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Internet Intermediary Liability in Defamation

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Internet Intermediary Liability in Defamation

Abstract

Given the broad meaning of publication in defamation law, internet intermediaries such as internet service providers, search engines, and social media companies may be liable for defamatory content posted by third parties. This article argues that current law is not suitable to dealing with issues of internet defamation and intermediary responsibility because it is needlessly complex, confusing, and may impose liability without blameworthiness. Instead, the article proposes that publication be redefined to require a deliberate act of communicating specific words. This would better reflect blameworthiness and few intermediaries would be liable in defamation under this test. That said, intermediaries profit from content, and they have the capacity and flexibility to respond to defamation in a way that courts cannot. The paper therefore also proposes a regulatory framework called notice-and-notice-plus. This would require intermediaries to forward a notice of complaint to content creators, and only to remove content in limited circumstances.

Keywords

Libel and slander; Liability (Law); Actions and defenses; Internet industry--Law and legislation

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Internet Intermediary Liability in Defamation

EMILY B. LAIDLAW AND HILARY YOUNG*

Given the broad meaning of publication in defamation law, internet intermediaries such as internet service providers, search engines, and social media companies may be liable for defamatory content posted by third parties. This article argues that current law is not suitable to dealing with issues of internet defamation and intermediary responsibility because it is needlessly complex, confusing, and may impose liability without blameworthiness. Instead, the article proposes that publication be redefined to require a deliberate act of communicating specific words. This would better reflect blameworthiness and few intermediaries would be liable in defamation under this test. That said, intermediaries profit from content, and they have the capacity and flexibility to respond to defamation in a way that courts cannot. The paper therefore also proposes a regulatory framework called notice-and-notice-plus. This would require intermediaries to forward a notice of complaint to content creators, and only to remove content in limited circumstances.

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It is arguable that the expansion of the concept of publication beyond primary authors, editors and publishers should be seen as a profound misstep in the development of the law, and one that should be rectified.¹

IMAGINE THAT EMILY AND HILARY create a legal academia blog using the WordPress platform. They believe that a colleague has been plagiarizing her articles and they accuse her on the blog. The blog post is widely shared on Facebook and Twitter. The colleague has not, in fact, plagiarized anything but now her reputation is at risk and she is in damage control mode. One of her options is a defamation action. She can sue Emily and Hilary, who are clearly publishers of the allegations (publication being an element of defamation). But is WordPress a publisher? Are the internet service providers (ISPs) that carried the information? What about Facebook and Twitter? What if a Google search

1. Andrew Scott, "Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance" (2016), 2.54, online: <www.finance-ni.gov.uk/sites/default/files/publications/dfp/report-on-defamation-law.pdf> [perma.cc/5RG2-5HJP].

for the colleague's name now links her to plagiarism? Is Google a publisher and potentially liable in defamation?

In Canada, the answers to these questions about the liability of internet intermediaries in defamation depend on the definition of publication at common law, which has traditionally been broad, allowing some intermediaries to be considered publishers. Common law doctrine is evolving to deal with these questions, but in complex, sometimes contradictory, and often unsatisfactory ways. The only other obligations on intermediaries with regard to defamatory content are contained in their own terms of service, which they create and enforce.

Some foreign jurisdictions have legislated on the matter. The regulatory models vary. The pendulum swings between broad immunity models (USA); stricter safe harbour models, better known as notice and takedown (NTD) (evident in Europe); human rights frameworks (evident in Brazil and civil society frameworks such as the *Manila Principles*); and Canada's middle-path notice and notice regime for copyright law. With the notice and notice framework an intermediary does not risk liability for copyright infringement, but rather risks a fine for failure to pass on notices of copyright infringement to the relevant user.

In this article, we recommend a new approach to the issue of internet intermediary liability in defamation. We begin by setting out the Canadian law and suggest that the status quo is unsatisfactory for three reasons. First, the law is complex, leading to errors and inconsistent application. Second, the law assigns responsibility to actors whose role in reputational harm is at least arguably insufficiently blameworthy to justify liability. Third, the existing law creates incentives for intermediaries to take down anything alleged to be defamatory, since failure to do so can make them legally responsible. Alleging to an intermediary that content is defamatory can therefore have the same effect as obtaining an injunction, but without meeting the high legal threshold for injunctive relief.

We then propose a two-part solution to the problem of internet intermediary liability. The first part is to narrow the common-law definition of publication so as to require a deliberate act of communicating specific words. Under such a definition, intermediaries would rarely be considered publishers of content generated by third parties.

However, we recognize that intermediaries incentivize content and often profit from it. They have considerable power to mediate between those who post content and those who object to it. We therefore also recommend obligations be imposed on intermediaries. Modelled on Canada's notice and notice regime in copyright law, we call this framework of obligations notice-and-notice-

plus. Essentially, following an allegation that content is defamatory, certain intermediaries would have to pass on notice to the primary publisher(s). Only in certain limited circumstances would the intermediary be required to remove content. Further, the consequences of failing to follow the regulations would be a fine—not liability in defamation.

I. INTRODUCING THE PROBLEM OF INTERNET INTERMEDIARY LIABILITY IN DEFAMATION

A. DOCTRINE

Internet intermediary liability in defamation is grounded in the concept of publication in defamation law, publication being one of the elements of the tort. Publishing essentially means conveying, in a comprehensible form, the content complained of to someone who then understood it.² Conveying includes participating in conveying, even without recourse to principles of vicarious or accessory liability: “[L]iability extends to any person who participated in, secured, or authorised the publication.”³ It is also well-established that repeating defamatory content amounts to publishing it.⁴ The Supreme Court of Canada acknowledged in *Crookes v Newton* that: “[T]he breadth of activity captured by the traditional publication rule is vast.”⁵

Defamation is strict liability in that the defendant did not have to intend to defame. The orthodox view is that she did not even have to be aware of the content she was transmitting (although this is changing, as discussed below).⁶ For example, an illiterate printing press operator was held responsible for defamatory content on the basis that he had operated the press.⁷ Thus, “a very wide class

2. See *e.g. Crookes v Newton*, 2011 SCC 47 at para 16 [*Crookes*], citing *McNichol v Grandy*, [1931] SCR 696 at 699 (The defendant must have, “*by any act*, conveyed defamatory meaning to a single third party who has received it” [emphasis in original]). See also Patrick Milmo et al, eds, *Gatley on Libel and Slander*, 12th ed (London, UK: Thomson Reuters, 2013) at para 6.1.

3. Milmo et al, *supra* note 2 at para 6.10.

4. *Ibid* at para 11.18.

5. *Crookes*, *supra* note 2 at para 18.

6. Joachim Dietrich, “Clarifying the Meaning of ‘Publication’ of Defamatory Matter in the Age of the Internet” (2013) 18 Media & Arts L Rev 88 at 90. See also *Grant v Torstar Corp*, 2009 SCC 61 at para 28 [*Grant*].

7. *R v Clerk* (1728), 94 ER 207.

of persons may be caught as publishers, including quite peripheral, seemingly innocent players.”⁸

This was once a marginal issue; plaintiffs were rarely so wrongheaded as to sue the printing press operator or newsagent who sold a newspaper containing a libel. But in the internet era, the issue has gained new importance. Given the international nature of internet communications and the fact that anyone can publish, plaintiffs may not be able to hold to account those most responsible for publishing a libel. Potential defendants may be anonymous, outside of the jurisdiction, or judgment-proof. Intermediaries are sometimes the only viable defendants. If the plaintiff wants expression removed from the internet, contacting the intermediary may be the path of least resistance. Further, the way intermediaries benefit from content leads some to believe the intermediaries should bear legal responsibility for what they convey.

We are therefore faced with questions about the potential liability and responsibility of internet intermediaries. Taking the example from the introductory paragraph, WordPress, ISPs, Facebook, Twitter, and Google all participate in conveying the defamatory allegation that our colleague plagiarized her work. But their roles in conveying libelous content vary considerably.

Before examining how the common law has been applied to intermediaries, we must first explore publication doctrine in more detail. Specifically, it is necessary to understand the concepts of innocent dissemination and publication by omission.

Innocent dissemination is a defence that arose, beginning with *Emmens v Pottle* in 1885, to address the injustice of holding the printing press operator or newsagent liable.⁹ It applies where the defendant is a secondary publisher who published without knowledge of the defamatory content or reason to suspect the work contained defamatory content (*i.e.*, negligence). Secondary publishers are those who have a “peripheral role” in publication.¹⁰ They “are not the printer or the first or main publisher of a work that contains a libel”¹¹ and are often defined

8. Dietrich, *supra* note 6 at 92.

9. (1885), 16 QBD 354 (CA) at 357 [*Emmens*].

10. Dietrich, *supra* note 6 at 91. See also *ibid* at 357; *Weldon v “The Times” Book Company Ltd* (1911), 28 TLR 143 (CA). See also *Crookes, supra* note 2 at para 20 (the Supreme Court of Canada has cited the rule in *obiter dicta*). Matthew Collins discusses whether this means that the defendant must know the publication contains words with defamatory meaning, or that they are actually defamatory in the sense of not being defensible. See Matthew Collins, *The Law of Defamation and the Internet*, 3d ed (Oxford: Oxford University Press, 2010) at paras 17.09-17.15.

11. *Vizetelly v Mudie’s Select Library Ltd*, [1900] 2 QB 170 at 180 [*Vizetelly*].

in contrast to “primary publisher.” Primary publishers “have or can readily acquire full knowledge of the publication’s content before its release and are able to control and, if necessary, prevent dissemination of such content.”¹²

Innocent dissemination has been applied to “news agents, booksellers, and libraries,”¹³ although not to letter carriers, whose role has been said to be too peripheral to constitute publication at all. If the basis for the distinction between letter carriers and newsagents is not immediately apparent to readers, they can perhaps take some comfort in the fact that it has never been apparent to the courts either.¹⁴

The need for the innocent dissemination doctrine may be waning, as courts have been departing from the orthodox view and beginning to require knowledge as a requirement for publication. That is, rather than being a publisher with an innocent dissemination defence, one who lacks knowledge of the expression conveyed is not a publisher at all. This began with the creation of the “passive instrument” doctrine in *Bunt v Tilley*: In that case, the England and Wales Court of Queen’s Bench held that publishing requires “knowing involvement in the process of publication of the relevant words.”¹⁵ This approach has been influential and was cited with approval, albeit in *obiter dicta*, by Justice Abella in *Crookes v Newton*.¹⁶ Similarly, Justice Deschamps, concurring in *Crookes v Newton*, proposed that publication only occurs where the defendant performs a deliberate act that makes defamatory content “readily available to a third party in a comprehensible form.”¹⁷ Lower courts have repeated both Justice Abella’s endorsement of the *Bunt v Tilley* approach and Justice Deschamps’ “deliberate act” approach and have generally interpreted them as meaning that “some awareness of the nature of the reader posts is necessary to meet the test of publication.”¹⁸

12. *Oriental Press v Fevaworks Solutions Ltd*, [2013] HKCFA 47 at para 57 [*Oriental Press*].

13. *Crookes*, *supra* note 2 at para 20, citing Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed (Markham: LexisNexis, 2006) at 783-784. See also Raymond Brown, *Defamation Law: A Primer* (Toronto: Carswell, 2013) at 117-18 (those who “play a subordinate role includ[e] printers, carriers, vendors, and other distributors.”).

14. *Vizetelly*, *supra* note 11 at 80 (Romer LJ stated, “I do not think that the judgements very clearly indicate on what principle Courts ought to act in dealing with similar cases in future.”).

15. *Bunt v Tilley*, [2006] EWHC 407 (QB) at para 23 [*Bunt*] [emphasis omitted].

16. *Crookes*, *supra* note 2 at para 21.

17. *Ibid* at para 59.

18. *Weaver v Corcoran*, 2015 BCSC 165 at para 282 [*Weaver*]. See also *Pritchard v Van Nes*, 2016 BCSC 686 at para 108 [*Pritchard*].

That said, given continued explicit and implicit reliance on the doctrine of secondary publication and innocent dissemination,¹⁹ it is too soon to declare them dead in Canadian law.

A third doctrine further complicates matters. Publication by omission relates to communications that were not originally made by the defendant, but that were placed in a venue that he or she controls. If the defendant refuses to remove the communication and the refusal can be interpreted as endorsing it, the defendant will become a publisher of that communication from the time he or she should have removed it. The doctrine was set out in *Byrne v Deane*,²⁰ in which someone anonymously posted a message on a golf course bulletin board. The management was made aware of it and when they failed to remove it, they were held liable as publishers of the message. The court articulated the following test:

[H]aving regard to all the facts of the case, is 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?²¹

The test is often easily made out as courts readily draw inferences of responsibility or endorsement from a failure to remove content. An inference of endorsement “would ordinarily be drawn” unless removal would require “very great trouble and expense.”²² “Ordinarily” drawing an inference of endorsement was likely problematic even in Victorian times but is even more so in the context of internet intermediaries. The vast amount of expression hosted, the nature of the intermediary, and the existence of terms of service may all militate against the conclusion that intermediaries endorse expression they fail to remove. As such, courts are, in our view, wrong to draw an inference of endorsement from a mere failure to remove expression. After all, these are distinct elements of publication by omission.

