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Defamation and the Internet: A New Challenge

On 10 December 2002, the High Court in Dow Jones & Company Inc v Gutnick unanimously affirmed a long established principle of defamation law. The tort of defamation is committed where the damage to reputation by the defamatory material occurs and that is the place where the defamatory material is published in comprehensible form. In the context of material on the Internet, the place where the material is downloaded is the location of the publication. As a consequence, the defamation law of the place of downloading is the law that applies to determining the action.

The Gutnick decision is the first in which any country's highest court has determined the issue of where a defamatory publication involving material on the Internet will occur and what law applies to the action.

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CONTENTS

1	INTRODUCTION.....	1
2	DOW JONES & COMPANY INC V GUTNICK	1
2.1	PROCEEDINGS IN LOWER COURTS	2
2.2	THE HIGH COURT PROCEEDINGS	2
3	HIGH COURT DECISION.....	3
3.1.1	The Jurisdiction Issue	4
3.1.2	Choice of Law to be Applied.....	4
3.1.3	Place of Publication	4
3.1.4	Publications in Several Places	8
3.1.5	Whether the Victorian Supreme Court was an Inconvenient Forum.....	9
3.1.6	Limit on Scope of Liability.....	10
4	SOME CASES INVOLVING THE INTERNET	11
5	IMPLICATIONS AND REACTION BY LEGAL AND MEDIA EXPERTS.....	12
6	INTERNATIONAL LEGAL RESPONSE.....	14
	APPENDIX A – NEWSPAPER ARTICLES.....	17
	RECENT QPL RESEARCH PUBLICATIONS 2003	31

1 INTRODUCTION

On 10 December 2002, the High Court in *Dow Jones & Company Inc v Gutnick*¹ unanimously affirmed a long established principle of defamation law. The tort of defamation is committed where the damage to reputation by the defamatory material occurs and that is the place where the defamatory material is published in comprehensible form. In the context of material on the Internet, the place where the material is downloaded is the location of the publication. As a consequence, the defamation law of the place of downloading is the law that applies to determining the action.

The *Gutnick* decision is the first in which any country's highest court has determined the issue of where a defamatory publication involving material on the Internet will occur and what law applies to the action.

2 DOW JONES & COMPANY INC V GUTNICK

Mr Joseph Gutnick is a businessman who is involved in a number of philanthropic, political, and sporting activities. His business activities extend outside Australia but he lives in Victoria with friends, associates, and business interests in that state.

Dow Jones publishes the *Wall Street Journal* and *Barron's Magazine*. The latter is a weekly magazine which, like the former, covers financial matters. An article dated 30 October 2000 appeared in *Barron's Magazine* with the title 'Unholy Gains'. It was sub-headed *when stock promoters cross paths with religious charities, investors had best be on guard* and was accompanied by a large photograph of Mr Gutnick and other persons. The article went on to state that some of Mr Gutnick's business dealings with charities raised 'uncomfortable questions' and that an investigation by *Barron's* had found that several charities traded heavily in stocks promoted by Mr Gutnick. It then linked the businessman with persons who may be involved in criminal activities in the USA, including convicted money-launderer Nachum Goldberg. One sentence stated that a communication from Mr Goldberg was taken by Australian authorities to mean that Mr Gutnick was Mr Goldberg's 'biggest money laundering customer'.

The magazine was widely circulated in the USA and a small number entered Victoria. The article was also posted on the *Barron's Online* website which could be accessed by any of the 550,000 or so subscribers to the website, including

¹ [2002] HCA 56, 10 December 2002. at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/2002/56.html?query=title+%28+%22dow+jone%22+%29>

around 300 subscribers in Victoria. Dow Jones has a web server in New Jersey on which its website is located.

2.1 PROCEEDINGS IN LOWER COURTS

Mr Gutnick sued Dow Jones in the tort of defamation in the Supreme Court of Victoria, arguing that the imputations made in the article were seriously defamatory. The writ was served under r 7.01 of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) (RSC), providing for service outside of Australia without leave of the court if any of the paragraphs of r 7 are complied with (ie the proceeding is founded on a tort committed within Victoria; or is brought in respect of damage suffered in Victoria caused by the tortious act wherever occurring). Dow Jones applied for a stay of the action or to have the service of the proceedings set aside on three bases. First, that publication was effected in the USA and not in Victoria. Second, that no act was committed in Victoria to enable service out of Victoria without the leave of the court. Third, that Victoria was not a convenient forum for the action to be tried.

The primary judge, Hedigan J, dismissed Dow Jones' arguments and refused to stay the action. Dow Jones then sought leave to appeal to the Court of Appeal of Victoria. During proceedings, Mr Gutnick gave an undertaking to sue in no place other than Victoria as it was in that State that he wished to repel the attack on his reputation.

The Court of Appeal refused leave to appeal. Dow Jones (the appellant) then appealed to the High Court, relying upon the same arguments put forward in the lower courts. The High Court granted special leave to appeal. A group of 18 businesses and organisations, including Amazon.com Inc, News Ltd, and Yahoo!, were given leave to intervene in support of the appellant.

2.2 THE HIGH COURT PROCEEDINGS

The issues before the High Court were, essentially, whether the Supreme Court of Victoria had jurisdiction over the matter; if so, the law to be applied to determine the matter; and thirdly, whether the Victorian Supreme Court was an inconvenient forum for the hearing of the matter.

Expert evidence was received about the nature of the Internet, in which it was described as a network that links other telecommunications networks and is unlike any pre-existing technology. The World Wide Web (WWW) is one service on the Internet. A webpage or website can be made available over the Internet by uploading it onto a storage area on a web server which can be retrieved

(downloaded) by a person using a web browser on their computer.² In this case, the material in question, once prepared by the author, was transferred to a computer at the appellant's premises in New Jersey, and then loaded onto six servers maintained at those premises.

It was not disputed by either party that in proceedings for an action for tort where the parties or events have some connection with a jurisdiction outside Australia, the choice of law rule to be applied is that matters of substance are governed by the law of the place where the tort is committed.³ What was in dispute was where the tort of defamation was committed. The appellant argued it was in the USA and that USA law should govern all questions of substance. Note that if the law to be applied was USA law, the appellant would be able to take advantage of that country's 'defendant friendly' defamation laws and the protection offered by the First Amendment to the US Constitution regarding freedom of speech. In the USA, the onus is on the plaintiff to show that the alleged defamatory matter is untrue and was published with intent to harm reputation.

