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Faculty of Business & Law

School of Law

Libel on Twitter: An examination of the continued application
of the law of defamation to govern defamatory content in the
Web 2.0 age

By

Sarosh Hassaan Razaq Khan

Thesis for the degree of Doctor of Philosophy

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Abstract

For the Web generation, the likes of Twitter are part and parcel of life. When people look for breaking news, they do not turn to television channels, but to Twitter. When they look for updates on sporting events, they turn first to Twitter. When they look to engage with others, they turn first to Twitter.

Twitter has democratised expression. It has empowered individuals to express themselves in ways never previously available to them. Where the right to public, written expression was traditionally in the hands of a select few, it is now a right given to all individuals. It has revolutionised expression.

The law of defamation was developed to address the nonconformity of the tabloid industry. Newspapers published conjecture and gossip because they appreciated that such content appealed to a significant proportion of the readership and in turn that doing so was lucrative. As a result, the modern day law of defamation was developed; a mechanism designed specifically to curb the behaviour of tabloid newspapers.

While there have been debates as to the extent to which its provisions are ‘fair’, the law has been applied to the instances that it ought to have been. The law has been able to be applied.

However, expression as we know it has evolved. No longer are there few newspapers publishing defamatory content. There are now thousands of individuals on Twitter, tweeting and retweeting defamatory content. The cases of *Giggs* and *McAlpine* are merely two instances of the subjects of remarks being left with little redress; having their reputations destroyed.

The key question in this thesis is; can the law of defamation remain the mechanism by which reputations are protected from harm on Twitter? Can it remain an effective mechanism in this new context of expression?

The very nature of law as a mechanism to deter a course of behaviour requires that there is fear; individuals fear that should they not act in accordance with the prescribed norm of behaviour, they will suffer some loss. If the punishment cannot be effectively enforced, the fear of punishment does not exist and in turn it is not effective as a deterrent.

The analysis in this thesis reveals that this does not occur as the provisions of law when applied to actual tweets and retweets do not allow for the effective application of the deterrents. When the cases of *Giggs* and *McAlpine* are considered against the provisions of primary and secondary liability, it is evident that the law cannot provide the clarity and certainty because of the sheer volume of actors and lack of context in decision making.

With the current mechanism no longer appropriate, a model that has at its core the community of individuals on Twitter developing and enforcing their own standards, is proposed in this thesis. The community is supplemented by the law and Twitter, both of which have a role. As a mechanism the comparative analysis of the emergence and growth of the 'RT' retweet variant and examination of the Wikipedian model of governance, makes it clear that the model could be viable, with the *Giggs* case used as a case study.

Expression has been democratised under Twitter as we harness the power of the collective, rather than affording the opportunity to express themselves to a few select individuals. And yet, we have retained the same mechanism as we have employed in the

previous environment in which there were a few publishers. The mechanism proposed in this thesis is one which, at its core, seeks to harness the power of the collective to govern. It is more appropriate in this new climate of expression to ensure reputations are not unduly damaged.

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All have demonstrated enthusiasm and a passion of the research that made it easy to continue to strive for success. Seeing these faces, walking the halls of the Web Science DTC building, without fail they would stop and ask me how my research was going which has been hugely comforting. Doctoral research, by its very nature is a very isolated, individual endeavour, but they have done their utmost to ensure this has not been the case.

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I will never be able to tell my friends exactly how thankful I am to them for their love and support. Doctoral research, by its very nature, requires a selfish attitude, one dedicated to the research, ensuring its success and completion. It requires the individual to give himself to the work at the expense of other things in and around him, part of which are his friends.

I have not always been there for my friends these past years, to the extent I would have wanted to have been, but they have always been there for. There have been birthdays, important dates and holidays I have missed by their love and support has been unwavering. Whether it is venting about my research, or just bearing my soul about my personal life, they have always been there for me, encouraging me to never give up.

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Thank you.

Declaration of Authorship

I, Sarosh Hassaan Razaq Khan,

Declare that the thesis entitled

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And the work presented in this thesis is both my own, and has been generated by me as a result of my own research. I can confirm that:

- This work was done wholly in candidature for a research degree at this University;
- Where any part of this thesis has been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
- Where I have consulted the published work of others, this is always clearly attributed;
- Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
- Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;

Signed:

Date:

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Chapter One: Introduction

The American philosopher Burrhus Skinner, when talking about technology in the 1960s remarked that *'the real problem is not whether machines think but whether men do.'*¹ A statement that is never truer than today.

Today, men have been empowered to do, to do for the first time what they have never previously been able to do; express themselves in writing to the public at large. This power has been granted to them by Twitter. However, almost inevitably as men, they have done much wrong, including publishing defamatory content.

We are in the midst of a revolution in expression; a revolution that has left the law in its wake. Any individual can now publish content instantaneously on any subject that they wish. Within a few short seconds, an individual can engage in conversations with thousands of others. The power to express themselves in writing to the public, has never been in the hands of so many.

This power has provided society with much good. Social actions like the Arab Spring would not have been as effective, were it not for Twitter. Breaking news like the live reporting of the death of Bin Laden would not have been possible in the way it was, without Twitter. Social causes such as fundraising would not have been possible in the way they have occurred; so instantaneously. All of these things have previously been possible previously, but Twitter has made them faster and more all-encompassing than ever before.

However, the power to express oneself has resulted in negative behaviour, including the destruction of reputations on Twitter.

¹ Skinner, B., *'Contingencies of Reinforcement'*, (New York, Pullman Press, 1969), 60

Giggs,² *McAlpine*,³ and many more have had their reputations destroyed by thousands tweeting and retweeting in an instant.

Gossip and conjecture are important crucial to society. While important, we have traditionally engaged in gossip behind closed doors because of the fear of being seen as one who engages in gossip and back-biting behind others. Individuals have taken what they did in the past behind closed doors, and decided to broadcast it to the public, in writing via Twitter.

Giggs, the facts of which are considered in detail in Chapter Five, saw thousands of individuals on Twitter tweet and retweet the fact that he had been the individual who had taken out a superinjunction. While newspapers could not report on the issue, thousands did on Twitter. And while *Giggs* wanted to seek redress, as of the time of writing, nothing has been available because of the sheer number of actors.

Lord *McAlpine* was a long-time member of the House of Lords and frankly, despite being as much, lived a largely innocuous life, away from the public eye; the case is considered in Chapter Six. He was accused of being a member of a Conservative Party child abuse ring in the 1970s, with thousands taking to Twitter to tweet and retweet the fact that he had engaged in as much. While *McAlpine* was able to obtain some measure of redress, holding two celebrities to account, thousands of others, whose behaviour contributed to the damage done, have gone unpunished to this day.

There have been thousands in both cases above, who contravened the societal norm that reputations ought not to be attacked. Norms are crucial for society as they ensure its effective existence; without norms a collective cannot function effectively.

² *CTB v. Twitter Inc., Persons Unknown* (Case No. HQ11XO1814)

³ *McAlpine v Bercow* – judgement.gov.uk, 24 May 2013

All individuals in society agree to be bound to a particular course of behaviour for the best of everyone within the group; considered in Chapter Three.

The norm that reputations not be attacked exists because reputations are hugely important; they reflect, at their most basic, how we are seen by others. The majority of individuals in society do not know of others in detail – who they are, what their character entails. In turn therefore, we have agreed that reputations should not be unduly attacked, as they serve as an immediate signpost for who we are.

The threat posed by tabloid journalism, the development of which is heralded as the last revolution in expression, saw the development of the law of defamation to curb such behaviour. The Industrial Revolution saw societal cultural and technological developments that resulted in what we now know as tabloid journalism.

Newspapers did not necessarily want to cause damage for any malicious reason but rather because they saw that such content was attractive to a significant proportion of the readership; and in turn profited from such content.

Therefore a strict law, the law of defamation, was developed, to curb the behaviour of newspapers. Strict financial penalties have been imposed to act as a deterrent; the fact that defamation is the only tort in which additional financial penalties may be imposed on top of what has been imposed as compensation for the victim is reflective of the fact that newspapers were driven by desire to profit from such stories, and in turn the extent to which the law of defamation was developed specifically for newspapers.

It is this same mechanism that has remained in place to the present day. The mechanism, despite claims from many that it might not be fair in respect of the line

drawn between the need to protect reputations and right to expression, has been effective in respect of its ability to be applied to cases as they arise. However, this appears to longer be the case – the development of Twitter, the sheer volume of actors and speed with which they act, calls into the question the way in which the law can function.

Twitter, has seen thousands of actors, behaving instantaneously to defame. Individuals don't have to have been called to publish their thoughts on Twitter. Simply put: There are not the same restrictions as the kind we have previously lived through. Any individual can, and is publishing to the public on Twitter.

Expression has been democratised and we are in the midst of a revolution in expression.

It is this number of individuals acting instantaneously, without the context that sits behind tabloid journalists, that calls into question the extent to which the current mechanism which has at its core, the law, can continue to remain an effective mechanism.

There have been instances on Twitter in which where there is a single defendant, the law has been able to work successfully; namely *Elsbury*⁴ and *Cairns*⁵. The fact that these two instances have been addressed with the victim able to obtain redress, while cases of mass actors, as in *Giggs*⁶ and *McAlpine*⁷, have gone unaddressed highlights the fact that it's the volume and speed of actors, that renders the current mechanism ineffective.

⁴ *Elsbury v Talbot*, [2009] unreported

⁵ *Chris Lance Cairns v Lalit Modi* [2010] EWHC 2859 (QB)

⁶ *CTB v. Twitter Inc., Persons Unknown* (Case No. HQ11XO1814)

⁷ *McAlpine v Bercow* – judgement.gov.uk, 24 May 2013

The Web 2.0 environment is distinct from anything we have seen previously. At its very core is the individual, as part of a collective, as the likes of Wikipedia, Flickr and YouTube, exemplify.

The Web 2.0 environment has revolutionised the role of the individual; no longer merely observing and taking from content provided, but contributing to the wealth of content themselves. And Twitter has democratised expression, harnessing the power of the collective to express themselves in ways completely distinct from what we have ever seen before; the few having the right to publish in public to the masses.

This thesis considers the extent to which the law can continue to remain the effective mechanism to deter the publishing of defamatory content on Twitter in light of the collective volume of actors, acting in an instant to defame. And whether a mechanism built on communally developed and enforced standards could be viable.

The hypothesis central to this thesis is that the **current mechanism cannot continue to be the most appropriate mechanism to deter nonconformity in respect of defamatory publications in the Web 2.0 environment.**

The model proposed in this thesis, one which seeks to harness the power of the collective on Twitter to develop and enforce standards, is considered in Chapter Seven. The new regulatory model has the community at its core, with Twitter and the law acting in a supplementary capacity.

The view is that the community policing itself will be able to drive down nonconformity amongst the majority of offenders, with Twitter bans acting to deter such behaviour. The law will be in place for repeat offenders, or instances in which the damage done is so significant that it is the only course of action.

The belief is that this model is better placed to ensure conformity as the community is able to reach individuals, as in *Giggs* and *McAlpine*, where the law has not.

The viability of the model is considered, in Chapter Seven, through a comparative analysis of the existence and development of the ‘RT’ retweet variant on Twitter and the Wikipedian model of governance, which harnesses the power of contributors in a self-regulatory mechanism. The *Giggs* case is used as a case study to highlight how the model would work in practice.

Chapters Five and Six examine the effectiveness of the current mechanism of law, in the context of primary and secondary liabilities against the cases of *Giggs* and *McAlpine* respectively. These are two of the most seminal cases in the U.K. with thousands of tweeters and retweeters in both.

Chapter Four considers the law of defamation – its theoretical foundations, provisions and application online. Consideration here is also had to the 2013 Act and the fact that despite some amendments, it does not actually address the issues brought forward by Twitter.

The law was developed to ensure that the norm that reputations not be harmed was achieved. Laws are one of the means by which adherence to a norm can be achieved, with standards being the other. Chapter Three considers initially the relationship between laws, standards and norms, how the former two are simply different means by which the third can be achieved. It then considers the broader relationship between regulation and deregulation to provide a contextual understanding of how a model built on standards enforced by the community on Twitter can be successful, where law has previously been applied.

Chapter Two considers the way in which Twitter has revolutionised the notion of public written expression. It considers the progression of expression, previous to the development of tabloid journalism, through to the present day, as well as focusing on the characteristics of Twitter that have seen it grow. It then considers in-depth the broader concept of Twitter being a virtual community, and how individuals are bound to others on the site.

Holistically the structure of this thesis serves to initially set the scene as to how expression has evolved, how we can govern expression and how and why we have governed it as we have; Chapters Two, Three and Four respectively. Chapters Five and Six consider the extent to which the law can be appropriate in the context of Twitter, and finally Chapter Seven outlines a model that it is believed would serve us better.

Mixed methodologies are used in this thesis as Chapters Two, Three and Four consist of literature reviews. Chapter Two explores the works of the like of Berners – Lee, Wellman and McMillan & Chivas, in particular. Chapter Three consider, amongst others, the work of Black and Chapter Four, the works of Barlow, Post, Lessig and Murray.

Chapters Five and Six consists of both quantitative and qualitative analyses of Twitter data. In both instances, the existing provisions are considered against actual tweets and retweets to establish the viability of the law in the broader Twitter context. Finally Chapter Seven consists of comparative analysis as the theoretical viability of the model proposed in this thesis is considered with respect to the ‘RT’ retweet variant on Twitter and the Wikipedian model of governance, alongside using the *Giggs* case as a case study.

This mixed methodological approach is one of the ways in which this thesis is novel and contributes to the existing body of academic research in the field. At the same time, such an approach provides a holistic understanding of an ability to explore the hypothesis central to this thesis.

1.1 Premise of this Thesis

This premise of this thesis arose from previous research and the *Giggs* case. Previous research explored the liability on employers for the unlawful behaviour of their employees. It considered this issue from the perspective of the development of mobile technologies and how it blurred the line between in and out of employment.

The result of the research was clear; there was no clarity for employers. The key reason for this was the development of the Web 2.0, as it was so new and revolutionary that it had not been considered.

As a result, the research questions arose as whether there was clarity at a higher level? Was there simply a lack of clarity and certainty in social media and the application of law with them? It would make sense that for there to be a lack of clarity in the employment specific sector, there would have to be a lack of clarity more broadly.

1.2 Scope of this Thesis

At this juncture, it is important to couch this thesis in terms of what is not within scope. The two most important things that this thesis does not touch upon are the interplay between freedom of expression and the right to protect reputations and the interplay between privacy and defamation.

1.2.1 Right to Expression v Right to Protect Reputations

One of the most important proponents of freedom of speech, Alexander Meiklejohn argued that for the concept of democracy to work successfully, the electorate need to be properly informed.⁸ For the electorate need to be informed there can be no constraints on the flow of information and idea; democracy will not be true if those in power are able to manipulate the electorate by withholding information and stifling criticism.⁹

Newspapers have been at the core of this desire to keep the electorate informed, given their ability to reach the masses. In turn, they have had a unique right to publish content. However, this right has been abused by some, as they have published scurrilous content, because such content has been attractive to some of the readership.

There has therefore been the need to develop a line between the right to free expression and the right to ensure reputations are not unduly attacked. This balance is seen in Art 10 and the fact that the subsection (2) provides for the fact that the right to expression may be fettered only in particular instances which includes in the insurance that remarks published are not defamatory about the individual subject of the remarks.¹⁰

We have established an interplay between expression and reputations; we have established the fact that newspapers can publish content freely so as to call into question society around us, while not unduly damaging reputations.

⁸ The importance of the right to expression can be seen in the existence of Art 10 of the ECHR and even further back in time dating back to the 1689 Bill of Rights and through various ancient civilisations. The notion of free expression can be found in numerous international instruments including; Art 19 of the Universal Declaration of Human Rights and in International Human Rights Law in the International Covenant on Civil and Political Rights, Article 11 of the Declaration of the Rights of Man and the Citizen, Article 19 of the Universal Declaration of Human Rights 1948.

⁹ Meiklejohn, A., *Free Speech and its Relation to Self-Government*, (New York, The Lawbook Exchange, 2011). See Marlin, R., *Propaganda and the Ethics of Persuasion* (London, Broadview Press, 2002), 226; Barendt, E., *Freedom of Speech* (Oxford, Oxford University Press, 2007), Emerson, T., 'Freedom of Association and Freedom of Expression', Yale School of Law, Faculty Scholarship Series, Paper 2797

¹⁰ European Convention of Human Rights 1960, Article 10(2).

There is certainly an argument to be made for re-evaluating this line; as we have empowered individuals, the balance ought to be in favour of expression, more than it currently is. However, as remarked this thesis does not the extent to which the current balance is appropriate in this new context – this is an entirely separate this question. And this thesis considers instead whether the current mechanism is effective in its application.

1.2.2 Privacy v Defamation

There is often a misconception that defamation and privacy are one in the same, with the words being used interchangeably by individuals. However, in actuality the two are distinct notions of law, as privacy relates to all rights of man and defamation reputation only.

In the '*Right to Privacy*' American lawyers Samuel Warren and Louis Brandeis defined the protection of the private realm as the foundation of individual freedom in the modern age. The pair concluded that the range of existing legal mechanisms deployed together were not sufficient to ensure all rights of man could be protected; there were gaps in protection that the existing mechanisms could not address.¹¹

Privacy is simply a '*right invaded*',¹² relating to the individual in any way in which he might be deprived of anything of himself. More fundamentally it was described by the pair as '*right to be let alone*'¹³

¹¹ Warren, S. & Brandeis, L., '*The Right to Privacy*', 4 Harvard Law Review 193-220 (1890). The pair considered the example of copyright and noted that the law of copyright provided the protection necessary to protect the tangible product itself but not the intangible, the value in the idea behind the product. The idea underpinning the product would be just as value as the product itself, as without the latter the former could not be viable, and yet it was not protected by the existing mechanism of law in the form of copyright. The same was the case for other aspects of law, they did not protect all aspects of man. The idea fell within the private realm of man and ought to be protected as such but was not and hence the law of privacy, a mechanism that would protect all rights of man, whether they are tangible or intangible

¹² *Prince Albert v Straneg*, 1 McN. & G. 25 (1849), Lord Cattenham.

While privacy protects all aspects of man, whether they are tangible or intangible, defamation protects only the intangible of reputation. As a result, they are actually two distinct pieces of law as a remark may be invasive of privacy and yet not defamatory and defamatory and not necessarily invasive of privacy.

Former Formula One Racing President Max Mosley was found to have taken part in Nazi themed sexual acts with prostitutes. Mosley was successfully able to argue that he had had his privacy invaded by a national newspaper in the taking and publishing of the photographs.¹⁴

Consider however a scenario in which no photographs were taken and instead the newspaper had suggested Mosley was a Nazi on the back of the fact that Mosley's father, Sir Oswald Mosley, was principally known as the founder of the British Union of Fascists, with strong links to the Nazi Party in Germany.

The scenario above may well be regarded as defamatory causing Mosley's reputation to be lowered in the eyes of society claiming him to be a right wing supporter and yet would not be regarded as privacy invasive given that Sir Oswald Mosley's history and political beliefs were public knowledge.

Individuals thinking that Mosley, the president of an international corporation like Formula One having fascist tendencies would certainly cause his reputation to be

¹³ Warren, S. & Brandeis, L., '*The Right to Privacy*', 4 Harvard Law Review 193-220 (1890). Bloustein described the notion of privacy as '*protects the inviolate personality, the individual's independence, dignity and integrity*', while Smith concluded it as '*the desire by each of us for physical space where we can be free from interruption, intrusion or embarrassment...*' See Bloustein, E., '*Privacy as an Aspect of Human Dignity: An answer to Dean Prosser*' 39 New York University Law Review 971 (1964); Smith, R., '*Ben Franklin's Web Site: Privacy and Curiosity from Plymouth Rock to the Internet*', Privacy Journal, 2004, 45.

¹⁴ *Mosley v News Group Newspapers* [2008] EWHC 1777 (Q.B.). The defendant newspaper suggested that given the nature of the acts, there being a suggested Nazi overtone to the actions of all individuals involved, and the position that Mosley held as the President of a major sporting body (the Federation of International Automobiles), the revelation of the photographs and content within them was a public necessity. Mosley contested that there had been an inherent breach of the pre-existing relationship of confidentiality between the participants.

lowered in the eyes of potentially millions. However, as the information was in the public domain, it would not be regarded as being an invasion of privacy.

In contrast to this, an invasion of privacy is not necessarily a case of defamation as in *Douglas v Hello! Ltd*, the claimants were successful in a claim of breach of privacy in the High Court and Court of Appeal.¹⁵ They were successful under the Data Protection Act 1998 and the law of breach of confidence for the publication on the part of Hello! magazine of unauthorised photographs by a freelance photographer.¹⁶

The claimants had suffered a detriment by the unauthorised release of the photographs as they had had agreements in place with OK magazine to publish photographs of the event exclusively; the claimants had suffered an invasion of privacy of the contract made between themselves and OK magazine but had not had their reputation lowered in the thinking of society and as a result there was not a case of defamation.¹⁷

The claimants had not had their reputations diminished in the eyes of the right thinking members of society for having had the pictures published. They were pictures of their wedding that they had previously signed agreements to have brought to the public through the print publications. Instead, the right that they had to have the exclusive distribution of the pictures through the avenue they had chosen violated. Essentially this was an instance of invasion of privacy of choice, the ability to be able to

¹⁵ *Douglas v Hello! Ltd* EWCA Civ 595.

¹⁶ Michael Douglas and Catherine Zeta Jones had agreed a deal with OK! Magazine which would give the company exclusivity over their wedding that took place in 2000. In order for the deal to apply there were great measures taken to prevent unauthorised photos were not allowed however a freelance photographer managed to get in and take photos which were then sold on to Hello! Magazine.

¹⁷ The same would also be the case where there might be an invasion of physical privacy (if an employer were to make an employee take a non-consensual drug test) or an invasion of an individual's right to make choices free from intrusion (being coerced into making a particular decision); they would be invasions of privacy without causing damage to the subject's reputation in the eyes of the community at large.

make the choice and decision as to the avenue through which the information that they wanted to have distributed would be so distributed.¹⁸

Privacy and defamation are two distinct legal beasts; the former designed to protect all rights of man, whether they be tangible or intangible, and the latter the intangible of reputation only.

This thesis considers only the extent to which the law of defamation, the mechanism developed to address the behaviour of newspapers, can continue to remain an effective mechanism to protect reputations, and not the law of privacy.

As a result, along with not considering the interplay between the right to expression and the right to protect ones reputation, this thesis will also not consider the law of privacy beyond this point.

1.3 What is Web Science?

For long, the Web has been considered from a purely a technical perspective. This approach has made sense given that it has been seen as merely a set of web pages linked to one another creating a natural and seamless ability for an individual to traverse these pages, on top of the Internet, in itself merely a set of protocols creating connections between computers.¹⁹

Web Science as a discipline challenges this notion. It contends that our understanding of the Web can no longer be siloed to consider the technical

¹⁸ Privacy of choice allows the individual to think for themselves and here the claimants decided on one publisher to reveal their pictures and therefore the publication of the pictures by a rival publication was an invasion of this privacy of choice in the decision adopted by the claimants. It is important to note too that there are different standards of analysis as privacy requires that it be demonstrated that harm has been caused while in the case of reputations it need only be demonstrated that damage would likely have been caused. See Dugdale, A., Jones, M. & Simpson, M., *'Clerk & Lindsell on Torts'* (Sweet & Maxwell, London, 19th edition, 2006), [28-01][28-03]; *Sim v Stretch* [1936] 2 ALL ER 1237, Lord Atkin 1240.

¹⁹ Berners – Lee, T. & Fischetti, M., *'Weaving the Web: The Original Design and Ultimate Destiny of the World Wide Web'* (New York, Harper Collins, 1999)

infrastructure of the Web.²⁰ Instead, Web Science considers that as the role of the Web changes in our lives, so too does the way in which we understand the Web. As we now rely on the Web for our banking, shopping, communicating with friends and families, as governments rely on the Web to communicate with citizens, the way in which we try to understand the Web must evolve.²¹

To ensure that the pro-human value that we currently derive from the Web is not lost our analysis of the Web must be interdisciplinary; through to a broader approach built upon sociology, psychology, economics, mathematics, and legal.

Web Science does this by bringing individuals together from all perspectives to consider the intersection of the Web and traditional subjects; law sociology, psychology, economics and many more.

²⁰ Berners – Lee, T., Hall, W., Hendler, J., Shadbolt, N. & Wietzner, D., ‘*Creating a Science of Web Science*’, *Science*, 311, 2006; Berners – Lee, T., Hall, W., Hendler, J., Shadbolt, N. & Wietzner, D., ‘*Web Science: An Interdisciplinary Approach to Understanding*’, *Communications of the ACM*, July 2008, 51(7), 60

²¹ Donato, D., Laura, L., Leonardi, S. & Millozzi, S., ‘*The web as a graph: How far we are*’, *ACM Transactions on Internet Technology*, 7(1), Feb 2007; See Huberman, B. & LukoseR., ‘*Social dielmmas and Internet congestion*’, *Science*, 277, 5325, July 1997; Kumar, P., Raghavan, P. & Tomkins, A., ‘*Trawling The Web For The Emergence of Cyber Communities*’, In *Proceedings of the 8th International World Wide Web Conference*, (New York, Holland Inc, 1999); Chun, S., Shulman, S., Sandoval , R. & Hovy., E., ‘*Government 2.0: making connections between citizen , data and government*’, *Information Polity*, 15(1-2), 1-9; Shadbolt, N. et al., ‘*Linked open government data: lessons from Data.gov.uk*’, *IEEE Intelligence Systems*, 27(3), Spring Issue, 16-24; Robinson, D., Yu, H., Zeller, W. & Felten, E., ‘*Government data and the Invisible Hand*’, 11 *Yale Law Journal*, 2009, 160.

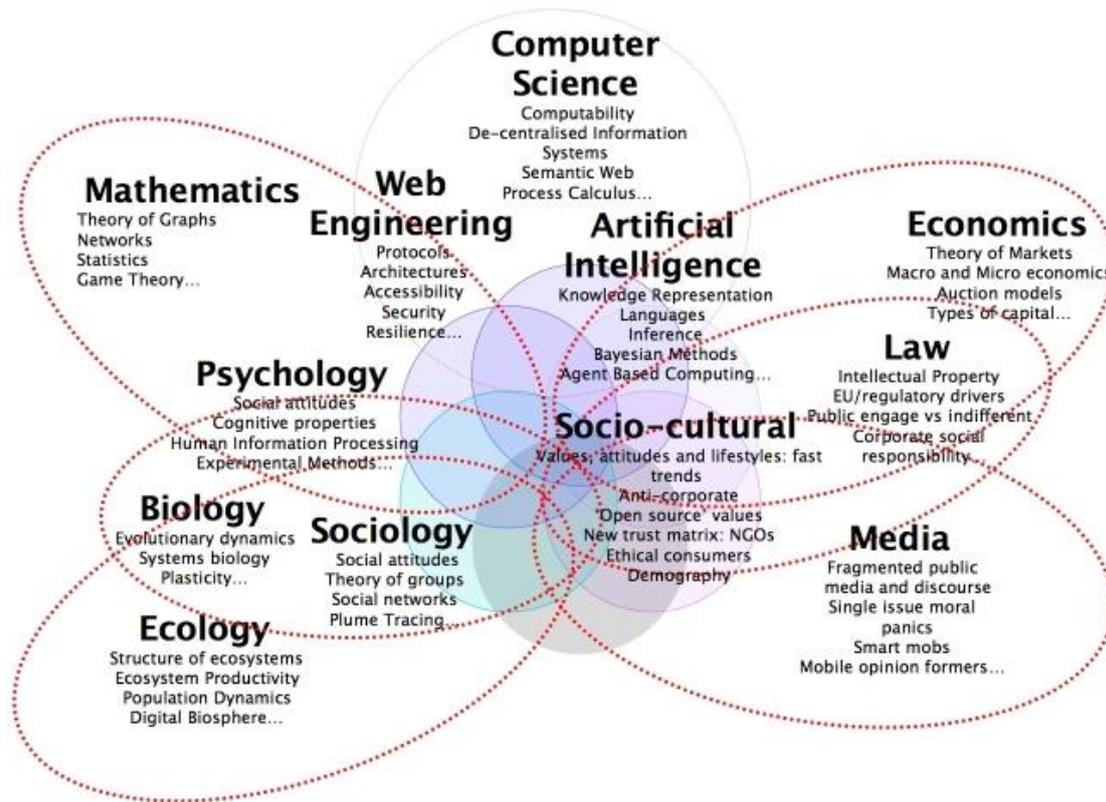


Fig 1. The Web Science diagram representing some of the overlapping research topics and disciplines that contribute to the field

The above Fig. illustrates Web Science. It is the interplay, the cross-section between traditional subjects and the Web allowing us to consider the way in which the Web will grow in our lives.

From the legal perspective, we need to consider how the nonconformity can be addressed. We need to understand how illegality on the Web cannot be allowed to flourish. However, the law presents its own unique qualities that mean that understanding law and transposing to the Web is not appropriate, instead we need to need to understand the interplay between law and the Web, as this thesis does.

The law has always lagged behind technology; the latter had evolved, leaving the former to catch up in its wake. And it has been no different with the development of the

Web. However, the Web is now even more intrinsic in our lives rendering a continued siloed analysis fatal.

To this end therefore, this thesis considers the issue of governance of defamatory content from a Web Science, interdisciplinary approach. A mixed methodology approach is adopted trying to consider the extent to which the existing legal mechanism can be viable.

This thesis sits at the very heart of Web Science, trying to understand how the freedom of expression the average man has been empowered with can be maintained, allowed to flourish as we move forward by considering the interplay between the law and individuals' behaviour on Twitter.

1.4 Contribution

This thesis makes a number of contributions to the area of study;

- Shows how a mixed method approach can be used to understand the implications of legal framework on the Web
- Proposes a new model for handling defamation on the Web

The existing body of academic research has considered the issue of defamation on the Web, from an isolated position and not with the Web Science approach; from an interdisciplinary perspective.

The interdisciplinary approach here, both in the literature review and the research methodologies is one aspect that makes this research novel; it has allowed conclusions to be reached that others have not been able to make.

All of the existing research in the area does not consider the issue by considering thousands of tweets to prove beyond doubt the application of the law. This large scale harvesting has meant that the conclusions reached are more significant than otherwise would be the case. The computational approaches used in this PhD allow us to explore a large corpus of Twitter data far larger than had there simply been the analysis true traditional legal tools.

Rather than considering a single tweet from the *Giggs* and *McAlpine* cases, we have been able to consider an entire corpus that mean that the conclusions being reached are much richer than would otherwise be the case.

The final thing that makes this research novel is the perspective from which it addresses this issue. The question of the governance of expression online is one that has been contested as long as the Web has been in its existence. This piece of research is the first that explores it from the Web Science perspective; considering the issue and what it means in the wider context for the Web in our lives. This in itself as Web Science is new itself and has not been considered before.

As well as being novel, this thesis is timely and important. The cases of *Giggs* and *McAlpine* are at the centre of this work and still reverberate in the wider media. Both have yet to be resolved fully. Both have yet to see the subjects obtain redress against all of those who have caused damage to their reputations.

Thousands of individuals have been able to evade accountability and have been given the impression that such behaviour will go unpunished. The individual at the centre of the Web will only become more pronounced as the Web 2.0 environment continues to evolve. We have merely seen the tip of the iceberg thus far.

Reputations are one of the most fundamental things that all human beings are born with; their represent our honour, dignity and are fundamentally a product of our hard work. They are arguably the most heavily entrenched and well protected aspect of the law of the land in the U.K. and yet nothing is being done to protect them on Twitter and the Web 2.0 environment. This thesis tries to put forward a mechanism by which such can be addressed and they remain as important as they have been.

Chapter Two: Democratisation of Expression

In 1910, John Stuart Mill in his essay *On Liberty in Utilitarianism* noted ‘... *there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it might be considered.*’²² Or as Voltaire has been paraphrased as saying; ‘*I disapprove of what you say, but I will defend to the death your right to say it.*’²³

The right to express oneself is one of the most fundamental rights in society; as it allows individuals the chance to live their lives as they wish. While the right developed in the context of religious expression in particular²⁴, it is equally applicable to more general expression.

Traditionally it has been limited to the spoken word, with written publicly disseminated expression in the hands of few. Social media has created a revolution in expression. Now anyone can publish content, with their views available to be read by potentially anyone across the world.

Twitter is at the core of this revolution, with individuals able to publish anything provided the content is 140 characters or less. The ability to republish and search for content mean that not only are able to publish content, but have that content engaged with by others, and more broadly have large scale conversations with others.

²² Mill, J.S., ‘*On Liberty in Utilitarianism*’ (London, 1910), 83.

²³ ‘*Voltaire: Stanford Encyclopaedia of Philosophy*’, 2009

²⁴ The right to express oneself was entrenched in the ECHR to ensure the ability of various religious groups across Europe to ensure they were able to practice their religious beliefs free from persecution. See Alexander, L., ‘*Is There a Right to Freedom of Expression? Cambridge Studies in Philosophy and Law*’, (Cambridge, Cambridge University Press, 2005); Cohen – Almagor, R., ‘*Speech, Media and Ethics: The Limits of Free Expression*’, (London, Palgrave Schol, 2005)

Twitter has been used for many positive things, breaking news and information, social causes engaging the most people as quickly as possible and specialist knowledge in particularly niche areas. However, individuals have also used it to engage in gossip and conjecture.

Gossip, while frowned upon in society, actually serves a number of important functions, and in turn, individuals have engaged in it behind closed doors. They have now taken what they did behind closed doors, and taken it to the most public of public forums, Twitter.

A combination of the characteristics of Twitter and human nature, have led to cases like *Giggs* and *McAlpine*; thousands of individuals destroying the reputations of individuals in an instant.

This Chapter explores the democratisation of expression. It considers the role of Twitter in this democratisation and the broader changes that have occurred since the last such revolution in expression; the development of large scale tabloid journalism. It then considers Twitter specifically, its characteristics and nuisances and how these have made it such an attractive medium for gossip. It concludes by highlighting the concept of community on Twitter, and how it is that individuals have come together on Twitter.

Understanding this democratisation of expression is key to this thesis. It is this revolution that has resulted in instances of *Giggs* and *McAlpine*; instances of thousands acting, with no ability for recourse. It is this revolution that calls into question the extent to which the law can continue to remain effective and therefore understanding what has happened is crucial.

2.1 Social Media

German philosopher Heidegger remarked that our understanding of and relationship with technology has given us the impression that we are God like.²⁵ Our relationship is one that has changed to one of master and slave; both in control of and simultaneously at its mercy; according to Heidegger, it is a relationship that has evolved as the role of technology has become even more entrenched in our lives.²⁶

Technology is no mere means itself towards an end, but is a way of revealing and it reveals a notion in which the individuals perceive themselves as being all powerful; *'the essence of technology is by no means anything technological'*.²⁷

Individuals by their very nature are driven by their own egos, their own perceptions of value in themselves as being hugely important, with a desire to share such with others, and Twitter has made the ability to articulate this desire even more pronounced. Twitter, and the broader development of social media, have given individuals a power to express themselves, that has made them feel God-like, as Heidegger remarked.

2.1.1 Web 2.0

Web 2.0 is the name given to the ideological foundation that has seen the Web become a medium on which any individual can publish content. The term Web 2.0 was coined in 2004 by Tim O'Reilly as he realised that the Web was on the cusp of a new

²⁵ Heidegger, M., *'The Question Concerning Technology'*, (New York, Garland Publishing Inc, 1997)

²⁶ Heidegger provides an in-depth examination of the growing role of technology in the lives of individuals.

²⁷ The notional contention of technology is one that sees itself within being more than just a means to an end and instead plays a crucial role within the action itself. The result therefore is our relationship with technology has profoundly changed resulting and if we merely keep considering technology we will never come to terms with it fully.

era 'one that would finally let loose the power of network effects, setting of a surge of innovation and opportunity'.²⁸

Web 2.0 is the change that means that the Web is no longer a platform upon which content is published by a select group of individuals; technically skilled, or knowledgeable in particular areas but instead continuously modified by all users in a participatory and collaborative fashion.²⁹

It is important at this stage to briefly understand the distinction between the terms 'Web 2.0', 'user generated content' and 'social media'; all of which are important in this thesis and often confused with one another. User generated content (UGC) is the product of individuals' endeavours made possible through social media that allows the Web 2.0 environment to exist.

²⁸ Musser, J. with Tim O'Reilly & The O'Reilly Radar Team, *'Web 2.0 Principles and Best Practices'*, O'Reilly Radar, Fall 2006. The bursting of the dot com bubble at the beginning of the twenty-first century was marked as the turning point of the Web with O'Reilly being of the view that rather than falling away to redundancy as many believed it would, the Web would in fact become more important than ever before with new sites and applications developing. O'Reilly provides a range of principles that articulate the way in which Web 2.0 differs from Web 1.0. He stated that the new Web could be regarded as a core around which the likes of wikis, blogs and others were drawn articulating the social nature of the new Web. Microsoft has sold its Office package since its first incarnation, Office 97, with regular updated versions being released for sale since right the way through to the most recent Office 2010. Customers are required to purchase these packages of software which have evolved and developed and hopefully improved to provide customers with better products. Google Chrome, a browser developed by Google was released in September 2008. Since its initial release Google has regularly improved the browser providing Web users with the ability to download the latest versions for free. Only one month after the first version was put out for availability, Google released another version with improve plug in performance and reliability amongst other features. Google has provided users with a constantly evolving and developing piece of software that does not require individuals having to purchase packaged software every few years.

²⁹ Barby, E., *'Web 2.0: Nothing changes...but everything is Different'* Communications & Strategies, Number 65, 1st Quarter 2007, 91, 103, 92. There has even been a suggestion that Web 2.0 is in fact a shift back to the initial purpose of the Internet when it was created, fostering the exchange of materials to allow better for collaboration to occur.

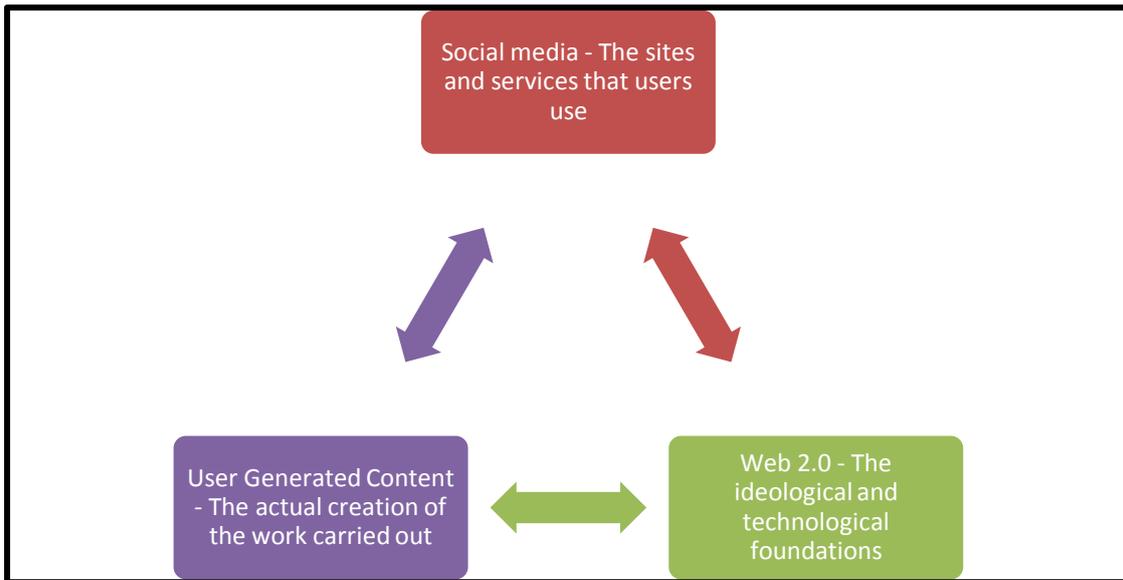


Fig 2. The relationship between the terms ‘social media’, ‘Web 2.0’ and ‘User Generated Content’

The phrase social media is difficult to define but understood to be the collection of websites and Web services that have allowed individuals to express themselves, producing the content that they want; ‘*sites that are transforming the Web where users are actively creating, evaluating and distributing content*’.³⁰ There are four criteria;

- Persistence (capture and archiving of content),
- Replicability (duplication of content),
- Scalability (broad visibility of content) and
- Searchability (access to content via search).³¹

The ease with which people are able to connect, communicate, produce, share, replicate and distribute content has led to and continues to have a profound effect on our

³⁰ ‘Participative Web: User-Generated Content’, Organisation for Economic Cooperation Development – Working Party on the Information Economy, 12 April 2007

³¹ Boyd, D., ‘Social network sites as networked publics: Affordances, dynamics and implications’, (eds), Papacharissi, Z., In a ‘Networked self: Identity, Community and Culture on Social Network Sites’ (Routledge, New York, 2010)

social and cultural practices. In the context of expression and opinion, traditionally the right to public expression has been in the hands of few, the newspapers, which has for the first time been opened up to all individuals in society.

2.1.2 Newspapers

The development of social media has been the most profound change to expression and threat to reputations since the development of tabloid journalism during the Industrial Revolution. This is discussed in detail in chapter Four, however, briefly, the Industrial Revolution led to the mass publishing of tabloid content for the first time.

Previous to the Industrial Revolution, a merchantilian approach to publishing existed with few newspapers in circulation, publishing only content that they had been allowed to, to a tiny proportion of the overall population that could read.³² Public written expression was entirely limited. It emanated from a central position, in terms of both production and consumption. The type of content was also controlled with only content that was perceived as being 'wholesome', being allowed.

The societal, cultural and technological developments of the Industrial Revolution changed all of this. Thousands of pages could be published at once, which was important as now more people than ever could read.³³ This community of individuals wanted content that would appeal to them directly, content that was directly relevant to their lives.³⁴

³² See Eisenstein, E., *The Printing Revolution in Early Modern Revolution* (Cambridge, Cambridge University Press, 2nd edition, 2005); Sommerville, C.J., *The News Revolution in England: Cultural Dynamics of Daily Information*, (Oxford, Oxford University Press, 1997)

³³ Chapter Four considers the broader drives and changes in societal expectations at the time with more of the population than ever before being able to read.

³⁴ The few newspapers that existed published content that would appeal to the few privileged and not content that related to the lives of the masses. Eisenstein, E., *The Printing Revolution in Early Modern Revolution* (Cambridge, Cambridge University Press, 2nd edition, 2005), 227-230. The development of the steam powered rotary in 1843 by American Richard Hoe allowed millions of copies of a single page to be printed, far in excess of the 500 or so that were possible via the manual presses.

The development of tabloid journalism was the last revolution in expression. We have seen incremental developments, since then, for example the development of specific publications for niche audiences. However, fundamentally these have existed within the same paradigm of the right to publication being in the hands of few.

2.1.3 Web 1.0

The development of the Web, known as Web 1.0 here, took the concept of connectivity a step further but was not a revolution in expression.

The Internet was indicative of society at the time with the breaking and broadening of traditional boundaries, as according to Wellman; *'By the early 1970s individuals had started to expand the definition of what was considered to be community taking account of those communities that were far flung away from the strong relations that were more obvious and that a community was described in respect of its social as opposed to spatial structure'*.³⁵

The subsequent development of the Web on top of the Internet was akin to the *'arrival of the internal combustion engine to the country lane.'*³⁶ The connectivity of the Internet was harnessed by the development of the Web, which meant that content published could reach even more people than newspapers could. Where newspapers were limited in geographical reach, the Web allowed content to reach anyone in the world.

However, crucially, the Web 1.0 did not spurn a revolution in expression as the ability to express oneself in writing to the public at large, remained in the hands of few.

³⁵ Wellman, B., *'The community question re-evaluated'* Centre for Urban and Community Studies University of Toronto, August 1987; Wellman, B., *'The Community Question: The Intimate Networks of east Yorkers'* University of Toronto and the Netherlands Institute for Advanced Study, 85(5)American Journal of sociology, March 1979, 1201, 1231.

³⁶ Gillies, J. & Cailliau, R., *'How the Web was Born: The Story of the World Wide Web'* (Oxford University Press, Oxford, 2000), 3.

In numerous instances, such as *Elton John*, *Max Mosley*, *Esther Rantzen* and many more in the U.K., newspapers have been found guilty of having published defamatory content online.³⁷ Given the motivations underpinning newspapers behaviour, as discussed at length in Chapter Four, the wider reach of the Web, allowed these newspapers to reach a wider audience, and make themselves even more attractive to readers.

