

# The internet – making a difference?

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The early days of internet law paid huge attention to the status of the subject and to the question of the difference between online and offline worlds. Did the same laws which apply offline also apply in cyberspace? How connected is the virtual world to the real world, and can the governments which so effectively assert control over the latter do the same for the former? If they do, should we rejoice at the extension of the rule of law to another realm, or should we mourn lost freedoms? Should we be looking for analogies between online and offline activities, or insisting on the distinctiveness of the virtual? And where does all of this leave the claim that there is such a thing as “internet law”?

These questions are still asked, but with diminishing emphasis. Information and communications technology and its many uses do not represent a different world so much as a set of additional dimensions of our existing world, and are no less “real” than any other aspect of it. As for analogies, they press themselves upon us – where offline and online activities are similar, it is natural to use the same language for each. Whether the analogy holds up, and to what extent it deceives us, may vary. It is unsurprising that the more authoritative news distribution sites are often called “online newspapers”, and it would be pedantic to insist that “paper” has nothing to do with it; yet this new technology has already dealt heavy blows to the economic prospects of its offline counterparts, so much so that we are already having to contemplate a world in which newspapers go the way of the dodo, as an obviously hopeless attempt to keep up with the electronic stream of news.

As to defamation law, the attempt to regulate the new technology in the same old way has had successes and failures. Before reviewing the relevant law, it seems best to sketch out first some of the main respects in which we might expect the law to be different in the online world.

## How the internet changes things

It has always been the case that information can cross vast distances, if it is interesting enough and if enough time is allowed. And anyone with the resources and the determination to do so would always have been able to read, say, the *Wall Street Journal* no matter where they were located. The most obvious change made by the introduction of the internet is the reduction of cost and time involved in the transmission of information, and the effective increase in range thus provided for. Reading the *Wall Street Journal* on the day of publication is certainly a different thing from reading it weeks or months later.

And many of the new cases turn simply on this increased ease and speed of access, facilitated by the trail of electronic evidence left by those who put new information into circulation. It is perhaps possible to think of offline analogies to *Applause Stores v Raphael*,<sup>1</sup> where the defendant created a false Facebook profile in the name of the second claimant and used it to defame him; but it was the online nature of the exercise that ultimately did for the defendant, as it led to incontrovertible evidence that it was his computer that was used to create the profile, and the judge found the suggestion that some random houseguest had done so without the defendant's knowledge "utterly implausible from start to finish".<sup>2</sup> While in principle the rules applied are the same as in offline cases, clearly the nature of the disputes will be rather different, not least in the quality of the evidence available.

Many writers stress the informality of the internet as necessitating a different approach, and indeed a different mind-set for evaluating meaning. In pre-internet days, the more widely disseminated publications tended to a certain formality, though these things were relative. Whether existing rules can accommodate this is an open question. Some judges are beginning to confront questions such as whether reasonable readers are presumed to follow hyperlinks in the text as part of the process of understanding its meaning,<sup>3</sup> and the "presumed knowledge of the reader" is becoming a more doubtful concept given the diversity of possible readers:

What of a case where the subject matter of the comment is not within the public domain, but is known only to the commentator or to a small circle of which he is one? Today the internet has made it possible for the man in the street to make public comment about others in a manner that did not exist when the principles of the law of fair comment were developed, and millions take advantage of that opportunity. Where the comments that they make are derogatory it will often be impossible for other readers to evaluate them without detailed information about the facts that have given rise to the comments. Frequently these will not be set out . . .<sup>4</sup>

Some, indeed, have suggested that defamation law should simply be dis-applied from the internet, at least where we are dealing with statements that "do not undergo any middle person, filtering or editing process and which do not pretend to be based on a reliable source or which do not deal with exact facts".<sup>5</sup> Bluntly, sensible people do not take apparently unsubstantiated internet gossip seriously, and neither should the law. This undoubtedly points to a problem – the courts have always insisted that statements should be assessed as reasonable people assess them, even in contexts where there are manifestly plenty of unreasonable people about – but it seems too extreme a solution for most. A more plausible suggestion is that the low credibility of many internet sources should feature more strongly as a factor when damages come to be assessed.<sup>6</sup>

More generally, there seems to be a growing body of opinion that more explicit reference needs to be made to the processes through which statements propagate on the internet. This may not be a universal view – it seems to put in doubt the principle of technological neutrality, and "inevitably places the government in the position of picking technological

1 *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781 (QB) (24 July 2008).

