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Defamation on the Internet: an analytical study of defamation law and the Internet in England and Wales: 1996 to 2009

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Defamation on the Internet:

An analytical study of defamation law and the Internet in England and Wales

1996 to 2009.

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by

Philip Rhodes

Doctoral Thesis

Submitted in partial fulfilment of the requirements

for the award of

Doctor of Philosophy of Loughborough University

June 2010

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Appendix A

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Abbreviations

Advanced Research Projects Agency (ARPA)

American Bar Association (ABA)

Civil Procedure Rules (CPR)

Communications Decency Act 1996 (CDA)

Conditional Fee Agreement (CFA)

Department of Trade and Industry (DTI)

Digital Millennium Copyright Act (DMCA)

European Convention of Human Rights (ECHR)

Human Rights Act 1998 (HRA)

International Review of Law, Computers & Technology (IRLCT)

Internet Research: Electronic Networking Applications and Policy (IR:ENAP)

Journal of Information, Law and Technology (JILT)

Local Area Networks (LANs)

Section 1 Defence of the Defamation Act 1996 (S1 Defence)

Society for Computers & Law (SCL)

Wide Area Networks (WANs)

World Wide Web (WWW)

Abstract

For many decades, defamation law in England in Wales has predominantly only had to deal with material that has been published via printed publications, radio and television. As such, defamation law has been tailored to best suit these media. Since the introduction of the Internet, defamation law has been tested to its limits with a number of commentators arguing that it is not equipped to deal with the uniqueness of the online publications. Consequently, Internet service providers, content hosts and Internet users are all at risk of being held as the publisher and being sued for defamation, potentially, anywhere in the world, even if they had no prior knowledge of the material in question.

Previous research regarding the Internet and defamation has been scarce. This research has set out to gain a greater understanding of the problems facing Internet service providers and the threats to freedom of expression on the Internet caused by defamation law, procedures and practice. This has been achieved by conducting an in-depth desk research of academic text, press commentary and case law followed by interviews with Internet service providers, content hosts and lawyers with an expertise of defamation.

Initial assumptions were that defamation law, procedures and practice was threatening freedom of expression on the Internet. This proved to be correct and of great concern to the Internet publishing community. It was also found that defamation law procedure and practice was in many cases efficient in the removal of alleged defamatory (Internet based) material and in its attempt to restore a person's reputation.

It has been concluded that parts of defamation law in England and Wales could be revised to improve the preservation of freedom of expression on the Internet. Furthermore, current defamation law coupled with defamation procedures and practice are leaving Internet publishers vulnerable to vexatious claims of defamation.

There is also evidence to suggest that conditional fee agreements used within defamation legal practice are becoming more popular for defamation cases and consequently, threatening freedom of expression on the Internet.

Finally, Internet defamation cases and disputes are becoming a greater part of a defamation lawyer's practice and in some practices becoming more popular than traditional printed libel cases. It is for this reason that the results, conclusions and recommendations of this research are of a timely nature and of significant importance to the field of Internet publishing.

1. Introduction

1.1 Introduction to defamation and Internet

The aim of defamation law is to strike a balance between a person's right to protect their reputation with one's right to express themselves freely. Defamation law in England and Wales has always been heavily weighted in favour of a person's reputation. So much so, that the burden of proof is placed on the defendant. Consequently, foreign public figures with a reputation within England and Wales have often sought to bring their lawsuits to these courts as it is regarded as a forum that favours the plaintiff. Such actions have been heavily criticised, most notably by the press who have in the past been unable to publish material they have regarded as 'public interest' because of the threat of a lawsuit. Conversely, it has enabled those who have been defamed an opportunity to put right any slur against their name.

For many decades up until the mid-1990s, the majority of claims were brought against those who have published defamatory material via the radio, TV, newspapers or magazines, under the Defamation Act 1952¹. It was not until 1996 that the law of defamation was subject to a reform when the Defamation Act 1996² was introduced. This was designed to deal with defamatory material published via current media, in addition to, new and evolving technology most notably, the Internet.

Over the past 13 years, following the introduction of the Defamation Act 1996, the Internet has grown in popularity and now encompasses a community of over one billion users³. It has allowed people to communicate across the world with relative

ease and with little cost. Millions of websites, forums and chatrooms have been set up for people to express their thoughts and opinions to a wide and varied audience and with no single government controlling it. It has been hailed as a positive move forward for freedom of expression.

An Internet Service Provider's (ISP) role is to provide access to the Internet for its customers. In addition, they often provide hosting packages to Internet based businesses. These packages include a number of options, however, the main feature is the rental of web/disk space, email and bandwidth. Under defamation law in England and Wales an ISP is regarded as the publisher of the material, as they are unlikely to have had any input in the authorship or have editorial control of the material that has been published.

In 1999, *Godfrey v Demon Internet*⁴ became the first Internet defamation case involving an ISP to test the Defamation Act 1996. Demon Internet was held under the Defamation Act 1996 as the publisher of defamatory material for having failed to remove material that was deemed to be defamatory. This was following a fax that had notified them of its presence on their system. Under the Section 1 defence of the Defamation Act 1996, once an ISP has been put on notice regarding defamatory material on their system, as had Demon Internet, they lose the defence unless they can prove that they had acted expeditiously to remove the material from publication.

Commentators believed the case to have a 'chilling effect' on freedom of expression and criticised the law for not embracing new communication technology. They were also critical of the inclusion of case law that was over 150 years old, which was used

against the defendant. These two issues are central to this study. By applying defamation law that is already in favour of the plaintiff, issues regarding freedom of expression are likely to arise, particularly when concerning the Internet. It is also questionable, despite the fundamental principles in both *Byrne v Deane*⁵ and *Day v Bream*⁶, whether they should be used in such a dominant manner for Internet defamation cases? *Godfrey v Demon Internet* is analysed further in Section 4.7.1. The cited cases *Byrne v Deane* and *Day v Bream* are analysed further in Section 4.7.2 and 4.7.3, respectively.

The case highlights that the safest course of action for an ISP faced with a claim of defamation is to remove the material in question. This is particularly relevant when concerning third party material that the ISP did not create, but could possibly face legal action for. The ISP in many cases is the first point of contact as they have the ability to remove material quickly and also because they are perceived as having ‘deeper pockets’ and potentially, a lot more to lose financially than the author. It is therefore, not in the interest of the ISP’s business to defend the actions of their user.

The notice and takedown procedure has been heavily criticised as it allows for unwarranted threats against an ISP to be made and the removable of legitimate material. Consequently, this is against the principles of the Human Rights Act 1998⁷ (HRA), which promotes freedom of expression. Therefore, it could be questioned whether in fact the Defamation Act 1996 is even compatible with the Human Rights Act 1998.

A further question that is also raised is the relationship between a traditional printed publisher and an online publisher. There are distinct differences between the two roles, yet they are both governed by the same law of defamation. It is therefore, something that needs to be addressed as current defamation law may need to be revised to adequately protect ISPs.

1.1.1 Associated law

Following the Defamation Act 1996, the HRA and EC Directive 2002⁸ were introduced. Section 12 of the HRA requires UK courts to regard Article 10⁹, which considers the right to freedom of expression. The aim of the EC Regulations is to help define the circumstances when an Internet intermediary should be liable for the content they did not create, but either hosted, cached or carried¹⁰.

Despite both pieces of legislations being transposed into English law it is questionable as to what additional protection the EC Directive provides for ISPs or indeed if the Defamation Act 1996 is even compatible with freedom of expression as outlined in the HRA. This research observes how relevant these statutes are to an ISP's business and for lawyers dealing with defamation cases. Furthermore, it discusses the Defamation Act 1996 as a source of protection for both the plaintiff and the defendant. The primary source of data for this area of research was undertaken using interviews with ISPs and lawyers, which can be found in Section 5.5. These findings were compared with the opinions of commentators regarding defamation and the Internet.

1.1.2 Defamation procedure and practice

Following the Defamation Act 1996, two key procedures were introduced. Firstly, the pre-action protocol was introduced to enable parties involved in a defamation claim to explore an early and appropriate resolution of that claim¹¹. The second, was conditional fee agreements (CFA), which, in its simplest form is a 'no win, no fee' agreement where the lawyer will not get paid if the case is lost. Both of these procedures aim to reduce the number of cases reaching court and reduce the costs for both parties. CFAs also allow those without the funds to bring a defamation case, the ability to do so. Chapters 4.8 discuss both of these procedures in further detail.

This thesis supports the aims of both procedures. However, by giving more power to the plaintiff certain media could be left vulnerable to vexatious claims, which ultimately, threatens freedom of expression. There has been no research until now that observes the effects of these procedures with regards to Internet based defamation cases. This thesis, using interviews with lawyers and ISPs observes what effects these procedures are having on freedom of expression.

1.1.3 Associated cases and disputes

There have been very few Internet defamation cases that have reached court. This is particularly apparent in England and Wales. A majority of disputes are resolved before reaching court, aided by the aforementioned defamation procedures or are settled following a summary judgement. However, there have been a number of disputes that have highlighted both the vulnerability of ISPs and a possible corrosion of freedom of expression. Consequently, if the future of defamation claims is to be held, for the most part, out of the court rooms, then it is important to observe these and similar disputes so as to monitor the effects on ISPs and freedom of expression.

The highly publicised defamation dispute between child care guru, Gina Ford and parenthood information website Mumsnet.com was one of the first to resemble that of the *Godfrey v Demon Internet* case. Comments had been made by a user of the Mumsnet forum, allegedly defaming Gina Ford. Ford threatened legal action against Mumsnet, targeting their ISP and at one point trying to close the website down¹². What is noted in this case is that the action was not taken against the author of the material, but instead the plaintiff targeted those with the perceived 'deeper pockets'. Furthermore, as the dispute was settled out of court there is evidence to suggest that the user's right to freedom of expression had been breached. Chapter 4.6.1 discusses this dispute further.

The second case, *Sheffield Wednesday Football Club Ltd & Ors v Hargreaves*¹³ differs from that of the Mumsnet dispute, however, the same outcome was achieved for the plaintiff. Legal action was taken against the Sheffield Wednesday fan site Owlstalk, in order to disclose the identity of 11 people who had allegedly defamed the claimants. Following the disclosure of some of the people's names, the case was

dropped. Sheffield Wednesday made no financial gain, did not rectify any wrong doing or indeed receive a public apology. What the plaintiffs did gain was a demonstration of power to unmask those who write false information and deter people from speaking out about them. Chapter 4.2.6 discusses the case further.

The final example is a defamation dispute between billionaire Alisher Usmanov and former UK ambassador Craig Murray and Murray's ISP, Fasthosts. Following a threat of defamation action from the plaintiff, Fasthosts deactivated Murray's website in addition to two other servers, which consequently shut down other hosted sites including the British Members of Parliament website. Despite Murray encouraging Usmanov to sue him¹⁴, no further action was taken by the plaintiff. This again demonstrated the power the plaintiff has when threatening defamation action and potential harm to freedom of expression. Chapter 4.6.1 discusses the dispute in further detail.

These three cases and disputes demonstrate a plaintiff's power to have material removed from a website. This arguably places far too much pressure on the ISP or host to remove material, when they have in fact not created or even seen the material in question. However, the potential consequences for not complying with the request can be devastating for the ISP.

Again, there have been no studies that consider the effects of these cases on freedom of expression or how ISPs deal with these types of claims. Furthermore, it is not known whether these three cases are just a few of a number of isolated incidents or if in fact these types of claims are more widespread.

A final case of interest is *Gutnick v Dow Jones*¹⁵. Even though the case did not have any direct connection to England or Wales, the case did cite the 1849 English case of *Duke of Brunswick v. Harmer*¹⁶. The *Gutnick v Dow Jones* prompted mass criticism from commentators and highlighted the worldwide problem of publishing potentially defamatory material worldwide.

American publishers Dow Jones were taken to court by the Australian businessman Joseph Gutnick for alleged defamatory material in one of their publications. The publication, *Barrons Magazine* and *Barron's Online*, sold approximately 300,000 copies of which, 1,700 were sold in Australia. In Victoria, where the plaintiff was resident, 300 copies were sold. This was in addition to being available online, via subscription¹⁷. Despite the limited amount of copies sold in Australia, Dow Jones being based in New York and *Barron's Online* being stored on servers in New Jersey¹⁸, the case was brought to Australia.

Although the case was eventually settled out of court, the fundamental principles of the case were criticised. The *Washington Post* predicted a 'chilling effect' rendering the Internet as 'unusable as a vehicle for mass communication'¹⁹. The case highlighted that international defamation laws were incompatible, as what may be protected under free speech in America, is not protected in Australia. Furthermore, it highlighted that the Internet has the ability to spread potential defamatory material throughout the world leaving ISPs open to defamation claims from anywhere in the world. For an ISP to cope with this problem they would have to limit access from other countries, which would have a detrimental effect on the potential of the Internet

and freedom of expression. There has been no solution to this problem and without international harmonisation of defamation laws it is unlikely that there will be a solution. What can be determined is how ISPs are coping with the possible threat of defamation claims and if international law is a problem for them. Further discussion of the *Gutnick v Dow Jones* can be found in Chapters 4.7.7 and 4.7.8.

1.1.4 Associated Research

In 2002, the Law Commission published the two reports, 'Aspects of Defamation Procedure: A Scoping Study',²⁰ and 'Defamation and the Internet: A Preliminary Investigation'. The Law Commission made a number of recommendations regarding the Internet, however, none of them have since been implemented. It was also recommended that further research was required in a number of areas. Furthermore, some of the concerns put forward by the ISPs appeared to be overshadowed by the arguments put forward by traditional press and lawyers.

It has been seven years since the two reports were published, with little evidence of their findings making any impact on law or procedures. Furthermore, there have been a number of disputes and cases relevant to the report's findings that may have influenced the Law Commission's research. It is therefore, appropriate that this study picks up from some of the findings and revisits areas that were seemingly dismissed in the Law Commission's recommendations. It will also analyse how procedures, cases and disputes have impacted Internet publishing since the reports were published. Chapter 4.9 discusses the Law Commission's reports in further detail.

In Chapter 1.2.2, it was commented that there had been no research regarding defamation procedures. This is so far as published research is concerned. On 24th February 2009²¹ the Government began a consultation aimed at curbing excessive libel costs. The results of this study have yet to be published. However, the aims of the Government study and the results from this study are compared in Chapter 6.5.2.

1.2 Aims and objectives

Overall Aim

To examine the current conflicts between defamation law and practice in England and Wales, Internet service providers and a person's right to freedom of expression.

Objectives:

- To investigate the attitudes of legal practitioners and ISPs towards Defamation law and the Internet in England and Wales.
- To investigate how Internet defamation cases both in England and in other countries have affected how ISPs deal with defamation claims.
- To identify arguments and evidence for a change in defamation law and procedure when concerning ISPs.

- To investigate how effective defamation practice has been in its attempt for an early settlement when concerning defamation claims and the Internet.
- To identify any conflicts between the ‘notice and takedown’ procedure and freedom of expression.
- To determine what changes could be made to defamation procedure, if any, which would be appropriate to allow investigation into defamation claims regarding the Internet to continue whilst also protecting a person’s right to freedom of expression.

1.3 Structure of this thesis

Chapter 2 discusses the methods used, the approach taken in collecting the data for this research and how the aim and objectives were identified. Chapter 3 and Chapter 4 concentrate on the literature and previous research concerning this topic, discussing and examining the sources of data and the data collected during the literature review. Chapter 5 analyses the data collected during the interviews with ISPs and lawyers. Chapter 6 concludes this thesis in relation to the aim and objectives, in addition to identifying potential areas of further research.

1.4 How this research was conducted

A deductive approach was used for this research and following extensive desk research, an aim and objectives were identified from which, a qualitative study could commence and finally be validated.

The study was conducted through document analysis of defamation law, the Internet and associated law and cases. This data was then compared with the responses from the interviews conducted with experts in the field of defamation law and Internet publishing.

The focus of this research surrounds law that affects publishing in England and Wales. Where applicable and relevant to this study, case law, statutes and publications from other countries have been included. This is particularly relevant when concerning defamation law and the Internet in the United States and Australia. An actual study and comparison of defamation law and Internet publishing in other countries is, for the most part, out of the scope of this study. In essence, any such research would warrant a study of its own.

1.5 Literature search

The topic of Internet defamation indicates that research within a number of disciplines should be employed. This research draws upon research and literature from such areas as law, media, technology and social and information science. The literature that has been sourced is from commentators and researchers with differing experiences of

defamation and the Internet to produce coherent and relevant work²² accessible to multiple disciplines.

Primary sources used were legal, information and computer based journals and books, case law, statutes and associated law, associated research and finally, expert interviews. Secondary sources included media articles, news articles, so to keep up-to-date with emerging cases or relevant news and Internet forums so to observe trends and emerging cases. The majority of these sources were published from 1996 onwards, however; publications that were published prior to the Defamation Act 1996 were consulted as a source of reference and to develop an understanding of the history of defamation law and the Internet. The quality and accuracy of the material sourced was imperative to the identification of the aim and objectives and the validation of the data collected. Furthermore, by sourcing information from different disciplines this thesis hopes to provide a further understanding of the concerns that different disciplines have with defamation on the Internet, in addition to contributing to the areas where there are gaps in the research. Chapter 2.1 and Chapter 3 discuss the desk research in further detail.

1.6 Conclusion

This Chapter has highlighted the difficulties and potential problems for those who publish on the Internet, with regards to defamation law in England and Wales. It has also introduced the overall aim and objectives which this research intends to explore. This Chapter has noted the lack of recent research concerning Internet Defamation,

reinforcing the importance and relevance of this study and has discussed a number of recent highly publicised defamation disputes reinforcing the timeliness of this research.

This Chapter has also acknowledged the importance of both the right to protect a reputation and the right to freedom of expression. A conflict that is currently being amplified by the Internet, the Defamation Act 1996, the HRA, in addition to current defamation procedures and practice methods. This Chapter has also provided examples of how defamation law in England and Wales is weighted in favour of the claimant providing them with a perceived power to silence, restrict further comment and expose anonymous authors.

In this Chapter, gaps in the research associated with defamation on the Internet have been identified, all of which will be addressed further in Chapters 3 and 4. This research intends to contribute to this field of investigation by reassessing previous research and covering the areas where there has been little, if not no previous research.

As the majority of research, case law, disputes and statutes are all dated following the Defamation Act 1996, in addition to the rise in popularity of the Internet since 1996, with 36 millions users in 1996, compared to 1,504 million in 2008²³, it is appropriate that this research concentrates on the period between 1996 and 2009. Where relevant, material prior to this timeframe has been included.

The following Chapter discusses the methods employed for this research, justification as to why they were chosen and highlights the relevant literature that has been consulted.

2. Methodology

There were three key areas of consideration whilst developing a methodology best suited for this research. Firstly, was that there had been very little research undertaken on the opinions and experiences of ISPs and legal practitioners regarding defamation. The majority of material that has considered defamation on the Internet has been from commentary in newspapers, academic text, journals and finally, on website or blogs. The majority of these sources have only either been able to speculate on what issues could arise following the introduction of the Internet and the strain it places on defamation law or have only provided commentary on defamation cases. Therefore, it was important to consider all of the commentary available regarding defamation and the Internet and associated law and cases. Based on these opinions and concerns the aim and objectives could be developed and then tested.

The second consideration was the best method to collect data. Following an in-depth research into different types of research methods, interviews were decided to be the most appropriate form of data collection. Justification for this choice is considered in Section 2.4.2. Choosing the most effective method of data collection was crucial for this study. As there had been little research in this area, the majority of the literature was based on author opinions and case commentary that still needed to be tested

thoroughly. This was achieved by comparing one source of literature against another source and finally, against the interviewee responses.

The final consideration was validation of research. Again, a number of methods were considered, from which, respondent validation and comparisons with actual case law and legislation were considered the most appropriate.

The remainder of this Chapter is split into eight sections. Section 2.1 considers the philosophical approach to this research and highlights why empirical work is important to this study.

Section 2.2 discusses the desk research that was undertaken, outlining the originality of this research and how overall aim has been developed. This section also discusses the approach taken during the desk research, including, how information was sourced, how this research has been kept up-to-date and highlights the difficulties encountered.

Section 2.3 continues on from Section 2.2 discussing how the overall aim was developed and why an inductive approach was used. Justification for using qualitative methods and the authors and texts consulted, are included in Section 2.4.

Section 2.5 is separated into three sub-sections. The first part considers other related studies and their approach to their research, in addition to differences between their study and this research. Furthermore, this identifies the interviewee sample chosen, in addition to their relevance and importance to this study. The second part of this

section considers data collection methods, including the options available and the methods eventually applied.

Finally, the last part of this section discusses why interviews were used as the primary method of data collection and the texts consulted to justify its use. Furthermore, this section identifies who was interviewed, the questions used, the interviewing process and the second set of interviews.

Section 2.6 considers validation, its role and importance in this study. Furthermore, reasons are provided as to why validation was needed and how the data collected was validated.

The ethical considerations of this study are discussed in Section 2.7. This includes the areas of concern regarding ethics and this study, in addition to the texts consulted. Furthermore, observations regarding how an ethically sound study has been achieved are made. Finally, Section 2.8 concludes the methodology.

2.1 Research Philosophy

From the start of this research the experiences of those involved or affected by defamation law were imperative so to gain a further understanding of how laws were impacting online communication and publishing. This inquiry into knowledge and experience encompasses the philosophy of positivism, which in itself is a restriction of knowledge to experience²⁴.

Maykut quotes Kincheloe, who comments that:

‘Positivist research holds that science is or should be primarily concerned with the explanation and the prediction of observable events’²⁵, based on measurable variables and provable propositions²⁶.

For a positive researcher, the emphasis on experience as the true basis of knowledge is highlighted by Locke, Berkley and Hume, who all commented that there was ‘no other source of knowledge about the world than experience’²⁷.

The importance of experience as knowledge is discussed by Hammersley, who cites Mill as one of the leading pioneers of positivism. Mill conducted campaigns against those who assigned too great a role to deduction rather than empirical evidence in science²⁸. Mill commented that:

‘All knowledge comes from experience, and experience consists of sensations linked together by association. It is from sensation organised by association that an individual constructs her or his perceptions and understanding of the world. Similarly, scientific laws emerge from the observation of regularities in the patterning of phenomena’²⁹.

Hammersley comments that Mill's writings are held in high esteem and his ideas have since been developed and modified by many subsequent writers. One of which, Spencer, commented 'that all knowledge comes from sense experience' and similar to Mill that 'science requires the induction of laws from the observation of empirical regularities'³⁰.

The choice of empirical work to gain a better understanding of the affects of defamation law on the Internet is justified by a positivist approach. Evidence in Chapters 3 and 4 highlights a lack of understanding in some areas of Internet defamation, in addition for a call for further research.

2.2 Desk Research

The preliminary stages of this research focused on consulting texts that provided an overall guide to research. The texts that were used were found at Loughborough University's Pilkington Library. For this thesis, a number of books provided helpful information at the early stages of research. Moore's *How to do Research*³¹ guides the reader through an overview of the day-to-day management of a research project. The book also included chapters on qualitative research, which were particularly useful for this thesis. Ó Dochartaigh's *The Internet Research Handbook*³² and Pester's *Finding Legal Information*³³ were also consulted, predominately for their links to various resources, which both books provided. This was followed by extensive desk research.

Desk research is regarded as the base point for nearly all research projects and is what Moore³⁴ refers to as the 'basis of coherent and relevant work'³⁵. This element of research during this thesis helped to develop assumptions, which could then be tested during data collection. This particular piece of research draws some of its influence from the findings of the Law Commission's reports³⁶ as it is a significant piece of research in this field. However, its originality lies in the specific areas of research concerning the Internet and defamation, in addition to the approach taken during data collection.

It was crucial during the initial stages of research that the material used came from reliable sources. An overall aim was identified from the background research, therefore, the quality of this research hinges on the choice of material used. Not only for the development of the aim of this research, but also for the validation of the results. Where possible, the material used throughout this thesis has come from peer-reviewed articles or from books whose authors have extensive experience in their field of work or research. Whenever the credibility of the source was questionable, the material has only been used as a reference.

The desk research began with an investigation into the history of defamation law through to the enactment of the Defamation Act 1952³⁷. All of the research for this particular section was undertaken using books from the libraries both at Loughborough University and Nottingham University. Nicol³⁸, O'Sullivan³⁹ and Crone⁴⁰ in particular, provided an in-depth discussion of the history of defamation law. A study into the background and development of defamation law helped this

researcher gain an understanding of how cases and the history of defamation are still effecting defamation today.

A similar method of research was conducted when considering the history and growth of the Internet. Engel's *The Role of Law in the Governance of the Internet*⁴¹ in addition to texts by Collins⁴², Briggs⁴³, Slevin⁴⁴ and Gringas⁴⁵ provided information detailing the history of the Internet and its growth.

Following the introduction of the Defamation Act 1996⁴⁶ commentators began to question the adequacy of the Section 1 defence⁴⁷ to provide sufficient protection for ISPs. This was soon followed by the cases of *Godfrey v Demon Internet*⁴⁸ and *Gutnick v Dow Jones*⁴⁹, both of which sparked an increase in commentary regarding Internet and defamation law.

Initial searches regarding modern defamation law and cases were conducted using the facilities at Loughborough University's Pilkington Library and Nottingham University Library. Databases provided by Metalib offered an excellent resource for journal articles and other related material. In addition, Zetoc, Emerald, Lexis Nexis and Web of Science, were four other databases used during this research.

Google Scholar was used cautiously throughout the research. Caution was applied when searching for material so to maintain a high quality of sourced material and wherever possible, only to consider material that had been peer-reviewed. However, Google Scholar did help source a number of excellent resources, which have been

included in both Chapter 3 and Chapter 4. Google Scholar's policy of listing the other authors that have cited the article was of particular use.

There are a number of publicly accessible web based databases that were used to collect statutes, case law and Government reports. The British and Irish Legal Information Institute⁵⁰ is a database that was predominantly used for legal case transcripts and statutes. For European law, the Office of Public Sector Information⁵¹ provided access to applicable statutes.

For Australian case law, the Australasian Legal Information Institute⁵² database was used in connection to the *Gutnick v Dow Jones*⁵³ case, for case notes and other cases where *Gutnick v Dow Jones*⁵⁴ had been cited. Other databases used included, CanLII⁵⁵ managed by Federation of Law Societies of Canada for Canadian cases and the World Legal Information Institute⁵⁶ for American and other worldwide cases.

In December 2006, membership to the Society for Computers and Law was obtained. Access was then available to a back catalogue of journal articles and a subscription to future publications. Chapter 3 discusses the relevant articles.

With regards to Government reports, the Department for Business, Enterprise and Regulatory Reform and the Law Commission provided relevant material. Of which, more is discussed in Chapters 3 and 4.

It has also been imperative to keep up to date with new and emerging defamation cases or disputes. The majority of which, were sourced using news feed aggregators

World Defamation (powered by World News) and Google News. Chapter 3 evaluates these two services. The results of the searches are detailed in Chapter 4.

The continuing of sourcing new articles applicable to this research was imperative to this study. Two databases that provided continual email updates concerning this research were Lexis Nexis and Zetoc.

Problems encountered during the desk research

There were a number of issues encountered during the desk research. Firstly, transcripts from cases prior to the Defamation Act 1952⁵⁷ were, for the most part, difficult to locate. Nevertheless, the important pieces of dialogue from previous cases were cited in recent defamation cases, in addition to Dean's *Hatred, Ridicule or Contempt: A book of Libel Cases*⁵⁸, which proved to be particularly valuable when investigating past case law.

The second issue was the difference between defamation online in comparison to traditional publications. Although the law is the same, procedures and practice when dealing with defamation on the Internet can be very different, as is discussed in Chapter 4. Furthermore, defamation law and procedures prior to the Defamation Act 1996⁵⁹ are very different to what they are now. Legal disputes and procedures must consider EC Regulations⁶⁰, Conditional Fee Agreements and the Pre-action Protocol for Defamation, the Human Rights Act 1998⁶¹, in addition to the Defamation Act 1996⁶². Consequently texts and articles prior to 1996 were often only used as reference and as a guide to the history of defamation. To a certain extent, case law,

texts and articles prior to the introduction of the EC Regulations⁶³ were only used as a reference.

Finally, a lack of case law concerning defamation and the Internet has had the effect of publications repeating the same information. A majority of the articles only had a limited number of cases as reference and as a result, could only speculate on future judicial decisions based on these few decisions and debate on what changes should be made to current defamation law and procedure, in addition to highlighting any limitations in the law and its affect on freedom of expression and ISPs.

2.3 Developing the Aim and Objectives

The background research highlighted a number of conflicts between defamation law, procedure and practice, Internet publishing and freedom of expression. With these findings in place, an inductive approach was used and following extensive desk research, an aim and subsequent objectives were developed from which, a qualitative study could commence and finally be validated.

The material that was gathered during the desk research opened up a number of areas of potential research. These areas had had little, if no previous other research. These included possible conflicts between the Defamation Act 1996 and Internet publishing and freedom of expression, the influence that Internet related defamation cases have had on the Internet publishing industry and that current defamation procedure and

practice may be having an adverse affect on freedom of expression. From these findings the overall aim was developed.

2.4 Qualitative Approach

As previously mentioned, qualitative research has been used for this thesis. The decision to use this method has been based on its appropriateness for this particular study. As this thesis is not about charting the growth of defamation disputes on the Internet, the amount of damages awarded to those who have been defamed on the Internet or any other statistical based information, quantitative research was viewed as an inappropriate method of research. This thesis does at points discuss the number of defamation claims or amount of damages awarded to a plaintiff, but does not put this information into any quantitative form.

What this research aims to achieve is a collection of opinions and experiences of those involved in the Internet publishing industry and defamation law and the interaction between current defamation law and the Internet. Consequently, it was decided that a qualitative approach would achieve these aims.

It was imperative to be aware of all forms of research methods and to appreciate each of their benefits before deciding on which methods were appropriate for this study. As

a qualitative data collection was chosen as the most appropriate form of data collection, it has been important to support this original assumption with theory.

A number of books were consulted, which provided a background into qualitative research. Maxwell's *Qualitative Research Design*⁶⁴, Allison's *Research Skills for Students*⁶⁵, Potter's *An Analysis of Thinking and Research about Qualitative Methods*⁶⁶, Denzin's *Strategies of Qualitative Enquiry*, Seidman's *Interviewing as Qualitative Research*⁶⁷ and Silverman's *Interpreting Qualitative Data*⁶⁸ were the texts predominately used.

Potter refers to a range of definitions produced by other scholars. Of these, Bogdan and Taylor's⁶⁹ definition in particular captures the foundations of qualitative research:

‘Qualitative methodologies refer to research procedures, which produce descriptive data: people’s own written or spoken words and observable behaviour.’⁷⁰

In *Strategies of Qualitative Inquiry*, Denzin and Lincoln⁷¹ refer to qualitative research as:

‘A multi-method in focus, involving an interpretative, naturalistic approach to its subject matter.’⁷²

These texts justify the approach taken during the data collection, as the opinions and reactions to defamation law and case law are fundamental to this research.

2.5 Methodology

The concept of designing a method of research is vital to the foundations of any study.

Potter describes that:

‘Methodologies are assumptions that researchers must hold; they are strategies that lay out the blueprint for scholars who must then use the tools of methods to build the design.’⁷³

This research assesses issues concerning defamation law and practice, with regards to the Internet. Therefore, the experiences of those who have been or who are currently directly involved in defamation disputes are vital to this study. This reaffirms the decision for a qualitative approach to this study.

Before choosing which areas within the topic of defamation and the Internet to focus this study on or which methods would be best suited to this research, other previous studies were consulted. The only English-based studies to assess defamation law following the introduction of the Defamation Act 1996⁷⁴ are the two reports by the Law Commission in 2002⁷⁵. The data collection undertaken by the Law Commission included expert interviews with ISPs, in addition to questionnaires sent to legal practitioners, media companies and ISPs to discuss their experiences regarding defamation law, defamation practice and the Internet. The Law Commission did not view the return of completed questionnaires as totally successful, with just less than 40% of the questionnaires returned. However, this is arguably a good response. The

Law Commission's studies covered a wide range of issues concerning defamation and the Internet, including the liability of ISPs, the liability for online archives, jurisdiction and applicable law, contempt of court (online searches for past convictions and foreign commentary), perceived abuses of defamation procedure: 'gagging writs', 'gagging letters' and tactical targeting, HRA and issues relating to defamation procedure and finally, issues regarding conditional fee agreements and freedom of expression.

In contrast to this thesis, the Law Commission's studies considered the wider picture of defamation, which included printed publications. This study is only concerned with defamation law and the Internet, except where cases involving traditional printed publications have influenced Internet defamation disputes. Liability of online archives and contempt of court is out of the scope of this study, both of which were included in the Law Commission reports. However, despite not being a main focus within this study, online archives are discussed during this research when relevant to a topic or case. The Law Commission's conclusions and recommendations are discussed in Chapter 4.

Jurisdictional issues and case law in other countries are analysed where appropriate in Chapters 3 and 4. Justification for not providing extensive coverage of jurisdictional issues within the fieldwork is based on the ISPs and legal practitioners interviewed applying their trade in the UK and having a large majority of clients based in the UK. Furthermore, to be able to conduct a full study of defamation, the Internet and jurisdictional issues would require an extensive research of international laws,

procedures, practice and case law. Nevertheless, this issue was briefly discussed in some of the interviews.

There are three main groups involved in this study. Firstly, the users of the Internet who have been involved in defamation disputes; secondly, legal practitioners and finally, ISPs and content hosts. All three groups are interconnected under an 'umbrella' of English and European statutes and case law regarding defamation.

It was therefore vital to this study that the experiences of defamation and associated law were gathered from all three groups. Internet users who have been involved in an Internet defamation dispute has proved to be the most difficult of the three groups to collect information from, as those who have been involved in an Internet defamation dispute either declined to discuss the issue or were currently involved in a dispute, therefore, the decision was taken not to pursue this avenue of investigation. Furthermore, as material that is alleged to be defamatory is often removed once the host or ISP has been made aware of it, there is no publicity concerning the complaint. The user account can also be suspended or deleted.

One group that has not been included in this research is journalism. This research's main focus is on the law and conduits of information, in addition to the consequences on freedom of expression from the experiences of legal practitioners, ISPs and content hosts. Furthermore, this research with regards to the Section 1 of the Defamation Act 1996, concentrates on the definition and wording of a 'publisher', rather than editor and author. This is not to suggest that the opinions of journalists would not be beneficial to research involving Internet defamation. It is however, suggesting that the

impact of law and the Internet on journalism be incorporated into a separate study that could include all relevant sources required to gauge a full understanding of the impact of defamation law on journalism in the early 21st century.

2.5.1 Data Collection

The examination of data is important when investigating the patterns and trends from the past⁷⁶. Potter refers to three types of evidence gathering methods in qualitative research, these being document examination, interviews and observations. In addition, the author comments that the use of more than one type of data collection method will provide different kinds of evidence, making for richer comparisons⁷⁷.

Choosing the appropriate method for this research was quite straightforward. The advantages the technique of interviewing offered to this research in comparison to other research techniques, proved to be the most appropriate technique to be applied.

Following the decision to take a qualitative approach, all data collection options were considered. The first option was that of questionnaires. The central reason for not using questionnaires was because of a deeper insight into the experiences of the interviewees being required. The advantage of using interviews over questionnaires for this research is that specific areas can be probed further, whilst also encouraging further discussion and comparison with other collected data.

The second method considered was focus groups. In principle the idea of bringing together a group of lawyers and a group of Internet publishers or a mix of both offered

the potential to open up a productive discussion. However, practically finding enough willing participants who would have been prepared to take part in a focus group may have been difficult if one is to compare it with the number of respondents who were willing to be interviewed in comparison to those who were contacted during this research.

A way around not being able to compare the other respondents' suggestions and arguments regarding defamation on the Internet is to conduct a second set of interviews giving the interviewee a chance to debate other interviewee's comments. This approach was used during this study.

The final qualitative technique that was considered was that of observations. There are a number of ways that observation could have been used within this research including monitoring the process of making a defamation claim or how ISPs deal with defamation claims. However, after some consideration it was decided that this technique would not be beneficial to this study. The data collected for both of these examples could be achieved during the interviews. Furthermore, as a defamation claim can take a number of years to reach court, it would be impractical to observe a claim within the time frame of this thesis.

Based on these reasons, the technique of interviews was deemed the most appropriate method of data collection. In particular, semi-structured interviews were viewed as the most appropriate form of interview. This interview style is designed to probe the interviewee with open-ended questions, which would allow them to discuss a broad⁷⁸

topic such as Internet defamation. Commonly used in qualitative research, interviews are generally economical with regards to time and resources⁷⁹.

2.5.2 Interviews

Justification for using this technique is highlighted by a number of authors. In *The Interview: From Structured Questions to Negotiated Text*, the authors⁸⁰ discuss a range of different approaches to interviewing. Although interviewing techniques are not discussed, the authors consider the overall process of interviewing as well as drawing upon the work and quotes from other qualitative researchers⁸¹.

When considering unstructured interviewing, the authors commented that it can ‘provide a greater breadth of data’⁸².

Quoting Marshall and Rossman, Potter comments:

‘Qualitative in-depth interviews are much more like conversations than formal, structured interviews. The research explores a few general topics to help uncover the participant’s meaning perspective, but otherwise respects how the participant frames and structures the responses.’⁸³

Seidman comments that:

“In depth interviewing is an approach that primarily uses open-ended questions, which gradually build upon and explore the interviewees responses”,⁸⁴

The interviews conducted in this research were kept semi-structured. Justification for this is that each experience with defamation and the Internet could be different for each ISP, content host and lawyer interviewed. Therefore, each interview had to be approached in a case-by-case manner.

Two separate lists of questions were devised. The first set of questions were aimed towards the business of an ISP or content host with regards to defamation. Question areas included:

- ISP experience with defamation.
- Adequacy of the Section 1 defence of the Defamation Act 1996 and the EC Regulations.
- ISP procedures upon being put on notice of defamatory material.
- Effect on ISP procedures following the Godfrey v Demon Internet case.
- Notice and take down procedures and Freedom of Expression.
- Concern of gagging letters.
- Experience of the Pre-action protocol.
- Dealing with complaints and request for remedies.

The second set of questions were addressed to legal practitioners in the area of defamation. Areas of questioning were similar to those that were used for the ISP interviews and included:

- Lawyer's experience of defamation, both online and in print.
- Recommendations to a client in response to defamatory material (both claimant and defendant).
- Experience of the Pre-action protocol.
- Concern of gagging letters.
- Adequacy of the Section 1 defence of the Defamation Act 1996 and the EC Regulations.
- Notice and take down procedures and Freedom of Expression.
- Discussion of the ISP opinions regarding the Section 1 defence of the Defamation Act 1996.

In addition to these questions, three areas of concern arose from the first interview, which were then tested in subsequent interviews. These were:

- Concern regarding Conditional Fee Agreements and defamation.
- Increase of Internet libel cases.
- Overall reduction of libel claims and cases.

128 ISPs and hosting services were contacted for the first set of interviews. Most of ISPs and hosting services contact details were acquired from the Internet Services Providers' Association (ISPA) website⁸⁵. Others were either acquired from personal

knowledge of their business or their company's name was obtained during the desk research.

The ISPs and hosting services were contacted by email. Seven of the ISPs agreed to be interviewed, six of whom requested the interview be conducted over the telephone and one who preferred to be interviewed by way of emails. Three of the interviewees had in the past or were currently involved in highly publicised defamation disputes.

The remainder either did not reply or declined to be interviewed citing two main reasons. Firstly, that they did not have the resources to assist my study. Secondly, that they had limited or no experience of defamation law. The ISPA were also contacted, but were unable to grant any time to this study.

The contact details of the lawyers were sourced from the Law Society⁸⁶ website. Of the 137 emails sent, 10 of the lawyers gave consent to being interviewed, however, all asked for the interview to be conducted over the telephone. The remaining eight declined to be interviewed as they could not allocate any time to assist the research or that they had limited experience in the area of defamation.

Questions for both groups were revised and edited throughout the data collection process so to improve the delivery of the questions. During the introduction of all of the interviews, interviewees were asked to give their consent to the conversation being recorded and transcribed, from which quotes would be taken and used in the report. All interviewees agreed to the interview being recorded and transcribed. However, a majority asked for their thoughts and opinions to be kept anonymous.

Consequently, all interview transcripts and quotes were kept anonymous throughout this research.

The interviewees were also made aware that they could stop or have a break from the interview at any time and that they did not have to answer any questions they did not feel comfortable answering.

In addition to the experiences and opinions of the interviewees, the interviews also opened up other potential areas of investigation and research. Further defamation cases, related associations and other relevant contacts were discovered during the interview process.

The interviewer's role during this process was to encourage the interviewee to develop the discussion and investigate further, the experiences of the interviewee. All of the interviews began with a discussion of the interviewee's experience dealing with defamatory material on the Internet. This starting point helped highlight how prominent this area of law was in their business. From this discussion other questions could logically be asked at appropriate points during the interview so to keep the fluidity of the conversation continuing.

Following the first set of interviews, all interviewees were contacted a subsequent time to see if they had anything to add regarding the issues listed below. This process allowed for parts of the data collected to be validated by checking for any errors or if an interviewee challenges another interviewees opinion.

The second set of questions that were put to the ISP interviewees was as follows:

A number of ideas considering potential improvements to defamation law and procedure were discussed during the interviews. These ideas were collected and discussed with other interviewees, including:

- Legal guidelines for ISPs/hosts, which offer greater clarity on how quickly they must act to remove the material and the time allowed for investigation.
- Introduction of the roles of Internet publishers into the Section 1 defence. e.g. ISPS, Hosts etc.
- The creation of a standard digital form (similar to a 'contact us' form) for complaints to be made directly to the ISP or host that highlight elements of the Defamation Pre-Action Protocol. Example elements include, the name of the complainant, details of the publication or broadcast, including the words complained of, date and where possible, a copy or transcript of the defamatory words. In addition, sufficient evidence that the words used were in fact inaccurate or unsupportable. This should be supported by adequate explanation to enable the defendant to appreciate why the words were inaccurate or unsupportable. Furthermore, where relevant, the words that make the complainant identifiable, in addition to what damage has been caused from the words complained of. Moreover, the complainant should also address a method of remedy so that the claim can be rectified. This would allow the

complainant and ISP to rectify the issue speedily with sufficient information to base their decisions on.

- A process that allows the ISP to seek indemnity from both the complainant and the author of the alleged defamatory material. The general idea behind this method would allow the author of the material to respond within a designated timeframe as to whether or not they would like the material to be kept online and therefore taking full responsibility for any legal consequences. Upon confirmation the ISP could then respond to the complainant on their decision and if necessary seek an indemnity from them.

The same points above were also discussed with the lawyer interviewees, in addition to the following questions/issues:

- Firstly, to ask if you have any issues regarding the multi-publication rule and the Internet.
- Secondly, if you have any experience dealing with large American corporate business, with regards to notice and takedown.
- Finally, if you are aware of any high profile personalities hiring lawyers to protect their reputation on the web by having them search for material about them.

2.6 Validation of Research

Validation has been vital part of this research, particularly as the interviewees are from different professional backgrounds with differing opinions. Both the ISPs and lawyers who were interviewed all had different experiences when dealing with defamatory material, particularly lawyers who had different experiences when representing their clients, either as a defendant or claimant.

The main form of validation employed for this research was respondent validation. Respondent validation is a process of taking one's findings back to the interviewees, where they can verify the findings. Arguably, by doing this a researcher can be more confident that their research is valid⁸⁷. A researcher can discuss tentative results with the subject and refine these results where necessary. In relation to this method, Reason and Rowan criticise researchers who do not use this process because they are scared of 'contaminating their data with the experience of the subject'⁸⁸.

Validation aside, this process can also generate further data and open-up other areas of investigation⁸⁹, as it did during the discussion with the lawyers regarding the increase of Internet defamation claims.

