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# **INTERNET INTERMEDIARY LIABILITY IN DEFAMATION: PROPOSALS FOR STATUTORY REFORM**

## **Defamation Law in the Internet Age**

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**Proposals for Statutory Reform**

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## I. INTRODUCTION

Given the breadth of the meaning of publication in defamation law, internet intermediaries<sup>1</sup> such as internet service providers, website hosts, search engines and social media companies may be liable for defamatory content posted by third parties. In recent years, courts have begun to address internet intermediary liability in defamation. In Canada, there is no relevant legislation, so the question is one of the common law of publication – an element of defamation. In examining the law and how it is applied in several common law jurisdictions, at least two problems emerge. First, the doctrine sometimes results in defendants being found to be publishers where many would not think their conduct sufficiently blameworthy to ground liability. Second, the law is complex and confusing. Courts sometimes conflate different lines of doctrine – for example regarding secondary publishing and publishing by omission. The result is an emerging case law that is sometimes unprincipled and, in our view, is ill-suited to dealing with the issue of internet intermediary liability in defamation.

We therefore recommend that the publication element of defamation be redefined so as to require a deliberate act of communicating specific words. The common law distinction between primary and secondary publishers – that is, between publishers who have knowledge and control over content and those who do not – would effectively be abolished, since the latter would no longer be publishers at all. Similarly, the doctrine of publication by omission, in which one is a publisher for failing to remove content posted by others, would be abolished. Only those who deliberately communicate with knowledge of specific words at the time of

publication should be treated as publishers. This change would not be limited to the internet intermediary context but rather to the tort of defamation as a whole.

That said, intermediaries incentivize and often profit from content and have considerable power to mediate between those who post content and those who object to it. We therefore recommend that intermediaries should have procedures for handling defamation complaints. It is our view such procedures should be incentivized and harmonized through defamation legislation.

In examining intermediary liability models in other jurisdictions, the pendulum swings between broad immunity models (USA), stricter safe harbour models (better known as notice and takedown) (evident in Europe), human rights frameworks (evident in Brazil and civil society frameworks such as the Manila Principles), and Canada's middle-path notice-and-notice regime for copyright law. With the notice-and-notice framework an intermediary does not risk liability for copyright infringement, but rather risks imposition of statutory damages for failure to pass on notices of copyright infringement to the relevant user.

In this report we recommend a bespoke framework modelled on the notice-and-notice regime best described as notice-and-notice-plus. The copyright framework closely aligns with the findings in this report that intermediaries should not be liable for the unlawful acts of third parties. However, given the significant harm to reputation caused by continued circulation of defamatory content online, we recommend that there be mechanisms for removal of allegedly

defamatory content in narrow circumstances. The risk to the intermediary for failure to comply with the procedures would not be liability for the underlying defamatory content, but rather a risk of a fine, similar to Canada's notice-and-notice system. It should be emphasized that our recommendations narrowly frame the circumstances in which content removal is appropriate; if a user disputes the allegations made in a notice of complaint, an intermediary is not required to remove the content. The recommended procedures are detailed in Part V and are modelled on three principles: the rules should be human-rights based; should enable innovation; and should serve to encourage corporate social responsibility.

## **II. THE COMMON LAW OF PUBLICATION IN DEFAMATION**

### **A. Introduction to Publication**

The tort of defamation has three elements, of which one is publication. Publication means that the defendant must have conveyed, in a comprehensible form, the content complained of to someone who then understood it.<sup>2</sup> Conveying defamatory content is necessary to the tort because the plaintiff's reputation is not at risk unless content is delivered to third parties: it is the link to the relevant injury.<sup>3</sup> Thus, merely creating defamatory content has never been sufficient for liability in defamation.

Conveying, for the purposes of the publication element, has traditionally been defined broadly. It means something like "bringing to someone's attention". In addition to content creators who convey, "liability extends to any person who participated in, secured, or authorised the

publication”,<sup>4</sup> (subject to defences). It follows that repeating defamatory content amounts to publishing it, and this is well established.<sup>5</sup>

The act or omission that constitutes publication must be intentional or negligent; accidentally dropping a letter, for example, will not suffice unless there was want of care.<sup>6</sup> That said, defamation is often referred to as a strict liability tort because no authorship or intent to defame is required. Nor, at least traditionally, is any awareness of the contents required.<sup>7</sup> (As we shall see in Section III, however, some courts are moving away from this orthodox view.) A library that lends a book,<sup>8</sup> and a newsagent who sells a magazine,<sup>9</sup> can be publishers even without reason to think the materials they make available contain a libel – albeit subject to a defence of innocent dissemination, discussed below. Thus, “[t]he requirement of intention in this sense did not narrow the width nor dilute the strictness of the traditional rule.”<sup>10</sup>

Given the breadth of the concept of publication,<sup>11</sup> it sometimes captures conduct that is generally not thought to be blameworthy. “[A] very wide class of persons may be caught as publishers, including quite peripheral, seemingly innocent players.”<sup>12</sup> In addition to the library and newsagent examples above, an illiterate worker operating a printing press was found to be a publisher of the material he helped to print.<sup>13</sup>

## **B. Innocent Dissemination**

Because of the potential injustice caused by the broad definition of publication, the doctrine of innocent dissemination was developed, beginning with *Emmens v Pottle* (1885).<sup>14</sup> It applies where two criteria are met. First, the defendant must be a “secondary publisher”. Second, the publication must have been without knowledge of the defamatory contents or negligence with regard to knowledge. A third criterion is sometimes mentioned: that the dissemination occur within the “ordinary course of business.”<sup>15</sup> The first two criteria require elaboration.

“Secondary publisher” means those who have a “peripheral role” in publication.<sup>16</sup> They: “are not the printer or the first or main publisher of a work that contains a libel”<sup>17</sup> and are often defined in contrast to “primary publisher”. Primary publishers “have or can readily acquire full knowledge of the publication’s content before its release and are able to control and, if necessary, prevent dissemination of such content.”<sup>18</sup> The definition of secondary publisher therefore incorporates a lack of knowledge and control over the dissemination of content.<sup>19</sup> Examples of secondary publishers include “news agents, booksellers, and libraries”.<sup>20</sup> Secondary publishers are also known as “distributors” or “subordinate publishers”.<sup>21</sup> They are sometimes distinguished from passive instruments, carriers or mere conduits (*e.g.* telephone companies), which are not publishers at all. (We will return to the passive instrument doctrine below).

To make out the innocent dissemination defence, secondary publishers must not know, or should not, with reasonable care, have known, that the publication contains a libel.<sup>22</sup> A lack of

both knowledge and negligence is sufficient, when it comes to secondary publishers, to rebut the presumption of malice that arises from the publication of a false statement.<sup>23</sup>

Although referred to above as a defence, it is unclear whether innocent dissemination negates a mental element of publication (albeit with the onus on the defendant) or whether it is a defence.<sup>24</sup> Do innocent disseminators publish, but with a defence, or do they not publish at all? Ribeiro PJ of the Hong Kong Final Court of Appeal considers the preferable view to be that secondary publishers are publishers with a defence. Their proof of a lack of knowledge and negligence must operate to defeat the publication element that the plaintiff must still prove.<sup>25</sup> On the other hand, Blue J. of the South Australia Supreme Court stated that: “[t]he better view is that [a mental element] is an element of publication: this is consistent with intention, knowledge or carelessness as to the fact – as opposed to the content – of communication being an element of publication...”<sup>26</sup> Little turns on the distinction, but it is another example of the complexity and uncertainty of the doctrine.

We have so far described two ways of avoiding responsibility for *publishing* a libel: either one is not a publisher at all, in the sense of having conveyed the information to a third party, or one is a secondary publisher, but with an innocent dissemination defence. As early as 1900 there was confusion as to the boundary between being an innocent disseminator and not being a publisher at all.<sup>27</sup> Some judges distinguished between letter carriers, who were not publishers at all, and newspaper vendors, who were publishers with an innocent dissemination defence. Others said that newspaper vendors were in the same position as letter carriers.<sup>28</sup> Romer LJ

stated: “I do not think that the judgements very clearly indicate on what principle Courts ought to act in dealing with similar cases in future.”<sup>29</sup> As we shall see in Section III, this lack of clarity has made it difficult to determine whether internet intermediaries are publishers (perhaps with an innocent dissemination defence) or are not publishers at all.

### **C. Publication by Omission**

The situation is complicated further by the doctrine of publication by omission. The rule that an omission can constitute publication was set out in *Byrne v Deane* (1937).<sup>30</sup> In that case, someone posted a defamatory notice on a golf club’s bulletin board. When the golf club did not remove it, it was held to have published the notice. The Court articulated the following test:

having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?<sup>31</sup>

Subsequent cases have struggled with how to determine whether defendants have taken responsibility for others’ publications, making them publishers of that content. It is clear that knowledge is required. Some have suggested that knowledge combined with inaction satisfies the requirements in *Byrne v Deane*.<sup>32</sup> The correct view, however, is that refusing to remove the libel following notice does not *necessarily* make one a publisher by omission. The ultimate issue is whether a failure to remove content amounts to endorsement or adoption.<sup>33</sup> One must be able to infer from the failure to remove that the defendant has adopted the content as her own. Knowledge is necessary but insufficient. For example, where removal would be unduly

expensive, it would not follow that by failing to take down content, the defendant was endorsing it.<sup>34</sup> Nevertheless, an inference of endorsement “would ordinarily be drawn” unless removal would require “very great trouble and expense”.<sup>35</sup>

Ribeiro PJ., writing in *Oriental Press* (2013), distinguished the publishing by omission cases as involving trespass (the bulletin board owner in *Byrne v Deane* had prohibited people from posting).<sup>36</sup> That conclusion has tended to be rejected.<sup>37</sup> As we shall see, internet intermediaries are often found to be publishers by omission even where content is invited or expected.

Being a publisher by omission is similar to being a secondary publisher in that both publish third party content and their ability to avoid liability as a publisher depends in large part on their knowledge and action. Nevertheless, there are at least three differences. The first is onus: for publishers by omission, the plaintiff must establish the defendant’s knowledge and failure to remove content while secondary publishers asserting an innocent dissemination defence have the onus of proving their lack of knowledge and negligence:

These rules [regarding publication by omission] are therefore not about relieving a person’s prima facie liability as a publisher but about whether or not an occupier is constituted a publisher. Since it is about establishing the occupier’s liability as a publisher (and not about a publisher establishing a defence), the onus rests on the plaintiff.<sup>38</sup>

A second difference relates to the *kind* of knowledge required. To be a publisher by omission, you need knowledge of specific words, or else an inference of endorsement presumably cannot be drawn, whereas for a secondary publisher to lose her innocent dissemination defence, it is

enough for her to know that the publication contained a libel or even to be careless with regard to knowledge.<sup>39</sup> Although doctrinally coherent, it is not clear why liability should rest on such distinctions.<sup>40</sup>

A third difference is that secondary publishers are publishers from the beginning (the initial publication of the impugned words), whereas those who publish by omission are effectively made publishers after the fact by their inaction in the face of knowledge.

Unsurprisingly, courts sometimes confuse publishing by omission and secondary publishing when dealing with internet intermediaries.<sup>41</sup> In the case of publishing by omission, the plaintiff should have to prove that the defendant's acts amounted to adoption and therefore publication. But courts sometimes place the onus on defendants – perhaps because the onus of proving innocent dissemination falls on defendants. In addition, in the omissions context courts sometimes treat knowledge as necessarily making one a publisher, since knowledge necessarily defeats an innocent dissemination defence. This is discussed in relation to specific examples below.

A flow chart is included at Appendix A to attempt to visually represent the common law of publication.

#### **D. Conclusion on the common law of publication**

From the foregoing, it should be apparent that the law of publication is highly technical and relies on a distinction between primary and secondary publishers that can be hard to draw, and on a doctrine of publishing by omission that creates additional confusion. Whereas this approach was arguably unsatisfactory even in the 19<sup>th</sup> century,<sup>42</sup> as we shall see in Section III, internet technology has “highlight[ed] conceptual uncertainties that have existed long before.”<sup>43</sup>

### **III. THE LAW OF PUBLICATION AS APPLIED TO INTERNET**

#### **INTERMEDIARIES**

##### **A. Introduction**

The application of the common law as set out above has proven difficult in the context of internet intermediaries. Because publication broadly means conveying information to others, intermediaries are often at least arguably publishers. Internet service providers allow information to be transmitted to and from their customers. Search engines make information available to users and create snippets and autocompletes based on searches and content generated by others. Social networks provide platforms for third party content and make that content available to billions of people around the world. Media companies may host comments sections, making third party content readily available through their websites.

Courts have struggled with how to apply the law of publication to internet intermediaries.<sup>44</sup> Some have held intermediaries are not publishers if they are mere “passive instruments”. Then, however, they may be made publishers by omission if they are made aware of content and do not remove it. Other courts have held that particular intermediaries *are* publishers, but with a defence of innocent dissemination. Some jurisdictions have enacted statutes to shield intermediaries from liability, suggesting a view that internet intermediaries should not be liable for third party content – at least if certain criteria are met.

This section begins by examining how courts have applied the common law of publication where internet intermediaries have been sued in defamation for third party content. It is divided into different jurisdictions. It then examines statutory approaches to the question of internet intermediary liability in defamation. The reason for examining the common law separately, even in jurisdictions where statute has made the common law of publication obsolete in the context of intermediaries, is to consider how the law might be applied in Ontario, where there are no such statutes.

## **B. The Common Law**

### ***1. United States***

The American common law on publication in defamation is of limited relevance, given that jurisdiction’s different common law of defamation generally and the paucity of case law, due to

the enactment of statutes in the 1990s. Nevertheless, early American cases are interesting in their response to internet intermediary liability, and in legislators' response to that case law.<sup>45</sup>

In a very early case, *Cubby v CompuServe Inc (1991)*,<sup>46</sup> a New York district court applied the traditional common law of publication to an internet service provider that had hosted an online news forum containing allegedly defamatory content. CompuServe argued that it was a distributor, not a publisher, and therefore could not be liable without knowledge. This is because it had little or no editorial control, as it had contracted that role to another entity. (Note that in the other common law jurisdictions canvassed, a distributor *is* a publisher, albeit with a potential innocent dissemination defence.)

The Court analogized the CompuServe Information Service, the platform on which the forums were made available, to a large for-profit library. "CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."<sup>47</sup> It was therefore held not liable.

Since it was not alleged that CompuServe had actual knowledge, the publishing by omission issue did not arise.

That issue did arise, however, in *Stratton Oakmont, Inc v Prodigy Services Co (1995)*,<sup>48</sup> in which a bulletin board operator was sued in relation to third party content. Unlike in *Cubby*, Prodigy did exercise a certain amount of editorial control over bulletin board posts. In fact, at one time it reviewed every post. However, it submitted that this was no longer the case, and was no longer feasible to do so by the time of the post in question. Thus, the relevant issue on summary judgment was: “whether the foregoing evidence establishes a prima facie case that PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities of a newspaper.”

The Court distinguished *Cubby* in two ways. First, unlike CompuServe, Prodigy held itself out as controlling content. Second, it actually controlled content by, for example, using a program to automatically delete offensive words. As such it was exercising editorial control and was a publisher of the defamatory content.

This created a perverse incentive *not* to monitor or edit content, since doing so made a party who might otherwise not have been a publisher at all into a publisher. For this reason, other jurisdictions have recommended against adopting a rule that depends on the degree of editorial control.<sup>49</sup>

In 1996, the *Stratton* decision influenced Congress to pass § 230 of the *Communications Decency Act*,<sup>50</sup> discussed in Section III.C(1) below, in order to protect internet intermediaries from liability for third party content.

## **2. United Kingdom**

Apparently the first United Kingdom case involving defamation on the internet,<sup>51</sup> **Godfrey v Demon Internet (2001)**<sup>52</sup> involved an anonymous user posing as the plaintiff when posting a “squalid, obscene and defamatory”<sup>53</sup> post on a newsgroup site. The site was hosted by the defendant, who was presumably sued because the post itself originated in the USA. It is worth emphasizing that although Demon Internet is an internet service provider (ISP), its role in this case was that of a content host, as it chose to store posts and had the ability to remove them.<sup>54</sup>

On the issue of whether Demon published the defamatory content at common law, Morland J. held that it did, analogizing to 19<sup>th</sup> century cases about booksellers and parcel deliverers. He reiterated that ignorance of the defamatory content did not negate publication.<sup>55</sup> He concluded:

[i]n my judgment the Defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting.<sup>56</sup>

Thus, Demon was a secondary publisher even before it had knowledge of the defamatory post. Innocent dissemination at common law was not discussed. Rather, the Court applied the statutory equivalent of that defence in s. 1 of the *Defamation Act, 1996*, discussed in Section III.C below. It held that the defence could not help the defendant because Demon had knowledge as of the relevant date and did not remove the defamatory content.

*Godfrey* has been distinguished in subsequent cases<sup>57</sup> and its continued applicability has been questioned.<sup>58</sup>

In ***Bunt v Tilley (2006)***,<sup>59</sup> the plaintiff sued both those who had made defamatory posts and three internet service providers (ISPs). The ISPs argued they were “mere conduits” and not publishers at all. Justice Eady agreed, referring to ISPs as a “passive medium of communication”.<sup>60</sup> As Matthew Collins notes, *Bunt* is the first case to distinguish between conduits and secondary publishers.<sup>61</sup> Conduits are not publishers at all, while secondary publishers (or “distributors”) have a potential innocent dissemination defence.

The difference is perhaps less than might be expected, however. As noted above in Section II.C, this only means that the onus of proof effectively shifts. For innocent dissemination the defendant must prove a lack of knowledge and negligence, whereas if the defendant is a conduit, plaintiffs must try to prove that defendants are publishers by omission by establishing that they had knowledge and did not remove the defamatory contents.<sup>62</sup> (Additionally, the plaintiff should have to prove this amounts to endorsement, but courts have been quick to draw that inference from inaction.)

Perhaps most noteworthy about *Bunt* is Eady J.’s view that for publication, “there must be knowing involvement in the process of publication of *the relevant words*”<sup>63</sup> (emphasis in the original). This is contrary to what Dietrich calls the “orthodox view” that knowledge of contents

is not required for publication.<sup>64</sup> Yet the view that publication requires knowing involvement in communicating particular words has been adopted in a number of subsequent cases, including by Deschamps J., concurring in *Crookes v Newton*.<sup>65</sup>

*Bunt* therefore stands for two important propositions: first ISPs are generally passive instruments, as opposed to secondary publishers, and therefore do not need to avail themselves of an innocent dissemination defence to avoid liability. Second, to be a publisher there must be knowing involvement in publishing the particular words at issue.

Three years later, in *Metropolitan International Schools v Designtecnica (2009)*,<sup>66</sup> the issue was whether Google “snippets” (*i.e.*, search results) that referenced an allegedly defamatory site constituted publication by Google. Although snippets are created and conveyed by Google, they are generated automatically based on search terms created by users and the content of web sites that Google has no control over.

The judge was again Mr. Justice Eady and it is therefore not surprising that he followed the reasoning in *Bunt*. He held that with regard to the snippets, Google was a “facilitator” (*i.e.*, passive instrument or conduit) and not a publisher because the snippets are generated automatically without meaningful input from the company. That is, there was no knowing involvement in publishing the particular words.<sup>67</sup>

*MIS* has also been understood to mean that even after notice, Google would not be a publisher.<sup>68</sup> It could be argued that with notice, it becomes a publisher by omission on the authority of cases like *Byrne v Deane*. However, because of the limits of technology and Google's inability to prevent certain search terms from being entered, Eady J. stated that failure to prevent the offending snippets from recurring cannot necessarily be interpreted as Google's having adopted the contents of the snippet.<sup>69</sup>

It is not possible to draw a complete analogy with a website host. One cannot merely press a button to ensure that the offending words will never reappear on a Google search snippet: there is no control over the search terms typed in by future users. If the words are thrown up in response to a future search, it would by no means follow that the Third Defendant has authorised or acquiesced in that process.<sup>70</sup>

A third case decided by Justice Eady is *Tamiz v Google Inc.*<sup>71</sup> It involved a claim against Google for third party content on a blog operated by Google's Blogger.com platform. Justice Eady held that in this particular role, Google was a passive instrument by analogy to *Bunt* and would not be a publisher by omission after notice. (The blogger removed the post, but the claim against Google was for the period before the post was removed.)

On appeal, however, Lord Justice Richards disagreed.<sup>72</sup> Although he agreed that Google was neither a primary nor a secondary publisher before notice, he found that it *was* a publisher by omission after notice. That said, he agreed with Eady J. that any post-notice defamation was trivial and rejected the appeal.<sup>73</sup>

Thus, the appellate decision in *Tamiz* stands for the proposition that a website host (or at least a blog site host) is not a publisher of third party defamatory content unless and until notice is received. The implication is that knowledge of particular contents is required even for secondary publishers, since without knowledge one is not a publisher of third party content at all. As noted in *Gatley*, this is inconsistent with the traditional view that publication does not require knowledge.<sup>74</sup> However, notice, combined with the ability to remove content, may make one a publisher by omission.

### **3. Australia**

***Dow Jones v Gutnick (2002)***<sup>75</sup> was an early internet defamation case that went to Australia's High Court. It was not an internet intermediary case but dealt with a range of publication issues such as where publication occurs and the multiple publication rule. For present purposes, the relevant holding was that the High Court endorsed the secondary publisher doctrine. Further, it held that actual knowledge was not required to defeat innocent dissemination – a lack of “reasonable diligence” as to the existence of defamatory content could also count.<sup>76</sup> This is consistent with the traditional view that negligence defeats innocent dissemination but inconsistent with the view expressed in certain more recent cases, especially UK cases like *Bunt* and *MIS*, that publication requires knowledge of specific words.

***Trkulja v Google Inc LLC & Anor (No 5) (2012)***<sup>77</sup> involved an application by Google for judgment notwithstanding the jury's verdict against it. The jury found that Google had published defamatory comments about Mr. Trkulja in the form of search engine results.

Both parties accepted that an intent to publish is necessary, but the plaintiff argued that by intentionally creating the programs that Google uses, it intends to publish every search engine result.<sup>78</sup> Google argued that since there was no human intervention in the creation of search engine results, intent could not be made out.

Analogizing to the newsagent cases, Beach J. held that on the facts, the jury was entitled to find that Google published search engine results. In other words, the jury could find that Google was a secondary publisher even before notice.<sup>79</sup> (Google made out an innocent dissemination defence with regard to some publications but not others.)

Beach J stated:

[a page containing images] was a page not published by any person other than Google Inc. It was a page of Google Inc's creation – put together as a result of the Google Inc search engine working as it was intended to work by those who wrote the relevant computer programs. It was a cut and paste creation (if somewhat more sophisticated than one involving cutting word or phrases from a newspaper and gluing them onto a piece of paper). If Google Inc's submission was to be accepted then, while this page might on one view be the natural and probable consequence of the material published on the source page from which it is derived, there would be no actual original publisher of this page.<sup>80</sup>

Beach J. distinguished the British cases generally by saying that cases are fact-specific and that the British cases were interlocutory. He distinguished *MIS* specifically on the basis that in that case, Google had attempted to block the identified URLs, and that Eady J. seemed not to have “given any consideration to the fact that internet search engines, while operating in an

automated fashion from the moment a request is typed into them, operate precisely as intended by those who own them and who provide their services.”<sup>81</sup>

Beach J. continued by noting that if anything in the British cases necessarily leads to the conclusion that Google is not a publisher on these facts, “then the same does not represent the common law of Australia.”<sup>82</sup>

Google had argued, in the alternative, that it could not be a publisher by omission because even with notice it could not be said to have adopted the third party comments. Beach J. also rejected this argument. He stated that an inference that Google adopts third party content was capable of being drawn on the facts of the case.<sup>83</sup> In our view, however, and more consistent with prior case law, where there is a lack of knowledge of specific contents, it is not possible to view inaction as constituting adoption of the contents.

