2012 - Joint Committee on Human Rights evidence on Defamation Bill

1. This is the response of the JNT Association, trading as Janet, to the Joint Committee on Human Rights' call for evidence on the Defamation Bill [1]. Janet is the non-profit company that operates the UK's national research and education network, connecting universities, colleges, schools and research organisations to each other and to the global Internet. As website operators, Janet and its customers are concerned that procedures for removing alleged defamatory content from websites must allow them to take proper account of Human Rights, particularly the right to free speech.
2. Both Janet and its customers operate websites where third parties can post content so have an interest in the provisions in paragraph 5 of the Bill relating to liability for such postings. The Human Rights aspects of these provisions are a particular issue for universities and colleges who, unlike commercial web hosts, are required by law to "take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers" (*Education (No.2) Act 1986*, s.43).
3. As was noted by the Law Commission [2] in 2002, the liability regime provided for web hosts under the *Defamation Act 1996* and the eCommerce Directive (2000/31/EC) is not favourable to free speech. Under that regime a host is protected from liability until they have knowledge of a potentially defamatory statement; once they become aware of it (typically through a notification from the person alleging defamation) they share the author's liability unless they act promptly to remove or alter the statement. Since web hosts typically have acceptable use terms that allow them to remove material when it is complained of, their safest course of action is to remove any statement for which a complaint is received, thereby ensuring that they continue to be protected from liability. As the Law Commission report concluded, this "places pressure on secondary publishers to remove material without considering whether it is in the public interest, or whether it is true" (para 2.65). A number of studies [3](mostly concerning copyright breach, rather than defamation, but there seems no reason why web hosts would behave differently in response to an allegation of defamation) have found that this removal normally occurs without any consideration of the merits of the complaint – not surprising, since assessing whether a defamation claim has merit may be a complex legal task that the law gives the host no incentive to perform.
4. By contrast universities and colleges are obliged to make that assessment in order to balance the competing claims of their statutory duties to promote free speech and to prevent defamation. Whichever choice they make risks being found liable for breaking the law if their conclusion does not match that of the judge in any eventual trial.
5. For any new process for managing liability to be adopted by Internet hosts, it must be as simple and as legally safe as the current notice and takedown regime. Otherwise they will continue to use the defence contained in section 1(1) of the 1996 Act with its harmful effects for free speech.

6. Paragraphs 5(2) and 5(3)(a) of the Bill attempt to provide such a simple and safe process: the operator of the website is protected to liability provided (a) it was not the operator who posted the statement and (b) it was possible for the claimant to identity the person who did post the statement. This ought to be something that website operators would be willing to rely on, thus improving the protection of free speech rights, but only if the meaning of "possible ... to identify" is clear. The website operator will need to be certain that whatever arrangements they adopt (whether, for example, to require that all comments have a named author, or to retain a record of the owners of accounts that could be disclosed following a *Norwich Pharmacal* Order) are sufficient to meet the "possible to identify" test and thereby secure the benefit of the defence. If there is any doubt the operator will revert to the current notice and takedown approach, which does offer a certain defence to liability, and the opportunity to improve free speech will be lost. We recommend that the Regulations include a non-exhaustive list of circumstances in which it will be considered "possible for the claimant to identify the author" so that the website operator can be confident of benefitting from the defence.
7. Although commercial web hosts may be willing to make a simple distinction between identifiable and anonymous statements – responding to complaints by leaving the former but taking down the latter – universities and colleges may consider that offering anonymity is a measure they should take in support of their statutory duty to secure free speech. In that case they will be concerned that the process contained in paragraph 5(5) is appropriate and does not expose them to unreasonable legal risk. We therefore recommend that the process should allow the website operator, without incurring liability, to leave a statement on-line while continuing to protect the anonymity of its author until a judicial view has been obtained on the balance between the conflicting legal duties. A number of possible options were discussed in October's report by the Joint Committee on the Draft Defamation Bill [4] (see para 105). This would ensure that the balance between the competing human rights of free speech and protection of reputation was determined by an appropriate body, not by a website operator who may have little or no knowledge of either the facts or the relevant statute and case law.
8. Finally we note that the paragraph 5(5) process for dealing with anonymous postings must not itself create additional threats to the fundamental rights of either the author or the website operator. If an unsubstantiated allegation of defamation were sufficient to make a website operator disclose the identity or contact details of an anonymous poster this would create a worse breach of the right to privacy than the current process's breach of the right to free speech. The process must not interfere with the existing rights of website hosts, as established by the e-Commerce Directive, *Defamation Act 1996* and other statute and case law. For example websites must continue to have the options provided by those laws to immediately remove content that is clearly harmful, and to leave up content where they consider that a complaint has no merit.

Recommendations

1. We recommend that the Regulations include a non-exhaustive list of circumstances in which it will be considered "possible for the claimant to identify the author" so that the website operator can be confident of benefitting from the defence (paragraph 6)
2. We recommend that the Regulations should allow the website operator, without incurring liability, to leave a statement on-line while continuing to protect the anonymity of its author until a judicial view has been obtained on the balance between the conflicting legal duties (paragraph 7)
3. We recommend that the Regulations must not interfere with the fundamental rights of

either the author or the website operator (paragraph 8)

Links
[1] http://services.parliament.uk/bills/2012-13/defamation.html
[2] http://lawcommission.justice.gov.uk/docs/Defamation_and_the_Internet_Scoping.pdf
[3] http://www.bof.nl/docs/researchpaperSANE.pdf
[4] http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/news/publication-report/ (para 105)