The same actors who had published in the physical world, had taken to the Web to publish content and reach more individuals, both instantaneously and later.³⁸ There was a slight growth in the pool of publishers online, with the likes of static webpages upon which individuals could write streams of thought. However, to utilise these individuals had to possess knowledge of code.³⁹

2.1.4 Summary

The Web 2.0 environment that we now find ourselves in is a true democratisation of expression. Traditionally the right to express oneself in writing to the public at large has been in the hands of a select few, namely newspapers. The Industrial Revolution led to an environment in which thousands of pages could be published and pushed out to readers. The development of the Web 1.0 environment did not really change this landscape as while it increased the geographical scope of content that was published, the right to publish remained in the hands of relatively few.

The development of the Web 2.0 environment, made possible by social media, has truly democratised expression whereby now any individual is able to say whatever they like; have their voice heard in writing, in the public domain for all to see. This is a

³⁷ A succinct summary of the various cases of newspaper libel is provided by King. See King, J., *A decade in the history of newspaper libel*, (London, Nabu Press, 2011)

³⁸ One of the important aspects of the Web 1.0 was the way in which content could be archived

³⁹ Allan provides an interesting in-depth critique and exploration of the changing dynamics of motivational behaviour in the posting of content on the Web. See Allan, S., *Online News: Journalism and the Internet*, (London, Open University Press, 2006)

momentous change from what we had known before it. The average individual has never before been in such a position.

A range of social media technologies and websites have empowered the average individual to such an extent that they are no longer merely passive observers taking the content presented to them on screens, but being active contributors. At the centre of this democratisation is Twitter, which has empowered individuals to express themselves in writing to the public at large with ease and speed.

2.2 Twitter

Twitter, a microblogging website, allows individuals to broadcast messages provided that they are 140 characters in length or fewer.⁴⁰ Users post messages, ‘tweets’ with other users having subscribed to receive these tweets, ‘followers’. Users can tweet messages to others through the ‘@’ symbol followed by the other individual’s Twitter handle and can add ‘#’ followed by sentiment to denote the subject or mood of the tweet.

Reciprocation is not necessary on Twitter. The Fig. below highlights the various relations at work on Twitters. User 1 is being followed by User 2 and is himself following User 3. These are one directional relationships without reciprocation which is an essential part of what makes Twitter. The relationship between User 1 and User 4 is such that they are both following each other which is the relationship that one finds with Facebook. The relational position in Twitter can be contrasted to that of Facebook

⁴⁰ The first microblogs were known as ‘tumbleblogs’ however by 2006 and 2007, the term microblog came into greater usage for services provided by Tumblr and Twitter.

whereby I may choose to follow an individual without the same individual following me back.⁴¹

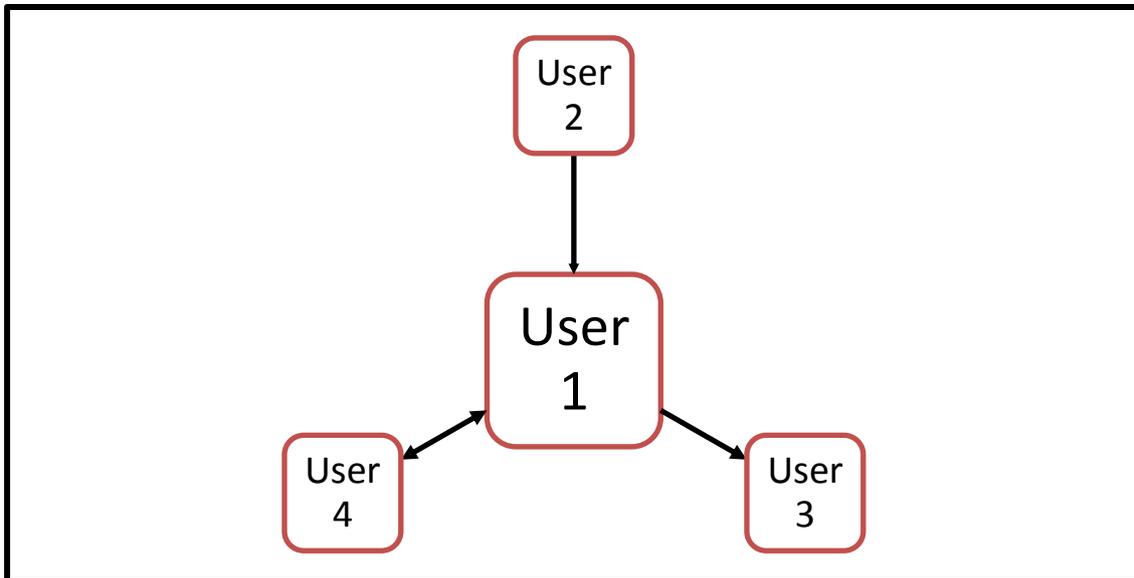


Fig 3. User relationships on Twitter

The lack of reciprocation is key as it ensures that content is proliferated further afield, engaging more individuals than otherwise would have been the case; rather than creating loops that would be created should two-way relationships be necessary. The lack of reciprocation means that content is engaged further than would otherwise be the case. Being able to search for and republish, retweet, are also crucial to the broader strategic aim of engaging as many people as possible.

2.2.1 Retweeting

Twitter allows individuals to republish content by retweeting. It exists to try and engage as many people as possible, beyond intended recipients.⁴² This sits at the heart

⁴¹ Boyd, D., 'Social network sites as networked publics: Affordances, dynamics and implications', (eds), Papacharissi, Z., In a 'Networked self: Identity, Community and Culture on Social Network Sites' (Routledge, New York, 2010) 44.

⁴² Yang, et al., 'Understanding retweeting behaviours in social networks' CIKM 2010 October 26-30 2010 Toronto, Canada.

of the Web 2.0 environment as it engages the largest number of people possible, allowing them to engage with content that they might not otherwise have been aware of.

Users are able to retweet content by either simply pressing the retweet button or by copying and pasting the tweet, adding a prefix to denote that it is a retweet and then publishing themselves. The Fig below highlight the way in which by the simple clicking of the retweeting button a user is able to rebroadcast a particular tweet under one's own Twitter feed for all of one's followers to see.⁴³



Fig 4. An example of 'automatic retweeting'

Retweeting can significantly amplify the reach of a tweet, particularly when a user with a large body of users retweets. Beyond merely rebroadcasting, retweeting *'contributes to a conversationalist ecology in which conversations are composed of a public interplay of voices that give rise to an emotional sense of shared conversationalist context.'*⁴⁴

The ability to retweet is fundamental to Twitter and is very much key to the development of communities on Twitter, discussed later in this Chapter, as it serves to engage individuals with others.

Users can choose to simply automatically retweet or add additional sentiment of their own to the original tweet when rebroadcasting it. It need not be that the sentiment

⁴³ Yang, et al., 'Understanding retweeting behaviours in social networks' CIKM 2010 October 26-30 2010 Toronto, Canada.

⁴⁴ Boyd, D., Golder, S. & Lotan, G., 'Tweet, tweet, retweet: Conversational aspects of retweeting on Twitter' In Proceedings of HICSS-43. 2009. Available at <http://www.danah.org/papers/TweetTweetRetweet.pdf>

of the retweet be copied exactly as is, alterations and additions may be made. Individuals will often change the retweet to try and add their own views and opinions on the tweet or to bring a point of clarity to what is being republished.

1. @sstacinator: Al Green died? Auto Accident? WTF?... TRUE OR NOT?...
2. @aplusk: Have you heard that Al Green died in an auto wreck a little while ago? SAD... (via @sstacinator) is this true?
3. @emeraldjane: RT @ sstacinator: Have you heard that Al Green died in an auto wreck a little while ago SAD...⁴⁵

The original message can become distorted as others add their own sentiment. Number two in the above instance can be seen as referencing the originator of the remark through the usage of the syntax 'via' but the content has been altered. While the sentiment has been retained as it asks the question as to whether the musician Al Green has died while seeking confirmation, there has been the addition of the retweeters own sentiment adding 'SAD'. The alteration of a tweet when posting a retweet is key, just as key as if the retweet were a verbatim copy of the original tweet itself.

2.2.2 Searchability

The ability to search for content is crucial as it's a mechanism designed to engage the largest number of people possible with the conversations occurring on the site. It is made possible by the fact that Twitter stores all content posted. The use of #hashtags on tweets means that tweets can be assigned with metadata, in relation to the nature of a tweet that makes it easier for users to search for content posted.

The folksonomy of social tagging is made possible by individuals in the community acting as opposed to the top down approach of metadata tagging.⁴⁶ The value in the ability to search for content that has been archived, has been hugely

⁴⁵ Ibid.

⁴⁶ Vander Wal , T., 'Folksonomy Coinage and Definition' 2007. Available at <http://vanderwal.net/folksonomy.html>

important for instances like the Arab Spring⁴⁷, Occupy Movements⁴⁸ as well as charity drives.⁴⁹

Alongside allowing individuals to search for content, Twitter promotes words and phrases trending in regions at that particular again with the intention that issues being discussed are brought to the attention of the wider community, driving towards greater engagement.⁵⁰

According to Twitter, *'Trends are automatically generated by an algorithm that attempts to identify topics that are being talked about more right now than they were previously. The Trends list is designed to help people discover the 'most breaking' breaking news from across the world, in real-time. The trends list captures the hottest emerging topics, not just what is most popular'*.

The entire mechanism works in real time, which is crucial. This means that the entire mechanism is automated, with little human input. The search function has to be in real time otherwise the value would be greatly diminished and therefore it works on the mere existence of words and phrases when returning searches as opposed to the context of the remarks made, which as is explored later can be troublesome.⁵¹

⁴⁷ Saletan, W., *'Is the Internet driving the revolutions in the Arab Spring?'*, Slate.com Online, available at <http://facultyfiles.deanza.edu/gems/kaufmancynthia/Saletan.pdf>; Khondker, H., *'Role of the New Media in the Arab Spring'* Globalisations, 8(5), 2011, 675-679.

⁴⁸ Skinner, J., *'Social Media and the Revolution: The Arab Spring and the Occupy Movement as seen through Three Information Studies Paradigms'* Sprouts: Working Papers on Information Systems, 11(169), 2011.

⁴⁹ Webb, J. & Byrne, J., *'Twitter for charities, non profits and the voluntary sector'* (Scotland, EchoeBooks Publishing, 2012).

⁵⁰ The role of the trending topics is discussed at length in Chapter Six.

⁵¹ If a comparison is had to a library in respect of the archiving and storage of books, the cataloguing of the books is done in such a way that it is made clear that there is an understanding as to where a particular piece of content is; the library has knowledge of where the books are should they need to retrieve. In contrast the nature of a single word posted and archived is such that any instances are returned to the individual; the contextual and semantic understanding cannot be said to exist in the case of Twitter given the massive volume of content and the lack of context surrounding 140 characters.

2.2.3 The Arab Spring

The recent Arab Spring consisted of a number of social actions across the Arab world that saw revolutions to uproot established dictatorships. While there have been revolutions throughout time, Twitter was crucial to the success here.⁵² Twitter allowed activists to engage with others, when other means of communication were being cut off, as well as, and inform the outside world of what was really occurring.

Philip Howard described Twitter and other social media as '*consistently one of the most important and necessary conditions*' for the Arab Spring movements.⁵³ This is not to say that Twitter, or other social media caused the Arab Spring, but rather gave individuals a voice, a medium through which they could achieve their desired ends.

Twitter provided activists with the ability to act quickly and on mass, moving from one space to another to protest to try and stay on top of the police and military.⁵⁴ They were able to speak to one another on mass, connect with others and warn them, tell them where to go, organise activities quickly and instantaneously to try and avoid being accosted.⁵⁵ Twitter was also crucial in the dissemination of information that was more likely to be seen as being factually correct, an accurate representation of what was 'happening on the ground', than traditional media. And crucially news, as it was breaking.

⁵² Lindsey, R., 'What the Arab Spring tells us about the Future of Social Media in Revolutionary Movements', The Small Wars Journal Online, 29 June 2013, Available at <http://smallwarsjournal.com/jrnl/art/what-the-arab-spring-tells-us-about-the-future-of-social-media-in-revolutionary-movements>

⁵³ Howard, P. & Hussein, M., 'Democracy's Fourth Wave?: Digital Media and Arab Spring', (Oxford, Oxford University Press, 2013), 14

⁵⁴ Ibid, 65

⁵⁵ The government would act and claim that anyone who did have an internet connection and was believed to be acting on social media was regarded as acting in treason and summarily arrested. An in-depth analysis of the role of social media in the Arab Spring can be found in 'Social Networking Popular Access to the Globe: Arab Publics Most Likely to express Political Views Online', Pew Research Centre, Global Attitudes Project, 2012.

There were a number of instances in which the reporting from traditional media was not accurate.⁵⁶ In Libya alone, there were government imposed limits on what could and could be published by the media, while at the same time reports on the numbers killed and injured were readily incorrect.⁵⁷

The ability to retweet and search for content were key to the successful use of Twitter as it was these two functions that truly engaged as many people as possible. The ability to retweet meant that information of what had just happened on the ground was brought to the attention of more people than otherwise would have been the case.⁵⁸ It meant that individuals both in the Arab nations could see content, like the video of Bouazizi and have content brought to them that they previously did not and engage, and for those overseas, it meant that more of us could see what was actually happening and act.

While the ability to search for content through appropriate #hashtags meant that more individuals again were able to see the tweets being posted and engage. #Hashtags like #ArabSpring, #Egypt, #FreedomSquare, #TahrirSqaure and many others allowed individuals on Twitter to see what was being posted and engage in dialogue, have their

⁵⁶ Aday, S., Farrell, H., Lynch, M. & Sides, J., *'Blogs and Bullets: New Media and Conflict after the Arab Spring'*, U.S. Institute for Peace, 2012. There were difficulties with the traditional journalists in being able to reach particular areas because of concerns surrounding safety and limits placed by the authorities on what could and could not be said.

⁵⁷ Aday, S., Farrell, H., Lynch, M. & Sides, J., *'Blogs and Bullets: New Media and Conflict after the Arab Spring'*, U.S. Institute for Peace, 2012.

⁵⁸ The actual suicide of the Tunisian street vendor Mohamed Bouazizi was not making much news on traditional media in the state and only came to the attentions of the population because it was posted on Twitter, with #hashtags and retweets being key to the story spreading amongst the wider population. See Lim, M., *'Framing Bouazizi: White Lies, hybrid network and collective/connective action in the 2010-11 Tunisian uprising'*, Journalism, March 1, 2013. See Halverson, J., Ruston, S. & Trethewey, A., *'Mediated Martyrs of the Arab Spring: New Media, Civil Religion and the Narrative in Tunisia and Egypt'*, Journal of Communication, Feb 2013

own views and opinions heard. The rest of the world engaging in a dialogue was crucial as it was this pressure that in part contributed to the downfall of the Arab dictators.⁵⁹

The Arab Spring is just one example of the way in which Twitter has democratised expression, with the ability to retweet and search for content key. It truly allowed the collective to harness their power with a public, written voice for the first time to engage with others, at speed.

2.2.4 Summary

The characteristics of Twitter have fostered the democratisation of expression, with individuals given the write to express themselves in writing to the public at large. As well as the brevity and speed of acting on Twitter being crucial, the ability to retweet and search for content has been crucial as it has resulted in content being proliferated to the largest number of people possible.

This in turn sits at the heart of the notion that any individual is able to express himself, and as remarked the collective behaviour has been hugely valuable in many instances, for social good. While Twitter did not foster the Arab Spring, its characteristics did allow those as part of the Spring to engage with others in ways that without it would have been almost impossible.

The ability to tweet and retweet about anything has resulted, in conjunction with the ability to search for content, in the development of communities consisting of the same individuals on Twitter, across all different types of topics. The reason for this is that Twitter, consists of and is within itself a virtual community, with a shared '*sense of community*' binding all individuals together.

⁵⁹ Howard, P. & Hussein. M., '*The Upheavals in Egypt and Tunisia and the Role of Digital Media*', *Journal of Democracy*, 22(3), 2011

2.3 Virtual Community

Twitter is a virtual community, and contains within it millions of virtual communities.⁶⁰ Understanding how it is that Twitter qualifies as a virtual community and how individuals are bound together in the communities with it, are crucial to this thesis given that the community of individuals on Twitter is at the core of the model proposed in Chapter Seven.

2.3.1 Virtual Community

There are countless definitions of what constitutes a virtual community; Licklider & Taylor remarked that virtual communities most commonly consist of geographically separated members,⁶¹ while Rheingold defined virtual communities as *'social aggregations that emerge from the Net when enough people carry on those public discussions long enough, with sufficient human feeling, to form webs of personal relationships in cyberspace'*.⁶²

Where the traditional definition of a community has at its core geographical proximity, virtual communities are usually dispersed geographically.⁶³ *'Community*

⁶⁰ The term 'virtually community' was first coined by Howard Rheingold in 'Virtual Community' in which he discussed his experiences on a range of different mediated communication networks. See Rheingold, H., 'The virtual community: Homesteading on the Electronic Frontier', (MIT Press, London, 2nd edition, 2000).

⁶¹ Licklider, J. & Taylor, R., *'The computer as a communication device'*, (1968) Science and Technology Republished in SRC Research Report 61, Digital Equipment Corporation, 1990, 37-38. Basu in his work provides an interesting debate on the extent to which there is actually a developed and thorough understanding of virtual community, and the lack of actual understanding of the term due to a lack of shared understanding of what it actually entails. See Basu, S., *'Stalking the Stranger in Web 2.0: A Contemporary Regulatory Analysis'*, European Journal for Law and Technology, 3(2), 2012

⁶² Rheingold, H., 'The virtual community: Homesteading on the Electronic Frontier', (MIT Press, London, 2nd edition, 2000). See Carver, C., 'Building a Virtual Community', IEEE Communications Magazine, 1999 37:3, 114-118; Craig, D. & Zimring, C., 'Supporting Collaborative Design Groups as Design Communities', Design Studies, 2000, 21:2, 187-204; Erickson, T., 'Social Interactions on the Net: Virtual Community as Participatory Genre', Proceedings of the 30th International Conference on Systems Science, 1997, 13-21; Hagel & Armstrong, 1997; Hesse, 'Curb Cuts in the Virtual Community', Proceedings of the 28th Annual International Conference on System Science, Hawaii, 1995; Jones, Q. & Rafaeli, S., 'Time to Split, Virtually', International Journal of Electronic Commerce & Business Media, 2000, 10:4, 214-222

⁶³ Early research into the existence of media-based communities was concerned with the nature of reality – whether communities could escape the requirements of having to have geographical proximity. In the 17th century scholars associated with the Royal Society of London formed a community through the

without propinquity', coined by Webber in 1963 and '*Community Liberated*', analysed by Wellman in 1979, began the modern era of thinking about non-local community.⁶⁴

Anderson concluded that the development of different technologies, such as national newspapers, contributed to the development of national and regional consciousness and effectively eliminated the notions of geographical proximity as being key to communities.⁶⁵

Virtual communities have become so important that Benkler suggested that virtual communities would '*come to represent a new form of human communal existence, providing new scope for building a shared experience of human interaction*'.⁶⁶

Despite the countless definitions, there are four constants across all definitions:

- A virtual community should be online;
- The common usage of computer-based information technology to support activities in a virtual community is crucial;
- Communication and interaction are the main focus and content or topics of virtual communities are driven by the participants; and
- A successful virtual community relationship exists that culminates after a certain time period of communicating together.

exchange of letters, not requiring geographical proximity to be seen as a community. See Anderson, B., '*Imagined Communities: Reflections on the Origin and Spread of Nationalism*', (London, Verso Press, 1991).

⁶⁴ Webber, M., '*Order in Diversity: Community with Propinquity*', (Harvard, Harvard University Press, 1963), 23-54; Wellman, B., '*Networks in the global village: life in contemporary communities*', (New York, Westview Press, 1999).

⁶⁵ Anderson, B., '*Imagined Communities: Reflections on the Origin and Spread of Nationalism*', (London, Verso Press, 1991)

⁶⁶ Benkler, Y., '*The Wealth of Networks: How Social Production Transforms Markets and Freedoms*' (Yale University Press, United States, 2006). Benkler sees the development of the Networked Information Economy as the most important cultural and economic development of advanced economies. The development of the networked economy would result in drastically new and diverse communities according to Benkler one of which was the development of non-hierarchical groups.

A cursory examination of the four principles above in the context of Twitter, leads to the conclusion that it is a virtual community, and in fact, it is a unique virtual community.⁶⁷

The first requirement of having to be online is clearly met. As is the second requirement that there is the common use of computer-based information technology; there is the common usage Twitter's ecosystem for the communities within Twitter to be able to exist and the individuals within them to be able to engage with one another.

The third requirement, that communication and interaction are the main focus, with discussions being driven by the participants, is exemplified by the fact that individuals on Twitter decide where conversations go, with communication and interaction being the main focus of activity on the site.

As discussed earlier in this Chapter, Twitter is a mechanism that, within the bounds of acceptability, allows individuals to discuss anything that they might wish. A cursory glance at Twitter on any particular day reveals a broad spectrum of topics being

⁶⁷ Social networking sites, online chat rooms and internet message boards are all virtual communities, with Twitter being a unique combination of all three. Social networking sites, like Facebook, are predicated on taking physical world relationships online, and the relationships with Twitter are preliminary those of the physical world that are transposed online. Chat rooms are unique as they have individual areas, 'rooms', for discussion to occur within in. As discussed earlier in this Chapter, #hashtags are used to establish the parameters within which a conversation ought to occur for everyone who wants to engage in it and in effect, they act to create 'rooms' within which discussions can occur. Finally, message boards are unique in that individuals can members of the community without having to contribute; it is accepted practice that individuals can merely view and not have to contribute. As discussed previously in this Chapter, a significant proportion of individuals on Twitter don't contribute but rather view the content published by others. See 'vBulletin Community Forum – FAQ: What is a bulletin board?'. Available at http://www.vbulletin.com/forum/help?faq=vb3_board_usage#faq_vb3_forums_threads_posts; See Peris, R. et al., 'Online Chat Rooms: Virtual Spaces of Interaction for Society Oriented People', *CyberPsychology & Behaviour*, 2002, 5(1), 43-51; Whitty, M., 'Liar, Liar! An examination of how open, supportive and honest people are in chat rooms', *Computers in Human Behaviour*, 18(4), 2002, 343-355; Markey, P. & Wells, S., 'Interpersonal Perception in internet Chat Rooms', *Journal of Research in Personality*, 36(2), 2002, 134-156; Java, A., Finin, T., Song, X. & Tseng, B., 'Why we Twitter: Understanding microblogging usage and communities', Joint 9th WEBKDD and 1st SNA-KDD Workshop 2007, August 12 2007, California, USA, 64-90; Kwak, H., Lee, C., Parl, H. Moon, S., 'What is Twitter, social network or a news media?', *World Wide Web Conference 2010*, April 26-30, 2010. North Carolina, U.S.A., 591.

discussed. While Twitter certainly plays a role in encouraging discussion between individuals, explored earlier, individuals on Twitter decide where conversations go.⁶⁸

In addition to this, there is no doubt that communication and interaction are the main focus of individuals on Twitter. As mentioned previously, a significant proportion of individuals are not tweeting, but viewing what is published by others.⁶⁹ However, for the vast majority this is not the case as they take part in communicating and interacting with others.

Finally, in the context of a successful virtual community, the relationships are successful where there is a certain time period of communicating together. Bryden et al considered development of communities on Twitter; the work is considered later in detail.⁷⁰ The group found the existence of communities on Twitter along the lines of sports, politics, and within them around baseball and U.S. politics being discussed at the time.

Examining the composition of the communities, the group found the same core of individuals tweeting and retweeting in the different conversation streams.

The fact that the same core of individuals are engaged in the community, across different conversation streams, means that the requirement of having to be engaged in communications for some time, is met too. While the conversations and discussion on

⁶⁸ Java et al considered the broader ability to conversations to develop on Twitter and established that the directions of the conversations was shaped by the individuals on Twitter primarily, with Twitter acting as the ecosystem within which such could occur; see Java, A., Finin, T., Song, X. & Tseng, B., *Why we Twitter: Understanding microblogging usage and communities*, Joint 9th WEBKDD and 1st SNA-KDD Workshop 2007, August 12 2007, California, USA

⁶⁹ Merwick & Boyd explored conversations on Twitter and explored more broadly how individuals go about engaging others. Of note, the pair found a significant percentage of non-actors on Twitter., See Merwick, A. & Boyd, D., 'I tweet honestly, I tweet passionately: Twitter users, context collapse and the imagined audience', *New Media & Society*, 13, 2011, 114-133

⁷⁰ In the case of sports, the group found that one of the core groups during the period they considered, baseball was prominent and within this, they identified a number of discussions around baseball and that when examining actors in these groups, the same core of individuals acted across all of the communities talking about baseball. Bryden, J., Funk, S. & Jansen., *Word usage mirrors community structure in the online social network Twitter*, EPJ Data Science, 2013

Twitter are very fluid, the fact that the same core are engaged in communities, means that at the core there are established relationships for some time.

Twitter is a virtual community, and there are within it, an endless number of communities. The key question then to be considered is what actually binds the individuals in the various communities together?

2.3.2 A Sense of Community

McMillan & Chavis conducted the seminal work on the issue of community and developed the concept of a '*sense of community*', which consisted of four principles; membership, influence, integration and fulfilment of needs and a shared emotional connection.⁷¹ It is this '*sense of community*', where the four principles above exist, that binds individuals in communities together.

- Membership is the feeling of belonging or of sharing a sense of personal relatedness. It includes five attributes; boundaries, emotional safety, a sense of belonging and identification, personal investment and a common symbol system;
- Influence works both ways as members need to feel that they have some influence in the group and influence is held by the group on its members to ensure cohesion;
- Integration and fulfilment of needs is addressed by members feeling that they are rewarded, in some way, for their participation in the community;
- and

⁷¹ McMillan, D. & Chavis, D., '*Sense of Community: A Definition and Theory*', Journal of Community Psychology, 14(1), 6-23

- There is the need for shared history and shared participation to provide the necessary emotional connection. To this end, there will be a history of experiences with a belief that there will be more experiences in the future.⁷²

McMillan & Chavis provided the following example to illustrate the dynamics within and between these four elements:

*'Someone puts an announcement on the dormitory bulletin board about the formation of an intramural dormitory basketball team. People attend the organizational meeting as strangers out of their individual needs (integration and fulfilment of needs). The team is bound by place of residence (membership boundaries are set) and spends time together in practice (the contact hypothesis). They play a game and win (successful shared valent event). While playing, members exert energy on behalf of the team (personal investment in the group). As the team continues to win, team members become recognized and congratulated (gaining honor and status for being members). Someone suggests that they all buy matching shirts and shoes (common symbols) and they do so (influence).'*⁷³

In the case of Twitter, membership boundaries are established by the fact that individuals have to be members of Twitter to engage with others; immediately all of those that are not members are excluded; a very clear and immediate membership mechanism.

#Hashtags act as a means of establishing membership for communities on Twitter. As considered previously in this Chapter, #hashtags act as a means of creating a focal point for engagement for a particular topic, and in effect, creating boundaries for

⁷² Ibid, 8

⁷³ Ibid, 16.

a discussion on said topic.⁷⁴ While having to be a member of Twitter excludes all not on Twitter, #hashtags act to exclude those on Twitter who are not members of the discussion, creating another layer of membership.

The mechanisms, registering at first instance, followed by the use of #hashtags, all drive the sense of belonging that is also necessary. These mechanisms act to create the sense that the individual belongs to the community, given the way in which they exclude all other individuals.⁷⁵

#Hashtags also create the identification necessary for the '*sense of community*'. They are developed by the community and, as discussed previously, establish a means by which there can be identification of what the conversation is about.

Bruns and Burgess considered the role of #hashtags in the formation and existence of political discussion and highlighted that in the political context, #hashtags created the means of identifying political positioning.⁷⁶ This contention can be extrapolated to non-political instances and leads to the conclusion that there is indeed a role being played by #hashtags as a means of establishing identification.

Emotional safety is created by the fact that individuals are in communities with other likeminded individuals.⁷⁷ It might be that they disagree on the performance of a

⁷⁴ See Carter, S. & Tsagkias, M. 'Twitter hashtags: Joint Translation and Clustering' In: Proceedings of the ACM WebSci'11, June 14-17 2011; Kouloumpis, E., Wilson, T. & Moore, J., 'Twitter Sentiment Analysis: The Good, the Bad and the OMG!' In: Proceedings of the 5th International AAI Conference on Weblogs and Social Media, 2012.

⁷⁵ See Efron, M., 'Hashtag retrieval in a microblogging environment' In proceedings of SIGIR '10, 787-788; Tsur, O. & Rappoport, A., 'What's in a hashtag?: Content based prediction of the spread of ideas in microblogging communities' In Proceedings of WSDM '12, 643-663; Small, T., 'What the hashtag?', Information, Communication & Society, 14(6), 2011, 872-897.

⁷⁶ Bruns, A. & Burgess, J., 'The use of Twitter hashtags in the formation of ad hoc publics', In Proceedings of the 6th European Consortium for Political Research General Conference, 2011

⁷⁷ McMillan discussed the concept of sense of community and heighthed that the requirement of feeling emotionally safe is met where individuals feel that they are surrounded by like-minded individuals; that they are protected because they are with others of a similar type. See McMillan, D., 'Sense of Community', Journal of Community Psychology, 1996, 21-40

particular sports team or the quality of a particular album, but the mere fact that they see the sports team or musical group as being important and tweet with others on them, creates the sense of safety that is necessary.⁷⁸

Influence is demonstrated both ways – members feel that they have influence over the community and the community has influence over them. As discussed previously, individuals tweet because they want to be heard by others, if not engaged in a back and forth discussion on the topic at hand, they at least want to know that what they tweet is seen as interesting by others in the community.

By being able to present your views on Twitter, and engage with others, there is the perception that you are influencing the views and opinions held by others.⁷⁹ This is also the case where there is no further engagement with others in the community; the mere act of publishing a tweet is sufficient for individuals to feel that they have influenced others. Turner concluded that individuals do not always need to see the results of their actions to feel that they have influenced others; merely feeling that so significant a contribution has been made that this is the only logical conclusion, i.e. others cannot help but be influenced, is sufficient.⁸⁰

For the community to have influence over its members it simply has to become a place that they care about; it has to provide them with value they don't want to lose.⁸¹

⁷⁸ McMillan went on to state that actually having different perspectives in communities in instances can affect the sense of emotional safety more positively than having the same views, at times. In his view, by holding different views, individuals demonstrated a lack of simply agreeing with others to appease them that might occur where there was complete agreement. See McMillan, D., 'Sense of Community', *Journal of Community Psychology*, 1996, 21-40

⁷⁹ As discussed earlier, part of the motivation behind acting on Twitter is that individuals are driven by their egos, with a sense that regardless of whether this is actually the case, that others will want to hear their views. The fact that others might not respond to a tweet posted, doesn't therefore detract from the feeling of influence over others.

⁸⁰ See Turner, J., 'Social Influence: Mapping Social Psychology', (Cole Publishing Company, California, 1991).

⁸¹ McMillan discussed the concept of loss and used examples to highlight that taking the right to engage in particular practice, allowed for the exercise of power that the community needed. He considered the

The value that individuals see in tweeting, its importance to them, has been explored earlier in this Chapter earlier and will be later in the context of gossip on Twitter. Twitter by providing individuals with the means by which they can tweet and retweet, exercises influences over those who use it, that those individuals don't want to lose.⁸²

In the case of the communities, the influence over the individuals is even more pronounced. If I as an individual who enjoys engaging with others around a topic, can no longer do so, the value that have gained by engaging with others on the topic is taken away from me; I have suffered a loss that I don't want.⁸³ If the community decides that they don't want to engage with me, that my tweets are not worth engaging with because they are outdated or incorrect or inappropriate, I have lost the value of being a member of the community.

In having needs fulfilled, members need to get what they hoped they would by joining. The reward might be something specific like an answer to a question or networking. Or it could be something more intangible like a sense of belonging, a support network, thoughtful conversations, inspiration, etc.⁸⁴ As discussed previously,

role of prison as an example here. The sending of individuals to prison was in his opinion an act of highlighting the role of the community over the individual; by threatening individuals with the loss. See McMillan, D., 'Sense of Community', *Journal of Community Psychology*, 1996, 21-40, 36.

⁸² For discussion on behavioural changes when individuals have had the right to tweet taken away from them, see; Java, A., Song, X., Finin, & Tseng, B., '*Why we Twitter: Understanding microblogging usage and communities*', *In proceedings of WebKDD '07*, New York, 56-65; Huberman, B., Romero, D. & Wu., '*Social Networks that Matter: Twitter Under the Microscope*', December 208

⁸³ There are countless examples of this actually happening in communities; individuals being phased out of conversations. Sim et al considered conversations on Twitter and the emotional influences underpinning them and established that in instances individuals excluded others having established that they, after a time period, were not interested in engaging with them any longer. Amongst other reasons for the exclusion of individuals, was the fact that the individuals were no longer of interest to others because of the way in which the conversation was moving; See Sim, S., Bak, J. & Oh, A., '*Do you feel what I feel? Social aspects of emotions in Twitter*', *In Proceedings of the 2012 ICWSM Conference*

⁸⁴ Barlow, Allen and Chaote conducted research into the treatment of emotional disorders and established through different mechanisms. One of the interesting things the groups discovered was the broader role of intangible mechanisms that provide emotional safety to individuals. See Barlow, D., Allen, L. & Choate, M., '*Towards a unified treatment for emotional disorders*', *Behaviour Therapy*, 35(2), 2004, 205-230.

intangibles such as a sense of belonging exist, as does the feeling of a being a member of a support network.⁸⁵

Answers to questions and networking opportunities are both two very clear tangible results of engagement. Twitter is readily used to ask questions of others, as in theory a question is asked of an audience of millions and therefore the response ought to be richer than might otherwise be the case.⁸⁶ There have been countless examples of Twitter being used as a networking medium; Liao et al in their work on the role of experts in Twitter, highlight examples of experts gaining traction as a result of their behaviour on Twitter.⁸⁷

Finally, in respect of a shared sense of emotional connection, it is crucial that the community have a shared story. McMillan & Chavis remarked *'This is the feeling one sees in farmers' faces as they talk about their home place, their land, and their families; it is the sense of family that Jews feel when they read The Source by James Michener.'*⁸⁸

Bryden et, as mentioned briefly above, examined the development of communities on Twitter.⁸⁹ The group looked into the language and behaviour of 189,000 nodes, each corresponding to a single user, to establish what bound individuals together in the formation of communities.

⁸⁵ Mohammad, S., '#Emotional tweets', In Proceedings of SemEval '12 Proceedings of the 1st Conference on Lexical and Computational Semantics, 246-255

⁸⁶ Paul, S., Hong, L. & Chi., E., *'Is Twitter a good place for asking questions? A characterisation study'*, In Proceedings of the 5th AAAI on Weblogs and Social Media, 2013

⁸⁷ Liao, V., Wagner, C., Pirolli. & Fu, W., *'Understanding experts' and novices' expertise judgement of Twitter'*, In Proceedings of the CHI '12, New York, 2012

⁸⁸ McMillan, D. & Chavis, D., *'Sense of Community: A Definition and Theory'*, Journal of Community Psychology, 14(1), 6-23, 20

⁸⁹ Bryden, J., Funk, S. & Jansen., *'Word usage mirrors community structure in the online social network Twitter'*, EPJ Data Science, 2013. By looking at the nodes, the group was able to consider the what each individual spoke about during the course of the month and establish the existence of communities on Twitter around particular specific areas.

Three Word Categorisation	Community Categorisation
Playoff, Bullpen, Roster	Sports
Bieber, Pleaeease, MyWorld	Music
SXSW, Texas, Conference	Current Event
Pelosi, Obamacare, Health	Politics
Kstew, Robsessed, Twilighters	Entertainment
Pastors, Missional, Worship	Religious
Foodies, Foodbuzz, Chefs	General Conversation

Table 1. A table containing examples of communities found by Bryden et al. on Twitter

The above table presents a cross section of the 20 communities that the group found to exist over the course of September 2013 on Twitter. The group by considering language used by a cross section of tweeters, were able to establish the presence of the same individuals, in the same subject areas, and in turn the existence of particular communities with a core of the same individuals within them.

There are communities along the lines of sports, politics, and entertainment, with each having particular topics being discussed within them.⁹⁰ The group looked into the topic areas, and found the formation of very particular communities around these topics, with language variations, specific to particular communities.

⁹⁰ In the case of Sports, the words refer to the Baseball Playoffs in the U.S. that start every September. In the case of Entertainment, the new Twilight film starring Kristen Stewart and Robert Pattinson has just been released and finally Politics, referred to President Obama’s Healthcare Reform Bill being discussed extensively. There are communities along different traditional and non-traditional lines on Twitter. As well as those above, the group found, another three word commonality the group found was ‘Novel, Comic-Con, Avengers’ which referred to the Comic-Con Convention being held at the time

The findings reveal that there are already communities on Twitter that possess a shared story. In the case of those talking about the baseball playoffs, they are all bound, when tweeting on the playoffs, by the fact that they want to speak on the playoffs as they are occurring, whether it is their team or not. And crucially they have a belief that such good times, will continue to occur in the future.

In the context of the political debate surrounding Obamacare, individuals tweeting are bound by a sense of wanting to understand the impact of the provisions, whether they are in favour or against them and once again believe that such engagement will continue into the future.⁹¹

The thought of individuals being bound by a shared emotional connection built on their favourite sports teams, may seem trivial, but this is immaterial. The crucial thing is that it is this passion for the sports teams that the members of the community possess, that brings them all together and binds them as individuals with others into these communities.

There are communities already on Twitter. These communities exist and are bound together by the fact that the individuals within them share a '*sense of community*'. This is in large part because they share an emotional connectedness, with a hope that by being members of these communities, such stories will continue on into the future.

It is this '*sense of community*', that binds all of the members of the communities, that drives the adoptions of norms for the betterment of the entire community. As will be explored in the next Chapter, norms are necessary as they ensure the effective

⁹¹ This is the case also in the other communities on Twitter. The community of individuals developed around Justin Bieber and his music are bound together by the desire to see him and the album succeed. In the case of the those in the community around politics and Obamacare, they are bound by a shared emotional connections around the healthcare plans.

functioning of a community. It is this '*sense of community*' that clearly exists on Twitter that is key to the model proposed in Chapter Seven.

2.3.3 Summary

Twitter is itself a virtual community, and has within it countless virtual communities. The individuals in these virtual communities are bound together by the fact that they share a '*sense of community*'. They all possess a sense of belonging, they feel that they exercise influence over their fellow community members. They believe their needs are met as they receive a reward, tangible or intangible, for being members of the community on Twitter. Finally, there is a shared story that exists across all of the members of the community; an emotional connectedness that brings them all together, there and, they hope, long into the future.

This '*sense of community*' has been crucial as it is this that has bound individuals together in the likes of the Arab Spring considered previously. While the characteristics of Twitter, discussed previously, have made it an ideal medium for individuals to engage on, the '*sense of community*' has meant that individuals have wanted to engage with others back and forth; they have been bought into engaging with others.

2.4 Gossip

The combination of value and importance of gossip and the characteristics of Twitter have seen individuals use the medium to engage in gossip. Thousands of individuals doing so has resulted in cases like *Giggs* and *McAlpine*. However, the vast majority have engaged in these cases, not through malice, but because of the importance of gossip and conjecture in society.

2.4.1 Value of Gossip

Gossiping is important to humans. It serves a number of social functions:

- Reinforce: Punish the lack of morality and accountability,
- Reveal passive aggression, isolating and harming others,
- Serve the purpose of social grooming
- Build and maintain a sense of community with shared interests and values
- Begin a courtship that helps one to find their desired mate by speaking with others, and
- Provide a peer to peer network for disseminating information.⁹²

Gossip plays an important role in society. From Dunbar's evolutionary theories, gossip originated to help bond the groups that were constantly growing in size.⁹³ To survive, individuals needed alliances; but as these alliances grew larger, it was difficult if not impossible to physically connect with everyone.

Gossip became a social interaction that helped the group gain information about other individuals without personally speaking to them. It enabled people to keep up with what was going on in their social network.⁹⁴ It also creates a bond between the teller and the hearer, as they share information of mutual interest and spend time together. It also helps the hearer learn about another individual's behaviour and helps them have a more effective approach to their relationship.

⁹² Sommerfield, R., Krambeck, H. Semmann, D. & Millinski, M., 'Gossip as an alternative indirect observation in games of indirect reciprocation', Proc Natl Acad Sci USA, 17435-40, 2007

⁹³ See Dunbar, R., Barrett, L. & Lycett, J., *Human Evolutionary Psychology*, (Boston, Princeton University Press, 2002), Dunbar, R., Knight, C. & Power, C., *The Evolution of Culture*, (Edinburgh, Edinburgh University Press, 1999); Dunbar, R. & Barrett, L., *Oxford Handbook of Evolutionary Psychology*, (Oxford, Oxford University Press, 2007).

⁹⁴ Besnier, N., 'Gossip and Everyday Production of Politics', (Honolulu, University of Honolulu Press, 2009), 14-19. See Ellickson, R., *Order without law; how neighbours settle disputes*, (Cambridge, Cambridge University Press, 1991)

Despite the importance of gossip, it is generally engaged in behind closed doors.⁹⁵ The norm of behaviour in society is that engaging in gossip is unacceptable. The reason is that anything else would lead to society failing to function effectively; there would be constant backbiting with individuals attacking others resulting in little occurring.⁹⁶

Given the importance of gossip, but also the fact that it is not generally seen as publicly acceptable in society, it has been engaged in behind closed doors. However, Twitter's provided individuals with a platform to voice their views and opinions and accordingly individuals have jumped at the opportunity to engage with gossip on Twitter.

2.4.2 Gossip on Twitter

One of the most important characteristics of Twitter is the ease with which individuals can act; speed of action.⁹⁷ Even in comparison to a blog, a Twitter account is far easier to use as *blogs are nothing compared to Twitter, which lets anyone with a cell phone instantly update the world with what they see and hear, via the simple and ubiquitous text message*⁹⁸ There are a limited number of characters on Twitter that means that individuals consider the content of their tweets less than they would do a blog post where they have a lot more words to play with.⁹⁹

⁹⁵ Ellickson, R., *Order without law; how neighbours settle disputes*, (Cambridge, Cambridge University Press, 1991), 14-19. See Spacks, P., *Gossip* (New York, Macmillan Press, 1985); Goodman, R. & Ben-Zeev, A., *Good Gossip*, (Kansas, Kansas University Press, 1993)

⁹⁶ Ibid.

⁹⁷ The perfect example is the Mumbai Terrorist Attack 2008 with news of the attacks being posted on Twitter before any mainstream media outlet had started to report on the incident. The news of Bin Laden's death and the operation was being lived tweeted by an Abbottabad resident describing the operation to try and kill Bin Laden. The tweeter's follower count increased rapidly as it became clear as to what he was tweeting about while the traditional media streams did not pick up the story some time later until confirmation of his death.

⁹⁸ See Nardi, B. et al., *'Why we Blog?'*, Communications of the ACM, 47(12), 2004, 41-46; Michael Arrington, *'I can't believe some people are still saying Twitter isn't a news source'*, Tech Crunch, November 27 2008. <http://techcrunch.com/2008/11/27/i-cant-believe-some-people-are-still-saying-twitter-isnt-a-news-source/>.

⁹⁹ Many individuals have decided to deploy Twitter as a means of keeping in contact with friends and family with the short number of limited characters causing them to essentially publish short messages as

Traditionally, individuals will spend a lot of time considering all aspects of their writing when putting words to paper, considering the impression the individual reading will take away with them. However, this is not the case with a Twitter post because of the few characteristics. The ability therefore to tweet something, without necessarily thinking of the consequences is greater than is the case through traditional mediums.

Individuals are looking to engage in real-time on Twitter, which by proxy means that the amount of time taken in consideration compensation is limited; again even a blog is not in real time and therefore the composer has time to consider the content before publishing.¹⁰⁰ Twitter is predicated on acting in real time.¹⁰¹

Furthermore, Twitter allows an individual to express himself to a number of individuals at once.¹⁰² As considered previously, gossip serves a number of social purposes with Twitter allowing the individual to prove himself to many at once as opposed to one at a time.

It has to be remembered that gossip is actually a way of trying to prove oneself that one can be trusted and ought to become to the collective. As a result if gossip can be engaged in with a number of people at once, rather than one at a time, it can only make the mechanism more attractive than otherwise would have been.

opposed to long composed pieces. See Java, A., Finin, T., Song, X. & Tseng, B., *'Why we Twitter: Understanding microblogging usage and communities'*, Joint 9th WEBKDD and 1st SNA-KDD Workshop 2007, August 12 2007, California, USA, 64-90; Kwak, H., Lee, C., Parl, H. Moon, S., *'What is Twitter, social network or a news media?'*, World Wide Web Conference 2010, April 26-30, 2010. North Carolina, U.S.A., 591; Nardi, B. et al., *'Why we Blog?'*, Communications of the ACM, 47(12), 2004, 41-46.

