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Author(s)	Cheung, ASY
Citation	
Issued Date	2014
URL	http://hdl.handle.net/10722/197827
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Liability of Internet Host Providers in Defamation Actions:

From Gatekeepers to Identifiers

Anne S.Y. Cheung*

Internet intermediary liabilities in defamation actions have posed vexing legal problems in the new Internet social era of Web 2.0, especially when users can generate and spread their own content anonymously without being easily identified. In such an event, Internet intermediaries or Internet service providers (ISPs) can become defendants in defamation actions, the legal outcome of which is highly dependent on the roles they play in most jurisdictions, that is, whether the ISPs are categorised as content, access or host providers.¹

Amongst the three different types of intermediaries, host providers are in a legally nebulous position. Unlike content providers who are actively involved in contributing to the content of the disputed defamatory statement and should be liable in defamation actions, and unlike access providers, who only connect users to the Internet through a telecommunications network and thus should not be liable, host providers are caught in the middle. They have 'hosted' a website or provided a

* Professor Anne S.Y. Cheung, Department of Law, the University of Hong Kong (HKU). The author would like to thank Dr. GU Yu, Senior Research Assistance at HKU, for her research assistance of this study. She can be reached at anne.cheung@hku.hk

¹ Broder Kleinschmidt, 'An International Comparison of ISP's Liabilities for Unlawful Third Party Content' (2010) 18(4) *International Journal of Law and Information Technology* 332.

platform for their customers, hence allowing their presence and facilitating their publications. Common forms of host providers are social networking sites such as Facebook and Myspace, and Internet forums or bulletin boards such as Ubuntu Forums (the largest help and support forum for Linux users) and Tianya (the most popular forum in China, with more than 85,000,000 registered users).² The operators of these platforms enable users to post their own content and upload their own profiles, pictures and films. However, in most cases, the host providers do not exercise any prior control or active monitoring before users upload material,³ notwithstanding the fact that there may be basic ground rules stating that defamatory or other unlawful content should not be posted.⁴ Still, host providers have access to and dominion over their own servers, and can remove users' content after publication. Overall, host providers are not as active as content providers, but neither are they as passive as access providers – they are not authors, yet not mere conduits. Clearly, they provide

² See 'Introduction to Tianya [Tianya jianjie]' (Tianya) <<http://help.tianya.cn/about/history/2011/06/02/166666.shtml>> (in Chinese) accessed 6 January 2014.

³ For example, based on interviews with online editors and community managers at 104 news organisations from 63 countries, a report found that 'there was a relatively even split between those that moderate pre- and post-publication: 38 and 42, respectively, with 16 adopting a mixed approach'. See Emma Goodman, 'Online Comment Moderation: Emerging Best Practices' (The World Association of Newspapers, 2013) <<http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>> accessed 6 January 2014.

⁴ For example, according to the Guardian's Community Standards and Participation Guidelines, 'personal attacks (on authors, other users or any individual), persistent trolling and mindless abuse will not be tolerated'. The Guardian's moderation team usually 'post-moderate[s] nearly all comment threads', but for 'certain special series or articles which may contain extremely sensitive content, such as Blogging the Qur'an, [all] comments are pre-moderated before appearing on the site', see 'Community Standards and Participation Guidelines' (The Guardian, 7 May 2009). <<http://www.theguardian.com/community-standards>> accessed 6 January 2014 and 'Frequently Asked Questions about Community on the Guardian Website' (The Guardian, 7 May 2009). <<http://www.theguardian.com/community-faqs#310>> accessed 6 January 2014.

platforms and invite and encourage postings, thereby earning revenue from advertisements on the sites. Should we then hold host providers accountable in defamation actions?

Interestingly, different answers were given in three jurisdictions in 2013, representing diverse judicial and legislative positions. First, the European Court of Human Rights held in *Delfi AS v. Estonia* that an Internet news provider was liable for the comments posted by its readers despite the fact that it had removed the objectionable content upon receiving notice from the claimant.⁵ Although the damages awarded against the host provider were modest (€320), the judgment remains controversial and the repercussions have been wide. Second, the Court of Final Appeal (CFA) of the Hong Kong Special Administration Region (Hong Kong) decided on the liability of online service providers in the case of *Oriental Press Group Ltd. v. Fevaworks Solutions Ltd*⁶ (hereinafter referred as *Feva*). The highest court in Hong Kong confirmed the decisions of the lower courts and ruled that the provider of an online discussion forum is liable for defamatory remarks posted by third parties, and that therefore when it has received notification from a complainant it has a duty to remove the defamatory remarks within a reasonable time.⁷ This approach to

⁵ App no 64569/09 (ECtHR, 10 October 2013)

<<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-126635>> accessed 6 January 2014.

⁶ [2013] HKCFA 47.

⁷ [2009] HKCFI 964; [2009] 5 HKLRD 641; HCA597/2009, affirmed by Court of Appeal [2012] HKCA 5; [2012] 1 HKLRD 848; [2012] 6 HKC 313; CACV53/2011, affirmed by Court of Final Appeal, [2013] HKCFA 47. For comments on decisions from the lower courts, see Gabriela Kennedy,

liability appears to be in line with the legal positions in other jurisdictions, which have largely been based on a notice-and-take-down regime. However, a careful analysis of the *Feva* judgment revealed that the Hong Kong court reached this conclusion through an extension of common law principles in holding online intermediaries of discussion forums as ‘secondary publishers’ with liabilities imposed from the outset.⁸ In both the *Delfi* and *Feva* judgments, what has been decided but far from settled is an online host provider’s duty to monitor. The disputed aspects cover when such duty arises, and what its nature and scope are. In contrast to these two positions, which treated host providers as gatekeepers, the third alternative was provided by the newly amended Defamation Act of the United Kingdom, which came into full force on the first day of 2014.⁹ To a great extent, as subsequent discussion shows, the duties and liabilities of host providers under the new regime depend on whether the originator of the defamatory statement can be identified. The new Act has consolidated the common law position and the European Union Directive 2000/31/EC (better known as the Electronic Commerce (EC) Directive¹⁰, enforced through the Electronic Commerce (EC Directive Regulations 2002),¹¹ with specific provisions governing the liabilities

‘Asia Pacific News’ (2013) 29 Computer Law and Security Review 94; Rebecca Ong, ‘Internet Intermediaries: The Liability for Defamatory Postings in China and Hong Kong’ (2013) 29 Computer Law and Security Review 274.

