ARTICLE 19

Revised Defining Defamation Principles: Background paper

2016

Report

Table of contents

Introduction

The protection of reputation – the esteem in which one is held by society - is an important social purpose.[1] Defamation laws, while aiming to suppress or redress harms to reputation resulting from speech – whether spoken aloud, distributed in print, broadcast, or otherwise publicly communicated – will necessarily interfere with the right to freedom of expression. In some instances, this interference can be justified; in others, defamation laws can be used to silence legitimate speech.

In 2000, ARTICLE 19, in cooperation with international freedom of expression and media experts, published one of the first standard-setting documents in this area.[2] *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* ("the Defamation Principles")[3] set out the appropriate balance between the right to freedom of expression and the need to protect individual reputation. Since their adoption, the Defamation Principles have obtained significant recognition and international endorsement.[4]

In the last fifteen years, however, there have been significant developments in legal, social and technological spheres that impact on how freedom of expression and reputation are balanced. While still a valid and important guiding document, ARTICLE 19 believes that the Defamation Principles need to be updated to properly reflect these developments.[5] We would like to highlight especially the following:

- There has been some confusion between "personality rights" and reputation, particularly regarding the right to privacy: the concept of **personality rights**, however, is broader than reputation; it includes the protection of other interests, such as data protection and privacy. Nevertheless, many national courts and the European Court of Human Rights (the European Court) regularly conflate the right to reputation with the right to privacy. We are concerned that concepts that should properly be regarded as distinct are being unhelpfully muddled;

- While there has been some progress in efforts to **decriminalize defamation** across the world, criminal laws remain an effective tool for restricting the free flow of information in a number of countries;

- Some legislation and case law has recognised **new or additional defences** in defamation cases;

- Some judicial practices – such as **forum shopping** ("libel tourism") and **strategic lawsuits against public participation** (SLAPPs) – are operating under defamation laws and call for a specific analysis;

- With the continuous, digitally-driven mutation of the media landscape, the traditional struggle between freedom of expression and reputation has found a new battlefield in **Internet-based communication**. Worrying trends in this area include the consideration of **potential damage** instead of actual harm to reputation, and decisions that hold **intermediaries** (internet service providers) liable for allegedly defamatory material that they have not published, notably when the original authors remain anonymous.

The aim of this background paper is to outline the key developments in the area of defamation law over the last fifteen years, and to provide a more detailed justification for an updated version of the Defamation Principles. We do not discuss or comment on areas where sufficient protection is already provided for by the original Defamation Principles and no additions or amendments are required. We hope that both documents will be used in international, regional and international advocacy to improve the protection of human rights in this complex area.

This background paper – alongside the accompanying draft Revised Defamation Principles – was developed to provide a foundation and a starting-point for discussion at a meeting in London on 4 December 2015, bringing together international experts in the field of human rights, freedom of expression and media freedom. It has been reviewed and slightly revised since the workshop and will accompany the publication of the Revised Defamation Principles for public consultation.

Defamation and personality rights

Protection of reputation

The right to reputation is guaranteed by Article 12 of the Universal Declaration of Human Rights (UDHR, together with a number of related rights) and Article 17 of the International Covenant on Civil and Political rights (ICCPR). These two are virtually identical except that the latter prohibits only "unlawful attacks" on honour and reputation.

The significance of the distinction between "honour" and "reputation" in the UDHR and ICCPR is not completely clear. During the negotiation of the UDHR, some delegations opposed the word "honour" on the grounds that it was too vague. The same objection arose during the drafting of the ICCPR. One reason why "honour" was nevertheless retained in the final text is that some delegations viewed "reputation" and "honour" as two separate aspects of an individual's standing in society. According to this view, "reputation" relates to professional or social standing, while "honour" relates to moral standing. Falsely accusing someone of, for example, incompetence would be an attack on reputation, while an accusation of theft would be an attack on honour. It would appear, then, that as used in these texts the word "honour" is not synonymous with subjective feelings but, rather, a distinct aspect of the objective esteem in which society holds the person. However, the word "reputation" encompasses both concepts; it denotes an individual's moral, social, and professional standing in society.

As noted above, the purpose of defamation laws is to protect people from false statements of factual nature that cause damage to their reputation.6 For example, in the jurisprudence of the Inter-American Court of Human Rights, the imposition of civil liability is only possible where "it is shown that serious harm was caused intentionally or with obvious disregard for the truth."7 In a similar way, the European Court of Human Rights has repeatedly stated that in order to be considered under Article 8, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life. In addition, Article 8 cannot be invoked in order to complain of a loss of reputation which is "the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence."[8] Similar solutions have been reached by domestic legislation and courts that require that harm to reputation must reach certain level of severity, e.g. "serious harm."[9]

Protection of personality rights

The concept of "personality rights" has gained recognition and protection, particularly in civil law countries. Although not universally defined, the term usually refers to a bundle of rights that protect the dignity, the emotional and psychological integrity, and the inviolability of a person. The concept can cover the protection of privacy and private life more broadly; it may include issues such as the dissemination of accurate information about the private life of an individual or control over the use of one's own image[10] as well as the basic protection of reputation. In some instances, laws protecting personality rights even include protection from discrimination and/or hate speech.

Where the country's domestic legal system does not have a notion of defamation *per se*, reputation is sometimes protected under the umbrella concept of "personality rights"; in the

case-law of the European Court, personality rights are similarly analysed under Article 8 of the European Convention on Human Rights (European Convention).[11]

ARTICLE 19 believes that conflating defamation with other dimensions of personality rights or privacy may lead to mixing up the protected interests. The applicable analytical frameworks should reflect the specific *raison d'être* and characteristics of each aspect of the various reputational and privacy rights. Confusion can only be detrimental to the understanding and protection of fundamental rights.

In any case, the Principles on Defamation only focus on laws that protect reputation. ARTICLE 19 will release a separate policy document on privacy and freedom of expression in 2016.

Criminal defamation - updates

The Defamation Principles conclude that criminal defamation laws are incompatible with international standards on freedom of expression and should be abolished.[12] Since the publication of the Principles in 2000, this position has gained in recognition. In particular:

- In **General Comment No. 34**, the Human Rights Committee (HR Committee) stated that "States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty;"[13]

- In the jurisprudence of regional human rights courts:
  - In December 2014, the **African Court of Human and People's Rights** (African Court) found that the condemnation of a journalist for defamation and insult to a magistrate to a 12-month prison sentence and a fine, plus damages to be paid to the victims, amounted to a violation of Article 9 of the African Convention on Human and People's Rights (ACHPR) and Article 19 of the ICCPR;[14]
  - In several cases, the **Inter-American Court of Human Rights** found that the criminal convictions in defamation cases were disproportionate and violated the right to freedom of expression;[15]
  - While the European Court has not yet affirmed that criminal defamation legislation as such is a violation of Article 10, it has maintained that only particularly solid motives could justify a criminal sanction.[16] Even though in some cases small criminal sanctions have been found to be proportionate, the European Court also considers that "the relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression;"[17]

- International and regional human rights bodies, including the **UNESCO**,[18] the **Council of Europe**[19] and the **Inter-American Commission on Human Rights**,[20] have also called for reform of criminal defamation laws;

- In their individual and joint statements,[21] **special freedom of expression mandates** - the OSCE Representative on Freedom of the Media,[22] the UN Special Rapporteur on Freedom of Opinion and Expression,[23] and the OAS Special Rapporteur for Freedom of Expression[24] - have repeatedly called on the states to repeal all criminal defamation laws in favour of civil defamation laws.

