BIRCHGROVE INSIGHT

Defamatory content online: The responsibility of online intermediaries

A comparative analysis of Australia, The United States, The European Union, and Canada's regulatory responses.

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DEFAMATORY CONTENT ONLINE: THE RESPONSIBILITY OF ONLINE INTERMEDIARIES? A COMPARATIVE ANALYSIS OF AUSTRALIA, THE UNITED STATES, THE EUROPEAN UNION, AND CANADA'S REGULATORY RESPONSES.

What level of responsibility do online intermediaries bear for defamatory content which passes through or is hosted on their network? What level of responsibility should they bear? Consider the position in Australia, US, the EU, and Canada.

Introduction

The regulation of defamatory content has progressively developed over time. The ease and accessibility of the internet means that potentially defamatory content is becoming increasingly widespread on social media outlets and online discussion forums. With this increase, comes the need for greater regulatory responses that will reduce online defamation. Recent academic debate queries the level of responsibility that online intermediaries such as Internet Service Providers (ISPs) and search engines (such as Google) should bear for defamatory content and whether they should in fact be held liable for any defamatory content passing through their networks or are hosted on them. The age-old debate of the difficulties of regulating the internet provides for the contextual struggles in imposing liabilities on online intermediaries yet is a good start in reducing libellous content online. Accordingly, this essay will discuss the extent to which online intermediaries should be responsible when hosting defamatory content and compare Australia's response to that of the US, the EU and Canada.

Defamation Legislation: Definition and Purpose

Prior to delving into the intricate relationship of the legislation governing online defamatory content, it is first essential to explore the characterisation of defamation law and understand the purpose behind the introduction of such legislation.

As a response of each State and Territory agreeing to introduce uniform defamation laws, the Legislative Council of each respective state introduced a *Defamation Act* in substantially similar form (the Uniform Acts). The NSW *Defamation Act,* for example, was introduced as a response to the *Uniform Defamation Legislation* to help streamline access to rights flowing from defamation matters.[1] Rather than having eight different pieces of legislation governing the defamatory content in all states and territories, applicants can now go to one area of the law

[1] *Defamation Act* 2005 (NSW).

to ascertain their rights. This introduction allowed for the elimination of duplicity in defamation claims and amongst others, abolished the pre-existing distinction between slander and libel.[2]

The *Uniform Legislation* purposely lacks a formal definition of defamation as it operates by reference to the common law tort of defamation and acts merely as a supplementary provision.[3] This however, has not prevented definitions resulting from public and academic debate about what defamation is. The *Arts Law Centre of Australia* explains defamation as "communication from one person to at least one other that harms the reputation of the person, where the communicator (the publisher) has no legal defence."[4] Although complex and unpredictable, defamation laws serve a greater purpose – to protect people's reputations. An action for defamation may be brought against many different publishers all bearing different levels of responsibilities, such as: the original publisher (the writer or speaker of the defamatory content); anyone who takes part in the publication of the content (such as the primary publisher); or any subsequent re-publication of the content. In recent case law, that will soon be discussed, this liability has also extended to online intermediaries.

In addition to the *Uniform Legislation* making significant procedural changes to the common law tort of defamation, it has also reinforced the rationale behind the need for such an Act of Parliament.[5] The purpose of defamation law is said to balance "society's interest in freedom of expression on one hand and the individual's interest in protecting his or her reputation from unwarranted attack on the other."[6] In doing so, the *Defamation Acts* provide a robust protection that reflects Australia's obligations under international law.[7] The *International Covenant on Civil and Political Rights* (ICCPR) states that no one shall be subject to "... unlawful attacks on his honour and reputation" and "everyone has the right to the protection of the law against such ... attacks".[8] One way this *Uniform Legislation* emphasises this stance on human dignity, is through the defences outlined in Part 4 Division 2 of the *Defamation Act*.[9] This division of

