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THE LEGAL CHALLENGES OF SOCIAL MEDIA

David Mangan and Lorna E. Gillies

1. Introduction

John Perry Barlow’s 1996 declaration from ‘Cyberspace’¹ earns frequent mention in discussions relating to the internet. Although it contained the self-assuredness hyperbole permits, this piece was also a demarcation point for an on-going discussion. With social media, the internet has developed a more complicated human character than one may glean from Barlow’s ‘new home of the Mind’.

There are several reasons why this collection has been an exciting project; an enthusiasm we hope readers share. First, the contributors bring the perspective of their own discipline knowledge. And yet, all are connected by the fact they have worked in the print and digital eras (to varying degrees). The ambition here is not only to provide prescient commentary but also to draw out the tremendous opportunity the present offers to speak to a future while knowing a past. Second, although the internet was initially developed as a research and military tool,² the uptake of social media remains a testament to the human

¹ John Perry Barlow, ‘A Declaration of the Independence of Cyberspace’ <<https://www.eff.org/cyberspace-independence>> All websites last accessed 19 September 2016.

² On the military origins of the internet see Jon Bing, ‘Building Cyberspace: A Brief History of the Internet’ in Lee A Bygrave and Jon Bing (eds) *Internet Governance – Infrastructure and Institutions* (OUP 2009) 8; Scott Malcomson, *Splinternet* (O/R Books 2016).

nature of our creations; a 'culture of connectivity'.³

The referendum on United Kingdom membership in the European Union factors into this collection in differing ways. The result (approximately 52% in favour of leaving the Union) has the potential to further complicate the area as a whole from a regulatory, pragmatic and fundamental rights perspective. Solutions, like plans, are speculated upon but conclusiveness is currently lacking in both. Given the absence of clarity at present, the contributions herein have either acknowledged the uncertainty that will remain for a period or elected to focus on particular jurisdictions. Where the United Kingdom forms the jurisdiction under study, the aim has been to use that law as an example of a response to this challenging area.

2. Social Media and the Law

Social media, as an example of user-generated platforms on the internet, provide unprecedented scope for expression, connection and selection. Through social media, the individual has instant access to a vehicle for self-expression and to an audience unrestricted by geography. Individuals may express opinions, beliefs, insights. They may also construct idealised identities. Through these personae, people connect. Through connection there is also selection: certain ideas are associated with by choice; groups are joined as an extension of idealised selves. These points may be unpacked using CS

³ As José van Dijck has put it: José van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (OUP 2013).

Lewis' memorial lecture at King's College London in 1944 entitled 'The Inner Ring'.⁴ This lecture contains Lewis' '[a]dvice and warnings about things which are so perennial that no one calls them "current affairs;" aimed at university graduates about to enter the post-World War II workforce. He defines the Inner Ring as one of the two hierarchies of human interaction. The first is the formalised hierarchy in which rank governs (such as in the military). The second, the focus of Lewis' lecture, is an unwritten hierarchy, more difficult to particularise: not a 'formally organised secret society with officers and rules which you would be told after you had been admitted'. He continues: 'You are never formally and explicitly admitted by anyone. You discover gradually, in almost indefinable ways, that it exists and that you are outside it; and then later, perhaps, that you are inside it'. One of the more ominous warnings in this lecture is the very human ambition to be part of the Inner Ring and the individual's attempts to gain admission: 'Of all the passions, the passion for the Inner Ring is most skilful in making a [person] who is not yet a very bad [person] do very bad things'. The nefarious is not the focus here; though as Lewis suggested it remains omnipresent.⁵ Instead, Lewis' phrase the 'inner ring' encapsulates a human characteristic; a desire for belonging, uniqueness and exclusivity. Prior to social media, this would be achieved by the localised gathering of 'like-minded' individuals. With social media, physical gathering need not take place and membership is no longer limited by geography. In this context, the contributors to the present collection insert the challenges of social media and the law's responses.

⁴ There are different sources for this. The one relied upon here is reproduced by the CS Lewis Society of California <<http://www.lewissociety.org/innerring.php>>.

⁵ To dramatise the more notorious aspect, Ben MacIntyre has employed Lewis' 'inner ring' in a biography of the double agent Kim Philby: Ben MacIntyre, *A Spy Among Friends* (Bloomsbury 2014) 42.

The law's engagement with speech dramatises one of the remarkable tensions posed by social media. Speech has been imbued with the inherent goodness of a democratic society.⁶ Conversely, defamation law has long illustrated the power of speech as a vehicle for harm.⁷ User-generated content on the internet poses further peril for reputation.⁸ To a mechanism with such potential, the law has adapted with difficulty; and for good reason: how does the law regulate⁹ an entity that speaks to individual self-development in such an exceptional manner? Regulation of online expression affects the deeply cherished democratic principle of free speech. Further adding to the complexity of the topic, social media casually cross over the public/private law divide; challenging the compartments into which regulatory responses occur, extend and overlap. While the various platforms provide users with control over intended audiences, these comments may still find their way into the public domain.¹⁰ To that end, this book engages with the legal implications of social media from the perspective of both public and private law.

