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Online defamation: A case study in competing rights

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ONLINE DEFAMATION: A CASE STUDY IN COMPETING RIGHTS

by

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Abstract

As a consequence of the dominant role the United States has played in its development, the Internet has become synonymous with a liberal interpretation of freedom of expression, heavily imbued with First Amendment free speech principles. This has resulted in an environment that supports an adversarial, aggressive style of interaction; an environment which has become a "defamation prone zone" (Edwards, 1997). However, resolving online defamation disputes is problematic, particularly in cross-jurisdictional cases involving defendants based in the United States. Incongruities in the balance of free speech and reputation between the United States and most other countries, as expressed through defamation law, limits the likelihood of foreign judgments being enforced in the United States.

The study of Dr Trevor Cullen's case highlights the difficulties facing Australian plaintiffs in achieving relief from malicious online defamation perpetrated by a resident of the United States. The case study is located within a broader discussion on the prevalence of online harassment and defamation, and the impact this type of behaviour has on individuals and the public sphere. Dr Cullen's experiences highlight the difficulties entailed in balancing conflicting rights - the rights of individuals to express themselves freely, and an individual's right to protect their reputation, particularly when these rights are interpreted quite differently cross-culturally. In doing so, the case study questions the hegemonic notion, as reflected in Internet culture, that an individual's right to free speech should necessarily be given primacy over other competing rights, in the interests of a healthy public sphere.

Content Declaration

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To reflect the extent to which these individuals have contributed to my thesis, I have formally referenced them in the Reference List.

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Contents

Title page.....1
Abstract.....2
Content Declaration.....3
Acknowledgements.....4

1. Introduction.....6
2. Review of the Literature.....10
   2.1 Freedom of expression – Key Theories.....10
   2.2 Freedom of expression on the Internet.....10
   2.3 Freedom of expression and the Law of Defamation.....11
      2.3.1 Australia.....12
      2.3.2 The United States.....15
   2.4 The Law of Defamation and the Internet.....15
      2.4.1 Australia.....16
      2.4.2 The United Kingdom.....20
      2.4.3 The United States.....21
   2.5 The Role of Internet Service Providers.....21
3. Dr Trevor Cullen's Case Study.....24
4. Prevalence of Online Defamation and Cyberharassment.....27
5. Impact of Defamation and Cyberharassment.....30
   5.1 Impact on Individuals and the Electronic Public Sphere.....30
   5.2 Impact on the Media.....35
6. Remedies.....38
   6.1 Application of Existing Laws.....38
      6.1.2 Defamation Law Reform.....41
   6.2 Elimination of the Law of Defamation.....43
   6.3 Law of Cyberspace.....45
7. Conclusion.....47
8. References.....51
9. Legal Authorities.....54

1. Introduction

Perhaps no other technology has been so invested with users' hopes and dreams as the Internet. Beyond the hardware and software that make up the physical infrastructure of this web of interconnecting networks, the utopian promise offered by the new realm of cyberspace captured the imagination. Here lay the potential to redefine gender and class relations; to create a more egalitarian and democratic society. Many of the narratives in the 1990s (Johnson & Post, 1997; Rheingold, 1998; Stone, 1991) reflected the notion that cyberspace was a distinct place, separate from the physical world; a space that provided an "alternative to the difficult and dangerous conditions of contemporary social reality" (Robins, 2000, p. 86). Within this "nowhere – somewhere" place, "new and innovative forms of society", community and identity would emerge (Robins, 2000, p. 86).

The potentially revolutionary properties of this new technology were explored in key threads of an emerging discourse on cyberspace and cyberculture that would shape the nature of the debate over the next decade. Meikle describes this early commentary as a 'discourse of empowerment' (2004, p. 75). Internet advocates such as Howard Rheingold (1998) foresaw a more communal and democratic society emerging in cyberspace, while Johnson and Post (1997) explored the notion of the 'real' and 'virtual' as "separate, discontinuous territories, each with their own distinctive social properties" (Watts, 2002, p. 14). Other writers viewed the anarchic, unregulated, and decentralised network as a "technology of freedom" – one that would "defy the tendencies towards censorship and centralised control of speech and content" (de Sola Pool, cited in Flew, 2002, p. 32).

Central to these utopian predictions was the premise that cyberspace should develop upon "laissez faire principles that characterised the settlement of the American western frontier in the nineteenth century, without attempts at government regulation or social planning" (Dyson, cited in Flew, 2002, p. 34). This notion of the Internet as an extension of the American dream underpinned much of the rhetoric in the following decade, particularly in relation to freedom of expression. Many commentators stressed the importance of extending the protection of the United States Constitution's First Amendment to the online environment (Electronic Frontier Foundation [EFF], 2004). The application of the First Amendment, which provides constitutional protection for freedom of expression, was viewed by commentators as not only vital to the integrity of the Internet, but essential to users' individual self-fulfilment. Internet advocates such as John Perry Barlow, and pressure groups such as EFF (of which he was a co-founder), viewed attempts to regulate the Internet as a threat to the utopian 'marketplace of ideas', and worked actively to promote freedom of expression on the Internet.

The 'laissez-faire' attitude that permeated the Internet during its formative years has contributed to a culture that both facilitates and accepts as 'normal' an aggressive, adversarial style of interaction that favours confrontation over conciliation (Belmas, 2002, p. 200; Edwards, 1997; Herring, 2001). Fogo-Schensul is particularly critical of the effect of American domination of the Internet, suggesting the 'electronic frontier' metaphor "evokes the rough and tumble world of frontier justice and survival of the fittest...in which physical strength, courage and personal charisma supplant institutional authority and violent conflict is the accepted means of settling disputes" (cited in Belmas, 2002, p. 200).

Given this atmosphere, it's not surprising that in many online forums and newsgroups, the individual right to freedom of expression often appears to be valued above and beyond the value of the information imparted. Furthermore, research suggests the adversarial, confrontational style of interaction accepted on the Internet too easily degenerates into abuse, harassment and in some cases malicious defamation (Arnold, 2005a; Edwards, 1997; Hymon, 2003). According to Edwards (1997), the style of interaction common in many online forums has resulted in the Internet becoming a "defamation-prone zone".

This thesis explores the impact of online harassment and defamation on the individual, and, more laterally, the public sphere as constituted on the Internet, through a case study of online defamation. The subject of this case study, Dr Trevor Cullen, became the target of a sustained campaign of online harassment and defamation beginning in 1997, perpetrated by a resident of the United States. Over the next six years, Bill White created dozens of abusive and defamatory websites on Dr Cullen, accusing him of a range of offences, including paedophilia and academic fraud. White's 'cyber-stalking' campaign included sending hundreds of abusive emails, not only to Dr Cullen, but also to news organisations and non-government organisations that Dr Cullen had been involved with. In an attempt to discredit Dr Cullen both personally and professionally, White also sent emails to Dr Cullen's former and current employers, the University of Queensland and Edith Cowan University, urging them to dismiss Dr Cullen for alleged academic fraud and sexual misconduct.

Initially, Dr Cullen attempted to ignore White's vitriolic campaign, but when White extended his attacks to include colleagues who had come to Dr Cullen's defence, he decided to take legal action in the Supreme Court of Western Australia. On September 3rd, 2003, in *Cullen v White* (2003) WASC 153 (*Cullen*), Dr Cullen was awarded $95,000 in damages, with the Court finding that "the conduct of the defendant can be attributed only to a conscious desire on his part to cause the plaintiff the maximum amount of damage, hurt and embarrassment by what amounts to a campaign of deliberately offensive vilification" (Newnes J in *Cullen*, 2003 at 22).

Unfortunately for Dr Cullen, fundamental differences in the law of defamation between the United States and Australia mean the Western Australian judgment is unlikely to be recognised in the United States. The First Amendment free speech principles, which underpin the libertarian culture of the Internet, have also influenced the development of law in the United States, particularly in areas related to freedom of expression. As a result, the key mechanism designed to balance the competing interests of freedom of expression and individual reputation - the law of defamation - is radically different in the United States in comparison to Australia (Weaver, 2000). Electronic Frontiers Australia (EFA, 2002) suggest defamation laws in the United States are "significantly less restrictive of speech than the laws of most (probably all) other countries." This presents enormous challenges to Australian plaintiffs such as Dr Cullen; incongruities in the balance of free speech and reputation between Australia and the United States, as expressed through defamation law, limits the likelihood of Australian judgments being enforced in the United States (Collins, 2001; Fitzgerald, 2003).

Under these circumstances, individuals in Dr Cullen's situation are effectively denied any practical form of relief from online defamation (Sheridan, cited in Belmas, 2002, p. 73). The difficulties Dr Cullen faced in reaching a suitable outcome were to a large extent caused by the fact that White was a resident of the United States, where it is unlikely that foreign defamation judgments that offend First Amendment principles will be enforced. Furthermore, legislation which provides ISPs based in the United States with total immunity from liability for defamation means that decisions on whether to remove offensive and defamatory websites are determined by commercial, rather than legal or ethical considerations.

As a result, although the damage to Dr Cullen's reputation was incurred largely in Western Australia, he was, for all intents and purposes, subject to a default "American legal hegemony" in operation on the Internet (Fitzgerald, 2003), which effectively denied him any true measure of justice. The practical impact of this is that despite the judgment in Dr Cullen's favour, many of White's defamatory web sites can still be accessed over two years later.

In contrast to the wealth of literature on the impact of defamation litigation on the free speech rights of individuals, and by extension, the integrity of the Internet as a 'marketplace of ideas', there appears to be little attention paid to the negative effects of unfettered speech, on both individuals and the public sphere, as constituted on the Internet. A general theme in the literature is that the ongoing benefits generated by the Internet far outweigh any disadvantages caused at an individual level. This thesis, by providing a personal insight into the devastating effects of online defamation, at both an individual and community level, aims to supplement the body of research into online defamation by challenging this notion.

The thesis includes a case study on the circumstances leading to Dr Cullen's legal action, examines the fundamental difficulties in achieving a satisfactory outcome in cross-jurisdictional online defamation cases, and briefly considers alternative remedies that acknowledge the Internet's unique qualities. The case study is located within a broader discussion on the prevalence of online harassment and defamation, and the impact this type of behaviour has on individuals and the public sphere. Dr Cullen's experiences highlight the difficulties entailed in balancing conflicting rights - the rights of individuals to express themselves freely, and an individual's right to protect their reputation, particularly when these rights are interpreted quite differently cross-culturally. In doing so, the case study questions the hegemonic notion, as reflected in Internet culture, that an individual's right to free speech should necessarily be given primacy over other competing rights, in the interests of a healthy public sphere.

2. Review of the Literature

The following section includes an overview of the literature in several key areas, designed to provide a contextual background to the case study. Firstly, the notion of 'freedom of expression' will be considered, with particular reference to its application in an online environment, and its influence on defamation laws in Australia and the United States. Secondly, the application of traditional defamation laws will be examined in more detail, by analysing relevant common law decisions as they have been applied to online disputes involving cross-jurisdictional issues in Australia and the United States.

2.1 Freedom of Expression – Key Theories

Traditional theories justifying freedom of expression often identify three main supporting arguments (Belmas, 2002; Chesterman, 2000). Firstly, freedom of expression is essential to individual self-fulfilment. According to this model, an individual's moral and intellectual development is dependant on that individual being fully able to express their opinions and thoughts; conversely, the listener benefits by being exposed to a wide variety of opinions and views. Secondly, society at large benefits from a 'free marketplace of ideas' whereby ideas of value and truth will emerge, and false ideas will be exposed and dismissed (Chesterman, 2000, p. 301). Lastly, the freedom to discuss matters of public interest is vital to a genuinely democratic society.

Perhaps no other document is as closely identified with the principles of freedom of expression as the First Amendment to the United States' Constitution, which was ratified on 15th December 1791, and states "Congress shall make no law...abridging the freedom of speech, or of the press" (FindLaw, 2005). The First Amendment has heavily influenced political, legal and cultural discourse in the United States in the twentieth century (Chesterman, 2000; Collins, 2001; Weaver, 2000). More recently, the rapid development and expansion of the Internet has seen the impact of the First Amendment reach beyond the borders of the United States. The following section explores this theme in more detail.