In *Duffy v Google (2015)*,<sup>84</sup> the plaintiff sued Google in relation to defamatory content published on the website “Ripoff Report” that ended up in Google snippets and auto-completes. The Supreme Court of South Australia reviewed the common law of publication, including the distinction between primary and secondary publishers. Google submitted that the law had taken “a wrong turn” with the 19<sup>th</sup> century cases holding that secondary publishers can be publishers at all.<sup>85</sup> The Court, however, rejected that contention, noting that the innocent dissemination defence had not only been applied in Australia, but also by courts in the United Kingdom, Canada and New Zealand.<sup>86</sup>

The Court also rejected Google's invitation to modify the law to require, in the internet context, actual (as opposed to constructive) knowledge of the relevant words to defeat innocent dissemination. Google cited a New Zealand case that had adopted an actual knowledge rule.<sup>87</sup> The Supreme Court of South Australia, however, viewed having a distinct rule for internet communications to be inadvisable and, in any event, considered itself bound by the test set out by the High Court in *Gutnick*.<sup>88</sup>

The Court found that Google was not a passive instrument but rather played an "active" and "critical" role in communicating the snippets and autocompletes. It stated that: "[t]he mere fact that the words are programmed to be generated because they appear on third party webpages makes no difference to the physical element",<sup>89</sup> and agreed with *Trkulja* in that respect. Google was therefore a secondary publisher of the search engine results. Further, it could not avail itself of the innocent dissemination defence once it had actual notice from the plaintiff.<sup>90</sup> The Court further stated that: "[t]here is no case in which it has been held that a search engine operator does not publish such paragraphs after the operator has been notified of them and failed to remove them within a reasonable time."<sup>91</sup>

Since Australia has no rule like that from *Crookes* that hyperlinking alone is not publication, Google was also liable, after notice was received, for failing to remove the links to the Ripoff Report website.<sup>92</sup>

Thus, although they have as their same starting point English case law, the British and Australian jurisprudence has diverged with regard to internet intermediary liability. *Gutnick* and *Duffy* indicate that actual knowledge is not required to defeat an innocent dissemination defence, but rather that a lack of diligence is sufficient. This is the traditional common law view although it is contrary to at least some recent British case law, especially *Bunt*, which required “knowing involvement in the process of publication of the relevant words” for publication. The Australian courts are therefore more likely than those in the United Kingdom to find that Google is a publisher of search results and autocompletes.

#### **4. Hong Kong**

***Oriental Press Group Ltd (2013)***<sup>93</sup> is a decision of the Hong Kong Final Court of Appeal. The defendants were operators and managers of an internet discussion forum and once again the issue was their liability for third party content posted to the forum. There was monitoring of the site in order to remove objectionable material. The impugned posts were removed once brought to the defendants’ attention, although in one case that took eight months.

Ribeiro PJ. held that hosts of online discussion forums were effectively never publishers by omission. Their invitation to users to post makes them active participants in conveying information (albeit with a potential innocent dissemination defence) rather than passive publishers by omission. As noted above, Ribeiro PJ considered that the line of cases including *Byrne v Deane* had been misinterpreted and that publication by omission requires an act of trespass.<sup>94</sup> Because they actively encouraged users to post, there was no trespass and

therefore no publication by omission on the facts of *Oriental Press*. Instead, by inviting content, the defendant was held to be a secondary publisher, even before notice, although it succeeded in an innocent dissemination defence with regard to two of the three impugned posts.

As noted in *Gatley*, treating intermediaries as secondary publishers before notice is more consistent with authority than the contrary view espoused in the *Tamiz* appeal.<sup>95</sup>

## **5. New Zealand**

***Murray v Wishart (2014)***<sup>96</sup> considered whether a defendant was a publisher of third party content on his Facebook page. It is therefore similar in some ways to *Pritchard v Van Nes*, discussed in Section III.B(6) below.

At issue was whether actual knowledge of defamatory words is required to make one a publisher by omission, or whether an “ought to know” test is sufficient.<sup>97</sup> The facts revolved around a Facebook page called “Boycott the Macsyna King book” that Mr. Murray created. Mr. Murray was alleged to have published content posted by others to that page. The New Zealand Court of Appeal treated the situation as analogous to the publication by omission cases rather than the secondary publisher/innocent dissemination cases because the page host’s role in publication (*i.e.*, setting up the page) is complete before the defamatory matter is posted.<sup>98</sup> The Court rejected Ribeiro PJ.’s interpretation of *Byrne v Deane* in *Oriental Press* and held that one can be a publisher by omission without being a trespasser.<sup>99</sup> The Court also seemed to consider

it important that it was not impossible to find the primary publisher, and so absolving the defendant for third party content would not necessarily leave the plaintiff without a remedy.

Ultimately, the Court held that actual knowledge was required and rejected the “ought to know” test. Thus, one cannot be a publisher by omission unless one has actual knowledge of content. As a result, Mr. Murray was found not to be a publisher of the third party comments.<sup>100</sup> The Court therefore granted the appeal in part, because the trial judge had conflated the secondary publisher and publisher by omission doctrines, leading her to adopt a test of constructive knowledge.<sup>101</sup> The Court of Appeal’s decision is, in our view, correct: carelessness with regard to knowledge may defeat a secondary publisher’s innocent dissemination defence, but it will not be enough to amount to adoption or endorsement of the contents, which is essential for publication by omission.

## **6. Canada**

Most of the relevant cases are from British Columbia. An early BC case is ***Carter v BC Federation of Foster Parents Assn (2005)***.<sup>102</sup> It dealt with liability for third party content, although it did not involve internet intermediaries. Rather, the issue was whether newsletter publishers could be liable for content in an internet chat room that the newsletter invited people to visit.

The British Columbia Court of Appeal held that the defendant was not a publisher of the relevant defamatory content by virtue of having invited people to visit the site on which that

content could be found. This was because the defendant had no control over the contents of the forum and did not actively draw people's attention to the defamatory contents.<sup>103</sup>

***Crookes v Newton (2011)***<sup>104</sup> concerned whether including a hyperlink amounts to publishing the contents of the site linked to. The Supreme Court of Canada created a bright line rule that hyperlinking never amounts to publication in and of itself. In so doing, it showed a willingness to depart from the common law test of publication. Abella J.'s majority judgment cited the approach in *Carter* with approval, saying that one should avoid "a formalistic application of the traditional publication rule", since that would result in a presumption that hyperlinkers are publishers of content in the linked site – an outcome that Abella J. referred to as "untenable".<sup>105</sup>

Abella J noted that: "the breadth of activity captured by the traditional publication rule is vast."<sup>106</sup> She cited the innocent dissemination defence as providing some relief from the breadth of publication. She also noted other countries' emerging willingness to treat some acts as too passive to constitute publication, although they might once have been treated that way. Specifically, Justice Eady's line of reasoning in *Bunt* and *MIS* was referenced.<sup>107</sup>

Abella J. also noted that deeming hyperlinks not to be publications does not leave the plaintiff unable to vindicate her reputation, since she can sue the party that created the content or manages the website linked to (*i.e.*, the person who "controls the content").<sup>108</sup>

Justice Deschamps wrote concurring reasons that are important in that they go beyond the majority's and suggest broad changes to the law of publication generally – not just in the context of hyperlinks.<sup>109</sup> She proposed that publication only occurs where the defendant performs a deliberate act that makes defamatory content “*readily available* to a third party in a comprehensible form”.<sup>110</sup> Deschamps J. referred to a “growing consensus” that publication requires a deliberate act,<sup>111</sup> citing cases like *Godfrey*,<sup>112</sup> *Bunt*,<sup>113</sup> and *MIS*.<sup>114</sup>

It is unclear what Deschamps J meant by “deliberate acts”, since publication has always required intent to convey. She is not drawing a line between acts and omissions, since she is clear that the “deliberate act” can be an omission.<sup>115</sup> Perhaps she is referring to a deliberate act of publishing *specific words*, an approach that has been endorsed in cases like *Bunt*.

Yet this too seems unlikely. Justice Deschamps cited the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers* (2004)<sup>116</sup> for the proposition that the innocent dissemination defence can be defeated either by knowledge or by negligence in failing to discover the libel.<sup>117</sup> She recommended that this defence continue to be made available to hyperlinkers. It is hard to see how one can be a secondary publisher, without an innocent dissemination defence, because of carelessness regarding whether material contains a libel, while at the same time having to know of the specific words at issue to be a publisher at all. It is therefore unclear what Justice Deschamps means by a deliberate act. Although some believe she proposed a change to the test of

publication (see *Weaver* and *Pritchard* below), in our view, her “deliberate act” requirement would at least arguably not be a change to the common law.

The first major Canadian case to deal with internet intermediary liability was ***Weaver v Corcoran (2015)***.<sup>118</sup> The facts involved (among other alleged publications) a post to the comments section of the National Post website. The offending post was removed following notice, but the plaintiffs claimed in relation to the pre-notice period. The defendant claimed that it was a passive instrument in relation to user posts, or that if it was a publisher, it was an innocent disseminator or a publisher by omission and did not endorse the content of the posts.<sup>119</sup>

The British Columbia Supreme Court noted the trend in the English cases, and the *dicta* in *Crookes*, to the effect that publication requires a deliberate act. It interpreted Justice Deschamps’ reasons in *Crookes* to mean that knowledge of specific words – or at least of the *nature* of the words – is necessary for publication.<sup>120</sup> The Court concluded that it before it received notice, the National Post was therefore not a publisher but rather a passive instrument. After notice, however, it would have become a publisher by omission if it did not take “immediate action” to remove the content.<sup>121</sup>

However, in our view the Court muddied the waters by pointing out, more than once, that it would be unreasonable for the National Post to pre-vet the thousands of comments on its page.<sup>122</sup> This raises a question about whether carelessness would have sufficed. Is the

implication that had pre-vetting been reasonable, the National Post would have been found to have been careless and therefore a publisher despite lacking actual knowledge? If so, this reflects the old view that negligence can defeat an innocent dissemination defence and belies the claim that actual knowledge is required for publication. To further complicate matters, it is unclear whether, had the National Post refused to remove the defamatory posts, it would have been a secondary publisher without an innocent dissemination defence or a publisher by omission. The reference to the reasonableness of vetting suggests a secondary publishing/innocent dissemination approach, since carelessness has never been sufficient for publication by omission. On the other hand, the Court refers to “approval” and “adoption” of specific words.<sup>123</sup> This is consistent only with the publication by omission line of doctrine.

That same year, the British Columbia Supreme Court decided *Niemela v Malamas (2015)*.<sup>124</sup> At issue was whether Google was a publisher of its search result snippets. The Court noted that the issue was a novel one in British Columbia.<sup>125</sup>

The Court adopted the approach in *Bunt* and *MIS* and rejected the approach in *Trkulja*. It noted that by creating the “passive instrument” doctrine, *Bunt* and *MIS* had effectively narrowed the scope of publication’s meaning.<sup>126</sup> Google might have been a publisher on the traditional common law approach to publication (although potentially with an innocent dissemination defence), but was now better conceived of as a passive instrument.<sup>127</sup> It also noted that *Crookes* had narrowed the test of publication by requiring a deliberate act (without noting that Justice Deschamps’s reasons on this point were concurring reasons, rather than those of the

majority).<sup>128</sup> We suggested above that it is, in fact, unclear whether Justice Deschamps' "deliberate act" actually amounts to a change in the common law.

Fenlon J. described the passive instrument test as similar to the defence of innocent dissemination, in that knowledge of defamatory content makes one a publisher in both cases. (What she must have meant by this is that even passive instruments can be made publishers by omission.) However, the advantage of the passive instrument approach is that "it shifts the burden of proof from the defendant to the plaintiff."<sup>129</sup>

In adopting the passive instrument test, Fenlon J. noted that while the Supreme Court in *Crookes* did not explicitly endorse it, such an endorsement could be implied from its reliance on the *MIS* case.<sup>130</sup>

The Court held that Google was a passive instrument, not a publisher. It did not endorse the content and so could not be a publisher by omission. Unfortunately, however, since the case related only to pre-notice conduct, the Court declined to indicate whether Google would have been a publisher after notice.<sup>131</sup>

***Pritchard v Van Nes (2016)***<sup>132</sup> is not an internet intermediary case but is concerned in part with liability for third party content. At issue was whether the defendant, who had posted disparaging statements about the plaintiff on Facebook, could be liable for: a) republication of

her posts beyond her group of Facebook friends, and b) a letter that a friend of the defendant's sent to the plaintiff's employer repeating allegations the defendant had made on Facebook.

The British Columbia Supreme Court held that the defendant was liable for the republishing of her posts because such republication was the "natural and probable result" of the original publication. Since republication is to be expected on a social media site like Facebook, the defendant was liable for the republication.<sup>133</sup>

More relevant to the issue of intermediary liability is the issue of Ms. Van Nes' liability for third party comments about the plaintiff. The Court noted that this was an "emerging issue" in Canadian law but that certain principles could be derived from the case law.<sup>134</sup> Citing Deschamps J.'s reference in *Crookes* to deliberate acts of making information readily available, as well as *Carter*, *Weaver* and *Niemela*, the Court held that three elements were required to establish liability for third party defamatory content:

1) actual knowledge of the defamatory material posted by the third party, 2) a deliberate act that can include inaction in the face of actual knowledge, and 3) power and control over the defamatory content. After meeting these elements, it may be said that a defendant has adopted the third party defamatory material as their own.<sup>135</sup>

By using the words "actual knowledge of the defamatory material", Saunders J. appears to understand the "knowledge" test in Justice Deschamps' concurring reasons in *Crookes* to mean actual knowledge of the specific words used. The defendant was therefore held liable for the third party comments on Facebook that she actually read.<sup>136</sup>

Yet the Court went further. It refined the above test to include constructive knowledge and held the defendant liable for posts that she should have anticipated would be made.<sup>137</sup> Emily Laidlaw has criticized this approach in her case comment on *Pritchard* as being overly infringing of freedom of expression.<sup>138</sup>

*Pritchard* is also open to criticism in that it appears to conflate the innocent dissemination and publication by omission doctrines. The reference to being able to say “that a defendant has adopted the third party defamatory material as their own” is relevant only to publication by omission. For secondary publishers with an innocent dissemination defence, the adoption issue never arises. A news agent, for example, loses his innocent dissemination upon knowledge that the newspaper he is selling contains a libel, even if he cannot be said to endorse its content by selling the newspaper. Adoption is only relevant to publication by omission – providing a platform for communications by others. The issue is whether a failure to remove content posted by others constitutes adoption.

But with regard to the defamatory letter sent by a friend of the defendant’s in *Pritchard*, Ms. Van Nes could not be said to have provided a platform for communication, and then failed to remove the content, in the usual publication by omission manner. In our view, then, it was not open to the Court to find that Ms Van Nes was a publisher by omission of her friend’s letter. As a secondary publisher, she would still have been a publisher once she had knowledge or if she was negligent in not having knowledge *and then still published*. But she did nothing, and therein

lies the problem. The Court applied an entirely different doctrine in finding Ms. Van Nes liable for her friend's letter to the plaintiff's employer. Although one is not usually responsible for others' repetitions of one's libels, there are exceptions. One relates to where republication is the natural and probable consequence of the original publication. It is beyond the scope of this paper to delve deeply into this, but the idea that responsibility would lie *solely* because republication is the natural and probable consequence is controversial.<sup>139</sup> Given our recommendations below, it should be clear that we reject liability as a publisher solely on the basis that a republication was a natural and probable consequence of the original publication. Instead, perhaps accessory liability principles could determine when someone is sufficiently involved in another's republication of her words to justify imposing liability for the republication.

These criticisms of *Pritchard* may not be important to the internet intermediary debate, since, unlike Ms. Van Nes, intermediaries will usually provide platforms of some kind. Nevertheless, it goes to show how confused the common law is when it comes to publication.

Finally, ***Nazerli v Mitchell (2016)***<sup>140</sup> involved a defamation action by a businessman against a number of defendants in relation to content on the internet. In addition to the content author, Nazerli sued corporate defendants including the website host and Google (although only an injunction, not damages, was sought against Google).

The BC Supreme Court found three of the defendants liable and ordered damages in the amount of \$1.2M. The website host, Nozone, was found not liable, although there was no discussion of its role as a common law publisher: the claim was dismissed for a lack of evidence.

A permanent injunction was granted against a number of parties including Google, although Google was not held liable. The reasons for this included that the primary publishers, who were American, were likely to resist enforcement of the judgment. This demonstrates that at least where judgments against primary publishers are likely unenforceable, courts may be willing to enjoin intermediaries like Google without finding that they are themselves publishers of defamatory content.

### ***7. Summary of the Common Law***

To summarize, the common law regarding when someone is a publisher of third party content is highly technical. Courts have disagreed about what the law is, and have sometimes confused the publication by omission and innocent dissemination doctrines.

There are at least three areas of uncertainty or divergence in the case law:

- a) whether intermediaries are passive instruments or secondary publishers;
- b) if they are passive instruments, whether knowledge/notice (necessarily) makes them publishers by omission; and
- c) what “knowing involvement” in the publication means.

With regard to whether intermediaries are passive instruments or secondary publishers, *Bunt*, *MIS*, *Tamiz* (trial), *Tamiz* (appeal), *Wishart*, *Weaver*, *Carter*, and *Niemela* have said particular intermediaries are passive instruments. *Godfrey*, *Stratton*, *Trkulja*, *Duffy*, *Oriental* have said that particular intermediaries are secondary publishers.

This does not necessarily imply inconsistent application: the facts could have justified those different conclusions. For example, the least involved intermediary, an ISP, was found to be a passive instrument rather than a publisher in *Bunt*. Hosts that invite or moderate comment were more likely to be secondary publishers than passive instruments (*Godfrey*, *Stratton*, *Oriental*), although not always (*Weaver*). When it comes to search engine results, the courts are divided: *Duffy* and *Trkulja* treated Google as a secondary publisher while *MIS* and *Niemela* treated it as a passive instrument.

Thus, although an ISP with no further involvement will likely be a passive instrument rather than a secondary publisher,<sup>141</sup> hosts that invite content tend to be secondary publishers. In Canada, as in the United Kingdom, creators of search engine results are likely to be treated as passive instruments. (However, even passive instruments will generally be made publishers if they do nothing after they become aware of the impugned content.)

*Crookes* (albeit in concurring reasons) and *Pritchard* posit new rules for publishing generally (*i.e.*, that apply to primary and secondary publishers, and publishers by omission). Justice Deschamps in *Crookes* would find that one is only a publisher if there is a deliberate act of

making content “readily available”. (As discussed above, we are not convinced that the reference to a “deliberate act” reflects a change to the law.) The Court in *Pritchard* stated that actual knowledge, a deliberate act and control are required for publication of third party content.

The second issue is the effect of knowledge or notice on whether a passive instrument becomes a publisher by omission. Most courts have tended to find that knowledge or notice does make a passive instrument a publisher by omission. One exception is the trial decision in *Tamiz*, in which Justice Eady said that even with notice, the blog host would not have been a publisher by omission. *Weaver* held that notice *would* make a passive instrument a publisher. Other cases like *Bunt* hold that notice *could* make a passive instrument a publisher by omission. Given the case law, the best conclusion is that notice or knowledge is necessary but not sufficient to make a passive instrument a publisher by omission of third party content. On the authority of *Byrne v Deane*, knowledge and a failure to remove the posts will not necessarily lead to the conclusion that the defendant has endorsed the content. It may be that removal is too costly, or the defendant may have a policy of never removing content, in which case the inference of endorsement would be difficult to draw. Nevertheless, as noted above, an inference of endorsement will usually be drawn from inaction.

The lack of consistency regarding the effect of notice on passive instruments is likely due in part to a general confusion between the publication by omission doctrine (in which knowledge is relevant to, but not determinative of, publication) and the secondary publisher/innocent

dissemination doctrines (in which knowledge necessarily defeats the innocent dissemination defence, but knowledge must predate the act of publication). See Collins' discussion of the difference in the description of the *Bunt* case in s. II.B.1 above.

The third issue is what is required for knowledge. We have seen throughout the cases discussions of whether constructive or actual knowledge is required. Courts are not always clear about whether they are talking about knowledge relevant to making a passive instrument a publisher by omission, or knowledge that would defeat a defence of innocent dissemination. However, the tests are different.

Traditionally, either knowledge or negligence would defeat a defence of innocent dissemination, and this seems still to be the case (*Gutnick, Duffy, Oriental*). Those cases that require actual knowledge of the impugned words tend to concern the issue of when one becomes a publisher by omission (*Bunt, MIS, Wishart*). Courts sometimes confuse these doctrines.<sup>142</sup> *Pritchard* seems to abolish the distinction altogether by creating a rule that applies to all publishers of third party content. Historically, the kind of fault that will defeat an innocent dissemination defence need not be the kind of knowledge that justifies an inference that statements are being endorsed. And yet, given that courts have referred to innocent dissemination and publication by omission as being essentially the same thing but with a different onus of proof, it is not obvious that there should be different standards as to the kind of knowledge that will lead to liability under these doctrines.

Attempting to summarize the law in Canada is no simple task. It seems that knowledge and a deliberate act are required for publication. It is unclear, however, whether knowledge is now an *element* of publication – at least where third party content is at issue – or whether it simply relates, as it always has, to innocent dissemination and publication by omission. The distinction between those types of publication remains a source of confusion in the law. The relevance of control is also unclear. Knowledge seems to include constructive knowledge of the relevant words, although we have suggested that there is uncertainty around this too.

### **C. Statutes**

Several common law jurisdictions have defamation statutes. This section sets out only those statutory provisions that are most relevant to intermediary liability in defamation, namely provisions of the United Kingdom's *Defamation Act, 1996*<sup>143</sup> and *Defamation Act, 2013*.<sup>144</sup> Statutes that are relevant to intermediary liability but are not defamation-specific, such as the EU Electronic Commerce (E.C. Directive) Regulations 2002 (E-Commerce Regulations),<sup>145</sup> are discussed in Section IV.

Section 1(1) of the UK *Defamation Act, 1996* creates a defence that effectively supersedes the innocent dissemination defence.<sup>146</sup>

- In defamation proceedings a person has a defence if he shows that –
- (a) he was not the author, editor or publisher of the statement complained of,
  - (b) he took reasonable care in relation to its publication, and
  - (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

Note that “publisher” means “commercial publisher”, rather than a publisher per the common law of defamation, and that “author” is defined more broadly than its typical meaning of content creator.<sup>147</sup>

Thus, the defence effectively applies to those who are not publishers at all (in the common law sense) or who are secondary publishers. It operates where there is no negligence with regard to publication and no knowledge or suspicion that contents were defamatory. It is therefore much like innocent dissemination.

Michael Deturbide has criticized this approach as not going far enough and creating a Catch 22 regarding monitoring. If you do not monitor you may not be taking reasonable care, but if you do monitor, you may have knowledge or perhaps *should* have knowledge.<sup>148</sup> This is the same perverse incentive created by the ruling in *Stratton*.

The 2013 Act goes farther in immunizing intermediaries. Section 5 applies to “operators of websites” and creates a defence in relation to third party content. It applies unless:

- (a) it was not possible for the claimant to identify the person who posted the statement,
- (b) the claimant gave the operator a notice of complaint in relation to the statement, and
- (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.<sup>149</sup>

This provides broad immunity for operators of websites for third party content. Although not as broad as s.230 of the *Communications Decency Act*, discussed in section IV.C.2.a below, it still effectively negates liability unless and until notice is received. Even then there is immunity if the person who posted the statement is identifiable. Some have endorsed the approach in s.5 of the Defamation Act 2013. In our view, however, it is preferable to change the elements of defamation rather than create new defences. In addition, we are not convinced that liability should depend on whether other publishers can be identified.

Further, s. 10 denies British courts jurisdiction to adjudicate defamation claims where the defendant is not the “author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable” to bring the action against a primary publisher.<sup>150</sup>

## **IV. OTHER APPROACHES TO INTERMEDIARY LIABILITY**

### **A. Introduction**

Five models of liability have developed to address the responsibilities of internet intermediaries: strict liability, safe harbour, broad immunity, notice-and-notice and generalist.<sup>151</sup> While most of these models will be explored in more detail below concerning specific jurisdictional approaches, they are canvassed here to identify the broad frameworks at work and the tensions between them.

The strict liability model requires monitoring of content by intermediaries, failing which they face legal consequences such as criminal penalties, withdrawal of business licences and so on. Countries that use such a model include, among others, Thailand and China.<sup>152</sup>

The safe harbour model provides intermediaries with conditional immunity from liability. This is better known as the notice and take down regime (NTD) wherein an intermediary is provided a safe harbour from liability as long as it removes content or disables access to content that is on the list of unlawful material to be taken down. This is observable in Europe. The *Electronic Commerce Directive* (ECD)<sup>153</sup> provides broad immunity for conduits (i.e. internet service providers (ISPs)) and to a lesser extent intermediaries that cache content, but requires hosts (e.g. social networking providers) to disable access to content upon actual knowledge or awareness that it is unlawful.<sup>154</sup> This is known as the horizontal approach, because it applies to multiple causes of action, which is contrasted with the American vertical approach where NTD is only required in the case of copyright infringement under the *Digital Millennium Copyright Act* (DMCA).<sup>155</sup>

Typically, as a condition of the safe harbour, intermediaries are encouraged to address unlawful content through their services with technical solutions, corporate social responsibility or similar codes of practice and memorandums of understanding.<sup>156</sup> For example, the UK threatened to directly regulate the ISP industry if ISPs failed to address the problem of child pornography through self-regulation. As a result, ISPs created the Internet Watch Foundation.<sup>157</sup> In the USA,

a memorandum of understanding was created between telecommunications companies and Hollywood studios to address online piracy.<sup>158</sup>

The broad immunity model provides what the title suggests – broad immunity to intermediaries for the content that is available through their services.<sup>159</sup> This is most evident in the USA under s. 230 of the *Communications Decency Act* (CDA),<sup>160</sup> which provides immunity to providers of interactive communication services for most unlawful content. The only exception is federal criminal, communications privacy and intellectual property matters (thus we turn to the safe harbour model under the DMCA for copyright infringement).

