficiently

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¹ Ryan Yagura, Does cyberspace expand the boundaries of personal jurisdiction? The Journal of Law and Technology no. 2/1998, p..303

and develop computer technology continuously, but also to establish the legal framework where to develop interactions in this area².

The Internet raises complex substantive legal conflicts as to what constitutes a defamatory statement and how reputation is to be measured for Internet transmissions. With hundreds of countries connected to the Internet, it is unclear as to whose community standards apply³.

Travelers on the World Wide Web require uniform procedural and substantive remedies for cross-border civil wrongs. Similarly, the international business community will be handicapped if it is subject to multiple conflicting procedural and substantive ground rules. Cross national trade requires a large degree of legal uniformity, and settled expectations about the rules of commerce and the processes by which those judgments are enforced. A focus on the unique features of Internet Law is justified⁴.

Publishing has always attracted a number of legal risks, and information professionals that publish materials in some way or another have always had to be aware of those risks, and the practical steps that can be taken to reduce them. This is especially so when the material being published relates to a living identifiable individual.

The debates over Internet jurisdiction, however, mask deep and fundamental objections to state authority. Jurisdiction fits within a broader struggle over the respect for the rule of law in the Information Society. In effect, jurisdiction over activities on the Internet has become one of the main battlegrounds for the struggle to establish the rule of law in the Information Society⁵.

2. DEFINITION OF JURISDICTION

Jurisdiction under public international law is generally defined as “the State’s right under international law to regulate conduct in matters not exclusively of domestic concern”, and is contrasted with “choice of law”, “conflict of laws”, or “applicable law”, which deal with the question of which law or laws shall be applied in a given case⁶.

Jurisdiction, defines three kinds of power: the power to prescribe, the power to adjudicate, and the power to enforce. The first of these relates principally to the power of a government to establish and prescribe criminal and regulatory sanctions; the second, to the power of the courts to hear disputes, especially civil disputes; and the third, to the power of a government compel compliance or to punish noncompliance with its laws, regulations, orders, and judgments⁷.

² Ramona Mihaela Moldovan, *Human Trafficking in Cyberspace*. In *Curentul juridic* no. 3/2011, p.91.

³ Ahmad Kamal, *The law of cyber space. An invitation to the table of negotiations*. Published by the United Nations Institute for Training and research, Geneva, 2005, p.151-152.

⁴ *Ibidem*, p.154.

⁵ Joel R. Reidenberg, *Technology and Internet Jurisdiction*,. In *University of Pennsylvania Law Review* vol. 153, no. 6/2005, p.1951.

⁶ Frederick Alexander Mann, *The Doctrine of Jurisdiction in International Law* (1964) 111, *Recueil des Cours de l’Académie de Droit International*, apud Christopher Kuner, *Data Protection Law and International Jurisdiction on the Internet (Part I)*. In *International Journal of Law and Information Technology*, Vol. 18, no. 3 / 2010 p. 180.

⁷ Ahmad Kamal, *The law of cyber space. An invitation to the table of negotiations*. Published by the United Nations Institute for Training and research, Geneva, 2005, p.197

3. TYPES OF CYBER DEFAMATION

Cyberspace is a breeding ground for defamation. Several factors contribute to this. As one commentator suggests, “The low cost of cyberspace communications makes wide-scale distribution of wrongful communications possible”. Therefore, “the caution ordinarily exercised in face-to-face real space tends to recede in the world of anonymity and solitude that one finds in front of computer terminals. The temptation to engage in otherwise reckless behavior increases the probability of cyber defamation”. Further, messages in cyberspace “transmit few social cues, so people communicating electronically tend to talk more freely than they would in person”. Moreover, cyberspace provides numerous forms by which people can engage in cyber-defamation, whether via an e-mail message, a message posted to a newsgroup or bulletin board, or an available file via file transport protocol or database⁸.

Libel, or defamation is a criminal offence in many countries, with prison sentences, sanctions and heavy fines making the act of damaging someone’s reputation a costly and dangerous business⁹.