⁸ *Feva* (n 6) [12], [103].

⁹ Defamation Act 2013.

¹⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, particularly electronic commerce, in the Internal Market [2000] OJ L178/1(Directive on electronic commerce).

¹¹ Electronic Commerce (EC Directive) Regulations 2002 (UK), SI 2002/2013.

of online website operators (section 5), new regulations outlining the rules on notice requirements given by the complainant and corresponding procedures on what an ISP should do upon receiving notice.¹²

In comparing and studying the approaches applied by the three abovementioned legal regimes, this chapter argues that it is necessary to have a special regulatory regime for Internet host providers. To be fair to host providers, users and victims of defamatory statements, clear guidelines on host providers' monitoring duties and ground rules for users should be stated at the outset. At the time of writing, it is unknown how the appeal to the *Delfi* case will be decided by the Grand Chamber of the European Court,¹³ how the judgment of the *Feva* case will be interpreted in Hong Kong and how the newly amended Defamation Act will be implemented in the UK. What is certain is that the legal battle will continue and is likely to remain intense.

Delfi AS v. Estonia: Internet News Portal's Duty to Prevent Harm

The Legal Battle over 'Add Your Comment'

¹² Defamation (Operators of Websites) Regulations 2013, SI 2013/3028.

¹³ 'Case of Delfi AS v. Estonia: Request for Referral to the Grand Chamber on Behalf of the Applicant', (8 January 2014)

<http://www.psw.ugent.be/cms_global/uploads/publicaties/dv/REQUEST%20FOR%20REFERRAL%20TO%20THE%20GRAND%20CHAMBER_DELFI_2014%2001%2008%20FINALDV.pdf>
accessed 16 January 2014.

The legal dispute in *Delfi* originated with an online news article in 2006, reported on the applicant Internet news portal, concerning a change in ferry routes that led to a delay in the opening of an ice road. It was implied that a cheaper means of transport between the mainland in Estonia and certain islands nearby had also been inevitably delayed. The report attracted 185 comments in the portal's 'Add Your Comment' section within two days, about twenty of which were abusive and contained personal threats and offensive language against L, who was a member of the ferry company's supervisory board.¹⁴ Six weeks later, the applicant received a request from L's lawyers to remove the offensive comments, and a claim of damages.¹⁵ Although the messages were promptly removed on the same date the request letter was received, Delfi refused to pay damages. Thus, a civil lawsuit was brought by L. The influence of the applicant company should not be underestimated, as it is one of the largest Internet news portals in Estonia, with a presence in Latvia and Lithuania.¹⁶ On average, each day it publishes up to 330 articles and attracts the comments of approximately 10,000 readers.¹⁷

Although the local court ruled in favour of Delfi in the first round, this was overturned by the Court of Appeal and the Supreme Court of Estonia. The latter ruled that Delfi could not rely on the Information Society Services Act of Estonia, which

¹⁴ Ibid [13].

¹⁵ Ibid [14].

¹⁶ *Delfi* (n 5) [7].

¹⁷ Ibid [7], [8].

was based on the European Union *Electronic Commerce Directive*. Under the *Electronic Commerce Directive*, the circumstances in which Internet intermediaries should be held accountable for materials that are hosted, cached or carried by them, but which they did not create are defined.¹⁸ Article 15 of the Directive clearly stipulates that ISPs have no general duty to monitor information that passes through or is hosted on their system. In effect, it provides a ‘safe haven’ for the exemption of ISPs’ liability when they are host providers, unless they have actual knowledge of unlawful activity or information¹⁹ and have failed to act expeditiously to remove the materials or disable access to the information upon obtaining such knowledge or awareness.²⁰ In effect, the Directive has set up a notice-and-take-down regime for online intermediaries. However, the appellant courts in Estonia ruled that Delfi was not immune from liability as it was not a merely technical, automatic and passive intermediary.²¹ Rather than applying the Information Society Services Act, the Court of Appeal and the Supreme Court applied the Obligations Act.²² According to their judicial opinion, Delfi was a publisher and a provider of content services because it had integrated the comment environment into its news portal and had invited users to

¹⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, particularly electronic commerce, in the Internal Market [2000] OJ L178/1(Directive on electronic commerce), arts 13, 14.

¹⁹ Ibid art 13.

²⁰ Ibid art 14. For discussion, see Daithi Mac Sithigh, ‘The Fragmentation of Intermediary Liability in the UK’ (2013) 8(7) *Journal of Intellectual Property Law and Practice* 521, 524.

²¹ *Delfi* (n 5) [25].

²² Ibid [22], [38].

post comments.²³ It had also derived economic benefits from the comments due to the advertisements on its portals.²⁴ Above all, only Delfi could remove the objectionable comments, whereas the original users who posted them could not. Thus, the Court of Appeal and the Supreme Court concluded that Delfi should bear the burden of publisher to prevent harmful publication.²⁵

Undeterred, Delfi appealed to the European Court of Human Rights. The issue has become whether the national courts of Estonia had infringed on Delfi's freedom of expression as protected under article 10 of the European Convention of Human Rights. The European Court confirmed the domestic court's decision and held that the finding of liability by the former was a justified and proportionate restriction on Delfi's right to freedom of expression. This was mainly because the comments posted were highly offensive, insulting and threatening in nature; the postings were in reaction to an article published by the appellant; the appellant had failed to prevent the offensive postings from becoming public but had profited from the postings; the authors of the posts were anonymous; and the fine imposed by the national courts was not excessive.²⁶

Walking the Tightrope of Host Providers

²³ Ibid [25], [27].

²⁴ Ibid [27].

²⁵ Ibid [24], [29].

²⁶ Ibid [94].