The doctrines of secondary publisher or innocent dissemination and publication by omission are distinct. They are similar in that both tend to turn on proof of knowledge, but there are important differences. First, the onus of proof is different (defendant proves lack of knowledge for innocent dissemination; plaintiff proves the defendant’s knowledge for publication by omission). Second, secondary publishers are publishers from the outset, whereas publishers by omission only become responsible after their failure to remove content. Third, one can be a secondary publisher without actual knowledge of the defamatory

19. See e.g. *Baglow v Smith*, 2015 ONSC 1175 [*Baglow*]; see also *Oriental Press*, *supra* note 12.

20. *Byrne v Deane*, [1937] 2 All ER 204 [*Byrne*].

21. *Ibid* at 212.

22. *Ibid* at 213.

publication. That is not true of publishers by omission. Fourth, publishers by omission must not only know of the third-party communication, their failure to do anything about it must be interpreted as acquiescence or endorsement. But as just noted, such inferences are readily drawn.

Courts have often confused or conflated the doctrines. In *Murray v Wishart*, the New Zealand Court of Appeal overturned a trial decision in part because the judge applied the knowledge requirement for secondary publishers (constructive knowledge) to a publisher by omission (which requires actual knowledge).²³ In *Weaver v Corcoran*,²⁴ the Supreme Court of British Columbia stated that once the National Post newspaper became aware of content on its site and failed to take it down, it would become a publisher. By ignoring the requirement of endorsement, this either conflates publishing by omission and secondary publishing (since no endorsement is required for the latter) or at least misstates the requirements for publishing by omission.

In *Bottrill v Bailey*, an Australian Capital Territory tribunal held that the defendant, who had posted a link to a YouTube video, was a publisher by omission of the content of that video.²⁵ It is certainly unusual to construe someone who deliberately created a link to content as a publisher by omission of that content. Publishers by omission are usually responsible for others' acts of publication in a space they control, not for their own acts of conveying content. The holding is perhaps arguable, but this oddity was not discussed.

Finally, in *Pritchard v Van Nes*,²⁶ the Supreme Court of British Columbia looked to cases involving both innocent dissemination (*Carter v BC Federation of Foster Parents*)²⁷ and publication by omission (*Weaver*).²⁸ It inferred from them the existence of a single test in which liability for third-party expression requires:

- 1) actual knowledge of the defamatory material posted by the third party, 2) a deliberate act that can include inaction in the face of actual knowledge, and 3) power and control over the defamatory content. After meeting these elements, it may be said that a defendant has adopted the third party defamatory material as their own.²⁹

23. *Murray v Wishart*, [2014] NZCA 461 at paras 128-29 [*Murray*].

24. *Weaver*, *supra* note 18 at para 284.

25. *Bottrill v Bailey (Civil Dispute)*, [2018] ACAT 45 at para 141.

26. *Pritchard*, *supra* note 18 at paras 99, 102.

27. *Carter v BC Federation of Foster Parents Assn*, 2005 BCCA 398.

28. *Weaver*, *supra* note 18.

29. *Pritchard*, *supra* note 18 at para 108.

The court seems to have conflated two lines of doctrine, effectively rejecting the common law of secondary publishing/innocent dissemination and of publication by omission. It is open to courts to alter the law in this area, but here the court did so without any explanation or justification. Particularly problematic is the automatic inference of endorsement where there is knowledge and control.

B. APPLICATION OF THE DOCTRINE TO INTERMEDIARIES

With all this by way of introduction, we turn to how the law of publication, including innocent dissemination and publication by omission, has been applied to internet intermediaries. Although the case law is still developing, there are enough cases from Canada and other common law jurisdictions to permit certain conclusions to be drawn.

Because publication means conveying or participating in conveying information to others, intermediaries are often at least arguably publishers. ISPs allow information to be transmitted to and from their customers. Search engines make information available to users and create snippets and autocompletes based on searches and content generated by others. Social networks provide platforms for third-party content and make that content available to billions of people around the world. Media companies may host comments sections, making third-party content readily available through their websites.

We discuss the treatment of three different kinds of intermediaries: ISPs, platforms/hosts and search engines.³⁰ Although the range of intermediaries is probably better thought of as a continuum, these categories are widely used and reflect relevantly different relationships between the intermediary and defamatory communications.

30. Although there has been no litigation in the defamation context confirming they would be treated identically, other infrastructure-type intermediaries, such as VPNs and DNS servers would likely be treated like ISPs. See Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016) at 12.90. Platforms or hosts tend to be defined in terms of being the primary storage site for content. They are therefore different from intermediaries that cache (temporarily store content). See Collins, *supra* note 10 at 6.04-6.05. Although some laws treat intermediaries that cache differently than those that host for the purposes of describing the common law approach to defamation, there is no basis for drawing this distinction. See *e.g.* EC, *Commission Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, [2000] OJ, L 178/1 at 13 [ECD].

1. INTERNET SERVICE PROVIDERS (ISPS)

The case law is consistent in holding that ISPs are not primary or secondary publishers.³¹ Although they do participate in conveying defamatory content, and might be caught under the traditional broad definition of publication, courts have tended to declare ISPs to be “passive instruments.”³² The concept of a passive instrument is a recent creation of the common law, and amounts to a narrowing of the definition of publication. It was introduced in *Bunt v Tilley*,³³ an English case in which Justice Eady held that the ISPs’ role was so passive that they should not be considered publishers at all. The courts of several countries, including Canada, have endorsed this approach.³⁴ Although there have been no Canadian defamation cases of which we are aware involving ISPs alleged to be publishers, Justice Deschamps, concurring in *Crookes v Newton*, said that the approach to ISPs in *Bunt v Tilley* should be adopted in Canada (*i.e.*, ISPs are passive instruments, not publishers).³⁵ In addition, the Supreme Court of Canada has treated ISPs as non-publishers (conduits) in the context of the *Copyright Act*.³⁶

ISPs are also unlikely to be considered publishers by omission. This has not, to our knowledge, been litigated. However, the fact that ISPs cannot remove content from the internet—at most they can block access to websites—suggests that they do not have the necessary control to be considered publishers by omission. Further, the fact that the ISPs in *Bunt* were not held liable as publishers by omission, combined with the general approval of *Bunt* in Canada, suggests that even after notice, ISPs will not be found to be publishers by omission.

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31. See *e.g. Godfrey v Demon Internet Service*, [2001] QB 201. An ISP was found to be a secondary publisher, but in that case its role was effectively that of a content host, not that of an ISP.
 32. See *e.g. Bunt*, *supra* note 15. See also Collins, *supra* note 10 at 6.49-117 (*Bunt* is the first case to refer to passive instruments, also known as mere conduits).
 33. *Bunt*, *supra* note 32.
 34. See *e.g. Crookes*, *supra* note 2 at para 89; *Niemela v Malamas*, 2015 BCSC 1024 at para 83 [*Niemela*]. While the United States had no need to endorse the approach, given broad immunities in its *Communications Decency Act*, 47 USC § 230 [*CDA*], its early case law also held an ISP not to be a publisher. See *e.g. Cubby v CompuServe Inc*, 776 F Supp 135 (SD NY 1991).
 35. *Crookes*, *supra* note 2 at para 89.
 36. *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at para 100-101.

2. PLATFORMS AND HOSTS

The next category to consider is that of intermediaries that host third-party content. The case law is not consistent as to whether they are publishers, and if so, what kind. Some platforms have been held to be secondary publishers with a potential innocent dissemination defence, so long as they lacked knowledge and were not negligent. This was the case in *Baglow v Smith*,³⁷ a Canadian case, and in *Oriental Press v Fevaworks*,³⁸ a Hong Kong case.

More often, however, platforms have been treated as non-publishers (passive instruments) until notice, and then publishers by omission if they fail to remove content after notice. This was the case in *Tamiz v Google*³⁹ (England), *Murray v Wishart*⁴⁰ (New Zealand), and *Weaver v Corcoran*,⁴¹ a decision of the Supreme Court of British Columbia.

3. SEARCH ENGINES

Search engines are an especially difficult category of intermediary. This is because unlike platforms, search engines do not simply make third-party content available—their algorithms generate new content, or a new context for content, based on what others have posted online. This takes the form of text in the hyperlinks to search engine results, snippets of information (*i.e.*, the underlying descriptive text) and autocompletes.

Courts in England and Canada have tended to treat search engines as passive instruments (*i.e.*, not publishers) with regard to the snippets they generate. *Metropolitan International Schools v Designtecnica (MIS)*⁴² is an English example of this approach, while *Niemela v Malamas*⁴³ is a Canadian example.

As for whether the search engine would be a publisher by omission after notice, in *Niemela v Malamas* only pre-notice conduct was at issue, so the judge

37. *Baglow*, *supra* note 19 at paras 192-96. The court did not specify whether the defendants were publishers based on the primary publisher, secondary publisher or publisher by omission doctrines. However, given the reference to the third-party content creator being the primary publisher, we infer the hosts were not liable as primary publishers. And given analogies the court drew to hyperlinking, we infer that the court was not invoking the publication by omission doctrine.

38. *Oriental Press*, *supra* note 12. See also *Godfrey*, *supra* note 31.

39. [2013] EWCA Civ 68.

40. [2014] 3 NZLR 722 at para 129, *aff'd Murray*, *supra* note 23.

41. *Weaver*, *supra* note 18, *rev'd* on other grounds 2017 BCCA 160.

42. [2009] EWHC 1765 [*MIS*].

43. *Niemela*, *supra* note 34.

declined to decide the effect of notice.⁴⁴ In *MIS*, the court implied that notice would not transform the search engine into a publisher by omission, because no acquiescence could be inferred,⁴⁵ but it is not clear that Canada will take the same approach, especially given the courts' tendency readily to infer acquiescence from a refusal to remove expression. The question is unresolved in New Zealand⁴⁶ and Hong Kong,⁴⁷ where actions based on Google being a publisher of search results or autocompletes have survived motions to strike.

The issue is also unresolved in Australia.⁴⁸ However, Australia has shown the greatest inclination to treat search engines as publishers. In *Trkulja v Google*, Justice Beach concluded that it was open to a jury to consider Google a publisher. He considered that search engines have an innocent dissemination defence until the matter is brought to their attention, but they may lose this defence with notice, since they no longer lack knowledge of the defamatory contents. Justice Beach found that Google could also be a publisher by omission as endorsement could be inferred.⁴⁹

In summary, courts are applying the common law of publication to intermediaries and sometimes taking very different approaches. All seem to agree that ISPs are not publishers, but the status of platforms and search engines varies. Regardless of their varying status before notice, most courts have found that platforms are publishers by omission after they receive notice. Search engines have been treated as passive instruments and publishers before notice, but in Canada it is unclear what their status is after notice.

44. *Ibid* at paras 56, 108.

45. *MIS*, *supra* note 42 at paras 58, 114.

46. *A v Google New Zealand Ltd*, [2012] NZHC 2352 at paras 68, 71.

47. *Dr Yeung, Sau Shing Albert v Google Inc*, [2014] HKCFI 1404.

48. *Trkulja v Google Inc LLC & Anor (No 5)*, [2012] VSC 533 [*Trkulja*]; *Duffy v Google*, [2015] SASC 170 at paras 29-31. Note that in these cases, the courts upheld jury verdicts. They do not stand for the proposition that Google search results, when read, necessarily constitute publication.

49. *Trkulja*, *supra* note 48 at paras 18-31. *Trkulja* was recently appealed to the High Court of Australia, which admonished the Court of Appeal for having decided the issue of publication. The High Court said the question was fact-dependent: “[T]here can be no certainty as to the nature and extent of Google’s involvement in the compilation and publication of its search engine results until after discovery.” See *Trkulja v Google LLC*, [2018] HCA 25 at para 39.

C. PROBLEMS WITH THE COMMON LAW APPROACH

The common law approach is problematic for three reasons: First, the law is unduly complex and has sometimes been interpreted inconsistently. The rule of law requires that people be able to know what conduct is unlawful and what conduct is not. Complexity and inconsistency both limit one's ability to determine what the law is.

Second, the law arguably imposes liability in the absence of blameworthiness. Tort law generally requires wrongdoing for liability. The tendency in Canadian law is to find that intermediaries without knowledge of the contents are passive instruments and not publishers. As such, they are not subject to strict liability. However, even after notice, the role of certain intermediaries in defaming is arguably too tenuous to justify liability for content in the same way, and to the same extent, as primary publishers. This is not to suggest that intermediaries should have no responsibility for content—as discussed below, we believe they should have statutory obligations when an allegation of defamation is made. But responsibility need not mean liability in defamation.

Third, holding intermediaries liable if they do not remove content after notice (or even uncertainty as to whether they'll be liable) creates an incentive for intermediaries to remove content based on nothing more than a bald allegation it is defamatory. This has serious consequences for freedom of expression.

We therefore ultimately recommend significant changes to the common law of defamation. These changes, which are described in detail below, would result in intermediaries rarely being liable in defamation for third-party content. However, we recognize that significant reputational harm can be caused by content posted online and intermediaries have the capacity and flexibility to respond to defamation complaints in a way that courts cannot (speed, anonymity, jurisdiction, content takedown, user blocking, community responses, and so on). We therefore recommend that changes to the common law be accompanied by a regulatory regime of intermediary accountability. Before setting out these two prongs of our proposed approach, we introduce a range of intermediary accountability regimes from Canada and around the world which inform our recommendations.