This validation process was used in two ways. Firstly, the follow up interviews demonstrate respondent validation as all interviewees were contacted to discuss a range of issues that arose during the first interviews. In addition, during the first set of interviews, issue and opinions of other interviewees were discussed to compare similar or differing experiences, opinions or scenarios. This is demonstrated during the interview with Lawyer E, in which the interviewee discussed the issue of conditional fee agreements. The opinions of Lawyer E were subsequently discussed

with all other lawyer interviewees. Furthermore, the opinions and issues that the ISPs discussed regarding defamation law and practice were also included in the interviews with the lawyers.

During this research, interviews were combined with desk research, in particular case law and statute law. The cases of *Godfrey v Demon Internet*⁹⁰, *Gutnick v Dow and Jones*⁹¹ and *Bunt v Tilley*⁹² were used extensively throughout the data collection as references. The Defamation Law 1996⁹³, Human Rights Act 1998⁹⁴ and EC Directive⁹⁵ were also used, as too were the Law Commission reports. By combining all of these sources, it was possible to present a more 'complete picture'⁹⁶. Furthermore, the opinions and interpretations of cases and law by the interviewees could be validated against the actual law.

2.7 Ethical Considerations

Before data collection could commence, it was vital to consider any ethical issues that could arise during this research, as naivety about ethics is in itself, unethical⁹⁷. This was done in the form of a completed ethics checklist and clearance form⁹⁸. Furthermore, background research was also carried out so to consider all ethical issues that may arise during this research and to avoid any ethical pitfalls.

In *Ethics and Politics in Qualitative Research*⁹⁹, Christians refers to privacy and confidentiality as a primary safeguard against unwanted exposure and that all personal data should be concealed and only published with the shield of anonymity. In

addition, a fundamental principle when publishing any data is that it should be accurate¹⁰⁰.

Regarding interviews, Fontana and Frey¹⁰¹ comment that researchers must take extreme care not to harm anyone, emotionally or physically, during or after the interview process¹⁰². Moreover, that the ethical concerns traditionally revolve around honest informed consent about the research, right to privacy by means of anonymity and protection from harm, both physically, emotionally or any other¹⁰³.

Silverman describes a number of ethical safeguards that were put into practise during this research:

- Ensuring that people participate voluntarily.
- Making people's comments and behaviour confidential.
- Protecting people from harm.
- Ensuring mutual trust between research and people studied¹⁰⁴.

These ethical goals were achieved using ethical guidelines, in addition to thoughtful and ethically responsible research practise, as advised by Silverman¹⁰⁵.

Although this research did not involve any interviewees whom Loughborough University consider to be a 'vulnerable group', this study had to consider some very serious and important issues. Firstly, a number of the interviewees have been or are involved in a defamation dispute. Therefore, anonymity was imperative so that no connection can be made between the interviewee and the dispute in question.

Secondly, it was vital that the interviewees who set aside time for the interviews were represented fairly and accurately in this study, so not to cause any potential damage to their personal and organisation's reputation. This is another reason why opinions of all the interviewees were kept anonymous.

Finally, as the material researched was in some cases, of a sensitive nature, data protection and confidentiality were a priority. All material collected during the interviews has been kept confidential and is subject to data protection rules outlined by Loughborough University.

2.8 Conclusion

This Chapter has introduced the methods used, the rationale and theory behind these choices and the methodological literature consulted. This Chapter has also discussed the importance of validation and the ethical considerations when dealing with sensitive information, as this research has.

This Chapter has also discussed some of the limitations of this research, which are discussed in further detail in Chapter 6.9. The following Chapter considers the overall literature search and the sources of literature consulted for this research.

3. Literature Review

The aims of this chapter are to:

- Identify the variety of quality publications and commentary concerning defamation, the Internet and associated law and issues.
- Highlight the main concerns regarding defamation and the Internet.
- Identify where further research is required.
- Re-emphasise why this research is necessary.

3.1 Background

English defamation action has been developed from common law through to two significant statutes, the Defamation Act 1952¹⁰⁶ and 1996¹⁰⁷. The law of defamation attempts to protect an individual's reputation, whilst also encouraging the right to freedom of expression¹⁰⁸.

The English courts have also been influenced by the European Convention of Human Rights¹⁰⁹ (ECHR), taking into account the compatibility of defamation law with the rights protected by the ECHR¹¹⁰ and by the Brussels Regulations¹¹¹ that govern jurisdictional issues.

Concerns regarding freedom of expression and the right to a reputation are a global issue. However, this study focuses on issues that have directly affected cases, law and

defamed parties in England and Wales. Defamation cases and their decisions outside of England and Wales have had an influence on defamation cases within these borders, particularly when concerning those that are published on the Internet. Evidence of this influence is demonstrated in the citations of English defamation cases.

The combination of defamation and the Internet is relatively new and consequently, commentary on this is also new. This is essentially because of the recent growth of the Internet and as a result, defamation disputes have risen during this time. These disputes can have a devastating effect on the defamed party. The ability that the Internet has to disseminate defamatory content is like no other form of media and therefore, the effect on a person's reputation can be immeasurable. As such, this chapter discusses the damage that can be caused by the circulation of defamatory material over the Internet.

This chapter also considers international defamation laws, paying particular attention to English, US and Australian law, where there has been a number of important cases involving defamation on the Internet. Furthermore, the influences from international legislations are discussed, including The Electronic Commerce (EC Directive) Regulations¹¹², ECHR¹¹³ and The Digital Millennium Copyright Act¹¹⁴ (DMCA).

Chapter 3 is divided into 10 sub-chapters. These include the growth and development of defamation law and cases, international law and cases and the Internet. All of these factors have contributed to the growth in commentary surrounding defamation and the Internet, particularly over the last decade. The following sub-chapters detail the issues

and concerns for the introduction of the Defamation Act 1952 and the comparisons regarding the Defamation Act 1996. It was between the 1952 Act and the 1996 Act that the Internet was introduced to the public. Great things were predicted for the Internet and the ‘communication revolution’ and discussions grew amongst commentators, such as the likes of Perrit¹¹⁵ and Slevin¹¹⁶ regarding how the law should adapt to regulate it. The Defamation Act 1996 was introduced to cope with these potential issues, yet it has not been without its critics.

The regulation of the Internet with regards to defamation has been one of the main concerns amongst commentators. Defamation cases involving the Internet have sparked a great amount of discussion. This is evident in the number of articles and books published, which discuss this topic. This sub-chapter considers these issues, in addition to other laws and cases that have influenced the law in England and Wales and the government-funded research that was conducted by the Law Commission in 2002.

This chapter also includes the media reaction to defamation law and cases and the websites and newsletters that are regularly updated with information regarding defamation and associated law and cases. These sites have been an excellent source for new and developing cases and issues throughout this research.

3.2 Legal and Associated Text Prior to the Defamation Act 1996

Defamation law in England and Wales has been adapted as and when changes or growth in areas of the media have dictated so. This chapter discusses how and why defamation law was introduced in 1952 and the opinions of those who have discussed its implementation.

In 1958, in the preface of *The Law of Defamation*¹¹⁷, O'Sullivan and Brown refer to an increase of international communication and media growth through the medium of newspapers, telephones, radio and television¹¹⁸. This book was first published over 50 years ago and it is apparent that there are similarities today with regards to the growth and global development of newspapers, telephones, radio and television compared to that of the late fifties. Therefore, the ideas that are discussed by O'Sullivan and Brown could easily be applied to how the Internet has radically transformed communication worldwide.

Unlike the amount of attention that commentators have given to the Defamation Act 1996 and its application to the Internet, the Defamation Act 1952 did not provoke anything near this amount of interest. Consequently, only a handful of books were published, which were dedicated or included large sections concerning the topic of defamation. This is possibly due to the defamation action only being available to those who could afford to take action and against those who were wealthy enough to publish material to a mass audience. Furthermore, the 1952 Act did not have to deal with such a revolutionary medium as the Internet.

Publishing to a mass audience in relation to the defamation law became a concern for a number of authors. Notably, the growth of English and Welsh based publications reaching other parts of the world and the Defamation Act's compatibility with other countries' defamation laws. O'Sullivan and Brown refer to *The Report of the Committee on the Law of Defamation*¹¹⁹, which states how common law rules of libel and slander have been impaired by modern systems of broadcasting¹²⁰, commenting that:

‘A defamatory statement transmitted over the radio in a broadcast, reaching as it may an audience of many millions, is calculated to cause as much, if not more damage than a written report in a newspaper however large its circulation’¹²¹

This highlights the similarities between the concerns regarding new broadcasting and publishing media prior to the enactment of both the Defamation Act 1996¹²² and the Defamation Act 1952¹²³.

Published 37 years after *The Law of Defamation*¹²⁴, Carter-Ruck and Walker's *Carter-Ruck on Libel and Slander*¹²⁵ provides an excellent source of cases, defamation procedure and defences. Carter-Ruck and Walker observe international defamation law, whilst comparing the differences and similarities to English defamation law. Of particular interest are the author's views on the conflict of laws regarding Defamation Act 1952¹²⁶ compared with other international defamation laws. It is in this area that the authors felt places the job of a publisher, printer and

writer in a very difficult position when publishing abroad¹²⁷. This again highlights the concerns observed by O'Sullivan and Brown¹²⁸.

Following the introduction of the Defamation Act 1952, some authors reflected on case law and significant cases, which led to the Act's development. What is apparent from these sources is that the law of defamation has a rich and sometimes absurd history. There have been large intervals between the changes in the law and procedures, which has led to criticism from some commentators. Carter-Ruck and Walker's comment that long intervals without change or review may well lead to injustice when trying to strike a balance between a right to a reputation and right of the press to investigate and comment freely on public matters¹²⁹.

Published prior to the enactment of the Defamation Act 1996¹³⁰, Weir's *A Casebook on Tort*¹³¹ provides both an introduction to and the history of the law of tort. Weir described defamation as arguably one of the most difficult and oddest of all the torts. Weir commented that there was a degree of dissatisfaction with the law of defamation in England with too much protection of reputation, which imposes restrictions on freedom of expression and that England had much stricter defamation laws than other free countries¹³².

This dissatisfaction has led to a number of committees being set up to recommend improvements. The Porter Committee, which resulted in the 1952 Act and the inclusion of the defence of 'justification' and 'fair comment', in addition to 'offer to amends'. Plaintiffs were also aided by not having to prove any damage. This was followed by the Faulks Committee in 1975, which did little more than tidy up loose

ends within the Defamation Act, such as details regarding the death of either the plaintiff or defendant and details regarding who should be able to access the ‘innocent dissemination’ defence. In 1991, the Neill Committee recommended changes to the ‘offer to amends’, stating that the court should dismiss claims that have an unrealistic chance of success and that the author, editor and publisher should take primary responsibility, in addition to the introduction of a one-year limitation period to bring a claim, rather than three years¹³³.

Weir criticised defamation law because one remedy is used in order to perform three distinct functions. Firstly to claim compensation, secondly to clear their reputation of unfounded allegations and finally to repress any further abuse, commenting that only the first function is an appropriate remedy¹³⁴.

Published in 2005, Mitchell’s *The Making of the Modern Law of Defamation*¹³⁵ draws on a number of pieces of work in its discussion regarding the developments and history of the law of defamation. Mitchell agrees that the law of defamation can be seen as odd and complex, without any unifying principles, but acknowledges that individual rules to cover all potential scenarios cannot be integrated into one coherent structure¹³⁶.

Mitchell discusses *The Earl of Northampton*¹³⁷ case that has had a resonating effect on Internet publishing, particularly in the context of linking to material that may be defamatory. Prior to 1829, there was a defence for repeating words used by others, which stemmed from the 1613 case, brought by The Earl of Northampton against six defendants. Each defendant argued that they had only repeated a scandalous

imputation and did not intend to injure the claimant's reputation. However, the defence was eliminated from English law in 1829 by two decisions, firstly *De Crespigny v Wellesley*¹³⁸ and *McPherson v Daniels*¹³⁹, both of which saw the defendants repeating the defamation and naming the source. Mitchell comments that neither of the defendants' repetition was malicious and that the failure to deal with this point was both deliberate and significant. The decisions were influenced by the judgement of the 1825 case of *Bromage v Prosser*¹⁴⁰ where it was held by Bailey J that 'malice' meant intention to injure and therefore it is presumed that the person intends the natural consequences of their act. As well as being the foundations for what destroyed the principles laid down by *The Earl of Northampton* case, the decision also had a major effect on the development of the qualified privilege defence and as such, the liability of authors¹⁴¹.

A majority of books that were consulted as part of this research, but were published prior to the introduction of the 1996 Act, were for the most part used as a source of reference. These books gave details of the 1952 Act, but without going into any detail regarding any flaws or issues the author may have with it. Instead they provided a source of reference aimed at those in the publishing industry.

Two books used as reference for defamation cases and defamation history were Fraser's *Principles and Practice of the Law of Libel and Slander –With Suggestions on the Conduct of a Civil Action* (1897)¹⁴² and Dean's *Hatred, Ridicule or Contempt*¹⁴³. Fraser discusses common law up to 1897, referencing cases that are still applicable today. In addition, the author discusses defamation law in the late

nineteenth century, which were part of a very different legal landscape to what it is today.

Dean's *Hatred, Ridicule or Contempt*¹⁴⁴ however, focuses on cases before the enactment of the Defamation Act 1952¹⁴⁵. Although the majority of the cases have very little relevance today, particularly when concerning the Internet, some parts of case transcripts and backgrounds have been cited in important Internet defamation cases. This proved to be an excellent reference when researching the background behind the *Godfrey v Demon Internet*¹⁴⁶ decision.

Other texts that were used as reference for this period of law were Duncan and Rampton's *Duncan and Neil on Defamation*¹⁴⁷, which provided a general overview of English defamation law, paying particular attention to defamatory meaning and issues concerning publication. The book offers many quotes from various different defamation cases, in addition to an excellent appendix, which includes the Libel Act 1792, 1819, 1843, 1845 amongst others. The Libel Acts demonstrate how law and proceedings have evolved over the centuries. Collins' *The Law of Defamation and the Internet*¹⁴⁸, Gatley *on Libel and Slander*¹⁴⁹ and Price's *Defamation: Law, Procedure and Practice*¹⁵⁰ all provided their own discussion concerning the history of defamation and the evolution of defamation law in England.

3.3 The Internet

Bray's *Innovation and the Communication Revolution: from the Victorian pioneers to broadband Internet*¹⁵¹, charts how the Internet began as the Advanced Defence Project Agency Network¹⁵² (APRANET) in 1969, whose aim was to develop a telecommunications system that could withstand enemy action during conflict or war. The network was later used by academics in the US, who began to link their computers so to share their computing power for research. This was all prior to the development of the World Wide Web (WWW), invented by researcher Tim Berners-Lee in 1989. Bray comments that the Internet has evolved into a global service and is now of major importance to many businesses, including publishing. He also notes that the WWW was created through organic growth and not by a central authority¹⁵³. This lack of authority and control is one of the reasons why many of the laws and legal systems have been trying to catch up and adjust to these new communication developments. No single government body owns the Internet and although some countries have tried to limit its access, it is one of the Internet's greatest strengths, but also one of its weaknesses¹⁵⁴.

Bray also discusses in *The Communications Miracle*¹⁵⁵ that the social, economic and political activities in the modern world are becoming more and more dependant on how information is being stored, processed and accessed. Furthermore, that the advancements of communication technology have removed the barrier of distance and cost¹⁵⁶.

Cairncross¹⁵⁷ is in agreement with Bray, believing that with the breaking down of the barriers of international borders the Internet has enhanced certain freedoms and therefore, individuals will have to take greater responsibility of what they do and say

on the Internet¹⁵⁸. Cairncross also observes the pressures on governments to regulate and protect the Internet and its users, in particular, the distribution of media resulting in issues regarding border-breaking and the fading line between public and private¹⁵⁹. Moreover, she considers whether or not regulation is either desirable or feasible, commenting that new technology does not mean that there has to be new laws, but instead current laws should be observed and adapted where necessary. The author reiterates the point of self-regulation, e.g. that parents should filter the content their children will see or companies should monitor their employees¹⁶⁰.

Collins¹⁶¹ also provides detailed analysis of the evolution of the Internet predicting a substantial increase in the speed and the ease of communication, but also comments that any such enhancement to speed and ease of communication will present a new set of concerns, one of which will be the conflict between freedom of expression and a right to reputation¹⁶².

3.4 Human Rights Act 1998

The Human Rights Act (HRA)¹⁶³ came into force on the 2nd October, 2000 and has been described as one of the most important pieces of constitutional legislation of the 20th century¹⁶⁴. The coverage in academic books and journals regarding the HRA has tended to focus on areas such as privacy and discrimination. However, some commentators have predicted how they think freedom of expression will integrate into UK law, particularly in England and Wales where the plaintiff has always been favoured in defamation cases.

The decisions made in UK defamation cases will now be monitored by the European Court of Human Rights, who will assess if there has been any inconsistency between the granting of defamation law remedy and a person's right to freedom of expression¹⁶⁵.

An excellent source of reference concerning human rights is Hoffman and Rowe's *Human Rights in the UK: An Introduction to the Human Rights Act 1998*¹⁶⁶. The text provides an overview of the design and ideas behind the European Conventions Human Rights Act 1998, from the government published White Paper 'Rights Brought Home' in 1996, through to its inception into English Law in October 2000.

Hoffman refers to the Act as legislation that has allowed people to rethink how their right to freedom of expression is protected. In addition, the authors comment that judges will gradually review and develop laws alongside the principles of the European Convention¹⁶⁷.

In *Human Rights and the Courts: Bringing Justice Home*¹⁶⁸, Ashcroft et al agree with Hoffman and Rowe, commenting that the introduction of the HRA, specifically Article 10: Freedom of Expression, will allow the media to increase their attempts to challenge publishing restriction orders¹⁶⁹.

However, Collins disagrees with this assessment, at least when concerning defamation law. The author comments that there is unlikely to be an overhaul of long standing

principles of defamation. Referring to Eady J's comments in *Galloway v Telegraph Group Ltd*:

‘If one applies the English law of defamation properly, there should be no reason to think that the principles underlying the Convention are infringed’¹⁷⁰.

3.5 Legal and Associated Text after the Introduction of the Defamation Act 1996

Part of the reason for the introduction of the Defamation Act 1996 was a reaction to new forms of communication. With no governing body or one single controller of the Internet, the WWW has become a place for people to air their opinions to a wide and diverse audience. Consequently, this has led to more opportunities for defamation on a mass scale by those who would otherwise not be able to cause damage to a person's reputation quite so easily.

The ease of mass communication throughout the world has led to a number of disputes and legal action being taken. These disputes have highlighted areas and scenarios within Internet publishing that may threaten freedom of expression and leave ISPs open to defamation claims. Consequently, commentators in the legal and publishing sectors, in addition to scholarly authors and journalists began to discuss the conflict between the Internet and defamation law. The introduction of the HRA, The

EC Directive¹⁷¹ and other associated laws introduced in other countries, in addition to the Law Commission Reports¹⁷², have only increased the publicity and commentary regarding defamation on the Internet.

Two cases in particular opened up a global debate on whether or not international defamation laws were adequate to deal with cases involving defamation and the Internet, whilst also discussing the ‘chilling effect’ that was said to have been caused by the decisions.

The first of these case was *Godfrey v Demon Internet Ltd*¹⁷³, in which, London based physicist Laurence Godfrey, successfully sued UK based ISP Demon Internet Ltd because of defamatory messages that were posted on an Internet newsgroup hosted by Demon Internet Ltd. The second, *Gutnick v Dow Jones & Co Inc*¹⁷⁴, was between an Australian based businessman, Gutnick, who was allegedly defamed in the US based publication *Barron’s Online*¹⁷⁵, published by Dow Jones. Gutnick successfully brought the case to Australia, despite the majority of the publication’s subscribers and the publisher being based in the US. Both cases raised issues regarding multi-jurisdictional publishing caused by the introduction of the Internet and their ‘border breaking effect’. Furthermore, both cases are still leading authorities in defamation cases today. These cases are discussed in further detail in Chapter 4.

3.5.1 Legal Text

The following section observes the authors who have published their research and work in books. A major contributor to this field is Collins. The importance and quality of Collins' work is highlighted in the number of citations in other texts and articles regarding defamation and extracts from the author's work used in defamation cases. In the two editions of *The Law of Defamation and The Internet*¹⁷⁶, the author discusses the major talking points regarding the Internet and defamation law, comparing scenarios, laws and cases in Australia, USA and the UK. Collins also discusses where greater clarification in the law is needed.

Collins comments that the Internet is a medium of communication that not only provides access to global communities, but also encourages the exchanging of ideas and increases freedom of speech¹⁷⁷. However, with this increase of communication, the author does have concerns regarding the inherent cross-border communication and because of the phenomenal global growth of the Internet. In addition to the Western world's attitudes and rights to freedom of speech and expression, there is the potential for a dramatic increase in the number of multi-jurisdictional defamation cases, which could have a devastating effect on a person's reputation¹⁷⁸. Collins also comments that Internet publications have a considerable capacity to cause harm, exacerbated by the ease of which a person can republish defamatory material to a wide and geographically diverse audience¹⁷⁹. Newey highlights this also, commenting that legal systems are generally tied to a particular geographical jurisdiction, unlike the Internet¹⁸⁰.

Collins compares the potential defences available in England, Australia and the United States, whilst also considering the leading authorities concerned with Internet publishing and their application to defamation cases. The author pays particular attention to the decision of Morland J in *Godfrey v Demon Internet Limited*¹⁸¹, in which ISP, Demon Internet Limited was held as the publisher for the offensive posting on one of their bulletin boards, which they took no action to remove once they had been notified. Consequently, they could not avail themselves to the Section 1 defence of the Defamation Act 1996¹⁸², which clarifies who is responsible for the publication of defamatory material. Further discussion of the Section 1 defence is found in Chapter 4.3.2.

Collins noted the authority of *Byrne v Deane*¹⁸³ that supports the conclusion that an Internet intermediary who is aware of defamatory material and has the ability to remove the offending material will almost always be considered the ‘publisher’ for the purpose of defamation law. However, the author finds it difficult to conceive the circumstances where this case could apply to transient communications, such as, e-mail or chatting services if the ISP was being held as the publisher¹⁸⁴.

Kenyon in *Defamation Comparative Law and Practice*¹⁸⁵ considers defamation law in England, US and Australia. However, unlike Collins, Kenyon does not focus on Internet related defamation, rarely discussing them at all. Instead, *Defamation Comparative Law and Practice* observes the issues and cases central to defamation disputes in each of the countries noted. Laid out in sensible chapters, Kenyon draws upon a wide range of research on which to base his discussions.

Of particular interest to this study is Kenyon's discussion of the fall in UK defamation cases between 2000 and 2004, based on research involving interviews with judges, solicitors and barristers. The author highlights the changes in which defamation action is now processed and how current practise has reduced the number of cases¹⁸⁶.

Hooper¹⁸⁷ similarly considers the decline in defamation cases and a fall in damages awarded. He noted that in 1989 there were 34 cases heard in the High Court, with the highest amount of damages awarded being £1.5 million¹⁸⁸. This is in contrast to 1999 where only 14 cases were heard and the highest award for damages was £100,000¹⁸⁹. Recent research conducted by online legal information company Sweet and Maxwell has shown that in 2000, 96 cases reached court in comparison to 66 in 2005¹⁹⁰.

Hooper, like Collins, also acknowledges the complex problems that the Internet could produce in the areas of jurisdiction and enforcement, commenting that there is a significant difference between libels in print, compared to that of electronically accessed material¹⁹¹. Hooper also observes that the disadvantage is not always with the defendant, but also with the claimant who may want to take action against or prevent the publication of material in another country¹⁹².

Johnston, Handa and Morgan's *Cyberlaw*¹⁹³, believe that it has never been easier for a person to voice their opinions to such a wide and captive audience¹⁹⁴, but with this freedom there also comes a price. A view also shared by Oppenheim in *The Legal and Regulatory Environment for Electronic Information*¹⁹⁵. Johnston et al comment, that the Internet allows for an increased possibility for 'cheap speech'. It is with such ease that a person can publish their views that an attitude that the Internet is a no holds

barred environment can occur¹⁹⁶. This combined with free speech advocates, who believe that the Internet should be 'anything goes', has resulted in defamation becoming a leading legal issue on the Internet¹⁹⁷.

Johnston et al, provide an in-depth discussion of two very significant US cases, *Chubby v Compuserve*¹⁹⁸ and *Stratton Oakmont, Inc v Prodigy Service Company*¹⁹⁹. The authors highlight that although the court attempted to determine whether the ISP was a publisher, distributor, seller, archivist or common carrier, they failed to recognise that they could be all of these. Furthermore, the decisions discourage ISPs from monitoring their content at all, therefore making them unaware of any defamatory material. Even if the ISP does monitor the content, as Mitchell comments, the rational and conventional response for the ISP is to close down controversial bulletin boards, which consequently chills the freedom to discuss certain matters²⁰⁰.

Gringras' *The Laws of the Internet*²⁰¹ dedicates an entire chapter to tort law, including defamation. In agreement with Collins and Johnston et al, Gringras comments that the Internet encourages a spirit of unrestrained comment or discussion, which is why a high proportion of Internet cases concern defamation²⁰². The author highlights a lack of clarity regarding Internet related material, commenting that the application of the Defamation Act when combined with the EC Directive is not free from doubt. The EC Directive helps define the circumstances when an Internet intermediary should be liable for the content they did not create, but either hosted, cached or carried²⁰³.

Gringras also discusses the commercial advantages and disadvantages of vetting online forums. One advantage is the lower insurance premium and potential reduction

of defamation claims and the disadvantages include being able to offer a service that still allows an ISP to avail themselves to a defence under Defamation Act 1996 and the cost of vetting posts and reacting to complaints²⁰⁴ (as noted in the *Defamation and the Internet: a preliminary investigation*²⁰⁵).

In *Defamation: Law, Procedure and Practice*, Price and Korieh²⁰⁶ also highlight issues regarding how defamation law will affect the Internet. Observing the law of defamation from an English legal perspective and how defamation law integrates itself with modern technology and communication, the author's comment that the law of defamation should be flexible enough to be applied to all media²⁰⁷. Like Collins, they also discuss the difficulty of applying legal principles from Eighteenth and Nineteenth century cases in modern Internet defamation cases²⁰⁸.

The issue of defamation and the Internet has also captured the attention of commentators with a publishing background. The general consensus from these texts is that the Internet should be allowed time to grow and that although regulation is necessary, harsh or restrictive laws will only limit the Internet's development.

An advocate of freedom of speech, Sableman²⁰⁹ praises the Internet's inception as something that will enrich public and personal communication as well as encourage open debate²¹⁰. In addition, the author observes the developments in communication law, whilst comparing this new era of information exchange and its subsequent development of laws and ideas, with that of the 'Industrial age' and its effect on labour and interstate commerce. Furthermore, he notes how the 'Information age' will

increasingly revolve around words and knowledge, rather than that of people and materials²¹¹.

Sableman considers both arguments regarding new and old laws for new technology, but believes that until the Internet has reached its full potential, the full scale of legal issues will not have emerged. However, the author does not give any prediction to the timescale of when this potential will be fulfilled or how we will know²¹².

Slevin's *The Internet Society*²¹³, examines how the Internet has risen from its modest beginning right through to its modern day use. Slevin discusses a detailed account of the rise of the Internet and its history, which is something the author believes, is only just beginning to be written²¹⁴. Secondly, he considers the issue of globalisation and how the Internet has contributed to it and finally, ways in which nation-states have approached the issue of regulation and the Internet and the subsequent effects and success of the different methods. The author describes a battle between the evolution of the Internet and the need for some form of regulation. Regarding censorship on the Internet, Slevin believes that although censorship is sometimes justified, without an effective positive system of legislation in place that protects freedom of expression, the potential of the Internet that many have hoped for will not be fulfilled²¹⁵.

3.5.2 Employer and Business Related Books

Following the dispute between *Western Provident Association* and *Norwich Union* the issue of vicarious liability and the Internet was prominently publicised. The dispute started when a member of staff at Norwich Union sent emails falsely claiming that Western Provident was insolvent. The case was settled with Norwich Union making a High Court apology and paying £450,000 in damages²¹⁶.

With more and more companies providing access to the Internet and Intranets for their employees, the chance of one of their employees defaming another party has increased. There are a number of authors who have discussed this area of liability and the consequential risks of employees publishing online.

In 1967, Atiyah²¹⁷ commented that ‘there is no doubt that a master may be held liable for a defamatory statement published by his servant’²¹⁸, if a servant is to write a letter defaming a third person in the ordinary course of and concerning his master’s business, the master will be liable²¹⁹.

MacDonald²²⁰ comments that defamation is a serious concern for employers and that the defamed person is more likely to claim against a company who will be seen by the defamed party as having ‘deeper pockets’ to pay out compensation. The author draws reference to the vicarious libel 1997 case of *Western Provident Association v Norwich Union*, in which Norwich Union had to pay £45,000 by way of compensation because of an email that contained allegedly defamatory comments about Western Provident Association’s financial situation²²¹.

In addition, MacDonald observes the potential of a company being held liable for the publication of defamatory material by an employee, providing reference to the *Godfrey v Demon Internet Ltd*²²² and the loss of a defence under Section 1 of the Defamation Act 1996²²³. Although the book fails to go into any great depth in its discussion of the Internet defamation, it does provide a starting point for employers to observe the inherent hazards of Internet access for employees and offers an example statement for an employee handbook or Internet policy²²⁴.

Specifically aimed at the US ISP sector, Casey's *ISP Liability Survival Guide*²²⁵ provides an overview of the concerns that ISPs face and the laws that they have to be aware of. Most of the book's focus is centred on intellectual property and the Digital Millennium Copyright Act 2000²²⁶ (DMCA), but there is a section regarding defamation, in which it discusses how ISPs have to adapt in wake of the *Godfrey* and *Stratton Oakmont* decisions and the introduction of the DMCA. Casey comments that although the DMCA protects ISPs, they still have to be aware of the courts issuing subpoenas and should therefore adapt their acceptable use policies so that information can be revealed in response to any court orders²²⁷.

Pedley's *Essential Law For Information Professionals*²²⁸ provides an in depth overview of the legal concerns information professionals now have to deal with on a daily basis, with one such issue being defamation. As the book is aimed towards those in the information sector, there is discussion of ISP liability, online archives and contempt in court. In addition, the author highlights the sections within the²²⁹

Defamation Act 1996²³⁰ and Electronic Commerce Directive (2000/31/EC)²³¹ that an information professional should be aware of²³².

3.6 Academic and Associated Text

Academic articles have exposed issues regarding the Internet and defamation. Two of the earliest piece of work discussing this were Martin's *Internet Law comes of Age*²³³ and Smith's *Setting up a Website - managing the legal risks*²³⁴. These two articles were published by the *Internet Research: Electronic Networking Applications and Policy (IR:ENAP)* journal, which was one of the first and still is one of the leading publications to discuss the Internet as a powerful resource²³⁵.

Both authors make predictions and observations prior to the Defamation Act 1996. Martin correctly predicted that courts in England will approach Internet defamation cases based on the ruling from the 1837 case of *Day v Bream*²³⁶. At the time of writing this article, Martin was only able to discuss the probable legal position ISPs would be in, commenting that litigation would undoubtedly happen and only then would there be more clarity for ISPs²³⁷. Litigation did follow shortly after *Godfrey v Demon Internet*, which indeed referred to *Day v Bream*.

Smith's article was published following the draft bill of the Defamation Act 1996. Discussing legal issues faced by ISPs and website owners, the author criticises the 1996 Act's Section 1 defence as being 'not wholly satisfactory'²³⁸ in its protection of ISPs and clarifying their roles in the publication.

A valuable source of information regarding this research came from the Warwick University Law School's *Journal of Information, Law and Technology* (JILT)²³⁹. JILT is an electronic journal that has featured a number of articles concerning defamation and freedom of speech on the Internet.

For an overview of the issues surrounding defamation law and the Internet, Weaver's *Defamation Law in Turmoil: The Challenges Presented by the Internet*²⁴⁰ highlights how the introduction of the Internet is affecting defamation laws and freedom of speech, globally. Weaver, like a number of other authors, has concerns regarding jurisdiction, commenting that prior to the Internet, many countries had the freedom to define defamation within their own borders, some of which had profoundly different approaches to others. The author observed the contrasting differences in law between the US, Australia and England. The issues of jurisdiction and publishing to a global audience is very much apparent in the current legal approach taken in England, which is seen as a 'pro-plaintiff' jurisdiction and where the media must be more aware of defamation law. Liability in the US in comparison, is less of a concern to journalists because of 'pro-defendant' defamation law, in addition to the constitutional right of Freedom of Speech²⁴¹.

Weaver predicts a levelling of defamation standards because of the ease of which information can be passed across jurisdictions, via the Internet. Furthermore, he noted that the Internet has the potential to reshape many areas of modern defamation law, which may also lead to a loosening of free speech restrictions in courts²⁴².

The *International Review of Law, Computers & Technology* (IRLCT)²⁴³ is a journal that is very much focused on technology and its interaction with law. Included in this journal is Engel's *The Role of Law in the Governance of the Internet*²⁴⁴, which considers some of the same issues highlighted by Weaver, observing some of the challenges that are inherent in governing the Internet by law, such as globalisation, different and conflicting laws and cultures, libertarian attitudes of Internet pioneers who fear that government control would decrease anonymity, the speed of evolution and whether or not law can keep pace with technological advancements.

Like Weaver, Engel believes that social boundaries have been reduced and from this communities are being formed, bringing together different cultures and sometimes solidarity. It is these conditions, the author comments, which make for unfavourable conditions for governance by law²⁴⁵.

Engel too predicted a change in law and Internet regulation, commenting that:

‘Law is inherently evolutionary. It collects and even generates experiences and uses them to permanently reprocess governance.’²⁴⁶

With reference to the evolution of law, the author also commented that a deeper understanding of social awareness is needed, which would in turn lead to the revision of laws under the changed conditions created by the Internet²⁴⁷.

Burden's *Fallen Angel: Demon Faces Defamation Claim*²⁴⁸, taken from the leading journal for the development of IT-related law, the *Society for Computers & Law*²⁴⁹ (SCL), discusses the events surrounding the *Godfrey v Demon Internet* case, which the author quite rightly believed would be a talking point within the Internet community for some time to come.

Armstrong²⁵⁰, a practising libel specialist observes the recent Internet libel case between *Mumsnet*, an online meeting point for parents and famous childcare expert, *Gina Ford*. The author refers to the cases of *Gutnick v Dow Jones*²⁵¹, *Bunt v Tilley*²⁵², *Yousef Jameel v Dow Jones & Co Inc*²⁵³ and *Godfrey v Demon Internet*. In addition to the EC Directive and Defamation Act 1996, which are all prominent events regarding defamation on the Internet. The author commented that:

‘Any complaint about content must be responded to swiftly and the queried material removed’ and that ‘many argue it means that the law must currently be wrong, as it leads to a grotesque erosion of freedom of speech’.²⁵⁴

Both points are covered in the dispute between *Mumsnet* and *Gina Ford*, where the material was removed, but the dispute did not end. Further discussion of the *Mumsnet* and *Gina Ford* dispute is included in Chapter 4.

The fears and concerns of multi-jurisdictional defamation disputes came to light in *Gutnick v Dow Jones Co. Inc.*²⁵⁵. The decision sparked concern regarding the future

of Internet publishing, with some commentators fearing the end of multi-jurisdictional publishing and that it would stunt the growth and potential of the Internet. Others took a more rational view and although they saw the decision as a set back and a worry for publishers, believed changes could be made to enforce defamation law, without a global ‘chilling effect’.

Macgregor and Vincent²⁵⁶ rejected the prediction of a ‘chilling effect’, observing that although some commentators did predict that this would be apparent in Internet publishing, it has not happened. However, the authors suggest that publishers should look at ways to limit their liability by controlling the ways they disseminate their material²⁵⁷.

Kohl²⁵⁸ compares the *Gutnick v Dow Jones* with the 2002 English obscenity case *R. v Perrin*²⁵⁹. Although not related to defamation as such, the *R. v Perrin* case deals with a freely available preview site for a pornographic subscription website for which defendant Stephane Laurent Perrin, a French national resident in England was sentenced to two and a half years imprisonment. However, he was acquitted in regards to the subscription site. The similarity between the *R v Perrin* case and the *Gutnick v Dow Jones* case is that in the English Court of Appeal, Perrin insisted that major steps to creating the website were made outside England, where such publication was legal. The English Court of Appeal, similar to the Australian Court of Appeal, denied the appeal.

Kohl²⁶⁰ observes three similarities between the *R v Perrin* case and the *Gutnick v Dow Jones Co. Inc.* Firstly, is that both courts rejected the country of origin approach, as

any such change would mean drastic reform in law. Secondly, both courts refused to take Johnson and Post's argument regarding ISPs' legal accountability for worldwide publication, therefore, an ISP must comply with the law of every state material is published in. Finally, a message emerges from the two cases that mutual co-operation of foreign judgements would encourage courts to think globally rather than locally, while strengthening the effectiveness of national law, therefore, protecting ISPs from excessive claims from foreign states²⁶¹. ISPs will find it difficult to predict from which part of this legal jungle complainants are likely to emerge and that the retention of the country of origin approach to Internet related activity has a chilling effect on the online world, with both publishers and consumers losing out²⁶².

Similar to Engel and Weaver, Kohl also predicts changes in the law and questions why countries do not co-operate more to enforce each other's laws, when co-operation would have numerous benefits. The author promotes the country of origin method for dealing with complaints believing that it will reduce the legal burden on ISPs²⁶³.

Macgregor and Vincent²⁶⁴ and Saadat²⁶⁵ observe that the predicted 'demise of the Internet' has not occurred and the prediction of 'exposure for publishers' has not deterred their growth, following the *Gutnick* decision. In response to those who have promoted the idea of harmonisation of defamation law between nations, Saadat believes that the traditional rules of jurisdiction are of a sound basis for Internet regulation. Each jurisdiction has its own distinct nation and priorities, irrespective of how quickly technology advances and seemingly irrelevant national borders become²⁶⁶.

The two cases and the application of new laws have led to commentary on the difficulties that ISPs face when publishing to a global audience. There was an apparent and genuine worry regarding publishing on the Internet and the threat of lawsuits against ISPs. This led to suggestions as to how defamation law and the Internet could interact more efficiently, in addition to further predictions.

Deturbide²⁶⁷ discussed how English and US policies were effecting the balance of freedom of speech, personal reputation and promotion of the Internet. The difference in the law and subsequent protection of ISPs in the US as opposed the UK are highlighted by the author, commenting that:

‘The U.S. Communications Decency Act of 1996 and The Digital Millennium Copyright Act 1998 has exceed the scope of Government policy, where as the U.K. Defamation Act 1996 does little to recognise the Internet as a unique communications medium’,²⁶⁸

Furthermore, that legislation in the US and England have so far produced unsatisfactory results. The US has created an enormous discrepancy between electronic media and other media in comparison to England whom have not recognised the uniqueness of the Internet in its legislation and in its case decisions. The specific cases the author draws upon are, *Cubby Inc. v CompuServe*²⁶⁹, *Stratton Oakmont Inc. v Prodigy Services Company*²⁷⁰, *Blumenthal v Drudge*, *Zeran v America Online, Inc.*²⁷¹, *Lunney v Prodigy Services Company*²⁷² and *Godfrey v Demon Internet Ltd.*

Like Deturbide, Sutter²⁷³ discusses the legal position and dilemmas that ISPs are currently facing. The author criticises the lack of effort that has been made to address the situation where an ISP identifies and removes material upon the receipt of a lawyer's letter, therefore, suppressing the right to freedom of expression. Sutter's criticism is primarily directed at the Government who has yet to put a code of conduct into practise²⁷⁴.

Hendrie-Liaño²⁷⁵ highlights the same concerns as Sutter. The author, with reference to the Law Commission's *Preliminary Investigation into Defamation and the Internet*, acknowledges the case for reviewing liability of ISPs, but questioned if it can be done without restricting freedom of expression.

The balance between a person's right to a reputation and a person's right to freely express themselves was also a topic of discussion amongst commentators, particularly following the cases of *Godfrey v Demon Internet* and *Gutnick v Dow Jones*. Both of these cases highlighted how the law could be used to deter people from expressing their opinions online and how corporations and public figures could use the threat of legal action to intimidate online users. In contrast, the cases also demonstrated how easy it is to publish alleged defamatory material to a mass audience and highlighted the potential difficulties of tracing the author of the alleged defamatory material posted online. Some authors have promoted the use of pseudonyms and anonymity online as positive means of freedom of expression, without the fear of the consequences in the 'real world'.

An early commentator in this area was Lidsky²⁷⁶, who comments that the Internet has turned the ordinary 'John Doe' into a publisher, but has also turned them into potential defamation defendants. The author comments that this can allow corporate plaintiffs to intimidate critics and as a consequence, reduced the effectiveness of the Internet as a medium for public discussion. Lidsky observes that there is more to just the recouping of damages, apologies and corrections. There is also an opportunity to silence further criticism. The unveiling of a John Doe's 'cloak of anonymity' or the result of successful action will help quell future remarks by John Does. Regardless of whether or not the remarks are true, defamation action with the sole intention to suppress negative discussion will clearly have a 'chilling' effect on free speech²⁷⁷.

Rowland²⁷⁸ observed the extent of which the law goes to in order to protect anonymity and to ensure privacy on the Internet and the platform to enter into public debate without fear of reprisal. Rowland also observes what the justifications are to unmask those with online anonymity.

Lidsky and Rowland both promoted anonymity on the Internet. Rowland comments that anonymity can be both a safeguard for privacy and freedom expression and allows those in the minority to be able to express their opinions without fear. However, anonymity should not obstruct criminal investigation²⁷⁹.

With very few cases involving Internet defamation, Rowland refers to the non-Internet and anonymity related privacy cases of *A v B and C*²⁸⁰ concerning a footballer's attempt to stop the publishing of an article that had allegations of an affair between him and two women²⁸¹ and the US case of *Watchtower Bible v Stratton*²⁸², in

which the village of Stratton attempted to stop the intrusion of door-to-door campaigning by issuing permits for those who wished to take part in such campaigns. Stratton subsequently lost the case on the grounds of freedom of speech²⁸³.

Both of these cases, for very different reasons, involved the unmasking of individuals. Rowland's concern is the issue of defamation and anonymity, and the cases brought by those who try to unmask the person or persons responsible. Such lawsuits have been referred to as cyberSLAPPs²⁸⁴ (Strategic Lawsuit Against Public Participation). Rowland comments that where evidence of defamation has been proven, no different standard should be applied from that of printed media, however, the preservation of anonymity should be kept so to harbour open debate and free speech²⁸⁵.

The author also comments that when the use of anonymity poses a serious and identifiable threat, then there is justification for taking action using appropriate rules to deal with the circumstances. However, if there is no such threat, then there is no overriding reason why the anonymity of the party involved should not be default²⁸⁶. This view is also shared with Naples and Maher in *Cybersmearing: A Legal conflict between Individuals and Corporations*²⁸⁷. They add that until there is a remedy for this issue, there will continue to be a struggle between the balance of free expression and legitimate corporate interests.

Naples and Maher also agree with the work of Weaver²⁸⁸, commenting that there will always be a struggle to balance free expression with legitimate corporate interests and until such time, freedom of expression will most likely prevail²⁸⁹. This observation is based on the current trends in 'cybersmear'²⁹⁰ cases, where the lawsuit is brought

against the defendant with the purpose of unmasking their anonymity, before deciding whether to continue to trial. However, such cases are still surfacing, such as *Sheffield Wednesday Football Club Ltd & Ors v Hargreaves*²⁹¹ and the dispute between Alisher Usmanov and Craig Murray, both of which resemble ‘cybersmear’ and ‘cyberSLAPP’ cases, respectively. Both of these cases are discussed further in Chapter 4.2.6 and Chapter 4.6.1, respectively.

A major concern to Internet publications is that of the multiple publication rule. Yet, very few commentators have discussed this area. Russell and Smillie²⁹² is one such publication. Believing that freedom of expression is the cornerstone of a modern democratic society, the authors comment that any online defamation case will have this very principle at the heart of the case. With regards to the multiple publication rule, the authors believe it to be ‘ill conceived’ and forces online publishers, particularly the press, to err on the side of caution.