Additionally, a number of countries have either decriminalised defamation or have taken significant steps towards the decriminalization of defamation,[25] most recently Burkina-Faso,[26] South Africa[27] and Zimbabwe.[28]

At the same time, criminal defamation laws remain a topic of a serious concern.[29] Their mere existence in countries where they are no longer applied may serve as an excuse for States that continue to apply their own criminal defamation laws.[30]

Administrative laws on defamation present flaws similar to those associated with criminal defamation laws; they should, therefore, be analysed similarly. As a transitional step towards their abolition, any criminal or administrative defamation law still in force should respect all of the Revised Principles.

Civil defamation issues

The Defamation Principles outline that civil, as opposed to criminal, defamation laws generally provide a more appropriate and balanced means to achieve the protection of reputations without unduly interfering with the protection of freedom of expression. However, a number of features of civil defamation laws can have a "chilling effect" upon the free flow of information and ideas;[31] consequently, such laws must provide adequate safeguards against abuses.

In this section, we highlight areas where these safeguards can be strengthened.

Defamation and fair trial

The protection of freedom of expression requires that the justice system effectively offers the defendants in a defamation trial a fair chance to present their arguments. Under international law, the right to a fair trial includes guarantees that the court will be independent and impartial, and that the equality of arms will be ensured.

For the purposes of the Principles, the notion of tribunal or court also includes other independent adjudicatory bodies, whether or not they belong to the judiciary, provided that they present all guarantees of the right to a fair trial, as protected by international human rights law.

The cost of legal defence can contribute to the chilling effect of legal action (see SLAPP below). In order to guarantee that access to justice becomes effective for all, the provision of legal aid is a requirement of international human rights law. As the Special Rapporteur on the independence of judges and lawyers noted in her 2013 report on Legal Aid, "Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy."[32]

Alternative dispute resolution mechanisms can provide a faster, less costly alternative to trials. As such, they may lead to a quick settlement of disputes to the satisfaction of all parties. However, as they may take place outside of the judiciary, they do not necessarily take into consideration the legal and constitutional guarantees of fundamental freedoms. Whenever they are asked to give legal force to a solution resulting from an alternative dispute resolution mechanism, courts should ensure that the interests of freedom of expression have been duly taken into consideration.

Jurisdiction

The term "libel tourism" has sometimes been used to describe the practice of "forum shopping", whereby defamation plaintiffs seek specific jurisdictions in which they believe courts are most likely to be friendly to their cause, even if the case has very little connection with the country whose laws they want to invoke. As a consequence, defendants may have to face costly procedures, leading to potentially high damages, in a country that they have never visited or whose language they do not even speak. In federal countries, the issue may also arise in interstate disputes.

On the other hand, in today's globalized world, reputations can indeed be transnational: the fame of international artists, for instance, may reach far beyond their country of residence. However, cases cannot be allowed to be pursued anywhere simply on the basis of the international availability of material published on the Internet, as this inevitably leads to the application of the lowest standards of protection of freedom of expression.

"Libel tourism" has allowed for extraordinary pressure to be imposed upon defendants. The UK has long maintained notoriously favourable defamation laws, with many choosing to have their cases heard in the UK in order to maximize their chances of success. The practice was limited only in 2013 with the reform of defamation legislation. The law now provides that where the defendant is outside the EU or the EEA, the court will not have jurisdiction to hear and determine an action unless the jurisdiction of England and Wales is "clearly the most appropriate place" in which to bring an action in respect of the statement.[33] Whereas the presumption was previously in favour of accepting jurisdiction, the position under the new law is the opposite; the jurisdiction requirement will be fulfilled only in 'exceptional' cases. This is certainly implied by the term 'clearly', which increases the evidential threshold for proving appropriateness.[34]

In the meantime, new "candidate countries" for libel tourism have emerged, in particular Ireland[35] and New Zealand.[36]

In the US, another reaction to libel tourism has been to prohibit the local enforcement of foreign libel judgements unless (a) the defendant would have been liable under US law, or (b) the foreign legislation provides for at least as much protection of freedom of expression as the First Amendment to the US Constitution.[37]

Malicious plaintiffs

The Defamation Principles recognise that in some instances, plaintiffs may try to abuse judicial process in defamation cases with a view of exerting a chilling effect on the right to freedom of expression rather than vindicating their reputation.

ARTICLE 19 observes that a practice of SLAPPs (strategic lawsuits against public participation) has emerged as an abuse of defamation laws. SLAPPs refer to situations where a plaintiff – often a powerful corporation – resorts to legal proceedings in order to silence criticism or political expression. The real objective is not to win their case and obtain damages, but rather to drown the defendants in lengthy and costly procedures, thereby reducing to silence whatever critical messages they had tried to publish.[38] Although SLAPP lawsuits can take many forms (e.g. claims of interference with contract or economic advantage or intellectual property), their application in defamation cases is very common. For example,

- In the **USA**, Oprah Winfrey was unsuccessfully sued for business defamation by the cattle industry after beef prices plummeted following a segment on her show during the mad-cow scare in which she exclaimed that some revelations had "stopped me cold from eating another hamburger";[39]

- In **Australia**, SLAPP suits were frequently employed in cases where community activists were threatened or sued over comments made in the course of public debate over particular developments, proposals or government policies. The most notorious example was the local community group in Victoria who were opposed to the proposed location of

a sewage facility being developed by the utility company, Barwon Water. The company sued for defamation over a car bumper sticker which read, "Barwon Water, Frankly Foul." After becoming enmeshed in costly court processes, the three individuals who took responsibility for the publication of the stickers apologized and paid AUD$10,000 in costs just to put an end to the case;[40]

- In France, journalist Denis Robert went through a 10-year legal process during which he was repeatedly sued for defamation by the financial institution Clearstream in response to his investigation into tax evasion and money laundering. In 2011, the Supreme Court ruled that although his investigative work contained inaccuracies, the thoroughness of his investigation and the public interest in the story outweighed the defamatory claims;[41]

- In **India**, a company whose members and shareholders were insecticide manufacturers took a defamation action against the newspaper *Rajasthan Patrika*. The newspaper had published a number of articles about the alleged quantities of pesticides the company used and the alleged harmful effects these have on plant and animal life.[42] The Delhi High Court held that the suit contained all the ingredients of a SLAPP suit, intending to censor, intimidate and silence critics. It observed that the concept of a SLAPP suit can be defined more broadly to include suits about speech on any public issue, and that the present suit was an indication in that direction. In another case concerning Greenpeace,[43] the plaintiff demanded permanent injunction against Greenpeace activists for defamation with the ulterior motive of damaging the charity's reputation. Greenpeace argued that the suit was a SLAPP suit intended to silence, censor and intimidate them. In the absence of proof of defamation, and after evaluating public interest in the expression sought to be restricted, the Delhi High Court refused to grant the application for injunction.

In response to this trend, some states have adopted anti-SLAPP legislation.[44] Anti-SLAPP laws generally provide a mechanism which allows the defendant, after service of the complaint, to file a motion to strike down or dismiss the complaint as being based upon speech directly related to and arising from a matter of public concern. The burden of proof is upon the defendant to convince the court that the speech in question is directly related to and arising from a matter of ongoing public concern, and to set forth the legal justifications for publication.

In the event that the court agrees that the speech is directly related to and arising from a matter of ongoing public concern, the claim is deemed a SLAPP case and the following substantive and procedural rules apply:

- All collateral litigation, including discovery and/or disclosure demands is immediately frozen;
- The burden of proof is upon the claimant to show from the four corners of the complaint alone with convincing clarity that they would prevail in a libel trial; and
- In the event that the claimant has failed to make the above showing, court could award appropriate attorney's fees and costs to the prevailing defendant.

In countries where no specific legislation has been adopted, malicious prosecutions may be dealt with by general rules of procedure that allow the courts to condemn the claimant for abusive proceedings, if the judge finds that (i) the proceedings have no serious nature or (ii) are engaged recklessly on no sensible grounds.[45]

We propose that the Defamation Principles reflect on this negative trend and explicitly stipulate legislation for anti-SLAPP protection or other procedural protection against this abuse.