II. STATUTORY APPROACHES TO INTERMEDIARY LIABILITY

There are many ways to categorize intermediary liability models.⁵⁰ They can be roughly broken down to six types. First, the strict liability model requires the monitoring of content by intermediaries, failing which they face legal consequences such as criminal penalties, withdrawal of business licences, and so on. Countries that use such a model include Thailand and China.⁵¹ Second, the safe harbour model provides intermediaries with conditional immunity from liability, better known as a notice and takedown regime. Two notable examples are the European *Electronic Commerce Directive* (ECD)⁵² and the American *Digital Millennium Copyright Act* (DMCA).⁵³ Third, the broad immunity model provides what the title suggests—broad immunity to intermediaries for the content that is available through their services—as exemplified in section 230 of the American *Communications Decency Act* (CDA).⁵⁴ Fourth, the notice and notice model, implemented in Canada’s *Copyright Act*,⁵⁵ imposes no liability risk on intermediaries, rather a risk of a fine for failure to pass on a notice of infringement to a user. Fifth, the generalist model does not provide special intermediary liability rules. Rather, a case is assessed against general civil and criminal laws on contributory or vicarious liability.⁵⁶ Last, a human rights model,

50. Article 19, *Internet Intermediaries: Dilemma of Liability* (London: Free World Centre, August 2013) at 7, online (pdf): <www.article19.org/data/files/Intermediaries_ENGLISH.pdf> [perma.cc/AR4P-5BB5] [Article 19]. Article 19 created three categories, but we suggest there are six because of Canada’s notice and notice system, which is the type of liability regime Article 19 recommends in the report. See also Association of Progressive Communications, “Frequently asked questions on internet intermediary liability” (May 2014), online: <www.apc.org/en/pubs/apc%E2%80%99s-frequently-asked-questions-internet-intermed> [perma.cc/235R-JFNY] (last accessed: 20 October 2018) [APC] (discussing the increase in explicitly human-rights based models).

51. *Ibid* at 7.

52. ECD, *supra* note 30.

53. Pub L No 105-304, § 512, 112 Stat 2860 at 2877 (1998) (codified as amended at 17 USC §§ 512, 1201-205, 1301-32; 28 USC § 4001 (1998)) [*DMCA*]. See also Article 19, *supra* note 50 at 7 (for framing of approaches).

54. CDA, *supra* note 34.

55. RSC 1985, c C-42, as amended by *Copyright Modernization Act*, 2012, c 20 [*Copyright Act*]. The notice and notice provisions are sections 41.25-41.27.

56. APC, *supra* note 50.

evident in Brazil's *Marco Civil*⁵⁷ and civil society's *Manila Principles*,⁵⁸ explicitly designs intermediary liability rules that reflect human rights principles.

Four of these models of liability are particularly relevant to this article and explored in more detail: safe harbour, broad immunity, notice and notice, and human rights-based.

A. SAFE HARBOUR

The safe harbour model provides intermediaries with conditional immunity from liability. This is better known as the NTD regime wherein an intermediary is provided a safe harbour from liability as long as it removes content or disables access to content that is on the list of unlawful material to be taken down. An example of a safe harbour model is Europe's ECD.⁵⁹ The ECD provides broad immunity for conduits (*e.g.*, ISPs) and to a lesser extent intermediaries that cache content, but requires hosts (*e.g.*, social networking providers) to disable access to content upon actual knowledge or awareness that it is unlawful.⁶⁰ This is known as the horizontal approach, because it applies to multiple causes of action, which is contrasted with the American vertical approach where NTD is only required in the case of copyright infringement under the DMCA.⁶¹

Typically, in safe harbour models, intermediaries are encouraged to address unlawful content with technical solutions, corporate social responsibility or similar codes of practice. For example, in the USA, a memorandum of understanding was created between telecommunications companies and Hollywood studios to address online piracy.⁶² The current push in the European Union is for

57. See Presidência da República Casa Civil Subchefia para Assuntos Jurídicos [Presidency of the Republic, Civil House, Legal Affairs Subsection], Brasília, 23 April 2014, *Marco Civil da Internet* [Brazilian Civil Rights Framework for the Internet] (2014), Law 12.965 (Brazil), online: <pensando.mj.gov.br/marcocivil/wp-content/uploads/sites/2/2015/03/bill-12965.pdf> [perma.cc/PNY4-RPZF].

58. See Electronic Frontier Foundation, *Manila Principles on Intermediary Liability* (24 March 2015), online: <www.manilaprinciples.org/principles> [perma.cc/R8JW-83JA] [*Manila Principles*].

59. ECD, *supra* note 30.

60. *Ibid.*, arts 12-14. Note this paper does not examine the separate data protection regime and its impact on intermediaries' legal obligations. See generally Bart van der Sloot, "Welcome to the Jungle: the Liability of Internet Intermediaries for Privacy Violations" (2015) 6 J Intell Prop Inf Tech & Electronic Com L 211 (for a comparison of approaches to intermediary liability between data protection, human rights and e-commerce regimes for privacy).

61. *DMCA*, *supra* note 53, s 512; Article 19, *supra* note 50 at 7 (for horizontal versus vertical description).

62. Article 19, *supra* note 50 at 7, n 17.

companies to more rapidly take down extremist content, warning that regulation is forthcoming if companies fail to self-regulate more effectively.⁶³

The main ECD Article of controversy (and relevance to this article) is Article 14's conditional safe harbour for hosts, meaning intermediaries in their capacity of storing third-party content. A typical host is a social networking provider, such as Facebook, Twitter, or Reddit, which does not tend to create content (as compared to newspapers and broadcasters) but is a platform for users to post content. Article 14 does not immunize a host from liability for any other services it provides, such as content creation. Based on Article 14, an intermediary can lose its safe harbour not only when it has actual knowledge it is hosting unlawful content and fails to disable access to it, but if it is "aware of facts or circumstances from which the illegal activity or information is apparent."⁶⁴

Article 14 is controversial and illustrates that a seemingly simple safe harbour regime is complicated to deploy.⁶⁵ Key points of uncertainty are the meaning of knowledge and notice. What must be known by the intermediary to trigger obligations under Article 14? What kind of notice to an intermediary fixes it with knowledge that it is hosting unlawful content? In the case of defamation, does a notice to Facebook that it is hosting defamatory content fix it with knowledge for the purpose of Article 14? Or is it when a representative from Facebook has assessed the content to make a determination of whether it is defamatory?

While actual knowledge is evident where an intermediary is provided with a court order, it is less clear when an intermediary has "general awareness" that

63. Samuel Gibbs, "EU gives Facebook and Google three months to tackle extremist content," *The Guardian*, (1 March 2018), online: <www.theguardian.com/technology/2018/mar/01/eu-facebook-google-youtube-twitter-extremist-content> [perma.cc/3TB8-WRZ5]. The European Commission confirmed it would be encouraging voluntary action on the part of platforms. See EC, Commission, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, (Brussels: COM, 25 May 2016) at 8.

64. ECD, *supra* note 30, art 14.

65. Article 19, *supra* note 50. There are numerous scholarly articles examining intermediary liability in Europe and the UK. See *e.g.* Daithí Mac Síthigh, "The Fragmentation of Intermediary Liability in the UK" (2013) 8 *J Intell Prop L & Prac* 521; Uta Kohl, "The rise and rise of online intermediaries in the governance of the Internet and beyond – connectivity intermediaries" (2012) 26 *Intl Rev L Comp & Tech* 185; Uta Kohl, "Google: the rise and rise of online intermediaries in the governance of the Internet and beyond (Part 2)" (2013) 21 *Intl JL & IT* 187; Christina Angelopoulos and Stijn Smet, "Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability" (2016) 8 *J Media L* 266.

it is hosting illegal content.⁶⁶ Further, the relevant knowledge under Article 14 is as to unlawfulness (“knowledge of illegal activity or information”).⁶⁷ Thus, in a defamation context, this means it is insufficient to have knowledge something is prima facie defamatory, as it might be saved by one of the defences such as truth or qualified privilege. Rather, knowledge must be that the content is actionable in the sense that there are no reasonably available defences.⁶⁸

In a UK context, this means that the threshold for knowledge is higher in Regulation 19 of the *E-Commerce Regulations*,⁶⁹ which implements the ECD, than under section 1 of the *Defamation Act 1996*.⁷⁰ Section 1 codifies an innocent dissemination defence. Knowledge is tied to publication of a defamatory statement rather than the narrower concept of unlawfulness in the ECD:

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.⁷¹

Further, as Michael Deturbide criticizes, section 1 creates a catch-22 regarding monitoring. If you do not monitor you may not be taking reasonable care, but if you do monitor, you may have knowledge or perhaps should have knowledge.⁷²

The ECD is silent as to the content of notices, although state-level legislation can provide more detail.⁷³ Rights holders complain that the detail required in notices is excessive, while intermediaries complain that often notices are not detailed enough for them to assess the legality of content.⁷⁴ In *Davison v Habeeb & Ors*,⁷⁵ the England and Wales High Court held that in the face of conflicting

66. See three interpretations set out in EC, Commission, *Online services, including e-commerce, in the Single Market: Accompanying the document*, (Brussels: SEC, 2011) at 33 [2011 Communication].

67. ECD, *supra* note 30, art 14.

68. Riordan, *supra* note 30 at 12.131.

69. *The Electronic Commerce (EC Directive) Regulations 2002*, SI 2002/2013, s 19 [E-Commerce Regulations].

70. (UK) c 31, s 1 [Defamation Act]. See generally Riordan, *supra* note 30 at paras 12.130-12.133.

71. *Defamation Act*, *supra* note 70.

72. Michael Deturbide, “Liability of ISPs for Defamation in the US and Britain: Same Competing Interests, Different Responses” (2000) 3 J Info L & Tech.

73. See *E-Commerce Regulations*, *supra* note 69, s 22.

74. 2011 Communication, *supra* note 66 at 43.

75. *Davison v Habeeb & Ors*, [2011] EWHC 3031 (QB).

claims from the claimant and those that published the information, Google, in its capacity as owner of Blogger, did not have notice. However, Google might be found to have notice if the claim were sufficiently well-defined and substantiated, and there had been no attempt to defend.⁷⁶

The DMCA is more detailed than the ECD in defining the NTD rules.⁷⁷ Section 512 of the DMCA provides a safe harbour to service providers for copyright-infringing content as long as certain conditions are met. Annemarie Bridy and Daphne Keller describe it as a hybrid system with defined rules (NTD) as well as standards (red flag), the latter aiming to prompt social and moral responsibility.⁷⁸ They criticize the inclusion of standards in the DMCA for creating uncertainty.⁷⁹ The question for Canadian law reform is whether to prioritize certainty of rules, or whether there is tolerance of uncertainty in the hopes of prompting intermediaries to regulate content in socially responsible ways.

The DMCA carves an interesting path whereby detailed rules provide an element of certainty missing from the ECD regime, but other provisions balance the risk of over-compliance (*i.e.*, taking down lawful content) by intermediaries. The DMCA operates in a similar way to the ECD: When a copyright infringement claim is made, a service provider must act promptly to remove the offending content.⁸⁰ However, the DMCA provides detailed notification requirements,⁸¹ including a good faith clause⁸² and put back procedure.⁸³ Bridy and Keller argue that these provisions help minimize the risk of over-takedown with the regime.⁸⁴ Good faith clauses and counter-notices (challenging the legitimacy of a notice of complaint) have been suggested to reform the ECD.⁸⁵ Some EU member states require counter-notices, although they are not popular with rights holders or ISPs, because they are viewed as making NTD slow, burdensome and less

76. *Ibid.*

77. Note that some EU Member States have legislated the content of such notices, but there is no uniformity. See 2011 Communication, *supra* note 66 at 39-46. See also *E-Commerce Regulations*, *supra* note 69.

78. Annemarie Bridy & Daphne Keller, "U.S. Copyright Office Section 512 Study: Comments in Response to Notice of Inquiry," Legislative Comment on 17 USC § 512 at 35-36, online: <papers.ssrn.com/abstract=2757197> [perma.cc/NF9F-NMW9].

79. *Ibid.*

80. *DMCA*, *supra* note 53, § 512(c)(C).

81. *Ibid.*, § 512(c)(3).

82. *Ibid.*, § 512(f).

83. *Ibid.*, § 512(g)(2)-(3).

84. Bridy & Keller, *supra* note 78 at 15-16.

85. 2011 Communication, *supra* note 66 at 43-45.

effective.⁸⁶ Further, a recent study suggests that the counter-notice procedure is rarely used under the DMCA.⁸⁷ It is unclear whether user behaviour would be the same for defamation disputes.

The strongest criticism of both the ECD and the DMCA is that they are easily abused. There is minimal motivation for an intermediary to dispute a claim, because there is a risk of liability for refusing NTD. Bridy and Keller document various studies showing over-removal under the DMCA's NTD regime.⁸⁸ Studies in Europe show similar tendencies under the ECD.⁸⁹

The United Kingdom's *Defamation Act 2013*⁹⁰ goes further in immunizing intermediaries than the ECD. Section 5 applies to "operators of websites" and creates a defence in relation to third-party content. It applies unless:

- (a) it was not possible for the claimant to identify the person who posted the statement,
- (b) the claimant gave the operator a notice of complaint in relation to the statement, and
- (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.⁹¹

This effectively negates liability unless and until notice is received. Even then there is immunity if the person who posted the statement is identifiable. While this addresses some of the abuse inherent in NTD regimes, for reasons set out below, we do not think that liability should depend on whether other publishers can be identified.

86. *Ibid* at 43-44.