Mr Gutnick, on the other hand, argued that the tort was committed in Victoria where the article was downloaded and, thus, caused damage to his reputation and that the relevant law to be applied was Victorian law. In that state, the common law rules of defamation apply with very little legislative alteration. The law presumes that the defamatory publication, that is one which contains a disparaging imputation about the plaintiff, is false. Malice of the defendant is relevant to the issue of damages but truth will be a complete defence, unlike in Queensland where it must also be shown that publication was for the public benefit.⁴

3 HIGH COURT DECISION

The seven members of the High Court delivered four separate judgements. All held that the publication of the communication, an essential element of a defamation action, occurred in Victoria where the matter was downloaded from the Internet. The law to be applied to matters of substance was the defamation law operating in Victoria. Thus, the Victorian Supreme Court was not a clearly inappropriate forum for the trial of the matter. The appeal by Dow Jones was, therefore, dismissed.

The merits of the case are yet to be heard by the Victorian Supreme Court.

² [2002] HCA 56, paras 15-16.

³ *Regie National des Usines Renault SA v Zhang* [2002] HCA 10.

⁴ *Halsbury's Laws of Australia*, 'Defamation' Ch 145, 2000 Reed International Books t/a LexisNexis Butterworths, para 145-75.

3.1.1 The Jurisdiction Issue

The joint judgement of Gleeson CJ, McHugh, Gummow, and Hayne JJ (the joint judgement) said that because Mr Gutnick allegedly suffered damage in Victoria as a result of the publication, r 7.01 of the Supreme Court Rules was called into play. The Court's jurisdiction was regularly invoked by service on the appellant. Kirby J and Callinan J agreed with that view in separate judgements. Even so, it had to be determined whether Victoria was, nevertheless, a clearly inappropriate forum for the trial of the action. That issue is dealt with later in this Brief.

3.1.2 Choice of Law to be Applied

Where the parties or elements of the action have some connection to another jurisdiction, there may be a need to make a choice between the application of the law of the forum or the law of another jurisdiction to resolve an action. This is called 'choice of law'.

In *Regie National des Usines Renault SA v Zhang*⁵, the High Court overturned a long-standing common law rule for the choice of law in cases involving torts committed outside Australia. Traditionally, a plaintiff had to show that the alleged wrong gave rise to action under the law of the forum of the proceedings as well as the law of the place the wrong was committed.⁶ In *Zhang* the Court held that the law to be applied in determining the action in tort was the law of the place where the wrong was allegedly committed (*lex loci delicti*). This will be the case whether the tort is committed inside Australia (but in another jurisdiction) or overseas.

In defamation actions, the law to be applied will be the place where the tort of defamation was committed. According to long established principles, that is the place where the allegedly defamatory matter was published.⁷ So the question for the High Court was where that place of publication was.

3.1.3 Place of Publication

The joint judgement observed that defamation is a tort of strict liability. Damage to reputation founds the cause of action and the tort of defamation is committed at

⁵ [2002] HCA 10, 14 March 2002. at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/10.html

⁶ *Phillips v Eyre* (1870) LR 6 QB 1.

⁷ *Webb v Bloch* (1928) 41 CLR 331; *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6.

the place where the damage occurs. Ordinarily, the place is where the allegedly defamatory material is available in comprehensible form in a place where the person defamed has a reputation to damage. In addition, every communication of the defamatory matter founds a separate cause of action.⁸ In the case of the WWW, material is not available in a comprehensible form until downloaded onto the computer of the person who has used the browser to retrieve it from the web server. It is the place where the person downloads the material that the damage to reputation occurs and the tort of defamation is committed.⁹

The appellant's main argument was that the traditional defamation rules were inapplicable to defamation on the Internet, a technological advancement that demanded a re-examination of the law, particularly in relation to the element of publication. The contention was that a web publisher should be able to govern its conduct according only to the law of the place where it maintained its web servers, unless that place was opportunistic or adventitious. If, on the other hand, it was held that the defamation occurred at the place where the material was downloaded, the publisher would need to take account of the law of every country on earth.¹⁰ It was also argued that 'forum shopping' would occur with litigants searching for places with laws favouring the allegedly defamed plaintiff.

In rejecting the appellant's arguments, the joint judgement stated that while persons should be able to act with confidence, that does not mean that they should be able to act according to one legal system, even if it is their 'home' legal system. Their Honours said –

*Activities that have effects beyond the jurisdiction in which they are done may be the concern of the legal systems in each place.*¹¹

In relation to the appellant's argument that the WWW created potential for widely disseminated communications, their Honours noted that this phenomena was something to which the law has had to adapt ever since the growth of the print and electronic media over a wide geographic area. Their Honours observed –

However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have..... In particular, those who post information on

⁸ *Duke of Brunswick v Harmer* (1849) 14 QB 185.

⁹ [2002] HCA 56, para 44, per Gleeson CJ, McHugh, Gummow, and Hayne JJ.

¹⁰ [2002] HCA 56, para 20.

¹¹ [2002] HCA 56, para 24.

*the World Wide Web do so knowing that it will be available to all and sundry without any geographic restriction.*¹²

Callinan J agreed, commenting that statements made on the Internet are neither more nor less ‘localised’ than statements made in any other media or by other processes. Newspapers, television, and radio can be heard or viewed in many places and beyond any one country.¹³ His Honour said –

A publisher, particularly one carrying on the business of publishing, does not act to put matter on the Internet in order for it to reach a small target.

