Defamation on the Internet — A Duty-Free Zone After All? Macquarie Bank Limited & Anor v Berg

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1. Introduction

In June 1999 Simpson J of the New South Wales Supreme Court handed down the judgment in *Macquarie Bank Limited & Anor v Berg*[1] in which she dismissed Macquarie Bank's application for an interlocutory injunction to restrain Charles Berg from publishing defamatory material on the Internet. According to the judge, to restrain the publication would be to 'superimpose the law of NSW relating to defamation on every other state, territory and country of the world'[2] and thus illegitimately interfere with any right to publish such material the defendant may have 'according to the law of the Bahamas, Tazhakistan [sic], or Mongolia'.[3]

This article evaluates the *ratio decidendi* of *Macquarie Bank* as well as using the judgment to make some more general observations in regard to defamation and jurisdictional competence in the online environment. It will be suggested, not that the judge should have reached a different decision, but that her main argument based on the nature of the Internet is faulty or at least at times not as clear cut as it appears. In particular, it is contended that just because defamatory material is put on the Internet, the grant of an injunction restraining publication pursuant to New South Wales law does not necessarily amount to a superimposition of New South Wales law on the rest of the world — even in the absence of means by which online material can be geographically restricted. The main argument to support this contention is that the concept of 'publication' in defamation law and possibly generally does not equate with the mere accessibility of material via the Internet. Also, it is questioned whether the distribution of material online can indeed not be geographically restricted. The last part of the article assesses how squarely the case

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1 [1999] NSWSC 526: <http://www.austlii.edu.au/au/cases/nsw/supreme-ct/1999/526.html> (3 Jun 1999). The term 'Internet' is used in this article to denote the World Wide Web which is just one of the services which the Internet supports.

2 Id at para 14.

3 Ibid. There is no place called Tazhakistan, only Tajikistan and Kazakhstan.

sits with the *Broadcasting Services Amendment (Online Services) Act* 1999 (Cth).[4] Has the judge, unlike the Federal Parliament, shown more insight into the peculiarly non-territorial nature of the Internet by adopting a hands-off approach?

2. *The Facts, Decision and Reasons*

The plaintiffs, Macquarie Bank Ltd (MBL) and Andrew Downe, and the defendant, Charles Berg, had not been on good terms for some time. For a period before December 1997 Berg had worked for MBL, a relationship which ultimately resulted in still unresolved litigation commenced by Berg in the Industrial Relations Commission of New South Wales and the Federal Court of Australia. Since January 1999 a document headed 'Letters From Charles Berg', together with other material pertaining to the relationship between the parties as well as the litigation, appeared on the Internet on a site located at www.brgvsmbl.com. But the present case arose from the publication of material on a site located at www.macquarieontrial.com, which has been accessible at least since May 1999. The material makes

> serious allegations against the plaintiffs ... there are thumbnail sketches of a number of individuals apparently involved in the engagement between MBL and the defendant, and these are not only critical of some of those individuals, but are illustrated by reference ... to notable characters from the world of entertainment.[5]

Simpson J acknowledged that 'the material on the site conveys imputations defamatory of each plaintiff'.[6]

While the material, which most likely originated from the defendant, was accessible from anywhere in the world including New South Wales, it was 'reasonably clear' that the defendant at the time of hearing was not present in New South Wales and that any acts done by him that resulted in the publication were done in the United States of America.[7] In other words, *Macquarie Bank* concerns online material hosted overseas — a scenario which is the most likely for a relatively small jurisdiction such as Australia.[8]

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4 The Act was passed on 16 July 1999 and came into force on I January 2000.

5 Above n1 at para 24.

6 Id at para 5.

7 Id at para 7.

8 While the number of domain names containing the country code does not accurately reflect the number of websites hosted in a particular jurisdiction, they can be assumed to reflect a general density of websites within a jurisdiction. Of about 14.8 million domains registered world-wide, only about 120,000 end with the country code '.au' indicating a connection with Australia: 'Domain name statistics': <http://www.netnames.com/emplate.cfm?page=statistics&advert=yes> (20 May 1999).

The judge, after deciding that the court had the discretionary power to 'restrain conduct occurring or expected to occur outside the territorial boundaries of the jurisdiction',[9] decided not to exercise that power for three main reasons.[10] First, she was not persuaded by the merits of orders 'the effectiveness of which is solely dependant upon the voluntary presence, at the time of his selection, of the person against whom the orders are made.'[11] Second, the nature of the Internet is such that making the order 'would exceed the proper limits of the use of the injunctive power'[12] of the court. And third, a long standing line of authority demands that interlocutory injunctive relief in defamation cases be granted with great caution because of the danger of unduly pre-empting the resolution of the legitimate issues and unduly interfering with the fundamental public interest in freedom of speech and freedom of information.[13] The most compelling factor, according to the judge, that militated against making the order of an interlocutory injunction concerned the nature of the Internet itself, that is, the second reason. The discussion below will be restricted to this, not the least because it raises questions of wider significance in relation to defamation and jurisdiction in the online world. Also, although the first ground on the likely enforceability of the injunction is of course of vital practical significance, it only becomes a concern once it has been decided that it would in principle be proper to grant an injunction to restrain the online publication. Before turning to this very question it should be noted that the decision could have comfortably and quietly rested on the other two grounds but in particular the last ground, which restricts the remedy of injunctive relief to very rare, exceptional cases.[14] Simpson J seems to acknowledge this when she concludes her discussion on the third ground with the words: 'Even leaving aside the considerations peculiar to publication on the Internet, I would not be satisfied that this is the kind of case that would attract injunctive relief.'[15]

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9 Above n1 at para 8. Note that one of the principles around which the case turned appears to have been that 'the Equity Court will, in its discretion, decline to interfere by way of injunction in respect of ... acts to be performed out of the jurisdiction, where it appears that a more appropriate forum for the determination of the matter is in a foreign court': *Helicopter Utilities v Australian National Airlines Commission* (1963) 80 WN (NSW) 48 at 51. In that case Jacobs J continued: 'It appears ... therefore, that the objection before me does not go to jurisdiction but goes rather to the exercise of discretion.' The same seems to apply to *Macquarie Bank*.

10 The judge also rejected the plaintiff's more ancillary arguments: (1) that the defendant had adequate alternative fora in which to voice his complaints against the plaintiff; (2) that the defendant's publications amount to 'scurrilous abuse' and are thus not covered by freedom of speech; and (3) that the defendant's impecuniosity made an injunction rather than an award of damages appropriate: above n1 at 23–26.

11 Above n1 at para 11.

12 Above n1 at para 14.

13 Above n1 at para 16. See also *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 163–164.

14 *Rural and General Insurance Ltd v Australian Broadcasting Corporation*, 19 June 1995 (New South Wales Court of Appeal, No. 40360/95): <http://www.austlii.edu.au/au/cases/nsw/supreme-ct/unrep69.html> (4 Jun 1999) at ll; *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 349.

