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25th

**ANNIVERSARY SPECIAL
LAW JOURNAL**

**IN
HONOUR**

of

**AARE
AFE BABALOLA**

[OFR. CON. FNIALS, FCI.
Arb, SAN, LLD]



[THE AARE BAAMOFIN OF YORUBA LAND]

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AARE AFE BABALOLA (OFR, CON, ENIMS, FCI, ARB, SAN, LL.D

(THE AARE BAAMOFIN OF YORUBA LAND)

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CHAPTER 3

DETERMINING LEGAL RESPONSIBILITIES IN DEFAMATION: CROSSING THE DIVIDING LINE BETWEEN REAL WORLD AND INTERNET JURISDICTION

ARAROMI, MARCUS AYODEJI (Ph.D.) *

Abstract

Defamation is a recognised exception to the exercise of right to freedom of expression under the law. With the advent of the Internet, defamatory statements can be communicated or published with seamless ease and having their consequences in geographically locatable territories. The Internet as a new and more effective medium of communication compared to the traditional communication systems, like newspapers, tabloids, letters, etc. presents special challenges to the existing legal regime for traditional defamation law, which include the determination of legal responsibilities of parties involved in the defamation matter and the problem of jurisdiction- given the ubiquitous nature of the Internet. This paper therefore seeks to address the peculiar challenges posed by this new medium, especially as to the phenomenon of 'publication' in determining the responsibilities of parties on the Internet and also the issue of court's jurisdiction in internet defamation. The paper will particularly engage the laws and approaches in some countries, especially the United Kingdom, the United State of America, Malaysia, India, China, Australia, Argentina and Nigeria, to identify the similarities and dissimilarities in their defamation legal regimes; and also to review the approaches adopted in addressing internet defamation. Nigeria in particular does not have specialised legal response to internet defamation just like many other developing jurisdictions. This paper seeks to address and analyse the approaches in other jurisdictions and distil a harmonious approach that can be adopted to address the deficit created in defamation laws in some jurisdictions that do not have legal response to internet based defamation.

1. Introduction

The Internet has become the common meeting point in the world and it is a viable platform for promoting globalisation. One of the beauties of globalisation is the ability to communicate easily. The Internet has provided a stage upon which people from different nations separated by physical borders can communicate with seamless ease. Interrelationship of man and his day to day activities could have legal implications. It is the role of the court to resolve legal tussles through the application of law and the machinery of justice to ensure free and fair resolution of conflicts. Promotion of justice system requires adequate application of the proper law to the case before the court.

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Internet users may see the Internet as a new region different from the real world but the activities on the Internet have implications that are felt in the real world sense which may have legal undertones. Internet data are strewn around the world though they may emanate from a particular or distinguishable jurisdiction. Assumption of jurisdiction and application of law may be easily determinable where the parties are resident within a designated country and the activities took place within that country. Where a party who is out-of-state carries out some activities on the Internet with consequences felt within the jurisdiction of a concerned State, it may be difficult to determine the appropriate court where a legal action may be commenced.¹ The phenomenon of cyberspace is an imaginary space different from a real or physical territory where cyber activities are carried out. Succinctly put in relation to cyber activities, cyberspace may seem to be a new province independent of the real-world the impact of internet activities are felt in the real world therefore the resolution of internet defamation cases must occur in a real world jurisdiction.²

At this juncture, defamation on the Internet will be considered in this work; whether such a misdemeanour creates a special problem which the extant law fashioned for physical world activities can address.

2. Right of freedom of expression under the law

According to the Black's Law Dictionary, "right" can be defined as "something that is due to a person by a just claim, legal guarantee or moral principle; a legally enforceable claim that another will do or will not do an act; a recognised or protected interest, violation of which is a wrong." There are some rights that are innate with man and are protected through the expressions of the law. There are rights which are inalienable and are classified as fundamental and are inherent in all human beings irrespective of their sex, age, creed, status, race, ethnicity, language, nationality, etc. and should not be deprived by any law or authority except in qualified circumstances. Part of the rights that are considered as fundamental is the right of freedom of expression codified in the law.³ Such a right can be exercised using any medium of communication, be it the traditional system of communication or the relatively nascent internet platform. Moreover, the right of freedom of expression is generally considered to be of universal application and it is promoted at the international level. Many international instruments have the right to freedom of expression enshrined in their letters. For instance, Article 9 of the Universal Declaration of Human Rights provides as follows:

Everyone shall have the right to freedom of expression: this shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.⁴

Furthermore, Article 9 of the African Charter on Human and Peoples' Rights states that:

1. Every individual has the right not only to receive information.
2. Every individual shall have the right to express and disseminate his opinion within the law.⁵

¹ Bosky, S. W. "Defamation in the Internet Age: Missouri's Jurisdictional Fight Begins with Baldwin v. Fischer-Smith" (2012) 56 *Saint Louis University Law Journal*, p. 588.

² Bosky, S. W, p. 587.

³ For instance, section 39(1) of the 1999 Constitution (as amended) of the Federal Republic of Nigeria, hereinafter referred to as the Constitution provides that "Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference."

⁴ Article 19 of the Universal Declaration of Human Rights 1948.

⁵ Article 9 of the African Charter on Human and Peoples' Rights 1986.

The International Convention on Civil and Political Rights (ICCPR) also provides for the right of individuals to hold opinions and right of freedom of expression without interference.⁶ Telecommunications and the internet have been described as veritable tools to ensure, not only the right to inform and right to communicate, but also the economic, political, educational and social equality for all the members of the society.⁷ Government that denies its citizenry access to telecommunication services doubtlessly generates a condition where its citizens are denied many potential advantages of basic and advanced communications which include healthcare, education, economic activities and benefit of participating effectively in the political process.⁸

From the provision of Article 19 of the Universal Declaration of Human Rights quoted above it is obvious that right of expression need not only be exercised orally but also in writing, in form of art or through any other media, including the Internet. In line with this, Yakubu posited that:

*The right to freedom of expression extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.*⁹

Freedom of expression must be given a pride of place in the society and it should be seen as proper tool in promoting the course of justice for democracy to thrive. There are some justifications for freedom of expression which include the need for the discovery of truth by open discussion; for expressing belief and political attitudes; for active participation in democracy; and as an avenue for free speech to encourage self-fulfilment and development.¹⁰

Put succinctly:

*Freedom of expression and free flow of information, including free and open debate regarding matters of public interest, even when this involves criticism of individuals, are of crucial importance in democratic society, for the personal development, dignity and fulfilment of every individual, as well as for the progress and welfare of society, and the enjoyment of other human rights and fundamental freedom.*¹¹

Therefore, exercise of freedom of expression has as one of its values opportunity for the governed to be a watchdog over the affairs of the government and to render the government accountable to the people.

The Internet functions as a viable platform for exchange of information and ideas. It serves as a giant dais for communication which attenuates, in fact, collapses and makes the physical boundaries negligible for free flow of information. Hence, freedom of expression plays a pivotal role in the political and legal analysis of the Internet. The Internet has been conceptualised as a free domain with unlimited potentials for individuals to express themselves and to access information or ideas from others.¹² More

⁶ Article 19(1) and (2) of the ICCPR, 16 December 1966.

⁷ Segura-Serrano, A., "Internet Regulation and the Role of International Law," (2006) 10 *Max Planck UNYB*, p. 263.

⁸ Segura-Serrano, A., "Internet Regulation and the Role of International Law," (2006) 10 *Max Planck UNYB*, p. 263.

⁹ Yakubu, J. A. *Press Law in Nigeria*, 1st ed. (Nigeria: Malthouse Press Ltd., 1999), 64.