*...Publishers are not obliged to publish on the Internet. If the potential reach is uncontrollable then the greater need to exercise care in publication.*¹⁴

Callinan J rejected the appellant’s arguments based on the ubiquitous nature of the Internet and the difficulty and futility of attempting to control or regulate its use. Some brands of motor vehicles were ubiquitous yet manufacturers still had to comply with the laws of the jurisdictions in which they may be sold.¹⁵

Kirby J dealt with the appellant’s arguments in some detail and explored the features of the Internet and the WWW that were said to warrant reconsideration of the law of defamation regarding publication on the web. His Honour noted that the nature of the technology presented peculiar difficulties for legal regulation of content and in being able to prevent access by users in certain jurisdictions. In particular, new technologies such as those which anonymise users and their locations make cost effective, practical and reliable identity verifications systems unlikely to emerge in the near future.¹⁶ His Honour then explored whether that created a need to adopt new principles or strengthen old ones in responding to questions of forum or choice of law.¹⁷

His Honour appeared to feel some disquiet about the conclusion to which he came but did not believe that the nature of the case was one that required a re-examination of the law in the context of publication on the Internet. His Honour ultimately considered that the deeply entrenched rules of defamation should not be altered in response to a particular technology and doing so may create its own set

¹² [2002] HCA 56, paras 38-39.

¹³ [2002] HCA 56, para 184.

¹⁴ [2002] HCA 56, paras 182-183.

¹⁵ [2002] HCA 56, paras 184-186, 197.

¹⁶ [2002] HCA 56, para 86.

¹⁷ [2002] HCA 56, paras 75-92, 114.

of new problems. In addition, if the place of uploading were adopted as the place of publication and as also governing the choice of law to be applied to the action, it would effectively be the law of the USA where a large number of web servers are located.

Australians whose reputations are damaged by publication on the Internet would not be comforted by being subjected to the law of a place of uploading (which would effectively be the assigning of the place of the defamation to the USA) when any decision made would depend upon a law reflecting different values.¹⁸ In the USA, the balance struck by the courts appears to be in favour of free speech over vindication of reputation. A similar point was made also by Callinan J.¹⁹

Kirby J said –

*At least in the case of publication of materials potentially damaging to the reputation and honour of an individual, it would not seem unreasonable, in principle, to oblige a publisher to consider the law of the jurisdiction of that person's habitual residence.*²⁰

In the end, Kirby J did, however, consider that the results the Court arrived at did not appear to be wholly satisfactory –

*They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself. In default of local legislation and international agreement there are limits on the extent to which the courts can provide radical solutions...*²¹

Rejection of the 'Single Publication' Rule

The appellant argued that the 'single publication' rule be adopted for WWW publications so that the place of uploading the matter would be the place of publication. It has been accepted in many USA jurisdictions but has not found favour in Australia.²² Under this rule, a widely disseminated publication is treated as a single publication regardless of the number of places in which it has been published. The plaintiff can bring only one action to recover damages for all of the publications. As the rule developed, it became aligned to the tenet that the place of

¹⁸ [2002] HCA 56, para 133, per Kirby J.

¹⁹ [2002] HCA 56, para 199.

²⁰ [2002] HCA 56, paras 123-135.

²¹ [2002] HCA 56, paras 165-166.

²² See, for example, *Mclean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513 at 520, 528.

that ‘single’ publication was where the person publishing the matter had acted and it was the law of that place that was applied in determining the action.

The High Court declined to adopt the ‘single publication’ rule, even by confining it to Internet publications.²³ Some members of the Court considered that Australian law deals with problems of multiple proceedings through courts having a discretion to refuse to exercise jurisdiction and by well-established principles such as vexation, *res judicata* and estoppel. Kirby J foresaw the possibility that publishers would ensure that uploading and locating of data occurred at a place more likely to insulate them from liability in other jurisdictions. As Callinan J pointed out, why would publishers owing duties to shareholders to maximise profits do otherwise?²⁴

3.1.4 Publications in Several Places

Each communication of defamatory matter is a separate publication and raises a separate cause of action. If the material is published in more than one jurisdiction, a plaintiff can, theoretically at least, sue for each publication. In practice, however, the court may regard it as an abuse of process to mount separate actions in respect of the same matter.

Mr Gutnick sought only to claim for damage to his reputation in one place – Victoria. As Mr Gutnick sought only to claim for damage suffered in Victoria where the damage to reputation occurred, the substantive issues fall to be determined in accordance with Victorian laws.²⁵ Thus, the High Court did not have to confront problems that might be raised where a person sues in one jurisdiction for each publication of defamatory matter on the WWW in a multitude of jurisdictions inside and outside of Australia.²⁶ In such a situation, an Australian court might be faced with applying Australian law to the publication in Australia and the applicable foreign law of the place of each other publication.

It might be necessary to distinguish between cases where the publication is made in Australia but in a number of jurisdictions, and those where publication has occurred outside Australia. While the issues did not arise in this case, their Honours raised some relevant questions that may emerge.²⁷

²³ See for example, the joint judgement at [2002] HCA 56, paras 29-37.

²⁴ [2002] HCA 56, para 199.

²⁵ [2002] HCA 56, paras 47-48.

²⁶ [2002] HCA 56, para 49.

²⁷ [2002] HCA 56, paras 50-53.

First, the joint judgement noted, the issue of appropriateness of the forum chosen to bring the action may arise as may questions of vexation of process if there is more than one action brought. Thus, a plaintiff may need to select an appropriate forum.

Secondly, if the conduct of the publisher has all occurred outside the jurisdiction of the forum, their Honours seemed to flag that this might invite consideration of the reasonableness of the publisher's conduct in deciding if there is any defence to an action. The reasonableness of conduct should, perhaps, be judged according to all of the circumstances, including where the conduct took place and the defamation laws in that place. This might cause a development in defences for defamation to recognise that the publisher may have acted reasonably. In considering such matters, if publication occurs in the USA and the publisher has acted in the USA, Australian courts may have to, when applying the law of the place of the commission of the tort, give effect to the different balance applying in the USA between freedom of speech and reputation of the individual.

Gaudron J, in her separate judgement, also noted the manner in which courts have dealt with such issues.²⁸

On the other hand, Callinan J said that he could see no immediate reason why, if a person has been defamed in more than one jurisdiction, he or she cannot litigate in each of those jurisdictions.²⁹

3.1.5 Whether the Victorian Supreme Court was an Inconvenient Forum

In *Zhang* five justices of the High Court found, in relation to similar wording in the NSW Supreme Court Rules, that a court will use its discretion to decline jurisdiction over a matter only if the party objecting can show that the court chosen was a 'clearly inappropriate forum'.³⁰ That formulation effectively requires an objecting defendant to show that the proceedings in the chosen forum would be vexatious or oppressive.