15 Above n1 at para 22.

The judge reasoned that the nature of the Internet is such that it is not possible for an online publisher to restrict the geographic reach of his or her publication. Consequently any prohibition on the publication based on New South Wales law would mean that the publication would have to cease entirely even in those jurisdictions in which it may be legitimate. This in turn could not be within the proper limits of injunctive powers of the New South Wales Supreme Court (or by implication any other local court). Her reasoning seems persuasive and is ostensibly within the spirit of a cautious regulatory approach which shows an awareness of the peculiarities of the Internet as a transnational, borderless and non-territorial medium. This article will put forward some arguments to test the strength of Simpson J's two premises, firstly that publications on the Internet cannot be geographically restricted, and secondly (but discussed first) that an injunction would have unduly superimposed New South Wales law on other jurisdictions.

3. *The Superimposition of New South Wales Law*

A. Is an Award of Damages Different?

Simpson J closes her judgment with the comment that '[i]t may be that, if and when the defamation proceedings come to hearing, a judge will conclude that the publication is defamatory, is not protected by any of the defences available under NSW law, and is so serious as to result in a large award of damages.'[16] Thus she allows for the possibility of a judgment against the defendant on the basis of New South Wales defamation law, despite the fact that the defendant cannot, according to the judge, avoid world-wide publication, including publication in New South Wales, apart from staying away from the Internet altogether. Would such a judgment not similarly 'superimpose the law of NSW relating to defamation on every other state, territory and country of the world'? Of course, an award of damages is ostensibly something the New South Wales court does within its own territory without interfering with other jurisdictions — but so is an injunction if appropriately framed. Yet, the judge refused to frame the injunction for it to apply merely to New South Wales because it would have meant turning a blind eye to the reality that you cannot in actual practice limit the effect of such an injunction to New South Wales. But could one limit the effect of an award of damages to New South Wales in the absence of means available to the online content provider to publish here but not there? Online content providers would have no option but to make their sites compliant with all the laws, even the most scurrilous, of every jurisdiction in order to avoid damages claims, if that is indeed possible. Would such insistence by a state on compliance with its law compelled via an award of damages not similarly fetter online publishers' rights to publish material in other states where such publication is entirely legal? It is tempting to justify the adjustments foreign online content providers make to avoid an award of damages in New South Wales on the basis that they are entirely voluntary adjustments for

16 Above n1 at para 25.

which the New South Wales court acting purely within its own territory is not responsible and cannot be reproached on extra-territoriality grounds; in contrast to a grant of an injunction where the effect of the court order on the content provider's behaviour is more direct and more obviously extra-territorial. Yet, while tempting, how convincing is this distinction?

Whatever the answers to these questions may be, at the very least an award of damages, like an injunction no doubt, inhibits online publication by raising fears of potential exposure to the laws of multiple jurisdictions. Indeed, the fear of having to pay substantial damages may be more threatening than a fear of being forced simply to modify the content of one's website in compliance with an injunction.

B. What if the Site Had Been Hosted in New South Wales?

Apart from this possible internal inconsistency in the judgment one may also query what the judge would have held if Berg had been present in New South Wales and hosted his site on a server located in New South Wales. Simpson J's reasoning on the nature of the Internet would have committed her to an identical decision (but, of course, for her first reason in relation to the likely enforceability of the injunction; yet Simpson J stressed that the likely unenforceability of an injunction was merely a factor adverse to the exercise of the discretion in the plaintiff's favour). The Internet's architecture would have made the matter equally transnational in principle because the site could have been accessed by anyone from anywhere; thus an injunction would have been equally incompatible with the defendant's enjoyment of his possibly unfettered rights to publish the relevant material in, say, the Bahamas or Mongolia. In such a hypothetical scenario Simpson J might have been tempted to justify an injunction on the ground that the offending conduct occurred 'at home' (because it was put on a New South Wales server). Yet it has long been established that in defamation — with publication being the essence of the tort — it is the place of the publication rather than the place of the source of the publication which is decisive in determining where the offending conduct occurred. In the context of radio broadcasts it has been held:

> [i]t is the publication of the defamatory material that is the actionable tort, that is the making of persons to hear and understand it, and if the hearing and understanding is within the jurisdiction the place of origin of the sound-waves or ether-waves is immaterial.[17]

This means that the offending conduct in the hypothetical case would not have occurred anymore 'at home' than in the present case. Nevertheless, it appears that in such a case Simpson J should not have refused an injunction merely on the basis of the transnational character of the Internet. But how could she have justified it? One has to wonder whether she would have paid any special attention to the

17 *Jenner v Sun Oil Co Ltd* [1952] 2 DLR 526 at 526. See also *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181.

transnational nature of the Internet. And why should she have? The Internet would merely have been another medium for communication within a limited territory — with its international character being entirely incidental to the particular matter. The subject-matter and harm (like in the actual case) would have been closely linked to Australia as it would have concerned an institution and employment relationship centred in Australia;[18] in addition all the parties and all the acts causing the tort would have been within Australia. The Internet was treated as nothing special in *Rindos v Hardwick*,[19] in which Ipp J of the Supreme Court of Western Australia acknowledged its world-wide reach, but proceeded — without giving it a second thought — to impose (or superimpose?) Western Australian defamation standards on the publication anyway because this quite clearly was a Western Australian defamation case: a publication concerning a former employee of the University of Western Australia and his dispute with the University, with the publication being transmitted by an Australian primarily for a Western Australian audience. Arguably that case might have justified focus on the international aspect of the communication medium because the plaintiff, a United States national, enjoyed a reputation amongst scientists world-wide.

Two points emerge from the above discussion. First, the hypothetical case illustrates that neither the location of the server from which the material is hosted nor the whereabouts of the defendant strictly speaking affect one way or another the strength of the argument for an injunction based on New South Wales law because neither factor shifts the location of the offending conduct — that is, the publication — to New South Wales.[20] Second, the hypothetical scenario and the judgment in *Rindos v Hardwick* also show that at times the apparently decisive feature of the Internet, namely its transnationality, is not significant to the actual case; or in other words, the Internet does not necessarily transform a local matter into a transnational matter,[21] which indeed does and should raise jurisdictional questions and concerns about superimposing local law on other jurisdictions. Would Simpson J have been excused if she had turned a blind eye to the international element imported through the Internet?

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18 The online directory of Macquarie Bank Group shows that the Group runs operations in eight places in Australia, eight places in Asia, in one in South Africa, two in New Zealand, four in North America and two in Europe: 'Macquarie Worldwide, Contacts Information': <http://www.macquarie.com.au/aboutus/cag/contacts-locations.htm> (18 Jun 1999).

19 31 March 1994 (Supreme Court of Western Australia, No. 1994 of 1993): <http://www.jmls.edu/cyber/cases/rindos.html> (11 Feb 1999). Note that this case concerned the forerunner of the Internet, that is, computer bulletin boards.