2 *Ibid.*, Richard Parkes QC, para. 62.

3 *Islam Expo Ltd v The Spectator (1828) Ltd* [2010] EWHC 2011 (QB) (30 July 2010).

4 *Spiller v Joseph* [2010] UKSC 53 (1 December 2010), Lord Phillips, para. 99.

5 Y Kamel, "A new proposal for the definition of defamation in cyberspace" [2008] *Communications Law* 38, p. 44.

6 M Nied, "Damage awards in internet defamation cases: reassessing assumptions about the credibility of online speech" (2010) *Alberta Law Review*.

winners and losers”,<sup>7</sup> which does not sound like either a sound industrial policy or a good way to promote freedom of speech. But ignoring the complex workings of the online world does not sound sensible either, and the traditional concerns of defamation law (not to mention its emphasis on money damages as remedy) may not be serving us well. “Perhaps we are asking defamation law to do too much: protect individual honor, dignity, and property; define community boundaries; enforce existing norms; validate new norms; and determine which communities are right-thinking and respectable.”<sup>8</sup>

With these general considerations in mind, I briefly review some of the major difficulties that have so far resulted from the application of traditional defamation principles in the new online context.

### Jurisdiction

Much attention has recently been focused on “forum shopping”, and particularly on libel actions brought in English courts against US defendants. The actions have been striking ones, not least because the US often seems at first blush the more natural forum, but also because those actions would be extremely hard to maintain there in the light of *New York Times v Sullivan*, which insists that a public figure must demonstrate “actual malice” before an action will lie.<sup>9</sup> The limits of who may be regarded as a “public figure” are not absolutely established, but the concept is not restricted to public officials, and to a great extent may cover even those who become public figures despite their own wishes or intentions (“involuntary public figures”). In the view of many, English cases such as *Berezovsky v Michaels*,<sup>10</sup> *Richardson v Schwarzenegger*<sup>11</sup> and *Polanski v Condé Nast*<sup>12</sup> were thought to show insufficient attention to whether England was an appropriate forum for the dispute – startlingly so in the last case, where the claimant dared not enter the UK, and would very probably have been arrested and extradited to the US if he had.

The case which proved the most egregious in American eyes was one which initially passed almost unnoticed in England. Rachel Ehrenfeld, a US researcher resident in New York, published widely on issues relating to the financing of international terrorism. In her book *Funding Evil*, she accused Khalid bin Mahfouz, a Saudi businessman, of financing al-Qaeda. Mahfouz sued Ehrenfeld in London. Ehrenfeld refused to acknowledge the jurisdiction of the English court, and default judgment was entered against her. She subsequently sued Mahfouz in the US Federal courts, seeking a declaration that the English judgment could not be enforced there, but this action failed for lack of personal jurisdiction over Mahfouz. The resulting furore led in short order to the passage of both state<sup>13</sup> and federal<sup>14</sup> legislation preventing the enforcement of defamation judgments in US courts, unless the substantive and procedural protections afforded to defendants under the foreign jurisdiction are comparable to those available in the US. Such legislation naturally attracted attention in the UK, with a House of Commons Select Committee concluding that “it is a

7 C S Yoo, “Free speech and the myth of the internet as an unintermediated experience” (2010) 78 *George Washington Law Review* 697, p. 772.

8 D Ardia, “Reputation in a networked world: revisiting the social foundations of defamation law” (2010) 45 *Harvard Civil Rights–Civil Liberties Law Review* 261, p. 326.

9 *New York Times Co. v Sullivan*, 376 US 254 (1964).

10 *Berezovsky v Michaels*, *Glouchkov v Michaels* [2000] UKHL 25 (11 May, 2000).

11 *Richardson v Schwarzenegger* [2004] EWHC 2422 (QB).

12 *Polanski v Condé Nast Publications Ltd* [2005] UKHL 10 (10 February 2005).