Single publication rule

The statute of limitation is not a new issue in defamation laws. In general, international law recognises that the passing of time becomes a legal obstacle to defamation lawsuits and that clear limitations period for defamation actions should be provided.

However, in the case of multiple publications of an allegedly defamatory statement, some legal systems admit that each new publication[46] of the same statement may give rise to a new cause of legal action, or restart the statute of limitation period. While this rule generally keeps media and other content producers under a prolonged threat of legal action,[47] it has particularly dramatic consequences in the context of Internet-based communication (see below).

In consideration of its chilling effect, the multiple publication rule should clearly be prohibited. By contrast, a Single Publication Rule implies that, in cases where the author of a defamatory statement re-publishes a substantially identical statement in the same format and medium, the statute of limitation period starts running from the initial publication. The Single Publication Rule also means that the plaintiff only has one cause of action in relation to a particular defamatory statement.

Public figures and matters of public interest

International and regional standards, as well as some national legislation, accept that public officials should tolerate a larger degree of criticism and intrusion than ordinary citizens. The Defamation Principles already reflect this issue.

As is already acknowledged in the case-law of some national and international courts, "public figures" - individuals who, despite not holding any public office or official responsibilities, occupy certain prominent positions in society – also have to tolerate a larger degree of criticism and intrusion than ordinary citizens. For example

- The US Supreme Court stated that the rule covers in essence anyone who plays "a prominent role in any public controversy, political or otherwise;"[48]

- The European Court expanded the application of the rule to include "anyone who is part of the public sphere, either because of their action or by their position. In other words, one must distinguish between private individuals and individuals acting in a public context."[49]

In addition to being part of a matter of public interest, the rationale for assimilating public figures to officials is that these persons find themselves in a position where they have easier access to the media to repair the harm suffered by their reputation.

The Revised Principles include a reference to public figures at Principle 2.

Non-natural entities

Jurisprudence of the European Court indicates that a different balancing act should be applied in cases involving non-natural entities, as opposed to individuals.

- **Members of certain institutions:** In a case where an academic had criticized the senate of a State University virulently enough for the institution to sue its employee for defamation, the European found that the reputation or "dignity" of the educational institution could not be equated to the dignity of human beings.[50] It found that "the protection of the University's authority is a mere institutional interest of the University, that is, a consideration not necessarily of the same strength as the protection of the reputation or rights of others."[51] While the European Court admits that non-natural entities may sue when their reputation is harmed, it argues that the balancing analysis should necessarily take into account the public scrutiny and wider criticism that these should be ready to tolerate.

- Importantly, the European Court reached a similar conclusion in a case concerning a defamation of a **multinational corporation**, stating that

> [L]arge public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies.[52]

We also note that the reform of the UK Defamation Act 2013 states that "harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss."[53] This reinforces the position under the English common law, though it also introduces a more specific need to demonstrate the reality of loss.

Privileges

The Defamation Principles recognised that in certain designated forums, it is in public interest that freedom of expression remains absolutely free and escapes all risks of litigation for defamation.

We propose to expand the list of absolute privileges to include statements in additional proceedings, namely,

- Statements in proceedings of judicial character (e.g. the proceedings before national human rights bodies, tribunals and other similar institutions);
- Statements made under oath or under the penalty of perjury;
- Statements contained not only in parliamentary reports but also in other reports written by certain statutory officers and bodies.

Words of others

The "words of others" defence recognises the rule that no one should be held accountable for fairly and accurately reporting the words of others.

This rule recognises that the media have a responsibility to cover the news and that this may include reporting on remarks which undermine the reputation of others. Furthermore, journalists are not required to distance themselves explicitly from the statements, or to check the truthfulness of every remark. This would make the work of the media very difficult and

thereby harm the flow of information to the public.[54] Professional ethics and good practices cover how and when journalists should report the words of others, including in situations where the original author has retracted the disputed statement or where the disputed statement has been published anonymously.

As discussed below, this issue is of particular importance in the digital context, and particularly with regard to social networks where the repetition of words of others, either by "sharing," "liking," "republishing" or "re-tweeting", is the main driver of the circulation of content.

We suggest that reporting the words of others should be subject to the standard of reasonable publication (as described in Principle 12). This standard – or an analogous defence based on the idea of 'due diligence' or 'good faith' – recognises that even the best journalists make honest mistakes, and that punishing those would amount to undermining the public interest in receiving timely information. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.

The "words of others" defence - combined with the standard of reasonable publication - equally applies to social communicators who are not media professionals. Particularly through digital technologies, individuals outside the traditional media sphere have increasingly been able to contribute effectively to debates of public concern. It is clear under international law that all information and ideas on matters of public interest should receive the same consideration without regard to the profession or "guild" of the author.[55] However, as social communicators have neither the same training as journalists (notably in terms of professional ethics) nor resources comparable to those of media professionals when it comes to producing, verifying and publishing information, they should not be held to an identical standard of liability.[56] The standard of reasonable publication implies that, when assessing a non-professional contribution to a debate of public interest, courts should take into account the specific features and personal context of the author in order to decide whether it was reasonable for them to publish the disputed statement; in any case, the capacity of a disputed statement to contribute to a debate of public concern should be a decisive factor in the court's decision.

Remedies

Non-pecuniary remedies

The Defamation Principles recommend that non-pecuniary remedies should systematically be prioritized over pecuniary ones.

Given the development of various laws on the right of reply or correction as an alternative to claims of defamation, we propose that the Defamation Principles provide more detailed guidelines in this area.

In particular:

- **The right of reply** should be voluntary rather than prescribed by law. However, whether the right of reply is statutory or organised through self-regulation, the same principles apply[57], namely:
  - A reply should only be available when responding to incorrect facts or in case of a breach of a legal right, not a means to comment on opinions that the reader/viewer doesn't like or that present the reader/viewer in a negative light;
  - The reply should receive similar, but not necessarily identical, prominence to the original article;
  - The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast;
  - The media should not be required to carry a reply which is abusive or illegal;
  - A reply should not be used to introduce new issues or to comment on correct facts.

- The right of reply should be clearly distinguished from a **right of correction**. A right of correction should limited to pointing out erroneous information published earlier, with an obligation on the publication itself to correct the mistaken material.

Defamation in the digital age

In this section, we examine the questions that specifically arise with the application of defamation laws in the context of Internet-based communication. The fact that legal documents can now be served via social media is a striking testament to the importance that these communication platforms have taken on in the few years of their rapid growth.[58]

Generally, courts will apply to online defamation the same rules applicable in the traditional context. However, as the traditional confrontation between the right to freedom of expression and the protection of reputation takes shape in the digital world, a number of new issues arise which need to be examined and addressed in the Defamation Principles.

Jurisdiction

As a consequence of the worldwide accessibility of information on the Internet, states can be tempted to assert their jurisdiction over cases with which they actually have very little connection.

- In their joint Declaration of 2010, the Special Rapporteurs expressed their concern about "jurisdictional rules which allow cases, particularly defamation cases, to be pursued anywhere, leading to a lowest common denominator approach."[59]

- In Australia, in *Dow Jones & Company Inc v Gutnick*, the court held that defamation on the Internet occurs in the jurisdiction where the material is downloaded (i.e. read or heard).[60]

In line with the discussion on forum shopping and jurisdiction above, we believe that the Defamation Principles should restrict jurisdiction to countries where there is a genuine, real and substantial connection between the parties and the State, and where it is most appropriate for courts of this State to decide on the merits of the case.

In addition, courts should take into account the application of international standards on freedom of expression to every case they take into consideration. Whatever the decision on jurisdiction, it should not lead to international free speech guarantees being discarded or diminished.