2.2 Freedom of Expression on the Internet

In many ways the Internet has become synonymous with an interpretation of freedom of expression that is heavily imbued with First Amendment values. The EFF refers in its mission statement to the preservation, protection and extension of First Amendment rights to the Internet

(EFF, 2005). The assertion by John Perry Barlow, co-founder of the EFF, that "on the Internet, the First Amendment is a local ordinance" (cited in Fitzgerald, 2003) is interesting on several counts. Firstly, it highlights the degree to which United States' values and ethics have influenced the Internet, creating an 'American' hegemony through the language, codes and norms that extend through much of the network (Barwell & Bowles, 2000, p. 705). Secondly, it displays a level of proprietary 'ownership' towards the Internet, which, by default, excludes other cultural interpretations of freedom of expression.

Although many Internet users in the United States would consider the right to free speech "an entrenched constitutional norm of transnational society and cyberspace" (Fitzgerald, 2003), it may not adequately represent the views of an increasingly multicultural user base. Barr claims that by September 2000, over half of all users with direct access to the Internet were from outside the United States (2002, p. 247).

Inevitably perhaps, this increase in online cultural diversity has resulted in a concurrent increase in disputes arising from different cultural interpretations of rights and responsibilities (Barwell & Bowles, 2000; Edwards, 1997; Fogo-Schensul, cited in Belmas, 2002). Traditionally, the law of defamation has been used to resolve disputes involving the competing rights of freedom of expression and the right to defend reputation. However, resolving disputes in an online environment is more complex, particularly when core values such as freedom of expression are challenged, as is often the case with cross-cultural disputes. The opportunities for an equitable solution are further compromised as a result of radically different defamation laws in the United States, in comparison to Australia and the United Kingdom, due to the influence of the First Amendment (Collins, 2001; Weaver, 2000).

2.3 Freedom of Expression and the Law of Defamation

It is interesting to compare the theoretical justifications for free speech that shape defamation laws in Australia and the United States. Chesterman suggests Australian courts have consistently relied upon the "central importance of free speech in a democratic society" to justify protection for freedom of expression, particularly as it relates to political communication, or matters that relate to the public interest (2000, p. 21). Therefore, the balance between freedom of expression and reputation is considered more in terms of how it contributes to an informed community, than in the part it plays in individual self-fulfilment. Free speech is seen "not as end in itself, but as a necessary element of democracy" (Beyer, 2004).

In contrast, the development of American defamation law has drawn more deeply upon theoretical rationales of freedom of expression that focus on the moral and intellectual development of the individual. As a result, defamation law in the United States appears to favour the rights of the individual speaker, over other competing rights. Chesterman suggests that the First Amendment principles which give "primacy to the freedom of speech of individual speakers" could be construed as compromising another United States' Constitutional guarantee – "the guarantee that citizens, under the Fourteenth Amendment, should enjoy the equal protection of the laws" (Chesterman, 2000, p. 233). This is particularly the case when the cost of pursuing a defamation action in the US is taken into account. [0]

This point is alluded to by Fish, who suggests American defamation law has, since the 1950s, been increasingly influenced by libertarian interpretations of the First Amendment, resulting in an environment which "privileges and values expression in and of itself independently of the real world consequence the speech might have" (cited in Lowe & Jonson, 1998). The following section examines in more detail how these contrasting cultural interpretations of freedom of expression have influenced the law of defamation in Australia and the United States.

2.3.1 Australia

Freedom of expression in Australia is not a constitutionally protected right. Instead the provisions operate negatively, either through statute or common law, to prevent and reduce restrictions on speech (Chesterman, 2000, p. 3). The High Court of Australia has described the notion of 'free speech rights' in these terms:

> Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'. (cited in Chesterman, 2000, p. 63)

However, Chesterman suggests the right to free speech is increasingly being recognised as a value to be protected in Australian law (2000, p. 1). The landmark High Court decision of *Lange v Australian Broadcasting Corporation (Lange)* (1997), which concerned defamatory statements directed at a politician, "clarified the interaction between the implied constitutional freedom of political communication[,] and legal rules, such as those of defamation law, which may constrain this freedom" (Chesterman, 2000, p. 79). In contrast, common law decisions generally incorporate less overt recognition of the general value of free speech. In *Ballina Shire Council v Ringland* (1994), the New South Wales Court of Appeal held that elected local councils could not sue for defamation. Although this decision concerned the rights of citizens to express their criticisms, "the conceptual basis of the decision, in strict legal terms, has to do

with the capacity of corporations to sue for defamation...rather than freedom of speech as an independent legal principle" (Chesterman, 2000, p. 8).

There are occasions, however, when legislation clearly refers to free speech values. As an example, Chesterman cites the rules which limit the granting of injunctions, designed to restrain the publication of defamatory material (2000 p. 10). In granting injunctions, Australian courts recognise the significant restrictive impact it may have on freedom of speech, and will only grant them in "rare and very clear cases" (Collins, 2001, 20.11). Simpson J, in her decision in *Macquarie* (1999),[1] outlines the factors to be considered in determining whether injunctions should be granted:

> [W]hile it may be relatively easy to establish, prima facie, that a publication is defamatory, the key to a defamation action very often lies in the defences advanced, and these cannot ordinarily be determined at the stage of an interlocutory injunction application. To restrain the publication would unduly override the rights of a publisher and pre-empt the resolution of legitimate issues which arise in claims for defamation. The second reason concerns the fundamental public interest in freedom of speech and freedom of information. An injunction will [not] ordinarily [be granted] ... where it would have the effect of restraining discussion in the media of matters of public interest or concern. (Simpson J in *Macquarie*, 1999 at 16)

In an Australian context, defamatory material is that which "exposes someone to hatred, contempt or ridicule. One judge described a defamatory statement as a statement that is 'of a kind likely to lead ordinary decent folk to think less of the person about whom it is made'" (Oz NetLaw, 2001). Moreover, "defamation is not restricted to statements that are presented as factual and that are demonstrably false. Australian jurisdictions recognise notions of false innuendo – a defamatory statement that has an inferential meaning" (Caslon Analytics, 2005).

In the interests of striking a fair balance between an individual's interest in protecting their reputation, and the importance of protecting free and open dialogue on matters of public interest, there are a number of defences to defamation in Australian jurisdictions. These defences generally include justification - relying on the truth of the statement, and, in some jurisdictions, that "the subject matter was of public interest or public benefit" (Martyn, 2004); fair comment, which relates to a statement of opinion about an issue of public interest; absolute and qualified privilege, which protects publication of statements made in parliamentary or judicial proceedings, and reporting of matters concerning government or political issues that

[1] Macquarie Bank Limited & Anor v Berg [1999] NSWSC 526 (2 June 1999) – this case, with reference to the application of injunctions to restrain publication of allegedly defamatory material, is discussed in more detail on pages 19 and 39

may be of interest to the general public; and innocent dissemination and triviality (Martyn, 2004).

The laws governing defamation in Australia vary across states, despite ongoing reviews by national and state Law Reform Commissions since 1968 (Law Reform Commission of Western Australia, LRCWA, 2002).[2] Defamation law in Queensland and Tasmania is covered by legislation, whereas NSW and the ACT rely on a combination of common law decisions handed down by the judiciary over time, and legislative measures. Defamation law in the remaining states and territory is covered mainly by the common law. Several Australian states also include provisions for defamatory statements to be prosecuted as criminal offences under their criminal codes. These provisions "cover statements that had a malicious basis and, in particular, that were known by the publisher to be false" (Caslon Analytics, 2005).

With reference to online disputes, "there is no legislation dealing specifically with defamation on the Internet. Defamation laws are applicable to publications generally, rather than specifically to particular media. Hence, the laws applicable to offline material are also applicable, in principle, to online material" (EFA, 2002).

Defamation law in Australia operates on the adversarial system, with the "onus ... on a defendant to defend the particular statement" (Caslon Analytics, 2005). That is, "the burden of proving that a defamatory statement is true rests with the person who made the statement" (LRCWA, 2003, p. 16). This 'burden of proof' placed on the defendant has led some critics to suggest Australia defamation law is 'pro-plaintiff', favouring the interests of individuals at the expense of the public interest in freedom of expression.

The underlying premise of defamation laws in Australia is that the principle of free speech, although important both to the individual and society as a whole, may on occasions need to be compromised to protect competing rights. According to Chesterman, Australian courts see "freedom of speech as a means to an end, the political end of enabling the people of Australia 'to exercise a free and informed choice as electors'" (2000, p. 21). Therefore, any limits to be placed on legal remedies for damage to reputation need to be considered in light of "the benefit to be derived from receiving information which we need to participate as active citizens" (LRCWA, 2003, p. 2).

[2] Current defamation law reform proposals are discussed on page 41

2.3.2 The United States

In contrast to the situation in Australia and the United Kingdom, freedom of expression is constitutionally protected in the United States through the First Amendment, and has traditionally attracted the highest levels of protection (Chesterman, 2000, p. 2). The dominant role the First Amendment plays in the United States' legal system is particularly evident in the area of defamation law. Legal scholars suggest the influence of the First Amendment's guarantee of freedom of expression has resulted in the development of radically different defamation laws in the United States, in comparison to Australia and the United Kingdom (Collins, 2001; Weaver, 2000).

These differences are perhaps most sharply illustrated in the fact that in the United States, defamation law places the onus on the plaintiff to prove the publication is defamatory. To be considered defamatory, a statement must be false (as proven by the plaintiff); and, if the plaintiff is a 'public figure', they must also prove "the defendant knew the statement was false, or acted in reckless disregard for its truth or falsity" (Weaver, 2000). As it is notoriously difficult to prove a 'negative', these laws have resulted in what Weaver describes as a 'pro-defendant' legal environment. In a report on defamation law reform, the Law Reform Commission of Western Australia noted similar concerns, suggesting provisions requiring a statement be disproved can create "an impossible burden on a plaintiff, particularly where the defamatory sting is a general one not readily susceptible of disproof" (2003, p. 16).

2.4 The Law of Defamation and the Internet

Contrasting approaches to defamation laws between jurisdictions reflects not only different cultural values in relation to free speech but, fundamentally, highlight their historical relationship to fixed geographical territories. According to Raut, traditional notions of jurisdiction are based on assumptions that "the law is made for a definite group of people residing in a certain territory...Legal rights and responsibilities are therefore largely dependent on where one is located" (2004, p. 7). Under this model, it is assumed that individuals within a democratic state or nation have some input into the laws that govern them (Raut, 2004, p. 11).

In the past, the effect of a defamatory statement was generally limited to a defined audience, "such as the readership of a local newspaper or the viewers of a local TV broadcast" (Raut, 2004, p. 10) and, as such, any defamation actions would be limited to a local jurisdiction. However, increasing use of the Internet has allowed citizens and publishers to reach a much wider audience than was previously possible, through the use of electronic mail, electronic

bulletin boards and discussion boards, Internet Relay Chat, and web pages. "On the Internet... a defamatory statement can be instantaneously available throughout the world" (Raut, 2004, p. 10). The question of whose jurisdiction should apply is thrown into stark relief; it is conceivable that jurisdiction can be available anywhere the Internet can be accessed. "If a defamatory statement is made available on a website, jurisdiction may lie in all the countries where access to that website can be obtained" (Fitzgerald, 2003).

Recent online defamation decisions suggest a divergence between Australian and United States law in relation to Internet jurisdiction (Fitzgerald, 2003). In contrast to recent United States' court decisions, Australian courts are now tending to exercise jurisdiction in Internet related cases (Raut, 2004, p. 53). The following section outlines developments in the law of defamation as it has been applied to the Internet, through an examination of key common law decisions that illustrate contrasting approaches.