The fourth model is notice-and-notice, implemented by Canada in its *Copyright Act*,<sup>161</sup> wherein the intermediary is required to forward electronically a notice of copyright infringement to the user linked with the IP address mentioned in the notice.<sup>162</sup> The risk to the intermediary is statutory damages between \$5,000-10,000 for failure to forward the notice.<sup>163</sup> The primary purpose of these provisions is to discourage copyright infringement. This means that a rights holder's only option, after sending the notice, is a traditional action against the user for copyright infringement.

The fifth model is the generalist model,<sup>164</sup> used in some African and South-American countries, and in Canada for intermediary liability in defamation. With the general model there is no special intermediary liability regime. Rather, the intermediary is assessed against general civil and criminal laws and risks liability “because they directly contributed to the illegal activity

(contributory liability) or because they indirectly contributed since they had the ability to control it and derived a direct financial benefit from not doing so (vicarious liability)".<sup>165</sup> In Canada, as discussed above, defamation cases are analyzed in the context of common law rules governing publication. There is no legislative framework similar to the ECD in Europe or the CDA in the USA.

A relevant issue for the above models is whether an intermediary has an obligation to monitor its services. Under the strict liability model an intermediary is required to monitor its services, while under the broad immunity model it is not. Under the safe harbour model it is unclear whether monitoring is required. Most notably the ECD provides there is no obligation to monitor. It thus errs more in the direction of the broad immunity model than the strictly liability model.<sup>166</sup> However, a point of debate in case law has been whether, once notified it is hosting unlawful content, an intermediary is required to monitor for future infringement of the same nature. On this point, European case law is conflicting,<sup>167</sup> although we suggest the general direction of the cases is to broadly interpret the protection from monitoring services such that there is no obligation to monitor even after notified of unlawful content. Under Canada's *Copyright Act*, there is no duty to monitor *per se*, except once an ISP receives a notice it is required to retain subscriber data for 6 months.<sup>168</sup> Under the general liability model the duty to monitor has been relatively unexplored.

## **B. International Human Rights Context**

Imposing obligations on intermediaries to disable access to unlawful content invites scrutiny through the lens of human rights, because blocking access to information raises censorship concerns. Various human rights are potentially implicated, such as user rights to seek and receive information and to communicate online, user rights to reputation as legitimate limitations on the right to free expression, and the rights of companies to freedom of expression. Crafting a human rights compliant intermediary framework that narrowly targets the unlawful content is tricky business. On the one hand, intermediaries have the capacity to redress or minimize a harm by removing the offending content. On the other hand, such intermediaries are vulnerable to being proxy censors for government<sup>169</sup> or other actors,<sup>170</sup> imbued with power over the right to free speech that is inappropriate for the private sector and/or can struggle with problems of over and under censorship.

Regulatory models such as the CDA (broad immunity) and ECD (safe harbour) were designed before international organizations paid much attention to the issue of intermediary liability. However, since approximately 2011, intermediary liability has been the subject of increasing scrutiny for its compliance with international human rights principles. At an international level we have seen the emergence of a rights-based analysis of the role of intermediaries. This is crucial in the area of defamation law, which is viewed as an acceptable limit on the right to freedom of expression. Intermediary liability in this context raises the further complicating issue of the responsibilities of businesses in deploying mechanisms that balance defamation and free speech, and the obligations of government in ensuring this balance is met.<sup>171</sup> This section seeks to contextualize developments in international human rights concerning

intermediary liability, which informs our recommendations for reform. In particular, it helps identify the features of a human rights compliant intermediary regime.

The International Bill of Human Rights, comprised of the Universal Declaration of Human Rights, 1948 (UDHR), the International Covenant on Civil and Political Rights, 1966 (ICCPR) (and its two Optional Protocols)<sup>172</sup> and the International Covenant on Economic, Social and Cultural Rights, 1966 is the foundation of international human rights.<sup>173</sup> Articles 19 of the UDHR and ICCPR guarantee the right to freedom of expression. In 2011, the Human Rights Council (HRC) confirmed that the right to free expression includes internet-communications,<sup>174</sup> and that such communications can involve non-media intermediaries whose independence should be fostered:

States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.<sup>175</sup>

The HRC also stated that any restriction on access to internet-based content, such as websites and blogs, must comply with Article 19(3) of the ICCPR,<sup>176</sup> namely they must be prescribed by law in pursuit of a legitimate aim, and necessary to respect others' rights or reputation or for national security or public order.<sup>177</sup> Thus the HRC notes that generic bans on websites are insupportable, but rather restrictions should be content-specific. In a Joint Declaration on freedom of expression and the internet, the four special rapporteurs stated,

## 2. Intermediary Liability

1. No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so ('mere conduit principle').
2. Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, from liability for content generated by others under the same conditions as in paragraph 2(a). At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).<sup>178</sup>

The HRC further warned that defamation laws should “be crafted with care to ensure that they comply with paragraph 3 [Article 19 of the ICCPR], and that they do not serve, in practice, to stifle freedom of expression.”<sup>179</sup>

Frank La Rue, the former United Nations special rapporteur on the promotion and protection of the right to freedom of opinion and expression, in a landmark report on free speech and the internet, expressed concern about the growing role of companies in deploying censorship measures, stating, “[t]he Special Rapporteur believes that censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf”.<sup>180</sup> When NTD is deployed, La Rue recommended the following:

To avoid infringing the right to freedom of expression and the right to privacy of Internet users, the Special Rapporteur recommends intermediaries to: only implement restrictions to these rights after judicial intervention; be transparent to the user involved about measures taken, and where applicable to the wider public; provide, if possible, forewarning to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved. Finally, there must be effective remedies for affected users, including the

possibility of appeal through the procedures provided by the intermediary and by a competent judicial authority.<sup>181</sup>

In 2016, the United Nations special rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, published a report focusing on how the information and communication technology (ICT) sector should protect and promote free speech.<sup>182</sup> On intermediaries, Kaye noted the following:

The contemporary exercise of freedom of opinion and expression owes much of its strength to private industry, which wields enormous power over digital space, acting as a gateway for information and an intermediary for expression. In digital environments, important questions about applicable law and the scope of private authority and public regulation cannot be avoided.<sup>183</sup>

Kaye highlighted the problems of excessive intermediary liability, noting among other things, criticism that NTD frameworks “incentiviz[e] questionable claims and [] fail[] to provide adequate protections for intermediaries that seek to apply fair and human rights-sensitive standards to content regulation.”<sup>184</sup> Further, companies are often not equipped to assess content legality (for a variety of reasons, including volume, resources, lack of accountability or conflicts of interest etc.).<sup>185</sup>

In the business context, while international human rights law has historically focused on the relationship between individuals and the state, the United Nations Guiding Principles have entrenched a responsibility on companies to respect human rights.<sup>186</sup> Thus, any intermediary liability framework created by the Ontario government should not only be human rights compliant, but set up in such a way that businesses deploy their responsibility to respect. It is

arguable that this responsibility is engaged any time a company makes a content-related decision that impacts users access to information or expression online. Further, the Guiding Principles require that there be access to a forum of remediation to resolve disputes, whether state-level, industry or company. This means that any intermediary liability framework crafted must reflect the responsibility to internet users of a remedial mechanism.<sup>187</sup>

## **C. Intermediary Liability Models**

### ***1. United Kingdom (Wider European Context)***

Europe operates a safe harbour for intermediaries pursuant to the ECD, which the UK implemented in the *E-Commerce Regulations*.<sup>188</sup> A history of the ECD is beyond the scope of this report, although it is worth bearing in mind in reading the below that the Digital Single Market was a driving factor with the Directive.<sup>189</sup> The Directive's main objectives are free movement of information and development of e-commerce, and harmonization of enforcement mechanisms.<sup>190</sup>

The relevant intermediary liability provisions of the ECD are Articles 12-15 (see Appendix B), which provide a safe harbour to an information society service<sup>191</sup> that acts as a conduit, cache or host of content. The ECD provides further contextualizing information in the recitals, but for

the purposes of this report, focus will remain on the strengths and weaknesses of Articles 12-15. The ECD applies to “*specific activities rather than service providers in general.*”<sup>192</sup>

Article 12 provides a near absolute safe harbour to conduits, typically the role of ISPs as access providers, on the condition that the conduit has not initiated the transmission, selected the receiver or selected/modified information in the transmission. Recently, litigants in the intellectual property context have circumvented this broad protection through injunctive relief. In the UK, intellectual property-infringing websites are increasingly blocked through injunctions.<sup>193</sup>

Article 13 provides a conditional safe harbour to intermediaries that cache content. Caching involves making a local copy of third party content to reduce bandwidth use so that access to websites is speedier (e.g. you are often accessing a cached copy of a webpage).<sup>194</sup> Pursuant to Article 13, if the intermediary that is caching content obtains *actual knowledge* that the source of the information has taken the content down, or a court has ordered that the content be taken down, then the intermediary must act expeditiously to remove or disable access to it. The key is that the intermediary has not modified the information and the storage is automatic and temporary, and done solely to make transmission of the information more efficient.<sup>195</sup>

The main Article of controversy (and relevance in this report) is Article 14’s conditional safe harbour for hosts, meaning intermediaries in their capacity storing third party content. A typical host is a social networking provider, such as Facebook, Twitter or Reddit, which does not tend

to create content (as compared to newspapers and broadcasters) but are platforms for users to post content. Article 14 does not immunize a host from liability for any other services it provides, such as content creation. Based on Article 14, an intermediary can lose its safe harbour not only when it has actual knowledge it is hosting unlawful content and fails to disable access to it, but if it is “aware of facts or circumstances from which the illegal activity or information is apparent.”<sup>196</sup>

Article 14 requires further analysis as it is the provision most often deployed to hold intermediaries liable for unlawful content, and it is the main source of the NTD regime in Europe. It also illustrates that a seemingly simple safe harbour regime is infinitely complicated to deploy.

The main criticisms of NTD regimes, as reflected in the ECD, are aptly summarized by the civil society organization Article 19:

- Complex and uncertain rules;
- Unfair procedures;
- Hosts erring on the side of takedown;
- Lack of judicial involvement in NTD;
- Risks of abuse;
- Lack of transparency in decision-making processes;
- Unsuitability of private intermediaries determining illegality;
- Differentiating between content creators and platforms;
- Chilling effect of monitoring and censorship by private parties.<sup>197</sup>

Article 19 identified certain benefits to NTD, namely the practicality of intermediaries removing content and their responsibility to do so, tied to their provision of the platform for distributing the content.<sup>198</sup>

In 2011, the European Commission (EC) published a communication on the digital single market and e-commerce, in particular, a review of the ECD. The EC noted four types of uncertainty from which we can learn in reforming Canadian defamation law:

- Definitions of what are intermediary activities;
- the conditions to benefit from the safe harbour, in particular the meaning of the terms “actual knowledge” and “expeditious”;
- the uncertainty surrounding the various notice and takedown procedures; and
- the uncertainty concerning the meaning of “general” obligation to monitor (which Member States are prohibited from imposing under Article 15) and “specific” obligation to monitor (which is permitted under Recital 47).<sup>199</sup>

Some of the uncertainty relates to matters that are specific to Europe, namely the variations in the rules in Member state codifications of the ECD.<sup>200</sup> In this respect the EC recommends a horizontal framework for notice and takedown procedures across Europe.<sup>201</sup>

In May 2016 the EC published a communication on “Online Platforms and the Digital Single Market Opportunities and Challenges for Europe”.<sup>202</sup> It diverged from its initial strategy, which would have imposed a duty of care on intermediaries, which translates into a monitoring obligation.<sup>203</sup> Rather, the EC confirmed it would not be re-opening the ECD, but rather would be encouraging platforms to “to take more effective voluntary action to curtail exposure to illegal or harmful content”,<sup>204</sup> mentioning specifically incitement to terrorism, hate speech and child sexual abuse content.

For the purposes of this report, the most relevant points of uncertainty, explored more broadly than through the lens of EC criticisms, are (1) the kinds of intermediary activities that qualify as “hosts” under Article 14; (2) the meaning of knowledge and notice; and (3) the speed for which content must be taken down.

a) Meaning of “host” versus “content provider” and “mixed-use sites”

The term host is not easily defined. As Jaani Riordan explains, “[t]he dividing line that separates protected acts of storage from unprotected acts of intervening in content can be difficult to discern.”<sup>205</sup> For example, a host does more with third party content than simply store it. Modern hosts often act as platforms for third party interactions. The platforms employ technical processes to make the content accessible and searchable and to facilitate users doing things with the content (sharing, remixing, embedding, promoting etc.), often through automated means.<sup>206</sup>

This raises the issue of what kind of editorial involvement on the part of the host risks losing the safe harbour. At one of the end of the scale, if a host does nothing with third party content beyond storing it, it benefits from the safe harbour. The Court of Justice of the European Union (CJEU) confirmed in *Google France, Google Inc v Louis Vuitton Malletier* (2010) (*Google France*)<sup>207</sup> that the safe harbour protects neutral intermediaries in the sense that they offer

storage “of a mere technical, automatic and passive nature”.<sup>208</sup> In *Google France*, the CJEU was concerned with the active versus passive nature of the intermediary.

What if the intermediary occasionally moderates content, for example, by removing offensive posts? Treatment by the courts is not settled. In *Kashcke v Gray and Hilton* (2010),<sup>209</sup> involving occasional moderation for offensiveness and shifting posts for prominence on a blog, the court expressed doubt whether the blog owner could benefit from the safe harbour in the E-Commerce Regulations given its editorial involvement. However, the court did find that moderation of one part of the website did not prevent other areas of the same site from being exempt from liability. In *Karim v Newsquest Media Group Ltd*,<sup>210</sup> the defendant newspaper benefited from the safe harbour for its role in hosting third party comments “even though the defendant had authored other, non-tortious content on the webpage concerned, and had the capability to moderate comments.”<sup>211</sup> The problem is that this disincentivizes intermediaries from taking responsibility from the services that they provide. The more they intervene, the more they risk liability. This is why the USA settled on CDA s. 230, discussed below.<sup>212</sup>

Treatment of search engines is also problematic under the ECD. The Directive does not explicitly address treatment of search providers, leaving it to Member states to decide. Some states specifically extended the safe harbour to search providers in their legislation, while other states, such as the UK have not, as of yet.<sup>213</sup>

#### b) Meaning of Knowledge and Notice

A key point of uncertainty is the meaning of knowledge. Under Article 14, it is not only actual knowledge that risks liability, but willful blindness. It is less clear whether it includes constructive knowledge.<sup>214</sup> But what must be known? In the case of defamation, does a notice to Facebook that it is hosting defamatory content fix it with knowledge for the purpose of Article 14? Or is it when a representative from Facebook has assessed the content to make a determination of whether it is defamatory? Is the knowledge based on whether the content is defamatory or unlawful?

The EC noted three interpretations on how an intermediary can be found to have actual knowledge:

- An intermediary can only obtain actual knowledge through a court order;
- an intermediary can only obtain actual knowledge through a notice (ranging from an 'informal' notice from a user, such as a red flag under a video, to a court order);
- an intermediary can obtain knowledge even in the absence of a notice if it, for instance, has a "general awareness" that its site hosts illegal information.<sup>215</sup>

Article 14 requires knowledge as to unlawfulness ("knowledge of illegal activity or information"). Thus, in a defamation context, this means it is insufficient to have knowledge something is *prima facie* defamatory, as it might be saved by one of the defences such as truth or qualified privilege. Rather, knowledge must be that the content is actionable.<sup>216</sup> In a UK context, this means that the threshold for knowledge is higher in Regulation 19 of the *E-Commerce Regulations*<sup>217</sup> than under s. 1 of the *Defamation Act*,<sup>218</sup> discussed above, because it is knowledge as to unlawfulness rather than of the defamatory nature of the statement that triggers the liability risk.<sup>219</sup>

This does not fully reveal the complexity of the knowledge requirements. For example, does knowledge of unlawfulness mean knowledge of the likelihood the complaint has a basis, of the strengths and weaknesses of the case, or a convincing case on a balance of probabilities? In *L’Oreal SA v eBay International AG* (2011),<sup>220</sup> the CJEU stated actual knowledge is deduced where:

it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31.<sup>221</sup>

Riordan describes this as the “hybrid subjective-objective test” where what is assessed is “what the defendant actually knew according to the standards of a reasonable service provider in the defendant’s position.”<sup>222</sup>

Intimately tied with the issue of knowledge is notice. What kind of notice to an intermediary fixes it with knowledge that it is hosting unlawful content? In the USA, the DMCA specifies the content of such notices for copyright infringement,<sup>223</sup> while the ECD does not provide such detail. Some states have legislated the content of such notices, but there is no uniformity.<sup>224</sup> The UK’s *E-Commerce Regulations*, for example, provides some criteria, although it is not as detailed as the DMCA.<sup>225</sup>

On the issue of notice the EC made the following points:

- Rights holders complain that the detail required in notices is excessive, while intermediaries complain that often notices are not detailed enough for them to assess the legality of content.
- Counter-notices have been suggested to allow the individual who posted the allegedly unlawful information to defend themselves. Some European states require that intermediaries provide the opportunity for counter-notices, and this was supported by most intermediaries and civil society organisations. It was opposed by most rights holders and ISPs, because it was viewed to make NTD slow, burdensome and less effective (and inappropriate for manifestly illegal content such as child pornography).<sup>226</sup>

Wrongful notice is another problem, wherein a notice is sent for NTD of lawful content. Some Member States provide that if an intermediary follows the NTD procedure in good faith there is no liability. One proposal to the EC was that notice providers be liable for providing wrongful notices.<sup>227</sup>

The key issues that arise concerning knowledge and notice are as follows:

- What if there are differing allegations as to whether the content is unlawful?
- How detailed or substantiated does the allegation have to be for notice to affix knowledge?
- Does the intermediary have to accept the complaint at face value?

These issues were examined in *Davison v Habeeb & Ors (2011)*<sup>228</sup> As discussed above, it involved allegedly defamatory comments posted on a blog hosted by Blogger (owned by Google). Among other things, the court held that since Google received conflicting information from the claimant and those that published the information, there was no notification as required by Regulation 19 that fixed Google with actual knowledge:

[Google] was faced with conflicting claims from the claimant and the second defendant between which it was in no position to adjudicate. That is of course not to say that a different conclusion could not be reached on different facts, such as where (to adapt the words of the ECJ) a complaint was sufficiently precise and well substantiated, and where there was no attempt by the author of the defamatory material to defend what had been written.<sup>229</sup>

The court described Blogger as a giant noticeboard over which the owner has the power to remove content. A different analogy was used by the trial judge in *Tamiz v Google Inc (2012)*,<sup>230</sup> involving similar facts. In *Tamiz*, Justice Eady described Blogger as the owner of a wall covered in graffiti for which there was no obligation to take positive steps nor risk liability because steps were not taken.<sup>231</sup> Something more in the way of substantiating the claim was required for knowledge to be found.<sup>232</sup> The Court of Appeal in *Tamiz (2013)*, while declining to address the hosting defence under the *E-Commerce Regulations*, preferred the analogy in *Davison* to the one used at trial.<sup>233</sup>

*Tamiz* makes clear that a complaint about content is not notice. There must be evidence of unlawfulness before takedown is required. *Davison* provides that in the face of conflicting claims the intermediary should not have to adjudicate, but might if the claim is sufficiently well-defined and substantiated, and there has been no attempt to defend.<sup>234</sup>

### c) Speed of Content Removal

The other issue relates to how quickly the material must be removed from circulation. In a Canadian context, the court concluded in *Pritchard v Van Nes (2016)*<sup>235</sup> that the appropriate time for removal of defamatory content, in that situation, was immediately.<sup>236</sup> The ECD

requires the intermediary to act expeditiously as do the UK Regulations, but neither elaborates on what that means. Jaani Riordan identifies three issues. First, it is unclear what length of time satisfies the criterion of acting expeditiously, although it is expected an objective standard looking at a reasonable intermediary and in all the circumstances is appropriate. Second, it is unclear whether a finding that the intermediary acted expeditiously is contingent on the intermediary being successful at removal of the content in question. What if, as often happens, the material is re-uploaded soon after takedown? Third, it is unclear, based on the drafting of the provision, whether an intermediary must act expeditiously at the point it is notified it is hosting unlawful content, or at the point it has knowledge of its unlawfulness. This is significant, because the intermediary might not be able to see the content in question (e.g. secure private messaging).<sup>237</sup>

#### d) Monitoring Under Article 15

Article 15 provides that there is no obligation for an intermediary to monitor information on its services. This is softened by Recital 47 of the ECD, which differentiates between monitoring of a general nature, which member states are prohibited from requiring, and monitoring in a specific case, which is permissible.

One difficulty the LCO should be mindful of, is that the line between general and specific monitoring is grey.<sup>238</sup> In *R (British Telecommunications plc) v Secretary of State (BT)* (2011),<sup>239</sup> the Court explained that monitoring means the following:

A "general" obligation refers to a systematic arrangement whereby the putative "monitor" is inspecting or examining information randomly, or by reference to particular classes of information or subscribers, and is not focusing on a specific instance that has for apparently good reason been brought to its attention.<sup>240</sup>

*BT* involved an application for judicial review of the graduated response scheme, known as three-strikes policies, in the *Digital Economy Act*.<sup>241</sup> While the broader purpose of the Act was to tackle digital copyright and media regulation issues, the graduate response scheme at issue in *BT* proposed that repeat copyright infringers could potentially have their services with an ISP suspended or terminated. One question for the Court was whether this required ISPs to monitor users in contravention of Article 15. The Court held that ISPs were passive in this process. They had obligations, but they were not monitors. The monitoring role was by the copyright holder who then reported to the ISP.<sup>242</sup>

In *L’Oreal*,<sup>243</sup> the CJEU held that an injunction against eBay requiring that it prohibit future infringement by the same username for a specific trademark did not offend Article 15, because it was not general monitoring.<sup>244</sup> In a social media context, a similar issue is being explored in the ongoing case of *AY v Facebook (Ireland) Ltd & Ors (2016)*.<sup>245</sup> A 14 year-old girl was the victim of revenge pornography. Nude photos of her were posted in a shame group on Facebook. Every time the girl complained, Facebook removed the photo, but the photo was soon re-posted. The girl sued Facebook arguing for, in effect, notice-and-keep-down. The girl argues that Facebook’s failure, after notification, to track the image and block it from being re-posted was a misuse of private information (tort), negligence and breach of data protection

legislation. Facebook sought to have the claim struck and the High Court allowed the case to proceed. One question the court asked itself, which may be taken up by the trial court, is whether blocking content is the same as monitoring content.

A lesson from the European experience is that a clear prohibition of mandatory monitoring provides better certainty, and if a more nuanced approach recommended by the LCO, then specificity concerning the kinds of monitoring post-notice that can be required is needed. The DMCA, as will be seen, opted for certainty, providing that the safe harbour for intermediaries for copyright infringement does not require that the intermediary monitor its services or “affirmatively seek[] facts indicating infringing activity...”.<sup>246</sup>

## **2. *United States of America***

The USA has a split system with broad immunity under s. 230 of the CDA<sup>247</sup> for most unlawful content online, with the exception of communications privacy, federal criminal and intellectual property matters. As at 2010, 17.2% of s. 230 claims were for allegedly defamatory content, and 2/3 of cases were pre-emptively dismissed pursuant to s. 230.<sup>248</sup> The USA operates a NTD regime for copyright infringement under the DMCA, s. 512.<sup>249</sup> Both statutes will be discussed below.

### a) Section 230 of the *Communications Decency Act*

Section 230 provides broad immunity to intermediaries termed an “interactive computer service” (ICS) (see Appendix B).<sup>250</sup> As David Ardia describes, s. 230 provides “breathing space”<sup>251</sup> to intermediaries, which arguably is partly responsible for the rich interactive space we know on the internet. However, commitment to this breathing space has been tested in recent years as online abuse becomes increasingly difficult to manage.

The history of s. 230 is not entirely clear. It is commonly believed that the USA stumbled into a broader immunity. The goal of the CDA was to regulate pornography,<sup>252</sup> but most of the Act was struck down, save for s. 230. At the time s. 230 was drafted, ISPs were actively advocating for a broad immunity.<sup>253</sup> Part of the goal with s. 230 was to overturn the implications of *Stratton* (1995),<sup>254</sup> discussed above, namely that any exercise of responsibility by an intermediary to edit, moderate or control content created a greater risk of liability for that content. *Stratton*, in effect, disincentivized self-regulation by intermediaries.<sup>255</sup> The goal with s. 230, therefore, was to provide immunity to intermediaries while at the same time encourage corporate social responsibility. The question for the LCO to consider is whether a s. 230 type immunity provision is appropriate in a Canadian context.

