Defamation on the Internet and other computer networks

Sanette Nel*
Senior Lecturer, Department of Criminal and Procedural Law
University of South Africa

INTRODUCTION
The emergence and widespread use of computer network technology has revolutionised the way we communicate. Although legal pitfalls abound, they are often ignored by users. Whilst pornography on the Internet is treated with contempt by the majority of Internet users, defamation has virtually taken on the status of a spectator sport with entire bulletin boards devoted to 'flaming' (as this activity is termed). The rapid growth of the Internet into a worldwide web of computer networks, with more than twenty million users in over 130 countries (and it is still growing at approximately twenty percent each month) has meant that no one entity has overall control over or responsibility for its regulation. What complicates the problem still further is that in a legal sense the Internet does not really exist. It is not an identifiable body or corporation, nor is it administered in accordance with any internationally recognised conventions or constitutions. The esoteric nature of

*BLC LLB (Pret); LLM (Unisa).

1The term 'computer network' is used to describe the situation where two computers are linked together in a way which allows them to communicate information between them.

2For the purposes of this discussion, any computer which is currently able to communicate with the Internet (whether it is done by way of the original Internet Protocol or via some translation process) will be considered part of the network. T Arnold-Moore 'Legal pitfalls in cyberspace: defamation on computer networks' 1994 Journal of Law and Information Science 165 at 8. In n 21 he explains that 'cyberspace' is often used to refer to any form of computer-based communication, but it is used interchangeably with 'Internet'. However, there is some difference of opinion among writers as to what exactly they consider to be the Internet and cyberspace — see E Krol The whole Internet: user's guide & catalog (1992) 13.


5J Landau & T Goddard 'Defamation and the Internet' 1995 International Media Law 75.
Defamation on the Internet

the Internet means that a victim of a defamatory allegation may find it difficult to trace its author. Even if the victim knows who the author is, not only may the victim find that the author is outside of his court's jurisdiction, but also that to sue would not make economic sense. As a result of the very nature of what is often referred to as the 'information superhighway' the worldwide experience has been that established regulations and procedures appear outmoded, inconsistent, and in some instances, completely inappropriate to deal with the problem.

Although the importance of legislative control has been discussed at length by lawyers, academics, philosophers and politicians ever since the inception of the Internet, there is little jurisprudence dealing with the Internet, as there have been few cases specifically involving its use. However, what is abundantly clear, is that some form of national and international regulation is necessary to prevent this global network's potential legal problems from getting out of hand. This article considers the legal ramifications of defamation on computer networks with specific focus on the Internet. After a comparative analysis of the English and American systems, the problem will be discussed and suggestions made on how to deal with it from a South African perspective.

Definition of defamation

Defamation has been defined as the 'intentional infringement of another's right to his good name, or, more comprehensively, the wrongful, intentional publication of words or behaviour concerning another which has the tendency to undermine his status, good name or reputation'.

The problems encountered

In terms of the basic principles of South African defamation law everyone who takes part in the publication of a defamatory allegation is in theory jointly and severally liable. This is significant as the author of a defamatory

6Ibid.

7Landau & Goddard n 5 above at 19; Calow n 4 above at 199 states: 'Traditionally the Internet, which has been described as "the lowest entry barrier mass-media system in history", has relied upon its users' own restraint — adhering to a code of "netiquette", in order to control online behaviour. However, as Internet use increases this self regulation no longer appears to be enough ....'


9This also corresponds to the position in England — Calow n 4 above at 199.

10Publication' as far as defamation is concerned, has a lego-technical meaning and implies that the objectionable statement regarding the defamed person is made known to at least one person other than the defamed individual.
message on the Internet\textsuperscript{11} may be unidentifiable,\textsuperscript{12} untraceable,\textsuperscript{13} outside the jurisdiction of the victim's court\textsuperscript{14} or have insufficient funds to meet the claim,\textsuperscript{15} while an academic institution or other system operator may have more funds or insurance cover.

When the law of defamation is considered in the context of the Internet, the following problems are encountered: when does publication occur, who is liable for the defamation\textsuperscript{16} and where does publication occur?

COMPARATIVE ANALYSIS

England

\textit{When does publication occur}

To be actionable, the defamatory statement must have been 'published' — in other words, communicated to a third party.\textsuperscript{17} The author of a defamatory

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  \item \textsuperscript{11}Basically two main types of communication on the Internet are of interest in the context of defamation. According to N. Braithwaite 'The Internet and bulletin board defamations' 1995 *New Law Journal* 1216 these are, first of all, the increasing popular bulletin boards on online computer host services such as CompuServe, Prodigy and Delphi, and secondly certain parts of the Internet, notably Usenet 'newsgroups' (Internet discussion groups categorised by subject matter). He states that bulletin boards on online computer host services have much in common with Usenet newsgroups for the following reason: 'Hosted bulletin boards are electronic post boxes residing on a single computer which can be accessed by interested persons but often restricted to 'subscribers' of bulletin board services. Usenet newsgroups achieve a similar net result by circulating masses of newsgroup data to each Usenet node, usually but not necessarily, via the Internet.' For further discussion of the major categories of service provided by computer networks connections, see Arnold-Moore \textsuperscript{2} above at 167.
  \item \textsuperscript{12}According to Braithwaite \textsuperscript{11} above at 1216 it may be evidentially problematic (although not impossible) for the plaintiff to prove that a particular individual, as opposed to a particular computer, actually sent the message. He explains: 'It should normally be possible to prove on a balance of probabilities that a particular posting originated from a given individual, partly through the message header and partly from the overall context — defamatory remarks do not normally come out of the blue. The location of relevant terminals abroad, the difficulty of inspection and the impermanence of magnetically stored evidence are likely to be more significant obstacles. Anonymous remailing services could make it impossible to trace the original sender, but many digital libels may be inadvertent, making deliberate use of a remailing service unlikely.'
  \item \textsuperscript{13}Calow \textsuperscript{4} above at 199 explains that various technical devices can be used to disguise or hide the true identity of an Internet user and it is far easier to reach a large number of people anonymously with the Internet than with other publishing media.
  \item \textsuperscript{14}Messages on the Internet can cross international borders with great ease in comparison with the traditional distribution channels for books and magazines. It is possible that the sender of a defamatory message on the Internet may be far from the jurisdiction of the victim's courts which may make it practically impossible to sue.
  \item \textsuperscript{15}Calow \textsuperscript{4} above at 199; Landau \& Goddard \textsuperscript{5} above at 75.
  \item \textsuperscript{16}Although other jurisdictions such as England draw a distinction between written defamation ('libel') and spoken defamation ('slander'), no such distinction exists in South African law.
  \item \textsuperscript{17}Landau \& Goddard \textsuperscript{5} above at 76 confirms that under English law, the essential requirement of publication is to show that the defamatory matter has been made known to persons other than the person whom the matter concerns. They conclude that this strongly suggests that nothing short of communication to a third party
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statement which appears on the World Wide Web\textsuperscript{18} will be liable for defamation since the statement will clearly have been published when other Internet users download it, just as if the statement appeared in a newspaper. Similarly, the sender of a defamatory e-mail message will be liable for defamation when a third party reads the message in the same way as more traditional mail.\textsuperscript{19}

