The Draft Defamation Bill: joint response by AOL, the Internet Service Providers' Association, Mumsnet and Yahoo!

1. Introduction

This position paper has been prepared by AOL, the Internet Services Providers' Association, Mumsnet and Yahoo!. It describes why we believe that the current regulatory framework for libel law insufficiently addresses the way content is published and conveyed in the digital environment.

We believe that a failure to provide a clear and workable regulatory framework for online content will not only have a chilling effect on freedom of speech, but will also undermine any efforts to protect robust scientific and academic debate more effectively.

In this paper we make suggestions for reform, beyond the single publication rule supported fully by the signatories to this paper, which we hope the Committee will take into consideration when it reports back to Government.

2. Rationale behind the Government's reform efforts

We welcome the Government's intention to reform the UK's defamation law, and fully agree with the Government's rationale for the current reform, as outlined in the Draft Defamation Bill Consultation:

"There has been mounting concern over the past few years that our defamation laws are not striking the right balance, but rather are having a chilling effect on freedom of speech."

and

"*Our core aim in preparing these provisions has been to ensure that the balance referred to above is achieved, so that people who have been defamed are able to take action to protect their reputation where appropriate, but so that free speech and freedom of expression are not unjustifiably impeded by actual or threatened libel proceedings. "*

and

"We are particularly concerned to ensure that the threat of libel proceedings is not used to frustrate robust scientific and academic debate, or to impede responsible investigative journalism and the valuable work undertaken by organisations."[1]

3. Online content publication and the role of online intermediaries

Traditional defamation law differentiates between authors, primary publishers, secondary publishers, and editors, but does not sufficiently take into account how content is produced, distributed and consumed online. Online businesses can commonly be publishers and intermediaries rather than having just a single role.

Some online businesses are publishers in a traditional sense. These businesses actively commission, edit and publish content. They have the same degree of control over content as their offline counterparts, and fall within the traditional categories: they are a primary publisher if they publish their own content, and a secondary publisher if they license content from others.

Other online businesses are regarded as intermediaries. These businesses enable a third party to publish content online, but do not assume an active role in the publication process and have no

[1] Ministry of Justice. 2011. Draft Defamation Bill Consultation. P 3.

direct or prior control over what is being published. These intermediaries connect users to the internet or store content online. Online hosting can include the storing of separate websites, but also the hosting of user-generated content (UGC) such as comments, photos or videos within a website.

There are also businesses that fall into more than one (and sometimes all) of these categories. Such businesses publish their own content, license content from others, and allow users to upload UGC. These businesses are primary publishers in respect of their own content, secondary publishers in respect of licensed content, and an intermediary in respect of UGC. Such 'composite' businesses include, for example, AOL, Mumsnet, Yahoo! and online newspaper sites. This is where the uncertainty of the current legal framework is felt most acutely.

Unlike Section 1 of the Defamation Act, which as currently drafted would regard most intermediaries as secondary publishers, the e-Commerce Regulations 2002 – the principal regulatory framework affecting internet service provider (ISP) liability – differentiates between three types of online intermediaries (access providers, cachers[2] and hosting providers), and assigns different degrees of protection from liability to them.

3.1 Different types of intermediary

3.1.1 Access providers are commonly referred to as ISPs (internet service providers) but are more accurately described as internet access providers. They connect customers to the internet, either through fixed or wireless connectivity. As access providers only pass traffic across a network, they are deemed 'mere conduits' under e-Commerce Regulation 17, and are exempted from liability[3] in recognition of the fact that they play no role in the content of the communications they carry: i.e., they do not determine what it is, they simply carry it from one place to another.

3.1.2 Hosting providers store others' content online, from the websites of large corporations to individual's personal websites or UGC posted on websites. Under e-Commerce Regulation 19, hosting providers are not liable for the content they host as long as they do not have actual knowledge of unlawful activity or information. However, upon obtaining such knowledge, hosting providers must act expeditiously to remove or disable access to the information, and may become liable if they fail to act.[4] Understanding what type of conduct gives a host 'knowledge' is the source of great uncertainty, often leading them to default to censorship on notice (regardless of the nature or validity of the notice), with all the attendant implications for freedom of expression. This uncertainty also constrains online business development. (For the purposes of clarity, it should be noted that the 'composite' businesses mentioned above all provide hosting functions.)