In *Gutnick*, the members of the High Court who discussed the issue applied the *Zhang* formulation to the Victorian RSC and found no reason to conclude that the primary judge erred in his discretion to refuse to stay the proceeding. There was no basis for the Supreme Court of Victoria being a clearly inappropriate forum. Mr Gutnick was not seeking to vindicate his reputation in any other jurisdiction. The

²⁸ [2002] HCA 56, paras 57-64.

²⁹ [2002] HCA 56, para 202.

³⁰ For example, *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

tort was committed in Victoria and the substantive issues fall to be determined according to Victorian law.³¹

3.1.6 Limit on Scope of Liability

Many media organisations may believe, and the appellant argued, that the High Court's findings would force a web publisher to 'consider every article it publishes on the WWW against the defamation laws of every country from Afghanistan to Zimbabwe'. This is coupled by an 'opening of the floodgates' fear – that plaintiffs may all rush to Australia to sue, taking advantage of defamation laws that are more favourable to plaintiffs. The High Court did not appear to believe that there was enormous potential for this occurring. As their Honours observed, there were a number of practical and legal limitations facing plaintiffs. The factors noted include –³²

- the fact that a claim can only be brought in a place where the plaintiff has a reputation.³³ As noted by some justices in *Gutnick*, it would not seem unreasonable for the publisher to comply with defamation laws in the place where the person resides. Difficulties will, however, arise where a plaintiff has a worldwide reputation;
- publishers using mass international communications such as television, radio, and newspapers have not gone out of business even though they have faced potential liability in defamation in countries where they publish. The High Court has merely included the Internet as one more such medium of communication to which the general laws of defamation apply;
- it is unlikely many plaintiffs would wish to go to the expense and difficulty of bringing proceedings in a number of countries and will tend to do so only in the place where the greatest harm to reputation has occurred;
- plaintiffs will generally seek to claim only in jurisdictions where a judgement can be executed against the defendant's assets;³⁴

³¹ [2002] HCA 56, paras 48, 202.

³² As set out conveniently in a publication by Allens Arthur Robinson, 'Silencing the Internet or a manageable risk?', *Focus Defamation – December 2002*. At <http://www.aar.com.au/pubs/cmt>

³³ [2002] HCA 56, para 53.

³⁴ [2002] HCA 56, paras 53-54.

- enforcement of judgements in some countries may be difficult. Australian judgements are not automatically enforceable in the USA and it seems that recognition will be given to such judgements only if they comply with USA standards under defamation law.³⁵ Only the more hardy and/or wealthy plaintiffs would undertake the ordeal of arguing their case again before a USA court. It appears that there were only 110 defamation cases in the whole USA in 2002 in comparison with 77 in NSW alone.³⁶ In the USA, the plaintiff has to establish that there is harm to reputation, the claim is false, and was made with intent to cause harm.

4 SOME CASES INVOLVING THE INTERNET

It has been observed that the findings in *Gutnick* are consistent with international jurisprudence concerning the circumstances in which courts will be justified in seizing jurisdiction over foreign Internet conduct.³⁷

Kitakufe v Oloya was a case in Toronto, Canada in which a Ugandan born Toronto doctor claimed damages against a Ugandan journalist over a report in a Ugandan newspaper accusing him of professional misconduct and fraud. The online edition was available in Canada but not the hardcopy version. The Court allowed the matter to proceed on the basis that the plaintiff should be able to sue in his place of residence and should not have to go all the way to Uganda to enforce his rights.³⁸

A fairly famous case, but not one involving defamation, was *LICRA v Yahoo!*³⁹ A website maintained by Yahoo! in the USA offered Nazi memorabilia for sale online. The sale of such items is a criminal offence in France but not in the USA under the First Amendment guarantee of freedom of speech. The French court held that it had jurisdiction to grant an injunction to compel Yahoo! to take steps to block access to the site in France.

However, reluctance to impose domestic legal standards on foreign conduct was observed in the decision of Simpson J of the NSW Supreme Court in *Macquarie*

³⁵ See, for example, *Bachchan v India Abroad Publications Inc*, 585 NY 2d 661 (NY County SC, 1992).

³⁶ Graham Young, 'Dow Jones v Gutnick: the Internet honeymoon is over. What's next?', *On Line Opinion*, 17 January 2003. At <http://www.onlineopinion.com.au/Sections/law.asp>

³⁷ Matt Collins, 'Global Net', *Law Institute Journal*, February 2002, pp 51-53, p 52.

³⁸ Ontario Court of Justice, Himel J, 2 June 1998.

³⁹ Tribunal de Grande Instance de Paris, Vice President Gomez, 22 May and 20 November 2000.

Bank Ltd v Berg.⁴⁰ Simpson J declined to grant an injunction restraining the publication of a webpage by the defendant who was not present in NSW. Her Honour said that to issue the injunction would effectively superimpose the defamation law of NSW on every other jurisdiction in the world and it might be futile to do so if the defendant did not come to NSW. It may be that *Berg* is distinguishable on the basis that the defendant was not within the jurisdiction and there was a difficulty raised by potential multiple publications in several jurisdictions.⁴¹

5 IMPLICATIONS AND REACTION BY LEGAL AND MEDIA EXPERTS

The *Gutnick* decision is important for publishers on the WWW and will have international implications. Web publishers will, theoretically, need to take care that material is not defamatory in any jurisdiction in which it may be downloaded. However, as seen above, the scope of potential liability is limited by a number of practical and legal considerations. Generally, reference to the place or places in which the person who may be defamed resides or does business will be a fair indication in practice of where the damage and, thus, the tort of defamation will occur.

Reaction by legal experts, publishers and other stakeholders was swift.

Some legal experts dealing with Internet legal issues have argued that the High Court merely confirmed existing defamation principles operating in Australia and declined to adopt an American regime for Internet publications. It will not mean that publishers on the WWW can be sued anywhere in the world for defamation because the finding by the High Court applies only to Australian suits.⁴² E-commerce law specialist, Leif Gamertsfelder, believes that the decision made sense in finding that the defamation occurs where the person comprehending the concept of reputation actually hears or reads the defamatory material.⁴³

⁴⁰ (1999) A Def R 53.035.

⁴¹ Matt Collins, 'Global Net', p 52.