[2] Ibid s 7.
[3] Explanatory Note, Model Defamation Provisions 2005, 3.
[4] Arts Law Centre of Australia, *Defamation Law – Online Publication* (30 June 2015) Arts Law Centre of Australia < https://www.artslaw.com.au/info-sheets/info-sheet/defamation-law-online-publication/>
[5] Above n 1, 5.
[6] New South Wales, *Parliamentary Debates,* Legislative Council, 18 October 2005, 1 (Henry Tsang Parliamentary Secretary).
[7] Ibid.
[8] *International Covenant on Civil and Political Rights,* opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR'*).
[9] *Defamation Act* 2005 (NSW), Part 4 Division 2.

the legislation aims to strike a balance between free speech/expression and protecting a person's reputation against harm by exempting liability for the distribution of defamatory content, so as long as it fits under one of the non-exhaustive list of defences.[10]

Elements of Defamation in Australia

As previously noted, Australia's response to defamatory content comes in the form of an auxiliary legislation to the common law tort. Thus, in order to establish defamation, one must look to recognised legal principles stemming from precedence. For a defamation action to succeed, the plaintiff must prove that the defamatory statement identifies the applicant and that it has been published to at least one other person.[11] The statement must be "of a kind to lead ordinary decent folk to think less of a person about whom it is made."[12] Australian common law dictates that prima facie, a claim for defamation is strict liability in nature, meaning the applicant need not prove that the defendant had intended to defame them. Thus, if a defendant cannot rely on a statutory defence, they can still be liable, despite the absence of an intention to injure a reputation or regardless of whether they acted with reasonable care.[13]

Defamation on the Internet

The borderless nature of the internet allows social media platforms to be prevalent with defamatory content. The anonymity of the internet permits users to deliberately make defamatory statements and suffer no repercussions. Consequently, in response to the online environment "potentially producing a flood gate of defamation claims" the courts have "attempted to balance the right of a person to seek vindication of his or her reputation through legal action" against "the need to avoid the resources of the courts being applied to trivial claims."[14] This allows the courts to control the number of claims and prevent vexatious litigants who resort to costly litigation for frivolous matters.

Liability of Australian Online Intermediaries

Due to this increase use of the internet as a vessel for defamatory content, legal and academic debate has queried the level of liability of online intermediaries in spreading defamation.

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[10] Ibid.
[11] Belinda Robilliard, 'Jurisdiction and Choice of Law Rules for Defamation Actions in Australia Following the Gutnick Case and the Uniform Defamation Legislation' (2013) 22(2) *Australian International Law Journal* 182, 186; *Duffy v Google Inc* [2015] SASC 170, 158.
[12] *Hulton (E) & Co v Jones* [1910] AC 20; *Lee v Wilson* (1934) 512 CLR 276.
[13] *Dow Jones & Company Inc. v Gutnick* (2002) 210 CLR 575.
[14] Above n 2, 2.

Different types of online intermediaries, such as ISPs and search engines have differing levels of liability in relation to defamation.

Internet Service Providers

Arguably, the best avenue to remove defamatory content online is to impose some rudimentary level of responsibility on ISPs. This idea was not entirely reflected in Australia's legislative framework. The legal scheme for dealing with 'offensive' content in Australia (including defamation) is found in Schedule 5 – Online Services to the *Broadcasting Services Act (BSA)*,[15] as inserted by the *Broadcasting Services Amendment (Online Services) Act (OSA)*.[16] Clause 91 effectively acts an immunity for ISPs and Internet Content Hosts (ICHs) from being liable for any offensive material, including defamatory content, online.[17] Clause 91 states that the law of any State or Territory, or a rule of common law or equity has no effect to the extent to which it would: "subject an ICH or ISP to civil or criminal liability for hosting or carrying content where it was not aware of its nature"; and "require an ICH or ISP to monitor, make enquiries about or keep records of content which it hosts or carries."[18] The consequence of this legislative provision means that ISPs would not be responsible for the content accessed through their service where they are not responsible for its creation.