13 Libel Terrorism Protection Act 2008 (NY). A number of other states subsequently passed similar laws.

14 The Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 2010.

humiliation for our system that the US legislators should feel the need to take steps to protect freedom of speech from what are seen as unreasonable incursions by our courts".<sup>15</sup>

Yet the simple comparison of the US and UK systems, to the latter's disadvantage, seems overly simplistic. There seem to be too few examples of "libel tourism" to conclude that it is a significant issue, and many commentators seem much too ready to label it "a growing problem" on the basis of a handful of cases. Most references to it are vague, and do not call any particular legal rule into question. The broad freedom which US law affords to those who criticise public figures is not an obvious model for others to follow, and (for what the point is worth) it is the US, not the UK, that is out of step with what is normal in democratic societies. A more plausible criticism would be that English law is too ready to assume jurisdiction in such cases, though it cannot be said to take a uniquely broad view,<sup>16</sup> and again it seems to be the US that is unusual here, not the UK.<sup>17</sup> There seems to be relatively little appreciation in the US that the law has been reconsidered since *Berezovsky*, the House of Lords in *Jameel*<sup>18</sup> placing renewed emphasis on the question whether the injury to the claimant's reputation was substantial, making it more difficult to invoke the court's jurisdiction where the connection between the defamatory utterance and the local jurisdiction was a vague one. Recent cases suggest that, at the very least, the sharper edges have now been smoothed off the *Berezovsky* doctrine. Thus, in *Amoudi v Brisard*,<sup>19</sup> it was argued that there was a rebuttable presumption of law that articles appearing on a website were read by a substantial number of people, by analogy with the offline rule that if a defendant publishes a statement to the world at large then the claimant need not plead or prove publication to any particular individual. Gray J held that there was no such presumption, and that substantial publication within the jurisdiction would have to be proved as a matter of fact. In *Lonzim v Sprague*,<sup>20</sup> again the court was asked to infer that a substantial publication within the jurisdiction had taken place. The article in question had been downloaded 65 times, on a site which on average received 6.8 per cent of its traffic from the UK over the relevant period. Tugendhat J declined, noting that all the UK visits might have been from the same individual, and that there was nothing to apportion any visits to the English/Welsh jurisdiction in preference to other UK jurisdictions.

### Persistence

As more information becomes available online, and searching it becomes ever easier, problems emerge which either did not exist before or took very different forms. Information willingly revealed in one online context may be embarrassing if published in another; social networking sites and discussion groups of all kinds put our ideas of privacy under a sharp spotlight. Persistence of private information across time is an element of this: a statement which it seemed sensible, praiseworthy or even obligatory to make at one time may seem like a major mistake at a later one. This has relevance to many areas of law. For defamation, one particular instance stands out. If a defendant makes a potentially defamatory statement, in the belief that it is true or privileged or both, subsequent events may call this into question. Obviously, it would be a rash defendant who then repeats the

15 House of Commons Culture, Media and Sport Committee, *Press Standards, Privacy and Libel* HC 362-I (9 February 2010), p. 6.

16 The English approach is in broad terms very similar to that taken by the High Court of Australia in *Dow Jones and Company Inc. v Gutnick* [2002] HCA 56 (10 December 2002).

17 For the history of the emergence of the US "single publication" rule see I Maytal, "Libel Lessons from across the pond" (2010) 3 *Journal of International Media and Entertainment Law* 121.

18 *Jameel v Wall Street Journal Europe* SPRL [2006] UKHL 44 (11 October 2006).

19 *Amoudi v Brisard* [2006] EWHC 1062 (QB) (12 May 2006). See also *Brady v Norman* [2008] EWHC 2481 (QB).

20 *Lonzim plc v Sprague* [2009] EWHC 2838 (QB) (11 November 2009).

statement. The difficulty is that a failure to remove a statement from an internet site may be regarded as a republication of that statement each time it is downloaded.