#### i) Section 230 Interpretation

Broadly, s. 230 applies to three types of ICS: communication conduits (e.g. ISPs), hosts (e.g. social networking providers) and search providers.<sup>256</sup> As discussed above, s. 230 modifies the common law on intermediary liability concerning publisher, distributor and conduit liability. It

provides that an ICS is not “the publisher or speaker of any information provided by another information content provider.”<sup>257</sup> This applies to all unlawful content except communications privacy law, federal criminal and intellectual property matters.<sup>258</sup> In the area of defamation law, the effect of s. 230 is to make an ICS largely immune from liability for third party content.

Legal interpretation of s. 230 is relatively stable, except for the outer-edges, which will be detailed in the next section. One of the earliest cases under s. 230 was **Zeran v AOL (1997)**,<sup>259</sup> where a person posted the plaintiff’s information, including his home phone number, on an AOL message board advertising for sale offensive Oklahoma City bombing paraphernalia. As a result, Zeran received threatening phone calls. The court concluded that s. 230 overrode the common law; once an intermediary is notified of unlawful content, even if it has knowledge the content is untrue, it has no obligation to remove it. As the court noted, “liability upon notice reinforces service providers’ incentives to restrict speech and abstain from self-regulation.”<sup>260</sup> This has certainly been the dominant criticism of the European model.

This interpretation of s. 230 is consistently applied in the case law,<sup>261</sup> which means that the immunity applies even when the author of the content asks for it to be removed and the intermediary refuses.<sup>262</sup>

## ii) Limitations on Section 230

Ardia summarizes judicial interpretation, as of 2010, as a three-prong approach. A claim against the defendant is dismissed if:

The defendant is “a provider or user of an interactive computer service.”

The defendant is being “treated as the publisher or speaker” of information for purposes of liability.

The challenged information is “information provided by another information content provider.”<sup>263</sup>

Most debates about the outer-edges of s. 230 relate to the third point, namely whether the defendant intermediary was an ICS, thus benefitting from the s. 230 immunity, or an ICP, thus liable as a publisher.<sup>264</sup> The Act defines an ICP as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>265</sup> Debates about the boundaries of this definition centre on two types of activities: (1) intermediaries that engage in an editorial role and (2) mixed-use sites, where website owners both post content (ICP) and post the content of third parties (ICS). Often the debate centers on whether the site developed the content.

Cases are relatively clear concerning editorial involvement, applying *Zeran*. Ardia reviewed the cases and found that they consistently “have held that the mere exercises of traditional editorial functions, such as deciding what content to publish or remove, does not make an intermediary responsible for the content it publishes.”<sup>266</sup> What does this mean? Based on these cases even active editing is protected. Screening for unlawful or otherwise objectionable content, removing content, editing content, such as to remove obscenities, does not make the ICS an ICP for the purpose of s. 230.<sup>267</sup> The key message from the cases is intermediaries that

provide the platform for third party content, even if they facilitate content, benefit from the s. 230 immunity.

However, the boundaries of liability for mixed-use sites are less clear. The question is as follows: at what point or in what capacity does an intermediary become an ICP and lose the benefit of the s. 230 immunity? A key case setting out an exception to s. 230 immunity is ***Fair Housing Council of San Fernando Valley v Roommates.com LLC (2007) (Roommates)***.<sup>268</sup>

Roommates provided what the website's name suggests – a service for people to find roommates. It created a form with answer choices for users to fill out, which included questions about preferences regarding roommate gender, sexual-orientation and family status. This allegedly violated anti-discrimination laws. The court focused on the role of the intermediary in developing unlawful content, which it defined as:

referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.<sup>269</sup>

This has become known as the material contribution test.<sup>270</sup>

The Court held that Roommates did not benefit from the immunity under s. 230. In contrast to a neutral, open-ended comments section, by creating the questionnaire, Roommates was “inducing third parties to express illegal preferences.”<sup>271</sup> Roommates' role was thus framed as

an ICP rather than an ICS. The court took care to articulate the boundaries of s. 230, preserving the broad immunity for editing:

[a] website operator who edits user-created content – such as by correcting spelling, removing obscenity or trimming for length – retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality.<sup>272</sup>

The application of the case was narrowed by the court, advising that borderline cases should err on the side of immunity.<sup>273</sup> Cases since have narrowly read ***Roommates*** as decided on its unique facts.<sup>274</sup>

In ***FTC v Accusearch Inc (2009)***,<sup>275</sup> s. 230 immunity was denied because the website, which sold private telephone numbers, *developed* the content and thus was an ICP. Here the court took issue with the fact that Abika.com paid its researchers to acquire the telephone numbers even though it knew the phone numbers were confidential. Part of the Court's judgment focused on the meaning of responsibility, on when an intermediary could be deemed *reponsible* for the development of content such that s. 230 immunity was lost. It reasoned a website owner is responsible when it "specifically encourages development of what is offensive about the content."<sup>276</sup>

There was an attempt to impose liability where the content was encouraged in ***Jones v Dirty World Entertainment Recordings LLC (2014) (Jones)***.<sup>277</sup> The Dirty is a notorious website where users ("the dirty army") post dirt on people in the form of photos, videos or text. Submissions are made to the Dirty and the staff select 150-200 to publish every day. The staff edit the submissions, and the owner, Nik Richie, often adds a comment when it is posted. User

submissions are not materially changed before being posted. This case concerned Sarah Jones, a Cincinnati BenGals cheerleader. Photos of her were posted on the Dirty alleging she slept around, which affected her reputation as a teacher and cheerleader and in her community.

The District Court identified two circumstances where the intermediary does not benefit from s. 230 because it develops content: when it intentionally encourages the illegal postings and adds comments ratifying or adopting the posts, or when the website invites these kinds of posts, adds their own comments and invites others to respond. Under this formulation an intermediary is liable for encouraging development of unlawful content.

This was overturned by the Court of Appeal, which confirmed that encouragement and/or facilitation are insufficient to impose liability. There is a crucial distinction between making content available, as traditional publishers do, and “responsibility for what makes the displayed content illegal or actionable.”<sup>278</sup> Here, the court noted that under the District Court’s approach, websites such as consumer review sites would be vulnerable to “hecklers’ suits”.<sup>279</sup> These sites encourage the kinds of content posted (e.g. Xcentric Ventures which runs <http://www.ripoffreport.com>, which actively invites negative posts about businesses), and adopt it by gathering the submissions and posting them. The Court further noted that encouragement was a woolly standard, more so than the material contribution test. Here the Dirty did not mandate users post illegal content as a condition of using the Dirty, nor compensated them.

Despite the relative stability mentioned above, there are indications that the boundaries of s. 230 are being challenged in conflicting ways. Eric Goldman identified several recent cases.<sup>280</sup>

They include, among others, and not without controversy:

- Finding that good faith language in s. 230(c)2(a) meant a s. 230 dismissal could not be granted when there is an allegation that removal from search engines was not in good faith.<sup>281</sup>
- On a site that criticized a troubled teens school, the About Us section summarized the main complaints. The Court held that s. 230 immunity was not available as the complaints were not presented as third party but rather as her own. While adopting third party statements is normally not successful to circumvent s. 230, here the Court found that the failure to clearly indicate it was third party content was problematic.<sup>282</sup>
- Forwarding an email with a screenshot of a tweet is not an ICS bringing it within s. 230 immunity.<sup>283</sup>
- Encouraging what was offensive about the content led the court to conclude the intermediary was not a neutral publisher and thus could not claim s. 230 immunity.<sup>284</sup>

### iii) The Future of Section 230

Proposals for amendment of s. 230 have included:

- To add an exemption for state criminal laws. Danielle Citron criticizes this as too broad, not targeting the kinds of behaviours that are causing the most problems.<sup>285</sup>
- To add a provision that targets what Citron calls “the very worst actors”: “sites that encourage cyber stalking or non-consensual pornography and make money from its removal *or* that principally host cyber stalking or non-consensual pornography.”<sup>286</sup>
- To amend s. 230 to reflect **Roommates** and **Accusearch**, namely that intermediaries that encourage or require the posting of unlawful content lose the immunity under s. 230.<sup>287</sup>
- To require an opt-in requirement, wherein only ISPs that have an identification system of its users (name, address, email etc.) can benefit from the immunity.<sup>288</sup>
- To amend s. 230 such that if the ISP is aware of information and has reasonable knowledge that it is defamatory, s. 230 immunity should be unavailable.<sup>289</sup>

- More broadly, one line of argument is that gatekeepers have the capacity to regulate and a failure to impose liability means illegality is not being efficiently discovered or deterred.<sup>290</sup>

Supporters of s. 230 argue that it is what has allowed the interactive internet that we know to thrive.<sup>291</sup> Without it, some of the major internet companies we know today might not exist, such as Google, Facebook, Twitter, Snapchat, and so on. Holland makes this type of argument, that a strength of s. 230 is that hecklers are not targeted, while a NTD regime makes vulnerable those that voice dissenting or different views.<sup>292</sup>

Section 230, however, has some significant weaknesses. First, one of the most basic criticisms is that under s. 230 unlawful behaviour is not deterred or remedied.<sup>293</sup> It is questionable whether s. 230 has prompted the kind of self-regulation hoped for in the provision's passage and a swatch of harmful speech continues to be published.<sup>294</sup> Relatedly, a dominant criticism of s. 230 is the interpretation emerging from *Zeran*, that as long as the content was originally from a third party, the intermediary is immune from liability.<sup>295</sup>

Second, arguably s. 230 prevented judicial development of the common law to reflect technological change. Ardia comments, “[w]hile the passage of section 230 in 1996, during the Internet’s infancy, provided much needed clarity for intermediaries, it halted judicial attempts to adapt the common law to the changing technology.”<sup>296</sup> It is questionable whether intermediaries continue to need these kinds of protections.<sup>297</sup> As Holland notes, technology has advanced such that it is easier to identify the “bad actors” than it used to be,<sup>298</sup> although even

when this person is found he or she might be outside of jurisdiction or otherwise judgment proof.

Third, perhaps, as Ali Ziegler argues, s. 230 was “based on a simplistic and utopian version of the internet.”<sup>299</sup> We have a healthier sense of some of the problems posed by digitization to the law of defamation, and we have the benefit of the USA and European experiences with intermediary liability legislation, albeit at opposite ends of the regulatory spectrum. The question is how to target harmful speech without targeting the hecklers and without incentivizing the removal of all content complained about. The recommendations in this report seek to pave a middle-path between the ECD and CDA.

#### b) *The Digital Millennium Copyright Act*

Section 512 of the DMCA provides a safe harbour to service providers for copyright infringing content as long as certain conditions are met, detailed below. It operates similarly to NTD under the ECD in that once a service provider is notified it is hosting copyright infringing content it should disable access to it lest risk liability for such infringing content.

Unlike the ECD, the DMCA is more detailed in defining the NTD rules. AnneMarie Bridy and Daphne Keller describe it as a hybrid system with defined rules (NTD) as well as standards (red flag), the latter with the hopes that it prompts social and moral responsibility.<sup>300</sup> They fault the DMCA for this hybrid design, because the goal was to provide certainty, while standards are

inherently uncertain.<sup>301</sup> The question for the LCO is whether it seeks certainty of rules, or is tolerant of uncertainty in the hopes of prompting social responsibility by intermediaries for regulation of defamatory content. The related question is tolerance of the costs associated with burdening notifiers and intermediaries with managing NTD. For example, the DMCA burdens smaller intermediaries who cannot bear the costs of the processing system as easily as a larger intermediary such as Google.<sup>302</sup> Google, for example, spent 60 million dollars in developing its Content ID system to deal with copyright claims on YouTube.<sup>303</sup>

Conditions to the safe harbour include:

- The service provider has a policy in place that provides for the termination of services to repeat copyright infringers (s. 512(i));
- The service provider accommodates and does not interfere with standard technical measures (s. 512(i));
- The service provider does not have actual knowledge of infringing content (s. 512(c)(1)(A));
- The service provider “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity”: (s. 512(c)(1)(B));
- The service provider, once it is notified of the claimed infringement, “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity”: (s. 512(c)(C));
- The service provider designates an agent to receive these notices (s. 512(c)(2)).

Some of the unique features of s. 512, in comparison to the ECD and Canada’s notice-and-notice system, detailed below, include:

- The detail in the notification requirements (s. 512(c)(3));
- A put back procedure wherein, upon receiving a counter notice by its subscriber, the service provider will cease disabling access within 10 days if the copyright holder does not sue within 14 days (s. 512(g)(2)-(3)). The purpose of this provision is to

counteract the risk of over-compliance by intermediaries, or over-censorship of legitimate non-infringing content;<sup>304</sup>

- Requiring a good faith clause in complaints and counter-complaints (s. 512(f)). The penalty risk is perjury or damages for misrepresentation. Bridy and Keller argue that this, combined with the counter-notice provision, help minimize the risk of over-takedown with the regime.<sup>305</sup>
- A simplified provision prohibiting an obligation to monitor. (s. 512(M)).<sup>306</sup>

The safe harbour has been denied in circumstances where the intermediary does not act as a passive conduit, but rather has knowledge and actively engages in the infringing activity,<sup>307</sup> or the website fails to enforce its own DMCA policy.<sup>308</sup> General awareness that the service might be used to illegally share copyrighted content is insufficient to lose the safe harbour.<sup>309</sup> Rather, the knowledge must be “of specific and identifiable infringements of particular items.”<sup>310</sup> The obligation to identify copyright infringing content remains on the copyright holder, thus there is no obligation to monitor.<sup>311</sup>

The biggest criticism of the DMCA is allegations that the system is abused. In particular, there is minimal motivation for the service provider to dispute a claim of copyright infringement, because by refusing NTD it risks liability. Bridy and Keller document the studies showing high removal rates under the DMCA’s NTD regime.<sup>312</sup> Studies in Europe show similar tendencies under the ECD.<sup>313</sup> In Bridy and Keller’s view the strongest counter-balance to the NTD regime, one that reduces the number of removals of lawful content, is found in “well-crafted removal procedures”,<sup>314</sup> namely:

- Not imposing monitoring requirements, which if in place can cause over-removal;
- Imposing on notice claimants that they state their notice is made in good faith, with a penalty of perjury if not. As Bridy and Keller note, “this ‘scary legal language’ has a meaningful deterrent effect on over-reaching removal demands.”<sup>315</sup>

- Having in place clear and detailed requirements for the notice. This is missing from the ECD and Canada’s notice-and-notice system under the *Copyright Act* (see next section), arguably to detrimental effect. Section 512(c)(3)(A), as Bridy and Keller note, “serves the key function of letting the OSP know when it has enough information to assume the burden of action and proceed to the other steps of section 512(c)”.<sup>316</sup>

Drawing from the *Manila Principles*, discussed below, Bridy and Keller suggest the following improvements:<sup>317</sup>

- *Notice to the user accused of infringement.*
- *Notice to users and opportunity for counter-notice when the OSP unilaterally removes content based on a suspected “red flag”.* [NTD is triggered not only by submission of a complaint notice, but also by red flag knowledge under s. 512(c)(1)(A), namely when the intermediary is “aware of facts and circumstances from which infringing activity is apparent”. As Bridy and Keller note, this has been an ambiguous standard, but courts have interpreted it to mean it is not generalized knowledge, but rather item-specific knowledge].<sup>318</sup>
- *Standards for counter-notice at section 512(g)(3)* [noting it is under-used].
- *The damages provision at section 512(f)* [currently those sending the notice can insulate themselves from damages even though they have minimally considered eg fair use – see *Lenz v Universal Music Group*, 801 F. 3d 1126 (9<sup>th</sup> Cir. 2015), on appeal].
- *Public transparency requirements.*
- *Standards for outsourced DMCA reporting organizations.*
- *Consequences for notifiers who submit bulk or robo-sourced removal requests with a high error rate.*
- *Special treatment for notices knowingly submitted for content that is plausibly protected by fair use* [e.g. must flag content for possible fair use exception].<sup>319</sup>

### **3. Canada**

The notice-and-notice provisions are a made-in-Canada framework for intermediary liability for copyright infringement. They came into effect in January, 2015, although operated informally as a voluntary industry practice for the previous decade.<sup>320</sup> Under this system a rights holder that has evidence of copyright infringement linked to an IP address writes a letter to the nameless individual, provides the letter to an ISP that passes it on to the user. If the ISP fails to forward

the letter, it risks statutory damages rather than liability for the underlying claim of copyright infringement.

The purpose of the notice provisions is educational – to discourage copyright infringement. Under ss. 41.25-41.26 of the *Copyright Act*, a copyright owner may send a notice to an intermediary that operates in the following capacity: provides a connection to the internet (*i.e.* an ISP), storage services, or an information location tool (*i.e.* search engines).<sup>321</sup> In practice the notices are largely sent to ISPs. The intermediary is then obligated to forward the notice to the person identified by the location data (or advise why it cannot do so), and advise the claimant it has done so. The intermediary is also required to retain records about the person linked with the location data for six months.<sup>322</sup> In the case of a search provider, there is no obligation to forward the notice. Rather, if a search provider is notified that the content has been removed from the source, then the safe harbour only applies for thirty days.<sup>323</sup> If the intermediary fails to forward the notice it risks statutory damages between \$5000-\$10,000.<sup>324</sup>

Civil Society organizations such as Article 19 argue that notice-and-notice is the ideal system for addressing unlawful content and the responsibilities of intermediaries.<sup>325</sup> However, we can learn from the flaws in how Canada executed this system. First, processing these notices can be burdensome for ISPs. Teksavvy processes about 5000 notices per day.<sup>326</sup> The main problem with the current system is that there are no mandatory criteria for the content of the notices in the *Copyright Act*. This has resulted in some of the following situations:

- There is a cap on statutory damages for non-commercial infringement of between \$100 and \$5000 dollars.<sup>327</sup> When the notice system first was in place, one rights holder, RightsCorp, sent letters to users stating that they could be liable for \$150,000 and/or have their internet access suspended, neither of which is provided for in Canadian law.<sup>328</sup>
- More recently, users have complained about the quantity of notices, target of notices (some people who have received notices have stated that they had not illegally downloaded content), or threatening nature of the letters e.g. of deportation, revoking scholarships etc.<sup>329</sup>

The government contemplated enacting regulations to provide more detail regarding the notices. Indeed, Industry Canada and various ISPs warned that a template was needed otherwise risking abuse by rights holders, but the government chose not to enact specific rules.<sup>330</sup> Since the system has been rolled out, Industry Canada and the Office of Consumer Affairs have both posted information online for users explaining the system.<sup>331</sup> Michael Geist summarized the various suggestions that have been made to fix the system:

- a fee for rights holders to file a notice. Government was asked to impose a fee on rightsholders, but chose not to, and so the cost will be likely borne by users through higher fees;
- sanctions for misleading or false demands. Recall that the DMCA requires NTD requests include a statement that the notice is being made in good faith;
- discretion for ISPs to refuse to forward notices, if the content of the notices is inaccurate or misleading; and
- a prohibition on settlement demands.<sup>332</sup>

Taking into account the recommendations for improving the system, notice-and-notice is a unique middle path between the ECD and CDA. Its suitability in the context of defamation claims is explored in the recommendations section.

## 4. Other

### a) Brazil

Brazil passed the *Marco Civil*,<sup>333</sup> which is known in internet governance circles as the “constitution for the internet”,<sup>334</sup> because it takes a rights-based approach (meaning based on international human rights standards) to regulating the internet (see Appendix B). There are four intermediary liability rules:

- Article 18: a more robust mere conduit defence. It states that the provider of an internet connection is not civilly liable for third party content.
- Article 19: Internet application providers (IAP) (essentially hosts) only risk liability if they fail to comply with a specific court order. Article 19 creates eight principles that define the contours of this, including that there will be a special causes court to deal with these applications.
- Article 21: It creates an exception for what is commonly known as “revenge pornography”: infringements of privacy arising from non-authorized sharing of content that contains nudity or is of a sexual nature. Liability only attaches to intermediaries that receive notice of the content and fail to disable access to it in a timely manner.
- Article 31: It exempts copyright law from the intermediary liability regime in *Marco Civil*, rather being governed by copyright law.

The key difference between *Marco Civil* and other models is that the risk of liability of a host is not tied to awareness or actual knowledge that it is hosting unlawful content. Rather, the risk of liability is only triggered by failure to comply with a court order. Civil Society organization Article 19 and the *Manila Principles*, discussed below, proposed similar limitations on intermediary liability.<sup>335</sup> Theoretically this is an ideal model for NTD. The struggle to

implementing it is the high volume, low value nature of many defamation disputes. Courts might be overly-burdened or the process might pose a barrier to access to justice for claimants without the legal knowledge or finances to make an application. In the case of *Marco Civil*, those concerns are partly addressed through Article 21, which provides for a fast-track process for so-called revenge pornography. This does not apply seamlessly to a defamation context, because it is easier to identify when content is an intimate image without consent. Any assessment of defamatory content inevitably involves murkier criteria.

b) *The Manila Principles*

One formulation of intermediary liability is the *Manila Principles* (Principles), a set of six principles created by civil society organizations from around the world.<sup>336</sup> The focus of the Principles is on “baseline safeguards and best practices”<sup>337</sup> rather than certainty of rules. Similar to *Marco Civil*, they take a rights-based approach to intermediary liability focusing on principles of necessity, proportionality and consistency. They draw significantly from the UN Guiding Principles.

Principle 1 provides that intermediary liability “must be provided by laws, which must be precise, clear, and accessible.”<sup>338</sup> Intermediaries should only be held liable for third party content when they modify the content, and in no circumstance should intermediaries be strictly liable, nor required to proactively monitor content.<sup>339</sup>

Principle 2 provides that intermediary restrictions on access to content should only occur through order by a judicial authority. Principle 3 provides the boundaries surrounding intermediary removal of content, namely due process. The principles address issues mentioned in this report: the need for detail in NTD requests and more generally, that intermediaries should not have to evaluate whether content is lawful or not. The latter point is difficult to comply with in the defamation context where an intermediary inevitably assesses the quality of the allegation to determine whether it has a legal basis to justify content removal.

Principles 4 and 5 confirm the rights-based approach of the Principles, stating that any content restrictions must comply with the necessity and proportionality tests and provide due process. Due process, in this context, includes a right to be heard by the content provider whose words, images or videos might be removed by the intermediary. This is a necessary, but difficult aspect of an intermediary liability regime.<sup>340</sup> Principle 6 identifies the need for transparency and accountability, such as the provision of reasons for content removal, where possible, and oversight and review of removal mechanisms. It focuses here on both government and company obligations.

The *Manila Principles*, it is suggested, provides a compelling conceptual framework for a human rights-compliant intermediary liability regime.

## **V. RECOMMENDATIONS FOR CHANGES TO THE LAW**

## **A. Principles and positions underlying our recommendations**

Our conclusions flow from a number of principles and positions that we believe should underlie any new law. These principles and positions include:

- intermediaries should not act as arbiters of what is defamatory;
- that said, intermediaries do have a role in mediating removal requests;
- all things being equal, laws should be technologically neutral;
- the element of publication in the common law of defamation is too broad and does not strike an appropriate balance between free speech and protection of reputation;
- the element of publication in the common law of defamation is too complex and leads to confusion and misapplication of the law;
- liability in defamation should not depend on whether another defendant is available to be sued;
- statutory reform, as opposed to incremental change through the common law, is needed;

Some of these principles and positions require elaboration.

### ***1. Intermediaries Should Not Act as Arbiters of What is Defamatory***

It is our view that intermediaries should not be placed in the role of determining whether content is defamatory for the purpose of deciding whether to remove it. So long as intermediaries are publishers (either from the outset or by omission by virtue of being notified of content), they will have an incentive to remove disputed content. This point was made by the United Kingdom's Joint Committee on the Draft Defamation Bill, and although the following point referred to pre-2013 UK defamation law, it is equally true of present Canadian law:

As the law stands, far from encouraging service providers to foster legitimate debate in a responsible manner and removing the most extreme material, it encourages them to ignore any dubious material but then to remove it without question following a complaint.<sup>341</sup>

We express no opinion as to whether it is appropriate for intermediaries to make determinations about other types of content like child pornography, or copyright infringement. However, defamation is particularly unsuited to assessment by private parties. First and foremost, this is because of the complexity of defamation law. Intermediaries are not legal experts and do not have the expertise to determine whether a particular disparaging statement is, in fact, defamatory.