The European Court's choice to defer to the domestic court's decision in not applying the Electronic Commerce Directive was understandably disappointing.²⁷ Many felt that Delfi had already acted in a responsible way as a news portal. Specifically, the news portal had an online report button for users to comment or complaint, a filter system that delete automatically comments that include vulgar words, and a policy of notice and takedown upon request. In light of this, critics consider the judgment a 'serious blow to freedom of expression online' that 'send[s] a shiver of fear down any website operator's spine,'²⁸ displaying 'a profound failure to understand the EU legal framework regulating intermediary liability' that 'conveniently ignores relevant international standards in the area of freedom of expression on the Internet.'²⁹ They also raised concerns that the judgment would impose a strict and onerous pre-publication monitoring standard on news portals in the future, possibly leading to comment sections being closed or a pre-registration system for users.³⁰ Furthermore, some were puzzled as to why Delfi had to bear the

²⁷ Ibid [74].

²⁸ Dirk Voorhoof, 'Qualification of News Portal as Publisher of Users' Comment May Have Far-Reaching Consequences for Online Freedom of Expression: Delfi AS v Estonia' (Strasbourg Observers Blog, 25 October 2013).
<<http://strasbourgobservers.com/2013/10/25/qualification-of-news-portal-as-publisher-of-users-comment-may-have-far-reaching-consequences-for-online-freedom-of-expression-delfi-as-v-estonia/>> accessed 10 January 2014.

²⁹ Gabrielle Guillemin, 'Case Law, Strasbourg: Delfi AS v Estonia: Court Strikes Serious Blow to Free Speech Online' (Inform's Blog, 15 October 2013)
<<http://inform.wordpress.com/2013/10/15/case-law-strasbourg-delfi-as-v-estonia-court-strikes-serious-blow-to-free-speech-online-gabrielle-guillemin/>> accessed 10 January 2014.

³⁰ Ibid. Merit Ulvik and Darian Pavli, 'Case Watch: A Strasbourg Setback for Freedom of Expression in Europe' (Open Society Foundations, 22 October 2013)
<<http://www.opensocietyfoundations.org/voices/case-watch-strasbourg-setback-freedom-expression-europe>> accessed 10 January 2014.

brunt of the blame when it acted swiftly to take down the objectionable postings despite the fact that the claimant took six weeks to complain through traditional mail.³¹ Others found it alarming that the Court would rule that a news organisation should have anticipated that a report of public interest would attract negative and hostile comments and should have exercised a degree of caution and diligence to avoid infringing on others' reputations.³²

The standard set by the Estonian Court and endorsed by the European Court is stringent and demanding for any ISP, especially compared with the situation in the US. The latter, arguably, is the most favourable to any intermediary, including host providers. Under s.230 of the Communications Decency Act, '[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'.³³ This can be most unfair to victims of anonymous and vexatious online defamatory postings, as seen in the case of *Zeran v. America Online, Inc.*³⁴ However, if both the strict standard of the

³¹ Guillemin (n 29); Voorhoof (n 28); Eileen Weinert, 'Oracle at "Delfi" – European Court of Human Rights Holds Website Liable for Angry Reader Comments' (2014) 25(1) Entertainment Law Review 28, 31.

³² *Delfi* (n 5) [29]; Guillermin (n 29); Dirk Voorhoof (n 28).

³³ 47 USC §230(c)(1). For discussion see Brian C. McManus, 'Rethinking Defamation Liability for Internet Service Providers' [2001] Suffolk University Law Review 647.

³⁴ 958 F Supp1124 (ED Va 1997), aff'd, 129 F3d 327 (4th Cir 1997). In *Zeran*, an unknown person posing as the plaintiff posted an advertisement for T-shirts containing offensive remarks concerning the Oklahoma City bombing on an Internet billboard hosted by the defendant. The advertisement directed buyers to contact the plaintiff's home phone number. This led to a series of abusive phone calls and escalated into death threats against the plaintiff, which lasted for nearly a month. The plaintiff brought actions against AOL for delay in removing defamatory messages posted by an unidentified third party, refusal to post retractions of those messages, and failure to screen for similar postings thereafter but the Court ruled in favour of the defendant. For discussion, see Eric Barendt, *Freedom of Speech* (OUP 2007) 464-66.

European Court and the lenient US approach are equally unsatisfactory, how should the balance be struck that is fair to both ISPs and claimants in defamatory actions?

Some may claim that the notice-and-take-down regime under the EU Electronic Commerce Directive has provided a fair solution. They may further argue that had the Directive applied in the case of *Delfi*, the news portal would not have been found liable, and that it was wrong for the Estonian courts to rule that Delfi was a content provider and a publisher.³⁵ Yet the line between the latter two categories and a host provider is delicate. The protection of the EC Directive defences may be easily lost when an intermediary is perceived as being too active. ISPs must often ‘walk the tightrope of liability’ to maintain their status as mere hosts.³⁶

To summarise briefly, in the *Delfi* case, the Estonian courts justified their decision in ruling the Internet news portal to be a content provider and a publisher largely due to the fact that Delfi had integrated the commenting environment for readers into its news portal and invited users to post comments.³⁷ Delfi had also determined which comments were published and which were not, and only it could remove or change them.³⁸ Foremost, the original authors could not delete or modify their own comments once posted. The European Court was convinced by the domestic

³⁵ Guillermin (n 29); Voorhoof (n 28).

³⁶ Steven James, ‘Tightening the Net: Defamation Reform and ISPs’ [2012] Entertainment Law Review 197.

³⁷ *Delfi* (n 5) [25], [27].

³⁸ *Ibid* [27].

courts. In a similar vein, it also highlighted the substantial degree of control over comments exercised by Delfi.³⁹

Regardless whether one agrees with the reasoning, *Delfi* is not the only case in which a seemingly neutral intermediary host was being categorised as a content provider or a publisher by the courts. In the UK, where the Electronic Commerce Directive is implemented through the Electronic Commerce (EC Directive) Regulations 2002,⁴⁰ similar disputes have arisen. The English High Court held in *Kaschke v Gray* that an ISP of a web blog had lost the protection of the EC Directive Regulations because it had corrected the spelling and grammar of blogs posted by its users.⁴¹ In the appeal against a summary judgment hearing, Justice Staden considered the ISP to have been actively engaged with the content, such that the extent of its control had gone beyond the mere storage function – an essential criterion of a host under Regulation 19.⁴² In another case, *McGrath v Dawkins*, the English High Court was asked to consider whether Amazon, the world’s biggest online book

³⁹ Ibid [89].

