

# **Online Defamation: A Case Study in Competing Rights**

*Julie Dare*

*School of Communications and Multimedia, Edith Cowan University*

On September 3<sup>rd</sup> 2003, the Supreme Court of Western Australia awarded Dr Trevor Cullen \$95,000 in damages for defamatory statements that appeared on a number of websites published by the defendant, Bill White (*Cullen v White* (2003) WASC 153). Despite the Court's finding of false imputations arising from defamatory words published on the Internet, and acknowledgment of the very great damage caused to Dr Cullen, many of the defamatory web sites can still be accessed on the Internet over 12 months after the judgment. Seen in this light, it would appear that the law of defamation, when applied to an online situation, has failed to provide any concrete protection or relief to Dr Cullen. This paper seeks to highlight the fundamental difficulties Australian plaintiffs face in achieving a satisfactory outcome in cross-jurisdictional online defamation cases, as experienced by Dr Cullen. In doing so, four key areas will be examined: the relationship between freedom of expression and the Internet, with particular reference to online defamation; an overview of the circumstances leading up to an including the court action taken by Dr Cullen (*Cullen v White*); defamation law as it has been applied to selected online defamation cases in Australia, the United Kingdom and the United States; and alternative online remedies undertaken by Dr Cullen.

## **Freedom of Expression and the Internet**

Historically, discourse regarding the Internet has focused on its potential to revolutionise society. Influential writers such as John Perry Barlow and Howard Rheingold viewed the Internet as a transformative communications technology, with the power to radically reshape society. In his famous speech A Declaration of the Independence of Cyberspace, Barlow outlined his vision of a new 'global social space' that was beyond the laws of traditional society. For him, cyberspace offered the opportunity to create a new social order, free from the entrenched power imbalances evident in the physical world. 'We are forming our own social contract. This governance will arise according to the conditions of our world, not yours. Our world is different' (Barlow, 1996). Howard Rheingold, writing on the phenomenon of virtual communities, foresaw the role the Internet would play in revitalising the public sphere. He suggested the Internet had the potential to 'challenge the existing political hierarchy's monopoly on powerful communications media, and perhaps thus revitalize citizen-based democracy' (Rheingold, 1998).

To some extent, as use of the Net has become normalised in Western society, Rheingold's predictions have been fulfilled. Increasingly, social and environmental activists are using the Internet to effect social and political change in the offline world. As an organising tool to coordinate protests at the local and global level, the Internet is unrivalled. Organisers of anti-globalisation protests centred on the WTO (World Trade Organisation) talks in Seattle in 1999, used the Internet to successfully coordinate protests, not only in Seattle, but also smaller protests in other countries timed to coincide with the first day of the summit (Smith, cited in Green, 2002, p. 121).

The Internet also provides an unprecedented forum for freedom of expression, particularly for minority or dissident voices, which often have little or no opportunity for expression through traditional media outlets. Organisations such as RAWA (Revolutionary Association of the Women of Afghanistan), which have operated under extremely dangerous conditions for almost thirty years, can now publicise their cause to a potential worldwide audience, through their website <http://www.rawa.org/>. The Internet gives RAWA the opportunity to deliver their message unfiltered, raising not only their international profile, but also encouraging moral and financial support. Echoing Rheingold's vision, Gregory Stock, Director of Programs for UCLA's Science, Technology and Society Program, said, in relation to the RAWA website: 'They can open a dialogue, at very low cost. It changes the game' (cited in O'Connor, 2000).

In contrast to other communications media such as television and radio, which are often the subject of extensive government regulation, the Internet has historically been a relatively unregulated, and at times seemingly anarchic medium. Social activists and minority groups rely on this to counter the government and corporate stranglehold on traditional media outlets. The ability to move their site to offshore servers, in the face of attempts by governments to block transmission, enables activists to continue to deliver their message (McLibel, 2000).

This relatively unregulated environment has provided a dynamic forum for the robust exchange of ideas and information. Internet pioneers such as Barlow, and the Electronic Frontier Foundation (EFF), of which he is a co-founder, view attempts by governments to

regulate the Internet as a threat to this utopian ‘marketplace of ideas’, and have been vociferous in their opposition to proposed legislative regulation of the Internet. Indeed, Barlow posted the Declaration of the Independence of Cyberspace immediately after the United States’ *Telecommunications Act 1996* came into effect, alarmed at ‘provisions that directly restricted online speech – the *Communications Decency Act*, subsequently stuck [sic] down as unconstitutional by the US Supreme Court’ (Given, 2004, p. 214). Barlow’s comments reflect a ‘digital libertarian’ (Given, 2004, p. 225) approach to Internet governance, which views attempts to impose government regulation restricting online speech as a threat to the fundamental integrity of the Internet.