¹⁰ Dheerajendra, P. "Freedom of Speech and expression : India v. America- A Study," (2010) *India Law Journal* Retrieved on February 17, 2016 from http://www.indiajournal.com/volume3/issue_4/article_by_dheerajendra.html

¹¹ ARTICLE 19, (July, 2000) "Defining Defamation: Principles on Freedom of Expression and Protection of Reputation" Global Campaign for Free Expression, Article 19, International Standards Series. P. 2. Retrieved on 14 February, 2016 from <https://www.article19.org/data/files/pdfs/publications/civil-defamation.pdf>

¹² Segura-Serrano, A., "Internet Regulation and the Role of International Law," (2006) 10 *Max Planck UNYB*, p. 261.

or less, the Internet serves as the cheapest means of carrying out long distance and the widest communication so far.

3. Is right to freedom of expression absolute?

At this juncture it is germane to consider whether the right to freedom of expression as guaranteed under available legal instruments are absolute. According to Yakubu:

The right is not absolute. It carries with it special responsibilities, and may be restricted on several grounds. For example, restrictions could relate to filtering access to certain Internet sites, the urging of violence or the classification of artistic material.¹³

In the case of *Patriotic Party v. Ghana Broadcasting Corporation*¹⁴ the Supreme Court of Ghana per Francois JSC held, quoting the U.S. Supreme Court, that speech concerning public affairs is more than self-expression; it is the essence of self-government. Therefore freedom of speech should not be extended to unbridled excesses. Where there is prescribed right there is also corresponding duty not to infringe the rights of others. As the popular saying 'the right to swing your hands ends where another person's nose begins.' This means that rights may sometimes not be absolute as it may be fettered or bridled by law if there is likelihood of infringement on the right or freedom of another person.

However, restriction on freedom of expression or information, including the right to protect the reputation of others, must be established as justifiable in a democratic society.¹⁵ Exercise of right of freedom of expression could fail a proportionality test where the benefit of protecting reputations significantly outweighs the harm to freedom of expression.¹⁶

The right to expression given at the international level is also not without restrictions. For instance, Article 19(3)(a)(b) and Article 20 of the ICCPR provide for exceptions to freedom of expression. Article 19(3) of the ICCPR provides that:

The freedom of expression carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by the law and necessary:

- (a) For respect of the rights or reputation of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

People must therefore be protected from statement or publication that is false and injurious to their reputation in the society.¹⁷ It is desirable that appropriate balance should be established between the right to freedom of expression and the need to protect reputation of others.

4. Defamation under the Law

It is germane to address the general principles of defamation as applicable in some jurisdictions which have the same legal implications regardless of the medium used. Defamation is a legal concept that tends to protect people from untrue statements that can damage their reputations. It is an imputation that is inclined at disparaging the victim and lowering him in the estimation of right thinking members of the society and may cause him to be shunned or avoided. On a general note, a defamation suit may be

¹³Yakubu, J. A. *Press Law in Nigeria*, 1st ed. (Nigeria: Malthouse Press Ltd., 1999), 57.

¹⁴ (2000) 20 WRN 163.

¹⁵ ARTICLE 19, n 12, 4.

¹⁶ ARTICLE 19, n 12, 4.

lost by the plaintiff if the defendant can prove that the defamatory statement in question is a true statement of fact. This defence is known as “justification” under the law of some common law jurisdictions, like Nigeria, the U.K., Ghana, etc. It should be noted, however, that under the Libel Act 1847 of Australia the defence of justification must be for public benefit, which largely modifies the common law position of mere justification.¹⁸

In Nigeria, there is no statutory law against civil defamation. Such a restriction to right to freedom of expression is only regulated by common law and Nigerian case law. In some countries, such a wrong is also regulated by statutory law. For instance, in the United Kingdom, aside the fact that defamation is largely regulated by the common law, the statutes regulating defamation include Defamation Act 1996 and Defamation Act 2013; and in Malaysia the statutory law is the Malaysian Defamation Act of 1957. In the United States defamation suit is traditionally brought under state tort law.¹⁹ Publication and republication of defamatory content is penalised under 558[b], Restatement Second of Torts 1977 in the United States. In most Australian jurisdictions, defamation is regulated both by common law and statutory law.

For there to be defamation it must be established that the defamatory statement has been published. In most jurisdictions, including the United States of America and England, publication requires that the statement has reached a third party aside the plaintiff in the suit. On the other hand, defamatory statement need not be communicated to a third party before it becomes actionable in Scotland.²⁰

Defamation is capable of two divisions in most common law jurisdictions like, the United Kingdom, Nigeria, Ghana, India, etc. It can either be libel or slander. In case of the first, the act is expressed in permanent form such as by writing, sign, picture, cartoon or electronic broadcast. In case of the other, it is only done through utterances or spoken word.²¹ However, the two forms of defamation cause the victim to be exposed to hatred, ridicule or contempt; or to be disparaged in his profession or trade.²² The Court in the case of *Corabi v. Curtis Publication Co.*,²³ defined libel as:

a method of defamation expressed by print, writing, pictures or signs; any publication that is injurious to the reputation of another, a false and unprivileged publication in writing of a defamatory material; a malicious written or printed publication which tends to blacken a person's reputation or to expose him to public hatred or ridicule, contempt or injures him in his business or profession.

In the case of libel the claimant just needs to prove that the libellous publication has been done without legal justification and need not established that he has suffered any resulting actual damage or

¹⁷ Segal Elizabeth “Internet Defamation Law: Update”, Continuing Legal Education Society of British Columbia (CLEBC), May 2013. Retrieved 17 February, 2016 from <https://cle.bc.ca/PracticePoints/TECH/14-InternetDefamationLaw.pdf>

¹⁸ The Libel Act 1847 first came into force in New South Wales in Australia and later replicated in identical terms in Queensland. The Act later formed an essential foundation in the landmark reform of Australian defamation law leading to the Uniform Defamation Acts 2006.

¹⁹ Madeline Johnson and Betsy D. Gelb, “Cyber-Libel: Policy Trade-offs” *Journal of Public Policy and Marketing*, (Spring 2002) Vol. 21, No. 1, Special Marketing Initiatives, p. 152.

²⁰ Crombie, K. F. “Scots Law Defamation on the Internet: A Consideration of New Issues, Problems and Solutions for Scots Law.” Retrieved on 17 February, 2016 from <http://www.scottishlaw.org.uk/journal/oct2000/def.pdf>. See *Mackay v. McChankie* 10 Rettie’s Session Cases 587.

²¹ See *Joe OdeyAgi v. First City Monument Bank Plc.* (2013) LPELR – 20708 (CA).

²² *Joe OdeyAgi v. First City Monument Bank Plc.* (2013) LPELR – 20708 (CA).

²³ 441 p.p. 432, 273 A. 2d 899, 904.

injury to his reputation as the law will presume such damage.²⁴ It should however be noted that these two classes of defamation do not exist in Australia. The *Libel Act* of 1847 first abolished the common law distinction between libel and slander which later form part of the general reform of the laws of defamation in Australia in order to have a uniform legal regime for the law of defamation.²⁵

The essential ingredients of defamation in Nigeria and the UK include:

- a. The defamatory statement or act must refer to the claimant;
- b. It must be defamatory or convey defamatory imputation;
- c. The publication must be false;²⁶
- d. It must be the defendant who published the word.²⁷

In the United States, most states have different definitions for defamation. However, the Restatement (Second) of Tort defines defamation to include the following elements: (a) a false and defamatory statement about another; (b) an unprivileged publication to a third party; (c) fault amounting

of special harm or the existence of special harm caused by the publication.²⁸ In addition, if the plaintiff is a public figure he has to prove that the defendant acted with actual malice.