⁴⁰ Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013, reg 19.

⁴¹ [2010] EWHC 690 (QB). For comments, see Robert Lundie-Smith, ‘Kaschke v Gray: The Application of Article 14 of the E-Commerce Directive to Blogs’ [2010] Entertainment Law Review 272.

⁴² *Kaschke* (n 41) [86]. Reg 19 of the EC Directive Regulations states that ‘[w]here an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—

(a) the service provider—

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.’

seller, should be held liable for defamatory remarks posted by readers in its ‘Review’ section.⁴³ The case shared various factual similarities with *Delfi*: it had a moderation policy of limited pre-publication control by automatic filter for forbidden words, a blacklist system against users who had used profane language, a ‘Report Abuse’ button and a notice-and-take-down procedure.⁴⁴ Most notably, it had invited readers to write reviews on books selected by the website,⁴⁵ and reviews that contained forbidden words were submitted for manual check before the final decision to exclude was made.⁴⁶ It was only because the complainant in *McGrath* had failed to give effective notice to Amazon of what the defamatory statement constituted and why it was ‘unlawful’ (the strength and weakness of any available defence under defamation law)⁴⁷ that Amazon was ‘bound to succeed’ under Regulation 19 and the English court was saved from resolving the difficult question in deciding whether Amazon was a mere host. Nevertheless, the court noted *obiter* that had the disputed postings in the case at bar triggered any manual review, Amazon’s position might have been very

⁴³ [2012] EWHC B3 (QB). Application for leave rejected [2013] EWCA Civ 206. For comments, see Inform, ‘Case Law: McGrath v Dawkins – Creationism, Atheism and Internet forums, where Libel Law Should Fear to Tread’ (Inform’s Blog, 18 April 2012).
<<http://inform.wordpress.com/2012/04/18/case-law-mcgrath-v-dawkins-creationism-atheism-and-inter-net-forums-where-libel-law-should-fear-to-tread/>> accessed 11 January 2014.

⁴⁴ *McGrath* (n 43) [33].

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid* [43].

different under s.1 of the Defamation Act 1996 (the scope of which is explained further under part III), as it might have been considered an editor.⁴⁸

The Gatekeeper's Duty to Prevent Harm

The *Delfi* judgment, as noted earlier, was also affected by various other considerations such as the economic interests of the ISP. It is, therefore, hard to tell whether the ruling would have been different if Delfi had played a more passive or reactive role in letting its readers retain the power to delete or amend comments after submission. All we know is that since the ruling by the domestic court, Delfi has implemented a new set of policies and measures. These include not allowing persons who have posted offensive comments to post any new comments without reading and accepting the rules of commenting; setting up a team of moderators who conduct follow-up moderation of comments posted on the portal; reviewing all user notices of inappropriate comments; and ensuring that comments comply with the rules of commenting.⁴⁹ On average, Delfi removed about 8% of the comments, mainly spam and irrelevant remarks, whereas defamatory comments constituted less than 0.5% of the total number.⁵⁰ Nevertheless, *Delfi* should not be dismissed as having little

⁴⁸ Ibid [41].

⁴⁹ *Delfi* (n 5) [30].

⁵⁰ Ibid.

application to the general online Internet environment.⁵¹ It is not and will not be a single case.

In fact, many online intermediaries are in a factual position analogous to that of Delfi. Many online discussion forums have been moderating their own portals. Based on interviews with online editors and community managers at 104 news organisations from 63 countries in 2013, it was found that 38 organisations exercised pre-publication moderation while 42 exercised post-publication moderation, with 16 adopting a mixed approach.⁵² Of the 97 organisations that allowed online comments, they admitted occasionally blocking comments from being published and deleting comments after publication.⁵³ The average deletion rate was 11% and the most common reason for such was the inclusion of offensive language.⁵⁴ Other than filtering keywords, 71% said that they blocked blacklisted individuals either by their accounts or by their IP addresses.⁵⁵ In addition, one of the publications expressed that they had a moderating team to read comments.⁵⁶ Indisputably, a significant number of news portals and discussion forums have endeavoured to act responsibly, but in doing so, they may have lost their immunity as host providers.

⁵¹ *J19 and J20 v Facebook Ireland*, [2013] NIQB 113 [29]-[32].

⁵² Goodman (n 3) 7.

⁵³ Ibid, 36.

⁵⁴ Ibid.

⁵⁵ Ibid,38.

⁵⁶ Ibid, 33.

Unless future judicial rulings or statutory provisions can clarify the exact factual basis for Delfi's liability or that of other online discussion forum providers, the problems concerning their status and their scope of monitoring duty are likely to recur.

*Oriental Press Group v Fevaworks: Online Discussion Forum as
Publisher*⁵⁷

If a statutory regime designed specifically to govern the responsibilities of ISPs in defamation cannot adequately resolve the problems faced by host providers, one can imagine the confusion and frustration that ISPs face in a pure common law jurisdiction, as illustrated in the Hong Kong case of *Oriental Press Group v Fevaworks*.

The respondents (defendants) in the case were the providers, administrators and managers of a website that hosted one of the most popular Internet discussion forums in Hong Kong, known as the Hong Kong Golden Forum.⁵⁸ It boasted having 30,000 users online at any given time and over 5,000 postings each hour during peak hours.⁵⁹

⁵⁷ Discussion of the Fevaworks case can be found also in Anne S.Y. Cheung, 'A Study of Online Forum Liabilities for Defamation: Hong Kong Court in Internet Fever' (2013) 18 Media and Arts Law Review 382.

⁵⁸ *Feva* (n 6) [12].

⁵⁹ *Ibid* [15].

Use of the forum was free to registered members and its revenue came from advertisement sponsorship.⁶⁰ The administrators did not edit or filter messages.⁶¹ In fact, the Forum had only two administrators monitoring its discussion for six to eight hours per day, with the duty of removing objectionable content.⁶² On the other side of the legal battle, the appellants (the plaintiffs) were the publishers of the Oriental Press Groups running the Oriental Daily, which is one of the most popular local newspapers.