As currently drafted, the Defamation Bill does not take into account or give guidance in respect of the fact that intermediaries (and specifically hosting providers) can be publishers, intermediaries, or *both*. It does not recognise that it is important to retain distinctions between these functions, and to accept that while an online company may be a single legal entity, its liability in defamation should differ according to which function it has performed in respect of the material in question. Nor does

[2] Cachers are less relevant in the context of defamation and subject to the same rules as hosting providers. The response will therefore only describe access and hosting providers in greater detail.
[3] As mere conduits access providers "shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as result of that transmission." (e-Commerce Regulation 17).
[4] It is important to note that under the e-Commerce Directive, ISPs are not obliged to monitor the information which they transmit or store and that member states are indeed barred from imposing general monitoring obligations on ISPs.

the draft Bill take into account the increase in direct user interaction with online services (a phenomenon that is likely to become even more pronounced over time).

The different liability provisions for access and hosting providers under the e-Commerce Regulations are sometimes overlooked. This may explain why the internet has been described as the 'Wild West' during the oral evidence sessions, and why it was asked whether the Committee "should recommend to Government that internet service providers should have some legal accountability for what they put on the internet?" Both types of intermediary can be referred to as "internet service providers" but since access providers merely provide connectivity, hosting providers are the relevant type of intermediary about which that question could be posed; and, in fact, they can already be held liable under the Defamation Act and the e-Commerce Regulations (see *Bunt v Tilley* and *Godfrey v Demon*).

We would therefore argue that the question of whether or not intermediaries should have some (or more) legal accountability should not be central to the Committee's considerations. Rather, the emphasis should be on determining how to develop a defamation framework to ensure:

- that persons who are defamed online have clear recourse to justice;
- that legitimate expression online can flourish freely;
- that hosting providers are given clear notice of defamatory content so that it can be taken down appropriately; and
- that online business models can evolve.

4. Defamation online

Under the e-Commerce Regulations and the Defamation Act, hosting providers can be held liable for not removing allegedly defamatory content on notice that may give knowledge. This has led to a situation in which intermediaries, instead of actual publishers or authors, are being asked to decide what content should be taken down and being threatened with legal action. We believe that this has a chilling effect on freedom of speech. If this is not amended, it will leave a significant loophole that could make online intermediaries tactical targets for those wishing to have content removed from the internet, in preference to of taking action against the primary publisher/author. (In cases of user-generated comment, the originator of the remark is, in effect, both author and primary publisher.)

The Booksellers Association and others have observed that there is a risk of claims against intermediaries becoming the norm and an alternative to a claimant taking up their complaint directly with the author or publisher. This is an observable trend in the online space and we agree that new procedures should include incentives for claimants to make reasonable attempts to contact the author and only approach an intermediary as a last resort.

5. Monitoring

UK law does not require internet service providers to monitor the information which they transmit or store and in any event the E-Commerce Directive Regulations precludes the imposition of such obligations.[5]

[5] E-Commerce Directive Article 15(1) " Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."

Some observers suggest that proactively monitoring content for defamatory comment is an option hosting providers should consider. A system in which companies are forced to monitor UGC is extremely resource-intensive, and is simply not feasible for many online businesses. (As an example, Mumsnet – which is a long way from being the UK's busiest site in terms of UGC – receives around 30,000 new posts every day.) Furthermore, it would be ineffective. Providers can rarely make objective legal assessments regarding defamation simply by reading the content of a post. In most cases one needs to know both sides of the story – including, for example, whether the author is entitled to a defence, and whether the comments in question caused significant harm to the claimant. This is notwithstanding the risk that such action exposes the service provider to possible liability as a primary publisher in the event that defamatory content is 'missed' (as it invariably will be at some point).