20 But note according to the interpretation of Art 5(3) of the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) defamation occurs either *in the place where the remark was originally made* or in the place of publication where it has an impact on the reputation of the person defamed: Edwards L, 'Defamation and the Internet' in Edwards A & Waelde C (eds), *Law and the Internet — Regulating Cyberspace* (1997) at 189.

21 On occasion the Internet may have just that effect, for example by bringing human rights abuses easily to the attention of the international community.

C. *Does World-wide Accessibility Equal World-wide Publication?*

The main problem which *Macquarie Bank* crystallises and which has recently been focused on in many legal treatises is that of inconsistent and overlapping regulation of online content providers by different territorial sovereigns.[22] More specifically, it raises the issue of which legal system, or systems, online content providers are (and should be) exposed to by reason of their online publications. This is a concern because exposure to the laws of too many jurisdictions may prove an overwhelming burden for online content providers. But while this would not rule out the parallel application of the laws of at least some jurisdictions,[23] the nature of some remedies to enforce these laws may in fact mean that only one jurisdiction can have a say. For example, when at the end of 1995 CompuServe responded to Germany's threat of prosecution for its violation of Germany's anti-pornography laws by blocking access to more than 200 news groups for its 4 million subscribers world-wide, Germany indirectly superimposed its moral and legal standards on the rest of the world. Simpson J was trying to avoid a similar result by refusing to grant the injunction.

Yet what is argued here is that such refusal to grant what may be the most effective and most appropriate remedy, and which may thus in fact create a 'duty-free' zone on the Internet,[24] is not necessary if the relevant jurisdiction is the *only* jurisdiction which has a legitimate claim to regulate the conduct. If such is the case any fear about undue superimposition of one state's standards on other states should be appeased because no other jurisdiction may legitimately impose its standards on the conduct. Also, it must be stressed that an injunction to restrain, for example, a defamatory publication need not mean that the website is shut down; modification would be sufficient. In that sense the effect of an injunction of the kind MBL sought is much more akin to the effect of a threat of an award of damages rather than to the blocking measure forced upon CompuServe. It would certainly not prevent the simultaneous application of the laws of several jurisdictions.

Yet, how is one to decide which jurisdiction(s) can regulate particular online conduct? Indeed does the non-territorial nature of the Internet not necessitate equally legitimate regulatory claims by every jurisdiction over every site? It is suggested that the answer to these questions can be found in the torts context in

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22 See for example Goldsmith JL, 'The Internet and the Abiding Significance of Territorial Sovereignty' (1998) 5(2) *Indiana Journal of Global Legal Studies*: <http://www.law.indiana.edu/glsj/vol5/no2/6golds.html> (1 Dec 1999). See also Johnson DR & Post D, 'Law and Borders — the Rise of Law in Cyberspace' (1996) 48 *Stan LR* 1367, one of the most influential articles in this area.

23 Content providers could comply with the inconsistent laws of several jurisdictions either by finding the lowest common denominator of the laws or by making their sites territorially sensitive as discussed in Part 4 of this paper.

24 Damages are not always the most attractive remedy to plaintiffs, especially in defamation cases; many online publishers capable of doing substantial harm through defamatory allegations are much less likely to be able to meet a substantial award of damages than their traditional equivalents, that is the wealthy mass media. This would also make an injunction a much more effective remedy.

traditional principles of private international law which have long had to allocate regulatory competence between two or more competing jurisdictions.[25] Accordingly foreign law and foreign rights are only considered and paid their due respect if the tort in question was committed wholly or partly outside the jurisdiction of the forum court; otherwise foreign jurisdictions have no stake in the matter. Thus we will now turn to the question of where the tort of online defamation is committed.

The tort of defamation occurs where the defamatory imputation is published.[26] This in turn raises the issues as to what amounts to 'publication' and how this applies to the medium of the Internet. Does world-wide accessibility equate with world-wide publication and, if not, where is material put on the Internet in fact actually published? In defamation, the defamatory imputation is published if it is communicated to some person or persons other than the plaintiff himself.[27] With the emphasis being on communication or the making known of the defamatory imputation,[28] it is not enough merely to write defamatory words[29] and it is not even enough to deliver a defamatory statement to another if the other person does not become aware of the defamatory words.[30] Similarly, publication is generally not equivalent to the mere posting of a message, but only becomes complete when the communication reaches the addressee. While it is not necessary for the plaintiff in all cases to prove directly that the defamatory matter was brought to the actual knowledge of anyone, publication is only established if the plaintiff makes it a matter of reasonable inference that such was the case:[31]

> Publication will be presumed, and the burden of disproving it lies upon the defendant, in all cases in which the document is so put in the way of being read and understood by someone that it is probable that he actually read and understood it.[32]

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25 While in *Macquarie Bank* the direct application of foreign law was not an issue (as injunctive relief is a procedural matter to which the law of the forum is always applied), Simpson J indirectly accorded foreign laws substantial weight by saying the court must not fetter their operation. The reason why this case indirectly raises issues normally only considered at the choice of law stage is that the injunction could not (according to the judge) be restricted to New South Wales, due to the nature of the Internet. Normally the injunction would have been granted to apply in New South Wales, which would not have required any regard to foreign law, even if the publication had also occurred outside New South Wales. What is analysed here is when consideration of foreign law and foreign rights is appropriate in the online environment, either at an early stage as in this case or at a later stage when choice of law questions take centre stage.

26 *Jenner v Sun Oil Co Ltd*, above n17 at 526; *M Isaacs & Sons Ltd v Cook* [1925] 2 KB 391 at 400; *Gorton v Australian Broadcasting Commission*, above n17 at 183; *Allsopp v Incorporated Newsagencies Co Pty Ltd* (1975) 26 FLR 238 at 241–246.

27 *Pullman v Hill & Co Ltd* (1891) 1 QB 524 at 527. 'Publication' is not defined in the *Defamation Act* 1974 (NSW).

28 See *Webb v Bloch* (1928) 41 CLR 331 at 363 (Isaacs J) where it was stated that '[t]o publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle.'

29 *Pullman v Hill & Co Ltd*, above n27 at 527.

30 *Clutterbuck v Chaffers* (1816) 1 Stark 471.

31 *Bata v Bata* (1948) WN 366; *Gaskin v Retail Credit Co* 43 DLR (2d) 120 at 124–125; 49 DLR (2d) 542 at 545.

32 *Jenner v Sun Oil Co Ltd*, above n17 at 536, citing Salmond on Torts (10th edn) at 389.

Thus it must be probable or a matter of reasonable inference that someone actually read the defamatory imputation after it was sent.