Both Barlow and the EFF work actively to promote freedom of expression on the Internet. For the EFF, this is best achieved through the recognition and application of the United States’ Constitution’s First Amendment, which provides constitutional protection for freedom of expression (Electronic Frontier Foundation [EFF], 2004). Implicit in this is the argument that ‘free speech is a fundamental constitutional principle without which the Internet will not flourish and that, therefore, it should not be obstructed’ (Fitzgerald, 2003). Perhaps as a result of the strong advocacy of organisations such as the EFF, and the consequences of its origins in the United States, the Internet has, in many ways, become synonymous with an interpretation of freedom of expression that is heavily imbued with First Amendment principles.

In Australia, the Internet has now become a part of everyday life. According to Clarke, by the end of 2000 ‘more than 50% of Australian adults were online, and nearly 40% of

households had Internet access' (2004, p. 34). That this new communications technology has become an integral medium not only in the public, but also the private sphere, is supported by Fitzgerald, who suggests 'A space known as transnational space, epitomised by life in cyberspace, is an integral part of social existence in the 21<sup>st</sup> century' (Fitzgerald, 2003).

Moreover, although originally dominated by American users, increasingly the Internet is developing an international flavour, as users from many different countries contribute to this shared space (Barr, 2002, p. 247). As the number of individuals and institutions using the Internet increases dramatically, internationalising its audience, the opportunities for ordinary people from different cultures to interact in everyday contexts has never been greater. The potential for increased tolerance and understanding are positive benefits of this new level of global interaction. However, increased interaction can also lead to an increase in disputes arising from different cultural interpretations of rights and responsibilities, particularly where they involve freedom of expression and individual reputation (Barwell & Bowles, 2000; Fogo-Schensul, cited in Belmas, 2002).

Traditionally, the law of defamation has been used to resolve disputes involving the competing rights of freedom of speech and protection of reputation. However, resolving such disputes in an online environment presents unique difficulties, particularly when rights of freedom of speech, often identified as synonymous with the Internet, are challenged. Although many Internet users in the United States would consider the right to free speech 'an entrenched constitutional norm of transnational society and cyberspace'

(Fitzgerald, 2003), it may not adequately represent the views of an increasingly multicultural Internet user base. Evidence suggests the increasing internationalisation of the Internet is vigorously challenging the appropriateness of traditional laws, designed by and for the citizens of individual nations, to resolve disputes involving international parties (Fitzgerald, 2003). An examination of the circumstances leading to Dr Cullen taking legal action against his harasser, Bill White, and the effectiveness of the resulting legal decision in *Cullen v White*, illustrates the shortcomings of applying traditional remedies to resolve disputes in an online environment.

### **Cullen v White**

The genesis of this case originated in Papua New Guinea in 1996, when Bill White, an American lecturer employed at the Divine Word University in Madang was dismissed, after only one semester of a three year contract. Apparently aggrieved, White began a campaign attacking the small Roman Catholic university, its staff, volunteers and supporters. During the following six years he registered hundreds of websites, often in the victims' names, and sent thousands of defamatory emails and faxes, attacking a diverse range of individuals and organisations, from the former PNG Acting Governor-General Sir Peter Barter, to AusAid volunteers, clergy members, missionaries, medical practitioners, journalists and lawyers. Online discussion groups which traditionally encouraged robust debate were repeatedly forced to close due to White's abusive postings, and 'wild claims about sex scandals, corruption, cover-ups and conspiracies' (Robie, 2003). The common thread to these attacks was White's perception that the individuals were in some way defending the Divine Word University, and were involved

in a 'conspiracy to cover up the truth about widespread corruption which only he can apprehend' (Henningham, 2003).

Dr Trevor Cullen first met Bill White when they were both working at the Divine Word University in 1996. As they were teaching in different schools, they had little contact with each other. After two years at the Divine Word University, Dr Cullen moved to the University of Queensland, where he was undertaking his PhD on the topic 'Press coverage of HIV/AIDS'. Following a series of disturbing messages posted by White to the Pacific Forum website in July 1998, Dr Cullen sent the Web maestro a letter, asking them to take action on the abusive and defamatory postings. Instead, his letter was posted on the website, and within two days White had created a web page in Dr Cullen's name, alleging he was a paedophile and had committed academic fraud.

Initially White concentrated his attack on Dr Cullen through a series of websites defaming him personally and professionally, and through dozens of emails he sent to staff at the University of Queensland, as well as other journalism educators throughout the country. At one stage Dr Cullen counted sixty four websites that White had linked to his name, and was receiving up to six emails a day, sent by White using an alias identity (Cullen, cited in O'Leary, 2003). On these abusive and bizarre websites, White claimed Cullen had falsified his academic credentials, fabricated interviews, and misrepresented himself as an ordained priest. Using domain names he'd purchased including <http://www.trevorcullen.info/thesis>, White posted excerpts of Dr Cullen's draft PhD thesis which he'd downloaded, and accused him of falsifying research, using unsubstantiated evidence to discredit Dr Cullen's research. Interspersed with a repetitive

theme of ‘massive fraud’ related to Dr Cullen’s PhD thesis, White’s commentary also included repeated references to Dr Cullen’s allegedly false theological qualifications, and accusations of paedophilia and homosexuality.