The legal action was concerned with three statements posted on the Golden Forum in 2007, 2008 and 2009 by third parties alleging that the appellants were involved in drug trafficking, money laundering and other illegal, immoral and corrupt activities.⁶³ The respondents were alerted to the existence of the first two statements and the 2008 statement was removed from the website within three and a half hours of the respondents being informed.⁶⁴ The 2007 statement, however, was not removed from the website until more than eight months after the respondents had been informed.⁶⁵ The 2009 statement was removed immediately by the respondents themselves on their own discovery.⁶⁶ The lower courts dismissed the claims regarding the 2008 and 2009 statements, but held the respondents liable for the 2007

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid [6].

⁶⁴ Ibid [7].

⁶⁵ Ibid.

⁶⁶ Ibid [8].

statement due to their unreasonable delay in taking down the offending post upon notice. For this, the appellants were awarded of HK\$100,000 (approximately US\$13,000) as damages.⁶⁷ The appellants were not satisfied with the outcome and the amount of damages. Hence, they applied for leave to appeal.

In the final round of the legal battle, the Court of Final Appeal was asked to consider the extent to which providers of Internet forums may be held liable for the posting of defamatory statements by their users.⁶⁸ To answer this, the Court had to decide whether Internet forum providers should be considered publishers of defamatory postings by third parties and whether the common law defence of innocent dissemination was available to them.⁶⁹

Feva before Court

As the Defamation Ordinance of Hong Kong does not cover issues and liabilities specifically concerning Internet service providers, the Court had to rely on existing common law principles. In sum, the Court first established that an online discussion forum was a 'secondary publisher' from the outset, to which the defence of innocent dissemination was applicable. The Court then differentiated between an online discussion forum and a notice board provider, such that the latter's liability in

⁶⁷ Ibid [7].

⁶⁸ Ibid [11].

⁶⁹ Ibid.

defamation only arose upon notification of the defamatory statement. Throughout the entire legal discussion, what proved most critical was deciding when and to what extent liability arises for an online discussion forum. Yet in the attempt to fix the liability of an Internet discussion forum as secondary publisher from the outset under common law principles established in previous centuries, many more questions were being raised in the judicial reasoning than were answered.

Publication and Innocent Dissemination

Under common law, publication takes place when a defendant communicates a defamatory statement to a third party, and liability in defamation arises from participation in the publication of the defamatory matter.⁷⁰ *Prima facie*, the author, editor, publisher, printer or vendor of a newspaper is liable.⁷¹ Having said that, the common law allows the defence of innocent dissemination to one who is not the first or main publisher of the libellous works but have only taken a ‘subordinate part in disseminating it’. Well known examples of the latter category are proprietors of libraries (*Vizetelly v. Mudie’s Select Library Limited*)⁷² and news vendors (*Emmens v. Pottle*).⁷³ To rely on this defence, one must show that (1) he did not know or was innocent of any knowledge of the libel contained in the work disseminated by him, (2)

⁷⁰ [Patrick Milmo](#) (ed), *Gatley on Libel and Slander* (11th edn, Sweet and Maxwell 2008), para 6.16.

⁷¹ *Ibid.*

⁷² [1900] 2 QB 170.

⁷³ (1886) 16 QBD 354.

that there was nothing in the work or the circumstances under which it came to him or was disseminated by him that should have led him to suppose that it contained a libel and (3) that such want of knowledge was not due to any negligence on his part.⁷⁴ The onus of proof is on the defendant.⁷⁵

Although consensus has been reached on the result not to hold this person to be liable, judicial opinions differ as to when legal liability arises, and when not to place legal liability. In *Tamiz v Google Inc.*, the English Court of Appeal considered that the successful invocation of the innocent dissemination defence leads to the defendant being deemed to have not published the libel at all.⁷⁶ In that case, the English Court left it open whether Blogger, as provided by Google, might be regarded as a secondary publisher in hosting a blogging platform, although that could only be for the period after it had received notice by the complainant.⁷⁷ Lord Justice Richards reasoned that there has been a long established line of authority that a person involved only in dissemination is not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory, and that Google could not be said to know or ought reasonably to have known of the defamatory comments prior to notification of the complaint.⁷⁸

⁷⁴ The ratio was established in the *Vizetelly* judgment, referred to in *Feva* (n 6) [27].

⁷⁵ *Feva* (n 6).

⁷⁶ *Tamiz v Google* [2013]EWCA Civ 68; 1 WLR 2151 [18], [26]; discussed in *Feva*; *ibid* [53].

⁷⁷ *Tamiz* (n 76) [26], [34], [35].

⁷⁸ *Ibid*.

The above reasoning, however, was rejected explicitly by the Hong Kong Court of Final Appeal in the *Feva* judgment.⁷⁹ Instead, Ribeiro P.J., in delivering the leading judgment, opted to follow the Australian position in *Thompson v. Australian Capital TV*, which holds that ‘it would be more accurate to say that any disseminator of a libel publishes the libel but, if he can establish the defence of innocent dissemination, he will not be responsible for that publication’.⁸⁰

This option is indeed a curious one. First, the facts of *Tamiz v. Google* were of direct relevance to the *Feva* case. Given that *Tamiz v. Google* was a dispute over the liabilities of a particular Blogger platform provided by Google, its nature shared many similarities with the Golden Forum. In contrast, *Thompson v. Australian Capital TV* was about the live broadcast of a live current affairs programme produced by another television station. The Australian High Court held that while the defendant did not have any real control over the defamatory material, innocent dissemination was not applicable as it was the defendant’s choice to choose the specific technical setup that caused the lack of control.⁸¹ Following the logic of the Australian case, the Hong Kong court should have ruled that *Feva* could not rely on an innocent dissemination defence, as it had chosen to run an online discussion forum knowing the set up’s

⁷⁹ *Feva* (n 6) [31], [53].

⁸⁰ (1996) 186 CLR 574, referred to at [30], [31].