2.4.1 Australia

Dow Jones & Company Inc. v Gutnick (2002) HCA 56

The leading international legal authority on online defamation is *Dow Jones & Company Inc. v Gutnick* (2002) HCA 56 *(Gutnick),* handed down in the High Court of Australia in December 2002. This is the first decision by any country's highest court to determine place of publication, and consequently which jurisdiction's laws apply for documents published online. It is worthy of consideration also, given that the principle regarding place of publication established in *Gutnick* was subsequently applied by the Western Australian Supreme Court (WASC) in *Cullen v White* (2003) WASC 153. The case concerned an allegedly defamatory article about Melbourne businessman Joseph Gutnick published in an edition of Barron's Online in October 2000, and in the equivalent hard copy of the magazine. The online version is available through subscription. While the bulk of the subscribers at the time of the judgment were located in the United States, there were an estimated 300 subscribers in Victoria.

The central issue hung on where publication of the defamatory article was deemed to have occurred, and consequently whether Gutnick "could litigate his defamation action in the courts of Victoria, where the defamation law was stricter than in the United States" (Fitzgerald, 2003). Gutnick, relying on established common law principles relating to traditional defamation actions, argued that publication of the article occurred in the place where it was "received and comprehended by a person (other than the publisher and the plaintiff) in Victoria, ie when the

material sued for appeared on the appellant's website and was 'downloaded'" (*Gutnick*, 2002 at 108).

In contrast, Dow Jones submitted that the unique nature of the Internet called for a radical departure from this principle, which would recognise publication as taking place at the point of upload. This would effectively mean articles that appear on Barron's Online are, for legal purposes, deemed to have been published in New Jersey where the servers are located (*Gutnick,* 2002 at 18). Furthermore, they contended that since the content was lawful at the point of upload in the United States, any attempt to enforce local jurisdiction by an Australian court would act to inhibit the Internet as a forum for transnational discourse. In their appeal to the High Court, Dow Jones noted the contribution the Internet had made to human knowledge and freedom, and argued that:

> [T]he law should generally facilitate and encourage such advances, not attempt to restrict or impede them by inconsistent and ineffective ... interventions, for fear of interrupting the benefit that the Internet has already brought and the greater benefits that its continued expansion promises. (*Gutnick*, 2002 at 88)

The High Court unanimously rejected their submission, finding that reputation is damaged when the defamatory publication is comprehended by the reader, listener or observer (*Gutnick,* 2002 at 25). In the case of material published on the World Wide Web, the High Court found:

> [I]t is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed. (*Gutnick*, 2002 at 44)

Both Justices Kirby and Callinan noted the very real possibility that if place of publication, and therefore appropriate jurisdiction, was deemed to be at the point of upload, it could have serious ramifications for future plaintiffs based outside the United States.

> Because of the vastly disproportionate location of webservers in the United States when compared to virtually all other countries (including Australia) this would necessarily have the result, in many cases, of extending the application of a law of the United States... to defamation proceedings brought by Australian and other foreign citizens in respect of local damage to their reputations by publication on the Internet... it would be small comfort to the person wronged to subject him or her to the law... of a place of uploading, when any decision so made would depend upon a law reflecting different values and applied in courts unable to afford vindication in the place where it matters most. (Kirby J in *Gutnick*, 2002 at 133)

The alternative, Pullen concurs, would make the "United States, arguably the largest publisher on the Internet, ... [the] de facto forum for settling these types of disputes. Put another way, US laws would control the rights to one's reputation throughout the world" (Pullen, 2002). In addition, the High Court rejected Dow Jones' argument that courts should resist the temptation to restrict the free flow of information and ideas on the Internet, for fear of obstructing the potential benefits offered by this revolutionary communications medium.

> Any suggestion that there can be no effective remedy for the tort of defamation ... committed by the use of the Internet (or that such wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable. (*Gutnick*, 2002 at 115)

In justifying their position, the Court noted Australia's obligations under the International Covenant of Civil and Political Rights (Office of the High Commissioner for Human Rights, [OHCHR], n.d.) to "provide effective legal protection for the honour, reputation and personal privacy of individuals" (*Gutnick*, 2002 at 116). As such the exercise of free speech rights may be subject to restrictions as are necessary "for respect of the rights or reputation of others" (*Gutnick*, 2002 at 115).

Both the High Court decision, and the preceding Victorian Supreme Court decision[3] in 2001 which led to the Dow Jones' appeal to the High Court, prompted much discussion in the media and among the legal community. For many commentators the significance lies in the judgments' potential reach. Both the New York Times and The Australian interpret the decisions as, in effect, forcing anyone publishing on the Internet "to know or predict the law in every jurisdiction" ("Gutnick ruling", 2001).

> Everyone who puts information on the Internet is, under yesterday's Gutnick defamation ruling, effectively publishing in every nation instantaneously, creating every second millions of excuses for governments and the law to step in and stop you or anyone else from taking part in open, informed debate. ("Gutnick ruling", 2001)

Fitzgerald (2003) examines this 'spectre of global liability' by analysing limits to the judgment. In particular, the impact of this judgment would be limited in future defamation suits to jurisdictions where the plaintiff had a reputation to defend. This notion is supported by Young, publisher of an Internet-only journal, who suggests "most of our reputations are local, not global....Therefore in most defamation cases there will be a strong correlation between place of production, audience and jurisdiction" (2003). Furthermore, a judgment of this type "would

[3] *Gutnick v Dow Jones & Company Inc* [2001] VSC 305 (28 August 2001)

only be of value if the judgment could be enforced where the defendant held assets" (Fitzgerald, 2003). Given the high level of protection afforded free speech in the United States through the First Amendment, it is doubtful if future foreign defamation judgments will be enforced in the United States (Collins, 2001; Fitzgerald, 2003; Kohl, 2000).

In evidence to the Court, Clarke suggested attempts to apply existing defamation principles to online communications fail to recognise the unique challenges the Internet presents (cited in *Gutnick*, 2002 at 180). This view is disputed by Thompson and van der Toorn (2003), who contend that traditional media have operated in a transnational market for many years. In their view, the High Court decision has done no more than affirm that the "usual practices for publishers in relation to other media can simply be extended to the Internet" (Thompson & van der Toorn, 2002). However, in limiting their discussion to commercial publishers, Thompson and van der Toorn fail to recognise the fundamental changes the Internet has wrought to the whole concept of 'publishing'. The technology empowers ordinary individuals to actively contribute to the Internet's content, challenging the notion of what it means to be a 'publisher'.

Legal challenges presented by the American dominance of cyberspace are alluded to by Barwell and Bowles: "the Internet, developed in the US and deeply encoded with the legal principles and ethics of that country, may pose a more complex problem for Australian culture (2000, p. 705). Justice Callinan appeared to acknowledge these difficulties, when commenting that Dow Jones' submission was an attempt to "impose upon Australian residents...an American [sic] legal hegemony in relation to Internet publications" (*Gutnick*, 2002 at 200), given the dominance of Internet traffic emanating from the United States.

Given (2004, p. 224) locates the *Gutnick* decision within a discussion on the evolution of regulatory mechanisms applied to the Internet, and suggests the application of existing defamation principles to the new media has been part of the legal and media landscape, both locally and internationally, for a number of years. In rejecting Dow Jones' submission that the laws of defamation should be reconceptualised to locate 'publication' at the point of upload, Given suggests the *Gutnick* decision can be seen as part of an evolutionary process of adapting existing legal principles to a new environment, in a national and international context.

Macquarie Bank Limited & Anor v Berg (1999) NSWSC 526

This decision, earlier than *Gutnick.* reflects a different approach to jurisdiction in online defamation disputes. In this earlier decision, the New South Wales Supreme Court (NSWSC) declined to grant an injunction restraining the publication of an online document uploaded in the United States (*Macquarie*, 1999). The Court reasoned that because it is not possible for an

online publisher to geographically restrict publication on the Internet, any injunction granted would be akin to superimposing the law of New South Wales on all other jurisdictions with access to the Internet (Kohl, 2000, p. 122). Furthermore, the Court held that granting an order that had little chance of being enforced, as is often the case with defamation proceedings involving United States' defendants, would be of limited value (Kohl, 2000, p. 138).

In particular, Kohl suggests the decision places undue emphasis on the role of the Internet in determining the appropriateness of granting an injunction:

> Worldwide accessibility of the Internet does not turn every online publication into an international publication and every dispute into a global matter in which every jurisdiction wants, should or does have a say. In relation to jurisdictions ... with which the dispute only has a minimal connection it may not make sense to speak of 'superimposing' the law of the jurisdiction with which the dispute had a substantial connection. (2000, p. 140)

Rindos v Hardwick (1994) WASC Unreported Judgment

This was the first Australian legal case to address defamation in an online environment, and involved messages to an electronic bulletin board. In this particular case the plaintiff, defendant, and the server hosting the offending material were all located in Western Australia. Consequently, the fact that the offending material was transmitted via the Internet was considered entirely incidental to the particular matter (Kohl, 2000, p. 124). Kohl contends the decision in *Rindos v Hardwick* illustrates "that at times the apparently decisive feature of the Internet, namely its transnationality, is not significant to the actual case; or, in other words, the Internet does not necessarily transform a local matter into a transnational matter" (Kohl, 2000, p. 124).

2.4.2 The United Kingdom

Recent decisions in the United Kingdom suggest a similar approach to online defamation as Australia. The English High Court decision in *Harrods v Dow Jones* (2003) EWHC 1162 followed the Australian decision in *Gutnick*, "in holding that an online article was deemed to be published where Internet users downloaded, read and comprehended the article" (Thompson & van der Toorn, 2003).

2.4.3 The United States

In contrast, decisions by United States' courts reflect a different approach to the issue of jurisdiction, in which "a plaintiff would need to prove that an out of state defendant's Internet activity was expressly targeted at, or directed to, the forum state in order to establish jurisdiction in the courts of that state" (Thompson & van der Toorn, 2003). Fitzgerald suggests "the primary principle is that an individual should not be subject to judgment in a jurisdiction in which he or she has no meaningful contact" (Fitzgerald, 2003). This tends to suggest the Court favours the interests of the defendant, and gives minimal consideration to the impact of the defamatory statement on the plaintiff. A recent decision handed down by the United States Court of Appeal, *Young v New Haven Advocate*, supported the 'single publication doctrine' which placed publication at the point of upload. Even though the plaintiff allegedly suffered damage to his reputation in Virginia as a result of comments in an online newspaper uploaded in Connecticut, the court held that the "newspapers had intended to direct the publication at a Connecticut audience, despite the article being accessible online in other jurisdictions" (Thompson & van der Toorn, 2003).

Fitzgerald contrasts this decision, which found that "jurisdiction was not satisfied where the alleged defamatory material was accessed or read unless the offending website had 'targeted' the forum state" (2003), with the *Gutnick* decision, which turned on similar facts, but came to a very different determination.

2.5 The Role of Internet Service Providers (ISPs)

Apart from common law decisions which illustrate contrasting approaches to online defamation in Australia, the United Kingdom and the United States, the role of Internet Service Providers has also been interpreted differently across jurisdictions. This section examines these differences, and considers the impact on victims of online defamation, with particular reference to this case study.

The liability of ISPs has been the subject of debate in recent years, given the dominant role they play in disseminating electronic information. The central issue hangs on whether intermediaries, such as ISPs, could be "liable for failing to remove defamatory material on their computer systems, once it has been brought to their attention" (Collins, 2001, 3.06). Citing a judgment which held proprietors of a golf club liable for failing to remove an allegedly defamatory notice placed on a noticeboard by a third party, Collins suggest the same argument could be used to support the conclusion that:

> Internet intermediaries who know that there is a defamatory material on their computer systems, and who have the ability to remove that material, become 'publishers' of the material for the purpose of defamation law if they fail to do so....It will usually be a simple matter for an Internet intermediary to act to remove or disable access to defamatory content stored on its computer system. (2001, 15.21)

Collins contends once the defendant has been notified of the offending material, and requested to remove it, any failure to do so could be interpreted as consent, or a ratification of the "continued presence of the offending content on its property" (2001, 15.21).

In practice, different jurisdictions have interpreted the liability of Internet Service Providers quite differently. In Australia, the Broadcasting Services Amendment (Online Services) Bill 1999 (Cth) introduced provisions to provide ISPs with "a measure of protection from criminal and civil liability for defamatory material hosted, cached or carried by them, but which they did not create" (Collins, 2001, 19.01). However, this protection does not extend to situations where the ISP is notified it is "hosting, caching or carrying defamatory material" (Collins, 2001, 19.33).