So, in the *Loutchansky* case, allegations were made in the London *Times* against the claimant; their truth could not subsequently be established by the journalists involved, but they were nonetheless able to plead the *Reynolds* “responsible journalism” privilege. However, the Court of Appeal refused to hold that this privilege protected the retention of the story in the newspaper’s online archive. Making that story available to all-comers amounted to repetition of material the site owner knew to be libellous, and it was nothing to the point that at an earlier stage they could have pleaded privilege for the earlier publication. “The failure to attach any qualifications to the articles published over the period of a year on *The Times*’ website could not possibly be described as responsible journalism.”<sup>21</sup> The European Court of Human Rights was not prepared to regard this as a disproportionate infringement of the defendants’ right of free speech.<sup>22</sup>

It is important to avoid oversimplification of the issues. At first glance the legal issue is simply over whether continual repetition of the same article should be regarded as a series of multiple publications or merely as aspects of a single publication, with the preference for the former analysis being based on the venerable *Duke of Brunswick* case.<sup>23</sup> But the issue is not really conceptual so much as one of policy, and *Brunswick* is not a case of great authority – if its facts were to recur and action were brought today, a modern court would “condemn the entire exercise as an abuse of process”.<sup>24</sup> Neither is it true as a generalisation that “the internet never forgets”. Once a particular item ceases to be topical, it will usually sink very rapidly in the search rankings, to the point where few will ever find it – much as in the offline world, it will for most practical purposes disappear from view, unless there are extraordinary circumstances to give it current relevance.

The problem is therefore narrower than it might at first sight seem, and it would be extravagant to address it by such a fundamental conceptual shift as treating multiple publications as single, with all the attendant uncertainty that such a shift would bring. Ireland has decided to make this experiment, enacting recently that “a person has one cause of action only in respect of a multiple publication”,<sup>25</sup> and perhaps this will generate experience in the matter, but the case for such a provision is not compelling. It is another question whether the precise issue in *Loutchansky* might not be addressed in some other way, whether by modifications to the relevant limitation period, or by creating a distinct privilege for recognised archives. But while there may be strong arguments for allowing a “paper of record” to maintain an accurate and seamless archive available to all, it is not obvious why this should extend to a freedom not to qualify the item in any way, so that those who consult it might have no clue that its veracity had been challenged before a court. This is especially so in a case where, as in *Loutchansky*, there was no attempt to defend the allegations in the article as being true.

### Intermediaries

The law of defamation is technically framed in terms of individual communications – publication occurs each time a fresh individual hears or sees the defamatory utterance, and all the people responsible for that publication might be liable for it – and so in principle the complexity of modern media could create an utterly convoluted pattern of liability.

21 *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805 (5 December 2001), at 79.

22 *Times Newspapers Ltd (Nos 1 and 2) v UK* (Applications 3002/03 and 23676/03) (10 March 2009).

23 *Duke of Brunswick v Harmer* (1849) 14 QB 185.

24 *Dow Jones and Co. Inc. v Jameel* [2005] EWCA Civ 75 (3 February 2005), Lord Phillips MR, at 56.

25 Defamation Act 2009 (Ireland), s. 11(1). The following subsection nonetheless allows a court to grant leave to bring more than one action “where it considers that the interests of justice so require”.

Following a single newspaper story from its early stirrings in the mind of a journalist, through all the editorial and production processes and on through its distribution, would typically bring in a number of potential defendants. In practice, however, the courts' approach is well settled.

Dissemination of libellous material over the internet is typically rather less complex than this, but its relative novelty has led to an unsettled state for the law.

National legislation tackles this problem by providing a defence to those involved only as intermediaries. By the Defamation Act 1996, s. 1, the defence is established if the defendant can show that he or she was not "the author, editor or publisher of the statement complained of", took "reasonable care in relation to its publication" and "did not know, and had no reason to believe" that the statement was defamatory. The first requirement is deemed to be satisfied if the defendant's only involvement was "in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded" or "in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form".<sup>26</sup> The section deals expressly with various cases, and also empowers the courts to deal with novel cases by analogy with those provisions.<sup>27</sup>

Running parallel to this is the "mere conduit" defence in European Union law, which exempts the provider of an "information society service" from liability for transmitted information, so long as the provider "(a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission".<sup>28</sup> There is considerable uncertainty as to which services are covered by this protection. In the *Betfair* case, a gambling exchange website provided various services for its customers, including a chat forum; the issue was whether its owners could plead the mere conduit defence when one user of the forum made defamatory statements. Clarke J held that they could. Gambling activities are excluded from the relevant directive, but the chatroom was thought sufficiently distinct from the site's gambling activities to be protected nonetheless; and running a chatroom "clearly" attracts the protection of the directive.<sup>29</sup>