⁸¹ For a discussion, see Dan Jerker B Svantesson, ‘A Bulletin Board is a Bulletin Board (Even if it is Electronic) – Certain Intermediaries are Protected from Liability After All’ (2004) 16(2) *Bond Law Review* 169, 170.

limitations. Such a result would have been a drastic blow to the running of most Internet service providers and a severe measure against freedom of expression.

Primary and Secondary Publishers

At this point, one cannot help but ask the fundamental question: what, exactly, is a publisher? Under common law as summarised by the Hong Kong Court, a primary publisher is one that knows or can easily acquire knowledge of the content of the article published and has a realistic ability to control its publication.⁸² The Hong Kong Court called these the ‘knowledge criterion’ and the ‘control criterion.’⁸³ As the respondent’s online discussion forum did not have prior knowledge of the postings, was not aware of their content,⁸⁴ and did not have the ability or opportunity to prevent their dissemination before notification,⁸⁵ the Court ruled that the forum could not be seen as a primary publisher, but rather as a ‘secondary publisher’.

As previously mentioned, those who have played a subordinate part in dissemination are entitled to the innocent dissemination defence because they have merely played a ‘passive instrumental role in the process’ and do not have the sufficient degree of awareness or intention for the law to impose legal responsibility

⁸² *Feva* (n 6) [76].

⁸³ *Ibid.*

⁸⁴ *Ibid* [84].

⁸⁵ *Ibid* [89].

for defamatory publications.⁸⁶ They are most often referred to as ‘innocent disseminators’ or ‘subordinate distributors’, whereas Ribeiro P.J. of the Hong Kong CFA prefers to call them ‘secondary publishers’.⁸⁷

This test of innocent dissemination also requires one to exercise reasonable care and not be negligent, especially when one has been warned of libellous matter in a former publication issue.⁸⁸ The test is readily applicable for print media, and is only fair to newsvendors and distributors. In the context of electronic media, however, it is questionable whether online discussion forums and other Internet service providers are analogous to distributors or innocent disseminators in the traditional sense.

The Hong Kong Court answered that they were the latter, because the respondent’s forum could not have realistically monitored each user post before its publication and likewise did not have the ability to edit or prevent the defamatory comments from being published.⁸⁹ Earlier in the reasoning, the Court noted that the nature of publication on the Internet was a qualitatively different process – an open, interactive procedure involving ‘many-to-many’ communications, such that the new intermediaries were not originators of content, but rather mere facilitators.⁹⁰

⁸⁶ *Tamiz* (n 76) [18], referring to *Emmens v. Pottle* (1885) 16 QBD 354.

⁸⁷ *Feva* (n 6) [32].

⁸⁸ *Milmo* (n 70), para 6.19.

⁸⁹ *Feva* (n 6) [102], [111].

⁹⁰ *Ibid* [55]-[58], [61].

When Does Liability Arise?

If that is the case, then how can online discussion forums as secondary publishers satisfy the requirements under the defence of innocent dissemination both before and after they have become aware of the defamatory content of the offending posts?

The position, once the discussion forum has received notice, is straightforward. In the opinion of the Hong Kong Court, the defendant should promptly take all reasonable steps to remove the offending content from circulation as soon as reasonably practicable.⁹¹ However, the position before receiving notice has remained confusing and unsatisfactory.

Ribeiro P.J. made it clear that ‘the focus of the innocent dissemination defence has been on past, completed publications in which the defendant was not aware of the defamatory content and could not, with reasonable care, have discovered it’.⁹² In *Feva*, the respondent had only two administrators to monitor the very high volume of Internet traffic in its online forum, thus the Court concluded that they had no realistic means of acquiring such knowledge or of exercising editorial control over the content.⁹³ In addition, in the Court’s opinion, there was nothing to alert the respondent before the 2007 complaint.⁹⁴

⁹¹ Ibid [97].

⁹² Ibid [90].

⁹³ Ibid [102].

⁹⁴ Ibid.

Given this position, the Court does not seem to have required prior monitoring by online discussion forums. In fact, one would arguably be in a better position not to have any administrators to monitor the forum. Otherwise, the online discussion forum may be held liable as a primary publisher exercising control, with required knowledge of the content of the postings. Compared with Ribeiro P.J.'s judgment, spotted correctly and addressed directly, but unfortunately not answered fully, were the issues raised by Justice Litton in the *Feva* case. In the concurring opinion of Justice Litton, the defendants as a forum host have 'in theory' 'some control' over the content of the statements published on the website, otherwise they would not have discovered, on their own initiative, the 2009 defamatory statement.⁹⁵ Also raised but not answered by Justice Litton was that it 'may not be enough' to 'merely employ two administrators to monitor forum discussion for six to eight hours a day, five days a week'.⁹⁶ Finally, he also noted that while keyword filtering and monitoring might not be feasible, there was nothing to suggest that having the administrators highlight the identities of key persons could not be an alternative to preventing the posting of defamatory statements against the appellants.⁹⁷

What the Hong Kong Court has failed to clarify is the standard of care required by online discussion forums before acquiring knowledge or notification of alleged

⁹⁵ Ibid [124].

⁹⁶ Ibid [131].

⁹⁷ Ibid.

defamatory postings. Adrian Fong pointed out that Ribeiro P.J. set the ‘reasonable care’ standard so low that it discourages good faith monitoring by large online social platform operators.⁹⁸ Regrettably, online discussion forums were left in limbo at this stage. Was the Court saying that it was unrealistic to monitor the Internet traffic and content of each individual posting in a popular discussion forum, and thus no monitoring duty should be imposed? Or was the Court saying that had the Feva discussion forum employed more administrators, then the basis of liability would have been different? If, in the future, a more advanced and powerful software is available for content screening and filtering, will online discussion forums and other Internet service providers be required to install it?