A similar situation exists in the United Kingdom, where the liability of intermediaries is established through the Electronic Commerce Directive (2000/31/EC). Article 14 provides protection from liability for ISPs provided they "act expeditiously" to remove offending content once they are notified, or become aware of it (Collins, 2001, 18.05).

The situation in the United States is quite different, and reflects the primacy given to free speech as a result of the First Amendment. The 'Good Samaritan' clause of the United States' Communications Decency Act (1996) (CDA) provides protection from liability for ISPs, and has been interpreted in decisions such as *Blumenthal v Drudge* 992 F. Supp. 44 (DDC) 1998, where the Judge noted: "Congress has conferred immunity from tort liability as an incentive to Internet Service Providers to self-police the Internet...even where the self-policing is unsuccessful or not even attempted" (cited in Collins, 2001, 27.67). Both Sheridan and Porter (cited in Belmas, 2002, p. 73) suggest application of the 'Good Samaritan' clause effectively denies those defamed online a remedy. "If an author cannot be ascertained, and an on-line [sic] service presumptively escapes liability as a 'distributor', then the Internet must be the exception to [the]...rule that for every civil wrong there is a right" (Porter, cited in Belmas, 2002, p. 73).

It is interesting to note, however, the contrasting approach taken in the United States to ISPs' liability in relation to copyright law. The Digital Millennium Copyright Act of 1998 (DMCA) provides protection to Internet intermediaries for copyright infringement, which closely resembles intermediary provisions relating to defamatory material in Australia and the United Kingdom (Collins, 2001, 27.76).

> Under the Act, if a party believes their copyright has been infringed, they can send a demand to an Internet Service Provider (ISP) to remove the offending material. If the ISP complies immediately, it cannot be held liable for contributing to copyright infringement. (Crawford, 2003, p. 179)

Crawford suggests the DMCA is being used by media and entertainment companies to protect their profit margins. "It gives a great deal of power to complainants – all they have to do is protest to an ISP about a site, and the ISP will take it down immediately for fear of further legal action" (Crawford, 2003, p. 179). The contradictions evident in the contrasting approaches taken in the United States to ISPs' liability for online content between defamation and copyright infringement, would suggest that neither industry nor government view the role of the Internet as a 'marketplace of ideas', as deserving of protection when their financial interests are at risk. This is supported by Collins, who notes that "different policy objectives have ... been pursued in the United States in ...[different] areas of online conduct" (2001, 27.76).

The role of ISPs is particularly relevant to the subject of this Case Study. It is probable that had Dr Cullen been defamed by material hosted on a server in the United Kingdom, he would have been able to have the offending material removed, either immediately on notice, or on the presentation of an Australian court order. Unfortunately for him, the material was hosted on a server based in the United States, where the 'Good Samaritan' clause provides total immunity from liability for the ISP, even after they become aware of the defamatory nature of the material. This will continue to present problems for Australian plaintiffs seeking to have defamatory material removed from United States servers.

3. Dr Trevor Cullen's Case Study

The genesis of this case originated in Papua New Guinea in 1996, when Bill White, an American lecturer employed at the Divine Word University in Madang was dismissed, after only one semester of a three year contract. Apparently aggrieved, White began a campaign attacking the small Roman Catholic university, its staff, volunteers and supporters. During the following six years he registered hundreds of websites, often in the victims' names, and sent thousands of defamatory emails and faxes, attacking a diverse range of individuals and organisations, from the former PNG Acting Governor-General Sir Peter Barter, to AusAid volunteers, clergy members, missionaries, medical practitioners, journalists and lawyers. Online discussion groups which traditionally encouraged robust debate were repeatedly forced to close due to White's abusive postings (Robie, 2003). The common thread to these attacks was White's perception that the individuals were in some way defending the Divine Word University, and were involved in a "conspiracy to cover up the truth about widespread corruption which only he can apprehend" (Henningham, 2003).

Dr Trevor Cullen first met Bill White when they were both working at the Divine Word University in 1996. As they were teaching in different schools, they had little contact with each other. After two years at the Divine Word University, Dr Cullen moved to the University of Queensland, where he was undertaking his PhD on the topic 'Press coverage of HIV/AIDS'. Following a series of disturbing messages posted by White to the Pacific Forum website in July 1998, Dr Cullen sent the Web maestro a letter, asking them to take action on the abusive and defamatory postings. Instead, his letter was posted on the website, and within two days White had created a web page in Dr Cullen's name, alleging he was a paedophile and had committed academic fraud.

Initially White concentrated his attack on Dr Cullen through a series of websites defaming him personally and professionally, and through dozens of emails he sent to staff at the University of Queensland, as well as other journalism educators throughout the country. At one stage Dr Cullen counted sixty four websites that White had linked to his name, and was receiving up to six emails a day, sent by White using an alias identity (Cullen, cited in O'Leary, 2003). On these abusive and bizarre websites, White claimed Cullen had falsified his academic credentials, fabricated interviews, and misrepresented himself as an ordained priest. Using domain names he'd purchased including http://www.trevorcullen.info/thesis, White posted excerpts of Dr Cullen's draft PhD thesis which he'd downloaded, and accused him of falsifying research, using unsubstantiated evidence to discredit Dr Cullen's research. Interspersed with a repetitive theme of 'massive fraud' related to Dr Cullen's PhD thesis, White's commentary also included

repeated references to Dr Cullen's allegedly false theological qualifications, and accusations of paedophilia and homosexuality.

By this stage White's attacks on Dr Cullen had come to the attention of the wider academic and journalism community. "I had a few lecturers coming to me saying that students had raised concerns about me after coming across sites, which was distressing and embarrassing" (Cullen, cited in Hellard, 2003). As Dr Cullen submitted articles to journals and newspapers, or travelled around the Pacific promoting HIV/AIDS awareness, White tracked his activities, "sending abusive emails to news organisations and NGOs across the Pacific" (Cullen, 2000). By this stage White had also created defamatory and abusive websites targeting Dr Cullen's colleagues; both the Head of The Department of Journalism at the University of Queensland, Professor John Henningham, and Dr David Robie became the recipients of White's vitriolic attacks after coming to Dr Cullen's defence.

In January 2002 Dr Cullen moved to Perth, to begin his tenure as a Lecturer in Journalism at Edith Cowan University. Personnel at the University immediately began receiving abusive emails from White, warning them about Dr Cullen's 'fraudulent' academic qualifications. When this didn't have the desired effect, he continued his pattern of creating defamatory websites, this time targeting academic staff at ECU. In an attempt to counter the weight of defamatory material White was posting on the Internet, attacking Dr Cullen and ECU, the Head of the School of Communications and Multimedia, Professor Robyn Quin, took the extraordinary step of posting an open letter, completely refuting White's allegations. The letter expressed ECU's view that White's allegations were defamatory, illegal and immoral (Quin, 2002).

Despite this show of support for Dr Cullen's academic credentials, and the public rebuttal of White's claims, the campaign of harassment towards Dr Cullen, and anyone who sought to defend him, continued unabated. Dr Cullen approached the Federal Police in 2001, and again in March 2003, seeking their assistance in bringing an end to White's offensive behaviour, but was advised there was little they could do, since there was no legislation that dealt specifically with this form of 'cyberstalking or cyberslandering', and as White had not physically attacked Dr Cullen, the police had no power to apprehend him on criminal charges (T. Cullen, 2004b). Moreover, the issue was further complicated by the fact that White did not reside in Australia; had he done so, there may have been some opportunity for police intervention.

By this time several other victims had attempted to have the defamatory websites removed, with limited success. As discussed previously, the primacy given to free speech in the United States provides protection from liability for ISPs. While some ISPs did remove White's sites after receiving complaints, he was easily able to find other ISPs to host his material. Catalina

Hosting, an American based ISP which in 2003 hosted the bulk of White's sites, chose not to remove them despite complaints; perhaps the financial advantages outweighed any moral obligations they may have felt (Hymon, 2003).

Approaches to Internet search engine companies and domain name suppliers were similarly unsuccessful. Google refused to remove the offending sites, citing an unwillingness to be "judge and jury over the approximately 3 billion Web sites that are searched by Google" (Krane, cited in Hymon, 2003). Domain name suppliers suggested they couldn't act unless a legal judgment against White was handed down in the United States. In the meantime, a quick search on Google continued to retrieve dozens of websites created by White, linked together to support his delusional theories and accusations against his victims.

Distressed at the impact it was having on his family and colleagues, and concerned about the effect White's attacks were having not only on his own reputation, but also those individuals who sought to defend him, Dr Cullen decided to take legal action. In April 2002 he sued White in the Supreme Court of Western Australia, having obtained leave to serve White in California. In a judgment delivered on 3rd September 2003, the Court found that White had gravely defamed Dr Cullen, deliberately disseminating defamatory statements on the Internet so as to "maximise their detrimental effect... in the circumstances, it is obvious that the defendant intended to cause as much damage and hurt as possible" (Newnes J in *Cullen,* 2003 at 9).

In determining damages the Court took into account the harmful effect of the defamatory statements upon Dr Cullen's reputation and standing as an academic, and upon his future employment prospects, as well as the "personal distress and anguish" he had suffered (Newnes J in *Cullen,* 2003 at 19). White did not appear at the proceedings, nor did he raise any defence to the defamatory statements. Dr Cullen was awarded $70,000 in compensatory damages, and a further $25,000 in exemplary damages, in recognition of the deliberate nature of White's attacks.

Despite the Supreme Court finding in his favour, difficulties in registering the judgment in the United States has meant judgment has not been satisfied. The possibility of pursuing legal action through the American courts was investigated by one of White's other targets, Sir Peter Barter, but found to be financially prohibitive. He was advised by "several US lawyers that it would cost about US$350,000, and that there was no assurance of success because it was a legal 'grey' area" (Cullen, 2004b).[4]

[4] Chapter 3 has been drawn from a refereed conference paper (Dare, 2004) titled Online Defamation: A Case Study in Competing Rights, presented at the Cultural Studies Association of Australasia Annual Conference 2004: Everyday Transformations: The Twenty-First Century Quotidian. Available from: http://wwwmcc.murdoch.edu.au/cfel/docs/Julie_Dare_FV.pdf

4. Prevalence of Online Defamation and Cyberharassment

Given the ubiquitousness of the Internet, and the volume of people accessing it globally, it is difficult to determine the prevalence of the sort of online abuse suffered by Dr Cullen. The issue is further complicated by the blurred taxonomic distinction between cyberstalking, cyberharassment and defamation. The term 'cyberstalking' appears to be to be applied most commonly to those activities that are actionable under criminal law, and is generally defined as "acts engaged in on more than one occasion which are intended to cause fear or apprehension" (Ogilvie, 2000, p. 4). Victims of cyberharassment and defamation, who may not have been physically threatened, may have little option but to pursue civil litigation (WiredSafety, n.d.,)

As demonstrated by Dr Cullen's case study, in practice it is not so easy to distinguish between instances of cyberharassment, cyberstalking and online defamation. Thanks to the global scope of the Internet, White was able to track Dr Cullen's movements, and target his abusive postings for maximum impact. "I feel I'm being stalked....Every time I write articles or travel around the Pacific to give talks and lead workshops on promoting HIV/AIDS awareness among the media and Church leaders, he sends abusive emails to news organisations and NGOs across the Pacific" (Cullen, 2000). Consequently, although this study is primarily concerned with examining the circumstances and impact of online defamation, it is also necessary to consider the impact of cyberharassment and cyberstalking. In particular, it is likely that instances of cyberharassment may sometimes be associated with defamatory behaviour.

In the absence of empirical evidence (Arnold, 2005a), the prevalence of cyberharassment is perhaps most clearly indicated by the thousands of websites providing advice on Internet safety. Organisations such as WiredSafety and CyberAngels include comprehensive information on a range of issues such as child pornography, child molesters, cyberstalking, cyberharassment, online abuse and Internet scams and fraud. Apart from an FAQ page on cyberstalking and cyberharassment on the WiredSafety site, they also provide "one-to-one help and a self-help interactive guide and tutorial", as well as advice on how to avoid online abuse and harassment (WiredSafety, n.d.).