However, ISPs are required to adhere to online service provider rules set out in the *BSA* that impose some responsibility on ISPs to "not knowingly allow a person to use an online service to publish material that is or would be refused under the National Classification Board Guidelines" – this includes defamatory content.[19] In addition, the *BSA* further protects the interests of ISPs and ICHs by exempting them from "making enquiries about, or keep records of internet content."[20] However this exemption only applies to communication with respect to 'internet content' as defined by Clause 3 of Schedule 5. 'Internet content' is defined as information that:

(a) is kept on a data storage device; and

[15] Broadcasting Services Act 1992 (Cth), sch 5.
[16] *Broadcasting Services Amendment (Online Services) Act* 1999 (Cth).
[17] Broadcasting Services Act 1992 (Cth), sch 5 cl 91.
[18] Julie Eisenberg, 'Safely Out of Sight: The Impact of the New Online Content Legislation on Defamation Law' (2000) 23(1) *UNSW Law Journal* 232, 233.
[19] Peter Leonard, 'Safe Harbours in Choppy Water – Building a Sensible Approach to Liability of Internet Intermediaries in Australia' (2010) 3(2) *Journal of International Media and Entertainment Law* 221, 256.
[20] Richard Alston, 'The Government's Regulatory Framework for Internet Content' (2000) 23(1) *UNSW Law Journal* 192, 194.

(b) is accessed, or available for access, using an internet carriage service; but does not include:

(c) ordinary electronic mail; or

(d) information that is transmitted in the form of a broadcasting service.[21]

Thus, this classification specifically excludes ordinary email communication and service broadcasting from the definition of internet content, unless they are stored and available for access – thus creating a loophole for liability. The Supplementary Explanatory Memorandum to the *OSA* identified that "the exclusion of 'ordinary electronic mail' from the definition of Internet content is intended to make it clear that the exclusion only applies to what an ordinary user of the Internet would regard as being e-mail, and that the exclusion does not apply to other forms of postings of material, such as postings to newsgroups."[22] In a way this reinforces the objectives of the *Defamation Act* by balancing the right to freedom of speech/expression with the protection of one's reputation.

By not including broadcasting service material in the definition of internet content, the legislation has effectively created potential exposure for providers of content hosting services. This is so, as many internet streaming services may fall under both the definition of a broadcasting service, as defined in section 6 of the *BSA,* as well as an internet carriage service.[23] To further complicate the liability of ISPs, a Ministerial Direction determined that a "service that makes available television programs or radio programs using the internet, is not a 'broadcasting service' for the purpose of the legislation," hence re-limiting the scope of liability.[24]

Another deficiency of clause 91 is that it leaves online intermediaries with no "statutory protection in relation to filtering or monitoring activities, which might give rise to 'awareness' as to the existence, if not the legality, of particular content."[25] This becomes problematic when clause 91 mandates that the ICH or ISP must be aware of the nature of the online content, and consequently prohibits any argument as to alleged or constructive knowledge. It is thus

[21] *Broadcasting Services Act 1992* (Cth), sch 5 cl 3.
[22] Supplementary Explanatory Memorandum, *Broadcasting Services Amendment (Online Services) Bill* 1999, 5.
[23] *Broadcasting Services Act 1992* (Cth), s 6.
[24] Ministerial Determination under paragraph (c) of the definition of "Broadcasting service" (No. 1 of 2000) 12 September 2000, Commonwealth of Australia Gazette No. GN 38, 27 Sept. 2010.
[25] Above n 19, 259.

somewhat clear from the legislation that once an online intermediary becomes aware of the imputed content, the ICH or ISP should take steps to investigate whether it is in fact infringing defamation laws.

However, it could be argued that the provision is a problematic one and could be read in a myriad of ways. Firstly, it could "remove the protection in circumstances where the host or service provider knew that the type of material *could* give rise to a liability in defamation."[26] On the other end of the spectrum it could require actual knowledge that the material is in fact defamatory in nature. Legal debate contends that a possible interpretation of the legislative provision is "that the host or service provider loses the benefit of the defence when the existence of the particular material is drawn to its attention."[27] An ICH or ISP who does in fact deem defamatory content to be established, must then play the role of 'judge, jury and executioner' and imposing such a liability on them for the millions of users can be antagonistic. Hence, the uncertainties associated with the scope of clause 91, query the future effects of user generated content and social media networking sites in Australia.