Among several challenges posed to the law by social media, the gap between the legal treatment of social media and users' understanding of that interplay stands out. Many users of social media contend these platforms are the equivalent of engaging in a

⁶ Professor Barendt has identified the 'democracy rationale' as the 'most influential theory in the development of 20th century free speech law': Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 18, 20.

⁷ Daniel Solove contends reputation and freedom are interlinked: Daniel Solove, *The Future of Reputation* (YUP 2007).

⁸ Danah Boyd's term 'persistent' embodies the challenges here: Danah Boyd, 'Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications' in Zizi Papacharissi (ed), *A Networked Self: Identity, Community, and Culture on Social Network Sites* (Routledge 2011).

⁹ The question of regulation has been a matter of pointed debate. See for example, Chris Reed, *Making Laws for Cyberspace* (OUP 2012); Daithí Mac Síthigh, 'The Mass Age of Internet Law' (2008) 17 I&CTL 79. Mac Síthigh returns to the discussion in this volume; as do other contributors, such as Andrew Murray, Ian Walden and Lorna Woods.

¹⁰ This is not to overlook consumer choice regarding security, the 'walled garden'. See further Andrew Murray, *Information Technology: The Law and Society* (3rd edn, OUP 2016) ch 22.

conversation. Presently, users not trained in law would discern no potential for legal repercussion for what they write on these platforms. However, defamation law has long established a distinction between spoken and written communication; where the latter is perceived to have greater harmful potential. Social media, if viewed as an online conversation, is a transcript and as such places the ‘speakers’ in a more (legally) actionable position. Furthermore, the permanent form of social media comments arguably situates the individual at home in a similar position to a publisher defendant in the common defamation cases; for this form of communication must be viewed as something beyond what was previously contemplated with regards to this tort.¹¹ The contributors to this collection will outline how the law, in various legal sub-disciplines and with varying success, has endeavoured to adapt existing tools to the new circumstances posed by social media.¹²

Social media have also precipitated an intriguing epidemic of convergence. For example, a platform such as LinkedIn aims to build up a viewable network of business contacts in a manner similar to Facebook. Indeed, even Facebook is not exclusively a social networking vehicle because it is increasingly used for non-social purposes.¹³

Convergence also creates communities that are in some instances linked by a social norm; a notion that comes up in varied ways in the ensuing contributions. It should be

¹¹ The Australian High Court in *Dow Jones v Gutnick* [2002] HCA 56 [118] described the internet as ‘not simply an extension of past communications technology’.

¹² One example from civil litigation is the *Norwich Pharmacal* order, made pursuant to *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1973] UKHL 6, referenced by Andrew Scott and discussed by Lorna Gillies in this volume. This procedural device may be requested to identify the location of a possible defendant for the purposes of, for example, establishing the English court’s jurisdiction.

¹³ The situation recalls discussion of a ‘networked information economy’: Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (YUP 2006).

kept in mind that these communities are ‘fluid’ and that ‘connection, not affection, is the defining characteristic’.¹⁴ While they may provide a means for addressing regulatory issues promulgated by social media, there remains a problematising relativity to these fluid communities.¹⁵

3. The content of this book

As social media cross the public and private spheres, the sequence of contributions is intended to take readers through the diverging yet inter-related issues. Two points consistently arise throughout the volume. First, the effect on individual rights is examined in different areas of law. Second, a framework for engaging with these challenging issues is the aim (as opposed to a statement of the law which can easily become dated).

Social media and the rule of law

Commencing the substantive elements of the collection, *Andrew D. Murray* offers a theoretical framework through which the undisturbed topic of the rule of law on the internet may be viewed. With regards to Cyberlaw (within which social media are constituent), he contends discussion has focussed ‘too extensively on the cyber and too little on the law’. Aiming to ‘rebalance and refocus’ the area, he investigates the rule of law in Cyberspace in an effort to ‘form the foundations of a Cyberlaw jurisprudence by asking some difficult normative questions: Can a rule of law exist online? If so who is the

¹⁴ David S Ardia, ‘Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law’ (2010) 45 Harv CR-CL L Rev 261.

¹⁵ Ardia (n 15) suggests this is the case with the management of reputational information. Mister Justice Binnie’s (of the Canadian Supreme Court) aphorism can also apply: reputation is the ‘regrettable but unavoidable road kill on the highway of public controversy’ in *WIC Radio Ltd v Simpson* [2008] SCC 40 [2].

legitimate lawmaker and what values are enshrined by Cyberlaw?'.