As to what amounts to publication, the Supreme Court of Nigeria held *Nsirim v. Nsirim*²⁹ per Obaseki JSC that "It is the reduction of libellous matter to writing and its delivery to any person other than the person injuriously affected thereby that is publication." Therefore, mere writing without actual publication will not amount to libel.³⁰ Every republication of a libel is a new libel under the common law. If such publication or republication is made by different persons each person will be liable as if the defamatory statement had originated from him.³¹ The award of damages in a libel suit in Nigeria is largely based on the discretion of the court. Such discretion is exercised by consideration of the following factors:

- (a) The standing of the plaintiff in the society;
- (b) The nature of the libel
- (c) The mode and extent of the publication;
- (d) The refusal to retract or render an apology to the plaintiff;
- (e) The value of the local currency.³²

On the other hand, slander contains defamatory words that are transient and does not appear in permanent form, such as speech or gesture.³³ For the claimants to successfully sue for damages in slander cases they must prove that the slanderous statement caused them some loss.³⁴

²⁴ See *Cross Rivers State News Paper Corporation v. Oni* (1995) 1 NWLR (PT 3710), 270 or 1 SCNJ 218; *Biodun Oduwole and Ors. Tam David West* (2010) 10 NWLR (PT 1203) 598.

²⁵ See generally Mitchell Paul (2006) "The Foundations of Australian Defamation Law" (2010), *Sydney Law Review*, vol. 28, pp. 477-504.

²⁶ Note however that the claim of the truth of a content of alleged defamatory statement does not exonerate the defendant he must prove in addition that the publication is for public interest.

²⁷ Per Otisi, J.C.A. in *Agi Odey v. FCMB* (supra).

²⁸ Restatement (Second) of Torts § 558.

²⁹ (1990) 3 NWLR (PT 138) 285 at 298.

³⁰ *Hebditch v. Macilwaine and Ors* (1894) 2 Q.B. 54; *Thomson v. Lambert* (1938) 2 DLR 545 (SC Canada); *Bata v Bata* (1948) WN 366.

³¹ *Morse v. Times Republican Co.* (1904) 124 Iowa R 700.

³² See *Mayange v. Panoh Nig. Ltd.* (1994) 7 NWLR (PT. 358), 750; *Ziks Press Ltd. V. Alvanluku* 13 WACA p. 188.

³³ See Okunowo, O., "Constitutional Provisions of the Freedom of the Press and their Limitations in Nigeria" (2004) 2:2, *International Journal of Management Science and Humanities*, 145.

³⁴ See Kodilinye, G., *The Nigerian Law of Torts*, 1st ed. (Nigeria: Spectrum, 1982), pp. 134-140.

For the purpose of determining libel or slander through television or radio broadcast, section 166(1) the UK *Broadcasting Act 1990* treat broadcasting through the two media as libel. It provides that "For the purposes of the law of libel and slander (including the law of criminal libel so far as it relates to the publication of defamatory matter) the publication of words in the course of any programme included in a programme service shall be treated as publication in permanent form." Hence, if such cases are treated as libel it means that the claimant need not prove actual damage to succeed in the suit for damages. In Scotland, however, all forms of defamation are actionable without proof of special damage.³⁵

In some jurisdictions, like Malaysia, Thailand, Indonesia and Nigeria, publication of defamatory statement can both be civil injury and criminal offence. To take Nigeria as an example, section 373 of the *Criminal Code Act*³⁶ defines defamatory matter as "a matter likely to injure the reputation of any person by exposing him to hatred, contempt, or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation." Such defamatory matter may be expressed in spoken words or in any audible sounds, or in words legibly marked on any substance whatever, or by any sign or object signifying such matter otherwise than the words, and may be expressed either directly or by insinuation or irony.³⁷ Such defamatory matter could be in respect of a living or dead persons. In the case of dead persons, no prosecution shall be instituted without the consent of the Attorney-General of the Federation.³⁸

The definition of "publication" under the *Criminal Code* includes, in the case of spoken words or audible sounds, the speaking of such words or the making of such sounds in the hearing of the person defamed or any other person and in other cases, exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with intent that it may be read or seen by the person defamed or by any other person.³⁹ This definition shows that in criminal defamation publication can be by transient words spoken or temporary audible sounds i.e. words or sounds not recorded or written in permanent form. This definition is in contradistinction to publication under the civil wrong where a permanent representation of word or sound constitutes libel. Hence, the distinction between libel and slander through publication in civil defamation does not exist in criminal defamation in Nigeria.

According to section 375 of the Nigerian *Criminal Code Act*, any person who publishes any defamatory matter is guilty of a misdemeanour, and is liable to imprisonment for one year. However, the statute creates an exception to this by providing that such publication is not an offence if, at the time it was made, is for the benefit of the public and if the defamatory matter is true.⁴⁰ Moreover, any person who publishes any defamatory matter knowing it to be false is liable to imprisonment for two years.⁴¹ Section 378 provides for cases in which publication is absolutely privileged and section 379 provides for cases in which publication is conditionally privileged.

Section 60 of Chapter 7 the *Criminal Code Act*, which deals with sedition and seditious publication, seems to give extra jurisdictional application to defamation made of persons outside the Nigeria when it provides that any person who, without such justification or excuse as would be sufficient in the case of the defamation of a private person, publishes anything intended to be read, or any sign or visible representation, tending to expose to hatred or contempt in the estimation of the people of any

³⁵Khairun-Nisaa Asari and Nazli Ismail Nawang "A Comparative Legal Analysis of Online Defamation in Malaysia, Singapore and the United Kingdom" (2015) 4:1 *International Journal of Cyber-Security and Digital Forensics*, Vol. 4, Issue 1, p. 317.

³⁶ Cap. C 38, Laws of the Federation of Nigeria, 2004.

³⁷ Section 373 of the *Criminal Code Act*.

³⁸ Section 373 of the *Criminal Code Act*.

³⁹ Section 374 of the *Criminal Code Act*.

⁴⁰ Section 377 of the *Criminal Code Act*.

⁴¹ Section 375 of the *Criminal Code Act*.

foreign State a person exercising sovereign authority over that State is guilty of a misdemeanour, and is liable to imprisonment for two years. Publication, according to that Chapter is defined to include "all written or printed matter and everything, whether of a nature similar to written or printed matter or not, containing any visible representation, or by form, shape, or in any manner capable of suggesting words or ideas, and every copy and reproduction of any publication."⁴²

Also in China, defamation is generally treated as a civil wrong but if it is deemed to be of serious threat to public order or national interest it can be treated as criminal matter. Under Article 246 of the *Criminal Law of the People's Republic of China of 1997* provides that:

Whoever, by violence or other methods, publicly humiliates another person or invents stories to defame him, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.

The crime mentioned in the preceding paragraph shall be handled only upon complaint, except where serious harm is done to public order or to the interests of the State.

Note, however, that some jurisdictions like Ghana,⁴³ the U.S.A. and in England and Wales,⁴⁴ and do not encourage criminal defamation in their laws because of the chilling effects it has on the exercise of freedom of expression, and it does not enjoy much relevance in the contemporary Australian society.

5. Legal Approaches to Defamation on the Internet

Defamation is no longer a "sin" which only the journalists should be careful about; with the invention of the Internet which is a public domain and the social media, it is now possible for anybody to post information on the medium without necessarily being a media practitioner. Hence, everybody must be wary of the information they post on the Internet or social media. The possibility of sending and receiving information through the Internet is bounteous and it a good medium to reach very wide recipients across the globe with little efforts and resources. The Internet is also a tool for exercising ones freedom of expression and access to information. Someone can sit in the corner of his room and send information through the Internet to millions of recipients all over the world with a single click of a button on the Internet. In other words, the Internet defies definite physical boundaries which may be regulated by municipal laws. It suggests that traditional laws designed for offline media of communication may not perfectly suit communications through the Internet. It is therefore possible that censorship of the Internet in one jurisdiction may constitute an infringement on the right of persons to impart or receive information in other countries.⁴⁵

In another case, every repetition of a libel by the same publisher or another person is considered a fresh publication and thus creates a separate line of action or claim. This established common law principle is also applicable to internet publications. Publication of internet materials takes place when

⁴² Section 50 of the *Criminal Code Act*.