Therefore, the question in the Internet context is, how probable is it that a particular website is being accessed by someone other than the plaintiff, in the absence of positive evidence of such access? And for those who assume that putting a website on the Internet equates with world-wide publication, it must not merely be probable that someone accessed the site but that someone in every jurisdiction accessed it. While this may at first not appear to be difficult to prove, it must be appreciated that there are more than 14.8 million domain names registered world-wide[33] and it can be assumed that the number of individual webpages must be in the 100 millions. Given the sheer number of websites the Internet must be distinguished from television and radio broadcasts. Mere accessibility of these media has been held to equate with publication of their programmes, that is, publication is presumed to occur in all areas to which their waves are transmitted.[34] This is because (given the relatively limited number of radio or TV channels and the great number of viewers and listeners) it is highly probable that someone in each area will actually switch their radio and TV on and view or listen to the particular programme. In contrast, with the Internet it is not at all probable that every website is accessed in every jurisdiction where it can theoretically be accessed. Some states have clearly a much greater Internet presence than others.[35] This may make it probable that even an obscure site is accessed in a state such as the United State but not necessarily in one which is hardly connected to the Internet. So, if as a matter of reasonable inference, it cannot be assumed that any site put on the Internet and theoretically accessible from anywhere is in fact accessed everywhere, where then can publication be assumed? This a question of fact which will depend on the circumstances of each particular case.[36] However, some guidance can be gleaned from decided case law involving traditional communication media.

The issue of where the publication took place was answered, as long as fifty years ago, in *Bata v Bata* by looking at who circular letters, written in Zurich, were addressed to because it was there where it was probable that the letters were published (meaning 'being read'): 'It was the publication of the contents of a defamatory document *to* a third party which constituted the tort of libel ... In this case the circular letter had been published *to* persons living in London.'[37] Thus publication took place in England. While it may seem that, in the Internet context, every website is necessarily addressed to the world at large, is this indeed the case?

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33 Above n8.

34 *Jenner v Sun Oil Co Ltd*, above n17; *Gorton v Australian Broadcasting Commission*, above n17 at 183. TV and radio may also be distinguished from the Internet in that the broadcast is sent to a particular area (push technology), while on the World Wide Web surfers have to request a site before it reaches the area where the surfer is present (pull technology). Therefore, a site which has never been requested by anyone is not in any physical sense anywhere apart from the place where it was put on the server.

35 For a comparison, see above n8.

36 *Byrne v Deane* [1937] 1 KB 818 at 837.

37 *Bata v Bata*, above n31 at 367.

Maybe not. Some websites clearly indicate the location of their targeted addressees by choosing a domain name reflecting the geographic origin of the content provider. Others indirectly demarcate their markets by using a particular language. Moreover, sometimes the subject-matter of the online content is clearly parochial, as is often the case with defamatory statements. They are about particular individuals or entities who enjoy a reputation and resultant interest within a physically limited area (international celebrities and multinational corporations apart). Outside that area any article about them is of no interest and thus pointless.[38] Thus although most websites do not expressly spell out to whom they are addressed, many are clearly tailored for one jurisdiction (or possibly a few) and thus bear a de facto address. This, no doubt, makes it generally, although admittedly not necessarily, probable or a matter of reasonable inference that the site is in fact accessed in that jurisdiction, which means in the defamation context that publication in that jurisdiction would be probable and thus could be presumed. The concept of de facto addresses on websites is well accepted in United States jurisdictions. In *Blumenthal v Drudge and AOL*,[39] a defamation case, the Columbian District Court rejected Drudge's argument that he should not be subject to the jurisdiction of the court on the ground that he had 'not specifically targeted persons in the District of Columbia for readership, largely because of the non-geographic nature of communicating via the Internet.'[40] The court's decision was partly based on the reasoning in *Telco Communications v An Apple a Day*[41] and put as follows:

> [T]he subject matter of the Drudge Report [containing the alleged defamatory imputations] primarily concerns political gossip and rumor in Washington, D.C. ... [It] is directly related to the political world of the Nation's capital and is quintessentially "inside the Beltway" gossip and rumor ... By targeting the Blumenthals who work in the White House and live in the District of Columbia, Drudge knew that "the primary and most devastating effects ... would be felt" in the District of Columbia.[42]

Thus although the Drudge Report could be read theoretically by anyone anywhere via the Internet, in reality it was 'addressed' to persons living in the District of Columbia as it was of greatest and possibly exclusive interest to them. This makes it probable that they read it.

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38 This is not to say that a defamation must be intended (see *Cassidy v Daily Mirror* [1929] 2 KB 331) but rather that most articles are as a matter of fact written for and with a particular audience in mind.

39 992 F Supp 44 (DDC 1998): <http://www.techlawjournal.com/courts/drudge/80423opin.htm> (3 Jun 1999).

40 Id at 53–58. For a recent discussion on how websites may indirectly demarcate the location of their surfers see *Barrett v The Catacombs Press & Ors* (United States District Court for the Eastern District of Pennsylvania, Civil No. 99-736): <http://www.paed.uscourts.gov/opinions/9900282P.htm> (1 Dec 1999).

41 977 F Supp 404 (ED Va 1997): <http://www.jmls.edu/cyber/cases/telco1.html> (3 Jun 1999).

42 Above n39 at 53–58.

An argument for geographically limited 'publication' on the seemingly limitless Internet can also be made by asking how easy the writer of the defamatory statement made it for others to read his or her statement.[43] If the writer of a defamatory publication provides for easy access by a third person to the defamatory statement, then it is probable that a third person in fact reads it and thus publication can be presumed. Publication was thus presumed in the case of postcards[44] and telegrams[45] (even if not addressed to a third party) because some third party such as a post office worker could easily read their content during transmission. Where, on the other hand, the defamatory letter is put in an unsealed envelope (which makes it that little bit harder to read it), it has been held that there is no presumption of publication of the letter, although publication could be proven by actual evidence that someone in the post office had in fact read the letter.[46] Finally, if a third person can only with difficulty, or other than in the ordinary course of events, obtain knowledge of the defamatory statement then there is not only no presumption in favour of publication but there is no publication at all.[47] Thus it was said that if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, there would not be a publication by the writer.[48] Clearly, there is a correlation between the efforts made by the writer to make his or her statement known or keep it secret and the existence or absence of publication for defamation purposes, that is, probable communication to a third party. This correlation reflects the fact that the publication of the statement (but importantly not its defamatory character) must have been intended or at least negligent.[49]

Applying this analysis to websites, it again appears at first that any content put on the Internet is easily accessible by anyone anywhere and thus likely to be read by anyone from anywhere. Yet, given the vast number of sites, this is not the case for all or even most websites. Unless the address of the site is widely advertised online and offline,[50] reliance on search engines, which are also often biased towards one jurisdiction, returning millions of results upon a simple enquiry, hardly guarantee that a particular site is brought to the attention of an international audience. Therefore, it is argued, a site should only be presumed to be published in those jurisdictions where surfers obtain easy access to it because they know or are likely to get to know its URL. To assess that likelihood, several factors would appear to be relevant, including the online and offline advertising efforts made by

43 While every publication presumes some active participation by the reader, the precise degree of input varies greatly depending on the efforts made by the writer to facilitate reading.