Where a defamatory message has been sent to a bulletin board\textsuperscript{20} discussion forum on the Internet, either open to all or merely to subscribers of a particular online service provider,\textsuperscript{21} this will constitute publications the bulletin board operates like a conventional notice board and allows any user, with access, to read the messages on the board.\textsuperscript{22}

Landau & Goddard\textsuperscript{23} point out that as only \emph{prima facie} evidence of publication is required, there should be no problem in proving that some form of publication has occurred, even though a message goes through a service provider, in a process that takes thousandths of a second. Furthermore, the fact that the victim has received a defamatory message may imply that the same message has been communicated to other end users. However, it is unlikely that this can be proved merely by the fact of publication to the victim. They point out that it is possible for a victim to rely on documents only obtainable upon discovery to provide evidence that publication to third parties has occurred. While this may be problematic for the victim, under English law the burden rests on the defendant to rebut any \emph{prima facie} evidence of publication. Landau & Goddard conclude that without legislation governing this issue, the Internet makes it extremely difficult for a victim to prove the wider publication essential for civil action.

\textbf{Who is liable for the defamation}

Since English law provides that everyone taking part in the publication of a defamation is theoretically liable, the question which arises is who else, apart from the author, may a plaintiff sue? The Internet is not an independent entity, but a series of interconnected networks. The most likely candidates are, would suffice to found a cause of action.

\textsuperscript{18}The World Wide Web (WWW) represents a collection of thousands of different documents or 'pages' linked to each other through hypertext on sites around the world. Calow n 4 above at 199 n 2. Regarding the nature of the World Wide Web, see also A Goldstuck \textit{The Hitchhiker's guide to the Internet} (1995) 94-95.

\textsuperscript{19}According to Calow n 4 above at 199 n 3 a UK police officer recently won a substantial out-of-court settlement over a libellous e-mail message circulated within a company.

\textsuperscript{20}For a discussion of the nature of computer bulletin boards and system operators (service providers), see Cutrera n 3 above at 556 ff. In respect of bulletin boards, see also TD Brooks \textit{Catching jellyfish in the Internet: The public-figure doctrine and defamation on computer bulletin boards} 1995 \textit{Rutgers Computer and Technology Law Journal} 461 466 ff.

\textsuperscript{21}Most individual users are linked to the Internet via a service provider, which may merely provide access or provide its own online services.

\textsuperscript{22}Calow n 4 above at 199; Braithwaite n 11 above at 1216.

\textsuperscript{23}Note 5 above at 76.
therefore the service providers who allow user access to the Internet or to particular destinations such as a bulletin board system. However, applying the principles of defamation law to a service provider is not straightforward. The problem lies in the level of involvement of different service providers in the control and editing of messages on their network. A service provider may, for instance, merely set up a system and take no active part in controlling messages which appear - in the same manner as a company providing transmitters or satellites may play no part in the selection or production of programmes appearing on the television channels it broadcasts.

The liability of a service provider under English law depends to a great extent on whether it is regarded as an editor, publisher, printer, distributor, vendor, or a new type of disseminator of information. If the courts were to decide that a service provider should be treated as an editor or publisher, it would have only the defence available to an author - in other words, its liability would depend on whether the alleged defamatory allegation was truthful, constituted fair comment or was privileged. Landau & Goddard point out that service providers are probably most closely related to distributors or vendors. If they can argue successfully that they do not take an active part in the actual process of communication, but merely provide the means to achieve it, they may be able to rely on the common law defence of innocent dissemination. The risk inherent in this approach is, of course, that if service providers are able to rely on this defence and the author of the defamatory statement cannot be traced the ridiculous situation arises whereby a victim has no effective remedy against a defamatory Internet message. The discussion surrounding the liability of online service providers has, however, focused principally on two categories: publishers of material on bulletin boards, and innocent disseminators of the material. It seems that various online

24Telecommunications service providers (also referred to as 'operators') in the United States are protected from defamation lawsuits as 'common carriers', but no comparable protection exists in the United Kingdom — Braithwaite n 11 above at 1216 n 6.

25Calow n 4 above at 199 explains as follows: If a service provider '... can successfully argue that it operates a 'telematic' service, i.e. a communication system for the exchange of information in the same way as a telephone company or the Post Office, but simply using a different medium, then it should be no more liable for delivering a defamatory message than the Post Office is for delivering a libellous letter or BT for defamatory comments made over the phone or sent by fax. Such an analogy may be valid for e-mail between individuals, but if facilitation or participation in sending a message to a bulletin board is more akin to, say, publishing a book or broadcasting a TV or radio programme — in that the messages are necessarily disclosed to a section of the public, should the service provider be liable?

26Landau & Goddard n 5 above at 75; Calow n 4 above at 200.

27Note 5 above at 75.

28In terms of the principles of strict liability of publishers in the case of defamation, they might, in such a case, be found liable for defamation without fault.

29In such a case they can be compared with street vendors who are innocent disseminators of the material in the newspapers they sell. Dooley n 3 above at 47 points out that the position of an innocent disseminator is equivalent to that of a distributor in the US.
service providers have adopted a hands-off approach to policing their systems to ensure that they are viewed as distributors or innocent disseminators rather than publishers. Dooley warns that this attitude may well result in liability rather than avoiding it. He explains:

The defence of innocent defamation has three elements when applied to a network operator: the operator
1) did not know that the network/bulletin board contained the libel complained of;
2) did not know that material on the network or bulletin board was of a nature likely to contain libellous material; and
3) did not lack knowledge of 1 and 2 above because of any negligence on the operator's part.

It is obvious that an operator who becomes aware that a bulletin board is likely to contain defamatory statements will not be able to rely on this defence. Furthermore, an operator who deliberately closes its eyes to the nature of the material on its bulletin boards or networks, will probably not be able to escape liability. Dooley explains that an operator which states that it does not vet material posted on its network will find it difficult to show that it was unaware of defamatory material being posted without any negligence on its part. He suggests that a service provider will be in a much better position if it clearly reserves the right to edit material which is offensive, obscene or defamatory, whilst clearly stating that its resources are such that it is possible to view only a tiny fraction of messages posted, and that it is the individual user's responsibility to ensure that messages do not infringe the provider's guidelines. He concludes that the sensible solution lies between the extremes of claiming to vet all material posted and refusing to look at any of it. The adoption of either extreme as a policy is likely to lead to liability for defamatory material posted on a provider's system.