By this stage White’s attacks on Dr Cullen had come to the attention of the wider academic and journalism community. ‘I had a few lecturers coming to me saying that students had raised concerns about me after coming across sites, which was distressing and embarrassing’ (Cullen, cited in Hellard, 2003). As Dr Cullen submitted articles to journals and newspapers, or travelled around the Pacific promoting HIV/AIDS awareness, White tracked his activities, ‘sending abusive emails to news organisations and NGOs across the Pacific’ (Cullen, 2000). By this stage White had also created defamatory and abusive websites targeting Dr Cullen’s colleagues; both the Head of The Department of Journalism at the University of Queensland, Professor John Henningham, and Dr David Robie became the unfortunate recipients of White’s vitriolic attacks after coming to Dr Cullen’s defence.

In January 2002 Dr Cullen moved to Perth, to begin his tenure as a Lecturer in Journalism at Edith Cowan University. Personnel at the University immediately began receiving abusive emails from White, warning them about Dr Cullen’s ‘fraudulent’ academic qualifications. When this didn’t have the desired effect, he continued his pattern of creating defamatory websites, this time targeting academic staff at ECU. In an attempt to counter the weight of defamatory material White was posting on the Internet, attacking Dr Cullen and ECU, the Head of the School of Communications and Multimedia,

Professor Robyn Quin, took the extraordinary step of posting an open letter, completely refuting White's allegations. The letter expressed ECU's view that White's allegations were defamatory, illegal and immoral (Quin, 2002).

Despite this show of support for Dr Cullen's academic credentials, and the public rebuttal of White's claims, the campaign of harassment towards Dr Cullen, and anyone who sought to defend him, continued unabated. Dr Cullen approached the Federal Police in 2001, and again in March 2003, seeking their assistance in bringing an end to White's offensive behaviour, but was advised there was little they could do, since there was no legislation that dealt specifically with this form of 'cyberstalking or cyberslandering', and as White had not physically attacked Dr Cullen, the police had no power to apprehend him on criminal charges (T. Cullen, personal communication, August 23, 2004). Moreover, the issue was further complicated by the fact that White did not reside in Australia; had he done so, there may have been some opportunity for police intervention.

By this time several other victims had attempted to have the defamatory websites removed, with limited success. The primacy given to free speech in the United States is reflected in regulatory mechanisms applied to Internet Service Providers - The Good Samaritan clause of the United States' *Communications Decency Act* provides protection from liability for ISPs. This has been interpreted in judgments as 'Congress has conferred immunity from tort liability as an incentive to Internet Service Providers to self-police the Internet... even where the self-policing is unsuccessful or not even attempted' (cited in Collins, 2001, 27.67). While some ISPs did remove White's sites after receiving

complaints, he was easily able to find other ISPs to host his material. Catalina Hosting, an American based ISP which in 2003 hosted the bulk of White's sites, chose not to remove them despite complaints; perhaps the financial advantages outweighed any moral obligations they may have had (Hymon, 2003). Approaches to Internet search engine companies and domain name suppliers have been similarly unsuccessful. Google refused to remove the offending sites, citing an unwillingness to be 'judge and jury over the approximately 3 billion Web sites that are searched by Google' (Krane, cited in Hymon, 2003). Domain name suppliers suggested they couldn't act unless a legal judgment against White was handed down in the United States. In the meantime, a quick search on Google continued to retrieve dozens of websites created by White, linked together to support his delusional theories and accusations against his victims.

Distressed at the impact it was having on his family and colleagues, and concerned about the effect White's attacks were having not only on his own reputation, but also those individuals who sought to defend him, Dr Cullen decided to take legal action. In April 2002 he sued White in the Supreme Court of Western Australia, having obtained leave to serve White in California. In a judgment delivered on 3<sup>rd</sup> September 2003, the Court found that White had gravely defamed Dr Cullen, deliberately disseminating defamatory statements on the Internet so as to 'maximise their detrimental effect... in the circumstances, it is obvious that the defendant intended to cause as much damage and hurt as possible' (Newnes J in *Cullen v White* (2003) WASC 153 at 9). In determining damages the Court took into account the harmful effect of the defamatory statements upon Dr Cullen's reputation and standing as an academic, and upon his future

employment prospects, as well as the ‘personal distress and anguish’ he had suffered (Newnes J in *Cullen* (2003) at 19). White did not appear at the proceedings, nor did he raise any defence to the defamatory statements. Dr Cullen was awarded \$70,000 in compensatory damages, and a further \$25,000 in exemplary damages, in recognition of the deliberate nature of White’s attacks. ‘The conduct of the defendant can be attributed only to a conscious desire on his part to cause the plaintiff the maximum amount of damage, hurt and embarrassment by what amounts to a campaign of deliberately offensive vilification’ (Newnes J in *Cullen* (2003) at 22).