The proliferation of Internet safety sites is, in some respects, a reflection of the ideological framework in which the Internet developed. The origins of the Internet within the American defence and research industries has, according to commentators such as Fitzgerald (2003) and Fogo-Schensul (cited in Belmas, 2002, p. 200), led to an environment heavily imbued with American values of individualism and competition: an adversarial medium that privileges aggression and confrontation over conciliation and compromise. This is echoed by Edwards, who suggests that many newsgroups express a traditional "Internet culture" that exhibits a:

> strong collective sentiment towards anarchy, libertarianism and free speech rights – and a strong corresponding dislike of corporate, governmental or legal authority or control. In this culture, full, frank and unfettered discussion known as 'flaming', which was often indistinguishable from rudeness and abuse, was not only tolerated but by and large encouraged....It was and is not uncommon for all newsgroups to degenerate into 'flame wars' – torrents of abusive comments which destroy all sensible discussion in the group. (Edwards, 1997)

A more scathing critique of 'Internet culture' is forwarded by Young, who suggests "It is almost a parallel universe to the respectable one in which the rest of us live our lives, a demi-monde where hackers can be heroes, and any hierarchy or authority or restraint is regarded with suspicion" (2003). Within this context, it is not surprising that abuse and harassment has become a part of the everyday online experience for many people.

The sheer volume of people accessing the Internet has also contributed to an environment that is prone to defamatory behaviour (Edwards, 1997). Previously, access to the mass media was limited to an elite few who controlled the media conglomerates. However the Internet is now, at least in most western countries, relatively easy to access and use, at relatively low cost. Consequently, almost anyone with access to the Internet can be a publisher. According to Roberts, this will inevitably lead to an increasing number of online defamation cases.

> Electronic communication provides a medium for publication by ordinary people who were not previously able to publish widely. Problems for them are particularly likely to arise with copyright and defamation law....Unlike journalists who have training in defamation and advice from lawyers and media organisations....'untrained people are unlikely to be alive to the dangers of defamation or to be guarded in their speech'. (Roberts, 1996)

In some respects the unique nature of computer-mediated communication (CMC) facilitates aggressive, confrontational behaviour. The relative anonymity of much CMC tends to "have a powerful, disinhibiting effect on behaviour. People allow themselves to behave in ways very different from ordinary, everyday life" (Danet, cited in Palandri & Green, 2000, p. 639). The immediacy and spontaneity of CMC, in which messages are often sent in haste and in the heat of the moment, "tends to lead parties to say things they would not only not normally commit to writing, let alone widely published writing, but would in fact often also not say in face to face interaction with the other party" (Edwards, 1997).

Indeed, the Internet provides an ideal platform from which to abuse others with minimal physical risk and inconvenience to oneself. In Dr Cullen's case, Bill White was able to conduct his campaign of harassment from the comfort and safety of his own home, thousands of kilometres away from his victims. "This is what is so nice about the Internet...you can do most of it without leaving your desk" (White, cited in Hymon, 2003). Furthermore, through the Internet, White was able to collect personal information on his victims which he would later use

to support his allegations of fraud and conspiracy. "[M]any of the people he has targeted say they have watched helplessly as he used information gleaned about them on the Internet – a resume, a photo from a baby christening, a research paper – and turned it against them" (Hymon, 2003).

Bill White's activities may be an alarming indication of the possible extent of cyberharassment and online defamation in cyberspace; at once a sobering example of the level of damage one individual can inflict, and a damning critique of the impact of unfettered freedom of expression on the lives of innocent people. White's campaign of harassment and defamation extended beyond his initial victims to include anyone who stepped in to defend them. According to Professor John Henningham, who himself became a target of White's abuse after defending Dr Cullen, "hundreds of innocent people in Australia, Papua New Guinea, other areas in the southern Pacific region as well as North America and Europe [were] ... harassed and defamed" by White (Henningham, 2003). His victims included "missionaries, businessmen, academics, clergy, journalists, medical practitioners and lawyers" (Henningham, 2003). As well as harassing and defaming individuals, White set up a network of offensive websites on the "Divine Word University, the Australian Government aid agency AusAid, the church aid organisation Cordaid, the Montfort religious community in England and the Lay Mission Helpers Association in Los Angeles" (Henningham, 2003).

It is perhaps impossible to determine how representative White's activities are, but the use of cyberspace to air grievances and attack others appears to be a growing issue (Hymon, 2003). The dearth of statistical evidence of prosecutions and convictions relating to online defamation should perhaps be seen as a reflection of the legal difficulties facing victims, rather than an accurate picture of the prevalence of this type of behaviour. Arnold suggests "On occasion I've seen postings in newsgroups that a subscriber will/has initiated legal action but there's no sign on any outcomes ... did tempers cool or is action underway offline[?]" (Arnold, 2005a).

Perhaps another alternative is more likely; many victims of cyberharassment and online defamation, faced with what may appear to be insurmountable difficulties in achieving a suitable legal outcome, may simply give up. According to the program manager of CyberAngels, "her organization receives 200 e-mails and up to 30 phone calls a week from people who say they are being harassed over the Internet" (Gifford, cited in Hymon, 2003). It is not unreasonable to suggest that extrapolating these figures across the myriad of Internet safety sites, in addition to the many more individuals who probably suffer in silence, points to a significant problem affecting many people.

5. Impact of Defamation and Cyberharassment

5.1 Impact on Individuals and the Electronic Public Sphere

Given the level of cyberharassment and defamation present in many online forums, and the difficulties this may present to users, it could be assumed that critical attention would be focused on the impact of such behaviour on cyberspace. However, the bulk of research into online defamation appears to be directed at a macro level; towards the potential impact of traditional, territorially based defamation laws on the integrity of the Internet as a robust 'marketplace of ideas', rather than the damage it may inflict on individuals, and, as evidenced in Bill White's activities, charitable and not-for-profit organisations as well. Many critics accuse plaintiffs of using the legal system to stifle freedom of expression, effectively 'chilling' robust debate, and situate the debate within a 'David and Goliath' context, wherein wealthy individuals and corporations use defamation laws to stifle opposition, whether that be in the mainstream media or on the Internet.[5]

The discourse surrounding the landmark High Court of Australia decision *Dow Jones & Company Inc. v Gutnick* reflects this paradigm. The judgment attracted widespread condemnation from digital libertarian groups such as the EFF, and Australian and international media organisations, concerned at the impact it may have on online publishing, and by extension, freedom of expression on the Internet. Much of the criticism levelled at the Gutnick decision draws on ideological concepts of the Internet as an inherently democratic medium, worthy of the highest levels of free speech protection. In contrast to other communications media such as television and radio, which are often the subject of extensive government regulation, the Internet historically has been a relatively unregulated and at times seemingly anarchic medium. This has provided a dynamic forum for the robust exchange of ideas and information for ordinary individuals; a utopian 'marketplace of ideas' in an era in which ownership of the mainstream media is increasingly concentrated in the hands of a few very powerful media moguls. As such, the Internet provides an unprecedented forum for minority and dissident voices, which often have little or no opportunity for expression either through local or international media outlets. In commenting on RAWA's (Revolutionary Association of the Women of Afghanistan) use of the Internet to bypass strict government control of the media in Afghanistan under the Taliban regime, Stock suggests "they can open a dialogue, at very low cost. It changes the game" (cited in O'Connor, 2000).

[5] 'chilling' is a term often used to describe the use of laws such as defamation and copyright to stifle free speech and open debate

It is perhaps not surprising then that attempts to regulate the Internet have been met with vociferous opposition. Both the EFF and the American Civil Liberties Union (ACLU) have taken an active stance in promoting freedom of expression on the Internet, by advocating the extension of First Amendment provisions to the online environment and opposing measures aimed at regulating content, such as the United States' Communications Decency Act 1996. This is articulated in the ACLU's claim that "the importance of the Internet as 'the most participatory form of mass speech yet developed' requires that the courts perpetually uphold the freedom of speech" (ACLU, n.d.).

However, while critics of Internet regulation focus on the importance of free speech in a democratic society, and on the potential chilling effect defamation actions may have on the public sphere, they fail to acknowledge that defamatory and abusive behaviour - as Bill White's was - can also be used to effectively stifle free speech. In contrast to the ACLU's vision of the Internet as the "most participatory form of mass speech", studies of CMC suggest many online forums reflect an environment in which only the most dominant participants are guaranteed the right to free speech. Far from fostering open and informed debate, Herring (1999) suggests a "rhetoric of harassment" is often used to intimidate and silence those with opposing viewpoints.

Ironically, in employing rhetorical harassment, it's not uncommon for participants to draw on civil libertarian notions of the Internet as a bastion of free speech to defend their aggressive behaviour, while at the same time they intimidate others into silence. In a study of gender harassment in two online forums, one recreational and the other academic, Herring observed what she termed a "blatant double standard" in relation to freedom of expression. "Males hypocritically represented themselves as heroic defenders of freedom of expression, even as their behaviour showed them to be intolerant of even partial disagreement with their views" (1999, p. 163). The repeated harassment observed on both forums uniformly resulted in a decline in female participation. "Overall, participation by women decreased as aggression by male participants increased in each sample....In many cases, women fall silent altogether or leave the group" (Herring, 1999, p. 161).

In these circumstances, it is apparent that freedom of expression on the Internet, as envisaged by digital libertarian groups such as the EFF and ACLU, is far from a guaranteed right. Herring's research into power dynamics exhibited in CMC also provides a useful corollary to studies conducted by Chesterman into the beneficiaries of contemporary free speech protection. In contrast to the popular notion that free speech protections ensure "dissenters, radicals, [and] outspoken critics of government action" are free to legitimately express their opinions, Chesterman highlights the subtle appropriation of First Amendment free speech principles by corporations and conservatives (2000, p. 305). His underlying proposition that "'free speech

principle[s]' generally favours [sic] socially and economically powerful groups within the private sphere" (2000, p. 307) has some parallels on the Internet, where free speech principles are often invoked to favour the most aggressive individuals at the expense of other participants.

The notion that free speech on the Internet is, in reality, a privilege reserved for an elite few who define the parameters of debate, echoes the theory put forward by Stanley Fish that "free speech is what's left over when you have determined which forms of speech cannot be permitted to flourish. The 'free speech zone' emerges against the background of what has been excluded" (Fish, cited in Lowe & Jonson, 1998). Fish argues that the term 'free speech' is:

> a label that is appropriated as the fruit of victory in a political struggle. If we win a political struggle about censorship then we get to call those views we like free speech and argue that those we do not should be censored. (Sparrow, 2004, p. 3)

In the context of the online forums studied by Herring, the most aggressive participants win the struggle to define the parameters of 'free speech'. Alternative points of view which do not conform to their hegemonic perspective are censored by repeated instances of harassment and abuse.

The close ideological association between the Internet and a libertarian interpretation of free speech is also built upon a general acknowledgement of the importance of free speech at both an individual and communal level, leading to self-fulfilment, a 'marketplace of ideas' and genuine democracy.

However, the notion that truth will emerge through open and robust debate, and that consequently the Internet deserves the highest level of free speech protection, operates on the flawed assumption that everyone shares the same concern with uncovering the truth. This assumption is challenged by the dynamics of harassment observed in many online forums (Arnold, 2005a; Edwards, 1997; Herring, 1999; Herring, 2001), which demonstrate that dominant participants are more interested in promoting their own ideas and values than in being open to other people's opinions and perspectives. According to Herring, "'harassment' is arguably incompatible with 'persuasion'; the harassing individuals appear to have had in mind to provoke and intimidate female participants, rather than to persuade them rationally to their point of view" (1999, p. 162).

Consequently, far from fostering the free flow of ideas, the accepted norms of adversarial dynamics evident in many online forums often result in a reduction in the diversity of opinions being expressed. According to Arnold, "people get harassed and leave, get disgusted by the bullying and leave, or filter vigorously, with the end result that the 'community' is one of the

likeminded" (Arnold, 2005a). As such, there is little opportunity for vigorous, rational debate to occur.