Search Engines

The scope of liability for search engines in Australia stems from the common law rather than statute. Unlike our British counterparts, Australian common law has been quite sporadic in imposing a level of liability on internet search engines such as Google for offensive material online. In a Victorian case, *Trkulja v Google Inc*, Google was found liable by a jury for offensive content accessed through its search engine; where the trial judge emphasised that the position in England does not in fact reflect Australia's stance on the issue.[28] This notion was further emphasised in the South Australian case of *Duffy v Google Inc,* where Justice Blue rejected the argument that Google should never be held liable for any defamatory content accessed through their sites.[29]

New South Wales Supreme Courts have diverted from this previously established rule in other States and Territories. The stance in NSW was established in the case of *Bleyer v Google Inc LLC;* where Google was found not to be liable as a publisher for online defamatory content,

[26] Above n 19, 259.
[27] Above n 19, 260.
[28] *Trkulja v Google Inc (No 5)* [2012] VSC 533.
[29] *Duffy v Google Inc [2015]* SASC 170 [202].

unless a user brings the defamatory content to their attention; and Google then refuses to remove the content from its search engines.[30] This approach was implemented in the Victorian Court of Appeal case of *Google Inc v Trkulja*, where the court rejected the previous Supreme Court decision and confirmed that Google is in fact liable for the defamatory content hosted and accessed on their sites.[31]

In addition to this ruling, the appeal case discussed the level of responsibility on search engines, such as Google, to monitor their image and autocomplete searches. It was concluded that image and autocomplete searches were in fact incapable of carrying any defamatory content to their users since it was an algorithm that completed such tasks.[32] A further appeal to the High Court rejected this Court of Appeal decision and paved a way for people to sue search engines for defamation through image and auto-complete searches.[33] The High Court case further explored whether search engines should be exempt from liability for defamatory content. The High Court rejected Google's "contention that Google should be held immune from suit as a matter of public interest, observing, correctly, that the range and extent of the defences provided for in Div 2 of Pt 4 of the *Defamation Act 2005 (Vic)* militate heavily against the development of a common law search engine proprietor immunity."[34] Thus, illustrating the scope of liability that search engines currently have in an Australian context.

Approaches in Other Jurisdictions

(1) United States

The Australian legislative stance surrounding the liability of ISPs in removing defamatory content is replicated in the US. Since the American Legislature passed the *Communications Decency Act* (*CDA*) in 1996, ISPs in America have enjoyed immunity from liability for any content provided by third parties on their servers.[35] This immunity comes in the form of section 230 of the *CDA,* often referred to as the 'Good Samaritan' provision, which exempts ISPs from being considered publishers of any information provided by an information content provider.[36] American courts have interpreted the 'Good Samaritan' provision as an extremely broad

[30] *Bleyer v Google Inc LLC (2014)* 300 ALR 529.
[31] *Google Inc v Trkulja [2016]* VSCA 333.
[32] *Ibid.*
[33] *Trkulja v Google LLC [2018]* HCA 25.
[34] *Ibid* 27.
[35] *Communications Decency Act* 1996 47 U.S.C.
[36] *Ibid* § 230.

protection in third-party internet defamation cases.[37] The objective of section 230 was to grant ISPs immunity from both distributor and publisher liability, while promoting the use and appreciation of technology.[38]

The greatest apprehension in American literature regarding the regulation of online defamatory content is that it could lead to not only overregulation, but to breaches of human rights, that Americans hold so dearly.[39] Consequently, America's legislative and judicial framework is meticulously known to uphold its citizen's right to freedom of speech. The extent to which this right is protected in an online defamation setting is emphasised in the 'Good Samaritan' provision. The American courts have noted that if they were to allow ISPs to be held liable for online defamatory content, they would be allowing the deterioration of that right.[40] This would "create incentives for ISPs to restrict speech and abstain from self-regulation, which would be in direct contradiction to the policies that Congress intended to promote in passing the *CDA*."[41] Resultantly, leaving victims of defamatory content, little redress avenues; at least those seeking the 'deep pockets' of ISPs.