The Defamation Act 1996 which was published on 4 July 1996 reforms, amongst other areas, the defence of innocent dissemination. These reforms were necessitated by the advances in technology since the defence was originally considered. The applicable clause reads:

1 (1) In defamation proceedings a person has a defence if he shows that -
(a) he was not the author, editor or publisher of the statement complained of,
(b) he took reasonable care in relation to its publication, and
(c) he did not know, and had no reason to believe, that what he did
caused or contributed to the publication of a defamatory statement.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved –
(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;
(c) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

(4) Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.3

Under the 1996 Defamation Act a distinction is drawn between primary and secondary publishers on the basis of editorial control.36 It seems that primary publishers would be held strictly liable, whereas secondary publishers would escape liability if they could prove that, in spite of taking reasonable care, they did not know and had no reason to suspect that defamatory material might be communicated.37

Service providers will therefore be able to rely on the defence of innocent dissemination, provided they are not primarily responsible for a defamatory

3S 1(2) provides that for the purpose of this Act 'author' means the 'originator of the statement, but does not include a person who did not intend that his statement be published at all'; 'editor' means 'a person having editorial or equivalent responsibility for the content of the statement or the decision to publish'; and 'publisher' means 'a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business'.

36Braithwaite n 11 above at 1218 states that in conventional publishing, the concept of 'editorial control' has a relatively settled meaning, namely the right and ability to control editorial content prior to publication. 'Conversely, distributors, booksellers and newsvendors, as well as electronic database operators, typically exercise a right of control post-publication, in essence a right to control access rather than content. Publication by third party computer hosts who have not originated the objectionable statement corresponds more closely to the latter secondary type of publication.' This is indeed the approach taken by two leading American cases, Cubby Inc v CompuServe Inc 776 F Supp 135 (SD NY 1991) and Stratton Oakmont Inc v Prodigy Services Company 1995 NY Misc Lexis 229 — see discussion in nn 49-62 below.

37Braithwaite n 11 above at 1218 is of the opinion that it is questionable, however, whether the fundamental assumption that requires secondary publishers to disprove fault is right. According to him, shifting the burden of proof of fault onto the plaintiff would give system operators a degree of confidence without necessarily encouraging complacency. He furthermore states that this would reflect approximately the current legal position in the United States (although this is still far from settled). He mentions the following example: '... a plaintiff who had been regularly abused on the Usenet might write to a university on whose system the defamatory material originated (or even an institution downstream from the originator on whose system the message was stored) requesting it to put an end to the abuse, either by barring a particular user from making further postings, or by killing existing stored messages (whether stored centrally, or more likely, on local computers within the institution). If the University failed to do so within a reasonable time, it would presumably be relatively straightforward to show fault.'
statement, have taken all reasonable care and do not know or have reason to suspect that their acts caused or contributed to the publication of a defamatory statement. This means that a service provider is unlikely to be held liable if it shows that it has taken all reasonable care to vet its Internet messages so as to avoid any question of negligence. Landau & Goddard\(^8\) criticise the philosophy underlying these provisions on the ground that they have created a dichotomy:

On the one hand, even if service providers were able to check every message, how could they know or find out which particular message contains a libel? On the other hand, if service providers were made responsible for vetting messages, this could raise serious questions about privacy and censorship.

They come to the following conclusion:

In the end though, someone has to be potentially liable if there is to be a reliable system of redress. If the author cannot be made liable, then the service provider should be, on the basis that it seems to be the only viable way in which the Internet can be properly "policed". Certainly, by putting the onus of liability on service providers, it will encourage them to take appropriate steps to make sure the author is properly identified in the first place ....

Furthermore, the Defamation Act states that in determining whether reasonable care has been exercised, the courts are to pay attention to, amongst other things, the defendant's responsibility for the content of the statement or the decision to publish it.\(^9\) This will be minimal for the average service provider. According to Dooley\(^6\) this defence is not intended to protect those who have cause to know that they are publishing defamatory material: this will include those who refuse to adopt a sensible attitude to policing their networks. Clearly no blanket immunity is intended for service providers, nor would one be appropriate. He stresses that these provisions encourage sensible use by individuals and sensible policing by service providers, but without imposing an obligation to censor or conferring a right to do nothing, and require that the service provider show that it was not responsible for the defamatory allegation, had no knowledge, and was not negligent.\(^4\)

According to Landau & Goddard\(^5\) the provisions of the 1996 Defamation Act do not appear effective or far reaching enough — the Internet involves more than liability. They suggest that what is really required is an internationally

\(^8\)Note 5 above at 75.

\(^9\)S 1(5) of the Defamation Act of 1996 provides: 'In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to — (a) the extent of his responsibility for the content of the statement or the decision to publish it, (b) the nature or circumstances of the publication, and (c) the previous conduct or character of the author, editor or publisher.'

\(^6\)Dooley n 3 above at 47.

\(^4\)This view corresponds to the US case law.

\(^5\)Landau & Goddard n 5 above at 76–77.
recognised regulatory framework to police the information superhighways, and address the dichotomy between freedom of speech and the need for regulation in a judicious but effective manner.

Where does publication occur

One of the aspects not clarified by the Defamation Act of 1996 is where the publication of a defamatory allegation takes place. The current position under English law is that words are published in the place where they are received — in other words, publication occurs at the place of communication rather than creation. In the case of the Internet, this may be in many countries around the world. When a case reaches the trial phase, the court will have to decide where ‘publication’ took place. Since the Internet transcends national borders, a defamatory message could be ‘published’ in every country in the world where Internet messages can be communicated to end users. The jurisdictional problem that arises is where should a victim institute a claim to redress the harm that has been caused to his reputation. This may lead lawyers to forum shop in an attempt to identify jurisdictions which are particularly favourable for their clients and for actions. Landau & Goddard point out that a victim may not necessarily have a significant reputation to protect in other jurisdictions. They suggest that the jurisdictions should be redefined so as to create a more global forum in which legal proceedings may be enforced.

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43This view is also expressed by Arnold-Moore n 2 above at 208: ‘Great attention must be paid to making the law uniform across state and national borders, requiring the pursuit of international conventions like those in the area of intellectual property.’