⁴³ Initially, criminal libel was part of the criminal jurisprudence of Ghanaian legal system as it was criminalised under sections 112 and 117(h) of the *Criminal Code of Ghana, 1960 (Act 29)* which were subsequently repealed by the Parliament as they were inconsistent with the spirit and letter of Articles 21(1)(a) and 162(1) and (4) of the 1992 Constitution.

⁴⁴ Criminal libel was fully abolished in England and Wales by the *Coroner and Justice Act 2009*.

⁴⁵ Dempsey, J., "Defamation in the Internet Age: Protecting Reputation without Infringing Free Expression"(2012), p.2. Retrieved on 17 February, 2016 from <https://cdt.org/files/pdfs/Defamation-Internet-Age.pdf>

such material is first put online and a reader accesses the text of the material. Thus, each access to the material constitutes a publication.⁴⁶ Adopting this approach to the operations of some social media platforms like the *Facebook* may create a very big problem. The configuration of *Facebook* is such that even if a defamatory statement is sent to your account or you access such a statement electronically through some website pages or other electronic platforms and you make your comment on the post, which perhaps may not be defamatory, or you click the “like” button from your account without necessarily sharing the post with your friends on the platform such a post will be seen automatically by all your friends and if your friends also act on the post the chains continue to grow *ad infinitum*. How then do we define actual publication on a communication platform like this?

In actual fact, the definition of publication adopted on other media is not a perfect designation for some communication platforms on the Internet. If the traditional definition of publication is adopted it may lead to a situation where a person may find himself culpable for an act which was not intentional by facilitating sending of defamatory message to another person. Perhaps it is necessary therefore to give a new interpretation to “publication” on the Internet.

It may not be unusual for media websites owners to invite content from users in form of chat rooms, newsgroup, forums, message boards, bulletin boards, and so on, which may be posted on their websites. In such a situation the website owners may be liable to defamatory statement posted online by the users just as a newspaper would be liable for publishing defamatory content. In some countries in Europe who are members of the European Community, such website owner may be excused under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 if he can prove that he did not know that the statement posted was defamatory; he was not aware of any circumstances or fact which would have told him it was defamatory; and he quickly removed such statement from the website when he became aware it was defamatory.

It is without doubts that online defamation involves a third party who is the Internet Service Provider as information sent on the Internet cannot be done singlehandedly by the user without an intermediary. Communications through Internet forums and e-mails are initially stored in a digital form in a computer server hosted by the Internet Service Providers for onward transmission to the recipients. The implication of this model of communication is that it is not only the writer of the defamatory statement that may be liable but also those who are involved in its publication and distribution.⁴⁷ It may be difficult sometimes to track down a defamer on the Internet especially when he makes use of pseudonym or he channels his defamatory communication through an “anonymous remailer,” which is a computer program that automatically strips any message of any identifiers. Be that as it may, it opens the Internet Service Providers to series of litigations where the actual authors of the defamatory contents cannot be found.

In order to avoid the escape tendency of real authors of defamatory statements on the online platforms, it is crucial that the users of the platforms are encouraged to supply their full identities before they will be allowed to join or operate on the platforms. Many developed countries make it a rule for every telephone user to get registered before being issues a phone line for the purpose of monitoring. With the recent SIM cards registration introduced into the regulation of the telecommunications industry in Nigeria by the Nigerian Communications Commission (NCC) all network carriers are encouraged to now accumulate the identities of their teaming customers. With this approach, it is most likely that the

⁴⁶ “Defamation and Malicious Falsehood.” Retrieved on 17 February, 2016 from http://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb_pearsonhighered/samplechapter/140825414X.pdf

⁴⁷ Gringras, C., *The Laws of the Internet*, 2nd ed., (UK: Butterworths LexisNexis, 2003), p. 124.

users of the Internet communication platforms can now be identified if an audit trail of their communication is taken through their registered telecommunication line. This would be in addition to tracing the IP addresses used in posting messages.

Internet platforms through which conversations can be exchanged by customers or visitors to the sites are strewn all over the world. Particularly, Nigeria also has its indigenous electronic platforms through which messages can be exchanged. Examples include 2go, soulsingle.com, wabiazo.com, nijaplanet.com, bestmuslim.com, lagosmeet.com, nigerianbulletin.com, nigerianweddingsguide.com, etc., in addition to the many blogs floated within the country. There is yet no decided case in which Internet defamation matter has been addressed in Nigerian court which makes it difficult to establish the approach of the court to this new regime of communication in determining the liability of writers and providers of electronic platforms for communication.

Due to the seeming similarity between online communication and the traditional communication system, there is tendency by lawyers and courts to use analogies to demonstrate the applicability of the existing law in the absence of precedent to aid development in this area.⁴⁸ The use of analogies in putting new situations within the scope of existing laws may not work in all cases as there may be fundamental difference between the two worlds. In the absence of existing case law in a jurisdiction, foreign judgments may be cited as persuasive authorities in order to decide potential cases in court.⁴⁹

In the United Kingdom (UK), it is apt to say that communications through the Internet represented in electronic format constitute a libel. According to the UK's *Broadcasting Act 1990*, section 166(1) provides that "For the purposes of the law of libel and slander (including the law of criminal libel so far as it relates to the publication of defamatory matter) the publication of words in the course of any programme included in a programme service shall be treated as publication in permanent form." Programme service has been defined as:

Any of the following services (whether or not it is, or is required to be, licensed under this Act), namely-

(a) any service which is a programme service within the meaning of *Communications Act 2003*;

(c) any other service which consists in the sending, by means of an electronic communication network (within the meaning of the *Communications Act 2003*), of sounds or visual images or both either-

(i) for reception at two or more places in the United Kingdom (whether they are so sent for simultaneous reception or at different times in response to request made by different users of service); or

(ii) for reception at a place in the United Kingdom for the purpose of being presented to the members of the public or to any group of persons.⁵⁰

⁴⁸ Crombie, K. F. "Scots Law Defamation on the Internet: A Consideration of New Issues, Problems and Solutions for Scot Laws." Retrieved on 17 February 2016 from <http://www.scottishlaw.org.uk/journal/oct2000/def.pdf>

⁴⁹ Crombie, K. F. "Scots Law Defamation on the Internet: A Consideration of New Issues, Problems and Solutions for Scot Laws." Retrieved on 17 February 2016 from <http://www.scottishlaw.org.uk/journal/oct2000/def.pdf>

⁵⁰ Section 201(1) of the UK *Broadcasting Act 1990*

This portrays that publications made through the Internet platforms, which could be in form of video, audio, image or even written communications, would constitute 'programme services' within the context of the provisions of the Act. However, such communications must be for the purpose of being received within the United Kingdom on the scope of the provision. Such communications undoubtedly is a libel within the context of the Act if defamatory in nature.