The result in *Betfair* seems sensible, but the legislation is not as clear as all that, and so this ruling can only be accepted with some caution. Clearly the legislation seeks to draw a line between those who exercise control over the content of electronic transmissions and those who do not. But forum operators are in an awkward middle position. As a technical matter they have complete control over all aspects of the forum. If the forum is to work as intended, they must in practice renounce that control almost completely. Yet for a number of reasons that renunciation cannot be absolute – whatever may be the position in defamation law, other legal doctrines would forestall any attempt to give up all responsibility for what happens on a site, particularly in relation to harassment, child pornography and copyright. The issue is whether the site operator is permitted to do in relation to defamation what they are most definitely *not* permitted to do in relation to more serious infractions, namely ignore all wrongdoing that does not expressly come to their attention, while taking all possible steps to ensure that nothing ever does.

<sup>26</sup> Defamation Act 2009 (Ireland), s. 27 is in very similar, though in many respects simpler, terms.

<sup>27</sup> Defamation Act 1996 (UK), s. 1(3).

<sup>28</sup> Directive 2000/31/EC (8 June 2000) on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on Electronic Commerce), Article 12.

<sup>29</sup> *Mulvaney v The Sporting Exchange Ltd t/a Betfair* [2009] IEHC 133 (18 March 2009). A similar English ruling, though like *Betfair* containing no serious argument on the point, is *Karim v Newsquest Media Group Ltd* [2009] EWHC 3205 (QB) (27 October 2009).

*Befair* holds that the operator may do precisely this, so that site operators may insist on their ignorance of any defamation unless it is expressly brought to their attention. But this was a very brief ruling, which relies heavily on the earlier English case of *Bunt v Tilley*.<sup>30</sup> *Bunt*, a more carefully considered judgment, certainly gives encouragement to defendants in these cases, as Eady J refused to find the defendants liable for statements made on bulletin boards and insisted that the claimant's remedy, if any, was against those who made the statements. But the defendants in *Bunt* were merely internet access providers, and when looked at in detail the judgment gives little joy to those who operate the bulletin board itself. There is an obvious difference between a mere service provider (who does not control content and could only with great difficulty do so) and the actual operator of a forum (who can control content quite easily, though he or she will have no reason to do so unless aware of a legal risk). None of that proves that the result in *Befair* is wrong, but it is clear that further justification is needed, especially given that a degree of control does seem to have been exercised by the operators through its terms and conditions.

Recent cases relating to the platform Blogger.com have left a confused picture. If remarks are made on such a platform (whether by a blogger or by someone commenting on a blog post) which the claimant says are defamatory, does that render the platform's owner liable? And does it make a difference if the claimant calls the owner's attention to the allegedly defamatory remarks? In *Davison v Habeeb*,<sup>31</sup> HH Judge Parkes QC thought it arguable that the platform's owner was a "publisher", though he also considered that the "mere conduit" defence applied. The defence did not dissipate once the complaint was received, because the platform owner had no easy means of discovering the truth of the matter, and so could not be said to have actual knowledge of any defamation.<sup>32</sup> The same result was reached on similar facts in *Tamiz v Google Inc.*,<sup>33</sup> but Eady J there went further: he did not accept that the owners of the platform were even "publishers" of the remarks in question, being properly regarded as mere facilitators.<sup>34</sup> While the hostility to claimants in such cases is clear, there are evidently difficult conceptual questions to be worked out here.

A more readily justifiable result was reached in *Carrie v Tolkien*, where the defendant posted remarks defaming the claimant on a website which the claimant himself operated under a pseudonym. The claimant discovered the remarks later that day, and made a minor change to them. It was held that no action lay in respect of the period after the claimant saw the remarks; in principle it could lie in respect of the short period before, but publication to others would not be presumed, and in the absence of evidence that a substantial number of people had seen it, no substantial tort was proved.<sup>35</sup> Once the claimant knew of the remarks and could remove them if he wished, a defence of consent was available if he chose not to remove them.

In one sense, these cases seem very positive, in that the courts seem to have a good grasp of the relevant technology, and to have developed an intuitively convincing allocation of responsibility in the light of that understanding. But the lack of any serious legal analysis is plain, and these cases are of little assistance in predicting how this area will evolve as the technology develops.

30 *Bunt v Tilley* [2006] EWHC 407 (QB) (10 March 2006).

31 *Davison v Habeeb and Others* [2011] EWHC 3031 (QB) (25 November 2011).