4. DECISIONS OF NATIONAL COURTS

In *Dow Jones & Co. v. Guntick* (2002), the High Court of Australia held that Dow Jones was subject to suit in Victoria for allegedly defamatory material that appeared in the online version of *Barron’s*, despite the fact that the Web site is published and hosted in New Jersey. The court’s decision rested, in part, on the subscription nature of the site by which *Barron’s* is accessed in Australia. Because the publication at issue was available through a subscription service with a handful of subscribers who paid using Australian credit cards, the court found that Dow Jones had accepted the risk of being sued in Australia and would be required to defend the suit there¹⁰.

Dow Jones argued against a finding of jurisdiction in Australia, pointing out that the material on which the complaint was based was published in New Jersey and that 99 percent of the circulation of *Barron’s* three hundred thousand subscribers are in the United States. The online version of the magazine had only five hundred thousand subscribers, and only seventeen hundred of these were in Victoria. The High Court focused on where publication occurs in an Internet publication, and rejected Dow Jones’s argument that publication occurs where the material is last edited before being placed online. „Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. It would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act in which the publisher makes it available and a third party has it available for his or her comprehension” the Court said. This „comprehension” rule in print or broadcast defamation cases commonly

⁸ Philip Adams Davis, *The defamation of choice of law in cyberspace: countering the view that the restatement (second) of conflict of laws is inadequate to navigate the borderless reaches of intangible frontier*. Federal communications law journal vol. 54, no. 2/2002, p. 342-343.

⁹ Klara Chlupata, Natasha Schmidt, *Libel*. in Index on censorship, vol.38 no.2/2009, p.126

¹⁰ Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*. In The ANNALS of the American Academy of Political and Social Science vol. 603, no.1/2006, p. 205-206.

leads to the result that jurisdiction will be found at the place where the damage to reputation occurred, which is most often the country of residence of the claimant. The High Court had no difficulty extending this concept to Internet publication, finding that „the material is not available in comprehensible form until downloaded” and thus that „it is where that person downloads the material that the damage to reputation may be done”¹¹. Defamation laws protect reputation. In doing so, there is a balance to be struck between reputation on the one hand and free speech on the other¹².

Should those publishing information online have to consider the laws of every country in which their site could be accessed, just the laws of the country in which the site is based, or something in between¹³?

The spectre which Dow Jones sought to conjure up in the present appeal, of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe, is seen to be unreal by the Court when it is recalled that in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person resorts.

The High Court also pointed out that other limiting factors would be at play, including the fact that a claimant ordinarily will be able to win damages only in a jurisdiction where the claimant has a reputation and that any judgement rendered in such a jurisdiction where the defendant has assets¹⁴.

In *Griffis v. Luban*, the Minnesota court of appeals ruled that Alabama had jurisdiction over a Minnesota defendant who posted defamatory messages on the Internet. The defendant repeatedly posted messages on an Internet newsgroup attacking the plaintiff's professional credentials. The plaintiff initially obtained a \$25,000.00 default judgment in Alabama, which she was seeking to enforce in Minnesota. The Minnesota court ruled that the Alabama court had properly exercised jurisdiction because the effects of the messages were felt in Alabama and that the defendant should have expected that she would be sued there. An important factor in the ruling was that she had actual knowledge of the effect of the defamatory statements on the Defendant. Therefore, the Minnesota court enforced the \$25,000.00 default judgment. *Griffis v. Luban*, 633 N.W. 2d 548 (Minn Ct. App. 2002)¹⁵.

However, there are cases where courts have refused to allow the exercise of personal jurisdiction based on defamatory statements. In a Pennsylvania case, the court refused to exercise jurisdiction over a New York defendant who had posted defamatory comments about a defendant on an offshore betting website. The court held that since the comments were not specifically directed at Pennsylvania, the court could not exercise personal jurisdiction over the defendant. *English Sports Betting Inc. V. Tostigan*, C.A. No. 01-2202 (E.D.Pa. 2002)¹⁶.

¹¹ *Ibidem*, p. 205-206.

¹² Lawrence McNamara, *A Matter of Honour*. In *Index on Censorship*, vol. 38, no.2/2009, p.81.

¹³ Graham Hann, *Liability in Cyberspace: some key legal issues when publishing material online that refers to individuals*. In *Business Information Review*, vol.20, no.2/2003, p. 97.