User-generated content and "professional" content-producers

A salient feature of digital technologies has been the possibility for non-professional communicators to take an active and important part in the production and circulation of all sorts of content, including news and discussion of public affairs. While online "professional" media publications tend to be legally assimilated to their analogue counterparts,[61] even if it has sometimes required a modification of legislation,[62] courts are more hesitant in their approach to non-professional content. It is more complex to decide whether professional journalists and non-professionals should be judged by the same standards for their online activities.

We make the following observations in this respect:

- **Equal protection to all communicators in the public interest**: Generally, the protection of freedom of expression is identical whether a contribution to a debate of public interest is

made by "professional media" or a social communicator who is not a media professional. The functional conception of freedom of speech prevails over the corporatist argument that would grant a stronger protection to the professional press only. For example,

- The European Court has already extended the protection typically granted to "professional media" to other contributors to debate of general public interest. It noted that "The [UK] Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment;"[63]

- In Canada, the Supreme Court extended the "responsible communication on matters of public interest" defence to bloggers and online posters; it is no longer limited to journalists;[64]

- In the USA, the Ninth Circuit Court explicitly held that media protections are not limited to cases with institutional media defendants: "With the advent of the Internet and the decline of print and broadcast media ... the line between the media and others who wish to comment on political and social issues becomes far more blurred."[65] In another decision, Twitter users have been assimilated to the media: any public figure plaintiff would have to prove actual malice against them (while private plaintiffs would usually only have to prove negligence);[66]

- In France, the Conseil d'Etat established that a blogger was entitled to the same protection as a "professional journalist," stipulating that a journalistic activity is identical, regardless of whether it is performed online or in legacy media.[67]

- There is a difference between the expectations of defendants in terms of **professional ethics or ethical behaviour;** this is relevant in the appreciation of a defence of good faith or responsible publication. For example:
  - In France, professionals (journalists mainly, but also magistrates) are in principle judged more strictly than lay people. However, their statements posted on blogs or discussion forums are treated more mildly as it is accepted that these social media stage a discourse with a wider freedom of tone. For instance, in one case, the Court held that even though the defendant was a professional journalist, the defamatory statement he posted on his private blog could be tolerated because someone acting in a non-professional capacity (as was found here to be the case) on a blog could more easily claim good faith if some kind of circumspection and prudence in the tone was respected.[68] In another case, the Court decided that good faith criteria should be appreciated differently according to the context of the writing and the quality of the writer; the Court said that good faith could be qualified with less rigour when the author of the defamatory statements published them on a discussion forum and was not a journalist but a person involved in the facts he was talking about.[69] The Court decided that the fact he was a lay person and furthermore an involved one required the toleration of a certain degree of exaggeration; the Court therefore ruled that the statements could not be characterized as defamation.

ARTICLE 19 has already made similar arguments in our Right to Blog policy paper,[70] where we recommended that non-professional communicators should not be judged by reference to the standards applicable to media professionals, as they do not possess similar training or resources.

We propose to incorporate these recommendations into the Defamation Principles.

In addition, it seems worth insisting on the fact that courts should always take into account the context of Internet communication, where a humorous or provocative tone is common practice.

Public vs. private communication online and the issue of damages

When it comes to assessing the consequences of communication through digital technologies, we observe that the courts seem to be divided between two trends.

- When defamatory statements "go viral," some courts assess that the **damage resulting from such dissemination is high or almost impossible to repair**. For instance:
    - In the UK, the court granted a substantial award of £90,000 in damages over the publication of a tweet to approximately 65 "followers" which made allegations of match-fixing against a world famous cricketer.[71] It seems from this decision that the UK courts may take the approach that publications by well-known individuals via social media are quite different from transient "saloon-bar banter" in anonymous web forums.

    - In Australia, the Adelaide Magistrates Court awarded a former principal of an outback school $40,000 over a defamatory Facebook page created by two parents of students at the school. The Court stated that "the fact that Ms Knueppel used the publication via a Facebook format and the ease of access and republication should be taken into account as a factor that aggravates the award of compensatory damages." [72]

    - Also, in another case,[73] the Perth Court held that the extent of the audience to whom the matter had been published was, by reason of the nature of social media, undefined and inexact; however, due to the "grapevine" effect, it was likely to be substantial within the local community and beyond, and that its existence on the internet made the audience potentially permanent, damaging the plaintiff's reputation into the future. The Court concluded that "when defamatory publications are made on social media it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication."[74]

    - The European Court also held that "the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press."[75]

    - In Brazil, a new Bill aims to raise penalties for acts of defamation committed online.[76]

- Other courts operate a factual analysis in determining **the actual circulation and context of the allegedly defamatory statement**. For example, some courts in France do not

consider social media platforms to be necessarily public spaces. The public or private nature of statements posted on social media platforms depends on the selected privacy settings: if it is available only to "contacts" or "friends", the statement is private; if not, the statement is public. More specifically, the nature of statements posted on Facebook or MSN Messenger, for instance, is generally considered as:

- **Private** when they are only accessible to "friends" and posted on the defendant's "wall". For instance, the French Supreme Court (the Court of Cassation) ruled that "insults" posted by the defendant on her MSN and Facebook profiles were not public because not only was access to both profiles limited to individual persons accepted as "friends" or "contacts" by the defendant, but also these persons were low in number and that, therefore, these persons constituted a "community of interests;"[77]

- **Public** when posted on a friend's "wall" (as the friend's privacy settings may differ and be more lenient), or when the privacy settings of the defendant are not very limited. This distinction was upheld in a 2010 case: a defamatory statement posted on the Facebook wall of a "friend" was held to be public because this "friend" may have many other "friends" and may have decided not to block access to her profile to other people on Facebook and that, therefore, the statement could be seen by hundreds, or more, persons. The author of the post was ordered to pay the symbolic value of one euro as liquidated damages for compensation of moral prejudice.[78]

We suggest that the Defamation Principles reflect this trend and stipulate that the actual dissemination and the actual resulting damage should be assessed on a strictly factual basis. Courts should never decide on the basis of the potential circulation of online content. Courts should also take into account the capacity of the Internet to serve the purposes of restoring reputation.

New forms of publication

Redistribution of existing statements through digital technologies

The Internet offers various mechanisms of permanent availability or re-distribution of existing allegedly defamatory statements, such as online archives, re-tweets or hyperlinks. Some courts analyze these as the beginning of a new limitation period or as a new cause for action, which in both cases exerts pressure on online content.

The practice of the courts in these cases varies. For example,

- **Australia** rejected the single publication rule and **New Zealand** similarly retains a multiple publication rule;

- Till recently, in **the UK**, the traditional common law rule allowed claimants to sue for every publication of substantially the same statement after the original defamatory publication.[79] This effectively allowed claimants to sue for every time the publication was re-posted, or even re-read, on the internet, as this would re-start the one-year time period for bringing defamation claims. The High Court interpreted the rule to mean that every 'hit' on a web page would constitute a separate cause of action.[80] The rule was only reversed by the Defamation Act 2013 (see above);

- In **Ireland**, following the adoption of the Defamation Act of 2009, a plaintiff only has one cause of action for multiple publications;

- In **India,** the Delhi High Court adopted the single publication rule for libel on the internet;[81]

- In **the US**, courts have generally applied the single publication rule to libel cases involving Internet publications in the same manner as they do to cases involving more traditional mediums. These decisions found that failure to apply this rule would subject web publishers to almost perpetual liability and would seriously inhibit the exchange of free ideas on the Internet.[82]

We suggest that the single publication rule is the most appropriate.

Hyperlinks, likes and sharing

Hyperlinks facilitate navigation on the internet but are sometimes treated as endorsement of the original content by the communicator who uses this function. For example:

- In **Canada**, the Supreme Court was asked to decide whether hyperlinks that connect to allegedly defamatory material could be said to publish that material, such that the publisher of the article which contained the hyperlink could be liable in defamation.[83] The court was definitive in its rejection of liability for hyper-linking. The Court held that the negative consequences for freedom of expression of imposing liability for hyperlinks would be grave.