### **The Law of Defamation and the Internet**

It is beyond the scope of this paper to give the reader an in depth analysis of defamation law as it applies in an online environment, but it is useful here to backtrack a little and attempt to provide a contextual background to this discussion. The law of defamation aims to balance two often competing interests: protection of the reputation of individuals and organisations, and protection of freedom of speech. The laws governing defamation in Australia vary across states, despite ongoing reviews by national and state Law Reform Commissions since 1968 (Law Reform Commission of Western Australia, 2002). This lack of uniformity is mirrored internationally, with defamation laws varying across jurisdictions. Defamation laws in the United States are ‘significantly less restrictive of speech than the laws of most (probably all) other countries because the US First Amendment provides strong protection for freedom of speech’ (Electronic Frontiers Australia, 2002). According to Brennan, ‘there is no more fundamental right under the United States Constitution than the right to free speech’ (1998, p. 127). In contrast, the

Australian Constitution does not expressly confer an enforceable right to freedom of expression; instead the provisions operate negatively, either through statute or common law, to prevent and reduce restrictions on speech (Chesterman, 2000, p. 3).

According to Raut, traditional notions of jurisdiction are based on territorial borders, with assumptions that ‘the law is made for a definite group of people residing in a certain territory...Legal rights and responsibilities are therefore largely dependent on where one is located’ (2004, p. 7). Under this model, it is assumed that individuals within a state or nation have some input into the laws that govern them (Raut, 2004, p. 11). In the past, the effect of a defamatory statement was generally limited to a defined audience, ‘such as the readership of a local newspaper or the viewers of a local TV broadcast’ (Raut, 2004, p. 10), and, as such, any defamation actions would be limited to a local jurisdiction. However, increasing use of the Internet has allowed citizens and publishers to reach a much wider audience than was previously possible, through the use of electronic mail, electronic bulletin boards and discussion boards, Internet Relay Chat, and web pages. ‘On the Internet... a defamatory statement can be instantaneously available throughout the world’ (Raut, 2004, p. 10). The question of whose jurisdiction should apply is thrown into stark relief; it is conceivable that jurisdiction can be available anywhere the Internet can be accessed. ‘If a defamatory statement is made available on a website, jurisdiction may lie in all the countries where access to that website can be obtained’ (Fitzgerald, 2003).

Recent online defamation decisions suggest a divergence between Australian and United States law in relation to Internet jurisdiction (Fitzgerald, 2003). In contrast to recent United States' court decisions, Australian courts are now tending to exercise jurisdiction in Internet related cases (Raut, 2004, p. 53). This was demonstrated in the landmark Australian High Court decision *Dow Jones & Company Inc. v Gutnick*, which was the first decision by any country's highest court to determine place of publication, and consequently which jurisdiction's laws apply for documents published online. The case concerned an allegedly defamatory article about Melbourne businessman Joseph Gutnick published in an edition of Barron's Online in October 2000, and the equivalent hard copy of the magazine. The online version is available through subscription. While the bulk of the subscribers at the time of the judgment were located in the United States, there were an estimated 300 subscribers in Victoria. The central issue hung on where publication of the defamatory article was deemed to have occurred, and consequently whether Gutnick 'could litigate his defamation action in the courts of Victoria, where the defamation law was stricter than in the United States' (Fitzgerald, 2003). Gutnick, relying on established common law principles relating to traditional defamation actions, argued that publication of the article occurred in the place where it was 'received and comprehended by a person (other than the publisher and the plaintiff) in Victoria, ie when the material sued for appeared on the appellant's website and was "downloaded"' (*Dow Jones & Company Inc. v Gutnick* (2002) HCA 56 at 108).

In contrast, Dow Jones submitted that the unique nature of the Internet called for a radical departure from this principle, which would recognise publication as taking place at the

point of upload. This would effectively mean articles that appear on Barron's Online are, for legal purposes, deemed to have been published in New Jersey where the servers are located (*Dow Jones* (2002) at 18). Furthermore, they contended that since the content was lawful at the point of upload in the United States, any attempt to enforce local jurisdiction by an Australian court would act to inhibit the Internet as a forum for transnational discourse.

