GOOGLE INC.'S RESPONSE TO THE SCOTTISH LAW COMMISSION'S DISCUSSION PAPER ON DEFAMATION (DISCUSSION PAPER NO. 161)

Google welcomes the opportunity to provide comments on the many important issues addressed by the Scottish Law Commission in their Discussion Paper on Defamation (the "Paper").

As the development of information technology, the internet and social media empowers individuals with more effective tools with which they can share and access information, we believe that all of the relevant stakeholders must work together to ensure that the correct balance is maintained between the rights of individuals to take action to protect their reputation where appropriate, and the rights of individuals to express themselves freely without being unjustifiably impeded by actual or threatened legal proceedings.

We believe, therefore, that Scotland should develop a legal framework that facilitates free expression online whilst giving individuals the tools to enable them to protect their reputation. Such a framework should discourage those who would seek to use defamation law to stifle legitimate public debate and criticism, whilst also helping to educate the new generation of authors online that they remain responsible for the content that they produce. Such a framework should reflect the laws governing ecommerce in the EU (particularly, the Ecommerce Directive, Directive 2000/31/EC), which provide clarity to internet intermediaries regarding the legal protection regime that applies to the activities on their services.

We also agree that it is important for the development and maintenance of a vibrant digital economy that pressures to shift liability for online content away from those who are actually responsible for generating and posting that content are properly scrutinised and ultimately resisted. In the main, internet intermediaries are neither the primary nor secondary publisher of content, nor the authors or editor of content. Innovative new online products and services, such as tools and platforms for users to create, share and find content, cannot be expected to develop if they are not provided with legal protection. The services that many of us take for granted today would not exist without such legal protection.

The Defamation Act 2013 and EU Framework

The Defamation Act 2013 of England and Wales (the "2013 Act") introduced significant improvements to the defamation law of England and Wales. The reforms brought about by the 2013 Act provided welcomed legal clarity and codification of the law by defining some of the boundaries of free speech, protecting an individual's reputation from harm caused by the publication of defamatory statements, and recognising the need to educate those who create content that they remain responsible for that content.

Google supports the view that Scotland should not be seen to be left behind by the developments in England and Wales in this important area of law, and we echo the concerns, noted by the Law Commission, that real practical disadvantages are likely to arise if defamation law is formulated differently in the jurisdictions making up the UK.

As well as agreeing with the desirability of adopting a consistent approach to defamation law across the UK, we believe that it is essential that any amendments or new legislative provisions made to the law on defamation in Scotland are consistent with the regime set out in the Ecommerce Directive. This was established in the late 1990s following a careful

assessment of all of the relevant factors to ensure that the resultant online intermediary liability regime was practical, uniform, acceptable to industry and also protective of consumers, citizens, institutions and businesses. Such factors remain just as relevant today as they did in 2000. As an OECD report on the role of Internet intermediaries stated in 2011, "[s]ince growth and innovation of ecommerce and the Internet economy depend on a reliable and expanding Internet infrastructure, an immunity or "limited liability" regime was, and is, in the public interest"[1]

Freedom of Expression

We believe that any reform of defamation law must be carefully implemented in order to avoid undue interference with the right to freedom of expression, including the right to seek, receive and impart information online. As is noted in the Law Commission's Paper, without sufficient and clear protection from liability, internet intermediaries may well simply decide that the easiest path to take is to delete or block content upon receipt of an allegation that the content is defamatory, even where that content is not obviously unlawful.

In the context of defamation law reform in England and Wales, some have appeared to suggest that a 'take down first, ask questions later' approach to allegations of online defamation is an appropriate one, suggesting that the content authors can always complain if they take issue with the removal of their content. Google firmly believes that such an approach is not appropriate, as it fails to attempt any meaningful balancing of the rights at issue, and dismisses the potential "chilling effect" of such hasty removals.

Google takes the issue of online defamation seriously. We appreciate that there is a delicate balancing act to be done in seeking to protect an individual's reputation from harm caused by the publication of false statements, whilst preventing a "chilling effect" on freedom of expression with the censorship of meritorious communications for fear of potential claims. The challenges of striking this balance have been discussed at length by the UN Special Rapporteur on Freedom of Expression[2], who has noted that the internet has become a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an "enabler" of other rights, including economic, social and cultural rights, such as the right to education, the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly[3].

Any reform of the law of defamation must therefore avoid imposing undue restrictions on freedom of expression which go further than is necessary to achieve the desired objective of vindicating a person's reputation when defamatory statements have been published.