Similar to other authors who hold the Internet as a special platform for freedom of expression, Russell and Smillie believe that the multiple publication rule clearly undermines not only the principle of freedom of expression, but also the full potential of the Internet as a forum to publish material²⁹³.

Other articles of relevance to this area of study include Joyce’s article²⁹⁴, which discusses *Jameel and Others v Wall Street Journal Europe Sprl*²⁹⁵ and the application of the *Reynolds* privilege defence. This is a defence which the author believes has the advantage of adapting to particular circumstance, but has the disadvantage of being

unpredictable in its application. With particular reference to Internet defamation, the author refers to the judgment made in the case, which stated that:

“Until very recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True but trivial intrusions into private life were safe. Reports of investigations by the newspaper into matters of public concern, which could be construed as reflecting badly on public figures, domestic or foreign, were risky. The House attempted to redress the balance in favour of privacy in *Campbell v MGN Limited* and in favour of greater freedom for the Press to publish stories of genuine public interest in *Reynolds v Times Newspapers Ltd*”²⁹⁶

Joyce concludes that this case has had a substantial impact on all engaged in responsible journalism and that lower courts must be aware of the new landscape of public interest defence and recognise that occasions when the public interest justifies publication will be more frequent than may previously have been thought²⁹⁷.

Morgan²⁹⁸ reviews the cases of *Bunt v Tilley*²⁹⁹ and *Al Amoudi v Brisard*³⁰⁰. In the 2006 case of *Bunt v Tilley*³⁰¹, the plaintiff took three individuals and their respective ISPs to court. Morgan also probes *Al Amoudi v Brisard*³⁰², in which a French national posted comments on a Swiss website comments relating to an Ethiopian businessman, who had a home in London. The case was brought before an English courtroom. However, the defence successfully argued that there was no proof that the content had actually been downloaded and therefore, no publication.

Morgan concludes that the effect of the two decisions should discourage claimants from outside the UK using English courts, but also makes the claimant responsible for providing evidence regarding how many times the material was downloaded³⁰³.

In 2005, The American Bar Association (ABA), the largest voluntary professional association in the world offering legal education and programs to assist lawyers and judges³⁰⁴, produced a report comprising of four articles titled *Cybersmear: It's What The is For, Right?*³⁰⁵. Two were particularly relevant to this study.

Firstly, Fox's *Jurisdiction and Choice of Law Issues*³⁰⁶ takes a predominantly American view on the challenges jurisdictions and the Internet has had on law and the courts. A number of cases surrounding the evolution jurisdiction issues, including two important cases. Firstly, *Burger King Corp v Rudzewicz*³⁰⁷ paved the way for a defendant not being able to avoid personal jurisdiction 'merely because the defendant did not physically enter the forum state'³⁰⁸. The case was then cited in the trademark infringement case *Zippo Mfg. Co. v Zippo Dot Com*³⁰⁹, which in turn has been applied to many cases since, particularly the sliding scale test that was used in the case to determine the level of interactivity and commercial nature of the website³¹⁰.

The second article is Barber and Gallagher's *Subpoenaing Internet Service Providers to Identify Internet Speakers*³¹¹. The article is an informative discussion of the American legal procedures during cybersmear cases, as well as the history of such cases. In addition, the article observes the position of the content host, company or person smeared and the person who has committed the cybersmear, in particular those

who hide their identity. The article also points to other reports for further reading as well as important US cybersmear cases.

Wainma³¹² and Patten³¹³ cover the growth and potential of blogs, but also the risk factors involved in blogging. Wainman in particular believes that as more and more people take up writing online, there will be more high profile cases of bloggers in court³¹⁴.

3.7 The Law Commission Reports

The most recent Law Commission study was carried out in 2002 when The Law Commission was asked by the Lord Chancellor's Department to undertake a study into the perceived abuse of defamation procedures, specifically whether or not "gagging" writs and letters are a problem in practise, in a report titled *Aspects of Defamation Procedure: A Scoping Study*³¹⁵. This was shortly followed by the *Defamation and the Internet: A Preliminary Investigation*³¹⁶, an investigation into how the law of defamation and contempt in court was affecting Internet communication

The studies blended quantitative and qualitative methods of research. Questionnaires were sent to solicitors, barristers, newspapers, broadcasters, online publishers and ISP's and expert interviews were carried out with ISPs and Internet publishers. This became the first Government investigation into defamation law since the introduction of the 1996 Act³¹⁷ and the rise in popularity of the Internet.

Although the number of questionnaire responses was good (13/30 for the *Aspects of Defamation Procedure: A Scoping Study* and only 11/31 for the *Defamation and the Internet: A Preliminary Investigation*), The Law Commission felt that the number indicated a lack of interest or concern dealing with the subject. Both online publishers and ISPs raised concerns, such as ‘gagging letters’, yet these were dismissed in the conclusions made by The Law Commission. This may have been due to the lack of respondents.

The investigations did offer a number of advisory points. Firstly, that the defence available under section 1 of the Defamation Act 1996³¹⁸ ought to be examined and that the legal position of ISPs requires clarification³¹⁹. It also recommended an extension of the innocent dissemination defence, with clear guidelines for ISPs.

Despite the advisory notes and recommendations The Law Commission made, their research was not free from criticism. One of first to criticise the Law Commission was Pounder³²⁰. He complained that The Law Commission ‘gave up the ghost on the Internet’ by recommending that no action be taken at this present time as any solution would require an international treaty and a greater harmonisation in defamation laws.

The majority of the objectives within this research consider the criticism made against the reports, in addition to the findings from the two reports. This research reevaluates the some areas which the Law Commission reviewed, in addition to areas that were omitted.

3.8 Non-Government Research and Reports

The one non-Government report of note to deal with defamation and the Internet is Article 19's *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*³²¹. Formed in 1987 in the UK, Article 19 take their name from Article 19 of the Universal Declaration of Human Rights³²², which states:

‘Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers’

As a human rights organisation, Article 19 monitors, researches, campaigns and publishes on behalf of freedom of expression wherever it is threatened. The report presents a set of principles that aim to set out an appropriate balance between freedom of expression and to the protection of a reputation. The report was submitted to the House of Lords regarding The European Commission's Proposal for a Regulation of the European and Council on the Law Applicable to non-Contractual Obligations (Rome II) focus on defamation. The report addresses the proposed regulation with suggested alterations. These suggestions take into consideration the current onerous position that ISPs are in and puts forward a proposal that would provide an opportunity to clarify their position in multi-jurisdictional defamation suits³²³. The Rome II treaty currently has no regulations regarding defamation.

3.9 Conference Papers

The annual Defamation Conference held in London is the principal conference dedicated to libel, slander, associated laws and cases, presented by expert speakers within legal practices and media companies. In 2006, Parkes³²⁴ and Amato³²⁵ presented two articles concerning Internet defamation.

Parkes, discussed a number of areas within defamation law that have developed in 2005. The first of which considers how the impact of the *Reynolds* privilege and Civil Procedure Rules' (CPR) case management are cutting down the length of hearings and reducing costs, whilst also reducing the need for trial by jury. He also discussed the decision in the Canadian case of *Bangoura v Washington Post*³²⁶ in which, libel action against an online publication (of which all website 'hits' by the plaintiffs lawyer) and seven hard copies of the article in Ontario, six years after its original publication. The Ontario Court of Appeal held that there was no significant connection between the plaintiff and Ontario³²⁷ and as a consequence struck a blow to potential 'forum-shoppers'.

Parkes also observed the drop in cases reaching court, commenting that the current trends in defamation claims dictate that between May 2000 and May 2005 defamation claims reaching court had dropped by a third, however, the number of claims had risen³²⁸.

Amato³²⁹ provided an overview of the problems concerning defamation and the Internet, in particular the risks that Internet publishers are exposed to in regards to

foreign jurisdictions. She also observed the ‘Rome II’³³⁰ proposal for a uniform choice of law within the EU, an area that has been heavily criticised because of its two proposals regarding choice of forum. The Commission of the European Communities has since omitted the provisions for claims for infringement of personality from the latest proposal. Whether it is included again is as Amato states, something that remains to be seen³³¹.

Amato discussed the most recent ISP related defamation case, *Bunt v Tilley*³³². The case concerned the posting of alleged defamatory comments by three users in an Internet chat room. Because of the passive role that the three ISP defendants had in the posting of the comments, they asked for a summary judgement and a strike out. The ISPs were found to have a complete defence under the Section 1 defence of the Defamation Act 1996³³³, as they had not been put on notice about the allegedly defamatory comments. Furthermore, they were protected under Article (2) of EC Regulations ‘mere conduit’, ‘caching’ or ‘hosting’³³⁴. A decision that Parkes³³⁵ believed to be reassuring for ISPs in light of the *Godfrey v Demon Internet Ltd*³³⁶ case.

The Law for Journalists conference held on 2nd December 2005 also acknowledged developments with the field of defamation and the Internet. Browne³³⁷, a member of the Queen’s Council, observed current Internet libel cases and in contrary to Parkes, the increased potential for plaintiffs to ‘forum shop’. Browne also acknowledged the Law Commission reports and agreed that issues regarding Internet defamation cases will not be solved within the short to medium term and until this matter is rectified issues relating to Internet publications will continue to be controversial³³⁸.

3.10 News, Media, Newsletters and Legal Discussion Groups

The Lawyer³³⁹ website, the online support for The Lawyer newspaper and their respective newsletters, boasts that it is the most authoritative source of legal news in the UK, with a catalogue of 35,000 articles online, which have been taken from the newspaper³⁴⁰ and written by professional legal journalists making the website such a powerful resource for searching defamation news. The Lawyer's newsletter was important during this study as it provided news of worldwide cases.

TheLaw.com³⁴¹ and its newsletter provided news via email, with access to 20 award winning national and regional legal publications, highlighting defamation cases and legal updates³⁴². The newsletter acted as an aggregator of legal issues and news.

The World News³⁴³ World Defamation³⁴⁴ website was used extensively during this research as it provided news headlines for issues regarding defamation, from different news sources. Each search of the news archive provided a list of articles in date order and then displayed the results of the topics or stories from the different news sites. This allowed for comparisons to be made between different reports from different news sources and authors.

In a similar manner, Google News³⁴⁵ harvests news articles from more than 4,500 English-language news sources and groups them according to personal interest. Each article is ranked on how often and what sites the news story appears online and is then sorted without any regard to political viewpoint and ideology³⁴⁶.

Guardian Unlimited³⁴⁷ has published a number of articles regarding Internet defamation. Where this site excels is in its quality of material by authors with a wealth of expertise, including articles by authors, who have had first hand experience of Internet defamation. Wall³⁴⁸ discussed the effects of posting false comments or jokes on message boards. She writes from personal experience of when an ‘off-the-cuff’ remark on an Internet message board resulted in her receiving a letter from the defamed party’s solicitors and international press coverage of the story within days of posting the comments³⁴⁹.

Other articles that have been used in this study include, *Childcare Expert Threatens to Have Website Shutdown*³⁵⁰, *Mums The Word From Now On*³⁵¹ and *Warning to abusive bloggers as judge tells site to reveal names*³⁵². The Guardian has over the past three years consistently produced excellent articles, including coverage of the disputes between Mumsnet and Gina Ford, *Bunt v Tilley*³⁵³ and *Sheffield Wednesday Football Club Ltd & Ors v Hargreaves*³⁵⁴. More recently, the newspaper has highlighted the issues of ‘libel tourism’ in such pieces as *MPs Demand Reform of Libel Laws*³⁵⁵ and *British Libel Laws Violate Human Rights, Says UN*³⁵⁶.

There were also a number of other sites that were used to monitor information regarding this topic of study. The Register³⁵⁷, BBC Technology News³⁵⁸ and ZDnet³⁵⁹ were all used for up-to-date news and articles on technology, law and media.

The topic of defamation on the Internet has been discussed on occasions across a number of different forums and discussion groups. Swarb³⁶⁰ has a dedicated thread for

information and general discussion regarding defamation. The thread itself consists of regular contributors, in addition to new members who have defamation queries. Members of Swarb are able to open a debate and discuss new laws affecting defamation, cases and disputes. Users seeking advice following being defamed or facing libel action can put questions to experts and lawyers, who in turn respond offering advice. The disputes and advice that are discussed on this site have helped identify the increasing problem of online libel and the variety of ways that these disputes begin. It has also highlighted how people have dealt with a dispute.

3.11 Conclusion

It is apparent that around the time of the introduction of the Defamation Act 1952, different forms of communication, notably radio broadcasting, television and newspapers were growing in popularity. As a form of regulation, the 1952 Act was introduced to deal with defamatory issues arising out of these mediums. However, there has been a degree of dissatisfaction with the law, with some commentators believing that there is too much emphasis on a person's reputation and little on freedom of expression. Furthermore, cases that are over 100 years old, are still relevant as part of common law. There was also a concern regarding publications reaching overseas jurisdictions, which had different or incompatible defamation laws to that of the UK. Very little has changed in this respect following the introduction of the Defamation Act 1996. Common law still refers to cases from the 19th and 20th centuries, despite the law having to deal with modern communication methods, highlighted in *Godfrey v Demon Internet* and *Gutnick v Dow Jones*.

The introduction of the Internet has highlighted the issue of publications being downloaded in other jurisdictions. A concern that was increased following the *Gutnick v Dow Jones* case. This ruling highlighted that just about anyone could be sued in any jurisdiction, given the appropriate circumstances. *Godfrey v Demon Internet* also demonstrated how vulnerable ISPs are to libel lawsuits.

The mid-1990s saw the start of an increase of literature concerning defamation, which highlighted a number of concerns between the interaction of law and modern communication mediums. The Internet is one of the primary reasons for this increase of literature.

The literature review highlighted three key areas for potential research and further investigation. What is interesting about these three areas is their uniqueness, yet each has common issues integrated within them.

1. *There are apparent concerns for the protection of ISPs and online publishers particularly for material that they did not know about or create and for material they have published across multiple jurisdictions.*

Godfrey v Demon Internet has arguably left ISPs with little choice other than to co-operate with the complainant when they have notified of potentially defamatory material on their system. However, the extent of this problem is undetermined. It is apparent that ISPs are subjected to the role of ‘judge and jury’, where they have to decide whether the material in question is in fact, defamatory.

Defamation law dictates that an ISP can be held as the author, editor or the publisher of the defamatory material. These are all roles that an ISP can arguably undertake in the course of their business. This highlights a lack of clarity in the law when concerning Internet media. Crucially, an ISP may have a defence if they can prove that they had no prior knowledge of the material. This therefore opens up a debate on whether an ISP should monitor third party content or not and consequently, if an ISP edits the material, are they breaching freedom of expression.

Finally, *Gutnick v Dow Jones* highlighted the issues of publishing in multiple jurisdictions. The breaking down of national borders via the Internet has opened ISPs up to a potential quagmire of legal scenarios. The multi-publication rule for defamation means that for those who make material available in the UK or Australia, where this rule applies, could face legal action in either of those jurisdictions, regardless of the origin of the publication. The *Gutnick v Dow Jones* highlighted this.

2. *Recent developments in procedures have had a profound effect of defamation practice. Furthermore, defamation practice shows a fall in defamation cases, but a rise in defamation claims.*

Conditional fee agreements, the pre-action protocol and the notice and takedown procedure, are all recent developments in defamation procedure. Of the three, only the notice and takedown procedure has had any significant coverage with regards to its effects on freedom of expression and the number of claims reaching court. However, the principles behind the pre-action protocol and conditional fee agreements, which

are discussed in further detail in Chapter 4, have yet to be researched in terms of their effects on freedom of expression on the Internet and the rise in defamation claims.

3. Freedom of Expression on the Internet

There is evidence to suggest that current UK defamation law is weighted too heavily on the side of reputation and it is not compatible with the HRA. Furthermore, ‘gagging letters’ and the removal of pseudonyms has been criticised for breaching a person’s right to freedom of expression. Despite this criticism, there have been no suggestions made as to how a balance could be struck between freedom of expression and a right to a reputation, particularly when concerning the Internet.

This literature review has identified a number of concerns regarding the topic of defamation on the Internet, furthering the argument that research is required. Previous research, excluding the Law Commission’s studies, has only considered associated law and cases. There has yet to be an in-depth study that has focused solely on Internet publishing involving the major stakeholders with an aim to provide a deeper analysis of the problems and concerns regarding defamation on the Internet.

In Chapter 4, the cases, law and research that have shaped how defamation on the Internet is handled are considered in further detail. It provides a greater understanding of the problems faced by ISPs, their customers, lawyers and the consequential effects on freedom of expression. It is from this analysis that the interviews could be designed and tested, with the results presented in Chapter 5.

4. Defamation Law and the Internet

4.1 Introduction

The Internet is a relatively new method of communication compared to traditional methods, such as newspapers and television broadcasts. Despite having been developed over a number of decades, the Internet has only been used by the general public for about 15 years. Defamation law, in comparison, is an area of law that has been present in society for many centuries as a way of restoring any damage caused to one's reputation. In its short history, the Internet has gone through a number of changes, this is unlike defamation law which has undergone much fewer changes in its long history. Chapter 4.2 observes the history and development of both defamation law and the Internet. This section also highlights how the Internet has created new issues concerning defamation law, in addition to how the Government is attempting to regulate online content.

In reaction to the use of the Internet, a number of statutes have either been reformed or new ones introduced. The Defamation Act was reformed in 1996, following its initial introduction in 1952. The Section 1 defence of the Defamation Act 1996³⁶¹ was introduced in an attempt to apply the common law defence of innocent dissemination. When defamatory material is published online, the Section 1 defence applies the

traditional defence of innocent dissemination. Chapter 4.3 assesses whether the Section 1 defence has made sufficient distinctions between traditional publishing and Internet publishing. Furthermore, this Chapter questions whether the Section 1 defence provides sufficient protection for ISPs and content hosts. In addition, this section also considers any problems an ISP may have when trying to avail themselves to a defence.

The UK is also subject to regulations enforced by the European Convention and the European Union. The Human Rights Act 1998³⁶² was introduced to provide guaranteed rights and freedom, including freedom of expression. The Electronic Commerce (EC Directive) Regulations 2002³⁶³ aims to ensure the free movement of information society services, thereby, encouraging e-commerce across European states. Chapter 4.4 assesses the extended protection ISPs have under regulations 17-19 of The Electronic Commerce (EC Directive) Regulations 2002³⁶⁴. The second part of this Chapter assesses the impact of the HRA³⁶⁵ on defamation law and whether current defamation proceedings and practice are compatible with Section 12: Freedom of Expression of the Human Rights Act³⁶⁶.

Chapter 4.5 considers the role and responsibility an ISP has in the distribution of defamatory material. Furthermore, this section also assesses how case law involving defamatory material has affected how ISPs deal with defamatory material on their systems. The final part of this section observes how the US has dealt with the distribution of defamatory material on the Internet and the issues that have arisen from their approach, in comparison to England.

*Godfrey v Demon Internet Limited*³⁶⁷ has been cited by numerous commentators as being one of the most important cases in England concerning defamatory material on the Internet. It was the first case to deal with the actions of an ISP upon the notice of alleged defamatory material and has been cited in other Internet related cases in England and in other jurisdictions. One such case is the Australian case of *Gutnick v Dow Jones*³⁶⁸. In addition to publishing defamatory material, the case also addressed jurisdictional issues, as the defendant and plaintiff were both based in different countries.

Chapter 4.6 assesses *Godfrey v Demon Internet Limited*³⁶⁹ and the impact the case has had on how ISPs handle defamatory material on their servers and other defamation disputes. This Chapter also assesses the impact of *Gutnick v Dow Jones*³⁷⁰ on defamation disputes. Finally, observing the opinions and attitudes of international courts towards defamatory material on the Internet.

The introduction of Conditional Fee Agreements (CFAs) has made litigation available to those who would not normally be able to finance the privilege of attempting to restore their reputation. In 1999 the Civil Procedures Rules were established as a way of reducing the costs and delays in civil cases. Part of the Civil Procedure Rules is the Pre-Action Protocol for Defamation. The protocol aims to provide those involved in a defamation dispute with an early and cost effective method of settling a claim. Chapter 4.7 investigates how both CFAs and the Pre-Action Protocol for Defamation have been integrated into defamation practice. Furthermore, this Chapter will assess whether either of the two procedures are having an adverse affect on freedom of expression.

Chapter 4.8 concerns the 2002 Law Commission reports ‘Aspects of Defamation Procedure: A Scoping Study’³⁷¹ and ‘Defamation and the Internet: A Preliminary Investigation’³⁷². This chapter considers the Law Commission’s results, conclusions and future developments that may arise from their recommendations.

Chapter 4.9 charts the recent developments in defamation law since the law commission reports were published, including the Department of Trade and Industry’s paper entitled The Electronic Commerce Directive: The liability of Hyperlinks, Location Tool Services and Content Aggregators³⁷³, the Rome II treaty and the Government’s reaction to the Law Commission’s reports. This section assesses each of these areas and how they may have an important role in the regulation of Internet content in the near future.

4.1.1 Objectives

With reference to the overall aims and objectives of the thesis, an understanding of defamation law and practice, defamation cases, associated law and cases, the development of Internet and examination of previous studies regarding Internet defamation was required. Particularly, regarding how all of these areas interact and the subsequent problems or issues arising from this. Based on these issues, further justification for the importance and timeliness of this thesis can be achieved. The key objectives of this chapter are:

- To gain an understanding of the problems of enforcing regulation on Internet content.
- To analyse the protection available for an ISP when involved in a defamation dispute.
- To investigate what impact defamation cases have had on the regulation of Internet content and the right to freedom of expression.
- To analyse the recently introduced defamation procedures in England.
- To examine previous Government reports concerning defamation and the Internet.

Books, journal articles, case law, news articles, publicised defamation disputes, conference presentations, Government reports, and legislation in England and abroad have supported a majority of material discussed in this chapter. A summary of findings will be included at the end of the chapter.

4.2 History of the Internet and Defamation Law

The Internet has been a communication revolution, but for all the benefits it has provided for its users, there are a number of issues that have proved difficult to regulate. The best-known issues include the distribution of child pornography and

obscene material, data protection and theft (identity and financial). However, one area of law that has been less publicised is defamation.

The most recent changes to defamation law came with the Defamation Act 1996³⁷⁴. In addition, the introduction of the EC Directive 2002³⁷⁵ and the Human Rights Act 1998³⁷⁶, have both had an impact on defamation proceedings regarding the Internet. However, there are two broad contrasting opinions regarding how effective the law has been when attempting to govern Internet defamation. There is an attitude that the law applied to Internet-related defamation disputes should be no different to that of the law applied to traditional media. Therefore, the Internet should not be subject to any exclusive defamation law or regulations. The opposing view is that the Internet should not be governed by the same rules that are applied to traditional media.

Arguments that oppose defamation on the Internet being governed by the same laws that are applied to printed libel stem from the criticism that defamation law in England is out of date and ineffective for new communication technology³⁷⁷. Their argument is that current defamation law does not protect those who play a passive role in Internet communication adequately and as a result, the right to freedom of expression is restricted. Rulings and settlements in defamation cases in the England, in addition to decisions in Australia and US have been criticised for not embracing the uniqueness of the Internet in its early stages.

These arguments highlight that the law of defamation in England may be out of date and that case law based on decisions over 100 years old should not have any place in modern defamation law.

4.2.1 Defamation Law

The law of Defamation is part of the law of tort, which originates from the French origin 'Avoir Tort', meaning 'to be wrong'. To commit a tort 'faire un tort' is to wrong or injure someone. This is a breach of duty, of which one person owes another person³⁷⁸. The aim of the law is to strike a balance between the private right to protect one's reputation with the public right to freedom of speech. Scutton J described this in *Youssouf v MGM Picture Ltd*³⁷⁹:

'The law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit'³⁸⁰.

In contrast, Littledale J commented in the case *McPherson v Daniels*³⁸¹:

'The law will not permit a man to recover damages in respect of an injury to a character which he does not ought not to possess'³⁸².

If a person or organisation's reputation is brought into contempt, disrepute or ridicule, they may choose to sue those who have published the false and malicious comments³⁸³. Consequently, every person involved in the publication of the defamatory material, is prima facie, liable in respect of that publication³⁸⁴. Moreover,

when filing a complaint, it is the job of the plaintiff's lawyer to include every cause of action as well as everyone involved in the publication³⁸⁵.

It is relatively easy for a defamation claim to be brought and subsequently prove that the publication was written about the plaintiff. However, it can be a difficult task for the defendant to avail themselves to a defence. In *Sadgrove v Hole*³⁸⁶, Smith J held that:

‘For the plaintiff to succeed in the action they must prove a publication of and concerning him were libellous matter, and if he does not satisfy the onus of proof which is on him in this respect there is no cause of action’³⁸⁷.

In order to establish a claim of defamation, a claimant must prove that the defendant was responsible for the publishing of the defamatory material. The material must be reasonably understood to refer to the claimant by name or other means of identification³⁸⁸. The law presumes that the defamatory words are false and it is therefore the responsibility of the defendant to prove that the words are true³⁸⁹.

It is not defamatory to identify a person as the subject of a previous defamatory statement, even if it lowers the estimation of that person to others³⁹⁰. In *Cassidy v Daily Mirror*³⁹¹, Russell J said, ‘liability for libel does not depend on the intentions of the defamer, but on the fact of defamation’³⁹².

It is the opinion of the right-thinking members of society to judge whether the statement in question would cause others to shun or lower their opinion of the subject. If the right-thinking members of society believe that they would think the worse of the defamed party, then the statement is regarded as defamatory³⁹³.

If an author publishes defamatory material unintentionally they can still be held liable unless there is a sufficient amount of proof that it was not due to a lack of care on the author's part³⁹⁴. However, there is no publication where the defamatory statement cannot be understood. Therefore, material that is in a foreign language or in any form of code that cannot be understood will not be held to be liable³⁹⁵.

There have been numerous judicial attempts to define what is defamatory. A common definition that is now given to juries is 'one that tends to make reasonable people think the worse of the claimant'. Another definition is 'words which cause a person to be shunned or avoided'³⁹⁶.

The law of defamation casts a wide net of liability over all who have been part of the communication of the defamatory statement. This applies to those who have only played a limited and sometimes unknowing role in the publishing of the defamatory content. Moreover, the term 'publisher' is not limited to its popular meaning³⁹⁷.

When faced with a claim of defamation, a defendant has a number of defences available. However, the only complete defence in English law is truth, even when the publication's intention was to injure the plaintiff³⁹⁸.

4.2.2 History of Defamation

The law of defamation in England has always been firmly rooted in its historical origins and has rarely been developed unlike other areas of common law³⁹⁹. Consequently, there is an opinion amongst some commentators that the courts have struggled to deal with defamation issues concerning technological advancements⁴⁰⁰.

There are differing opinions regarding when the law of defamation was first created. Crone believes the origins of the law date back to as early as the Ninth Century when King Alfred the Great ruled that slanderers should have their tongues cut out⁴⁰¹. Nicol is of the opinion that ecclesiastical courts created the law of defamation in the Eleventh Century, when, in the village of Murdoch, stocks would be used for those who disobeyed the injunction of Leviticus:

‘Thou shalt not go up and down as a tale-bearer among people’⁴⁰².

The first defamation statute came into force in 1275, creating the offence ‘Scandalum Magnatum’. The statute’s aim was to protect the men of the realm against the embarrassment of stories that might arouse people against them⁴⁰³.

It was during the term of the Star Chamber (an English court of law, before it was abolished in 1641) that the civil action for libel was permitted. Prior to this the traditional method to redress any damage to reputation was to duel. As a consequence,

the courts became inundated with libel cases, most of which were brought by noblemen⁴⁰⁴.

Between the Nineteenth Century and the beginning of the Twentieth Century, common law was re-fashioned to suit the class system and social movement of the Victorian era. Damages were awarded with respect of a person's real value, a method that decided whether or not the claimant was a 'real' gentleman. Judges made a presumption that any allegation that would damage a person's reputation in a 'right-minded society', must be false. This reversed the burden of proof and caused the accusers (notably the emerging popular press) to be especially cautious. It was from this point that defamation law began to become heavily weighted towards protecting reputation, rather than freedom of speech⁴⁰⁵.

Also during this period, definitions of defamation were beginning to be devised. In the 1840 case of *Parmiter v Coupland*⁴⁰⁶, Baron Parke defined a defamatory statement as one that injures someone's reputation by exposing them to 'hatred, contempt or ridicule'⁴⁰⁷. Cave J later defined defamation as 'a false statement about a man to his discredit' in the 1882 case *Scott v Sampson*⁴⁰⁸.

Lord Aitkin devised an alternative test in the 1936 case *Sim v Stretchby*⁴⁰⁹, asking 'would the words tend to lower the plaintiff in the estimation of right-thinking member of society generally?'⁴¹⁰. In 1975, the Faulkes Committee on Defamation proposed the definition of:

‘Defamation shall consist of the publication to a third party of matter which in all circumstances would be likely to affect a person adversely in the estimation of reasonable people generally’,⁴¹¹

In 1958, O’Sullivan wrote that because of the growth of the international press, telegraph and telephone and the more recent introduction of the radio and television in the homes of millions, there was a greater importance for the principles of defamation to be widely understood and that the modern methods of disseminating words have made it necessary to supplement the common law statutes⁴¹². These comments are still true today.

4.2.3 Modern Day Defamation Law

Countries, such as England and Australia have long been seen as legal jurisdictions that have libel law that is ‘incredibly harsh and can be used capriciously’,⁴¹³. During the conception of the Human Rights Act 1998⁴¹⁴, the English common law of libel was condemned for the uncontrolled discretion to award large sums of money for damages⁴¹⁵.

The media frequently argue that current defamation law has a ‘chilling effect’, deterring their freedom to publish material of public interest⁴¹⁶. This chilling effect has been caused by what the media refers to as the ‘inadequate protection of the defence of justification, fair comment and privilege’, when publishing material that is of interest to the public and their right to freedom of expression⁴¹⁷. It is this ‘chilling

effect', in addition to the opinion that English defamation law traditionally favours a person's reputation over freedom of expression, that attracts international public figures with a reputation in England to bring their libel suits to English courts⁴¹⁸.

Martin believes that defamation law is ineffective in dealing with defamation and that it has a dark side, which is routinely used to suppress free speech⁴¹⁹. In addition, the author highlights that defamation law in both Australia and Britain are incredibly harsh and can allow those who are corrupt the means to escape media scrutiny by threatening actions of defamation⁴²⁰. Weaver also highlights this issue, finding that British newspapers and broadcasters frequently receive defamation complaints. Adding that a newspaper perceived to have high quality journalistic content could receive two or more letters of complaint per week⁴²¹.

The innocent dissemination defence does not always protect distributors and once a potential plaintiff has notified the distributor that what they are handling contains defamatory material, they are no longer acting innocently. A distributor is unlikely to attempt to defend a libel action for reasons of principle, even if the writers and editors are committed to the truth of the material and freedom of expression⁴²².

The protection of fair comment for authors and publishers has a severely limited scope, protecting assertions of opinion and not assertions of fact. In addition, all privileges other than fair comment in England require the reporting to be fair and accurate⁴²³.

Current defamation law is also having an impact on the ways in which ISPs and content hosts deal with 3rd party content. Most ISPs are advised to remove any content they feel they could be held liable for. This can be viewed as a threat on freedom of expression.

4.2.4 The Internet

The Internet has become an everyday necessity for thousands of people and businesses throughout the world and its use and popularity has been nothing short of phenomenal. It has revolutionised the way in which people communicate, live and work, and anyone with a computer can become part of this world known as ‘cyberspace’.

Using the Internet, a person can communicate to potentially millions of people. The Internet removes geographical boundaries and encourages freedom of speech and the exchanging of ideas⁴²⁴ freely amongst its users. However, this freedom has not been without its critics. Yet most believe that the Internet is liberating and empowering to individuals, offering countless advantages to society⁴²⁵.

However, there is an opinion that the Internet has created an ‘anything goes’ attitude, where people can do and say things that they would not normally do in the ‘real world’. Furthermore, what Internet users do say is addressed to a wide and varied audience that would otherwise not be possible. It is this attitude that has seen some commentators label the Internet as the ‘wild west frontier’ of communications⁴²⁶.

Furthermore, the increase of Internet users voicing their opinions online dramatically increases the potential for multi-jurisdictional defamation⁴²⁷.

The Internet has been given a number labels, including ‘communication revolution’ and the abovementioned ‘wild west frontier’. It has also been hyped, praised and criticised. However, before all of the advantages, disadvantages and legal issues caused by this new medium, the Internet, as people know it now had a much more humble beginning.

The foundations of the Internet took shape in the 1950s, when individual governments, university departments and businesses used the first developments in networking technology. This was the first use of local area networks (LANs)⁴²⁸ and was achieved by using coaxial cables to interconnect computers. By the late 1960’s this network developed into the first emergence of wide area networks (WANs), which connected computers of a geographical distant⁴²⁹.

The development of the Internet came from the introduction of the United States’ Department of Defence’s Advanced Research Projects Agency (ARPA) in 1968-69⁴³⁰, which was set up because of the circumstances of the Cold War⁴³¹. The ARPA developed its own WAN⁴³², which was a network used by universities and other research institutions to share information⁴³³ using different WANs and LANs to ARPANET. This then became the Internet project, which aimed to maintain a computer network, even though part of the connection was unavailable⁴³⁴.

By 1969, four networks were connected via ARPANET, a number that grew to 111 by March 1977. During the early 1970s, the first electronic mail was sent, as too was the incorporation of the first non-American network. During the mid-1980s, the TCP/IP Internet Protocol became the computer industry standard and it was through this that information was sent and reassembled using the Internet⁴³⁵.

The development of the modem came from a different source. Two Chicago based students created the Xmodem protocol in the late 1970's. The Xmodem allowed the transfer of information between computers over a regular telephone line. It was the modem and the introduction of personal computers that contributed to the development of electronic notice boards and electronic discussion forums⁴³⁶.

In 1989, physics researcher Tim Berners-Lee devised an open and free method of communication, where information and data could be shared by linking computers together. Named the World Wide Web (WWW)⁴³⁷, it was to become the most user-friendly element of the Internet and also the source of many legal issues⁴³⁸.

It was not until 1993 that the development of the Internet advanced to become a commercially viable product. CompuServe became the first commercial ISP and was shortly followed by America Online and Prodigy. The combined number of subscribers in 1993 between the three ISPs was 3.5 million. By 1995 the number of subscribers had doubled⁴³⁹.

In 1990, Edwards et al, remarked that the last 30 years of computing had been largely concerned with the processing of data, however, 'the next ten years will focus on

communication'. This prediction was to prove accurate⁴⁴⁰. The growth and popularity of communication over the Internet has been phenomenal. In June 1993 there was only 130 websites, compared to over 38 million, which followed ten years later⁴⁴¹.

Unlike television, radio and newspapers, the Internet's history is only beginning to be written, mainly due to the introduction of rapid developments⁴⁴². Furthermore, the WWW is now integrating other various kinds of media, including radio, television and newspapers⁴⁴³, which only enhances the power of this medium. The Internet has gradually changed from a system that was predominantly used by the well educated, to a global phenomenon that can be accessed by households across the world⁴⁴⁴.

Gringras believes that the real power of the Internet is that anyone with access to a computer and a telephone line can connect to it⁴⁴⁵ and although it is difficult to determine to what extent the Internet has become a part of daily life, it has however, become a place to live, work and play⁴⁴⁶.

Engel believes that the Internet is one of the hallmarks of globalisation and illustrates how permeable national borders have become⁴⁴⁷. In contrast, Slevin believes that globalisation is not a new phenomenon and that its origins can be traced back to beyond the seventeenth century⁴⁴⁸. However, Slevin does agree with Engel in that 'communication and information technology facilitate action at a distance and are deeply bound up with the intensification of globalisation' and that 'we no longer merely exist 'side by side' with other intelligent cultures, but interact with them in many different and ever changing ways'⁴⁴⁹.

4.2.5 The Internet and Law

A distinctive characteristic of the Internet is the nature and scope of freedom of expression⁴⁵⁰. A foremost concern is that legal systems are predominantly tied to a particular geographical region. This is the opposite of the Internet⁴⁵¹, which offers an unparalleled degree of interactive communication that can sometimes represent an escape from the real world⁴⁵².

Nation-states have a prime interest in the use and development of modern communication technologies and therefore, demand some form of regulation. Modern technologies have the power to influence values and moral standards in modern society just from the transmitting of a message. However, opinions regarding how the Internet should be regulated are divided between those who believe regulation is impossible and those who believe current state laws can integrate new forms of communication technology. It has been commented that it is impossible to regulate the Internet and that no state policy will be able to enforce adequate control. Furthermore, those who use the Internet can evade authorities through anonymity and the bounds of jurisdiction⁴⁵³. On the other hand, it has also been commented that it is not impossible to enforce current state laws, but instead, current law requires re-examining to be in tune with freedom of speech and new technology.

A degree of regulation must be accepted, however, attempts to do so have been relatively unsuccessful. In particular, censorship has resulted in a 'moral panic' rather than an outcome based on careful deliberation. Slevin⁴⁵⁴ discussed a conflict of ideas

between the public and Government perception of the Internet. The Government's opinion of the Internet is as a technology that circulates public material and therefore requires regulation. In comparison, an individual's opinion of the Internet is as an extension of a media akin to the telephone that has less regulation⁴⁵⁵.

He also considers the global consequences of censorship on the Internet, commenting that censorship does not promote the principle by Thompson, of regulated pluralism⁴⁵⁶:

‘Establishment of an institutional framework which would both accommodate and secure the existence of a plurality of independent media organisations’, which is free from the exercise of state power, but also unhindered by market forces⁴⁵⁷.

Most countries have approached the regulation of the Internet by using existing laws, in some cases, with a number of amendments to accommodate the uniqueness of the Internet. This has proved to be a difficult task for nation-states and according to Slevin, many have now begun to direct their attention towards self-regulation with blind enthusiasm⁴⁵⁸.

As the Internet brings together users with different cultural perspectives, the problems caused by self-regulation are only intensified. The coming together of various cultures creates new opportunities for conflict⁴⁵⁹. ISPs are encouraged to be a major part of this self-regulation, particularly by the European Commission, who have stressed the responsibility that authors and ISPs have for the content they publish⁴⁶⁰.

ISPs have long argued that they are uncomfortable with the position of ‘judge and jury’ that they are placed in when they are forced to decide whether to remove content that has been complained about. Although this sort of censorship can sometimes be justified, Slevin believes that a continual threat of censorship will prevent the influential power that the Internet has on advancing economic, social, educational and cultural fields that many hope for⁴⁶¹.

The opinion of commentators regarding the future of Internet regulation differs from author to author. Some are more optimistic about the future of regulation, such as Lessig, who believes that although the first generation of Internet users may have breached the walls of control, there is no reason to believe that the second generation will not build in control. Moreover, there is no reason to believe that this initial flash of freedom will be short lived⁴⁶².

Engel has a more pessimistic view of control, believing that the Internet epitomises rapid evolution and questions whether law can keep pace with technology and communication advancements. This is something the author believes does not look promising⁴⁶³. Lessig also acknowledges the rapid evolution of the Internet, but also sees the beginnings of regulation that has formed the architecture of real-space regulation. Lessig continues to comment that the current architecture is perhaps the most important model of free speech since its founding⁴⁶⁴. It is free speech that advocates zealously insist should be permitted in this new frontier of communication⁴⁶⁵.

Weaver, however, believes that because the Internet is so easy and inexpensive to gain access to, defamatory material can spread across different networks in seconds and that defamation litigation may not be as effective as it once was in repressing speech. Therefore, arguably threatening the influence of defamation law and causing the courts to rethink how they apply freedom of speech laws to defamation litigation⁴⁶⁶.

4.2.6 Cybersmear

The term ‘cybersmear’ has been referred to in cases where a defamatory remark has been made on the Internet about a company, its management or stock. Although the term has not been defined in court, it has been referred to in the commentary of American Internet defamation cases. These cases have involved corporations claiming to have suffered damage following the publishing of defamatory material on the Internet⁴⁶⁷.

When a company has been defamed, they will actively seek who is responsible for the authoring of the defamatory posting. In the US, it has long been recognised that the Fourth Amendment⁴⁶⁸ precludes warrant-less searches. However, the Fourth Amendment may not protect files stored on an ISPs server. Therefore, a plaintiff would only need to require the consent of the ISP to access the identity and information of the anonymous user. If the ISP refuses to provide this information, the plaintiff would then have to seek a subpoena from the court. Once the plaintiff has succeeded in gaining information about the anonymous user, they can then take

action. However, this process has recently been criticised by commentators, finding that it is an abuse of the system and is being used as a scare tactic to deter others from voicing their opinion. The plaintiff may only want to confirm their own suspicions and initiate some form of non-judicial action, for instance, the termination of employment if they suspect the user worked for the company. Consequently, once the identity of the anonymous user has been discovered, the lawsuit is dropped⁴⁶⁹.

A common term for this type of action is 'cyber-SLAPP' (Strategic Lawsuits Against Public Participation). A 'cyber-SLAPP' is the online equivalent to a strategic lawsuit, where the corporate plaintiff can invoke punitive sanctions against offenders⁴⁷⁰. Martin believes that there are many cases in the US where defamation law has been used to intimidate those who complain to the government or merely sign a petition. Moreover, demonstrates how wealthy and powerful groups can manipulate the legal system⁴⁷¹.

Rowland refers to the online defamation case of *Totalise plc v Motley Fool Ltd*⁴⁷² as bearing a strong resemblance to a CyberSLAPP case. Prima facie there was a strong case of serious defamation, concerning material written by an anonymous person. Owen J did not hesitate in arriving at his conclusion to remove the anonymity of the person and commented that the right to privacy and being able to air ones views in public as coming second when involved in a tortuous act that injures another party⁴⁷³.

Naples & Maher⁴⁷⁴ observe that a balance has to be struck between the benefits and potential abuse of Internet anonymity. From a US constitutional and human rights perspective, the balance should be heavily weighted towards the preservation of free

and unimpeded online expression. Furthermore, that some form of judicial oversight should monitor the discovery process of anonymous defendants. The authors continue to suggest that the oversight could take the form of requirements that will be imposed on the corporate plaintiff or as a remedy for the aggrieved defendant. However, until such a balance is struck, there will always be a struggle between the protection of legitimate corporate interests and the freedom of expression.

Rowland supports the rationale behind remaining anonymous and acknowledges that pseudonyms protect the right to freedom of expression and the right to privacy, even within nation states with an elected democracy, a person's views may be unpopular with the majority or the powerful minority. Therefore, anonymity can protect the identity of a speaker and in doing so avoid reprisal. She also acknowledges that anonymity can provide a safe harbour for those who want to engage in malicious, defamatory or criminal activities⁴⁷⁵.

One case that could potentially be seen as a cybersmear case and the equivalent to a CyberSLAPP, is that of *Sheffield Wednesday Football Club Ltd & Ors v Hargreaves*⁴⁷⁶. The case concerns anonymous postings made by fans of Sheffield Wednesday Football Club on the website www.owlstalk.co.uk, where fans can post comments on matters relating to the club⁴⁷⁷. The claimants took action against the website owner, Neil Hargreaves as a result of alleged false and defamatory comments that were made by users on the website. The comments were described by the claimant's lawyer 'as a campaign of vilification against the claimants'⁴⁷⁸.

The claimant's lawyer proceeded to ask Richard Parkes J to order the disclosure of the identities of 11 fans⁴⁷⁹. The defendant's lawyer Miss Caroline Addy agreed that disclosure was an appropriate order. However, as the users of the website used anonymous pseudonyms they would expect their privacy to be respected⁴⁸⁰. Miss Addy referred to *Totalise plc v Motley Fool Ltd*⁴⁸¹, paragraph 25:

‘...in a case where the proposed order will result in the identification of website users who expected their identities to be kept hidden, the court must be careful not to make an order which unjustifiably invades the right of an individual to respect for his private life, especially when that individual is in the nature of things not before the court.’⁴⁸²

In response, Parkes J dismissed the request to disclose the identities of those who were merely abusive or whose comments would be understood as jokes⁴⁸³. The judge commented that it was important to consider whether the words complained of were in fact defamatory⁴⁸⁴. Consequently, Parkes J ordered that three of the fan's identities be disclosed, commenting that:

‘The postings which I regard as more serious are those which may reasonably be understood to allege greed, selfishness, untrustworthiness and dishonest behaviour on the part of the Claimants. In the case of those postings, the Claimants entitlement to take action to protect their right to reputation outweighs, in my judgment, the right of the authors to maintain their anonymity and their right to express themselves freely.’⁴⁸⁵

The case confirms that anonymity is limited to a certain extent and that those with funding to do so can remove the ‘shield’ of anonymity. It should also be noted that Parkes J protected those who had in fact made no false or defamatory comments. The case was eventually dropped, however, the publicity that the case has had will no doubt prompt accusations of scare tactics and that the case bears a strong resemblance to a CyberSLAPP case.