44 *Chattell v Turner* [1896] 12 TLR 360 at 361; *Robinson v Jones* (1879) 4 LR Ir 391.

45 *Chattell v Turner*, id at 360–361.

46 *Huth v Huth* [1915] 3 KB 32 at 41–42.

47 Ibid; *Powell v Gelston* [1916] 2 KB 615 at 620; *Sharp v Skues* (1909) 25 TLR 336 at 338.

48 *Pullman v Hill & Co*, above n27 at 527 (Lord Esher, MR).

49 For a discussion of the distinction between unintentional defamation published intentionally and unintentional publication of intentionally defamatory matter see Fleming JG, *The Law of Torts* (9th edn, 1992) at 543f.

50 For example, through the print media, TV or radio and online through links, link collections, banners or meta-tags.

the content provider, whether the content of the site was prima facie comprehensible and of interest to certain readers, and whether the URL could easily be guessed in view of the offline activity of the entity in that jurisdiction. Depending on all these factors, a particular site may be like a postcard in one jurisdiction, like a letter in an unsealed envelope in another and in yet another like a letter locked in a drawer.

Using the analogy of newspapers, a site may be treated as 'distributed' in one jurisdiction and thus can be presumed to be published in that jurisdiction. In another jurisdiction that same site may be more like a newspaper which the isolated interested customer from overseas has to obtain by specifically ordering it from the country in which it is distributed, which in the case of websites is not necessarily the jurisdiction in which it was put on the server. It appears that in such a case the newspaper would be treated as published not in the country of its final destination but rather in the place of its distribution.[51] This approach appears to be indirectly supported in *Playboy Enterprises Inc v Chuckleberry Publishing Inc*,[52] albeit in the context of intellectual property, when the judge rejected the defendant's argument that '[t]he use of the Internet is akin to boarding a plane, landing in Italy, and purchasing a copy of PLAYMEN magazine.'[53] The judge continued: '[o]nce more, I disagree. Defendant has actively solicited United States customers to its Internet site, and in doing so has distributed its product within the United States.'[54]

It appears that, in other circumstances, if the defendant had not actively solicited US customers to its site, the judge might have been persuaded that the product was not distributed in the US, but only in Italy, despite the fact that it could have been accessed in the US via the Internet. Similarly, upon closer scrutiny www.macquariebankontrial.com was more than likely never 'distributed' or 'published' in 'Bahamas, Tazhakistan, or Mongolia'. Accordingly, should not the rights the defendant might have had pursuant to the laws of those jurisdictions be disregarded?

Assuming for the moment that 'publication' of a particular site only occurred in the forum jurisdiction because the material it contained was very parochial, that forum jurisdiction would be the only jurisdiction which would have a legitimate right to impose its defamation standards on the publication. If to enforce these standards modification or even the restraint of the site was deemed necessary, should such modification or restraint really amount to a superimposition of the law of the forum on jurisdictions where the site was never published because the likelihood of actual access of that site is very small? By the same token would anyone argue that an injunction enjoining a newspaper distributed only in Australia from publishing a particular article takes effect in the rest of the world

51 In *Kroch v Rossell et Copagnie Societe des Personnes a Responsibilite Ltee* [1937] 1 All ER 725 the court held that there was 'publication' of a French and a Belgian newspaper in England because a small number of each was actually brought to and distributed in England.

52 939 F Supp 1032 (SDNY): < http://www.jmls.edu/cyber/cases/playmen.txt> (10 Jun 1999).

53 Id at 1039.

54 Ibid.

just because people from those other jurisdictions could no longer exercise their right to 'access' it? This would surely be unreasonable and contrary to precedent.

The above arguments demonstrate that the concept of 'publication' in defamation law does not equate with mere accessibility of defamatory statements, no matter how unlikely it is that these statements are indeed accessed and read. Consequently, publication of defamatory material via a website is likely to be geographically limited to the jurisdiction(s) to which its subject-matter is connected. In this sense the subject-matter of the publication recreates de facto boundaries in a space which appears to be entirely non-territorial. While sometimes even those de facto boundaries may be absent, at the very least the concept of publication lets one discriminate between uses of the Internet as a truly transnational communication medium and as a medium which is used for local communication because it is cheap, fast and efficient, and which quite incidentally happens to allow world-wide access. With regard to the latter usage, there is no reason why traditional legal standards should not rigorously be applied without regard to the transnational nature of the Internet, provided of course there are ways to enforce them. An appreciation of this seems valuable beyond the narrow context of defamation. One may also ask whether publication as defined in defamation law highlights the proper meaning of publication generally and may thus be helpful in other legal contexts. Certainly, assertions of regulatory competence would in the Internet context often be based on the fact that a site was 'published' in the jurisdiction. But was it really? Was it likely to be read or was it merely accessible from the jurisdiction?

D. Not Every Website is Parochial

Even assuming the validity of the above argument, that the meaning of 'publication' in defamation law, and possibly even generally, does not equate with mere online accessibility of material, it is nevertheless beyond doubt that many websites must still be considered to be 'published' in more than one jurisdiction. For example, www.macquarieontrial.com would probably be 'published' in most jurisdictions in which Macquarie Bank carries on operations. In that sense Simpson J was right in considering the particular facts before her as transnational. But was she justified in denying an injunction based on a fear of superimposing New South Wales law on the rest of the world? Again, it is suggested that the answer to this question can be found in traditional choice of law rules. How much respect is validly accorded to foreign law and foreign rights once it has been established that the facts in question are indeed transnational? How much respect would one hope other jurisdictions accord to one's own laws? As a comprehensive discussion of Australian torts choice of law rules in the online environment is beyond this paper and as these rules are only indirectly and loosely connected to the issues raised in *Macquarie Bank*,[55] only two points shall be made here.

First, it must be stressed that existing choice of law rules in respect of torts have long had to cope with the situation where a tort is committed in multiple

55 See above n25.

jurisdictions simultaneously, as in the case of defamatory statements published in national newspapers or via national television or radio broadcasts. In that sense, multiple defamation via the Internet does not present radically new problems. What it does, however, is exacerbate the already existing legal shortcomings and inefficiencies of the torts choice-of-law regime as there will be an increasing number of those multi-jurisdictional cases which are also very likely to involve a foreign jurisdiction rather than, as previously, an interstate jurisdiction.