32 Para. 68.

33 *Tamiz v Google Inc. and Google UK Ltd* [2012] EWHC 449 (QB) (2 March 2012).

34 Para. 39.

35 *Carrie v Tolkien* [2009] EWHC 29 (QB) (15 January 2009).

### Search engines

Similar remarks apply in respect of search engines. To modern eyes, a search engine is the classic “intermediary” service, creating nothing original but simply providing facilities for linking to material of interest. It would be strange if such engines were treated as “publishers” of any data they link to, and while it seems more natural to treat them as publishers of the search results themselves, it seems harsh to treat them as asserting the truth of any statement that appears in those results.

Yet on any natural reading of the intermediary defences, it is hard to see how search engines receive any protection at all. It seems hard to deny that the operator of the engine is the “author, editor or publisher” of the search results themselves, which rules out any defence under national law.<sup>36</sup> And while guidance from the European Court is desperately needed, it is quite unclear how search facilities can be an “information society service”, as they are not “normally provided for remuneration”.<sup>37</sup> (Search engines are certainly not operated on charitable lines, but there is no direct remuneration in respect of individual searches.) In any event, if either defence applied, its effect would vanish as soon as the engine’s owner was made aware of the injury to the claimant’s reputation – even though it might not be technically possible to prevent the defamation occurring without removing essentially inoffensive material from the search engine’s database.

Considerations of this type recently led Eady J to what might at first sight seem an odd conclusion, that the results of a search query are not published by the search engine operator at all, or at least not insofar as they consist of material quoted from other websites:

It is fundamentally important to have in mind that [Google Inc.] has no role to play in formulating the search terms. Accordingly, it could not prevent the snippet appearing in response to the user’s request unless it has taken some positive step in advance. There being no input from [Google Inc.], therefore, on the scenario I have so far posited, it cannot be characterised as a publisher at common law. It has not authorised or caused the snippet to appear on the user’s screen in any meaningful sense. It has merely, by the provision of its search service, played the role of a facilitator.<sup>38</sup>

Once again, the result is intuitively appealing, but the reasoning unsatisfying. It is simply not true – indeed, it is rather bizarre to claim – that a search engine operator does not “authorise or cause” search results to appear. It has never been a defence in defamation that the defendant had chosen to act merely as a facilitator, particularly if that role involves widespread dissemination of information regardless of its accuracy. Libel does not cease to be libel simply because the defamatory statement was a response to a query. And Eady J’s reliance on the point that the results are “automatic” does not seem to lead us towards anything that has traditionally been recognised as a defence.

None of this is to suggest that a properly run search engine should attract liability – very much the contrary. And it is a tribute to the high standards we set for, and usually get from, search engines that we are reluctant to drag them into the net of defamation law. But a

<sup>36</sup> See Defamation Act 1996 (UK), s. 1; Defamation Act 2009 (Ireland), s. 27.

<sup>37</sup> “Service” in Directive 2000/31/EC is defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”: see Directive 98/34/EC, Article 1(2) as amended by Directive 98/48/EC, Article 2.

<sup>38</sup> *Metropolitan International Schools Ltd v Designtechica Corp.* [2009] EWHC 1765 (QB) (16 July 2009), Eady J, at [51]. Given that the search engine operator is not liable for these snippets, it would be surprising if anyone else were; it was subsequently held that the original author of an article is not responsible for a Google snippet from that article, at least if it conveys a different meaning from the original: *Budu v British Broadcasting Corporation* [2010] EWHC 616 (QB) (23 March 2010).

fiction that search engines are not engaged in any activity that the law regards as publishing is rather hard to stomach. It seems more rational to admit that they publish their results but to craft a specific privilege for search engines, which would be on generous terms if there was no reason to doubt the fairness of the search algorithm and other internal procedures, but which could in principle be defeated by proof of misconduct. Eady J's discussion of what a search engine could do to accommodate complaints without compromising the objectivity of the search results<sup>39</sup> could be a model for later judgments. But it is doubtful whether this result can be reached without legislation.<sup>40</sup>

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39 *Metropolitan International Schools*, n. 34 above, at [56]–[9].

40 For discussion of some relevant legislation in other European jurisdictions, see *Metropolitan International Schools*, n. 34 above, at [97]–[110].