4.2.7 Jurisdiction

The Internet, especially when concerning trans-jurisdictional litigation is threatening modern defamation laws⁴⁸⁶. In 1997, the US Supreme Court labelled the Internet as ‘a unique medium – known to its users as ‘cyberspace’ – located in no geographical location, but available to anyone, anywhere in the world’. The description the Court provided gives a glimpse into the jurisdictional problems that have arisen as a result of the introduction of such a ‘revolutionary’ medium⁴⁸⁷. Collins continues from the court’s account commenting, ‘what constitutes actionable defamation in one jurisdiction maybe entirely lawful in another’⁴⁸⁸.

English defamation law has long been regarded as stricter than other jurisdictions and assuming that the plaintiff can prove the necessary connections, the general rule described by Lord Goff in *Spiliada Maritime Corp v Consulex Ltd* applies:⁴⁸⁹

‘The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all parties and the ends of justice’⁴⁹⁰

Saadat observes the alternative views of authors Goldsmith and Post, who both have differing beliefs concerning the Internet and its relation to ‘real space’. It is claimed by Goldsmith that the Internet does not deserve special jurisdictional rules. However, Post believes that the Internet should be governed by ‘decentralised self-governing institutions’. Saadat also refers to a third view of Menthe, who proposes that the Internet should be regulated in the same way as other established ‘international spaces’. Examples of international space include Antarctica, outer space and the high seas. Furthermore, that the jurisdiction should be determined by the nationality of the parties involved in a dispute⁴⁹¹. Menthe argues that:

‘In Cyberspace, jurisdiction is the overriding conceptual problem for domestic and foreign jurisdictions alike. Unless it is conceived of as an international space, cyberspace takes all of the traditional principles of conflicts-of-law and reduces them to absurdity. Unlike traditional jurisdictional problems that might involve two, three, or more conflicting

jurisdictions, the set of laws which could apply to a simple homespun webpage are all of them.’⁴⁹²

4.2.8 Traditional Rules of Jurisdiction in the EU

Member states of the European Union agreed to the Brussels Regulation in order to prevent overlapping assertions of jurisdiction by the member’s states of the Regulation. By agreeing to the regulations, the member states agree to rules that govern which court has jurisdiction⁴⁹³. The Regulation stipulates that:

The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.⁴⁹⁴

Article 2(1) of the Regulation states that ‘subject to this Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state’⁴⁹⁵.

For Europeans, the Regulation provides a degree of certainty for parties entering into inter-state disputes. When dealing with non-member states, national rules of jurisdiction apply⁴⁹⁶.

The argument of *forum non-conveniens* may not always be successful under the agreement. The court where the defendant is based must not decline jurisdiction under the argument that there is a more appropriate forum⁴⁹⁷. This decision further tightens the rules for inter-state disputes.

However, for non-state members and because England is perceived as a favourable environment to bring a defamation claim, a claimant can claim in England, if the Court believes that it is an appropriate jurisdiction to hold proceedings. The defendant in many cases will always argue that there is a better forum for the case to be held if neither party is resident or has substantial links to England. However, it is a fundamental principle in England that it is not where the defamatory material is created, but that it has been read in the jurisdiction of the English courts⁴⁹⁸.

4.3 Modern Defamation Law

Over the last ten years, defamation has gone through a bewildering amount of changes and developments⁴⁹⁹. However, there is still an attitude that defamation law is still working as a 'one rule fits all', covering all communications media and the potential defamation disputes.

Price believes that 'the Internet is merely a means of communication'. Furthermore, that 'Defamation laws should be sufficiently flexible to apply to all media'⁵⁰⁰. However, English defamation law was structured when most defamatory publications were either spoken or printed⁵⁰¹, therefore, it could be argued that it is difficult to

apply such principles derived in the eighteenth and nineteenth century to issues that arise on the Internet⁵⁰².

The Internet has provided a greater possibility for ‘cheap speech’ and that it has never been as easy for a person to step up onto a soapbox and voice any grievances to a wide and varied audience. This can be problematic, as people who publish on bulletin boards may not be as careful as those who publish newspaper articles, for instance⁵⁰³. There is still an attitude that ‘posting’ on bulletin boards is akin to talking amongst friends in a social and private environment, rather than publishing one’s thoughts to a mass audience around the world.

Despite the Internet being common in many people’s working and social lives, it is still a relatively new medium of communication and people may be more willing to ignore material of a defamatory nature, compared to material in a newspaper or on television. Moreover, complaints submitted to an ISP tend to resolve the situation with the removal of the material⁵⁰⁴.

The Internet has distinct characteristics, which include the ability to reply to defamatory comments within minutes. Therefore, it could be argued that defamation laws could be developed to take this technological ability into account⁵⁰⁵. Godwin is in agreement believing the ease in which it is to reply to defamatory posting has eliminated any actual need for libel lawsuits and that this has functioned to significantly limit such cases arising from postings on the Internet⁵⁰⁶. However, Martin believes that mass media corporations are notoriously reluctant when it concerns the publishing of a retraction and that they would rather fight the case in the

courts, than to promptly reply to comments that have been previously published. What is apparent is that the Internet provides a wonderful solution for online defamation, as it is a low cost and timely avenue to reply to the same audience⁵⁰⁷.

Defamation law has long been criticised for its use in suppressing free speech. Since the introduction of the Internet, a medium that is believed to promote free speech, the law has been criticised even more so. Martin comments that the law is being used to suppress free speech through the use of threats, which are far more common than lawsuits. Furthermore, that cases lodged in court, seldom go to trial, with many suits dropped well before⁵⁰⁸.

Those who are on the receiving end of a defamation claim, such as an ISP, may well argue that if there is any uncertainty, Article 10 of the HRA⁵⁰⁹, which gives protection of freedom on expression should influence the court's decision⁵¹⁰.

The ability for users to remain anonymous when communicating on the Internet is a potential problem. This allows for political speech or whistle blowing, without the risk of detection⁵¹¹. It is a concern that with comparative ease, authors can make themselves anonymous⁵¹². Internet users can therefore, publish defamatory material to the world with little risk of being identified or traced⁵¹³. It is because of such circumstances that the defamed party will target the intermediaries who have hosted the defamatory material⁵¹⁴.

The remainder of this chapter continues to observe elements of law that are affecting ISPs. In regards to this, objective 'To identify arguments and evidence for a change in

defamation law and procedure when concerning ISPs' will consider the opinions of ISPs and lawyers in comparison to the desk research.

4.3.1 Defamation Act 1996

The law of defamation casts a wide net of liability⁵¹⁵ when judging who played a role in the publishing of the defamatory material, even if it was a limited role. Therefore, those who were unaware of the defamatory material, such as printers or distributors, could still be held responsible for its publication. Section 1 of the Defamation Act 1996⁵¹⁶, was brought in to clarify who is responsible for the publication of defamatory material.

4.3.2 Section 1 defence

The Section 1 defence is a new defamation defence created in the Defamation Act 1996⁵¹⁷, which follows on from the common law defence of 'innocent dissemination'. The defence offers protection to those who had second responsibility for the publication that is wider than that of the innocent dissemination defence⁵¹⁸.

One of the main aims of the Section 1 defence was to develop a defence that would be able to cope with the developments in electronic publishing. Instead of classifying the different and evolving secondary publishers, the defence identifies the primary publishers, i.e., authors, editors and publishers⁵¹⁹. Furthermore, a defendant will not

be classed as an author, editor or publisher if the involvement with the work in question is ‘only’ in the specified capacities that are included in section 1(2)⁵²⁰.

With regards to the Internet, Section 1 of the Defamation Act 1996⁵²¹ is in many cases, the defence that ISPs will attempt to avail themselves of in respect of content that they host, cache or carry, but they did not create⁵²². The primary consideration for an ISP is the practicality of controlling what is published, in addition to the inherent risks of publishing third party material⁵²³.

For the complete Section 1 defence please consult Appendix C.

4.3.3 Satisfying Section 1(1)

In most cases, an ISP would have to demonstrate that they were not the author, editor or the publisher of the defamatory content, in addition to, providing evidence that they took reasonable care and that they did not know or had no reason to believe they were contributing to the publication of the defamatory statement.

To satisfy the Section 1(1)(a) requirement ‘he was not the author, editor or publisher of the statement complained of’, an ISP will have to show that its conduct was limited to that described in one or more of the paragraphs in Section 1(3). If the role of the ISP was more than what was described in Section 1(3), then the ISP may be held to be the author, editor or publisher of the statement. Therefore, cases involving an ISP may focus on their policies and practises⁵²⁴.

With regards to Section 1(1)(b), intermediaries have to prove they took ‘reasonable care’ in relation to the publication of the defamatory material. This is determined in Section 1(5)⁵²⁵.

Section 1(1)(b) is an area of the defence that is unclear and also where an ISP may stumble. Section 1(5)(b) is of particular concern to ISPs who have to regard ‘the nature or circumstances of the publication’. ISPs publishing on the Internet may have many publications passing through their systems on a daily or even hourly basis. Therefore, an ISP cannot possibly handle the workload that it would take to monitor them all. On the other hand, the nature of the Internet allows for people to publish what they want, to an audience of potentially millions, therefore, screening of material should be a high priority.

Section 1(5)(c) to ‘the previous conducts or character of the author, editor or publisher’ does not refer to any previous conduct of the intermediary. This places the burden on the intermediary if the author, editor or publisher’s conduct is that of someone who is likely to communicate defamatory material⁵²⁶.

There is also an apparent tension between the ISPs obligation to exercise reasonable care as part of Section 1(1)(b) and the requirement to only be involved in the publication as is worded in Section 1(3). Therefore, intermediaries who do their best to monitor, edit or remove defamatory material cannot claim that they were only involved in the conduct set out in 1(3)(c) or (e). On the other hand, if an intermediary does demonstrate that they can satisfy Section 1(3)(c) or (e) they may lose the Section 1 defence for not exercising reasonable care⁵²⁷.

Lloyd believes that the formulation falls way short of protecting ISPs and it is unlikely that an ISP would be able to take advantage of the defence. Furthermore, the use of the adverb 'only' in Section 1(3) would seem to conclude that an ISP that controls or monitors material will not be able to benefit from the defence⁵²⁸.

Section 1(1)(c) concerns the intermediary's knowledge of the defamatory material. The Section 1 defence will fail unless the ISP can show they did not know and had no reason to believe their conduct caused or contributed to the publishing of the statement in question. The Section 1 defence will also fail if the ISP has been put on notice, regardless of the ISP's conduct. In addition, the defence will also fail regardless of the defendant's belief that the material in question is fair comment, privileged or justified⁵²⁹. This is demonstrated in the case *Godfrey v Demon Internet Ltd*, where Demon Internet were unable to avail themselves to the Section 1 defence because they had been put on notice about the defamatory material. However, it could be argued that because of the way in which communication technologies have developed, the distinctions between publisher and distributor are blurred and that the practise of an ISP may be seen as an amalgamation of the two⁵³⁰.

A separate area of the Defamation Act 1996 is the introduction of 'offer to amends',⁵³¹ that provides defendants with a possible method of damage limitation. ISPs may choose to make suitable corrections, whilst informing those who may have seen the alleged defamatory material of the corrections. In addition, an ISP may offer a financial remedy⁵³² for any damage that may have been caused as a result of the publication.

4.4 Associated Law

In addition to the Defamation Act 1996⁵³³, there are two other pieces of legislation that a defendant could attempt to avail to during a defamation case. These are the Electronic Commerce (EC Directive) Regulations 2002 (EC Regulations)⁵³⁴ and the Human Rights Act 1998⁵³⁵. Both of which, have had an impact on the English Courts.

4.4.1 Electronic Commerce (EC Directive) Regulations 2002

Intermediaries may also be able to avail themselves to the defences in regulations 17-19 of the Electronic Commerce (EC Directive) Regulations 2002 (EC Regulations). The EC Regulations came into force on August 21, 2002 and transposed into UK law. The aim of the EC Regulations is help define the circumstances when an Internet intermediary should be liable for the content they did not create, but either hosted, cached or carried⁵³⁶. The Directive observed that there were disparities between the laws of the member states regarding ISP liability, which could have an adverse affect on the running of the internal market⁵³⁷.

Part of the EC Directive's objective is to remove 'existing and emerging disparities in Member States' legislation and case law concerning liability of service providers acting as intermediaries', which prevent the smooth functioning of the internal market, in particular, by impairing the development of cross-border services and producing distortions of competition. The EC Directive recognises that service

providers have an obligation, in certain circumstances, to prevent or stop illegal activities⁵³⁸.

The EC Regulations apply to 'information society services'. ISPs, bulletin boards and web hosting services will usually satisfy this definition⁵³⁹. The Regulations also categorise intermediaries in terms of their methods of storage, rather than their business characteristics⁵⁴⁰. Regulations 17-19⁵⁴¹ can be found in Appendix D.

4.4.2 The Regulations and Section 1 defence

Mere conduit and caching intermediaries, where information and communication happened en route through or were temporarily stored on their system will more than likely be able to avail themselves to the Section 1 defence of the Defamation Act 1996⁵⁴².

As with the Section 1 defence, regulation 19 will not protect intermediaries who host material from liability when they have been made aware of alleged defamatory material being stored on their systems.

A fundamental difference between Regulation 19 and the Section 1 defence is that an ISP will not be held liable for material that they remove expeditiously on obtaining actual knowledge of its defamatory content. This is unlike the Section 1 defence of the Defamation Act 1996, where the defence is unavailable once the ISP has been made aware of the content⁵⁴³. Therefore, an ISP will only be able to avail themselves

to the mere conduit defence if they (a) did not initiate the transmission, (b) were not involved in the selection of recipients and (c) did not select or modify the information that was transmitted. If the ISP can prove they had no involvement they will have then demonstrated that they were merely providing a conduit through which the information has been sent⁵⁴⁴.

The interaction between the two laws was tested in *Bunt v Tilley*⁵⁴⁵, in which three ISPs were claimed to be responsible for ‘providing access’ to defamatory material. The claim was struck out of court as the material was only communicated over their service and that the delivery of the material in such a manner is similar to that of the postal service.

4.4.3 Human Rights Act 1998

UK defamation law is currently being influenced by the HRA. Evidence of this is demonstrated by the reduction of damages awarded since its transposition into UK law. It is now common for Article 10⁵⁴⁶ to be recited in a defamation case, which is something that English judges are fond of saying, is no different to common law because freedom of expression has always been acknowledged. Under common law, the protection of reputation is the primary right, in comparison to the HRA, which regards freedom of expression as a fundamental part of democratic society⁵⁴⁷. Section 12 of the HRA requires UK courts to regard Article 10, which considers the right to freedom of expression. This right may be affected by the awarding of damages, if the awarded amount is disproportionate to the aim of Article 10(2), to compensate the

claimant for damaged reputation⁵⁴⁸. The court must also consider Article 10 where material:

‘Is journalistic, literary, or artistic in nature, to the extent to which the material has or is about to become available to the public, the public interest in the publication of the material, and any relevant privacy code’⁵⁴⁹.

The HRA requires member states to ensure that defamation law and practice does not become unfavourable towards the defendant. Underpinning Article 10 is the concern of a ‘chilling effect’, where the publishing of material is deterred by the threat of a libel suit⁵⁵⁰. Although restrictions on freedom of expression are legitimate, the measure of the restrictions is the fundamental question. This question is for the court to decide under The European Court’s guidance⁵⁵¹.

Freedom of Expression has long been held to be the cornerstone of a democratic society and one of the first human rights to be guaranteed in law. The Internet exposes this right to freedom of expression at the expense of other rights and freedoms. The ease of which information can be accessed and created on the Internet creates a conflict between freedom of expression and individual rights⁵⁵². Furthermore, the laws that seek to regulate these conflicts can also threaten freedom of expression.

It is important, despite the application of different state laws that freedom of expression does not diminish. Wimmer⁵⁵³ quotes Emerson who states that freedom of expression ‘has long been seen as necessary condition for effective civil society’⁵⁵⁴

and Wolfenson who comments that ‘free expression is essential for building working economies and stable societies’⁵⁵⁵. Evidence of Wolfenson’s comments can be observed by comparing the long-term and stable democracies in Europe, USA and Canada who support free speech, in comparison to the stability of countries like North Korea, Cuba and Zimbabwe who limit freedom of speech⁵⁵⁶ and who have in the past controlled this freedom by using force. Although not to this extreme, Britain’s libel laws and the restricting of information on grounds for national security are some of the toughest in the world. Consequently, this can inhibit freedom of expression⁵⁵⁷.

Taking a more philosophical view on human rights, Haas comments that Governments have ethical responsibilities to individuals and must respect that people have rights⁵⁵⁸. Quoting Mill:

‘The need for a free society takes precedence over majority preferences, that a multiplicity of opinions is necessary so that truth can be determined in a marketplace of ideas’⁵⁵⁹.

Furthermore, freedom of speech is more important than the prerogatives of the majority as an error can only be corrected if freedom of expression is maintained⁵⁶⁰.

However, the exercising of the right to freely express one’s self carries with it special responsibilities, including respecting the rights of others. If a person does not respect their responsibilities then they may be breaking the law and face the consequences that accompany the offence⁵⁶¹. Nothing highlights this more than the dissemination of illegal information and material such as child pornography. However, groups that

operated outside of the Internet before its introduction now have new avenue or tool for subversion. Groups such as neo-Nazis or white supremacists are now able to target social groups who use the Internet⁵⁶².

This section has highlighted the importance of the Human Rights Act and in particular the right to freedom of expression. Furthermore, it has observed the importance of regulation. However, it is the balance between the right to freedom of expression and the regulation of expression that can prove to be the most difficult form of stability to ascertain.

Article 10: Freedom of Expression and Section 12 of the HRA can be found in Appendix E.

4.4.4 Incorporation of the HRA 1998

Lord Denning highlighted the importance of freedom of expression, in addition to protecting the disseminator in the judgment of *Goldsmith v Sperrings*⁵⁶³. He commented that ‘the freedom of the press depends on the channels of distribution being kept open’⁵⁶⁴.

The incorporation of the HRA into English law should sway judges in a way that is favourable towards the defendant in a defamation case. However, the balance between freedom of expression and reputation is a subjective one and it could be argued that the law of defamation and Article 10 are incompatible⁵⁶⁵.

4.5 International Defamation Law

During this research, the law and cases based in Australia and the US have been discussed throughout, yet both jurisdictions operate under a different legal landscape to that of the UK. The law in England and Wales shares some similarities to that of Australia, but both are very different to that of the US. The following two Sub-Chapters consider the key elements and differences between the three countries' defamation laws.

4.5.1 Australian Defamation Law

In 2005, Australia introduced the Defamation Act 2005⁵⁶⁶. Prior to its introduction, Collins commented that a uniform defamation law would dramatically simplify Australian defamation law⁵⁶⁷. The 2005 Act follows very much so in the footsteps of defamation law in England and Wales, by providing an opportunity for disputes to be settled outside of the court, with a framework for settlement. It also includes the reduction of the limitation period from six years to one year and the inclusion of absolute privilege and the defence of truth. Unlike the defamation Act 1996, the distinction between slander and libel has been abolished.

With regards to the Internet, ISPs may avail themselves to the ‘innocent dissemination’ defence and clause 91 of the Broadcasting Service Act 1992⁵⁶⁸. The 1992 Act provides ‘Internet content hosts’ and ‘Internet Service Providers’ with a measure of protection from defamatory material that they hosted, cached or carried, but they did not create⁵⁶⁹. The defence does not extend to electronic mail or information transmitted in the form of a broadcasting service⁵⁷⁰.

In Australia, an ‘Internet content host’ is defined as a person who hosts Internet content, or who proposes to host Internet content. ‘Internet content’ is that which is kept on a data storage device and can be accessed via an Internet carriage service⁵⁷¹.

An ‘Internet service provider’ is a person who supplies, or proposes to supply an Internet carriage service to the public, allowing end-users access to the Internet⁵⁷². The defence for both an ‘Internet content host’ and ‘Internet service provider’ are defeated by actual knowledge or where an absence of knowledge is due to negligence⁵⁷³.

With regards to the law in England and Wales, a majority of the law of defamation is comparable to that of Australia. The influence of both jurisdictions case law is apparent in the likes of the *Gutnick v Dow Jones*, where the *Godfrey v Demon Internet* was cited. The introduction of the Defamation Act 2005, only confirms these comparisons with the burden of proof being placed on the defendant in both jurisdictions.

4.5.2 US Defamation Law

Defamation action in the United States has been developed very differently to that in the UK and Australia because of the freedom of speech guaranteed by the First Amendment of the United States' Constitution. This has an influence on American common law decisions⁵⁷⁴ and consequently, there are a number of differences. The most significant of these is the burden of proof being placed on the plaintiff.

In 1996, the Communications Decency Act 1996⁵⁷⁵ (CDA) was enacted by Congress. It was designed to prohibit obscene and indecent material being transmitted by means of telecommunications devices. Section 230(c) 'Protection for 'Good Samaritan' Block and Screening of Offensive Material' encourages the ISP to exercise editorial control, without fear of being sued. The CDA offers protection to all users of interactive computer services, unlike the S1 defence of the Defamation Act 1996, which only applies to the author, editor or publisher, for example. Further discussion of the CDA and its influence on ISPs and Internet users is included in Chapter 4.6.2.

The combination of both the First Amendment and the plaintiff's burden of proof is a continuing concern for UK based ISPs. Their worry is that if US law continues to be more relaxed in comparison to the UK and the high costs and hassle of ordering a subpoena against an author who has posted anonymously on a US based ISP continues, then UK based ISPs may see a loss of business to US based ISPs.

4.6 Internet Service Providers and Content Hosts

An Internet Service Provider is an organisation that provides access to the Internet for its customers. This is usually done by way of a subscription with the ISP⁵⁷⁶. Telephone companies have run a majority of ISPs in the past, however, ISPs are now run by many other different and varied organisations⁵⁷⁷.

Content hosts are often subscribers to ISPs and do not provide actual Internet access to their subscribers. Instead they host services, such as, WebPages and bulletin boards. A content host is responsible for the content that is stored on their system and then displayed on the user's screen⁵⁷⁸.

4.6.1 Internet Service Providers and Defamation Law (England and Wales)

Once an ISP has been put on notice, it will almost certainly lose the protection of the Section 1 defence. It is the usual course of action to make the ISP aware of the material by putting them on notice as in the *Godfrey v Demon Internet*⁵⁷⁹ case⁵⁸⁰. Therefore, to reduce the risk of liability and the likelihood of it being seen by anyone after the ISP has been notified, an ISP will view the removal of the material and even the complete withdrawal the author's account as the safest course of action. Their defence would be lost even if the ISP had good grounds to believe that the material was justified, fair comment or privileged⁵⁸¹.

ISPs must have a system in place on how to deal with the notification of defamatory material. An ISP will need to act promptly to any notification and should make all staff aware of the legal significance of being notified of any allegedly defamatory material and most importantly, how to deal with it. If an ISP were to refuse the removal of material that had been complained of, the claimant would then be in a position to commence against the ISP. The plaintiff could claim for damages for a loss of reputation and finance, in addition to restraining further publications⁵⁸².

There are a number of commentators who have discussed the best practise for ISPs on preventing and dealing with defamation claims. Hunter, amongst others, recommends the use of disclaimers in user agreements. The user accepts such agreements before being granted access to a website's content. For sufficient protection, disclaimers should include (a) responsibility for content in areas that may not be regularly monitored, (b) warning users against the posting of defamatory or unlawful statements and (c) the websites right to remove any material at its discretion⁵⁸³.

By taking steps to deal with illegal content, through monitoring or filtering content, an ISP in many cases will be able to avail themselves to the second requirement of the Section 1 defence, of taking reasonable care. However, there is an in-built tension in the Section 1 defence with sub-section 1(3)(e). The sub-section puts pressure on the ISP to prove that they had no effective control over the defamatory material. Therefore, this places ISPs in the vulnerable and precarious position of having to exercise enough control to show they have taken 'reasonable care', but without having 'effective control' over the originators or assuming the role of editor⁵⁸⁴. An issue that ISPs have with such a burden of proof is that by providing more value

added services such as digital versions of printed publications and bulletin boards, their vulnerability to defamation concerns are increased⁵⁸⁵.

The issue of showing that reasonable care has been taken in relation to the publication, is potentially difficult for ISPs i.e. what steps are considered to be reasonable.⁵⁸⁶ ISPs may also attempt to avail themselves to the defences of the EC Regulations⁵⁸⁷, which sets out the three defences of mere conduit, hosting and caching. The two most common defences that an ISP will try to avail to are the mere conduit and hosting defence. The mere conduit applies to ISPs that were merely providing a conduit through which information was sent. Contrary to the hosting defence, which applies when the user has not acted under any direction from the ISP and that the ISP had no knowledge of the unlawful activities⁵⁸⁸.

An example of notice and takedown procedures was demonstrated in a dispute between billionaire Alisher Usmanov and former UK ambassador Craig Murray and Murray's ISP, Fasthosts. In September 2007, Murray's blog was deleted by Fasthost following a threat of libel action by Usmanov, after Murray had posted alleged defamatory material on his blog, which concerned Usmanov⁵⁸⁹.

Representing Usmanov, was London law firm Schillings, who demanded the elimination of the postings within 24 hours. These demands were met after the fourth complaint. Fasthosts deactivated the website, in addition to two other servers, which consequently shut down other hosted sites including the British Members of Parliament website⁵⁹⁰.

In reaction to the removal of the website, Murray challenged Usmanov to sue him, so that his claims could be tested in court⁵⁹¹. Murray commented:

‘It's extremely scary that this can happen, because they can take down something without anything being tested in court, without any legal sanction at all except a letter from a high-priced lawyer,’ Murray said in an interview. ‘I'm very happy to have this tested in court. Why don't they do that? Because that will bring together people who know the truth of the matter.’⁵⁹²

There has yet to be any further action regarding this dispute.

A second dispute that sparked debate amongst the press was between that of Mumsnet and Gina Ford. Comments had been made by a user of the Mumsnet forum, allegedly defaming Gina Ford. Ford, threatened legal action against Mumsnet, targeted their ISP and at one point tried to close the website down⁵⁹³. However, the attempt on the site closure has been denied by Gina Ford⁵⁹⁴. The case was eventually settled out of court, but the dispute put Internet defamation back in the public eye and opened up a number of questions regarding 3rd party publishing on the Internet.

It was again questioned in the media whether defamation law needed to be updated. Mumsnet receive 650,000 visitors to their site and 10,000 posts on their forum everyday, making it impossible to monitor every single post and fund the website at the same time⁵⁹⁵. In reaction to this dispute, Mumsnet wrote to the Department for

Constitutional Affairs ‘urging for the government to reconsider this area in its forthcoming consultation on defamation’⁵⁹⁶.

The case raised a number of questions. Firstly, how quick does a host have to be to remove the material? In this case the claimant’s lawyers were quick to contact the ISP to have the entire site shutdown. Secondly, is removing posts or entire sites a breach of a person’s right to freedom of expression? By removing individual comments that are potentially defamatory, demonstrates care. However, removing entire threads or large sections of material demonstrates fear by the ISP or host, power to the claimant and consequently, a lack of conviction within the HRA when imposing its rules in England and Wales.

If the claimant intended to try and silence those that discuss her childcare advice and practise, the publicity of the dispute will have helped. It appears that the claimant made no attempt to find out the details of the author who posted the alleged defamatory material. Therefore, it is inevitable that some commentators will question the morals behind the claim. Evidence of silencing further debate can be found in an article about the incident written by the author of the alleged defamatory material, suggesting that she would resist from posting comments in future⁵⁹⁷.

Until the courts have had the opportunity to rule on what constitutes ‘effective control’, ISPs and their lawyers will always face difficult decisions when confronted with defamation complaints and in what situations the Defamation Act 1996 protects the ISP. Clark-Williams believes that the ‘courts will be cautious in generalising and will emphasise that each ruling depends on the facts of the particular case’⁵⁹⁸. If the

courts begin to take such an approach, the legal position that ISPs currently find themselves in, will not change.

4.6.2 Internet Service Providers: The American Approach

There was an air of uncertainty in the US regarding ISPs and third party publications following the cases of *Stratton Oakmont, Inc v Prodigy Servs. Co*⁵⁹⁹ and *Cubby, Inc v CompuServe, Inc*⁶⁰⁰. In 1996, the Communications Decency Act⁶⁰¹ (CDA) was introduced to regulate legal issues on the Internet and resolve any confusion caused. Part of the CDA that concerned ISPs was Section 230 and was considered to be a landmark piece of legislation, providing virtual immunity for a 'Good Samaritan' ISP. Therefore, an ISP who blocks and screens offensive material, shall afford greater protection:

'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.'⁶⁰²

The CDA was passed with two goals in mind concerning ISPs and defamation. The first of these goals was to promote freedom of expression and secondly, to encourage ISPs to monitor their own hosting services⁶⁰³. Perrit believes that intermediaries must not be inhibited from performing their role as a disseminator of information for fear of liability. The First Amendment reinforces the idea that an intermediary who has a lack of control over the content should have a reduced level of exposure to liability⁶⁰⁴.

Immunity from many lawsuits has indeed promoted freedom of expression. Following *Godfrey v Demon Internet Limited*⁶⁰⁵, commentators argued that immunity should be introduced into English law to attempt to remove the ISP's role of 'judge and jury'. In the US, there has also been a call for change⁶⁰⁶ fearing that the legislation is too harsh on the defamed party.

One commentator has referred to the CDA as being a sound policy if it was to protect individuals from defamatory comments, the uniqueness of the Internet and an ISP's ability to voluntarily edit material they deem to be illegal⁶⁰⁷.

An example where immunity has been a problem for the defamed party is the dispute between John Seigenthaler and the website Wikipedia, an online encyclopaedia that is maintained by its users. The dispute began when former journalist Seigenthaler discovered an article claiming that for a brief time, he was thought to have been involved in the assassination of both John and Bobby Kennedy. The article was published on the online encyclopaedia Wikipedia, by an anonymous user and was not removed until Seigenthaler threatened to publish an angry op-ed in the US Today newspaper⁶⁰⁸, despite prior requests.

Where the law fails to protect the defamed party is demonstrated in the Seigenthaler and Wikipedia dispute. If the defamed party in this incident was to try and protect his reputation by taking legal action, the case would have more than likely been dismissed because of the CDA, despite Wikipedia being an encyclopaedia, which is regarded by many as a source of information that is reliable and valid⁶⁰⁹. The plaintiff

is still entitled to sue the person who posted the comment however, as this case demonstrated, the user may be anonymous and therefore, difficult to trace.

America and England have approached liability of defamatory material from two different angles. America has embraced the uniqueness of the Internet, coupled with its idea that freedom of speech should not be any different online to that in print. As a consequence, those defamed on the Internet are often placed in the difficult position of trying to defend their reputation with little legislation to aid them. England, however, has arguably not been as forthcoming in embracing the uniqueness of the Internet seeing liability in 'cyberspace' as no different to that in the 'real-world' i.e. in print.

Both countries have introduced new legislations to deal with the difficulties of governing online material and both have approached it from different ends of a spectrum concerning the law of defamation. However, a lot has changed since the legislations were introduced. The Internet's population has increased dramatically, services available have become more sophisticated, ways in which users communicate over the Internet have changed and what could be referred to as the 'second generation' of World Wide Web users are becoming more equipped with the skills, tools and knowledge of the Internet at an earlier age.

Both pieces of legislation have been criticised and praised for different reasons. In the case of the UK, protection is available for those whose reputation has been damaged, but there is arguably less protection for those who host material. Consequently, freedom of expression is compromised. The US is the polar opposite.

The UK and the US both have legislations and rights in place that would be almost impossible to change. However, for all parties involved in Internet defamation disputes to be able to avail themselves to a particular defence or seek protection under a piece of legislation, then an area of middle ground has to be reached.

The difficulty in reaching this middle ground lies in the history of both the countries. The US has its roots firmly planted in the right to free speech, whereas change to UK defamation law would go against centuries of common law. Therefore, changes to defamation law would be required across all forms of publication, indicating a major reform to the law and its conduct.

4.7 Defamation and Associated cases

There have been a number of cases since the introduction of the Internet that have shaped the way in which defamation is regulated in England. Cases in the US and Australia have also affected the way the English courts have approached defamation on the Internet. Both of these jurisdictions are relevant to English law and rulings in each respective country have been cited in English court rooms. These rulings also demonstrate how three of the major English speaking countries in the world have dealt with the issues of defamation on the Internet.

One of the first cases in England to specifically deal with Internet defamation was *Godfrey v Demon Internet Limited*⁶¹⁰. The dispute began in 1997 and was decided in 1999. However, even to this date, the ruling is cited in defamation disputes.

4.7.1 Godfrey v Demon Internet Ltd

Known as the leading authority regarding Internet intermediaries and publication is the decision by Morland J in⁶¹¹ *Godfrey v Demon Internet Limited*⁶¹². The case was also the first action of defamation involving the Internet to come up for judicial decision in England⁶¹³.

4.7.2 Background of the case

Founded in June 1992, Demon Internet, an ISP based in England and Wales⁶¹⁴, provided its customers with access to web and e-mail facilities⁶¹⁵. The ISP also allowed subscribers to, amongst other services, access the USENET bulletin board⁶¹⁶. The claimant, Laurence Godfrey, was a lecturer in physics, mathematics and computer science. He was also resident in England.

On January 13, 1997, a message was posted on USENET's newsgroup 'soc.culture.thai'⁶¹⁷ by a user based in the US⁶¹⁸. The content of the message was defamatory of the plaintiff and accessible to all Demon Internet subscribers⁶¹⁹. The

message itself was purported to have been posted by the plaintiff, however, the name 'Laurence' was spelt incorrectly, with a 'w'. However, it invited replies to the claimant's email address⁶²⁰. It is apparent from these points that the posting was in fact a forgery⁶²¹.

On January 17, 1997, the plaintiff contacted Demon Internet, by way of a fax to Mr Stanford, the defendant's Managing Director. The fax notified Demon Internet that the posting was a forgery and that the plaintiff was not responsible for it being posted on the bulletin board⁶²² and requested the removal of the posting. Demon Internet did not remove the posting⁶²³, which was made accessible to its users until January 27, 1997⁶²⁴ when it was automatically removed⁶²⁵. Having received the fax regarding the bulletin post, there is no dispute that Demon could have removed the material after the plaintiff had requested it so⁶²⁶.

4.7.3 Judgement

In the judgement made by Morland J, he noted that the defendants were not the publisher of the defamatory statement, which consequently provided them with the defence of Section 1 (1)(a). However, the defendant would have difficulties availing themselves of the Section (1)(b) and Section (1)(c)⁶²⁷.

Demon Internet attempted to convince the court that they had not published the defamatory posting or caused its publishing. The defendant argued that their involvement was similar to the role of a telephone company and therefore not

responsible for the posting⁶²⁸. The defence based their argument on the American case of *Anderson v New York Telephone Co.*⁶²⁹ a case in which, the New York Court of Appeal held that there was no publication by the telephone company who were being tried for defamation of words transmitted over their system. Gabrielli J of the New York Court of Appeal held that:

‘The telephone company’s role is merely passive and no different from any company which leases equipment to another for the latter’s use’ furthermore, ‘In order to be deemed to have published the libel a defendant must have had a direct hand in disseminating the material whether authored by another or not’⁶³⁰.

This contention was robustly rejected by Morland J⁶³¹, who did not believe the judgement assisted the defendants because they had not played a passive role⁶³². The defence also referred Morland J to the US cases of *Cubby v CompuServe*⁶³³, *Stratton Oakmont v Prodigy*⁶³⁴ and *Zeran v America Online*⁶³⁵. However, Morland J rejected the US decisions and emphasised that the Defamation Act 1996 does not adopt the approach of immunity for ISPs included in⁶³⁶ Section 230 of the CDA⁶³⁷.

Finally, the defence referred the court to the US case of *Lunney v Prodigy Services*⁶³⁸, a case that did not consider the⁶³⁹ CDA s.230⁶⁴⁰. Morland J held in his judgement that in English Common Law, Prodigy would clearly have been the publisher and found the US cases to be of marginal assistance because of the different approach to defamation across the Atlantic⁶⁴¹.

Morland J held that Demon Internet was responsible for the defamatory posting under English law. The defendant would not be able to avail itself to the statutory defence in⁶⁴² Section 1 of the Defamation Act 1996⁶⁴³ having failed to meet the requirements of Section (1)(b)⁶⁴⁴ and Section(1)(c)⁶⁴⁵.

The court also rejected the argument that the defendants were merely owners of an electronic device through which postings were transmitted, finding that:

‘The defendants chose to store ‘soc.culture.thai’ postings within their computers. Such postings could be accessed on that newsgroup. The defendant could obliterate and indeed did so about a fortnight after receipt’⁶⁴⁶.

Demon Internet initially intended to appeal against the decision, however, this idea was later abandoned and the defendant agreed to pay the plaintiff £15,000 damages and £230,000 costs⁶⁴⁷.

This was the first time an ISP was a direct defendant in a defamation case and also the first time the use of the Internet and email had given rise to legal liabilities for parties in the UK. Prior to this, the best-known example was the dispute between *Norwich Union* and *Western Provident*, which was eventually settled out of court⁶⁴⁸.

4.7.4 Reaction and conclusion

In an interview with BBC News Online, following Morland J's decision, Godfrey commented that he was 'delighted' that the decision meant, 'ISPs do publish material on their news servers and once they are on notice, they can not avail themselves of that defamation defence.'⁶⁴⁹ Nick Braithwaite, Godfrey's lawyer commented, 'This decision is in line with the [law's] intention. ISPs cannot now put their heads in the sand and kid themselves they are not publishing libellous messages'⁶⁵⁰.

The case has since become an authority for defamation disputes involving an ISP with actual knowledge of defamatory material stored on their computer systems. For the purposes of civil defamation law, the ISP is at least a 'publisher'⁶⁵¹. Collins finds the decision to hold Demon Internet liable unsurprising and noted that it has caused consternation among ISPs⁶⁵².

During the case, Morland J referred to two cases, which illustrate the scope of liability for publications, concerning different media. Furthermore, they show the ease in which principles derived from these cases can be applied to the Internet⁶⁵³. The two cases were *Byrne v Deane*⁶⁵⁴ and *Day v Bream*⁶⁵⁵.

The principles derived make it almost impossible for anyone involved in an Internet publication to deny they were a participant and subsequently not the publisher. This is in contrast to the attitudes of the United States, where ISPs are not liable for material

that is merely disseminated. This was acknowledged by Morland J who emphasised that they are operating in a 'different legal landscape'⁶⁵⁶.

Demon Internet was placed in a major disadvantage because of Section 1(1)(c) of the Defamation Act 1996. This is because as soon as an ISP is put on notice about defamatory material that they may be disseminating or storing, they will automatically lose the protection of the Section 1 defence. This is a consequence of Section 1(1)(c), and as Godfrey did, by contacting the ISP about such material, disables the Section 1 defence⁶⁵⁷. Godfrey made no attempt to impose liability on Demon Internet for the publication of the defamatory material before Demon was put on notice⁶⁵⁸. Furthermore, Morland J initially held the defendant not to be publisher of the defamatory material within the meaning of the Defamation Act 1996. However, they did have an obligation to remove it⁶⁵⁹.

It should also be noted that the plaintiff never tried to suggest that the material that was posted was indeed, false⁶⁶⁰. Awareness of the alleged defamatory material was enough to disable the defence for the ISP⁶⁶¹. Price remarked that as it is not in the commercial interest of an ISP to seek an alternative defence, it is safer to remove any material that may be seen by anyone else in the period after the notification when the Section 1 defence may not be available. Price also commented that it is safer to withdraw the user's account altogether if they have breached the terms and conditions of the site⁶⁶².

Although the case is now regarded as an authority on Internet defamation cases, Saadat believes that the case is not groundbreaking for two reasons. Firstly,

jurisdiction was not an issue because both the plaintiff and defendant were English and secondly that ISPs that unknowingly host defamatory material are potentially liable if they ignore or refuse any request to remove the material⁶⁶³.

Deturbide observed that the decision failed to recognise the uniqueness of the Internet⁶⁶⁴. This is something that the US courts have acknowledged and have subsequently dealt with by protecting ISPs against such libel action in the CDA.

Burden believed the outcome of the case appears to tip the scales firmly in favour of the complainant allowing them to 'police' material they find objectionable, with no financial risk in doing so. Burden also commented that the perceived view that ISPs have 'deep pockets' makes them easy targets. As a result, further legislation is required to correct the position that ISPs currently find themselves in⁶⁶⁵.

The author also commented that the US case of *Zeran v AOL*⁶⁶⁶, which was referred to in the Godfrey case goes too far, as it is unreasonable to think that an ISP should take responsibility for all the material made available to the world via their servers⁶⁶⁷. As such, Burden makes four suggestions. Firstly, making a defence for an ISP that shows they had no prior knowledge of the material before the complaint was made and furthermore, had no editorial control over the content. Secondly, to create an independent cause of action in respect of the making of unfounded threats of libel action. Thirdly, for ISPs to be allowed to use disclaimers indicating that they have no responsibilities for the contents of its customers' material. This could be in conjunction with an independent Internet industry mediation that would review potential defamatory material and decide how to deal with it. Finally, to create a

defence for ISPs to withdraw/remove offending items once put on notice. However, this would be likely to conflict with freedom of expression⁶⁶⁸.

The overall message that this ruling sends out to ISPs is that once they are put on notice of defamatory material they should act swiftly to resolve the issue by removing the offending material. It is likely that if Demon had removed the offending post that had been complained of, they would have had a defence under Section 1 of the Defamation Act 1996. This is an indication to ISPs that if they ignore valid complaints regarding defamatory material, they could face legal action⁶⁶⁹. However, an ISP is not always in a position to decide if the claim is valid or otherwise. Moreover, it also places the ISP in the role of 'judge and jury'. Therefore, an ISP would be advised and safer to remove material without question when put on notice about alleged defamatory content.

Shortly after the decision, director and co-founder of Cyber-rights and Cyber-Liberties, Dr Yaman Akdeniz, referred to the decision as having a:

'Chilling effect over Internet communication and will force the UK ISPs to take a pro-active role in relation to Internet content. This is most undesirable and unacceptable'⁶⁷⁰

Akdeniz bases his comments on the aforementioned issues of notice and take down, viewing it as unacceptable that it is so easy for the offended party to 'simply notify an Internet Service Provider claiming the information to be legally defamatory'⁶⁷¹.

Two cases that were cited in the *Godfrey v Demon*⁶⁷² case were, *Byrne v Deane*⁶⁷³ and *Day v Bream*⁶⁷⁴. Both cases deal with the issues of taking part in the publication and having actual knowledge of the publication. Furthermore, both cases demonstrate how Morland J came to his decision.

4.7.5 Byrne v Deane

Under English law a person who is in a position to prevent a defamatory publication by a third party can be held liable. Under Section 1 of the Defamation Act 1996⁶⁷⁵, they can only avoid liability if he or she did not know they were taking part in the publication of defamatory material⁶⁷⁶.

In the 1937 case of *Byrne v Deane*⁶⁷⁷, the plaintiff claimed against the proprietors of the golf club of which the plaintiff was a member. The claim was issued after a typewritten notice was posted on the wall of the club. The note suggested that the plaintiff informed the police about automatic gambling machines that were on the premises of the golf club, which had been kept without permission. The typewritten letter contained:

‘For many years upon this spot
You heard the sound of a merry bell
Those who were rash and those who were not
Lost and made a spot of cash,
But he who gave away,
May be bryrnn in hell and rue the day’

Diddleramus

This suggested that the plaintiff was the police informant and a disloyal member of the club amongst his fellow members⁶⁷⁸. Another notice on the wall included the club rule that ‘no notice or placard, written or printed, shall be posted in the club premises without the consent of the secretary’. The plaintiff claimed that as the club had the power to remove the posting after it had been seen that they were liable. The court agreed, and the defendants were found, in principle, liable for the posting⁶⁷⁹. The crucial point in this case is that the secretary of the golf club had the power to remove the defamatory material⁶⁸⁰. The action was tried by Hilberry J without jury, who awarded Byrne forty shillings damages and his costs⁶⁸¹.