6. Mismatch in current legal framework

A detailed analysis of the Defamation Act and the e-Commerce Regulations reveals that the two pieces of legislation do not offer the same levels of protection to online intermediaries and, when taken together, fail to provide clarity on:

- how a claim of defamation should be properly made;
- whether claims should be directed at publishers or intermediaries; and
- what action should be taken by whom in response to a claim of defamation.

This uncertainty often results in an extra-judicial 'notice and takedown' process. Faced with a request to take down content, intermediaries are forced to make difficult judgements about whether to expeditiously remove content (in an attempt to ensure that they do not acquire exposure to liability for the content in question), or to assign a higher value to the rights of the authors and leave the content online (often to their own detriment should a claim ensue). There is nothing in the current Defamation Act that could help an intermediary to make this judgement, and the e-Commerce Directive did not intend that they ever should.

There are some forms of content, such as images of child abuse, that can be assessed relatively objectively for potential illegality. However, defamatory content is different. It is not possible for intermediaries to conduct a full and objective assessment of a defamation claim without knowledge of the background facts. Intermediaries cannot, for example, determine whether a statement is true or honest comment, or in the public interest, or otherwise privileged; in particular, they cannot determine whether the *author* benefits from one of these defences. The legal and procedural weaknesses referred to above result in online businesses having to place themselves in the position of the author/editor/publisher, and/or having to make judgements about private disputes between third parties with whom they have no connection. The only review that a non-publisher can do is to assess whether the statement is, on its face (ignoring any context or innuendo) capable of a defamatory meaning, which in the UK has a very low threshold.

Unlike clearly illegal content, there is no uniform approach to dealing with allegedly defamatory content online. Some intermediaries apply best efforts to assess claims on a case-by-case basis but – as noted above - can only determine whether a piece of content is capable of defamatory meaning. Other providers may decide to remove content in almost all circumstances. This will happen regardless of the type of notice received (e.g. in response to a solicitor's letter, an email or even a phone call alleging defamation); from whom the notice is received and how much detail of the claim is provided; without consideration of the strength of the claim and whether any defences might apply; and regardless of whether there is an argument that the online service provider is or is not a publisher (primary or secondary) in respect of that content.

What is clear, and what has resulted, is that online intermediaries have become police, judge and jury in a system without legal due process to safeguard free expression. We believe that the emergence of such an inconsistent, patchwork 'notice and takedown' procedure was not the intention of lawmakers when they drafted the current Bill and supports our call for a reform of the legal framework.

7. Suggestions for reform

We believe that a reform of the Defamation Act needs to achieve a number of things:

a. It is important that the burden is on the claimant to make reasonable efforts to resolve his claim with the author directly, and not pass the claim to the relevant online intermediary as a matter of course, as is often the case currently. One means of helping to achieve this may be to say that the online intermediary shall not be subject to any financial liability unless and until the claimant has pursued (or taken all reasonable steps to pursue) his remedy against the author/primary publisher.

b. It is critical that the responsibility for assessing the validity and legality of a claim is not intentionally or inadvertently placed on online intermediaries. As noted above, intermediaries are in no position to make such a judgement. The procedure must set out a legal due process whereby the facts of the case (including whether the author benefits from any of the defences) are considered by a qualified legal body.

c. This process must result in a court order, and only upon notification of that ruling would a service provider be deemed to have the requisite degree of knowledge that there is a legitimate claim for defamation in respect of that content. Court orders that reflect the factors recognised in s230 of the Communications Decency Act in the USA as safeguarding free expression might provide a suitable approach.

d. It is important that any court order served on an online intermediary contains a clear instruction about what action to take (i.e.: to keep the content up, take it down, or post a correction or other notice) and within what timeframe. Content can be removed quickly by an intermediary when a court order clearly and specifically (e.g.: via URL) identifies offending material correctly and contains an actionable instruction.

e. Once a court order has been actioned, the online intermediary has fulfilled its obligation under the e-Commerce Directive and the Act, and should exit the process without incurring liability.

f. Full liability for wrongful notice must rest with the claimant. At present, the legal framework is unclear and, in the absence of something as clear and independent as a court order, liability for both the decision about what action to take and any consequences of that action fall solely on the intermediary. It is inappropriate that these additional liabilities fall on intermediaries providing a hosting function who act in good faith in response to a claim. This is not the intention of either the Defamation Act or the e-Commerce Directive.