In the same vein, section 13(1) of the *Malaysian Defamation Act 1957* provides that reports or matters broadcast through the radio are equated with newspaper publications. Also, television broadcasts are treated by the court as libel.⁵¹ According to section 3 of the *Malaysian Defamation Act*, for the purpose of the law of libel and slander the broadcasting of words by means of radio communication shall be treated as publication in a permanent form. 'Word,' according to section 2 of the Act includes 'pictures, visual images, gestures and other methods of signifying meanings.' 'Broadcasting by means of radio communication,' on the other hand, means:

*publication by general reception by means of radio communication within the meaning of the Communications Act 1950, and includes the transmission simultaneously by telecommunication lines in accordance with licence granted in that behalf under the Telecommunications Act of words broadcast by means of radio communication.*⁵²

Defamatory materials published through online platforms can be regarded as libel as online contents are also transmitted through telecommunication lines.⁵³

It should be noted that in Australia the practical difficulty of drawing a distinction between libel and slander has brought the dichotomy under heavy criticism over a long period of time. Moreover, it also posed a grave problem in applying this distinction to new and emerging communications technologies.⁵⁴ For instance, in 2001 the Supreme Court of Western Australia in the case of *Mickelberg v 6PR Southern Cross Radio Pty Ltd*,⁵⁵ ruled that a simultaneous radio broadcast through a website of a radio station was not in a permanent form and therefore could not constitute a libel but a slander.

India has very clear legal provisions for addressing Internet defamation, albeit criminal in nature. It is provided in section 66A of the *Information Technology Act 2000* that:

Any person who sends, by means of a computer resource or a communication device, -
(a) any information that is grossly offensive or has menacing character; or
(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device,
(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages

⁵¹ See *Mohamed Azwan bin Haji Ali v. Sistem Televisyen (M) Bhd & Ors.* [2000] 4 MLJ 120; *YB Dato' Dr Hassan bin Mohamed Ali v. YB Mulia Tengku Putra bin Tengku Awang* [2010] 8 MLJ 269.

⁵² Section 2 of the *Malaysian Defamation Act 1957*.

⁵³ Khairun-Nisaa Asari and Nazli Ismail Nawang "A Comparative Legal Analysis of Online Defamation in Malaysia, Singapore and the United Kingdom" (2015) 4:1 *International Journal of Cyber-Security and Digital Forensics*, Vol. 4, Issue 1, p. 320.

⁵⁴ Rolph David "A Critique of National Uniform Defamation Laws" (2008), *Torts Law Journal*, Vol. 16, p. 213.

⁵⁵ (2001) 24 WAR 187 at [27]-[34].

shall be punishable with imprisonment for a term which may extend to three years and with fine.

In China, the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) jointly issued a new guideline in September, 2013 *The Interpretation of the Supreme People's Court and Supreme People's Procuratorate on Issues Pertaining to Application of Laws in Handling Criminal Cases of Using the Internet to Defame etc. (Joint Interpretation)* which sets out the criteria for sentencing offenders who use information network to defame. Information network, however, includes "the Internet, broadcasting networks, wired communication networks, mobile communication networks that use electronic devices such as computer, television, wired telephone and mobile as terminals, and local area networks to which the public has access."⁵⁶

The SPC and the SPP averred in their *Joint Interpretation* that defamation via the Internet will under Article 246 of the *Chinese Criminal Law 1997* amount to State action where such action causes mass incident; public disorder; ethnic or religious conflicts; unfavourable international repercussion; damages the image of the state and national interests; results in multiple cases of libel, creating adverse social impact; or otherwise causes serious harm to social order and state interests.⁵⁷

However, under the Inter-American System for the protection of human rights, criminal defamation offences have been found incompatible with the American Convention on Human Rights because of the chilling effects it has over the freedom of expression of individuals.⁵⁸ Therefore, many countries now have legislation to decriminalise such offences hinged on criminal defamation.⁵⁹ In addition, if criminal defamation is encourage for internet publications it will promote forum shopping in which a claimant will shop for a suitable and an aggressive forum where such an act is criminalised to institute his case in court.

There is therefore no uniformity in the treatment of communications through the new communications media such as the Internet amongst different jurisdictions. It is prudent to align with the provisions of the *United Kingdom Broadcasting Act 1990* which brings communications on internet platforms within the purview of a libel because of the apparent permanent nature of communications on the platforms.

At this juncture it is prudent to also examine if each publication in multiple publication of internet defamation will lead to different legal actions due to the nature of the communication topology on the platform and the approaches adopted in some countries.

5.1 The single publication rule under the laws of the UK and the USA

The actual basis of finding a suit against a defendant in a defamation case is not the writing of the defamatory material but publication of the material i.e., making known to a third party a defamatory statement will make a suit against the publisher. Since the contents on the Internet are strewn all over the world they are potentially accessible anywhere on the globe where internet access is found. Hence,

⁵⁶Woon-WahSiu, Julian Zou and Liang Tao, "Chinese Defamation Law" (2013). Retrieved from <http://documents.jdsupra.com/6476a589-ae5f-40e3-b06b-bd0a5a45355f.pdf>

⁵⁷Woon-WahSiu, Julian Zou and Liang Tao, "Chinese Defamation Law" (2013). Retrieved from <http://documents.jdsupra.com/6476a589-ae5f-40e3-b06b-bd0a5a45355f.pdf>

⁵⁸EduadorBertoni, "Determining Jurisdiction in Internet Defamation Cases: Insights on Latin America." Retrieved on 17 February, 2016 from http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Jurisdiction_Eduardo%20Bertoni.pdf

⁵⁹EduadorBertoni, "Determining Jurisdiction in Internet Defamation Cases: Insights on Latin America." Retrieved on 17 February, 2016 from http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Jurisdiction_Eduardo%20Bertoni.pdf

defamatory publication on the Internet may create a problem of multiple publications. This multiple publication rule was developed in the case of *Duke of Brunswick v. Harma*⁶⁰ where it was held that every publication of a defamatory statement constitutes new publication and leads to a separate cause of action.

Initially in the UK, this multiple publication rule was considered applicable to internet publication, even by a single author or publisher of a material of the same defamatory content.⁶¹ However, the enactment of UK *Defamation Act 2013* changed the legal landscape by introducing single publication rule for internet publications. Section 8 of the Act provides that the single publication rule applies if a person publishes a statement to the public or a section of the public and subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.⁶² It means that for this provision to apply the subsequent publication must be materially the same with the first publication.⁶³ It is also to be noted that under the Act, the single publication rule does not apply to a repeat or subsequent republication by a third party as each republication of a defamatory material will be considered as a fresh publication that can lead to a fresh cause of action.⁶⁴ It is also provided under the Act that the limitation time for bringing legal actions for defamation against any person, which is one year period as provided for in section 4A of the UK *Limitation Act 1980*, starts to count from the date of first publication and not subsequent publication.⁶⁵

From time, single publication rule is the basis for determining the liability of a defendant to defamation suit in the United States of America, and only the first publication gives rise to a cause of action, though subsequent publications may be taken into account in assessing damages for the plaintiff.⁶⁶

Following the UK's position it is unjustifiable to place undue responsibility on a third party who sends, for instance, a defamatory statement authored by another person and posted on the Internet or other media to the email account of a friend. Under the UK law, this will constitute a fresh publication by the third party. Therefore, many media platforms running on the Internet, like the *facebook*, may make the users guilty of defamation even without intentionally posting defamatory messages. The nature of the Internet gives room for speedy and easy exchange or dissemination of information, and to prevent the maximum utility given by this platform will have chilling effects on the exercise of right to freedom of expression and information. It is apt to say that a fresh publication should mean a publication not exactly the one that has been published earlier by another person but a novel one. This can work perfectly on the Internet platform, given its volatility.

5.2 Legal Status of Bloggers in Internet Defamation in the USA

Blogs are defined as "websites that consist of a series of dated entries called 'posts' which are usually displayed in reverse chronological order. Posts often contain hyperlinks that connect to other websites to support the content of the post or to provide further information on the topic."⁶⁷ In the United States of America, some bloggers are treated as non-members of the media for the purpose of

⁶⁰ (1849) 14 Q.B. 185.

⁶¹ See the case of *Loutchansky v. Times Newspapers Ltd* (Nos. 2-5)[2001] EWCA Civ 1805 [2002] QB 783.