Under these circumstances, the Internet's potential to enhance self-realisation and contribute to a more democratic society appears to be threatened by the very principles that protect unfettered, indiscriminate speech. This echoes concerns forwarded by Fish, in a broader discussion on the liberalisation of United States' First Amendment principles.

> Before the '50s and '60s there were a number of balancing tests that were at the heart of First Amendment jurisprudence; the rights of individuals to free expression were recognized but they were balanced against other rights and values. And so you had a series of formulae put forward by the courts designed to instruct you in how to balance various interests. One famous formula ... was the test of 'clear and present danger', which meant that expression was to be allowed in the service of robust and wide open debate in a democratic society up to the point where it seemed that the effect of that expression might constitute a danger to the very democratic process that was allowing it. (Fish, cited in Lowe & Jonson, 1998)

Thus, to apply Fish's argument to the Internet, it can be suggested that the adversarial, and at times abusive and defamatory environment in which much CMC takes place, threatens not only the free speech rights of many individuals, but also undermines the potential the Internet offers for a more democratic, inclusive society to emerge.

In the case of Bill White, his activities not only impinged other people's rights of freedom of expression, but also directly impacted on the public sphere by disrupting forums dedicated to fostering open and informed debate. According to Henningham, "White has sent thousands of emails to discussion groups and forums, attempting (often successfully) to disrupt discussions and conferences" (2003). White's actions also resulted in the repeated closure of discussion groups. David Robie, the publisher of an online forum disrupted by White's abusive postings, had first attracted White's wrath late in 1998, after he refused to join White in exposing the supposed web of corruption at Divine Word University. Dr Robie then became the target of a torrent of personally abusive and threatening emails, accusing him of "sexual misconduct of various kinds [and] betraying the principles of independent and ethical journalism by 'failing to investigate the Divine Word University fraud'" (Robie, 2005). When White discovered Dr Robie ran an unmoderated discussion board, Toktok, he directed his attention there.

> In the space of about four hours on one particular day, he sent 11 messages to the website. The result of this abusive bombardment is that other people offering considered comment on media issues were scared off. It virtually killed off the discussion board. I closed the board three times and left it closed for a matter of weeks at a time. Remarkably, when I reopened Toktok again, Bill White seemed to be lying in wait and a message from him would be posted on the message board within hours of it being live. (Robie, 2005)

As a result of White's repeated interjections Dr Robie closed the unmoderated board completely, and replaced it with a moderated version. According to Dr Robie, "the time involved in minimising the damage inflicted by Bill White meant less time for providing new content on the website" and resulted in a "'chilling' of free expression on my website" (Robie, 2005).

Dr Robie is particularly concerned by the issues arising from this unfortunate incident. "[White's] sustained malicious activities with apparent impunity had a disturbing implication for the [I]nternet public sphere and for those committed to ethic[al] and professional journalism and commentary" (Robie, 2005). It is illuminating to contrast the basis of Dr Robie's concerns for the future of the Internet, with those of digital libertarians who view restrictions on free speech as the greatest threat to a thriving electronic public sphere. Dr Robie's practical experiences with unfettered freedom of speech stand in stark contrast to utopian notions of a cyberspace that "would be the embodiment of free speech, devoid of censorship, a realm where discourse would flourish and truth would – somehow – travel more quickly and be more persistent than lies" (Caslon Analytics, 2005). As demonstrated on Toktok, in practice the 'unregulated' environment of an unmoderated discussion board can too easily be subverted to serve the interests of a very narrow band of users.

The experiences on Toktok are a vivid reminder that a lack of formal regulatory measures does not automatically mean an absence of regulation altogether; White imposed his own brand of regulation on Dr Robie's discussion board with devastating effect. This notion of regulation by default is reflected in Lessig's claim that "Liberty in cyberspace ... will not come from the absence of the state. Liberty there, as anywhere, will come from a state of a certain kind" (Lessig, cited in Given, 2004, p. 214). In the context of Toktok, the only way that an equitable level of freedom of expression for all legitimate participants could be ensured was to institute formal regulatory measures that restricted completely unfettered freedom of expression.

Aside from the damage to personal and professional reputations as a result of White's allegations, his actions also had the potential to cause much wider, long term damage to the offline community. As well as individuals such as Dr Cullen and Professor Henningham, White's victims included missionaries and medical practitioners, as well as a number of not-for-profit organisations such as the Australian Government aid agency AusAid and the church aid organisation Cordaid. By implying that individuals, many of them volunteers and missionaries, as well as aid agencies and charitable organisations, were involved in corrupt and inappropriate activities, White's actions had the potential to damage ongoing development work in the Pacific. According to Professor Henningham, "To the extent that [White's attacks] ... may have affected financial and other support for

genuine charitable and development activity, they may have adversely affected thousands" (Henningham, 2003).

5.2 Impact on the Media

White's network of websites and email postings eventually came to the attention of the mainstream media in mid 2003, after Dr Cullen resorted to the courts to seek redress. Reports carried in The Los Angeles Times (US), The Sunday Times (WA), The West Australian (WA) and the Australian Broadcasting Corporation's current affairs programme, The 7.30 Report exposed the extent of White's activities. The Los Angeles Times article 'Cyberspace: Last Frontier for Settling Scores?' highlighted the potential danger posed by the Internet. "For all its omnipresence, it remains frontier territory, laden with traps for the unwary" (Hymon, 2003). Both The Los Angeles Times article and The 7.30 Report explored the difficulties victims face in having abusive and defamatory websites removed, in light of the international nature of the network.

Following his normal pattern of behaviour, it wasn't long before White had created abusive websites about the journalists involved. Incensed that The Los Angeles Times was focusing on his behaviour, rather than the alleged scandal he was trying to expose, White set up websites about the reporter just five days after meeting him (Hymon, 2003). This was soon followed by further sites abusing two Los Angeles Times editors. Similar treatment was meted out to journalists from Australian media outlets following their requests for information. The medical editor of The West Australian, and journalists from The Sunday Times and The 7.30 Report were on the receiving end of a "series of abusive emails and harmful web postings" after contacting White to seek verification of his allegations (Cullen, 2004b).

As with other victims, White attempted to coerce the journalists by threatening to create abusive and damaging websites about them. In essence, his actions had the same goal as his interjections on numerous discussion groups and online forums – to silence alternative voices. To some extent he succeeded. While an article revealing White's attacks on Dr Cullen, and the judgement against him, appeared in the print version of The West Australian, a conscious decision was made not to publish it in the web version of the newspaper. According to the journalist who covered the story, the newspaper's proprietors decided the risk of attracting Bill White's attention was too great. Similarly, after making initial inquiries to Dr Cullen, the local ABC radio station, which posts transcripts of most stories on the ABC website, decided not to pursue the story (Cullen, 2005a).

In this context, the end result of White's threats bear a striking similarity to the oft-quoted dangers posed to the media by threats of defamation suits. According to Weaver, although many observers may consider the media as hard-hitting and at times invasive, in reality they exhibit a high level of self-censorship, in order to avoid defamation suits. "The British media frankly admits that defamation laws have a significant impact on its coverage by giving plaintiffs an 'easy run' and because quite small errors can lead to substantial judgments" (Weaver, 2000). Weaver suggests there are similar parallels in the Australian media landscape, where "most newspapers and broadcasters have teams of lawyers who review each day's paper or program for material that might be defamatory" (2000).

However, it's apparent that White's threats had the same impact as a litigious plaintiff in preventing a story from seeing the light of day. Furthermore, the two media organisations that made conscious decisions to 'self-censor', in order to avoid unwanted attention from White, may be just the tip of the iceberg. This author has recently learned an Internet research and analysis consultancy, Caslon Analytics, has delayed adding information to their website on the *Cullen v White* case because of concern that they too will become a target of White's paranoia (Arnold, 2005b).[6]

There is no way of knowing how many other individuals and organisations have had similar concerns. What is apparent, however, is that aggressive behaviour such as White engaged in, has the potential to induce a degree of self-censorship that impacts on the level of information in the electronic public sphere, at least to an extent that may parallel the threat posed by a defamation suit. Indeed, it could be argued that the insidious nature of the threat posed by individuals such as White – a threat which often escapes the notice of the broader public and the media - represents a greater risk to an active and engaged public sphere than traditional defamation suits.

It is instructive at this point to contrast the nature of existing defamation laws, with the insidious threat posed to an active and enquiring media by individuals such as White. Despite perceived flaws, defamation laws in Australia, the United Kingdom and the United States operate within a transparent framework of statutory and common law rules. In Australia, the media are provided with a measure of protection from defamation actions by common law qualified privilege, which extends to "publications made by the media or any other publishers to any wide audience on 'government and political matters'" (Chesterman, 2000, p. 96). These rules aim to provide a balance between an individual's interest in protecting his or her reputation, with "the

[6] Caslon Analytics were not aware of White's death in early 2004, until contacted during research by this author, in October 2005.

community's interest in hearing all sides of an issue of public significance" (Chesterman, 2000, p. 42).

Within this framework, political or philosophical evaluations of 'free speech' are most often interpreted as "freedom from interference by state agencies operating under authority of law" (Chesterman, 2000, p. 5). This paradigm reflects the view that "'censorship', ie restrictions on freedom to express oneself, emanates solely from the state" (Post, cited in Chesterman, 2000, p. 5). However, Post suggests this point of view is "too narrow and, indeed, old-fashioned for the present time, because restrictions ('censorship') imposed by private individuals and entities may be of equal strength and significance" (cited in Chesterman, 2000, p. 5).

It is of concern that while defamation law continues to draw strong criticism from civil libertarians for its chilling effect on free speech, there appears to be little consideration given to other forms of informal regulation. These more insidious forms of censorship remain largely off the radar; unnoticed and unchallenged. White's abusive and defamatory behaviour is no less an attempt at censorship, albeit directed at people rather than ideas, than many opportunistic defamation lawsuits, yet this form of subversive regulation receives little critical attention. Moreover, behaviour such as White's, designed expressly to silence criticism and repress alternative points of view, receives protection under the First Amendment to the United States Constitution, effectively undermining efforts by non-American plaintiffs seeking relief from defendants based in the United States.

6. Remedies

Given the difficulties Dr Cullen faced in reaching a suitable solution to the attacks by Bill White, it is apparent the current situation with regard to online defamation is far from satisfactory. The following section considers a range of remedies, both legal and informal, that could be applied to future online defamation disputes, in an attempt to reach a more equitable balance between the right to free speech and an individual's interest in protecting their reputation. It is not within the scope of this thesis to provide an exhaustive analysis of potential remedies. Rather, this section is intended to provide an overview of the key themes in common law decisions, law reform proposals and the literature that address this problematic area.

6.1 Application of Existing Laws

This approach supports the application of traditional laws to online disputes. Concomitant with this is the assumption that the technological advances presented by the Internet and cyberspace do not radically challenge the application of existing laws. In rejecting Dow Jones' argument suggesting a need to reformulate the rules of defamation, the judgment in *Gutnick* affirmed the appropriateness of applying existing laws to an online situation. Furthermore, the judgment questioned the desirability of tailoring a common law decision to suit a particular technology. "Doing so presents problems where that technology is itself overtaken by fresh developments...A legal rule expressed in terms of the Internet might very soon be out of date" (*Gutnick,* 2002 at 125).