Public order in a virtual space

Part two moves into the more discipline-specific considerations of social media and the law. Free speech has long been a right steeped in public law. The right gains renewed consideration with the noteworthy potential afforded by social media for individual expression. To that end, the chapters in this section take certain examples of the difficulties encountered with regards to the right to free speech and where there may be a crossing of boundaries online. We begin with criminal law adjudication involving social media.

Considering the recordable and searchable nature of digital media, *Jacob Rowbottom* draws attention to the question of proportionality and the absence of public interest defences in criminal law. Social media and criminal law have been common partners in news reports. Rowbottom's discussion (as well as that of other contributors) alludes to the differing treatment of the law depending upon the venue, an exchange on a social media platform as compared to a conversation in a café. The profound change brought about by social media underpins how Rowbottom sees criminal law addressing the challenge with a 'catch-all' provision that 'is not narrowly tailored to deal with a specific problem'. Analysing how the 'application of the law to conversations, ill-judged remarks and spontaneous comments can give rise to concerns about disproportionate effects', he assesses the English Crown Prosecution Service (CPS) guidance for prosecutors in relation to the social media.

Ian Walden probes the need for a regulatory scheme for the press as well as the difficulties of preserving freedom of expression while protecting and balancing other fundamental rights. Walden brings a wealth of experience to his comments and so there is instruction when he writes: ‘Media law is a messy business, as messy as the sector itself’. Social media have compounded the existing challenges; prompting questions about regulation: ‘First, whether such services fall within the regulatory sphere? Second, if they do, how should the rules be applied? Do we adopt a principle of offline-online equivalence, or do we need to accept that social media services present regulatory challenges that require innovative solutions?’. Walden’s analysis reveals the complications of social media as it pertains to the now expanding term ‘press regulation’.

Daithí Mac Síthigh investigates the issues surrounding contempt of court, court reports, jurors, and social media in an international context. Contempt of court and social media have intersected through some high-profile news reports involving public figures who sought an injunction to prevent their names from being used in connection with these news stories. In a discussion that recalls that of Andrew Murray’s regarding the rule of law, Mac Síthigh outlines how ‘contempt is facing a number of quite substantial challenges in relation to social media’. He further draws out the difficulties using work from commonwealth law commissions.

In relation to the ‘edges’ of freedom of expression, *Lorna Woods* assesses ‘the application of freedom of expression principles in the context of social media and

questions whether the right to private life might not provide a better frame for analysis'. To this forceful assessment, Woods argues that there have been difficulties with the manner in which Article 10 of the European Convention on Human Rights may be utilised. She bundles these complications into the following categories: the way in which individuals' engagement with social media is viewed; the type of speech that is valued; and the persons on whom the rights burden falls. She asserts, in conclusion, that greater engagement with the relationship between Articles 8 and 10 are necessary in order to effect a 'coherent framework to protect individuals' rights in the social media context'.

Private law responses to social media

While free speech may be viewed as a public law freedom, its potency can be witnessed in private law through, for example, the calls for expanding defences (legislated and common law) to the tort of defamation aimed at protecting a wider range of free speech. This balancing remains delicate and the chapters in this third section engage with aspects of that challenge.

Using a joke as a departure point, *Emily B. Laidlaw* maps the regulatory environment of speech on social networks focusing on the ways that the law, industry measures as well as voluntary policies by the providers intersect. In Canada and the United States of America (as compared to the United Kingdom for example), complaints about content are left to private regulation by the hosts. In an effort to map out the path of complaints on user-generated networks, Laidlaw endeavours to 'highlight the difficulty in drawing a line between offensive speech requiring regulation and jokes'.

Robin D. Barnes and Paul Wragg examine the phenomena of the troll using social media to hold sports personalities accountable for perceived lapses of moral judgment, focusing on the United States and the United Kingdom. Social media have provided a vehicle for the public to offer unfiltered criticism of celebrities' perceived moral lapses. The authors explore private law and whether or not it is affording a protection or compensation to those affected. They contend that 'the misuse of private information tort may be developed so that victims are protected from coercive uses of social media to regulate their moral behaviour'.

Edina Harbinja examines issues surrounding the transmission after death of content created in social networks (Facebook and Twitter). Considering social network accounts and content as a type of digital asset, Harbinja outlines how the law must be reformed so as 'to allow a deceased user's family to acquire IP rights to user unpublished content on Facebook, without allowing the family to access and use the actual account'. Effecting this change should come through in-service solutions where copyright is involved. For non-copyrightable content, Harbinja argues that 'the law should prevent the deceased's family from controlling his/her account and personal data as a matter of post-mortem privacy'.