Publication and Threshold Test

In line with our views on the desirability of commonality in the defamation laws of the UK, we strongly support the proposal that communication of an allegedly defamatory imputation to a

[1] The Role of Internet Intermediaries in Advancing Public Policy Objectives: Forging partnerships for advancing policy objectives for the Internet economy, Part II (2011) OECD, DSTI/ICCP(2010)11/Final, see pp10-12.
[2] Frank La Rue Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/17/27 (2011) 43.
[3] *Ibid*, paragraph 22.

third party should become a requisite of defamation in Scots law, and that a statutory threshold should be introduced requiring a certain level of harm to reputation in order that a defamation action may be brought.

As well as helping to ensure effective and appropriate use of court resources, the introduction of an appropriate threshold test can be expected to discourage those who might seek to use defamation law: to suppress legitimate criticism; to stifle those who would seek to remind readers of facts of genuine public interest that the subject in question might find uncomfortable; or, to stamp out online expressions of heartfelt opinion about the actions or policies of those in the public sphere. Even if the subject is not so discouraged, the introduction of such a threshold test, as well as effective court procedures to dispose of trivial claims at an early stage, would greatly assist to halt the progress of any such claims and thus diminish their adverse effects.

Just as the rights of individuals to express themselves online should be afforded appropriate protection against those who would seek to misuse the law, so individuals who are genuinely the subject of unlawful defamatory content should be able to take timely and effective action against those responsible for authoring and posting that content, in order to secure the required vindication in the courts. The *Brett Wilson LLP v Persons Unknown*[4] case illustrates how courts can address issues of noncompliant or anonymous authors, and help ensure that those who are defamed can secure vindication.

We support the proposal that bodies trading for profit should continue to be permitted to bring actions for defamation, and that such actions should also be subject to a statutory threshold of harm, as well as appropriate restrictions where the defamation relates to trading activities. Increasingly, businesses find it commercially advantageous to have an engaging online presence and to maintain effective communication with their current and prospective customers. A business' online presence and reputation can be an important aspect of its current commercial potential. Accordingly, if, for example, a rival business is damaging another business' reputation by deliberately publishing defamatory comments, the impacted business should be able to bring a claim in defamation against that rival business to prevent further damage. Equally, however, where a customer of a business experiences bad customer service, or has otherwise been significantly let down by that business, the individual concerned should be able to express online his or her genuine opinions without fear of his or her legitimate criticism being suppressed by a meritless claim brought, or threatened, by that business.

Defences of Truth, Fair Comment and Public Interest

In the interests of assisting with legal certainty, and with a view to increasing consistency throughout the defamation laws of the UK, we support the proposal that the defences of truth, fair comment and public interest should be encapsulated in statutory form.

Following the developments brought about by the 2013 Act, we also agree that the defence of fair comment should be broadened, and should reflect a requirement that the author honestly believed the comment of opinion he or she expressed.

[4] [2015] EWHC 2628 (QB).

Internet Intermediaries

2013 Act Sections 5, 10 & 13

We strongly support approaches that encourage and facilitate the placing of responsibility for defamatory material on the individual internet users who posted that content online. Such approaches encourage individuals to be responsible online citizens, and ensure that citizens who do not act responsibly are held accountable for any online misconduct. In this regard, we would support the introduction of a provision equivalent to Section 10 of the 2013 Act, which makes clear that claims should not be brought against parties that are not the author, editor or publisher of the statement complained of where the claimant is able to bring an action against the author, editor or publisher. As internet intermediaries are, in most cases, not the author, editor or publisher of the content complained of, this provision ensures that claimants pursue the individuals directly responsible for posting the offending content online. In this context, the *Brett Wilson LLP v Persons Unknown* case helps demonstrate that it remains entirely practicable for a claimant to bring a successful action against an individual even when their identity remains unknown.

In the event that the (known or unknown) author of the content either does not engage with the proceedings brought against him or her by the claimant, or refuses to comply with any subsequent court order, Section 13 of the 2013 Act provides the claimant with the ability to invite the court to order the operator of a website on which the defamatory statement is posted to remove that statement. This approach ensures that defamation disputes (particularly those in which the content is not obviously unlawful) are addressed in the appropriate forum, i.e. the court, and that a successful claimant can secure both the vital vindication that he or she seeks, as well as removal of the statement in issue.

The Law Commission has asked whether a defence for website operators along the lines of Section 5 of the 2013 Act would sufficiently address the issue of liability of internet intermediaries for publication of third party defamatory material. In discussions of defences that may be available to internet intermediaries, it is important to consider carefully whether in fact the intermediary has any liability in the first place, and thus has any need to present a defence. In this regard, we would highlight that Articles 1215 of the Ecommerce Directive do not constitute a liability regime, that is, they do not introduce additional liability for internet intermediaries. Rather, they are a defensive regime that impact such, if any, liability that an internet intermediary might have under existing laws. Accordingly, if an internet intermediary does not have any liability under national defamation law (such as is the case where an intermediary hosts unlawful defamatory content prior to having received and considered sufficiently detailed and adequately substantiated notice of that content) then they do not need to avail themselves of the Ecommerce Directive defences, nor of any national defamation law defences[5].