¹⁰⁰ Golder, S., Wilkinson, D. & Huberman, B., *'Rhythms of social interaction: messaging within a massive online network'* Communities and Technologies, 2007, 41-66. Haythornthwaite, C. & Hager, C., *'The Social Worlds of the Web'* Annual Review of Information Science and Technology, October 2006; Haythornthwaite, C., Garton, L. & Wellman, B., *'Studying Online Social Networks'* Journal of Computer Mediated Communication, 3(1), 1997.

¹⁰¹ Musician Beyoncé performed on the MTV VMAs in 2011 and when she revealed that she was having a baby there were more than 8,800 tweets per second posted by users, at that time the record for the most tweets posted her second. See <http://techcrunch.com/2011/08/29/beyonce-pregnancy-news-at-the-mtv-vm-as-births-new-twitter-record-with-8868-tweets-per-second/>

¹⁰² Barby, E., *'Web 2.0: Nothing changes...but everything is Different'* Communications & Strategies, Number 65, 1st Quarter 2007, 91; Boyd, D., Golder, S. & Lotan, G., *'Tweet, tweet, retweet: Conversational aspects of retweeting on Twitter'* In Proceedings of HICSS-43. 2009.

The ability to apply #hashtags means that individuals can try and start a debate with others around the content that they have published and what they find interesting.¹⁰³ As a result, there is much more of a public discussion and conversation than would be otherwise possible. There is a widely held notion of the discussion over the water cooler which sees individuals gossiping with their colleagues around things of interest and Twitter takes the water cooler to the Web, resulting in far greater number of individuals around the water cooler gossiping as they have always done.

At the same time, the #hashtags serve to make it easier to see what is being discussed at the time and know what to engage with accordingly. If #hashtags did not exist, it would be more difficult to engage in discussions occurring as they are more difficult to find.

The existence of so many individuals, being one discussing an issue with so many others, is also important as it gives individuals a sense of pseudo-anonymity.¹⁰⁴ The lack of accountability or the perceived lack of accountability is crucial as this gives individuals the power to say things that they otherwise would not have the courage to, for example the Arab Spring.¹⁰⁵ This is something that is pertinent in many instances like social actions, but even more so where the action is one which is not accepted in society.

¹⁰³ Boyd, D., Golder, S. & Lotan, G., 'Tweet, tweet, retweet: Conversational aspects of retweeting on Twitter' In Proceedings of HICSS-43. 2009. Ellison, N., Steinfield, C. & Lampe, C., 'The Benefits of Facebook "Friends": Social Capital and College Students' Use of Online Social Network Sites' Journal of Computer-Mediated Communication (2007), 12, 1143-1167.

¹⁰⁴ Rosnow, R., 'Psychology of rumour reconsidered' Psychological Bulletin, 1980, 87, 578-91, 580.

¹⁰⁵ See Crowson, A., 'Orientalist Representations of the 2011 Egyptian Revolution in Elite US Newspaper Editorials: A Critical Discourse Analysis', (New York, Lulu.com, 2012); Lindsey, R., 'What the Arab Spring tells us about the future of social media in revolutionary movements', Small Wars Journal Online, 29 June 2013. Available at <http://smallwarsjournal.com/jrnl/art/what-the-arab-spring-tells-us-about-the-future-of-social-media-in-revolutionary-movements>; Huang, C., 'Facebook and Twitter key to the Arab Springs uprisings', The National Online, 6 June 2011. Available at <http://www.thenational.ae/news/uae-news/facebook-and-twitter-key-to-arab-spring-uprisings-report>

There are a number of characteristic of Twitter, that have made it an attractive medium for the average individual to engage in gossip and conjecture and that have resulted in cases like *Giggs, McAlpine* and others. In *Elsbury v Talbot*,¹⁰⁶ Colin Elsbury, made remarks about a rival stating that the claimant, Eddie Talbot, had been removed from the polling station by the police at the time of the election. He remarked that “*It’s not in our nature to deride our opponents however Eddie Talbot had to be removed by the Police from a polling station*”.¹⁰⁷

Looking at the case, and considering the nature of the actor, it is clear that he engaged in the behaviour, not out to malice, but he took what he would have said behind a water cooler with a colleague, and decided to use the medium of Twitter to express himself. The brevity of characters and speed of action, meant that the defendant did not think twice, where he otherwise would have done.

2.4.3 Summary

Gossip serves a number of social functions and despite being something that is frowned upon in society serves a number of vital functions. In turn therefore, individuals in society have decided to engage in gossip behind closed doors. The characteristics of Twitter, however, make it an attractive medium for individuals to engage in gossip.

The brevity of characteristics, speed of action and ability to act before and engage with many others all mean that defamatory tweets and retweets are something we have already seen as in the cases of *Elsbury and Cairns*. Individuals have taken to in these

¹⁰⁶ *Elsbury v Talbot*, [2009] unreported. As it turns out, a man had been removed from the polling station that day but it was not the claimant and the High Court approved a settlement of £3,000 with the defendant having to pay the claimant’s legal costs too, understood to be substantial.

¹⁰⁷ The claimant argued that the implication of the statement was that he had been forcibly removed for criminal conduct and that the statement left entirely open to ridicule.

cases to engage in suing the freedom of public expression provided to them by Twitter and decided to behave in a nonconformist manner.

2.5 Conclusion

Social media is at the forefront of a revolution in expression as now any individual can express himself in writing to the public at large; never before has this power been in the hands of so many. The Web 2.0 environment means that no longer is the average individual purely a consumer, but an active contributor.

At the heart of the Web 2.0 environment is Twitter, as it truly encapsulates the democratisation of expression. Not only is any individual able to express himself but individuals can republish and search for archived content, thereby meaning that even more individuals can express themselves on an issue than otherwise would have likely done.

The democratisation of expression has resulted in much good but also seen individuals engage in gossip and conjecture on mass. The characteristics of Twitter along with human nature have resulted in the proliferation of gossip by individuals on Twitter. Individuals have engaged in gossip behind closed doors but now they have engaged in it for the first time in a public space, the most public of public spaces made easier by the characteristics of Twitter.

Tweets are short, not requiring time to compose, whole individuals can quickly in conversations and discussions around things are breaking in short time frames, not having to spend a long time considering their behaviour before they act. Crucially individuals feel a sense of anonymity, a lack of accountability for their behaviour because they are one of many.

Twitter is a virtual community and has within it numerous communities on all nature of different issues and areas. It meets all of the characteristics of a virtual community and there are examples already of communities forming on Twitter. These communities exist, and the members within them are bound to them, by the fact that all of the members feel a '*sense of community*'. Amongst other things, they feel a sense of emotional connectedness with others in the community, as they share a single narrative, a single story that runs through their community.

The combination of the technical characteristics of Twitter and human nature have taken the democratisation of expression and created cases like *Elsbury* and *Cairns*, in which single individuals have destroyed the reputations of others and subsequently *Cairns and Elsbury*, in which thousands of individuals destroying the reputations of individuals in an instant and as of the time of writing no recourse has been available.

Norms are crucial as they ensure the effective functioning of a collective and yet there are individual who feel that they ought to not have to adhere to the norm and in the case of reputations, the mechanism we have to ensure adherence to the norm is law. Standards may also be sued in particular contexts. The next Chapter considers the interplay between norms, laws and standards in preventing nonconformity from occurring.

Chapter Three: Norms & Nonconformity

Instances like *Giggs* and *McAlpine* occurred despite the fact that the established norm in society is that reputations ought not to be attacked. Norms are idealisations that dictate collective behaviour to allow a group to function; without them nothing could occur. Despite the existence of norms and the fact that all have agreed to abide by them, there are nonconformists; those who believe that they do not need to abide and can do as they like.

A deterrent mechanism is necessary and in the case of reputations, it is the law of defamation. Law provides clarity and certainty, in respect of the punishment individuals who decide not to conform will receive. This is traditional command and control, centred approach where the central government body establishes the exact wording of the law, along with the punishments for nonconformists.

In contrast to this, there are instances in which standards are adopted; the community governing itself. The perception is that the community are better placed than the central government to ensure compliance with the norm. There are a number of contextual issues that will help shape the mechanism used.

This Chapter serves to provide an understanding of the relationships between laws and standards, regulation and deregulation. Without this understanding it is impossible to really understand whether a mechanism other than law, as proposed in Chapter Seven could be viable.

The Chapter commences by exploring norms; how they come to be, their importance and their acceptance by the community. It then considers the role of laws

and standards to ensure compliance to norms, along the way trying to understand the way in which some individuals choose to not conform to the norm. It then considers the concepts of regulation and deregulation and what they mean for the application of laws and standards.

A full review of regulatory theory is not conducted as it is out of the scope of thesis. Rather a higher level overview is provided, one which comprehensively yet succinctly explores how the concepts of regulation and deregulation relate to laws and standards.

3.1 Nonconformity

The defendants in *Elsbury* and *Cairns*, as well as all of those that tweeted and retweeted in *Giggs* and *McAlpine*, decided to go against the norms that reputations not be attacked. Laws and standards may be deployed to deter nonconformity from occurring, causing individuals in collectives to adhere to the norm.

3.1.1 Norms

Norms are idealisations of how individuals should behave to allow a collective of individuals to function effectively; they dictate what is acceptable so as to ensure that what is achieved is for the best of everyone.¹⁰⁸

There is a not a singular definition of what a ‘norm’ is. However, reference has been made to norms being ‘societal expectations’, ‘specifications of appropriate and

¹⁰⁸ Durkheim, E., *The Division of Labor in Society* (MacMillan, New York, 1933); Birenbaum, A. & Sagarin, E., *Norms and Human Behaviour* (Praeger Publishers, New York, 1976), 6-8. The pair provide an interesting analysis of the collectives, large and small, that failed because individuals were not bound by norms effectively. Birenbaum and Sagarin provide the example of a small New York community of underground fighters in the 1970s who adherence to a range of norms, including not punching each other in the face and not speaking publicly of the fighting ring, once broken, stopped its effective existence any longer

inappropriate behaviours;’ and the ‘rules of conduct’.¹⁰⁹ Gibbs established three key parameters in defining norms;

- A collective evaluation of behaviour in terms of what is and ought to be;
- A collective expectation as to what the behaviour will be;
- And particular reactions to behaviour.¹¹⁰

Norms are applied to groups of individuals. Hetcher exclaimed the key to the understanding of a norm lies within its ‘*prescriptive, prescribing as to how individuals ought to behave in given contexts and shared with the existence of sanctions for a failure to comply.*’¹¹¹

If norms did not exist, communities would not be able to function effectively as individuals would be pulling in different directions, in accordance with their own wishes and desires.¹¹² As discussed earlier, individuals are driven by their own desires, and if this is considered in the context of a collective, individuals adhere to their own desires, would not simply mean that the collective could not function effectively.

¹⁰⁹ Ibid, 10-14. Many academics have given their own definitions on what ‘norms’ are and their validity; Weber defined the validity of a norm in terms of whether it is followed by a sufficient number of people, implicitly in it being that an insufficient volume of support renders a norm invalid (Weber, M., *Economy and Society: An Outline of Interpretive Sociology Part 2*, eds Roth, G. & Wittich, C., (University of California Press, California, U.S.A., 4th edition, 1979) Chapter 1). Parsons noted that ‘a norm is a verbal description of a concrete course of action ... regarded as desirable, combined with an injunction to make certain feature actions conform to this course’ (Parsons, T., *The Structure of Social Action* (1937), 75). Homans remarked that a norms is an ‘idea in the minds of members of a group an idea that can be put in the form of a statement.’ (Homans, G., *The Human Group* (Thomson Learning, 1950) 124). Williams remarked that remarks that ‘norms are rules of conduct as they specify that what should and should not be done by various kinds of social actors in various social situations’ (Williams, R., *American Sociology* (1961) 207). Cancian describes them as ‘shared conceptions of appropriate or expected actions’ (Cancian, F., *What Are Norms?* (Cambridge University Press, 1975) 5. Allan Gibbard remarked that ‘a norm we might say is a linguistically encoded precept’.

¹¹⁰ Gibbs, J., ‘Norms: the problem of definition and classification’ *American Journal of Sociology*, 70, (1965), 586-94.

¹¹¹ Hetcher, S., *Norms in a Wired World* (Cambridge University Press, UK, 2004), 18.

¹¹² HLA Hart, *The Concept of Law* (Oxford University Press, Oxford), 121.

Collectives function effectively because everyone has agreed to be bound into a social contract, first detailed by Thomas Hobbes.¹¹³ In the adoption of a social contract, individuals in a collective agree to cede some of their own wishes, provided that others in the collective do the same, so as to adopt a course of action that is for the best of everyone in the community.¹¹⁴

Locke built upon this notion by contending that individuals would naturally be drawn to others in the formation of a state and in doing so would cede some of their own views on acceptability to ensure the development of the state.¹¹⁵

To provide individuals with the security that they will not lose out as others decide against adopting the norm, there needs to be a deterrent to prevent nonconformity.¹¹⁶ Deterrents therefore seek to shape behaviour; specific punishments for offenders will prevent them from doing wrongdoing any further while also deterring others from potentially doing the same.¹¹⁷

Penalties can take a number of forms, largely dependent on the nature of the norm. There may be a social penalty whereby individuals will be looked down on by

¹¹³ Hobbes, T., *Leviathan*, 1588-1679

¹¹⁴ Ibid.

¹¹⁵ Locke, J., *Second Treatise of Government*, 1689. Locke believed that individuals in a state of nature would be bound morally, by the Law of Nature, not to harm each other in their lives or possession but without the government to defend them against those seeking to injure or enslave the people would have no security and live in fear; effectively that all individuals would buy into the idea of a social contract provided that there was some mechanism to ensure all others did the same.

¹¹⁶ Zagare, F., *Classical deterrence theory: A critical assessment*, *International Interactions: Empirical and Theoretical Research in International Relations*, 21(4), 1996. In the case of the driving in society there are social and financial penalties to be suffered by individuals who are deemed to be driving at an unreasonable speed and it is because individuals know that such a penalty is likely to be enforced that the deterrent works effectively. Judicial and technical developments mean that it is relatively viable to establish from an evidential and procedural hurdles in considering whether or not an individual has been driving an unreasonable speed can be overcome meaning that the deterrent is perceived as being that enforced thereby keeping individuals in acting in accordance with the norm.

¹¹⁷ The argument that deterrence, rather than retribution, is the main justification for punishments is a hallmark of the rational choice theory and traced back to the work of Beccaria, C., *Dei Delitti e delle Pene* (On Crimes and Punishments) (1764)

others in society for their behaviour¹¹⁸, or even financial penalties are also common as a deterrent, as in the case of defamation.¹¹⁹

Financial penalties take the view that a higher than expected sanction lowers the crime rate; in the calculation of rationality of behaviour the existence of higher sanctions will result in the potential injurer contemplating the action and concluding that since the cost massively outweighs the potential benefit, the course of action should not be adopted.¹²⁰

Almost more important than the deterrent, is the fear of it actually being applied; it is the threat that will shape behaviour and ensure compliance.¹²¹ If individuals see that their failure to comply with the norm will result in them being punished, and equally others within their collective being punished, compliance is more likely to occur. Whereas if the feeling is that the deterrent mechanism cannot be effectively enforced, the fear that drives compliance does not exist.

It is this enforceability of deterrent, or more correctly the lack of it on Twitter, that is at the core of this thesis.

The existence of the punishment is intended to cause individuals to exercise rational choice in deciding against the nonconformity. Rational choice theory adopts the

¹¹⁸ An example of this is community service, which while it is designed that the individual 'put something back into society for what he has taken out', is equally designed to almost shame the individual by putting them in front of their peers.

¹¹⁹ The nature of the offending newspapers industry, discussed in the next Chapter, meant that a financial deterrent was most appropriate.

¹²⁰ Becker, G., '*Crime and Punishment: An Economic Approach*' Journal of Political Economy, 2001, 175. If an action will make the injurer £100 but it will the individual injurer knows that potentially the cost of the action will be £200 if they are caught injuring, then the rational decision will be one which clearly decides against adopting the risk. In contrast, if the penalty is only £50, then it is a lot more understandable as to why it is that the individual has adopted the risk. The application of the financial penalty therefore is designed to try and address the particular course of behaviour by the individual by putting in place a financial penalty greater than the potential gain to be made; the course of behaviour deserved is tried to be pushed.

¹²¹ It need not be that every individual instance of individuals not driving at a reasonable speed be picked up but rather the evidential and procedural hurdles of having to trace and consider potential individuals not driving at reasonable speeds can be established and penalties attributed.

utilitarian belief that man is a reasoning actor who weighs the costs of an activity he is about to undertake against the benefits from his actions.¹²² The theory was designed by Cornish and Clarke to assist in thinking about situational crime punishment; how individuals ought to be punished to ensure that the course of behaviour that adopted is the one that is desired.¹²³

In the case of reputations, the established norm is that reputations ought not be unduly attacked.¹²⁴ There are different notions of reputation is that includes honour, self-worth, self-image. Post remarked that with honour in this context it is defined as *‘a form of reputation in which an individual personally identifies with the normative characteristics of a particular social role and in return receives from others the regard and estimation that society accords to that role’*¹²⁵

Neill LJ quoted the Canadian case of *Manning v Hill* remarking that *‘...the protection of reputation remains of vital importance ... reputation is the ‘fundamental foundation on which people are able to interact with each other in social environments.’*¹²⁶ It was eloquently expressed by Stewart J as *‘The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty’*.¹²⁷

¹²² Baldwin, R., Cave, M. & Lodge, M., *‘Understanding Regulation: Theory, Strategy and Practice’* (Oxford, Oxford University Press, 2nd edition, 2011); Baldwin, R., Scott, C. & Hood, C., *‘A Reader on Regulation’* (Oxford, Oxford University Press, 1998)

¹²³ Clarke, R., *‘Situational Crime Prevention: Successful Case Studies’*, (New York, Harrow and Heston, 2nd edition, 1997), 10.

¹²⁴ References can be found in Ancient texts of Chinese societies as well as in Christian, Jewish and Islamic religious texts from the inceptions of the religions. The importance of reputations historically is discussed in greater detail in Chapter Four.

¹²⁵ Post, R., *‘The Social Foundations of Defamation Law: Reputation and the Constitution’*, 74 California Law Review, 1986, 699-700.

¹²⁶ *Berkoff v Burchill & Another* [1996] EWCA Civ 564.

¹²⁷ *Rosenblatt v Bear* (1966)383 US 75, 92.

With the norm that reputations not be unduly harmed, all individuals have agreed that they will not attack the reputations of others, provided that everyone does the same. However, the development of tabloid journalism, discussed in the next Chapter, saw the emergence of a nonconformist that wanted to go against the norm for its own financial profiteering.

Given the motivations of these defamers, financial, there was the need for a deterring mechanism underpinned by financial penalties, and hence the law of defamation, the mechanism developed.¹²⁸

3.1.2 Laws & Standards

A deterrence mechanism may exist as either laws or standards, and choice between the pair is primarily the result of the context within which application is occurring.¹²⁹

Laws (or rules) are associated with formalism and rigidity, in conjunction with certainty and uniformity, whereas standards (or conventions) are seen as allowing a more purposive approach affording flexibility in the application with greater discretion, but in turn resulting in greater degrees of uncertainty.¹³⁰

Laws and standards can therefore be seen as ‘monoliths’ representing competing modes of rationality.¹³¹ The resolution of the competing demands of these rationalities of certainty and flexibility, uniformity and individualisation is seen to be a manner of

¹²⁸ Social deterrents could not be effective in such a situation because of the motivations of tabloid publications; strict financial penalties necessary and hence the financial penalties designed to shape behaviour.

¹²⁹ Jackson, J., *Structural characteristics of norms*, (Oxford, Oxford University Press, 2007), 23-34. See Feldman, D., *The development and enforcement of group norms*, *Academy of Management Review*, 9(1); Black, J., *Rules and Regulators*, (Oxford University Press, Oxford, 1999).

¹³⁰ Black, J., *Rules and Regulators*, (Oxford University Press, Oxford, 1999), 10

¹³¹ Bellah, R., *The Meaning of Reputation in American Society*, 74 *California Law Review*, 1986, 743; See Ehlich, I., *Deterrents (theory), economics of*, in Durlauf, S. & Blume, L., *The New Palgrave Dictionary of Economics* (London, Macmillan Palgrave, 2008).

combining rules and standards to achieve the appropriate of discretion at one time. Petrazycki remarked *'the true practice of civil law or any law is not to be found in the courts, but altogether elsewhere. Its practitioners are not judges and advocates, but each individual citizen...'*; in effect that the pair are one in the same.¹³²

Laws are traditionally deployed in instances in which there is a need for greater formalism, in contrast to which standards are traditionally deployed in cases in which it is evident that pragmatism and flexibility are desired and appropriate.¹³³

The homogeneity of the community is one characteristic used to establish which mechanism is appropriate. In instances in which there is a small collective of individuals all of whom are tied to one another, the perception is that standards are sufficient, and the most appropriate mechanism.¹³⁴

The contention is that where there is a homogenous community of individuals, there will be a tacit understanding amongst the collective that means that standards are sufficient; there is not the need for the formalism that accompanies laws.¹³⁵ Where there is less homogeneity amongst the community, the view is that the tacit understanding is lessened and in turn, law desired.¹³⁶

¹³² Kelsen, H., 'Society and Nature', (*The Lawbook Exchange, Reprint Edition, London 2009*); Kelsen, H., 'Pure Theory of Law' (*Union Publishing, New Jersey, 1997*). This is the same view as that held by Kelsen who contended that there were 'laws' and 'living laws', effectively laws and standards, and that both were driving towards the same desired end.

¹³³ Black, J., *'Rules and Regulators'*, (Oxford University Press, Oxford, 199), 12; Terry, D. & Hogg, M., *'Attitudes, Behaviour and social Context: The role of norms and group membership'*, (New York, Psychology Press, 1999)

¹³⁴ Jackson, J., 'Structural characteristics of norms', Steiner, I. & Fishbein, M., *'Current studies in social psychology'* (Oxford University Press, Oxford, 1965), 301-309. See Smith, L. & Voneche, J., *Norms in Human Development'* (Cambridge, Cambridge University Press, 2006)

¹³⁵ Feldman, D., *'The development and enforcement of group norms'*, *Academy of Management Review*, 9(1), 47-55.

¹³⁶ Black, J., *'Rules and Regulators'*, (Oxford University Press, Oxford, 199), 17

The nature of the deterrence to be applied will also dictate the form adopted.¹³⁷

Where economic deterrence is going to be most effective, law will likely be the more appropriate vehicle to ensure that such punishment is effectively enforced.¹³⁸ In contrast, where the deterrence is social, for example a ban, being developed and enforced by the community would be more appropriate.

The notion of social contract ties to the theory of Authoritarian Communitarians (found mainly in East Asia) who privilege the common good to the point where they are willing to sacrifice individual rights, and they view the person as an organic cell of the body-society.¹³⁹ Responsive Communitarians, led by Etzioni, take it as their starting point that we face two basic normative claims, neither of which is a priori privileged: the common good and individual rights. They further hold that each society must work out the balance between these two major claims.¹⁴⁰

In the context of reputations and defamation, it is suggested that the correct school of thought is that of the Responsive Communitarian. It would be incorrect to say as the Authoritarian view holds, that we have sacrificed the individual's right to expression in favour of reputations; individuals are freely able to express themselves. In fact, we have established a position whereby both are protected, with a balance between the pair established; a remark that is clearly unfounded and causes damage will be inappropriate, while a remark that is factually correct is acceptable.

¹³⁷ Black, J., *Rules and Regulators*, (Oxford University Press, Oxford, 199), 20

¹³⁸ Ehlich, I., *'Deterrents (theory), economics of'*, in Durlauf, S. & Blume, L., *'The New Palgrave Dictionary of Economics'* (London, Macmillan Palgrave, 2008)

¹³⁹ In effect the notion held by the community is that the views and desires of the collective are more important and take precedence over the desires of any single individual.

¹⁴⁰ Etzioni, A., *'The Spirit of the Community Rights, Responsibilities and the Communitarian Agenda'*, (London, Crown Publishing, 1993). Etzioni's work has been crucial to the development of geo-political issues in the Western world with the development of Homeland security after 9/11. He articulated that in the months after the attack, in order to address the issues of security that arose, the common good for the community, took precedence above individuals' rights. See Etzioni, A., *'Security First'*, (Harvard Press, 2007).

Laws and standards are two means of achieving the same desired end. And as is hypothesised before this thesis, and can be seen in Chapters Five and Six, the law is no longer appropriate. One then turns to consider why standards would be successful, where law has not.

The answer is that the nonconformist is no longer a handful of a few newspapers, motivated by money, but thousands acting in an instant. The continued application of a slow, contextually rich mechanism is not appropriate as it cannot reach all offending actors to hold them to account.

In *Giggs* and *McAlpine*, which are considered in Chapters Five and Six, the law has not been successful because it has not been possible to reach all actors, with provisions that are not appropriate given the context. Where law has failed to reach individuals, individuals within those same said communities, feeling the crucial '*sense of community*' that binds them together, will not fail. They are in a position driven by their desire to ensure the best for their community, to engage individuals who have acted out of turn and address such behaviour.

Their desire to stamp such offending behaviour given everything that they and other conformists have invested and gained from being members of these communities, will see them address nonconformist behaviour within their communities.

3.1.3 Summary

All individuals in the U.K. have agreed to a social contract that dictates reputations not be attacked. However, despite this there are nonconformists, who believe that abiding by the norm does not apply to them. These nonconformists have historically been tabloid newspapers, and in turn, given their financial motives, the law has been the most appropriate mechanism to try and deter such nonconformity.

Where law is not applicable, standards can also be deployed to ensure conformity, as standards and laws are effectively two different means of ensuring the same end; conformity to a norm. While the law has been appropriate in the context of tabloid newspapers, it appears no longer to be the case in the context of the new environment of expression in which we now find ourselves.

The use of law has meant a centred regulatory model of governance at work. Deregulation, communal standards imposed are also viable, and given this thesis proposes a model built on communal conventions, understanding deregulation and regulation is crucial.

3.2 Regulation & Deregulation

Law emanates from the traditional state, command control position, where standards tend to be developed and proliferated by the community to whom they apply. In this way, laws are seen as very much regulatory while standards, deregulatory.

3.2.1 Regulation

The notion of regulation is one that comes with a great deal of complexity as it is employed for a myriad of discursive, theoretical and analytical purposes that require clarification and mapping.¹⁴¹ This thesis considers regulation as referring to instances of the state being at the centre, with laws developed and enforced by the state to deter undesired behaviour.¹⁴²

¹⁴¹ Baldwin, R., Scott, C. & Hood, C., *A Reader on Regulation* (Oxford, OUP, 1998); Parker, C. & Braithwaite, J., *Regulation* In Cane, P. & Tushnet, M., *The Oxford Handbook of Legal Studies*. (Oxford, OUP, 2003) 119-45; Black, J., *Critical Reflection on Regulation*, American Journal of Legal Philosophy, 2002, 27, 1-35. The far right would see regulation as a dirty word that articulates the heavy handed state authoritarian approach with the curbing of civil liberties while the left see it as part of the superstructure that serves the interests of the dominant class, framing power in seemingly civilised forms see Joskow, P. & Noll, R., *Regulation in Theory and Practice: An Overview* (Boston, MIT Press), 15

¹⁴² Black, J., *Critical Reflection on Regulation*, American Journal of Legal Philosophy, 2002, 27, 1-35. See Bernstein, M., *Regulating Business by Independent Commission* (Princeton, Princeton University Press, 1955); Mitnick, B., *The Political Economy of Regulation* (New York, Columbia University Press,

This view assumes that the central body is in a better position than anyone else; public interest theory. The argument here is that resources are allocated for the best of the entire community; society exists within a collective utilitarian notion in which all individuals within society agree to forego their own selfish wants and wishes in return for all others doing the same and in turn therefore in every aspect of society, a particular optimal position that is best for all.¹⁴³

The theory continues that the best allocation of resources can be achieved through the government acting to ensure that the best occurs and nothing else; ideally the market would be left to its own devices, however where this does not occur the government has to intervene and act.¹⁴⁴ Regulation is deployed to ensure the optimal position is achieved, as the view is that the market cannot be allowed to it.¹⁴⁵

However, in the context of public interest it may well be that there are instances in which a regulatory approach is no longer best; it may well be that there have been new developments in the market that mean that the government is no longer in the best position to try and ensure that the optimal position is achieved. Instead deregulation

1980). In the deployment of regulation for governance, individuals are either punished for the failures or incentivised to behave in appropriate correct ways; carrot and stick. The idiom refers to a policy of offering a combination of rewards and punishment to induce behaviour named in reference to a cart driver dangling a carrot in front of a mule and holding a stick behind it. The mule would move towards the carrot because it wants the reward of the food while moving away from the stick behind it as it did not want to be punished and in turn pulling the cart. Where instead, the mule fails to draw the cart, the stick at the back acts as a punishment for the mule's failures as a means of correcting behaviour to ensure he does pull the cart in the future.

¹⁴³ See Stigler, G., *The Theory of Economic Regulation*, Bell Journal of Economics and Management Science, 1971, 3-21. Another prominent theory is the economic theory as regulation is designed primarily for the benefit of the industry. The benefits of regulation for a branch of industry are evident; the government can grant subsidies or ban competitor entry so that prices rise, the government can maintain minimum price level better than cartels and the government can suppress the usage of substitutes. The economic aspect of regulation therefore very much works within the notion of markets in which there is an actual product as sale however reputation and the newspaper publishing in this context exists within the consideration of regulation as ensuring that the public interest is protected.

¹⁴⁴ Ibid, 6

¹⁴⁵ As a mechanism, regulation needs to be transparent, accountable, proportionate, consistent and targeted so as to apply to cases that are necessary. It is crucial that regulation be able to achieve the desired aim and not be burdensome and disproportionate towards the intended aim. See Hood, C., Rothstein, H. & Baldwin, R., *The Government of Risk: Understanding Risk Regulation Regime* (Oxford, Oxford University Press, 2001).

occurs whereby the market is left to itself to regulate and to ensure that the optimal point is achieved through the development and enforcement of standards.¹⁴⁶

3.2.2 Deregulation

Deregulation occurs where it becomes the case that the continued application of law is no longer appropriate.¹⁴⁷

Where regulation no longer remains appropriate, a mechanism needs to be established, one which will ensure that individuals continue to adhere to the norm; something needs to be done to ensure that the social contract does not break down. Accordingly therefore a political decision is taken to shift the power to those in the market themselves to maintain compliance and order.¹⁴⁸

Given the change to the market, it becomes the case that it passes the responsibility onto the market itself and more specifically entities within the market. In adopting a self-regulatory mechanism, standards are deployed; developed and enforced by the community.¹⁴⁹

¹⁴⁶ Black, J., *Critical Reflection on Regulation*, American Journal of Legal Philosophy, 2002, 22, 1-35.. See Grabosky, P., 'Using non-Governmental resources to foster regulatory compliance' Governance, 1995, 8, 527-50; Parker, C., *The Open Corporation: Effective Self Regulation and Democracy* (New York, Cambridge University Press 2002).

¹⁴⁷ Dempsey, P., *The Social and Economic Consequences of Deregulation*, Washington & Lee Law Review, 40, 1989; Dempsey, P., 'Market failure and Regulatory failure as a catalyst for political change: The choice between imperfect regulation and imperfect competition', 46, Washington & Lee Law Review, 1, 26-29 (1989).

¹⁴⁸ See Derthick, M. & Quirk, P., *The Politics of Regulation* (New York, Brookings Institution, 1985); Lodge, M. & Wegrich, K., *Managing Regulation: regulatory Analysis, Politics and Policy*, (London, Palgrave Macmillan, 2012); McAvoy, P. & Schmalensee, R., *The Causes and Effects of Deregulation*, (New York, Edward Elgar Publishing Ltd, 2014)

¹⁴⁹ In the shift from regulation to deregulation it is not the case that the government merely hands over the responsibility to the entities in the market to govern themselves to develop codes of conduct and ensure that they were success. Instead what has actually happened is that there has been assistance from the government in order to ensure that the transition is successful with this assistance coming for one in the form of education.

Standards have been deployed as early as time itself in religion, armies and now greatly in employment; employers to provide their employees with guidance as to how they ought to behave.¹⁵⁰

Codes are often deployed because of their decentralised, flexible, pragmatic manner as opposed to the formalism of the law, better able to respond and evolve from its environment. As Codes are developed by those in the community, there is greater flexibility and pragmatism, with punishments being flexible as required and enforced with speed.¹⁵¹

Deregulation has been deployed extensively in employment circles with the first being 'Our Credo' that was introduced by Johnson & Johnson in 1943 establishing the company's corporate social responsibility as well as articulating how it is that individuals within the company ought to behave.¹⁵²

3.2.3 Reputation

In the context of protecting reputations, the law is the regulatory mechanism of choice. Law has been necessary as the Code of the Press Complaints Commission has

¹⁵⁰ The Ten Commandments are a set of biblical principles relating to ethics and worship that seek to try and provide individuals with guidance as to how they ought to behave with the Pillars of Islam and the Ten Precepts of Buddhism doing the same. In many instances there have been a specialised class of warriors with specific codes of conduct to ensure that the warrior class is not corrupted or otherwise dangerous to the rest of society with emphasis placed upon honour, faith, loyalty and courage. The warriors code has been used by numerous cases the Arab-Persian ethical code of Furusiyya during the Middle ages, the French Foreign Legion Code d'Honneur still in use to this day to the Medieval knights code of chivalry. See French, S., *The Code of the Warrior: Exploring Warrior Values Past and Present*, (Rowman & Littlefield Publishers, New York, 2004); Brunsson, N. & Jacobson, B., *A World of Standards*, (Oxford, Oxford University Press, 2002)

¹⁵¹ As individuals in the community understand the norm and what everyone is working towards, there is not the same time required to establish how individuals will behave if changes are made.

¹⁵² In a recent LRN ethics study eight out of ten employees say their organization has a written code of conduct or code of ethics, and of those, the vast majority, 83%, believe that their management genuinely wants to promote ethics and integrity in the organization. The LRN ethics survey also showed that roughly three out of four people who work at an organization with a written code of conduct or code of ethics affirm that their code helps them understand the conduct that the organization values. Nearly 75% say it makes the organization a better place to work and that it alters behaviour and helps direct decisions. More than eight out of 10 employees apply their understanding of the code frequently on the job. In contrast, other studies have shown a direct correlation between job dissatisfaction and unethical conduct. See LRN Research on Code of Ethics, July 5 2006

failed to deter newspapers from publishing defamatory content.¹⁵³ The PCC is a voluntary regulatory body created to ensure that all professional journalists uphold basic principles of publishing including not publishing defamatory content.¹⁵⁴

The idea behind the adoption of a deregulatory mechanism with standards, was that the press ought to be free from legal intervention to write accurately and critically of the political climate.¹⁵⁵ In 1931 Stanley Baldwin said that the press *'had power without responsibility'*,¹⁵⁶ - that it was not the responsibility of the press to run the nation but that it ought to be free to hold those whose job it was to run the country to account.

Interestingly it was created after the Press Council failed.¹⁵⁷ In December 2007, the then DCMS Minister Margaret Hidge MP said *"The Government strongly supports freedom of speech and a free press. It is therefore appropriate that there should be a system of self-regulation. There is a long standing notion that the press should be free of government intrusion, which we intend to continue to maintain"*

The failure of the PCC has been the result of the conflict of interest.¹⁵⁸ On one hand, gossip and conjecture are the lifeblood of tabloid journalism but on the other

¹⁵³ Press Complaints Commission, Editors' Code of Practice, Available at <http://www.pcc.org.uk/cop/practice.html>

¹⁵⁴ It gives individuals the opportunity to bring a claim against individuals who have felt that journalists have not complied with the Code in ensuring that their behaviour is acceptable. The Code itself contains a number of principles that journalists ought to adhere to including, accuracy, all of which are basic norms in the journalistic community.

¹⁵⁵ The press is sometimes called the fourth estate with the idea being the apartness that the press is from three traditional central foundations of governance is crucial. The press does not share the same aims as the government, legislature or executive. It is instead an outsider and looks to hold the other three to account.

¹⁵⁶ Stanley Baldwin, Conservative Party leader (1923-1937), in a public address on March 17, 1931.

¹⁵⁷ The Press Council was a voluntary organisation designed to maintain standards in journalism. However by the 1980s it became clear that several journalists had failed to abide by the Council and therefore something stronger and more effective was demanded. Members of the Press established the PCC and Code of Practice, wanting to avoid regulation.

¹⁵⁸ Both Shannon and Snoddy provide comprehensive accounts of the failures of the PCC over the years to hold the press to account effectively because of the conflict of interest that served to make effective application near impossible. See Shannon, R., *'A Press Free and Responsible: Self Regulation and the*

those in the PCC are trying to ensure that only acceptable content is posted. If one thinks that a body is compiled of individuals with the intention that defamatory content not be published, while those same individuals' success is dependent on potentially defamatory, one can clearly see why the PCC failed.

This was been evident in the Leveson Inquiry which recently considered the practices of the newspaper industry with a focus on the failings of the PCC. The Inquiry consisted of a public inquiry into the culture, practices and ethics of the press following the News International phone hacking scandal.¹⁵⁹

Secret interviews conducted during the investigation with reporters saw many remarks that the '*PCC is run by newspaper editors*' and that '*Getting a PCC is not great but a lot of papers just brush it aside, all it is, is a little report by the PCC, but there's no money*'.¹⁶⁰ The PCC has been branded as being '*toothless*', with no focus on consumer rights but as a body designed to tick a boss.¹⁶¹ Jonathan Coad, a specialist media lawyer, who had dealt with the PCC for 18 years, bringing forth complaints, described the PCC as '*principally a cartel, set up for the purpose of ensuring that the*

Press Complaints Commission, 1991-2001, (London, John Murray, 2001); Snoddy, R., '*The Good, the Bad and the Unacceptable: hard News About the British Press*', (London, Faber & Faber, 2007)

¹⁵⁹ The Inquiry was set up by David Cameron and Nick Clegg in the wake of the revelation that the mobile phone belonging to missing schoolgirl Milly Dowler had been hacked by the News of the World. The result was that it appeared that phone hacking was more widespread than initially thought. The question was then raised of why there had been a failure to investigate the issue more thoroughly when it had first been raised by the Guardian in 2009. The purpose of the Inquiry therefore was to consider the press and the continued application of a self-regulatory model of governance could be effective. Coming out of the Inquiry the intention is that self-regulation will continue with a new body that will see a greater emphasis on trying to ensure engagement beyond what has been the case previously. Membership of the body would remain voluntary but incentives would be offered for engagement with individuals on the panel not being persons placed on with conflicting roles in prominent newspapers.

¹⁶⁰ Lewis, P., 'Tabloids lured by celebrity plastic surgery hoax' The Guardian Online, 15 October 2009, available at <http://www.theguardian.com/media/2009/oct/15/starsuckers-celebrity-cosmetic-surgery-hoax>; Lewis, P., Khalili, M. & Bennett, C., '*Revealed: Secret footage of tabloids being offered confidential information about celebrities*', The Guardian Online, 14 October 2009, available at <http://www.theguardian.com/media/video/2009/oct/14/starsuckers-celebrity-medical-records>

¹⁶¹ Leigh, D., 'Wintour, P. & Davies, C., 'MP's verdict on News of the World phone-hacking scandal: Amnesia, obfuscation and hush money', The Guardian Online, 24 February 2010, available at <http://www.theguardian.com/media/2010/feb/24/phone-hacking-scandal-mps-report>

*lack of press accountability is preserved against any form of effective regulation and to the clear detriment of the rights of the individual*¹⁶²

The failure of a self-regulatory standards based model under the PCC was the result of a conflict of interest that existed amongst its members; it was doomed to failure from its inception.

While standards developed and enforced are at the core of the new regulatory model proposed in Chapter Seven, the model doesn't suffer from the same fatal conflict of interest as the PCC.

As discussed in the previous Chapter, those that engaged in gossip in *Giggs* and *McAlpine* did not do so with malice, or a desire to profit from doing so, but because others did the same. The vast majority of individuals didn't intend to cause damage to others, and engaged because they saw others doing so, and being bound into the shared sense of community, engaged in a practice without thinking twice.

To have expected the PCC to have been successful was a fatal error from the start; the conflict of interest meant that it just wasn't going to happen. This same conflict doesn't exist in the context of the model proposed here, which is why it will not fatal as the PCC standard will.

In the context of this environment, and the model proposed in Chapter Seven, the view is that individuals in these communities are so borne into being members of these

¹⁶² Coad, J., 'The PCC, Secretive Biased and Weak', *British Journalism Review*, 20(4), December 2009. He continued "The continued claims made by the PCC to be "independent" are manifestly untrue, since it was set up by the press; is funded by the press; its members are appointed by the press; seven of the 17 Commission members are editors; the lay members are appointed by the Commission and the PCC Code is written exclusively by the press. The PCC's obvious lack of independence renders it both structurally and culturally incapable of fulfilling its role as the guardian of the interests of the general public against those of the immensely powerful commercial organisations that control print journalism."

communities on Twitter that they will drive to ensure the standards developed are enforced and nonconformity within their communities is tackled.

3.3 Conclusion

While the democratisation of expression has led to much good, it has also resulted in mass nonconformity. There is an established norm that dictates that individuals ought not to attack the reputations of others and yet it is clear from many instances that individuals are acting out of turn on Twitter. Despite the existence of the social contract that everyone has agreed to, these individuals are acting out turn.

Law and standards are both used to deter nonconforming behaviour, and the use of each depends on the issue at hand. The intention is that punishments, and the threat of them, will shape individuals behaviour, making them think twice before acting out of turn and against the norm.

In the context of reputation in the U.K., a regulatory mechanism with law at its core has been developed and employed. This is because the nonconformist has been the tabloid industry, one which was motivated by the desire to make money and in turn a strong financial penalty necessary to act as a deterrent. Attempts to employ a self-regulatory mechanism failed; individuals who needed tabloid content given the value that it served them in selling copies against the fact that these same individuals were supposed to prevent the dissemination of the very same content. The resulting failure of the PCC Code meant that the law of defamation was necessary; a mechanism with teeth that could apply strong financial penalties.

The environment of expression has evolved and the nonconformist is no longer only the tabloid industry. As the environment has evolved, the community is now itself better placed to govern than the traditional central regulatory mechanism.

The democratisation of expression discussed in the previous Chapter, has provided a new environment one that calls into question the extent to which law can remain effective. This change suggests that the community is better placed than an external body to govern itself and ensure nonconformity does not occur.

In order to truly understand the way in which the law of defamation can no longer be the correct mechanism, it is important to understand where it is come from? Why is it the way that it is? To this end, the next Chapter considers the law of defamation as it is; its emergence, theoretical foundations and aims as a mechanism to regulate and shape behaviour, along with its application online, which truly establishes the way in which it has been applied since the last revolution in expression.

Chapter Four: The Law of Defamation

John Stuart Mill in *On Liberty* remarked that ‘...there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine....’¹⁶³ championing the virtues of free expression and newspapers were central to this. However, they would overstep their bounds and publish defamatory content, given that they knew that such content was appealing to a significant proportion of the readership.

The law of defamation was the mechanism chosen to try and curb such behaviour. This Chapter seeks to provide a comprehensive understanding of the development of the law of defamation; its theoretical foundations, its provisions and application.

To understand the development of the law of defamation, it is important at the outset to understand the development of reputation as something to be protected and how this time period coincided with the development of a new class of readership looking for more entertainment based content. This time period saw the rise of nonconformity that subsequently resulted in the development of the law.

The Chapter then considers the law of defamation itself and in particular the theory behind the development of the law. The law of defamation can be seen as an anomaly, distinct from the rest of tort in the deterrents and penalties used to shape behaviour. Understanding this is important as this allows us to understand why the law of defamation has been developed as it has; why the deterrents employed, have been and why they are not viable in the context of expression.

¹⁶³ Mill, J., ‘*On Liberty*’ (Longman, Roberts & Green, London, 1869), 60.

There is then a brief examination of the 2013 Act to consider the extent to which it has materially altered the provisions of defamation and their application to Twitter. The Chapter concludes by examining the concepts of transjurisdictionality and anonymity on the Web – the two tenants upon which academics have traditionally called for new mechanisms of governance.

The Chapter is crucial to this thesis. It provides an understanding as to how and why the law of defamation came into existence. The previous Chapter considered that to protect norms from being set to one side, deterrent mechanisms are necessary and hence the development of law. By understanding how defamation has developed, one can understand why the provisions are as they are, and crucially, why it cannot be appropriate in the context of Twitter.