⁴² Anne Flahvin (online defamation lawyer and research associate) 'Gutnick High Court Decision: Storm in a Teacup?', Media, News & Events, Baker & McKenzie Cyberspace Law and Policy Centre at the University of New South Wales, 11 December 2002. Downloaded March 2003 from <http://www.unsw.edu.au>.

⁴³ 'Gutnick criticism misplaced', *Deacons Media Release*, 13 December 2002.

On the other hand, Mr Robert Todd, the lawyer who represented a major group of publishers who intervened in the High Court proceedings, argues that the High Court took an orthodox view to a problem of international proportions. He believes that the decision has significant implications for online publishers. In any articles that profile controversial persons around the world, web publishers would need to be aware of defamation laws in countries where that person may be resident or do business.⁴⁴

An Internet expert from the Australian National University's Computer Science Department, Dr Roger Clarke (who was an expert witness called by the appellants in *Gutnick*) argues that the Internet is unlike any technology that has preceded it. Unlike other mediums of communication, the transmission of copies of a document in response to requests from a person is not the result of action by the originator because it is initiated by the requestor.⁴⁵

Dr Clarke considers that if the focus on defamation law is the place of downloading, an impossible constraint is imposed on publishers which could seriously affect the availability of information. If web publishers are required to 'filter' requests to ensure they cannot be accessed in jurisdictions where the communication may be defamatory, it would impose a very time-consuming and costly burden and the economics of net-publishing would change dramatically. Many such publishers do not have the time or legal knowledge to consider defamation laws of hundreds of jurisdictions nor access to details of the requestors' apparent location and may well be forced to close websites. This will impact upon freedom of access to information which the Internet has championed.

A spokesperson for *Asia Times Online* in Hong Kong is reported as saying that the High Court has paved the way for China and other oppressive governments to apply their home-grown standards to anything published anywhere in the world.⁴⁶

One web publisher has said that one impact might be that less material is freely available on websites and that if an article is published in the USA it will be made available only there (in hardcopy) but not on the WWW in case it is downloaded in Australia.⁴⁷

⁴⁴ 'Tangled in a legal web: Online publishing and defamation', *The Media Report – Radio National*, 12 December 2002.

⁴⁵ Roger Clarke, 'Defamation on the Web', *Community Service pages*, Australian National University, at <http://www.anu.edu.au/people/Roger.Clarke/II/DefWeb01.html>

⁴⁶ Bernard Lane, 'Nowhere to hide', *Australian*, 14 December 2002, p 25.

⁴⁷ 'Tangled in a legal web: Online publishing and defamation'.

There is also a possibility that smaller publishers (who may have few assets in other countries than their own) may have an advantage in being able to publish more robustly over bigger media concerns such as Dow Jones (with significant assets around the world) because there is less likelihood in being sued in other places.⁴⁸ This appears to be a rather ironic twist.

In the USA and Canada, there has also been some reaction. A University of Ottawa Law Professor believes that several countries, particularly Commonwealth countries such as Canada and the UK, would apply the decision. However, he doubted that it would have a major impact on what news organisations will publish on the Internet. A Harvard Law School Internet specialist took the view that such publishers would generally work the cost of possible lawsuits into their sales figures.⁴⁹

Technological solutions may provide some relief for web publishers. It is understood that software is being developed that could allow identification of the location of site visitors and block material going to jurisdictions with restrictive defamation laws.⁵⁰ In the meantime, web publishers could make inexpensive changes such as addressing subscriber channels using IP addresses and credit card numbers.⁵¹ However, challenges may be posed by anonymising technologies (which obscure the originator of a request), the development of which may stay ahead of any possible solutions.

6 INTERNATIONAL LEGAL RESPONSE

Legal commentators have observed that *Gutnick* does underline a number of difficulties with defamation law in the context of widely disseminated publications. There is some argument that the decision provides impetus for the ratification of a multilateral treaty to provide a single regime for resolving jurisdictional issues in cross-border situations.⁵² As Kirby J commented in *Gutnick*, there were limits to which the courts can provide a satisfactory solution and that national and international legislative attention was needed.

⁴⁸ Graham Young, 'Dow Jones v Gutnick: the Internet honeymoon is over. What's next?'

⁴⁹ Anick Jesdanun, 'Defamation Ruling Could Affect Internet Publications Worldwide', *Information Week*, 10 December 2002.

⁵⁰ Anick Jesdanun, 'Defamation Ruling Could Affect Internet Publications Worldwide'.

⁵¹ Sue Cant, 'Publish at your peril', *Age Online*, 25 February 2003 citing Deacons IT lawyer, Lief Gamertsfelder.

⁵² 'Gutnick criticism misplaced', *Deacons Media Release*, 13 December 2002.

A number of governments have been engaged in developing a *Draft Hauge Convention on Jurisdiction in Civil and Commercial Matters* aimed at providing certainty and a unified approach relating to jurisdiction of courts to determine cases involving more than one country. This still, however, leaves the problem of significant differences in laws across the globe, including defamation law.⁵³

Possibly a future international treaty on the Internet could be one that provides immunity from being sued to persons who publish in accordance with specified guidelines.⁵⁴ Such an agreement may, however, be a long way off when it is noted that Australian jurisdictions, all of which have different defamation laws, have been attempting to agree on uniform laws for many years. Many publishers desire certainty now, not in the indefinite future.

⁵³ 'Gutnick criticism misplaced', *Deacons Media Release*, 13 December 2002.

⁵⁴ Graham Young, 'Dow Jones v Gutnick: the Internet honeymoon is over. What's next?'

APPENDIX A – NEWSPAPER ARTICLES

Title **Court misses Internet opportunity**

Source **The Age**

Date Issue **15 December 2002**

The High Court has missed a unique opportunity to bring the law of defamation, in so far as it relates to the Internet, into the 21st century.

The court has relied on principles set down in the Duke of Brunswick case in England in 1849.

We have seen a communications revolution since then that requires a review and, where appropriate, a change in our laws.

Dow Jones argued that, for Internet publications, there should be one global right to sue, rather than separate rights for every Internet hit in so many different countries.

Thus, Dow Jones argued that Joseph Gutnick should have sued in New Jersey, where the Dow Jones server was located and the article was uploaded.

The Internet makes it impossible to isolate access to any geographic area on earth.