¹⁴ Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*. In *The ANNALS of the American Academy of Political and Social Science* vol. 603, no.1/2006, p. 205-206.

¹⁵ Nick Delaunt, *Defamation and Slander on the Internet*, p. 2. <http://ezinearticles.com/?Defamation-and-Slander-on-the-Internet&id=422889>

¹⁶ *Ibidem*, p.2.

In *Bangoura v. The Washington Post*, the Ontario Superior Court of Justice exercised jurisdiction over The Washington Post for an article that reached only once over the Internet by the plaintiff's lawyer. In sweeping language, the Canadian court found that the Washington Post should anticipate being sued in any court in the world. The plaintiff, Cheickh Bangoura, was the head of United Nations program in Kenya when The Washington Post published three articles in 1997 alleging mismanagement of the program. Bangoura moved to Canada in 2001 and sued The Washington Post in Toronto, some four years after the article was published, alleging that the article damaged his reputation in his new country. The Washington Post moved to dismiss the case, but the court maintained that jurisdiction was proper. Although the court conceded that the Post had „no connection to Ontario”, it noted that „the Washington Post is a major newspaper in the capital of the most powerful country in the world now made figuratively smaller by, inter alia, the internet....Frankly, the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided”¹⁷.

The court further reasoned that it would be fair for the case to be tried in Canada because „The Post is a newspaper with an international profile”. The court noted that it „would be surprised if the Post were not insured for damages for libel or defamation anywhere in the world, and if it is not, then it should be”. The court cited the decision of the Australian High Court in *Gutnick* with approval and specifically noted that „those who publish via Internet are aware of the global reach of their publications”. The Washington Post has appealed to the Ontario Court of Appeal. On July 30, 2004, more than fifty newspaper, magazine, and Internet publishers; trade associations; and nongovernmental organizations promoting free expression filed an amicus brief in support of the appeal. On September 16, 2005, the Ontario Supreme Court reversed the trial court's decision, holding that it was not reasonably foreseeable that the Washington Post would have been sued in Ontario based on Internet publication of the article in question¹⁸.

One more country that employed the effects principle for asserting jurisdiction in the Internet content case was Italy. The Italian case originated because of online publications injurious to reputation and privacy of Dulberg Moshe and his two daughters, presumably posted online in Israel by Moshe's ex-wife and her husband. The court of the first instance did not assert jurisdiction over the case because the statements under discussion were published abroad, the offence was committed outside the national territory. The Court of Cassation disagreed and remanded the case for further consideration in accordance with its guidelines. Like the Australian court, the Italian Court of Cassation makes a distinction between the act of the sender publishing defamatory statements online and the perception of these statements by a third party. Further, mere availability of the injurious statements on the Internet is not sufficient, actual perception of them by a third person is required. Hypothetically it is possible to argue that the offence is not committed even if the material is online if, for example, nobody visits the web-site. This is of course a very hard thing to argue and in practice it does not narrow the final conclusion of the court. Once “perception' of the injurious contents of the messages took place in Italy, the offence must

¹⁷ Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*. In *The ANNALS of the American Academy of Political and Social Science* vol. 603, no.1/2006, p. 207.

¹⁸ *Ibidem*, p. 207

be deemed to have been perpetrated on the national territory” and the Italian state is entitled to jurisdiction (Court of Cassation, decision of December 27, 2000)¹⁹.

5. CONCLUSIONS

It is necessary to establish legal provisions to regulate who exactly will be held responsible for the distribution of defamation materials, only the author of publication, the chief editor with administrator of the site, one of them or none of them. In case of defamation through the Internet by simple persons who will be responsible, the author only or with administrator of the site or other person. Which law should be applicable if the author and the defended person are in different countries? The law of the country where is the author, the law where is the defamed person, or the law of country where the host is located. The applicable law is important because defamation in one country may be civil in another may be criminal. We think that all this problems must be resolved by an international agreement.

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¹⁹Yulia A. Timofeeva, *Worldwide Jurisdiction in Internet Content Controversies: A Comparative Analysis*. *Connecticut Journal of International Law*, vol. 20, no.1/2005, p.213-214.