- By contrast, **in Australia**, the court held that there is potential liability for content in published links.[84]

The Internet is in essence a copy machine and the growth of social media and content-sharing platforms makes it even more so. On the Web, navigation is greatly facilitated by hyperlinks. On social media, "liking," "re-tweeting," "pinning" or otherwise republishing online material similarly facilitate the circulation and the curation of content. Without these mechanisms, the online flow of information and ideas would be sluggish, if not completely frozen. When sharing information, Internet users do not necessarily endorse any possibly defamatory meaning. Courts should ensure that the use of ordinary web devices (such as the hyperlink) or of the ordinary sharing mechanisms of social media (such as liking, re-tweeting, and similar functions) is not **automatically** construed as the republication of a defamatory statement. Instead, courts should apply the standard of reasonable publication (see Principle 12 and discussion above).

Online archives

Online archives - such as those of newspapers - may contain articles that were found to be defamatory in court proceedings.

The European Court has recognised that the maintenance of Internet archives is a critical aspect of the role of the Internet in enhancing the public's access to news and facilitating the

dissemination of information more generally. In relation to Internet news archives, the Court has gone even further and said:

> [It is] not the role of judicial authorities to engage in the rewriting of history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations.[85]

At the same time, the European Court also held that "a requirement to publish an appropriate qualification to an article contained in an Internet archive, where it has been brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press, did not constitute a disproportionate interference with the right to freedom of expression."[86]

Similarly, the US Court of Appeal held that relying on the responsible journalism in the public interest defence requires that an online archive of a story must be updated to take account of exculpatory developments.[87]

Posting updates on such articles appears to be a less restrictive limitation on the right to freedom of expression than orders to remove a defamatory article from online archives.[88] We suggest that the Defamation Principles consider this measure as well.

Intermediaries

Hosts

Webhosting providers, or "hosts", play a crucial role in facilitating access to the Internet and transmission of third party content, including content that might be defamatory.

Hosts are bodies (typically companies) that rent web server space to enable their customers to set up their own websites. However, the term "host" has also taken on a more general meaning, i.e. any person or company who controls a website or a webpage which allows third parties to upload or post material. For this reason, social media platforms,[89] blog owners, and video- and photo-sharing services are usually referred to as 'hosts'.

In many Western countries, hosts have been granted immunity for third-party content.[90] They have also been exempted from monitoring content.[91] However, they have often been made subject to **'**notice and take-down' procedures, which give them a strong incentive to remove particular content once they are told by private parties or law enforcement agencies that the content is unlawful, lest they face liability for that content. A number of problems have been identified in relation to such 'notice and take-down' procedures, including their lack of clear legal basis[92] and a lack of basic fairness.

International bodies have also commented on the compliance of these procedures with international standards on freedom of expression and intermediary liability. The four special rapporteurs recommended in their 2011 Joint Declaration that:

- No one should be held liable for content produced by others when providing technical services, such as providing access, searching for, or transmission or caching of information;
- Liability should only be incurred if the intermediary has specifically intervened in the content, which is published online;
- ISPs and other intermediaries should only be required to take down content following a

court order, contrary to the practice of "notice and takedown".[93]

Similar conclusions on intermediary liability have been reached in national standards related to defamation.[94]

Since the release of the Defamation Principles, the issue of intermediary liability has been extensively discussed at international and national levels. ARTICLE 19 has joined other organisations to formulate and promote the Manila Principles on Intermediary Liability,[95] a set of rules that we consider the appropriate approach to this problem. Hence, we suggest that the Revised Principles should reflect the Manila Principles.

Search engines

The principles on intermediary liability – discussed above - should apply also to search engines. However, we can observe some issues specific to search engines that are prominent in defamation cases:

- **Search results** - plaintiffs sometimes seek liability from search engines because the search results link to defamatory content, or ask for the removal of content that has already been found defamatory in court proceedings. In addition, it can be expected that more requests for delisting the material will be sought under so-called "right to be forgotten" laws. At the same time, judicial practices in national courts vary;[96]

- **Search suggestions** - search requests may contain a certain number of words which, it is sometimes claimed, in themselves amount to a defamatory statement. Such claims have recently been considered favourably in some jurisdictions. For example:
  - In France, the Supreme Court held that the statements proposed by search engines ("Google suggest", more precisely) do not constitute defamation unless made intentionally.[97] However, a new trend has emerged in which claimants pursue search engine owners on the general principles of tort law, accusing them of negligence in not warning the users of said search engines and of misconduct in refusing to remove the unlawful statement. Another trend is to sue search engines on the grounds of liability for damages committed by things under one's custody.[98] Claimants argue that algorithms used by search engines to create suggestions are things under the search engines owner's custody and that these algorithms may cause damages.

  - Also, the Supreme Court of South Australia held Google liable for the search results returned by a search on the plaintiff's name, including the hyperlinks and the snippets provided by the search engine. The search engine was considered to be a secondary publisher of the defamatory content. In addition, the suggestions offered by the auto-complete function of the search engine were also found to be defamatory.[99]

We suggest that search engines should be considered as intermediaries and benefit from a similar exemption from liability.

Anonymity and defamation

Anonymity (the ability of not being identified or identifiable) has taken on an increased importance in the digital age. In several countries, the right to anonymous speech, the right to read anonymously and, more generally, the right to online anonymity have been recognised.[100]

Laws on data protection aim at the same result as they purport to protect individuals from being identified through the processing of their personal data.

It is now increasingly recognized that anonymity is a vital enabler of freedom of expression in relation to digital technologies.[101] In his May 2015 Report, the UN Special Rapporteur on freedom of expression insisted that anonymity and encryption are necessary to ensure the privacy and security that allow people to exercise their right to freedom of expression and opinion in the digital context. Anonymity, he added, is a necessity for journalists, human rights defenders and protestors. The Council of Europe's Council of Ministers had previously recommended that "in order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity."[102]

Obviously, any restriction to the right to anonymity should comply with the three-part test of international law on freedom of expression.

Any lifting of anonymity in defamation cases should be subject to strong procedural safeguards. As a matter of principle, the mandatory disclosure of an individual's online identity should only be ordered by the courts, which are best placed to properly balance the right to anonymous expression with other interests.

In cases of defamation, this should require that a number of conditions be fulfilled, including notice to the anonymous poster, details of the allegedly defamatory statements, evidence of a prima facie case against the anonymous poster, and a balance struck between the right to anonymous speech and the prima facie case, taking into account the need for disclosure of identity in order for the case to proceed.

This is consistent with best practice in countries where the courts have recognised that anonymity could be lifted in specific cases, subject to the careful scrutiny of the courts. For example,

- The New Jersey Superior Court identified a number of steps to be taken first:
  - Plaintiff must undertake efforts to notify the anonymous posters that they are subject to subpoena and allow them reasonable time to file an opposition to the application;
  - Plaintiff must identify the specific statements that allegedly constitute actionable speech;
  - Plaintiff must produce sufficient evidence supporting each element of its cause of action on a prima facie basis;
  - Courts must balance the defendant's right to anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the defendant's identity in order to allow the plaintiff to properly proceed.[103]

- In the UK, *a* law firm (painted in a very negative light on a website called "Solicitors From Hell UK") was permitted to sue unidentified defendants for defamation after taking reasonable steps to identify them.[104] However, the UK courts have declined to grant Norwich Pharmacal disclosure orders, arguing that it would be disproportionate and unjustifiably intrusive to uncover the identities of users who had posted messages that were not defamatory, barely defamatory or little more than abusive.[105]

It is ARTICLE 19's view that laws that create mandatory real-name registration systems as a prerequisite to access and use of the Internet are contrary to international human rights law and should be abolished. ARTICLE 19 also considers that social media platforms and news sites should not require the use of real-name registration systems.[106]

We propose that these recommendations are reiterated in the Defamation Principles.