Embedded in the appellant's argument was the idea that free speech is a fundamental constitutional principle without which the Internet will not flourish and that, therefore, it should not be obstructed. In essence, it was said that where the Internet runs so too should the First Amendment guarantee of free speech. (Fitzgerald, 2003)

In rejecting Dow Jones' argument, the High Court applied established common law principles in finding that reputation is damaged when the defamatory publication is comprehended by the reader, listener or observer (*Dow Jones* (2002) at 25). 'It is the publication, not the composition of a libel, which is the actionable wrong' (Dixon J in *Dow Jones* (2002) at 25).

Both Justices Kirby and Callinan noted the very real possibility that if place of publication, and therefore appropriate jurisdiction, was deemed to be at the point of upload, it could have serious ramifications for future plaintiffs based outside the United States.

Because of the vastly disproportionate location of web servers in the United States when compared to virtually all other countries (including Australia) this would necessarily have the result, in many cases, of extending the application of a law of the United States... to defamation proceedings brought by Australian and other foreign citizens in respect of local damage to their reputations by publication on the Internet... it would be small comfort to the person wronged to subject him or her to the law... of a place of uploading, when any decision so made would depend upon a law reflecting different values and applied in courts unable to afford vindication in the place where it matters most. (Kirby J in *Dow Jones* (2002) at 133)

A recent case, again involving Dow Jones, illustrates a similar approach to jurisdictional issues and Internet publications in the United Kingdom. Harrods alleged an article published in the Wall Street Journal, as well as on the Dow Jones' website, contained defamatory material about them. In an English High Court decision in May 2003, the court followed the Australian decision in *Dow Jones* in determining that England was an appropriate forum to hear the dispute.

In contrast, decisions by United States' courts reflect a different approach to the issue of jurisdiction, in which 'a plaintiff would need to prove that an out of state defendant's Internet activity was expressly targeted at, or directed to, the forum state in order to establish jurisdiction in the courts of that state' (Thompson & van der Toorn, 2003). A recent decision handed down by the United States Court of Appeal, *Young v New Haven*

*Advocate*, supported the ‘single publication doctrine’ which placed publication at the point of upload. Even though the plaintiff allegedly suffered damage to his reputation in Virginia as a result of comments in an online newspaper uploaded in Connecticut, the court held that the ‘newspapers had intended to direct the publication at a Connecticut audience, despite the article being accessible online in other jurisdictions’ (Thompson & van der Toorn, 2003).

Existing principles regarding place of publication, and consequently defamation, that were applied in *Dow Jones* were also applied in *Cullen v White* (Malcolm, 2003). In the decision, the Court accepted Dr Cullen had suffered distress, humiliation and embarrassment, and damage to his reputation as a result of the publication of false accusations by the defendant. Damages were assessed against the previous leading case involving online defamation, *Rindos v Hardwick*. This case, brought in 1993 before the era of widespread public Internet access, was the first Australian case to address defamation in an online environment. The plaintiff, Dr David Rindos, alleged Hardwick had made defamatory statements on a Usenet newsgroup, suggesting Dr Rindos was a paedophile and lacked professional competence. The court found the defendant liable, and awarded damages of \$40,000 (*Rindos v Hardwick* (1994) WASC Unreported Judgment 940164).

In the intervening ten years since the *Rindos* decision there has been a rapid expansion of the online environment, resulting in a radically different communications landscape. According to Malcolm (2003), the Court found the defamatory statements in *Cullen v*

*White* more serious than *Rindos*, resulting in a more substantial damages award. Factors relevant to the decision included the much larger number of people who now have access to the Internet, in comparison to when the *Rindos* decision was handed down in 1994; the longevity of many of *White*'s defamatory publications, in contrast to the limited lifespan of bulletin board messages in 1993; and the sheer volume of defamatory publications posted by *White* (Malcolm, 2003). In awarding damages, Master Newnes acknowledged the possible harmful effect of *White*'s actions on Dr Cullen's reputation and standing as an academic, and the personal distress and embarrassment he had suffered as a result. He held the 'damages award must compensate him in respect of those matters and be sufficient to signal to the public the vindication of his reputation' (Newnes J in *Cullen* (2003) at 19).

Despite the Supreme Court finding in his favour, difficulties in registering the judgment in the United States has meant judgment has not been satisfied. Many of the offending websites defaming Dr Cullen, and other innocent individuals, continue to rank high on a quick search on Google. The possibility of pursuing legal action through the American courts was investigated by one of *White*'s other victims, Sir Peter Barter, but found to be financially prohibitive. He was advised by 'several US lawyers that it would cost about US\$350,000, and that there was no assurance of success because it was a legal 'grey' area' (T. Cullen, personal communication, August 23, 2004).