A precursor to section 230 of the *CDA* that effectively expands the ambit of this section is the decision in the case of *Smith v California.*[42] In *Smith v California*, the United States Supreme Court held that "a distributor must have demonstrable knowledge of defamatory content of a publication prior to dissemination in order to be held liable for defamation."[43] This likens the provision to Australia's common law, requiring ISPs to have knowledge about the defamatory content, and upon it being brought to their attention, removing the defamatory content from its servers. Hence, the overall legal response from the US can be seen to encourage self-regulation and exercise of control from the ISP as a response. This idea is exacerbated in the legal debate surrounding section 230, which has effectively queried the expanding nature of the immunity beyond protecting ISPs. This debate started by virtue of *Barret v Rosenthal* where it was established that anyone who posts defamatory content online can still be spared from liability

[37] Sewali Patel, 'Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go' (2002) 55 *Vanderbilt Law Review* 647, 661.
[38] *Blumenthal v Drudge,* 992 F. Supp. 44, 52 (D.D.C. 1998).
[39] Allison Horton, 'Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet' (2009) 43(3) *Valparaiso University Law Review* 1265, 1274.
[40] *Zeran v America Online Inc*., 129 F.3d 327, 330 (4th Cir. 1997).
[41] Above n 37.
[42] *Smith v California* 361 U.S 147 (1959).
[43] Carlisle George and Jackie Scerri, 'Web 2.0 and User Generated Content: Legal Challenges in the New Frontier' (2001) 10 *Journal of Information, Law and Technology* 3, 14.

if they can prove that they were not the actual author of the material.[44] The wide reaching scope of section 230 extends beyond just ISPs and although this reach is meant to uphold the strong belief of freedom of speech, its consequences can go beyond this scope.

(2) Europe and the European Union

Where freedom of speech underpins America's response to liability of online intermediaries, the European Union's stance is heavily influenced by Article 10 of the *EC Human Rights Convention*. The Convention "secures the right to freely receive and distribute information and ideas across boundaries without interference."[45] To reflect this, Europe introduced the EU *E-Commerce Directive* (*the Directive*) that dictates the framework for the liability of online intermediaries in an online setting.[46]

The purpose of *the Directive* is not to wholly exempt ISPs from liability; rather it provides for a safe haven for ISPs "provided they remain passive facilitators and react upon knowledge of illegal content."[47] The *Directive* does not protect online intermediaries that participate in the dissemination of the online defamatory content, rather it protects intermediaries that are "merely technical, automatic and passive."[48] Additionally, it does not impose a responsibility on online intermediaries to monitor content on websites they host. This may be problematic as many intermediaries may not be considered hosts and as such are not shielded by the *Directive.*[49]

Interestingly, cases in the European Union have discussed the liability of online intermediaries, such as search engines, in disseminating hyperlinks carrying defamatory content. Although many European countries have specific liabilities for online intermediaries when it comes to 'linking', the judicial stance has been unclear and inconsistent with the statutory provisions.[50]

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[44] *Barret v Rosenthal* S 122953 (Cal. Sup. Ct., November 20, 2006).
[45] Yun Zhao, 'Internet Service Providers and their Liability' (2001) 34(1) *Journal of Law Technology* 1, 13.
[46] *Council Directive 178/1/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market* [2000] OJ L178/29, art 4.
[47] Michael Lavi, 'Taking Out of Context' (2017) 31(3) *Harvard Journal of Law and Technology* 121, 144.
[48] *Google France SARL, Google, Inc. v Louis Vuitton Malletier* SA 2010 E.C.R. III-114.
[49] Peggy Valcke and Marieke Lenaerts, 'Who's Author, Editor and Publisher in UGC Content: Applying Traditional Media Concepts to UGC Providers' (2010) 24 *International Review of Law, Computers & Technology* 119, 126.
[50] Lorenzo Hueso, 'The Problem of Liability for Illegal Content in the Web 2.0 and Some Proposals' (2009) 3 *Journal of Proceedings for the First International Workshop*, 73, 79.