About ARTICLE 19

ARTICLE 19: Global Campaign for Freedom of expression (ARTICLE 19) is an international human rights organization that works globally to promote and protect freedom of expression and information. It was founded in 1987 and has international office in London and regional offices in Bangladesh, Brazil, Kenya, Mexico, Senegal, Tunisia and Myanmar.

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. It has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals, as well as existing laws that affect the right to freedom of expression, and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All legal and policy materials are available at .

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[1] Reputation has been highly prized in societies over the course of history: it was for instance protected under Roman law. See E. Barendt, Freedom of Speech, 2nd Ed., OUP, 2005, 198.
[2] For the purposes of the Principles, laws which purport, at least at a prima facie level, to strike this balance are referred to as 'defamation laws', recognising that in different countries these laws go by a variety of other names, including insult, libel, slander and *desacato*.
[3] Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, ARTICLE 19, July 2000.
[4] The 2000 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 30 November 2000. See also UN Doc. E/CN.4/2001/64, 13 February 2001, para. 48.
[5] For a general discussion of defamation laws, see ARTICLE 19's materials, in particular the Defamation Maps (updated in 2012); Briefing Note on International and Comparative Defamation Standards, February 2004; Putting Expression Behind Bars: Criminal Defamation and Freedom of Expression, December 2005; Defamation ABC: Simple Introduction to Key concepts of Defamation Law, November 2006; or Civil Defamation: Undermining Freedom of Expression, December 2009.
[6] *Gatley on Libel and Slander*, 12th edn, Sweet & Maxwell, section 1.7.
[7] The Inter-American Legal Framework regarding the Right to Freedom of Expression, Office of the Special Rapporteur for Freedom of Expression of the Inter American Commission on Human Rights, 2010, para 79, p. 50.
[8] European Court, *Axel Springer v. Germany*, App. No. 39954/08, 7 February 2012, para 83.
[9] For example, in the UK, where a threshold of harm for a finding of 'defamation' had developed under the common law, the UK 2013 Defamation Act clarified and reinforced this requirement. Section 1(1) of the 2013 Act builds upon previous attempts by the judiciary to elaborate a defined 'threshold' of harm and provides that "[a] statement is not defamatory unless its publication has caused or is likely to cause *serious harm* to the reputation of

the claimant". The 'serious harm' requirement was said to 'raise the bar' for bringing a claim in order to prevent claimant success in trivial cases; see, Explanatory Note to the legislation. It is not yet entirely clear precisely to what extent the Act changes the threshold, but useful dicta was provided by the courts in *Cooke and Another v MGN Ltd & Trinity Mirror Midlands Ltd* [2014] EWHC 2831 (QB) and *Lachaux v Independent Print* [2015] EWHC 2242 (QB).

[10] See, e.g. Germany or France.

[11] The European Court has determined that the right to a private life enshrined in Article 8 of the European Convention on Human Rights encompasses the right to reputation; see, e.g. *Radio France & Others v. France*, App. no. 53984/00, 30 March 2004; or *Sipos v. Romania*, App. No. 26125/04, 5 May 2011.

[12] Principle 4 of the Defamation Principles. See also, ARTICLE 19, Putting Expression Behind Bars: Criminal Defamation and Freedom of Expression, Background Paper for EU NGO forum, London, 8-9 December 2005.

[13] HR Committee, General Comment No. 34, CCPR/C/GC/34, adopted on 12 September 2011, para 47.

[14] African Court, *Lohé Issa Konaté v. Burkina Faso*, no. 004/2013, 5 December 2014. The African Court ordered that Burkina Faso modify its legislation.

[15] See, the Inter-American Court of Human Rights, *Herrera-Ulloa v. Costa Rica*, 2 July 2004, Series C, No. 107; *Ricardo Canese v. Paraguay*, 31 August 2004, Series C, No. 111; *Tristán Donoso v. Panama*, 27 January 2009. List of all defamation cases of the Inter-American Court is available at http://bit.ly/1I8ecQH.

[16] European Court, *Cumpana Mazare v. Romania*, 17 December 2004, para 115.

[17] European Court, *Morice v. France*, App. No. 29369/10, 23 April 2015, para 127.

[18] The UNESCO Doha Declaration, 1-3 May 2009.

[19] The Council of Europe Parliamentary Assembly's Resolution 1577 (2007) Towards decriminalization of defamation; and the Response of the Committee of Ministers, adopted at the 1029th meeting of the Ministers' Deputies, 11 June 2008.

[20] For all materials on defamation, see http://www.oas.org/en/iachr/expression/jurisprudence/si_decisions_court.asp.

[21] See the 2010 Joint Declaration; and the Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade.

[22] See e.g., OSCE, Ending the Chilling Effect – Working to Repeal Criminal Libel and Insult Law, November 2004.

[23] See, e.g. Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52; or Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2001/64, 26 January 2001.

[24] OAS, IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 2014, p. 417.

[25] See also the list in ARTICLE 19's Amicus Curiae to the IACrtHR, Nestor José, Luiz Uzcategui et al., no. 12.661, November 2011.

[26] In Burkina Faso, a new press Code was adopted in September 2015; fines replaced imprisonment as a sanction for defamation or the dissemination of false news; see BBC, Burkina: un nouveau code de la presse, 5 September 2015.

[27] In September 2015, the ANC has taken a stance against criminal defamation, which should be followed by legislative action; see D. Milo, The Case Against Criminal Defamation, 29 September 2015.

[28] The Constitutional Court of Zimbabwe, *Madanhire and Another v The Attorney General,* Judgment No CCZ 2/14.

[29] See, e.g. IPI, Out of Balance: Defamation Law in the European Union and its Effect on Press Freedom, A provisional overview for journalists, civil society, and policymakers, July 2014; and the IPI database on European defamation legislation.

[30] See Council of Europe, Resolution 1577 (2007),

[31] For examples, see ARTICLE 19, Civil Defamation: Undermining Freedom of Expression, December 2009.

[32] Special Rapporteur on independence of judges and lawyers, 2013 Report on Legal Aid, A/HRC/23/43, para 20.

[33] Section 9(2) of the 2013 Defamation Act.

[34] It is still unclear what will determine whether it is 'appropriate' for a case to be heard in the UK. The Act does not specify any factors that the courts are likely to consider, nor is there previous case law on the issue given the reversal of the common law rule. The reputation of a claimant in a particular jurisdiction may well be relevant, as undoubtedly will the claimant's country of residence.

[35] See, e.g. Irish Times, Libel tourism may become our newest cottage industry, 10 November 2014.

[36] See, e.g. A. Romanos, Is New Zealand the Libel World's most plaintiff friendly jurisdiction?, 25 August 2015.

[37] See the US Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, 2010 (Pub.L. 111–223). For a critical perspective, see for instance D. A. Anderson, Transnational Libel, 53 Va. J. Int'l L. 71, 2012-2013.

[38] See also, European Court, *Steel and Morris v. UK*, *op.cit*.

[39] *Engler v Winfrey,* 201 F 3d 680 (5th Cir.) 2000.

[40] G.Ogle (2010), Anti-SLAPP Law Reform in Australia, Review of European Community & International Environmental Law Volume 19 Issue 1 pp. 35–44.