Turning to the Section 5 defence in England and Wales, we support the adoption of provisions that help protect website operators against claims brought in respect of third-party Content hosted on their websites. W here an action is brought against a website operator (for example an operator of an online forum, blog sit e, social media site or a site which facilitates the posting of user-generated video content) in respect of a statement posted on the website, it will be a defence under Section 5 for the website operator to show that it did not post that statement itself. In circumstances where the actual poster of an offending statement is identifiable, Section 5 of the 2013 Act therefore provides a complete defence for website operators and is a welcomed reform on that basis. The existence of such a defence

[5] Assuming that publication is a requirement under such national defamation law.

should discourage vexatious claims which target website operators instead of targeting the source of the defamatory content, i.e. its known author.

However, in order for website operators to avail themselves of the Section 5 defence where the poster is anonymous, they must comply with the onerous procedures set out in the *Defamation (Operators of Website) Regulations 2013* . In practice, these labyrinthine procedures place a complex and disproportionate administrative burden on website operators, and need to be carried out within unreasonably short timeframes if the defence is to be relied on (instead of simply requiring the operator to act "expeditiously" as per the Ecommerce Directive). In some instances, the procedures are simply impracticable, such as the requirement to anonymise a complaint, at the complainant's option, before sending it on to the original author. This makes it impossible for the author to determine who has submitted the complaint, and, correspondingly, makes it impossible for the author to determine whether the complainant truly has any rights to assert (assuming that the complaint remains intelligible in such circumstances).

The difficulty of meeting the short timeframes associated with the steps in this process (e.g., 48 hours), whilst handling the large volume of complaints often received by larger website operators, and, time differences associated with operations of multinational companies being spread across multiple jurisdictions, means that website operators' compliance with these procedures is, in reality, exceedingly difficult and burdensome. As a result, many website operators may prefer to avoid the impracticable procedures set out in the Regulations in respect of the Section 5 defence and continue to rely on the existing defences, where such defences are required.

Ecommerce Directive

It is vital that any amendments made to, or new legislative provisions concerning, defamation law in Scotland are consistent with EU law, and in particular the requirements of the Ecommerce Directive. In particular, we would highlight the need for national legislation to reflect the 'notice and takedown' procedures specifically envisaged by the Ecommerce Directive; this regime contained in Articles 1214 (together with the ban on imposing general monitoring obligations contained in Article 15) strikes a careful balance between the interests of persons affected by unlawful information, internet intermediaries and internet users.

With this in mind, consistency of terminology is an important issue. We would therefore recommend that any legislative reform in this area use the language and terminology already used in the Ecommerce Directive, or at least explain clearly how the legislative language relates to the Ecommerce Directive language (for example, by adopting a definition of "Internet Service Provider" that expressly includes, but is not limited to, those providing the services covered in Articles 1214 of the Ecommerce Directive). At the very least, this will help reduce the potential for conflict between domestic and international law.

When applying Articles 1215 of the Ecommerce Directive, it is important to note the obvious desirability, particularly from a public policy perspective, of not penalising internet intermediaries that introduce voluntary measures to detect and tackle illegal or harmful online material. Such responsible intermediaries should not be prevented from benefitting from the Ecommerce defence regime on the dubious grounds that such measures change the overall nature of their service and thus prevent that service from being considered as inherently technical, automatic and passive in nature. In this regard, we welcome the recognition under Section 5(12) of the 2013 Act, that moderation by the operator of a website of statements posted on it by others, does not invalidate the Section 5 website operators' defence.

Search Engine Operators

The Law Commission has asked for input in relation to defences that might be available to intermediaries who set hyperlinks, operate search engines or offer aggregation services. While we believe that it remains important to question any underlying assumption that intermediaries might be considered liable in the first place, and thus be deemed to need any defence, we also believe that an appropriate framework of defences has been established by the Ecommerce Directive, and that Articles 12-15 of the Ecommerce Directive provide a robust and well thought out regime, which is flexible enough to cover all such services, and has withstood the test of time.

In relation to the application of this existing framework of defences to intermediaries who, for example, operate search engines, we note that the CJEU decision in *Papasavas* (C-291/13) clarified that "Article 2(a) of Directive 2000/31 must be interpreted as meaning that the concept of 'information society services', within the meaning of that provision, covers the provision of online information services for which the service provider is remunerated, not by the recipient, but by income generated by advertisements posted on a website". Following this, it was held in the *Mosley v Google* case[6] that Article 13 of the Ecommerce Directive (the "Caching" defence) affords legal protection to internet service providers providing search engine services, such as Google. A pragmatic view shared by Advocate General Maduro in *Google France SARL v Louis Vuitton Malletier SA*[7]:

> "In my view, it would be consistent with the aim of Directive 2000/31 for Google's search engine to be covered by a liability exemption. Arguably Google's search engine does not fall under Article 14 of that directive [the "Hosting" defence], as it does not store information (the natural results) at the request of the sites that provide it. Nevertheless, I believe that those sites can be regarded as the recipients of a (free) service provided by Google, namely of making the information about them accessible to internet users, which means that Google's search engine may fall under the liability exemption provided in respect of 'caching' in Article 13 of that directive. If necessary, the underlying aim of Directive 2000/31 would also allow an application by analogy of the liability exemption provided in Articles 12 to 14 thereof."