Second, intermediaries would have to make these determinations without the benefit of a full evidentiary record. This may be appropriate where the issue is whether content is offensive or abusive, and in violation of terms of service, but not all defamatory content will fall into this category. If factual allegations are made, decisions about take downs should not be made on the basis of a complaint by one party. This does not sufficiently protect free speech.<sup>342</sup> This does not mean that businesses should necessarily be prohibited from removing content that is alleged to be defamatory, but rather that they should be incentivized not to do so.

Third, intermediaries seem not to want to take on this role of assessing what's defamatory. The work is resource-intensive and opens intermediaries up to criticism in courts of law and in courts of public opinion. In our interviews of representatives of internet intermediaries, one interviewee said that it was "a terrible idea" for his company to effectively adjudicate

defamation claims.<sup>343</sup> A media representative said that trying to assess the appropriateness of online comments sections “was an impossible thing to manage” and asked: “why am I having to deal with this?... I had nothing to do with [the content]. As an organization, why do we have to deal with this nonsense?” He added that, in an age of lower revenues and layoffs, the resources required to deal with problematic content was one reason for getting rid of comments sections altogether.

Other scholars have identified the problem of intermediaries removing content that may not be unlawful or contrary to terms of service. Daphne Keller examined a number of studies of take-downs and take-down request.<sup>344</sup> Although none of them relates to defamatory content, Keller concludes that there is empirical evidence of over-removal. She notes that:

the easiest, cheapest, and most risk-avoidant path for any technical intermediary is simply to process a removal request and not question its validity. A company that takes an “if in doubt, take it down” approach to requests may simply be a rational economic actor.

Andrew Scott agrees that intermediaries should not be acting as censors of defamatory content. He states: “[u]ltimately, it should be for a court to determine rights. As a matter of policy, intermediaries should not be asked to do so.”<sup>345</sup> Not surprisingly, the representatives of intermediaries that we spoke with generally agreed. To be sure, not all disputes can or should be resolved by courts. Nevertheless, given the power of intermediaries to affect public discourse, their incentive to remove content complained about, regardless of whether the content is defamatory, is problematic.

## ***2. Intermediaries have a role in mediating removal requests***

We recognize that significant reputational harm can be caused by content posted online. Intermediaries often have better capacity to regulate than courts (e.g. the high volume, low value nature of many complaints, anonymity, speed of company processes versus courts, jurisdictional problems, and so on). Although intermediaries should not act as censors, they should have procedures for handling defamation complaints.

In our view, both the ECD and CDA are the wrong approaches to intermediary responsibilities. The NTD regime under the ECD incentivizes content removal by burdening an intermediary with the risk of liability for unlawful third party content it fails to remove. The CDA, on the other hand, doesn't incentivize an intermediary to manage its services. The notice-and-notice system under *Canada's Copyright Act*, although flawed, is a unique middle path that shields an intermediary from liability, rather targeting procedural obligations. If an intermediary fails to pass on a notice of copyright infringement, the penalty is statutory damages.

It is our view that for the defamation context, notice-and-notice-*plus* is the desirable approach. The plus is (a) lessons learned from deployment of notice-and-notice for copyright infringement and (b) the need for something more in the defamation context. Notice-and-notice under the *Copyright Act* is a rather weak regulatory tool and we recommend that, in certain circumstances, intermediaries should disable access to content alleged to be defamatory. Therefore, recommendation 4, below, suggests codifying a set of procedures based on three

principles: the rules should be human-rights based; the rules should enable innovation; and the rules should serve to encourage corporate social responsibility.

### ***3. All things Being Equal, Laws Should be Technologically Neutral***

All things being equal, technology-neutral rules are preferred to technology-specific ones. The primary reason for this is to avoid new laws becoming obsolete as technology changes. For example, one of our internet intermediary interviewees said that it no longer made as much sense to focus on internet hosts, because although most problematic content used to be found on websites, much of it has now moved to instant messaging. In the intellectual property context, he further noted that the notice and takedown regime no longer makes as much sense given changes in technology: now that people stream content that violates copyright, rather than posting it on the internet, there is nothing to “take down”.

In her reasons in *Dow Jones v Gutnick*,<sup>346</sup> Gaudron J. of the High Court of Australia rejected an internet-specific rule for publication. Her reasons included that:

[g]enerally speaking, it is undesirable to express a rule of the common law in terms of a particular technology. Doing so presents problems where that technology is itself overtaken by fresh developments. It can scarcely be supposed that the full potential of the Internet has yet been realised. The next phase in the global distribution of information cannot be predicted. A legal rule expressed in terms of the Internet might very soon be out of date.<sup>347</sup>

That said, it may make sense for proposed legislation to mention specific technologies “for greater certainty”.

#### ***4. The breadth of the law of publication, combined with new technologies, poses a threat to freedom of expression***

We agree with scholars like Andrew Scott<sup>348</sup> that the breadth of the law of publication poses an unacceptable threat to free speech. Because the definition of publication is so broad, it captures conduct that has little to do with causing injury to reputation. This was the reason for creating the innocent dissemination defence more than a hundred years ago. It was thought that secondary publishers like newsagents, librarians and printing press operators should not be held responsible for libelous content – at least so long as they remained unaware of the libel. Although this defence protects freedom of expression, in our view it is the wrong solution to the overbreadth of the element of publication. The onus it places on defendants, as well as its considerable complexity, make it a poor substitute for a definition of publication itself that more accurately reflects what is blameworthy about communicating a libel.

Although publication was defined too broadly in the nineteenth and twentieth centuries, the problem has come to a head in the twenty-first. Publishers (in the defamation sense) of third party content at least arguably now include international corporations that control staggering amounts of speech, and in many ways function as public spheres.<sup>349</sup> Holding them to be publishers impairs freedom of expression because, unlike newsagents and librarians, they have the ability to control vast amounts of content, and treating them as publishers provides intermediaries with an incentive to remove controversial content.

The point is not that intermediaries should never be legally responsible for third party content. Rather, the point is that the breadth of the publication element means that it captures less- and non-blameworthy parties in its scope. This, combined with the chilling effect of potential liability on internet intermediaries suggests that the breadth of the publication element poses a threat to freedom of expression.

#### ***5. Liability Should Not Depend on Whether Another Defendant is Available to be Sued***

We reject any approach that allows for intermediary liability only where a suitable primary publisher cannot be identified. If defendants are not publishers, they should not be transformed into publishers by the inability to hold someone else liable. Perhaps there should be a requirement that intermediaries collect user information, so that the original poster can always be identified, but given the importance of anonymity on the internet we are not prepared to make such a recommendation here.

It may seem obvious that liability shouldn't depend on the existence of another party who can be sued. However, we address this point because s. 10 of the United Kingdom's *Defamation Act, 2013* denies UK courts jurisdiction to hear defamation actions against secondary publishers unless it is "not reasonably practicable" to bring an action against the primary publisher. In addition, there is some sympathy in Canadian case law for the view that intermediaries should perhaps be liable where the alternative is to deny the plaintiff any recourse at all. Deschamps J,

writing in *Crookes v Newton*, suggests that a problem with immunizing secondary publishers (in that case, those who create references) is that it may leave plaintiffs without a remedy.<sup>350</sup>

The reasons why liability should not depend on the existence of another defendant have been well-articulated by others. Andrew Scott stated that: “[p]ractical difficulties in bringing a claim against one person... can hardly justify by themselves the extension of joint and several liability to relatively innocent parties.”<sup>351</sup> Ryan Turner noted that: “the broad definition of ‘publication’... facilitates this search for deep pockets”.<sup>352</sup> Liability based on the existence of other parties creates uncertainty and unfairness, in that defendants’ responsibility for third party content depends on factors completely outside their control. On principle, the law should not encourage the pursuit of deep-pocketed but non-blameworthy parties simply because the alternative is to leave someone without a remedy.

## **6. Statutory reform is necessary**

Almost fifty years ago, in *Slim v Daily Telegraph Ltd*, Lord Diplock stated that defamation law was “a fit topic for the attention of the Law Commission [as] [i]t has passed beyond redemption by the courts.”<sup>353</sup> Although not referring to the publication element specifically and certainly not to internet intermediaries, his conclusion is nevertheless true of the publication issue. We can think of no incremental changes to the law that would adequately address the problem of internet intermediary liability.

## **B. Recommendations**

### ***1. The law of defamation should be modified so that secondary publishers are not considered publishers of defamatory content***

*It is arguable that the expansion of the concept of publication beyond primary authors, editors and publishers should be seen as a profound misstep in the development of the law, and one that should be rectified.*<sup>354</sup>

The principal reason we recommend secondary publishers not be treated as publishers is simply that their role in causing reputational injury is insufficient to justify their liability in defamation. Recall that primary publishers are those who “have or can readily acquire full knowledge of the publication’s content before its release and are able to control and, if necessary, prevent dissemination of such content.”<sup>355</sup> Thus, secondary publishers do not have (access to) such knowledge or control (although they could have one but not the other). By definition, they either do not knowingly convey particular words, or they knowingly convey information but have no ability to prevent publication. Typically, they provide platforms or otherwise assist a primary publisher. In addition to internet intermediaries, examples include libraries and newspaper vendors. Although at common law, publishers must publish intentionally, that intentional act does not require knowledge of particular words.

In his article on publication by omission, Ryan Turner argues against secondary publisher liability. He supports a defence akin to s. 5 of the UK *Defamation Act, 2013* (which, as discussed above, provides a defence to “operators of websites” for third party content), noting that:

[t]he upshot of such an approach is that legal responsibility for managing the tension between individuals' rights to reputation and speech is imposed on the primary publisher, who is in the best position to prevent, or refrain from, publication of the defamatory material in the first place.<sup>356</sup>

He continues:

defamation law ought to be broken down and reconstructed so that the distinction between publication and innocent dissemination is obliterated. In its place should be a simplified cause of action based on the moral responsibility of an entity for the publication that does not risk peripheral actors being unnecessarily caught in defamation proceedings merely because they were a prima facie publisher.<sup>357</sup>

It is presumably for similar reasons that Andrew Scott states: “[t]he description of intermediaries as ‘publishers’ is a legal construction that is difficult to justify.”<sup>358</sup>

Another reason for recommending that secondary publishers not be treated as publishers is more practical: although much of the free speech-protecting work of defamation law happens through defences, secondary publishers often lack the knowledge necessary to be able to avail themselves of defences.<sup>359</sup> In addition, because they are less closely connected to the content, they will often be uninterested in protecting it, especially at the high cost of pursuing defamation litigation. Scott makes this point as well, noting that the likely outcome is “collateral censorship”.<sup>360</sup> That is, secondary publishers (in the form of intermediaries, at least, with control but no prior knowledge) will simply take content down rather than fight to protect it.

Although the rule that secondary publishers are responsible for defamatory content (subject to defences) may once have been a justifiable limit on free speech, it is difficult to defend in the 21<sup>st</sup> century. Changes in technology, and the movement toward greater free speech protections (reflected in the enactment of the *Charter*, among other things), and away from strict liability in tort support the conclusion that secondary publishers should no longer be treated as publishers at all.

If our recommendation were adopted into law, it would mean that the innocent dissemination defence would effectively be abolished, as would the distinction between secondary publishers and mere conduits. If a deliberate act of conveying specific words were required for publication (in the sense elaborated on in Recommendation 3), traditional secondary publishers would not be publishers at all, so they would need no innocent dissemination defence and the “mere conduit” doctrine would also be superfluous. This would result in a simplification of the law.

***2. The law of defamation should be modified so that one cannot be made a publisher by omission***

Related to the idea that secondary publishers should not be liable is the recommendation that the publication by omission doctrine be abandoned. This is perhaps a more controversial recommendation, but it relates to the requirement of knowing publication that we adopt below. It is our recommendation that, if the defendant was not initially responsible for communicating the relevant words, she should not be made responsible for them, as a

defamer, because she failed to remove them – even if that failure can be interpreted as endorsement. This was also the recommendation of Andrew Scott who stated: “[f]ailure to take content down after it has been identified as problematic by a complainant does not amount to primary involvement in communicating a libel.”<sup>361</sup>

Similarly, in Ryan Turner’s view, it is problematic to ground internet intermediary liability in the publication by omission doctrine:

If the Court were to return to first principles, a tension would emerge between the imputation of liability for defamation to the owners and operators of internet platforms for publication by omission and the justice-based reasoning in *Emmens*.<sup>362</sup>

Abolishing the publication by omission doctrine promotes the principle that intermediaries should not be the arbiters of what is defamatory. Placing legal responsibility on them if they fail to take down content amounts to creating an incentive for them to take it down regardless of whether it is defamatory.

It therefore follows that we reject the test espoused in *Pritchard*. In that case, the British Columbia Supreme Court adopted a test of “liability for third party defamatory material”<sup>363</sup> whose elements are:

1) actual knowledge of the defamatory material posted by the third party, 2) a deliberate act that can include inaction in the face of actual knowledge, and 3) power and control over the defamatory content. After meeting these elements, it may be said that a defendant has adopted the third party defamatory material as their own.<sup>364</sup>

In our view, there are two problems with this test. First, it allows omissions (*i.e.*, failures to remove content) to ground liability. We recommend against this for the reasons above. Second, even if omissions could ground liability, we would oppose a test that allowed an inference of adoption (“it may be said that the defendant has adopted the third party defamatory material as their own”) based on nothing more than knowledge plus a decision not to remove. This is inconsistent with *Byrne v Deane*. We noted several examples above where it may not be proper to draw an inference of adoption based on knowledge plus a failure to remove (e.g. it is too expensive to remove or the defendant has a general policy of never removing anything).

Thus, even if the publication by omission doctrine were retained, we would reject a test of publication by omission that could be satisfied merely by knowledge, control and inaction, as opposed to endorsement.

### ***3. The test of publication should therefore be one of intentionally conveying specific words***

To this point, we have implied that only primary publishers should be considered publishers and have explained why that is the recommended approach. In addition, we have recommended against publishers by omission being treated as primary publishers. In this section, we elaborate on what that means. In essence, “publication” would mean conveying specific words with intent that those words be conveyed. Put differently, publishers would have to have knowledge of specific words and control over whether they are conveyed. Thus, defamation would be an intentional tort, with intent relating not simply to an intentional act of conveyance (like selling a

newspaper or clamping down the printing press). Rather, the intentional act would be conveying *particular words*.

There will inevitably be uncertainties that arise regarding what it means to intentionally convey particular words. It is the role of the courts to resolve such matters. However, for greater certainty, we address the relevance of negligence and constructive intent.

We recommend against an approach in which carelessness can make one a publisher. This is because an intent fault requirement better reflects blameworthiness and helps protect freedom of expression. Specifically, we are concerned that a negligence standard would bring back into the scope of publication many of the secondary publishers, including internet intermediaries, whose lack of blameworthiness triggered this very debate over the meaning of publication. While one might think that Google is not careless for allowing defamatory contents to be found in its search engine results, or that a news media company is not careless for allowing defamatory contents to be found in its comments sections, courts have sometimes suggested otherwise.<sup>365</sup> Thus, in addition to the relative lack of blameworthiness, the uncertainty around when a defendant is careless in conveying someone else's content is problematic.

Content creators who intentionally disseminate their own words, and those who intentionally repeat others' words, would be captured under the proposed intent standard. Editors, publishers or traditional secondary publishers who were careless and did not actually read the

relevant words before participating in their dissemination could be dealt with in one of two ways: either they should not be liable as defamers because, although they were careless, they did not intentionally take part in an act that harmed reputation. Alternatively, they could be captured under traditional doctrines of accessory liability or vicarious liability. As Joachim Dietrich notes in his paper on publication, if the scope of the publication element were narrowed, accessory liability could capture some of the conduct that now falls within the definition of publication:

The very meaning of publication, as encompassing persons who ‘take part or participate in some way in the publication, appears to refer to concepts that are relevant to establishing liability as an accessory, that is, a person who has not committed the primary wrong but nonetheless was sufficiently *involved* in the commission of such a wrong by another. Importantly, an accessory is someone against whom the elements of the primary torts cannot be established.<sup>366</sup>

The reason that accessory liability principles have not generally been relied on in defamation is that: “[g]iven the absence of any mental element other than the intention to communicate [in the existing law], this leaves little scope for reliance on accessorial liability principles in defamation law.”<sup>367</sup>

The benefit of relying on accessory liability, rather than a broad definition of publication, is that it is grounded in acts that are actually wrongful by virtue of some mental state on the part of the defendant and a relationship with someone who committed the tort.<sup>368</sup>

That said, willful blindness should, consistent with legal principles, be treated as intent – not carelessness. Similarly, intent can be constructive, in the sense that where conveying particular

content is substantially certain to result from the defendant's act, intent to publish will be inferred.

In some ways, this definition is still, in our view, too broad. It would capture, for example, a newsagent or librarian who reads a newspaper or book, becomes aware of the relevant words (although not necessarily that they are defamatory), and continues to sell or lend the item. (It would *not* capture traditional secondary publishers who refuse to remove content after notice since a deliberate act of conveying specific words is still required. Inaction should never be interpreted as a deliberate act. Nor should an automated act, like supplying search engine results, or displaying user-generated content, amount to a deliberate act of conveying specific words – even after notice.) Although the newsagent/library scenario above is intuitively unsatisfactory, we are unable to support certain alternative tests that would avoid this problem, such as a publication test based on authorship, commercial publication, being the first publisher, or endorsement. Further, we take some comfort from the fact that defamation actions of this kind should be exceedingly rare.

Finally, a brief word on control. Control is implicit in the concept of an intentional act of conveyance. If the defendant were unable to do otherwise, then she has not intentionally conveyed content. Recall, however, that control is insufficient: a positive act of conveying, rather than a failure to remove content should be required.

It follows that we do not recommend adopting an approach like that in s. 1(1) of the UK *Defamation Act 1996*, and s. 10 of the UK *Defamation Act 2013*. They focus on whether the defendant is an “author, editor or [commercial] publisher”. Authorship has never been the touchstone of publication and we are not proposing that that would change. And although the Act’s definition of “authorship” is broader than how that word is generally understood, in that it includes those who repeat content without being a content creator, in our view that adds unnecessary confusion to the law.

In addition, “editor” could be interpreted to include those who monitor generally but have no specific prior knowledge of the defamatory words, or who simply have systems in place for censoring or removing content.<sup>369</sup> Such people should not be treated as publishers, except under principles of accessory liability.

Therefore, rather than importing these concepts into Ontario defamation law, either into the definition of publication or as a defence, we prefer an approach to publication that requires an intent to publish specific words, images etc.<sup>370</sup>

#### **4. Intermediary obligations related to complaints of third party defamatory content should be codified.**

Taking into account our recommendation that the common law of defamation should be modified so that secondary publishers are not considered publishers of defamatory content,

this section identifies the obligations we recommend intermediaries should have once notified of defamatory content. We recommend that intermediaries must execute certain steps related to a complaint or otherwise a risk fine, analogous to what are known as statutory damages in the notice-and-notice system under the *Copyright Act*. Despite drawing from the notice-and-notice system, however, the below framework is bespoke to the defamation context.

Positioning the recommendations below within the five models discussed in Part IV.A., the proposed framework is closest to a safe harbour model, although a key difference is that there is no risk of defamation liability for the intermediary, but rather a fine. While some interviewees recommended adopting a broad immunity similar to CDA s. 230,<sup>371</sup> our recommendation, as will be seen, is not to adopt a s. 230-type defence.

#### a) Recommendations: Principles

The recommendations in this section are based on three principles:

1. Any intermediary rules should be human-rights based, namely should be prescribed by law with a legitimate aim, and comply with principles of necessity, proportionality, transparency, accountability and due process. This is consistent with recent HRC general comments and United Nations special rapporteur reports.<sup>372</sup>

2. Any intermediary rules should enable innovation. In the background of any intermediary regime, whether liability-based or otherwise, must be the recognition that the framework is inextricably tied with innovation.<sup>373</sup> One aspect the LCO must be conscious of in crafting intermediary rules is the importance of online platforms to the digital economy and participation online, and that overly restrictive intermediary rules can stifle business development. Similarly, overly-burdensome rules impact small and medium sized companies more than entrenched multi-nationals, and we do not want rules that have such an anti-competitive effect. Such consideration is reflected in, for example, the United Nations Guiding Principles.<sup>374</sup> While defamation law does not differ depending on the size of companies, we can be conscious of the varying impact intermediary rules can have on different players and react accordingly.
  
3. Any intermediary rules should serve to encourage social responsibility by intermediaries to manage defamation on their platforms. Whatever intermediary rules are implemented will be inevitably be imperfect in addressing the problems of defamation online. The most effective approach in the circumstances, in our view, involves various regulatory strategies, both law and non-law, and various regulatory players. Encouraging this kind of social responsibility means focusing on incentivizing having processes in place (modeled on human rights principles) to manage content complaints.

The recommendations also reflect consideration of the following themes that emerged from our interviews:

- Intermediaries should not be responsible in defamation for third party content because they are insufficiently implicated in the resulting harm to reputation.
- Accountability should be viewed along a spectrum from publishers to hosts to conduits.
- Responding to complaints and managing third party content (through assessment, removal etc.) is resource intensive.
- Intermediaries are not and should not be in a position to adjudicate content disputes.
- Beyond factual scenarios that fit within *Crookes v Newton*,<sup>375</sup> intermediaries are operating in an area of uncertainty concerning obligations and liability risks for third party content.
- In examining regulatory models for intermediary liability, care should be taken in comparing frameworks for copyright infringement and defamation. Defamation is more difficult for intermediaries to assess (e.g. conflicting claims, volume of complaints, the fuzzy line between defamation and insulting speech, and the different ways that free speech operates in intellectual property versus defamation).
- The parameters of a notice of complaint should be clear, because there is a risk of abuse, especially in the context of a defamation complaint.

#### b) Recommendation Overview

##### *Notice-and-Notice-Plus*

Although we recommend that intermediaries not be liable as publishers of third party defamatory content, we recommend that procedures be codified for handling defamation complaints. In line with the recommendation concerning publication, it is our view that intermediaries should not be at risk of liability for failing to comply with the rules. Rather, drawing from the use of statutory damages in the notice-and-notice system under the *Copyright Act*, the risk to the intermediary for failure to comply with the rules should be a fine. This recommendation is based on the following.

First, as set out in Section IV.A, Principle 1, it is our view that it is inappropriate for intermediaries to act in the quasi-judicial role of assessing the legality of content on its services (outside the context of its own Terms of Service). NTD, as it is currently crafted under the ECD, for example, imposes an enormous burden on intermediaries and creates a privatized censorship role. That said, we conclude that a s. 230 CDA defence is inappropriate in a Canadian context. There is no evidence that s. 230 has spurred the kinds of social responsibility it was supposed to. Rather, it has effectively shielded sites that host defamatory content, even in situations where the website owner knows it is hosting defamatory content and chooses not to remove it.<sup>376</sup> The balance between free speech and other rights is tipped differently in Canada than America. Introducing a s. 230 defence would be out-of-step with our balancing between free speech and reputation, even taking into account the bolstering of free speech in recent cases such as *Crookes v Newton*,<sup>377</sup> *Grant v Torstar*<sup>378</sup> and *WIC Radio Ltd v Simpson*.<sup>379</sup>

Second, even though intermediaries should not be treated as publishers of third party content and liable as such, we conclude that a mechanism for users to disable access to defamatory content should be available given the significant harm to reputation that can happen from its continued circulation online. Detailed rules provide intermediaries with the information they need to act and reduce the risk of over-removal of content.<sup>380</sup>

We acknowledge that regardless of amendments made to Ontario's *Libel and Slander Act*,<sup>381</sup> enforcement in the USA against American-based companies will remain an issue due to the limitations set out in the *SPEECH Act*.<sup>382</sup>

#### *To whom notice-and-notice-plus applies*

Intermediaries that merely provide access to the internet (generally known as mere conduits or common carriers), such as ISPs solely in that capacity, should have no obligations under these recommendations. Rather, it is recommended that these rules target intermediaries that provide platforms for user-generated content. Concerning mixed-used sites, where the intermediary both hosts content and creates content, the question is one of publication as detailed in Parts II and III of this report. Where an internet provider *publishes* (in the recommended sense of intentionally conveying specific defamatory content), it would not be an intermediary for the purposes of these rules.

Search engines are unique, because while they are not platforms for user-generated content the way that social networking providers are, their search results provide links, snippets and suggested auto-complete terms that either are, or are based on, third party content. We recommend that search engines be treated similarly to those subject to the notice-and-notice system under the *Copyright Act*. This means that search engines would not have an obligation to forward a complaint. Rather, a defamation plaintiff could only obtain an injunction against the provider to remove search results. However, if a search provider is notified that content has been removed from the source, the search provider should remove the search result within a reasonable period of time.