Dow Jones and the Gutnick article, it may be argued, have a substantial and bona fide connection with the United States, but not with Australia.

The problem was accurately stated by Justice Michael Kirby in the High Court: "The notion that those who publish defamatory material on the Internet are answerable before the courts of any nation where the damage to reputation has occurred, such as in the jurisdiction where the complaining party resides, presents difficulties: technological, legal and practical".

Kirby made it clear that he did not find it appealing to decide the Gutnick case on principles set down in a case decided in 1849.

He said that the strength of Australia's legal system was its capacity to adapt past principles to resolving new and unforeseen problems.

He said: "When the new problem is as novel, complex and global as that presented by the Internet in this appeal, a greater sense of legal imagination may be required than is ordinarily called for".

As Kirby pointed out, the normal principle is that "no jurisdiction should ...impose its laws on the conduct of persons in other jurisdictions in preference to the laws that would ordinarily govern such conduct where it occurs".

The High Court decision is clearly and correctly made on the basis of the law as it stands.

However, we must consider the vast number of people in the US who have read the Gutnick article.

Only a limited number have read it in Victoria.

The article was written in the US.

Presumably most, if not all, of the Dow Jones witnesses are in the US.

Gutnick is able to justify having the trial in Victoria because he sued for damages for the publication only in Victoria.

Even though he lives in Victoria, and has his principal place of business and a reputation in the state, he would have found it difficult to justify a trial in Victoria had he also sought damages for publication in the US.

In those circumstances, even a trial in Victoria would have looked at US law, which, based on the First Amendment of the US constitution, is nowhere near as favourable to Gutnick as Victorian laws.

Kirby correctly noted that any development of the common law in Australia "should provide effective legal protection for the honour, reputation and personal privacy of individuals".

The judge acknowledged that real defects had been established in the current Australian law of defamation as it applies to publications on the Internet.

While he noted concerns raised that it would be an "agonisingly slow" process to wait for legislatures or multilateral international agreement to address the problem, Kirby supported his fellow judges' view that this was a role for parliaments and not for the court.

Media lawyers from more than a score of countries discussed the issues relating to jurisdiction on the Internet at the International Bar Association conference in Durban, South Africa, recently.

The lawyers recognised that the exposure of online publishers to defamation actions was significant.

They recognised that while a plaintiff might not be able to recover large damages (due to the limited nature of the publication in that plaintiff's jurisdiction), the exposure of publishers to legal costs in defending such claims was significant.

The lawyers produced what they termed the "Durban principles".

1. A court may hear a complaint if the court is in a forum where the claimant lives, the defendant lives or the parties consent to jurisdiction.

2. The court should apply the law of the jurisdiction with the most significant connection to the Internet site.

This would ordinarily be where the editorial work was completed.

3. In any claim arising from the content of an Internet site posting, it should be a complete defence to liability if, within 24 hours, the Internet content provider posts a notice that a complaint has been made and provides a link to the text of the complaint on its site.

We are in a new technological age.

The Durban Principles are one suggestion worthy of consideration to overcome the difficulties faced by publishers.

The Durban principles would not have prevented Gutnick from suing Dow Jones in Australia.

They would, however, prevent non-residents going to Australia to sue due to Australia's conservative defamation laws.

The issue should be examined by Victorian Attorney-General Rob Hulls and the standing committee of attorneys-general.

Peter Bartlett is a Minter Ellison partner and joint chair of the media committee of the International Bar Association.

Title **Nowhere to hide**
Author **Bernard Lane**
Source **The Australian**
Date Issue **14 December 2002**
Page **25**

In theory, one incautious comment on your family website could be enough to land you in a foreign court if it gets read in the wrong place.

SO says The Wall Street Journal, distinctly glum about our High Court's refusal this week to upload a defamation law for the internet age.

But if Adam Greenfield is any guide, US geeks aren't about to be silenced.

He says: "Those judges are stoopit assblankets - Come and get me, boys". Greenfield, whose website is higher toned, threw this taunt into MetaFilter, a US-centric online forum.

If the internet is revolutionary, then forums such as MetaFilter and weblog sites such as Greenfield's are in the vanguard.

But you won't find references to them in the High Court judgment or in the media lamentations of this uniquely gloomy verdict for the net.

Precisely because of the nature of the net, it would be surprising if the judgment of one court had a simple effect.

In 2000, a US business magazine with an online presence, Barron's , carried an article, Unholy Gains, that alleged share price manipulation, money laundering and misuse of religious charities.

Joseph Gutnick, the Melbourne-based businessman, got several mentions and sued for defamation.

Barron's argued the case should be heard in the US, where the article was uploaded to its computer servers.

No, said Gutnick, Victoria's the venue; that's where the article was downloaded and read by people - a small, uncertain number - who'd know Gutnick from Sputnik.

Victoria it will be.

"Australia is suddenly looking like a good place to sue," says Peter Coroneos, chief executive of the Internet Industry Association, which opposed Gutnick in the case.

"I can imagine all the Hollywood celebrities lining up to sue the American online publications in the ACT or NSW," he says.

Our defamation law is much more plaintiff-friendly than the first amendment free speech regime of the US.

And our High Court has become something of a celebrity as the first senior court to try - and fail - to reconcile defamation with the everywhere-at-once publication of the internet.

But Barron's is venerable old media.

Its article appeared in print before it merged with The Wall Street Journal Online, all Dow Jones property, and became available to subscribers, almost all of them in the US.

Much of what makes the internet revolutionary - being freely accessible and throwing up new forms of interaction - was missing.

Perhaps it's not so surprising that the judges - Michael Kirby aside - showed little interest in the human potential of the net.

Justice Ian Callinan thought it rich of Dow Jones to cast itself as information that wants to be free.

"The word profit never passed the [Dow Jones'] advocate's lips," he said.

Dow Jones had plenty of big media mates in the case (including News Limited, publisher of The Weekend Australian, CNN and The New York Times).

They would say that profit, credibility and the enmity of those with something to hide go together.

Webloggers are different; they're midget media.

Online publishing revolutionaries, they're hardly famous for self-censorship and the Gutnick judgment is unlikely to give them a chill.

One Sydney blogger's response was to post a link to the offending Barron's article.

Ken Parish, who posts at The Parish Pump, had this to say to fellow bloggers: "There's probably no need to lie awake at night worrying about million-dollar lawsuits.