The unnecessary logical complexities involved in regarding the respondents as secondary publishers from the outset, with actual liability imposed only at the point of notification, are even more noticeable when Ribeiro P.J. stated that providers of discussion forums should not be treated on a par with the occupiers of premises because they ‘played an active role in encouraging and facilitating the multitude of Internet postings by members of their forum ... they designed the forum ... they laid down conditions for becoming a member and being permitted to make postings ... they employed administrators whose job was to monitor discussions and to delete

⁹⁸ Adrian Fong, ‘Dissemination of Libel by Online Social Platforms: Reinterpreting Laws to Meet the Information Age,’ (SSRN, 15 July 2013) <<http://dx.doi.org/10.2139/ssrn.2293889>> accessed 10 January 2014.

postings which broke the rules; they derived income from advertisements placed on their website'.⁹⁹ In his opinion, the online forums were clearly participants and publishers from the outset. While Ribeiro P.J. has argued convincingly that defamatory postings by third parties on online discussion forums should not be compared with unauthorised postings on notice boards run by a golf club, as in *Byrne v Deane* (a case dating back to 1937),¹⁰⁰ it is difficult to conceptualise a situation in which one might apply the test results in a finding that a defendant has published due to active participation in publication, but that same degree of participation and involvement do not prevent a defence of innocent dissemination from arising.

These difficulties could be avoided if the Hong Kong Court recognised the unique nature of online discussion forums and concluded that liability arises only upon notification. An online discussion forum is simply not a primary publisher due to the lack of required knowledge and control in the interactive and user-generated content environment of the Internet world. Yet it is not as passive as a secondary publisher in the traditional sense of being a library or a news vendor, due to its active role in hosting and running the online platform and in inviting participation. Rather than distorting the nature of online discussion forums so that they can be mapped into a common law equivalent of primary or secondary publisher, future disputes would be

⁹⁹ *Feva* (n 6) [51].

¹⁰⁰ [1937] 1 KB 818.

better resolved through statutory guidelines designed for a new category of Internet intermediaries.

While the result of *Feva* in imposing liabilities on the defendant only for the 2007 statement, which it took eight months to remove, was justified, a more viable legal solution would have been to adopt a statutory provision that clearly stipulates the basis and nature of liability for Internet intermediaries based on their roles (as facilitator, as host, as moderator). As we have seen in the *Feva* case, it is both artificial and unsatisfactory to fit an invention of the Internet era into the straitjacket of 19th-century defamation common law.

The Legislative Attempt in the United Kingdom: Identified or Unidentified Poster

Parallel to the legal developments of the judiciary in the European Court and in Hong Kong, the UK witnessed significant legislative changes in defamation law in 2013.¹⁰¹ The Defamation Act 2013, with specific provisions governing Internet intermediaries, complements the Defamation Act of 1996 and the EU Regulations 2002 without replacing them.

¹⁰¹ For an overview discussion, see Alastair Mullis and Andrew Scott, 'Tilting at Windmills: the Defamation Act 2013' (2014) 77(1) *Modern Law Review* 87.

The legal liabilities of ISPs in the pre-2013 era hinged much on their roles. For instance, Section 1(3)(e) of the Defamation Act of 1996 stipulates that a ‘person shall not be considered the author, editor, or publisher of a statement if he is only involved as the operator of or provider of access to a communication system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.’ However, the defence is only available to the ISP if it can show that (1) it was not the author, editor or publisher of the statement; (2) that it has taken reasonable care in respect of its publication; and that (3) it did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.¹⁰² The first two criteria have forced host providers to face the notorious ‘catch -22’ dilemma: in seeking to attract the statutory defence by taking reasonable care, they have instead forfeited it by being considered too proactive and hence have become editors.¹⁰³ The last criterion may mean that an ISP who is initially being considered as a host provider may end up being a publisher once it has received notice of a defamatory statement, as in *Tamiz v Google*.

Unlike the Defamation Act of 1996, which is dominated by the lexicon of authors, editors and publishers used in common law defamation actions, the immunity granted under the EC Regulations 2002 is based on whether the ISP is considered a

¹⁰² Defamation Act 1996 (UK), s 1(1).

¹⁰³ *McGrath* (n 43) [41]. For discussion, see Victoria McEvedy, ‘Defamation and Intermediaries: ISP Defences’ [2013] *Computer and Telecommunications Law Review* 108, 111.

mere conduit, a cache or a host. In addition, the knowledge requirement on the part of an ISP also differs between the two statutes. As discussed earlier in Part II of this chapter, the Defamation Act requires that the ISP has knowledge of the defamatory statement concerned, while the EC Regulation refers to the unlawfulness of the statement. While the former only notes the injury to another's reputation, the latter requires that enough evidence be adduced to show the strengths or weaknesses of the case's available defences.¹⁰⁴

Without changing these standards, the Defamation Act of 2013 has added a new defence to Internet intermediaries (referred to as website operators under the Act).¹⁰⁵ Under s.5(2), the defence allows the operator to show that 'it was not the operator who posted the statement on the website'. Furthermore, s5(12) states that the defence is not defeated by reason, only by the fact that the website operator is a moderator of the statements posted by others. The defence will, however, be defeated if the claimant shows that (1) it was not possible for him to identify the person who posted the statement; (2) he gave the operator a notice of complaint in relation to the statement;¹⁰⁶ and (3) the operator failed to respond to the notice within the required

¹⁰⁴ *McGrath* (n 43) [43].

¹⁰⁵ Defamation Act 2013, s 5; Defamation (Operators of Websites) Regulation 2013, reg 1(2). Under reg 1(2), an operator is defined simply as the 'operator of the website on which the statement complained of in the notice of complaint is posted'. This definition is broad enough to accommodate the possible range of platforms with future and fast advances in technology.

¹⁰⁶ Under reg 2 of the Defamation (Operators of Websites) Regulation 2013, a notice of complaint must specify (a) the electronic mail address at which the complainant can be contacted; (b) the meaning that the complainant attributes to the statement; (c) the aspects of the statement that are factually inaccurate; or opinions not supported by fact. In addition, the complainant needs to confirm if he does

provision, which is 48 hours as stated in the Defamation Regulations.¹⁰⁷ The other ground on which the defence is defeated is when the website operator has acted with malice in relation to the posting of the statement concerned (s.5(11)).¹⁰⁸ In addition to s.5, s.10 provides that a court does not have jurisdiction to hear and determine an action for defamation brought against one who was not the author, editor or publisher of the statement complained of, unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.¹⁰⁹ As scholars have commented, this makes it ‘significantly more difficult to proceed against online intermediaries’.¹¹⁰ From now on, much will be dependent on whether the original poster, defined as ‘the person who posted the statement complained of on the website referred to in the notice of complaint’,¹¹¹ can be identified.