Second, a solution to the present conundrum of Australian choice of law rules in torts may lie in Justice Miles' practical and common sense approach in *Woodger v Federal Capital Press of Australia Pty Ltd*[56] (following Mason CJ's approach in *Breavington v Godleman and Others*[57]) where he had to decide on the most appropriate defamation standard in relation to an Australia-wide publication. What he observed in relation to publication within Australia is surely valid in the Internet context:

> The freedom to publish within and throughout Australia should not be inhibited by fear of liability for defamation in a part of Australia with which the publication does not have substantial connection.[58]

But, at the same time, that very freedom should be inhibited by fear of liability for defamation in those areas with which the publication does have a substantial connection. In that case he decided to 'apply the law of the Australian Capital Territory (ACT) to the whole of the publication in Australia', as that was the State with the most substantial connection to the publication.[59] In *Macquarie Bank* the jurisdiction with the most substantial connection would probably be New South Wales. In both cases the application of the relevant law to the whole of the publication would theoretically amount to a superimposition of that law on all those jurisdictions where publication also occurred. Yet in reality, the connection of the case with those other jurisdictions may be so tenuous as to make it a fiction to speak of an interference with the possible rights granted by those other jurisdictions.[60] Thus, it is argued, provided New South Wales was the jurisdiction with the most substantial connection to the case, Simpson J's fear of unduly

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56 (1992) 106 FLR 183: <http://www.austlii.edu.au> (8 Jun 1999).

57 (1989) 169 CLR 41 at 76f: '[T]he qualified or flexible application of the law of the place of the wrong copes with the incidents of tort law in the modern age of travel when the place of accident may be fortuitous, as it is in the case of an aircraft accident, and the parties may have no substantial connexion with the law of that place or with that place at all ... [T]he application of the lex loci delicti [is] subject to an exception involving the application of the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.' This approach is also consistent with the general recommendation made by the Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) at [6.15]–[6.27].

58 Above n56.

59 As the plaintiff lived and had his business centred there, the publication attracted most readers in Canberra and was mainly concerned with ACT issues. Id at para 140.

60 Considerations of territorial sovereignty and of the legitimate expectations of the parties would generally justify the application of the *lex loci delicti* to a tort which occurred outside the forum state.

superimposing New South Wales defamation standards on other jurisdictions would be unfounded.

In summary, in those cases where a website is not entirely parochial and has indeed been 'published' in more than one jurisdiction, foreign law and foreign rights cannot be ignored. Choice of law rules which have traditionally accommodated these laws may provide the answer as to the extent to which these foreign laws need to be taken account of. Predictable and just results to an increasing number of transnational cases are more likely to be achieved if a clear, simple and common sense approach is adopted. Such an approach would have to accommodate the reality that online 'publication' may have occurred in many jurisdictions with which the case only has minimal connection, making it unnecessary (in terms of respecting the foreign jurisdiction's sovereignty) and indeed unjust (in terms of the legitimate expectations of the parties) not to 'superimpose' the law of the jurisdiction with which the case has a substantial connection.

4. The Feasibility of Geographic Restrictions

The first and basic premise of Simpson J's argument against the grant of the injunction was that the injunction could not be limited to publication or dissemination within New South Wales: there are 'no means by which material, once published on the Internet, could be excluded from transmission to or receipt in any geographical area.' If the injunction could have been limited to New South Wales, no concern about superimposing New South Wales standards on other jurisdictions would have arisen. But was the judge right in saying that there can be no limits on the geographic diffusion of websites? Interestingly, the creator of the very website under attack seems to think differently. The homepage of www.macquarieontrial.com states:

> Important Notice
> This site and its content are constitutionally protected by the laws of the United States of America. Should you be in a jurisdiction where these fundamental rights and freedoms do not apply, please disconnect from this website NOW and refrain from disseminating the details of this website address to anyone else.

Of course, the effectiveness of such a notice is highly dubious. It would quite certainly not have sufficed to comply with a prohibitory injunction applicable within New South Wales — even if New South Wales residents had been mentioned specifically as those not entitled to access the website. But there are more potent measures to limit the geographic diffusion of websites. For example, a content provider may install filtering devices programmed to determine the customer's self-reported geographic location. Based on pre-determined criteria, such software could reject attempts to transact business by customers of unfavourable states.[61] At least in circumstances where regular contact is envisaged, password-restricted websites based on offline verification of the place of residence of the surfer is an option to limit the reach of online publications.

While these means are not very attractive options to most online publishers and do not guarantee 100 percent effectiveness, they certainly show that Simpson J was too quick to accept a generalisation about the borderless nature of the Internet.

Again, the case of *Playboy Enterprises Inc v Chuckleberry Publishing Inc*[62] illustrates that, in the absence of (and possibly in addition to) de facto boundaries on the Internet (created for example through the subject matter of the publication) the onus should at least sometimes be on the wrongdoer to find means to resurrect them. In that case the defendant was alleged to have violated a 15 year old injunction, which prohibited him from distributing, through its Internet service which was accessible to anyone, including US residents, pornographic material in the United States in breach of Playboy's trademark rights. The judge rejected the defendant's argument that the injunction should not apply to the website because the Internet did not facilitate any discrimination between customers based on residence. She put the onus on the defendant to find ways to geographically restrict access to its website to non-US customers:

> While this Court has neither the jurisdiction nor the desire to prohibit the creation of Internet sites around the globe, it may prohibit access to those sites in this country. Therefore, while Tattilo may continue to operate its Internet site, it must refrain from accepting subscriptions from customers living in the United States.[63]

How this could be achieved exactly was left to the defendant to work out but the court still indicated what it had in mind:

> Tattilo must either shut down PLAYMEN Lite completely or prohibit United States users from accessing the site in the future. The simplest method of prohibiting access by United States users is to ... require users of PLAYMEN Lite service to acquire a free password and user IDs in order to access the site ... [footnote] If technology cannot identify the country of origin of e-mail addresses, these passwords and user IDs should be sent by mail.[64]

This solution allowed the judge to uphold US copyright standards within the US while not unduly superimposing those standards on the rest of the world — which was a real danger in that case (unlike *Macquarie Bank*) as the site was also aimed at the Italian and European market[65] and was a publication which heavily relied on the international accessibility of the Internet.

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61 Vartanian TP, Ledig RH, Bruneau L, *21st Century of Money, Banking & Commerce* (1998) at 607. See also Goldsmith, above n22 at section IV.

62 Above n52.

63 Id at para 111.B.

64 *Playboy Enterprises Inc v Chuckleberry Publishing Inc* 939 F Supp 1041 (SDNY 1996): <http://www.jmls.edu/cyber/cases/playmen2.txt> (11 June 1999) at para 111.A.2.

65 Above n52 at para III.B: 'Although a portion of the text is written in Italian, enough sections appear in English to allow an English speaking user to navigate the site with ease ... The "Playmen" magazine is written in Italian, and is sold in Italy and all the major countries in Europe.'

But is this a solution which will always be available? In what circumstances is it appropriate and desirable to impose such artificial boundaries onto the Internet, one of the major benefits of which is its great ease of access to material otherwise barricaded behind the tyranny of distance? The judge in *Playboy* cautiously restricted her decision to cases concerning existing court orders and injunctions,[66] without quite explaining why such cases are a special threat to the efficacy of the local intellectual property laws. It may be argued that those cases are exceptional in that the defendant is put on notice about its potential exposure to the law of a particular jurisdiction, in contrast to most online publishers who may merely know that publication on the Internet potentially exposes them to the laws of any jurisdiction, but none in particular. In that respect these cases are similar to most online defamation cases where the defendant is on notice about its potential exposure to the legal standards of a particular jurisdiction by virtue of the subject matter of the publication.