4.1 Reputation

Reputations have been regarded as being important through time as they articulate an individual's perception in the eyes of others, their humanity, dignity and as well as their worth.¹⁶⁴ Neill LJ remarked that '*...the protection of reputation remains of vital importance ... reputation is the 'fundamental foundation on which people are able to interact with each other in social environments.*'¹⁶⁵

Reputations foster an individuals' self-image and self-worth¹⁶⁶, dignity with aspects of personal identity that stem from membership in the general community;

¹⁶⁴ Post, R., '*The Social Foundations of Defamation Law: Reputation and the Constitution*', 74 California Law Review, 1986, 699-700.

¹⁶⁵ *Berkoff v Burchill & Another* [1996] EWCA Civ 564.

¹⁶⁶ The notion of honour can be seen in the way in which actual harm as a result of the publication need not be demonstrated; mere tendency will suffice for the claim to succeed, as honour is a notion that really lacks the ability to be able to be measured in a tangible way.

*'individual must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts'.*¹⁶⁷

Reputations can be seen as akin to other property, we gain from our endeavours and progression as any other tangible; Post remarked statements that are merely unflattering or annoying exist outside of this marketplace.¹⁶⁸

Sociologist Bellah remarked that *'our tendency to think of reputation in individualistic terms is rooted in our cultural emphasis on the autonomy, independence, and achievements of individuals'* and this conception of reputation being held in such esteem as something to be protected emerged out of the Industrial Revolution.¹⁶⁹

The Industrial Revolution brought with it cultural, societal and technological developments that resulted in the development of wide scale defamatory content for the first time. Tabloid journalism, publishing thousands of pages of defamatory content to appeal to a new readership that demanded such content emerged, simultaneously with the notion that reputations ought to be protected for the first time.

4.1.1 Tabloid Journalism

The Industrial Revolution saw the emergence of the ability to mass print newspapers for the first time.¹⁷⁰ The geographic reach of newspapers was greater than

¹⁶⁷ Goffman, E., *'Interaction Ritual'*, 1967, 84-85. This conception of reputation as dignity can be seen in the need for publication for defamation; the fact that there has been an attack that has been seen by another member of the community as *'Reputation is an integral and important part of the dignity of the individual; should publication not be necessary. It forms many of the bases of decisions in a democratic society which are fundamental to its wellbeing. Once besmeared by an unfounded allegation in national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation ... Protection of reputation is conducive to the public good.'* See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, Lord Nicholls.

¹⁶⁸ Post, R., *'The Social Foundations of Defamation Law: Reputation and the Constitution'*, 74 California Law Review, 1986, 691, 695. This idea of property is borne out in the fact that *'one's good name is ... as truly the product of one's efforts as any physical possession.'* See Von Vechten, V., *'The history and theory of the law of defamation II'* 4 Columbia Law Review, 1904, 33, 33.

¹⁶⁹ Bellah, R., *'The Meaning of Reputation in American Society'*, 74 California Law Review, 1986, 743, 743

¹⁷⁰ Eisenstein, E., *'The Printing Revolution in Early Modern Revolution'* (Cambridge, Cambridge University Press, 2nd edition, 2005), 227-230. The development of the steam powered rotary in 1843 by

had previously been the case, while the number of individuals in society who could read was greater than ever before.¹⁷¹ The new class of readership wanted content that appealed to them as opposed to what had existed previously.

Existing newspapers did not cater for these individuals; a new market of readers who were not interested in things that the existing readers were being provided with.¹⁷² This new class wanted content that was more entertainment based with tabloids emerging to cater for them. The newspaper industry had been controlled for years previously under government controlled merchantilian approach, was now opening up with a more varied range of content being produced.

With the development of a new class of readership, there needed to be content that appealed to them directly, publishing content that affected their day to day lives.¹⁷³ Locke contended that all persons were born rational, free, equal and capable of governing, leading to individuals challenging the notions that saw hierarchies in society, which newspapers dedicated to them allowed this new class to do.¹⁷⁴

American Richard Hoe allowed millions of copies of a single page to be printed, far in excess of the 500 or so that were possible via the manual presses.

¹⁷¹ See Pound, R. & Harmsworth, G., *Northcliffe* (Cassell, London, 1959). The Elementary education Act 1870 was one of the attempts put in place by the government to try and increase the percentage of the population that were literate.

¹⁷² Marzolf, M., *Civilian Voices: American press criticism* (New York, Longman, 1991). New professional careers were being added to universities with the notion that journalism ought to become a profession emerging to take hold. See Dickens-Garcia, H., *Journalistic Standards in Nineteenth Century America* (Wisconsin, University of Wisconsin Press, 1989), 158-61. Providing them with information as to the cities that they were migrating to, information about political issues that were affecting them along with playing a crucial role in other aspects.

¹⁷³ There is a debate as to the role of the newspaper industry in any society. The various theories can be seen as; authoritarian (which sees all media as subject to the supervision of the ruling authority and expression or opinion which might undermine the established social and political order as forbidden), free press (the complete freedom of expression rejecting any government interference), social responsibility (modified freedom of press theory which sees the media as free but having to accept the responsibility of the public good having to be accepted) and development media theory (the media should be free but this is subordinate to the requirement of economic, social and political development). The normative theory notes that the press takes the form and coloration of the social and political structures within which it operates. See Siebert et al, *Four Theories of the Press*, 1-2.

¹⁷⁴ Locke, J., *Locke: Two Treatises of Government* (Cambridge University Press, Cambridge, 3rd edition, 1988)

Content that appealed to the desires of this new class of readership included more entertainment based content that touched on the nature of others. Tabloid publications like *Tit-Bits* (founded in 1885) and *Answers* (1888) took the approach of ‘*information as entertainment*’ with the latter often posing imaginary questions like ‘*What the Queen Eats?*’ and ‘*Why Jews Don’t Ride Bicycles?*’¹⁷⁵

Daily newspapers, like *The Star*, also altered their content being influenced greatly by American popular journalism which was concise and punchy.¹⁷⁶ It promised its readers ‘*plenty of entirely unpolitical literature – sometimes humorous, sometimes pathetic, anecdotal, statistical, the craze of fashions and the arts of housekeeping – now and then a short, dramatic and picturesque tale...*’¹⁷⁷

These publications were competing with one another to try and attract this new readership, producing content knowing of the damage done to be individuals. Farewell J summed it up when he remarked that ‘*such newspapers publish libellous statements because they find it pays...*’¹⁷⁸

The result was the development of modern day tabloid journalism with content being produced not with malice, but a desire to outsell competing publications. Journalism was developing into professional vocation and in turn the damage to be done by such remarks greater than would otherwise have been the case.¹⁷⁹

The Industrial Revolution was the last revolution in expression. Not only did technological developments mean that now thousands of pages could be printed, where

¹⁷⁵ Pound, R. & Harmsworth, G., ‘*Northcliffe*’ (Cassell, London, 1959), 82.

¹⁷⁶ Mitchell, P., ‘*The Making of the Modern Law of Defamation*’ (Hart Publishing, Oxford, 2005), 118.

¹⁷⁷ *The Star*, 1 January 1888. Critics of the popular press in the late nineteenth century specially in the US accessed the so called yellow press of being a serious threat to democratic values and family morals with many calling for government control which in 1912 saw Congress pass legislation regulating newspapers and the subsequent year saw 20 states considering some form of regulation.

¹⁷⁸ *Jones v E Hulton & Co* [1909] 2 KB 444, 483. .

¹⁷⁹ Marzolf, M., ‘*Civilian Voices: American press criticism*’ (New York, Longman, 1991), 50-61.

previously they could not, which meant the geographical reach of content was greater than ever before. But, society had changed with an increase in the population reading, who wanted a different type of content that appealed to them and hence more content based around gossip and conjecture.

The Industrial Revolution also saw the emergence of the concept of protecting reputations because of the importance that lay within them themselves.

4.1.2 Utilitarianism to Individualism

Prior to the Industrial Revolution, the notion of protecting reputation did exist but not because it was perceived as something that in itself ought to be protected but rather to ensure the maintenance of peace within the community. Individuals could bring actions under communal conventions that were not focused upon defamation but general communal maintenance of peace.¹⁸⁰

As early as the twelfth century, individuals could bring actions for attacks on reputation with a number of avenues available; for slander in local courts, causes in the ecclesiastical courts and actions under the *scandalum magnatum* statutes. Actions were not motivated by money or the need to protect something that belonged to oneself that had been damaged, but by the need to address the issue quickly to allow the community to continue to function effectively.¹⁸¹

¹⁸⁰ See Carr, F., *The English Law of Defamation, Part I*, 18 LQR, 1902, 255.

¹⁸¹ Ecclesiastical courts were established by the Crown as a means of counteracting the power that the Church had over individuals' behaviour, with defamation falling within the power of the Church as it was regarded as a 'sin'. The focus of proceedings was the defendant, the 'sinner', and their remarks as opposed to the subject of such remarks with a view towards ensuring that the sinner repented. Shortly after Edward I's ascension to the throne in 1272, a new statute made it a criminal offence to commit slander however it quickly faded away. The statute was re-enacted in 1388 and these were known as the statutes of *scandalum magnatum*. The statutes were designed to allow individuals to bring actions for the maintenance of peace and order within the community primarily with the ability to even gain financial compensation. However financial gain was not the primary gain it was very sparse and when it was awarded it was minimal to say the least and the insurance of social peace remained the primary objective when the statutes were used. See McNamara, L., *Reputation and Defamation* (Oxford University Press,

The notion of what was ‘defamatory’ was very broad with the idea that anything that would cause disruption to the community ought to be actionable.¹⁸²

The result was that actions for damage existed because of the good that addressing the issue would have for the collective. Jeremy Bentham and John Stuart Mill remarked that the good ought to be maximised; bring about the greatest amount of good for the greatest number, as opposed to individuals pursuing their own self-interests; utilitarianism as opposed to individualism.¹⁸³

The Industrial Revolution saw a time in which individuals were encouraged to pursue their own interests, making use of the technological and societal developments that were occurring. The population was migrating to large industrial heartlands to keep up with developments, government wanted individuals to make use of all that was now available, encouraging individuals to pursue self-interests.

Individuals who were willing to take risks and chances were rewarded as ‘*wages and profits are the creation of a man. They are the recompense for the sacrifice made in the one case of ease, in the other of immediate enjoyment*’¹⁸⁴ with an appreciation that through taking chances individuals could differentiate themselves from others.¹⁸⁵

Oxford, 2007), 69-72; Helmholtz, R., ‘*Canonical Defamation in Medieval England*’ 15 *American Journal of Legal History*, 1971, 255.

¹⁸² Carr, F., ‘*The English Law of Defamation, Part I*’, 18 *LQR*, 1902, 255.

¹⁸³ See Kelly, P., ‘*Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*’ (Oxford University Press, Oxford, 1990), Mill, J., S., ‘*Utilitarianism*’ (Hackett Publishing Company, London, 2nd revised edition, 2002). Utilitarianism is in opposition to psychological egoism, the view that a person should pursue his own self-interest, even at the expense of others.

¹⁸⁴ Perkin, H., ‘*The Origins of Modern English Society, 1780-1880*’ (Routledge Publishing, London, 2nd edition, 2002), 97.

¹⁸⁵ The concept of the modern class system had started to develop as man was now placed in a different relationship with his fellow man the authoritarian relations that had traditionally existed, had fallen away in favour for a more horizontal, equal perch for all men. Not only could individuals develop their reputations as the notion of property but also as honour and dignity, the fact that they could see their self-esteem on a par with their fellow man and their dignity in no longer being regarded as a lower class.

The individual freely pursuing his own self interests in competition with others was the common social ethic underlying the early industrial society. However, individuals needed the fruits of their endeavours to be protected; no one would want to take risks if the results of such risks were not protectable and susceptible to theft and attack by others.¹⁸⁶ As well as acquiring tangibles, individuals could acquire intangibles like a reputation and standing; as Locke noted those who worked hard and took risks were seen as models for all others as an example of the ability to progress socially.¹⁸⁷

Starkie remarked that '*society had progressed to a state that all the honours and constituted reputation were the proper objects of legal protection*'¹⁸⁸; there was now an intrinsic value placed on an individual's reputation with legal jurisprudence suggesting as much.¹⁸⁹ Paine & Philip summed the issue up noting that in the development of all rights in relation to man, reputation was one of the most prominent to be protected.¹⁹⁰

The result was that reputation had now emerged as something within its own right to be protected from harm; actions available for defamation not because of the value that addressing the issue served for society as a whole, but because something that belonged to that individual, had been unduly damaged.

In *Thorley*, the court considered the application or otherwise of the decision in *Villers v Monsley*. in which Wilmost LCJ noted that '*if any man deliberately or*

¹⁸⁶ As a means of protecting individuals' property, the Metropolitan Police Force was created at the beginning of the nineteenth century. Fraser, D., '*The Evolution of the British Welfare State*' (Palgrave Macmillan, London, 3rd edition, 2003), 103.

¹⁸⁷ Fraser, D., '*The Evolution of the British Welfare State*' (Palgrave Macmillan, London, 3rd edition, 2003), 113.

¹⁸⁸ Starkie, T., '*A Treatise on the Law of Slander, Libel, Scandalum Magnatum and False Rumours*', 1813, 1-2.

¹⁸⁹ See Perkin, H., '*The Origins of Modern English Society, 1780-1880*' (Routledge Publishing, London, 2nd edition, 2002); Fraser, D., '*The Evolution of the British Welfare State*' (Palgrave Macmillan, London, 3rd edition, 2003)

¹⁹⁰ Paine, T. & Philip, M., '*Rights of Man, Common Sense, and other Political Writings*', (Oxford, Oxford Paperbacks, 2008), 65-87. See Fraser, D., '*The Evolution of the British Welfare State*' (Palgrave Macmillan, London, 3rd edition, 2003)

maliciously publishes anything in writing concerning another which tends to render him ridiculous or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher'.¹⁹¹

4.1.3 Summary

Reputations are seen as hugely important and the product of an individual's hard work and endeavours. Ensuring that they are not unduly attacked and damaged is a huge part of the social and legal landscape of the U.K. This was not always the case.

The Industrial Revolution saw the development of reputations as something to be protected within their own right. Individuals were encouraged to pursue their own self-interests but the product of their endeavours, their reputations, had to be protected. As society progressed, it quickly became clear that all rights of man ought to be protected, which included reputations.

This coincided with the development of tabloid publications, who were looking to appeal to readership that demanded sensationalist content that included content that looked into lives of others. There was a new class of readership in society one which demanded entertainment based content, more than the wholesome content that had been given to readers for years.

Tabloid publications knew that there was a norm in society that dictated that reputations ought not be harmed and yet continued to publish defamatory content considering only the financial gain to be had by publishing such stories. It was this time, this period that saw the development of tabloid journalism alongside reputations as something to be protected - that saw the emergence of the law of defamation, the mechanism to deter nonconformist behaviour we still have in place to this date.

¹⁹¹ *Villers v Monsley* (1769) 2 Wils KB 403.

4.2 The Law of Defamation

The law of defamation is the mechanism in place to curb nonconformity. Given that newspapers published defamatory content because of the financial gain to be made, the law of defamation is a strict mechanism, underpinned by a strong economic deterrence mechanism. All of this is designed to make newspapers think twice before publishing defamatory publications.

4.2.1 The Law of Defamation

Published matter will be defamatory if it conveys an imputation that *'tends to lower the plaintiff [claimant] in the estimation of the right thinking members of society generally'*,¹⁹² *'without justification or law excuse, [are] calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule'*¹⁹³ or tend to make the claimant *'be shunned and avoided and that without any moral discredit on [the claimant's] part'*.¹⁹⁴

The burden of proof on the claimant can be divided into three elements:

- Do the words convey a defamatory meaning?
- If the answer to (1) is yes, then has the defendant published or was responsible for the publication of the defamatory statement?
- If the answer to (1) and (2) is yes, then would the defamatory statement be reasonably understood to refer to the claimant?

If the claimant succeeds under each, it will then be for the defendant to prove the applicability of one of the various defences available.¹⁹⁵

¹⁹² *Sim v Stretch* [1936] 2 ALL ER 1237, Lord Atkin 1240.

¹⁹³ *Parmiter v Coupland* (1840) 6 M& W 105, Lord Wensleydale 108; *Byrne v Deane* [1937] 1 K.B. 818.

¹⁹⁴ *Youssouf v MGM Pictures Ltd* (1934) 50 TLR 581, Slessor LJ 587.

¹⁹⁵ Defamation Act, 1996

The requirement of proving the words had a defamatory meaning has two hurdles; firstly what meaning(s) would it convey to an ordinary and reasonable person? And secondly, is that meaning(s) defamatory? In order to ascertain the meaning(s), the court will have regard to its ordinary and natural meaning; the meaning a normal person would derive from the words without having any special knowledge of the circumstances.¹⁹⁶

The defamatory matter must also have been published to one person other than the claimant, with all of those who have played a role in publishing such matter potentially being held liable.¹⁹⁷ Publication is the point at which the material has been accessed and involves both the dissemination but also the accessing of the material as it is seen as a two way process.

The remark must also be seen as referring to the claimant, which in the majority of instances will be straightforward. However, there may be instances in which it might not and therefore the question of whether reasonable readers would have understood the remarks as referring to the claimant as in *Watts v Times Newspaper*, will be assessed.¹⁹⁸

In the U.K. a new cause of action arises every time defamatory material has been published with the point of publication being the point at which the material has been

¹⁹⁶ When the Daily Herald newspaper published an article entitled '*False Profit Return Charge Against Society*' which reported that the plaintiff had been accused of certain false entries in the annual return, the claimant successfully claimed that to the ordinary reader the word 'false' would imply fraudulent and dishonest, and not incorrect as the newspaper claimed to have intended, *English and Scottish Co-Operative Investment Mortgage and Investment Society Limited v Odhams Press Limited* [1941] K.B. 440. See *Vodafone Group Plc and another v Orange Personal Communications Services Ltd* [1997] EMLR 84; *The Times*, August 31, 1996.

¹⁹⁷ *Pullman v Hill & Co.* [1891] 1 Q.B. 524. Crucially, in the U.K. publication occurs at the point at which materials is accessed and read and therefore numerous causes arise potentially in respect of the same material; See *Duke of Brunswick v Harmer* (1849) 14 QB 185; *Loutchansky v Times Newspapers* (2002) WLR 640.

¹⁹⁸ *Watts v Times Newspapers Ltd* [1997] Q.B. 650. The defendant newspaper published an article accusing author Nigel Watts of plagiarism. However they added a photograph of a different Nigel Watts who was an artist and the latter was successfully able to argue that many people would have understood the allegation as referring to him.

accessed.¹⁹⁹ This leads to the multiple publication rule - potentially the same piece of defamatory material being actionable on numerous occasions.²⁰⁰

In the *Duke of Brunswick v Harmer*, to bring an action, the claimant sent an employee to purchase a back issue of the newspaper that had been published 17 years earlier that contained libel about him.²⁰¹ It was held that the sale of the copy to the employee was a new publication and from this point the claimant had one year to bring an actions; which he did.²⁰²

The law of defamation will also hold to account any and all republishers and intermediaries whose actions have caused the subject of the remarks damage. It was remarked that; '*...in a private action for slander to a common person, if JS publish that he hath heard JN say, that JG was a traitor or thief, in any action of the case, if the truth be such, he may justify*'.²⁰³ The same construction extended to distributors of material with the key to accountability being knowledge; a constructive knowledge standard being the parameter for accountability.²⁰⁴

It used to be the case that defendants could claim that they had republished defamatory content from another as a defence. However, it was appreciated that in the context of the way in which an individual may be seen by others, the republication

¹⁹⁹ Defamation Act 1996, s8

²⁰⁰ *Duke of Brunswick v Harmer* (1849) 14 QB 185.

²⁰¹ *Duke of Brunswick v Harmer* (1849) 14 Q.B. 185

²⁰² This can be understood both through the application of the multiple publication rule in the manner in which it treats every subsequent publication as a fresh tort but also the purpose of the law of defamation; to repair the reputation of the subject of the remarks. Every time the defamatory content has been published, the claimant's reputation has been tarnished and needs to be repaired. If the one year period accrued only to the first publication, then the damage caused by every subsequent publication could not be repaired.

²⁰³ *Ibid*, 141.

²⁰⁴ *Emmens v Pottle* (1885) 16 QBD 354, 356.

could cause just as much, or even more damage to the subject than the original publisher.²⁰⁵

Previous to the development of newspapers, malice was necessary for action.²⁰⁶ However, given the motivations of newspapers, explored previously, this require was done away with. Wilmost LCJ remarked that *'if any man deliberately or maliciously publishes anything in writing concerning another which tends to render him ridiculous or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher'*.²⁰⁷

4.2.2 Defamation and Tort Theory

Tort exists as a means of essentially placing the injured party in the position as though the harm had never occurred *'restituto in integrum'*; restoration to the original state. Negligence dictates that *'those who go personally or bring property where they know that they or it may come into collision with the persons or property of others have by law a duty cast upon them to use reasonable care and skill to avoid such a collision'*.²⁰⁸ Damages are capped according to the particular limb loss; a loss of a thumb £18,000, arm £72,000 and 2 arms £150,000 with anything more meaning that the injured party would be able to profit from the injury that has occurred to him.²⁰⁹

Negligence is very specific about the damages an individual is to receive, which is the result of the notion that the injured party should be put back in the position as

²⁰⁵ *The Earl of Northampton's Case* (1612) 12 Co Rep 132.

²⁰⁶ *Bromage v Prosser* (1824) 1 Car & P 475, 479. This can be understood when one considers that actions were community centric and therefore to minimise the potential disruption to the community any potential case would have a high threshold for consideration.

²⁰⁷ *Ibid.*

²⁰⁸ *Fletcher v Rylands* [1866] LR 1 Ex 265

²⁰⁹ Mr Justice Mackay, Bruffell, M., Cherry, J., Hughes, A. & Tillet, M., *'Guidelines for the Assessment of General Damages in Personal Injury Cases'*, (Oxford University Press, Oxford, 2006, 8th edition).

though the harm had never occurred.²¹⁰ The damages awarded are not designed to allow the injured to profit from the damage done; *‘that sum of money which will put the party who has been injured in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.’*²¹¹

In contrast to this, damages for defamation exist to act as a deterrence as in *John v MGN Ltd* in which on Appeal the subject of defamation remarks was awarded £75,000 in damages; £25,000 compensation and £50,000 exemplary.²¹² Sir Thomas Bingham MR remarked: *‘The question is, whether the sum which we have awarded for compensatory damages is sufficient to punish the newspaper and deter it and others. In our judgment it is not, since we do not think that this sum adequately reflects the gravity of the newspaper’s conduct, or that it would deter it or other national newspapers of a*

²¹⁰ Irrationality exists where an individual takes an action where it is clear that the costs associated with the action outweigh the benefit to be derived and this is the foundation of tort. An activity carries a benefit of £100 and expected injury of £90 and the only way to prevent the injury is to stop the activity entirely. In such an instance it would be irrational to forego a benefit of £100 in order to avoid the cost of £90 as foregoing the benefit would not be cost justified precaution. Instead if it were the other way around the result would be that the foregoing of the benefit would be justified and a failure to do so would be irrational; the resulting notion that where it is clear that the adoption in the course of action is one which when considered would be irrational then injury accruing liable on the injurer. In turn where there is not a contractual relationship between the parties the costs need to be borne for the damage resulting from the activity given its irrational nature and it is this that is the basis of the law of tort. The economic perspective of tort is the premier body of thinking where tort exists to compensate victims of irrational activities however it is also seen as correcting justice and under the thinking of the academic Prosser. An examination of the various theories of tort law is beyond the scope of this thesis but see; Chapman, B., “Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice,” in David G. Owen (ed.), *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford, 1995); Coleman, J., “Corrective Justice And Wrongful Gain,” *Journal of Legal Studies*, 1982 11, 421–440; Coleman, J., “The Mixed Conception Of Corrective Justice,” *Iowa Law Review*, 1992, 77, 427–444; Coleman, J., *Risks and Wrongs*, (New York, Cambridge University Press, 1992); Coleman, J., “Tort Law and the Demands of Corrective Justice,” *Indiana Law Review*, 1992, 67, 349–378; Benson, P., “The Basis for Excluding Liability for Economic Loss in Tort Law,” in David G. Owen (ed.), *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford, 1995); Calabresi, G., 1970, *The Costs of Accidents: A Legal and Economic Analysis*, (Yale University Press, New Haven, 1970)

²¹¹ *Livingstone v Rawyards Coal Company* (1880) 5 App Case 25, Lord Blackburn

²¹² Here the Court of Appeal held that the initial award of £75,000 with £275,000 on top of it was disproportional towards the intended aim of repairing the subject’s reputation and the damage done and deterring future publishers; *John v MGN Ltd* [1997] QB 586, 626.

*similar character from such conduct in future. An award of exemplary damages is therefore, in our judgment, necessary to meet these two requirements.*²¹³

Damages can be awarded where it is clear that compensatory damages are not sufficient to act as a deterrent. The Court of Appeal in *Riches v News Group Newspapers Ltd* provided the most comprehensive explanation as to the scope of exemplary damages and their application as it remarked ‘... *If the case is one where exemplary damages can be awarded the court or jury should consider whether the sum which it proposes to award by way of compensatory damages is sufficient not only for the purpose of compensating the plaintiff but also for the purpose of deterring the defendant. It is only if the sum proposed by way of compensatory damages (which may include an element of aggravated damages) is insufficient that the court or jury should add to it enough "to bring it up to a sum sufficient as deterrent.*’²¹⁴

The damages underpinning defamation are distinct from any other aspect of tort; they are designed not only to compensate the injured but act as a deterrent towards the tabloid publishers. As considered in the previous Chapter, effective regulation requires a deterrent and in the case of defamation this has been economic. The idea has been that if the costs of defamation are higher than the potential money to be made by publishing such content, tabloids would think twice before acting.²¹⁵

This whole mechanism of the law of defamation has been developed for the newspaper industry and the newspaper industry alone. The potential for double

²¹³ *John v MGN Ltd* [1997] QB 586, per Sir Thomas Bingham MR 619

²¹⁴ *Riches v News Group Newspapers Ltd* [1985] 2 ALL ER 845, 850.

²¹⁵ If an action will make the injurer £100 and the expected potential fine is £100 but the fine for the action is £500 given that the social loss to be suffered can be offset by such a sum with the belief is that subsequent potential injurers will see the fine and it will act as an ex ante restriction on the action to be adopted. Becker, G., ‘*Crime and Punishment: An Economic Approach*’ *Journal of Political Economy*, 2001, 175.

jeopardy, the high financial penalties being awarded and the provisions of the law of defamation have all been designed with regards to the newspaper industry – to deter newspapers from acting in a nonconformist manner.

4.2.3 Summary

The law of defamation was developed as the mechanism to deter tabloid publications from publishing potentially defamatory content. Profiting was the sole aim of the newspapers, unconcerned by the potential damage done to individuals.

The result has been the development of a strict, financially harsh law; evidenced by the fact that publishers potentially held to account on numerous occasions for a defamatory publication out of kilt with the rest of law. The contextually rich provisions of defamation are aligned with the newspaper publishers and what can be extrapolated to establish liability.

The law of defamation from the provisions through to punishments have all been developed for the tabloid newspapers, given that when it was developed, and to the present day they have been the only nonconformist threat. And this law, despite some suggesting otherwise has been applied online with success.

4.3 Online Defamation

The law of defamation has been applied online as it has in the instances of offline defamation. This has been possible because as explored in Chapter Two, the Web 1.0 environment, did not truly revolutionise expression; it extended the reach of content both immediately and in-time, but the actors were largely the same.

4.3.1 Publisher Liability

The High Court stressed in *Berezovsky v Forbes Inc.* that the position of an online publisher was akin to that of an offline publisher as the multiple publication rule applied

with the claimant being able to bring an action whenever and wherever harm had occurred.²¹⁶ In 1996, Forbes magazine published an article claiming the Mr Berezovsky was involved in criminal activity, and involved in the murder of a Russian television producer. The claimant wanted to bring an action in the U.K. given the U.K.'s claimant friendly approach in comparison to other states like the U.S.²¹⁷

The claimant remarked that the U.K. was an appropriate forum as he had a considerable reputation in the U.K. to protect given his financial dealings in the U.K.²¹⁸ The defendants contended that the appropriate forum for the dispute was either Russia, where the claimant resided primarily, or the U.S., as 98.0% of all copies being sold were sold in the U.S. and Canada, and only 0.25% in the U.K.²¹⁹

The Court of Appeal concluded that the claimant had sufficient links to the U.K. so as to allow him to bring proceedings here, upheld by the House of Lords. Lord Steyn in the leading judgement cited a number of factors that included; that he had visited the U.K. regularly from 1994-1997, as well as having a property in London, his children were also living in the U.K. as well as having many financial dealings. Furthermore, it was shown that the nature of accusations made in the article had impacted on the claimant's financial dealings in the U.K., as they had deterred others from entering into or continuing existing negotiations in London.²²⁰

Lord Steyn addressed the claim that *'the correct approach is to treat multi-jurisdiction cases like the present as giving rise to a single cause of action and then to*

²¹⁶ *Berezovsky v Forbes, Inc (No.1)* [2000] 1 W.L.R. 1004.

²¹⁷ The standards in the U.K. for plaintiffs are lower than in other states and therefore often individuals have tried to bring claims in the U.K.; 'Libel Tourism'.

²¹⁸ *Berezovsky v Forbes, Inc (No.1)* [2000] 1 W.L.R. 1004, 1007.

²¹⁹ Ibid, 1008.

²²⁰ Ibid, 1010-1012.

ascertain where the global cause of action arose'.²²¹ He rejected this as he stated that *'such an argument runs counter to well established principles of libel law... [the present case is one] in which all the constituent elements of the torts occurred in England ... in such a case it is not unfair that the foreign publisher should be sued here*'.²²²

4.3.2 Republisher Liability

Liability for subsequent online republications has also been firmly established with the case of *Loutchansky*.²²³ The defendants accepted that the stories were defamatory but argued that the action was time barred; bringing the action three year after the stories had been published. The defamatory nature of the content and the fact that in theory it should be actionable was at issue, with the defendants' contending that there was a one year period within which the claimants would have to bring the action, and as three years had elapsed, they no longer could.²²⁴

The claimant's case was based on s4A of the Limitation Act 1980 which states that in actions of libel or slander *'no such action shall be brought after the expiration of*

²²¹ Ibid, 1011.

²²² Ibid, 1012-1013. The application of the law of defamation was affirmed in the subsequent decision of *Dow Jones v Gutnick*. In *Dow Jones v Gutnick* considered largely the same facts as that of *Berezovsky* and addressed the issue of *'does internet publication qualify as publication within a jurisdiction?'* The claimant raised a case in the Supreme Court of Victoria where he claimed that he had been defamed both in print and online in the State of Victoria. There were a very small number of physical copies of the magazine distributed in Victoria and instead the claim focused on the Barrons Online site which at the time had 550,000 subscribers, almost 2,000 of which were from Australia and several hundred from Victoria. The defendant applied for a stay on proceedings contending that the correct forum for the dispute to be heard was New Jersey; *'stories which were written and edited in New York and transmitted by our dedicated computer to our corporate campus in New Jersey...All six servers are physically located in New Jersey.'* The defendants claim was dismissed and the court held that Australia was the correct forum for the case to be heard in as harm had occurred to the claimant in Australia and therefore given that a claimant could bring an action wherever they have suffered harm, it was correct. The court noted that there should be the application of the multiple publication rule as opposed to the single as suggested by the defendants as in part publication was a two way process with at least two parties; the publisher and the person to whom it has been published. See *Dow Jones & Co. Inc v Gutnick* [2002] HCA 56.

²²³ *Loutchansky v Times Newspapers Ltd* [2002] QB 783.

²²⁴ Ibid, 785. The defendant newspaper argued that the one year limitation within which an action had to be brought started when the initial publication occurred, and that therefore a new one year period did not accrue with every subsequent republication, whilst also noting that such an approach was incompatible with the development of the Internet, and in particular the ability to archive and spread information, while old news they contended would be stale

one year from the date on which the cause of action accrued'.²²⁵ The claimant failed to do so but contended that each time the story had been subsequently accessed from The Times' server, a new cause of action arose as a result of the republication thereby allowing him to comply with the requirements of the Act; each republication accrued its own separate one year period beginning from the point of publication.

The court rejected the defendant's contention with Lord Phillips of Worth Matravers MR pointing out that every action based on an Internet publication was subordinate; *'the scale of such a publication and any resulting damage is likely to be modest compared with that of the original publication'*²²⁶ but no less actionable. The resulting damage caused to the subject of the remarks by the republication was just as actionable as the initial publication made regardless of the markedly different publication model online.

4.3.3 Online Intermediary Liability

Online intermediaries have also been subject to the same provisions of the law of defamation, as applies to physical world distributors. In *Godfrey v Demon Internet Services*, the claimant brought an action against the defendant ISP for comments that were posted by an individual on a message board.²²⁷ The claimant had noticed the message and requested that the ISP remove it. However, they failed to act and the comments disappeared fourteen days after they had been posted which was the automatic period after which the remarks were deleted themselves.

There were two questions to be considered; firstly could the ISP be held as having published the defamatory remarks on each occasion that the material was accessed and secondly could the defendant avail itself of the defences in s1 Defamation Act 1996. On

²²⁵ Limitation Act 1980, s4A.

²²⁶ *Loutchansky v Times Newspapers Ltd* [2002] QB 783, 818.

²²⁷ *Godfrey v Demon Internet Services Limited* [1999] 4 ALL ER 342.

the first issue Moreland J said that the defendants clearly were not publishers of the posting within the meaning of s1(2) and 1(3) of the Defamation Act 1996.²²⁸

However he was unequivocal about the second question as he held that the ISP had received notification about the existence of the defamatory material but failed to remove it from the servers. The existence of this knowledge meant that Demon Internet Services could not use the defence provided by s1 Defamation Act 1996 as it could not be said that it did not know that what it was doing, or not doing in its case, was contributing to the publication of the defamatory statement,²²⁹ and at this point it was then required to *'take reasonable care in relation to its publication'*.²³⁰ The fact that the defendant intermediary had received actual notice of the existence of the defamatory material by the claimant and had failed to act rendered it unable to avail itself of liability under s1 Defamation Act 1996.

Subsequent to the decision in *Godfrey*, the Electronic Commerce (EC Directive) Regulations 2002 came into force with the intention of harmonising provisions across Member States.²³¹ Online intermediaries have been able to use the defences provided by Regulations 17-19, as it has been held that they qualify as information society service (ISS) providers²³² as they provide a service for remuneration at a distance by means of electronic equipment.²³³

Regulation 17 provides protection for an ISS where it has acted as a transient in the process, whilst Regulation 18 provides a defence where an ISS makes a temporary copy of a website to provide a more efficient service which contains unlawful material.

²²⁸ Ibid, [19].

²²⁹ Ibid, [20].

²³⁰ Defamation Act 1996, s1(1)(b).

²³¹ Electronic-Commerce (EC Directive) Regulations 2002

²³² Electronic-Commerce (EC Directive) Regulations 2002, Regulation 2(1).

²³³ *Bunt v Tilley & Others* [2006] EWHC 407 (QB)

Regulation 19 provides a defence where the ISS hosts unlawful material that it did know to be unlawful.²³⁴

The recent decision in *L'Oréal v eBay* stressed that a constructive knowledge standard could be deployed whereby the intermediary need not have actual knowledge of the existence of unlawful content, and instead the existence of constructive knowledge would be regarded as sufficient.²³⁵

It very much carries forward the negligent standard developed under *Emmens* which required that distributors acted reasonably in preventing the dissemination of defamatory content and not simply turn a blind eye; it must have shown that they '*ought not to have known it, using reasonable care*'.²³⁶ Lord Esher remarked that: '*The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing.*'²³⁷

4.3.4 Summary

The law of defamation has been applied to the online world, just as it has in the physical world. This has been viable because the Web 1.0 did not present any materially different issues for consideration that called into question the application of the law, as the development of the Web 2.0 has.

As these cases clearly demonstrate the right to publish remained in the hands of few, and therefore the law could be used to consider liability. Given the relatively few publishers, economic deterrence as a mechanism to act over a relatively few, wealthy

²³⁴ Electronic-Commerce (EC Directive) Regulations 2002, Regulations 17-19.

²³⁵ *L'Oréal v eBay* [2009] EWHC 1094 (CH). Where the intermediary host ought to have known but failed to act, it would be rendered liable. This can really be seen as very much against the blunt instrument of law protecting reputation and the damage done by requiring that an intermediary comply with the provisions that exist quickly.

²³⁶ *Emmens v Pottle* (1885) 16 QBD 354, 356.

²³⁷ *Ibid*, 357.

publishers could in theory be viable. It is important to remember that in this context, whether the measures are fair, is it fair to have a multiple publication rule online, has not been called into question, merely the application of the law.

There has been a view that the provisions of the Act have not been appropriate for the Web environment and in turn there have been some changes implemented by the 2013 Act. However, a closer examination of these key changes highlights that these don't consider the broader context of the Web 2.0 environment.

4.4 2013 Defamation Act

This thesis was written before the 2013 Act was brought into force, early 2014; the substantive elements of this PhD thesis were written from 2010 – 2014. As a result this thesis does not consider the 2013 Act throughout and for the conclusions being made. To have considered the 2013 Act throughout this PhD would have been improper given the lack of certainty in respect of its application.

The 2013 Act brings into force six key changes to the previous legislation,²³⁸ with the three most important in this context being:

- The Serious Harm Test – Someone bringing a libel action will now have to prove that the statement caused or was likely to cause serious harm to their reputation;²³⁹
- Single Publication Rule – Only one action will be available to the claimant, will be available once an article is first published online;²⁴⁰ and

²³⁸ The Act also brings into force the following: 1. 'Taking care of business' – businesses can now only sue if a statement caused serious financial loss, 2. 'The Public Interest' – the Reynolds Privilege public interest defence has been abolished and replaced by the public interests defence, and 3. 'More Privilege' – Privileged material which is protected from defamation action is now extended to cover more instances. The extension for cover now goes as far as; peer reviewed statements in scientific and academic journals, reports of scientific and academic conferences and related documents, articles based on information provided by the public companies and reports of proceedings of government

²³⁹ Defamation Act 2013, s1

- Website Operator Liability – This is a ‘report and remove’ system that people can use if they believe they have been defamed on a website message board with the operator having to act as an intermediary between the poster and offended.²⁴¹

In the context of Twitter, these changes ignore the characteristics of the medium and in particular the speed and number of actors.

4.4.1 Serious Harm

The concept of serious harm is one that can be easily established when considering a traditional website – page views are a simple and effective way of determining readership and harm caused.²⁴² Even more pronounced than this is the ability now to determine which aspects of a page the individual reader has spent most of their time on.²⁴³ The evolution in technology means that these evidential hurdles can be overcome relatively easily.

This is not possible with Twitter as there is no comparable way of establishing how many times a tweet has been seen. Retweets and favourites are useful metrics for determining the popularity of a tweet, but as will be highlighted in Chapters Five and Six, they are not reflective of actual readership of a tweet. A tweet may be retweeted by 100% of those who have seen it, just as equally as it might be by 1% of those who have seen it.

The notion of serious harm as a test to be passed, sits comfortably with traditional webpages. The number of actors and the speed with which they act on Twitter renders

²⁴⁰ Defamation Act 2013, s8

²⁴¹ Defamation Act 2013, s5

²⁴² Defamation Act 2013, s1

²⁴³ As well as technology that allows you to monitor the number of times a page has been viewed, there is technology that allows you to detect which parts of a page are being focused on. This in turn allows for an easy ability to establish whether it is one piece of material that is gaining the attention of readers.

the serious harm hurdle an almost impossible one to establish with any degree of certainty and satisfaction.

In the context of Twitter, there is the potential to create a two-tiered system of liability. Tweeters of notoriety will be held to account, while those that are not, will not.

While the *McAlpine* case was decided before the implementation of provisions, considering it here highlights the lack of satisfaction in the provisions in the context of Twitter. In the context of addressing *McAlpine* under the serious harm provision, the affect would have been to hold the likes of Bercow and Davies to account for their tweets, while not holding all others who had tweeted and retweeted to account.²⁴⁴ Given the notoriety of these particular individuals on Twitter, there would be an assumption that they had caused serious harm, where others would be hypothesised as not because of their lack of notoriety.

In actuality, as Chapter Six highlights, it is the sheer volume of all of the actors, all 130,000 tweeters and retweeters that resulted in such extensive damage to McAlpine. If it were the case, that all 130,000 actors were to be considered, it is plainly the case that the provision isn't appropriate, and materially no different from the current lack of satisfaction and effectiveness in the mechanism of law.

In talks on developing the 2013 Act, one of the clear objectives was to move away from an environment in which those with financial clout were able to buy their way into obtaining redress at the expense of those less financially secure.²⁴⁵ The effective development of a serious harm provision almost has the opposite effect.

²⁴⁴ Chapter Six considers the McAlpine case and highlights the damage caused by Samantha Bercow Alan Davies as a result of their tweets.

²⁴⁵ As discussed earlier in the Chapter, because of the great costs associated with defamation litigation, it quickly became a game of who had the deepest pockets was the victor.

The requirement of serious harm in effect, in the context of Twitter, does nothing to address this, and in fact one could argue that it makes the issue here even more pronounced – there is a greater feeling of unease than previously the case.

4.4.2 Single Publication Rule

The single publication rule means that publication will have occurred once material has been uploaded onto a server.²⁴⁶ In the context of traditional webpages, this change means that publication will no longer be an issue of when and how many times the content has been read but is established as soon as the material has been uploaded onto the server. The impact is that from an evidential perspective, any debate surrounding publication is a moot one.

The ability to retweet is fundamental to Twitter, as considered in Chapter Two. However, it is this ability to retweet that creates a lack of clarity in the context of the point of publication and in particular in respect of whether a retweet is a fresh publication or not; the complexities surrounding retweeting on Twitter are considered in Chapter Five.

In its simplest form, retweeting will consist of pressing the automatic retweet button. Here, it is not clear whether the material is being uploaded once again onto the server or whether as the content is already on the server there is a mere re-broadcast to a new audience.

There is also a debate when there is additional sentiment added to a retweet. As is explored in Chapter Two, additional content is often added to retweets to provide context or a personal view. Once again, there is a question around whether this will be a

²⁴⁶ This is a change from the previous legislation which dictated that publication occurred every time a remark has been read by an individual thereby giving the subject the ability to bring numerous actions in respect of the same remark. See Defamation Act 2013, s8

fresh publication onto the server or whether this not the case. As is seen in Chapter Five, this additional sentiment may only consist of a single word or phrase.

If the decision were to be that every retweet would be considered as material published onto the server for the first time, then every tweet and retweet would be actionable. This position does not provide any greater clarity or satisfaction than the previous provision under the multiple publication rule.

However, if only tweets, and not retweets, were seen as publications, then there would be free reign to republish without accountability which doesn't provide a satisfactory conclusion moving forward either. In effect, the change in provision here would allow individuals to retweet without any consideration or accountability for their behaviour.

Once again, considering *McAlpine* highlights the lack of satisfaction in the provision. If only tweets were held to account, it would mean that the thousands of retweeters would not be held to account. If every retweet would also be seen as a publication, then all of the 130,000 actors would have to be held to account, which is not materially different to the problem posed by the current provisions in sheer volume of actors.

The fact that this provision of single publication applies only to the online instances of defamation, and not physical world, highlights the fact that there is a perception of a hierarchy of expression, whereby traditional news media are viewed as high level speech and content on Twitter as being lower level.

4.4.3 Website Operator Liability

The change in operator liability means that Twitter has to act on receiving notification of the existence of offending material.²⁴⁷ As there is no requirement to proactively monitor content, on the face of it, it would appear as though the change in provision here is friendlier to Twitter.

The requirement that Twitter now act as an intermediary back and forth between the individual who published the potentially defamatory tweet and the potential victim is entirely impractical. This impracticality is exasperated by the fact that Twitter is required to act within a very short space of time and has to do so every time an individual feels that content has been published that is not acceptable – every time an individual makes a complaint. The change requires that Twitter now act back and forth every time an individual makes a complaint, irrespective of whether that tweet is actually offensive or not.

In the context of the Web 1.0 environment, this new requirement on site operators is friendlier than the older provision. If there were comments posted at the bottom of an article, the relatively few comments and pace of publication, would make it easy for the site operator to act and engage back and forth between the complainant and the author of the complained of material, as the provision now requires.

Contrasting this to the case of *McAlpine*, given that there were 130,000 tweets and retweets within the first 48 hours of the first tweet, it would have been impossible for Twitter to act as an intermediary between the tweeters and retweeters and McAlpine's counsel.