[41] M. Bouchart, French landmark case: A new dawn for investigative journalism?, 11 January 2012.
[42] See, *Crop Care Federation of India v Rajasthan Patrika* (PVT) Ltd & ors [2009].
[43] See *Tata Sons Ltd v Greenpeace International & anor* [2011] 178 (2011) DLT 705.
[44] For example, The California Anti-SLAPP Act is widely regarded as most sweeping anti-SLAPP law in the US. The statute was enacted in 1993 to prevent "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." As a consequence of the act, when a defendant challenges a libel or slander case as a SLAPP suit, the court must examine the suit critically and, if it finds that the plaintiff is not likely to succeed, the court must dismiss the action. The Act has been used successfully by defendants in a number of cases; a critic of the Church of Scientology was able to get the church's libel suit dismissed, a political candidate who criticized an opponent had the opponent's suit against him dismissed (see*, Beilenson v Superior Court*, 44 C.A. 4Th 944 1996). It has been used by media corporations to dispose of meritless libel suits filed by individuals (see, e.g. *Braun v Chronicle publishing*, Co 52 C.A. 4th 1036 1997), and by individuals criticizing corporations on internet message boards where the corporation failed to present sufficient evidence to establish a prima facie claim (see, e.g. *ComputerXpress, Inc. v. Lee Jackson et al.*, 93 Cal.App.4th 993, 113 Cal.Rptr.2d 625, E027841 (Cal. Court App., 4th District, Nov. 15, 2001)). Similarly, After Quebec in 2009, the government of Ontario passed Bill 52, the Protection of Public Participation Act, 2015, see. Madondo, Ontario defends freedom of expression, passes anti-SLAPP legislation, 29 October 2015; or T. Cushing, Ontario Passes Law Targeting Bogus Defamation Lawsuits, 12 November 2015.
[45] In France, where no specific legislation has been adopted, malicious prosecutions may lead to the Court condemning the claimant for abusive proceedings, if the judge finds that (i) the proceedings have no serious nature or (ii) when they are engaged recklessly on no sensible grounds. It was held, for instance, that a woman who sued a political party twice on the grounds of defamation, the first subpoena / claim ("assignation") being void for failure to comply with several mandatory formalities and the second one being void for failure to observe the statute of limitation, had engaged in abusive proceedings as it was reckless to address a subpoena / claim which was not once, but twice void on different grounds – even though the claimant's wish to defend her honour and her good faith were recognised by the Court -. The claimant was condemned to pay a symbolic sum of €1 to the defendant (Nevers High Court, 23 October 2012, Martine C. v. UMP). In another case, the High Court condemned the claimant for an abuse of criminal procedure and required her to pay to the defendant the sum of €8,000. In that particular case, the Court held that not only was the claimant guilty of libel tourism, but also of bad faith. Indeed, the claimant, a law professor, had sued an editor for publishing criticism of her book. The Court noted that the review of her book did not damage her honour or reputation but only expressed in moderate terms a scientific opinion on her book without ever exceeding the limits of free criticism and that therefore, the bad faith of the claimant, a lawyer familiar with French law, was undeniably established (Paris High Court, 3 March 2011, *Ministère Public v. Weiler*).
[46] Publication is to be understood as the fact of making information or content available to persons other than the author; thus, the date of publication is the moment when information or content becomes accessible to the public.
[47] In the textbook (in)famous case of *Duke of Brunswick v. Harmer, [(1849) 14 QB 185], it* was decided that the sale of single copy of a newspaper originally published 17 years before constituted a new cause for action.
[48] US Supreme Court, *Curtis v. Butts*, 388 US 130 (1967) or *Gertz v. Welsh* (418 US 323 (1974).
[49] European Court, *Morar v. Romania*, Appl. No 25217/06, 7 July 2015, para 55 (original in French only at the time of writing).
[50] European Court, *Kharlamov v. Russia*, App. No. 27447/07, 8 October 2015, para 32: "The Court notes that the applicant had recourse to a certain degree of hyperbole in his address. At the same time, employees, while engaging in a debate of public interest, are entitled to have recourse to exaggerations as long as they do not overstep the limits of admissible criticism (see, *mutatis mutandis*, *Vellutini & Michel v. France*, App. no. 32820/09, § 39, 6 October 2011). The Court considers that the applicant did not resort to offensive and intemperate language and did not go beyond the generally acceptable degree of exaggeration."
[51] European Court, *Kharlamov v. Russia*, *Ibid.*, para 29.
[52] European Court, *Steel and Morris v. UK*, App. no. 68416/01, 15 February 2005, para 94. The Court observed that "in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good."
[53] See UK Defamation Act 2013, Section 1(2).
[54] See ARTICLE 19, Defamation ABC, *op.cit.* p. 18.
[55] See General Comment 34: "Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self- publication in print, on the internet or elsewhere." (para 44).
[56] See ARTICLE 19, The Right to Blog, 2013.

[57] See ARTICLE 19's Memorandum on the draft Council of Europe Recommendation on the right of reply in the new media environment, August 2003, p. 5.
[58] Under English law, courts have admitted that legal documents can be served through social media platforms, such as Twitter, Facebook or Instagram. See A. Cochrane, Social media disputes: some cause for optimism?, 10 September 2015.
[59] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Tenth Anniversary Joint Declaration: Ten key challenges to freedom of expression in the next decade (2010 Joint declaration), para. 9, A/HRC/14/23/Add.2, March 25, 2010.
[60] *Dow Jones v Gutnick* (2002) 210 CLR 575.
[61] For instance, in the US, in a recent defamation case where the defendant sought anti-SLAPP protection related to internet forum posts about the plaintiffs, a federal district court recognized that social-media speech is no different from "traditional" speech. (Piping Rock Partners, Inc. v. David Lerner Assocs., Inc., No. C 12-04634 SI (N.D. Cal. May 17, 2013) (Illston, J.). The Canadian courts have ruled that the online version of a magazine otherwise qualifying as a "newspaper" did not lose this benefit (Weiss v Sawyer [2002] O.J Bi 3570 61 O.r. (3d) 256 (C.A.))
[62] For instance, California has recently adopted an act that extends libel retraction and damages provisions to online publications, as both categories of media fulfil the same function. See, J. Fong, California amendment extends libel provisions to online publications, 30 October 2015.
[63] European Court, *Steel and Morris v. UK, op.cit.*
[64] *Grant v. Torstar Corp.*, 2009 SCC 61.
[65] See, *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014)
[66] See, *Rosario v Clark County School District*, No 2:13-CV-362 3CM, 2013 US Dist LEXIS 93963 (NV Apr 23, 2013). See the presentation and comment in J. Azriel, C. Mayo, Contemporary United States Law Regarding Online Social Media Libel Standards on the 50th Year Anniversary of Times v Sullivan and 40th Year Anniversary of *Gertz v Welch*, ICL Journal, Vol. 8, 4/2014, 432.
[67] Decision N° 377177, 16 October 2015.
[68] Paris High Court, *Commune de Puteaux v. Christophe G.*, 17 March 2006.
[69] Paris High Court, *Electro Clim v. Nicolas D,* 24 June 2015.
[70] ARTICLE 19, Right to Blog, 2013.
[71] *Cairns v Modi*, [2012] EWCA] Civ 1382 CA.
[72] See *Burtenshaw v Knueppel,* in Case Law, Australia: Mickle v Farley, $105,000 awarded for defamatory tweets and Facebook posts – Patrick George.
[73] *Dabrowski v Greeuw*, [2014] WADC 175.
[74] *Ibid.,* p.48, 265.
[75] European Court, *Wegrzynowski & Smolczewski v Poland*, App, No. 3346/07, 16 October 2013, para 56. See also *Editorial Board of Pravoye Delo & Shtekel v. Ukraine*, App. no. 33014/05, para 63.
[76] See ARTICLE 19, "CGI.br: "PL 215/2015 subverte princípios fundamentais da Internet", 2 October 2015; or ARTICLE 19, Netizen Report: Will Brazil Give Up on Defending Digital Rights?, 30 September 2015.
[77] See, Cour de cassation, 10 April 2013, n°11-19530.
[78] See, Reims Court of Appeal, 9 June 2010 n°09/03209.
[79] *The Duke of Brunswick v Harmer* [1849] 14 QB 154.
[80] *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805.
[81] The case *Khawar Butt vs Asif Nazir Mir* concerned an allegedly defamatory posting on Facebook. The High Court ruled that the plaintiff was time-barred by limitation under the Limitation Act, since the posts were published in 2008 but the plaintiff instituted the suit in 2010.
[82] See, e.g. *Clemens v Namee*, 615 F.3D 374 (5th Cir. 2010), *Young v New Haven Advocate,* 315 F. 3d 256 (4th Cir. 2002); *Gorman v Jacobs,* 597 F.Supp 2d 541 (e.d. Pa. 2009) or *Firth v State of New York*, 98 N.Y. 2d at 372
[83] *Crookes v Newton* 2011 SCC 47.
[84] *Cooper v Universal Music Australia* Pty Ltd, [2006] FCAFC 187.
[85] *Wegrzynowski and Smolczewski v Poland*, *op. cit.*, para. 65.
[86] *Times Newspaper (n. 1-2) v. United Kingdom* (2009):
[87] *Flood v. Times Newspapers Ltd* [2010] EWCA Civ 804.
[88] European Court has reached this conclusion in Article 10 and Article 8 cases; see e.g. *Wegrzynowski*, *op. cit*.
[89] Social media platforms: the distinctive feature of social media platforms (such as Facebook or Twitter) is that they encourage individuals to connect and interact with other users and to share content. Another name for them is 'web 2.0 applications'. They are usually considered to be 'hosts' because they allow third parties to post content. This is important since, in some countries, the liability regime is different depending on whether or not a company (or other body) is regarded as a hosting provider or as an access provider.