#### c) The Rules

The recommended rules are based on international human rights principles, namely that rules should be prescribed by law with a legitimate aim, and comply with principles of necessity, proportionality, transparency, accountability and due process. The *Manila Principles*, explored above, are an example of a human rights-driven intermediary liability framework on which the below rules are partly modeled.

The basic principle is that an intermediary should not be required to evaluate the legality of third party content (see Section V.A, Principle 1). There are two issues with intermediaries acting in this capacity. First, it forces intermediaries to act as a private censors. Second, as The ECD evidences, it is difficult to pinpoint when an intermediary has knowledge that it is hosting

unlawful content. We conclude that this “knowledge problem” is largely insurmountable and recommend that knowledge be removed from the context of assessing intermediary conduct, which is possible through use of a notice-and-notice framework.

Bespoke to the defamation context, the recommended rules are as follows.

*Terms:*

*Complainant – the defamed who is seeking content removal*

*Intermediary – the internet platform for third party content*

*Third Party – the person who posted the allegedly defamatory content and who is subject to a notice of complaint*

- a) **Content of Complaint** – A complainant must include the following information in a notice of complaint (and an intermediary is not required to forward a notice that is incomplete):
- the allegedly defamatory content and internet identifier (identifying information the third party used for communication);
  - the legal basis for the claim that the content is defamatory;
  - what the complainant wants, such as content removal, an apology and so on;
  - the complainant’s contact information; and

- a statement that the complaint is made in good faith as to its accuracy (see d) below).

Further comment is required concerning the criteria that a notice of complaint should include the legal basis for the claim. The issue is how much information must be included in the notice. The ECD, for example, requires evidence of unlawfulness, which in a defamation context means more than mere evidence that content is defamatory. Rather, it requires evidence that the defamation is unlawful in the sense that there are no reasonably available defences.<sup>383</sup> While a notice-and-notice regime is different than the liability-based framework of the ECD, the question remains as to the level of detail necessary in the notice of complaint. We recommend that more than a simple allegation of defamation is necessary to forward a notice. This requires the complainant to state, for example, that the information is not true. It is not the goal to weigh down a complainant with legalese without the benefit, in most situations, of a lawyer. However, a complaints form might indicate points for a complainant to consider, modelled on the various elements of defamation and defences.<sup>384</sup>

- a) **Complaint** - Upon receipt of a notice of complaint that meets the content requirements in a), an intermediary must forward it to the third party. Failure to forward the complaint risks a fine, detailed below.
- b) **Content that should not be in a Complaint** – The complaint should not include settlement demands. This avoids the problem that arose with the notice-and-notice system under the *Copyright Act*, where copyright holders were using their notices to

demand money, and often in greater amounts than would have been available as damages.

- c) **Good Faith** – Taking into account allegations of abuse of the notice-and-notice system under the *Copyright Act* and successful use of the good faith clause in the DMCA, it is recommended that all notices of complaint include a declaration that the complaint is made in good faith as to its accuracy. The risk to a bad faith complainant is perjury or potentially a civil action for misrepresentation.
- d) **Administrative Burden** – Taking into account the risks of abuse of a complaints system, as evidenced with the notice-and-notice system under the *Copyright Act*, it is recommended that a small administrative fee be permissible for processing complaints. This recommendation is made with some trepidation. Most social networking providers currently process complaints for free. The permissibility of a small administrative fee acknowledges that codification of intermediary responsibility increases their burdens. Further, we acknowledge that administrative fees can also burden complainants. In *AT v Globe24h.com*,<sup>385</sup> a Federal Court characterized the defendant website, which among other things, republished court decisions for free online and searchable on Google, and charged a fee to remove cases from the website, as follows: “[the website’s] primary purpose is to incentivize individuals to pay to have their person information removed from the website.”<sup>386</sup> By permitting an administrative fee, the goal is to incentivize good faith complaints not incentivize new, exploitive business models. There is a risk that a fee might encourage a website owner not to manage its services responsibly, relying on

the fees to prompt action (and with more complaints, the operator receives more money).

- e) **Discretion** – The intermediary should have discretion to not forward a complaint, namely when the complainant fails to include all of the content detailed above, fails to pay a fee, fails to include a good faith clause, makes bulk removal requests or if the complaint is not plausible.
- f) **Content removal** – An intermediary should only disable access to content when the third party fails to respond to the notice within a specified period of time. Given how quickly reputation can be damaged, it is recommended that a third party is provided a short period of time to respond to a complaint, such as one to two days, although it is acknowledged that significant damage to reputation can occur within this timeframe. The failure of the intermediary to remove the content in such circumstances entitles the complainant to apply to the court to impose a fine, detailed below. The LCO should take note that larger platforms receive numerous complaints daily. For example, Facebook, receive approximately two million requests per week for content removal,<sup>387</sup> so a reasonable amount of time to process content removal requests is desirable.
- g) **Minimal Impairment** – Content removal should be narrowly targeted so as to avoid disproportionate interference with the right to free expression. In practice, this means that specific content should be removed, rather than entire URLs, threads, groups etc. Concerning geographic scope of content removal, where content removal can be limited in this way, we await the judgment of the Supreme Court of Canada in *Google v Equustek*<sup>388</sup> to give guidance as to the narrowness of such orders. It is recommended

that, in most circumstances, limiting removal geographically is appropriate and necessary for minimal impairment.

- h) Anonymity** – If the intermediary cannot identify the third party, the intermediary should, upon receiving the notice of complaint, remove the content within a reasonable period of time or else be subject to a fine.
- i) Reasons** – In situations where the intermediary removes content, reasons should be provided to the user, including identifying a put back procedure (see m) below).
- j) Communication that Content has been Removed or Challenged** - Intermediaries should communicate to users that content has been challenged and/or removed. Options include, but are not limited to, a notice or symbol.<sup>389</sup>
- k) Counter notice/Dispute** – The third party subject to the notice should be provided the opportunity to dispute the allegations in the notice of complaint. In practice, such a notice of dispute would allege that the content is lawful, whether it is because the content posted is true, a statement of opinion, and so on. Like the notice of complaint, a dispute notice form might indicate points for the third party to consider, modelled on the various elements of defamation and defences. Where a user disputes the allegations, the intermediary is not required to remove the content. The complainant in such a situation can seek a court order for content removal.
- l) Put Back Procedure** – The DMCA provides a put back procedure for content that has been disabled but is then challenged. It does not seamlessly apply to the rules herein, because content is not removed under these rules unless the third party fails to challenge the removal. However, in certain circumstances a third party might miss the

deadline for responding to a notice of complaint. In such circumstances, if a third party wishes to challenge the notice, the intermediary should provide a put back procedure, where technically feasible, for the content. This recommendation is made, because the content will have been removed without judicial authority.

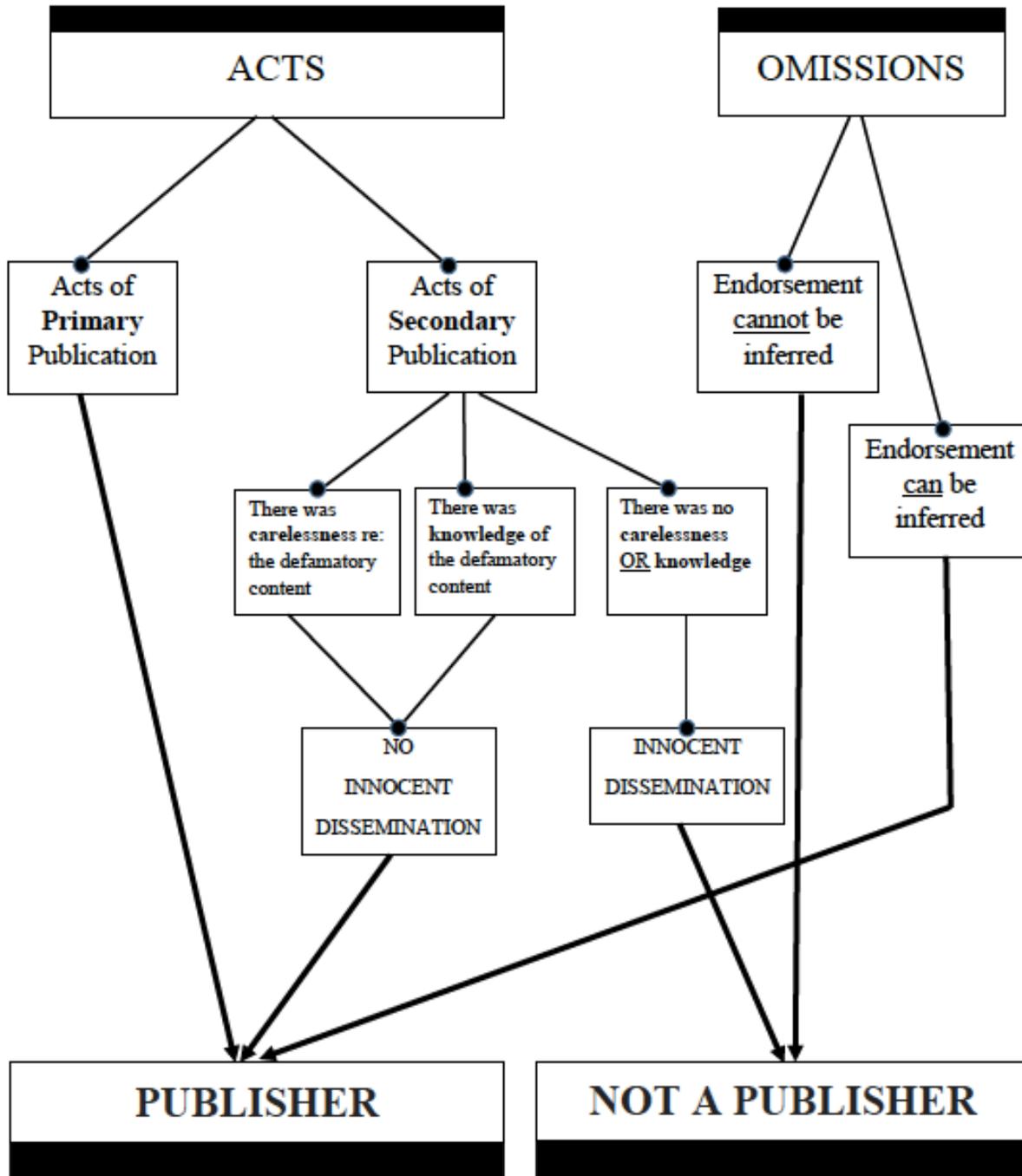
- m) **Court Order** – Except in the narrow situations described above, namely where the third party has not responded to the notice of complaint, an intermediary should only remove content via court order.
- n) **Transparency** – It is worth highlighting explicitly that transparency is critical to a legitimate, human rights-compliant intermediary regime. These rules emphasize transparency of processes and decision-making, for complainants, third parties and users seeking to access content generally. Intermediaries should be obligated to publish their content restriction policies, including annual reports detailing restriction practices (both state and private requests).<sup>390</sup>
- o) **Monitoring** - Intermediaries should have no obligation to monitor for defamatory content. This recommendation is consistent with international human rights principles, in particular, related privacy concerns. In addition, a monitoring system burdens the intermediary and places it in the role of censor. Most regulatory models do not impose monitoring obligations, although it is recommended that draft laws explicitly exclude both general and specific monitoring. This avoids the confusion between the two concepts evident in the ECD regime.
- p) **Sites Primarily devoted to unlawful content or soliciting content** – We recommend against an exception to these rules for sites that are primarily devoted to unlawful

content or that solicit content. As noted in *Jones*,<sup>391</sup> discussed above, it is difficult to delineate the differences between legitimate sites soliciting, for example, consumer reviews, and the site that was the subject of that litigation. If the LCO considers such a provision, we recommend narrowly targeting sites that are devoted to or solicit comments that defame individuals, leaving intact sites that provide platforms for business reviews.<sup>392</sup>

- q) **Self-Regulation** - There should be no penalty for an intermediary managing abusive content on its services. However, intermediaries should manage their services in compliance with the duty to respect human rights as set out in the United Nations Guiding Principles.<sup>393</sup> It is the state's duty to protect human rights. This might entail the state fulfilling this obligation by codifying a requirement that intermediary content restriction procedures comply with human rights principles (e.g. prescribed by law, necessity, proportionality, transparency, accountability and due process). This might be effected through t) below.
- r) **Fine** – If an intermediary fails to comply with these rules, a complainant's only remedy should be an order by a court imposing a fine. We make no recommendations on the appropriate amount for such a fine, although note that the *Copyright Act* sets statutory damages in the amount at \$5,000-10,000. We recommend that a court have discretion in determining the appropriate amount: baselines or ranges are perhaps inappropriate in a defamation context. In particular, see t) below.
- s) **Corporate Responsibility** - In order to encourage responsibility, it is recommended that an intermediary's terms of service and other management of content on its services,

such as its remedial mechanisms for disputes, be taken into account in assessing the suitability or amount of a fine. Similar clauses, for different purposes, and not without controversy, are observable in s. 40 of the UK's *Crime and Courts Act*<sup>394</sup> (costs are not awarded to news publisher defendants that are members of a press regulator),<sup>395</sup> and s. 417(5) the UK's *Companies Act*<sup>396</sup> (requiring companies discuss their CSR policies in their annual reports).<sup>397</sup> Such provisions are designed to encourage responsibility for a particular issue. A similar provision in defamation legislation for intermediaries would aim to incentivize responsible management of services, focusing on the procedures in place, while at the same time providing allowance for the imperfect nature of content restriction.

APPENDIX A  
COMMON LAW PUBLICATION FLOW CHART



**APPENDIX B**  
**INTERMEDIARY LIABILITY PROVISIONS**

**Europe: *Electronic Commerce Directive***

Article 12

"Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement."

Article 13

"Caching"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

#### Article 14

##### Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

#### Article 15

##### No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

#### **USA: *Communications Decency Act***

Section 230(c) provides:

##### **“(c) Protection for “Good Samaritan” blocking and screening of offensive material**

###### **(1) Treatment of publisher or speaker**

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.

**(2) Civil liability** No provider or user of an interactive computer service shall be held liable on account of—

**(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

**(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”

**USA: *Digital Millennium Copyright Act***

§ 512

**(a) Transitory Digital Network Communications.**—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

...

**(c) Information Residing on Systems or Networks At Direction of Users.**—

(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)

(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

...

**(d) Information Location Tools.**—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

(1)

(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

...

**(m) Protection of Privacy.**—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

### **Canada: Copyright Act**

#### Provisions Respecting Providers of Network Services or Information Location Tools

## Notice of claimed infringement

**41.25** (1) An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides

(a) the means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network;

(b) for the purpose set out in subsection 31.1(4), the digital memory that is used for the electronic location to which the claim of infringement relates; or

(c) an information location tool as defined in subsection 41.27(5).

(2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall

(a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;

(b) identify the work or other subject-matter to which the claimed infringement relates;

(c) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;

(d) specify the location data for the electronic location to which the claimed infringement relates;

(e) specify the infringement that is claimed;

(f) specify the date and time of the commission of the claimed infringement; and

(g) contain any other information that may be prescribed by regulation.

## Obligations related to notice

**41.26** (1) A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,

(a) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and

(b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.

(2) The Minister may, by regulation, fix the maximum fee that a person may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection.

(3) A claimant's only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.

(4) The Governor in Council may, by regulation, increase or decrease the minimum or maximum amount of statutory damages set out in subsection (3).

Injunctive relief only — providers of information location tools

**41.27 ...**

(3) If the [information location provider] receives a notice of claimed infringement, relating to a work or other subject-matter, that complies with subsection 41.25(2) after the work or other subject-matter has been removed from the electronic location set out in the notice, then subsection (1) applies, with respect to reproductions made from that electronic location, only to infringements that occurred before the day that is 30 days — or the period that may be prescribed by regulation — after the day on which the provider receives the notice.

...

**Brazil: *Marco Civil***

### **Section III**

#### **Liability for any damages arising from content generated by third parties**

Art. 18. The provider of connection to internet shall not be liable for civil damages resulting from content generated by third parties.

Art. 19. In order to ensure freedom of expression and prevent censorship, the provider of internet applications can only be subject to civil liability for damages resulting from content generated by third parties if, after a specific court order, it does not take any steps to, within the framework of their service and within the time stated in the order, make unavailable the content that was identified as being unlawful, unless otherwise provided by law.

§ 1. The referred court order must include, under penalty of being null, clear identification of the specific content identified as infringing, allowing the unquestionable location of the material.

§ 2. The implementation of the provisions of this article for infringement of copyright or related rights is subject to a specific legal provision, which must respect freedom of speech and other guarantees provided for in art. 5<sup>o</sup> of the Federal Constitution.

§ 3<sup>o</sup> The compensation disputes for damages arising from content made available on the internet related to the honor, reputation or personality rights, as well as the removal of related contents by internet application providers, can be presented to special small causes courts.

§ 4<sup>o</sup> The judge, including within the proceeding set forth in § 3<sup>o</sup>, can anticipate, partially or in full, the effects of the request contained in the initial petition, to the extent that undisputable proof exists of the fact, considering society's collective interest in the availability of the content

on the internet, as long as the requisits of truthiness of the author's claims, the reasonable concern of irreparable damage, or damage that is difficult to repair are met.

Art. 20. Whenever the contact information of the user directly responsible for the content, referred to in art. 19, is available, the provider of internet applications shall have the obligation to inform the user about the execution of the court order with information that allows the user to legally contest and submit a defense in court, unless otherwise provided by law or in a court order.

When requested by the user, who provided the content made unavailable, the provider of internet applications that carries out this activity in an organized, professional manner and for economic purposes, shall replace the content made unavailable for a note of explanation or with the text of the court order that gave grounds to the unavailability of such content.

Art. 21. The internet application provider that makes third party generated content available shall be held liable for the breach of privacy arising from the disclosure of images, videos and other materials containing nudity or sexual activities of a private nature, without the authorization of the participants, when, after receipt of notice by the participant or his/hers legal representative, refrains from removing, in a diligent manner, within its own technical limitations, such content.

The notice set forth above must contain sufficient elements that allow the specific identification of the material said to violate the right to privacy of the participant-user and the confirmation of the legitimacy of the party presenting the request.

## ACRONYMS

|       |  |
|-------|--|
| CDA   | <i>Communications Decency Act</i>                    |
| CJEU  | Court of Justice of the European Union               |
| CSR   | Corporate Social Responsibility                      |
| DMCA  | <i>Digital Millennium Copyright Act</i>              |
| EC    | European Commission                                  |
| ECD   | E-Commerce Directive                                 |
| HRC   | Human Rights Council                                 |
| ICCPR | International Covenant on Civil and Political Rights |
| ICP   | Information Content Provider                         |
| ICS   | Interactive Computer Service                         |
| ISP   | Internet Service Provider                            |
| ISS   | Information Society Service                          |
| NTD   | Notice and Takedown                                  |
| UDHR  | Universal Declaration of Human Rights                |
| UK    | United Kingdom                                       |
| US    | United States  |

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<sup>1</sup> There is no single, generally-accepted definition of internet intermediary (the categories are unclear and overlapping, and intermediaries often play multiple online roles). However, we adopt the Organisation for Economic Co-operation and Development (OECD)'s definition:

Internet intermediaries' bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties (OECD, *Economic and Social Role of Internet Intermediaries* (April 2010), online: <https://www.oecd.org/internet/ieconomy/44949023.pdf> (last accessed: 8 March 2017) [OECD], 9).

Intermediaries tend to include internet service providers, search engines, e-commerce platforms, social networking platforms, payment systems and domain name registrars (OECD 9-10).

A narrower conception of intermediaries, one more relevant to the defamation context, is that intermediaries facilitate communication from and between third parties. Such a definition excludes entities that produce original content, at least in relation to that aspect of their activities. (See the excellent discussion of what an intermediary is in Rebecca McKinnon, Elonnai Hickok and Hae-in Lim, *Fostering Freedom Online: the Role of Internet Intermediaries* (Paris: UNESCO Publishing, 2014), Part 1.3, and noting that most definitions of intermediary exclude content producers). Our usage does not strictly exclude content producers, such as online news media (see UNESCO report, section 1.3). News media with an online presence often operate in a hybrid role and teasing out the differing expectations between their media and intermediary functions is important (UNESCO report, 20). We include news media within our definition, but only concerning their *intermediary liability role*, namely vulnerability to liability and management of third party content posted on their websites (i.e. the comments sections). We endeavour to help tease out the differing expectations between their media and intermediary functions, although it is outside the scope of this project to attempt to define media.

<sup>2</sup> The defendant must have, "by any act, conveyed defamatory meaning to a single third party who has received it" *Crookes v Newton*, [2011] 3 SCR 269, 2011 SCC 47 [Crookes], 16, citing *McNichol v Grandy*, 1931 CanLII 99 (SCC), [1931] SCR 696, 699. "Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so 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

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the publisher makes it available and a third party has it available for his or her comprehension” (*Gutnick v Dow Jones*, [2002] HCA 56 (Australia) [*Gutnick*], 26.) See also Patrick Milmo et al, eds, *Gatley on Libel and Slander*, 11th ed (London, UK: Thomson Reuters, 2008) [*Gatley*], 6.1-187-88.

<sup>3</sup> *Gatley*, note 2, 188.

<sup>4</sup> *Gatley*, note 2, 199. For the relationship between the meaning of publication and accessory liability in defamation, see Joachim Dietrich, “Clarifying the Meaning of ‘Publication’ of Defamatory Matter in the Age of the Internet” (2013) 18 Media and Arts Law Review [*Dietrich*], 88.

<sup>5</sup> *Gatley*, note 2, 414-15.

<sup>6</sup> *Gatley*, note 2, 211.

<sup>7</sup> *Dietrich*, note 4, 90. See also *Grant v Torstar Corp.*, 2009 SCC 61, [2009] 3 SCR 640, 28.

<sup>8</sup> *Vizetelly v Mudie’s Select Library Ltd*, [1900] 2 QB 170 [*Vizetelly*].

<sup>9</sup> *Emmens v Pottle* (1885) QBD 354 [*Emmens*].

<sup>10</sup> Ribeiro J in *Oriental Press v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 [*Oriental Press*], 21.

<sup>11</sup> “[T]he breadth of activity captured by the traditional publication rule is vast” *Crookes*, note 2, 18.

<sup>12</sup> *Dietrich*, note 4, 92.

<sup>13</sup> *R v Clerk* (1728), 1 Barn. KB 304, 94 ER 207.

<sup>14</sup> *Emmens*, note 9.

<sup>15</sup> David Potts mentions this as a requirement of innocent dissemination in his book, *Cyberlibel: Information Warfare in the 21<sup>st</sup> Century?* (Markham: Irwin Law, 2011) [Potts], 279, citing *Vizetelly*, note 7, 172. *Gatley*, when discussing the defence, does not mention the ‘ordinary course of business’ requirement: *Gatley*, note 2, 227.

<sup>16</sup> *Dietrich*, note 4, 91.

<sup>17</sup> *Vizetelly*, note 8, 180.

<sup>18</sup> *Oriental Press*, note 10, 57.

<sup>19</sup> For example, a broadcaster was held not to be a secondary publisher (and therefore could not avail itself of an innocent dissemination defence) because it had the ability to “control and supervise the material” (*Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, [1996] HCA 38, 589-90.

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<sup>20</sup> *Crookes*, note 2, 20, citing Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed Markham: LexisNexis, 2006), 783-84. See also See Raymond Brown, *Defamation Law: A Primer* (Toronto: Carswell, 2013) [Brown], 117-118: those who play a subordinate role “include[e] printers, carriers, vendors, and other distributors.”

<sup>21</sup> *Oriental Press*, note 10, 32, *Crookes*, note 2, 20.

<sup>22</sup> *Emmens* note 9, 357; *Weldon v “The Times” Book Co*, (1911), 28 TLR 143 (CA). The Supreme Court of Canada has cited the rule in *obiter* in *Crookes*, note 2, 20. For a discussion of whether this means that the defendant must know the publication contains words with defamatory meaning, or that they are actually defamatory in the sense of not being defensible, see Matthew Collins, *The Law of Defamation and the Internet*, 3d ed. (London: Oxford University Press, 2010) [Collins], 17.09-17.15/298-301.

<sup>23</sup> *Vizetelly*, note 8, 178.

<sup>24</sup> In *Oriental Press*, note 10, Justice Ribeiro states at paragraph 31:

in both *Emmens* and *Vizetelly*, it was suggested that successful invocation of the innocent dissemination defence leads to the defendant being deemed not to have published the libel at all, I respectfully consider the better view to be that stated by Duncan and Neill in an earlier edition of their work, noted by Brennan CJ, Dawson and Toohey JJ in their joint judgment in *Thompson v Australian Capital TV Ltd*, namely, that: “...it would be more accurate to say that any disseminator of a libel publishes the libel but, if he can establish the defence of innocent dissemination, he will not be responsible for that publication.”