Policing the Internet

Google believes that intermediaries should not be forced to police the internet. This is particularly the case in the context of allegations of defamation, which can be highly fact dependant and can involve complex legal defences regarding which the internet intermediary cannot be expected to possess all, or any, of the relevant supporting information. An intermediary simply cannot be expected to know something of the strength of possible defences such as truth or fair comment for every complaint. It would not appear to us to be desirable to effectively outsource the judicial function of national courts in such cases to internet intermediaries, by making intermediaries decide what should stay online and what should not, in circumstances where the unlawfulness of the content is not obvious. Equally, it is hard to see how it would be in the genuine interest of a nation to impose obligations on each intermediary to review and moderate its content (even if such an exercise was feasible given the scale at which popular intermediaries operate) when such an imposition would force many intermediaries (particularly those who are starting up) to take the easiest path and delete content irrespective of whether it is obviously unlawful or not.

[6] Mosley v Google Inc & Anor [2015] EWHC 59 (QB), para 34.
[7] [2011] Bus LR 1, para 144.

For the reasons set out above, Google highly commends the Ecommerce Directive regime to the Law Commission and trusts that, whilst it was established more than 15 years ago, the careful and respectful balancing of rights that it embodies will act as a guiding framework for the reform of defamation law in Scotland.

Remedies

We consider it contrary to public policy and the principle of freedom of expression for a court to be able to order a website operator to publish a summary of its judgment. However, if the decision is made to adopt Section 12 of the 2013 Act into Scots law, we believe that it should not extend to intermediaries.

As highlighted above, internet intermediaries are rarely able to defend a defamation claim on the grounds of truth, because they do not know whether the material published is true or not. We feel strongly that in these circumstances it is wrong that an internet intermediary could be forced by the courts to publish material in circumstances where it has no knowledge of the facts underlying the claim.

Further, requiring an intermediary to publish such material raises many issues, for example, assuming that the summary is to be published in the same place as the words complained of, if the author of the words was not sued, or given an opportunity to defend his or her position, why should the claimant be entitled to force the publication of material on the author's blog/website that the author might not agree with?

If the power to publish a summary of a judgment is introduced, it is suggested that this power be amended so that it only applies to claims against the primary publisher/author of material, and not against any internet intermediary.

As regards Section 13 of the 2013 Act, which concerns the power of the court to order removal of defamatory content from a website, we believe that it is entirely appropriate in circumstances where: (a) a claimant has secured a final injunction to prevent publication of an online statement by the author; and (b) the author has declined to remove that statement, that there be a statutory provision empowering the court to order the website operator to remove the specific statement complained of from the identified web page. Such an order may of course be unnecessary to the extent that some website operators would voluntarily remove the content on sight of the third party court order. We would note however, that it would be wrong as a matter of principle for a website operator to be ordered to remove material in circumstances where the court either refuses to grant an injunction against the author of the defamatory material, or lacks the jurisdiction to do so. Section 13(1) currently fails to make reference to the court granting any such injunction in an action for defamation and should therefore be amended to include reference to this prior to adoption.

Limitation of defamation claims

We believe that the introduction of the single publication rule, equivalent to Section 8 of the 2013 Act, into Scots law is highly desirable, to prevent, amongst other things, indefinite liability for online publications. Without the single publication rule, publishers are at risk of being sued perpetually, years or even decades, after first publication. By this time, the authors of the material in question may not be able to adequately defend what they have written because the evidence may no longer be available for them to establish a defence of truth. We are of the opinion that the multiple publication rule is incompatible with the way in which the internetworks, because it effectively abolishes the limitation period. This approach

is out of date with the modern age, and does not reflect how internet users seek to communicate information.

We also believe that it is desirable for there to be harmonisation of the limitation period and its operation for defamation laws across the UK, as well as the court's discretionary power to override the limitation period in appropriate circumstances.

Jurisdiction and Jury trials

In line with our comments above, regarding the desirability of adopting a consistent approach to defamation law across the UK, Google supports the abolition of the presumption of jury trial, and the retention of a discretionary power to order trial by jury in exceptional cases. We also support the introduction of a threshold test for establishing jurisdiction in defamation actions, equivalent to Section 9 of the 2013 Act.

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