⁶² Section 8(1) and (2) of the *Defamation Act 2013*.

⁶³ Section 8(4) of the *Defamation Act 2013*.

⁶⁴ Khairun-Nisaa Asari and Nazli Ismail Nawang, n 34, 321.

⁶⁵ Section 8(3) of the *Defamation Act 2013*.

⁶⁶ Bainbridge, D., *Introduction to Computer Law*, 5th ed. (UK: Pearson Longman, 2004), p. 331.

⁶⁷ Guicheteau, L., "What is the Media in the Age of the Internet? Defamation Law and the Blogosphere," (2013) 8:5 *Washington Journal of Law, Technology and Arts*, p. 575.

defamation which thereby placed them under strict liability for their blog contents.⁶⁸ The plaintiff in the case of defamation through a blog must show that the content was at least negligent on the part of the defendant blogger. In the USA defamation matters are regulated by common law and the First Amendment. The First Amendment guarantees freedom of speech including speech made online unless such speech is offensive and a false statement of fact rather than a mere statement of opinion.⁶⁹ The First Amendment is originally established to focus on defamation in the traditional media.⁷⁰ With the new internet technology the trend of the decisions of the courts is to extend the definition of media to include internet sources.⁷¹ In *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*⁷² the court held that a website was a "legitimate publisher of information" and a member of the press. For a blogger to qualify as a media practitioner his/her activities must have a semblance of the traditional media. The more a blog resembles a traditional media the more likely it will be considered as a media. Succinctly put:

*What is most important is not whether the website is a blog, but whether the blog facilitates distribution of information to the public in a meaningful way that the First Amendment strives to protect.*⁷³

What the courts look at in determining whether a blog has a semblance of a traditional media are "(1) the content of the website, (2) the format of the website, and (3) the journalistic credentials of the creator of the defamatory statements."⁷⁴

Blog is regarded as an interactive computer service in which not only the blogger can post messages but other users of the platform can as well make comments or contributions. Section 230 of the Communications Decency Act (CDA)⁷⁵ creates a broad range of protection to communications on the Internet which covers interactive computer services like blogs, which include immunity from defamation, negligence, gross negligence, false advertisement and unfair competition.⁷⁶ Under section 230 of the CDA bloggers are not liable for the content posted by users.

6.0 Jurisdiction in Internet defamation

Given the above explanation of the provisions of the *Defamation Act 2013* establishing a single publication rule for internet defamation, it suffices to also consider issue of jurisdiction in internet defamation due to the fact that even a single publication of a defamatory statement can be viewed anywhere in the world. Suffice to say therefore that the concern of this paper as regards jurisdiction in internet defamation matters is limited to civil defamation claims.

⁶⁸ See *Obsidian Finance Group, LLC v. Cox* CV-11-57-HZ, 2011 WL 5999334, at *5 (D. Or. Nov. 30, 2011).

⁶⁹ Alice E. Marwick and Ross Miller, "Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape" (2014), *Fordham Center on Law and Information Policy Report*. Retrieved on 23 November, 2016 from <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1002&context=clip>

⁷⁰ The US Supreme Court has not defined the term "media" but in the context of defamation the term is said to include "publishers," "broadcasters," and the "press." See Guicheteau, n 60, 580.

⁷¹ Guicheteau, n 60, 582.

⁷² 160 N.H. 227, 999 A.2d 184 (N.H. 2010).

⁷³ Guicheteau, L., "What is the Media in the Age of the Internet? Defamation Law and the Blogosphere," (2013) 8:5 *Washington Journal of Law, Technology and Arts*, p. 585.

⁷⁴ Guicheteau, L., "What is the Media in the Age of the Internet? Defamation Law and the Blogosphere," (2013) 8:5 *Washington Journal of Law, Technology and Arts*, p. 582.

⁷⁵ 47 USC § 230.

⁷⁶ Alice E. Marwick and Ross Miller, "Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape" (2014), *Fordham Center on Law and Information Policy Report*. Retrieved on 23 November, 2016 from <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1002&context=clip>

Many factors may need to be considered in determining the proper jurisdiction where an action for defamation can be commenced. Such factors include the place of residence of the defendant, place of residence of the claimant, the place where the defamatory material was published or disseminated, the place where the claimant has reputation to protect, and such other relevant considerations. In a print media, it is relatively easier to determine the place of publication or dissemination of a defamation material compared with the publications through internet platforms such as blogs, social media, websites, etc. which clearly involve third actors like Internet Service Providers, website rental providers, etc.

State sovereignty is a concept that is recognised in international law in which each State has power to make laws for its internal operations and to also involve itself in relationship with the international community. State power to govern itself must not have overlapping effect on other States so as not to affect the sovereignty of those States. In internet matters, it is not unlikely that actions or laws made in one sovereign State could have overlapping effect on another State due to the nature of the Internet which can have multijurisdictional cause and effect implications. Determining the jurisdiction where an action can be brought in internet defamation cases and the applicable law may be problematic.

Under the Australian legal system, internet publication is deemed to be published where the defamatory material is downloaded and a suit can be brought up by a claimant in that place provided his reputation is damaged there by the material in question regardless of the place of uploading the defamatory material, for instance the place of the server of the defamer.⁷⁷ In the Canadian case of *Black v. Breeden*⁷⁸ a legal principle was adopted that the place of publication of defamatory statement affords the court in that place jurisdiction to entertain the matter if the reputation of the claimant is injured in that place. Publication is done when the words are heard, read or downloaded. On the strength of the decision of the court in the case of *Van Breda v. Village Resorts Ltd.*,⁷⁹ it was established that the test for assuming jurisdiction does not depend on the comparison of strengths of connection of the defamatory event amongst two or more States, once publication is made within the jurisdiction and there is damage to the reputation of the claimant it is enough to establish jurisdiction.⁸⁰ This creates the substantial connection needed to find a jurisdiction.

In the United States of American case of *Calder v Jones*⁸¹ a California resident, Jones, alleged that she had been defamed by a publication written and edited in Florida and published in a national magazine having its principal place of business in Florida but having the largest circulation in the State of California: Jones sued the writer and the editor of the purported libellous article in the California Superior Court. The defendants moved to quash the service of the process of the court based on lack of personal jurisdiction which the court granted and which was reversed by the California Court of Appeal. The U.S.A. Supreme Court affirmed the decision of the California Court of Appeal and held that jurisdiction over the petitioners in California was proper. The Supreme Court held that the libellous article concerned a California resident whose career was centred in California; the harm to her reputation was therefore suffered in California so the writer and the editor should have reasonable expectation to be subject to the jurisdictions of California courts.

Also in another United States' case of *Edias Software International, L.L.C. v. Basis International Ltd.* the defendant (Basis International) which was based in New Mexico terminated a contractual arrangement between itself and the plaintiff (Edias Software International, L.L.C.) for distribution of

⁷⁷ *Dow Jones & Company Inc. v. Gutnick* [2002] HCA 56 (December 10, 2002).

⁷⁸ (2010) ONCA 547, August 13, 2010, Docket C50380.

⁷⁹ (2010) 98 O.R.(3d) 721 (C.A.).

⁸⁰ See also the case of *Burke v. NYP Holdings, Inc.* (2005) BCSC 1287.

⁸¹ 465 U.S. 783 (1984)

software and sent e-mail messages to its clients in Europe and its employees located in New Mexico and also posted information on its website which was alleged to be defamatory of the plaintiff. The plaintiff sued for defamation in Arizona where he had his offices. The defendant filed a motion to dismiss the complaint for lack of personal jurisdiction arguing that it did not have sufficient contact with Arizona and that it would be a great burden for it to defend the action in Arizona. The court held that by publishing the defamatory statement online the defendant meant that the statement would be accessible in Arizona by her residents and as a result would have negative effect on the plaintiff in Arizona where he had its offices. The court relied on "effects" principle where intentional actions are expressly aimed at the forum state and cause foreseeable harm to the plaintiff in this case jurisdiction will be conferred on the court of the forum state. In the instant case the website, forum message and e-mail directed at Arizona fulfil this condition.