The court questioned the circumstances surrounding the publication, commenting that:

‘having regard to all the facts of the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put up’⁶⁸²

Byrne later lost the case in the Court of Appeal⁶⁸³. The court held that the meaning of the words conveyed in the notice were not libellous. Referring to *Mawe v Pigott*⁶⁸⁴ where it was found that ‘we can only regard the estimation in which a man is held by society generally’⁶⁸⁵. Therefore, reporting illegal activity would not lower a person in the estimation of the right thinking public, even if it does to fellow golf club members. What is relevant to the *Godfrey* case is that the club had control of the material on its walls.

In the *Godfrey* case, the high court supported the decision in *Byrne v Dean* and the decision that there was no general rule that required active involvement in a publication⁶⁸⁶.

4.7.6 Day v Bream

The second of the two cases referred to by Morland J was the 1837 case of *Day v Bream*⁶⁸⁷. In this case, the defendant, a porter in a coach office in Malborough, also where the plaintiff was resident, delivered sealed packages from the coach house. One of the packages that the porter delivered contained material that was defamatory of the plaintiff. The defendant was held liable for dissemination of the material, subject to any defence⁶⁸⁸.

The court left the decision to the jury to decide whether or not they thought that the defendant had any knowledge of the contents of the parcels he delivered and was part of his course of business or instead had delivered and put into publication the libel complained of⁶⁸⁹.

*Day v Bream*⁶⁹⁰ was also applied by the court of appeal in *Emmens v Pottle*⁶⁹¹, where Lord Esher said:

‘But the defendants did not compose the libel on the plaintiff, they did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, they would have published the libel, and would have been liable for so doing.’⁶⁹²

In *Godfrey v Demon Internet*⁶⁹³, once the defendant was put on notice that they were hosting allegedly defamatory content, they were then publishing the material complained of.

4.7.7 Applications of Godfrey v Demon Internet Ltd

The decision in the Godfrey case is now an authority on Internet defamation cases and has been used as case law by claimants who are taking action against those who have published alleged defamatory material on the Internet. The first example of this is in *Loutchansky v Times*⁶⁹⁴.

4.7.8 Loutchansky v Times

The plaintiff Grigori Loutchansky, who had a residence in the UK, sued the Times Newspaper for defamation regarding two articles that were published in 1999. Both articles appeared in print, but were also available online globally through the newspaper's website. The Court accepted the defence of qualified privilege for the print editions, however, found that the newspaper had acted irresponsibly by leaving the online articles on their site for over a year, with no notice that the article was the subject of litigation⁶⁹⁵.

The court rejected the 'single publication rule', but accepted the decision of Morland J in *Godfrey*, citing:

'In my judgment, the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting. Thus every time one of the defendants' customers accesses 'soc.culture.thai' and sees that posting defamatory of the plaintiff there is a publication to that customer'⁶⁹⁶

4.7.9 Don King v Lennox Lewis

*Don King v Lennox Lewis*⁶⁹⁷ concerns two articles posted on two separate boxing websites. Firstly, from the 5th July onwards, an article appeared on fightnews.com entitled 'My Response to Don King'. The article was written by Judd Burstein and referred back to an article published in the New York Daily News on 4 July, 2003, which included quotations from Don King, in particular a statement which refers to Mr. Burstein as a 'shyster lawyer'. Burstein's response accused Mr. King of anti-Semitism, including the lines: 'Don apparently believes that insulting Jews is appropriate conduct' and 'Were it not for the anti-Semitic nature of Don's comments, I would have remained silent'⁶⁹⁸.

The second article was on the boxingtalk.com website from 8, July 2003 onwards. The article was entitled 'Interview with Judd Burstein' and contained an interview in which allegations about Mr. King were made. These included: 'What got me so upset and led me to respond to him was the clearly anti-Semitic tone in his comments' and referring to Mr. King 'he is quite plainly anti-Semite'⁶⁹⁹.

It was pleaded that the words complained of meant that Mr. King is a persistent, bigoted and unashamed (or unrepentant) anti-Semite⁷⁰⁰. As a result, Mr. King attempted to take legal action in the English courts. Mr King favored the English courts based on burden of proof being placed on the defendant, as discussed in Chapter 4.5.2.

The court stated that the burden was on the claimant to demonstrate that England is the appropriate forum. The evidence disclosed that the plaintiff had a substantial reputation in England, making frequent appearances on television, radio and other forms of media. It was commented that Mr. King may be the best known person in the world of boxing and was ‘certainly one of the best known people in the world of boxing’. In addition, there was evidence that Mr. King has many business associates and friends in the country⁷⁰¹.

The court stated that the place where the defamatory words are heard or read is regarded as the place where the words were published. Referring to *Godfrey v Demon Internet*⁷⁰², *Loutchansky v Times Newspaper Ltd*⁷⁰³ and *Gutnick v Dow Jones*⁷⁰⁴, current common law regards the publication of an Internet posting as taking place where it is downloaded⁷⁰⁵. Eady J commented that he was ‘quite satisfied in the light of all these considerations that this claim which should be permitted to go forward in this jurisdiction’⁷⁰⁶. The matter between all parties was settled out of court.

4.7.10 Gutnick v Dow Jones & Company Inc

*Gutnick v Dow Jones*⁷⁰⁷ is regarded as one of the most important decisions to concern Internet defamation and jurisdiction⁷⁰⁸. The claim concerns an article published in the Dow Jones business journal *Barron's Magazine* and *Barron's Online* in October 2000, entitled ‘Unholy Gains’⁷⁰⁹. It was alleged in the article that Joseph Gutnick, an Australian business man, well known for his religious and philanthropic activities, in addition to his involvement in Football and mining companies⁷¹⁰, had been involved

in the laundering of money⁷¹¹. There were also allegations of exploitation of religious charities, share manipulation and tax evasion⁷¹². An example of one of the quotes used by author Bill Alpert stated:

‘Some of Gutnick's business dealings with religious charities raise uncomfortable questions. A Barron's investigation found that several charities traded heavily in stocks promoted by Gutnick. Although the charities profited, other investors were left with heavy losses’⁷¹³

The magazine sold approximately 300,000 copies, of which 1,700 were sold in Australia, 300 of these copies in Victoria where the plaintiff was resident. In addition, to being available as a hard copy, the article was also available online,⁷¹⁴ which, subscribers could access using a username and password assigned to them by Dow Jones⁷¹⁵. The principle issue that was debated in the court was where was the alleged defamatory material published?⁷¹⁶

Limiting the claim against Dow Jones, Gutnick sued the defendant in respect to the damages suffered to his reputation in Victoria only⁷¹⁷. Although Dow Jones had its editorial offices in New York and *Barron's Online* was stored on servers in New Jersey⁷¹⁸, it had to be proven by the defence that Victoria was an ‘inappropriate forum’⁷¹⁹. The High Court of Australia judged it to be the most appropriate forum and held that when material is accessible via the Internet, the tort of defamation is committed each time and in each place the material is downloaded in comprehensible form⁷²⁰. In addition, that it is where the person downloads the material that the

damage may be done and consequently is the place where the tort has been committed⁷²¹.

The court found that ‘the authorities establish that defamatory material is published at the time and in the place where it is made manifest in a form capable of being comprehended by a third party’⁷²². The court considered that Mr Gutnick did have a reputation to protect in the US, however, he also had a reputation in Israel and Australia. As a resident of Victoria, this would be the most appropriate forum for him to raise proceedings. It could therefore be argued, that in Internet defamation proceedings the fundamental consideration is the extent to which the claimant has a reputation to protect that determines the jurisdiction where proceedings are held⁷²³.

With regards to the argument concerning which forum is best suited, Callinan J found:

‘The question which this case raises is whether the development of the Internet calls for a radical shift in the law of defamation’⁷²⁴ in addition, ‘the plea of *forum non conveniens*, we perceive no appellable error in the exercise of the judge’s discretion. Indeed we think the decision was plainly correct. Publication took place in Victoria. The respondent resides and carries on business in Victoria. He wishes to restore his reputation in Victoria, and has undertaken to sue in no other place’⁷²⁵

The Court also ruled out the possibility of a defence based upon the two US cases of *Polly Peck v Trelford*⁷²⁶ and *David Syme v Hore-Lacey*⁷²⁷.

Callinan J also remarked that ‘publishers are not obliged to publish on the Internet. Moreover, if the potential reach is uncontrollable, then the greater the need to exercise care in publication’⁷²⁸.

Dow Jones argued firstly, that the rule for Internet publications should be similar to the US’s ‘single publication rule’, where the place of publication is deemed published where it is uploaded to the server, in this case, New Jersey. Secondly, that there should be special emphasis on the rules applying to the Internet⁷²⁹ and by not applying the ‘single publication rule’ would create a ‘chilling effect’ on material published on the Internet.

Six of the seven High Court judges did not find any inherent reason why the Internet should be subject to any different rules and that the freedom that the Internet offers to publish worldwide carries the commitments to comply with laws in other countries. In a joint judgment Gleeson CJ and McHugh J, Gummow J and Hayne J held that they:

‘Doubted that it is right to say that the World Wide Web has a uniquely broad reach. It was no more or less ubiquitous than some television services. In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact. However, broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so

knowing that the information they make available is available to all and sundry without any geographic restriction’,⁷³⁰

The majority also rejected the argument for a ‘single publication rule’, because:

‘If it were accepted, publishers would be free to manipulate the uploading and location of data so as to insulate themselves from liability in Australia, or elsewhere: for example, by using a web server in a ‘d e f a m a t i o n f r e e jurisdiction’ or, one in which the defamation laws are tilted decidedly towards defendants’,⁷³¹.

The only exception was Kirby J who accepted that the Internet was a unique medium⁷³², stating that:

‘The Internet is not simply an extension of past communication technology. It is a new means of creating continuous relationship in a manner that could not previously have been contemplated’⁷³³. With respect to the ‘single publication rule’ Kirby J agreed: ‘potential liability in defamation for the publication of material relating to such a person on the Internet may indeed have a chilling effect on free speech merely because one of those jurisdictions has more restrictive defamation laws than the others’,⁷³⁴.

The cases concluded with the reiteration that Victoria should be the forum for which the case is held, finding that:

‘Victoria is a clearly appropriate forum for the litigation of the respondent's claim to vindicate his reputation which has been attacked in Victoria, as well, plainly as elsewhere. For myself I would see no immediate reason why, if a person has been defamed in more than one jurisdiction, he or she, if so advised might not litigate the case in each of those jurisdictions. However, that issue does not arise here as the respondent has offered an undertaking to proceed in Victoria only’,⁷³⁵

Godfrey v Demon Internet was referred to on a number of occasions during *Gutnick v Dow Jones*. The case was firstly referred to concerning the history of the Internet and its ubiquity, universality and its utilisation and secondly, with regards to the rule that each publication under current law gives rise to a separate cause of action. The case’s final reference was that libel or slander is committed when and where comprehension of the defamatory matter occurs, including material over the Internet⁷³⁶.

4.7.11 Reaction and Conclusion

The *Dow Jones v Gutnick* decision attracted significant international response⁷³⁷, particularly in the US where the decision offended the sensibilities of journalists, publishers and commentators⁷³⁸. Saadat⁷³⁹ refers to two newspaper articles written shortly after the decision. Firstly, by the *Washington Post*, who predicted a ‘chilling effect’ rendering the Internet as ‘unusable as a vehicle for mass communication’ and

that the decision ‘could crimp the increasingly free flow of information across borders that the Internet has unleashed’⁷⁴⁰.

The second article, which was featured in *The Australian*⁷⁴¹ newspaper, attacked the High Court judges, remarking that they ‘remained entrapped by the arcane art of the common law and the inglorious history of defamation law as a tool of the powerful’ and the law of defamation should be revised to ‘properly comprehend the new world of the Internet’⁷⁴². This was also one of the arguments made by the defendant, who urged the court to establish separate rules for Internet publishing and that the location of the server should determine the applicable choice of law and jurisdiction⁷⁴³.

Out of the seven judges, only Kirby J recognised the potential need for a reform in the law to respond to the inherent problems caused by communication over the Internet⁷⁴⁴. Kirby J observed:

‘The notion that those who publish defamatory material on the Internet are answerable before the courts of any nation where the damage to reputation has occurred, such as in jurisdiction where the complaining party resides, presents difficulties: technological, legal and practical.’⁷⁴⁵

Saadat, refers to Collins⁷⁴⁶, who commented that the case has ‘the potential to chill freedom of speech’ and that:

‘Foreign publishers may decide to water down or not publish material which has the potential to damage the reputations of Australians ...or try to restrict Australians from having access to their site.’⁷⁴⁷

The six remaining judges, in addition to Kirby J, agreed that the decision of the High court would not necessarily have a significant impact on the Internet⁷⁴⁸ as people would fear. Saadat, agrees with the judges and disputed the claim that the decision of the High Court would spark the demise of the Internet, despite the threat of multiple lawsuits still exists, the growth of the Internet has not been threatened⁷⁴⁹.

Macgregor and Vincent⁷⁵⁰ also agree that the decision would not have the chilling effect on Internet publishing as many newspaper articles predicted. The financial resources necessary to begin litigation have to be sufficient enough against a publisher who will not consider settling defamation claims. In addition, claims against overseas publishers will deter all but the determined and wealthy litigants⁷⁵¹.

Russell and Smillie observed the significance of the ruling, heralding it a landmark case, but criticised the rejection of the US single publication rule over the Duke of Brunswick case. They were also critical of the court’s decision to hold that where the defamatory publication was downloaded was where the publishing took place, irrespective of where the publisher resides or where the material is hosted⁷⁵².

The *Duke of Brunswick v. Harmer*⁷⁵³ case occurred over 150 years ago, when the Duke of Brunswick sued for libel some 17 years after the original publication. The Duke of Brunswick had been made aware that the issues had defamatory material

about him and requested that one of his servants buy back issues of *The Weekly Dispatch* from the British Museum and from the *Weekly Dispatch's* office. Subsequently, the Duke of Brunswick sued for defamation on account of both issues. The Court found that the delivery of two fresh issues constitutes two fresh publications and that the plaintiff was entitled to sue⁷⁵⁴.

The *Weekly Dispatch* argued that the cause of action was time barred, relying on the original publication date. The court held that the delivery of the two copies constituted two fresh publications and that the Duke was accordingly entitled to sue. For hard copy publication this decision was problematic enough, but for some reason very few, if any claimants appeared to take advantage of it⁷⁵⁵.

The decision to apply Victorian principles to solve modern day legal issues was met with dismay, but with no surprise. The court issued a warning to publishers that if they are to publish in multiple jurisdictions, they must accept the risk of liability⁷⁵⁶ if they do not comply with the laws in other countries where material is published⁷⁵⁷. It was these comments by the court that were criticised by the media as having a 'chilling effect' on the publishing industry⁷⁵⁸.

The single publication rule applies in most American States to prevent a multiplicity of suits arising from widespread publications of the same material⁷⁵⁹. This rule also applies to material stored on the Internet⁷⁶⁰. A number of authors have suggested that this is the way forward for the law in England, however; it would represent a significant change to defamation law⁷⁶¹.

Macgregor and Vincent⁷⁶² concluded that the decision of *Gutnick v Dow Jones* did not raise the spectre of global liability and confirms that 'Internet communication is no different from other forms of communication'. The laws in place now apply to all forms of media and that current defamation law can accommodate claims that arise through Internet publication. If publishers have any doubts about publishing in territories where they feel litigation may arise, they need look no further than technology when disseminating material⁷⁶³.

4.7.12 English case: Jameel v Dow Jones & Company Inc

A case that draw some similarities to that of *Gutnick v Dow Jones & Company Inc*⁷⁶⁴, is the case between *Jameel v Dow Jones & Company Inc*⁷⁶⁵. However, the English Court of Appeal took a different approach to that of the Australian Court.

The case involved an article being posted by Dow Jones on the servers of the *Wall Street Journal Online*. The article was available to subscribers around the world from 18th March, 2003. The article remained on the website until approximately 22nd March 2003, before it was moved into an archive until July 2003 when it was removed from the server completely⁷⁶⁶.

The plaintiff claimed that the article alleged that he was an 'early funder' of Osama Bin Laden and also featured a link to a document that the plaintiff said referred to him. The court held that:

‘It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake’⁷⁶⁷

The court also held that damage to Jameel’s reputation had been minimal and that:

‘There seems no likelihood that Dow Jones will repeat their article in the form in which it was originally published. It has been removed from the web site and from the archive’⁷⁶⁸

It should also be noted that the Wall Street Journal never tried to defend the article by stating that it was true. Instead they sought to persuade the court that it was responsible journalism⁷⁶⁹. The House of Lords, upon hearing the appeal held that the article was responsible and clearly in the public interest and as such, it did not constitute libel⁷⁷⁰.

4.7.13 Canadian Case: Bangoura v The Washington Post

*Bangoura v The Washington Post*⁷⁷¹ held in Ontario, has been quoted as being the Canadian version of the *Gutnick* case⁷⁷². The action was taken by Cheickh Bangoura, a Guinean, but now Canadian citizen having lived there since February 1997 and a

citizen since 2001, against the *Washington Post*, concerning two articles in their online archive⁷⁷³.

The first of the two articles was published on 5th January 1997 by the Washington Post, allegedly defaming the plaintiff in reports of allegations by his United Nations (UN) colleagues that he was guilty of sexual harassment, financial improprieties and nepotism during his tenure in the Ivory Coast. The plaintiff lost his position at the UN soon after the three articles were published, but was later cleared following a UN investigation⁷⁷⁴.

In 2004, it was agreed by an Ontario judge that the case of libel against the Washington Post should be heard in Canada, based on the fact that the articles can still be accessed online. The plaintiff claimed for \$11 million in damages.⁷⁷⁵

In 2005, the Court of Appeal ruled on the plaintiff's connection to Ontario, finding it to be minimal at best. The court concluded that:

‘There is simply no real and substantial connection between this action and Ontario and that it is not appropriate for the courts of Ontario to assume jurisdiction’⁷⁷⁶

It was also commented that the *Washington Post* is a major newspaper, which is ‘often spoken of in the same breath as the *New York Times* and the *London Telegraph*’⁷⁷⁷. In conclusion ‘the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided’⁷⁷⁸.

When presenting the case of *Gutnick*⁷⁷⁹ before the court, their reaction was to dismiss it. The Court held that they did ‘not find the Australian case to be helpful in determining the issue before this court’⁷⁸⁰.

Richard Parkes QC, commented in his presentation at the Defamation Conference 2006, that if Mr Bangoura had lived in Ontario when the article was published, it is likely that his position would have been different and questioned if the decision was a blow for Internet forum shopping⁷⁸¹.

All of the cases have affected Internet publishing in some way. The objective ‘To investigate how Internet defamation cases both in England and in other countries have affected how ISPs deal with defamation claims’ will consider the cases discussed.

4.8 Conditional Free Agreements and Pre Action Protocol

Defamation action has long been regarded as an action of tort that can only be afforded by those with the wealth to pay for the litigation. When a claim goes to trial the costs incurred are usually far greater than the damages received, if the case is successful. It is these costs that can prevent the defamed party from taking any action. Businessman and founder of the Referendum Party, Sir James Goldsmith once remarked that he:

‘Completely failed to understand a culture which provides state funding if you lose a finger, but not if you are deprived of your reputation. And I profoundly reject the idea that defending your reputation should be the preserve of the rich’⁷⁸²

These comments were followed by the creation of a fund for people who had been defamed, but were unable to afford the costs of taking a case to trial⁷⁸³.

An alternative method to legal aid is the CFA, which is similar to a ‘no win, no fee’ agreement. In such, an agreement is made that a lawyer will only receive their fee if the case is successful.

Prior to the introduction of CFAs, a potential claimant may not have been able to get around the obstacle of cost and the complexity of defamation law, no matter how severe and false the defamatory statement may have been. CFAs now allow litigants, even those who can afford the cost of defamation action without any additional financial support, representation in defamation action where the case is viewed as one that is likely to be won⁷⁸⁴.

The advantage for the claimant under a CFA is that the lawyer who acts on their behalf owes the same professional duties to them as a client paying the full costs. However, a lawyer who acts under a CFA is entitled to charge a success fee if the case is successful. This is usually a percentage of the lawyer’s ordinary fees⁷⁸⁵.

However, the introduction of CFAs has been criticised as having a ‘chilling effect’. This criticism has mostly been from media defendants, who have argued that they are grossly unfair on them. The media’s reasoning being that the more responsibly they deal with potentially defamatory material, the greater the risk that a claimant will bring action against them. Therefore, it could be argued that a CFA is contrary to freedom of expression protected by Article 10⁷⁸⁶.

This research considers the issues regarding CFAs within the objective ‘To determine what changes could be made to defamation procedure, if any, which would be appropriate to allow investigation into defamation claims regarding the Internet to continue whilst also protecting a person’s right to freedom of expression’.

4.8.1 Pre-Action Protocol for Defamation

A method of reducing the cost and delays in civil cases was introduced in April 1999 under the name Civil Procedure Rules (CPR). The CPR gave rise to a substantial change in the handling of civil cases⁷⁸⁷, introducing a new culture into the civil justice system, where litigation is a last resort⁷⁸⁸.

A part of the CPR is the pre-action protocol. These were introduced to establish standards for parties preparing to bring personal injury claims to court. The aims of pre-action protocols are to improve communication between the two parties and if possible for the case to be resolved without being brought to court. The framework

provided by the pre-action protocol intends to enable parties involved in a defamation claim to explore an early and appropriate resolution of that claim⁷⁸⁹.

The protocol was developed and drafted by working parties comprising of lawyers from all fields of interest concerning defamation bringing a wealth of experience prior to its integration⁷⁹⁰.

An inherent advantage of the pre-action protocol is the turnaround of which the publishing of defamatory material can be corrected and any necessary apologies be made. It is advised in the protocol that the defendant's response be made within 14 days so a quicker resolution can be achieved, compared to the one-year limitation period that is the usual timescale for defamation claims⁷⁹¹. As time is of the essence during defamation disputes, the protocol can speed up the resolution procedure. This is an advantage to the claimant who will almost always want an immediate correction and/or an apology to restore their reputation⁷⁹².

The protocol aims to set out a code of good practise, which parties should follow during defamation action. The code encourages early communication, the disclosure of sufficient information and the standards for the content of correspondence so an early resolution may be achieved. The code also sets out a timetable for the relevant exchanging of information relevant to the dispute⁷⁹³.

The importance of the protocol is emphasised in the CPR code. The extent of which each party follows the protocol both in practise and spirit will be considered in court, if the litigation reaches civil action⁷⁹⁴. In his foreword concerning the pre-action

protocol for Personal Injury Claims, Lord Irvine of Lairg identified the values of the pre-action protocol being devised:

‘The protocol aims to improve pre-action communication between the parties by establishing a timetable for the exchange of information relevant to the dispute and by setting standards for the content of correspondence. Compliance with the protocol will enable parties to make an informed judgement on the merits of their cases earlier than before as they will earlier access to the information they need. This will provide every opportunity for improved communications between the parties and is designed to lead to an increase in the number of pre-action settlements.’⁷⁹⁵

Section 3 of the pre-action protocol outlines what should be contained in the letter of claim. Section 3.1 states ‘the claimant should notify the defendant of his/her claim in writing at the earliest reasonable opportunity’⁷⁹⁶.

Section 3.2 specifically highlights what should be contained in the letter of claim. Included is the name of the claimant, details of the publication or broadcast, including the words complained of, date and where possible, a copy or transcript of the defamatory words and sufficient evidence that the words used were in fact inaccurate or unsupportable. This should be supported by an adequate explanation to enable the defendant to appreciate why the words were inaccurate or unsupportable. Where relevant, the words that make the claimant identifiable, in addition to what damage

has been caused from the words complained of. The claimant should also address a method of remedy so that the claim can be rectified⁷⁹⁷.

Sections 3.3 and 3.4 provide details for the defendant, which should be responded to within 14 days, unless a time limit has been specified in the letter of claim. The letter should include whether or not the claimant's claim is accepted or if more information is required, then what information and why it is needed. If the claim has been accepted, the letter should include whether it has been wholly or partly accepted, in addition to what remedies the defendant is willing to offer⁷⁹⁸.

If the claim is rejected, an explanation why, in addition to significant details of any facts should be included in the response. The defendant should also include the facts and the defence they would likely rely on. It is desirable that the defendant includes what he/she attributes to the words complained of, in the response⁷⁹⁹.

Both parties should act reasonably to keep costs proportionate to the nature and gravity of the case, whilst considering what stage the complaint has reached. Clarke-Williams comments that 'the success or otherwise of the pre-action protocol lies not in the hands of the lawyers but with the courts'⁸⁰⁰. The reasoning behind this theory is that if the courts penalise those who do not attempt to resolve issues using the pre-action protocol by issuing heavy cost, the protocol will gain the credibility and force needed. Such action would play an important role in changing the perception that defamation claims are exclusive to the rich, famous or foolhardy⁸⁰¹.

The pre-action protocol is still in its infancy and little has yet to be discussed regarding the how it affects Internet based cases and the notice and takedown procedure. Objective 'To investigate how effective defamation practice has been in its attempt for an early settlement when concerning defamation claims and the Internet' considers these elements.

4.9 The Law Commission Reports

In 2002, the Law Commission undertook two separate studies regarding defamation. The studies were undertaken upon the request of the Lord Chancellor's Department. The first of the two studies, 'Aspects of Defamation Procedure: A Scoping Study',⁸⁰² was published in May 2002. The study was carried out following The Lord Chancellor's Department's concerns of 'gagging' writs or letters in practise and to determine whether there is a problem of 'tactical targeting', where claimants routinely target secondary publishers who are less able to establish a defence⁸⁰³.

The term 'gagging' writ or letters can be defined as a party's attempt to stifle further comment or debate with regards to published comments with the threat of libel action. Such actions are legitimate when the goal is to deter those from making further defamatory comments. However, it is seen as abuse when the aim is to prevent unwanted criticism or exposure⁸⁰⁴.

In the second report, 'Defamation and the Internet: A Preliminary Investigation',⁸⁰⁵ the law commission were asked to provide preliminary advice to the Government on

whether current law is causing difficulties for online publishers, ISPs, their customers or others. Results of the study would determine whether there was a need for possible further work⁸⁰⁶. Both studies are discussed.

4.9.1 Aspects of Defamation Procedure: A Scoping Study

The study involved the consulting of organisations affected by the law of defamation and defamation practitioners. 30 questionnaires were sent out to a targeted sample, of these, the Law Commission received 13 responses. The responses came from six solicitors, two barristers and five organisations. The Law Commission suggested that because of the low return in responses the issue may not be seen as that pressing of a concern⁸⁰⁷.

With regards to ‘gagging’ writs, the study concluded that there was no evidence of abuse of defamation procedures. The concern of ‘gagging’ initially followed the change in legal landscape since the introduction of Civil Procedure Rules and the Defamation Act 1996⁸⁰⁸.

The opinion of the practitioners was unanimous. Believing there was no evidence that claims were being started without the intention of pursuing the case. The organisations surveyed only provided a small amount of evidence that they had been the victims of ‘gagging’ writs, however, four out of the five complained that the law of libel generally creates a ‘gagging’ or ‘chilling’ effect on the freedom of the press⁸⁰⁹.

The Law Commission found no evidence to suggest that there was an issue with claimants starting proceedings with the sole intention to restrict exposure and that there are enough procedural safeguards in place to deter claimants attempting such action⁸¹⁰.

The study showed that the use of gagging letters being sent out with the sole intention to silence critics from exposure or further repetition of defamatory statements was found not to be of any concern. There were nine responses from the study, which were from five solicitors, two barristers and two organisations. The majority found that in their experience there was no evidence of a problem with ‘gagging’ letter, basing their answers on a number of points⁸¹¹.

Firstly, that the Pre-Action Protocol for defamation claims states that a letter should be sent to the defendant containing details of the claim. One solicitor commented that it was common for a letter to be sent out to a potential defendant with information regarding an investigation into defamatory material. This is in accordance with the CPR and not an abuse of practise. It was also observed from a number of the respondents that it is right to send letters to all third parties contributing to the defamatory material⁸¹² so all parties are aware of the defamatory material being investigated.

Secondly, three respondents referred to ‘responsible journalism’ and that journalists should not fear the receipt of a ‘gagging’ letter if research has been conducted properly before its publication. Defendants are perceived to be robust enough not to

cave in after the receipt of pre-action letters, especially with protective mechanisms now available to defendants⁸¹³.

One of the organisations, a local and regional newspaper, responded that in their experiences they have received letters from claimants attempting to deter publication. It was commented that letters, warning them of potential legal action are often received by the editors complaining of defamatory material. Although it is right for a complainant to take such a route if he feels he has been wronged, a letter sent with the sole intention to ‘gag’ the publisher could lead to financial issues for newspapers that do not have the money or in-house lawyers that national newspapers or major media corporations may have⁸¹⁴.

A second organisation on behalf of the booksellers, spoke of threats of legal action against its members if they distribute a particular book. They referred to being routinely targeted by this method⁸¹⁵.

The Law Commission found little evidence of letters sent to solely ‘gag’ the potential defendant, commenting that it was an important part of the CPR and that any changes would increase the limitations for the claimant⁸¹⁶.

4.9.2 Tactical Targeting

The second part of the investigation aimed to uncover any evidence of widespread ‘tactical targeting’ of potential defendants. By targeting those less able to assess the

strength of a claim, complainants are more likely to halt any distribution, due to the ‘chilling effect’ of libel action⁸¹⁷.

A majority of the respondents commented that they had no experience regarding the problem of ‘tactical targeting’ and that there were deterrents in place against such a problem. In addition, secondary publishers should protect themselves by seeking indemnities or contributions from the primary publisher⁸¹⁸.

The respondents referred to the Section 1 defence of Defamation Act 1996 as a form of protection against secondary publishers being targeted for libel action. It was highlighted that those not considered to be the author, editor or publisher and took reasonable care in relation to the publication such as those only involved in the printing, distributing, copy making or selling of the material may be able to avail themselves to the protection of the Section 1 defence⁸¹⁹.

It was also noted by a number of the respondents that there are limitations within the Section 1 defence, with four of the respondents believing that the protection was inadequate. This inadequacy was highlighted in relation to the removal of the defence once the secondary publisher has been put on notice. One of the barristers consulted commented that it may be unjust for a secondary publisher to be at risk once put on notice, but continues to publish regardless. Once put on notice of a defamatory article, a secondary publisher faces the choice of surrendering to the claim or continuing to publish with (potentially worthless) assurance from the primary publisher that the material is not libellous⁸²⁰.

Two of the organisations that were consulted complained of the application of the Section 1 defence. The first, on behalf of the booksellers, commented that both large and small booksellers are targets for claimants who wish to prevent distribution of material and that change should be made to the law to protect secondary publishers⁸²¹.

The final organisation consulted was an ISP, who complained that they are 'very much seen as tactical targets'. Following the decision of *Godfrey v Demon Internet*, ISPs are regularly put on notice of defamatory material and then assume the role of both judge and jury in deciding whether to remove the content or not⁸²².

Two other consultees, one a barrister and the other a solicitor, agreed that the law needs clarifying for ISPs who are currently subjects of the 'most common manifestation' of 'tactical targeting'⁸²³.

The Law Commission concluded that they saw no significant problem concerning 'tactical targeting' with existing protection available for defendants. The Law Commission did recognise the issues of the Section 1 defence of the Defamation Act 1996 with regards to secondary publishers and the position of ISPs, concluding that further investigation is required to address this issue⁸²⁴.

4.9.3 Law Commission Conclusion

The Law Commission concluded that following the introduction of the CPR and Pre-Action Protocol in defamation, incidences of 'gagging writs' and 'gagging letter' were rare. The Law Commission recommended to the Lord Chancellor's Department,

that no project is required to examine this area of concern⁸²⁵, commenting that a majority of the respondents had not experienced any form of ‘tactical targeting’ based on the comments they received.

The Law Commission highlighted two issues arising from the questions concerning ‘tactical targeting’. Firstly, the defence available to secondary publishers under Section 1 of Defamation Act 1996 ought to be re-examined, recommending further consideration to the wording of Section 1 of the Defamation Act 1996, to strike the right balance between claimants and defendants in defamation cases⁸²⁶.

The second issue concerned the re-examination and clarification of the position of ISPs. The Law Commission, recommend that because of its position in carrying out the study of ‘Defamation and the Internet: A Preliminary Investigation’, that it would be more beneficial to consider all Internet related issues together⁸²⁷.

4.9.4 Defamation and the Internet: A Preliminary Investigation

For the second report, the Lord Chancellors Department requested that the Law Commission investigate how the law of defamation and contempt in court is effecting Internet communication⁸²⁸. Any feedback to the Lord Chancellors Department would provide preliminary advice for improving areas of law concerning online publishers, ISPs, their customers and others⁸²⁹.

The study involved 31 questionnaires being sent out to interested parties, including online publishers, ISPs, barristers and solicitors. The Law Commission received 11 responses, in addition to meeting four ISP organisations about the volume and nature of defamation complaints they receive⁸³⁰.

The study highlighted four areas of concern. Firstly, was the issue of ISPs being held liable for third party material that they did not now know about, but could still be sued for. Secondly, was the issue of the one year limitation period being reset every time a page is downloaded, therefore, creating a new publication and restarting the one-year period. Thirdly, was the issue of Internet publishers being exposed to defamation threats and lawsuits in other countries. The final issue was the risk of prosecution for contempt of court because of the availability of material on the Internet regarding parties involved in a case, which could influence a juror's decision⁸³¹.

The remainder of this Chapter will consider the Law Commissions work concerning ISPs and Internet publishers. Although the issue of contempt of court is a valid concern regarding defamation and the Internet, it is not in the scope of this study.

4.9.5 Liability of ISPs

The scoping study found that the Section 1 defence⁸³² may cause problems for Internet publishers and that issues that were raised should be investigated further. The Law Commission commented that the defence was narrow and only applies to those unaware of the defamatory material. Furthermore, that there is no defence for

secondary publishers who believe or have assurance that the material is the truth, privileged or fair comment⁸³³.

The report considered the decision of the *Godfrey v Demon Internet* case as the main authority on Internet Defamation, commenting that the case drew attention to the limitation of the Section 1 defence, in addition to not dealing with the question of reasonable care⁸³⁴.

The Law Commission discussed the implementation of the EU directive, designed to limit the liability of ISPs. They commented that although the directive does provide immunity, this privilege may be lost if the ISP fails to 'act expeditiously to remove or disable access to information', when the ISP has actual knowledge of the content⁸³⁵.

It could be argued that there is little difference between the test under Section 1 of the Defamation Act 1996 and Article 14 of the EU Directive. Moreover, that article 14 mirrors the Section 1 defence and therefore, once an ISP has been put on notice and fails to act expeditiously, the protection is lost. A contrasting view is that Article 14 provides a wider protection and it is not enough for an ISP to know that the material is defamatory. Instead, they would need to know that it was illegal too⁸³⁶.

It was therefore applicable to ask what constitutes unlawful activity under English defamation law. Prima facie, it is unlawful to publish words that are defamatory of the claimant. Therefore, an ISP with actual knowledge of defamatory material does not need to know that the material is false, as knowledge alone that the material is

defamatory confirms what they are publishing is illegal. If this view is correct, then Regulation 19 fails to provide a defence, similar to how Section 1 fails to do so⁸³⁷.

4.9.6 Consultation

Several of the respondents who the Law Commission contacted argued that the problems with the Section 1 defence are much more widespread and serious in Internet publishing than in traditional publishing. This is because of the ease of which anyone can publish on the Internet, unlike traditional paper publishing. In addition, due to the volume of traffic on the Internet, it is the ISPs who are the easiest defendants to locate and can easily become a ‘tactical target’⁸³⁸.

One ISP described that they regularly receive letters from solicitors concerning sites set up about companies by disgruntled customers. Although many of these sites may not be offensive or unreasonable and just recount a personal experience, when faced with a letter on behalf of a well-resourced company, the ISP will normally remove the site, rather than have to face any litigation. Campaigning groups are particularly vulnerable to having their sites removed following a complaint⁸³⁹.

ISPs told the Law Commission during the study, that once aware of defamatory material contained on a website, common practise is to remove it. Therefore, to prove reasonable care was taken for purpose of Section 1 of the Defamation Act 1996, ISPs will often remove the whole website and will only reinstate it once the customer promises in writing, not to repeat the defamatory material⁸⁴⁰.

The Law Commission's investigation highlighted three criticisms made by the industry regarding the position of ISPs and defamation law. Firstly, that it is costly and burdensome to receive and react to defamation complaints. Once a complaint has been identified it has to be acted upon quickly. However, it can be a time consuming process to find the correct material and any subsequent material that has been copied. According to ISPs, this has left them within a climate of legal uncertainty and risk, which could be improved if defamation procedures were clarified for them⁸⁴¹.

Secondly, the industry expressed that they were uncomfortable with the idea of being both 'judge and jury', which sees them censoring material that may not be libellous. The removal of material could expose the ISP to a claim by the author for breach of contract and freedom of expression. Consequently, ISPs have to place restrictive terms and conditions on their customers to prevent any counter claims⁸⁴².

Finally, the investigation found that ISPs were concerned about the loss of business to US providers who have a greater protection against liable action and could offer more attractive terms to their customers⁸⁴³.

In conclusion, the investigation stated that the:

'Practical application of defamation law to secondary publishers in general, and to ISPs in particular, bears more harshly on freedom of expression than its application to primary publishers'⁸⁴⁴

Consequently, to protect reputation without the removal of true material, alternative methods should be sought that consider the practical effects of law so that application is reasonably certain⁸⁴⁵.

Those consulted considered the present situation to be unsatisfactory and in need of reform. Included in the many ideas for reform, was the extension of ISP immunity, reform of the Section 1 defence of the Defamation Act 1996 and the introduction of codes of practise for ISPs to follow, either voluntary or with statutory backing⁸⁴⁶.

The Law Commission concluded that there was a strong case for reviewing defamation law with regards to the impacts on ISPs. Current law places pressure on secondary publishers such as ISPs to remove material regardless of the public interest or if it is true. Consequently, this can sometimes make ISPs be seen as tactical targets to those wanting to prevent dissemination of material. In addition, although it is a legitimate goal to protect a person's reputation, it should be questioned whether or not it can be done through other means that do not cause conflict with freedom of expression⁸⁴⁷.

Consequently, the Law Commission did not reach a final conclusion, but suggested several areas of reform. Firstly, to exempt ISPs from liability. Secondly to extend the innocent dissemination defence, with clear guidance provided through an industry code, negotiated with interested parties. Finally, to include some form of independent adjudication within an industry code so that ISPs do not have to assume the role of 'judge and jury' when assessing potentially illegal material⁸⁴⁸.

4.9.7 Jurisdiction and Applicable Law

The Law Commission observed that the issue of jurisdiction is complex, with three inter-related elements. Firstly, the definition of where defamatory publication takes place is different in each country. In England, each communication to a third party is a new tort, therefore, an Internet publication takes place in each country it is downloaded. US law differs to UK law in that a single publication will only give rise to one action for damages. English courts apply different rules depending on which country the publication takes place. The final element concerned which body of law the court should apply⁸⁴⁹.

The E-Commerce Directive's overall aim was to reduce legal uncertainty regarding which rules apply to information services, something the Law Commission concluded as something it was failing to do. In addition, the law applicable to non-contractual obligations, referred to as the 'Rome II Treaty', which in its current draft suggests that defamation action should be tried according to 'the law of the country where the victim is habitually resident at the time of the tort'⁸⁵⁰.

Those consulted had three main criticisms concerning jurisdiction and Internet publication. Firstly, was the possibility of facing legal action anywhere in the world because of the global nature of the Internet. The BBC stated that it faced 'unacceptable levels of business risk' complying with every law in the world. However, most of the respondents had not been involved in an actual foreign claim, but they did refer to the potential risk. Secondly, because England is seen as a 'claimant friendly' jurisdiction to bring defamation action, foreign claimants with

even the most tenuous links, are attracted to English courts. Finally, that there was a culture clash between both English and American values in regards to defamation and that foreign action against US citizens undermines America's approach to free speech⁸⁵¹.

The Law Commission concluded their study by referring to this area of law as complex and the attempts within the EU to 'create greater legal certainty have added their own ambiguities'. Potential defendants argue that they should only face defamation action in their own jurisdiction, where they know and understand the law. Moreover, that it is impractical to be familiar with law in multiple jurisdictions. In contrast, potential claimants can argue the same and that action against those who have published defamatory material should be in the country where the damage of reputation has taken place⁸⁵².

The Law Commission found that any solution could not be achieved in the short to medium term, as greater harmonisation of international defamation laws would require an international treaty and did not recommend reform in this area. The Law Commission also referred to the benefit of a study on the impact of defamation law and the Internet in other jurisdictions⁸⁵³.

There has since been no response by the Government regarding these reports. This research under the objective 'To investigate the attitudes of legal practitioners and ISPs towards Defamation law and the Internet in England and Wales' will also consider the experiences of ISPs and legal practitioners and compare the two report's finding.

4.10 Recent and Future Developments

4.10.1 Consultation Document on The Electronic Commerce Directive

In December 2006, the then Department of Trade and Industry (DTI) published a paper entitled Consultation Document on The Electronic Commerce Directive: The liability of Hyperlinks, Location Tool Services and Content Aggregators⁸⁵⁴. The paper considered the extension of Articles 12 to 14 of the EC Directive. In conclusion, the Government found that there was insufficient evidence to justify an extension of the limitations for hyperlinks, location tools and content aggregation services.

4.10.2 Rome II treaty

The aim of the Rome II treaty is not to harmonise laws, but to ensure that the court in which action is taken is consistent and therefore reducing the issue of ‘forum shopping’⁸⁵⁵.

In a European Parliament statement:

‘At second reading, MEPs had approved an amendment to regulate the violation of privacy by print or audiovisual media. According to that text, the law applicable in case of defamation by media would have been the one of the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised. However, national governments strongly opposed the Parliament’s position and the Conciliation Committee agreed to leave this matter to be discussed in the future under the review clause.’⁸⁵⁶

The Rome II treaty has now been agreed, with defamation excluded⁸⁵⁷. The European Commission has been asked to conduct a study by the end of 2008⁸⁵⁸.

4.11 Summary

Where Internet defamation, its history and the legal issues that have been discussed conclude and this particular piece of research begins is very much based on the problems that have yet to be addressed by any other research. These include the issue of ‘notice and take down’ and the effectiveness of current English law to protect reputation and freedom of expression on the Internet.

The Law Commission went so far in trying to address the issue of defamation and the Internet, but there is an argument that the lack of replies returned from ISPs does not provide a fair reflection of the problem. The issue of freedom of expression and its

conflict with the Section 1 defence of the Defamation Act 1996 and the notice and takedown procedure have had little coverage in previous research.

Below is a summary of the findings from this chapter:

Defamation Law

- English defamation law has been criticised for being out of touch with new communication technology. Foundations for such arguments are based on the history of defamation law, which is structured on principles derived from the Eighteenth and Nineteenth centuries.
- Defamation law in England is still viewed as having a ‘chilling effect’ on media outlets. Consequently, there is a concern that freedom of expression is being suppressed by the current laws and defamation practice.
- Distributors of defamatory material are no longer acting innocently once put on notice about the material in question. An ISP who is aware of potential defamatory material is advised to remove the material promptly, in addition to any accounts in the author’s name.
- In England, the Defamation Act 1996 covers all media publication acting as a ‘one rule fits all’ law.