44Dooley n 3 above at 47 mentions the following example: a defamatory e-mail message received in Swindon from a source in Stockholm will be subject to the English law of defamation. Braithwaite n 11 above at 1219 states that although bulletin board defamation has the potential of spreading globally and that this may lead to unparalleled opportunities for forum shopping, in practice, potential plaintiffs may face considerable difficulties in pursuing claims against overseas-based authors of defamatory postings. Without recourse against a conventional ‘publisher’ the average plaintiff may lack a credible remedy in damages for serious damage to reputation, and may be forced to rely on ‘right of reply’ to neutralise any lasting damage. Indeed, the networks may soon develop their own structures for formalising these defensive pleas. He concludes: 'At best, 'Internet libel' may encourage plaintiffs to be less thin-skinned about slings and arrows traded on computerised networks, especially if legislative intervention removes the realistic prospect of recovering libel damages from system operators. At the very least, a modicum of self-censorship will become inevitable for users who wish to avoid having a libel lawyer at their elbow when logging on.'

45Braithwaite n 11 above at 1219 is of the opinion that since electronic bulletin boards are directed at users with special interest in the subject matter under discussion, the scope for damage is akin to that in a special interest magazine. 'It remains to be established, however, to what extent reputations can really be badly damaged by a medium that is not subject to prior editorial control. Conversely, the scope for redress is proportionately greater, in that a reply can swiftly be directed to the same special interest grouping. Such a reply ought to attract qualified privilege, but doubt as to that could arise if a wider audience were targeted.'

46Landau & Goddard n 5 above at 76.
Since publication is a requirement for liability for defamation, the plaintiff must specifically aver and prove that publication of the defamatory allegation to a third party did indeed take place.\(^70\) However, publication is presumed in certain instances, which shifts the onus to rebut the presumption rests on the defendant. Such cases include: where the statement complained of were contained in a telegram or postcard,\(^71\) or appeared in a book, magazine or newspaper which has been sold.\(^72\) According to Neethling,\(^73\) the reason for the existence of a presumption of publication in these cases is that it can be expected and therefore is probable, that others will read the words. When these principles are applied to the Internet, it becomes clear that publication of a defamatory allegation will occur as soon as users of the Internet download the particular defamatory message. It is suggested that e-mail messages should be regarded analogous to ordinary mail in that publication will have occurred once a third party reads the message.\(^74\) A presumption of publication must certainly exist where a defamatory message has been sent to a bulletin board discussion forum on the Internet, since it can be expected, and is highly probable, that others will read the message.\(^75\)

Who is liable for the defamation

Once publication has taken place, the plaintiff must show that the defendant was responsible for the publication.\(^76\) According to Neethling\(^77\) it can be

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the true significance of what he had been told. If the person addressed discovered the defamatory significance of the statement at a later stage, the defamer should be liable, regardless the length of the time lapse between communication and understanding.\(^78\) According to Neethling 141 the defendant escapes liability not because the publication is lacking, but because an infringement of personality did not take place. Where the outsider is unaware of the defamatory nature of the conduct complained of, the defamatory words or conduct, despite the publication thereof, does not have the effect of infringing the plaintiff's \textit{fama}.\(^79\)

\(^{70}\)Neethling 142.

\(^{71}\)Pretorius v Niehaus 1960 3 SA 109 (O) 112.

\(^{72}\)African Life Assurance Society Ltd v Robinson & Co Ltd 1938 NPD 277 297. In Trimble v Central News Agency Ltd 1933 WLD 88 on 96 it is, however, stated that publication is not presumed from the mere fact that the book, magazine or newspaper is displayed for purposes of sale (although it is not yet sold).

\(^{73}\)Neethling 142.

\(^{74}\)Brooks n 20 above at defines an e-mail message as '... a private message sent by one user directly to another user; other users normally do not have access to this message'.

\(^{75}\)Computer bulletin boards do not afford their users privacy. A user can post a message on the board where it can be read by all other users, who may in turn post a message in reply to the first message. Since these communications can occur between two or a hundred users, it has been pointed out that users may be under the illusion that they are having a private conversation, but instead it is more like they are using a megaphone — Brooks n 20 above at 467. In n 53 he further explains that \textit{listservs} combine characteristics of both electronic mail and bulletin boards — since the aspect of privacy which is a feature of electronic mail is lost in the process, \textit{listservs} will also be regarded as bulletin boards for the purposes of this article.

\(^{76}\)Pretorius v Niehaus 1960 3 SA 109 (O) 112; Van Vliet's Collection Agency v Schreuder 1939 TPD 265; Neethling 143.

\(^{77}\)Neethling 143.
stated as a general rule that the defendant will be accountable for defamation if he was aware or could reasonably have expected that an outsider would gain knowledge of the alleged defamation. He explains that the question is, therefore, whether the objectionable consequence was indeed foreseen by the perpetrator, or was at least reasonably foreseeable. He concludes that when viewed in this light, a special application of reasonable foreseeability as a criterion for legal causation (limitation of liability or imputability of harm) is involved. The question is for which of the consequences which flowed factually from the perpetrator's conduct he should be held liable. The plaintiff will have to establish that the defendant deliberately defamed him or her (in other words, that animus intuiriandi is present). In practice, once the plaintiff has proved that defamatory words were published, the court usually assumes that the defendant had the necessary intention.

Since messages on a large network like the Internet 'propagate' from one computer to the other, the question arises whether a user who posts a defamatory message on one computer is liable for publication which occurs on other computers. The person from whom the defamatory remarks originated will be responsible for publication, but also any person who repeats, confirms or directs attention to these remarks. Therefore not

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78 Pretorius v Niehaus 1960 3 SA 109 (O) 113; Van Vliet's Collection Agency v Schreuder 1939 TPD 265 268-269.
79 McKerron 185; Amerasinghe Defamation and other aspects of the actio inturiarum in Roman Dutch law (1968) 60-62.
80 According to Neethling 143 n 33 it should be noted that the defendant can be held liable for these consequences only if, in addition, he had acted wrongfully and intentionally.
81 Neethling 178 explains that '... although the plaintiff must expressly aver the existence of animus intuiriandi in his pleadings, he need not prove intent on the part of the defendant. If it is certain that the publication is defamatory and that it relates to the plaintiff, then in addition to the presumption of wrongfulness there is also a presumption that the defamation was committed intentionally.'
82 Every computer receives messages from other computers and where it is programmed to do so, passes it on to other computers.
83 Jooste v Claassens 1916 TPD 723; Farrar v Madeley 1913 CPD 888 890; Hassen v Post Newspapers (Pty) Ltd 1965 3 SA 562 (W) 564-565. Neethling 144 n 38 points out that in certain circumstances a defamer may be held liable for the further repetition of the defamatory statements by others. Apparently this will be the case where such repetition was in fact foreseen by the defendant, or was reasonably foreseeable. See also Burchell 78. In Vengtas v Nyadoo (S) 1963 4 SA 358 (D) 393 the positive law regarding this aspect was set out as follows: 'It seems to me that a person who publishes a defamatory statement is prima facie not liable for damages flowing from its unauthorised and voluntary republication by the person to whom, in the first instance he published it, but there may be exceptional cases in which he is liable. Those exceptional cases are (1) where the person who published the defamatory statement originally authorised or intended that there should be republication to the third person, or (2) where its repetition to the third person was the natural and probable result of its original publication to him who repeated it, or (3) where he to whom the original publication was made was under a moral duty to repeat it to a third person and the original publisher was aware, at the time of the original publication, of the facts and circumstances out of which that duty arose. Normally republication is not the necessary, natural or probable consequence of the original publication.' See also Moolman v Slovo 1964 1 SA 760 (W) 762-763; Butbelezi v Poorier 1975 4 SA 608 (W) 615.
Defamation on the Internet