This is seen in the case of *Google Spain SL, Google, Inc. v González*.[51] In this case, the judges decided that search engines assume some liability for search results that link a user to personal data that appears on a third party webpage; if the content is offensive in nature –including defamatory content. This decision was guided by the general interpretation of the term 'controller' in the *Data Protection Directive*,[52,] and mandates search engines to remove links to defamatory content upon receiving a request by a user.

The decision in *Google Spain SL* and the reliance on the *Data Protection Directive* rather than the *E-Commerce Directive* illustrates the shift in traditional attitude of the European Union when it comes to search engines. Rather than imposing a level of exemption from liability as with ISPs, search engines fail to meet the 'automatic and passive' requirement in order to be protected by the safe harbor protection in the *E-Commerce Directive.* Despite this, European courts have failed to "reconcile this obligation with the safe haven principles of the *E-Commerce Directive* and the scope of intermediaries," thus leaving the scope of liability in question.

(3) Canada

The Canadian regulatory framework is unlike the aforementioned jurisdictions, as it does not have a statutory history. The lack of a legislative response to the scope of liability for online intermediaries for defamatory content alludes to the lack of clarity of the Canadian response. Perhaps, an advantage of such a framework is that there is no one body of law governing ISPs and another governing search engines; eliminating the duplicitous nature of other jurisdiction's regulatory responses.

As there is no legal framework like the *BSA*, the *CDA* or the *E-Commerce Directive*, online intermediaries cannot enjoy the benefit of any safe haven provisions. In Canada liability is regulated by the mass body of existing common law that was established as a response to offline defamation.[53] Accordingly, online intermediaries will resort to common law defences such as 'innocent dissemination' when arguing the extent of their liability. The defence of innocent dissemination exists in other jurisdictions, such as Australia, but is not necessarily

[51] *Google Spain SL, Google, Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (2014) C-131/12.
[52] *Council Directive 95/46/EC of 24 October 1995 on The Protection of Individuals with Regard to The Processing of Personal Data and on The Free Movement of Such Data* [1995] OJ L281/50, art 2(b), 2(d).
[53] Above n 47.

relied upon by online intermediaries in these jurisdictions, due to the exemption from liability.[54]

The defence effectively protects those who play a subsidiary role and "applies in circumstances where the defendant was not the originator of the alleged defamation but simply someone who facilitated its public dissemination without being aware of the content."[55] To be successful in escaping liability, online intermediaries must show that they had "no actual knowledge of an alleged libel, [was] aware of no circumstances to put [it] on notice to suspect a libel, and committed no negligence in failing to find out about the libel."[56] Hence, under Canadian Law an online intermediary can be liable for defamatory content if it receives notice of the content, possesses control over the said content and fails to remove it at the earliest opportune moment.[57]

Like the European Union, Canadian courts also queried the scope of liability for links that are deemed to carry defamatory content. In *Crookes v Newton* the judges decided that links are analogous to footnotes and cannot be seen to carry defamatory content as they are not 'published' by the online intermediary.[58] Canadian courts also considered whether online intermediaries should be liable for defamatory content that is published in snippets in search results. In *Niemela v Malamas,* the British Columbian Supreme Court decided, after reviewing *Crookes v Newton*, that online intermediaries could possibly rely on the innocent dissemination defence, to escape liability for the publication.[59] In this case the courts did not impose liability for snippets published, but left the door opened to do so in cases where the publisher was given notice.[60]

Overall, the Canadian regulatory response is more plaintiff friendly than its US counterparts and somewhat aligns more with the European Union's stance on the liability of online intermediaries.