If the poster can be identified and subject to his consent, the ISP can pass the poster’s full name and postal address of residence or business to the complainant, and

not have sufficient information about the poster to bring proceedings against the poster; and whether he consents to the operator providing the poster with his name and electronic mail address.

¹⁰⁷ Defamation Act 2013, s 5(3); Defamation (Operators of Websites) Regulation 2013, reg 5(2)(a).

¹⁰⁸ An example is that the website operator had incited the poster to make the defamatory statement or had otherwise colluded with the poster. Explanatory Notes to the Defamation Act 2013, para 42. <<http://www.legislation.gov.uk/ukpga/2013/26/notes>> accessed 17 January 17, 2014.

¹⁰⁹ Section 10(2) confirms that the terms ‘author,’ ‘editor’ and ‘publisher’ have the same meaning as in section 1 of the Defamation Act 1996. Under s 1(2) of the 1996 Act, ‘author’ means the originator of the statement but does not include a person who did not intend that his statement be published at all; ‘editor’ means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and ‘publisher’ means a commercial publisher; that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

¹¹⁰ Mullis and Scott (n 101) 101.

¹¹¹ Defamation (Operators of Websites) Regulation 2013, reg 1(2).

leave the post on the site,¹¹² unless and until the court orders its removal under s.13 of the Act. If it is not possible to identify the poster,¹¹³ or if the poster fails to respond within 48 hours,¹¹⁴ then the ISP can then take down the post within 48 hours of receiving a notice of complaint.

The new approach is not without problems. First, victims of defamatory statements will face a very unpleasant situation if the poster is willing to have a legal confrontation in court, when the statement could be left online without any notice of complaint attached.¹¹⁵ Second, the new statute has not resolved the conflicting assessment standards of claims by the ISP upon receiving notice of complaint between the UK Defamation Act since 1996 ('defamatory') and the EU Regulations ('unlawful').¹¹⁶ Third, the scope of s.10 of the new Act remains uncertain regarding what being 'reasonably practicable for an action to be brought against the author, editor or publisher' would constitute.¹¹⁷ Namely, would a claimant be required to pursue a Norwich Pharmacal order from the court for the disclosure of anonymous user details before going to court? What should one do when the post is uploaded by an overseas author to a local website? Above all, as many posters do not use real

¹¹² Defamation (Operators of Websites) Regulation 2013, reg 2(2)(b).

¹¹³ Defamation (Operators of Websites) Regulation 2013, reg 3(1).

¹¹⁴ Defamation (Operators of Websites) Regulation 2013, reg 5.

¹¹⁵ Mullis and Scott (n 101) 102.

¹¹⁶ Defamation Act 2013, s 5(6); EU E Commerce Regulations, reg 19. Mike Harris, 'Defamation Act 2013: A Step in the Right Direction' (Inform's Blog, 9 January 2014) <<http://inform.wordpress.com/2014/01/09/defamation-act-2013-a-step-in-the-right-direction-mike-harris/>> accessed 14 January 2014.

¹¹⁷ Jennifer Ashgate, 'The Defamation Act 2013 – Key Changes for Online' (2013) 19(6) Computer and Telecommunications Law Review 170, 171.

names to register, it is uncertain whether the new law would lead to a system of real name registration and verification before posting, or whether this would simply imply a swift notice-and-take-down system for ISPs. Its effect on anonymous posting is difficult to predict.¹¹⁸ Nevertheless, it is no longer necessary to identify with precision the degree of an ISP's involvement (whether it has exceeded its capacity and has become a publisher), the nature of the knowledge it has about the contested statement and its role (whether it is a mere host or not), as long as it is not responsible for the offending statement.

Conclusion

The social and participatory nature of Web 2.0 has presented unprecedented problems for defamation disputes. It challenges our traditional understanding of what publishers are, begs us to redress the grievances faced by victims of defamation actions in the face of anonymous writers and confronts us with wrongs for which host providers are asked to share responsibility.

In reviewing the three legal attempts to define the responsibilities of intermediaries in defamation, we have seen the uphill legal battles that host providers must wage. Despite the fact that the three jurisdictions studied are premised largely on

¹¹⁸ Regarding the conflict between the public interest value of anonymous speech and reputation protection, and its relation to the Defamation Act 2013, see Eric Barendt, 'Defamation and the Net: Anonymity, Meaning and ISPs' in Clive Walker and Russell L. Weaver (eds), *Free Speech in an Internet Era* (Carolina Academic Press 2013) 107.

a seemingly sensible notice-and-take-down regime for intermediaries' liabilities, the actual implementation of this standard has revealed many intricate legal problems yet to be solved. The statutory classification of intermediaries into mere conduit, cache or host may not be helpful, especially when such categorisation is highly fact sensitive. The courts have struggled to understand the technological roles and monitoring functions of Internet providers. Equally, our common law understanding of author, publisher and editor is hardly adequate. As one author observed, 'defamation cases challenge the analogical abilities of the courts to apply traditional defamation analysis to a new technological medium.'¹¹⁹ In seeing host providers as publishers, courts are often preoccupied with enabling the victims to bypass the threshold for facing anonymous authors. In contrast to the approach of treating host providers as gatekeepers, the UK's new Defamation Act has swept aside the necessity to classify the role and status of ISPs. In re-adjusting the focus to the identification of the original poster, it has opted for a practical and functional solution that enables victims of defamation with an adequate remedy while providing clearer guidelines to ISPs. Although the new solution offered by the UK Parliament is yet to be tested, it has re-drawn the parameters between host providers, users and victims of defamatory statements.

¹¹⁹ McManus, (n 33) 653.

What can be safely concluded for now is that a statutory regime that can specifically address the liability of intermediaries without being shackled by their forms and functions is essential in defamation regulation. Regardless which approach is chosen, one should not lose sight of the notion that the ultimate concern of defamation is the protection of freedom of reputation without the undue sacrifice of freedom of expression, even in the ever-changing online social ecology of commenting and blogging.