²⁴⁷ Upon receiving notification of the materials, authors are then given 5 days within which to respond and state that the complained of material may be removed from the site. If the author fails to respond, the site operator then has 48 hours to remove the offending material or they are held to account for a failure to do so. If the author refutes the removal of the content, their details are then to be passed on to the victim to pursue the potential action. See Defamation Act 2013, s5

4.4.4 Summary

All of the above changes to the legal provisions are inappropriate for Twitter and wider social media environment. All have been developed for the previous online environment, one which, as discussed in Chapter Two, had far fewer actors, acting in a much slower time frame.

Consider the example of an article posted online that has been commented upon and the comment is potentially defamatory. Publication has clearly occurred as soon as the comment has been published, as it has been uploaded on the website's servers. Serious harm can be established by using website tracking technology to establish how many times the comment has been viewed. Finally, the website operator can relatively easily act back and forth between the commentator and potential victim of the remark, as required.

The Twitter environment is entirely different to the one above. The complexity of retweeting, as considered in Chapter Five, calls into question the issue of publication, with neither answer, as explored above, being satisfactory. There is also no satisfactory mechanism by which serious harm can be established as any metrics that are in place are indicative and nothing more. Finally the requirements on Twitter, to act back and forth between the subject of a tweet and the tweet's publisher are entirely onerous, given the sheer volume of content being posted highlighted in Chapter Six.

The sheer number of actors and the speed with which they act, render the provisions of the 2013 Act inappropriate in the Twitter context. Considering the *McAlpine* case here briefly, which is considered in detail in Chapter Six, it is clear that the most troubling aspect potentially is the law's lethargy in meeting the challenges posed by social media.

The key changes to the Act, as analysed above, ignore the very nature of social media and actually goes as far as to undermine the elements of responsible publishing in the previous Act.

As discussed in Chapter One, Twitter has democratised expression and given the average individual the opportunity express himself in writing to the public at large in an instant. This contextual environment has been ignored in the development of the 2013 Act.

4.5 Literature

Academics have proposed different models for governance in the online world, built upon different foundations and notions. The regulatory model proposed in Chapter Seven borrows from different aspects of models and arguments already put forward. However, all fall down for one reason or another.

4.5.1 Barlow's Transjurisdictional Web

It has been suggested by some academics that the lack of boundaries in the online world rendered the continued application of law as null and void. One of the first proponents of the notion was John Perry Barlow believing that the community of individuals should be left unto themselves to govern arguing that; *'Weary giants of flesh and steel you are not welcome among us and have no sovereignty where we gather...You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.'*²⁴⁸

Barlow continued that asocial contract would emerge one through a combination of *'ethics, enlightened self-interest and the commonweal'* would result in a workable

²⁴⁸ Barlow, J.P., *'A Declaration of Independence for Cyberspace'* Available at <https://projects.eff.org/~barlow/Declaration-Final.html>. See Palfrey, J., 'Four phases of internet regulation' Harvard Law School, Public Law & legal theory Working Paper Series, Paper No. 10-42, Research Publication No. 2010-9, August 11, 2010.

model of self-governance; the '*Golden Rule*' determined through the free market in which individuals would be able to choose the rules applicable to them that they see most appropriate.²⁴⁹ The perception was that given the nature of the Web as borderless, individuals could freely choose which legal regimes applied to them, thus rendering law redundant.

The perceived ability of individuals to be able to freely move between legal regimes and pick and choose which were most attractive to them was fully considered by David Johnson and David Post in '*Law and Borders – The Rise of Law in Cyberspace*' as the pair argued the nature of the Web rendered law inappropriate.²⁵⁰ Post continued that the special circumstances of cyberspace based upon the lack of geographical boundaries meant that no choice of law would apply and work effectively.²⁵¹

Individuals accordingly could pick which regimes were most favourable to them, which in the context of defamation is crucial as, previously discussed in this Chapter, there is a huge difference in the perception of reputation and exactly what is and is not defamatory between the U.K. and U.S.A. alone. All have held that effective conformity can be achieved through self-regulation, a better appreciation that individuals understand the nature of the content they are publishing before acting.²⁵²

²⁴⁹Barlow, J.P., '*A Declaration of Independence for Cyberspace*' Available at <https://projects.eff.org/~barlow/Declaration-Final.html>.

²⁵⁰Johnson, D. & Post, D., '*Law and Borders – The Rise of Law in Cyberspace*' (1996), 48 *Stanford Law Review*, 1367. Oberding, J. & Norderhaug, T., '*A separate jurisdiction for cyberspace*', 1996, 2 *Journal of Computer Mediated Communications*; Burk, D., '*Jurisdiction in a world without borders*' 1997, 1 *Virginia Journal of Law & Technology*; Lessig, L., '*The Law of the horse: What cyberlaw might teach*', 1999, 113 *Harvard Law Review*, 501.

²⁵¹Post, D., '*Governing Cyberspace*' 43 *Wayne Law Review* 155 (1997). See Anderson, D., 'Is Libel Law worth reforming, 1991, *U. PA. Law Review*, 487; Banks, J., '*European regulation of Cross Border Hate Speech in Cyberspace: the limits of legislation*', *European Journal of Crime, Criminal Law and Criminal Justice* 19 (2011), 1-13, 5

²⁵²Delacourt built on this notion contending that the value in law was lacking as remarks made in Australia about an American would lack contextual value for the application of the law in the former. The

Clearly the previously considered decision of *Berezovsky* demonstrates this contention cannot be true. *Berezovsky* saw Forbes magazine, a U.S. based publication, with an action brought in the U.K. for publications and damage caused to the subject in the latter.

Had the transjurisdictional nature of the Web been an issue, the defendant publication would have not been the subject of an action in the U.K. and instead would have been able to choose a legal regime; which would have been the U.S. given its expression friendly stance.

In this instance, as in many others had Perry Barlow, Post and others been correct, Forbes magazine would have been able to choose the jurisdiction it wanted, namely the U.S. to evade liability. However, this was not the case. Instead the law of defamation from the U.K. was applied and the result discussed previously.

scope of the Web therefore meant that remarks published would lack value within another region where the defendant might seek to try and bring a case forth and that therefore the only potential viable mechanism would be for individuals to appreciate the nature of their remarks before acting; akin to individuals in society appreciating the need to work together in the pre-Industrial Revolution era discussed previously in this Chapter. See Delacourt, J., *'The International Impact of Internet Regulation'* 1997, 38 Harvard International Law Journal, 207, 219. See Burnstein, M., *'Conflicts on the net: choice of law in transactional cyberspace'* 1996, 29, Vanderbilt Journal of Transnational Law 75, 110; Perry, B. & Olsson, P., *'Cyberhate: The globalisation of hate'* Information & Communications Technology Law, 18(2) June 2009, 185-199; Kulesza, J., *'Internet governance and the jurisdiction of states: Justification of the need for an international regulation of cyberspace'*, Information & Technology Law, 20(2), 2010. Banks and others have contended that the failure of the law can only be addressed through a greater role on to be played by service providers; given their position as gatekeepers to the Web, they have the ability to ban individuals, in ensuring that conformity is achieved. Benkler continued along this notion contending that the rapid advancement of technology meant that the most appropriate course of action could be to place the power in the hands of service providers and technology; they were at the forefront of this advancement and therefore best placed to act. See Banks, J., *'European regulation of Cross Border Hate Speech in Cyberspace: the limits of legislation'*, European Journal of Crime, Criminal Law and Criminal Justice 19 (2011), 1-13, 10; Smith, M & Kollock, P., 'Communities in Cyberspace' in Smith, M. & Kollock, P., *'Communities in Cyberspace'* (Routledge, London 1999), Benkler, Y., *'Internet Regulation: A case study in the problem of unilateralism'* New York University School of Law, Working Paper 11, Fall 1999. Benkler considered the US Communications Decency Act which was a legislative mechanism designed to provide greater clarity and grasp of technology but in actuality has provided the law enforcers with greater scope of intrusion.

4.5.2 Van Graafeild's Anonymity

In 1974, Justice Van Graafeiland observed that although the computer had great power '*it presents a real danger of being the vehicle of introducing erroneous, misleading or unreliable evidence*'²⁵³ which has been built upon by individuals suggesting that the anonymity with which individuals could post content online rendered the continued application of law online as null and void; nonconformists could not be traced and would not be deterred by the law as it could not be applied effectively.²⁵⁴

According to Goldsmith, the ability to act anonymously forms and integral part of autonomy; the ability to choose for oneself whether and how it is that one is going to present oneself to others, just as important as the actual thoughts being presented.²⁵⁵ Therefore the notion of anonymity is not within itself incorrect or wrong, something that ought to be outlawed but rather the posting of unlawful content which includes defamatory content.²⁵⁶

Campbell & Machet contended that the existing mechanism of law was not sufficient given that it could not when individuals decided to post anonymously; there was no an effective mechanism to cause them to be deterred in their behaviour. The pair continued that the law as a mechanism is a blunt one, one which is reactive and slow

²⁵³ While this relayed to the law of evidence, it could equally be applied to defamation online.

²⁵⁴ Harris, C., Rowbotham, J. & Stevenson, K., 'Truth, law and hate in the virtual marketplace of internet content' Information & Communications technology Law, 18(2) June 2009, 155-184, 172.

²⁵⁵ Goldsmith, J., 'Regulation of the Internet: 3 Persistent Fallacies', 73 Chi-Kent Law Review, 1119, 1121 (1998).

²⁵⁶ In cases of particularly tight and controlled states, individuals are often seen to post content that is counter to the state and the values held by the controlling regime and in doing so the only safe way for such people to act is through posting anonymously During the 2009 Iranian election, Anonymous worked together with the Pirate Bay to create Anonymous Iran, a site that had drawn over 22,000 supports providing individuals with an ability to circumvent the existing harsh Internet censorship prevent individuals from discussing content anti the existing regime. See Nine News Online, 'Internet Underground takes on Iran', Accessed 29 June 2009.

and that technology in the form of anonymity would always be ahead and therefore would not be ideal.²⁵⁷

As with the transjurisdictionality argument, jurisprudence has seen the law addresses instances of anonymous defamatory postings; courts have compelled revelation of identities of individuals who have posted anonymously as in *Author of a Blog v Times Newspaper Ltd.*²⁵⁸ The court refused to grant an injunction to the blogger contending that knowing the identity of the poster was important given that such knowledge allowed readers to determine how much weight to attach to blog posts.

The result has been that courts have been able to force the revelation of posters identities which has been made possible through developments in technology that have been able to establish identities. This was the case in Winter of 2012 when the High Court in the UK compelled Google UK to reveal the details of an anonymous blogger who was using Google's Blogger platform as a means of publishing defamatory comments.²⁵⁹

²⁵⁷ 'Liberating Cyberspace: Civil Liberties, Human Rights and the Internet', edited by Liberty (Pluto Press, London, 1999). Campbell, P & Machet, E., 'European Policy on Regulation of Content on the Internet' 140-160, 141. Pearce continued that given such a fatal ability for the law to act the law is not capable of being able to address basic instances in which individuals post anonymously and in turn the appropriate response is one that is according to him vested in the power of technology itself; ISPs playing a role in the governance of expression given their ability to be able to trace IPs of individuals and hold them to account when they ought to be. See Knill, C. & Lehmkuhl, D., 'Private actors and the state: internationalisation and changing patterns of governance' *Governance: An international journal of policy, administration and institutions*, 2002, 15(1), 42.

²⁵⁸ *Author of a Blog v Times Newspaper Ltd* [2009] EWHC 1358 (QB). The Claimant is a serving police officer and the author of the "Night Jack" blog, which deals with his police work and his opinions on a number of social and political issues relating to the police and the administration of justice. He sought to conceal his real identity by blogging under a pseudonym. It was accepted that a journalist for the *Times* newspaper had successfully identified the claimant by a process of deduction and detective work, mainly using information available on the Internet. The Claimant applied for an injunction to prevent the *Times* publishing his identity. He argued that the newspaper was subject to an enforceable duty of confidence not to reveal his identity and that he had a reasonable expectation of privacy in respect of the information that he was the blog's author, in respect of which there was no countervailing public interest justification for its disclosure.

²⁵⁹ Dixon, H., 'Google to reveal the name of blogger who called Rabbi a cheat', *The Telegraph Online* 8 February 2013'. Available at <http://www.telegraph.co.uk/technology/google/9857797/Google-to-reveal-name-of-blogger-who-called-Rabbi-a-cheat.html>

The High Court compelled Google to provide data including the blog owner's username, email and IP address to the claimant's counsel, information from which the particular defendant publisher could be identified. Mr Justice Gloster remarked *'I take the view that if people are making what appear to be prima facie defamatory comments, they should not be protected by the cloak of anonymity.'*²⁶⁰

4.5.3 Lessig's Code as Law

Lessig argued that computer code, or West Coast Code (referring to Silicon Valley), regulated conduct in much of the same way as the legal code, or East Coast Code (referring to Washington D.C.) does.²⁶¹ Accordingly he was of the view that Code *is* Law and should be the means of governing behaviour online.

Lessig considered the example of copyright law, arguing that cyberspace changed not only the technology of copying but also the power to protect against illegal copying. He continued that code displaced the balance in copyright and doctrines such as fair use – if it becomes possible to licence every aspect of use, then no aspect of use would have the protection of fair use.²⁶² Essentially the parameters set by code dictated what was and was not feasible and in turn the parameters of governance, therefore there was no need for law and code was governing.

In the context of defamation, as will be seen in Chapters Five and Six, and bearing in mind what is already known, using code as law in a pre-emptive manner simply isn't viable. Unlike copyright, and other aspects of the law, defamation is not an objective matter of fact; it is highly subjective. Outlining the provisions of the law of defamation, and its theoretical foundations, earlier in this Chapter, make it very clear that there is a

²⁶⁰ Ibid. The anonymous posters remarked that the subject of the posts, a Rabbi was having an affair and within his community such remarks had the ability to cause great offence and damage to his reputation within the Jewish community in which he resided.

²⁶¹ Lessig, L., *'Code and Other Laws of Cyberspace'*, (Basic Books, New York, 1999).

²⁶² Ibid.

rich contextual understanding required of everything around the remark to establish liability. The mere existence of particular words or phrases does not render something defamatory.

The idea therefore the code ought to be *the* law, i.e. purely the mechanism used to define was is and is not acceptable in the context of defamation is not appropriate. Attempts at using pre-publication filters, as seen in Chapter Six, would be either a gross infringement on the right to expression or redundant.

However, there is *a* role to be played by technology, and in particular post publication with the assistance of the communities on Twitter, as is clear in the regulatory model proposed in Chapter Seven.

4.5.4 Murray's Matrix

Murray proposed the development of a mechanism that afforded all participants in the 'matrix' the opportunity to shape their environment; *'evolution rather than revolution is the key to effective regulatory intervention'*.²⁶³

He proposed the development of a dynamic regulatory matrix that looked to harness the relationships that already existed between all of the actors online, as opposed to imposing a new matrix into a settled environment, which is hugely disruptive.²⁶⁴

²⁶³ Murray, A., *The Regulation of Cyberspace* (Abingdon, Routledge-Cavendish, 2007).

²⁶⁴ 'Liberating Cyberspace: Civil Liberties, Human Rights and the Internet', edited by Liberty (Pluto Press, London, 1999). Newey, A., 'Freedom of Expression: Censorship in Private Hands' 13-43, 34-35. See Power, A. & Tobin, O., 'Soft law for the Internet, lessons from International law', Vol 8(1), April 2011. This is held by Price and Verhulst who accordingly state that individuals take account for their own actions and others being seen to do the same has a knock on effect on others and their behaviours. See Price, M & Verhulst, S., 'In search of the self: charting the course of self-regulation on the internet in a global environment' Cardozo Law School, Jacob Burns Institute for Advanced legal studies, Public Law & legal Theory, Working Paper, March 2000.

At the core of the model is Luhmann's thesis of autopoiesis which sees social systems as being self-referring entities created within their organisational logic.²⁶⁵ Murray's model depicts a three-dimensional field with points and lines representing regulators and their protagonists.²⁶⁶ He argues that the regulatory matrix is a dynamic structure and that lawmakers should avoid the static approach and expand towards a smarter, more dynamic regulatory model.²⁶⁷

While Murray's model shares many similarities to the one proposed in this thesis, one crucial difference is that at the core of Murray's model is the regulator – designing and implementing the regulatory model on those in cyberspace.²⁶⁸

Murray concedes that such an approach might not resonate with individuals in cyberspace. He concedes that many will have their own views and that therefore the regulator needs to be able to consider where such counter behaviour will come from and be prepared to act to address this. As a result, in his model the regulator remains at the core of the matrix.

As remarked this is a crucial difference to the model proposed in Chapter Seven. The notion that the regulator ought to effectively implement and administer the model, while tipping his hat to others in the environment, it is suggested is not appropriate in the context of defamation on Twitter.

As discussed in Chapter Two, the key to individuals engaging with others and being bound with others into communities on Twitter is the sense of community that

²⁶⁵ See Luhmann, N., *'Soziale Systems'*, (Suhrkamp, Germany, 1984)

²⁶⁶ See Luhmann, N., *'Soziale Systems'*, (Suhrkamp, Germany, 1984); Varela, F., Maturana, H. & Uribe, R., *'The Organisation of Living Systems: Its Characterisation and a Model'*, 5 *Biosystems*, 187, 1974. Luhmann's work highlights the role of the self-referring system by which content is passed through.

²⁶⁷ Murray, A., *The Regulation of Cyberspace* (Abingdon, Routledge-Cavendish, 2007), 243. One of the key differences between the model proposed in this thesis and the work of Murray is that Murray's model foresaw the regulator as remaining central in the broader decision making in the matrix.

²⁶⁸ Murray sees the regulator, government, as developing the matrix and inviting stakeholders in to ensure the collaborative development of the regulations within the matrix.

they feel. They have invested emotionally that means that they want their community to succeed and continue to exist into the future.

Therefore, the view is that the community of individuals governing themselves must be at the core of the model its core and not the regulator; there is certainly a role to be played by law, but it cannot be at the centre of the matrix.

For individuals to govern themselves successfully there must be a sense that they are in the command position with the responsibility for the mechanism, and their community. If they are, they are far more likely to be bought into the self-regulation of their own communities on Twitter than would otherwise be the case.

4.5.5 Summary

The law of defamation has been applied to instances of online defamation as to instances of offline defamation. Decisions in *Berezovsky*, *Down Jones*, *Loutchansky*, *Godfrey and L'Oréal v eBay* have all seen affirmation of the fact that the same principles be applied online as are considered offline.

Despite this some academics have contended that the continued application of law is not ideal along two primary tenants; the transjurisdictional nature of the Web and the anonymity with which individuals can post content. Both have been considered by some as reasons why law online is not able to ensure that the norm that reputations not be attacked can be achieved. However, recent jurisprudence demonstrates that both arguments are no longer valid.

A combination of law and technological developments has meant an ability to ensure the effective application of national law across the global in the context of defamation as in the *Berezovsky* case itself. At the same time, the issue of anonymity is no longer at issue given the ability of the courts to compel revelation of individuals who

have posted anonymously in a defamatory capacity supported by online service providers as in the case of *Author of a Blog v The Times Newspaper*.

Those who have contended that a regulatory matrix is necessary, such as Murray, hold the view that at the centre of the matrix ought to be the regulator establishing the parameters within which the matrix works. However, there is an appreciation that such a model is not most appropriate potentially, because at its core is the regulator, with the community playing a supplementary role.

The law has been applied successfully online because the Web 1.0 environment did not actually revolutionise expression; it extended the time and space in which individuals could publish, but the range of publishers remained limited. However, as was considered in Chapter Two, it did not revolutionise expression as Web 2.0 has.

4.6 Conclusion

The law of defamation is the mechanism that has been developed to try and protect reputations from being unduly attacked. It was developed as a result of the Industrial Revolution; a time that saw the simultaneous emergence of tabloid journalism and the notion of reputation as something within its own right to be protected.

The newspaper industry was able to mass publish newspapers for the first time, which they did alongside publishing content that was far more entertainment based than historically the case. At the same time reputations emerged as something in their own right to be protected because of the value that lay within them, as opposed to addressing the issue because it was necessary for harmony in the community.

The result was the development of the law of defamation as the mechanism to ensure that these tabloid publications would be deterred from continuing to publish such

stories. Given that the motivation of such publications was financial, the want to outsell competitors, the deterrence had to take the form of financial penalties; making the choice of taking the defamatory publication risk irrational given the financial penalty to be accrued.

Defamation was developed with compensation taking the aim of trying to deter continued tabloid behaviour in the future. Along with the financial penalties, the threat of potential multiple liabilities in respect of the same publication was designed, as much as providing the injured party with relief, to act to deter publisher behaviour.

The emergence of tabloid journalism during the Industrial Revolution coincided with a time that saw reputations as recognised as something in their own right to be protected because of the value that lay in them. The result was the development of the law of defamation with its economic deterrence and stringent provisions. The motivations of tabloid journalism alongside the environment of publishing meant that these provisions were enforceable. There were a limited number of publishers, expression remained in the hands of few and as a result such an approach viable.

As was explored in Chapter Two, the development of the Web 1.0 did little to change the environment of expression; publishing remained in the hands of few. The law of defamation could therefore be applied as it was, with decisions in *Berezovsky*, *Loutchansky* and others demonstrating that it was, with success.

This has been possible despite the fact that some have called for new mechanisms to be considered along two central pillars; the transjurisdictional nature of the Web and the anonymity with which individuals are acting. Prominent academics like Post and Perry Barlow have called for the need for a new mechanism online. However, an examination of the jurisprudence demonstrates the way in which such arguments no

longer hold water. Decisions in *Berezovsky* and *Author of a Blog* reveal clearly the way in which the law is able to address both issues.

Lessig has called for code as law but in the context of defamation this is not appropriate given its subjective, and not objective nature. And Murray's matrix falls down because at its core is the regulator implementing and installing on all others in the matrix. For the community to buy-in to govern themselves, they must be at the core.

In the Web 1.0 environment, defamation has been successfully deployed as the mechanism to curb nonconformity. As Chapter Two made clear, Web 1.0 did not revolutionise expression, as Web 2.0 has. It did not, as the Web 2.0 environment has done, democratise expression, resulting in *Giggs* and *McAlpine*. As the Web 1.0 environment did not present anything new, the same regulatory mechanism in law, underpinned by an economic deterrence could and was applied.

The Web 2.0 environment, and Twitter specifically has democratised expression. It is this new environment that has that has seen cases like *Giggs* and *McAlpine* that see a lack of accountability. It is this sheer volume that calls into question the continued application of law.

To this end, the subsequent Chapters explore the extent to which, if at all, the existing provisions of the law of defamation are viable as deterrents in the in the context of the cases of *Giggs* and *McAlpine*; Chapter Five considers original publisher and republisher liabilities for defamatory tweets and retweets posted, while Chapter Six considers secondary liability on Twitter.

Chapter Five: Republicatory Liability

Individuals who have been the subject of defamatory remarks will first try and seek redress against the individual publisher and any potential republishers.

As a result the law of defamation was developed with provisions designed to specifically curb such nonconformist behaviour, considered in the previous Chapter, with liability for the republishers and original publisher. The theory being that by holding all individuals to account, there would be move towards causing them to consider their behaviour. Holding republicators to account was designed to try and prevent newspapers from republishing content they had come across that could be defamatory as well individuals from engaging with newspapers.

At the core of Twitter, and the wider Web 2.0 environment, is the republication of content to encourage individuals to engage others who might originally been intended recipients of tweets. Not only retweeting possible on Twitter but it is actively encouraged.

This mass action has led to the likes of *Giggs*. The footballer saw almost one hundred thousand tweets and retweet, publications and republications, that may have been defamatory but nothing has been done to consider the liability of all of these actors as ought to have been the case.

The markedly different environment, and the fact that no one has been held to account as they ought to have, calls into question the extent to which the existing provisions, developed for the tabloid industry, are appropriate to this new environment of tweeting and retweeting to act as a deterrent.

The following Chapter considers the extent to which the existing provisions that have been developed to curb the nonconformity of the newspaper industry in respect of the republication of defamatory stories are appropriate in the new environment of mass tweeting and retweeting on Twitter. The Chapter initially outlines the provisions of republisher and original publisher liability, then outlines the *Giggs* case and finally considers the extent to which the provisions provide clarity and certainty against actual tweets and retweets from the case.

The Chapter is crucial to this thesis given that the hypothesis is that the law cannot continue to be effective as a deterrent against defamatory content being published in the new environment of publishing with Twitter. Tweeting and retweeting are fundamental to this new environment and therefore establishing the extent to which the provisions of original publisher and republisher liability are applicable and viable in this context goes a long way towards proving or disproving the hypothesis that underpins this thesis.

5.1 The Law of Republicatory Liability

The law of defamation dictates that where a defamatory remark is republished, both the original publisher of the remarks and any and all individuals who have republished will be held to account for the damage that has resulted. At this stage it is important to understand the provisions that exist across both actors.

5.1.1 Republisher Liability

An individual who has republished a defamatory comment may be held to account for the damage caused by his republication. This can be understood when one considers the newspaper industry and the way in which given the volume of content that could

published and its reach, subsequent republications could cause as much damage, if not more, than the original remark.²⁶⁹

In *Truth (NZ) Ltd v Holloway*, the defendant newspaper had printed an article purporting to report a conversation in which an individual had said that the plaintiff was prepared to act dishonestly. A direction that the jury could treat the case as though defendant had said the words was approved; although the individual might have slandered the plaintiff as ‘... *if the words had not been repeated by the newspaper, the damage done by the individual would have nothing compared to the damage done by this newspaper when it repeated it. It broadcast the statement to the public at large...*’²⁷⁰

It used to be the case that stating that one has republished a defamatory remark, originating from another, was a defence.²⁷¹ However, given the behaviour of the emerging tabloid newspaper industry, it became clear that such an approach could not be viable as it would give them an established defence.

The key addition to republisher liability is; was the republication an adoption or repudiation of the libel in the original publication?

In *Wake v John Fairfax* the court noted that ‘[T]he nature and quality of the defamatory publication may vary, dependent upon whether it is a report of what another has said and whether it is adopted, repudiated or discounted. The purpose of the republication will also have a significant bearing ...When a defamatory publication

²⁶⁹ *Truth (NZ) Ltd v Holloway* [1960] 1 WLR 997 PC.

²⁷⁰ *Ibid*, 1003.

²⁷¹ The mere fact that a libellous statement in a newspaper had been published previously in another newspaper was no defence to an action against the proprietor who had republished the article *Lewis v Walter* (1821) 4 B. & Ald 605.

*purports to repeat or report the defamatory statement of another it is an essentially different libel from one in which the imputation is conveyed directly.*²⁷²

The law errs on the side of the fact that the republication adopts the sting, where it is not clear that the republication repudiates the sting. This makes sense when one considers the way in which the law of defamation is on the side of the individual who has had his reputation harmed. Given the want to try and curb such behaviour, erring on the side of adoption would ensure addressing of issues as opposed to leaving issues to go unaddressed.

This can also be understood given that there were relatively few offenders, and therefore while erring on the side of guilt would mean more actions to consider, it would not so many more that the law could not cope.

5.1.2 Original Publisher Liability

The original publisher may also be held to account for the damage caused by republications as had it not been for his initial publication, the subsequent damage done by any republications would not have occurred.²⁷³

By establishing such liability, individuals would be prevented from making such remarks at all. If newspapers could not be fed such content, they would appreciate the fact that such content would not be the appropriate route and as a result, their behaviour curbed towards that desired.

The key to establishing the liability on the original publisher was establishing that there was a natural, causal link between the original publication and the subsequent republication. Stocker LJ expressed the factors to be considered as; '(i) *Did the reviews*

²⁷² *Wake v John Fairfax* [1973] 1 NSWLR 43, 49-50.

²⁷³ Collins, M., *The Law of defamation and The internet*, (Oxford, Oxford University Press, 2nd edition, 2005), 72.

*reproduce the sting of the libel? This is a question of fact for the jury. (ii) Did the defendants invite the reviews? The answer here depends on the facts concerning all the circumstances in which the preview was given to the press... (iii) Did the defendants anticipate that such reviews would repeat the sting of the libel? It is at this point that the issue of natural and probable consequence or foreseeability arises.*²⁷⁴

5.1.2.1 Sting of the Allegations

Consideration is had to whether the republication retains the sting of the original publication; whether or not the subsequent republications sufficiently maintain the substance of the original remark made. This is crucial as if the sting has not been retained, there is a sufficient enough a distinction between the original publication and any republication, that no link can be established. Establishing whether the sting has been retained is an issue of subjective consideration for the court.

It need not be that the remarks are republished verbatim, but rather that the substance of the original remarks has been retained.²⁷⁵ In *Payton*, the published account of the meetings of a board of guardians was condensed but the substance of the allegations made had been retained despite the content published being reduced in volume.²⁷⁶ In *Adams*, the mere fact that the editor of a newspaper had struck out various passages of the letter that was sent in or altered the article in places, did not detract from the liability imposed upon the publisher of the letter itself.²⁷⁷

5.1.2.2 Invitation to Republish

It need not be that be that there was an express authority to republish but rather it may have been implied by the circumstances in which the remark was made. Laws LJ stated that the consequences of further publication would apply if the original publisher

²⁷⁴ Ibid, 296.

²⁷⁵ *Parkes v Prescott* (1869) LR 4 Ex. 169, 179 per Montagu Smith J.

²⁷⁶ *Payton v Daily Sketch*, The Times, May 2, 1967. See *Parkes v Prescott* (1869) LR 4 Ex. 169.

²⁷⁷ *Adams v Kelly* (1824) Ry. M. 157; *Tarpley v Blabey* (1836) 2 Bing. N.C. 437; *R v Cooper* (1846) 8 Q.B. 533; *Pierce v Ellis* (1856) 6 Ir.CLR 55.

foresaw or ought reasonably to have foreseen that the further publication would have taken place.²⁷⁸ However, this will not be the case, if such subsequent republications are too remote or '*constitutes a novus actus interveniens*'.²⁷⁹

In *McManus v Beckham*, the defendant, a celebrity wife entered claimant's shop which was selling photographs of her husband and '*in a rude, loud and unreasonable way*' advised the customers present that the autograph from her husband was a fake.²⁸⁰ This led to widespread newspaper and internet reporting of the incident, which the claimant complained of as causing them a loss of trade as a result of the initial slander.

The Court of Appeal reinstated the claimant's particulars alleging that the defendant was a person who courted the media, spoke for the protection of customers generally and knew that it was likely that what she said would spread well beyond the confines of the shop. A person who communicates defamatory material to the media will generally be liable for the republication of the material as the original publisher as it could be reasonably foreseen that the remarks would be republished by the media.²⁸¹

5.1.2.3 Reference to the Original Publisher

Finally, it needs to be the case that reference is made to the original publisher in the subsequent republications. If this does not occur, the individual who has seen the remarks does not associate the damage done by the republication, with the initial publication. By referencing the original publisher, the resulting damage done to the individual's reputation can be better judged; the extent to which the sting of the remarks is likely to be true.

²⁷⁸ *Watkin v Hall* (1868) LR 3 QB 396(QB) 401; *McManus v Beckham* [2002] EMLR 40.

²⁷⁹ *Ibid.*

²⁸⁰ *McManus v Beckham* [2002] EWCA Civ 939

²⁸¹ See *Douglas v Tucker* [1952] 1 SCR 275; *Slipper v BBC* [1991] 1 QB 283 CA; *Timms v Clift* [1998] 2 Qd. R. 100 Qd. CA; *Cock v Hughes* [2001] WASC 24 (radio interview).

In Lady Archer's proceedings against her former aid, the fact that the aid had been listed as the source of the remarks, essentially gave the remarks greater credence than had there been no reference at all.²⁸² The existence of the aid and her position in the remarks strengthened the potentially defamatory nature of the remarks.

The provisions of original and republisher liability established above are considered in this Chapter against the case of *Giggs* and in turn the next section outlines the details of the case.

5.2 Ryan Giggs Case

Ryan Giggs, Welsh footballer, took out a super injunction to prevent the details of an extra-marital affair that he was having, with fellow celebrity Imogen Thomas, from being exposed in public. The nature of a super injunction is such that where an injunction exists it means that the details of a certain issue are prevented from being released to the public at large.²⁸³

Giggs took out the injunction under the name of 'CTB' and brought an action against News Group Newspapers Limited and Imogen Thomas. On April 14 2011, Mr Justice Eady granted an injunction at the High Court with no able to mention the individuals involved nor could they mention the details of the injunction, with legal redress available to Giggs for any that did.²⁸⁴

However, very quickly, thousands of Twitter users tweeted and retweeted the fact that Giggs had taken the injunction out. One of the first tweets was posted that evening,

²⁸² *Archer v Williams* [2003] EWHC 1670 (QB).

²⁸³ A super injunction means that not only can the details around the issue not be discussed but furthermore, it cannot even be discussed as to who it is that has taken the injunction; complete anonymity.

²⁸⁴ Protection was afforded under Article 8 of the ECHR which guarantees the 'right to private and family life'. Mr Justice Eady was of the opinion that the nature of the remarks being discussed, Giggs's affair that he was trying to cover up were such that there was no merit in them being discussed and lauded to the public at large as instead they went to the very heart of his private life and in turn ought to be prevented from being made public in print publications.

timed at 10.02 PM BST. Within a short period, it was quickly all over Twitter that Giggs was the individuals who had taken out the super injunction, despite the fact that such should not have occurred.

There were almost one hundred thousand individuals who had tweeted and retweeted about Giggs, including many celebrities, Piers Morgan (@PiersMorgan) and Dom Joly (@domjoly) and others with large numbers of followers.²⁸⁵ The pair were both retweeted thousands of times with users pressing the automatic retweet button to republish their tweets verbatim but also copying and pasting the contents of the tweets and making reference to them with them being republications with 'RT'.

One of the first tweets was published by @unknownj and which was automatically retweeted by 2 users and copy and pasted with the prefix 'RT' in being retweeted by an additional 10 users.



Fig 5. User @unknownj's tweet breaking the super injunction

²⁸⁵ Garner, S., 'Ryan Giggs super-injunction: Celebrities in Twitter storm revealed', Metro Online, 24 May 2011. Available at <http://www.metro.co.uk/news/864256-ryan-giggs-super-injunction-celebrities-in-twitter-storm-revealed>

Sometime later, an account under the username @InjunctionSuper tweeted the terms of the injunction, an account specifically created with a view towards breaking the various super injunctions that existed at the time.



Fig 6. User @InjunctionSuper's tweet breaking the superinjunction

Giggs wanted to bring legal actions against all of the tweeters and retweeters demanding that Twitter had over the details of all users, in *CTB v Twitter Inc, Persons Unknown*.²⁸⁶ Twitter initially were reluctant to do so but since have stated that they would do so, however as of the time of writing, no formal request has been made by Giggs for such to occur.²⁸⁷

As of the time of writing nothing has been done to try and seek redress against any tweeters or retweeters with the reason being the inability to apply the provisions to make a determination to the thousands of actors. The contention is that republication in

²⁸⁶ *CTB v. Twitter Inc., Persons Unknown* (Case No. HQ11XO1814) ; Evans, M, *Lawyers for Ryan Giggs still pursuing tweeters*, The Telegraph Online, 07 June, 2011. Available at <http://www.telegraph.co.uk/technology/twitter/8561524/Lawyers-for-Ryan-Giggs-still-pursuing-tweeters.html>

²⁸⁷ Twitter initially refused to comply. Twitter subsequently took the view that in handing over user data, they would essentially be allowing users to be able to defend themselves; 'platforms have a responsibility not to defend their users but to protect users' rights under their jurisdiction'.

newspapers is so different from that of Twitter, given that there are so many more actors in the case of the latter and the republications are occurring instantaneously, which means that the law designed to address tabloid newspapers cannot be applied to retweets on Twitter.

The *Giggs* case and in particular tweets and retweets from four tweeters, @PiersMorgan, @domjoly, @InjunctionSuper and @unknownj, are considered in establishing the extent to which the provisions of republicatory liability under the law of defamation can be applicable with the realities of republication on Twitter, the provisions outlined above.

Giggs saw the first case in which we saw such mass collective tweeting and retweeting, instantaneously, with no recourse available to the injured. The former footballer's extra marital affairs were revealed to the public at large. The *Giggs* case therefore serves as the seminal case in the area, but also there is a rich context of tweets and retweets that mean that the conclusion drawn can be regarded as significant.

5.3 Methodology

The *Giggs* case is considered here because it along with *McAlpine* is one of the seminal in respect of the changing environment of expression made possible by Twitter; thousands of individuals acting in an instant.

5.3.1 Data Selection Parameters

The four original tweeters examined are; @PiersMorgan, @domjoly, @InjunctionSuper and @unknownj. These four have been chosen as they represent a cross section of tweeters from the case. They represent individuals who have been retweeted extensively, others less so, some of whom are prominent and well-known and others less so.

There were a number of others that could have been chosen, both well-known and not, extensively followed and retweeted and not. However, doing so would have meant that there would have been an unintended bias towards one particular subset of actors. By selecting four tweeters from the spectrum of actors, the conclusions are more representative of actual Twitter behaviour of individuals.

In choosing these four tweeters to consider, a sample of 100 of all of those two tweeted an original tweet, was taken and categorised. All tweeters were ranked according to the total number of followers they had at the time and the total number of retweets of their *Giggs* tweet. Here, the retweets consisted of those that were automatic as well all of those using the ‘RT’ prefix. Having ranked all of the individuals in the sample, one individual was randomly selected to analyse from each quartile.

The table below highlights the quartile the individual chosen was in, along with examples of others that could have been chosen.

	Quartile	Others that could have been chosen
@PiersMorgan	1st	@AlanDavies, @JoeyBarton, @HughTomlinson
@domjoly	2 nd	@tokyotimes, @AccioMaria, @Don_Tony
@Injunction Super	3 rd	@SueMae, @ChrisEagles, @Sam_Caddick
@unknown	4th	@JamesSmith, @soccerguy, @stevietruth

Table 2. Table with the individuals chosen to analyse, along with others in their quartile.

As well as presenting a broad spectrum of Twitter actors, the resulting corpus is large enough so that the conclusions drawn can be seen as being significant. Had less prominent individuals been chosen and analysed, the corpus of data may well have been

too small for significant conclusions to be drawn. The extraction of these tweets and retweets was done with the assistance of those at the Web Observatory.

Key to both tweeter and retweeter liability is whether the sting of the libel has been retained in the subsequent retweets. Only those retweets that use the ‘RT’ retweet prefix are considered and not retweets that use any other syntax.

The reason for this is simply that this is the most prominent retweet prefix used; as considered in Chapter Seven. While it does mean that there are a percentage of retweets that are not considered, the RT variant is by far the most popular, and therefore we have still considered the vast majority of retweets.

In considering the retweets, the corpus of retweets is taken and split into four categories for analysis:

- Automatic retweet;
- Copy and paste retweet with the ‘RT’ prefix;
- Copy and paste ‘RT’ with a single word or phrase added; and
- Copy and paste ‘RT’ with more than a single word or phrase added.

These four groups have been chosen because they represent four distinct ways of behaving, while being logical from an analysis perspective. Azman developed a typology of 19 different types of tweets based on various characteristics to help her better understand the nature of tweets and retweets.²⁸⁸ While the classification is incredibly useful, the one developed here is more appropriate because of the nature of

²⁸⁸ Azman, Norhidayah, *Dark Retweets: An Investigation of Non – Conventional Retweeting Patterns*, Thesis, June 2014. Azman considered proprietary, propagation mechanism, explicit, follower or non-follower relationship, links to original tweet, mentions of other users and whether the tweet was published to all or some followers, to help her understand how tweets looked.

the provisions of defamation, against which the tweets are being considered. 19 different groupings is overly complex in this context.

Those who have used the ‘automatic retweet’ button have behaved in a very particular manner and they need to be considered as a distinct group from those that have copy and pasted content and used the ‘RT’ retweet prefix.

Retweets with additional sentiment have been considered in two categories, those with one additional word or phrase and those with two or more. Given the nature of the corpus of retweets and the nature of defamation, analysing retweets with one additional word or phrase as a distinct group from those in which there are two or more words of additional sentiment, makes logical sense. While we could have considered each every additional word to a retweet as a separate and distinct group, the sheer number of retweets, means that this is overly complex and not necessary in the context of defamation.

5.3.2 Retweeter Liability

As highlighted above, retweeter liability is established by considering whether there has been adoption or repudiation of the remarks. This can only be done by considering the original tweet and retweet, manually and making a subjective decision as to whether or not this has occurred. This has been done in these cases to establish the extent to which a conclusion can be drawn for this area.

A sample of the retweets of the four actors chosen above have been considered against the original tweets and a subjective decision making process adopted to establish whether or not there has been adoption or repudiation. The sample is a random sample of retweeters in the case of each individual, to avoid any bias.

Where it's a verbatim retweet, the retweet and context of the actor are used to establish potential liability or otherwise. In the case of those where there is additional content added, this is analysed by considering the additional content, alongside the tweet being retweeted, to establish whether there is adoption or repudiation.

5.3.3 Original Tweeter Liability

As highlighted above, the first aspect of original tweeter liability is whether there has been adoption or repudiation of the sting of the libel. And as with the case of retweeter liability, this can only be done in a manual manner by considering the original tweet against the retweet. The process adopted above, is adopted here for this aspect of the original tweeter liability, with the same set four original tweeters.

The second element is whether reference was made to the original tweeter in subsequent retweets. To address this hurdle, the four individuals above have been considered. The strings of their tweets have been taken and every instance in which that same string has appeared in the corpus has been highlighted. This group has then been split between those that make reference to the original tweeter and those that do not.

Those actors that have not are then analysed to establish whether or not there was a follower-followee relationship and when their tweet was posted. If it evident that their tweet was after the original tweet from one of the four actors above, and they were followers, then it can be concluded with a degree of certainty that the tweet was in fact a retweet but without reference being made to the originator of the remark.

This methodology is the most appropriate means by which this hurdle can be considered. While it cannot be said with complete 100% certainty that an individual who has the exact same string as another individual after that individual's initial tweet likely retweeted them without reference, it seems a more than fair conclusion to draw.

The final aspect of original publisher liability is that there was an invitation to retweet and this is considered with reference to the cases of behaviour that have previously existed and the nature of the original publishers. As opposed to the other hurdles above, there are not provisions in place and in turn, establishing whether or not this has occurred, in respect of the four actors above is dependent on the environment in which the remarks have been made and the nature of the remarks themselves; i.e. could it be said that there was likely an invitation to retweet based on the circumstances of the tweeter and the tweeter.

To do this, consideration is had to @ReallyVirtual, an individual whose tweets were retweeted extensively despite his relative obscurity, as an individual with very few followers. This is justified as he was an individual of no real notoriety and in turn allows for a conclusion to be made as to what if anything can be said to be driving behaviour here; if it is the nature of the content being produced or the individuals tweeting that drives subsequent behaviour.

The combination of quantitative and qualitative analysis of the tweets allows us to establish the extent to which the provisions of publisher and republisher liability can function effectively in this context of Twitter, against the *Giggs* case.

5.4 Retweeter Liability

To establish the extent to which the retweet is an adoption or repudiation of the original defamatory tweet, consideration is had to a corpus of retweets from the original tweets posted by @PiersMorgan, @domjoly and @InjunctionSuper from the *Giggs* case outlined above.

5.4.1 Adoption of Repudiation

In respect of establishing whether there has been adoption or repudiation, there needs to be broader contextual knowledge, if not ideally, additional content. However, this does not exist in cases where there is an automatic retweet or copy and paste where there is no additional content. In both instances there would be an almost presumption that the individual in acting were adopting the retweets as they had not taken the conscious decision to repudiate.

It might be that a conclusion can be drawn by examining the history of the individuals' previous tweets, but this from a practical perspective is almost impossible to do and therefore is it likely that the previously highlighted conclusion will be drawn.

The same is the case for the copy and paste with no additional sentiment retweets, the lack of extra knowledge would make it difficult to establish whether the retweeter, retweeting is adopting or repudiating. As individuals have not taken the deliberate decision to repudiate, they would however likely be seen to be adopting; they had the opportunity to clear portray that they are repudiating the libel in the original tweet but have taken the decision not to actually do so.

The result is that these two classes of retweeters are impossible to make an accurate representation of because of a lack of context surrounding them as individuals and the tone of their behaviour.

This is particularly problematic in the case of establishing the nature of the individuals' retweet as these are the two most popular types of retweet by a distance of the four classes of retweets, across the four individuals we have considered. The Table below outlines the number of retweets that all into each of the four categories and it is evident that the first two classes are the most popular.

	Total Automatic Retweets	Total Copy Paste Retweets	RT and	Total Copy Paste Retweets + 1 word or phrase	RT and Retweets + 2 or more words or phrases	Total Number of Retweets
@PiersMorgan	4,543	3,199		768	511	7,970
@domjoly	3,983	916		303	137	5,340
@Injunction Super	2,144	1,994		205	106	4,406
@unknownj	2	10		1	3	16

Table. 3. A table collating the breakdown of the tweet variations for the four Twitter users considered.