87. Jennifer M Urban, Joe Karaganis & Brianna Schofield, "Notice and Takedown in Everyday Practice" online: (2017) UC Berkeley Pub L Research Paper Series, <ssrn.com/abstract=2755628> [perma.cc/77X4-S2CM].

88. Bridy & Keller, *supra* note 78 at 23, 44, Appendix B. See also Daphne Keller, "Empirical Evidence of 'Over-Removal' by Internet Companies under Intermediary Liability Laws" (12 October 2015), *Stanford Center for Internet and Society* (blog), online: <www.cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.

89. See e.g. Christian Ahlert et al, *How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Regulation* (2014) [unpublished, archived at University of Oxford, Programme in Comparative Media Law and Policy (PCMLP) at the Centre for Socio-Legal Studies], online (pdf): <pcmlp.socleg.ox.ac.uk/wp-content/uploads/2014/12/liberty.pdf> [perma.cc/ZCK2-DD8A].

90. (UK), c 26 [*Defamation Act 2013*].

91. *Ibid*, s 5(3).

B. BROAD IMMUNITY

Another option for law reform, which avoids some of the uncertainty and confusion evident with the safe harbour model, is to adopt a broad immunity similar to CDA section 230.⁹² As David Ardia describes, section 230 provides “breathing space”⁹³ to intermediaries, which is arguably partly responsible for the rich interactive space we know on the internet.⁹⁴ However, commitment to this breathing space has been tested in recent years as online abuse becomes increasingly difficult to manage.

Section 230 provides immunity to an “interactive computer service” (ICS),⁹⁵ which generally refers to three types of intermediaries: communication conduits (*e.g.* ISPs), hosts (*e.g.* social networking providers) and search providers.⁹⁶ It modifies the common law of intermediary liability by legislating that an ICS is not “the publisher or speaker of any information provided by another information content provider.”⁹⁷ The only exception is federal criminal, communications, privacy, and intellectual property matters (thus we turn to the safe harbour model under the DMCA for copyright infringement).⁹⁸ In the area of defamation law, the effect of section 230 is to make an ICS largely immune from liability for third-party content. As of 2010, 17.2 percent of section 230 claims were for allegedly defamatory content, and two-thirds of cases were pre-emptively dismissed pursuant to section 230.⁹⁹

While the story of section 230 is not entirely clear,¹⁰⁰ one of the purposes of passing section 230 was to overturn *Stratton Oakmont, Inc v Prodigy Services Co* (*Stratton*),¹⁰¹ which created a greater liability risk to hosts of third-party content that exercised responsibility by editing, moderating, or controlling content. *Stratton*, in effect, disincentivized self-regulation by intermediaries.¹⁰² This has

92. *CDA*, *supra* note 34.

93. David S Ardia, “Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act” (2010) 43 *Loy LA L Rev* 373 at 494.

94. See Danielle Citron, *Hate Crimes in Cyberspace* (Cambridge: Harvard University Press, 2014) at 170-72.

95. *CDA*, *supra* note 34 at s 230(f)(2).

96. Ardia, *supra* note 93 at 432.

97. *CDA*, *supra* note 34 at s 230(c)(1).

98. *Ibid*, s 230(c).

99. Ardia, *supra* note 93 at 429, 481.

100. See *ibid* at 409-11 (history of *CDA*).

101. 24 *Media L Rep* 1126 (NY Sup Ct 1995).

102. Ardia, *supra* note 93 at 410; see also Citron, *supra* note 92 at 170-72.

certainly been the dominant criticism of the European model.¹⁰³ A goal of section 230, therefore, was to provide immunity to intermediaries while at the same time encouraging corporate social responsibility. The question is whether a section 230 type immunity provision is appropriate in a Canadian context.

Legal interpretation of section 230 is relatively stable:¹⁰⁴ Once an intermediary is notified of unlawful content, even if it has knowledge the content is untrue, it has no obligation to remove it.¹⁰⁵ Traditional editorial functions, such as screening for unlawful or otherwise objectionable content, removing content, editing content, such as to remove obscenities, do not risk the immunity under section 230.¹⁰⁶ The immunity applies even when the author of the content asks for it to be removed and the intermediary refuses.¹⁰⁷

However, even a broad immunity model like section 230 is plagued with interpretive woes at the outer edges. The boundaries of liability for mixed-use sites are less clear, although courts are largely guided by the material contribution test articulated in *Fair Housing Council of San Fernando Valley v Roommates.com LLC*.¹⁰⁸ In that case the court held that an intermediary loses the section 230 immunity if it develops the unlawful content, “referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.”¹⁰⁹

The key flaw of section 230, however, is that it is questionable whether it has prompted the kind of self-regulation the legislators intended and a swathe

103. *Supra* note 89 at 7-8, 11- 12 (a seminal article on this point).

104. See *e.g. Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, Pub L No 115-164, 132 Stat 1253 (2018). It amends s 230 and might potentially have broader implications to the liability exceptions for intermediaries. However, this analysis is focused on historical interpretation of s 230. Further, there have been recent challenges to s 230. See *e.g.* Eric Goldman, “WTF is Going on with Section 230?—Cross v. Facebook” (7 June 2016), *Technology and Marketing Law* (blog), online: <blog.ericgoldman.org/archives/2016/06/wtf-is-going-on-with-section-230-cross-v-facebook.htm> [perma.cc/2ERJ-52KY].

105. See *Zeran v America Online, Inc*, 129 F (3d) 327 (4th Cir 1997), leave to appeal to USSC refused, 524 US 937 (1998) [*Zeran*]. See also Ardia, *supra* note 93 at 465. See also Brian Holland, “In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism” (2008) 56 Kan L Rev 369 at 370-376 (discussion of expansion of s 230).

106. Ardia, *supra* note 93 at 462.

107. *Ibid* at 466, citing *Global Royalties Ltd v XCentric Ventures LLC*, 544 F Supp (2d) 929 (D Ariz 2008).

108. 521 F (3d) 1157 (9th Cir 2007) [*Fair Housing Council*]. See *e.g. FTC v Accusearch, Inc*, 570 F (3d) 1187 (10th Cir 2009) (for application of same principle).

109. *Fair Housing Council, supra* note 108 at 3462.

of harmful speech continues to be published undeterred and un-remedied.¹¹⁰ This is particularly relevant in the area of defamation law. For example, in *Jones v Dirty World Entertainment Recordings LLC*,¹¹¹ Sarah Jones, a Cincinnati Bengals cheerleader, unsuccessfully sued the website, theDirty.com, for photos posted on the site and allegations of promiscuity, which affected her reputation as a teacher and cheerleader, and in her community.

The District Court for the Eastern District of Kentucky attempted to soften the hardship of section 230 for defamation claimants by holding that intermediaries do not benefit from section 230 when they encourage the development of unlawful content.¹¹² However, this was overturned by the Court of Appeal for the Sixth Circuit, which confirmed that encouragement and/or facilitation are insufficient to impose liability. The court reasoned that there is a crucial distinction between making content available, as traditional publishers do, and “responsibility for what makes the displayed content illegal or actionable.”¹¹³ Under the District Court’s approach, websites such as consumer review sites would be vulnerable to the “hecklers’ veto,”¹¹⁴ meaning complainants threatening to sue an intermediary to suppress unwanted speech, which results in the intermediary choosing between removing content or risking liability.

Arguably, at the time section 230 was passed, it “provided much needed clarity for intermediaries,”¹¹⁵ although perhaps even then section 230 was “based on a simplistic and utopian version of the internet.”¹¹⁶ Regardless, the playing field has changed. It is questionable whether intermediaries continue to need these kinds of protections.¹¹⁷ One line of argument is that intermediaries have the capacity to regulate and a failure to impose liability means illegality is not being efficiently discovered or deterred.¹¹⁸ Most proposals to amend section 230 are

110. Ryan Gerdes, “Scaling Back § 230 Immunity: Why the Communications Decency Act should Take a Page from the Digital Millennium Copyright Act’s Service Provider Immunity Playbook” (2012) 60 Drake L Rev 653 at 667. Holland, *supra* note 105 at 392-393.

111. 755 F (3d) 398 (6th Cir 2014) [*Jones*].

112. *Jones v Dirty World Entertainment Recordings LLC*, 965 F Supp (2d) 818 (ED Kent 2013) at 821-22.

113. *Jones*, *supra* note 111 at 20.

114. *Ibid* at 21-24.

115. Ardia, *supra* note 93 at 411.

116. Gerdes, *supra* note 110 at 667, n 116, quoting Ali Grace Ziegłowski, “Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act” (2010) 61 Hastings LJ 1307 at 1313-14.

117. See Gerdes, *supra* note 110 at 667-68. See also Holland, *supra* note 105 at 392.

118. See discussion in Holland, *supra* note 105 at 391.

tweaks which, for example, target “the very worst actors”¹¹⁹ or create an exception for encouraging the posting of unlawful content.¹²⁰ Others inch closer to an ECD framework, such as a proposed exception to section 230 where the ISP is aware of information and has reasonable knowledge that it is defamatory.¹²¹

The question is how to target harmful speech without targeting the hecklers and without incentivizing the removal of all content complained about. The recommendations in this article seek to pave a middle-path between the ECD and CDA.

C. NOTICE AND NOTICE

The third model is notice and notice, which finds support among Civil Society organizations such as Article 19.¹²² Thus far, Canada’s *Copyright Act*¹²³ is the only implementation of this model in the world. The provisions came into effect in January, 2015, although notice and notice operated informally as a voluntary industry practice for the previous decade.¹²⁴ Pursuant to the *Copyright Act*, a copyright holder can send a notice of alleged copyright infringement to a user by sending it to the ISP. The ISP is required to electronically forward the notice to the user linked with the IP address mentioned in the notice.¹²⁵ The risk to the intermediary for failure to forward the notice is statutory damages—effectively a fine—of \$5,000–\$10,000.¹²⁶ This means that a rights holder’s only option, after sending the notice, is a traditional action against the user for copyright infringement.

The purpose of the notice provisions is educational—to discourage copyright infringement.¹²⁷ Notices can be sent to intermediaries that provide a connection to the internet (*e.g.*, an ISP), storage services, or to information location tools (*e.g.*, search engines).¹²⁸ In practice the notices are largely sent to ISPs. Search providers have no obligation to forward notices. Rather, if a search provider is

119. Citron, *supra* note 94 at 177.

120. Gerdes, *supra* note 110 at 672-75.

121. *Ibid* at 674-675.

122. Article 19, *supra* note 50.

123. *Copyright Act*, *supra* note 55.

124. *Ibid*. See also *Copyright Modernization Act*, *supra* note 55. See Government of Canada, Office of Consumer Affairs, *Notice and Notice Regime*, online: <www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02920.html> [perma.cc/VWZ3-NY9N] [Office of Consumer Affairs].

125. *Copyright Act*, *supra* note 55, s 41.26(1)(a).

126. *Ibid*, s 41.26(3).

127. Office of Consumer Affairs, *supra* note 124.

128. *Copyright Act*, *supra* note 55, ss 41.25(1) and 41.25(2).

notified that content has been removed from the source, the safe harbour only applies for thirty days from the date of notice.¹²⁹

We can learn from the flaws in how Canada executed this system. First, processing these notices can be burdensome for ISPs. For example, Teksavvy processes about five thousand notices per day.¹³⁰ The main problem with the current system is that, at the time the relevant provisions came into force, the *Copyright Act* contained no mandatory criteria for the content of the notices. The government contemplated enacting regulations to provide more detail regarding the notices. Indeed, Industry Canada and various ISPs warned that a template was needed to avoid abuse by rights holders, but the government chose not to enact specific rules.¹³¹ This resulted in avoidable uncertainty, confusion, and abuse. For example, there is a cap on damages for non-commercial infringement of between \$100 and \$5000.¹³² When the notice system first was in place, one rights holder, RightsCorp, sent letters to users stating that they could be liable for \$150,000 and/or have their internet access suspended, neither of which is provided for in Canadian law.¹³³

To combat the problem, Industry Canada and the Office of Consumer Affairs posted information online for users explaining the system.¹³⁴ Michael

129. *Ibid*, s 41.27.

130. Claire Brownell, "Pirates in your neighbourhood: How new online copyright infringement laws are affecting Canadians one year later," *Financial Post* (12 February 2016), online: <business.financialpost.com/fp-tech-desk/pirates-in-your-neighbourhood-how-new-online-copyright-infringement-laws-are-affecting-canadians-one-year-later> [perma.cc/PU5K-AWMC] (Teksavvy reported that the software system cost \$500,000 and administration over the first-year cost \$100,000).

131. Michael Geist, "Canada's Copyright Notice Fiasco: Why Industry Minister James Moore Bears Some Responsibility" (12 January 2015), online: <www.michaelgeist.ca/2015/01/canadas-copyright-notice-fiasco-industry-minister-james-moore-bears-responsibility> [perma.cc/BYR8-9DTT].

132. *Copyright Act*, *supra* note 55, s 38.1.

133. See discussion Michael Geist, "Rightscorp and BMG Exploiting Copyright Notice-and-Notice System: Citing False Legal Information in Payment Demands" (8 January 2015), *Michael Geist* (blog), online: <www.michaelgeist.ca/2015/01/rightscorp-bmg-exploiting-copyright-notice-notice-system-citing-false-legal-information-payment-demands> [perma.cc/E4SE-G2WS]. See also "University of Manitoba students receive 'extortion' letters over illegal downloads" (16 September 2016), *CBC*, online: <www.cbc.ca/news/canada/manitoba/copyright-letters-university-of-manitoba-1.3757554> [perma.cc/2SJ2-GBMV].