<sup>25</sup> *Oriental Press*, note 10, 32: “The rule that persons relying on the defence are liable unless they discharge the onus of proving lack of knowledge and the absence of negligence indicates that they must in principle be publishers, albeit in a subordinate role, for otherwise they could not be held liable at all since a fundamental constituent of the tort would be missing”. Collins also thinks that innocent dissemination is best thought of as a defence. Collins, note 22, 17.02-296.

<sup>26</sup> *Duffy v Google*, [2015] SASC 170 [*Duffy*], 178. See also Dietrich, note 4, 90-91 for more examples of differing views.

<sup>27</sup> Romer LJ remarked in *Vizetelly*, note 8, 179 that the case law on innocent dissemination was not “altogether logical or satisfactory on principle”.

<sup>28</sup> *Vizetelly*, note 8, 179.

<sup>29</sup> *Vizetelly*, note 8, 80.

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<sup>30</sup> *Byrne v Deane*, [1937] 1KB 818 [*Byrne*].

<sup>31</sup> *Byrne*, note 30, 837.

<sup>32</sup> For example, this was effectively the plaintiff's argument in *Urbanchich v Drummoyne Municipal Council*, (1991) Aust Torts Reports 81 [*Urbanchich*]. Further, although not interpreting *Byrne*, the British Columbia Supreme Court held that inaction after notice would necessarily amount to adoption of the statement. *Pritchard v Van Nes*, 2016 BCSC 686 [*Pritchard*], 108.

<sup>33</sup> In *Urbanchich*, note 32, 193, Hunt J stated:

In a case where the plaintiff seeks to make the defendant responsible for the publication of someone else's defamatory statement which is physically attached to the defendant's property, he must establish more than mere knowledge on the part of the defendant of the existence of that statement and the opportunity to remove it. According to the authorities, the plaintiff must establish that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of that statement on his property so that persons other than the plaintiff may continue to read it – in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement.

<sup>34</sup> *Byrne*, note 30, 838.

<sup>35</sup> *Byrne*, note 30, 838.

<sup>36</sup> *Oriental Press*, note 10, 48.

<sup>37</sup> See, e.g. *Murray v Wishart*, [2014] NZCA 461; [2014] 3 NZLR 722, 129 [*Wishart*]. See also the discussion in Section II(5) below, citing Ryan Turner, "Internet Defamation Law and Publication by Omission: a Multi-jurisdictional Analysis" (2014) 37(1) University of New South Wales Law Journal 34 [Turner], 50. This conclusion can also be drawn from the fact that the publication by omission doctrine has been applied in numerous cases in which there was no trespass, such as *Tamiz v Google* 920013] EWCA Civ 68 CA [*Tamiz Appeal*].

<sup>38</sup> *Oriental Press*, note 10, 48.

<sup>39</sup> Dietrich, note 4, 103.

<sup>40</sup> Collins, note 22, 6.49-117.

<sup>41</sup> Ryan Turner gives an example from *Wishart*, note 36, discussed in Section II(4) below (Turner, note 37, 46). We also suggest in Section II(6) that the *Pritchard* case, note 32, effectively conflates the secondary publisher and publisher by omission doctrines.

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<sup>42</sup> Recall that Romer LJ stated in 1900 that the case law on innocent dissemination was not “altogether logical or satisfactory on principle”, *Vitzetelly*, note 8, 179.

<sup>43</sup> Dietrich, note 4, 88.

<sup>44</sup> In *Davison v Habeeb & Ors* [2011] EWHC 3031 (QB) [*Davison*], 38, Parkes J stated:

It is necessary to see how relatively novel internet-bred concepts can be made to fit into the traditional legal framework. One tool is analogy. But it can be difficult to draw effective analogies between long established modes of publication like the newspaper and the television, and radically novel platforms like the enormous burgeoning Babel which [Google] hosts through Blogger.com.

Similarly, in *Wishart*, note 36, 126, after canvassing the relevant case law the New Zealand Court of Appeal stated:

Many of the decisions show an effort by the relevant Court to reach a conclusion by reference to an analogy in a non-internet circumstance. We agree that is a helpful form of reasoning, but it must be acknowledged that the analogies are only analogies, and there is room for debate about their appropriateness in particular cases.

<sup>45</sup> Scassa and Deturbide note that although internet intermediary liability in the US is now a matter of statute, “the common law principles and reasoning employed by the courts in these [early US] cases would be useful to a court in Canada if the issue of ISP liability for defamation is ever litigated in this country.” Teresa Scassa and Michael Deturbide, *Electronic Commerce and Internet Law in Canada*, 2d ed (Toronto: Wolters Kluwer, 2012) at 569.

<sup>46</sup> *Cubby v CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) [*Cubby*].

<sup>47</sup> *Cubby*, note 46, 140.

<sup>48</sup> *Stratton Oakmont Inc v Prodigy Services Co*, 1995 WL 323710 (NY Sup Ct 1995) [*Stratton*].

<sup>49</sup> See e.g. New Zealand Law Commission, “Law Commission Electronic Commerce Part 2: A basic legal framework” (NZLC R58, 1999), 250.

<sup>50</sup> *Communications Decency Act*, 47 USC § 230 [CDA]. This is according to *Zeran v America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 US 937 (1998), [*Zeran*] 331.

<sup>51</sup> *Godfrey v Demon Internet Service* [2001] QB 201 [*Godfrey*], 1. Matthew Collins refers to *Godfrey* as “the first significant non-American decision concerning Internet intermediaries and publication” (Collins, note 22, 6.35-112).

<sup>52</sup> *Godfrey*, note 51.

<sup>53</sup> *Godfrey*, note 51, 12.

<sup>54</sup> *Godfrey*, note 51, 20.

<sup>55</sup> *Godfrey*, note 51, 26.

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<sup>56</sup> *Godfrey*, note 51, 33.

<sup>57</sup> See, e.g. *Tamiz Appeal*, note 37.

<sup>58</sup> *Gatley*, note 2, 218: “[*Tamiz*] casts doubt on the correctness of Morland J.’s decision [in *Godfrey*] – at least with regard to pre-notification publication”.

<sup>59</sup> *Bunt v Tilley*, [2006] EWHC 407 (QB) [*Bunt*].

<sup>60</sup> *Bunt*, note 59, 37.

<sup>61</sup> *Collins*, note 22, 6.49-117.

<sup>62</sup> *Collins*, note 22, 6.49-117.

<sup>63</sup> *Bunt*, note 59, 23.

<sup>64</sup> See note 7.

<sup>65</sup> *Crookes*, note 2.

<sup>66</sup> *Metropolitan International Schools v Designtecnica*, [2009] EWHC 1765 (QB) [*MIS*].

<sup>67</sup> *MIS*, note 66, 51.

<sup>68</sup> *Collins*, note 22, 6.51-118.

<sup>69</sup> *MIS*, note 66, 55.

<sup>70</sup> *MIS*, note 66, 55.

<sup>71</sup> [2012] EWHC 449 (QB) [*Tamiz Trial*].

<sup>72</sup> *Tamiz Appeal*, note 37.

<sup>73</sup> *Tamiz Appeal*, note 37, 50.

<sup>74</sup> *Gatley*, note 2, 6.29-225,

<sup>75</sup> *Gutnick*, note 2.

<sup>76</sup> *Gutnick*, note 2, 25.

<sup>77</sup> *Trkulja v Google Inc LLC & Anor (No 5)*, [2012] VSC 533 [*Trkulja*].

<sup>78</sup> *Trkulja*, note 77, 16.

<sup>79</sup> *Trkulja*, note 77, 18.

<sup>80</sup> *Trkulja*, note 77, 20.

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<sup>81</sup> *Trkulja*, note 77, 27.

<sup>82</sup> *Trkulja*, note 77, 29.

<sup>83</sup> *Trkulja*, note 77, 31.

<sup>84</sup> *Duffy*, note 25.

<sup>85</sup> *Duffy*, note 26, 173.

<sup>86</sup> *Duffy*, note 26.

<sup>87</sup> *Wishart*, note 37.

<sup>88</sup> *Duffy*, note 26, 180.

<sup>89</sup> *Duffy*, note 26, 204.

<sup>90</sup> *Duffy*, note 26, 1, 6 and 204.

<sup>91</sup> *Duffy*, note 26, 209.

<sup>92</sup> *Duffy*, note 26, 230.

<sup>93</sup> *Oriental Press*, note 10.

<sup>94</sup> As noted, this approach is generally rejected. *Turner*, note 37, 50 states:

With all due respect, Permanent Justice Ribeiro's narrow interpretation of *Byrne* is at odds with the longstanding approach to the publication by omission stream of defamation law, which has not been constrained by a requirement that the associated act of intentional publication be a trespass.

<sup>95</sup> *Gatley*, note 2, 226.

<sup>96</sup> *Wishart*, note 37.

<sup>97</sup> *Wishart*, note 37, 81.

<sup>98</sup> *Wishart*, note 37, 128-129.

<sup>99</sup> *Wishart*, note 37, 129.

<sup>100</sup> *Wishart*, note 37, 151.

<sup>101</sup> *Wishart*, note 37, 128-129. As discussed above, *Turner*, note 36, 46 also makes this point.

<sup>102</sup> *Carter v BC Federation of Foster Parents Assn*, 2005 BCCA 398 (CanLII), 42 BCLR (4th) [*Carter*].

<sup>103</sup> *Carter*, note 102, 13.

<sup>104</sup> *Crookes*, note 2.

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<sup>105</sup> *Crookes*, note 2, 25.

<sup>106</sup> *Crookes*, note 2, 18.

<sup>107</sup> *Crookes*, note 2, 21.

<sup>108</sup> *Crookes*, note 2, 41.

<sup>109</sup> *Crookes*, note 2, 56:

The question is whether the first component of publication needs to be reconsidered owing to the impact of new forms of communications media. In answering this question, it will of course be necessary to bear in mind the particular technological feature — the Internet hyperlink — at issue in the case at bar. At the same time, however, the answer must be adaptable to other modes of communication and to future technological change.

<sup>110</sup> *Crookes*, note 2, 59.

<sup>111</sup> *Crookes*, note 2, 85.

<sup>112</sup> *Crookes*, note 2, 88.

<sup>113</sup> *Crookes*, note 2, 89.

<sup>114</sup> *Crookes*, note 2, 90.

<sup>115</sup> *Crookes*, note 2, 86-87.

<sup>116</sup> *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, [2004] 2 SCR 427, 2004 SCC 45 [*SOCAN*].

<sup>117</sup> *Crookes*, note 2, 113-114.

<sup>118</sup> *Weaver v Corcoran*, 2015 BCSC 165 [*Weaver*], 269: “The parties are of the view this case raises, for the first time in Canada, the issue of whether one who operates an internet forum – in this case a reader comment area on the newspaper’s website – is liable for third-party postings.

<sup>119</sup> *Weaver*, note 118, 267 and 272.

<sup>120</sup> *Weaver*, note 118, 282: “[S]ome awareness of the nature of the reader posts is necessary to meet the test of publication.”

<sup>121</sup> *Weaver*, note 118, 284.

<sup>122</sup> *Weaver*, note 118, 273, 283.

<sup>123</sup> *Weaver*, note 118, 284.

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<sup>124</sup> *Niemela v Malamas*, 2015 BCSC 1024 [*Niemela*].

<sup>125</sup> *Niemela*, note 124, 62.

<sup>126</sup> *Niemela*, note 124, 85.

<sup>127</sup> *Niemela*, note 124, 94.

<sup>128</sup> *Niemela*, note 124, 95.

<sup>129</sup> *Niemela*, note 124, 99.

<sup>130</sup> *Niemela*, note 124, 101.

<sup>131</sup> *Niemela*, note 124, 108.

<sup>132</sup> *Pritchard*, note 32.

<sup>133</sup> *Pritchard*, note 32, 78-84.

<sup>134</sup> *Pritchard*, note 32, 91.

<sup>135</sup> *Pritchard*, note 32, 108.

<sup>136</sup> *Pritchard*, note 32, 109.

<sup>137</sup> *Pritchard*, note 32, 110.

<sup>138</sup> Emily Laidlaw, “*Pritchard v Van Nes*: Imposing Liability on Perpetrator Zero of Defamatory Facebook Posts gone Viral”, ABlawg.ca, online: [http://ablawg.ca/wp-content/uploads/2016/05/Blog\\_EL\\_Pritchard\\_May2016.pdf](http://ablawg.ca/wp-content/uploads/2016/05/Blog_EL_Pritchard_May2016.pdf) (last accessed 11 February 2017).

<sup>139</sup> *Pritchard*, note 32, 78 cites Raymond Brown, *The Law of Defamation in Canada*, 2d ed (Scarborough: Carswell, 1994), 348-350 for the proposition that one is liable for another’s republications if they are the natural and probable consequence of the original publication. However, Brown also agrees with *Duncan & Neill on Defamation* (Brian Duncan, *Duncan and Neill On Defamation*, 2d ed. (London: Butterworths, 1983), 40) that “original publishers are not liable for any republication *merely* because it was the natural or probable consequence of the original publication.” This is because it would lead to too great a scope of liability.

As a practical matter, it can be reasonably anticipated that if something of general interest is published, it will be repeated by at least one other person and probably by a large number of persons. In fact, the more devastating the revelation is of the plaintiff’s reputation, the faster the information will travel. Nevertheless, the courts seldom impose liability on the original publisher solely for that reason. (7.5(4)).

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<sup>140</sup> *Nazerali v Mitchell*, 2016 BCSC 810, 2016 CarswellBC 1263.

<sup>141</sup> Potts, note 15, 311.

<sup>142</sup> Turner, note 37, 46 notes that this error was made in the trial decision in *Wishart*, note 36:

Courtney J conflated the positive act and omission streams of defamation law. ... [She] concluded that '[a] test that requires actual knowledge of the defamatory statement would be inconsistent with *Emmens v Pottle*.' Yet, there is a central difference between *Emmens* and the circumstances of an entity publishing the comments of a third party by omission. *Emmens* involved a publication occurring by way of a positive act of distribution, rather than a publication by way of omission, and ought to be confined to the positive act stream of publication. A contrary conclusion would give rise to an unduly broad imposition of liability on internet platform hosts and operators, who would not necessarily be protected by the defence of innocent dissemination.

<sup>143</sup> *Defamation Act, 1996*, c 31 [UK 1996 Act].

<sup>144</sup> *Defamation Act, 2013*, c 26 [UK 2013 Act].

<sup>145</sup> EU Electronic Commerce Regulations 2002, SI 2002/2013 [*E-Commerce Regulations*].

<sup>146</sup> See *MIS*, note 66, 70.

<sup>147</sup> UK 1996 Act, note 143, 1(2).

<sup>148</sup> Michael Deturbide, "Liability of ISPs for Defamation in the US and Britain: Same Competing Interests, Different Responses" (2000) 3 *The Journal of Information, Law and Technology (JILT)* [Deturbide], 14.

<sup>149</sup> UK Act 2013, note 144, s. 5(3).

<sup>150</sup> UK Act 2013, note 144, 10(1).

<sup>151</sup> Article 19, "Internet Intermediaries: Dilemma of Liability" (2013), 7, online: [https://www.article19.org/data/files/Intermediaries\\_ENGLISH.pdf](https://www.article19.org/data/files/Intermediaries_ENGLISH.pdf) (last accessed: 14 February, 2017) [Article 19]. Article 19 created three categories, but we suggest there are five, because of Canada's notice-and-notice system, which is the type of liability regime Article 19 recommends in the report, and based on categories created by the Association of Progressive Communications, "Frequently asked questions on internet intermediary liability" (May 2014), online: <https://www.apc.org/en/pubs/frequently-asked-questions-internet-intermediary-l> (last accessed: 14 February 2017) [Association of Progressive Communications].

<sup>152</sup> Article 19, note 151, 7.

<sup>153</sup> 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 [ECD] .

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<sup>154</sup> ECD, note 152, articles 12-14.

<sup>155</sup> s. 512. For this framing of approaches see Article 19, note 151, 7.

<sup>156</sup> Pub L No 105-304, 112 Stat 2860 (1998). The horizontal versus vertical description is from Article 19, note 151, 7.

<sup>157</sup> See discussion in Emily B. Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Reponsibility* (Cambridge University Press, 2015), 4.2.1.

<sup>158</sup> Article 19, note 151, 7, footnote 17.

<sup>159</sup> Article 19, note 150, 7.

<sup>160</sup> CDA, note 50.

<sup>161</sup> RSC 1985, c C-42, amended by the *Copyright Modernization Act, 2012*, c 20 [*Copyright Act*]. The notice-and-notice provisions are sections 41.25-41.27.

<sup>162</sup> *Copyright Act*, note 161, s. 41.26(1)(a).

<sup>163</sup> *Copyright Act*, note 161, s. 41.26(3).

<sup>164</sup> Association of Progressive Communications, note 151.

<sup>165</sup> Association of Progressive Communications, note 151.

<sup>166</sup> ECD, note 153, article 15.

<sup>167</sup> See discussion in Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford University Press, 2016), part 3, safe harbours. See discussion below, IV.C.1.d.

<sup>168</sup> *Copyright Act*, note 161, s. 38.

<sup>169</sup> Seth F. Kreimer, "Censorship by Proxy: First Amendment, Internet Intermediaries, and the Problem of the Weakest Link" (2006-2007) 155 U. Pa. L. Rev. 11.

<sup>170</sup> Laidlaw, note 157.

<sup>171</sup> See the United Nations Guiding Principles drafted by John Ruggie, *Guiding principles on business and human rights: implementing the United Nations 'protect, respect and remedy' framework* (March 2011), and endorsed by the Human Rights Council, A/HRC/RES/17/4 (June 2011).

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<sup>172</sup> The First Optional Protocol creates a complaints mechanism to the Human Rights Committee (General Assembly resolution 2200A), while the Second Optional Protocol abolishes the death penalty (General Assembly resolution 44/128).

<sup>173</sup> RKM Smith, *International Human Rights* (Oxford University Press, 2007), 38.

<sup>174</sup> Human Right Council, CCPR/C/GC/34 (July 2011), para 12.

<sup>175</sup> Human Right Council, CCPR/C/GC/34, note 174, para 15,

<sup>176</sup> Human Right Council, CCPR/C/GC/34, note 174, para 43.

<sup>177</sup> ICCPR, article 19(3), note 151.

<sup>178</sup> The United Nations Special Rapporteur on Freedom of Opinion and Expression, and others, “Joint Declaration on Freedom of Expression and the Internet”, online: <https://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf> (last accessed: 14 February 2017), para 2 [Joint Declaration].

<sup>179</sup> Human Right Council, CCPR/C/GC/34, note 174, para 47.

<sup>180</sup> Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/17/27 (2011), para 43.

<sup>181</sup> La Rue, note 180 para 47.

<sup>182</sup> David Kaye *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/32/38 (2016).

<sup>183</sup> Kaye, note 182, para 2.

<sup>184</sup> Kaye, note 182, para 43.

<sup>185</sup> Kaye, note 182, para 44 and 51-54.

<sup>186</sup> Ruggie, note 171.

<sup>187</sup> Laidlaw, note 157, chapter 6. See Rebecca MacKinnon, and others, “Fostering Freedom Online: the role of intermediaries” (2014), *UNESCO Series on Internet Freedom*, online: <http://unesdoc.unesco.org/images/0023/002311/231162e.pdf> (last accessed: 14 February 2017).

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<sup>188</sup> *E-Commerce Regulations*, note 145. Note this report does not examine the separate data protection regime and its impact on intermediaries' legal obligations. For a comparison of approaches to intermediary liability between data protection, human rights and e-commerce regimes for privacy, see Bart van der Sloot, "Welcome to the Jungle: the Liability of Internet Intermediaries for Privacy Violations" (2015) 6 JIPITEC 211.

<sup>189</sup> As the European Commission explains, the Digital Single Market "is one in which the free movement of persons, services and capital is ensured and where the individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence": "Digital Single Market", online: <https://ec.europa.eu/digital-single-market/en/digital-single-market> (last accessed: 14 February 2017).

<sup>190</sup> See discussion in Riordan, note 167, paras 12.05-12.10.

<sup>191</sup> Information society service is defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of the recipient of the services": ECD, note 153, article 2(a), drawing its definition from Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC. Issues concerning this definition will not be explored here. For further information see Riordan, note 167, paras 12.58-12.66 and for the context of search engines, see Laidlaw, note 157, chapter 5.

<sup>192</sup> European Commission, *Online services, including e-commerce, in the Single Market: Accompanying the document*, SEC (2011) 1641, 26 [2011 Communication].

<sup>193</sup> See, for example, *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd*, [2012] EWHC 268 (Ch) and [2012] EWHC 1152 (Ch); *Twentieth Century Fox Film Corp & Ors v British Telecommunication Plc*, [2011] EWHC 1981 (Ch); and *Cartier International AG & Ors v British Sky Broadcasting Ltd*, [2016] EWCA Civ 658.

<sup>194</sup> ECD, note 132, article 13. This summary of the provision is provided by Riordan, note 167, para 12.100.

<sup>195</sup> ECD, note 153, article 13.

<sup>196</sup> ECD, note 153, article 14.

<sup>197</sup> Article 19, note 151. There are numerous scholarly articles examining intermediary liability in Europe and the UK. See, for example, Daithí Mac Síthigh, "The Fragmentation of Intermediary Liability in the UK" (2013) 8(7) JIPLP 521; Uta Kohl, "The rise and rise of online intermediaries in the governance of the Internet and beyond –

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connectivity intermediaries” (2012) 26(2-3) IRLCT; and Uta Kohl, “Google: the rise and rise of online intermediaries in the governance of the Internet and beyond (Part 2)” (2013) 21(2) IJLIT 187.

<sup>198</sup> Article 19, note 151, 13-14.

<sup>199</sup> European Commission, 2011 Communication, note 192, 25-26.

<sup>200</sup> European Commission, *A coherent framework for building trust in the Digital Single Market for e-commerce and online services*, COM (2011) 942, 13-14 [2011 Framework].

<sup>201</sup> European Commission, 2011 Framework, note 200, 13-14.

<sup>202</sup> European Commission, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM (2016) 288 [2016 Communication].

<sup>203</sup> Jens-Henrik Jeppesen, “European Commission Online Platform Proposals Puts Onus on Companies” (May 2016), online: <https://cdt.org/blog/european-commission-online-platform-proposals-puts-onus-on-companies/> (last accessed: 14 February 2017).

<sup>204</sup> 2016 Communication, note 202, 8.

<sup>205</sup> Riordan, note 167, para 12.114.

<sup>206</sup> Riordan, note 167, para 12. 114.

<sup>207</sup> (2010) C-236/08 (three conjoined cases C-236/08, C-237/08, C-238/08) [*Google France*].

<sup>208</sup> *Google France*, note 207, para 113.

<sup>209</sup> [2010] EWHC 690 (QB).

<sup>210</sup> [2009] EWHC 3205 (QB).

<sup>211</sup> Riordan, note 167, para 12.116. For examination of the line between a content provider and an intermediary see *Delfi AS v Estonia*, (2015)( Application no. 64569/09) (European Court of Human Rights, Grand Chamber).

<sup>212</sup> See discussion IV.C.2.

<sup>213</sup> Laidlaw, note 157, 192-193. For examination of search engines, see Joris van Hoboken, *Search Engine Freedom: on the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Services* (Amsterdam: Kluwer International, 2012).

<sup>214</sup> Riordan, note 167, para 12.130.

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<sup>215</sup> 2011 Communication, note 192, 33.

<sup>216</sup> Riordan, note 167, para. 12.131.

<sup>217</sup> E-Commerce Regulations, note 145.

<sup>218</sup> *Defamation Act 1996*, note 143.

<sup>219</sup> See generally Riordan, note 1667 paras 12.130-12.133.

<sup>220</sup> (2011), Case C-324/09 [*L’Oreal*].

<sup>221</sup> *L’Oreal*, note 220, para 120. See discussion in European Commission, 2011 Communication, note 191, 36-37.

<sup>222</sup> Riordan, note 157, para 12.137.

<sup>223</sup> See discussion of the DMCA in section IV.C.2.

<sup>224</sup> See 2011 Communication, note 192, 39-46.

<sup>225</sup> *E-Commerce Regulations*, note 145, regulation 22.

<sup>226</sup> 2011 Communication, note 192, 43-44.

<sup>227</sup> 2011 Communication, note 192, 45.

<sup>228</sup> *Davison*, note 44.

<sup>229</sup> *Davison*, note 44 para 68.

<sup>230</sup> *Tamiz* Trial, note 71.

<sup>231</sup> *Tamiz* Trial, note 71.