Trust me, I'm a lawyer". A legal academic, in fact, at Northern Territory University.

Still, freedom of speech is supposed to be indivisible, just as the world wide web is borderless.

Denis Dutton observes the web from an interesting vantage point.

An American philosopher of art based in New Zealand, he edits Arts&Letters Daily, a web portal to some of the best journalism and writing online.

"The court's reasoning is inimical to the whole spirit of the web, which is to encourage an open marketplace in information and ideas," Dutton says.

"Neither Dow Jones nor any private citizen who runs a website can determine every law that might be broken in any jurisdiction in the world".

That was why Dow Jones asked the court to change the common law so that no matter how many times a defamatory article was downloaded in however many jurisdictions, a plaintiff could sue only once in the country of upload.

The court refused but gave a host of reasons why it would be a rare plaintiff keen - or able - to litigate anywhere other than at home.

(Even then, a defendant may not have assets in the country and it seems unlikely that the US courts would enforce a foreign judgment at odds with the first amendment.)

BARRISTER Matt Collins, author of *The Law of Defamation and the Internet*, agrees with the High Court that the fear of forum-shopping is overdone: "The idea that Joe Gutnick would go off and sue in Mongolia or Afghanistan or Zimbabwe [over an article such as Barron's] is fanciful".

But what about celebrities - mightn't they fancy some Down Under defamation action?

When actor Jim Carrey sued *Woman's Day* magazine in Victoria, it was news not because of the hurtful headline - "Hollywood stars ban groper Jim" - but because here was an actor who did care about his reputation in the hairdressing salons of Elsternwick.

He got an apology; the net wasn't implicated.

After Gutnick's case, a Dow Jones counsel has suggested global publishers may have to tailor their content to a "tyranny of the lowest common denominator" - no geek can tell them how to insulate completely a strict defamation jurisdiction from the web - but otherwise the corporate reaction so far has been less anguished than the arguments the judges heard.

The consensus among media lawyers is unexciting: publishers know the people they're about to chastise and therefore they'll know the country where damage to reputation would occur; take advice.

"I think that most publishers and their legal advisers have been doing that anyway," says Andrew Kenyon, director of graduate studies in communications law at the University of Melbourne.

It could be trickier for Australian online publishers if Malaysia, for example, takes the High Court judgment to heart.

Then again, periodic banishment by the authoritarians of the region is nothing new for old media.

Had Gutnick lost, publishers of global clout would have found their legal advice predictable.

More often than not, it would be US law.

The US is the home not just of the first amendment but of the internet (perhaps not a coincidence).

It is the first nation of upload.

Indeed, Callinan rebuked Dow Jones for an attempt to impose nothing less than "an American legal hegemony".

This got Dutton riled.

Imagine, he says, that Dow Jones has the goods on an Australian company.

Defamatory in Victoria, legally kosher in the US, the article will nonetheless affect the share price.

"It would follow according to the principles of this [Gutnick] decision that Dow Jones should block Australian servers and web surfers access to the story," Dutton says.

"This in turn would allow American investors to dump their shares while Australians remained in the dark.

Somebody should remind Justice Callinan that the hegemony not of Americans but of free speech has distinct benefits".

The US invasion repelled, most of Callinan's colleagues feel relaxed enough to offer Dow Jones some subtle advice for its coming trial.

True, the defamation law must be Australia's because the Barron's article was downloaded here.

But, the judges say, that Barron's had uploaded in the land of the first amendment might say something about whether they had acted reasonably.

"It looks to me like an invitation to develop a [new] defence to defamation," says Kenyon.

A defence influenced by US legal hegemony.

What they said...

- The New York Times - The Australian High Court's reasoning in this case is analogous to that employed by Zimbabwe's regime in seeking to punish a writer for an article the country's police downloaded from a London newspaper's website.

To subject distant providers of online content to sanctions in countries intent on curbing free speech....is to undermine the internet's viability.

- MetaFilter online forum Posting by James Wallis, UK-based publisher - The internet's a global medium; you can publish to the entire world with the press of a button. With great power should come at least some responsibility.
- Asia Times Online, Hong Kong Gary LaMoshi - Australia's highest court has paved the way for China and other oppressive governments to apply their home-grown standards to anything published anywhere in the world.

That ruling will help the world's autocrats sleep better, while keeping media companies and reporters awake and their lawyers busy.

- The Parish Pump weblog Posting by Ken Parish, Darwin-based legal academic - [The] real concern [of publishers such as Dow Jones] is that the Australian approach to accepting local jurisdiction in internet publication disputes will spread to other countries.

If it really becomes a major problem for corporate publishers (which I doubt), they may pressure the US Government to push for an international treaty requiring other countries to adopt the American "single publication" rule.

Just as pressure from the world's only economic superpower ensured almost universal adoption of the Copyright Convention and the GATT and WTO [trade] agreements, so a determined US push to protect internet publishers from multiple lawsuits would probably succeed too.

Title **High Court throws a spanner in the global networks**
Source **The Australian**
Date Issue **11 December 2002**
Page **15**

The Gutnick defamation victory over Dow Jones could halt the communications revolution, warns Glenn Harlan Reynolds.

IN the 1950s, before space travel was a reality, scholars worried about whether orbiting the Earth would even be legal.

Under the law as it existed at that time, each nation's sovereignty extended usque ad coelum - literally "to the heavens".

Each nation's territory thus consisted of a wedge beginning at the Earth's core and continuing infinitely upward and outward.

This posed a number of absurdities, but the greatest difficulty was to orbiting spacecraft.

Flying over a nation's territory without permission was illegal, perhaps even an act of war.

But although aircraft could change course to avoid passing over countries who desired to bar their way, spacecraft - their orbital paths fixed by the laws of physics - could not.

If any country beneath them (which might mean any country in the world, depending on the inclination of their orbit) objected, it didn't matter that everyone else agreed.

People worried about this at some length, but after the launch of Sputnik the Soviets and the US, soon followed by the other nations of the world, agreed that parochial concerns should not stand in the way of a promised worldwide communications revolution.

Spacecraft in orbit were thus regarded as beyond the reach of earthbound law, and subject only to international space law and the law of the launching state, not that of the nations that they happened to pass over.