United States of America

When does publication occur

In the United States the common law tort of defamation requires that a false and defamatory statement about another should have been published (without privilege) to a third person 47 by a publisher who was at least negligent. 48

Who is liable for the defamation

The question of a service provider's liability has also been raised in the United States. In the case of Cubby Inc & Blanchard v CompuServe and Fitzpatrick, 49 CompuServe, a large online service provider, provided a bulletin board which focused on the journalism industry. It used an independent company to 'manage, review, create, delete, edit and otherwise control the contents' 50 of the online journalism discussion forum in accordance with standards set by CompuServe. The bulletin board carried defamatory statements against the plaintiff, who sued, amongst others, CompuServe for libel. 51 The court, after applying legal US analogies, dismissed the claims against CompuServe. It accepted that once CompuServe decided to carry a posting, it had little editorial control and the matter was instantaneously available to subscribers. The court came to the conclusion that CompuServe did not know and had no reason to know of the allegedly defamatory allegations and that it was inappropriate to expect CompuServe to know of the allegations. The court held that:

47Brooks n 20 above at 471 states that 'publication' is a term of art meaning communication to someone other than the person defamed and the publication need not be written. See also Keeton et al Prosser & Keeton on the law of torts (1984) par 113 at 797.

48A distinction is made in the US between libel and slander. Thus distinction is important because slander actions require proof of special damages whereas libel actions do not. However, Cutrera n 3 above at 562 states that electronic messages are printed material and should be covered by the law of libel.

49776 F Supp 135 (SD NY 1991). This case was followed in 1992 by Aulet v CBS '60 Minutes' 800 F Supp 928 in which case CBS and three of its affiliates were sued over a programme which contained an alleged defamatory allegation of the plaintiff. Although the affiliates had the power to exercise editorial control over the broadcast (and had done so on previous occasions where viewing content was thought to be unsuitable for local viewers), they did not do so on this occasion. The court held that having the power and ability to edit material did not necessarily impose a duty to do so. The court held that the affiliates did republish the alleged defamatory allegations as conduits of CBS but that, in the absence of fault, there was no liability. See Dooley n 3 above at 46; EJ McCarthy 'Networking in cyberspace: electronic defamation and the potential for international forum shopping' 1995 University of Pennsylvania Journal of International Business Law 527 543; G Bovenzi 'Liabilities of system operators on the Internet' 1996 Berkeley Technology Law Journal 93 at 123.

50Calow n 4 above at 200.

51Rumourville, one of the newsletters on the bulletin board, was run by a third defendant. CompuServe did not review Rumourville’s contents before it was transmitted. The plaintiffs developed a news database with the intention of competing with Rumourville. Rumourville allegedly published defamatory allegations about this database and the plaintiffs instituted a civil action for libel. Dooley n 3 above at 46.
CompuServe does not have any more editorial control over such a publication than does a public library, book store or news-stand and it would be no more feasible for CompuServe to examine every publication it carries for potential defamatory statements than it would be for any other distributor to do so.\[^{52}\]

In other words, CompuServe was able to rely on a defence similar to innocent dissemination.\[^{53}\]

However, this judgment should be contrasted with the decision in *Stratton Oakmont Inc v Prodigy Services Company*.\[^{54}\] Prodigy, a commercial online network, has at least two million subscribers who make use of its bulletin boards, including 'Money Talk' where members can post statements regarding stocks, investments and other financial matters. Defamatory remarks about the plaintiff company were posted anonymously on the 'Money Talk' bulletin board. The first point to be established was whether Prodigy exercised sufficient control over its computer bulletin boards to render it a publisher in which case it could be held liable for defamation in the same way that, for example, a newspaper could be held liable.\[^{55}\] In an interim judgment the court ruled that Prodigy was liable because it functioned more as a publisher than as a passive conduit of information.

The court stressed that Prodigy\[^{56}\] asserted the right to review and edit material placed on its system, including any material it considered 'harmful' to other subscribers and to itself and publicly advertised and defended this policy. Furthermore, Prodigy used a software programme that screens postings for offensive words and warns their originators to erase the words or risk censorship of their messages and gave guidance notes to the 'Board Leaders'\[^{57}\] who could delete messages if, for example, they were in 'bad taste'. On the other hand, Prodigy argued that its Board Leaders had the ability to remove messages, but that they did not invariably do so, nor could they be expected to do so, given the 60 000 messages a day on Prodigy's bulletin board.

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\[^{52}\text{Calow n 4 above at 200.}\]

\[^{53}\text{Landau & Goddard n 5 above at 76. They are of the opinion that if the CompuServe case had been brought under English law, it would be difficult to say whether CompuServe could have relied on the defence of innocent dissemination, in its common law or proposed statutory form, since in the US, the First Amendment requires the plaintiff to show that the distributor had knowledge of the contents of the alleged defamatory statement before it can be found liable. He explains that under English law, the burden is on the distributor to show that it was not negligent which is also much harder to prove.}\]

\[^{54}\text{1995 NY Misc Lexis 229; 23 Media L Rep (BNA) 1794 (NY Sup Ct) May 24, 1995. See also the discussion of McCarthy n 49 above at 547; Bovenzi n 49 above at 126.}\]

\[^{55}\text{H Rowe 'Libel over the Internet' 1995 The Computer Law and Security Report 201; Dooley n 3 above at 46 explains that in the United States the standard of care required of a publisher is somewhat higher than for a distributor. Liability depends not so much on the basis that a publisher must exercise a certain degree of control, but on the premise that, if a certain degree of control is exercised over a publication's content, then that person is a publisher. If that control has not led to the detection or prevention of the defamatory statement, liability is likely to follow.}\]

\[^{56}\text{In contrast to CompuServe.}\]

\[^{57}\text{Prodigy entered into a contract with a 'bulletin board leader' who participated in discussions on the board and undertook promotional activities to encourage increased usage and new users. Rowe n 55 above at 201.}\]
Defamation on the Internet

board. Prodigy furthermore contended that it is a distributor in a manner similar to a library or a book store, and that it exercises no control over the content of the bulletin board other than screening for foul language or racial epithets.8