g. The procedure must set out clearly the rights of authors to intervene and make their case under one or more of the substantive defences under defamation law.

h. Where the procedure places obligations on the host, they must be reasonable. For example, to pass on a notice to a customer where a claimant cannot identify them (as is common practice with, for example, domain proxy services where the domain name registrant 'hides' behind the service provider) or make direct contact himself to the extent the host can, based on the information they have on the user. However, the procedure must not include any expectation that an intermediary would voluntarily disclose the identity of their customer to

a claimant. Such requests must be made through the proper civil legal process (the Norwich Pharmacal procedure), consistent with the Data Protection Act.

Keeping the aforementioned points in mind, we believe that the Draft Defamation Bill should be amended to:

a. Introduce in Section 1 a definition of “online intermediaries” that recognises their specific role and responsibilities, as distinct from “facilitators". This definition must be consistent with the definitions in the e-Commerce Directive, and provide much needed clarification. The current definition of 'facilitator', as set out in the draft Bill and in Lord Lester’s earlier Bill, would appear to be very narrow and is likely to lead to as many uncertainties as exist under the Section 1 defence. For example, a hosting provider could be deemed to have "*other influence or control*" over content, or could be deemed to assume "*editorial or equivalent responsibility for the content of the publication*" simply by enforcing its terms of service, even where it does so without any consideration of whether content is defamatory. It is surely undesirable that a hosting provider should not remove obscene postings for fear that doing so might lead a court to decide that it is assuming a full editorial function, but this could be the outcome of the Bill as it currently stands. We believe that it should be made clear that an online intermediary should not be deemed to assume responsibility for content by reason only of enforcing its own terms of service, and that it should not be liable unless it assumes responsibility for the commissioning, preparation, creation, or material modification (so as to change its meaning) of content (i.e. the traditional editorial functions).
b. Transcribe the legal framework for intermediary liability (regulations 17–19 of the e-Commerce Directive) on the face of the Bill, subject to the clarification set out below. This has become customary for new UK criminal law statutes (e.g. e-Commerce Directive (Terrorism Act 2006) Regulations 2007), and could equally apply to online defamation.
c. Address the procedural weaknesses of the Defamation Act by defining a ‘notice and takedown’ process and giving clarity on how a court order triggers an obligation to act, i.e.: what constitutes the requisite degree of “knowledge” for the purposes of the intermediary liability provisions under the e-Commerce Directive and the Section 1 defence.
d. Provide a genuine legal safe harbour for intermediaries that act in good faith and follow a specified process – i.e., introduce legal provisions which would prohibit further legal action against online intermediaries where they are not the author or publisher of content believed to be defamatory.

What a court-based system could look like

The suggested changes outlined above are heavily reliant on a court-based system. We believe that such a system can be both effective in dealing with the issues outlined in this paper, and accessible to everyone. We are aware that the Committee has already received proposals for such a system, including one from the Libel Reform Campaign, and believe that they are a good starting point for a thorough and broad discussion with MoJ and other stakeholders.

The contours and detail of a court-based system need to be defined in consultation with the MoJ and other stakeholders, and in the light of public spending cuts and other reforms to the court process. We will be keen to engage further with MoJ and other stakeholders on this to ensure that a system can be devised that is accessible but also offer intermediaries legal certainty.

Authors and publishers are keen to explore whether alternative dispute resolution (ADR) could provide an alternative to costly court action for defamation cases. This is very welcome. However, any ADR process must consider what happens to online content once a claim has been made and is

being considered under an ADR process. If the law does not clarify this, a claimant could act in bad faith and serve a notice on an intermediary who may be forced by the lack of certainty to take the content down. This would not achieve the objective of safeguarding free expression.

The Committee enquired about the use of the Digital Millennium Copyright Act (DMCA) during an oral evidence session. DMCA established a US notice-and-takedown system for removing allegedly copyright infringing works online. Given that it relates to a different subject matter in a different country, we do not feel that it should be applicable for the UK in the area of defamation.