The benefit, of course, was an explosion of satellite-based communications that was a boon for the entire world, and especially for previously isolated nations.

Now another new technology - the internet - faces a similar problem.

In the case of Dow Jones and Company v. Gutnick, the High Court of Australia, yesterday ruled that anyone who publishes on the internet should

be liable to be sued in any country in which an individual believes that he or she has been defamed by that publication.

This is so, even though the High Court admits that, much as spacecraft cannot control their orbits: "The nature of the web makes it impossible to ensure with complete effectiveness the isolation of any geographic area on the Earth's surface from access to a particular website".

Thus, unlike traditional publishers who can restrict sales of their publications by geography, internet publishers - simply by choosing to publish on the internet - are held to be subject to the various laws of every nation reached by the internet, which means, of course, of every nation on earth.

The results are likely to be damaging for the internet, encouraging a lowest common denominator approach in which internet publishers strive not to be offensive according to anyone's standards, which is likely to mean not publishing at all, or publishing only inoffensive pap.

Another possibility, of course, is that internet publishing will be the domain of discrimination: publishers may choose only to print negative articles about those too poor, or too unpopular or discriminated against, to be likely to sue.

Or perhaps only the wealthiest enterprises, able to afford any legal charges, will be able to publish on the internet - except, perhaps, for private individuals who are so impecunious as to be "judgment-proof" and hence able to flout libel laws with impunity.

It's hard to see how any of these outcomes will serve the cause of free expression, or of civic responsibility.

THE High Court justifies this dangerous position, in part, by reference to the International Covenant on Civil and Political Rights, which provides, among other things, that everyone shall be protected from "unlawful attacks on his honour and reputation".

But the covenant says far more than that.

It also provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The Gutnick decision would seem to put all of this in peril.

A rule that subjects internet publication to an unprecedented degree of transnational regulation would seem to make a mockery of the guarantee of communication through "any other media of his choice" as it would place the medium of internet communication at a substantial disadvantage.

And a rule that subjects internet publication - the most inherently international kind of communication - to a virtual welter of overlapping parochial national regulation would seem to fly in the face of the guarantee that the right of free expression should be exercised "regardless of frontiers".

Such nationalistic regulation did not clip the wings of the Space Age.

It should not be allowed to drag down the internet, either.

Glenn Harlan Reynolds, author of *Outer Space: Problems of Law and Policy* (HarperCollins, 1998), teaches internet law at the University of Tennessee.

Title **Defamation on the Internet: a tangled web**
Author **Nicholas Pullen**
Source **The Age**
Date Issue **11 December 2002**

At last Internet publishers and free-speech advocates have a clear answer as to where a defamatory publication on the Internet can be litigated.

If a story originates on a server in the United States and makes allegations about a person in Australia, then that person will be entitled to sue in their home state.

The proposition is simple but arriving at it has vexed the Victorian Supreme Court.

Yesterday it was finally put to rest by the High Court of Australia in the case of Dow Jones versus Gutnick.

After it was decided that an article published on the Internet - making allegations of improper dealings by Melbourne businessman Joseph Gutnick - could be litigated in Victoria, there was a terrific howl of indignation from many commentators.

Cries of limiting the freedom offered by the Internet made great copy but shed little light and missed the real issue.

The High Court (as indeed Justice Hedigan did in Victoria) has treated Internet publishing in much the same way as other means of mass communication - and rightly so.

If information is "uploaded" from a server on the other side of the world it should be irrelevant to the harm it may cause in the home country of the person who is its subject.

The real issue is where a person reads or hears and comprehends the material, not where it may have come from.

To have news agencies such as CNN expressing great concern over this decision because they may be liable to defamation actions in every country on Earth is a good example of uninformed panic rather than rational consideration of the matter generally and the judgment itself.

The context in which the decision is made is no different to what has occurred in radio, television or other forms of international communication in the past.

The only real difference is that the Internet has offered a greater reach and immediacy than previous forms of mass communication.

The advent of "cyberspace" has not caused the mayhem in this area of the law that many observers would make us believe.

The High Court has correctly observed that it is doubtful the World Wide Web has a uniquely broad reach: "It is no more or less ubiquitous than some television services.

In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact ...

In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction".

News organisations such as CNN or free-speech advocates need not fear a muzzle being placed on the freedom of publication made available by the Internet.

Potential actions arising in every country around the world may exist in theory, but the reality is otherwise.

Normally, people will only have a valid claim in defending their reputation in a place where the publication is made.

As the High Court pertinently states, "Plaintiffs are unlikely to sue for defamation published outside the forum (the court's jurisdiction) unless a judgment obtained in the action would be of real value to the plaintiff.

The value that a judgment would have may be much affected by whether it can be enforced in a place where the defendant has assets".

Joseph Gutnick has his home, business headquarters, family and social life in Victoria.

In addition to this, he has restricted his claim to suing in Victoria only for the effect that the Internet publication has had on his reputation in Victoria.

He is not suing the world at large.

This could not occur in practice - a sentiment echoed in the High Court decision.

Dow Jones argued that the relevant jurisdiction for hearing this matter should be New Jersey, where the server for the Internet article is located.

If this were accepted then absurd situations would arise.

For instance, a person defamed by an article appearing on the Internet would have to protect their reputation in the country hosting the relevant server, even though they may not be known there.

Furthermore, the United States, arguably the largest publisher on the Internet, would become the de facto forum for settling these types of disputes.

Put another way, US laws would control the rights to one's reputation throughout the world.

For the High Court of Australia to decide otherwise would not have been in step with similar overseas decisions concerning the Internet.

Cases in the United Kingdom, Canada and the United States have clearly shown that countries will determine Internet issues, such as where a publication occurs, by their own domestic standards rather than being influenced or dictated to by foreign laws.

The decision of the High Court was unanimous in dismissing the application made by Dow Jones.

Nevertheless, the court is clearly sensitive to multi-jurisdictional issues characterised by Internet publications and has left the door open for any variation of its decision should the substantive facts of the Gutnick case differ at some time in the future.

In any event, yesterday's decision is clearly practical and one of common sense.

Hopefully, it will be the beginning of a more rational and measured approach to the effect the Internet has on the law - rather than encouraging some of the sometimes hysterical scenarios developed by some Internet commentators.

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