The court agreed that in general online service providers should not be held responsible for the truth or falsity of the messages on their bulletin boards—that they should generally be regarded in the same context as bookstalls, libraries and network affiliates, being more akin to a simple conduit. However, the court rejected the defence in this case.9

The court distinguished this case from the decision in Cubby on the ground that Prodigy held itself out to the public as controlling the content of the bulletin board and employed technology and manpower to achieve this. The exercise of such control, even if not total, was sufficient to make Prodigy a publisher of the defamatory allegation, rather than a distributor. This decision left online service providers, who maintain that they are passive carriers similar to a telephone company, uneasy.60 The plaintiff, Stratton Oakmont, ultimately decided not to oppose Prodigy’s motion to reverse the court’s decision that online service providers can be held liable for the material they carry. However, in a much anticipated ruling, the court declined to reverse its earlier decision that online service providers such as Prodigy are responsible for messages posted by their subscribers.62

The Prodigy decision is seen by many as problematic.63 Braithwaite64

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8Garbus, the counsel which Prodigy hired to reargue the court’s decision, stated that Prodigy had long discontinued screening, that it could not ‘edit like a publisher,’ and that speech can be reviewed only when ‘the author works together with a publisher and supplies source material and detailed explanation.’ See C Reid ‘Prodigy switches lawyers to reargue counsel’ decision, 1995 3 July Publisher’s Weekly 11.

9The court stated that it was in full agreement with the decision given in Cubby Inc v CompuServe Inc 776 F Supp 135 and Auvil v CBS ‘60 Minutes’ 800 F Supp 928, but as a result of Prodigy’s expressly stated policies, it had to be viewed, uniquely, as a publisher rather than a distributor.

60 J Milliot ‘Litigation fear dominates cyberspace panel’ 1995 19 June Publisher’s Weekly 15; C Reid ‘Prodigy libel suit is dropped’ 1995 30 October Publisher’s Weekly 12; C Reid ‘Online liability: mixed signals in 2 current cases’ 1995 11 December Publisher’s Weekly 11.

61 Reid n 58 above.

62C Reid ‘Judge declines to reverse ruling on Prodigy’s liability’ 1996 1 January Publisher’s Weekly 23.

63JR Friedman ‘Libel in cyberspace’ 1995 1 September Folio 57 sketches the problem from the viewpoint of a magazine which has been put online: ‘If you try to keep your more sensitive subscribers happy by pre-screening messages, not only will you force long delays in the transmission of messages, but you increase the risk that you will be treated as a “publisher” if you are sued for libel. (And a screening policy won’t even work in real-time chat situations.) To run a successful online publishing business, you can’t afford to close your eyes to what’s happening on your network. If you do, you will be blindsided not only by litigation, but by consumer dissatisfaction. For example, if someone is regularly posting messages on your bulletin board that are likely to offend many readers, your print publication might lose subscribers or advertisers. The dilemma is compounded because advertisers and agencies are not yet sold on online advertising, so you can’t count on making enough money to offset the increased risk.’
criticises it on the following grounds:

While it is certainly true that Prodigy marketed itself, on the back of what it labelled editorial control, as a "family orientated service", the reality is remote from the editorial control exemplified by primary publishers. Prodigy in fact only retained an explicit right to interfere after the event with content it deemed unacceptable — a right it reserved in common with most other major service providers.

Thus it is arguable that, in the United States at least, not only should each operator be treated on its own merits, but also each single communication ought to be considered discretely. That is, was a moderator employed, and what guidelines had the operator set in place? For example, a sysop may escape liability if it delegates editorial control to a third party, such as a moderator with a special interest in the subject matter.

Where does publication occur
Any material which has been uploaded, can be retransmitted to a location where one had no intention of publishing. The range of places where one could be sued for defamation and be forced to defend the suit increases dramatically.

South Africa
When does publication occur
The law of defamation is part of our common law of delict and therefore a victim of a defamatory statement who institutes an action for defamation will have to prove all the elements of a delict. First, the plaintiff will have to prove that publication of the statement has taken place. Publication, in this sense, has a lego-technical meaning and implies that the objectionable statement regarding the defamed person is made known to at least one person other than the defamed individual. This principle is however, subject to certain qualifications. If the outsider is unaware of the meaning of the defamatory allegation, where for example, defamatory words appear in an encoded message or in a foreign language, or is unaware that they refer to the plaintiff, the courts do not regard this as constituting publication. However, as soon as the outsider becomes aware of the defamatory nature of the allegation, the publication requirement is fulfilled.

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64Braithwaite n 11 above at 1218.
65He maintains that the presence or absence of any designated moderator will be a significant factor in determining editorial control on the part of the operator (service provider).
66He explains that both online service providers (sysops) and Usenet newsgroups may appoint moderators, although the level of editorial control actually exercised is infinitely variable.
67Friedman n 63 above at 57.
68These requirements are basically that publication of a defamatory allegation has taken place, that the objectionable publication does not only impair the plaintiff's good name, but is also objectively unreasonable or (contra bonos mores) and that the defendant has acted intentionally (or animo iniurandi). For a detailed discussion of these elements, see Neethling 140–153.
69In Vermaak v Van der Merwe 1981 3 SA 78 (N) the court stated on 83: 'In our view the law would be deficient in a most material aspect if a person who did everything he thought necessary to defame another could escape liability simply because the person to whom he addressed his defamatory statement did not immediately grasp
only the author of a defamatory message or a defamatory allegation in, for example, an online magazine, will be held liable, but also the editor, printer publisher and owner of that magazine.

This category has usually been held strictly liable for defamation, but it has been suggested that their liability should rather be based on negligence.

It is suggested that the liability of online service providers who have no editorial control over the messages on their bulletin boards but who are merely 'innocent disseminators' should be considered analogous to that of distributors or vendors (such as news agencies and book shops) whose liability is based on negligence. They should be held liable for defamatory allegations on, for example, bulletin boards only if they should reasonably have been aware of them. In terms of the principles laid down in *Dunning v Thomson* an online service provider should be able to avoid liability if it can be proved:

1. that the service provider had no knowledge of the defamatory allegation;
2. that the service provider had no reason to believe that the material was defamatory; and
3. that negligence was not the cause of its lack of knowledge.