### **Alternative Remedies**

In the absence of any legal relief, perhaps the Internet itself may offer the next best solution. Echoing right of reply arguments put forward by anti-defamation proponents (Martin, 1996), Dr Cullen, along with several other victims of White's attacks, has used the Internet to launch a counter attack. He has created his own webpage, using the only domain name White had not appropriated – <http://www.trevorcullen.id.au>, to refute White's claims. The home page includes a summary of the events of the past 6 years, and outlines the purpose of the site. 'I intend to use this web site to share my research findings. For now, however, its purpose is to correct false information that has been disseminated by notorious cyber-stalker and liar Bill White of Los Angeles' (Cullen, 2004). This comprehensive site links to similar pages produced by other victims, including John Henningham and David Robie, as well as the Supreme Court decision, a psychologist's report on White, and other related material. There are also links to many of White's own sites, and information on how to identify his material. The latter, combining many of White's sites under the one umbrella, highlight for the reader in a more forceful way than any amount of criticism by his victims could ever achieve, the irrational nature of White's comments. As a result of his own words, the full extent of White's extraordinary behaviour is fully exposed.

Critics of defamation law would argue that this form of reply to defamatory statements is preferable to costly legal action, and is the most appropriate response to online disputes of this nature. Critics such as Brian Martin argue that:

Defamation law doesn't work well to protect reputations. It prevents the dialogue and debate necessary to seek the truth. More speech and more

writing is the answer to the problem rather than defamation law, which discourages speech and writing and suppresses even information that probably wouldn't be found defamatory if it went to court. Published statements – including libellous ones – are open, available to be criticised and refuted. (Martin, 1996)

Moreover, the Internet allows the individual to respond in a timely fashion, with minimal expense, and without the danger of inhibiting robust debate. In fact, one of the major benefits of the Internet, according to commentators such as Johnson (2000, p. 188) and Barr (2002, p. 247) is the power it puts in the hands of ordinary people, sitting at their desks in their home or office. Previously access to the mass media was limited to an elite few who controlled the media conglomerates; the opportunity to respond to offensive or defamatory remarks was limited to those with the necessary financial resources. The decentralised, relatively anarchic structure of the Internet has redefined the rules. Now almost anyone (in Western societies) with access to the Internet can be a publisher.

Ironically, it is this aspect of the Internet which White has used so successfully in his campaign against Dr Cullen. From the safety of his home, he has been able to create a network of offensive websites. 'This is what is so nice about the Internet... you can do most of it without leaving your desk' (White, cited in Hyman, 2003). For White, the Internet offers an unprecedented opportunity to air his grievances publicly, and attack others with very little risk to him. 'In the Old West, they called the six-shooter, 'the great equalizer'... Well, in the 21<sup>st</sup> century and the Information Age, the Internet is the great

equalizer' (White, cited in Hyman, 2003). One wonders whether White's use of the technology was what Howard Rheingold had in mind when he predicted the role the Internet would play in revitalising the public sphere.

Martin is not alone in linking defamation law to the repression of free speech. Critics accuse plaintiffs of using the legal system to stifle freedom of expression, echoing Martin's fears of its chilling effect on robust debate, and warn of dire consequences for the Internet should legal decisions such as *Dow Jones* be enforced. The significance of this decision for many commentators lies in its potential reach. Critics fear the application of current defamation law to the Internet will result in 'a watering down of opinions to meet the most restrictive laws' (The Australian, 2001). Their argument is that anyone who publishes on the Internet is 'effectively publishing in every nation instantaneously' and must therefore be aware of defamation laws in every jurisdiction. They contend the resulting self-imposed censorship would severely limit freedom of expression, with dire consequences for open and informed debate on matters of public interest.

This 'spectre of 'global' liability' is challenged by Fitzgerald (2003), who points out limitations to the judgment which will, in practical terms, limit its global impact. In the *Dow Jones* decision, the scope of the judgment was limited to a Victorian resident suing for damage occurring in Victoria, having given an undertaking to the court not to seek damages outside that jurisdiction. Furthermore, the impact of judgments in defamation suits would be limited to jurisdictions where the defendant had a reputation, and 'would only be of value if the judgment could be enforced where the defendant held assets' (Fitzgerald, 2003). Given the strong protection of free speech afforded by the First

Amendment, it is debatable whether foreign defamation judgments would in fact succeed in being enforced in the United States.

While the risk posed by frivolous defamation suits to a healthy public sphere shouldn't be underestimated, critics such as Martin appear to ignore the very real damage malicious defamation of individuals can have on society as a whole. Not only do the individuals suffer, but the ripple effects of the damage can extend far beyond the victims' sphere of influence. In the case of Bill White, his attacks affected not only professional people such as Dr Cullen, but through similar defamatory attacks on volunteer aid workers, missionaries, and aid organisations had the potential to cause much wider, long term damage. 'To the extent that they may have affected financial and other support for genuine charitable and development activity, they may have adversely affected thousands' (Henningham, 2003).