134. See Office of Consumer Affairs, *supra* note 124.

Geist summarized the various suggestions that have been made to fix it.¹³⁵ First, there should be a fee for rights holders to file a notice. Government was asked to impose a fee on rights holders, but chose not to, and so the cost will be likely borne by users through higher fees. Second, there should be sanctions for misleading or false demands. Recall that the DMCA requires NTD requests to include a statement that the notice is being made in good faith. Third, ISPs should have discretion to refuse to forward notices, if the content of the notices is inaccurate or misleading. And finally, there should be a prohibition on settlement demands.

Given these recommendations for improving the system, the notice and notice regime is a unique middle ground between the ECD and CDA. Its suitability in the context of defamation claims is explored in the recommendations section.

D. HUMAN RIGHTS

Regulatory models such as the CDA (broad immunity) and ECD (safe harbour) were designed before international organizations paid much attention to the issue of intermediary liability. However, since approximately 2011, intermediary liability has been the subject of increasing scrutiny for its compliance with international human rights principles.

A theme in international human rights work is that restriction of internet content should comply with human rights principles. Thus, the Human Rights Council stated that any restriction on access to internet-based content, such as websites and blogs, must comply with Article 19(3) of the International Covenant on Civil and Political Rights, namely it must be prescribed by law in pursuit of a legitimate aim, and necessary to respect others' rights or reputation or for national security or public order.¹³⁶

Crafting a human rights-compliant intermediary framework that narrowly targets unlawful content is tricky business. On the one hand, intermediaries have the capacity to redress or minimize harm by removing offending content. On the other hand, such intermediaries are vulnerable to being proxy censors

135. Michael Geist, "Misuse of Canada's Copyright Notice System Continues: U.S. Firm Sending Thousands of Notices With Settlement Demands" (5 March 2015), *Michael Geist* (blog), online: <www.michaelgeist.ca/2015/03/misuse-canadas-copyright-notice-system-continues-u-s-firm-sending-thousands-notices-settlement-demands> [perma.cc/6EEH-LXP8].

136. Office of the High Commissioner for Human Rights, *General Comment No. 34*, OHCHR, 102nd Sess, UN Doc CCPR/C/GC/34 (2011) at paras 21, 43 (interpreting and applying the *International Covenant on Civil and Political Rights*, (GA Res 2200A (XXI), UNGAOR, 21st Sess, Supp No 14668, UN Doc A/6546 (1966), art 19) [HRC 2011].

for government¹³⁷ or other actors,¹³⁸ imbued with power over the right to free speech that is inappropriate for the private sector. Intermediary liability in this context raises the further complicating issue of the responsibilities of businesses in deploying mechanisms that balance defamation and free speech, and the obligations of government in ensuring this balance is achieved.¹³⁹ In this respect, the United Nations Guiding Principles provide a framework for state obligations to protect human rights, businesses obligations to respect human rights and the right of those affected to have access to a remedial mechanism.¹⁴⁰

Commentary on the role of intermediaries and human rights tends to focus on three things: That intermediaries should not be liable for content created by others; that there should be no obligation to monitor users; and general concern about extra-judicial content takedown.¹⁴¹ The former special rapporteur on the promotion and protection of the right to freedom of expression, Frank La Rue, recommended the following when NTD is deployed:

To avoid infringing the right to freedom of expression and the right to privacy of Internet users, the Special Rapporteur recommends intermediaries to: only implement restrictions to these rights after judicial intervention; be transparent to the user involved about measures taken, and where applicable to the wider public; provide, if possible, forewarning to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved. Finally, there must be effective remedies for affected users, including the possibility

137. Seth F Kreimer, “Censorship by Proxy: First Amendment, Internet Intermediaries, and the Problem of the Weakest Link” (2006) 155 U Pa L Rev 11.

138. See discussion in Emily B Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge University Press, 2015) [Laidlaw, *Regulating Speech*].

139. Office of the United Nations High Commissioner for Human Rights, *Guiding principles on business and human rights: Implementing the United Nations ‘protect, respect and remedy’ framework*, OHCHR, 2011, UN Doc A/HRC/17/31 [Guiding Principles]. Later endorsed by Human Rights Council, *Human rights and transnational corporations and other business enterprises*, HRC Res 17/4, OHCHR, 17th Sess, UN Doc A/HRC/RES/17/4 (2011).

140. *Ibid.*

141. The United Nations Special Rapporteur on Freedom of Opinion and Expression et al, *Joint Declaration on Freedom of Expression and the Internet*, (Washington DC: OSCE, June 2011) at 2, online: <www.osce.org/fom/78309> [perma.cc/RD5P-ZT6G]; Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UNHRC, 17th Sess, UN Doc A/HRC/17/27 (2011) at para 43; David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UNHRC, 32nd Sess, UN Doc A/HRC/32/38 (2016) at para 2 [Report of the Special Rapporteur]; David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UNHRC, 38th Sess, UN Doc A/HRC/38/35 (2018) [Kaye 2018].

of appeal through the procedures provided by the intermediary and by a competent judicial authority.¹⁴²

Two frameworks seek to take a rights-based approach (meaning based on international human rights standards) to regulating intermediaries. First, Brazil's *Marco Civil*¹⁴³ (known in internet governance circles as the "constitution for the internet"¹⁴⁴) reflects human rights principles by unshackling host awareness or knowledge that it is hosting unlawful content from the liability framework. Rather, the risk of liability is only triggered by failure to comply with a court order. In this way, it is consistent with Frank La Rue's recommendation that content takedown should only be deployed pursuant to a court order. Civil Society organization Article 19 and the *Manila Principles* propose similar limitations on intermediary liability.¹⁴⁵

The *Manila Principles* ("Principles") are a set of six principles created by civil society organizations from around the world.¹⁴⁶ The focus of the Principles is best practices rather than certainty of rules.¹⁴⁷ The six principles summarized are:

Intermediaries should be shielded from liability for third-party content.

Content must not be required to be restricted without an order by a judicial authority.

Requests for restrictions of content must be clear, be unambiguous, and follow due process.

Laws and content restriction orders and practices must comply with the tests of necessity and proportionality.

Laws and content restriction policies and practices must respect due process.

Transparency and accountability must be built into laws and content restriction policies and practices.¹⁴⁸

The Principles are influential. For example, Annemarie Bridy and Daphne Keller used it as the basis for recommendations to reform the DMCA NTD regime.¹⁴⁹ The Special Rapporteur on the promotion and protection of the right

142. La Rue, *supra* note 141 at para 47.

143. *Marco Civil*, *supra* note 57.

144. Nicolo Zingales, "The Brazilian approach to internet intermediary liability: blueprint for a global regime?" (2015) 4 Internet Pol'y Rev 1.

145. See Article 19, *supra* note 50.

146. *Manila Principles*, *supra* 58.

147. *Ibid*, Introduction.

148. *Ibid*.

149. Bridy & Keller, *supra* note 78 at 24-25.

to freedom of opinion and expression, David Kaye, in his report on content moderation, stated that the Principles “identify essential principles that should guide any intermediary liability framework.”¹⁵⁰

A consistent recommendation in the above models and literature is that content should only be restricted via court order. It would be difficult to implement this for defamation disputes, which tend to be high volume, low value and legally complex. Courts are slow, the volume of applications high, or the process might pose a barrier to access to justice for claimants without the legal knowledge or finances to make an application. In the case of *Marco Civil*, those concerns are partly addressed through Article 21, which provides for a fast-track process for non-consensual distribution of intimate images, known as revenge pornography. A fast-track option does not apply seamlessly to a defamation context, because it involves issues more complex than identifying when an image is intimate and distributed without consent.

III. RECOMMENDED CHANGES TO THE LAW

We recommend a bespoke two-part approach that will achieve a balance we think is best suited to Canada. We set out the approach in three parts. First, we are explicit about the principles that guide our recommendations. Second, we describe proposed changes to the law of defamation. Third, we set out a novel regulatory regime we call notice-and-notice-plus. The combined effect of these proposed changes is to impose an appropriate degree of responsibility on intermediaries without holding them liable as defamers for the expression of others.

A. PRINCIPLES

In this section we set out the principles and positions that guided us in making our recommendations. Those who do not value the same principles or weigh them in the way we did will obviously have different preferences for law reform.

First, we are of the view that intermediaries should not act as arbiters of what is defamatory. Defamation involves complex determinations of fact and law, and intermediaries do not have the legal expertise to make such determinations. Nor do they usually have a sufficient factual record on which to judge whether something is defamatory. They often have received a complaint and nothing more. This may be enough information where it is alleged that expression is offensive or abusive, but whether it is defamatory (or false) is more complicated.

150. Kaye 2018, *supra* note 141 at para 14.

Further, if intermediaries have to decide whether to take down expression alleged to be defamatory, the incentive will be for them to over-remove, since that is cheaper than fighting to defend expression.¹⁵¹ This is evident in the safe harbour regimes analysed above, with studies showing over-removal under both the ECD and DMCA.¹⁵² As Daphne Keller observes:

[T]he easiest, cheapest, and most risk-avoidant path for any technical intermediary is simply to process a removal request and not question its validity. A company that takes an “if in doubt, take it down” approach to requests may simply be a rational economic actor.¹⁵³

Furthermore, intermediaries tend not to be transparent in their takedown decisions, which also militates against them being the arbiters of what is defamatory.¹⁵⁴ Those of us interested in free expression cannot scrutinize the basis for decisions the intermediary is making, and which may have the effect of denying public access to expression.

Second, we are of the view that intermediaries have a role in mediating removal requests. This is because online content can cause significant reputational harm, intermediaries benefit from third-party content, and intermediaries often have better capacity to respond to complaints than courts (due to the slow pace and high cost of access to justice, anonymity, jurisdictional problems, et cetera). Although intermediaries should not act as censors, they should have obligations when it comes to handling defamation complaints.

151. This point was made by the United Kingdom’s Joint Committee on the Draft Defamation Bill, and although the following point referred to pre-2013 English defamation law, it is equally true of present Canadian law: “As the law stands, far from encouraging service providers to foster legitimate debate in a responsible manner and removing the most extreme material, it encourages them to ignore any dubious material but then to remove it without question following a complaint.” UK, Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill* (Report, together with formal minutes) (London: The Stationary Office, 2011) at 54.

152. See Keller, *supra* note 88; Ahlert, Marsden & Yung, *supra* note 89.

153. Keller, *supra* note 88.

154. See “Ranking Digital Rights,” *Ranking Digital Rights*, online: <rankingdigitalrights.org> (under the leadership of Rebecca MacKinnon, they published a Corporate Accountability Index in 2015, 2017, and 2018) [Ranking Digital Rights].

Third, all things being equal, laws should be technologically neutral. This allows them better to adapt to technological changes.¹⁵⁵

Fourth, liability in defamation should not hinge on whether another defendant, such as the third-party content creator, is available to be sued. It may seem obvious that liability should not depend on the existence of another party who can be sued. However, we address this point because section 10 of the United Kingdom's *Defamation Act 2013* denies courts jurisdiction to hear defamation actions against secondary publishers unless it is "not reasonably practicable" to bring an action against the primary publisher. In addition, there is some sympathy in the case law for the view that intermediaries should perhaps be liable where the alternative is to deny the plaintiff any recourse at all. Justice Deschamps, writing in *Crookes v Newton*, suggests that a problem with immunizing secondary publishers is that it may leave plaintiffs without a remedy.¹⁵⁶

Although leaving a plaintiff without a remedy is problematic, it is more so to have rules that impose liability for reasons unrelated to a defendant's conduct. "Practical difficulties in bringing a claim against one person ... can hardly justify by themselves the extension of joint and several liability to relatively innocent parties."¹⁵⁷ Liability dependent on the existence of other parties creates uncertainty and unfairness, in that defendants' responsibility for third-party content depends on factors completely outside their control. On principle, the law should not encourage the pursuit of deep-pocketed but non-blameworthy parties simply because the alternative is to leave someone without a remedy. Ryan Turner noted that: "The broad definition of 'publication' ... facilitates this

155. See *e.g.* *Gutnick v Dow Jones*, [2002] HCA 56 at para 125. The court stated as follows:

Generally speaking, it is undesirable to express a rule of the common law in terms of a particular technology. Doing so presents problems where that technology is itself overtaken by fresh developments. It can scarcely be supposed that the full potential of the Internet has yet been realised. The next phase in the global distribution of information cannot be predicted. A legal rule expressed in terms of the Internet might very soon be out of date.

156. *Crookes*, *supra* note 2 at para 105. The court stated as follows:

"... Although I agree with my colleague that the most effective remedy for someone who has been defamed on line is to sue the person who created the defamatory material (para 41), it may not always be possible to do so in the context of the Internet. ... If no remedy exists against 'mere' hyperlinkers, persons defamed on line may in many cases not be able to protect their reputations."

See also *Baglow*, *supra* note 19 at para 196.

157. See *e.g.* Scott, *supra* note 1 at 2.65.

search for deep pockets.”¹⁵⁸ We propose to address the problem by narrowing the definition of publication.

