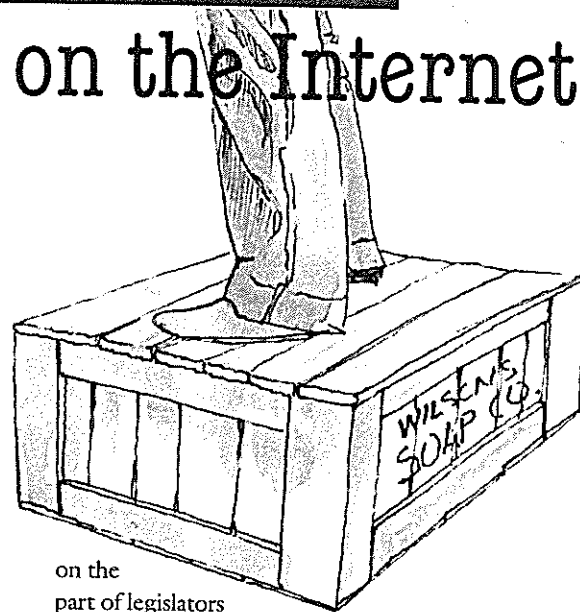


Ron Wigglesworth

## Speaking to the World:

# Defamation on the Internet

**Peter Bowal**



The growth of the Internet and the World Wide Web has been amply chronicled over the last few years. Many Canadians have their own personal modem and account for electronic transmission. If not, they have access to one in the public domain of libraries and other community resources. Getting on-line will soon be as commonplace and easy as getting a dial tone.

The law is characteristically in a catch-up mode to leaps in social and technological change. There is no law which has been enacted to regulate the Internet. This is due largely to a failure

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on the part of legislators to truly understand this electronic phenomenon and devise *how*, if at all, they can control it in the public interest. Telecommunications have always been troublesome matters for regulators since radio waves are impossible to contain. At the most, regulators concentrate on licensing operators such as television stations which are large capital plants. These businesses could not escape detection by the licensing authorities, which is the practical basis for control.

The Internet, on the other hand, is an entirely different medium. With a density of verbal, auditory, and graphic images being instantly transmitted and received among hundreds of millions of people, no one sovereign state can monitor, much less regulate, the content on the Internet. It is often said that this is the first great democratization of speech since the printing press. Now everyone can be a publisher to the world.

This is not to say that there have not been, and will not continue to be, legislative efforts to regulate Internet communications. The most recent and well-known example is the United States government's legislation to outlaw pornographic images. Recently, that statute has been ruled unconstitutional as against the freedom of speech. Its critics argue that it is too broad. There are many other concerns,

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including extraterritoriality and enforcement. How does one penalize someone in a far off country who has posted offensive content?

Another sphere of law which is thought to embrace Internet communications in the same way as other communications is *defamation*. There is nothing about electronic transmission which would exempt one from the laws of defamation. In fact, the opposite is true. While electronic transmission is more ephemeral, it also has considerably greater reach than magazines and newspapers.

On March 31, 1994, the first defamation judgment from Internet communication was handed down by the courts. This case was from Western Australia and involved two university professors in a nasty exchange which turned personal. The following is a summary of the facts.

An American anthropologist emigrated to Western Australia where he held down an academic position. By most accounts he was a successful professor, but after a few years he was denied indefinite employment, *tenure*. He was terminated instead. His colleagues from all over took an interest in this

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tenure decision. On an electronic network of anthropology scholars around the world, his termination in Western Australia was raised and debated, indeed criticized.

These discussion group networks are now a fixture of the Internet, where computer users can communicate instantly with each other and discuss various issues of interest. The types of messages (postings) vary. They would include information on subject issues, research, opinions and debates, questions, and notices of meetings which are of interest to the group. Occasionally, messages will have personal content, but this is frowned upon. Some of these discussion groups have closed *lists*; others are more open. At the time of this particular discussion, it was estimated that there were approximately 23,000 persons worldwide whose computers had access to the communications of this group.

The messages posted to the bulletin board can remain on a subscriber's or participant's computer for days or weeks until it is deleted, if ever, from the machine by the user. Postings can be made from all over the world by people interested in the general subject. Most computers and software programs permit the messages to be printed on hard copy by anyone participating in the discussion group. Such printouts can, and are, circulated to others.

In response to criticism of the termination, a professor familiar with the Western Australian university in question, sent a long message out to the whole group,

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... defamation litigation, which ultimately seeks to undo the damage to one's reputation, itself may be continuously reported in the mass media.

which is to say, essentially to the whole world. The message detailed how the sender, later to become the defendant in the defamation action, had philosophical and academic differences with the terminated professor. He wrote, in part,

... [he] quite openly attempted to discredit my own lifetime's experience with Aboriginal people on the basis of his one phone call apparently to an outstation! I have met the man myself, and my impression is that his entire career has been built not on field research at all, but on his ability to berate and bully all and sundry on the logic of his own evolutionary theories. In the local pub, drinking and chain smoking all the while for that matter.

Secondly, and this is rumours passed to me by several reputable and long-standing Western Australian anthropologists as to [his] 'Puppy Parties' focused, I am told on a local boy they called 'Puppy'. Hmm, strange dicey behaviour indeed, especially here in an environment dominated by conservative fundamentalists...

The judge found that this message imputed sexual misconduct and academic incompetence which were "seriously defamatory" to the terminated professor. The inference was that these matters had some bearing on the dismissal decision. The judge further believed that the nature of these comments increased the likelihood that they would be repeated and publication would lend strength to them. The author of these remarks made no attempt to justify them. He also did not defend the defamation action. The judge concluded that the dismissed professor enjoyed a good professional reputation in his field.

The dismissed professor was still unem-

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played at the time of trial, and the judge said that these defamatory remarks were likely to have a "most harmful effect" on his reputation. The academic had also endured personal suffering from the defamation. The judge thought it would be more difficult for him to obtain appropriate employment. He awarded the defamed professor the equivalent of \$40,000. The case is *Rindos v. Hardwick*, heard in the Supreme Court of Western Australia.

This case demonstrates that Internet transmission is no different to the law of defamation than other forms of publication. In fact, it may lead to more defamation lawsuits merely by the extent of publication. Two ironies emerge from this case. The first is that defamation litigation, which ultimately seeks to undo the damage to one's reputation, itself may be continuously reported in the mass media. More people will hear about the allegations by virtue of the litigation than from the original publication. Litigation fans the defamatory allegations. Rarely can a successful lawsuit ever erase the damage of the allegation in the public mind. In this sense, the cure may be worse than the disease.

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The second irony has to do with the unassuming calm of the Internet. In the quiet and privacy before one's computer terminal, the Internet may seem faceless. One may be tempted to be bold in expressing oneself. Self-restraint and instant accountability do not accompany written communications in the same way that they keep oral face-to-face communications in check. Ironically, the medium of electronic transmission combines the widest possible publication (hence, opportunity for harm) with the most modest input form (lack of accountability). One must, therefore, exercise more caution when using this new technology than when using other forms of communication. LL

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