<sup>232</sup> Justice Eady stated,

[i]n this particular case Ms Evans highlights the absence of any “details of the unlawful nature of the activity or information in question”; in other words, no explanation is offered as to the extent of inaccuracy or the inadequacy of any defence. It may be thought by Mr. Tamiz to be implicit in his complaints that he was denying, outright, any allegation of theft or drug dealing, but it cannot be right that any provider is required, in the light of the strict terms of Regulation 19, to take all such protestations at face value. Clearly more is required for a provider to acquire a sufficient state of knowledge to be deprived of the statutory protection.

*Tamiz* Trial, note 71, para 60.

<sup>233</sup> *Tamiz* Appeal, note 37.

<sup>234</sup> Recall the generalist model of intermediary liability, discussed in part IV.A, which assesses liability against traditional civil and criminal laws, wherein intermediaries might risk, for example, accessory or vicarious liability for

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third party content. In contrast, the analysis here concerns a specific codification of intermediary liability, and the strengths and weaknesses of its framing of knowledge and notice.

<sup>235</sup> *Pritchard*, note 32.

<sup>236</sup> *Pritchard*, note 32, para 109.

<sup>237</sup> Riordan, note 167, paras 12.144-12.149.

<sup>238</sup> As Riordan commented about article 15, “[i]t is difficult to delineate precisely the boundary between monitoring which is specific and that which is general”: note 167, para 13.49.

<sup>239</sup> [2011] 3 CMLR 5 [*BT*].

<sup>240</sup> *BT*, note 239, para 114.

<sup>241</sup> *Digital Economy Act 2010 c 24*.

<sup>242</sup> *BT*, note 239, paras 115-116.

<sup>243</sup> *L’Oreal*, note 220.

<sup>244</sup> *L’Oreal*, note 220. See discussion in Riordan, note 167, para 13.51. See *GEMA v Rapidshare*, I ZR 80/12 (2013) where the Federal Court of Justice of Germany, imposed a narrow obligation to monitor once notified of a specific incident. In a series of cases in France, the Court of Appeal held Google liable for copyright infringement for videos uploaded to Google Video. Google had removed the videos upon notice that they were infringing, but the court held that Google should have taken steps to block future access to the videos. The court concluded this did not offend the prohibition on monitoring in article 15, because it was of a specific, not general nature: *Google Inc. c/ Compagnie des phares et balises*, Cour d’appel de Paris (2011); *Google Inc. c/ Bac Films, The Factory*, Cour d’appel de Paris (2011); *Google Inc. c/ Bac Films, The Factory, Canal+*, Cour d’appel de Paris (2011); *Google Inc. c/ Les Films de la Croisade, Goatworks Films*, Cour d’appel de Paris (2011). See Christina Angelopoulos, “Beyond the Safe Harbour: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe” (2013) Amsterdam Law School Legal Studies Research Paper No. 2013-72.

<sup>245</sup> *AY v Facebook (Ireland) Ltd & Ors* [2016] NIQB 76.

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<sup>246</sup> DMCA note 155, s. 512(m). See however, discussion of AnneMarie Bridy and Daphne Keller, *U.S. Copyright*

*Office Section 512 Study: Comments in Response to Notice of Inquiry* (March 2016), online:

[https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2757197](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2757197) (last accessed: 15 February 2017), 33, that there are ways around the no monitor rule.

<sup>247</sup> CDA, note 50.

<sup>248</sup> David S. Ardia, “Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act” (2010) 43 *Loyola of Los Angeles Law Review* 373 [Ardia], 429 and 481.

<sup>249</sup> DMCA, note 155.

<sup>250</sup> An interactive computer service (ICS) is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions”: CDA, note 50, s. 230(f)(2). Access software provider refers to a provider of software or enabling tools that “(a) filter, screen, allow or disallow content; (b) pick, choose, analyze, or digest content; or (c) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content”: CDA, note 50, s. 230(f)(4)(a)-(c).

<sup>251</sup> Ardia, note 248, 494.

<sup>252</sup> For a history of the CDA, see Ardia, note 248, 409-411.

<sup>253</sup> Ardia, note 248.

<sup>254</sup> *Stratton*, note 48.

<sup>255</sup> Ardia, note 248, 410. See Danielle Citron, *Hate Crimes in Cyberspace* (Cambridge: Harvard University Press, 2014), 170-172.

<sup>256</sup> Ardia, note 248, 432.

<sup>257</sup> CDA, note 50, s. 230(c)(1).

<sup>258</sup> CDA, note 50, s. 230(e).

<sup>259</sup> *Zeran* note 50. See discussion Ardia, note 248, 465.

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<sup>260</sup> *Zeran*, note 50.

<sup>261</sup> See, for example, *Blumenthal v Drudge and American Online, Inc*, 992 F. Supp. 44, 52 (USDC DC, 1998), where the court stated, “[b]ut Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.” See discussion of expansion of s. 230 by Brian Holland, “In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism” (2008) 56 *Kansas L. Rev.* 101, 102-108.

<sup>262</sup> *Ardia*, note 248, 466, citing *Global Royalties Ltd v XCentric Ventures LLC*, 544 F. Supp. 2d 929 (USDC AZ, 2008).

<sup>263</sup> *Ardia* note 248, 412.

<sup>264</sup> *Ardia*, note 248, 454.

<sup>265</sup> CDA, note 50, s. 230(f)(3).

<sup>266</sup> *Ardia*, note 248, 462.

<sup>267</sup> *Ardia*, note 248, 462.

<sup>268</sup> 521 F.3d. 1157 (9<sup>th</sup> Cir., 2007) [*Fair Housing Council*].

<sup>269</sup> *Fair Housing Council*, note 268, 3462.

<sup>270</sup> Applied in, for example, *FTC v Accusearch, Inc.*, 570 F.3d 1187 (10th Cir., 2009), discussed below [*Accusearch*].

<sup>271</sup> *Fair Housing Council*, note 268, 3457.

<sup>272</sup> *Fair Housing Council*, note 268, 3464. Judge Kozinski makes the further point at footnote 24, “[r]equiring website owners to refrain from taking affirmative acts that are unlawful does not strike us as an undue burden. These are, after all, businesses that are being held responsible only for their own conduct; there is no vicarious liability for the misconduct of their customers.”

<sup>273</sup> The court artfully described it as: “close cases...must be resolved in favour of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged – or at least tacitly assented to – the illegality of third parties”: *Fair Housing Council*, note 268, 3474.

<sup>274</sup> See discussion in *Ardia*, note 248, 464.

<sup>275</sup> *Accusearch*, note 270.

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<sup>276</sup> *Accusearch*, note 270, 22.

<sup>277</sup> 521 F3d 1157 (6th Cir. June 16, 2014) [*Jones*].

<sup>278</sup> *Jones*, note 277, 20.

<sup>279</sup> *Jones*, note 277, 21.

<sup>280</sup> Eric Goldman, “WTF is Going on with Section 230?-Cross v. Facebook”, *Technology and Marketing Law Blog* (June 2016), online: <http://blog.ericgoldman.org/archives/2016/06/wtf-is-going-on-with-section-230-cross-v-facebook.htm> (last accessed 15 February, 2017).

<sup>281</sup> *E-Ventures Worldwide, LLC v Google, Inc*, 2016, WL 2758889 (MD Fla, 2016).

<sup>282</sup> *Diamond Ranch Academy, Inc v Filer*, 2016 WL 633351 (D Utah, 2016).

<sup>283</sup> *Maxfield v Maxfield*, 2015 WL 9809777 (Conn Superior Ct, 2015). Note this case involves an email forwarding a screenshot, not a hyperlink. For a discussion of the case see Eric Goldman, “Section 230 Doesn’t Protect Email Forwarding of Screenshoted Tweets?—Maxfield v. Maxfield” (January 2016), online: <http://blog.ericgoldman.org/archives/2016/01/maxfieldvmaxfield.htm>.

<sup>284</sup> *Vision Security LLC v Xcentric Ventures LLC*, Case No. 2:13-cv-00926-CW-BCW (D Utah, 2015).

<sup>285</sup> Citron, note 255, 177.

<sup>286</sup> Citron, note 255, 177.

<sup>287</sup> Ryan Gerdes, “Scaling Back s. 230 Immunity: Why the Communications Decency Act should Take a Page from the Digital Millennium Copyright Act’s Service Provider Immunity Playbook” (2011-2012), 60 Drake L Rev 653, 672-675.

<sup>288</sup> Gerdes, note 287, 674. Gerdes notes that the DMCA, discussed in the following section, requires this type of identification system for repeat infringers: 674.

<sup>289</sup> Gerdes, note 287, 674-675.

<sup>290</sup> See discussion, Holland, note 261, 124 and section IV.

<sup>291</sup> See discussion in Citron, note 255, 170-172.

<sup>292</sup> Holland, note 261, section IV, in particular 127-128.

<sup>293</sup> See discussion Holland, note 261, 124-125.

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<sup>294</sup> Gerdes, note 287, 667.

<sup>295</sup> Gerdes, note 287, 667.

<sup>296</sup> Ardia, note 248, 411.

<sup>297</sup> See discussion Gerdes, note 287, 667-668.

<sup>298</sup> Holland, note 261, 125.

<sup>299</sup> Gerdes, note 287, 667, footnote 116, quoting Ali Grace Zieglowsky, "Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act" (2010) 61 Hastings LJ 1307, 1313-1314.

<sup>300</sup> Bridy and Keller, note 246, 35-36. In footnote 123, they quote Joseph William Singer, "[t]he Rules of Reason in Property Law" (2013) 46 UC Davis L Rev 1369, 1374: "[s]tandards promote useful moral reflection and deter socially destructive behavior. Fuzziness at the edges of rules often prompts better decision making, both by market actors and by judges."

<sup>301</sup> See Bridy and Keller discussion, note 246, 35-36.

<sup>302</sup> Bridy and Keller, note 246, 2.

<sup>303</sup> Bridy and Keller, note 246, 20.

<sup>304</sup> Bridy and Keller, note 246, 13, 15.

<sup>305</sup> Bridy and Keller, note 246, 15-16.

<sup>306</sup> See discussion Bridy and Keller, note 246, 16-17. They argue against a shift to monitoring, partly because the costs of the system would shift from the copyright holder to the service provider, and because of the negative impact on internet users' rights resulting from the likely human and automated monitoring that would result.

<sup>307</sup> *Arista Records LLC v Usenet.com, Inc*, 633 F. Supp. 2d 124 (SDNY 2009).

<sup>308</sup> *Perfect 10 Inc v CCBill (Perfect 10 II)*, 488 F. 3d 1102 (9<sup>th</sup> Cir 2007). With regard to the policy, the court stated, 6546, "[w]e hold that a service provider 'implements' a policy if it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications." See also discussion in Gerdes, note 287, 669-671.

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<sup>309</sup> See *Viacom International Inc v YouTube, Inc*, 676 F3d 19 (2<sup>nd</sup> Cir 2012) [*Viacom*] concerning Google's liability for third parties uploading copyright infringing videos to YouTube [*Viacom*]. For a discussion of the lower court decision see Gerdes, note 284, 670-671.

<sup>310</sup> *Viacom*, note 309, para 10.

<sup>311</sup> Gerdes, note 287, 670.

<sup>312</sup> Bridy and Keller, note 246, 23, 44 and Appendix B. For a link to other studies, see: <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws> (last accessed: 15 February 2017).

<sup>313</sup> See, for example, Christian Ahlert, Chris Marsden, and Chester Yung, *How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Regulation*, online: <http://pcmlp.socleg.ox.ac.uk/wp-content/uploads/2014/12/liberty.pdf> (last accessed: 15 February 2017).

<sup>314</sup> Bridy and Keller, note 246, 23.

<sup>315</sup> Bridy and Keller, note 246, 23.

<sup>316</sup> Bridy and Keller, note 246, 23.

<sup>317</sup> Bridy and Keller's recommendations are reproduced verbatim using italics, with additional commentary by the authors.

<sup>318</sup> See Bridy and Keller, note 246, 31-32.

<sup>319</sup> Bridy and Keller, note 246, 24-25.

<sup>320</sup> The provisions were part of several amendments to Canada's *Copyright Act*, note 161 (see *Copyright Modernization Act*, note 160). See Government of Canada, Office of Consumer Affairs, *Notice and Notice Regime*, online: <http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02920.html> (last accessed 15 February 2017) [Office of Consumer Affairs].

<sup>321</sup> Sections 41.25(1) and 41.25(2) provide that the notice should be in writing and include the following information: the claimant's name and address, the work for which copyright infringement is claimed, the claimant's interest in that work, the location data related to the infringement, and details about the infringement claimed, including date and time: *Copyright Act*, note 161.

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<sup>322</sup> Specifically, records must be retained for 6 months from the date the notice is received by the intermediary, or if the claimant begins proceedings against the user, for one year after receipt of the notice: *Copyright Act*, note 161, s. 41.26(a)(b).

<sup>323</sup> *Copyright Act*, note 161, s. 41.27.

<sup>324</sup> *Copyright Act*, note 161, s. 41.26(3).

<sup>325</sup> Article 19, note 151.

<sup>326</sup> Claire Brownell, "Pirates in your neighbourhood: How new online copyright infringement laws are affecting Canadians one year later" (12 February 2016), *Financial Post*, online: <http://business.financialpost.com/fp-tech-desk/pirates-in-your-neighbourhood-how-new-online-copyright-infringement-laws-are-affecting-canadians-one-year-later> (last accessed: 15 February 2017). Teksavvy reported that the software system cost \$500,000 and administration over the first year cost \$100,000.

<sup>327</sup> *Copyright Act*, note 161, s. 38.

<sup>328</sup> See discussion Michael Geist, "Rightscorp and BMG Exploiting Copyright Notice-and-Notice System: Citing False Legal Information in Payment Demands" (8 January 2015), online: <http://www.michealgeist.ca/2015/01/rightscorp-bmg-exploiting-copyright-notice-notice-system-citing-false-legal-information-payment-demands/> (last accessed: 15 February 2017).

<sup>329</sup> CBC, "University of Manitoba students receive 'extortion' letters over illegal downloads" (16 September 2016), *CBC*, online: <http://www.cbc.ca/news/canada/manitoba/copyright-letters-university-of-manitoba-1.3757554> (last accessed: 15 February 2017).

<sup>330</sup> Michael Geist, "Canada's Copyright Notice Fiasco: Why Industry Minister James Moore Bears Some Responsibility" (12 January 2015), online: <http://www.michaelgeist.ca/2015/01/canadas-copyright-notice-fiasco-industry-minister-james-moore-bears-responsibility/> (last accessed: 15 February 2015).

<sup>331</sup> See Office of Consumer Affairs, note 320.

<sup>332</sup> Michael Geist, "Misuse of Canada's Copyright Notice System Continues: U.S. Firm Sending Thousands of Notices With Settlement Demands" (5 March 2015), online: <http://www.michaelgeist.ca/2015/03/misuse-canadas->

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copyright-notice-system-continues-u-s-firm-sending-thousands-notices-settlement-demands/ (last accessed 15 February 2017) [Misuse of Copyright System].

<sup>333</sup> An English translation is available through the Association for Progressive Communications website, online: <https://www.apc.org/en/blog/marco-civil-brazilian-internet-bill-rights-english> (last accessed 15 February 2017).

<sup>334</sup> Nicolo Zingales, "The Brazilian approach to internet intermediary liability: blueprint for a global regime?" (2015) 4(4) Internet Policy Review.

<sup>335</sup> See Article 19, note 151. See also section IV.B. about international human rights principles.

<sup>336</sup> *Manila Principles on Intermediary Liability*, online: <https://www.manilaprinciples.org/principles> (last accessed: 15 February 2017) [*Manila Principles*].

<sup>337</sup> *Manila Principles*, note 336, Introduction.

<sup>338</sup> *Manila Principles*, note 336, Principle 1(a).

<sup>339</sup> *Manila Principles*, note 336, Principle 1(d).

<sup>340</sup> The need for this is advocated in Laidlaw, note 157, and is the critical third pillar of the United Nations Guiding Principles, Ruggie, note 171.

<sup>341</sup> Joint Committee on the Draft Defamation Bill, Draft Defamation Bill, House of Lords Paper No 203, House of Commons Paper No 930-1, Session 2010-12 (2011) 54.

<sup>342</sup> This point was made in the Scotland Law Commission (Discussion Papers), "Discussion Paper on Defamation" [2016] SLC 161 (DP) (March 2016) [Scotland LC]. Online: <http://www.bailii.org/scot/other/SLC/DP/2016/161.html#para7.1>, 7.35, citing John Gillen, "Defamation Act 2013: More to Admire than to Despise?", (2014) 23 Journal of the Commonwealth Lawyers' Association 25, 29 and Alexia Bedat, "Defamation Act 2013: The Section 5 Regulations, cumbersome and of questionable benefit?", (2014) Inform's Blog, 7 March 2014:

It has also been suggested that in practice the website operator may be required to take down the statement complained of on the basis of "half the story", given the limited information which need be supplied in a notice of complaint, thereby producing a chilling effect on freedom of expression.

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<sup>343</sup> Due to the confidential nature of the interviews, we are not identifying speakers by name. However, the interviewees were all either senior counsel for internet intermediaries or senior employees with experience of, or responsibility for, the company's legal or policy decisions relevant to intermediary liability.

<sup>344</sup> Daphne Keller, "Empirical Evidence of 'Over-removal' by Internet Companies under Intermediary Liability Laws", Stanford CIS Blog, 12 October 2015. Online <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.

<sup>345</sup> Andrew Scott. "Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance" (2016) [Scott], 2.63. Online: <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/report-on-defamation-law.pdf>.

<sup>346</sup> *Gutnick*, note 2.

<sup>347</sup> *Gutnick*, note 2, 125.

<sup>348</sup> See e.g. Scott, note 345, 2.59.

<sup>349</sup> In addition to considerable academic scholarship, see Taso Lagos, Seattle Times, "Social Media: The Public Sphere on Steroids" May 4, 2012, online: <http://www.seattletimes.com/opinion/social-media-8212-the-public-sphere-on-steroids/>

<sup>350</sup> ...Although I agree with my colleague that the most effective remedy for someone who has been defamed on line is to sue the person who created the defamatory material (para. 41), it may not always be possible to do so in the context of the Internet... If no remedy exists against "mere" hyperlinkers, persons defamed on line may in many cases not be able to protect their reputations (*Crookes*, note 2, 105).

<sup>351</sup> See e.g. Scott, note 345, 2.65.

<sup>352</sup> Turner, note 37, 61.

<sup>353</sup> *Slim v Daily Telegraph Ltd*, [1968] 2 QB 157, [1968] 1 All ER 497 at 508.

<sup>354</sup> Scott, note 345, 2.54.

<sup>355</sup> Oriental Press, note 10, 57.

<sup>356</sup> Turner, note 37, 41.

<sup>357</sup> Turner, note 37, 55.

<sup>358</sup> Scott, note 345, 2.62.

<sup>359</sup> Scott, note 345, 2.59.

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<sup>360</sup> Scott note 345, 2.59.

<sup>361</sup> Scott, note 345, 2.62.

<sup>362</sup> Turner, note 37, 55.

<sup>363</sup> *Pritchard*, note 32, 108.

<sup>364</sup> *Pritchard*, note 32, 108.

<sup>365</sup> In *Trkulja*, the Court stated:

In any event, Google Inc’s submissions overlook the fact that in order to establish the defence of innocent dissemination it had to establish not only that it did not know that the matter was defamatory, but also that it ought not reasonably to have known of that matter and that such lack of knowledge was not due to any negligence on its part. The jury may well have concluded that Google Inc failed to establish that it ought not have reasonably known that the relevant matter was defamatory and/or that it had not established that any lack of knowledge on its part was not due to its negligence (*Trkulja*, note 77, 41)

<sup>366</sup> Dietrich, note 4, 95.

<sup>367</sup> Dietrich, note 4, 95.

<sup>368</sup> Dietrich, note 4, 95.

<sup>369</sup> Scotland LC, note 342, 7.7 citing Collins, note 22, 16.13. The Scotland LC report also notes the difficulty in interpreting what “moderating” means, 7.38.

<sup>370</sup> Note that although Andrew Scott, note 345, recommends that Northern Ireland adopt some of the “author, editor and publisher” language in its laws (2.74), that must be understood in the context of the advantage of Northern Ireland’s laws mirroring those of the United Kingdom, all things being equal.

<sup>371</sup> There was no consensus among interviewees whether s. 230 was the best framework for intermediary liability. Most interviewees discussed the notice-and-notice provisions of the *Copyright Act* positively, although some mentioned that it is currently flawed in its execution.

<sup>372</sup> See Part IV.B above. In particular, these recommendations are conscious of the recommendations by the former special rapporteur, Frank La Rue, note 180, para 47:

- Content removal only via a court order;
- Transparency of process and decisions;
- If possible, warning to users before restrictions are deployed;

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- Minimization of restrictions.

<sup>373</sup> As Martin Husovec commented in the European intellectual property context:

Intermediary liability, regulated by intellectual property laws is a type of *application-level regulation*. Any allocation of responsibilities to application developers also has a direct impact on the future of Internet-enabled innovation. Intermediary liability is thus an important part of *innovation policy*. It sets certain incentives for behavior and business models. Assuming the intermediaries behave rationally, they will always respond to this regulation by minimizing the cost of their assistance to right holders and adjusting their business models appropriately. This can be, of course, either good or bad depending on the incentives.

Martin Husovec, “Accountable, Not Liable: Injunctions Against Intermediaries” (May 2016), *TILEC Discussion Paper* (Tilburg University), 9.

<sup>374</sup> The United Nations Guiding Principles, note 171. It is also reflected in, for example, the UK’s Equality and Human Rights Commission, *A Guide to Business and Human Rights* (2014), online: <https://www.equalityhumanrights.com/en/publication-download/guide-business-and-human-rights> (last accessed: 15 February 2017).

<sup>375</sup> *Crookes*, note 2.

<sup>376</sup> The early case of *Zeran*, note 50, is illustrative here. As discussed above, the court’s interpretation of s. 230 in that case is consistently applied in the case law.

<sup>377</sup> *Crookes*, note 2.

<sup>378</sup> *Grant*, note 7.

<sup>379</sup> 2008 SCC 40, [2008] SCR420.

<sup>380</sup> See *Bridy and Keller*, note 246, 23.

<sup>381</sup> RSO 1990, c L 12.

<sup>382</sup> *Securing the Protection of our Enduring and Established Constitutional Heritage*, Public Law 111-223 (2010).

<sup>383</sup> This puts aside the question of whether the intermediary, in processing the complaint, requires this level of detail before disabling access to content.

<sup>384</sup> For complaints purposes this might shift the burden, wherein the complainant must not only make his or her case, but resolve any defences. The impact is softened, because this is only for the purpose of the notice of

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complaint, rather than shifting the burden in a cause of action generally. There is support for this approach with Ontario's *Protection of Public Participation Act*, 2015 SO c 23, which operates similarly.

<sup>385</sup> 2017 FC 114 [AT].

<sup>386</sup> AT, note 385, para 69.

<sup>387</sup> Jeffrey Rosen, 'The Delete Squad: Google, Twitter, Facebook and the New Global Battle over the Future of Free Speech' (29 April 2013), *New Republic*, online: [www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules](http://www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules) (last accessed: 15 February 2017).

<sup>388</sup> 2015 BCCA 265, 386 DLR (4<sup>th</sup>) 224, on appeal to the Supreme Court of Canada.

<sup>389</sup> Frank Pasquale, for example, examines the viability of a right of reply in two articles: "Rankings, Reductionism, and Responsibility" (2006) 54 Clev St L Rev 115 and "Asterisk Revisited: Debating a Right of Reply on Search Results" (2008) 3 J Bus & Tech L 61. See also Frank Pasquale, *The Black Box Society: the Secret Algorithms that Control Money and Information* (Cambridge: Harvard University Press, 2015), in particular chapter 3.

<sup>390</sup> Note the report of Ranking Digital Rights, *2015 Corporate Accountability Index*, online: <https://rankingdigitalrights.org/index2015/> (last accessed: 15 February 2017), which found that intermediaries provide minimal information, if any, concerning private requests for content removal compared to government requests.

<sup>391</sup> Jones, note 277.

<sup>392</sup> We acknowledge that it is difficult to distinguish between defaming a company and defaming individuals affiliated with a company.

<sup>393</sup> The Guiding Principles, note 171.

<sup>394</sup> 2013 c 22.

<sup>395</sup> The criticisms of s. 40 are legitimate. See, for example, the Index on Censorship, "What is Section 40 of the Crime and Courts Act 2013?" (6 January 2017), online: <https://www.indexoncensorship.org/2017/01/section-40-crime-courts-act-2013/> (last accessed: 15 February 2017).

<sup>396</sup> 2006 c 46.

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<sup>397</sup> Note criticism of this type of provision for encouraging corporate social responsibility for freedom of expression online: Laidlaw, note 156, 248. However, for the purposes of defamation legislation, and the narrow target on procedures, such a provision might be effective.