Fifth, rules should be human-rights based; namely, they should be prescribed by law with a legitimate aim, and comply with principles of necessity, proportionality, transparency, accountability and due process. This is consistent with recent Human Rights Council general comments and United Nations special rapporteur reports.¹⁵⁹

Sixth, rules governing internet intermediaries should not stifle innovation. In the background of any intermediary regime, whether liability-based or otherwise, must be the recognition that the framework is inextricably tied with innovation. As Martin Husovec commented in the European intellectual property context:

Intermediary liability, regulated by intellectual property laws, is a type of *application-level regulation*. Any allocation of responsibilities to application developers also has a direct impact on the future of Internet-enabled innovation. Intermediary liability is thus an important part of *innovation policy*. It sets certain incentives for behavior and business models. Assuming the intermediaries behave rationally, they will always respond to this regulation by minimizing the cost of their assistance to rights holders and adjusting their business models appropriately. This can be, of course, either good or bad depending on the incentives.¹⁶⁰

In crafting intermediary rules, we are conscious that overly restrictive intermediary rules can stifle business development and, in particular, burden small- and medium sized companies.

Finally, rules governing internet intermediaries should encourage social responsibility in relation to defamatory content. In our view, this means incentivizing having processes in place (modeled on human rights principles) to manage content complaints.

158. Ryan Turner, “Internet Defamation Law and Publication by Omission: A Multijurisdictional Analysis” (2014) 37 UNSWLJ 34 at 61 [Turner].

159. See HRC 2011, *supra* note 136; Report of the Special Rapporteur, *supra* note 141. See also Frank La Rue, *supra* note 141 at para 47. In particular, we are conscious of the recommendations by the former special rapporteur, Frank La Rue, which include the following: content removal only via a court order; transparency of process and decisions; warning to users before restrictions are deployed, if possible; and minimization of restrictions.

160. Martin Husovec, “Accountable, Not Liable: Injunctions Against Intermediaries” (2016), [unpublished, archived at Tilburg Law and Economic Center] at 9, online: <www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/research/discussion-papers/2016> [perma.cc/B9E2-NDD4] [emphasis in original].

B. CHANGES TO THE LAW OF DEFAMATION

We propose that the common law definition of publication in defamation be changed so as to require intent to publish specific words at the time of publication. This change would apply to the law of defamation as a whole, not only to cases involving intermediaries. As such, not only is it a technology-neutral approach, it is an approach that goes beyond the problem of intermediary liability. We begin by clarifying what this would mean. We then justify the recommended approach.

The common law has already been moving in the direction of requiring knowledge, as exemplified by *Bunt v Tilley*, which held that: “[T]here must be knowing involvement in the process of publication of the *relevant words*.”¹⁶¹ Justice Abella in *Crookes* cited these words with approval, and Justice Deschamps’ concurring reasons in *Crookes* also suggest a narrowing of the definition of publication.¹⁶² However, the case law is somewhat confused and contradictory. Rather than modifying the concepts of publication by omission and innocent dissemination, we recommend a change to the definition of publication as a whole. Ryan Turner argues for such an approach:

[D]efamation law ought to be broken down and reconstructed so that the distinction between publication and innocent dissemination is obliterated. In its place should be a simplified cause of action based on the moral responsibility of an entity for the publication that does not risk peripheral actors being unnecessarily caught in defamation proceedings merely because they were a *prima facie* publisher.¹⁶³

In essence, “publication” would mean conveying words with intent that those specific words be conveyed at the time they are conveyed. Put differently, publishers would have to have knowledge of specific words, knowledge that they are being conveyed, and control over whether they are conveyed. Thus, defamation would be an intentional tort, with intent relating not simply to an intentional act of conveyance (like selling a newspaper or clamping down the printing press). Rather, the intentional act would be conveying particular words.

As for whether a failure to remove content after notice should be treated as such an intentional act of publication, we recommend that it should not—the publication by omission doctrine should be abandoned.

161. *Bunt*, *supra* note 15 at 23 [emphasis in original].

162. *Crookes*, *supra* note 2 at paras 21, 88-90. Although Justice Deschamps endorses a different test of publication requiring a deliberate act of making content readily available, she relates that to a “emerging consensus” reflected in cases like *Godfrey*, *Bunt*, and *MIS*, which all adopt the “knowing involvement in the process of publication of the relevant words” approach (*ibid* at para 59).

163. Turner, *supra* note 158 at 55.

An alternative proposal is to continue to allow publication by omission, but only on the condition that the endorsement requirement be applied rigorously. As demonstrated above, endorsement is generally inferred from knowledge and a refusal to take down. In all contexts, but especially the internet intermediary context, there are many reasons why a refusal to remove content does not indicate endorsement of that content. These include a lack of resources to deal with complaints, a platform's policy of not removing certain content, a general commitment to free speech, or the view that it is not the appropriate role of intermediaries to censor online speech. Rigorous application of the endorsement requirement might be sufficient to justify continued use of the publication by omission doctrine. Nevertheless, we remain concerned that courts will continue too readily to infer endorsement. For that reason, we recommend eliminating the publication by omission doctrine entirely.

This is a more controversial recommendation than requiring knowing publication of specific words. However, if the defendant is not initially responsible for communicating the relevant words, she should not be made responsible for them, as a defamer, because she failed to remove them—even if that failure can be interpreted as endorsement. As with our recommendation with regard to secondary publishers, this recommendation is based both on a lack of blameworthiness and on the incentives the status quo creates, both of which are discussed below.

Others have endorsed this approach. Andrew Scott recommends that only primary involvement in communicating a libel should ground liability, and “[f]ailure to take content down after it has been identified as problematic by a complainant does not amount to primary involvement in communicating a libel.”¹⁶⁴ Similarly, in Ryan Turner’s view, it is problematic to ground internet intermediary liability in the publication by omission is doctrine:

If the Court were to return to first principles, a tension would emerge between the imputation of liability for defamation to the owners and operators of internet platforms for publication by omission and the justice-based reasoning in *Emmens*.¹⁶⁵

Thus, our recommendation is that only intentional acts of conveying specific words, not failures to remove expression, should constitute publication in defamation.

Questions will inevitably arise regarding what it means to convey particular words intentionally. It is the role of the courts to resolve such matters. However,

164. Scott, *supra* note 1 at para 2.62.

165. Turner, *supra* note 158 at 55.

for greater certainty, we address the relevance of control, negligence, constructive intent, and automatically generated content.

Control is implicit in the concept of an intentional act of conveyance. If the defendant were unable to do otherwise, then she has not intentionally conveyed content (or the act was not voluntary, which should have the same effect). Recall, however, that control is insufficient: A positive act of conveying, rather than a failure to remove content should be required.

Content creators who intentionally disseminate their own words, and those who intentionally repeat others' words, would be captured under the proposed intent standard. Editors, commercial publishers, or traditional secondary publishers who did not actually read the relevant words before participating in their dissemination could be dealt with in one of two ways: Either they should not be liable as defamers because, though they may have been careless, they did not intentionally take part in an act that harmed reputation. The preferable alternative, however, is that their liability be assessed according to traditional doctrines of accessory or vicarious liability. As Joachim Dietrich notes in his article on publication, if the scope of the publication element were narrowed, accessory liability could capture some of the conduct that now falls within the definition of publication:

[T]he very meaning of publication, as encompassing persons who 'take part' or participate in some way in the publication, appears to refer to concepts that are relevant to establishing liability as an accessory, that is, a person who has not committed the primary wrong but nonetheless was sufficiently *involved* in the commission of such a wrong by another. Importantly, an accessory is someone against whom the elements of the primary torts cannot be established.¹⁶⁶

The reason that accessory liability principles have not generally been relied on in defamation is that: "Given the absence of any mental element other than the intention to communicate [in the existing law], this leaves little scope for reliance on accessorial liability principles in defamation law."¹⁶⁷ The benefit of relying on accessory liability, rather than a broad definition of publication, is that it is grounded in acts that are actually wrongful by virtue of some mental state on the part of the defendant and a relationship with someone who committed the tort.¹⁶⁸

Willful blindness should, consistent with legal principles, be treated as intent—not carelessness. In addition, intent can be constructive, in the sense that where conveying particular content is substantially certain to result from the

166. Dietrich, *supra* note 6 at 93-94 [emphasis in original].

167. *Ibid* at 95.

168. *Ibid*.

defendant's act, intent to publish will be inferred. It is important to distinguish, however, between constructive intent, in which intent is inferred because of the substantial certainty of the outcome, and constructive knowledge. In the defamation context, constructive knowledge is generally understood to mean that the defendant ought to have known the publication contained a libel. This is different than constructive intent in two ways: First, it relates to what was known about the contents rather than what was intended to be conveyed. Second, it is based on negligence (ought reasonably to have known) rather than substantial certainty. Constructive intent to convey, with its high threshold of substantial certainty, is an evidentiary shortcut for actual intent to convey. Constructive knowledge, as the courts have understood it, imposes a negligence standard rather than an intent standard. We recommend the higher intent standard for liability.

We further recommend that it be sufficient that the defendant intended to convey the specific words; she need not agree that they have the meaning attributed to them by the finder of fact. This is part of what it means to say that the defendant need not have known the words were defamatory. The other part relates to not knowing that the act constitutes a civil wrong, which is never a defence.

As for generating expression automatically based on third-party content, such as creating search engine snippets and autocompletes, we propose that this not be considered an intentional act of publication. This conclusion is adopted with some hesitation, since of all the roles intermediaries play, this one is arguably the closest to primary publication in the traditional sense. Nevertheless, this approach is recommended for the same reasons we recommend liability require intent and control: A lack of blameworthiness and the incentives liability would create to modify or remove search engine results that may not be defamatory. (These justifications are expanded on below.) It is important that there be processes for removing or amending defamatory snippets and autocompletes, but simply generating this content should not make a search engine a defamer.

In some ways, the proposed definition is still, in our view, too broad. It would capture, for example, a newsagent or librarian who reads a newspaper or book, becomes aware of the relevant words (although not necessarily that they are defamatory), and continues to sell or lend the item. Although the newsagent/library scenario is intuitively unsatisfactory to us, we are unable to support certain alternative tests that would avoid this problem, such as a publication test based on authorship, commercial publication, being the first publisher, or endorsement.

Further, we take some comfort from the fact that defamation actions of this kind should be exceedingly rare.

It follows from the foregoing that we do not recommend adopting an approach like those in section 1(1) of the UK *Defamation Act 1996*, and section 10 of the UK *Defamation Act 2013*. They focus on whether the defendant is an “author, editor or [commercial] publisher.” Authorship has never been the touchstone of publication and we are not proposing that that would change. And although the Act’s definition of “authorship” is broader than how that word is generally understood—in that it includes those who repeat content without being a content creator—in our view, this adds unnecessary confusion to the law.

In addition, “editor” could be interpreted to include those who monitor generally but have no specific prior knowledge of the defamatory words, or who simply have systems in place for censoring or removing content.¹⁶⁹ Such people should not be treated as publishers, except under principles of accessory liability.

Therefore, rather than importing these British concepts into Canadian defamation law we prefer an approach to publication that requires an intent to publish specific content.¹⁷⁰

We justify this approach in two ways: A lack of blameworthiness and the problematic incentives that broader liability creates.

First, the current definition of publication captures conduct that is arguably not blameworthy. By definition, secondary publishers lack knowledge or control over defamatory content. They either do not knowingly convey particular words, or they knowingly convey information but have no ability to prevent publication. And although the doctrines of innocent dissemination and passive instruments exist to protect non-blameworthy conduct, they do not go far enough. Passive instruments are often made publishers by omission. And the innocent dissemination defence is defeated by mere negligence. Thus, for example, a newsagent who sells a tabloid, knowing it often contains libels, but without knowing of specific libelous content, is arguably a publisher of that specific

169. Scottish Law Commission, Discussion Paper on Defamation (Discussion Paper No 161) (Edinburgh, APS Group Scotland 2016) at para 7.7, online: <www.scotlaw.com.gov.uk/files/5114/5820/6101/Discussion_Paper_on_Defamation_DP_No_161.pdf> [perma.cc/FKB6-9463], citing Collins, *supra* note 10 at para 16.13. The Scotland Law Commission also notes the difficulty in interpreting what “moderating” means (*ibid* at para 7.38) [Scotland LC].

170. Note that although Andrew Scott recommends that Northern Ireland adopt some of the “author, editor and publisher” language in its laws, that must be understood in the context of the advantage of Northern Ireland’s laws mirroring those of the United Kingdom, all things being equal. See Scott, *supra* note 1 at para 2.74.

libelous content. It is our view that the newsagent's actions are insufficiently blameworthy to ground liability in these circumstances. Given the importance of protecting speech, and the potentially broad scope of the resulting liability, carelessness or constructive knowledge should be insufficient to justify liability for third-party conduct. Rather, knowledge of specific words should be necessary.

Publishing by omission is also generally not sufficiently blameworthy to justify liability for third-party defamatory content unless perhaps their omission satisfies the requirements for accessory liability. (This does not mean they should have no responsibility in relation to that content, as discussed in detail below.) Tort law imposes few positive duties to act and we are not convinced there should be an exception for removing third-party content. When people sue intermediaries on the basis of the publication by omission doctrine, we believe they are usually saying "you have to take it down," not "you have defamed me." Our proposal allows for the content to be removed, if appropriate to do so, without the need to hold the intermediary liable as a defamer.