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[54] *Defamation Act 2005* (NSW), s 32.
[55] *Crookes v Newton* 2011 SCC 47 [20].
[56] *Society of Composers, Authors & Music Publishers of Canada v Canadian Association of Internet Providers* (2004) SCC 45 at. 89.
[57] Corey Omer, 'Intermediary Liability for Harmful Speech: Lessons from Abroad' (2014) 28 *Harvard Journal of Law and Technology* 289, 294.
[58] Robert Danay, 'The Medium is not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation' (2010) 56(1) *McGill Law Journal* 1, 6.
[59] *Niemela v Malamas* [2015] B.C.S.C. 1024 No. 24.
[60] Above n 47.

Should Liability be Imposed on Online Intermediaries?

As seen above, courts from different jurisdictions have struggled to determine the scope of liability offered to online intermediaries for online defamatory content. As such, one must question whether online intermediaries should be liable for online defamatory content and whether there is a better policy response.

Arguments in Favour and Against Liability

As defamation in most jurisdictions is a common law tort that affects the community at large, society feels the need to be protected from its consequences. Online intermediaries such as ISPs, search engines and social media platforms all provide users access to both the internet and a forum for public discussion. Legislatures who are responding to authentic concerns regarding online content, perceive that extending liability on ISPs as far easier than on any other intermediary, as ISPs can be tied down to a specific geographical location. This is "arguably enough to warrant attaching at least a contingent liability for the acts of third parties (who are often the real culprits, if blame is to be laid)."[61] Additionally, suing an online intermediary who has 'deeper pockets' means that not only are plaintiffs able to effectively restore their reputation if they are successful in their proceedings; but they also receive a larger sum of damages than they would if they were suing an individual.

Despite these advantages, there exists systemic issues with imposing liability on online intermediaries. Most prominently is the fear of overregulation and over censoring. When fronted with online defamatory content, online intermediaries usually have two options. Either "swiftly disable access; or choose not to disable access and investigate."[62] Usually, online intermediaries will rely on the more economical solution which is to disable access. Unfortunately, this knee-jerk reaction could lead to overregulation, and this becomes problematic in countries such as America, where the right to freedom of speech holds significant importance.

Additionally, there is a concern with jurisdiction for some online intermediaries. The ability of the internet "to allow instantaneous publication across jurisdictional boundaries causes

[61] Peter Coroneos, 'Internet Content Control in Australia: Attempting the Impossible?' (2000) 23(1) *University of New South Wales Law Journal* 238, 239.
[62] Andrew Row, 'Googols of liability and censoring the internet – the liability of internet intermediaries for defamation: Part II' (2015) 23 *Tort Law Review* 45, 57.

immense problems for the operation of defamation laws" and the imposition of liability on online intermediaries.[63] Although countries such as Australia, the US and the EU have provisions exempting online intermediaries from liability, other countries do not yet have these protections, and this becomes problematic when defamatory claims have a link to these jurisdictions.

The issue of jurisdiction is further amplified by the various means of publication. The internet creates an opportunity for many people to be involved in the widespread dissemination of defamatory content, which in turn, hinders the courts' ability to trace back the defamatory content to the infringer.[64] This is the case, particularly with the anonymity and secrecy offered by the internet. Thus, it could be argued that liability should in fact not be imposed on online intermediaries, to prevent the censoring of legitimate speech online.

Re-thinking Liability – Considerations for Online Intermediaries

1) Balancing Freedom of Speech and Reputation of the Victim

As previously mentioned, the aim of defamation law is to balance the right to freedom of speech/expression with that of the reputation of the victim. Holding a user or entity liable for defamation, protects the "basic elements of a person's status, dignity and reputation as a member of society."[65] This is juxtaposed to the purpose of freedom of speech, which is to shield against government censorship and promote individual autonomy. These two fundamental underpinnings must be balanced to help determine the extent of liability for online intermediaries.