In summary, as a tentative conclusion it may be asked: can online publishers be expected to comply with certain national regulations (even if this entails making the site territorially sensitive) when they were or ought to have been on notice about the exposure to the laws of that particular jurisdiction by virtue of the subject matter of the publication, pre-existing court orders or other factors? This would be equitable in that it would give individuals or entities a reasonable opportunity to adjust their conduct to comply with the legal standards of but a few jurisdictions at the most. Also, conflicts between the laws of different jurisdictions would at least be minimised as only jurisdictions with a substantial connection to the online publication would trigger the requisite notice. Of course, there may be other criteria apart from the notice requirement which could, and should, operate to limit the circumstances in which national boundaries are resurrected on the Internet. But at present it is sufficient to note firstly that Simpson J was too hasty when she asserted that material, once put on the Net, cannot be excluded from transmission in any geographic area; and secondly, that imposing artificial boundaries on the Internet should be done cautiously and restrictively in order to preserve the Internet as an open world-wide medium.

66 Ibid: 'The Internet deserves special protection as a place where public discourse may be conducted without regard to nationality, religion, sex, age, or to monitors of community standards of decency ... However, this special protection does not extend to ignoring court orders and injunctions.'

5. *Implications of the Decision for the* Broadcasting Services Amendment (Online Services) Act *1999*

As *Macquarie Bank Ltd and Anor v Berg* touches upon the feasibility of creating boundaries on the Internet, it has immediately invited comparisons with the legislative regime set up in the *Broadcasting Services Amendment (Online Services) Act* 1999 (Cth) (hereinafter *Content Legislation*).[67] More so, it has been hailed as a 'landmark court decision ... [which] has raised questions over the effectiveness of Australian attempts to control online content.'[68] The decision is perceived to lend support to the protests against the Content Legislation in that it seems to confirm the futility of attempts to redraw national boundaries onto the Internet which inherently transcends such boundaries. But on closer analysis the judgment and the new legislation are not as inconsistent as they may at first appear.

Very briefly,[69] the new Content Legislation sets up a regime whereby complaints about offensive material on the Internet can be made by members of the public to the Australian Broadcasting Authority (ABA)[70] which, with the help of the National Classification Board,[71] may then investigate[72] and classify that material as RC and X-rated (illegal and highly offensive material such as violent or child pornography) or R-rated (such as common pornography).[73] Depending on the classification the material is prohibited entirely (RC and X-rated) or may require an adult verification mechanism to prevent access by minors (R-rated). To enforce any such prohibition or condition, Internet Service Providers (ISPs) [74] or Internet Content Hosts (ICHs)[75] are obliged to prevent publication after notification by the ABA,[76] or face sanctions.[77] While material hosted in Australia must be removed by the relevant ICH,[78] ISPs have to take reasonable steps — assessed in terms of their technical and commercial feasibility — to block access

67 This term is preferred to the commonly used but pejorative reference to online censorship legislation.

68 'Defamation decision casts new light on Net law' *Newswire* (Australia) 2 June 1999: <http://newswire.com.au> (3 June 1999).

69 For a summary, the full text, the Second Reading Speech and the Explanatory Memorandum of the Content Legislation see National Office of the Information Economy: <http://www.noie.gov.au/legreg/content/index.htm> (16 Jun 1999).

70 *Broadcasting Services Act* 1992 (Cth) Sch 5 s22–25; *Broadcasting Services Amendment (Online Services) Act* 1999 (Cth) Sch 1 s10 [long reference hereinafter omitted]. Note that the ABA can also investigate matters on its own initiative: s27.

71 Part 3, 30.

72 Ss26–28.

73 For a definition of 'Prohibited Content' see Part 3. Note that prohibited content in relation to Internet content hosted outside Australia does not include any R-rated content: s10.

74 For a definition of ISPs see Part 2.

75 For a definition of ICHs see s3.

76 Division 3 and 4 of Part 4.

77 Mainly, parts 6 and 7. A graduated range of sanctions include sanctions and incentives to be developed by the industry in Codes of practices, formal warnings by the ABA, fines and court orders directing ISPs to cease providing services. For a summary see Second Reading Speech, above n69 at 11f.

78 S30.

to prohibited material hosted overseas.[79] In relation to the latter material, the ABA may also notify local or foreign law enforcement agencies.[80]

The legislation has been subjected to widespread criticism[81] although on a very basic level it actually does no more than broadly apply current existing Australian classification guidelines for films to the Internet.[82] Yet, the legislation is perceived to interfere improperly with the intrinsically international and decentralised open communication medium of the Internet which appears to be beyond national regulation. This perception often finds expression in more concrete arguments about the regime's general futility or unreasonable implementation costs.[83] For example, the legislation is criticised for the great burden it imposes on ISPs and ICHs — even though they are subjected to a regulatory approach which is intended to be less onerous than the existing one under State and Territory law.[84] Their obligation only starts after notification by the ABA and, in relation to material hosted overseas, their responsibility is expressly confined to taking 'reasonable steps' ('technically and commercially feasible') to prevent access to prohibited material. Also, primary responsibility for online material rests with their creators and ISPs and ICHs are protected from litigation by customers affected by ABA notices.[85]

Whatever the merits of the criticisms of the legislation, *Macquarie Bank* does not lend support to them, and indeed in some important aspects it confirms the underlying premises and assumptions of the legislation. Both the judgment and the legislation deal with the issue of how to apply and enforce existing legal rules in Australia to the transnational communication medium of the Internet. More specifically, they are both at least partially concerned with online material, which is hosted overseas and accessible but illegal (or unacceptable[86]) in Australia. And both judgment and legislation can be said to attempt to balance the need to preserve the newly gained benefits of the Internet with the need to uphold existing legal rules, rights and standards. And yet it seems that they strike that balance very

79 S40.

80 Ibid.

81 For some of these see, Censorship Stories Archive, *Newswire* (Australia) <http://newswire.com.com.au:8008/apcweb/news.nsf/Web/Censorship> (31 May 1999).

82 While the Content Legislation provides for a different classification procedure for Internet content than that applicable to conventional media, the classification criteria correspond to those applicable to films under the *Classification (Publications, Films and Computer Games) Act* 1995 (Cth): Second Reading Speech, above n68 at 3.

83 See for example, 'Can the ABA afford to control the net?', *Newswire* (Australia): <http://newswire.com.com.au:8008/apcweb/news.nsf/Web/Censorship> (31 May /1999).