A second justification for the changes we propose relates to the incentives the existing law creates. If liability in defamation can rest on a secondary publisher's negligence, this raises the question of what constitutes unreasonable conduct. While one might think that Google is not careless for allowing defamatory content to be found in its search engine results, or that a news media company is not careless for allowing defamatory content to be found in its comments sections, courts have sometimes held otherwise.¹⁷¹ It seems inevitable that such a standard would incentivize intermediaries to monitor and take down content alleged to be defamatory since a mere failure to detect a libel, through "unreasonable" monitoring practices, could ground liability.

While one might think that increased monitoring and takedowns could only be a positive development, we strongly disagree. While monitoring and takedowns for compliance with terms of service may be desirable in relation to certain kinds of online content (child sexual abuse images, for example), in our view it is not appropriate for intermediaries to monitor for, and take down, expression alleged to be defamatory. Intermediaries are not well-positioned to

171. *Trkulja*, *supra* note 48. In *Trkulja*, the court stated the following:

In any event, Google Inc's submissions overlook the fact that in order to establish the defence of innocent dissemination it had to establish not only that it did not know that the matter was defamatory, but also that it ought not reasonably to have known of that matter and that such lack of knowledge was not due to any negligence on its part. The jury may well have concluded that Google Inc failed to establish that it ought not have reasonably known that the relevant matter was defamatory and/or that it had not established that any lack of knowledge on its part was not due to its negligence (*ibid* at 41).

assess the complex factual and legal issues that determine whether third-party expression is defamatory. The complexity of defamation law and the need for evidence of what is true mean that proper and balanced determinations would be costly and time-consuming. It will always be cheaper and easier to remove content that is challenging or offensive, but perhaps true and valuable. Intermediaries will also tend to have little incentive to defend the speech complained of.¹⁷² Further, they are unlikely to make takedown decisions in a transparent way that permits public scrutiny.

If assigned this role, intermediaries' response will almost inevitably be to remove content that is lawful as well as unlawful. The law of defamation online would largely be replaced by terms of service, which give corporations the right to decide what content is problematic, both in terms of the standards themselves and in terms of deciding when those standards are met. Indeed, this already happens with regard to most complaints regarding online content and many people have expressed concern about the effect of such an approach on freedom of expression.¹⁷³ A different liability and regulatory regime might change this. Thus, the practical reasons against a negligence standard militate strongly against it.

The practical argument against a negligence/innocent dissemination standard also applies to the offline context. If librarians or newsagents can be held liable for their constructive knowledge or failure to monitor content, they too will have an incentive to censor what they lend and sell. This is a less realistic scenario because these librarians or newsagents are less likely to be sued in the first place where there is a physical publication (book, newspaper) and therefore likely a viable primary publisher to be sued. Nevertheless, the analogy works outside the intermediary context and there is no reason, in our view, to create special defamation rules for internet intermediaries.

The incentives created by the publication by omission doctrine are identical to those above (intermediaries will remove expression in a discretionary and likely non-transparent way because it is cheaper and easier than fighting to protect expression, and immunizes them from liability). If anything, the incentives are clearer in the publication by omission context because once there is knowledge, a refusal to take down expression is readily interpreted as endorsement and grounds liability. There is no need to debate whether conduct is unreasonable. Abolishing the publication by omission doctrine therefore protects speech and promotes the principle that intermediaries should not be the arbiters of what is defamatory.

172. See Scott, *supra* note 1 at 2.59.

173. See *e.g.* Jacquelyn E. Fradette, "Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action" (2013) 89 *Notre Dame L Rev* 947 at 948-49.

Changing the meaning of the publication element could be accomplished through the common law or through statute. The United Kingdom, for example, has modified its common law definitions of publication by statute.¹⁷⁴ We believe a statutory change to the common law is quicker and easier to justify. Also, given that our recommendations are in two parts, the second of which must be statutory, it may make sense for the changes both to be made by statute. In the absence of political interest in making the change, however, judges could continue narrowing the definition of publication in defamation.

C. NOTICE-AND-NOTICE-PLUS: A REGULATORY FRAMEWORK

Taking into account our recommendation that the common law of defamation should be modified so that secondary publishers are not considered publishers of defamatory content, we recommend that procedures be codified for handling defamation complaints, which we call notice-and-notice-plus. They draw from the notice and notice framework under the *Copyright Act* and the plus is (a) lessons learned from deployment of notice and notice for copyright infringement and (b) the need for something more in the defamation context.

We propose that intermediaries be required to pass along a notice of complaint to the third-party content creator. The form of the notice requests a response setting out some form of justification for the impugned speech. If such a response is received, the intermediary will take no further steps and the complainant would have to get a court order for removal. If, however, no response is received, the intermediary must take down the impugned content. If the intermediary fails to comply with its obligations to pass on notice or to take down content, it would face regulatory fines rather than liability in defamation.

We justify our recommendations on the basis of the following. Drawing from the principles above, it is inappropriate, at least in the defamation context, for intermediaries to act in the quasi-judicial role of assessing the legality of content on its services (outside the context of its own terms of service). NTD, as it is currently crafted under the ECD, for example, imposes an enormous burden on intermediaries, creates a privatized censorship role, is uncertain as to the knowledge requirement to trigger obligations, and results in over-removal of content. A notice and notice approach removes intermediaries from being arbiters of what is defamatory (and questions about knowledge), rather channeling intermediaries in the role they more accurately play—internet middlemen.

174. *Defamation Act 2013*, *supra* note 90, s 15.

We reject a section 230 CDA broad immunity defence as inappropriate in a Canadian context. There is no evidence that section 230 spurred the kinds of social responsibility it was supposed to. Rather, it effectively shields sites that host defamatory content, even in situations where the website owner knows it is hosting defamatory content and chooses not to remove it.¹⁷⁵ Introducing a section 230 defence would be out-of-step with the balance between free speech and reputation in Canada, even taking into account the bolstering of free speech in recent cases such as *Crookes v Newton*,¹⁷⁶ *Grant v Torstar*,¹⁷⁷ and *WIC Radio Ltd v Simpson*.¹⁷⁸

That said, in our view notice and notice under the *Copyright Act* cannot be transferred, whole kit and caboodle, to defamation without modification. Defamatory content can cause significant harm to reputation, and some mechanism should be available for users, in limited circumstances, to disable access to the offending content short of obtaining a court order. Although human rights-based intermediary models, such as the *Manila Principles*, recommend that content should be restricted only by court order, this poses an access to justice problem in the area of defamation disputes, where there is a high-volume of disputes, largely comprised of complainants without the finances for a lengthy lawsuit. A better approach is to codify detailed rules for intermediaries to reduce the risk of over-removal of content¹⁷⁹ and provide due process.¹⁸⁰ Ideally, reform to intermediary liability would be complemented with improved access to justice through creation of online tribunals to hear defamation disputes.¹⁸¹

Several aspects of this proposal require elaboration.

1. TYPES OF INTERMEDIARIES

Intermediaries that merely provide access to the internet (generally known as mere conduits or common carriers), such as ISPs solely in that capacity, should have no obligations under these recommendations. Rather, we recommend that these rules target intermediaries that provide platforms for user-generated content. Concerning mixed-use sites, where the intermediary both hosts content

175. *Zeran*, *supra* note 105 (this early case is illustrative here). The court's interpretation of section 230 in that case is consistently applied in the case law.

176. *Crookes*, *supra* note 2.

177. *Grant*, *supra* note 6.

178. 2008 SCC 40.

179. See Bridy & Keller, *supra* note 78 at 23.

180. See the *Manila Principles*, *supra* note 58.

181. See Emily Laidlaw, "Re-Imagining Resolution of Online Defamation Disputes" (2019) 56 *Osgoode Hall LJ* 162 at 197 [Laidlaw, "Re-Imagining Resolution"].

and creates content, the question is one of publication. Where an internet provider publishes (in the recommended sense of intentionally conveying specific defamatory content), it would not be an intermediary for the purposes of these rules.

We recommend that search engines be treated similarly to those subject to the notice and notice system under the *Copyright Act*. This means that search engines would not have an obligation to forward a complaint. Rather, a defamation plaintiff could only obtain an injunction against the provider to remove search results. However, if a search provider is notified that content has been removed from the source, the search provider should remove the search result within a reasonable period of time.

2. CONTENT OF NOTICE OF COMPLAINT

Learning from the flawed execution of Canada's notice and notice framework, namely the failure to enact regulations mandating the content of such notices, we recommend codification of the requirements of defamation notices. Such codification has provided a level of certainty under the DMCA.

A notice of complaint should include the allegedly defamatory content and internet identifier (identifying information the third party used for communication); the legal basis for the claim that the content is defamatory; what the complainant wants, such as content removal, an apology and so on; the complainant's contact information; and a statement that the complaint is made in good faith as to its accuracy.¹⁸² A notice of complaint should be prohibited from including settlement demands or otherwise making unlawful demands. This avoids the problem that arose with the notice and notice system under the *Copyright Act*, where copyright holders were using their notices to demand money, and often in greater amounts than would have been available as damages. An intermediary should not forward an incomplete notice.

Further comment is required on a few of these criteria. While a complainant should identify the legal basis of a claim, this does not elucidate how much information is necessary to achieve that threshold. The ECD, for example, requires evidence of unlawfulness, which in a defamation context means more than mere evidence that content is *prima facie* defamatory. Rather, it requires evidence that the defamation is unlawful in the sense that there are no reasonably

182. Some of these suggestions are drawn from the *Manila Principles*. See *e.g. Manila Principles*, *supra* note 58, principle 3.

available defences.¹⁸³ While a notice and notice regime is different than the liability-based framework of the ECD, the question remains as to the level of detail necessary in the notice of complaint.

We recommend that more than a simple allegation of defamation is necessary to forward a notice. This requires the complainant to state some reason, such as that the information is not true. It is not the goal to weigh down a complainant with legalese without the benefit, in most situations, of a lawyer. However, a complaint form might indicate points for a complainant to consider, modeled on the various elements of defamation and defences.¹⁸⁴ This kind of educational role is evident in British Columbia's Civil Resolution Tribunal, an online tribunal to resolve small claims and condo disputes, where information and drop-down menus help litigants understand and diagnose their problem, as well as find the language to communicate their claim.¹⁸⁵

We recommend that all notices of complaint include a declaration that the complaint is made in good faith as to its accuracy. The risk to a bad faith complainant is perjury or potentially a civil action for misrepresentation. As Bridy and Keller note, "this 'scary legal language'"¹⁸⁶ in the DMCA has a deterrent effect on abusive content removal requests.

Indeed, in Bridy and Keller's view the strongest counter-balance to an NTD regime like the DMCA, one that reduces the number of removals of lawful content, is found in "well-crafted removal procedures,"¹⁸⁷ including no monitoring requirements, a good faith, and detailed notice requirements.¹⁸⁸ In our view, such procedures will also help alleviate over-removal of content under the notice-and-notice-plus model.

183. This puts aside the question of whether the intermediary, pursuant to its terms of service, requires this level of detail before disabling access to content.

184. For complaints purposes this might shift the burden, wherein the complainant must not only make his or her case, but also resolve any defences. The impact is softened, because this is only for the purpose of the notice of complaint, rather than shifting the burden in a cause of action generally. There is support for this approach with similarly operated Ontario legislation. See *Protection of Public Participation Act, 2015*, SO 2015, c 23.

185. See "Home – Civil Resolution Tribunal," *Civil resolution Tribunal*, online: <civilresolutionbc.ca>.

186. Bridy & Keller, *supra* note 78 at 23.

187. *Ibid.*

188. *Ibid.*

3. ADMINISTRATIVE BURDEN

There is a risk of abuse of a complaints system. We recommend that a small administrative fee be permissible for processing complaints. This recommendation is made with some trepidation. Most social networking providers currently process complaints for free. An administrative fee serves two purposes. First, it serves to dissuade the casual complainer from proceeding with a complaint. This goes some way to alleviating the concern that content can be removed without court order, by creating a hurdle for complainants to make the complaint in the first place. Second, it acknowledges that codification of intermediary responsibility increases intermediary burdens. We recommend further exploration of the uses to which such a fee would be put. Suggestions made to the authors include holding the fee in escrow to be returned to the complainant if content is removed, directing fees to an organization that in some way serves complainants in the area of online abuse, providing the fee to intermediaries to ease the administrative burden, and/or only providing fees to small and medium sized intermediaries.¹⁸⁹

Caution must be exercised. In *AT v Globe24h.com*, a Federal Court characterized the defendant website, which among other things, republished court decisions for free online and searchable on Google, and charged a fee to remove cases from the website, as follows: “[The website’s] primary purpose is to incentivize individuals to pay to have their personal information removed from the website.”¹⁹⁰ By permitting an administrative fee, the goal is to help ensure complaints are made in good faith not incentivize new, exploitive business models. Depending on the fee arrangement, there is a risk that a fee might encourage a website owner not to manage its services responsibly, relying on the fees to prompt action (and with more complaints, the operator receives more money).

4. DISCRETION

One important issue to be resolved is whether intermediaries should have discretion to depart from these rules when it comes to forwarding notices or removing content. The lack of discretion in the *Copyright Act* meant ISPs had to forward notices they knew were illegitimate. Intermediaries as first responders are familiar with repeat complaints or complainants, bulk requests, and specious claims. One option is to allow for discretion in easy cases. In such a scenario, a clearly defamatory post would be taken down regardless of whether the person responsible responds to a notice, while a clearly malicious and unfounded

189. We thank various participants of RightsCon 2018 for their suggestions.

190. 2017 FC 114 at para 71.

complaint would be ignored and not result in a takedown even if the person responsible does not respond.