The fact that these two classes are most attractive in respect of retweeting is problematic as in establishing adoption or repudiation these are the most difficult. It would mean that from an enforcement perspective, conclusions would be drawn that all are adoptions or all repudiations or all examinations of the retweeters which from a practical perspective is impossible.

In terms of establishing the effectiveness of the law, this is problematic as it suggests a lack of enforceability.

In the other two classes retweeters have acknowledged that the content originated from someone else but they have added to it with their own. We explored this category of retweets in the context of retweets in relation to tweets posted by @PiersMorgan, @domjoly and @InjunctionSuper. We narrowed this category of retweets done to those that had the exact string of the original tweet, alongside the ‘RT’ prefix and one or more additional words – a broader understanding of the choices has been explored previously.

The tweets included sentiment of one word including; ‘busted’, ‘serious?!’, ‘libel’, ‘wrong’, ‘proof?’ for all three case studies of @PiersMorgan, @domjoly and

@InjunctionSuper. Table 1. above lists the number of instances in which there has been a single word or phrase added to the ‘RT’ from @PiersMorgan, @domjoly and @InjunctionSuper, with the table below listing the 20 most popular with their number of instances listed alongside.

Additional Sentiment	Occurrence
Serious!	55
Busted	47
Libel	45
SuperInjunction	40
Proof?	33
Wrong	27
Injunction	22
CTB	21
Evidence	19
Nonsense	19
Lies	19
MadeUp	19
Shameful	19
ShockHorror	18
NotTrue	18
Fake!	16
Homewreckers	9
Whore	9
Slut	9
BigBrother	8

Table 4. Table showing the most prominent words added to tweets when one word was added for the three users considered

It is clear to see that examining the top 20 words, that some are clearly adopting the libel when retweeting, along with some that are repudiations. There are instances in which a conclusion can be made as to whether or not there is a repudiation; it is likely that instances of ‘busted’ are being used by individuals which suggests that they believe the libel to be correct and conveying that to others in their retweets.

The same can be said for the ‘libel’; the usage of this would suggest that the individual retweeter appreciated that the remarks were libellous and in turn therefore were repudiating the sting as dangerous to be adopted.

Others, however, can be taken either way as ‘Serious!’, ‘Busted’, ‘ShockHorror’ and even ‘Shameful’; this could be referring both to the infidelity but also just as likely to the making of libellous remarks and repudiating the truth within them. In this sense therefore it can be understood the way in which such the context is rendered crucial; without understanding the context in which the remarks are being made, it is impossible to make a judgement.

This contention is even stronger when one considers when a decision is made as to whether the tweet is defamatory not, what this decision actually is. Having taken a sample of 100 tweets across the four individuals above, from tweets that contained only one additional word as above, and then categorised as clearly an adoption, clearly a repudiation or a decision could not be made, it is clear that in the vast majority of instances a decision cannot be made.

Clear Adoption	Clear Repudiation	Unclear
2%	6%	92%

Table 5. Table showing the percentage of retweets with one additional word, in which there was a clear adoption or repudiation of the libel in the original tweet

One would have to understand the nature of the retweeter, views, and perceptions, examine their previous tweets and even this does not provide an ability to make a comprehensive decision. ‘Shameful’ can be as much in reference to the revelation of the infidelity on the part of *Giggs* as much as it can be about the libellous remarks being

made in the tweet, suggesting that the retweet on the part of the individual is wrong and should not occur.

The table below highlights the percentage of tweets that fall into each group for the four actors. It is evident to see that the copy and paste ‘RT’ variant retweet with more than one additional word or phrase is least popular of the four classes of action explored.

	Total Automatic Retweets	Total Copy Paste Retweets	RT and	Total Copy Paste Retweets + 1 word or phrase	RT and Total Copy Paste Retweets + 2 or more words or phrases
@PiersMorgan	57.0%	40.1%		9.6%	6.4%
@domjoly	74.6%	17.2%		5.7%	2.6%
@Injunction Super	48.7%	45.3%		4.7%	2.4%
@unknownj	12.5%	62.5%		6.3%	18.8%

Table 6. The percentage composition of retweets across the four different types of retweets across the four different actors.

With the exception of @unknownj, for the other actors considered, it forms, by some distance, the smallest percentage of retweets

	Examples
@PiersMorgan	‘shame on him, his poor wife’, ‘should not spread rumours Piers’, ‘don’t believe it!’
@domjoly	‘where the proof its Giggsy?’, ‘don’t believe it!’, ‘behave Dom, mightn’t be tru’
@Injunction Super	‘knew it!’, ‘that’s his clean image gone’, ‘cant believe youre saying this’
@unknownj	‘dodgy character’, ‘cant do that to his brotha’, ‘shameless asshole’

Table 7. Examples of the additional sentiment in retweets that contained two or more words or phrases.

The table above contains examples of retweets that contain more than one word or phrase. Unlike the other three categories, there is not the ability to categorise the retweets given the nature of the additional content.

However as with earlier there are other instances in which the decision is more difficult to make. Without a contextual understanding of the tone in which the remarks were made, a decision cannot be made. The instances ‘don’t believe it!’, and even ‘knew it!’, cannot be borne out as there is not a further contextual understanding of the individual making the remarks.

‘Don’t believe it!’ could be sarcastic tone commenting on the nature of footballer’s as individuals who have traditionally been anything but the moral compass of society and being plastered across the various tabloid publications of the land for their infidelities. By the same token however, the remarks could clearly be entirely thoughtful and without any sarcastic merit to them whatsoever and in turn therefore be regarded as the retweeter being seen to renounce the sentiment of the original tweet posted.

Furthermore, in instances it is not clear that the remarks made by the retweeter are in reference to the actual original tweet, or in reference to the individual tweeting. The ‘dont believe it!’ additional retweet content to one of @domjoly’s retweet could be in reference to the allegations around Giggs, and just as equally refer to the fact that @domjoly had made the remarks in his original tweet. The same is the case for the ‘shameless asshole’ additional sentiment to the original tweet of @unknownj, which

again can be equally applied to the nature of the remarks, the behaviour of Giggs, and, the decision by @unknownj to tweet such content.

In this class the ability to establish whether the retweeter was adopting or repudiating the sting of the libel from the original tweet is greater than in the other instance where there is a single additional word or phrase because there is more sentiment to understand the behaviour of the individual but it is still very difficult. However, as the above table highlights, it is also the smallest category for most of actors analysed, which means that the data available to be analysed is entirely limited.

5.4.2 Summary

The provisions of retweeter liability do not provide clarity and certainty in order to act as an effective deterrent as they ought to. In the case of retweets that have been copied and pasted with additional sentiment added to them, it is evident from the above analysis that in the majority of instances it is impossible to make a clear judgement as to the nature of the republication. This same issue exists with the automatic and copied and paste retweets with no additional sentiment, whereby the lack of additional content means that the presumption is in favour of adoption.

In contrast to this, while even in the case of retweets that have 1 or more additional word, in theory the best opportunity establish, whether there has been adoption of repudiation of the libel, the words are so limited that context cannot be established to make an informed decision.

The vast majority of retweets have no additional sentiment and as a result would be considered as adoptions. This is wholly unsatisfactory from both an enforcement perspective, given the sheer volume of individuals to be held to account, but also from a broader 'fairness' perspective.

5.5 Original Tweeter Liability

Original tweeter liability as mentioned previously is considered under three provisions; is the sting of the libel retained in the retweet from the original tweet, was there an invitation to retweet and was reference made in the retweet to the original tweeter. All three are considered in this section under the *Giggs* case.

5.5.1 Sting of the Libel

In order to consider whether the sting of the libel was retained, we took the original tweets from @PiersMorgan, @domjoly and @InjunctionSuper and all of the subsequent copy and paste retweets that used the ‘RT’ prefix.²⁸⁹

Focus is had on the third and fourth categories because, as with the previous subsection, the lack of additional sentiment makes consideration of the sting of the libel being retained more difficult. Where there is no additional sentiment, without having contextual knowledge of the individual making the original tweet, tone, perception of the issue, it is impossible to make an assertion as to whether the sting of the libel is retained.

	Total Automatic Retweets	Total Copy Paste Retweets	RT and	Total Copy Paste Retweets + 1 word phrase	RT and or	Total Copy Paste Retweets or words phrases	RT and + 2 more or
@PiersMorgan	4,543	2,199		768		511	
@domjoly	3,983	916		303		137	
@Injunction Super	2,144	1,994		205		106	

²⁸⁹ We have excluded those retweets that have been accomplished automatically under the automatic retweet button as these retweets copy the exact tweet as it was published and in turn therefore the sting in the allegations made has been retained as it exactly was. We have narrowed the parameters of the copy and paste retweets to only that deploy the prefix RT as this is the most popular prefix adopted by users when retweeting.

Table 8. A table collating the breakdown of the tweet variations for the three Twitter users considered.

The same tweeters have been chosen as with the previous discussion above to allow for consistency of conclusions drawn.

The tweets in question are:

@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer’

@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs – why would I mention him anyway? He’s (Literally) not in the news’

@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months #superinjunction’

The table below provides a range of retweets that have contained more than simply one word or phrase added for consideration for @PiersMorgan, @domjoly and @InjunctionSuper and an analysis of these examples reveals the way in which establishing whether the sting has been retained can be difficult. These retweets have been chosen entirely at random from a sample of retweets for each individual, as highlighted above.

@PiersMorgan	@domjoly	@InjunctionSuper
@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer’, can someone confirm please?	@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs – why would I mention him anyway? He’s (Literally) not in the news’ Ur n truble’	@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months #superinjunction’ #TypicalFootballer
@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer’, if youre wrong, cud b expensive	@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs – why would I mention him anyway?’, maybe bcos he’s a cheat!’	@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months #superinjunction’ Shame on him
@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer’, the Injunction didn’t last	@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs – why would I mention him anyway? He’s (Literally) not in the news’ SuperInjunction!’	@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months #superinjunction’ Any proof?!
@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer, wheres the proof	@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs’ SuperInjunction right?!’	@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months Trouble Coming
@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer, destroying a reputation. shame on you.	@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs – why would I mention him anyway? He’s (Literally) not in the news’	@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months SuperInjunction broken
@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer #attentionwhore	@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs – why would I mention him anyway? He’s (Literally) not in the news’	@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months Silly to make such claims
@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer’, Giggs holier than thou eh	@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs – why would I mention him anyway? He’s not playing for Utd atm is he?’	@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months Cant be believed without evidence

@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer, I Imogen he’s not too happy right now.	@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs – why would I mention him anyway? Thought you were a Spurs fan!’	@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months’, garbage tweet
@PiersMorgan: ‘Tip to Ryan Giggs – get a new lawyer, contract running out?’	@domjoly: ‘When I mentioned Giggs in my last tweet – I in no way mean Ryan Giggs – why would I mention him anyway? #UtdLeg	@InjunctionSuper: ‘Footballer Ryan Giggs had an extramarital affair with Big Brother star Imogen Thomas which lasted for 7 months’ Not true at all.

Table 9. A table containing sample of the retweets from three users in question.

In all of the three instances it is evident that there are instances in which the additional sentiment detracts from the sting of the libel being retained, while in others the sting of the libel retained with the additional sentiment added by individuals.

In @PiersMorgan and @domjoly, the more cautious nature of the original tweet means that the additional sentiment would take a greater determination in establishing whether there has been an adoption or repudiation in the action. The original tweets by these two individuals are more cryptic and therefore the additional sentiment from retweeters more determinative as to liability or otherwise. With these two individuals, the nature of their remarks is such that there the additional sentiment makes establishing of behaviour more difficult.

As @InjunctionSuper’s tweet was more clearly defamatory, the additional sentiment would be less reflective of whether the sting has been retained. The final instance of ‘not true at all’ may well allow a third party to lead to the conclusion that actually it is just a flippant remark made as opposed to being one that is defamatory and in turn therefore the sting in the libel lost.

In the case of @PiersMorgan and @domjoly, the examples leader to a clear analysis considering ‘Thought you were a Spurs fan!’ and ‘contract running out?’ listed above would both be considered in reference to Giggs’s professional career as a footballer and therefore would be considered not in reference to the libel of infidelity.

The sample of 100 retweets across the three original tweeters considered above, was analysed to establish the percentage of tweets that could clearly be defined as being a clear retention of the sting of the libel or not or whether an answer could not concluded. This was across only those retweets in which there was one more additional word or phrase, or more than one word or phrase.

	RT Copy and Paste Retweets + 1 word or phrase			RT Copy and Paste Retweets + 2 or more words or phrases		
	Retention	Repudiation	Unclear	Retention	Repudiation	Unclear
@PiersMorgan	7%	7%	86%	10%	12%	78%
@domjoly	10%	6%	84%	8%	12%	80%
@InjunctionSuper	15%	6%	97%	17%	8%	75%

Table 10. Table highlighting the percentage of retweets that contained one additional word or phrase or two or more words that could be classified as retention or repudiation of the sting from the original remark, or where it was unclear.

It is evident from the above that, while there are instances in which an analysis of the additional content added as part of the original tweet can allow a conclusion to be drawn as to whether the sting is being retained, in the vast majority of instances, this simply is not the case. In the vast majority of these cases, the additional content is so limited, and lacking context, that a clear decision cannot be made. This in addition to the fact that the vast majority of retweets don’t have additional content, which would automatically lead to the conclusion of adoption, doesn’t provide a satisfactory conclusion from the perspective of the law.

5.5.2 Original Tweeter Reference

In the majority of instances there will be clear reference made to the original tweeter, in fact individuals on Twitter will want to reference the individual from the tweet has emanated; the value of such is considered in Chapter Two.

The methodological approach adopted is outlined earlier, however, briefly we established instances in which there was no reference to the original tweeter even though based on the nature of the string, as being exactly the same, and there was a follower-followee relationship that meant that there ought to be reference.

By doing this, we were able to conclude with a degree of certainty, that the resulting tweet was in fact a retweet, without reference to the original publisher, as ought to have been the case. There is no way of ensuring that it in fact it was not a pure coincidence that it just so happened to be the case that the string was exactly the same in both. However, the above parameters mean that the likelihood is that indeed it was retweeted without reference.

	% of Tweets Not Referenced	Total Number of Retweets
@PiersMorgan	0.8%	7,970
@domjoly	2.5%	5,340
@Injunction Super	16%	4,406
@unknownj	34.5%	16

Table 11. A table containing the percentage of likely retweets that went unreferenced to the originator of the content

In the case of @InjunctionSuper, 16% of tweets that ought to have been retweets did not make reference to the original tweeter. The likelihood is that these individuals felt that they would not reference @InjunctionSuper when acting as they wanted individuals on Twitter to think that the tweets emanated from them and not from others;

that they were original tweets. While there is certainly credence with integrity in nothing that a tweet emanated from another, there is also credence with being the originator of a remark itself; being the tweeter and opposed to retweeter.

This is the same for @unknownj, where the figure is in fact even higher. As is the case with @InjunctionSuper, the lack of notoriety of the individual tweeter, likely means that individuals who act, without deciding to reference the original tweeter, do so because they feel comfortable doing so. The fact that the percentages are far lower for @PiersMorgan and @domjoly is once again testament to the fact that individuals are prepared to act as though tweets originate from them, and not others, where the notoriety of the original tweeter is low, because they can, as opposed to where they cannot claim to do so because the tweet is notorious.

The result therefore is that there are a significant proportion of individuals who are not original tweeters but instead individuals who are retweeters and their liability ought to be held to as much. In this instance, there was a sufficient enough number of retweeters that did reference @InjunctionSuper that would have meant that sufficient recourse could be have, as is the case of @unknownj.

While in the case of both @PiersMorgan and @domjoly, the fact that the portion of retweets are not considered because of a lack of reference, is not going to be fatal because there are simply just more retweets that mean consideration can still be had to a sufficient extent to this strand of liability. The lack of reference in both instances of @InjunctionSuper and @unknownj however is crucial. The small number of retweets, especially in the case of @unknownj could crucially affect the extent to which we are able to accurately establish liability for improper behaviour.

If this is considered in the wider context of liability, the majority of individuals on Twitter have few followers; there is a long tail at work. As a result, in the majority of instances, such a significant proportion of retweets will not be considered as they ought to be. In turn therefore the extent to which the law can be applied in this particular instance is greatly hampered. While this is less of a critical issue in the case of the more prominent tweeters, who have been retweeted thousands of times, the significant proportion of lack of reference in the less pronounced tweeters, is a critical issue that encapsulates the failings of the application of the law.

5.5.3 Invitation to Retweet

This aspect is determined with reference to the environment in which the publication is made; the audience, the nature of the content, the positioning of said person. On the face of it, the answer to this would appear to be that by tweeting and making their tweets available to the public, is inviting a retweet.

By its very nature Twitter is predicated upon the ability of individuals to retweet at will therefore by posting individuals are inviting others to retweet. It might be considered as akin to an individual making a remark before a newspaper reporter, they have a propensity towards retweeting content and if one published content before them there is an invitation for one of them to act and retweet. as is considered in previously in this Chapter, remarks made in the presence of a newspaper publisher are considered as being very much inviting a republication of said remarks and the same theoretical contention can be made here.

However by the same token, the propensity is also based upon the nature of the individual. It is evident that more famous individuals are more likely to be republished because their names being attached to content makes it more attractive than individuals not known. In the context of Twitter, this is markedly more difficult to establish; sure it

might be easy to say that the likes of @PiersMorgan and @domjoly have a greater propensity towards being retweeted and therefore are inviting such behaviour. The table considered previously highlights the way in which @unknownj and @InjunctionSuper, individuals of no real notoriety have not been referenced as many times as both @PiersMorgan and @domjoly.

This in turn therefore makes the idea that the notoriety of the individual dictates the extent to which there is an invitation to retweet as one that is difficult to establish. It might be concluded therefore that it is the subject which actually dictates the extent to which such occurs; the more notorious the content, the greater propensity a retweet and therefore the greater chance that there has been an invitation to retweet.

This notion would certainly hold true in the case of the tweets discussed previously, it is evident that given the subject matter these individuals were inviting others to retweet and others did so and therefore can be no issue for consideration. It appears as though therefore that the nature of the individual is key in establishing propensity to retweet, and fundamentally the extent to which they are inviting a retweet.

However, there are countless instances in which individuals with no notoriety have been retweeted thousands of times because of the nature of the content. This therefore suggests that it cannot merely be the subject matter alone that dictates the extent to which there are retweets likely to occur, that it must be a combination of various factors. If it were notoriety of individuals alone, @InjunctionSuper would not have been as retweeted as he was and if subject matter alone @unknownj as little as he

was. @justinbieber posted the tweet ‘Frog lawn mower’ which was retweeted ~70,000 times on 14 June 2013 despite its relatively inane nature.²⁹⁰

The below are a collection of tweets from a Pakistani IT Consultant live tweeting the death of Osama Bin Laden. His tweets were retweeted thousands of times by others; here it was not him as an individual and his notoriety but rather it was the subject matter which prompted the mass retweeting of his content.



Fig 7. The live tweeting of the death of Osama Bin Laden

Total Number of Retweets	
@PiersMorgan	7,970
@ReallyVirtual	7,691

Table 12. Table containing the total number of retweets for @PiersMorgan and @Really Virtual

²⁹⁰ @justinbieber Frog lawn mower 14 June 2013, available at <https://twitter.com/justinbieber/status/345604968327307264>

The table above considers the total number of retweets for the @PiersMorgan Giggs tweet we have considered previously and the first tweet from @ReallyVirtual about the death of Bin Laden. We considered the string of @ReallyVirtual's first tweet, posted above, and searched for tweets that contained the exact same string verbatim. We have considered whether there was additional sentiment or whether it was just the string itself, but merely that it was a retweet, either automatic or used the 'RT' variant prefix.

It is clear to see from the above table that the similarity in the total number of retweets suggests that the extent to which there is an invitation to retweet is in fact driven by the nature of the original tweet, in as much as it is by the notoriety of the original tweeter. The fact that @ReallyVirtual was retweeted more times than all of the other three original tweeters we have considered in this Chapter, @domjoly, @InjunctionSuper and @unknownj, which is highlighted earlier in the Chapter, further supports the contention of content being a driven factor of retweets.

On the face of it therefore, every remark made on Twitter, where an individual does it from an account that is open on the face of it would appear to be an invitation to retweet. However delving deeper into whether the driving factor is the nature of the individual original tweeter or the subject of the content, does not provide any greater degree of clarity as hoped. Considering Giggs and the previous data on the number of times individuals were retweeted, we can see that those of great notoriety are retweeted more often than those of less or little notoriety.

However, considering the example of @ReallyVirtual, which is very much just once instance of many we have seen on twitter, we can then see that actually the content of the remarks, the nature of the remarks, that drives the extent to which there is retweeting and in turn therefore, not necessarily the notoriety.

The lack of clarity here, therefore, means that actually it is not possible to establish the key driving factor behind whether it can be said there is an invitation to retweet or not. The lack of clarity suggests that therefore every instance has to be considered with the context of each case, in isolation, as opposed to establishing a benchmark standard that would allow us to easily establish whether an invitation existed or not.

5.5.4 Summary

The provisions of original publisher liability are three fold; has the sting of the libel been retained from the original publication to subsequent republications, was reference made to the original publisher in subsequent republications and was there an invitation to republish on the part of the original publisher. All of these three provisions are considered against @PiersMorgan, @domjoly, @unknownj and @InjunctionSuper in relation to the *Giggs* case.

The key to the sting of the allegations is not that it need be verbatim copy of the tweet but rather the sentiment; has the sentiment been retained. An examination of the instances under these three individuals, all of the different ways in which the retweets occurs, makes it clear that while the vast majority of retweets are automatic and verbatim, and only in the other rarer instances in which there has been sentiment added to the original tweet in the retweet.

In these rare cases, the original sentiment is one which can be difficult to establish, however as remarked, in the vast majority of instances, the subsequent retweet, saw a verbatim republication of the original tweet.

The second provision was that of reference having to be established to the original publisher and this is key in establishing the potential liability on the original publisher

for the subsequent damage caused as a result of the retweets. In the vast majority of instances, once against this is not beyond dispute as reference is made where there is an automatic retweet. Of interest here was that in consideration of whether reference is made to the original publisher when it ought to have been made but was not. By plotting relationships between one of the three and individuals who had followed them and had copied the exact same sentiment of the tweet, without making reference, it could be established that they ought to have been referenced but were not.

In the case @InjunctionSuper, this was not necessarily fatal, as there was already a large enough number of instances in which reference had been made to establish liability. However, this was not the case in the case of @unknownj. In this instance, there were a number of individuals who ought to have referenced the original tweeter but did not and given the lack of individuals who did, the potential liability on @unknownj did not accrue as it ought to have.

The final provision is that there ought to have been an invitation to retweet on the part of the original publisher; that there was a causation of behaviour that was invited and made possible by the original publisher. By its very nature individuals who post on Twitter are making their content available to be seen and retweeted by others, with the exception of those who private their profiles. In this way, therefore it might be contended that all individuals are inviting subsequent retweets to occur. A closer examination however reveals that both the notoriety of the individual and the notoriety of the subject matter around which they are retweeting.

Individuals of notoriety are seen as individuals who might be perceived as individuals particularly susceptible and inviting retweets, and while this was the case with @PiersMorgan and @domjoly, this was not the case for @InjunctionSuper,

individual of no notoriety whose tweet was retweeted thousands of times. However, an examination of @unknownj adds a layer of complication as while not a notorious individual, the subject matter was and yet there were almost no retweets, especially in comparison to the other individuals considered. The result therefore is that there is a lack of clarity in the application of and the extent to which there is an invitation to retweet or not.

The result is that there is a lack of clarity in the application of the provisions that establish original publisher liability for a retweet. In order for the law to be an effective deterrent, it needs to be clear that the failure to comply with its edict will see individuals punished. The lack of clarity in the law means that effective enforcement is not viable meaning that the deterrent cannot function effectively.

Given that it was developed for tabloid publishers, the lack of viability in enforcement is not altogether surprising. The comparison between the relatively few newspapers and the thousands of retweeters is the key as to why it is that enforcement is not effective.

5.6 Conclusion

The law of defamation dictates that republishers and original publishers of defamatory content ought to be held to account for the damage that has resulted from the publications and republications. It is evident from the analysis of the provisions against the *Giggs* case that there is no effective enforcement viable which renders the mechanism unable to act as an effective deterrent. The collective mass of individuals makes the environment so different rendering the deterrent ineffective.

Republicatory liability dictates that liability depends on whether there has been adoption or repudiation of the sting in the subsequent republication, the law erring on

the side of adoption. It is evident from the retweets considered that it is impossible with any consideration to establish the adoption of repudiation in the retweets. While the majority of retweets are automatic and therefore verbatim and therefore considered to be adoptions, without knowing the context surrounding the retweeter a more conclusive decision cannot be made.

The original publisher may also be held to account for the damage that has been caused by the subsequent retweets, with three provisions key; was the sting of the original publication retained in subsequent publications, was there an invitation to republish on the part of the original publisher and was reference made to the original publisher in subsequent republications. The application of both was considered against the case of Ryan Giggs which saw almost one hundred thousand tweets and retweets breaking the terms of the superinjunction, including celebrities on Twitter.

The sting of the original remarks is the first aspect of original retweeter liability and again there is a lack of clarity. In the case of automatic and copy and paste retweets verbatim would not be an issue for consideration as these would clearly contain the same sentiment. In the context of additional sentiment being added to the tweet, in the retweet there were changes in particular in the cases of @PiersMorgan and @domjoly. As the tweet chain moves down, the sentiment becomes more distorted with additional, changes to content that distort the retweets from the original tweet posted in particular by @domjoly.

The second aspect is that there ought to be reference to the original publisher which in the vast majority of instances will be established and in place; the original tweeter will be mentioned in the retweet. However an examination of the follower-follower relationship alongside whether the sentiment had been adopted verbatim. The

result is that in the case of @InjunctionSuper, there were numerous instances of tweets that were actually retweets but not made clear. In this case @unknownj, however, these individuals account for more individuals than the actual retweeters; there are more individuals who ought to hold the initial tweeter to account however are not.

Finally, there ought to have been an invitation to retweet on the part of the initial tweeter. On the face of it this would appear as though every tweeter is inviting retweets as there tweets are public, in a public arena with the ethos of the site being the retweeting of content. The result of @PiersMorgan and @domjoly would suggest that the notoriety of the individual is key, however other instances of @InjunctionSuper suggests that the notoriety of the subject is key however @unknownj suggests neither are clearly established in place to provide clarity as they ought to.

It is clear, therefore, that in the case of primary liability, the liability on publishers and republishers, the law cannot be an effective deterrent mechanism. There is a lack of clarity in the application of law against tweets and retweets meaning that there is no effective enforcement and hence no deterrent. As remarked, this mechanism was developed for the newspaper industry, a time distinct from the Web 2.0 environment. Retweeting is fundamental to Twitter, and the wider Web 2.0 environment, it sits at the heart of it, seeking to engage the largest number of people possible; such a seismic shift from the environment we have known.

Where an individual could not seek redress against the individual tweeters or retweeters who have caused damage to their reputations, they would then look to Twitter as the host intermediary who has provided the service for redress, which is considered in the next Chapter. The results of the Chapter support the hypothesis that

the law is not appropriate in this new environment with the next Chapter with intermediary liability.

Chapter Six: Twitter Liability

Where the subject of the remark cannot obtain redress from the individual publisher or republisher, the defamed has the ability to seek redress from those who have aided or abetted the damage defamatory content; secondary liability. Where the previous Chapter considered the potential application of primary liability on original tweeters and retweeters, this Chapter considers the secondary liability that may accrue for Twitter as the host intermediary for defamatory tweets and retweets.

As considered previously, the law was developed to deter newspapers and by placing liability on distributors, they would then have to act and prevent potentially defamatory content from being circulated. Distributors acting to prevent the circulation of defamatory material would hit publishers in the pocket meaning that they would think twice before publishing such content. The provisions of distributor liability have been applied to online intermediaries given that they fulfil the same basic function online, as the former to offline.

In the context of Twitter, it would be considered an online intermediary given the way in which it provides the mechanism for individuals to tweet and retweet; post their content. The ability to store tweets and retweets underpins Twitter, as was considered in Chapter Two, underpins the entire model that sees content proliferated and engaged with. In the same way that a physical world newspaper stand acts to disseminate content to the public, Twitter provides the mechanism for individuals to tweet and retweet.

As a host intermediary, the issue is the ability of Twitter to act on gaining knowledge of the existence of defamatory tweets and retweets to evade secondary liability as an intermediary, underpinned by Regulation 19 of the E-Commerce

Regulations 2002. The failure to remove the content on gaining knowledge of its existence, would see Twitter held secondarily liable.

The decision in *eBay* most recently affirmed the principles upon which the standard of knowledge is assessed with the key being the standard of constructive knowledge; were the circumstances such that a diligent economic operator ought to have acted.

This Chapter considers the extent to which the existing provisions of intermediary liability fortified in the *eBay* decision interplay with the role of and what Twitter can make possible as an online intermediary in the context of the *McAlpine* case. The decision recently established the factors that the court would consider in establishing the liability or otherwise on a host intermediary and as a result exploring its application to the case of Twitter is crucial.

The Chapter initially considers the exact nature of the provisions and then considers the extent to which Twitter behaviour interplays with these provisions and what this means for the liability on Twitter as the host intermediary.

This Chapter is crucial to this thesis as where it is not possible for an individual to explore the potential liability on the individual tweeters for the damage that he has done, they will see to try and establish liability against Twitter as the online intermediary for its role in the content published and damage done. The *McAlpine* case saw the former Tory Lord named as a paedophile by thousands of individuals on Twitter including some famous celebrities with little recourse available to the subject.

Establishing the scope of these provisions and the role of Twitter establishes the extent to which the law can continue effectively to address the nonconformity of

behaviour. As explored in the previous Chapters, the law as we know it was developed to address the nonconformity of the newspaper industry, one which published content regardless.

This Chapter in conjunction with the previous one, establishes the extent to which if at all the existing provisions of law are able to effectively ensure nonconformity is deterred from occurring in the context of the new Web 2.0 environment. This Chapter therefore sits at the very heart of the hypothesis underpinning this thesis.

6.1 Intermediary Liability Law

Intermediary liability is a form of secondary liability which arises when a party materially contributes to, facilitates, induces or is otherwise responsible for the infringing acts carried out by another.²⁹¹ The key lies in the fact that the second entity facilitated the damage done to the subject through its behaviour; it provides an environment in which the damage from the offending individual could be carried out. Intermediaries are held to account for secondary liability as were it not for them, individuals would not be able to access the Web, and the unlawful activity would not occur.

From the perspective of the subject of the defamatory remark, the online intermediary will me more attractive than a single publisher, as the former will traditionally have deeper pockets than any single individual publisher; deep pocket theory.²⁹²

²⁹¹ Taipale, K., 'Secondary Liability on the Internet: Towards a Performative Standard for Constitutive Responsibility', Centre for Advanced Studies Working Paper, No. 04-2003, February 2003. Discussing the notion of secondary liability is beyond the scope of this thesis but is important for contextual information.

²⁹² Bowles, R., 'Economic Aspects of Legal procedure' in 'The Economic Approach to Law', Burrows, P. & Velijanovski, C. (Butterworths, London, 1981), 204-206.

The theory refers to the idea that the risk of an activity should be borne by an entity that is in a strong position to handle such a risk which can be carried out by spreading the risk over a number of bearers (large numbers each accounting for a small proportion of the overall risk) or imposing the cost on a single entity. The latter is often assumed to be the case for wealthy individuals or large corporations who are regarded as having deep pockets since their wealth would be greatly affected if the risk materialises.

Prima facie intermediaries are held liable for the damage done as a publisher, with the onus then on it to prove the application of a defence.²⁹³ The element of publication is established clearly as: *'In my judgment, the defendants [sic], whenever they transmit and wherever it is transmitted from the storage of their news servers a defamatory posting, publish that posting to any subscriber to their ISP who access the [material] containing that posting.'*²⁹⁴ He continued that: *'Once publication was established, the publisher was guilty of publishing the libel unless he could establish and the onus was upon him, that he was an innocent disseminator,* essentially articulating the need for a successful defence to evade liability.²⁹⁵

As with publisher and republisher liability considered previously, provisions of online intermediary liability mirror offline distributor liability, the latter developed to address the nonconformity of the tabloid publication industry. By placing potential

²⁹³ In 2002, the UK Department of Trade and Industry stated that in its view the regulations did not only apply to the buying and selling of content online as it remarked that; *'The requirement for an information society service to be normally provided for remuneration does not restrict its scope to services giving rise to buying and selling online.'* It continued stating that *'it also covers services (insofar as they represent an economic activity) that are not directly remunerated by those who receive them, such as those offering online information or commercial communications (e.g. adverts) or providing tools allowing for search and access and retrieval of data.'* The Department of Trade and Industry Guidance on the Regulations, 31 July 2002.

²⁹⁴ *Godfrey v Demon Internet Ltd* [2001] QB 201, 208-209, Morland J.

²⁹⁵ *Godfrey v Demon Internet Ltd* [2001] QB 201, 207. The decision to establish this as the point of publication was supported by the subsequent decisions in *Loutchanksy v Times Newspapers Ltd* (No 4 & 5) and *Dow Jones & Co Inc v Gutnick* [2002] HCA 56.

liability on distributors, it would cause them to consider the content that they were distributing.

Previous to the decision in *Emmens v Pottle*, distributors could evade the entire issue by turning a blind eye; many would ignore the issue of defamation entirely by simply not acting on it at all as doing so would then mean that they could not be held accountable.

Emmens established the notion that prima facie distributors would be found to be liable, for their role in the distribution of defamatory content and the damage done, with the onus then on them to prove that they had acted on gaining knowledge to remove the material from circulation.²⁹⁶

The requirement that distributors only act on gaining knowledge, and not have to act all times, constantly monitoring content was fair and equitable given the volume of content that passed through them. This was developed to shape behaviour during the course of the Industrial Revolution with the development of tabloid newspapers as a means of helping to achieve the wider aim that the behaviour of newspapers be curbed from what was actually occurring,

In the case of a host intermediary like Twitter, it will prima facie be held liable for the damage done with it having to prove the application of Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 (UK), The Electronic Commerce Regulations 2002 define the circumstances in which internet intermediaries

²⁹⁶ *Emmens v Pottle* (1885) 16 QBD 354, 357. There were discussions as to what this standard entailed exactly for distributors with Lord Esher MR stating that a distributor ought to be able to rely on the defence provided that it acted on gaining knowledge and not without such knowledge.

should be held accountable for material hosted, cached or carried by them but which they did not create.²⁹⁷

Regulation 19 is intended to apply to intermediaries who store internet content like webpages and bulletin board postings on their computer systems as Twitter does.²⁹⁸ To evade liability, Twitter would have to prove that Twitter was not negligent on failing to remove the content on gaining knowledge of the existence of a defamatory tweet; whether the ISP was aware of facts or circumstances from which the existence of the defamatory item 'would have been apparent'.²⁹⁹

It is not the case that Twitter would have to actively monitor all content posted at all times to ensure that defamatory tweets and retweets were removed immediately, but rather act on gaining knowledge; *Bunt v Tilley*.³⁰⁰ Eady J, fortunately for intermediaries dismissed Mr Bunt's claim as he held that ISPs fell within the definition of an 'information society service' provider by applying the definition of an information society service provided in Reg. 2(1) in the E-Commerce (EC Directive) Regulations and subsequently therefore that Regulation 19 could be relied upon by the defendant intermediary here.³⁰¹ On knowledge, Twitter would have to act, as in Blogspot.³⁰²

²⁹⁷ The Regulations do not apply only to defamatory material but equally to intermediaries who host, cache or carry other illegal material like pornography or material which infringes others' intellectual property rights. The Regulations have been imposed into law domestically by the Directive on Electronic Commerce issued by the European Parliament and Council on 8 June 2000. The Regulations are such that they cover every commercial website with the purpose of the Directive being to harmonise provisions across Europe and therefore allow for greater confidence in the online world.

²⁹⁸ Electronic Commerce Regulations, reg 19. Twitter does not act as a mere conduit in the transmission of data nor does it merely cache information; it stores content to make such content available for all others to retweet or at the least just see what has been posted by others.

²⁹⁹ Electronic Commerce Regulations, reg 19(i)(a)

³⁰⁰ *Bunt v Tilley & Others* [2006] EWHC 407 (QB), [5]. The claimant, Bunt, claimed that the defendant and two others made defamatory remarks about him using online services, while also bringing proceedings against the three ISPs that provided the three individual defendants with Internet connection on the basis that the defendants published the defamatory words 'via the services provided'. They should be liable as they had provided them with a service and should have been monitoring the content published all of the time, and not that they should act upon gaining knowledge of the defamatory material.

³⁰¹ *Ibid*, [41].

Regulation 19 merely takes what was already established in holding physical world distributors to account and applies the same proviso to online intermediaries; the online equivalent. Where distributors have been expected to act on gaining knowledge, remove offending material from circulation, so too has been the case for online host intermediaries.

Regulation 19 does not apply only to defamation but all instances of host intermediary behaviour; just as applicable to copyright as defamation as in *eBay* most recently.³⁰³ The single application of a set of principles was established to bring clarity across states and service providers.

eBay v L'Oréal

The HC made reference to the ECJ for a ruling on a number of issues one of which was the extent to which eBay as an intermediary should be liable for the copyright infringements of various products sold on eBay. L'Oréal owned a number of trademarks in the U.K. and argued that eBay should be liable for the infringements that

³⁰² *Davison v Habeeb* [2011] EWHC 3031 (QB) (QBD). The claimant was the subject of allegedly defamatory remarks by a blog owner, another defendant, on Blogger.com a platform run by Google Inc. The contention on the part of the subject of the remarks was that as she had provided Google with actual knowledge of the existence of the defamatory blog post, its failure to act meant that it could not make use of the defence under Regulation 19 for having hosted defamatory content. The defamatory nature of the content was not at issue but what was for consideration in the instance was the application or not of the defence; Google were prima facie accountable as publisher of the content and down to it to establish its lack of liability. The articles complained of took the form of a series of allegations about a number of public figures who were accused of fraud and corruption which included reference to the claimant. She in turn made it clear to Google UK but they remarked that they did not own Blogger.com, and it was forwarded onto Google Inc. she complained on numerous occasions about the articles that were written and provided a URL link and provided comprehensive details to Google about the kind of act that was carrying on.

³⁰³ This has occurred despite the fact that there are great differences between different provisions; copyright in comparison to defamation for one. Copyright, which exists upon the creation of work is motivated by the need for the copyright holder to be able to enjoy the monetary value that exists within the work that they created; individuals who own rights within the work that they have created will take action because they do not want to lose out on the money that they would have made had the work been sold legally as opposed to illegally. In contrast, defamation is motivated by the want to repair the damage done to the individual reputation that the individual, there is almost an inability to place a pecuniary note on the value that exists within an individual reputation and how important it is that it not be harmed and not my money and where defamation is difficult to establish, it requires a contextual understanding of the environment in which the remark has been made, copyright instead is far more straight forward. Individuals are certainly financially remunerated for libel however the mechanism of defamation exists to try and repair the damage done to the intangible in the eyes of others.

had occurred as eBay had purchased keywords for advertisements on various search engines like Google, keywords that corresponded to products being sold on eBay that included a combination of counterfeit and legitimate goods.³⁰⁴

L'Oréal sent a letter to eBay expressing its concern that there was the widespread selling of counterfeit goods on eBay but it was not satisfied with eBay's response and brought actions within various Member States, one of which was the subject of the ECJ preliminary ruling.³⁰⁵

It also maintained that eBay itself was liable for the use of its trademarks where those marks were displayed on eBay's websites and in respect of those marks, sponsored links triggered by the usage of keywords corresponding to them were displayed on the websites of search engine operators like Google.³⁰⁶

Arnold J referred to the ECJ the following:

“iv) Whether eBay Europe has infringed the Link Marks by use in sponsored links and on the Site in relation to infringing goods again depends upon a number of questions of interpretation of the Trade Marks Directive upon which guidance from the ECJ is required [...].

v) Whether eBay Europe have a defence under Article 14 of the E-Commerce Directive is another matter upon which guidance from the ECJ is needed [...].

vi) As a matter of domestic law the court has power to grant an injunction against eBay Europe by virtue of the infringements committed by the Fourth to Tenth Defendants, but

³⁰⁴ *L'Oréal v eBay* [2009] EWHC 1094 (CH)

³⁰⁵ C-324/09 *L'Oréal and Others*

³⁰⁶ In some instances eBay assist sellers to enhance the sale of their goods, to both set up a shop as well as increase sales, along with crucially advertising some products sold on its marketplace using search engines like Google to trigger the display of advertisements.

the scope of the relief which Article 11 requires national courts to grant in such circumstances is another matter upon which guidance from the ECJ is required [...].”

The questions therefore before the ECJ were the extent to which if any eBay should be liable as a result of the keyword acquisition which essentially optimised the offending products for sale through its website and secondarily whether based upon the nature of the circumstances of the content being sold on the site alongside the nature of the content at issue, it was clear and apparent that there were goods being sold upon the site that were infringing to the rights’ held by the owners under Article 14 of the Directive.³⁰⁷

On the issue of the role played by eBay, the court concluded that eBay played an active role in the optimisation of the goods for sale, an element of which contained goods that were counterfeit. By picking the particular keywords that in turn linked to a range of material that it ought to have known contained, illegal and counterfeit materials. In this way therefore eBay optimised goods for sale that included counterfeit goods for sale and therefore was said to be an active actor in the resulting damage that was caused.

The ECJ remarked that the proprietor of a trade mark is entitled to prevent an online marketplace from advertising goods that bear the trade mark “*where the advertising does not enable reasonably well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods concerned originate from the proprietor of the trade mark or from an undertaking*

³⁰⁷ The ECJ remarked that the proprietor of a trade mark is entitled to prevent an online marketplace from advertising goods that bear the trade mark “*where the advertising does not enable reasonably well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods concerned originate from the proprietor of the trade mark or from an undertaking economically linked to that proprietor or, on the contrary, originate from a third party.*”

economically linked to that proprietor or, on the contrary, originate from a third party.”

The court explored the issue of knowledge, not stopping at this point and established that based upon the socio-technical relationship that eBay had with rights' holders; it ought to have known of the existence of the illegal material and acted. Historically, eBay had acted with rights' holders in removing illegal content through the Verified Rights Owner (VeRO) Programme so that rights owners could report listings that infringe their rights.

It is stated that any individual or company who holds intellectual property rights, whether they be copyright, trademark or patent, which may be infringed by listings or items sold on eBay. The Programme represents a range of intellectual property rights holders from major software companies to luxury goods manufacturers and given the nature of counterfeit goods selling there will only be a finite range of companies that will be the victims of their rights being infringed; counterfeit goods sellers will be individuals who will be passing off fake goods as end brands.

The decision affirms the need for knowledge to cause a host intermediary to act. However, the key is the need for constructive knowledge. Twitter would not be able to evade liability if it played an active role in embellishing defamatory tweets. Failing this it will be held liable if its behaviour such that a socio-technical endeavours could be adopted that would make the existence of defamatory material obvious that it to act to remove the offending tweets. This dual standard maintains the essence of the physical world distributor provisions of having act on gaining of the existence of defamatory material.

6.2 Lord McAlpine Case

Lord McAlpine, a long-time Conservative member of the House of Lords was the victim of thousands of tweets and retweets claiming him to have been a member of a child sex abuse groups.³⁰⁸ The claims on Twitter stemmed from a report on BBC Two's Newsnight the night before that claimed him to be the senior Conservative politician involved.³⁰⁹

Very quickly, thousands of individuals on Twitter posted, destroying the reputation of the Lord. Individuals included Sally Bercow who tweeted '*Why is Lord McAlpine trending? *innocent face*?*' Comedian Alan Davies tweeted '*any clues as to who this Tory paedophile is...?*', followed by retweeting the name of McAlpine to his, approximately 500,000 followers.

In the case of Bercow The Hon. Mr Justice Tugendhat was asked to rule on the meaning of Bercow's tweet, particularly the phrase '*innocent face*' which the judge said was intended to be read as a stage direction with readers '*imagining that they can see [Bercow's] face as she asks the question in the Tweet. The words direct the reader to imagine that the expression on her face is one of innocence, that is an expression which purports to indicate (sincerely, on the Defendant's case, but insincerely or ironically on the Claimant's case) that she does not know the answer to her question*'.³¹⁰

McAlpine initially sought redress against all of those who had acted causing damage to his reputation. However, it became apparent very quickly that such an approach simply would not be viable and instead decided to try and pursue action

³⁰⁸ *McAlpine – Bercow Judgement*, judiciary.gov.uk, 24 May 2013

³⁰⁹ See Swinford, S., '*Lord McAlpine asks police to investigate Twitter users over smears*' The Telegraph Online, 21 November 2012. Available at <http://www.telegraph.co.uk/culture/tvandradio/bbc/9693080/Lord-McAlpine-asks-police-to-investigate-Twitter-users-over-smears.html>; Tweed, P., '*Lord McAlpine and the high costs of tweeting gossip*' The Guardian Online, 27 November 2012, Available at <http://www.guardian.co.uk/law/2012/nov/27/lord-mcalpine-twitter-libel>.