In *Stanley Young v. New Haven Advocates*⁸² the warden of a Virginia prison sued two Connecticut newspapers available online in Virginia for defamation. The Court of Appeal, relying on the decision in the case of *ALS Scan, Inc. v. Digital Service Consultants, Inc.*⁸³ held that the court in Virginia could not constitutionally exercise jurisdiction over a person based outside the state when that person posts defamatory content on the Internet. Therefore, a court in Virginia could not exercise jurisdiction over the defendants based in Connecticut since they did not manifest any intention to aim the websites' posts at the audience in Virginia. The Court of Appeal therefore reversed the order made by the court of first instance denying the motion made by the defendants to dismiss an action in Virginia court for lack of personal jurisdiction.

Similarly, in the *Clemens v. McNamee*⁸⁴ McNamee was being investigated in the New York for delivering performance-enhancing drugs to athletes. McNamee posited that he administered the drugs on the Plaintiff, Clemens, on certain occasions in New York and Toronto. The report containing this revelation was later published after being released by several newspapers including the major newspapers in Texas and also posted by a senior writer for an Internet site, SI.com, on its site following an interview granted in New York by McNamee to the reporter after the release of the report. Clemens, who had his permanent residence in Texas, though temporarily resident outside Texas due to the nature of his career, sued McNamee for defamation in Texas. McNamee raised a defence of lack of personal jurisdiction which was granted by the district court because the focal point of the defendant's statement was not in Texas. On appeal, the court found that the statements were not made in Texas and not directed to Texas residents and the statements concerned non-Texas activities, which included delivery of drugs to Clemens in New York and Canada.

From the line of decisions by the US courts, it can be submitted that the mere fact that defamatory content is accessed through the Internet anywhere within the country would not confer automatic jurisdiction on the courts but manifestation of the intention of the defendant to target the audience in a

state will confer jurisdiction on the court of that state.

In an Argentine case of *J. G. R. v. GOOGLE INC.*⁸⁵ the plaintiff, a legislator representing the Province of Jujuy, claimed that GOOGLE had hosted and promoted a defamatory publication in its blogger systems, despite court's order to remove same. The Federal Court of Appeal that heard the appeal from the case held that the court of the place where harm occurs, i.e., where the damage affects

⁸² No. 01-2340 (4th Cir., December 13, 2002).

⁸³ 293 F.3d 707 (4th Cir.2002).

⁸⁴ No. 09-20525 (5th Circuit, August 12, 2010).

⁸⁵ Federal Court of Appeal of Salta [CÁMARA FEDERAL DE APELACIONES DE SALTA], JULY 4, 2011, LA LEY 7/19/11.

the aggrieved party shall have jurisdiction over the case. This decision was based on the provision of Article 5 paragraph 4 of the *National Code of Civil and Commercial Procedure* authorising plaintiffs to bring actions in jurisdiction where the event took place or the defendant is domicile; which gives the plaintiff the freedom to choose amongst the eligible jurisdictions. The court therefore held that the act by which the damage was actually inflicted on the plaintiff has clearly occurred within the Province of Jujuy being the place of residence of the plaintiff and his family, and the place where he pursues his professional and political activities and not in other part of the globe, even in the place where GOOGLE has its domicile (California, United States of America), where the plaintiff hardly has a reputation.

In the case of *J. G R.* above, the determination of jurisdiction may be regulated by *locus regit actus rule*, translated as “the place governs the act,” which means the place where an act is done should have jurisdiction to entertain a suit bordering on that act. Applying this to online situations seems dicey because the place where the act actually occurs is the cyberspace which means that the action takes place in all the territories of the world where the website is available. The court in this case came to the conclusion that:

*a coherent interpretation of the principles at issue, in light of the new circumstances, indicates that in the case of damages inflicted within this context, there will be jurisdiction in the court of the place where the damage occurs, that is to say, where the damage affects the aggrieved party.*⁸⁶

Under the English system of law, jurisdiction of the court in tort committed over the Internet with a foreign coloration takes its leap from the Brussels Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.⁸⁷ By Article 2 of the Brussels Convention, general provisions on jurisdiction stipulate that persons domiciled in a contracting State shall be sued in court of that State no matter their nationality.⁸⁸ According to Article 5 of the Brussels Convention, which creates special jurisdiction, a person domiciled in a contracting State may be sued in another contracting State in matters relating to tort, delict or quasi-delict in the court of the place where the harmful event occurred.⁸⁹ Also in civil claim for damages or restitution, which is based on an act leading to criminal proceedings, the court, which according to its own law, has jurisdiction to entertain the criminal proceedings, will also entertain the civil claims provided the court has jurisdiction under its own law to entertain civil proceedings.⁹⁰ Where the party is not domiciled in a contracting State, the jurisdiction of courts of each contracting State shall be determined by the law of that State.⁹¹

From the above analyses, a defendant can be domiciled in a Member State to the Brussels Convention or a non-Member. If the defendant is domiciled in a Member State the Regulation rules apply but if he is domiciled in a non-Member State the jurisdiction of court will be decided by the law of the that contracting State concerned. Determination of the domicile of a party, whether within a Member State or a non-Member State is decided in the United Kingdom (UK) based on the provisions

⁸⁶ *J. G R. v. GOOGLE Inc.*, Federal Court of Appeal of Salta [CÁMARA FEDERAL DE APELACIONES DE SALTA], JULY 4, 2011, LA LEY 7/19/11.

⁸⁷ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Gringras C., (2003) *The Laws of the Internet*, 2nd ed. Butterworths LexisNexis, p. 142.

⁸⁸ Article 2 of Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968.

⁸⁹ Article 5(3) of the Brussels Convention.

⁹⁰ Article 5(4) of the Brussels Convention.

⁹¹ Article 4 of the Brussels Convention.

of the *Civil Jurisdiction and Judgments Act 1982* (as amended).⁹² By this Act a domiciled defendant within a Member State will be subject to the Regulation rules for determining jurisdiction, while in case of a non-Member domiciled defendant question of jurisdiction will be resolved based on common law. Therefore, to determine whether a defendant in an internet tort is domiciled within a Member State his domicile must be assessed based on that State's legal perspective.⁹³

For a defendant to be domiciled in a non-Member State such individual must be resident in the non-Member State and the circumstances of his residence must indicate that he has a substantial connection with that State. In case of a legal person such may be domiciled within UK if it was incorporated under the law of a part of the UK, and it has its registered office or other official address in the UK; or its central administration or principal place of business in the UK.⁹⁴ The Regulation rules applicable to torts committed in traditional tort will also be applicable to internet torts. It should be stated that ownership, control or access to a website anywhere in the world is mostly irrelevant for the purposes of determining jurisdiction over an individual or legal person under the Regulation. It is therefore irrelevant that a company domiciled in the UK has its server located in another jurisdiction.⁹⁵ If however the company or a legal person is not domiciled within the UK or other Member States the question of jurisdiction will be decided with recourse to the common law.