[90] See for example, the 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, the 'E-commerce directive' in the EU. See also the Communications Decency Act 1996 in the US, and in Singapore, the Electronic Transaction Act 2010 which gives strong protection to innocent providers.

[91] See Article 15 of the E-commerce directive. In the case of *SABAM v. Scarlet Extended SA,* the Court of Justice of the European Union (CJEU) considered that an injunction requiring an ISP to install a filtering system to make it absolutely impossible for its customers to send or receive files containing musical works using peer-to-peer software without the permission of the rights holders would oblige it to actively monitor all the data relating to each of its customers, which would be in breach of the right to privacy and the right to freedom to receive or impart information. The court noted that such an injunction could potentially undermine freedom of information since the suggested filtering system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.

[92] 2011 Joint Declaration on Freedom of Expression and the Internet, July 2011.

[93] The 2011 Joint Declaration, *op.cit.*

[94] For example

- In the US, the Federal Communications Decency Act 1996 provides a strong protection against liability for Internet intermediaries who provide or republish speech by others, including in cases of defamation; see Section 230 of the Communications Decency Act;
- In the UK, the 2013 Defamation Act has added a new defence to Internet intermediaries (referred to as website operators). In Section 5 (2), the defence allows the operator to show that it was not the operator who posted the statement on the website. Further, the defence is not defeated by the fact that the website operator is a moderator of the statements posted by others; the defence will be defeated if the claimant shows that a) it was not possible for him to identify the person who posted the statement and he/she gave the operator notice of complaint in relation to the statement and b) the operator failed to respond to the notice within 48 hours (see Section 5(12)). Another basis on which the defence can be defeated is when the website operator has acted with malice. This legislative solution to challenges posed to traditional defamation law by growth of social media has yet to be tested in the courts;
- In Germany, different standards of liability apply for different kinds of ISPs, dividing them into those that offer their own content or adopt third parties' content as their own and those that merely host or give access to third parties' content. Content providers are fully responsible for published material according to established principles of libel law, whereas host and access providers are only obliged to remove or disable access to the unlawful material. See J Hegemann (2013) Germany, in C. Glasser (Ed) International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers 3rd ed. John Wiley & Sons;
- In Australia, the Broadcasting Services Act 1992 provides a statutory defence for defamatory "Internet content" carried, hosted or cached by Internet content hosts and ISPs where they are not aware of the nature of the material. The Uniform Defamation Law 2006 contains a defence of innocent dissemination. Under this legislation most internet intermediaries would not be liable for defamatory matter they republish so long as they are not the author of the material and do not exercise any editorial control over the content of the matter. There is no direct authority in Australia as to whether this defence would apply to an ISP. The elements of the statutory defence of innocent dissemination substantially replicate the common law, requiring a subordinate distributor to prove a lack of actual or constructive knowledge and that such ignorance was not due to negligence. See also *Weaver v. Corcoran* 2015 BCSC 165 and *Baglow v. Smith* 2015 ONSC 1175.

[95] See the Manila Principles; or ARTICLE 19, Internet intermediaries: Dilemma of liability, July 2013.

[96] For example:

- In Canada, in July 2015, the Supreme Court of British Columbia dismissed a claim that defamatory search results should be removed worldwide after Google had already agreed to remove the URLs from its Canadian search page; see H. Tomlinson, S Mansoori, Case Law, Canada: Niemela v Google Inc, British Columbia Court dismisses claim for worldwide libel injunction against Google, 24 July 2015;
- In Argentina, the Supreme Court held that search engines are not subject to some form of *ex anteor* strict liability for third-party violations; rather, only after a finding of illegality and relevant notification by a court or other competent authority could the Court place intermediaries on notice; see *Belén Rodriguez v. Google*, 99.613/06. See *Da Cunha, Virginia v. Yahoo SRL* and *Lorenzo, Bárbara v. Google Inc.*;
- By contrast, in Australia, the Supreme Court of Victoria held that Yahoo! was liable for defamatory imputations contained in an article that was said to have been published by the defendant because it could be found using the Yahoo! search engine; see in *Trkulja v Yahoo! Inc LLC & Anor*, [2012] VSC 88.

[97] French Supreme Court, 19 June 2013, n°12-17591. In this particular case, when someone typed the start of a particular company's name, Google suggested the word "fraudster" ("escroc"). The French Supreme Court decided that Google could not be condemned for defamation as it lacked a condition: the intention to commit the offence.

[98] Under Article 1384 of the French Civil Code.
[99] N. Suzor, Australian Court Holds Google Responsible For Linking To Defamatory Websites, 2 October 2015; L. Skinner, Case Law, Australia: Duffy v Google Inc, Google liable for search results, hyperlinks and autocompletes, 12 November 2015; and J. Malcom, Liability Hammer Comes Down on Google, But Hits Users, EFF, 28 October 2015.
[100] See, US Supreme Court cases: *Talley v. California*, 362 U.S. 60 (1960), *McIntyre v Ohio Elections Commission*, 514 U.S. 334 (1995), *US v Rumely*, 345 US 41, 57; *John Doe v 2theMart.com Inc.*, 140 F Supp 2d 1088 (2001); or Supreme Court of Canada, *R v Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212.
[101] See the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on the use of encryption and anonymity in digital communications, 22 May 2015, A/HRC/29/32; see also the 2013 Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/23/40, 17 April 2013, at para 47; ARTICLE 19, The Right to Online Anonymity, June 2015.
[102] Council of Europe, Declaration on freedom of communication on the Internet, May 2003, Principle 7.
[103] See, *Dendrite international Inc v Doe, No.3*, 775 A 2d 756 (N.J. Super Ct App Div 2001). For information about an anonymous online review, see the case described by S. Brennet, United States: The Lawyer, Avvo and the Anonymous Review, 13 September 2015.
[104] See *Brett Wilson LLP v Persons Unknown, September 2015, in* H. Tomlinson, Case Law: Brett Wilson LLP v Persons Unknown, corporate damages and injunction against unknown operators of website, 21 September 2015.
[105] See *Mith v ADVFN Ltd* [2008] EWHC 1797 (QB), *Sheffield Wednesday v Hargreaves* [2007] EWHC 2375 (QB) and *Jane Clift v Martin Clarke* [2011] EWHC 1164.
[106] ARTICLE 19, The Right to Online Anonymity, *op.cit.*