It is furthermore suggested that, based on the principles laid down in

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64 Neethling 143–144 and McKerron 184.
65 Wilson _v_ Halle 1903 TH 178; *Dunning v Thomson and Co Ltd* 1905 TH 313; *Dunning v Cape Times Ltd* 1905 TH 231; *Robinson v Kingswell; Argus Printing & Publishing Co Ltd v Kingswell* 1913 AD 513.
66 *In Pakendorf v De Flamingh* 1982 (3) SA 146 (A) the court held that the absolute (strict) liability of the press, and specifically that of the owners, editors, printers and publishers of newspapers must be enforced. (This principle of liability without fault has been taken to apply not only to the print media, but to the media in general eg. also the broadcasting media.) Since freedom of speech and expression of the media is guaranteed in section 16 of the Constitution as a fundamental human right, it has been argued by some that liability without fault unjustifiably restricts the freedom of the media. A Van Aswegen 'The implications of a Bill of Rights for the law of contract and delict' 1995 _SAHJR_ 50 60–61; H Botha 'Privatism, authoritarianism and the constitution: the Case of Neethling and Potgieter' 1995 _THRHR_ 496; *Gardener v Whitaker* 1995 2 SA 672 (E) 687. It has therefore been suggested that perhaps a good compromise could be reached by accepting negligence as the basis of liability of the media for defamation. Neethling 182; PJ Visser 'Nalatige krenking van die reg op die Fama' 1982 _THRHR_ 168–174; Burchell _Principles ... n 8 above at 182; J Neethling and JM Potgieter 'Laster: die bewyslas, media-privilegie en die invloed van die Grondwet' 1994 _THRHR_ 513 517–518; J Neethling and JM Potgieter 'Aspekte van die lasterreg in die lig van die Grondwet' 1995 _THRHR_ 709 713–714.
67 Neethling 144 points out in n 44 that these people will however usually go scot-free because of the absence of fault.
68 1905 TH 313. On 317 Smith J stated the position as follows: 'I hesitate to say, however, that there is any duty cast upon newswendors to read every publication they offer for sale. The evidence before me is that it is not the practice of newswendors so to do, and indeed it would be a physical impossibility. It would under these circumstances be reasonable to hold that there was any duty cast upon them to read through every publication they obtain for the purposes of sale, and satisfy themselves that there is no defamatory matter contained in it. Of course, if a newswendor knows that a paper contains a libel, or if there are any circumstances which should have directed his attention to the fact, he cannot take advantage of his own negligence and shelter himself behind the defence of ignorance.'
Dunning v Thomson, where there should not be a positive duty on service providers to examine all material to avoid an action for defamation. However, if defamatory material is brought to the attention of a service provider, or there are circumstances which should have directed the service provider’s attention to the fact, there will be a positive duty to examine the relevant material.

Where does publication occur

Publication of a defamatory allegation on the Internet or other network system raises a number of cross jurisdictional issues, as a single news item or e-mail message could be published in multiple countries and therefore multiple jurisdictions. In terms of South African law, a plaintiff has a choice of either instituting a claim against the defendant in the jurisdiction where the cause of action arose or in the defendant’s jurisdictional court. When a defendant is in another country, the plaintiff will either have to institute a claim for defamation in that other country and then that country’s laws will prevail, or a plaintiff must wait until the defendant comes to South Africa and then arrest him to found or confirm jurisdiction. The latter option is, however, of little assistance if the defendant is an overseas based company.

Remedies

If the plaintiff is successful in proving that the words are defamatory and refer to him or her, and the defendant fails to rebut the presumptions of wrongfulness and animus iniuriandi, the plaintiff can claim satisfaction from the defendant. A plaintiff who also suffers financial loss as a result of the defamatory statement, can claim these damages with the Aquillian action.
Defamation on the Internet

A plaintiff, who is confronted with a threatening or continuing attack on his right to his good name, can, in addition apply for an interdict to prohibit the perpetrator from continuing with his wrongful conduct. 96

It is suggested that two additional remedies for defamation, namely a right of reply and a retraction (with possibly an apology) may be useful in certain circumstances. 97

A right of reply

Burchell 98 explains that the cornerstone of the right of reply lies in the immediacy of the reply. The required length of the legitimate reply, who may exercise the right, and the contents of the reply may differ in the countries (in which it is an accepted remedy), but it is clear that this remedy has certain advantages over a lengthy trial to recover damages for defamation. 99 The original rationale underlying the right of reply is to supply an individual with an inexpensive and expeditious way of correcting statements about him or herself in the press — this could now also be extended to online publication. 100 The downside of the right to reply is that given the diversity of Internet news groups and other computer bulletin boards, a plaintiff defamed on one board may not be able to rebut the falsehood if he does not have

96 Neethling 185 summarises the specific requirements which have to be complied with before the court will grant an interdict as follows: 'To succeed with an application for an interdict an applicant must prove on a balance of probabilities that the respondent will publish defamatory allegations concerning him or will continue with such defamatory publication; that the respondent will not have a valid defence against a defamation action; that the applicant will be prejudiced if the interdict is not allowed; and that no other remedy is available.'

97 For a discussion of these defence, see also JR Midgley 'Retraction, apology and right to reply' 1995 THRHR 288.

98 Burchell 312-313.

99 Although Brooks n 20 above at 482-483 expresses the following view from an American perspective, the principle involved is of universal relevance: '... computer bulletin boards are more amenable to a plaintiff replying to a falsehood than are traditional fora. Unlike traditional fora such as newspapers and magazines, computer bulletin boards do away with the intermediary of an editor. The plaintiff can post his rebuttal without a third party's review, whereas one replying to a libel in a newspaper would have to first confront a gatekeeper, such as an editor of the letters to the editor section. A defamation victim trying to reach the audience of a traditional forum directly to rehabilitate himself may face prohibitive obstacles in the form of cost (such as those related to printing and distributing) and difficulty in tracking down readers. By contrast, with only the cost of a few keystrokes, a plaintiff in an on-line libel case can send out a rebuttal which the network then routes to the same people who saw the defamatory statement. Additionally, while a plaintiff may not have access to the precise news group on which he was defamed, he may be able to gain access by paying a small subscription fee. On the other hand, given the myriad of news groups and news group providers, the burden of finding the proper provider and accessing its (potentially incompatible) software may be prohibitive.'