There may be some merit to Martin's assertion that the best answer to libellous comments is for the victim to respond by challenging the allegations head on. And, it could be argued that in a situation involving two individuals, as was the case with *Cullen v White*, a legal approach is unnecessary and high-handed. However, it is difficult to see how expecting an individual to 'cop it sweet' when they are subjected to ongoing abuse and libel, in the interests of protecting freedom of expression for the public good, can in any way contribute to an enriched online public sphere. Indeed, White's very actions would appear to have gone some way to stifling speech itself, through his continued abusive interactions on online discussion groups and forums, and his attacks on journalists.

Dow Jones' contention that the benefits of freedom of expression provided by the Internet far outweigh any disadvantages to individuals, and therefore warrants extra legal protection, echoes earlier comments by digital libertarians such as Martin and Barlow. However, this argument fails to take into account the necessity in any civil society that individual rights carry with them duties and responsibilities (Kirby J in *Dow Jones (2002)* at 115). In rejecting Dow Jones' submission, Kirby J (*Dow Jones (2002)* at 115) cites international human rights law which recognises that everyone has the right to legal protection from attacks on their honour or reputation:

Any suggestion that there can be no effective remedy for the tort of defamation (or other civil wrongs) committed by the use of the Internet (or that such wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable. (*Dow Jones (2002)* at 115)

Moreover, a right of reply response such as Dr Cullen has launched in no way prohibits the offending party from continuing their attacks. In such a case, the right of reply argument seems to fall well short of a suitable solution.

While it is vitally important that people can freely express their ideas, views and grievances on the web, there must be some control to protect people from continually posting blatant defamatory and abusive material...Due to hardly any regulation on the web, it seems anyone can say anything about

anybody and escape the consequences. Somehow this is not right. (Cullen, 2000)

As more and more people go online, and the Internet becomes just another tool in the communications toolbox, it is likely that this sort of dispute will become more commonplace. In the relatively unregulated environment of the Internet, the risk of this sort of harassment occurring to ordinary people in everyday situations, as opposed to public figures or corporations, shouldn't be trivialised. The proliferation of sites such as CyberAngels (<http://www.cyberangels.org/101/chat/index.html>), and WiredSafety (<http://www.wiredpatrol.org/>) which provide advice on how to use the Internet safely, suggest the risk of harassment has become a part of the everyday online experience. It is paradoxical, perhaps, that such a useful tool, so embedded in daily life, can also increase the opportunities for particular offensive behaviours.

Much of the literature in regard to online defamation focuses on the damage to public figures and organisations, as well as the chilling effects it may have on the media, and, by extension, the public sphere. But for many ordinary people, the risk of harassment and online defamation is just as distressing. Dr Cullen, responding to White's initial attacks on an Internet forum out of genuine concern for others, could not have guessed he would inadvertently trigger such an irrational, obsessive reaction. It is not beyond reason to suggest anyone, through quite innocent interaction on the Internet, could inadvertently trigger a similar obsessive response from another mentally unstable individual, with little chance of relief. While governments and corporations have the financial power to force

individuals to rethink their position, it may well be individuals who suffer the most on the electronic frontier.

Although Dr Cullen achieved a legal and moral victory, the nature of the Internet, and the cross-jurisdictional and financial issues involved in registering an Australian defamation judgment in the United States, have combined to deny him any concrete relief. Far from being deterred from publishing defamatory material, White's attacks continued unabated, with new websites appearing attacking both Dr Cullen and his solicitor, Jeremy Malcolm, and lampooning the legal proceedings in the Supreme Court of Western Australia.. And, in a final postscript to this remarkable story, despite the death of the central character, Bill White in early 2004, many of his websites remain active. A simple search for 'Trevor Cullen' on Google continues to bring up a myriad of sites, mostly the product of White's feverish imagination. So, until such time as the commercial contracts White entered into with domain name suppliers and ISPs expire, his legacy of lies and malicious attacks will continue to haunt his victims.

## References

The Australian (2001, June 30) *Defamation law's bad reputation*. Retrieved August 24, 2004, from Australian/New Zealand Reference Centre database.

Barlow, John Perry (1996) *A declaration of the independence of cyberspace*. Retrieved August 20, 2004, from <http://www.eff.org/~barlow/Declaration-Final.html>

Barr, Trevor (2002) The Internet and online communication, in Stuart Cunningham & Graeme Turner (eds) *The Media and Communications in Australia*. Crows Nest, NSW: Allen & Unwin, pp. 244-257.

Brennan, Frank (1998) *Legislating liberty: A bill of rights for Australia?* St Lucia, Qld: University of Queensland Press.