³¹⁰ *McAlpine – Bercow Judgement*, judiciary.gov.uk, 24 May 2013

against the famous individuals involved; namely Bercow and Davies. The latter settled with the Tory Lord out of court, approximately £15,000.³¹¹

The former did not as she maintained that her tweet was not defamatory. The court ruled that ‘a natural and ordinary meaning may be either the literal meaning or a meaning that does not require the support of extrinsic facts passing beyond general knowledge.’³¹² It was concluded therefore that based on the remarks made and the fact that Bercow had previously engaged in such behaviour that the nature of her remarks was intended to be defamatory.

The interesting thing in this case is the way in which the Tory Lord was happy to settle with the more prominent pair and asked all of those with fewer than 500 followers to make charitable donations, which actually a tiny fraction did.³¹³ The Lord was happy to seek redress from the two most prominent individuals who tweeted and retweeted. For example he did not seek redress from the individual who named Lord McAlpine that was retweeted by Alan Davies that explicitly named the Lord.

The result has been that the vast, vast majority of actors have gone entirely unpunished; only two have actually been held to account despite the fact that they had actually caused the damage to the same extent, if not more than the these two individuals.

Where McAlpine was able to obtain basic redress against these two individuals, he has not been able to obtain redress against all others as he ought to have been able to.

³¹¹ Sweney, M., ‘*Lord McAlpine settles libel action with Alan Davies over Twitter comment*’, The Guardian Online, 24 October 2013. Available at <http://www.theguardian.com/media/2013/oct/24/lord-mcalpine-libel-alan-davies>

³¹² *McAlpine – Bercow Judgement*, judiciary.gov.uk, 24 May 2013

³¹³ Research suggests that 5% of those with fewer than 500 of those who had been asked to make the donation actually did. In the vast majority of instances, individuals did nothing with the Lord unable to seek redress against them.

At the same time, the damage in large part was caused by the role of Twitter in facilitating the publishing of content to the largest range of people possible. It is evident from the Bercow instance, the tweet itself that it came to her attention because it was trending; had it not, she likely would not have tweeted.

The Tory Lord was looking to hold Bercow in particular to account as he had had a poor relationship with her based on her being the wife of the former Speaker of the House of Commons.³¹⁴ They had had a run in previously which meant that as much as anything else, he was looking to address the poor personal relationship the pair had with one another.

6.3 Methodology

This case has been chosen as, along with *Giggs*, it is one of the most seminal in respect of mass actors on Twitter defaming in an instant; it is very much indicative of the issues spoken about earlier in this thesis, and indicative of the environment of expression we now find ourselves in.

6.3.1 Active Role: Trending Topics

Initially consideration is had to whether Twitter might be considered as playing an active role in the posting of defamatory content on the site; promoting such content through the trending topics on the site. The trending topics might be considered as analogous to the way in which eBay promotes content; as eBay uses various parts of its site to promote products being sold, so might Twitter be considered with its trending topics that promote content being discussed by individuals on the site.

³¹⁴ Sherwin, A., 'Twitter Libel: Sally Bercow says she has learned the hard way as she settles with Tory peer Lord over tweet' Independent Online, 24 May 2013. Available at <http://www.independent.co.uk/news/uk/crime/twitter-libel-sally-bercow-says-she-has-learned-the-hard-way-as-she-settles-with-tory-peer-lord-mcalpine-over-libellous-tweet-8630653.html>

By plotting the uptake and growth of six #hashtags over the course of a one month period we can establish the extent to which, if at all, Twitter actually promotes content akin to the way in which eBay did. The argument is that given that Twitter wants individuals to continue to engage with the site, if it could, it would promote content designed to keep individuals engaged, and hide content that could in anyway cause it any kind of legal issue. However, in contrast to this, if Twitter does not control content being promoted to individuals, then a varied range of content is being promoted, that might not include content that Twitter would want.

The six #hashtags are; ‘#ArabSpring’, ‘#Obama2012’, ‘#2ThingsIKnow’, ‘#KimKWedding’, ‘#ICantRespectYouIf’ and ‘#McAlpine’. These first five have been chosen at random. Having taken a sample of 100 #hashtags that existed over the month in question, they were then categorised manually according to the apparent nature of the #hashtag. One #hashtag from each group was taken at random and analysed alongside ‘#McAlpine’.

The table below contains the categories along with other #hashtags that also trended during the period in question that could have been considered. All of those in the 100 that could not be categorised were put into the ‘Other’ category.

Category	#Hashtag Analysed	Others that trended and could have been considered
World News	#ArabSpring	#HurricaneSandy, #TusconShooting, #PillarofDefence
Political	#Obama2012	#Levenson, #MichaelGove, #MarCarney
Social	#2ThingsIKnow	#Curiosity, #SandyIsland, #HydePark
Entertainment	#KimKWedding	#Entwistle, #JackieChan, #Elmo
Other	#ICantRespectYouIf	#Deiter-Heauer, #SAF, #HatersGoneHate

Table 13. Table containing #hashtags found in sample

The table above provides examples of #hashtags in the 5 categories. One #hashtag was chosen at random from each of the five categories to analyse.

In the case of the first hurdle, the content of the tweets under the #hashtag is immaterial. The important thing is merely the number of times that #hashtag was used and when; whether it trended, if at all over the course of the one month period analysed. By plotting the number of times the #hashtags were used, and considering whether or not they trended accordingly, one can establish whether Twitter effectively controlled the content being promoted. Once again, this is under the premise that if Twitter did actively promote content on the site, it would choose content it desired, and hide content that it wanted.

If Twitter did pick content to promote, one would expect, in this pool of six #hashtags, the #hashtag ‘#ArabSpring’ to trend throughout the course of the month given its prominence as an issue of discussion; as discussed in Chapter Two. Equally if Twitter were controlling the content being promoted, it would prevent ‘#McAlpine’ from being promoted as a trend given the legal issues underpinning the #hashtag’s usage during the month.

The second aspect of liability here dictates that an intermediary ought reasonably to have known that the material being promoted by it was likely to contain unlawful content in light of the broader narrative running through the material.

In the case of Twitter, this aspect is analysed by analysing samples of the tweets that used the six #hashtags above. The argument here is that by considering the tweets under the #hashtags it may be clear that there is a common narrative underpinning the

usage of the #hashtag. This therefore means that Twitter in light of this, ought to know when to act given any #hashtag and remove the content if required.

This analysis is carried out manually by considering a sample of 100 tweets for each of the six #hashtags above and establishing whether the collective of tweets point towards a single common usage. As with the analysis of tweets in the previous Chapter, this is a manual analysis process that requires consideration of all of the tweets, and categorisation accordingly.

If it is the case that the vast majority of the tweets under the #hashtag relate to a single narrative or common usage, then one can argue that Twitter ought to know, on seeing the #hashtag, the nature of the tweets within the trending #hashtag and if required, act to remove the offending material.

6.3.2 Constructive Knowledge: Socio Technical Relationship

The decision in *eBay* also established that where an active role is not being played, liability can be established where the circumstances are such that the intermediary ought to have own of the existence of offending material. This is predicated on the fact that eBay had a socio-technical relationship with IP rights' holders. The key to this is the limited number of potential victims, alongside technology already in place that could detect instances of counterfeit goods being sold in the past and therefore ought to have acted in this case.

By analysing the nature of individuals who have been the subject of defamatory posts on Twitter, consideration can be had to whether there is a 'certain type of individual' who is likely to be the victim of defamatory tweets. If so, it means that Twitter is able to develop a relationship with this category of person and potentially act accordingly to protect them from harm.

To establish the extent to which this truly is the case, the case of *Brick* is considered, where thousands of tweets were posted that attacked Samantha Brick after she published an article in a newspaper. A sample of tweets from the *Brick* case is considered to establish the extent to which the tweets were defamatory or otherwise. The tweets are manually considered so as to make an assessment as to whether or not they are defamatory, by considering the existing provisions of defamation, outlined in Chapter Four.

The *Brick* case is considered because it is an instance of an individual being the subject of remarks posted by individuals on Twitter and there is so many tweets that the conclusions drawn are significant.

By doing so, one can establish the extent to which *Brick* does indeed have a case as a victim of mass defamation. This analysis of actual tweets from the case serves to establish whether or not it is that the case that in the context of defamation on Twitter, that any individual can potentially be the victim of defamatory remarks. Or whether it is in fact the case that in reality, it is only a small class of celebrities as in *Giggs* that are the victims of defamatory tweets on Twitter.

The potential for a technical measure is considered by analysing tweets from the *McAlpine* case. Here, consideration is had to the extent to which pre-publication sentiment filters could be used, in a manner akin to eBay's use of technology.

A representative sample of 200 tweets and retweets is considered from the first 48 hours after the first tweet about McAlpine was posted in the U.K. The sample consists of 25 tweets from the eight 6 hour time increments over the first 48 period, so as to avoid any issues of bias. The sample is analysed to establish whether, pre-publication filters could have successfully prevented defamatory tweets from being posted.

By examining the corpus of 200 tweets that contained 'McAlpine' should they all be defamatory, and then it is clear that pre-publication filters could have been successful given that every tweet that contained the word was defamatory. And in turn, therefore that Twitter should employ such filters to prevent defamatory tweets from being posted.

To establish whether this actually the case, within the sample of 200, consideration is had to the instances in which 'McAlpine' and 'paedophile' are used in the same tweet. All such tweets are analysed to establish whether or not they are defamatory. This is done, as in all other instances, manually with respect to the provisions of defamation, discussed earlier.

The rationale for this is that given the issue at hand here, one would expect the words 'McAlpine' and 'paedophile' to go hand in hand when individuals are tweeting, especially in the case of defamatory tweets. In turn therefore, if it is the case that all of the tweets that used these two words were defamatory, then it can be concluded that Twitter ought to be able to use pre-publication filters that prevent particular words being tweeted together in a single tweet. However, if this is not the case, then it is clear that pre-publication filters are not viable in the context of defamation on Twitter.

This sample is analysed manually by considering the tweets against the provisions of defamation. Given the subjective nature of defamation, this is the only way that analysis could be conducted. The sample is taken from Twitter and analysed manually and categorised as either being defamatory or not.

By considering this sample of tweets along with the case of *Brick*, one can establish the extent to which the provisions that meant that eBay was found guilty based on its relationship with victims and technical measures could be applied to Twitter.

6.4 Active Role: Trending Topics

The trending topics on Twitter might be considered as analogous to the optimisation of goods for sale on eBay. Twitter uses them as a means of trying to promote the content being discussed on the site at a particular time, wanting others to engage with it. In the same way eBay is promoting content that is being sold on the site by individuals, trying to promote what it believes to be the most interesting goods for sale on the site.

Twitter may be considered as a market place for the exchange of information and ideas for social capital as opposed to remuneration and that in the way that eBay deployed keywords in advertisements as a means of trying to engage individuals into content being sold on the site, it might be contended that Twitter deploys trending topics as a means of engaging individuals with content that includes amongst other content libel.

6.4.1 Trending Words and Phrases

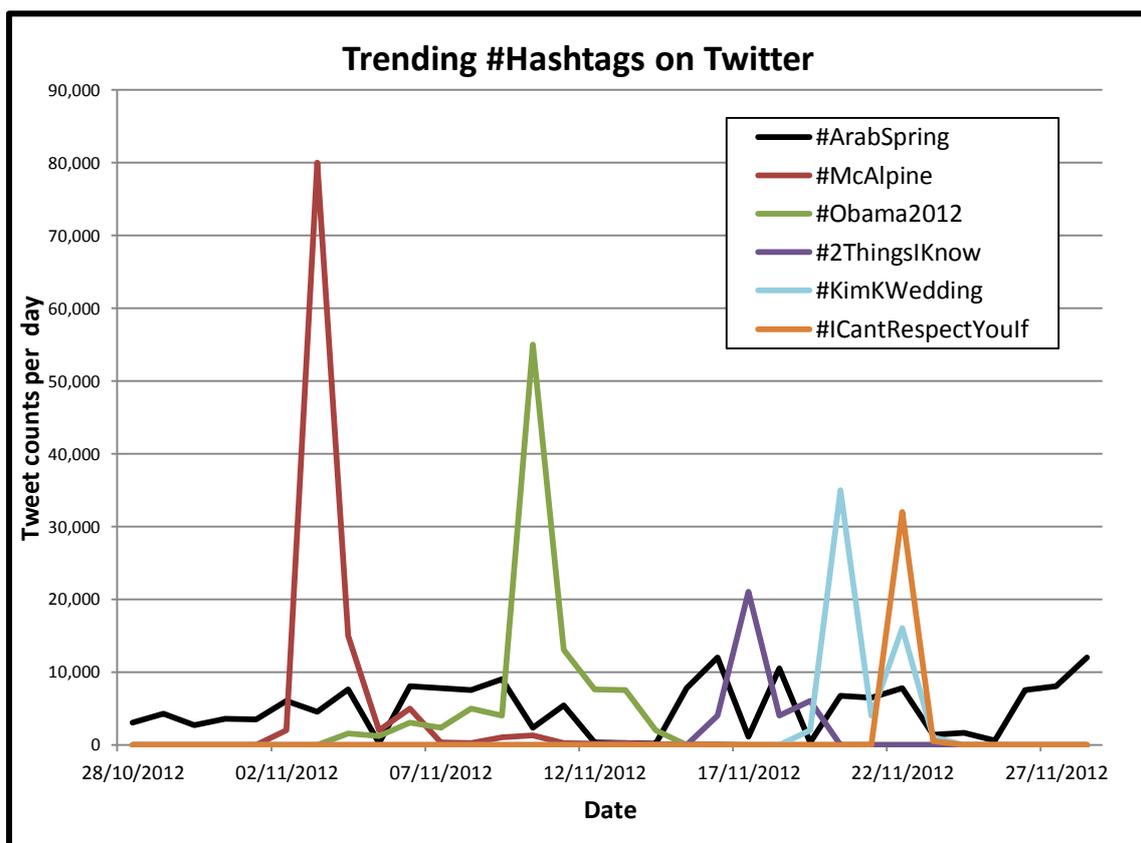
Trending words and phrases are key to Twitter as they provide a gateway into the issues being discussed most on the site in a particular region, at a particular time, with an emphasis upon being most relevant and real in time. They serve a vital purpose in engaging content with individuals beyond those that might immediately have been the intended recipients of what has been published as a means of trying to bring content to the attention to more individuals.

An algorithm is used to calculate words and phrases that are regarded as trending on the basis of content that is spiking in popularity within a particular region in a period of time. According to Twitter, *'Trends are automatically generated by an algorithm that attempts to identify topics that are being talked about more right now than they were previously. The Trends list is designed to help people discover the 'most breaking'*

breaking news from across the world, in real-time. The trends list captures the hottest emerging topics, not just what is most popular.³¹⁵

A quantitative analysis of tweets that spanned the course of one month in November 2012 demonstrates the way in which there is a lack of control on the part of Twitter as to the words and phrases that trend with trending words and phrases being reflective of the real time nature of what is happening at the time, spiking in popularity as opposed to content that is constantly being engaged with over the course of the month.

The rationale behind these 6 #hashtags is discussed above and here we plotted the number of tweets that used the #hashtag over the course of a one month period.



³¹⁵ Twitter, 'FAQs about Twitters' Trends', 2013. Available at <https://support.twitter.com/articles/101125-faqs-about-twitter-s-trends>.

Fig 8. Graph demonstrating the development of phrases trending over the course of a one month period.

The above graph highlights the number of tweets in relation to particular tweets during a one month period during 2012 and one can see why ‘#ArabSpring’ would have made it on the trending topic list. In comparison ‘#KimKWedding’ saw 35,000 tweets use the #hashtag on the 20th November in relation to the fact that Kim Kardashian announced her intention to get married. There were 55,000 tweets that used ‘#Obama2012’ on 10th November, the day that President Obama won the 2012 U.S. Presidential Election. ‘#McAlpine’ spiked with over 80,000 tweets using the #hashtag on the 3rd November, which was the day the first tweet was posted and the story broke on Twitter.

‘#ICantRespectYouIf’ and ‘#2ThingsIKnow’, which would have become popular as other users saw the usage and decided to engage with the discussion occurring spiked in popularity on the 22nd and 17th November respectively.

During the course of the month, ‘#ArabSpring’ did not trend but all of the other #hashtags did. The reason for this is simply the fact that the selection of what trends and what does not is not down to Twitter but instead there is an algorithm that establishes what ought to and what not to trend, based on spikes, as opposed to constant.

The fact that ‘#ArabSpring’ did not trend at all during the period, while other #hashtags, some notorious, others not, some key to the social chatter on Twitter, others not, would suggest that Twitter has no active part in deciding what is promoted, in a manner akin to eBay.

Twitter altered its algorithm in 2010 with a view towards reflecting emerging topics as opposed to merely highlighting those topics that remained popular for long periods of time as the same words and phrases in particular in reflection of American musician Justin Bieber, with a view towards reflecting the real time nature of what was being discussed.³¹⁶

#Hashtag	Cumulative Number of Tweets 28 Oct – 28
	Nov 2012
#ArabSpring	189,060
#McAlpine	94,500
#Obama2012	102,100
#2ThingsIKnow	35,700
#KimKWedding	56,430
#ICantRespectYouIf	31,349

Table 14. Table of the cumulative numbers of tweets for the varying trending phrases discussed above.

As the Table above highlights, the ‘#ArabSpring’ was used in the most tweets of the six #hashtags we have considered. And despite this, it did not trend over the month. Had Twitter actively been deciding what content to promote, the #hashtag would have been promoted because it was used so much more extensively than others. This contention is further strengthened by the fact that had Twitter been in control of what was being promoted, what was advertised, akin to eBay, it certainly would not have promoted ‘#McAlpine’, given the nature of the content underneath.

³¹⁶ Fans of the musician flooded Twitter with tweets accounting for as much as 3% of all traffic in the Spring of 2010 meaning that essentially all trending topics related to Bieber.

The result therefore, is that it cannot be said that Twitter, with its #hashtags promoted on the site, plays an active role in deciding which content to promote. It cannot be said that Twitter is playing an active role akin to eBay. The fact that there is an algorithm that picks the content to be promoted, independent of any direct influence, as is required by the legal provisions means that Twitter cannot be held to account under this provision of behaviour.

Along with Twitter not choosing the words and phrases that trends, unlike eBay it also does not know the nature of the content that appears under the words and phrases. Where eBay could establish the nature of likely goods sold under what it had advertised through its optimisation, the same cannot be said for Twitter.

6.4.2 Content under Trending

Twitter's algorithm takes every instance of a tweet that contains the word or phrase that is trending and displays in reverse chronological order under the word or phrase. The algorithm does not consider the sentiment under the tweet and instead merely the existence of the word or phrase in the tweet regardless of how ancillary this instance might be. Tweets are broken down into all of their composite elements when stored and hosted by Twitter and subsequently repackaged when brought to the screen.

This lack of contextual semantic understanding is considered in greater detail in an exploration of the instances in which the subject of the tweet was that that related to the primary reason for the tweets. A sample of all of the six trending topics was considered with manual analysis of the sentiment of the tweets with a view towards establishing the number of instances in which the subject of the tweet related to the phrases trending.

In some instances it is easy to understand the likely primary context behind the trending #hashtag. ‘#KimKWedding’ concerned with the wedding of Kim Kardashian, ‘#ArabSpring’ relating to the political and social unrest occurring in the Arab world, ‘#McAlpine’ in relation to the allegations as to the Tory Lord.

In other instances there is no way of knowing what the context behind the #hashtags; ‘#2ThingsIKnow’ and ‘ICantRespectYouIf’ in particular having no clear subjective context. The table below highlights the percentage of tweets within each #hashtag that could be attributed as being within the main context of the #hashtag being used.

In some instances, the substantive context of the ‘#hashtag was obvious as in #ArabSpring. Accordingly, every tweet within the sample of 100 that was about the Arab Spring uprising was considered. In other instances, the context is not obvious and therefore I considered all 100 tweets, pre-categorised them and then considered the groups once again to establish whether there was a broader context within which the #hashtag existed.

#Hashtag	Percentage of tweets that were about the primary subject of the trend
#ArabSpring	95%
#2ThingsIKnow	31%
#ICantRespectYouIf	24%
#McAlpine	87%
#KimKWedding	89%
#Obama2012	83%

Table 15. Table of the percentage of tweets that relate to the primary of the trending phrase

	Percentage of tweets within #ICantRespectYouIf	Percentage of tweets within #2ThingIKnow
Sport	9%	7%
Political	7%	8%
Entertainment	16%	25%
Social Chat	24%	41%
Arts & Culture	10%	15%
World Events	5%	11%
Other	29%	25%

Table 16. Table containing the categorisation of tweets for the #hashtags ‘#ICantRespectYouIf’ and ‘#2ThingsIKnow’

#Hashtag	Examples of Tweets within each #hashtag
#ArabSpring	‘Amazing scenes in #Egypt #ArabSpring #Tahir square, ‘Rise in Syria against Bashir #ArabSpring’, ‘we need to support those wanting democracy #ArabSpring’, ‘#ArabSpring coverage on #sky is amazing #historybeingmade’
#2ThingsIKnow	‘#2ThingsIKnow are 1D are the best and I love them’, ‘#2ThingsIKNow 1. #drake is killing the game 2. Hes my future husband #TheOne’, ‘1.#SAF is the #boss and 2.The #cl will be ours #mufc #2ThingsIKnow’. ‘#2ThingsIKnow are Grace is mad and Steph is doing me in right now’
#ICantRespectYouIf	‘#ICantRespectYouIf you don’t support #mufc’, #ICantRespectYouIf you believe that #Obama is not doing the right thing #hope’, #ICantRespectYouIf you don’t own the new #DaftPunk album. #ItsHot! #GetLucky’, ‘#ICantRespectYouIf you don’t get me at my worst’, ‘#ICantRespectYouIf you are not on this hype’
#McAlpine	‘#McAlpine Tory Lord #paedophile’, ‘Lord #McAlpine Tory Lord

	shamed as a paedophile on tele this morning’, ‘#McAlpine shamed as child molester #paedophile’, ‘Cant believe whats going on with these claims #McAlpine’, ‘Surely #McAlpine should be locked away if true’
#KimKWedding	‘Still buzzing about the #KimKWedding news’, ‘Love the dress #princess #KimKWedding’. ‘#ergh, this #KimKWedding stuff is getting too much’. ‘Wonder how long this one will last #KimKWedding’, ‘I wish I could hide from this #KIMKWedding rubbish’
#Obama2012	‘I believe in #Obama2012, 1 more term’, ‘#Obama2012 – healthcare and economic reform the key’, ‘No Republicans thnx #Obama2012’, ‘Guantanamo still open, no jobs, healthcare fails #Obama2012’, ‘BO has done amazing so far, we need more #Obama2012’

Table 17. Table containing examples of tweets within each #hashtag considered.

The result is that the while in some instances, it is relatively conclusive as to what the content under the #hashtag will relate to; there are instances in which it is impossible to establish. ‘#ICantRespectYouIf’ for example had tweets that considered subjects ranging from supporting football teams to music to political leanings and others. This is the same for #2ThingsIKnow where the context of the #hashtag that would allow Twitter to summarise what the underlying content would be, does not exist.

A closer examination of instances in which the context is established reveals that even within these are a significant proportion of tweets using the #hashtags that are entirely unrelated to the substantive context. In the case of ‘#McAlpine’ the majority of tweets and retweets related to the allegations of child molestation. However, there were many that had nothing to do with the election and instead used the #hashtag for other reasons. At the same time, Celtic Football Club of Scotland were speculated to sign

footballer Gary McAlpine with many supporters using the same #hashtag. While 87% of tweets were about the Lord McAlpine allegations, the remaining 13% were about Gary McAlpine. Examples of the 13% can be seen in the table below.

#Hashtag	Percentage of Tweets not about the context of the #hashtag	Examples of Tweets
#McAlpine	13%	‘Who is this #McAlpine fella we are linked with us #spl #celtic’, ‘I don’t think #McAlpine is the sort of player we should be after #celtic’, #mcalpine will be a decent add to the squad but nothing more #cfc’
#KimKWedding	11%	‘FLASH SALE NOW #KIMKWedding’, ‘Best tweet decks #KimKWedding #PatsBucks #CBSMadness #Ohio’
#Obama2012	17%	‘Geopolitical conspiracy #Obama 2012’, ‘Wizards 110-105 Lakers #Obama2012’, ‘#2ThingsIKnow is #Obama2012 aint gonna work’
#ArabSpring	5%	‘#ArabSpring coverage getting in the way of #towie’, ‘FLASH SALE #ArabSpring’, ‘#ArabSpring #Levenson, #Murdoch, #Syria’

Table 18. Table containing examples of tweets not about the primary context of the #hashtag

The above table presents examples of tweets that used the various #hashtags but the substantive context was not the main purpose of the #hashtag. In the above instances, it is evident that the extent to which the context of the tweets underlying the #hashtag is not clear and consistent, as hoped. While in the majority of instances it is evident. Based on our sample of #hashtags, it would appear that it is not possible to establish the underlying context in one-third of #hashtag, which is a significant proportion.

Where eBay ought to have known of the sale of counterfeit goods based on content being advertised and acted accordingly, the same cannot be said for Twitter based on #hashtags. As the above analysis highlights, this is not the case with Twitter. In one-third of instances of #hashtags, it is not possible to establish the substantive context of the #hashtag and have constructive knowledge.

6.4.3 Summary

There is a distinct separation between what eBay did in actively advertising content that it chose that it ought to have known contained counterfeit material and that of Twitter that sees it merely provide the mechanism that makes the advertising of the trending topics possible. Trending topics unlike eBay's deliberate keywords are words and phrases highlighted by an automatic algorithm the control of which Twitter had no control unlike eBay's keywords; quantitative analysis of the trends of the course of a month reveals the lack of Twitter control over what appears to individuals.

At the same time, Twitter does not know the nature of tweets and retweets that are presented under the trending topics; merely every tweet that contains the trending string

appears. The sheer volume of tweets along with the key semantic context means that it is not possible for Twitter to establish the context of tweets that appear under the trending topics.

Twitter does not play the same active role in the provision of the trending topics as eBay did. The sheer volume of tweets along with the semantic context of tweets means that, Twitter cannot. Unlike *eBay*, the number of tweets and retweets cannot be accurately monitored at all times, attempting at constant categorisation cannot be effective. Therefore, in turn consideration needs to be had as to whether there were other factors such that would have led a diligent economic operator to the conclusion that defamatory content have been posted.

6.5 Constructive Knowledge: Socio Technical Relationship

The constructive knowledge standard deployed in *eBay* that rendered eBay liable was also based upon the fact that eBay had a socio-technical relationship with rights' holders designed to prevent counterfeit goods being sold on the website. eBay created the Verified Rights Owner (VeRO) Programme so that rights owners could report listings that infringe their rights. It is stated that any individual or company who holds intellectual property rights, whether they be copyright, trademark or patent, which may be infringed by listings or items sold on eBay. The Programme represents a range of intellectual property rights holders from major software companies to luxury goods manufacturers.

As well as the Programme, the technology underpinning eBay is such that it allows for the ability to establish potential infringements as eBay has adopted auction

monitoring services.³¹⁷ The socio-technical relationship was viable as there are a limited number of rights' holders who are likely to be the victims of infringements while whether goods sold are counterfeit or not is an objective statement of fact.

In this instance L'Oréal is one of the premier cosmetic brand and therefore it likely to be the case that should infringing cosmetic goods be sold on the site, they belong to L'Oréal or one of the tiny number of premier cosmetic brands; it is unlikely that a high street cosmetic brand will be the victim of counterfeit good selling on eBay. The very nature of infringing a holder's rights in selling counterfeit goods is the fact that individuals are attempting to sell a product that proclaims to be a particular premium brand but is not.

To this end therefore, the success of the programme was the result of two thing; the limited number of right's holders and the objective nature of counterfeit goods. In contrast to this defamation is neither limited in the range of potential actors nor is it objective; establishing the defamatory nature of remarks is a subjective matter of decision making requiring contextual understanding of the environment in which the remarks were made, not established through the mere use of particular words or phrases.

6.5.1 Not Limited

Any individual can be the basis of an defamatory remark and this has been seen to a great extent already in the first Twitter libel case that was presented before the courts in while the defendant politician remarked of a rival; *'It's not in our nature to deride our opponents however Eddie Talbot had to be removed by the Police from a polling station.*³¹⁸

³¹⁷ At the time of the case, eBay used technology from a company called NetNames, providing online brand protection. Available at http://www.envisional.com/downloads/Anti_Counterfeit.pdf

³¹⁸ *Elsbury v Talbot*, [2009] unreported

In this statement, there is nothing that would a sentiment filter could pick up without being excessive and encroachment on freedom of expression; it is the fact that the claimant being defamed is a politician who is being suggested to have been removed from a polling station by the police and that it was mistaken identity that renders the remark made defamatory, attempts to block singular words would not be effective.

In all of these cases, context has been crucial with a view towards establishing the potential scope of liability as the potential words in isolation mean little and therefore the ability of filtering mechanism is lacking severely without simply trying to adopt a broad brush approach that sees excessive filtering of words that would have a chilling effect on volume of content produced.³¹⁹

In this case it is clear to see the way in which a relatively innocuous and not hugely famous individual can nonetheless be the basis of an action in defamation having his reputation harmed in the eyes of other individuals. The claimant here was essentially a local politician and therefore the tweet published attacking him one that might not be considered to be against a particularly famous individual but this is the very nature of defamation; the fact that any individual can be the victim as it relates to the damage done to the individual in the eyes of other individuals around him.

This contention in the ability of any individual to be the basis of a defamatory remark can be seen in the case of *McAlpine* a seemingly innocuous member of the

³¹⁹ The context was also important in the decision of *Islam Expo* [2010] EWHC 2011 in which the court held that the name of the event was the same as the organisation and therefore statements made would be construed as being linked to the company and not just the company itself; the words had to be placed within their context. The importance of context was also seen in the decision of *Sheffield Wednesday v Hargreaves* [2007] EWHC 2375 (QB) in which the club wanted to expose the identity of posters on one of its fan sites as they were concerned by the statements on the site and that they might be defamatory of the claimant's board of directors. The court distinguished between formal and informal colloquialisms and more serious allegations of untrustworthiness and dishonesty of the board. The order was therefore granted against the ISPs of users of the site whose messages were deemed serious enough within the context of the manner of the overall posts.

House of Lords who became the victim of a sustained attack calling him a paedophile on Twitter by thousands.³²⁰

McAlpine, while a member of the House of Lords, would not be regarded as being a particularly famous individual, the kind of individual that one might consider as being a traditional target for a defamatory remark; not a famous actor or musician that tabloid right about exploit in order to sell copies of publications. The story developed and in turn therefore it quickly became the case that thousands of individuals attacked the subject on the site and individual that one would not initially have considered as being the kind of individual who would be targeted.³²¹

Samantha Brick was a writer for the Daily Mail but relatively little known for the best part; no more than the average journalist is to the average person on the street. She published an article on the Daily Mail website in April entitled 'There are downsides to looking this pretty: Why women hate me for being beautiful' for which she received she amounts of criticism from all range of persons online.

Within 24 hours of posting the article, over 10,000 tweets were posted with the string 'Samantha Brick' in it with the majority appearing to be negative about Brick and her article and would have been considered potentially defamatory. A sample of 100 tweets that contained the strong 'Samantha Brick', within the considered time frame was considered and analysed. Only tweets that contained this string was considered for

³²⁰ Swinford, S., 'Lord McAlpine asks police to investigate Twitter users over smears' The Telegraph Online, 21 November 2012. Available at <http://www.telegraph.co.uk/culture/tvandradio/bbc/9693080/Lord-McAlpine-asks-police-to-investigate-Twitter-users-over-smears.html>; Tweed, P., 'Lord McAlpine and the high costs of tweeting gossip' The Guardian Online, 27 November 2012, Available at <http://www.guardian.co.uk/law/2012/nov/27/lord-mcalpine-twitter-libel>.

³²¹ This has also occurred in other instances of defamatory publications on social media with individuals publishing content that is defamatory and actionable surrounding seemingly random and non-famous individuals on Facebook as in Bryce v Barber in which the defendant posted defamatory remarks about the claimant on Facebook with the claimant winning damages in excess of £10,000, See Bryce v Barber [2010] Available at <http://www.telegraph.co.uk/technology/facebook/7912731/Law-student-wins-10000-after-being-branded-a-paedophile-on-Facebook.html>.

consistency. Therefore while there are certainly tweets that ought to be considered, the corpus from which the sample is taken and the resulting analysis is nonetheless robust.

The sample was manually analysed to establish the underlying nature of the tweet, either defamatory or not. This was done by considering the sentiment of the tweet and the extent to which it would be regarded as defamatory or potentially defamatory, within the definition of defamation. As with the rest of the tweet analysis in this thesis, the only way in which analysis could be carried out was manually given the subjective nature of defamation.

Percentage of Example Tweets Sample		
Defamatory	93%	‘I couldn’t get to the end of the article. Thanks Samantha Brick. Probly cheating on her fella’ ‘If Brick’s so attractive why does her husbandll look like that? Moneygrabber or delusional?’ ‘This Samantha Brick has got the Myra Hindley’s about her! #fugly #slag #cheater’ ‘Clearly someone who wasn’t given enough attention as a child. Go Away Samantha Brick you cheating mess’
Non-Defamatory	7%	‘How horrible are people about Samantha Brick for no reason’ ‘The abuse Samantha Brick is getting is whats wrong with Twitter’ ‘Don’t get why Samantha Brick is getting all of this abuse’ Think people are wrong about tweeting as they are about Samantha Brick. #NotRight’

Table 19. Table containing the percentage of tweets in the Brick case that were defamatory, with examples

Samantha Brick emerged from obscurity to become instantaneously a figure of ridicule and hate including having her reputation damaged for her article. As the above sample of tweets highlights, the overwhelming majority of tweets were defamatory, over 90% of our sample. As a result she, an individual of no real notoriety, the kind of person that would not traditionally be the victim of a defamatory publication to the publication at large, was here.

All of these individuals, *Talbot*, *Brick* and *McAlpine*, are not necessarily the kinds of individuals that it would be expected defamatory remarks would be written of; it has traditionally been higher profile individuals, the kinds of individuals that would sell publications. However the nature of defamation is such that any individual's reputation can potentially be attacked and damaged; it is not limited in the range of individuals who may be the subject of damage.

The development of expression, as explored in Chapter Two means that potentially even more individuals than previously the case could be the victim of defamatory remarks. As in *Talbot*, the nature of the relationship between the pair along with the fact that the defendant was given a platform from which he express himself, rendered the subject of the remarks a potential victim.

As was explored previously in this thesis, reputations are hugely value as they serve to establish an individual's dignity, self-worth, and honour while at their very core being the way in which individuals are seen by those around them.

While an individual can better his reputation through his hard work and endeavours, this was central to the development of defamation itself during the Industrial Revolution as previously considered, every individual is born with a reputation, entitled to not have it unduly attacked.

In contrast, by its very nature counterfeit is designed to pass goods off as though they were something else, traditionally goods as though they are a premium brand of which they are a limited number. While reputations are vested in each and every individual, making them a potential targeted, rights' against counterfeit exist only in brands and an even smaller, subset of these.

The limited range of brands means that eBay ought to have been able to act and remove the infringing content before its existence; appreciating the posting of such content and on; the technology was developed as a means of trying to establish when such was occurring proactively. It is exactly this that made the usage of technology so important and viable in the case of *eBay*.

6.5.2 Sentiment Analysis

Technology was key in the case as eBay used it to monitor and crucially determine where there were counterfeit goods being sold by individuals on eBay. This was possible as, as remarked earlier this is an objective question that the technology can make a determination over and has in instances on Twitter.³²²

The subjective nature of defamation makes the same usage of technology impossible however; the mere usage of some words and phrases and not others in tweets does not make them, and not others defamatory.

The first tweet in relation to McAlpine was published November 4 2012 with the vast majority coming within a 24 hour period of this initial tweet being published. There were in excess of 130,000 tweets and retweets over a 48 hour period that had their

³²² In the case of content being posted on Twitter, content that is counter to intellectual property laws has been removed by Twitter; in particular links to material that is counter to the intellectual property that individuals own within goods; movies (Magnolia Pictures Inc and Warner Brothers), music (RCA Music Group/Sony Music Entertainment) and illegal streaming of broadcasts (Indian Premier League).

location as the U.K. The graph below shows the way in which the retweets and tweets that mentioned the words proliferated at speed after the initial tweet was posted.

Having established the exact time when the first defamatory tweet was posted, we collected all subsequent tweets within the next 48 hours after this point. The corpus was compiled of all tweets that geolocated in the U.K. that referenced ‘McAlpine’. The context of the tweet was not analysed at this stage but rather but a compilation of tweets that had ‘McAlpine’ in them.

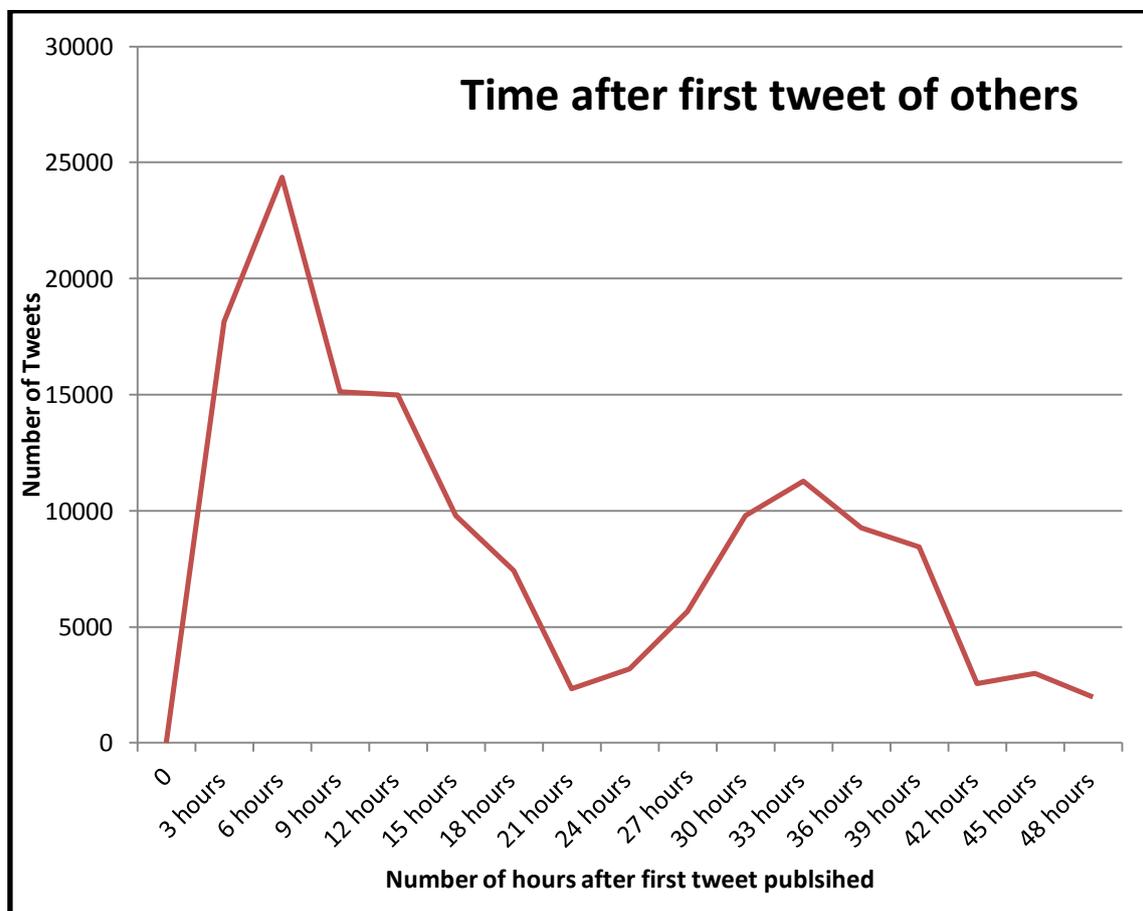


Fig 9. Graph showing the time after the first tweet that the other tweets were published regarding Lord McAlpine and the paedophilia claims.

We see from the graph above the way in which the vast majority of tweets were within a very short period of the initial tweet having been published, with the smallest percentage being after an extended period of time of the tweet having been posted.

There are two peaks one a few hours after the first tweet which can be attributed to the fact that individuals started to see what others were tweeting and did so themselves or retweeted that they had seen and the second peak the next day at the same time which on examination of the sentiment between these tweets can be largely attributed to individuals who had seen what had been published and question the extent to which such publications were sound practices in journalism and as a response to the backlash to the initial publication.

In considering the potential for a pre-publication technical measure, of the total corpus of tweets, we took a representative sample of 200 to analyse. The sample was chosen to reflect the different times at which the tweets were posted after the initial tweet. The rationale behind this approach is that the time after which the initial tweet is posted, may well impact the resulting behaviour – individuals may become more aware of the surrounding context of the issue that accordingly impacts what they publish.

The table below shows the breakdown of the times with how many tweets and retweets fell into each group. As we can see, the over one-quarter of all tweets and retweets came within 6 hours of the initial tweet being published.

Time Group (hrs)	Percentage of Tweets and Retweets	Examples of Tweets
0-6	27%	‘McAlpine Tory Lord paedophile’, ‘Lord McAlpine Tory Lord shamed as a paedophile on tele this morning’, ‘Lord McAlpine named as member of paedophile ring. Need proof for such #libel’
6-12	12%	‘Lord McAlpine named to tele as child molester. Where is the proof? Reputation destroyed’, ‘Tory Lord McAlpine named as paedophile on ITV. Looks like one, hardly a shock really’, ‘McAlpine named childmolester. #sick #vile #hanghim’
12-18	10%	‘How irresponsible naming Lord McAlpine this morning. Taking them to court’, ‘Tory Lord McAlpine shamed as child molester #paedophile’, ‘Cant believe the irresponsible journalism in the allegations against Lord McAlpine’
18-24	7%	‘Tory HoL Mcalpine named as member of child molestation ring on ITV. Outrageous journalism. Poor man’, ‘Latest one is Tory Lord McAlpine to be publicly named as part of 70s child sex abuse ring’, ‘Where is the proof in the allegations made against L McAlpine?!’
24-30	10%	‘McAlpine named as paedophile. The poor children. #sick’, ‘Tory Peer McAlpine named as member of Tory paedophile ring. The abuse goes right to the top’, ‘Shocked by the crazy behaviour of people on Twitter regarding #McAlpine!!!’
30-36	15%	‘Tory Lord McAlpine named by #itv as paedophile. Ridiculous journalism. Hope they get used for big £’, ‘Peer McAlpine named as paedophile. Thought we were past this kinda

		journalism. #Destroying Lives’, ‘Lock Up the paedo McAlpine with all of his other mates’
36-42	12%	‘Lord McAlpine of HoL named as paedo on tele’, ‘Lord McAlpine latest to be named as kiddie fiddler #lockhimup’, ‘All of the allegations being throw around on Twitter about Lord McAlpine are out of order IMO’
42-48	6%	‘Dirty McAlpine child molester. Yet another oldman celeb at it’, ‘McAlpine – another privileged white man, abusing his power’, ‘Don’t believe how far this McAlpine stuff goes’

Table 20. Table containing examples of tweets posted across the first 48 hours of the first tweet being posted.

25 tweets were taken from each of 8 time groups above to prevent any bias in the time at which the tweet or retweet was posted for consideration. Such an approach should eliminate any biases around individuals more knowledgeable ton the issue behaving differently because of such. In examining the sample of 200, we have been able to consider the extent to which pre-publication measures would be successful.

	Percentage of Tweets and Retweets	Examples of Tweets
Defamatory	56%	‘McAlpine Tory Lord paedophile’ ‘Lord McAlpine Tory Lord shamed as a paedophile on tele this morning’ ‘Tory Lord McAlpine shamed as child molester #paedophile’
Non-Defamatory	44%	‘Lord McAlpine named to tele as child molester. Where is the proof? Reputation destroyed’ ‘Tory HoL Mcalpine named as member of child molestation ring on ITV. Outrageous journalism. Poor man’ @z ‘How irresponsible naming Lord McAlpine this morning. Taking them to court’

Table 21. A table outlining how many tweets of the sample were defamatory or not, with examples

The above table highlights that only just over half of all of the tweets in our sample would be regarded as defamatory. Looking at the examples above, one can see that they are plainly defamatory, seeking to destroy the reputation of Lord McAlpine unduly. In contrast to this, however, three examples in the second row, once again from the sample 200, are unlike the first three not defamatory. The tweets are clearly calling into question the extent to which the journalism and remarks made were made so in an appropriate way. They can all be seen to clearly be calling into question the nature of the original publications. They are actually key to any effective society – the ability to call into question public expressions made in writing.