90 This is also mentioned as a viable possibility by AW Branscomb 'Anonymity, autonomy, and accountability: challenges to the First Amendment in cyberspace' 1995 The Yale Law Journal 1639 1671.
access to that of a related bulletin board.\textsuperscript{101}

\textit{Retraction and apology}

Under current South African law a full, frank and prompt retraction and apology will at most be a mitigating factor in the assessment of damages.\textsuperscript{102} In \textit{Kritzinger v Perskorporasie van Suid-Afrika (Edms) Bpk en 'n ander}\textsuperscript{103} the judge stated that no award of monetary damages would eliminate the plaintiff's loss of reputation. He said that if he had the authority to do so, he would, without hesitation, have required the defendant, apart from payment of an amount of money as penalty, to publish a correction with the same prominence and in the same place as the original report. According to Burchell,\textsuperscript{104} the efficacy of our traditional remedy for an impairment of reputation, is open to some doubt and the court's warning in the \textit{Kritzinger} case is an 'eloquent warning that we should not curtail the possible options available to us to vindicate a person's reputation and effect a workable balance between protection of reputation and free speech'.\textsuperscript{105} However, it seems that a retraction and apology can only be effective where an ostensibly factual allegation is made and the allegation complained of is one that is 'false'.\textsuperscript{106} The success of a retraction and apology depends on the defendant's willingness to retract and apologise and the plaintiff's willingness to accept such retraction and apology. If the allegation complained of is one of fact and is false, then both parties may gain from a retraction (including an acknowledgment of the falsity of the allegation) and an apology.\textsuperscript{107} For a retraction and apology to be sufficient to mitigate damages, the retraction (including acknowledgement of the falsity of the words used) and apology must be unreserved, as prompt as possible, and carry the same prominence

\textsuperscript{101}Brooks \textit{n 20 above at 480} explains that the diversity of the bulletin boards is characterised by the fact that not all users of Internet and other on-line services have access to all news groups or bulletin boards. As a result, a subscriber to one board could be defamed on another board to which he does not subscribe. Since that individual does not subscribe to that particular system, he would not have a chance to post a reply. (It is assumed that the plaintiff would become aware of the defamatory allegation through some method other than subscription.)

\textsuperscript{102}Burchell 317. On 316 he adds that our law of defamation is based squarely on the principle that the remedy for an impairment of reputation is an award of damages (apart from the possibility of restraining publication by means of an interdict).

\textsuperscript{103}1981 2 SA 373(O) 389.

\textsuperscript{104}Burchell 316.

\textsuperscript{105}\textit{id} 316.

\textsuperscript{106}Burchell 316 point out that it is extremely difficult if not impossible to brand an opinion as false, because of the difficulty of finding any objective basis by which to reach such a conclusion.

\textsuperscript{107}Burchell 318 explains: 'The plaintiff's reputation will be vindicated by a prompt, unreserved acknowledgement of the falsity of the imputation, and, if the retraction receives prominence equal to the original imputation, his esteem in the eyes of the very people who might be affected by the imputation may be re-established. What is more, the plaintiff will avoid the risk which is attendant on lengthy (and perhaps costly) legal proceedings. The defendant will also avoid the same risk and, in the end, if the imputation appeared in a periodical or a newspaper, the reputation of the publication for journalistic integrity and honest reporting may well be enhanced by effects a retraction and apology.' The same will be true for online publications and discussion forums.
as the original imputation.\(^{108}\)

**Defence**

Apart from the defence of innocent dissemination, the other major defence available to the defendant are truth for public benefit, fair comment and qualified privilege.\(^{109}\)

**CONCLUSION**

Pool\(^{110}\) explains that modern technology has caused a blurring — a convergence of modes — among the historic types of media (such as print and broadcast). As a result of technological advancement, one single physical means can now carry all of the formerly discrete modes of communication. One optical fibre cable, for example, can carry telephone communications, cable television, computer information networks, electronic newspapers and magazines, fax messages and radio programme all in a single modulated, multiplexed signal.\(^{111}\) Furthermore, a service that was provided in the past by any one medium, can now be provided in several different ways.\(^{112}\) For example

... single page of hard copy can arrive at its destination in a variety of ways: it can be printed on a press and mailed; it can be sent over a computer information network and down loaded to a printer; it can be faxed over the telephone lines; or it can be telexed over a cable television channel. In each case the same result is reached by different technical means. Because of mode convergence the task of the law in defining and regulating the media has become extremely complicated.\(^{113}\)

However, defamation law is equally applicable to the Internet as to any other media.

It is, however, important for users, owners and system providers to be aware of their rights and responsibilities. The following suggestions on the limitation of potential liability may be advanced.

- A service provider should take steps to ensure that its conditions of use are brought to the attention of its users and that its users have easy access to them.\(^{114}\)
- If one uses a commercial online service to publish, for example, a magazine, one should by way of contract expressly prohibit a subscriber from transmitting offensive material and require individual subscribers to

\(^{108}\) Burchell 318 points out that although it is tempting to say that where a defendant has promptly retracted the offending words and apologised for their use the plaintiff who is the subject of the offending words has in fact suffered no loss of reputation. But there is always the possibility, even with a prompt and unqualified retraction and apology, that those who read the defamatory words may not read the retraction and apology.

\(^{109}\) See a discussion of these defence in Neethling 155–171; Burchell 206–259.


\(^{111}\) Cutrera n 3 above at 580.

\(^{112}\) Pool n 110 above at 23.

\(^{113}\) Cutrera n 3 above at 580.

\(^{114}\) Dooley n 3 above at 46.
indemnify the online service for any violation of the rules and the subscriber contract.

- An online magazine should try to limit access to its forum to people whose identities it has verified independently, and require them to use their real names so that the magazine can track them down if they post problematic messages. If one goes through a commercial online service, the service may already be doing this.

- It is important for service providers and owners of computers on networks to ensure as far as possible that misusers can be identified — they should therefore preferably have an account for every user.

- One should train the employees running bulletin boards or chat sites to handle problems as they arise. For example, if someone claims to have been defamed by an article published by an online magazine or a posting on the magazine's network, this person should be encouraged to present his or her side of the story in the same forum as quickly as possible (so that the rebuttal will reach the people who saw the original message). If a manager wants to delete a posting, he or she should explain to the person who posted it why it should be deleted, and should encourage that person to rephrase the message in a way that minimises the legal risk.

- Employers providing access to the Internet to their employees should expressly forbid employees to post defamatory messages\textsuperscript{115} and an employer should consider obtaining some form of indemnity from employees for any defamatory messages they may post.

The major weakness exposed by the Internet is its total disregard for political and geographical borders. The ever-increasing expansion of the Internet is turning us into a so-called global community. A balance must to be maintained between freedom of speech on the one hand and regulation on the other. Furthermore, system operators play a vital part in the communication process since they provide a service that facilitate communication between users. It is therefore important that the boundaries of liability of system operators be clarified to eliminate or reduce harm in such a way that the provision of network access is not unnecessarily deterred.

\textsuperscript{115}Such prohibition may demonstrate that an employee was acting beyond his or her authority and may therefore release the employer from liability.