The Internet and Defamation Law

- Defamation law is of greater concern to the general public since the Internet's introduction as more people are now able to publish material to a wide and varied audience.
- Anyone can publish on the Internet, which inevitably leads to the issue of how to regulate content. Two suggestions have been made. Firstly, to adapt current laws to regulate both Internet and traditional publishing. Secondly, to create separate rules for Internet related material that promotes self-regulation and acknowledges the uniqueness of the Internet. Furthermore, the idea of incorporating the ability to reply to defamatory material on the Internet into defamation law and procedure has also been put forward as a way to aid regulation.
- There is a danger that corporate companies or individuals with sufficient financial backing can use current defamation law and practice to silence Internet critics and whistleblowers. There is also a risk that those who publish their views under a pseudonym could possibly be uncovered through threats of libel against the ISP. This is also a concern for ISPs, who will more than likely be the first and easiest target in a defamation dispute.
- Once they have been put on notice, an ISP faces the risk of being held liable for the content they publish unless they take appropriate action. An ISP can attempt to resolve a complaint by removing the offending material, however, this action has been criticised because it suppresses free speech. Furthermore, these complaints are often sent straight to the ISP without any legal medium or formal process.

- The Internet has blurred the traditional borders of countries opening up a number of issues regarding how and where multi-jurisdictional defamation disputes should be handled.

Defamation Act 1996

- Under current case law, notice and take down seems to be the only evidence of reasonable care that can be shown by an ISP.
- Distinctions between publisher and distributor are blurred on the Internet.
- ISPs have to question whether or not to monitor content on their servers with regards to the conflict of ‘showing reasonable care’ and ‘actual knowledge of defamatory material’.

EC Directive

- There is little evidence to suggest that the regulations provide any extra protection for ISPs.

Human Rights Act: Freedom of Expression

- Freedom of Expression is a fundamental part of a democratic society and a court must consider Article 10 when material is journalistic, literary or artistic

or is of public interest. However, there are concerns that current defamation law, procedure and practice is having an adverse affect on freedom of expression.

- There is a concern of a chilling affect caused by the threat of libel action against those who publish on the Internet.
- It has been questioned whether it is possible to protect both freedom of expression and a person's right to a reputation. Therefore, is the HRA compatible with the Defamation Act?

Internet Service Providers

- There are concerns over the loss of the section 1 defence once an ISP has been put on notice of defamatory material.
- It is safer to remove material that could hold the ISP liable. Therefore, material that would most probably be protected by the HRA is effectively being censored.
- Concerns that a lack of case law continues to confine an ISP to the role of 'judge and jury'.
- Should English based ISPs be subject to similar protection that American based ISPs are given?

Defamation and Associated cases

- *Godfrey v Demon Internet* has been cited as one of the most important cases concerning defamation on the Internet. There are a number of reasons for this. Firstly, the case has been cited in subsequent cases concerning ISPs and

defamation. Secondly, it has set the precedent for all ISPs who are put on notice regarding defamatory material and is often cited in defamation claims sent to the ISP.

- *Godfrey v Demon Internet* did not question whether or not the material was true or justified. Awareness of the material was enough to remove the defence.
- *Gutnick v Dow Jones* confirms that the place where the material is downloaded is where the tort is committed. This would be applicable to English courts.
- *Gutnick v Dow Jones* highlighted the issue of the single publication rule. Furthermore, the Court agreed that there should be no new rules made for publications on the Internet. This decision will be influential in other territories.
- The case also places the burden on publishers to be aware of committing an act of tort in multiple jurisdictions. Therefore, publishers may not publish articles in some territories because of the risk of a libel suit. This is a demonstration of the 'chilling effect' of libel and restricted freedom of expression.

Defamation procedures and practice

- Since the introduction of conditional fee agreements there is an increased risk of action being taken against those who publish on the Internet. However,

these agreements do provide an opportunity for those who are defamed to restore their reputation.

- Because of the risk of taking on a case using a CFA, a lawyer is entitled to increase their normal fee.
- Pre-Action Protocol aims to reduce the cost and time taken over settling a defamation dispute.
- The success or otherwise of the pre-action protocol depends on how strict the courts are going to be when penalising those who do not attempt to resolve the dispute at an earlier stage using the pre-action protocol.
- As ISPs are often contacted directly by the complainant, without the aid of a legal practitioner, it could therefore be questioned how often the pre-action protocol for defamation is used for Internet related disputes. Furthermore, is it viable for Internet defamation disputes?

Law Commission

- The Law Commission made a number of findings during their research. Firstly, they found that there was no concern relating to ‘gagging letters’. However, two organisations did mention during the research that in their experience there was a problem. Furthermore, the lack of evidence may have been due to the limited scope of the study due to the number of ISPs responses and that ISPs are often contacted directly by the plaintiff and not by a lawyer.
- The Law Commission held that responsible journalism should not fear defamation.

- With regards to ISPs being seen as tactical targets, the Law commission found that there was little evidence. However, the Law Commission did question whether the Section 1 defence provided adequate protection, finding limitations in the defence, which place ISPs in the role of ‘judge and jury’ when put on notice regarding defamatory material. Furthermore, because of the Godfrey v Demon case, ISPs are regularly targeted. It is therefore unjust for secondary publishers to be at risk. The Law Commission concluded that there needs to be clarification for ISP and that the section 1 defence should be re-examined.
- The Law Commission also found that the protection offered by Article 14 of the Human Rights Act does not help ISPs.
- The ISPs who submitted a response to the Law Commission held that dealing with defamation complaints was costly and burdensome. Furthermore, that they were uncomfortable with the role ‘judge and jury’ and were concerned about a loss of business to US based ISPs.

4.12 Conclusion

The law of defamation has long been renowned as the one of the most complex areas of tort and its application has often been criticised. Defamation law aims to strike a balance between a person’s right to a reputation and a person’s right to freedom of expression. However, this balance is rarely achieved without any criticism. The

complexity and criticism has only increased since the introduction of the Internet and some have even called for reform of the law to handle defamation on the Internet.

This chapter has highlighted four areas of concern, which have been repeatedly discussed.

1. English defamation law

Further research is required to fully gauge the impact defamation law is having on the Internet publishing community in addition to, the impact of the Internet on defamation law. There are differing views on what is the best approach to deal with the strain that Internet publishing has put on defamation law. Moreover, there is a strong argument for defamation law to be modernised so to embrace the uniqueness of the Internet. There are arguments of equal merit that suggest that defamation law in England is adequate enough to deal with modern communicational methods and that an Internet publisher should not be subject to any special rules or regulations from that of a traditional printed publisher.

The courts and the Government have recognised that there are new and potentially difficult issues arising because of the Internet. However, they have yet to introduce a solution that fully embraces these issues and one that strikes a balance between freedom of expression and a right to a reputation.

2. Freedom of Expression

There is a general consensus among ISPs, journalists and commentators that defamation law suppresses a person's right to freedom of expression on the Internet. Furthermore, there are concerns regarding the compatibility of the Defamation Act 1996 and the EC Directive with the Human Rights Act, specifically Article 10: Freedom of Expression. This is demonstrated in the wording of the Defamation Act 1996 and the EC Directive and that once an ISP has been notified about defamatory material on their servers they are then aware of the material and should remove it expeditiously. If an ISP were to disregard any such notice, they may lose the defence completely. An ISP would more than likely remove the material without question, so to be able to avail themselves to a defence.

3. Internet Service Providers

There is a growing concern that ISPs are an easy target during a defamation dispute and that the lack of case law concerning defamation and Internet publishing places the ISP in the precarious position of 'judge and jury'. *Godfrey v Demon Internet Ltd* is currently an authority on defamation disputes on the Internet, which, in addition to the Defamation Act 1996, often leaves the ISP with no choice but to remove material once they have been put on notice. If this material is true or justified, then this action could be viewed as an infringement of freedom of expression. Research is therefore required to determine how current defamation law is affecting Internet publishing, what impact *Godfrey v Demon Internet Ltd* has had on ISPs dealing with defamation complaints and how an ISP's guidelines and procedures are affecting freedom of expression.

4. Defamation Procedure and Practice

Defamation procedure has recently gone through a number of changes. Notably, the introduction of conditional fee agreements has made it easier for those who feel their reputation has been damaged to take action against those who have written and published the defamatory material. The pre-action protocol has been introduced to help ease the cost and the time consumed during a defamation dispute, in addition to reducing the number of litigations reaching court.

The Internet consists of many informal publications, such as, blogs, message boards and personal websites. Consequently, informal complaints are made to ISPs and content hosts, requiring the removal of material as a remedy for the defamatory remarks. This process bypasses the protocol and legal opinions, yet still removes the Section 1 defence unless action is taken to remove the material in question. It could be questioned how effective and common is the use of the protocol when concerning Internet defamation. Or if a cost effective process should be put in place that does not bypass any legal intervention, but still harbours freedom of expression and the spirit of Internet communication.

Conditional fee agreements have now made litigation available to those who would normally not be able to fund a defamation case. This is a positive step for those who have been defamed and do not have the financial resources to restore their reputation. However, this does leave the press and other publishers open to claims that they would normally not have to face. The costs for the defendant is increased by the increase of fees by the plaintiff's lawyer to cover the risk of taking on an effectively

‘no win no fee’ agreement. Therefore, claims that are settled at an early stage will reduce the costs for the defendant.

The following Chapter details the opinions and experiences regarding these four issues with the ISPs and lawyers interviewed. This is then followed by the Chapter 6, which concludes this research and addresses any recommendations for further research.

5. Data Collection and Findings

5.1 Introduction

The opinion and experiences of those directly involved in the practising of defamation law and of those whose business it is to publish material online are vital to this study. These experiences have helped to validate whether or not the claims that have been made by commentators on the subject on Internet Defamation are in fact an issue in practise. With reference to the aims and objectives of this thesis, the interviewing process has identified the attitudes of legal practitioners and ISPs towards Defamation law and the Internet in England, in addition to how Internet defamation cases both in England and in other countries are affecting how ISPs deal with defamation claims.

This chapter confirms whether or not legal practitioners and Internet publisher believe that change is something that is required as well as what improvements are needed. The interviews also consider the notice and take down procedure in relation to freedom of expression.

With regards to defamation practise and procedure, the interviewing process has helped identify how current defamation procedures and practises are affecting the way in which online defamation is handled, any effects to freedom of expression and whether or not new procedures are helping to resolve defamation disputes on the Internet quickly and efficiently. These issues have been less publicised in the literature concerning defamation on the Internet.

Finally, the interviews also provided an opportunity for the interviewees to discuss any other matters they felt that needed to be discussed or publicised. This helped to identify any issues that had not arisen during the literature review.

This chapter is divided into 18 separate sections. Firstly, Chapter 5.2 details the sample of interviewees who were chosen and agreed to share their experiences of defamation on the Internet. Where relevant, information regarding the background of the interviewee such as, the type of company they work for or own and their experience regarding defamation is included.

Chapter 5.3 is an introduction into the findings from the interviews and a reminder of the approach taken during the data collection process. This chapter also considers the structure of the interviews and the way in which they were conducted.

Chapter 5.4 discusses the experiences of the ISPs regarding defamation claims and cases. This chapter also observes any differences between an ISP and a content host's vulnerability to defamation claims and the causes for these differences.

Following the discussion of experiences regarding defamation disputes, Chapter 5.5 considers the problems that the interviewees may have with current defamation law. In Chapter 4, there were concerns regarding the loss of the Section 1 defence once the ISP has been put on notice and that ISPs were effectively censors of material on the Internet. This chapter observes any complaints the ISP interviewees have with the Section 1 defence, in addition to the opinions of the lawyers regarding the defence and ISPs. Moreover, the clarity of the wording of the defence is considered in relation

to Internet stakeholders. This chapter also considers the issues regarding freedom of expression and notice and takedown, in addition to the role of judge and jury, which ISP's role has been compared to.

Chapter 5.6 observes any issues that ISPs and lawyers have with the notice and takedown procedure. The procedure has been heavily criticised in journals and other media articles, evidence of which can be found in previous chapters. In the summary in Chapter 4 it was stated that there is a concern regarding the 'chilling effect' defamation law may be having on Internet publishing. Interviewees offer their opinions on the defence in relation to this procedure, in addition to what guidelines ISPs have in place once put on notice about defamatory material, what actions they take once placed on notice and what are the common requests that are included in the notice. There are also details regarding what advice legal practitioners give to their clients during a defamation dispute, in addition to, relevant issues regarding notice and takedown.

Chapter 5.7 observes the issue of freedom of expression and defamation on the Internet. As mentioned previously in Chapter 4, commentators have been very critical of the role of 'judge of jury'. This chapter discusses this issue with the ISPs as to whether they agree with the tag of 'judge and jury', in addition to, whether they feel this has an adverse affect on freedom of expression.

The Law Commission found that there was no evidence to suggest that there was any pressing issue regarding 'gagging letters'. The term 'gagging' writ or letters can be defined as a party's attempt to stifle further comment or debate with regards to

published comments with the threat of libel action⁸⁵⁹. In Chapter 4, it was stated that two of the organisations commented during the Law Commission's interviews that they had experienced 'gagging letters' before. The Law Commission's reports were not solely concerned about Internet publishing, but instead, defamation and publishing as a whole. Chapter 5.8 discusses this issue with the ISP interviewees as to whether they have had experience of 'gagging letters' or anything that resembles such a letter, in addition to providing any relevant examples.

Research has shown in the previous two chapters that commentators regard ISPs as an easy target for defamation lawsuits. It was noted in Chapter 4, that the Law Commission saw no significant problem for further research to be done regarding ISPs being viewed as tactical targets, even though an ISP commented in the report that they were 'very much seen as tactical targets'⁸⁶⁰. In Chapter 5.9 ISP and hosts discuss their views on whether they believe they are an easy target, in addition to reasons why they have become targets.

A contributing factor to why ISPs are perceived as an easy target is because of the case of *Godfrey v Demon Internet*⁸⁶¹. As the first ever case in the UK to deal with ISPs publishing alleged defamatory material, many commentators have referred to it as an authority for how defamation claims are dealt and the case is often cited in defamation claims sent to an ISP. In Chapter 5.10, ISPs and hosts discuss from their experience how the case has affected the way in which they deal with defamation claims.

Chapter 5.11 provides an opportunity for the legal professionals to respond to any of the concerns raised by the ISP and host interviewees regarding the law and legal practice in the previous sections of this chapter. Furthermore, the issue of responsibility for publication is also considered.

In Chapter 5.12, ISPs and hosts who regularly deal with complaints discuss the costs and time consumed when dealing with complaints, in addition to what resources are used to rectify these issues.

Chapter 5.13 observes the criticisms that have been addressed during the interviews, in addition to those made in Chapter 4 regarding defamation law. Moreover, the interviewees discuss from their experiences what changes are needed to defamation law and practice, if anything at all.

The Pre-Action Protocol for defamation was introduced in 1999 in an attempt to encourage the exchange of information between parties, in which it includes a clear framework for both parties to work from. In Chapter 4 it was stated that the Pre-Action Protocol aims to reduce the cost and time taken over settling a defamation dispute and that success or otherwise of the pre-action protocol depends on how strict the courts are when penalising those who do not attempt to resolve the dispute at an earlier stage using the pre-action protocol. It was questioned in Chapter 4 that as ISPs are often contacted directly by the complainant, without the aid of a legal practitioner, it could therefore be questioned how often the pre-action protocol for defamation is used for Internet related disputes? and is it viable for Internet defamation disputes? Chapter 5.14 discusses the experiences that ISPs and lawyers have had using the pre-action protocol and their opinions of its effectiveness in settling a dispute at an early

stage. Furthermore, it investigates whether it is common for lawyers to use the pre-action protocol in disputes involving the Internet.

In Chapter 4, the introduction of CFAs was discussed, concluding that now such a process is in place, it is therefore easier for a claimant to take action against someone who has potentially damaged their reputation, without the risk of an enormous legal bill if they are to lose the case. This should provide a greater opportunity for those who have been defamed to restore their reputation. Chapter 5.15 discusses whether its introduction is having an affect on freedom of expression on the Internet and if they are becoming more popular in defamation cases.

In Chapter 5.16 the legal practitioners discuss whether or not they have seen an increase in Internet related defamation disputes. This Chapter also discusses whether the number of claims and cases concerning traditional printed media has been affected by the introduction of CFAs, the 1 year limitation period, the pre-action protocol or any other legal elements.

A number of ideas and further questions arose from the first set of interviews. Subsequently, all of the interviewees were contacted and asked if they had any further information to contribute to this research regarding these ideas and questions. Chapter 5.17 observes the responses from the interviewees who contributed to this section, in which changes to defamation law and practice are considered. The lawyers who responded discussed their views regarding the multi-publication rule, dealing with large American corporations who are hosting potentially damaging material and

whether they are aware of high profile personalities hiring lawyers to protect their reputation on the Internet.

In Chapter 5.18, the findings of these interviews are summarised. This chapter highlights the key findings from the interviews, in addition to where improvements could have been made throughout the interviewing process.

5.2 Data collection

The data collected was from a sample of lawyers with experience of defamation cases and claims, in addition to a sample of ISPs and content hosts. Of the lawyers who were contacted, 10 agreed to be interviewed. In the case of the ISPs, six agreed to be interviewed. The identity of the interviewees will be kept anonymous throughout the course of this research and will be referred to as Lawyer A through to K and ISP A through to F. One of the interviewees, Lawyer I, published material on a popular legal website and therefore, had experience from a legal and publishing perspective.

ISP A was a representative of one of the leading ISPs in Europe. The company supplies Internet connection, amongst other communication technology, to 3.5 million Internet users. The representative for ISP A had been working for the company for two and a half years and has been involved in one major defamation dispute during this period. The first interview was conducted on the 8th October 2007 and the second on the 9th July 2008.

ISP B has been providing a wide range of communicational technology for over 15 years, particularly to businesses. The representative who was interviewed had been working for this company for more than a decade, undertaking a number of roles, one of which, involving Internet regulation. The company has also been involved in a very significant Internet defamation case. The interview was conducted on the 29th June 2007.

ISP C is dedicated to supporting Internet communication for businesses. The representative who was interviewed is the CEO on the board of directors and also founded the company in 1995. The first interview was conducted on the 19th June 2007 and the second on the 5th June 2008.

The interviewee from ISP D was the co-founder of a website where users can come together to find information regarding the topic of the website. The website also hosts a popular discussion board, where material relevant to the website's topic can be discussed by the users. ISP D has also been involved in a highly publicised defamation dispute. The first interview was conducted on the 19th June 2007 and the second on the 5th June 2008.

ISP E, like ISP C dedicates its resources to addressing the technological and communication needs of small to medium businesses. The interviewee was the owner of the company and was interviewed on the 21st June 2007.

ISP F, is a website that offers a service for users to compare different packages and research information regarding a particular method of communication. The ISP also

runs a forum for users to discuss and compare these particular packages. The representative who was interviewed was one of the co-founders of the website. The interview was conducted via email, on the 20th June 2007.

The lawyers who were interviewed all had extensive experience in the area of defamation. The sample included lawyers who had both experience representing defendants and claimants.

Lawyer A is a partner for London based law firm. The interviewee is the Head of Litigation and Dispute Resolution, in which they have nearly three decades of experience. Lawyer A regularly deals with defamation disputes. The interview was conducted on the 20th September 2007.

Lawyer B is a partner for a law firm based in London, Watford and Milton Keynes. The interviewee is the Head of Commercial Law, Intellectual Property and Information Technology, in addition to having an expertise in Ecommerce. The practice was founded over 100 years ago. The interview was conducted on the 2nd October 2007.

Lawyer C is a solicitor working for a law firm based in London and Birmingham. The interviewee has been representing claimants involved in Internet defamation disputes as part of the firm's Commercial Litigation work for over a year. The interview was conducted on the 27th September 2007.

Based in Nottingham, Lawyer D has been a qualified solicitor for two years at one of the largest law firms in the Midlands. In this time the interviewee has been dealing with a number of issues including reputation management. Lawyer D, has for the majority of their career, represented defendants during defamation disputes. The first interview was conducted on the 20th September 2007 and second on the 10th June 2008.

Lawyer E is a partner in a London based firm and has over two decades of experience regarding litigation. For the last 15 years Lawyer E has mostly been representing defendants, but has had experience acting on behalf of claimants. Lawyer E was also closely involved in the drafting of the pre-action protocol. The interview was conducted on the 19th September 2007.

Lawyer F has had experience working for both defendants and claimants dealing with commercial issues including defamation claims. Lawyer F, works for a London based firm who have an expertise in a number of areas including litigation and dispute resolution. The interview was conducted on the 9th September 2007.

Lawyer G has over two decades of defamation experience and was one of the co-founding partners of a Tunbridge Wells based firm that was set up in 1994. The interview was conducted on the 24th September 2007.

Lawyer H, is a partner in a different law firm based Tunbridge Wells. Lawyer H has over 25 years experience in law, including defamation. The interview was conducted on the 17th January 2008.

Lawyer I is both a lawyer for an international law firm and an editor for a web based legal resource. As an IT law specialist, Lawyer I has over 8 years experience working for the firm and is now a senior associate. The interview was conducted on the 15th January 2008.

Finally, based at law firm in London, Lawyer J has extensive experience in libel law spanning over 25 years. The interviewee has represented defendants involved in Internet based defamation cases, including one that has since become a landmark case in Internet defamation. The first interview was conducted on the 9th January 2008 and the second on the 16th June 2008.

5.3 Findings from the Interviews

Each interview began with a short and informal conversation about why this research was being undertaken, in addition to checking if they were still happy to continue with the interview based upon the information that had been sent to them in a previous correspondence via email. This detailed the aims and objectives of the study, in addition to the areas that would be discussed during the interview.

The interviews began with a discussion of the interviewees' experiences with defamation and the Internet. This allowed for prepared questions from a semi-structured interview to be asked at appropriate times during the discussion. By

allowing the interviewee to openly discuss their experiences it helped to highlight other areas of interest to this research that had yet to be addressed prior to the interview. The interview questions for both the ISPS and lawyers can be found in Appendix A and B.

5.4 ISPs and Content Hosts' Experience of Defamation Complaints

The experiences of the interviewees regarding defamation on the Internet were split depending on the role in which they had in the publishing of material. The content hosts were more likely to be in the firing line of a defamation complaint, especially if they choose to host material posted by third parties on their message boards or chat rooms.

Both ISP A and ISP B had had experiences with defamation cases and were involved in these cases because of third party material posted on message boards or in chat rooms, which the ISP either hosted or provided access to. ISP A commented that despite being the defendant in a defamation case, they had alleged defamation from a claimant's point of view more often than having to deal with it as a defendant⁸⁶². The final two ISPs (ISP C and ISP E) had comparatively less experience dealing with defamation complaints.

The two content hosts (ISP F and ISP D) had more experience dealing with defamation complaints that concerned the publishing of third party material. Their reasoning for this was that a person who wishes to complain about material found on

a website will find it easier to contact the host directly, rather than trying to find the host's or author's ISP details.

The host of the material under Section 1 of the Defamation Act⁸⁶³ would fall somewhere between the definition of 'editor' and 'publisher' of the material. The host has the ability to edit and publish the content and as part of their business, publishes this information to the public. To summarise, a host has effective control of the content and would under current law, find it difficult to avail themselves to the Section 1 defence. An ISP will in most cases only be regarded as the publisher of the statement.

With regards to the EC Regulations⁸⁶⁴ an ISP could under permitted circumstances, avail themselves to the Mere Conduit defence. The host of the material would find it difficult to rely on this defence and would instead attempt to avail themselves to the Hosting defence. However, this defence would be lost if when put on notice they did not remove or disable the access to the material in question.

5.5 The Section 1 Defence

The general perception of the Section 1 defence by the hosts and ISPs was that it was inadequate in its attempts to deal with Internet defamation. They based their argument on a number of concerns. Firstly, was the role of 'judge and jury' that in which an ISP can find itself once placed on notice about defamatory material on their system. This

was also highlighted in the conclusion published by the Law Commission⁸⁶⁵. ISP B commented that once on notice, this prompted the ISP:

‘To decide whether or not the material bears any defamatory meaning, when in reality that would be up to a judge to decide’⁸⁶⁶.

The second issue concerned the clarity of the Section 1 defence. Similar to conclusion in the Law Commission report comments were made during some of the interviews complaining that there was not enough clarity in the law as to what constitutes ‘expeditious’ when removing potentially defamatory material. Furthermore, that ISPs and hosts differ from the traditional role of ‘publisher’, ‘editor’ and ‘author’ found in the Section 1 defence.

The final criticism concerned the way in which the law was failing to maintain freedom of expression when considering the notice and takedown procedure and the impact of *Godfrey v Demon Internet*. Commenting that those who post material on the Internet rarely get a chance to defend their comments because of ISP liability and the costs involved for the defendant. As with the whole of defamation law, the law it self is heavily weighted in favour of reputation⁸⁶⁷.

ISP C criticised defamation law, accusing it of offloading the cost base on to the ISP community and that the Government was pointing in the wrong direction. Moreover, that the notice and takedown procedure is not symmetrical with the rest of publishing market, commenting that:

‘If you are going to treat ISPs in terms of printed publishers then you are trying to create parity with something that is not symmetrical right now’,⁸⁶⁸.

This is an understandable concern that has been raised by ISP C as there are a number of elements, such as, the resetting of the limitation period on each download and the lack of initial control on third party material, which is very different to printed media. These comments reflect the views of Price⁸⁶⁹ in Chapter 4.3, who comments that English defamation law was structured when most defamatory publications were either spoken or printed.

ISP A did not see defamation law as relevant to their business anymore because of the Mere Conduit defence of the EC Regulations, which they believed they could rely on⁸⁷⁰. However, the EC Regulations may do little more than protect the ISP if they have removed the material ‘expeditiously’ for the ‘host defence’ or if they can prove they had nothing to do with the transmission of the material for the ‘mere conduit’ defence. ISP F had no strong opinion of the defence.

A selection of legal practitioners had some sympathy for the situation that ISPs/Hosts currently find themselves in. With regards to the notice and takedown procedure, Lawyer F commented that although the situation is not entirely satisfactory, it is at least one that an ISP or host can manage⁸⁷¹. However, the knock-on effect caused by the notice and takedown procedure can sometimes prompt ISPs to remove entire websites, some of which do not contain the material complained of. An example of which, can be seen in the dispute between Usmanov and Murray in Chapter 4.6.1.

Lawyer F also remarked that because of the lack of case law, the 1996 Act has not really been explored⁸⁷². Consequently, once an ISP is placed on notice they will remove material (under their terms and conditions) rather than get involved in a situation they have no background on.

In contrast, Lawyers G and Lawyer I had no issues regarding the 1996 Defamation Act. Lawyer G in particular commented that they saw no justifiable reason to give ISPs any special privilege similar to that provided under American law. Lawyer I was critical of the American approach and the extended protection ISPs receive for defamatory material that they are hosting, believing it to be unjustified. It seems apparent from these comments that there could be strong opposition towards the loosening of defamation law to protect ISPs.

Lawyer J and Lawyer C expressed their concern regarding the multi-publication rule and multiple defamation suits. Their unease was founded on the principle devised from the Duke of Brunswick case. Lawyer J described the principle as one that ‘artificially restarts the limitation act’ and that one can ‘just hit on the Internet edition of the article and that will restart the time running’⁸⁷³. Moreover, that the reasons for having a statute limitation period are not currently being applied to the Internet. Lawyer C commented that there should be some change in the legislation to say how many times somebody can be defamed and how many times someone can sue for the same thing⁸⁷⁴.

Lawyer J also had a concern with the issue of multi-jurisdictional defamation claims commenting that a claimant:

‘Should be entitled to sue in the location where the publication was made’ therefore, requiring the claimant to ‘rehabilitate their reputation in the place of publication’⁸⁷⁵.

Apart from *Gutnick v Dow Jones*, there have been very few incidents where this rule has been applied. However, it is apparent that the threat of multi-jurisdictional defamation lawsuits is still there and that an Internet publisher must be cautious. These comments are supported by Collins, who comments in Chapter 4.7.11 that the single publication rule prevents a multiplicity of suits arising from widespread publications of the same material⁸⁷⁶. Bainbridge also agrees and comments that a number of authors have suggested that the single publication rule is way forward for the law in England⁸⁷⁷.

5.6 Notice and Takedown Procedure

ISPs and hosts have openly criticised defamation law which can often place them in the role of ‘judge and jury’ once put on notice about defamatory material. All of the ISPs interviewed had either specific defamation or general abuse guidelines in place to deal with a complaint of defamation. Furthermore, all of the interviewees said they would remove any material they were uncertain about, rather than risk any further action against them.

The common request that ISPs and hosts receive from complainants or lawyers is for the removal of the offending material. Once the material has been removed the majority of complainants will then cease their threat of libel action against the ISP or host. ISP B commented that:

‘Because they (the complainant) see that them telling us is enough and we do something about it and we see that the fact that the law leaves us in a tricky position that if we do not do something about it, then we run the risk of legal action further down the line’⁸⁷⁸.

These comments support Akdeniz in Chapter 4.7.4 who believes it to be unacceptable that the offended party can ‘simply notify an Internet Service Provider claiming the information to be legally defamatory’⁸⁷⁹.

From the position of a lawyer representing a client who has been defamed on the Internet, their main concern is to get the offending material removed. Following the removal of material, the second objective is to then ensure that it is not repeated and finally, if necessary, request a published apology.

If the claimant wishes to take action against the author of the defamatory material and attempt to prevent any further slur on their reputation, then, in the case of message boards and chat rooms, they would have to contact the host or ISP for them to disclose the details of the user. This process can be problematic for the claimant particularly if the ISP or host has a confidentiality policy in place, which does not

allow them to easily disclose these details. Consequently, a claimant would then have to seek a court order that would instruct the ISP or host to disclose the details of the author. However, as Lawyer D commented, this ‘is a high risk exercise for the claimant’⁸⁸⁰ as it can be an expensive process to seek a court order and there is no guarantee that the information that the host or ISP has stored is accurate or that the material in question has not been uploaded from a publicly accessible Internet point e.g. library or Internet café. This reiterates the comments made by Johnson⁸⁸¹ and Collins⁸⁸² in Chapter 4.3, who highlight the potential dangers and cost of starting a defamation claim/investigation.

From a defendant lawyer’s perspective, the majority recommended that an ISP should remove material that has been complained about. This is at least until further investigation had been completed. Lawyer B commented that:

‘Very often it is just a matter of taking it down pending an investigation and most sites will prefer in practice to minimise risk to themselves to freeze whatever comment is on there’⁸⁸³.

Despite having the option of investigation, an ISP would need to be 100% certain that the material was not defamatory before re-uploading it. This is very unlikely and would probably not be in the ISP’s interest to consume resources investigating third party material. If the material was re-uploaded and found to be defamatory then it could be foreseeable that a court would acknowledge this prior to awarding damages. An ISP would have to seek indemnities from both parties to be fully assured that they would not be sued.

Lawyer J commented that in their practice they always looked for indemnities from both the claimant and the author on behalf of the ISP, commenting ‘you have asked me to remove material, that would put me in breach of my obligations to the person whose information I am hosting’ and asking the complainant ‘will you indemnify me against any costs and claims brought by that person against me?’⁸⁸⁴. Lawyer J commented that this process allows for a reasonable amount of time for investigation and for the ISP to contact the person who’s material the ISP is hosting to explain that:

‘We have had this letter of complaint about your content and they want us to remove it. So do you want us to keep it up there? If so, we would seek an indemnity from you’⁸⁸⁵.

A method such as this would help ISPs to protect themselves, however it would take a strong-willed and confident author to ask for the material to be put back with the knowledge that legal action would be taken if it was to be re-uploaded.

Also of relevance to this research is the issue of monitored and unmonitored chat rooms. Lawyer B commented that monitored chat rooms carry more risk because ‘you are undertaking to be responsible to cover what is on there’⁸⁸⁶. In contrast,

‘Unmonitored chat rooms, we tend to say undertake a basic level of investigation, it depends on how obviously blatant or not the particular comment is’⁸⁸⁷.

By not monitoring chat room activity, an ISP has an improved chance of being protected by the EC Regulation, as highlighted in *Bunt v Tilley*⁸⁸⁸.

With reference to the potential risk and cost for the claimant when defamatory material has been published on a website, Lawyer H complained about a problem they have had with defamatory material being hosted by large corporate American owned businesses, whose services are frequently used in the UK. Their complaint concerned an unsatisfactory experience dealing with an American company who were hosting defamatory material about their client. The lawyer requested for the company to remove the content but it was refused, arguing that unless their client sought an injunction against the person who posted the material they would not remove it. Lawyer H complained that the company ‘seemed to take the view that they are big and can do what they like’ furthermore, ‘they completely ignored the fact that they as the company were hosting the page, were liable’⁸⁸⁹. The claimant was unable to afford the cost of proceeding with a court injunction and consequently, the defamatory material remained on the ISP’s web space with potentially damaging effects to the claimant’s reputation and business.

Many Internet users use American based search engines and websites. Therefore, there is a high chance of being defamed on a US hosted site. It is already difficult for US based citizens to get material removed. Chapter 4.6.2 discusses the dispute between John Seigenthaler and the website, Wikipedia, where both parties were American, yet Wikipedia refused Mr Seigenthaler’s request for the material to be removed. As the US and UK are governed by different laws, the process of removing

material from a US based website could be extremely difficult and costly, with no guarantee of success.

5.7 Freedom of Expression

A further complaint concerning the Section 1 defence and the notice and takedown procedure, was the potentially damaging effects it can have on freedom of expression. It was unanimous amongst the surveyed ISP community that the current legal procedure of notice and takedown has an adverse affect on freedom of expression.

The majority of the interviewees based their decision to remove material once on notice due to the potential costs involved in attempting to defend a defamation claim, in addition to the lack of clarity of their position with regards to publishing.

ISP F commented that the:

‘Incentive to remove content due to cost by a non-publisher (i.e. ISP) to defend or clarify their position is restricting the freedom of expression of the end user’ furthermore, ‘the major problem with defending defamation cases is the enormous cost of doing so. This is far beyond the scope of most individuals and small companies and as a result, cases are settled even when there was no case to answer’⁸⁹⁰.

ISP D, who agreed that the Section 1 defence was suppressing freedom of expression, supported ISP F's comments:

‘Because I do not know what is the truth or not and I cannot really afford to go the court to find out on behalf of someone else. The easiest response for a website operator is to simply take the thing down’⁸⁹¹.

ISP E also discussed the commercial implications of a defamation claim, commenting that:

‘In a commercial world, if I am running a business that has ‘x’ number of people employed, then making a wrong decision could ultimately result in the collapse of the business and those stakes are very high’, furthermore, ‘the commercial interests of my business override any moral or outlook on life I might have’⁸⁹².

ISP C commented that:

‘I have great difficulty with ISPs being seen as censors’ and that ‘it is a bit like blaming a big printing firm for libel when in fact it was the publisher or newspaper who published the libel, there is no parity’⁸⁹³.

The interviewee also believed that ‘the government are pointing in the wrong direction at the easy target, rather than the correct target’⁸⁹⁴.

ISP B referred to what they called the ‘horrible position of being judge and jury’ and ‘having to make the decision’⁸⁹⁵ when faced with a complaint of defamation, despite the author believing it to be of public interest or that they have good reasons as to why it is not defamatory.

ISP A agreed that it is an easy option to take down the material when faced with a complaint and in doing so, does have implications on freedom of expression. Furthermore, when their company is faced with a complaint they do not routinely take it down, but instead try to take an informed view on it. This balances the interests of their customer and of the third party. The interviewee did say that they would err on the side of caution if they had any doubt about the material, which would most likely result in its removal from their system⁸⁹⁶.

It has been made quite clear from these responses that the ISPs have a serious issue with the way in which the law expects them to censor material. As businesses, the threat of libel action and potential damage to their company was their first concern; following this was an acknowledgement of the detrimental effects on freedom of expression. It is apparent from the comments that the Price’s opinion in Chapter 4.4.4, where it is stated that the balance between freedom of expression and reputation is a subjective one and it could be argued that the law of defamation and Article 10 are incompatible⁸⁹⁷ support the interviewee’s comments.

The reaction to the issue of freedom of expression was met with a mixed response from the lawyers who were interviewed. One point that was mentioned in a number of

the interviews was the matter of balancing the right to a reputation and the right to freedom of expression and subsequently where to draw the line.

Although some of the interviewees did consider the position that ISPs and hosts find themselves in, in addition to the impact of the notice and takedown procedure on freedom of expression. All of the lawyers were in favour of the procedure that is currently in place. Their reasoning behind this was as follows:

Lawyer G commented that the procedure is ‘quite right’ and furthermore did:

‘Not feel in the least bit sorry for the ISPs. I do not see any need for a legal reform to make life easier for them’⁸⁹⁸.

Lawyer C was in agreement with the previous interviewee and believed that:

‘Defamation does have a very important role to stop people literally bullying each other by the written word and causing all sorts of upset and harm to those families’⁸⁹⁹.

Lawyer I commented that:

‘The situation we have is reasonable, requiring that the host removes material once aware of it. Yes it can be exploited to suppress free speech, but I think the alternative is potentially more damaging’⁹⁰⁰.

The alternative procedure the lawyer referred to was that of the American approach to defamatory material online. The interviewee expressed their concern regarding this approach, believing it to provide too much protection for those who defame others online. Consequently, this can result in it becoming very difficult for the defamed party to rectify the comments made and take action against those who have published or wrote the material.

ISPs have argued that allowing for more time to investigate could reduce the number of claims against freedom of expression. Lawyer H agreed to a ‘certain extent’⁹⁰¹ that the notice and takedown procedure does affect a person’s right to freedom of expression, but questioned, if the ISP had more time, how they were actually going to work out whether it is defamatory? Commenting that:

‘They can not say whether or not a defence of justification would succeed because they do not have the information and they are never going to put the effort into deciding where justification would succeed. So for an ISP to say it is unfair because we do not have the time to investigate it is frankly unrealistic, because I cannot see if they are ever either to have the interest or the ability to investigate it all anyway’⁹⁰².

Lawyer E believed there could be a conflict between freedom of expression and the notice and takedown procedure, however the majority of defamation complaints they receive are justified. The interviewee commented that:

‘Editors get very upset about it, I tell the company look, someone has made a complaint, it may or may not be with substance, but the reality is you take it off the web, you mitigate if it is wrong. More often than not, people who make complaints have reason to reason to make complaints’⁹⁰³.

The same lawyer continued:

‘In my experience probably nine out of 10 people who make a complaint about things, particularly through solicitors, the story is wrong and therefore the story does need to come down or be edited’⁹⁰⁴.

These comments refer back to the issue of ISPs and hosts receiving complaints via abuse contact forms on websites or via email. This could suggest that complaints made through solicitors are more likely to be genuine complaints as a solicitor is less likely to take on a case without merit.

Finally, Lawyer J suggested in relation to the notice and takedown procedure that there:

‘Should be a process where you go against the speaker, if you are a claimant. Then the ISP abides by the outcome of what the legal proceedings or resolutions the parties have come to’⁹⁰⁵.

This method would take the problem of ‘judge and jury’ out of the hands of the ISP or host and help strengthen freedom of expression on the Internet, but only if the author of the material was to take on the dispute.

5.8 Gagging letters

An area of research that was conducted during the Law Commission reports was the issue of ‘gagging letters’. The Law Commission found that there was insufficient evidence to suggest that further research was required in this area.

When discussing this issue with the ISPs and hosts, four of the interviewees had a concern regarding the use of ‘gagging letters’, each providing examples of what they considered to be an attempt to stifle comment.

Firstly, ISP F complained that it was ‘common practise’ for:

‘Companies who do not understand how we work, as many sites I believe will respond by removing content to avoid costs of dealing with the issue’⁹⁰⁶.

They also commented that ‘future material’ claims are also included in these types of letters, which they believe to be an attempt to deter any future material being published about the complainant. This ‘common practice’ is supported by Price, who comments that complaints submitted to an ISP tend to resolve the situation with the removal of the material⁹⁰⁷.

ISP D, when discussing a defamation dispute they had been involved in, believed that there was a strong resemblance to a ‘gagging letter’. The interviewee commented that:

‘Certainly in this case that is what it was all about. It is about control and silence. Along with the early complaints, was a demand for us to see that any material going on the website, in other words not to takedown things that were potentially defamatory, but actually to stop any publication of anything that was, and the word used was ‘derogatory’, not defamatory’⁹⁰⁸.

Furthermore, the interviewee complained that they thought that this approach was an abuse of the system and that they used ‘the heavy hand of the law, in order to try and stifle comment’⁹⁰⁹.

ISP B commented that they receive:

‘Complaints about all sorts of types of things, however in the area of defamation it can be quite obvious or it can be quite obscure or difficult to assess’⁹¹⁰.

Consequently, an ISP can only take a view on whether or not the material bears defamatory meaning. The interviewee commented:

‘Whether or not you want to consider that to be as possibly being a ‘gagging letter’, in reality they probably would not have gone to court with it, because it is quite small. We do not take the risk of being sued or even taken to court to decide whether we can be sued’⁹¹¹.

The interviewee also recognised that it was difficult to assess the impact of the notices that they receive and it is therefore difficult to judge whether it was a ‘gagging’ issue or not. The interviewee commented that when they do receive complaints that often ‘try to convince us by threatening us with law to get the material taken down’⁹¹². The final interviewee, ISP C, commented that they had not received that type of a letter concerning defamation, but had for copyright infringement⁹¹³. In Chapter 4.7.4, Burden has sympathy for ISPs commenting that it is unreasonable to think that an ISP should take responsibility for all the material made available to the world via their servers⁹¹⁴.

It is common practise for lawyers to send a letter to a publisher informing them that they are currently investigating potentially defamatory material that they have

published. Evidence of this is included in the Law Commission reports. Consequently, this will then make the ISP or host aware of the material in question and potentially liable for it.

This research has shown that ISPs and hosts are unlikely to take the risk of hosting potentially defamatory material that could leave them vulnerable and ultimately at risk of being taken to court. On the surface, this may well look as if ISPs are an easy target for lawyers and complainants who wish to have material they disapprove of, removed. It was therefore appropriate in this research to ask both sets of interviewees if they thought that ISPs and hosts were an easy target in defamation complaints.

The Law Commission's study found that there was no perceived issue regarding 'gagging letters', despite comments that some of the interviewees had received such letters. This research has found that there may be an issue with 'gagging letters' regarding ISPs and hosts.

5.9 Are ISPs and Hosts an easy target when concerning defamation complaints?

All of the ISPs and hosts agreed that they thought that they were an easy target for defamation claims and attempts to have material removed from their sites. ISP A commented that they are often in the line of fire because they have the ability to regulate the issue and that they 'are the first target with deep pockets that somebody

can come at'⁹¹⁵. The interviewee did concede that it was a fact of life in the market that they operated in and that issues like defamation claims come with the territory.

ISP C, in agreement with the ISP A, commented that it is very easy to find an ISP and easy to request that they remove certain material, remarking that:

'It is all do with who's making the judgment, so if it was to do with print publishing, it would go through the courts, you would ask for a gagging order and job done'⁹¹⁶.

The interviewee concluded by questioning that if this is the usual way of dealing with defamatory material in printed publications then why should it be any different for an ISP?

ISP B discussed how the *Godfrey v Demon Internet*⁹¹⁷ ruling had impacted on their business, finding that they were still getting the case quoted to them as a reason to take material down for all types of content, not just defamatory material. They also received threats against them stating that they will be taken to court if they do not do anything about the material complained of.

The main concern for a plaintiff or their lawyer is to get the offending material removed as quickly as possible. The ISP is the first point of contact, particularly when the plaintiff does not know the identity of the author. It is understandable that ISPs believe they are an easy target for disputes and claims. Under current laws and procedures, it is difficult to see any alternative. The views presented by ISPs, which

suggest they are easy targets are supported in Chapter 4 by commentator's Burden⁹¹⁸ and Akdeniz⁹¹⁹.

5.10 Godfrey v Demon Internet

The issue of the notice and takedown procedure was highlighted in *Godfrey v Demon Internet*. All ISP and host interviewees were subsequently asked if the case has had any effect on the way in which they deal with defamation claims. Three of the interviewees provided an insight to their experiences with claims following the case, including ISP B who discussed the issue in Chapter 5.9. ISP B continued to explain that before the introduction of the E-Commerce Regulations, the case had serious implications on their business, commenting,

‘If someone complains of defamatory material we have to do something about it, where before we would argue that we did not put the content there, so we do not need to do anything’⁹²⁰.