The *Defamation Act 2013*⁹⁶ of the UK makes specific provisions for the tort of defamation. Section 9 of the Act provides that a court in the UK does not have jurisdiction to hear and determine an action for defamation against a person not domiciled in the UK or a Member State⁹⁷ or a State that is a contracting party to the Lugano Convention⁹⁸ unless the court is satisfied that of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

7.0 Conclusion

Having considered cases bordering on defamation above, it suffice to say that the ubiquitous nature of the Internet definitely creates a problem of jurisdiction as defamatory content can be downloaded or accessed in any place where internet connection may be found. It is not therefore prudent to sue a defendant for defamation in all the jurisdictions where the defamatory content can be accessed. The development of single publication rule by some jurisdictions, like the UK, limits publication on the Internet to the originally published defamatory contents whereas there still remain some jurisdictions, like Malaysia, where double publication rule is still applicable therefore exposing internet users to unlimited and indeterminate liability. Submitting the defendant to several suits in different jurisdictions

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⁹² The Act is amended by the *Civil Jurisdiction and Judgment Act 1991* and the *Civil Jurisdiction and Judgment Order 2001*

⁹³ Gringras, C., *The Laws of the Internet*, 2nd ed., (UK: Butterworths LexisNexis, 2003), p. 143.

⁹⁴ Gringras, C., *The Laws of the Internet*, 2nd ed., (UK: Butterworths LexisNexis, 2003), p. 144.

⁹⁵ Gringras, C., *The Laws of the Internet*, 2nd ed., (UK: Butterworths LexisNexis, 2003), p. 144.

⁹⁶ *Defamation Act 2013* Cap 26.

⁹⁷ Member State means a State that is a signatory to the Brussels Convention 1968 and subject to the Brussels Regulation. Brussels Regulation means Council Regulation (EC) No. 44/2001 of 22nd December 2000 and as amended from time to time and as applied by Agreement made on 19th October 2005 between the European Community and the Republic of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No. L299 16.11.2005 at p62. See section 9(5) of the *Defamation Act 2013*

⁹⁸ The Lugano Convention is the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007. See section 9(5) of the *Defamation Act 2013*

due to the internet content may stifle freedom of speech as it will discourage communication or publication through this medium.

A writer once asserted that:

The rule that has survived to date provides that where a statement may have effects in an unlimited number of places, jurisdiction will be established based on the domicile of the person making the statement. There, individuals will be able to defend themselves—at the civil or criminal level—and anticipate the result of any civil or criminal actions, because the proceedings and the laws are more familiar to them.⁹⁹

This submission may seem valid as it would help the party on the defending side to have ample opportunity to prepare for his defence and would not make him answerable at any court outside his place of residence to defend an action.¹⁰⁰ To do otherwise could have a frightening effect on freedom of speech. However, if the defendant is made amenable to the jurisdiction of the court where he is resident the question is, if the court of the place where the defamer is resident does not recognise the matters as actionable within the jurisdiction, or where damages that can be awarded is not satisfactory whereas it is actionable in the jurisdiction where the defamed person resides and the damages awardable is ample, will the end of justice be satisfied?

On the other hand, if the plaintiff is allowed to bring an action for defamation in any jurisdiction he feels convenient or most favourable in terms of damages, it may lead to libel tourism and submit the defendant to hardship of defending his case where he least expected or does not have real affiliation. It is apt to submit that the best approach is to consider the place where the plaintiff has a reputation together with the fact that the defendant actually targeted that defamatory statement at that jurisdiction. This approach is pertinent in view of the fact that the defendant would have envisaged the consequences of his action, and bringing a suit in the place so mentioned will not come as a surprise to him. On the other hand sticking to the rule that the action should be commenced in the place of resident of the defendant could also place the plaintiff under untold hardship to institute a matter where he himself is not resident, especially taking into consideration the ubiquitous nature of the Internet.

A common thread that runs through the decisions of the courts in the jurisdictions considered above, apart from the UK which based its jurisdiction on the domicile of the defendant as prescribed by

place where the plaintiff's reputation is injured should have jurisdiction to entertain the matter which most times is the place of resident of the plaintiff. In the case of *Van Breda v. Village Resorts Ltd.*¹⁰¹ it was held that the test for assuming jurisdiction does not depend on the comparison of strengths of connection of the defamatory event amongst two or more States, once publication is made within the jurisdiction and there is damage to the reputation of the claimant it is enough to establish jurisdiction. Since publication is done when a third party has access to the defamatory material, mere uploading of such information on the Internet will not be enough to complete the action but the action is complete upon being read by the third party. Therefore, the place where the third party reads the material is the place the publication is made. This gives a simple solution to the problem of Internet defamation where

⁹⁹Eduador Bertoni, "Determining Jurisdiction in Internet Defamation Cases: Insights on Latin America." Retrieved on 17 February, 2016 from http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Jurisdiction_Eduardo%20Bertoni.pdf

¹⁰⁰Note that the domicile of the defendant forms the basis for assuming jurisdiction in the UK. See section 19 of the *Defamation Act 2013*.

¹⁰¹(2010) 98 O.R.(3d) 721 (C.A.).

the defamatory statement may be uploaded in one jurisdiction but read in another coupled with the target and reputation formula.

There is no generally acceptable basis for assuming jurisdiction in Internet defamation matters. It is therefore imperative that a common ground be established through which there will be uniformity in the determination of jurisdiction for defamation. This will ensure a single jurisdictional basis for determining jurisdiction for each defamatory situation. Harmonisation of the defamatory laws for Internet communications of all the jurisdictions is therefore a sure way of creating certainty in defamatory matters. In another breath, there may be need for all the countries to engage in developing a treaty to take care of Internet defamation. At a time in Australia, eight substantially different defamation jurisdictions existed which led to all the Australian States and Territories passing substantially uniform defamation law which harmonises the substantive defamation laws.¹⁰² This law does not codify defamation law but co-exists with the common law, though amending the common law where necessary. A similar approach can be adopted at the global level to create uniformity in defamation law as it relates to the Internet to generate legal harmony.

The internet has a natural resistance to regulation due to its virtual nature even though attempts have been made by some countries to subject the internet to 'real' regulation. Considering the global nature of the internet, International Law could be a more veritable tool to regulate some of the issues on the internet.¹⁰³ As once said, "governments will have to accept a zone of harmonized Internet law that, at minimum, functions as an autonomous region within their legal system"¹⁰⁴ the consequence is the pressure to "produce a set of convergent or harmonized legal norms to govern behaviour in the jurisdiction of the Internet."¹⁰⁵ It has been maintained that due to the borderless nature of the internet, efforts to regulate it by territorially based sovereigns will be doomed for failure, and jurisdictionally, no state has a more compelling claim than other to subject events on the internet exclusively to its laws.¹⁰⁶ Convergence could be achieved by negotiating international treaties amongst countries and efforts would be made to ensure that countries ratify and implement the new legal norms. The norms should be founded on minimum contact with the concerned jurisdiction and must sufficiently promote fair play and substantive justice. This standard may be balanced on the burden that may be put on the defendant to defend his action in a jurisdiction; the plaintiff's interest in obtaining convenient and effective relief; the forum state's interest in adjudicating the dispute; and the interstate judicial system's interest in obtaining the most efficient resolution of disputes.¹⁰⁷

¹⁰² Some of these laws modified the common law by statute, some codified defamation law, whilst some of the states the common law largely prevail.

¹⁰³ Segura-Serrano Antonio, "Internet Regulation and the Role of International Law" (2006), *Max Planck UNYB*, Vol. 10, p. 192.

¹⁰⁴ Hughes, J. "The Internet and the Persistence of Law," Cardozo Law School, Jacob Burns Institute for Advanced Legal Studies, January 2003, Research Paper Series No. 61, p. 12. Accessed 12 October, 2012 from http://ssrn.com/abstract_id=370380

¹⁰⁵ *Ibid.*

¹⁰⁶ Segura-Serrano Antonio, "Internet Regulation and the Role of International Law" (2006), *Max Planck UNYB*, Vol. 10, p.195.

¹⁰⁷ Bosky, n 1, 589.