Notwithstanding the unanimous decision in *Gutnick*, Justice Kirby noted his concerns on the "technological, legal and practical" difficulties presented by Internet related disputes, and suggested the decision was "less than wholly satisfactory" (*Gutnick*, 2002 at 166). As an alternative, Justice Kirby suggested the general principle of *comity* may be appropriate; this requires that jurisdictions, when developing laws or making decisions that may impact on other jurisdictions, exercise due care and respect for the other's laws. As Justice Kirby reasoned:

> [W]ith respect to the legal consequences of the Internet, no jurisdiction should ordinarily impose its laws on the conduct of persons in other jurisdictions in preference to the laws that would ordinarily govern such conduct where it occurs. At least this should be so unless the former jurisdiction can demonstrate that it has a stronger interest in the resolution of the dispute in question that the latter. (*Gutnick*, 2002 at 114)

In determining the appropriate law to be applied in Internet related cases, Justice Kirby suggested the 'choice of law' issue may be decided by "reference to the conduct that is to be

influenced, [or] the place that has the strongest connection with [the offending conduct], or [the place that] is in the best position to control or regulate, such conduct" (*Gutnick*, 2002 at 114). In the context of both *Dow Jones & Company Inc. v Gutnick* and *Cullen v White*, it would appear that these criteria are somewhat problematic, given that the latter two appear to deliver contradictory outcomes. That is, if the choice of law were to be determined by the jurisdiction that was best placed to control or regulate the offending conduct, then in both cases it is apparent the appropriate choice of law would have been the law of defamation of the United States, since that is where the servers the material was posted on were located, and is also the domicile of the individual or corporation posting the material. However, if the choice of law were to be determined by the jurisdiction that had the strongest connection with the offence that occurred, then, according to the general principles of defamation law, which concern damage to reputation, it is equally apparent that the appropriate choice of law would be the law in the jurisdiction in which the plaintiffs had a reputation. For both cases, this would be Australia.

Unfortunately, Justice Kirby does not offer any suggestions on how these seemingly contradictory criteria could be accommodated in determining the appropriate forum in Internet related defamation disputes, or what measures could be employed to determine which criteria takes precedence. Furthermore, even where an Australian court could demonstrate it has a stronger interest in the resolution of an online dispute than an American court, it is unlikely that any subsequent decision made by the Australian court would be enforced in the United States. A United States' perspective on comity "will only require recognition and effect to be given...where the foreign laws and proceedings on which the judgment is based are consistent with American public policy" (Collins, 2001, 22.04). It is therefore difficult to determine the effectiveness of comity in addressing the challenges posed by Internet related cross-jurisdictional disputes.

More problematic is the application of injunctions to restrain publication of allegedly defamatory material, as illustrated in *Macquarie Bank Limited & Anor v Berg* (1999) *(Macquarie)*. In this case, the plaintiffs, Macquarie Bank Limited (MBL) and Andrew Down, had applied to the New South Wales Supreme Court for an "interlocutory injunction to restrain Charles Berg from publishing defamatory material on the Internet" (Kohl, 2000, p. 119). The Court found that although the material was accessible anywhere in the world, including New South Wales, it was "reasonably clear" that it had originated in the United States, where the defendant apparently then resided (Simpson J in *Macquarie*, 1999 at 7).

In finding against the plaintiff, Justice Simpson considered two major factors. Firstly, any order the Court made to restrain publication would rely upon the defendant voluntarily returning to New South Wales. In her opinion, it was "unsatisfactory to make orders the effectiveness of

which is solely dependent upon the voluntary presence, at a time of his selection, of the person against whom the orders are made" (Simpson J in *Macquarie*, 1999 at 11). Of more concern to the Judge, however, was that the nature of the Internet meant that any attempt to limit the effect of an injunction only to New South Wales would be impossible, and would result in an imposition of New South Wales law on all other jurisdictions with access to the Internet (Simpson J in *Macquarie*, 1999 at 12). As the Judge reasoned:

> It is not to be assumed that the law of defamation in other countries is coextensive with that of NSW, and indeed, one knows that it is not. It may very well be that, according to the law of the Bahamas, Tazhakistan, or Mongolia, the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of this court. (Simpson J in *Macquarie*, 1999 at 14)

Implicit in the judgment is the notion that it is impossible to geographically restrict publication on the Internet. However, in an analysis of the judgment, Kohl suggests content providers have access to:

> more potent measures to limit the geographic diffusion of websites, such as passwords, subscriptions, or filtering devices based on domain name....and that, in the absence of ... de facto boundaries on the Internet (created for example through the subject matter of the publication) the onus should at least sometimes be on the wrongdoer to find means to resurrect them. (2000, p. 133)

Furthermore, Kohl questions whether an injunction granted in *Macquarie* would have automatically placed unnecessary restrictions on other jurisdictions. In doing so, Kohl rejects the notion that every jurisdiction with access to the Internet necessarily has an equal interest in the outcome. The implication is that the granting of injunctions should not automatically be read as superimposing local laws on all other jurisdictions with access to the Internet, since not all other jurisdictions will be equally affected by the proceedings. More often, sites are tailored to a particular audience in a variety of ways, such as language and the parochial nature of the material. "In this sense, the subject matter of the publication recreates de facto boundaries in a space which appears to be entirely non-territorial" (Kohl, 2000, p. 131).

Applying these principles to *Cullen v White* (2003), it is clear the subject matter in the offensive material was about Dr Cullen. White sent defamatory emails to staff at the University of Queensland and Edith Cowan University, and also posted defamatory messages on a Pacific forum discussion board – all places directly associated with Dr Cullen. The defamatory postings targeting Dr Cullen were consequently directed to a fairly limited geographical area: the area in which Dr Cullen lived, and had a reputation to defend. Therefore, it could be argued that any restrictions imposed by an Australian court in situations such as *Cullen v White* (2003) would not unduly superimpose the law of Western Australia on any other jurisdiction, since the dispute

would have minimal connection with any other jurisdiction. Therefore, restrictions caused to any other jurisdictions would be largely irrelevant.

6.1.2 Defamation Law Reform

Perceived shortcomings in Australian defamation law, particularly in relation to a lack of uniformity across states and territories, have led to ongoing calls for law reform in this area. As a result, the Standing Committee of Attorneys General (SCAG) published a discussion paper in July 2004, 'Proposal for Uniform Defamation Laws' (SCAG, 2004). Although the recommendations are not expressly targeted at the online environment, the paper acknowledges fundamental changes to the communications landscape as a result of the widespread adoption of the Internet, and the challenges these changes present in applying legal remedies for defamation.

The main objectives of the Standing Committee of Attorneys General discussion paper are to overcome jurisdictional differences between Australian states and territories, by providing a model for future uniform defamation legislation, and to ensure that a fair and equitable balance between freedom of expression and the protection of personal reputation is achieved. In arriving at a correct balance, the Committee considered:

> If the balance is tilted too far in favour of protecting personal reputation, the danger is that the dissemination of information and public discourse will be stifled to an unhealthy degree. Conversely, if it is tilted too far in favour of freedom of expression there will be little to constrain people from lying, or exaggerating and distorting facts, and causing irreparable harm to the reputations of individuals. (SCAG, 2004, p. 7)

In March 2005 all states and territories agreed to implement uniform defamation legislation, based on this model legislation, to take effect on 1st January 2006. Subsequently, the Western Australian Attorney General, Mr Jim McGinty, introduced the Defamation Bill 2005 into the Western Australian Legislative Assembly in August 2005.

One of the key objectives of the Bill was aimed at encouraging "early and non-litigious settlement of disputes ... that is, the object of defamation proceedings should be to vindicate the reputation of persons who have been defamed, rather than being an avenue principally focusing on obtaining monetary compensation" (McGinty, 2005).

These provisions include an 'Offers to make amends' clause, as well as an 'Apologies' clause which enables a defendant to apologise without the fear that the apology will constitute an admission of liability.[7] The potential to resolve disputes without the need to resort to costly, time-consuming litigation, should prove beneficial not only to individual litigants, but to the community in general, as a result of reduced court costs in this area. Flow on benefits from reduced loss of working hours, and a reduction in stress due to protracted court proceedings, can also result from non-litigious remedies.

The Bill is not intended to be "an exhaustive or exclusive legislative code on defamation law" (McGinty, 2005). Instead, common law will continue to apply, except for those areas specifically provided for in the Bill. This combination of legislation and common law will, according to McGinty, "ensure that defamation law retains its flexibility, with the capacity to develop in response to changing circumstances" (2005).

To address concerns regarding which jurisdiction should apply in cases where the alleged defamatory material is published in more than one Australian jurisdiction, as will be the case for most online material emanating from an Australian server, the Bill includes a 'choice of law' rule, as discussed above. This will require a court in Western Australia to apply the law in the "Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection" (Defamation Bill 2005, Explanatory Memorandum, clause 11). In general, the appropriate forum will usually be "where the plaintiff is resident" (Defamation Bill 2005, Explanatory Memorandum, clause 11). These provisions are designed not only to provide guidance to the courts in determining the appropriate forum, but also to deter plaintiffs from 'forum shopping', whereby a plaintiff seeks to have their case heard in a 'pro-plaintiff' jurisdiction.

Of particular relevance to this case study are law reform proposals that consider "court jurisdiction issues in relation to the Internet" (SCAG, 2004, p. 37). The Standing Committee of Attorneys General considered Justice Kirby's call for "national legislative attention" to address difficulties in enforcing Australian judgment in foreign courts, particularly where that "enforcement would be regarded as unconstitutional or otherwise offensive to a different legal culture" (*Gutnick*, 2002 at 166), alongside competing calls for Australian governments to apply "statutory limits on the jurisdiction claimed by Australian courts over Internet communications"

[7] This focus on swift vindication has been the subject of research by Belmas, who proposes an 'Internet Mediation Clearinghouse' – an online repository where retractions, corrections and clarifications could circulate freely, coupled with provisions which would allow plaintiffs to admit mistakes without legal ramifications (Belmas, 2002, p. 84). However, it is debatable whether one retraction published on a website containing hundreds, possibly thousands, of similar retractions would fairly compensate the plaintiff. Furthermore, there is a danger that removing all legal ramifications for defamation, merely by posting a retraction, may swing the balance too much in favour of defendants, and leave future victims of defamatory allegations with little useful protection.

(SCAG, 2004, p. 37). The Committee concluded that to legislate unilaterally to limit jurisdictional claims by Australian courts would deny "ordinary Australians a remedy for damage they suffer, as litigating in a foreign country is beyond the means of most Australians" (SCAG, 2004, p. 37). In addition, they noted that through 'choice of law' considerations, "Australian courts themselves impose restraints on the jurisdiction they will exercise" (SCAG, 2004, p. 37). Finally, the Committee concluded that:

> [F]or the purposes of any future international negotiations it may not be in Australia's interests if other countries see that it has unilaterally restricted the jurisdiction of its courts without, by treaty, extracting their agreement to limit the jurisdiction of their courts and to guarantee the recognition of Australian defamation judgments. (SCAG, 2004, p. 37)

In reaching this decision, the Committee noted that the United Kingdom Law Commission had similarly concluded "that the problem cannot be solved within the short to medium term and recommended against unilateral UK reform at the present time" (SCAG, 2004, p. 37). As a result, the model legislation prepared by the Standing Committee of Attorneys General, and the subsequent Defamation Bill 2005 currently progressing through the Western Australian Parliament, do not contain provisions to limit the jurisdiction claimed by Australian courts.

Notwithstanding this, the reforms do not address the fundamental problems caused by radically different interpretations of defamation law in Australia and the United States.

6.2 Elimination of the Law of Defamation

Proponents of this approach maintain that the interactive nature of the Internet has rendered the law of defamation redundant, by allowing individuals that have been defamed online an equal 'right of reply' (Belmas, 2002, p. 80; Martin, 1997). Roberts suggests this approach utilises the "free speech interactive Internet context better [and means] the plaintiff is no longer at the mercy of a media organisation which can decide whether [or not] to print a correction" (Roberts, 1996).

This presupposes that the defendant will usually be a media organisation, as is the case with the majority of traditional defamation suits. However, the Internet has the potential to be just as effective in providing a forum for ordinary individuals defamed online. Dr Cullen, along with several other victims of White's attacks, has used the Internet to launch a 'counter attack'. He has created his own webpage, using of the few domain names White had not appropriated – http://www.trevorcullen.id.au, to refute White's claims. The home page includes a summary of the events of the past 6 years, and outlines the purpose of the site. "I intend to use this web site

to share my research findings. For now, however, its purpose is to correct false information that has been disseminated by notorious cyber-stalker and liar Bill White of Los Angeles" (Cullen, 2004). This comprehensive site links to similar pages produced by other victims, including Professor John Henningham and Dr David Robie, as well as the Supreme Court decision, a psychologist's report on White and his activities, and other related material. There are also links to many of White's own sites, and information on how to identify his material. The latter, combining many of White's sites under the one umbrella, highlight for the reader in a more forceful way than any amount of criticism by his victims could ever achieve, the irrational nature of White's comments.