The interviewee continued to discuss the implications of the E-Commerce Regulations in which,

‘Any type of content that is illegal, civil or criminal, means we have got to do something because we actual knowledge and have to act expeditiously to get that material removed if we believe it to be illegal’⁹²¹.

Under English law, defamatory material is deemed to be illegal and therefore, an ISP would be liable for the content. The removal of the offending material is the fundamental difference between Regulation 19 and the Section 1 defence, where the latter defence is unavailable once the ISP has been made aware of the content⁹²². The comments made by ISP B are supported by Hendrie-Liaño⁹²³ in Chapter 4.4.2.

ISP D, whose business was set up soon after the case was concluded, refers to *Godfrey v Demon Internet* as ‘forming the basis of the cases law we have to work with’⁹²⁴. ISP D was in agreement with the ISP B, complaining that:

‘There is so little case law and that is one of the few ones that there is. I think people are very quick to disassociate themselves with any potential legal situation, because what it made clear was that the ISP is liable’⁹²⁵.

As a content host, the interviewee also commented that it was hard to know whether or not they were regarded as an ISP and because they moderate and edit more than an ISP, they would be seen to have increased liability. The interviewee also continued to highlight that a lack of case law was a fundamental problem and since *Godfrey v Demon Internet*:

‘A lot has changed, I do not think there was the proliferation of bulletin boards and community websites that there is now, that there was then’⁹²⁶.

Godfrey v Demon Internet has certainly had a profound effect on the handling of defamatory material. With such a lack of case law in this area of defamation, ISPs have very little choice but to abide by the ruling until law or case law dismisses it. The knock-on effect of this is a potential restriction on freedom of expression. Furthermore, the data collected from the interviews backs up the views of commentator's Collins⁹²⁷, Price⁹²⁸, Sadaat⁹²⁹, Deturibe⁹³⁰ and Burden⁹³¹ in Chapter 4.7.4.

5.11 Is The Government Pointing in the Wrong Direction?

In reaction to the ISPs' opinion that they regarded themselves as easy targets and that the law, as ISP C commented, was pointing in the wrong direction, these issues were put to the legal professionals.

There was little sympathy for the ISPs in the interviews conducted with the lawyers, including Lawyer G who questioned:

‘Why shouldn't they be a target, when they are publishing it? Once they are made aware of the material they have got all the statutory defences in the Defamation Act to take it down’⁹³².

Observing potential issues that could arise if an ISP sought immunity similar to that of the American system, Lawyer G commented that ‘if they had some immunity, they would leave it up there for forever and a day’⁹³³.

Lawyer H⁹³⁴ and Lawyer C echoed these views, with Lawyer C believing that it was:

‘Very naïve of them (the ISPs) if they think people can just type up anything they like and to be allowed to get away with it’⁹³⁵.

With regards to the ISPs and hosts as a business, the interviewee commented that:

‘To provide such an area you have to take some of the responsibility to make sure it stays clean and that people behave on it’ furthermore, that ‘they make a lot of money on it, they do not do it out of the goodness of their hearts, so they need to take responsibility for it’⁹³⁶.

Responsibility of publication was also discussed in an interview with Lawyer E, commenting that:

‘If you publish something that is defamatory then you have to got to take the consequences. Just because they host the site and they do no know the content, then more fool them’⁹³⁷.

The interviewee also commented on the ISPs’ ability to mitigate themselves when faced with a claim of defamation, stating that ‘if you put it up, you’ve got to take the

rap and there is a get out for them', referring to the notice and take down procedure.

Lawyer E stated that he did not 'think the law is wrong on that at all',⁹³⁸.

Lawyer D agreed, commenting that 'they are publishers, so they are responsible'. The interviewee did mention that they thought that:

'It is more difficult for an ISP to have editorial control of their publications, than a traditional newspaper and that is understood, I think'. Furthermore, that the 'threat of libel only comes when they continue to publish the material once they have been told it is defamatory',⁹³⁹.

The interviewee also recognised that there was an issue concerning freedom of expression, but:

'I do not think the ISPs are publishing defamatory comments for commercial gain, so it is not really in their interest to publish such things',⁹⁴⁰.

Lawyer D also believed that there was:

'A lot more freedom of expression going on than there was without the Internet. I know this is not ideal really, but I think there is a difficult balance to be struck and there is a freedom of expression point to be

made, but equally there is no reason why the Internet should be a lawless area',⁹⁴¹.

The issue of striking a balance was also considered in the interviews with Lawyer A and Lawyer B. Lawyer A observing that:

'It is a balance isn't it. Where the needle lies in between the two I think is difficult to say and I think it depends on resources on either side',⁹⁴².

Lawyer B also agreed, finding it to be a:

'Political view rather than a legal more than anything, it is a question of where you draw the line, if they were operating as mere conduit or not',⁹⁴³.

The interviewee also believed that the economic argument would always win, commenting that:

'Is the economy going to be better off having ISPs being liable and people who operate websites taking responsibility themselves? I think the answer is going to be yes'. Lawyer B also added that they thought it would be more sensible to make 'website operators liable, rather than the ISPs who are just channelling the data',⁹⁴⁴.

Lawyer J, who has had experience of representing ISPs in defamation cases, commented that ‘they (ISPs) are over stated in their relation to defamation. I think that they do have a problem’⁹⁴⁵.

The majority of the lawyers believed that ISPs should take responsibility for the content they provide. Some of whom gave examples of the damaging effects that defamation can have on a person, justifying their reasons for not wanting any change to the law. The point about there being balance between reputation and freedom of expression is a fair point to make, however, it could be argued that current procedures make for the balance to be tipped in favour of reputation. The comments made by the interviewees tended to align themselves with the traditional views of defamation commentators, such as Neil⁹⁴⁶, Wallace⁹⁴⁷ and Milmo⁹⁴⁸, in addition to judgements and case law discussed in Chapter 4.

5.12 The Costs Involved when Dealing with Defamation Complaints

Following the complaint made by ISP C in Chapter 5.5 that the cost of dealing with a complaint was placed on an ISP, all of the ISP were asked to discuss the resources used when dealing with a complaint. ISP F commented that resources were committed to these claims:

‘Because we take them (claims) seriously and do not remove comments without investigating them’⁹⁴⁹.

ISP B also found that dealing with complaints was costly and burdensome, commenting that:

‘When we were dealing with lots and lots of them we were often seeking external legal advice, so the cost was even more because we’re seeking legal advice about whether or not they thought the material was bearing defamatory meaning’⁹⁵⁰.

The interviewee mentioned that cost and time has to be considered when material is removed from their client’s website, as they can often feel hard done by, especially long term customers. The interviewee added that the:

‘Whole process takes time and if you engage an external lawyer, then obviously it can be quite expensive’⁹⁵¹.

Finally, ISP C commented that although they had only been involved in a few disputes, they would seek ways to manage the situation efficiently if the number of disputes were to grow in scale. It was also added that although it was not a huge burden for their company, they could see that it would be an issue for larger ISPs that host a lot of small businesses⁹⁵².

There was little evidence to suggest that this is a major concern for an ISP and the comments made by Martin⁹⁵³ in Chapter 4.3 are not disputed. However, this all depends on the procedures that an ISP takes. If the claim is made via a ‘contact us’ form and the material is just removed based on the notice and takedown procedure

then there is a low cost base. If however, the ISP needs to seek legal advice or takes time to investigate the claim, then this will be at a cost to the ISP.

5.13 What Improvements should be made to the Law?

Following the criticism regarding defamation law in England, which for the majority came from the ISP/hosts, the interviewees were asked what improvements they thought were needed.

It was made clear by three of the ISPs/hosts that they felt change in the law was called for, making a number of suggestions regarding the areas which needed to be addressed.

The main complaints concerned the notice and takedown procedure. ISP F commented that the law ‘encourages ISPs to take the content down rather than defend the users’ position. Subsequently, suggesting that:

‘To balance cases, anyone claiming for defamation liable for the costs if they are not successful in proving their case in court. This would prevent vexatious requests’⁹⁵⁴.

A second interviewee, ISP D, addressed two areas for improvement. Firstly, was the need for clarity regarding what constitutes ‘being expeditious’⁹⁵⁵ from the time of

being put on notice to the removal of the material? Secondly, was the need to change the law to improve freedom of speech on the Internet, commenting that:

‘Websites do not have much choice, but to take anything down that is been complained about, without any regards to its legitimacy or truth’⁹⁵⁶.

The interviewee complained that the current situation does not allow the third party who posted the alleged defamatory material:

‘To stick up for their opinions and views, because they do not have any chance to say that they will take responsibility’⁹⁵⁷.

The interviewee also commented that they thought that ‘we need to be brave and look at it (Internet) as a whole new form of communication’⁹⁵⁸.

ISP B suggested that there should be ‘some mechanism in place to deal with the complaints’ and that:

‘We (ISPs) should not be making the decision whether something is defamatory because often, as far as I am aware, cases have not gone to court’⁹⁵⁹.

In comparison to the second ISP/host, the interviewee also commented that to have some kind of mechanism in place that:

‘Sets out a legal regime that we can follow, which takes the risk away from us and it becomes an issue for the person putting up on notice and the person who is publishing the material in the first place’⁹⁶⁰.

Four of the lawyers interviewed also commented on what, if any, changes they believed are required to the law. Firstly, Lawyer H commented that the:

‘English Courts regard the Internet simply as another form of publication and normal rules apply. I do not think the Internet presents any new legal odds and decisions have clarified the law’⁹⁶¹.

Lawyer C was in agreement with Lawyer H, commenting that ‘anyone who knows about defamation, can tell very quickly if it is defamatory of comment or privilege’ and that it does not take ‘that long to make a decision whether to remove it or not’⁹⁶². Therefore, there is no reason for a change in the law.

Considering the history of defamation law, Lawyer B commented that ‘the law we’ve got is designed for very offline medium’. Current defamation law has not been revised since 1996, something that Lawyer B believes will not change in the short term, commenting that ‘I do not think that any serious lobby (by ISPs) has been taken serious by any political body’⁹⁶³. furthermore that:

‘Existing law applies to online by default. That in the sense that parliament has never turned its mind to saying we should have something different’⁹⁶⁴.

Lawyer I had no strong beliefs for any changes to English defamation law and practice, but did have concerns about America’s approach to regulation on the Internet. Lawyer I commented that there was:

‘An unjustified inconsistency between America’s approach to dealing with material that infringes copyright and material that defames. I think that should change, I do not think the scope of the Communications Decency Act 230c⁹⁶⁵ is reasonable, I think it goes too far, so people who have been defamed should have an opportunity to get rid of the comment from the web, rather than granting the host complete immunity’⁹⁶⁶.

ISP D also commented on the approach that America has taken to deal with Internet defamation. The interviewee believed that because of the different bias, which results in the burden of proof being switched to the defamed party, unlike in England, it becomes more difficult for the defamed party to try and find someone to sue. ISP D argued that holding the author liable and not the Internet publishers could reach some form of middle ground, commenting that:

‘I think there is a middle ground. If someone wants to stand by their opinions then they are able to do that and they do not put the website at

risk with their opinion. If they are not prepared to stand by their opinions then the website has to take it down'⁹⁶⁷.

Evidence suggests that there may be some room for change in defamation law, particularly when the Internet is concerned. The majority of the lawyers interviewed opposed the idea of a change in the law, in comparison to the ISPs. A middle-ground would have to be reached for both reputation and freedom of expression to be protected and for both parties to be content with the law.

5.14 Pre-Action Protocol

The Pre-Action Protocol for defamation⁹⁶⁸, as discussed in Chapter 4.7.1 was introduced in attempt to encourage the exchange of information between parties, in which, it includes a clear framework for both parties to work from. This includes a timescale and sufficient information for both parties to understand and work from.

The ISP interviewees were asked how familiar they were with the protocol, in addition to what were the common methods for receiving complaints.

All of the ISP respondents had little or no experience with the protocol. ISP B, who had been involved in a defamation case before the protocol's introduction commented that in their experience they received complaints directly from the complainant without any legal aid, stating that:

‘Most of the stuff is other Internet users complaining about our users or material they have found on our servers’⁹⁶⁹.

ISP D, who had been involved in defamation proceedings following the protocol’s introduction, found that the majority of their complaints came directly to them from other users of their site. However, when they were involved in defamation proceedings they ‘obviously got a pre-action protocol’⁹⁷⁰.

ISP A, who like ISP D had been involved in proceedings following the protocol’s introduction, even though the case was dismissed following a summary judgement, commented that the complaint came ‘through to the abuse mail box’ and that the complainant ‘had not followed any protocol’⁹⁷¹.

Finally, ISP F, whose website has received a number of complaints regarding defamation in the past, commented that:

‘Most of our requests come direct (even from larger companies) and not from solicitors, so they do not tend to follow these.’ Many claims of defamation do not proceed beyond e-mail or one letter and do not involve solicitors. These are almost always legally inaccurate’⁹⁷².

In reaction to the ISP’s comments, the experience and effectiveness of the protocol was discussed with the lawyer interviewees.

The majority of lawyers were in favour of the protocol and happy with its introduction. However, lawyer A did say although he used the protocol he did find it 'cumbersome' and:

'Whilst one does follow it, usually one's more concerned with the more and more urgent need, which is to prevent the libel either being written or repeated or published and/or being withdrawn at the earliest possible opportunity'⁹⁷³.

Lawyer E, who was part of the committee that drew up the protocol, believed that 'the pre-action protocol is a very good thing' and that:

'It is very rare for a claim to be issued without there having been fairly extensive dialogue and correspondence before hand'⁹⁷⁴.

Lawyer H referred to the protocol as 'perfectly sensible' and that by not complying with it the other party is at a disadvantage. The interviewee also added that:

'The combination of the protocol and the short limitation period makes life quite difficult for claimants'⁹⁷⁵.

Lawyer J, who predominantly acts on behalf of defendants tended not to use the protocol, however, does hold people to preparing them if a claim is brought against their client.

Lawyer C also used the protocol, but commented that:

‘Usually writing to the host and saying that you are or somebody has posted statements and you could be prosecuted for libel because you have allowed those to be published and facilitate that publication, so you better remove it PDQ. To be fair they usually do’,⁹⁷⁶.

Three of the lawyers spoke of using the pre-action protocol for printed material but choose to contact the ISP directly without using the protocol. Lawyer B commented that:

‘The nature of the medium (Internet) is much more immediate so if you have got a defamation action off line and you have got something that is published you can go through the protocol and take your time in getting it sorted, because very often opinions are changed and they are formed fluidly. Very often timescales in the protocol are not very appropriate, so in practice you tend to be giving very much quick fire advice which just bypasses the protocol’,⁹⁷⁷.

In agreement with Lawyer B, Lawyer F observed a difference between ‘Internet scenario and the printed scenario’. Lawyer F commented that:

‘Where there is a dispute over something in a magazine that tends to become more formal more quickly. Where as arguments over Internet content seems to get resolved by the notice and takedown procedure’,⁹⁷⁸.

Lawyer F also noted that although the notice and takedown procedure does help to settle any disputes at an early stage, it can 'be difficult to know where it (the defamatory material) has been achieved'⁹⁷⁹.

Lawyer D was in agreement that the protocol tended to not get used when dealing with Internet cases. Lawyer D commented when acting for an ISP that

'It is difficult because the pre-action protocol applies to defamation actions and strictly whenever we are contacted by the ISP they have been directly contacted by the complainant. Usually it is the case that the complainant has not received legal advice either'⁹⁸⁰.

With regards to acting on behalf of the complainant, Lawyer D commented that 'we would contact the ISP directly to say please take this down' and that:

'We would not be looking to sue the ISP because of the S1 defence, so defamation pre-action protocol applies when you want to sue someone for defamation'⁹⁸¹.

The general opinion of the pre-action protocol is that it is a good thing. However, when a lawyer contacts an ISP regarding defamatory material, the protocol is bypassed because by simply contacting the ISP and requesting that the content is removed the same result can be achieved. Once placed on notice by a legal professional an ISP will undoubtedly take the request seriously and ultimately remove the material.

As there is no formal process in place when contacting an ISP or host, either directly through a complaints contact email or via lawyer, the ISP/host, when on notice must deal with the complaint in order not to be held liable for the content. This would not be the case if the publication was in a physical form, i.e. a magazine, yet the same law and procedures govern publications both on the Internet and those in a physical form.

However, this process does allow for the ISP/host to deal with complaints 'in-house' without the added cost of seeking legal advice. When considering the idea of a formal process for complaints, Lawyer F commented that 'in an ideal world that would be great' but 'I do not think it would be easy to introduce'⁹⁸². Lawyer F also discussed an idea that had been mentioned by ISP D and Lawyer J, whereby the ISP seeks protection from both parties, commenting that:

'The ISP does not get involved in any debate, it just takes it down then if the person who wrote that article wants to disagree with that, then comes back to the ISP and says no I want my article printed, the ISP is then obliged to put it back up on the site. I think in principle and with probably 9/10 cases, if the ISP took the article down, no one would come back and argue about it'⁹⁸³.

Lawyer H was unconvinced with the idea of a procedure in place for Internet defamation claims arguing that:

‘The procedure of notifying and takedown is well established, ISPs appreciate that, they know what the law is’⁹⁸⁴.

The interviewee also commented on the issue of large American corporations who Lawyer H believes would be unwilling to co-operate with any sort of procedure. In reaction to the idea of a procedure in place for Internet defamation, Lawyer I commented that:

‘We also have the problem with organisations such as Google and eBay, where even if you had that freedom in place, they show no signs of being prepared to abide by it. So where one is dealing with a large American corporation, they are unlikely to be at all willing to assist in a procedure like that. Seeing how Google are very dominant in this area, if they are not going to comply, then that is a real problem’⁹⁸⁵.

The by-passing of the pre-action protocol is another indication of the uniqueness of the Internet when compared to other methods of communication. This of course allows for a quick removal of material, which is beneficial for the complainant, but it also reduces the cost for the ISP as they do not have to seek legal advice. However, ISPs have complained that the information that is given, particularly when the claimant has not instructed by a lawyer, can be vague. With regards to freedom of expression, any procedure that results in the ISP removing the material could potentially have a detrimental effect.

5.15 Conditional Fee Agreements

During the interview with Lawyer E, the interviewee spoke of their concern regarding the introduction of CFAs, believing that it was an area of legal procedure that needs to be reviewed. Lawyer E's main concern was:

‘That solicitors charge higher rates for work they do on a CFA to that that they would charge on a privately paid basis. In other words, because they know the client is never going to pay, they can charge what the hell they like. Now I am getting in regularly, claims from solicitors where they are charging allegedly, their client £400 an hour, plus the uplift and £250 for their assistance. There is no way on God's earth if that client was paying that they would be charging those figures and that's what I find wrong’⁹⁸⁶.

Lawyer G when discussing the increase of lawyer's fees observed the vulnerable position that the lawyers are placed in if they take on a case under a CFA, commenting that:

‘It is not really ‘no win, no fee’, but if you are doing something under a CFA, you are entitled to take a view on the merits of the claim and on the success fee mark up’. Furthermore, ‘If you take a case under a CFA backed by after the event insurance, the solicitor's position much stronger and it is much more profitable. It is not a question of bumping

the charges up it is a question of proving the solicitor with an appropriate premium to reflect the fact that they are not going to get paid in those cases which they run and lose'⁹⁸⁷.

Lawyer F agreed with Lawyer G stating that:

‘From a law firm’s point of view, were taking the risk, that is why we charge more in the end’⁹⁸⁸.

Lawyer J disagreed with both Lawyer F and Lawyer G, believing that the cases that they risk losing under a CFA are not in equilibrium with the cases that they lose. The interviewee was critical of CFAs commenting that:

‘They over compensate, they are supposed to account for the cases that are lost and in truth there is not much that is lost. So I think that they are overpaid’⁹⁸⁹.

Lawyer E also added that if lawyers are going to do work on a CFA they should ‘do it on the same basis that they do for legal aid’, therefore, taking on the case at a reduced rate, rather than an increased rate. Lawyer E spoke of his experience when dealing with lawyers acting under a CFA, claiming that:

‘It is so unfair and every single libel claim that comes in now, the defendants are mostly focused on the costs of the other side rather than

whether the story is right or wrong. Their decisions are based on paying the other side's costs, not on the damages or whether it is right or wrong and that is directly as of a result of CFAs'⁹⁹⁰.

Lawyer E added that when asked by a client whether the story is right or wrong, their response is that 'it does not really matter' because settlement or losing the case will result in a large sum of costs and that 'the clock is running'. Lawyer E also commented that their clients' 'decision to settle is not based on the rights and wrongs of the case it is based on the cost'⁹⁹¹.

Lawyer H, whose company uses CFAs, disagreed with Lawyer E and Lawyer J, commenting that CFAs 'give the small person a voice they would otherwise not have'. The interviewee did however believe it was an abuse of the system when rich people use CFAs in a claim and that it 'should not be happening, but there was nothing to stop it'⁹⁹².

In relation to freedom of expression, Lawyer H observed the argument put forward by media representatives that CFAs cause a chilling effect, believing that these views were hypocritical, commenting that:

'They (the media) in the past have been extremely crude with defaming people and often just making up stories about people, safe in the knowledge that they have a lot of clout and the person they are defaming has little or no clout. So for the balance to be redressed to an extent is no bad thing. If the existence of CFAs causes media

organisations to be more responsible in their reporting, that is a good thing',⁹⁹³.

Lawyer C observed a growing use of CFAs in defamation cases and although their firm has not used CFAs for defamation, they recognised that it was a continually growing area of law and would introduce CFAs if this was to continue, commenting that 'we haven't as yet, but I think times are a changing',⁹⁹⁴.

Lawyer F also noted that CFAs were becoming more common in defamation practice. The interviewee commented that although it was something that they would not do 'CFAs are becoming more common I guess in this field'. Lawyer F also commented that as the Internet grows 'this (using CFAs) may become more of a growth area',⁹⁹⁵.

The final three interviewees, Lawyer A, Lawyer B and Lawyer D had little experience or none of acting under a CFA for defamation cases. Lawyer A was unsurprised that some lawyers were unhappy with CFAs and the increasing of costs, where as Lawyer B had no comment to make regarding CFAs, as they did not use them. Lawyer D commented that his firm tended not to use CFAs because it is 'difficult asses the merits at the outset', Furthermore, that the use of CFAs does 'promote settlement before the risk and the fees go to high' and that even when the plaintiff is being represented without a CFA 'there is always a case of can you afford the costs',⁹⁹⁶.

At this stage it is difficult to define how much of an impact CFAs are having in the field of defamation, particularly when complaints involve the Internet. However, there is an indication that they are becoming more popular. Furthermore, the opinions

regarding CFAs are split with some leaning towards Sir James Goldsmith's⁹⁹⁷ remarks and others towards Price's⁹⁹⁸ discussion regarding the apparent 'chilling effect', both of which are observed in Chapter 4.8.

5.16 Increase of Internet Defamation

During the interviews with the lawyers, it was mentioned by Lawyer E that it was in their opinion that 'libel was a dying trade'. Lawyer E commented, 'I think the claims are far, far fewer than they ever used to be and the work is drying up'. Why this was happening, Lawyer E responded:

'I will be naïve and think that the publishers are getting their act together and are being more careful. I think they were spending enormous amounts of money on libel cases and I think people have looked at it and said why are you doing this? This is an avoidable expense. The press are far more concerned with the complaints commission than they are with a libel claim'⁹⁹⁹.

This arising issue, in addition to what they thought was the future of online defamation was addressed to all of the other interviewees. Lawyer G, in agreement with Lawyer E commented that 'it (defamation) is a declining jurisdiction. If you look at the stats, it is a declining jurisdiction'¹⁰⁰⁰.

Lawyer C believed that because of the introduction of the Reynolds defence, newspapers are much more aware of what they can and can not say in print and that in the past it 'has been a big and expensive problem for them' and have consequently 'learnt how to temper their arguments accordingly',¹⁰⁰¹.

Lawyer C also believed that the future of jurisdiction of libel will be heavily influenced by what is published on the Internet, commenting that:

'Although there will always be the odd one and people will always make mistakes I think it is far more likely on WebPages when people's guard is down and they do not realise what defamation is and how they defame somebody and what they think of as candid comments on a discussion board or via email is actually libellous',¹⁰⁰².

It was observed by Lawyer A that there has been fewer number of contested defamation cases, providing reasons for why this may be:

'Firstly, the sorts of damages you can recover are much less now than you could, so it is no way a get rich quick or indeed slowly. Secondly, I think that the whole climate in this country following the Wolf reforms as you know is to encourage settlements and discourage litigation and I would see those as major contributing factors and I am not sure I could agree that publishers are more careful. It may be now that people have got thicker skins and nobody believes a word that is written in a newspaper',¹⁰⁰³.

Lawyer J also commented that they had seen fewer cases recently:

‘There has been a significant reduction in the level of work in defamation mainly because people have realised that it is sensible not to sue’¹⁰⁰⁴.

In relation to Internet libel there were a number of lawyers who discussed how they saw Internet libel was affecting their firm’s work. Lawyer D observed:

‘I have certainly seen more Internet libel. A lot of libel was based on newspaper reports and things like that and a lot of that is printed on the Internet now, which gives you a wider publication than a local rag. I would not say that normal defamation is decreasing so much, but it is the case that the majority of the work is Internet based now in some way or another, simply because the articles that are defaming are published on the Internet. So in that respect I suppose defamation in print has decreased because people are looking at the Internet for their news and their publicity, because you get trade libel and that often goes through the Internet as it does through print’¹⁰⁰⁵.

Lawyer F agreed that there was an increase in Internet libel in comparison to printed libel, particularly in recent years. Lawyer F commented that:

‘I would agree from my experience we have more issues about online articles and less issues about printed articles over the last 3 or 4 years’,¹⁰⁰⁶.

This increase was also noted by Lawyer I, who observed that their legal based website had had more calls about Internet defamation in the past 12 months than the seven proceeding years put together. Lawyer I did note that they could not confirm that the reason for this increase was because of a rising threat of libel online or because of the growing popularity and exposure of their website.

Lawyer H also observed an increase of defamatory material online and the subsequent claims following the material’s publication:

‘There is a huge amount, a vast amount, because anyone can be a publisher to the hundreds and thousands of people at the click of a mouse. It is a growing problem and not helped by the fact that a lot of people/defamers are under the impression they cannot be traced and therefore they can do it with impunity, which to an extent is true. Also, a lot of the people being defamed are not aware there are remedies available to them. Yes there is a growing amount as the Internet continues to grow and message boards proliferate and various ways of posting on the Internet grow, so defamatory postings grow’,¹⁰⁰⁷.

Lawyer B also believed that because the Internet being such an easy and quick medium to publish on, it is the catalyst behind the increase in defamation claims online. Lawyer B commented:

‘By and large the nature of the online medium is so much quicker and immediate, people just type something out without thinking and it is posted up somewhere’¹⁰⁰⁸.

Finally, Lawyer E did not see the Internet as a significant growth area in defamation commenting that:

‘Quite often complaints come in and in addition to it being in print, it is also on the Internet. In isolation, the Internet is not a mammoth area of growth in the law I have to say’¹⁰⁰⁹.

The majority of lawyers have confirmed that the Internet is a growing, if not their main area for defamation work. This increase supports the comments made by Collins¹⁰¹⁰ and Clark-Willimas¹⁰¹¹ for future potential rise of defamation action in Chapter 4. It is at this point that it could be argued that any problems that are surfacing with regards to the Internet should be considered sooner, rather than later to clarify what is the best way forward for defamation law in this digital age.

5.17 Follow up Interviews

During the first set of interviews a number of questions were raised, particularly regarding changes to the way in which ISPs deal with defamation complaints. This was in addition to issues regarding the multi-publication rule, dealing with American corporations who are hosting alleged defamatory material and the issue of high profile personalities hiring lawyers for the sole purpose of vetting the Internet for material they believe might damage their reputation.

Subsequently, all of the interviewees were contacted a second time to ask if they had any further contribution to make concerning these issues. It was commented by ISP B and ISP D that greater clarity was needed within the law of defamation. One such method would be to include legal guidelines for ISPs and hosts. ISP D and Lawyer J commented that there should be a process whereby the plaintiff can seek indemnities from the author, so that the authors can standby their comments if they so wish, without the ISP being threatened with legal action.

Two other approaches to help improve defamation practise were developed based on the concerns and issues in Chapters 3 and 4 and the interviews. Firstly, was the introduction of the roles of Internet publishers, e.g. ISP and hosts into the S1 defence, so to clarify their position under defamation law. Secondly, was the creation of a standard digital form based on the principles of the defamation pre-action protocol, which would aid an ISP in the decisions making process. This initiative is based on the information provided by the ISPs in that there is a lack of information received when someone makes a complaint, in addition to, both lawyers often bypassing the pre-action protocol when making a complaint.

- Legal guidelines for ISPs/host, which would offer greater clarity on how expeditious they must act to remove the material and the time allowed for investigation.
- Introduction of the roles of Internet publishers into the Section 1 defence e.g. ISP, Hosts etc.
- The creation of a standard digital form (similar to a 'contact us' form) for complaints to be made directly to the ISP or host that highlight elements of the Defamation Pre-Action Protocol. Example elements include the name of the complainant, details of the publication or broadcast, including the words complained of, date and where possible, a copy or transcript of the defamatory words. In addition, sufficient evidence that the words used were in fact inaccurate or unsupportable. This should be supported by adequate explanation to enable the defendant to appreciate why the words were inaccurate or unsupportable. Furthermore, where relevant, the words that make the complainant identifiable, in addition to what damage has been caused from the words complained of. Moreover, the complainant should also address a method of remedy so that the claim can be rectified. This would allow the complainant and ISP to rectify the issue speedily, with sufficient information to base their decisions on.
- A process that allows the ISP to seek indemnity from both the complainant and the author of the alleged defamatory material. The general idea behind this method would allow the author of the material to respond within a designated

timeframe as to whether or not they would like the material to be kept online and therefore taking full responsibility for any legal consequences. Upon confirmation the ISP could then respond to the complainant on their decision and if necessary seek an indemnity from them.

The same ideas were emailed to lawyers, in addition to the three other areas of interest listed below:

- Firstly, to ask their opinion on the multi-publication rule and the Internet?
- Secondly, if you had had any experience dealing with large American corporate business, with regards to notice and takedown.
- Finally, if you were aware of high profile personalities hiring lawyers to protect their reputation on the web by having them search for material about them.

Of the six ISPs who were contacted, three replied. These were ISP A, ISP C and ISP D. Lawyer D and Lawyer J made up the responses from the legal practitioners.

In reply to the first idea of introducing greater clarity to the Section 1 defence, ISP C and ISP D were in agreement that clarity would be welcomed, with ISP C commenting that:

‘anything that creates clarity is a good thing - everyone has expectations clearly set and can work with that’¹⁰¹².

However, ISP A dismissed the idea commenting that:

‘I would have thought most ISPs would feel fairly comfortable as to what their obligations are as a result of the existing legislation and case law. For my part, I do not think further guidance is particularly necessary’¹⁰¹³.

In response to the idea that the Internet publishing stakeholders, such as an ISP or content host, should be included in the Section 1 defence was met with a mixed response. ISP D thought the idea was fine, however ISP C dismissed the idea on the grounds that:

‘I basically don't think ISPs / Host "produce" publications. We only provide the digital equivalent of printing process. Again, you wouldn't censor WH Smiths or HMV for distribution - you would censor the actual producer of DVDs / Music etc’¹⁰¹⁴.

Regarding the final idea of the creation of a standard digital complaints form, ISP C disagreed with the idea, commenting that:

‘Not for an ISP - this is the kind of thing that an Ombudsman would normally handle. I see no reason why either the Press Complaints Commission (PCC), or an equivalent, takes responsibility for this as it would for printed press/publications’¹⁰¹⁵.

ISP A believed this to be a good introduction. Being an ISP with a large client base, ISP A commented that:

‘This is a very sensible practical idea. Nearly all of the time that people write into us, they provide incorrect information and very often send the information to the wrong place. This would solve both points and speed up the process’¹⁰¹⁶.

ISP A also added that:

‘The only slight drawback that my commercial colleagues would raise, is that it would increase the level of complaints and this clearly would have a cost impact for us’¹⁰¹⁷.

With regards to the final idea of indemnifying an ISP once faced with a defamation complaint, ISP C commented that:

‘I think there is value in a “publisher” asking their ISP to leave material up if they accept full liability and indemnify an ISP of the consequences. I don't understand the symmetric position (i.e. why go back to the complainant - what are they indemnifying the ISP of and what if they refuse etc?)’¹⁰¹⁸.

ISP D disagreed with ISP C, believing that seeking indemnities from both sides was an appropriate way to deal with defamation complaints, confirming the previous

suggestions made by ISP D in Chapter 5.13, which suggested that the current situation does not allow the third party who posted the alleged defamatory material to defend the comments that they have made.

ISP A was in agreement with ISP D commenting:

‘A very sensible idea and this coupled with the form above could work well. I think there is a danger that people will make unjustified complaints if they can be easily submitted. If they had to indemnify the ISP, this would make them stop and think. The ISP would also be happier to act on that information. Giving the customer the opportunity to keep the material up in return for a counter indemnity is also a good idea and promotes freedom of speech’¹⁰¹⁹.

However, ISP A did comment that from a ISPs point of view they were not sure it could work in practice:

‘Neither the complainant of the customer is likely to be good for an indemnity claim and the ISP is not going to want to be seen to be suing its own customers anyway’¹⁰²⁰.

The second sets of interviews that were conducted were with the legal practitioners, in which, the four ideas and the additional areas of interest were discussed. These interviews were again conducted via email, with exception of the interview with Lawyer J, where the interview was conducted both via email and by telephone.

In relation to the four proposals, Lawyer D commented that the first option regarding legal guidelines for ISPs/host, would offer greater clarity on how expeditious they must act to remove the material ‘would be welcome’¹⁰²¹.

Lawyer J, who only replied to the first option, had a different view to that Lawyer D, commenting that it was a:

‘Silly suggestion. Most ISPs will not have first hand knowledge and so will not know the truth nor will they know if the material should comply with the Reynolds defence. This is a censor’s charter and would only be suggested by those that care little about speech’¹⁰²².

Lawyer D had no particular comment to make regarding option two, the introduction of the roles of Internet publishers into the Section 1 defence e.g. ISP, Hosts etc, but did however mention that:

‘This would very much depend on whether this was intended to strengthen or weaken the defence in relation to each of these roles’¹⁰²³.

In relation to option three, Lawyer D commented that the creation of a standard digital form (similar to a ‘contact us’ form) for complaints to be made directly to the ISP or host that highlight elements of the Defamation Pre-Action Protocol ‘would be helpful’. However, the interviewee did note that if such a form was in working practise, there could be some issues to consider, commenting that:

‘One of the key problems with the “contact us” forms is that they provide no simple way for the sender to record what was sent and when, which is essential from a legal point of view. In addition, in some cases it will not be simple or even possible for the complainant to give “adequate explanation to enable the defendant to appreciate why the words were inaccurate or insupportable”. This requires them to prove a negative. This is why the burden is always on the defendant to justify. In addition, in some cases there may be no specific identifiable damage as yet (or not all, hence general damages being awarded for libel). It would therefore need to be made clear what information in the form was mandatory and what was optional’¹⁰²⁴.

Lawyer D also commented that they believed option four of seeking indemnities was a good idea. However, they commented that:

‘In reality the concern would be that the complainant may not be traceable or financially good for any indemnity given and so an ISP would be reluctant to defend a complaint in libel on that basis’¹⁰²⁵.

In response to the queries that were only sent to the lawyer interviewees, Lawyer D commented that they had ‘no issues with the multi-publication rule’¹⁰²⁶. This was again in contrast to the views of Lawyer J, who when asked if they had any issues regarding the multi-publication rule responded:

‘Yes many. It is an anachronistic law. As Sedley J said in Yousef Jameel in the Court of Appeal “I am not sure the Duke of Brunswick’s case would be decided that way if it came before the courts today”’,¹⁰²⁷.

Lawyer D responded to the second query concerning large American businesses, commenting that:

‘I think there is an issue with large US based ISPs. The key issues that they are granted greater protection because of their constitutional right to free speech. It means that it is more difficult to stop campaigns where the publisher is based over the Atlantic’,¹⁰²⁸.

Lawyer J commented that when a party has been defamed on the Internet and an American company hosts that material:

‘They should give them sufficient information for them to be able to sue the individual who has posted the information that is completely false’,¹⁰²⁹.

The process of trying to identify the author can be extremely expensive, particularly when the identification process concerns one or more other countries. Lawyer J recommended other ways to diffuse the situation. Providing large UK based companies as an example, the interviewee commented that:

‘If you have got a large UK corporation that has something they believe is inaccurate or inappropriate, then I think the right thing to do is correct the record. I do not think you should be suing for libel. That does not really add or help particularly’,¹⁰³⁰.

Lawyer J continued:

‘You have to remember that there are a lot of lawyers out there who make their living suing people, so it is in their interest to explain to people why it is a good thing to sue. I think if you ask people who have been through the process, most of them do not think it was a very good idea. Quite a painful idea, if someone fights you’,¹⁰³¹.

In response to the final query regarding high profile personalities hiring lawyers to protect their reputation on the web, Lawyer D commented that:

‘I am not aware of any personalities instructing lawyers specifically to trawl the net. I would expect PR agencies to normally carry out this role for them and then refer matters to lawyers when formal action is required’,¹⁰³².

Discussing the same issue, Lawyer J commented that in his experience ‘it tends to be that the lawyers do it on an ambulance chasing basis’.

Summary

The opinions regarding having guidelines in place to assist ISPs were split. Although it was acknowledged that it would do no harm, some of the interviewees felt it was not necessary. Clarifying an ISP's position in the Section 1 defence was generally well received, however, it was questioned whether this would weaken or strengthen an ISP's position. It is without question that ISPs would want their position strengthening, if not, at least clarifying.

The opinions regarding the use of a digital form was again split. Despite some reservations regarding how practical it would be, it could help ISPs assess the complaint and if necessary provide their lawyer with adequate information.

Finally, the opinions regarding indemnities were split. In principle the idea would protect the ISP and improve freedom of expression, however, it would all be dependent on whether the author was financially secure or traceable for an indemnity.

The additional three questions put to the lawyers found that there was no evidence of high profile personalities instructing lawyers to trawl the Internet to find defamatory material. The issue of the multi-publication rule was split, however this could be very much dependent on the lawyers' personal experiences with the Duke of Brunswick case. Both lawyers were in agreement with the issue of dealing with American Internet publishers, acknowledging the difficulties of tracing an author and attempting to have the material removed.

5.18 Summary

The interviews were extremely informative and opened up a number of areas of discussion that had yet to be addressed. These included the comments made by the lawyers concerning the increase of Internet libel, compared to printed libel work, which was said to be on the decline. During the discussion regarding the impact and growth of CFAs, it became apparent that it was a bigger issue amongst the legal professionals than had previously been thought.

There were two key areas during the interviews where both sets of interviewees were, for the majority, in complete disagreement with one another. Both the ISPs and lawyers had strong views regarding the need for change in the law, with both sets of interviewees having opposing views regarding whether change was required to the law of defamation. There was also a difference in opinion regarding freedom of expression on the Internet. A majority of the lawyer interviewees believed that freedom of expression was not being compromised by current defamation law, in comparison to the ISP interviewees who felt that the law was having an adverse affect on freedom of expression.

Despite a lower number of respondents, the second set of interviews did help confirm areas where improvement could be made to defamation law and consequently to freedom of expression on the Internet. The rationale behind conducting the second set of interviews was so that some of the ideas and issues discussed by the interviewees

could be put to other interviewees to discuss and validate. However, a higher response from the previous interviewees would have helped strengthen these ideas and arguments.

Chapter 6 will compare the findings of these interviews with the research included in Chapters 3 and Chapter 4. Recommendations, conclusion of findings and areas of further research will also be discussed. The remainder of this sub-chapter summaries the findings during this chapter.

Defamation law

ISPs felt that they were an easy target for defamation claims, placing them in the position of ‘judge and jury’ when deciding how to deal with a complaint. This position is not symmetrical with that of a traditional publisher, with one ISP believing that the government was pointing in the ‘wrong direction’ with regards to the law. One of the reasons for these complaints was because of the lack of clarity in the law particularly on how expeditious they have to be to remove material.

There was a general consensus amongst the lawyers that defamation law was flexible enough to deal with digital media and that ISPs should take responsibility for what they publish. The majority of lawyers commented that although the current situation is not ideal for the ISPs, it is manageable and they should have no special treatment, including the approach taken in America.

The multi-publication rule was highlighted as an issue because of the restarting of the one-year limitation period following a new hit on the webpage. The ease of which, defamatory material can be repeated on the Internet, brought about the question of how many times one party sue could for the same libel.

Notice and Takedown Procedure

All of the ISPs commented that they would remove material that they believed to be potentially defamatory and all had guidelines in place. The most common request in a letter of complaint was for the removal of the material, following this the threat would cease. The majority of the lawyers were happy with the current procedure of notice and takedown.

Freedom of Expression

The majority of ISPs believed that freedom of expression was being compromised under current defamation law and that they only remove material out of fear of litigation. Four of the ISPs provided evidence of what they believed was an attempt to ‘gag’ or silence material they had hosted on the Internet.

It was commented by some of the lawyers that there has to be a balance struck between freedom of expression and a right to reputation. There was also a general opinion that freedom of expression had increased since the introduction of the Internet.

One ISP and one lawyer proposed an idea whereby the claimant's claim is against the speaker so to protect freedom of expression.

Case Law

Godfrey v Demon Internet is still held as an authority in this area of defamation and a lack of case law is an issue. It was commented by ISP D that a lot has changed regarding the Internet and law since the case, particularly in the area of Internet publishing.

Improvements to Defamation Law - ISPs' opinions

A number of suggestions were made regarding how defamation law and procedure could be improved. Firstly, measures should be brought in to prevent vexatious requests. Secondly, there should be confirmation of what actually constitutes 'expeditious'. Thirdly, freedom of expression should be improved on the Internet. Fourthly, there should be an opportunity for the third party (author) to stand by their opinions. One lawyer also approved of this. Finally, was the introduction of a mechanism such as an independent body to deal with complaints.

Improvements to Defamation Law - Lawyers' opinions

The majority of lawyers who were interviewed believed that there were no new legal issues presented by the Internet to justify a change in the law and that it does not take long to decipher whether or not material is defamatory. They also dismissed the American approach to defamation as it was not inline with their copyright laws and that defamation law is unlikely to change in the short-term.

Requests for the removal of material and the pre-action protocol

It was noted that defamation complaints tend to come directly from the complainant and that ISPs had very little experience dealing with the pre-action protocol. It was also noted that complaints that were made through a lawyer were more often than not valid. The majority of lawyers were happy with the protocol, but commented that it was rarely used for claims involving the Internet and that defamation claims involving the Internet and traditional printed material are handled differently, i.e. the protocol tends to be used more for printed libel. Most of the lawyers were happy with this situation and were unconvinced by the idea of a new complaints procedure being introduced and that a complaint that comes directly to the ISP or host does reduce the costs involved in dealing with it

Conditional Fee Agreements

It was questioned whether the cases that lawyers won, were in equilibrium with the cases that they lost, raising the question were lawyers being over-compensated when acting under a CFA? A major criticism of CFAs was that the defendant's decision to settle was predominately based on the costs rather than whether the material complained about was the truth or not.

The majority of lawyers felt that as the law firm is taking the risk of not getting paid if they lose the case, they have a right to increase their normal rate. In addition, CFAs can give someone who would not normally be able to afford to make a claim, the ability to do so. It was also mentioned that CFAs might also increase the responsibility of the media as to what they publish.

The future of CFAs in defamation law was also considered, with the expectation that it will be a growth area in libel law and that as the Internet and respective defamation claims grow it is expected that the popularity of CFAs will too.

Defamation and the Internet

Evidence suggests that libel cases involving printed material are decreasing, in contrast, the majority of lawyers were noticing that their defamation work involving the Internet is increasing.