84 Part 9. See also Second Reading Speech, above n69 at 2, 11f.

85 Part 8.

86 It is not certain whether existing censorship and criminal laws would be applicable to all acts of publishing and transmitting on the Internet, or of accessing and/or storing material in non-persistent memory. Department of Communications, Information Technology and the Arts, 'Regulation of Objectionable Online Material: Frequently Asked Questions' June 1999: <http://www.dcita.gov.au/cgi-bin/trap.pl?path=3871> (16 Jun 1999) at para 'Why Isn't Current Criminal Law Sufficient?'.

differently, with the judge apparently wisely accepting the non-territoriality of the Internet while the legislature blindly takes on the challenge:

> It is recognised that there are technical difficulties with blocking all illegal and offensive material that is hosted overseas ... [b]ut it is not acceptable to make no attempt at all on the basis that it may be difficult.[87]

In terms of restraining the publication of overseas online content in Australia, *Macquarie Bank* appears to stand for the proposition that such restraint is not enforceable, feasible nor justifiable, even if the publication is defamatory in Australia. However, on closer analysis the judgment stands for the much narrower propositions, firstly, that an order the enforceability of which is uncertain is of limited value, and secondly, that the court does not have the competence to restrain publication of material if such restraint cannot be limited to New South Wales. And these are broadly the same propositions on which the online content legislation is based. Because prosecutions for illegal online publication in Australia of material hosted overseas would not generally be possible, the legislative regime — through the blocking requirement — redresses the effect (and not the cause) of such material in Australia. And it imposes obligations on entities which are within the territorial boundaries of Australia and thus easily amenable to Australia's enforcement jurisdiction. Also, the blocking regime avoids the undue superimposition of Australian legal standards on the rest of the world as websites hosted overseas would still be freely available overseas, even if not accessible in Australia. Thus, the Content Legislation and *Macquarie Bank* are very similar in that they are strongly guided by practical considerations concerning the enforceability of their rules or orders and by an awareness of possible limits of 'legislative' competence.[88] In the case of *Macquarie Bank* it has been argued above that these jurisdictional limits have been set more narrowly than was necessary.

So why is it that the judge came to the conclusion that publication of the material cannot be prevented in New South Wales (without preventing it everywhere else), while the legislature implicitly reached the opposite conclusion by requiring ISPs to block access to certain material? The reason for this lies simply in the fact that the judgment is about the application and enforcement of a private right while the legislation concerns the application and enforcement of a public good. This difference is primarily reflected in the type of available remedy and the considerations relevant in evaluating that remedy. For the enforcement of a public good, such as the prohibition of illegal and highly offensive material, it may be justifiable to impose fairly onerous obligations on third parties, that is, parties which are not responsible for the creation of the material such as, in this

87 Second Reading Speech, above n69 at 12.

88 These two considerations both fall within the topic of jurisdiction, the first concerning enforcement or executive jurisdiction and the second concerning prescriptive or legislative jurisdiction. For a general treatise on jurisdiction, see Akehurst M, 'Jurisdiction in International Law' (1972–1973) *British Yearbook of International Law* 145.

case, ISPs. Similar obligations on distributors are not justifiable to remedy the violation of a private right. Thus as far as 'blocking' of the material was an option in *Macquarie Bank* it was an obligation which could only have been imposed on the content creator, the defendant Berg. Blocking access by content creators and blocking access by distributors such as ISPs are not comparable. The technical solutions to achieve them are entirely different and the relative effectiveness or appropriateness of one blocking devise does not reflect on the other. Furthermore, distributors, unlike content providers, are subjected to the blocking requirement precisely because they are within the territorial jurisdiction and thus amenable to Australian enforcement jurisdiction. In contrast, while the court in *Macquarie Bank* had adjudicative jurisdiction over Berg (established through the service of process), the reality was that at the time of hearing Berg was not in Australia and thus he belonged to the category of 'man [who] can disobey a judge with impunity outside the territory over which the judge had jurisdiction.'[89] Thus, whatever Simpson J said about the feasibility of blocking access to overseas online material must be viewed against the background of a private action and has no bearing on the legislative blocking regime.

Finally, considerations of costs are highly relevant to the merits of the content legislation and were decisive in shaping its precise structure:

> The Broadcasting Services Amendment (Online Services) Bill 1999 ... will enact a regime which balances the need for the Government to meet legitimate community concerns ... while ensuring that regulation does not place onerous or unjustifiable burdens on industry ...[90]

For example, the complaints-driven process, which is expected to be least resource intensive,[91] was preferred to the more costly one which would require either ISPs or the ABA actively to monitor the Internet. In contrast, consideration of the relative costs of orders is at the most a minor concern in private actions where the parties are responsible for them. Whether the implementation of the injunction restraining the defamatory publication would have been very costly or not was of no relevance to the judge's decision on whether to grant it. Thus again, *Macquarie Bank* cannot possibly be seen to support those strong criticisms relating to the relative proportionality between the financial effort going into content control and the resultant benefit and effectiveness of the regime.

The above discussion demonstrates that, despite the relative similarity of the subject-matter of *Macquarie Bank* and the Content Legislation, there are substantial differences between the means available to enforce a private right and those available to enforce a public good. These differences (rather than fundamental disagreements on the nature of the Internet) explain why the judge and the legislature have reached opposite conclusions on the feasibility of building protective walls in cyberspace.

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89 Id 181.

90 Second Reading Speech, above n69 at 1.

91 Above n86 at para 'Will the Complaints-Driven Process be Sufficiently 'Proactive'?'.

6. *Conclusion*

This article has attempted to draw a few lessons from one of the first Australian cases concerning the difficult jurisdictional issues arising out of Internet-related disputes. It is primarily aimed at raising questions and concerns rather than finding answers to a topic which deserves much greater attention.

While the decision in *Macquarie Bank Ltd and Anor v Berg* is laudable for not pretending that nothing much has changed in the era of global connectivity, it commits the mistake of oversimplifying the legal effects of the Internet. *Macquarie Bank*, which is perhaps an archetypal online defamation case, illustrates well that a more subtle approach which takes account of the particular nature of the publication and dispute can lead to a more satisfactory result in terms of upholding parties' legitimate rights while not substantially inhibiting online communications. World-wide accessibility of the Internet does not turn every online publication into an international publication and every dispute into a global matter in which every jurisdiction wants, should or does have a say. In relation to jurisdictions where no 'publication' occurred or where 'publication' occurred but with which the dispute has only a minimal connection it may not make sense to speak of 'superimposing' the law of the jurisdiction with which the dispute had a substantial connection.

Of most immediate relevance to an Australian audience appear to be Simpson J's remarks on the impossibility of trying to impose limits on the global reach of a website as they seem to contradict directly the efforts the Australian legislature is making at the moment to tackle illegal and highly offensive online material. This article showed not only why Simpson J might have been wrong in holding that the injunction could not possibly be restricted to New South Wales, but also why — even if Simpson J had been right about the non-feasibility of artificial borders in cyberspace — this would not have been inconsistent with the legislative blocking attempts.

Principally, the judgment and the case display a very similar tendency to focus on the measures available at home to minimise the harmful effects of conduct occurring in the neighbour's garden without suppressing its positive effects. This is no doubt a difficult juggling act in which sometimes someone's interest is bound to be let slip.