David Mangan examines the protection of employers' business reputation in English employment cases with issues pertaining to social media in the workplace. These decisions demonstrate how workers may be dismissed for any remarks made on social

media that employers deems embarrassing or harmful to its interests. Though employers have well-founded concerns about reputational harm arising from certain comments by workers, Mangan contends the punishment of dismissal is an extreme response to such a nuanced issue.

Finally, *Andrew Scott* investigates the interplay between defamation and data protection. He is concerned with the expansion of publication as found through current English law because 'it carries with it potentially profound impacts on free speech and the socio-political potential of the internet'. To this point, Scott identifies intermediaries (such as Internet Service Providers) as having been 'induced to act as censors'. He argues that 'the expansion of the concept of publication beyond primary authors, editors and publishers has been a profound misstep in the development of the law'. Putting forward the argument for a conception of publication as not including intermediaries, thereby removing them from the censorship role. He concludes in wondering if this revised conception may offer a superior means of addressing this issue or whether it is too late (the point being swept up in the 'expanding remit of data protection law').

Cross-border regulation of virtual space

Part four closes out the collection with a discussion of jurisdiction. First, *Lorna E. Gillies* offers an answer to the fundamental question: on what basis should it be reasonable that a claimant may raise proceedings to protect reputation in a particular jurisdiction? Gillies argues, from the perspective of English residual jurisdiction, that freedom of expression and the right to a fair trial should be integrated into English residual jurisdiction rules

applicable to defamation.

Finally, *Alex Mills* explores choice of law questions in relation to cross-border defamation on social media. He notes the complicating duality of the medium: social media networks' influence in democratising mass communication coupled with the perils of the medium, notably that individuals are at 'greater risk of committing defamation than existed under traditional media'. When the platform crosses borders, Mills' question becomes all the more prescient: 'whose law should govern whether the communication gives rise to an actionable claim for defamation?'. Referencing English courts' application of relevant rules, he makes the important point that many of these rules were developed in the nineteenth century and have been remarkably resistant to modernisation with regards to twenty-first century scenarios.

4. Future Developments

We foresee movement with regards to social media as converging while simultaneously being parsed into separate aspects. The contributions to this collection speak to convergence promulgated by social media and as a whole the collection shows how separation into different categories depending on the area of law has arisen.

Two further points have informed the present discussion; but they are also areas of growing challenges the future. The first is national security. The opening of this introduction noted the military's role in the history of cyberspace and the internet. Encrypted messages are one illustration of the platforms of social media that concern security agencies. Here there

is a duality to social media that highlights its positive potential as well as its negative capacities.¹⁶ It is a reminder of the pernicious challenge terrorism poses, while also casually alluding to other examples of domestic or international criminal activity.

The second is social media as data. Social media platforms are businesses and so position their products to be attractive to individuals by offering free connection to communities.

Where connection is the aim, the absence of payment to enrol offers a more palatable gateway. To cover running costs, these platforms sell data to advertisers. With this commoditising of relationships¹⁷ through the data they produce, more targeted advertising can be sent to individuals. The more localised targeted advertising is juxtaposed with the theoretically global reach of activity. Even though individuals may connect with anyone in the world via these platforms, they remain participants more exclusively situated within their own jurisdiction. Data protection regulation adds to the considerations. For example, the General Data Protection Regulation (GDPR) was passed as a regulation of the European Union in 2016¹⁸ and will come into force 25 May 2018. While the Regulation will have direct effect, a fundamental issue is the regulation of personal data transfers to third countries and the role of intermediaries. The interpretation of the GDPR will be highly relevant to the on-going debate concerning cross-border

¹⁶ Daniel Solove, *Nothing To Hide: The False Trade-Off between Privacy and Security* (YUP 2011). More generally with regards to the information technology, Emily Laidlaw has written of the 'positive force for the discursive values underlying democracy' also being used as a 'tool of control': Emily Laidlaw, *Regulating Speech in Cyberspace* (CUP 2015) 1.

¹⁷ van Dijck (n 4) 16.

¹⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1.

communication and connectivity.¹⁹

In the final analysis, recalling Andrew Murray in this volume, the question of who should regulate and what values should be attributed in the regulation of social media provides a crucial link between public and private law's responses. These points, amongst many others, further contribute to a discussion that we foresee will be profound, on-going and controversial.

¹⁹ To the point, in Case C-362/14 *Schrems v Data Protection Commissioner* (CJEU, 6 October 2015) the CJEU found to be invalid the 'safe harbour' aspect of the predecessor Directive 95/46/EC regarding information exchanged between the EU and the US. Further adding to the discussions are the considerations raised in Case C-131/12 *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja González* (CJEU, 13 May 2014).