Other points

Trying to find the author of defamatory material can be a high-risk exercise for the complainant, as the process can be expensive and there is no guarantee of tracing the author. If an American company hosts the material, it can be difficult to get the material removed, even with legal assistance. It was also mentioned that ISPs are at a higher risk of being sued if they monitor chat rooms or forums, as they will have actual knowledge of the defamatory material.

6 Conclusions and Recommendations

This Chapter concludes this research and reinforces some of the initiatives discussed in the second set of interviews in Chapter 5. The data collected during the interviews has both supported initial assumptions, which were derived from the literature review and has also challenged them. This is evident with the issue of freedom of expression where there have been strong arguments both for and against the application of current defamation law in England and Wales.

6.1 Overview of Aim and Objectives

The overall aim of this research was:

To examine the current conflicts between defamation law and practice in England and Wales, Internet service providers and a person's right to freedom of expression.

Objectives:

- To investigate the attitudes of legal practitioners and ISPs towards Defamation law and the Internet in England and Wales.

- To investigate how Internet defamation cases both in England and in other countries have affected how ISPs deal with defamation claims.
- To identify arguments and evidence for a change in defamation law and procedure when concerning ISPs.
- To investigate how effective defamation practice has been in its attempt for an early settlement when concerning defamation claims and the Internet.
- To identify any conflicts between the ‘notice and takedown’ procedure and freedom of expression.
- To determine what changes could be made to defamation procedure, if any, which would be appropriate to allow investigation into defamation claims regarding the Internet to continue whilst also protecting a person’s right to freedom of expression.

This research was divided into six objectives, each designed to test four key elements regarding Internet defamation. All six objectives were achieved using a methodology that was strictly adhered to. The literature review and the data collected in Chapter 4 provided sound knowledge of the research topic and highlighted where there were areas ambiguity within the law and its relation to the Internet. The interviews not only helped to satisfy the objectives, but also opened up new areas of research, including evidence of a decline of printed libel. Sub-chapters 6.2 through to 6.11 analyse the four objectives tested.

6.1.1 Validation

Chapters 3 and 4 provided the background of literature, case law and legislation from which, the data collected during the interviews in Chapter 5 could be validated. Comparison of opinions and evidence during the interviews sought to continue the validation process throughout the interviews, based on Silverman's design for respondent validation¹⁰³³.

A comparison of all results was made against the work of the Law Commission. Both reports were held in high esteem during this research as they are the only significant UK based study to consider issues regarding defamation on the Internet from which to compare this research's findings.

The remainder of this chapter analyses the objectives that were covered during this research. Communication on the Internet is challenging the interaction between Internet stakeholders, the law, freedom of expression, protection of reputation and legal procedure. The Sub-Chapters highlight these issues.

6.2 Defamation Act 1996, the Internet and ISPs

The flexibility of defamation law in England and Wales has been put to the test since the introduction of the Internet, with differing opinions regarding its success. Price comments in Chapter 4.3, that 'defamation laws should be sufficiently flexible to apply to all media'¹⁰³⁴. There is a general consensus amongst the ISPs that the

Defamation Act 1996 is not suitable for the online medium and that there is no symmetry between the role of a 'publisher' who publishes in print and the ISPs role in the publishing or the delivery of material on the Internet.

There are some distinct differences between the roles of a print publisher and an ISP. The most obvious being the control of the content they publish. An ISP may never see the material they publish, whereas a printed publisher will more than likely have some form of editorial process and therefore, be aware of what they publish. Yet under common law they are defined as the same.

The majority of the lawyers who were interviewed had little sympathy for the ISP's position with regards to the law. However, the ISPs, as one ISP commented believed that the Government was pointing in the wrong direction. Consequently, ISPs may be right to feel aggrieved. The difference between an online publisher and a printed publisher is very different, yet they are governed by the same laws. The process of 'notice and takedown' is not applicable to the offline medium, yet it is incredibly significant for online material.

It is apparent that there is a lack of clarity regarding defamation law and the Internet. There is little parity between the roles of a traditional printed publisher and that of an ISP or host. Therefore, defamation law in its current form may not be flexible enough to deal with online material. This is not to suggest that ISPs or hosts should not be held accountable for defamatory material they publish, but instead, the law should be re-examined so to define the position of an ISP.

The majority of the lawyers believed that ISPs should take responsibility for the material they publish and although the situation is not ideal for them, it is manageable. This research is in agreement with this. If we are to observe the approach that America has taken when dealing with ISPs and defamatory material, it is evident that there is a lack of responsibility being taken by the ISP, consequently leading to damaging effects. This was highlighted in the John Seigenthaler and Wikipedia dispute in Chapter 4.6.2. Lawyers dismissed the approach taken by the US when dealing with defamatory material on the Internet, particularly as their copyright law holds the ISP responsible for the illegal distribution of copyright protected material.

With regards to the situation being manageable for ISPs, this is correct. Unfortunately the situation may be having an adverse effect on freedom of expression and consequently, not compatible with the HRA.

6.2.1 Notice and takedown procedure

The notice and takedown procedure is the most effective method of removing material that is potentially defamatory from the Internet and ISPs have guidelines in place for when they receive the notice of defamatory material. However, all of the ISPs interviewed expressed that they would remove any material if there was any doubt because they could be held liable if they do not take any action.

The most common request included in a letter of complaint is for the removal of the offending material. Once the material is removed the claim would cease. The ISPs

were understandably dissatisfied with the notice and takedown procedure. The procedure places the ISP in the role of 'judge and jury', as argued throughout this research. The actions of the ISP, who are likely to have no previous knowledge of the material has consequences on their liability, the author's freedom of expression and the defamed party's reputation. It is therefore questionable as to why the author of the material has no input in the dispute.

The ease of which material can be removed by notifying the ISP does make ISPs an easy target for claims. With reference to Dr Yaman Akdeniz in Chapter 4.7.1, the process of removing the material is unacceptably easy¹⁰³⁵. This is particularly relevant when claims are made via a contact form on the host's website. This then puts the host on notice and makes it difficult for them to avail themselves to the Section 1 defence.

The lawyers were content with the current situation. It was commented that the first priority in any claim regarding the Internet was to get the material removed. The notice and takedown procedure helps enhance their chances for an effective removal of the material.

The ISPs commented that the majority of the complaints they receive came from unsolicited emails. This issue can be both beneficial or a problem for an ISP or Internet user. A user who believes that they have been defamed on the Internet can easily contact the host or ISP who is publishing the material and request that the offending material be removed without the cost of instructing a lawyer to do so on their behalf. This is both a cost effective and a quick method of removing the material.

If the ISP or host agrees that the material is defamatory and removes it, then both parties can avoid any potential legal costs. However, this is arguably detrimental to freedom of expression. Early settlements are discussed in further detail in Chapter 6.2.4.

Even if the material is not deemed to be defamatory by the ISP, the safest course of action for them is to remove it. This is justified in Chapter 5.6, where the majority of lawyers recommended that material should be removed to avoid legal action and in Chapter 5.7, where the majority of ISPs commented that if they were in any doubt they would remove the material.

An ISP will always have its long term future and business as the first priority when a claim is made and despite some ISPs investigating material that has been complained about, they have little choice other than to remove it if there is any doubt. Case law and defamation law dictates that if they do not act quickly to remove the material, then they may face legal action.

The notice and takedown rule is a tried and tested method and is the most effective means to remove material. However, it is questionable that the actions taken by both the complainant and the ISP do in fact censor the opinions of the author. Consequently, freedom of expression is being restricted. By asking the ISP to decide whether the material is defamatory, based on the evidence they have received from the complainant, places the ISP in the role of ‘judge and jury’, where as in reality it would be up to a court to decide whether the material is defamatory or not.

This demonstrates a clear distinction between publishers in the traditional sense, to that of an ISP. As an ISP is less likely to have any editorial control on the material they distribute, it could therefore be argued that their role is akin to that of a bookseller or distributor, whereby they are the frontline between the consumer and the author, with the ability to remove the material, if required. This is illustrated in the comparison between an ISP to that of a bookseller. The ISP and bookseller may only know the content of a select number of sites/books, yet have had no editorial control over them and are not in a position to judge what is defamatory or not.

If we are to continue the comparisons between traditional printed publishing to that of Internet publishing, then if the 'host' of the material is different to that of the ISP and author, then arguably their role is similar to that of a distributor, yet also draws similarities to that of a bookseller, if the material has been created by a third party. The author (if a third party), can in fact be author, editor and possibly the publisher of the material. They are, under Section 1 defence of the Defamation Act 1996, the 'author' as they are 'the originator of the statement' and the 'editor' as they have 'editorial or equivalent responsibility for the content of the statement or the decision to publish it'¹⁰³⁶. It is arguable that they are not the publisher of the material as they are not in the business of publishing, as stated under the S1 defence. However, they are still in control of its initial publication to an audience. Under this scenario, it is the author/editor/publisher that should be notified and who in turn should instruct the host or ISP to remove the material.

Of course these scenarios are not enough to define the roles of each party in the publication of material. There are likely to be scenarios whereby the previous

arguments that have been presented can not be justified. This only further demonstrates the complex nature of Internet publishing. There are a number of variables regarding publishing on the Internet and in essence, the lines between, editor, distributor, publisher and author can often be blurred.

This research can conclude that defamation law is not flexible enough to deal with publishing on the Internet adequately. This is based on two significant findings: firstly, that the roles defined in the Defamation Act 1996 do not accurately define the roles involved in Internet publishing; secondly, that the notice and takedown procedure is not in parity with that of traditional publishing, therefore, placing an unnecessary strain on ISPs and freedom of expression.

6.3 Freedom of Expression

The notice and takedown procedure is the fundamental reason for the dissatisfaction regarding the removal of material and the potential detrimental effects on freedom of expression. There has to be a balance between freedom of expression and the protection of a reputation, but trying to strike a balance with law that is heavily in favour of reputation, is proving to be difficult.

ISPs are well aware of what is expected of them when they receive a letter of complaint and the consequences they may face if they do not act upon the instructions. In the Law Commission's findings it was found that there was no significant evidence to suggest that there was a problem regarding 'gagging' letters, which are used to

deter current and future publications from being published. Four of the six ISPs who were interviewed provided evidence of what they believed to be an attempt to 'gag' or silence material they hosted on the Internet.

As far as ISPs are concerned, there may be an issue regarding 'gagging' letters that needs to be considered further. The lawyers who were interviewed commented that it was common practise to send a letter to the defendants detailing the investigation into the material that they are hosting. It is possible that these letters are being perceived as an attempt to 'gag' the ISP. Consequently, it is difficult to assess at this stage whether or not the letters that have been received are attempting to silence further comment.

This research has acknowledged that there may be an issue with a 'gagging letter', particularly when concerning ISPs. However, without firm evidence of this, further research would be required. It is apparent that a letter sent to an ISP notifying them of an ongoing investigation does place the ISP on notice in accordance with the notice and takedown procedure. Therefore, the issue of 'gagging' letters is arguably an extension of the problems caused by the notice and takedown procedure, leaving the ISP with little other choice under current legal conditions, but to remove the material.

The general consensus amongst the ISPs was that freedom of expression was being compromised by current defamation law, particularly the notice and takedown procedure. Their reasoning was based on their urgency to remove material out of fear of litigation. In contrast, the lawyers believed that freedom of expression had

increased since the introduction of the Internet, or at least the opportunity had increased.

Both parties are arguably correct in their analysis of freedom of expression on the Internet. The opportunity to communicate to a mass audience has never been greater, so the potential for a person to freely express themselves has increased. ISPs will see what they believe to be an infringement of freedom of expression when notified, but are less likely to see unreported and potentially defamatory material. It is therefore, difficult to assess to what extent freedom of expression is being compromised. It is inevitable that ISPs will receive complaints that could compromise freedom of expression, but it is unlikely to outweigh the potential of free speech on the Internet.

Despite the potential for increased communication, complaints that are made with the intention to silence the publisher are unwelcome. A solution to deal with unwarranted complaints would be to impose an external body to monitor complaints that may lack the merits of a defamation claim.

It has been mentioned throughout this research that there has to be a balance between freedom of expression and protection of a reputation. The Internet has provided an unequalled opportunity for free speech for the general public. However, with this freedom comes the responsibility to protect those who are targeted by hateful or dishonest campaigns against their name. Therefore, the question arises, what is more important, the protection of freedom of expression or a person's reputation? In the UK, reputation has long been regarded the prominent factor in a defamation case and looks to continue in this manner. The HRA looks to have made very little difference to the

protection of Internet published material, most probably because it is arguably incompatible with English defamation law.

This argument of incompatibility or lack of effectiveness stems from the right under the HRA for an ISP to remove material that they deem to be illegal. Under English law, defamatory material is illegal and once put on notice an ISP has every right to remove the material, regardless of the merits of the claim. This therefore, makes it difficult to assess the impact of Section 12: Freedom of Expression under the HRA.

6.4 The Impact of Case Law on Internet Publishing

The Defamation Act 1996, HRA and the EC Directive have yet to be tested thoroughly enough for ISPs to feel comfortable in their position in the publishing of material, particularly by a third party. This issue is solely down to a lack of case law.

The most significant case is that of *Godfrey v Demon Internet*¹⁰³⁷ and is still held as an authority regarding defamation law amongst ISPs. The decision to hold the ISP liable as the publisher of the material came under heavy criticism in both the desk research and the interviews. This criticism points directly to the issues raised in section 6.1, regarding the role on an ISP in the publishing of the material. Furthermore, it was disappointing that the material that was published by the author was never actually tested to assess where or not it was defamatory.

ISP D commented that the Internet has evolved since the case was settled and that the law and the case ought to be tested again. This demonstrates an inherent problem in defamation law, whereby the law continues to hold cases that may no longer be relevant, in high esteem. A prime example of this is *Duke of Brunswick v Harmer*¹⁰³⁸, which is over 150 years old, yet still holds prominence in defamation law to this day. This is particularly worrying for Internet published material as the one-year limitation period is reset on every new download.

The *Duke of Brunswick v Harmer* case played a prominent role in the *Gutnick v Dow Jones*¹⁰³⁹ case, which has highlighted the dangers of publishing potentially libellous material over the Internet. However, what has irritated Internet publishers is that the case was heard in Australia where there was minimal readership, unlike in America where most of the publications were sold. For any sort of rectification to be made in this area of law there would almost certainly need to be increased harmony between international defamation laws, which is something that will not be achieved in the short to medium term.

Case law combined with the notice and takedown procedure is resulting in the potentially unwarranted removal of material. The Defamation Act 1996 has not been tested thoroughly enough when concerning the Internet. Ironically, some of the new initiatives in defamation practice and procedure that are helping to improve the efficiency of defamation claims and reducing the number of claims reaching the courts are the possible reasons as to why case law has not been tested. Therefore, until a dispute escalates to a point where the courts are involved, there may be little chance that the Godfrey decision will be tested.

ISPs can take some satisfaction from the decision in *Bunt v Tilley*, which held the ISP as ‘mere conduits’ under the EC Directive. However, given the circumstances it would have been likely even if the EC Directive were not in place, that they would have been protected under the Defamation Act 1996.

6.5 Defamation Procedure and Practice

The following sub-chapter considers the findings regarding the pre-action protocol and conditional free agreements. Both of which were hailed as a positive addition to defamation practice during the desk research. The effectiveness of the pre-action protocol and the potential adverse effects of CFAs on freedom of expression have been highlighted during the interviews.

6.5.1 Pre-Action Protocol

The pre-action protocol is used to speed up the process of a defamation dispute without it resulting in going to court. However, it is apparent that the protocol is not being used for Internet disputes as much as it is for printed claims.

It was apparent, for the most part, that defamation complaints were being sent directly from the complainant to the ISP, without any legal advice or the use of the pre-action protocol. This was also the case when complaints were made via a lawyer. The

lawyers commented that this was the most effective and fastest method of achieving the end goal, which is the removal of the offending material and that the protocol is rarely used in Internet defamation disputes. The lawyers were happy with the situation and commented that the majority of claims that went via a lawyer were in fact valid.

Under the current circumstances the lawyers have every right to be happy. The ease in which material is removed arguably makes it easier for the lawyer to get the result that their client wants. By bypassing the pre-action protocol, both parties reduce the costs that would be incurred if the material was in print and if the protocol was used. For large ISPs with large amount of third-party content, passing through their system, quick and effective removal of material will undoubtedly be cheaper than employing a lawyer to deal with a formal complaint.

Consequently, when a complaint is received informally without the pre-action protocol being used, the ISP, as has been commented in the interviews, may not receive adequate enough information to base their decision on. Subsequently, they will most probably remove the material out of fear of litigation.

This further demonstrates the difference between the complaints procedure for defamatory material in print to that of online material. The question again arises whether defamation law is indeed flexible enough to deal with online material as well as printed? In this case, are ISPs being unfairly treated because of the ease of which material can be removed? If an ISP is to be held as a publisher then there should be increased parity between how material on the Internet is dealt with in comparison to

printed material. If not, then the two should be separate and legislation should be in place to clarify the position of the ISPs.

6.5.2 Conditional Fee Agreements

There were no concerns regarding CFAs highlighted during the initial desk research. However, it became apparent during the interviews that some of the lawyers had a problem with its application to defamation procedure.

The issue concerned the increase of lawyer's rates when acting under a CFA. It was questioned whether or not lawyers were being overcompensated for their work using CFAs and that there was no balance between the cases they won with the cases they lost.

The majority of the lawyers interviewed believed that as the law firms were taking the risk of not being paid if they were to lose, they have the right to increase their normal fee. However, this raises concerns regarding freedom of expression. It was apparent from two of the lawyer's experience that a defendant's decision to settle the case was mainly based on the costs of the other party who were acting under a CFA and not because they believed they would lose the case. It is the fear of losing the case and the potential costs involved, which forces the defendant to settle.

On the other hand, CFAs have been welcomed in the field of defamation as they allow those who have been defamed, but without the means to fund a case, the ability to do so. It was also mentioned that the increased risk of being sued by someone acting

under a CFA increases the responsibility of the media as to what they publish. However, this could be regarded as having a 'chilling effect' on the media.

It is fair that a lawyer will increase their fee when acting under a CFA to cover the cases that they lose. For claimants, the option of a CFA provides those who would normally not be able to afford to make a claim the capacity to do so, therefore, removing any discrimination between the wealthy and those unable to afford legal representation.

The problem, as with many issues surrounding defamation on the Internet is that of freedom of expression. It was apparent that CFAs were a growing area in libel law, with those who did not use them, considering them as a future option, seeing their potential and believing it to be a growth area.

It is difficult to assess the extent that CFAs are impacting freedom of expression without having proof of overcompensation and figures that indicate the number of claims made under a CFA that are successful or lost. This research has highlighted the positive and negative impact of CFAs, but without facts of actual overcompensation a definitive response can not be made. Furthermore, as it is an area that affects the whole of defamation, the extent of the problem is out of the scope of this research.

There is evidence to suggest that lawyers are being over compensated and defendants are being forced to settle early because of spiralling costs. Furthermore, there is a potential for CFAs to have a 'chilling effect' on the media if costs are allowed to be increased without being monitored. There is also further evidence to suggest that

lawyers using CFAs are increasing. Therefore, this matter should be researched further to assess how CFAs are effecting freedom of expression and whether or not lawyers are being overcompensated for the work they undertake whilst acting under a CFA.

Following the interviews on February 24th 2009, the Government began a consultation aimed at curbing the excessive libel costs, by considering:

‘Limiting recoverable hourly rates by setting maximum or fixed recoverable rates. Mandatory cost capping or mandatory consideration of cost capping in every case. Requiring the proportionality of total costs to be considered on cost assessments conducted by the court’¹⁰⁴⁰

The Government noted that CFAs were one of the primary reasons for the consultation, in addition to the potential damaging effects to investigative journalism. Referring to an Oxford University Study, which compared libel costs across Europe¹⁰⁴¹, it was commented that:

‘Defamation cases in England and Wales were 140 times more costly than in the rest of Europe and may not be compatible with human rights legislation. The report said the "no win, no fee" agreements were leaving newspapers shackled and unable to act as public watchdogs.’¹⁰⁴²

Results of the consultation will be published later this year (2009).

The results of *A Comparative Study of Costs in Defamation Proceedings Across Europe*¹⁰⁴³, in addition to the reasons behind the Government's consultation further justify the reasons for this study and increases the significance of its findings.

6.6 Other Issues Raised

Any attempt to discover the identity of the author of the material in question can be a high-risk exercise for the plaintiff. This is particularly true when the material is hosted abroad. The process of finding the author and removing the material when it is hosted in the US can prove to be exceptionally difficult and costly. It is by no means a process for the faint-hearted and even with legal assistance there is still a chance that the attempt will be unsuccessful, especially when dealing with large corporate companies based in the US.

Internet services and websites that are hosted in the US are constantly being used by UK Internet users, so it is undoubtedly a concern that the processes to remove material in the UK are of little use when dealing with US hosted material.

Harmonisation of laws would be a sensible solution to multi-jurisdictional Internet based disputes, however it is very unlikely that any agreement will be reached between the US and UK. The US has recently introduced the Free Speech Protection Act 2009¹⁰⁴⁴ that prevents US courts from recognising any foreign defamation judgements against US based defendants, which are against the principles of freedom

speech. Alongside increased protection for ISPs based in the US, this will make claims made by UK based citizens exceptionally difficult.

The English courts have also dismissed US decisions in defamation cases, making it very unlikely that any harmonisation between the two countries will ever happen. The ISP interviewees commented that they had not seen any loss of business to the US however, it remains to be seen if this ever increasing protection offered in the US will have an influence on companies defecting to the US for increased protection in the future and the extent of the damage of UK based citizen's reputations who have been defamed on US based ISPs websites, following the Free Speech Protection Act 2009. Crucially, if there are a growing number of people unable to protect their reputation due to the host or ISP being based in the US, then it will be of interest to see how the UK Government reacts to this issue.

Countries such as China have strict censorship in place and have been known to block their citizens accessing certain material outside of its borders. It is very doubtful that the UK would take such extreme action, however, if UK citizens cannot protect their reputations outside of its borders, then the Government will need to take action.

6.7 Is Internet Defamation Increasing?

According to the lawyer interviewees, libel work involving printed material is decreasing in their firms. A number of reasons were given as to why this was happening, such as, the media being more aware of defamatory material, the one-year

limitation period and the offer to make amends. All of which, may be contributing to the reduction in cases.

Most of the lawyers commented that Internet based disputes were increasing and at a rate where the majority of their defamation work was either Internet based or was becoming more Internet based. There was only one lawyer who found that work involving Internet libel was not increasing in their firm.

This evidence suggests that Internet claims are rising and becoming more prominent than printed libel. This only strengthens the argument that issues regarding the Internet and defamation law should be researched further. It also confirms that people are choosing the Internet to publish their opinions, possibly instead of in a printed form. Consequently, if claims concerning the Internet continue to rise, then the issues that have been discussed throughout this research could potentially be magnified. This could potentially cause serious unrest for freedom of expression advocates and ISPs.

It is at this stage in the Internet's short history that defamation law should be reassessed to consider the full impact and potential of Internet defamation. The Internet is providing unequalled possibilities for freedom of expression and to a certain extent this should be protected. It is also important to protect a person's reputation and as communication over the Internet grows the potential risk to a person's reputation will too.

It is recommended that further research is needed to clarify the position of ISPs and hosts within defamation law. There is evidence to suggest that defamation law may

not be flexible enough to cope with the demands placed on it by the Internet. Therefore, it is arguably placing unnecessary restraints on ISPs.

Further clarification of what is best practice for approaching a defamation dispute is also needed. The notice and takedown procedure is not in line with other forms of libel action and is arguably incompatible with Section 12: Freedom of Expression of the Human Rights Act 1998. This raises the question of how to regulate defamation on the Internet? This research recommends that the Government should decide whether to change law so to adapt to the uniqueness of the Internet and create a level playing field for all published material or to create completely different rules to apply to defamation on the Internet. Either approach would clarify the position of all parties involved in defamation disputes, something that is currently not present in the law.

6.8 Summary

This research has highlighted some key areas within defamation law and practice where further research or rethinking of attitudes towards defamation practice is required. These findings would have benefited from an increased number of participants, particularly in the second set of interviews. The initiatives discussed in the second set of interviews were designed based on the interviewee's ideas, in addition to problems that were found during the entire research. Despite a lack of participants compared to that in the first interviews, the idea of a digital form, the inclusion of ISPs and host within the Defamation Act and the process of the ISP seeking indemnities was for the most part, well received.

Evidence and findings from the objectives conclude that not only is the Defamation Act 1996 not protecting ISPs adequately enough, but new procedures and practice methods are leaving ISPs vulnerable to libel claims and with very little choice but to abide with the instructions of the complainant.

Defamation law has long been established as an integral method of protecting a person's reputation and it is the duty of an author, editor or publisher that their publications reflect the correct reputation of the parties they are discussing. There has to be a balance between the protection of reputation and that of freedom of expression. The Internet has tipped this balance in favour of freedom of expression because of the many outlets available to users and the scale of the publishing community using it.

The Internet has created a platform for people to air their opinions and despite the inherent good for the Internet user and freedom of expression, there are consequences for the host and ISPs for this privilege. ISPs and hosts are normally the first point of contact for a defamation dispute, for both a complainant and a lawyer. Unlike when defamatory material is in print, a complainant will almost always contact the ISP because this is the most effective and cheapest method of dealing with the problem. If the ISP is in any doubt they will remove the material.

The process of notice and takedown has been criticised throughout this research, despite lawyers being comfortable and happy using this procedure. ISPs commented that they were left with no statutory enforced time to deal with or investigate the issue and therefore, vexatious and trivial claims can be made and be successful in the

removal of material. This is a direct result of the decision made in the *Godfrey v Demon Internet* case, where the ISP was notified of the material and deemed to be the publisher of the material. What is particularly worrying ISPs is that they were held as the publisher of potentially defamatory material and not as the publisher of defamatory material because the content of the material was never brought into question.

Godfrey v Demon Internet has made a significant impact regarding how material is handled once it has been complained about. Rightly or wrongly, this has resulted in ISPs becoming easy targets and the material in question being removed. The process does help ISPs and claimants to quickly remove material they both believe to be defamatory and without any additional legal costs. On the other hand, vexatious requests can sometimes lead to the removal of legitimate material, which is a clear breach of freedom of expression.

In conclusion, there is evidence to suggest that not only is the Defamation Act 1996 not protecting ISPs adequately in comparison to printed publishers, but defamation practice and procedure is leaving ISPs open to vexatious and trivial claims. *Godfrey v Demon Internet* is the only case that an ISP can base their decisions on. However, this promotes notice and takedown regardless of the content. The difference in the manner in which ISPs deal with defamation claims and the part they play in the handling of information suggests that their role as is currently defined in the Section 1 defence of the Defamation Act 1996 could be modified. This research, recommends that for greater clarity to be achieved the role that ISPs and hosts play in the handling

of defamatory material should be included within the Section 1 defence, with possible additional guidelines regarding the timescale to remove material.

Findings from the final two objectives suggested that the current procedures of notice and takedown, CFAs and the bypassing of the pre-action protocol were having an adverse and determining effect on freedom of expression on the Internet.

The notice and takedown procedure is looked on favourably by the majority of lawyers as a tried and tested method of diffusing a defamation dispute, yet ISPs believe that a change is needed in this area. This method, in addition to *Godfrey v Demon Internet* places the ISP in the role of ‘judge and jury’ and with little choice but to remove the material. The dispute is relatively easy to diffuse when the burden of proof is on the defendant and the procedures in place provide the ISP little time to investigate.

A worrying matter is the bypassing of the pre-action protocol when dealing with Internet defamation claims. The pre-action protocol promotes the exchange of information to benefit both the defendant and claimant. So to bypass this and threaten libel action if the material is not removed, is not only detrimental to freedom of expression, but is also undermining the principles of the protocol. What this research proposes is a method which both embraces the core elements of the pre-action protocol and the immediateness of dealing with defamatory material on the Internet. A digital complaints form with mandatory elements similar to that of the pre-action protocol could help weed out trivial complaints, but also allow any Internet user to

contact the ISP without involving a lawyer (something ISPs have encouraged) and provide the ISP with enough information to make a quick and accurate decision.

CFAs are an area that would require further investigation across the whole jurisdiction of defamation. Until CFAs are properly monitored, ISPs and their users will be open to potentially extortionate lawyer fees. There is evidence to suggest that lawyers are being over compensated for their work, therefore, further research is required. Although CFAs give the small person a voice, they should not be used in a way that silences others.

In conclusion, evidence suggests that the notice and takedown procedure, CFAs and the bypassing of the pre-action protocol are all having an adverse affect on freedom of expression on the Internet.

6.8.1 Comparison with the Law Commission's reports

In relation to the Law Commission's conclusions and recommendations¹⁰⁴⁵ this research rejects the claims that there is not a problem regarding 'gagging' letters, as there is evidence in this study to suggest that ISPs and hosts sometimes feel they are being 'gagged'. The Law Commission concluded that following the introduction of the pre-action protocol 'gagging' letters are rare. Although this maybe for printed libel, this research has found that the pre-action protocol is being by-passed by lawyers when it concerns the Internet so that they can achieve a more immediate result.

The Law Commission's conclusion regarding tactical targeting was that there was no evidence that further work was needed in this area. When considering tactical targeting in this study it would depend on the definition. If one is to define tactical targeting as concentrating action against a smaller secondary publisher, then there is no evidence to suggest that they are being targeted in this manner and this research is in agreement with the Law Commission's conclusion. However, if one defines tactical targeting as targeting the ISP rather than the author because of the perceived judgement that the ISP will have 'deeper pockets' then there is evidence to suggest that the ISP is the first and only point of contact during a defamation dispute. This is evident when the ISP is unaware of third party material and must assume the role of both 'judge and jury'. The Law Commission concluded that the role of an ISP needs to be 'examined and clarified'¹⁰⁴⁶ in the Defamation Act. This research agrees with this proposition.

The Law Commission in its second study furthered their argument for a change in the law when concerning ISPs and defamation because of the possible conflict between the notice and takedown procedure and freedom of expression, as emphasised in HRA. This research has made similar findings and although the law states that a person has a right to a reputation, this should not be at the cost of freedom of expression. Therefore, other means to protect this right should be sought and applied.

The issue of the multi-publication rule being applied to Internet publications was also discussed in the second report. The conclusion was that although there are concerns regarding 'the unacceptable global risks'¹⁰⁴⁷ for online publishers, without a global treaty and harmonization of laws there is very little that can be done. As with the Law

Commission's conclusion, this research agrees that any sort of reform in this area is going to take a lot of time and resources. The Rome II treaty looks to be the most appropriate method for EU states, however, there has yet to be an agreement regarding inter-state defamation and consequently defamation has been omitted from the treaty, pending further investigation.

6.9 Limitation of Research

The number of participants that agreed to be interviewed, in comparison to the number of requests sent was the biggest limitation involved in this research. This is particularly apparent in the second set of interviews. This lack of response may have been possibly due to the time and resources available to the companies contacted or that defamation on the Internet was not a pressing concern for their business. Those who agreed to be interviewed did increase the awareness of issues regarding this research, however, a greater response would have helped produce a clearer and more detailed review of defamation on the Internet.

Despite a lack of responses, the findings have justified this research. A number of recommendations and areas of further research have been included, which would be beneficial to the foundations of any further research in this area. Furthermore, new findings have highlighted areas that have yet to be discussed in any of the publications consulted during the desk research.

Time and resources were the underlining limitations as to why the interviews were limited to the UK. The Australian case, *Gutnick v Dow Jones* and American defamation law has been discussed throughout this research and the opinions of ISPs and lawyers in both of these countries would have helped to highlight the similarities and differences of law and the effects of respective case law. However, sourcing lawyers who dealt with defamation issues proved to be far more difficult than in the UK. ISPs in these two countries provided little more than a general contact form on their website and following contacting them there were no replies. As this research has focused on the issues regarding defamation law in England and Wales, it was decided that exhausting this avenue of research further would not be worthwhile and a lack of input from these countries would not be detrimental to this study.

6.10 Recommendations and Future Research

The overall aim of this study has been ‘To examine the current conflicts between defamation law and practice in England and Wales, Internet service providers and a person’s right to freedom of expression’. This research identified various areas of conflict that would benefit from further studies and changes to defamation procedure and practice.

There is a possibility that current laws and procedures will not encourage ISPs or hosts to invest in future systems that promote freedom of expression and creativity on the Internet whilst current laws and procedures exist in England and Wales. This is

evident when observing current major communication trends, many of which are based in the U.S. such as Facebook¹⁰⁴⁸, Myspace¹⁰⁴⁹ and Twitter¹⁰⁵⁰.

Although regulation of content on the Internet is important and an ISP must take responsibility for the content they make available for the general public current defamation law means that they are more likely to turn a blind eye to third party content rather than monitor it.

As the population of the Internet increases, so too does the potential for more defamation disputes. This is a key factor as to why there is a need for increased awareness of how defamation procedure and practice is affecting ISPs, hosts and consequently, freedom of expression.

Any changes to the law and procedure will undoubtedly come under stiff opposition from some sections of the legal profession as current procedures make light work and potentially great rewards for lawyers. It is therefore, understandable why some would not want any alterations to be made to the notice and take down procedure or to CFAs. If there are any eventual changes made to defamation law or its procedures, it is important that the uniqueness of the Internet as a platform for freedom of expression is kept appealing. It is also vital that it is regulated and the means in which a person can protect their reputation are available to anyone, regardless of their wealth, financial security or status.

6.10.1 Recommendations

The following recommendations have been developed based on conclusions in the previous sub-chapters. Recommendations are only made where safe conclusions have been derived.

ISPs and Defamation Law

- An obvious issue was that of clarity in defamation law, in addition to evidence that there is a lack of parity between printed and Internet publishing. Publishing as a whole would benefit from the defining of the roles of all the Internet publishing stakeholders. Based on these definitions, a decision could be made as to whether or not to include the stakeholders within the Defamation Act alongside the traditional printed stakeholders or to create a separate defence with possible guidelines, for Internet stakeholders.
- The multi-publication rule should be reassessed with regards to Internet publications. It is recommended that the limitation period for bringing an action of defamation is either one year from the initial publishing or that the limitation period is redesigned for online material.

The Notice and Takedown Procedure and Freedom of Expression

- It has been highlighted that the majority of ISPs believe that they have been issued with a letter that attempts to ‘gag’ them. It is recommended that some

form of external body is set up to monitor this issue. ISPs should not have to remove material out of fear of litigation, when claims are made without merit, as this is a clear breach of freedom of expression.

- Guidelines on how ISPs and hosts should deal with material that has been complained about would help clarify how long they have to investigate and remove the material.
- An opportunity for an author of third party material to protect their right to freely express themselves, without the ISP being liable for the material should be sought. It is recommended that an ISP should be allowed to indemnify themselves from liability with both parties and the author be allowed to request that the material in question is republished. The ISP would have to abide by any legal decision made and co-operate with any request made by the courts.

Defamation Procedure and Practice

- Despite being governed by the same laws, the procedures involved in notifying an ISP about defamatory material in comparison to printed material is very different. The defamation pre-action protocol is rarely used for Internet based complaints as lawyer can achieve the removal of the material almost immediately after the complaint is made. It is recommended that this is re-evaluated. Evidence of lawyers not using the protocol suggests that it is little

use for online material and a cost-effective procedure tailored to the Internet based material would be more beneficial. Furthermore, it is recommended that complaints made directly to the ISP or host are registered with the Ministry of Justice so to monitor the extent of unsolicited claims.

- The escalating costs of lawyer fees, especially when acting under a CFA is an issue throughout the field of defamation. It is recommended on the limited evidence that this research has produced that further research is carried out to determine whether or not lawyers are being over compensated for their work, with a view to capping fees or limiting them. Such action would help bring defamation action in line with the principles of the HRA.

The final recommendation regarding lawyers being overcompensated and the adverse effects on freedom of expression is currently being addressed by the Government who have begun a consultation aimed at curbing excessive libel costs. Measures that are being considered reflect some of the recommendations made in this study, these include (i) Limiting recoverable hourly rates by setting maximum or fixed recoverable rates (ii) Mandatory cost capping or mandatory consideration of cost capping in every case (iii) Requiring the proportionality of total costs to be considered on cost assessments conducted by the court¹⁰⁵¹.

6.11 Areas of Further Research

The field of defamation law is vast. This became only too apparent during the desk research, in addition to further issues regarding the law that were discovered during

the interviews. The following recommendations for further research are listed because they were out of the scope of this research or because there was insufficient evidence to draw safe or accurate conclusions from this research.

- It was commented during the interviews that an independent body, similar to that of the Press Complaints Commission could be used for Internet based publication. It would make for an interesting research topic to evaluate whether such a body would be advantageous to online material and if so, whether its enforcement is realistic for Internet publishing.
- An investigation into the growing number of Internet disputes in comparison to the falling number of printed libel disputes, as highlighted in this research would make for an interesting thesis. Such a review of libel trends would add weight to any evidence that libel law needs to be adapted to house the Internet stakeholders.
- In an age where cross-border communication is as simple as clicking a mouse, two questions arise regarding defamation law and jurisdiction. Firstly, where should the defamed party be allowed to bring their case and secondly, should there be increased harmony between international defamation laws? Current procedures in England and Wales dictate that if a foreign person has a sufficient reputation they may be able to seek action within the courts. It is therefore questionable whether a person's reputation should be divisible between nation states? With regards to harmonisation, the Rome II Act has up to this point been unable to satisfactorily determine the choice of law for

cross-border defamation claims regarding EU states. Further investigation is needed to determine why defamation is currently unsuitable for the non-contractual obligations under the Rome II Act and to determine how harmonisation of laws worldwide could potentially be achieved.

- An inherent issue with publishing on the Internet is the one-year limitation period. In accordance with the Duke of Brunswick case, each individual publication gives rise to a new cause of defamation action. With regards to the Internet, a new cause of action and the one-year limitation period begins on every new website 'hit' or download. This places ISPs under a constant threat of defamation action for an infinite timescale. Therefore, research is required to determine whether or not the 150 year-old Duke of Brunswick case should still be the bedrock for these types of cases and if not, what other possible solutions would be best suited for Internet publishing.

- An exciting growth area in the media is the movement of journalism onto blogs, in addition to a journalist's normal everyday work. This allows for much more detailed work without word limits. A study of impact of the Internet on journalism in the 21st century, in addition to the problems journalists, in particular investigate journalism face, including the threat of defamation on freedom of expression would make for a very worth while study.

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Appendix A

Interview Questions for ISPs and Lawyers

ISP interview questions

- Do you believe that the protection afforded by ISP under section 1 of the Defamation Act 1996 is adequate enough to protect them against claims of defamatory content posted by a third party? Main Criticisms if any?
- What improvements are necessary, if any?
- How is current UK defamation law affecting freedom of expression on the Internet?
- Are defamation claims mostly from UK based individuals/companies?
- What are your procedures as an ISP in the event of a defamation/or other claim regarding third party content?
- Do you have guidelines in place following defamation claims?
- Do you find that dealing with claims of alleged defamation is costly and time consuming for the company?
- Do you believe there is problem concerning ‘gagging’ letters sent by a client’s solicitor with the sole intention to remove current and possible future material?
- How much of the letter of claim provides full details set out by the Pre-Action Protocol? If you have received a letter before?
- What the common request for damages/resolution?
- How has the Demon Internet vs. Godfrey affected the way you deal with defamation acts?

Lawyer interview questions

- Do you believe that the protection afforded by ISP under section 1 of the Defamation Act 1996 is adequate enough to protect them against claims of defamatory content posted by a third party? Main Criticisms if any?
- What improvements are necessary, if any?
- Discuss the criticisms ISPs have with the Defamation Act
- Have you had any experience in representing someone who wants to make a claim because of defamatory material on the Internet?
- What is your overall opinion of the Defamation Pre-Action protocol as a method of settling claims?
- How much of the letter of claim provides full details set out by the Pre-Action protocol?
- What the common request for damages/resolution?
- What is the normal advice you give to your clients regarding Internet defamation?
- What is your opinion of Conditional Fee Agreements?
- Have you noticed an increase in defamation claims involving the Internet?

Appendix B

2nd Interview Questions for ISPs and Lawyers

Areas that arose during the first interviews:

- Firstly, to ask if you have any issues regarding the multi-publication rule and the Internet?
- Secondly, if you have any experience dealing with large American corporate business, with regards to notice and takedown.
- Finally, if you are aware of high profile personalities hiring lawyers to protect their reputation on the web by having them search for material about them.

Also, a number of options have also been discussed regarding Defamation law and practice.

- Legal guidelines for ISPs/host which offer greater clarity on how expeditious they must act to remove the material and the time allowed for investigation.
- Introduction of the roles of Internet publishers into the Section 1 defence. e.g. ISP, Hosts etc.
- The creation of a standard digital form (similar to a 'contact us' form) for complaints to be made directly to the ISP or host that highlight elements of the Defamation Pre-Action Protocol. Example elements include, the name of the complainant, details of the publication or broadcast, including the words

complained of, date and where possible, a copy or transcript of the defamatory words. In addition, sufficient evidence that the words used were in fact inaccurate or unsupportable. This should be supported by adequate explanation to enable the defendant to appreciate why the words were inaccurate or unsupportable. Furthermore, where relevant, the words that make the complainant identifiable, in addition to what damage has been caused from the words complained of. Moreover, the complainant should also address a method of remedy so that the claim can be rectified. This would allow the complainant and ISP to rectify the issue speedily with sufficient information to base their decisions on.

- The conception of a process that allows the ISP to seek indemnity from both the complainant and the author of the alleged defamatory material. The general idea behind this method would allow the author of the material to respond within a designated timeframe as to whether or not they would like the material to be kept online and therefore taking full responsibility for any legal consequences. Upon confirmation the ISP could then respond to the complainant on their decision and if necessary seek an indemnity from them.

Appendix C

Section 1 of the Defamation Act 1996

Section 1 defence of the Defamation Act 1996

Responsibility for publication

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.

(2) For this purpose 'author', 'editor' and 'publisher' have the following meanings, which are further explained in subsection (3)-

'author' means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

'editor' means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

'publisher' means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved-

- (a) in printing, producing, distributing or selling printed material containing the statement;
- (b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;
- (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;
- (d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;
- (e) 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.

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(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.

(5) 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) This section does not apply to any cause of action which arose before the section came into force.

Appendix D

Regulations 17-19 of the Electronic Commerce (EC Directive)

Regulations 2002 (EC Regulations).

Mere Conduit

17. - (1) Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where the service provider -

(a) did not initiate the transmission;

(b) did not select the receiver of the transmission; and

(c) did not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in paragraph (1) include the automatic, intermediate and transient storage of the information transmitted where:

(a) this takes place for the sole purpose of carrying out the transmission in the communication network, and

(b) the information is not stored for any period longer than is reasonably necessary for the transmission.

Caching

18. Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where -

(a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and

(b) the service provider -

(i) does not modify the information;

(ii) complies with conditions on access to the information;

(iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(iv) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

Hosting

19. Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where -

(a) the service provider -

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

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

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

Appendix E

Article 10: Freedom of Expression

Section 12 of the Human Rights Act 1998

Article 10: Freedom of Expression

Everyone has a right to freedom of expression. This shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, since it carries with it duties and responsibilities, scribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

Section 12: Freedom of Expression

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied-

- (a) that the applicant has taken all practicable steps to notify the respondent; or
- (b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-

(a) the extent to which-

- (i) the material has, or is about to, become available to the public; or
- (ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section-

'court' includes a tribunal; and

'relief' includes any remedy or order (other than in criminal proceedings).

¹ Defamation Act 1952. <http://www.bailii.org/uk/legis/num_act/1952/1102065.html>, [30.10.52], [accessed 03.02.06].

² Defamation Act 1996. <http://www.opsi.gov.uk/acts/acts1996/ukpga_19960031_en_1#pb1-l1g1>, [n.d.], [accessed 01.06].

³ Internet World Stats. <<http://www.internetworldstats.com/>>, [18.08.06], [accessed 20.8.06 & 20.10.08].

⁴ *Godfrey v. Demon Internet Limited* [1999] EWHC QB 244 (26th March, 1999) .
<<http://www.bailii.org/ew/cases/EWHC/QB/1999/244.html>>, [28.05.02], [accessed 01.06].

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