The problem, however, is in deciding what constitutes an easy case. Without clear guidance on this, allowing discretion might have the effect of defeating the very purpose of these recommendations. Intermediaries would be placed in the position of assessing the merits of a claim.

Given this, we recommend discretion only where the complainant is vexatious. This concept would have to be defined, but this could be done with reference to the doctrine of vexatious litigants and perhaps abuse of process more generally. Beyond vexatious complaints, however, caution is warranted. While discretion is helpful in theory, in practice it may be unworkable to define its limits so as not to undo the benefits that flow from notice-and-notice-plus.

5. TIMING

The timing for content removal is a point of uncertainty. In a Canadian context, the court concluded in *Pritchard v Van Nes*¹⁹¹ that the appropriate time for removal of defamatory content, in that situation, was immediately.¹⁹² The European Commission recommends that platforms should remove terrorist related content within one hour of notification¹⁹³ and a 24-hour timeframe was imposed in Germany's NetzDG¹⁹⁴ for removal of hate speech. The ECD and DMCA require that intermediaries act "expeditiously."¹⁹⁵ As Jaani Riordan explains, the lack of clarity in the ECD creates confusion. While it is expected that an objective standard is used looking at a reasonable intermediary in all the circumstances, it is unclear, among other things, whether the duty to act expeditiously is triggered upon notice or knowledge of actual illegality, and

191. *Pritchard*, *supra* note 19.

192. *Ibid* at para 109.

193. EU, Commission, *Commission Recommendation on measures to effectively tackle illegal content online* (Brussels: EC, 2018) at para 35 (following up from the 2017 Communication). See EC, Commission, *Communication Tackling Illegal Content Online: towards an enhanced responsibility of online platforms* (Brussels: COM, 2017).

194. *Gesetz zur Verbesserung der Rechtsdurchsetzung in Sozialen Netzwerken [Act to Improve Enforcement of the Law in Social Networks]*, Federal Law Gazette I No 61 at 3352, 2017. The legislation is commonly referred to as NetzDG. An official English translation is available online: <www.bmju.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2> [perma.cc/79Q8-V57E].

195. ECD, *supra* note 30, art 14; DMCA, *supra* note 53, ss 512(b)(2)(E), (c)(1)(A)(iii), (c)(1)(C), (d)(1)(C), (d)(3).

whether it is contingent on the intermediary being successful at removal of the content in question.¹⁹⁶

There is a tension between how quickly reputation can be damaged online and the speed with which an intermediary can reasonably process a complaint, particularly if the goal is to counteract over-removal of content and provide due process. For example, Facebook receives approximately two million requests per week for content removal.¹⁹⁷ Time must be provided for the intermediary to assess the notice of complaint, pass the notice to the third party, and time for the third party to respond. In our view, a 24-hour time frame is unreasonably short if the end result is potentially content removal without a court order. Rather, we recommend setting the timing from receipt of the notice of complaint to content takedown at approximately two days.

6. MINIMAL IMPAIRMENT

Content removal should be narrowly targeted so as to avoid disproportionate interference with the right to free expression. In practice, this means that specific content should be removed, rather than entire URLs, threads, groups, et cetera. Concerning geographic scope of content removal, where content removal can be limited in this way, we recommend that, in most circumstances, limiting removal geographically is appropriate and necessary for minimal impairment. We nevertheless acknowledge that, pursuant to *Google v Equustek*,¹⁹⁸ worldwide delisting from search results is sometimes appropriate.

7. MONITORING

Intermediaries should have no obligation to monitor for defamatory content. This recommendation is consistent with international human rights principles, in particular, respect for privacy. In addition, a monitoring system burdens the intermediary and places it in the role of censor. Indeed, one of our justifications for changing the definition of publication was that the current definition of publication incentivizes monitoring.

196. Riordan, *supra* note 30 at paras 12.144-12.149.

197. Jeffrey Rosen, "The Delete Squad: Google, Twitter, Facebook and the New Global Battle over the Future of Free Speech" *New Republic*, (29 April 2013), online: <www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules> [perma.cc/SMC2-FTKN]. See also Facebook, "Community Standards Enforcement Preliminary Report" *Facebook*, online: <transparency.facebook.com/community-standards-enforcement> [perma.cc/HV7M-CSFV].

198. 2017 SCC 34.

We recommend that legislation explicitly exclude both general and specific monitoring, learning from the confusion evident in the ECD regime. The ECD theoretically insulates intermediaries from this pressure through Article 15, which provides that there is no obligation for an intermediary to monitor information on its services. However, this is softened by Recital 47 of the ECD, which differentiates between monitoring of a general nature, which member states are prohibited from requiring, and monitoring in a specific case, which is permissible. The problem is that the line between specific and general monitoring is not always clear.¹⁹⁹ For example, if Facebook is notified of defamatory content hosted on its service and deletes the post, is Facebook required to monitor to prevent re-uploads?²⁰⁰

A lesson from the European experience is that a clear prohibition of mandatory monitoring provides better certainty. The DMCA opts for such certainty, directing that the safe harbour for intermediaries for copyright infringement does not require that the intermediary monitor its services or “affirmatively seek[] facts indicating infringing activity...”.²⁰¹

8. SITES THAT SOLICIT UNLAWFUL CONTENT

Some have suggested stricter rules for sites that solicit unlawful content. We reject a special rule. As noted in *Jones*,²⁰² discussed above, it is difficult to delineate the differences between legitimate sites soliciting, for example, consumer reviews, and the site that was the subject of that litigation. If legislators consider such a provision, we recommend narrowly targeting sites that are devoted to or solicit comments that defame individuals, excluding sites that provide platforms for business reviews.

199. As Riordan commented about article 15, “[i]t is difficult to delineate precisely the boundary between monitoring which is specific and that which is general.” *Supra* note 31 at para 13.49.

200. See *L’Oreal SA v eBay International AG* (2011), [2012] All ER (EC) 501 (ECJ); Bundesgerichtshof [Federal Court of Justice of Germany], *GEMA v Rapidshare* (2013), I ZR 80/12; CA Paris, 14 January 2011, *Google Inc c Compagnie des phares et balises*; CA Paris, 14 January 2011, *Google Inc c Bac Films, The Factory*; CA Paris, 14 January 2011, *Google Inc c Bac Films, The Factory, Canal+*; CA Paris, 14 January 2011, *Google Inc c Les Films de la Croisade, Goatworks Films* (France); *AY v Facebook (Ireland) Ltd & Others*, [2016] NIQB 76 (note that this case was settled in 2018).

201. *DMCA*, *supra* note 53, s 512(m). See, however, Bridy & Keller, *supra* note 78 at 33 (discusses how there are ways around the no monitor rule).

202. *Jones*, *supra* note 111.

9. ANONYMITY

In some situations, the third party will use a real name or other identifiable information. However, sometimes the third party posts the allegedly defamatory content anonymously. In the latter situation, the third party should remain anonymous except through a court order. In other words, it is not the role of the intermediary to out anonymous users to complainants. In practice, if the intermediary can communicate with the anonymous third party, the notice of complaint would be passed on, and a response potentially received. However, through this process an intermediary should not provide the complainant with personally identifying information of the third party.²⁰³ Otherwise, there would be a significant risk the complaints system would be abused to identify anonymous users.

10. DUE PROCESS

The *Manila Principles* emphasize the need for clear and unambiguous content restriction practices that provide due process.²⁰⁴ In practice this means users should have the right to be heard, to hear the case against them, the right to appeal or review of a decision, reinstatement of content when appropriate, and provision of reasons.

We are particularly conscious that some content will be removed without court order albeit in limited circumstances. This makes due process an important part of intermediary content restriction practices even if privately crafted. Therefore, legislation should mandate that private remedial frameworks have certain characteristics modeled on due process principles.

In particular, the third party subject to the notice should be provided the opportunity to dispute the allegations in the notice of complaint. In practice, such a notice of dispute would allege that the content is lawful, whether it is because the content posted is true, a statement of opinion, and so on. Like the notice of complaint, a dispute notice form might indicate points for the third party to consider, modeled on the various elements of defamation and defences. Where a third party disputes the defamation allegations, the intermediary is not required to remove the content. The complainant in such a situation can seek a court order for content removal.

Reasons should be provided to the complainant and third party for the decision to remove or not remove content, including identifying a put back

203. See also *Manila Principles*, *supra* note 58, principle 5.

204. *Ibid*, principles 3, 5 and 6.

procedure. The DMCA provides a put back procedure for content that has been disabled but is then challenged. The DMCA does not seamlessly apply to the rules herein, because content is not removed under these rules unless the third party fails to challenge the removal, while the DMCA operates as an NTD regime, meaning content can be taken down upon receiving notice. In the notice-and-notice-plus model, one imagines a third party might miss the deadline for responding to a notice of complaint. In such circumstances, if a third party wishes to challenge the notice, the intermediary should provide a put back procedure, where technically feasible, for the content. This recommendation is made because the content will have been removed without judicial authority.

Further, intermediaries should communicate that content has been challenged and/or removed. Options include, but are not limited to, a flag or similar symbol, or discursive solution such as rights of reply or information on the dispute.²⁰⁵

11. CORPORATE RESPONSIBILITY

Intermediaries should be encouraged to manage abusive content on their platforms in compliance with the duty to respect human rights as set out in the United Nations Guiding Principles.²⁰⁶ It is the state's duty to protect human rights. This might entail the state fulfilling this obligation by codifying a requirement that intermediary content restriction procedures comply with human rights principles (*e.g.*, prescribed by law, necessity, proportionality, transparency, accountability, and due process). This might also be effected by requiring that an intermediary's terms of service and other management of content on its services, such as its remedial mechanisms for disputes, be taken into account in assessing the suitability or amount of a fine.

Furthermore, transparency is critical to a legitimate, human rights-compliant intermediary regime. Intermediaries should be obligated to publish their content restriction policies, including annual reports detailing restriction practices

205. Frank Pasquale examines the viability of a right of reply in two articles. See Frank Pasquale "Rankings, Reductionism, and Responsibility" (2006) 54 Clev St L Rev 115; Frank Pasquale "Asterisk Revisited: Debating a Right of Reply on Search Results" (2008) 3 J Bus & Tech L 61. See also Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge: Harvard University Press, 2015) especially at ch 3. See also David S Ardia, "Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law" (2010) 45 Harv CR-CLL Rev 261. He explores more discursive technical solution such as flagging content as disputed. Alastair Mullis & Andrew Scott, "Reframing Libel: Taking (All) Rights Seriously and Where It Leads" (2012) 63 N Ir Leg Q 5 at 19-21 (advocating for discursive remedies).

206. Guiding Principles, *supra* note 139.

(both state and private requests).²⁰⁷ This kind of regulation through reporting requirements is observable in section 417(5) the UK's *Companies Act*²⁰⁸ (requiring companies discuss their CSR policies in their annual reports),²⁰⁹ or to address a particular issue, such as reporting of supply chain management concerning trafficking and slavery.²¹⁰ A similar provision in defamation legislation for intermediaries would aim to incentivize responsible management of services, focusing on the procedures in place.

12. FINE

If an intermediary fails to comply with these rules, a complainant's only option vis-à-vis the intermediary should be to apply for an order by a court imposing a fine. We make no recommendations on the appropriate amount for such a fine, although we note that the *Copyright Act* sets statutory damages in the amount at \$5,000–\$10,000. We recommend that courts have discretion to determine fines in a way that reflects the reasons for, and effects of, intermediaries' failure to comply with the regulations.

IV. CONCLUSION

Our aim has been to craft defamation laws and intermediary regulations that strike the best balance between freedom of expression and protection of reputation, while promoting a wide set of principles and while acknowledging the incentives that laws create. Inevitably, some will disagree with our choices. Indeed, when we presented notice-and-notice-plus to experts, some thought it went too far, while others thought it did not go far enough. This is perhaps the hallmark of a viable compromise approach.

Although there is room for debate about where we have drawn certain lines, some aspects of the proposal are, we believe, uncontroversial. Three important aspects are highlighted: First, the law of defamation is badly out of date and

207. Ranking Digital Rights, *supra* note 154. The corporate accountability index reports that the companies studied provide minimal information, if any, concerning private requests for content removal compared to government requests.

208. 2006 (UK), c 46.

209. Laidlaw, *Regulating Speech*, *supra* note 138 at 248. Note criticism of this type of provision for encouraging corporate social responsibility for freedom of expression online (*ibid*). However, for the purposes of defamation legislation, and the narrow target on procedures, such a provision might be effective.

210. See *California Transparency in Supply Chains Act*, Cal Civ Code, § 1714.43 (2010). See also *Modern Slavery Act 2015* (UK), c 30.

should be modernized—not only in the realm of internet intermediary liability but with regard to the publication element generally. Second, approaches to intermediary regulation should not be one-size-fits-all. Intermediaries' response to child sexual imagery should be different than that to copyright infringement or to defamation. Third, any regulatory approach must protect human rights both substantively (promoting free speech and protecting reputation) and procedurally (ensuring due process and transparency).

We believe that changes to defamation law combined with notice-and-notice-plus would be a vast improvement over the status quo. However, we remain especially concerned about the prospect of content over-removal under notice-and-notice-plus. If the model were adopted, we hope that legislators and others would closely monitor it, investigating in particular who files notices, how many, how often there are counter-notices, how often content is removed, whether timelines are adhered to, whether there are abuses, and whether intermediaries are transparent. Adjustments can then be made as necessary, and as technology evolves.