Chesterman, Michael (2000) *Freedom of speech in Australian law: A delicate plant*. Burlington, Vermont: Ashgate.

Clarke, Roger (2004) The emergence of the Internet in Australia: From researchers' tool to public infrastructure, in Gerard Goggin (ed.) *Virtual nation: The Internet in Australia*. Sydney: University of New South Wales Press, pp. 30-43.

Collins, Matthew (2001) *The law of defamation and the Internet*. Oxford: Oxford University Press.

Cullen, Trevor (2000, April 20) *Open letter challenges DWU stalking: Who is Bill White?* Retrieved August 8, 2004, from <http://www.asiapac.org.fj/cafepacific/resources/aspac/reg2670.html>

Electronic Frontiers Australia (2002) *Defamation laws & the Internet*. Retrieved August 12, 2004, from <http://www.efa.org.au/Issues/Censor/defamation.html>

Fitzgerald, Brian (2003) Dow Jones & Co Inc v Gutnick: Negotiating 'American legal hegemony' in the transnational world of cyberspace, *Melbourne University Law Review*, 21. Retrieved August 12, 2004 from AustLII database.

Green, Lelia (2002) *Technoculture: From alphabet to cybersex*. Crows Nest, NSW: Allen & Unwin.

Hellard, Peta (2003, July 27) Cyber victim seeks payout. *The Sunday Times*. Retrieved August 2, 2004, from <http://www.jschool.com.au/billwhitecyberstalker.php#sundaytimes>

Henningham, John (2003, August 14) *Bill White: cyber-stalker*. Retrieved August 2, 2004, from <http://www.jschool.com.au/billwhitecyberstalker.php>

Hyman, Steve (2003, June 15) Cyberspace: Last frontier for settling scores? *Los Angeles Times*. Retrieved August 28, 2004, from <http://www.trevorcullen.id.au/press/latimes.html>

Johnson, Deborah (2000) Democratic values and the Internet, in Duncan Langford (ed.) *Internet ethics*. London: Macmillan, pp. 181-199.

Law Reform Commission of Western Australia (LRCWA) (2002) *Defamation*. Retrieved August 25, 2004, from <http://www.lrcjustice.wa.gov.au/index.htm>

Malcolm, Jeremy (2003) *A new Australian damages benchmark in Internet defamation*. Retrieved August 3, 2004, from <http://www.ilaw.com.au/public/cullenarticle.html>

Martin, Brian (1996) *Defamation law and free speech*. Retrieved August 12, 2004, from University of Wollongong, Faculty of Arts, Suppression of Dissent website: <http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/defamation.html>

*McLibel: Two worlds collide* (Franny Armstrong, One-Off Productions: London, 2000).

O'Connor, Anne-Marie (2000, July 8) Internet gives a voice to Afghan women's cause. [Electronic version]. *Los Angeles Times*. Retrieved August 28, 2004, from <http://www.rawa.org/latimes.htm>

O'Leary, Cathy (2003) Cyber-stalker traps Perth lecturer in web of deceit. [Electronic version]. *The West Australian*, October 11, p. 13. Retrieved August 20, 2004, from <http://www.trevorcullen.id.au/press/westaustrian.pdf>

Quin, Robyn (2002) *Open letter*. [Electronic version]. Retrieved August 22, 2004, from [http://www.trevorcullen.id.au/ECU\\_letter.pdf](http://www.trevorcullen.id.au/ECU_letter.pdf)

Raut, Bimal (2004) *Determining the judicial jurisdiction in the transnational cyberspace*. Retrieved August 3, 2004, from Queensland University of Technology, Australian Digital Theses Program Web site: <http://adt.library.qut.edu.au/adt-qut/public/adt-QUT20040713.100855/>

Rheingold, Howard (1998) Electronic frontiers and online activists, in *The virtual community: Homesteading on the electronic frontier* (chap. 9). Retrieved August 22, 2004, from <http://www.rheingold.com/vc/book/9.html>

Thompson, Belinda & van der Toorn, Damien (2003) *World wide Internet defamation law divided*. Retrieved August 3, 2004, from <http://www.findlaw.com.au/articles/default.asp?task=read&id=9966&site=LE>

## **Legal Authorities**

*Cullen v. White* (2003) [Electronic version] WASC 153 (Newnes, M). Retrieved August 22, 2004, from <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/wa/WASC/2003/153.html?query=cullen%20and%20white#disp5>

*Dow Jones & Company Inc. v Gutnick* [Electronic version] [2002] HCA 56 (10 December 2002). Retrieved August 17, 2004, from [http://www.austlii.edu.au/cases/cth/high\\_ct/2002/56.html](http://www.austlii.edu.au/cases/cth/high_ct/2002/56.html)

*Rindos v Hardwick* (1994) WASC Unreported Judgment 940164.