An added benefit of using the Internet to respond to defamatory material is that it allows the individual to respond in a timely fashion, with minimal expense (depending upon their web-based skills), and without the danger of inhibiting robust debate. Martin uses the example of an electronic discussion group, suggesting it "is quite easy to write a detailed refutation and send it to all concerned the next hour, day or week" (Martin, 1996).

Although a relatively controlled forum such as this might enable an equal 'right of reply', it may not always be possible to know "all of the places to which a defamatory [email] message was sent" (Weaver, 2000). Furthermore, it may be virtually impossible for a defamed person to determine who has accessed a defamatory website, or by what channels they have accessed it. This was the situation Dr Cullen found himself in, faced with attacks from a particularly prolific harasser:

> I had no idea who accessed the sites - only those people who approached me saying that they had come across them. This was also true for email. White was clever enough not to let me know who he wrote to and what he said. And he had hundreds of email addresses. Some people told me about the emails but were, I expect, too embarrassed to resend them to me (Cullen, 2005b).

Moreover, the sheer extent of White's network of websites ensured that they "regularly surface[d] high on search engines such as Google (Robie, 2003). It is debatable whether the websites created by Dr Cullen, Professor Henningham or Dr Robie would be retrieved in Internet searches to the same degree as the hundreds of offensive websites White created.

Furthermore, while the Internet does have the potential to reach a vast audience, it is more specifically in areas where the plaintiff has a reputation to protect, that the plaintiff would most likely want his or her response to reach. Without the prospect of targeting a rebuttal to a specific audience, the likelihood of achieving a satisfactory outcome for the plaintiff is doubtful. That is, merely having access to a potential global audience (by posting a web page on Google, for example) will not necessarily deliver a fair outcome. Moreover, a right of reply response such

as Dr Cullen has launched in no way prohibits the offending party from continuing their attacks. In such a case, the right of reply argument seems to fall well short of a suitable solution.

6.3 International Dialogue

As discussed previously, legislatures in both Australia and the United Kingdom have rejected unilateral legislative reforms to address cross-jurisdictional issues. The way forward, therefore, appears to require cooperation at an international level. Indeed, Collins suggests:

> [S]hort of a change in American public policy, or the passage of an international treaty dealing with the issue, it is difficult to see how any solution could be found to the problems which plaintiffs are likely to encounter in seeking to have United Kingdom or Australian defamation judgments recognized in the United States. (Collins, 2001, 22.10)

The need for international cooperation was also flagged by Justice Kirby, who was concerned that the High Court decision in *Gutnick* (2002) did not deliver an entirely satisfactory outcome:

> Intuition suggests that the remarkable features of the Internet ... makes it more than simply another medium of human communication....It is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression. But the human right to protection by law for the reputation and honour of individuals must also be defended to the extent that the law provides. (Kirby J in *Gutnick,* 2002 at 164)

In Justice Kirby's opinion, the issues raised in *Gutnick* warranted "international discussion in a forum as global as the Internet itself" (Kirby J in *Gutnick*, 2002 at 166). The Standing Committee of Attorneys General considered Justice Kirby's call for "international discussion", and referred to Australia's ongoing efforts to "negotiate a comprehensive multilateral treaty regulating civil jurisdiction and reciprocal enforcement of judgments ... [focussing] on the work of the Hague Conference of Private International Law where jurisdiction in tort (including defamation) has been the subject of lengthy negotiations" (SCAG, 2004, p. 36). Unfortunately, the Committee viewed the prospect of an international treaty as remote, "largely because the USA and the European Community at present have very different views about appropriate limits on the jurisdiction of each other's courts" (SCAG, 2004, p. 36). The Committee concluded, therefore, that there was "little prospect of a comprehensive international agreement being concluded in the near future in this area" (SCAG, 2004, p. 37).

In the absence of any formal international treaties to provide guidance in this area, Raut suggests that Trans-national Judicial Dialogue (TJD) can "play a role in the creation, recognition and enforcement of global norms" (Raut, 2004, p. 94). He uses an example of a

bankruptcy suit (which required a great deal of dialogue between judges in the United Kingdom and the United States, resulting in a 'mini-treaty' approved and adopted by both courts) to illustrate the operation of TJD, and suggests it would also be appropriate for resolving disputes in 'cyberspace' (Raut, 2004, p. 131).

The application of a transnational judicial dialogue would appear to be a useful strategy for disputes such as bankruptcy, although perhaps its success in this instance relies more on the similarities in bankruptcy law across jurisdictions, than the reconciliation of differences. Unfortunately, Raut does not suggest how TJD would work in areas that involve fundamental differences, such as defamation law, in order to construct 'global norms' that are truly inclusive. Such strategies would need to reconcile the "historically evident and inevitable" (EFA, 2002; Fitzgerald, 2003) domination of 'cyberspace' by the United States, with an acknowledgment that the United States' approach to defamation appears to be out of step with most, if not all, other countries.

7. Conclusion

This thesis concerns, at its most fundamental level, the difficulties involved in balancing competing rights, in situations where cultural interpretations of those rights have evolved quite differently. Dr Cullen's case study highlights the challenges involved in reconciling different cultural values and expectations regarding the right to free speech, and the right an individual has to protect their reputation.

These rights are considered fundamental to human wellbeing and dignity, and as such, exercising the right to free speech carries with it the responsibility to ensure the co-existing right to protect an individual's reputation is not impinged. This responsibility is enshrined in Article 19 of the International Covenant of Civil and Political Rights to which both Australia and the United States are signatories:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers....The exercise of [these] rights ... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary ... for respect of the rights or reputation of others. (OHCHR, n.d.)

Article 17 of the Covenant states: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" (OHCHR, n.d.).

In practice, reconciling these competing rights is problematic. Although there is a general acceptance in most (if not all) democratic societies that these two rights need to be balanced to ensure everyone has equal access to the benefits democracy may offer, the ways in which the balance is struck, through the law of defamation, differs significantly across societies. These differences suggest that the principle of 'freedom of expression' is not a universal construct; rather it develops in response to distinct cultural norms and expectations (Clarke, 1995).

In the United States, the First Amendment guarantee of 'freedom of expression' has heavily influenced the law of defamation in the United States, resulting in laws that strongly privilege the rights of individual speakers, over an individual's right to protect their reputation (EFA, 2002). Indeed, the extent to which First Amendment principles have increasingly shaped common law defamation decisions in the United States, has resulted in the development of radically different defamation laws, in comparison to Australia, and, in fact, most of the world (EFA, 2002). As a result, defamation law in the United States could be defined as 'pro-

defendant', while defamation law in Australia strikes a balance more in favour of the plaintiff (Weaver, 2000).

In the past, the impact of defamation law was largely limited to national borders; therefore conflicts that arose as a result of different cultural interpretations of rights and responsibilities in relation to freedom of expression were uncommon. Before the popularisation of the Internet, cross-cultural disputes of this nature, most often articulated through defamation suits, were usually restricted to traditional publishers, such as media organisations, with plaintiffs most often being wealthy individuals or corporations. However, the potential for cross-cultural disputes has increased dramatically with the rapid expansion of the Internet. The Internet now provides a forum wherein ordinary individuals can 'publish' to an international audience *potentially* as large as that of any media conglomerate. Furthermore, the opportunities for ordinary people from different cultures to interact have never been greater. Increased tolerance and understanding are positive benefits of the new level of global interaction. However, increased interaction can also lead to an escalation in disputes arising from different cultural interpretations of rights and responsibilities, particularly those involving freedom of expression.

The potential for these types of disputes to occur is exacerbated by an 'Internet culture' that champions a liberal interpretation of free speech rights, and encourages an adversarial style of interaction. As a result of its origins in the United States, the Internet has been strongly influenced by notions of 'freedom of expression' that have been shaped within a 'First Amendment discourse'. This is particularly evident in the *raison d'etre* of organisations such as the EFF, as articulated in their mission statement: "If America's founding fathers had anticipated the digital frontier, there would be a clause in the Constitution protecting your rights online, as well" (2005). Implicit in this is the argument that any laws applied to the Internet must embody United States' free speech values (Arnold, 2005b).

This ideology appears to have influenced both United States' common law decisions concerning online defamation disputes, and legislation, as evidenced in protective measures extended to Internet service providers in the United States. United States' court decisions in relation to online defamation disputes appear to focus more on minimising the negative impact on online free speech rights, than on the impact of the defamatory statement on the plaintiff.

The combination of an American legal system weighted heavily in favour of the individual's right to free speech, an Internet culture that encourages liberal and unfettered free speech rights, and the current American dominance of Internet traffic, which in effect extends the impact of American law beyond its borders, creates enormous challenges for Australian victims of online defamation perpetrated by United States' citizens.

The practical impact of this, in the context of *Cullen v White*, is that despite the fact that an Australian court judged White's behaviour to be defamatory, and found that Dr Cullen's reputation had been damaged by a "campaign of deliberately offensive vilification" (Newnes J in *Cullen*, 2003 at 22), the cross-jurisdictional and financial issues involved in registering an Australian defamation judgment in the United States have meant the decision remains unenforced in the United States – the only jurisdiction which could effectively restrict White's defamatory actions.

Indeed, far from being deterred from publishing defamatory material as a result of the decision against him, White's attacks continued unabated, with new websites appearing attacking both Dr Cullen and his solicitor, Jeremy Malcolm. It was only with Bill White's death in early 2004 that the attacks on Dr Cullen, and others, ceased. Despite this, many of his offensive and damaging websites have remained active on the Internet almost eighteen months after White's death.

Arguably denied his rights under the International Covenant of Civil and Political Rights (OHCHR, n.d), Dr Cullen has also been left out of pocket for expenses associated with the court case, and is unlikely to ever receive any of the damages awarded to him. The cost of the court case has added injury to insult, and the impracticality of calling White (or his estate) to account effectively denies him any true measure of justice.

This thesis has sought to provide a uniquely personal insight into the effects of online defamation and, in doing so, supplements the body of research into defamation in an online environment. The bulk of literature concerning online defamation focuses on the potential impact the application of traditional, territorially based defamation laws may have on online publishing, and by extension, freedom of expression on the Internet. This thesis, using a case study methodology, aims to provide a different perspective on the impact of online defamation, by considering the very real damage malicious defamatory behaviour can have not only on the individual concerned, but on other innocent people as well. Not only does the individual suffer, but the ripple effects of the damage can extend far beyond the victim's immediate sphere of influence. In this particular case study, the defamatory attacks affected not only Dr Cullen, but through similar defamatory attacks on educators, volunteer aid workers, missionaries, and aid organisations had the potential to cause much wider, long term damage (Henningham, 2003).

Furthermore, by locating the case study within a broader discussion on the prevalence and impact of online harassment and defamatory behaviour in an online environment, the thesis has sought to highlight the danger this insidious form of 'regulation' poses, both to the individual right to freedom of expression, and to a healthy and dynamic electronic public sphere.

For Dr Cullen, the last seven years have been a difficult and distressing period. Faced with constant, at times daily, defamatory and abusive attacks, Dr Cullen found that traditional legal measures designed to protect an individual's reputation against defamatory attacks, were largely ineffectual in regulating the offensive behaviour in an online environment. Faced with this legal impotence, Dr Cullen resorted to a 'self-help' remedy, through the creation of a website designed to refute White's claims. While this may be an effective solution in certain situations, it is difficult to see how expecting innocent individuals such as Dr Cullen to tolerate continuous defamatory attacks, in the interests of protecting freedom of expression for the greater good, can in any way contribute to an enriched public sphere.

> While it is vitally important that people can freely express their ideas, views and grievances on the web, there must be some control to protect people from continually posting blatant defamatory and abusive material...Due to hardly any regulation on the web, it seems anyone can say anything about anybody and escape the consequences. Somehow this is not right. (Cullen, 2000)

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