In the age of the internet, online intermediaries are easily able to distribute defamatory content and heavily increase its circulation. As a result, more users spread the content online and the reputational harm associated with it is disseminated on a large scale in a short period of time. Accordingly, "liability can be the key for mitigating harm and protecting civil rights of victims."[66] However, online intermediaries need to err on the side of caution when seeking

[63] David Grant, 'Defamation and the Internet: Principles for a unified Australian (and world) Online Defamation Law' (2002) 3(1) *Journal of Journalism Studies* 115, 120.
[64] *Ibid* 122.
[65] Peter Danchin, 'Defaming Muhammad: Dignity, Harm, and Incitement to Religious Hatred' (2010) 2 *Duke Forum for Law and Social Change v.5* 17, 20.
[66] Above n 47, 149.

freedom of speech protections as they have the ability to contradict with the protections in tort law. An online intermediary "cannot claim to be active speakers when seeking First Amendment protection but also claim to be mere 'tools' when facing tort liability."[67]

2) Rectification of Harm

A prominent justification for imposing liability on online intermediaries for online defamatory content is the need for rectification of harm where there is harm wrongfully caused by another. As an online intermediary disseminates the defamatory content to the masses, it is effectively enhancing its availability and that consequently enhances the harm caused to the victim. As a result, some may argue that intermediaries should be liable for the defamatory content published through their service providers. On the other hand, if one were to differentiate primary publication from secondary publication, liability should not be attributed to secondary publishers as they "aim to facilitate the flow of information and are an integral part of online platforms."[68] These different stances on the rectification of harm further illustrate the difficulties of determining the scope of online intermediaries.

3) Advances in Technology

A subsidiary, yet convincing, argument for exempting online intermediaries from liability for defamatory content is its ability to lead to technological innovation. By offering a protection for online intermediaries from liability, it "will enable freedom and openness, thereby incentivizing entrepreneurs to invest in technological ventures and digital markets."[69] Consequently, it could lead to an alternative way for the dissemination of information that could inadvertently protect users from online defamation in the future. Due to the current uncertainty surrounding the scope of liability of intermediaries "innovation will become too risky or expensive" and intermediaries will "refrain from developing interactive systems for sharing content and will avoid disseminating user-generated content."[70] Thus, reinforcing the current legislative stance on exempting intermediaries from liability.

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[67] Above n 57, 298.
[68] Eva Fried, 'Issues and Challenges Presented by Defamation on the Internet' (2003) 15 *Journal of Internet Law* 3, 7.
[69] Kathryn Taylor, 'Anything You Post Online Can and Will Be Used against You in a Court of Law: Criminal Liability and First Amendment Implications of Social Media Expression' (2014) 71 *National Lawyers Guild Review* 78. 81.
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Conclusion

In summation, the scope of liability for online intermediaries regarding online defamatory content, varies in differing jurisdictions. The definition and purpose of the legislation illustrates the policy underpinnings of the introduction of defamation laws in Australia, and that is to balance the freedom of expression with the protection of human dignity. This allows us to contextualise the legal discourse behind the need to impose liability on online intermediaries. Although online defamation has been difficult to police statutorily due to its changing nature, courts have attempted to do so, to prevent opening the floodgates. The scope of liability in Australia, the US and the EU differ slightly in respect to ISPs and search engines; where ISPs enjoy complete statutory immunity and search engines enjoy some common law exemptions for liability. This is juxtaposed to Canada's response, where online intermediaries are immune from liability only if they can successfully argue a common law defence such as innocent dissemination.

To determine whether liability should be imposed, one must consider not only the arguments for and against imposing liability but also the theoretical underpinnings and consequences of attributing liability. Given the role that online intermediaries play in the dissemination of defamatory content and the ability to increase technological innovation, it may be in the best interests of users and online intermediaries to maintain the status quo. This may allow for respective judicial systems to react to matters on a case by case basis and adapt to the everchanging world of the internet. Alternatively, perhaps moving forward, an international framework can be developed that strikes a balance between protecting human dignity and freedom of speech. Although easier said than done, this approach may prove to be a suitable attitude to the regulation of liability for online intermediaries.

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