Considering the sample once again, there are 124 tweets and retweets that contain both ‘McAlpine’ and ‘paedophile’. Once again, analysis of each tweet within the sample reveals that just over 60% are clearly defamatory.

	Percentage of Tweets and Retweets	Examples of Tweets
Defamatory	62%	‘Tory Lord McAlpine named as paedophile on ITV. Looks like one, hardly a shock really’ ‘McAlpine named as paedophile. The poor children. #sick’ ‘Tory Peer McAlpine named as member of Tory paedophile ring. The abuse goes right to the top’.
Non-Defamatory	38%	‘Tory Lord McAlpine named by #itv as paedophile. Ridiculous journalism. Hope they get used for big £’. ‘Peer McAlpine named as paedophile. Thought we were past this kinda journalism. #Destroying Lives’ ‘Lord McAlpine named as member of paedophile ring. Need proof for such #libel’

Table 22. A table outlining how many tweets that contained ‘McAlpine’ and ‘paedophile’ were defamatory or not, with examples

As with the analysis of those tweets with just ‘McAlpine’, the first row above in ‘McAlpine’ and ‘paedophile’ gives rise to the fact that these remarks are clearly defamatory. The remarks would be read as clearly trying to damage McAlpine’s reputation. However, there are other instances within our sample that use both

‘McAlpine’ and ‘paedophile’ that clearly are not defamatory and instead question the quality of journalism and the validity of the remarks made.

It is evident therefore that the application of sentiment filters on Twitter to try and proactively detect the potential posting of defamatory content would not be successful. The mere existence of the words ‘McAlpine’ and ‘paedophile’ in the same tweet has not rendered the tweet as defamatory.

What this analysis and the results highlight is the inability for Twitter to effectively prevent potentially defamatory content based upon the context of the words without an ability to effectively place language filters in place that would prevent what would be deemed to be defamatory being blocked. The fact that such significant percentages of tweets and retweets that used ‘McAlpine’ alone or ‘McAlpine’ and ‘paedophile’ were not defamatory, means that attempts at pre-publication sentiment filters would be a gross invasion on the right to free expression.

The nature of defamation is such that it is the context and not the mere incidence of words used that determines whether a remark is defamatory or not. Examining the remaining 76 tweets that don’t contain ‘McAlpine’ and ‘paedophile’, there are numerous instances in which a subjective examination of the tweet reveals that the underlying sentiment is towards a defamatory publication.

	Percentage of Tweets and Retweets	Examples of Tweets
Defamatory	67%	‘Tory Lord McAlpine named as child molester ITV. Looks like one, hardly a shock really’ ‘McAlpine named childmolester. #sick #vile #hanghim’ ‘Dirty McAlpine child molester. Yet another oldman celeb at it’ ‘Lord McAlpine of HoL named as child abuser on tele’ ‘Lord McAlpine latest to be named as kiddie fiddler #lockhimup’ ‘Latest one is Tory Lord McAlpine to be publicly named as part of 70s child sex abuse ring ’

Table 23. A table outlining how many tweets that didn’t contain ‘McAlpine’ and ‘paedophile’ were defamatory, with examples

The above are examples of the 67% within the 76 in our sample in which ‘paedophile’ is not used and yet it is clear that the implication is towards a defamatory publication. The phrase ‘child molester’ has been used to convey the same allegations as ‘paedophile’; the tweet might contain different words, but it is just as defamatory. The above tweets are clearly defamatory and yet would not have been picked up by a sentiment filter had Twitter attempted to act on ‘paedophile’. Furthermore, in the three examples at the bottom of the six, no reference was made to ‘paedophile’ or ‘child molester’; the words used are in themselves normal words and it’s the combination of them that renders these tweets. In the three we can see that the words on their own are

not 'illegal' or offensive, but the combination of the words along with the context in which they have been composed that establishes liability for defamation.

The imposition of sentiment filtering technology would be both an intrusion on the right to expression and also not guaranteed to be successful. The mere existence of a pair of words that might be considered as being defamatory, does not necessarily render the tweet defamatory while at the same time, seemingly innocuous words on their own collated together have the potential of being defamatory; as the above analysis reveals.

Furthermore, such an approach would be a great infringement on expression as particular words would be deemed inappropriate regardless of their usage. Such an approach would have meant that in the *McAlpine* case, tweets in support of the peer would have been prevented from being published; individuals' right to express themselves fettered.

This is the interesting and important distinction between what Twitter can do proactively and what eBay ought to have been able to do but failed to. Where trademark infringement is an objective question, defamation is not; it requires a subjective examination of the remarks made and the context in which they have been made.

6.5.3 Summary

eBay possessed a socio-technical relationship with rights' holders that meant that it ought to have been able to exercise constructive knowledge and remove the offending content. There were a limited number of such people while it had put in place and previously used technology that allowed it to act and remove the offending material. It is evident from the above that this is not the case for Twitter; there are neither a limited range of individuals who will be the subject of defamatory tweets and retweets, nor can technology be used in an ex ante manner.

Individuals like *Talbot*, *Brick* and *McAlpine* would not be traditional targets of defamatory content and yet have been on Twitter already. In the case of the tabloid industry, there are a select group of people that would be the basis of a defamatory publication, newspapers were looking to outsell others, and there was a 'kind' of person that would be attractive to readership. This simply is not the case with Twitter where ordinary individuals can be and have been the subject of defamatory remarks given that the motivations of individuals on Twitter are not the same as for traditional journalists.

While an analysis of the *McAlpine* case makes it clear that an ex ante approach to sentiment filtering would not be viable because of the context specific nature of defamation; the mere existence of '*McAlpine*' and 'paedophile' in tweets did not render these tweets defamatory with such measures being a dramatic infringement upon the right to expression and there being no guarantee of success. The sentiment analysis of the case makes it clear that such an attempt to do so would not be viable.

Establishing the defamatory nature of a remark is a subjective question, one that requires deep contextual understanding of the remark, with the mere existence of particular words not necessarily rendering the tweet defamatory. Exploring the nuisances of a remark published in a newspaper article is viable, where thousands of tweets and retweets is not. Ex ante measures as Twitter would be required to deploy could not be viable in any manner to be successful as they ought to in order to avoid liability.

6.6 Conclusion

Where an individual defamed cannot seek redress against those primarily liable for the damage done, he may well turn to Twitter as the host intermediary, secondarily liable. Twitter will be prima facie found liable with it having to prove the application of

Reg 19 of the E-Commerce Regulations 2002 to evade liability, in particular that it acted to remove the content on gaining knowledge of its existence.

eBay v L'Oréal saw the ECJ provided guidance and clarity as to the fact that the actual knowledge standard was one of constructive knowledge; the nature of circumstances were such that a diligent economic operator ought to have known.

eBay were not able to evade liability as for one they had played an active role as they chose the keywords to optimise which in turn linked to material that included counterfeit goods; playing an active role in the resulting damage caused. The court continued, however, that based upon the socio-technical relationship eBay had with rights holders, the like L'Oréal that had seen its technology to act to remove counterfeit listings, eBay ought to have known and acted to remove the offending material. The limited number of rights holders likely to be the reason of counterfeit selling and the objective nature of counterfeit meant that it could act.

The trending topics might be considered as analogous to eBay's keywords given that they promote content being discussed at the time, designed to engage others. The trending topics are designed to promote what is being discussed by individuals on the site, what is most appealing at the time.

However, the key differences lies in the fact that Twitter does not deliberately choose the trending words or phrases, as opposed to eBay, which did. The words and phrases appear as a result of an algorithm, control over which Twitter does not have.

Twitter also does not possess the same constructive knowledge as eBay did that daw its failure to act fatal, as firstly there are not a limited range of individuals who will be defamed. The instances of *Talbot*, *Brick* and *McAlpine* reveal instances of

individuals being defamed that would not necessarily be considered as likely targets of defamatory publications. Unlike, counterfeit goods violations, the subjects of which are likely a tiny group of brands, any individual can be, and have been, the subjects of defamatory tweets.

Furthermore, the application of technical *ex ante* measures would be successful even in likely instances given the nature of expression; the mere existence of singular words that might be the basis of defamatory does not necessarily mean the expression is defamatory while other words that would not necessarily be considered defamatory may be. The sentiment analysis of a corpus of *McAlpine* tweet reveals the way in which the mere incidence of particular words does not by proxy render the tweet defamatory; instead it is the context surrounding those tweets that determines their defamatory nature or otherwise of the tweets.

Therefore, as with primary liability, the law on secondary liability does not provide clarity and certainty in its application to such an extent that it could act as an effective deterrent. Online host intermediary liability does not in its application, does not provide certainty or clarity. It is not able to effectively as a deterrent causing behaviour to be shaped that would result in the curbing of defamatory tweets and retweets. Twitter is not in a position to act effectively, which in turn does not place any pressure on individual contributors to Twitter not to post defamatory tweets or retweets.

These provisions of online intermediary liability, that have their roots in distributor liability, as with the provisions of publisher and republisher liabilities are not effective in the context of Twitter. Rather than a limited number of newspapers passing through a stand, there are literally thousands of tweets and retweets posted in an instant

that require the same contextual exploration that means that Twitter as an online intermediary cannot be forced to act as others.

It is evident that the mechanism of law simply is not appropriate any longer to act as an effective deterrent, as it ought to, in this new environment that has seen the democratisation of expression. Simply put, the thousands of actors, acting in an instant is unlike anything we have ever seen before.

It has created a revolution, with the mechanism we currently have in place developed for the last revolution during the Industrial Revolution. It is clear that the existing mechanism of law from a central, external body, regulation is no longer appropriate to deter individuals from wanting to behave as they have in *Giggs* and *McAlpine*.

To this end, a model that ought to be more appropriate, one that harnesses the power of the collective to govern, that is built on the community developing, proliferating and enforcing is proposed in the next Chapter.

Chapter Seven: New Regulatory Model

Virginia Woolf once wrote “[T]o enjoy freedom, we have ... to control ourselves”.³²³ This thesis demonstrates that such sentiment has never been truer than today; to enjoy the freedom of expression granted to us by Twitter, we must govern ourselves.

The law of defamation is no longer effective at deterring individuals on Twitter from publishing defamatory tweets. The law was developed for an entirely different environment, and not the thousands of actors publishing instantaneously on Twitter, that we now find ourselves faced with.

In this Chapter, I will first outline a new model that would be more appropriate. The model proposed harnesses the power of the community that tweet, to govern themselves as they develop and enforce their own standards. There is a role to be played by the law, but it is to supplement the community – where the offender is a repeat offender or where the damage done is so onerous. The role of Twitter is post publication whereby it bans individuals who have continually flouted the community’s standards, with escalating bans for repeat offenses.

At the core of the model is the community governing its own members, driving out the kind of behaviour seen in *Giggs* and *McAlpine*.

I will then consider the viability of the model by considering the development of the RT retweet prefix and the Wikipedian model of governance. The RT retweet mechanism was developed organically, by individuals on Twitter, to denote a retweet

³²³ Woolf, V., ‘*How Should One Read A Book*’, in *The Common Reader*, Second Series, 1926

and has become the accepted normative practice of behaviour across the entire community. While the use of the RT prefix doesn't strictly prevent a negative course of behaviour, there are sufficient similarities that render the analysis appropriate.

The Wikipedian model of governance consists of the community of individuals that contribute to the site, governing themselves. Wikipedia is an attempt to establish all of the world's knowledge in a single place with the notion that the knowledge held by everyone is greater than that of any single individual. While there are some important differences between Wikipedia and Twitter, crucially both are examples of virtual communities, and it is this similarity between the pair that once again means the analysis is appropriate.

The Chapter is concluded by using the *Giggs* case as a case study to highlight how the model proposed here would work in practice. The details of the case are considered at length in Chapter Five, and therefore are not reiterated in this Chapter. However, consideration is had to how the model proposed in this Chapter would work to deter individuals who had defamed *Giggs*.

The Chapter provides a comprehensive analysis of the model, by not only outlining it in theory, but also considering its theoretical viability, through considering the RT prefix and Wikipedian model of governance, and its practical application, with the *Giggs* case. However, before delving into the above, I will briefly outline the progress of the thesis to this point

7.1 Thesis

The hypothesis at the heart of this thesis is that the current mechanism of law cannot remain effective in deterring individuals from damaging reputations on Twitter. Analysis of the cases of *Giggs and McAlpine* against the laws of primary and secondary

liability, Chapters Five and Six of this thesis, highlights the lack of effectiveness in the current mechanism.

The development of Twitter, explored in Chapter Two, has democratised expression. Never before has the power to express oneself in writing to the public at large been in the hands of the masses. Twitter bears out the vision of the Web's creator, Sir Tim Berners – Lee, whereby not only is the average individual able to see content presented to them online, but actually contribute to the wealth of content.

While Twitter has led to much good, it has also led to the likes of *Giggs* and *McAlpine*. The democratisation of expression has resulted in an increase in nonconformity to the norm that reputations are not unduly destroyed.

Society has decided that, for the betterment of all in society, reputations should not be unduly attacked. However, there are nonconformists; individuals who don't adhere to the norm. It has traditionally been the case that newspapers and broader tabloid publications have been the nonconformists. As explored in Chapter Four, these publications behaved out of turn not out of malice but because they wanted to profit; there was an emerging class of reader that wanted such gossip based content.

The law of defamation was developed to combat such nonconformity. The rise of tabloid publications saw the need for a clear mechanism that could be applied to the relatively few publications in existence and hence the law of defamation; see Chapter Four. Examining the nature of the law of defamation, its provisions, penalties, and leads to the clear conclusion that it was developed specifically for tabloid publications.

In light of the PCC Code and its failures, analysed in Chapter Three, it was clearly the case that standards could not work in this context of tabloid publications because of

the conflict of interest. The same mechanism of law has been translated to instances of online defamation, Chapter 4. Instances of publishers, republishers and online intermediaries being held to account for damage done to individuals have demonstrated the application of law offline, online.

Jurisprudence in *Berezovsky, Times Newspapers* and many others has seen the application of the mechanism of law in the context of online publications much in the same way as in the offline world. While there has been a debate as to the extent to which the provisions are 'fair', the ability to apply them has not been called into question.

Twitter has revolutionised expression, with the key being that there are no longer a handful of newspapers behaving out of turn, but thousands of normal individuals, as exemplified by *Giggs* and *McAlpine*. Chapters Five and Six considered the provisions of primary and secondary liabilities against the cases of *Giggs* and *McAlpine* respectively with a view towards establishing the extent to which the law of defamation remains an appropriate mechanism in the context of defamation on Twitter and it is clear that it is no longer effective.

A combination of quantitative and qualitative empirical analysis of the *Giggs* case against the provision of publisher and republisher liability, leads to the conclusion that actually there is not an ability to make satisfactory application of the law. The procedural and evidential hurdles to address cannot be overcome. This failure is the result of the fact that these provisions were developed for, typically, one or two offending newspapers, not thousands of individuals. The former scenario afforded the opportunity to consider the entire context around a publication, as defamation requires, the latter doesn't.

Secondary liability that of Twitter was considered in Chapter Six against the *McAlpine* case. Once again, the application of the provisions of host intermediary liability, that would require Twitter to act on the constructive knowledge standard, do not provide certainty or clarity in their application. Requiring Twitter to act in such a capacity is entirely unfeasible given the contextual nature of defamation.

The result is that the current mechanism of law is simply ineffective in the new environment in which we live. The current mechanism was developed for few tabloid publications, not for thousands of ordinary individuals. It was developed for a relatively slow moving process of newspapers and not for the instantaneous nature of Twitter.

As the current mechanism is no longer fit for purpose, a new mechanism, one which has the community on Twitter enforcing standards developed by themselves at its core, is proposed in the next section.

7.2 New Regulatory Model

The key to the model proposed here is that the individuals on Twitter define and enforce standards within their own communities, with the law and Twitter acting in a supplementary capacity.

7.2.1 New Regulatory Model

The model works on the basis that that the power that has been granted to the masses to express themselves, is harnessed to govern themselves. Individuals in communities will enforce the standards developed by the community, with Twitter and the law playing a supplementary role.

Communities will develop standards on what is and is not acceptable within their community and individuals in these communities will enforce the standards. Penalties for a failure to comply with the standards will start off as discussions to

correct behaviour and escalate through to Twitter bans, and legal recourse where the individual continues to offend. The view is that this model is more effective than the current mechanism in the context of Twitter.

The view is that such an approach, will be effective to deter the vast majority of those who would defame, as in *Giggs* and *McAlpine*, from behaving in such a way again. The failings of the PCC, discussed in Chapter Three, are not going to exist in the case here as the same conflict of interest doesn't exist here.

7.2.1.1 The Standards

The standards will be developed by the community and reflective of the community's views. As explored in Chapter Two, there are already communities on Twitter, and these communities already have their own standards.

The standards that already exist tend to be stylistic, for example using particular abbreviations and #hashtags. Examples include; where there are multiple words in a single #hashtag, the first letter of each ought to be capitalised with no spaces between any words, avoid tagging every word of a tweet as individuals are likely to lose track of what the sentiment being articulated is, avoiding using descriptive synonym tags at the end of a post. All are designed to ensure that there is a particular course of behaviour when individuals use #hashtags.³²⁴

The importance of this is that these communities that consist of individuals from across the world, have been able to overcome cultural differences in the development of

³²⁴ The standards that already exist tend to be stylistic, for example using particular abbreviations and #hashtags. Examples include; where there are multiple words in a single #hashtag, the first letter of each ought to be capitalised with no spaces between any words, avoid tagging every word of a tweet as individuals are likely to lose track of what the sentiment being articulated is, avoiding using descriptive synonym tags at the end of a post. All are designed to ensure that there is a particular course of behaviour when individuals use #hashtags. See Carter, S. & Tsagkias, M. 'Twitter hashtags: Joint Translation and Clustering' In: Proceedings of the ACM WebSci'11, June 14-17 2011; Kouloumpis, E., Wilson, T. & Moore, J., 'Twitter Sentiment Analysis: The Good, the Bad and the OMG!' In: Proceedings of the 5th International AAI Conference on Weblogs and Social Media, 2012.

standards that they all adhere to. An argument against the model proposed here, may be that there are different cultural notions of what is and is not acceptable and that therefore standards across such communities in respect of defamatory content cannot be viable.

While there is certainly a difference between standards that prevent a course of behaviour, as opposed to stylistic practices, the fact that communities have been able to overcome cultural differences in the development of standards is crucial. This suggests that this issue of culture will not be one in the development of the standards here. There is even an argument to be made, as is made in justifying the consideration of the RT prefix later in the Chapter, that while on the face of it stylistic, in fact there is a subtle form of governance at work.

While the standards will be reflective of the community, naturally it will be the case that they won't be reflective of everyone; there will be a minority that won't agree. The fact that there will be a minority is an accepted element of this model and this is no different to what is currently the case.

As discussed in Chapter Three, individuals adhere to laws and standards not necessarily because they believe it is the right thing to do, but because they appreciate the need to do so; the value in doing so.³²⁵ Individuals have self-selected themselves to be members of the community and in turn will have to comply with the standards of the community.

³²⁵ Barzilair – Nahon & Neumann conducted research into the issue of self-regulation mechanisms in virtual communities. The pair conducted a study of policy and enforcement of disregarding inappropriate messages on 7 virtual communities and discovered that the key to successful self-regulatory mechanisms was the social capital that individuals feared would be lost from their failure to comply. See Barzilair – Nahon, K. & Neumann, S., 'Bounded in Cyberspace: An Empirical Model of Self-Regulation in Virtual Communities', *In Proceedings of the 38th Internal Conference on Systems Science*, 2005

In the case of the standards developed as part of this model, this will be no different. Individuals will adhere to the standards of their community, some of which they might not agree with, because they appreciate the importance of doing so. Having been bound with others in the community by the shared '*sense of community*', individuals will not want to lose everything that they have by being members of the community and in turn will adhere.³²⁶ There will be some that will not, and for these, the model exists to correct such behaviour and prevent further nonconformity.

This is not to say that minority views will be ignored out of hand. Should we arrive at a point where the minority view, becomes the view of the majority, which has happened in the past, the standards of the community, will be shaped to reflect as much.³²⁷ As discussed in Chapter Three, the speed and ease with which standards can be altered and amended is one of the reasons why they are often more appropriate than laws, in particular circumstances.

7.2.1.2 Community Enforcement

The fact that communities already exist, means that for this model to be successful, new 'communities' don't need to be created. Instead all that needs to be done is for the current standards that exist within these communities to be built upon.

All communities built around issues that are going to have a 'significant' presence in the U.K. will have to comply with the model. This might not necessarily seem like a satisfactory definition but in reality it is relatively clear as to what communities have a

³²⁶ Chua explored the issue of conflicting views in virtual communities, in particular around the development of conflicting speech standards in virtual communities. See Chua, C., '*Why Do Virtual Communities Regulate Speech?*', *Communication Monographs*, 76(2), 2009

³²⁷ We have had countless examples in society in which the views of a minority have gone on to become the views accepted by the majority, with legislation being amended to reflect as much. Historically it was the case that for the majority the concept of same sex marriage was not acceptable, and in turn it was not allowed. This was all the while, it was held by a minority as being acceptable. Eventually this changed.

significant presence of individuals on Twitter in the U.K. The nature of the topic being discussed is actually a very clear and simple parameter that can be used to establish where the model will be applied.

In the context of the broader community of sports, there are some that are very clearly going to be filled to a significant extent with individuals publishing based in the U.K. and others less so. Therefore at first instance, the model will be applied to these communities. However, given the fluid nature of Twitter, the model can quickly potentially be rolled out to other communities whereby the conversation grows to be become one in which there is significant presence in the U.K.

Enforcement will be carried out by individuals who are respected in the community on the basis of their previous behaviour; individuals who have acted extensively to contribute to the success of the community. It is crucial to bear in mind that these individuals who be enforcing standards reflective of the views of the entire community and not their own views.

Any individual that tweets or retweets on a particular topic, will have selected himself to be a member of that community; an individual that tweets on the English football league will have self-selected himself to be a member of the 'English football league' community. In turn he will have to adhere to the standards of the community and it will be on that individual to comply.³²⁸ Individuals will be members of many different communities on Twitter, and will have to comply with the standards of each of these communities. The emphasis will be on individuals to understand the standards of the community and to comply.

³²⁸ There are hundreds of examples of this throughout our physical lives. If I choose to visit a library, I have selected to put myself in that position and have to adhere to the standards of the library community that will include not talking, eating etc. I have put myself in that position and cannot decide not to adhere to the standards of the community, already in place.

The fact that the punishments for nonconformity start off with discussions will mean that new members of a community, there is the opportunity to learn from any mistakes made, as opposed to merely being banned for a defamatory tweet at first instance.

The communities will operate at this level of granularity, as opposed to being at a slightly higher level; i.e. Sports, Entertainment more broadly. Adopting such an approach will ensure that reaching all individuals is more viable than if the other way around, while simultaneously ensuring application of the model. At a higher level, enforcement is potentially more difficult while the development of standards that are applicable to the community is more difficult.

The requirement of having to comply with the standards of the community is irrespective of geographical location; individuals from the U.S. can and will be members of the community in the U.K. and held to account to the same standard as any individual in the U.K. in respect of defamation.³²⁹ This aspect of the model is no different to the current mechanism of law, whereby individuals who publish from overseas but cause damage in the U.K. are held to account in the U.K.; discussed in Chapter Four.

The model proposed will actually be addresses these kinds of instances with greater ease than the law currently can. Having considered some instances of overseas offenders in Chapter Four, it is clear that these instances require huge amounts of resource to address; long drawn out affairs. This won't be the case with the model

³²⁹ This is no different to the current provisions of defamation, whereby those who are based outside of the U.K. but publish to cause damage in the U.K. can be held to account in the U.K. The community would be acting in the same capacity to punish the individual.

proposed here, whereby the community can quickly establish whether the tweet is in contravention of the standards of the community and act if necessary.

As the work of McMillan & Chivas, discussed in Chapter Two, highlighted, members of communities are bound together by a shared '*sense of community*'; '*a feeling that members have of belonging, a feeling that members matter to one another and to the group, and a shared faith that members' needs will be met through their commitment to be together*'.³³⁰

It is this investment that individuals have in these communities on Twitter that binds the communities together and will ensure that the standards of the community are upheld and the model successful.

7.2.1.3 Twitter

Twitter will play a role in the model proposed as it will enforce bans as decided by the enforcers in the community.

The role being played by Twitter has its roots in the work of Lessig, discussed in Chapter Four. While his view that *the regulator* ought to be technology is misplaced in the context of defamation, as is evidenced by Chapters Five and Six, there is certainly a role to be played by Twitter, as is the case in this model proposed here.

Expecting Twitter to play an effective role in the proactive prevention of potentially defamatory tweets is impossible given the contextual, subjective nature of defamation. Sentiment filtering mechanisms would be a gross impediment on speech, let alone not being successful; discussed in Chapter Six.

³³⁰ McMillan, D. & Chavis, D., '*Sense of Community: A Definition and Theory*', *Journal of Community Psychology*, 14(1), 6-23

The requirement of the 2013 Act that Twitter act as an intermediary back and forth between the complainant and potential victim of remarks, is also hugely impractical from its perspective; as discussed in Chapter Four. In light of the sheer volume of tweets published the fact that it would have to act, within 72 hours of an individual making a complaint is entirely impractical.

Twitter's role will be to ensure that it is able to act quickly and effectively retroactively, in conjunction with the individuals in the community, to ban individuals who have repeatedly offended. This is one that it can practically meet as it is already behaves in such a manner.³³¹

Where the current requirements on Twitter fail because of the subjective nature of defamation, effectively this model turns its role in an objective one; has the community decided that x individual should be banned? If so, it has to act to act in compliance with the community's wishes.

³³¹ Twitter acts to remove illegal streams posted on the site.

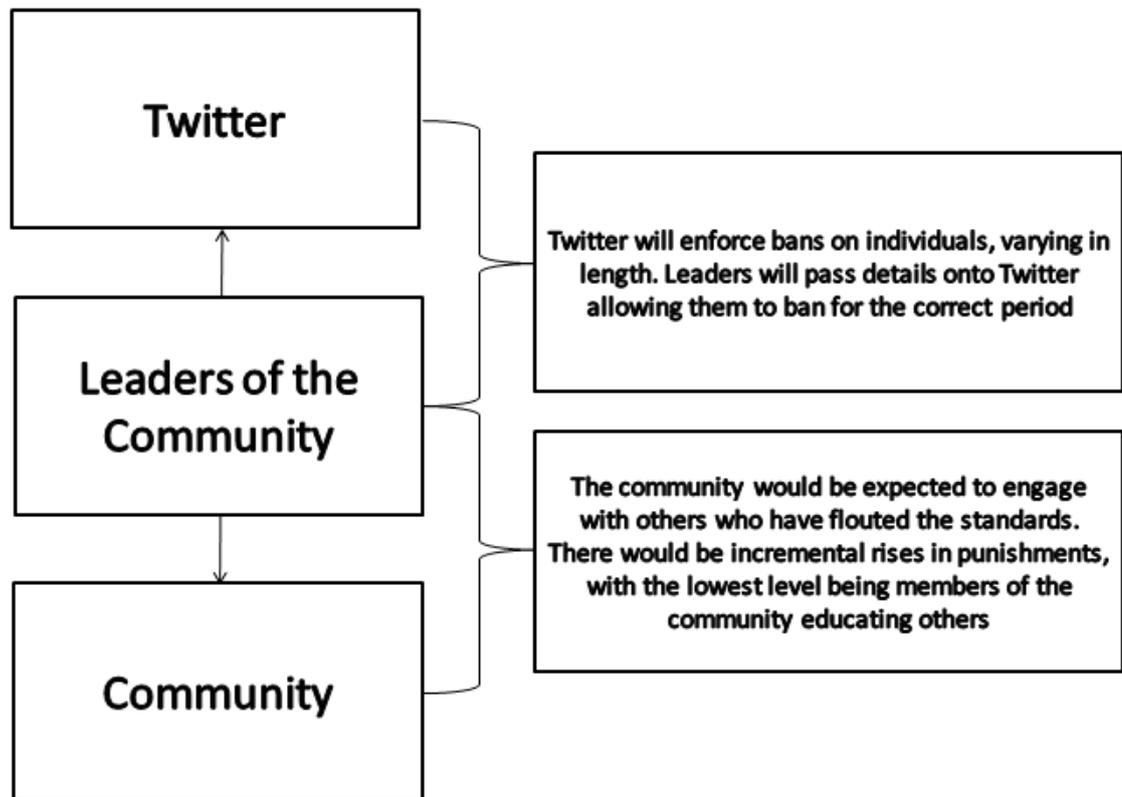


Fig 10. The enforcement mechanism in the model

7.2.1.4 Law

Where the individual continuously disregards bans, and continues to tweet defamatory content, or where the damage caused by the individual is exceptionally onerous, there will be the ability to seek redress through the law. The continuous disregarding of bans will be an objective standard that can be easily established.

The question of when serious harm has been caused is one which is more subjective and will very much dependent on the individual instance. To a large extent this will dependent on the nature of the individual tweeting, notoriety, number of followers, along with the subject matter of the defamatory tweet. When the community decides that this has occurred, it will be on them to engage Twitter to pass the details of the defamer to the victim to allow the victim to seek redress through the law.

The role of the law as a supplementary mechanism is important. As is evident throughout this thesis, the argument is not that the law is wrong, that the balance between expression and reputations is not appropriate, but rather that the law is not an effective mechanism because of the sheer volume of actors. Where the community is able to dramatically reduce the number of actors at first instance, the law can effectively provide assistance as and when it is required.

The model proposed here, addresses the limitations of Murray's work. Firstly that he foresaw the regulator as designing and implementing the regulatory model on cyberspace. This is not the case in the model proposed here, as at the core of the model are the community; see Chapter Four for a more detailed discussion on Murray's work. Secondly, and more importantly, he failed to present '*concrete roadmap to regulators*' as Basu put it, to act.³³² The above clearly overcomes his limitation.

7.2.2 Summary

A new regulatory model proposed above has the community of individuals on Twitter at its core; the same individuals that tweet will develop and enforce standards to drive out nonconformist behaviour. Communities exist around different areas and these communities will develop standards and enforce them across their members to deter nonconformity.

As considered throughout this thesis and demonstrated in Chapters Five and Six, the key contextual issue presented by the development of Twitter is the sheer number of actors; the law was not developed for an environment like we now find ourselves in. By using the community to govern itself, the number of nonconforming actors will be greatly reduced, the community can reach its own members on Twitter, in ways that the

³³² Basu, S., '*Stalking the Stranger in Web 2.0: A Contemporary Regulatory Analysis*', *European Journal for Law and Technology*, 3(2), 2012

law simply cannot. However, this will not eradicate entirely and where such instances occur, the law is still well placed to act.

As Suzor remarked governance within virtual communities occurs at the intersection of constraints from the market, the law, technology, internal community standards, and external social values.³³³ The model proposed above achieves this balance perfectly as it places the emphasis of governance at the door of the internal standards, with law, technology and external social value playing supplementary roles.³³⁴

Having outlined the model above, it now turns to consider its potential viability by considering the success of the ‘RT’ retweet variant on Twitter and the Wikipedian model of governance.

7.3 ‘RT’ retweet prefix

As has been seen through this thesis, the ability to retweet is fundamental to Twitter and very much a part of the ethos of social media more broadly. Individuals are able to press the ‘RETWEET’ button on Twitter now as so as to allow them to retweet automatically. However, this has not always been the case as the ability to retweet developed as a convention of behaviour across the community organically, with the prefix ‘RT’ being used to denote a retweet.

Examining and understanding the emergence and growth of the ‘RT’ retweet prefix allows us to understand the potential success of the model proposed in this thesis. At the core of the model is that the community will develop, proliferate, and enforce

³³³ See Suzor, N., ‘*The Role of the Rule of Law in Virtual Communities*’, Berkley Technology Law Journal, 26(4), Fall, 2010

³³⁴ The interplay between sociology and law, discussed extensively in Chapter Three earlier, is borne out in the model proposed above for the new age of technology we are now in

conventions of behaviour that will govern so as to stamp out defamatory tweets from being posted.

It might be argued that using the analysis of the 'RT' retweet prefix here isn't appropriate because of the differences between it, a convention of behaviour, and the model proposed here, governance of behaviour, and that these differences are too great.

However, a closer examination of the 'RT' prefix leads to the conclusion that there are more similarities than initially perceived. As explored in Chapter Two, there is great social capital in retweeting.³³⁵ There is little value if such behaviour is not seen by others and appreciated as being a retweet.

While in theory individuals can retweet as they wish, in actuality the need for the retweet to be recognised by others as being a retweet, means that they need to adopt a mechanism that is recognised as denoting a retweet. If we lived in an environment in which any individual could denote a retweet by any means they wished, it would be difficult to establish what was and was not a retweet.³³⁶

What has actually happened is that by the community choosing 'RT' to denote a retweet, they have decided that this is the mechanism that ought to be used by individuals on Twitter to denote a retweet. While not everyone has used it, as discussed subsequently, others have used other mechanisms, the vast majority have.

In effect, this is social contract theory, as discussed extensively in Chapter Three, at work. Individuals have agreed to forego their own views on retweeting, and what

³³⁵ For a broader discussion on the role and value of retweeting, see Chapter One.

³³⁶ Zetterberg, H., 'Social Science Theories and the Study of Public Opinion', WAPOR annual meeting in Prague, Czech Republic, 17-19, 2003. The pair discuss different instances in which there are individuals adopting conventions of behaviour that essentially dictating how they ought to behave

mechanism they think ought to be used to denote a retweet, to adopt the same course of action as everyone else, to reap the benefits of retweeting.

There is actually a very subtle form of governance at work here.

It is not as explicit as stating that x behaviour is not acceptable, with conventions being used to deter from it occurring. But, the community is establishing that if you want to receive the value that exists from retweeting, then in order for others to appreciate that you are retweeting, you should use this mechanism of denotation.

While not as explicitly a form of governance, the similarities are sufficient so as to allow the use of the 'RT' mechanism as a case study to establish the success of the model proposed is appropriate.

7.3.1 Emergence

The ability to retweet was developed by Twitter but organically by the community; the 'RETWEET' button was introduced in 2009 by Twitter, but the idea of retweeting emerged from the community in early 2007. Now 'RT' is almost the sole means of individuals referencing a tweet as a retweet but it emerged and proliferated organically across the community, despite the existence of other variants.

The first prefix to denote a retweet was 'via' in March 2007 only twelve months after the launch of Twitter and four months after the first user name reference. It is impossible without speaking to the user to understand why he chose to use the 'via' variation but the likelihood is that he did so because the phrase 'via' is something that can be understood and appreciated by all native English speakers as referring to the fact that the sentiment is from another individual.

There were subsequent developments with ‘HT’, ‘retweet’, ‘retweeting’, ‘R/T’ and the ‘Recycle Icon’ variants all emerging. However, the ‘RT’ variance has become the accepted way of retweeting and denoting a tweet to be a retweet with the first usage of the prefix being ‘RT @breakingNewsOn: LV Fire Department: No major injuries and the fire on the Monte Carlo west wing contained east wing nearly contained’ and as can be seen including ‘RT’ it is exactly 140 characters in length, the limit that a tweet allows.

Variation	Username	Date	Text
Via	@tagami	16/03/2007	@jasonCalacanis (via@kosso) – new Nokia N-Series phones will do Flash, Video and YouTube.
HT	@TravisSeitler	22/10/2007	The Age Project: how old do I look? http://tweetl.com/21b (HT @technosailor)
Retweet	@kevinks	01/11/2007	Retweet: @AHealthyLaugh is in the Boston Globe today, for a stand-up show she’s doing tonight. Add the funny lady on Twitter!
Retweeting	@musicdt	05/01/2008	Retweeting @Bwana: Is anyone streaming live from CES? #ces
RT	@TDavid	25/01/2008	RT @BreakingNewsOn: LV Fire Department: No major injuries and the fire on the Monte Carlo west wing contained east wing nearly contained
R/T	@samflemming	20/06/2008	r/t: @danwei Live Online chat with Chinese President Hu Jintao. He claims he uses net to know netizen concerns.
Recycle Icon	@claynewton	16/09/2008	[recycle icon] @ev of @bizre:twitterkeys [star] http://twurl.nl/fc6trd

Table 24. The first usage of the various Retweet prefixes.

The ‘RT’ variant emerged to become the norm in retweeting, denoting that a tweet was from another user, despite the fact that there were other variants being deployed, and variants that others saw as being more appropriate. While ‘via’ was used because of

its natural English meaning, subsequent Twitter specific variants were developed. 'Via' was not seen as being appropriate any longer and in turn 'Retweet' and 'Retweeting' developed, because they were Twitter specific.

For whatever reason, these variants were seen as not appropriate, likely because they used too many characters, and in turn 'RT' emerged, as was likely the case with the 'Recycle Icon' variant.

The different variations experienced very different patterns of growth. By the end of mid 2009 only two variations, 'RT' and 'via', had achieved widespread usage while the remaining variations continued to add new users but the number of new adopters remained constant and even tailed off.

The Fig. below shows the way in which 'RT' has continued to grow in respect of the number of new adopters in a week during the first three years of Twitter's existence in comparison to the other variations that have declined in respect of the number of new adopters a week from the development of Twitter to the creation of the automatic RETWEET button in late 2009.

The data set is a near complete set of retweet for the almost three year period with all retweets that have occurred. In establishing the usage of the various prefixes we had to make a decision in instances where the extent to which the prefix being used was as a prefix or as a normal tweet. In instances therefore, the dataset included tweets that were not retweets and instead were normal first publication tweets and merely included the prefix in some other semantic context.

In turn therefore this collection of content had to be removed before consideration for this particular analysis of the growth and spread of the various prefix variants. This

has been an essential manual cleaning of the data that has required the removal of data that would considered as being a retweet but in actuality is not.

An analysis of this data set allows for the ability to be able to establish the way in which the various different variations have grown with time over the course of an almost three year period before the introduction of the automatic retweet button. The quantitative analysis allows for an ability to establish the success of the conventions with the results demonstrated in the graph below.

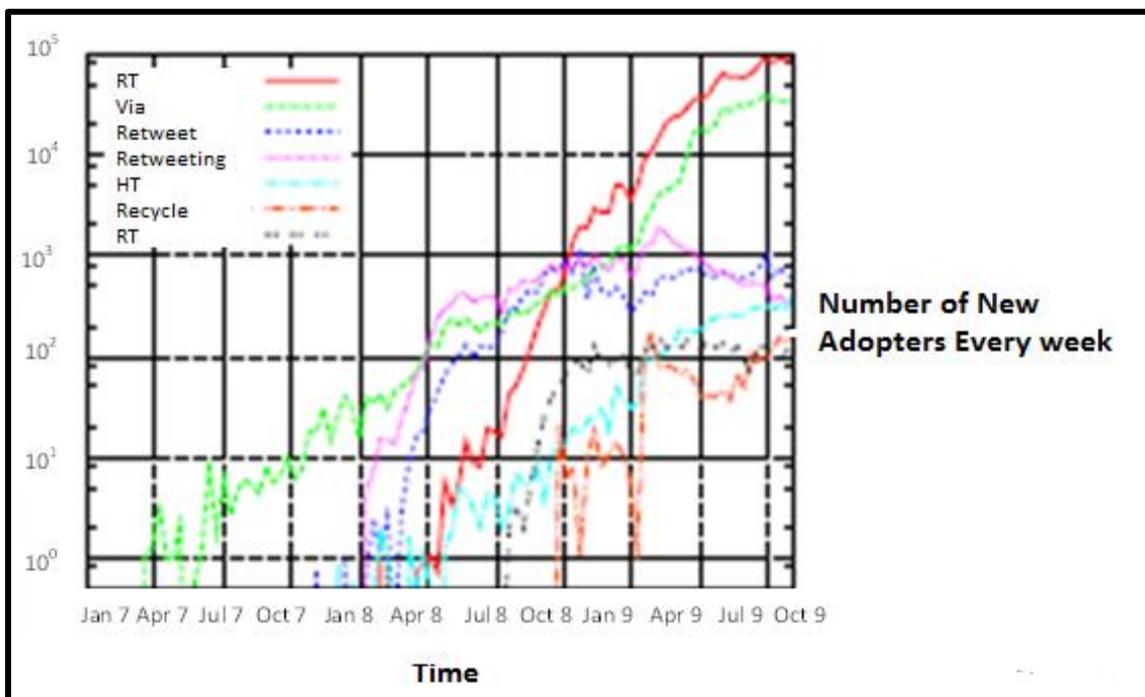


Fig 11. New adopters of variations over time

Variation	# of adopters	% of # of adopters of total	# of retweets
RT	1,836,852	89.2%	53,221,529
Via	751,547	36.5%	5,367,304
Retweeting	50,400	2.44%	296,608
Retweet	36,601	1.78%	110,616
HT	8,346	0.41%	22,657
R/T	5,300	0.26%	28,658
Recycle icon	3,305	0.16%	18,225
Total	2,059,350		59,065,627

Table 25. The number of adopters and retweets adopting the various different retweet variations.

In total there were over two million users adopting a variant; individuals who had adopted numerous would be counted as a new adopters for every prefix they adopted therefore meaning that the actual number of users was below two million, while 59 million of the 1.7 billion tweets contained a retweeting variant. As a result it can be said that there were over three thousand users who used the prefix ‘recycle icon’ and there were over eighteen thousands retweets that did so, while almost two million adopted the ‘RT’ prefix accounting for more than 53 million retweets.

The emergence of other variants suggests that individuals did not at the outset see the ‘RT’ variant as the correct way of behaving, but decided to adopt it, likely appreciating its importance when they were retweeting.³³⁷ ‘Recycle Icon’ emerged 8 months after the ‘RT’ variant, which suggests that even after the development of the

³³⁷ Emergent norm theory makes it clear that individuals in collectives adopt a course of behaviour not because they see that as necessarily because they appreciate that that is the most appropriate or correct for the environment instead because that is the accepted course of behaving; they appreciate that that is the most appropriate way of behaving. Turner built upon Smelser who argued that for a norm to emerge within a community; all members of the community had to individually take on the norm thus allowing it to be a success within the community. See Turner, R., ‘Collective Behaviour’ In ‘Handbook of Modern Sociology’, 382-425, edited by Faris, R., (Rand McNally, Chicago, U.S.A., 1964), Chapter Seven; Smelser, N., ‘The Theory of Collective Behaviour’ (Free Press, New York, U.S.A., 1963).

latter, some users did not feel it was the correct way of denoting a retweet and therefore developed a mechanism of their own.

Individuals adopted the 'RT' variant as the correct course of behaviour not necessarily because they believed it to be right, but because they appreciated it to be the most appropriate course of behaviour, retaining the higher norm of retweeting in mind; they appreciated that failing to do so would be to their detriment as their retweets would not be acknowledged as such.

The 'RT' variant came to be the norm in terms of denoting a retweet. It developed organically by the community. In order to ensure that all retweets were seen as such, and treated accordingly. In an environment in which a norm did not exist, the community defined the norm and refined it until it reached a point at which it was happy with the result. Some individuals developed a mechanism they saw as more correct but it fell away as it was not the norm and proliferated organically across the community.

7.3.2 Proliferation

The success of the 'RT' variant required proliferation across the community so as to ensure adoption by users ahead of other variants. In respect of why it is that a user adopts a particular variant ahead of another; there are three reasons;

- (i) The user was influenced by another that they were following on Twitter,
- (ii) The user was influenced by an external force, or
- (iii) The user independently invented the variant all by themselves.

Adopters in (i) are internal adopters and in (ii) and (iii) as external adopters. Given the temporal ordering of user's adoptions and the direction of following links between them, a network of early adopters is constructed to show how the variant

spread in the early stages. In this particular network, there is a link from user A to user B if and only if (1) user B follows user A and (2) user B adopts the variation after user A. the scope of the diffusion network is such that it represents those instances in which the adoption of the variant was most likely due to exposure through Twitter; where they are internal adopters.

The Fig below is the diffusion network of the first 500 adopters of the 'RT' variation. Of the 500 users, 447 formed a single large connected component, indicating that 'RT' diffused in the network of early adopters.³³⁸ There are four communities created within the larger subset of the 500 first early adopters at work.

An analysis of the relationships between these various nodes allows for an ability to be able to establish how it is that the community individuals have relationships with one another allowing for consideration of the spread of the convention.

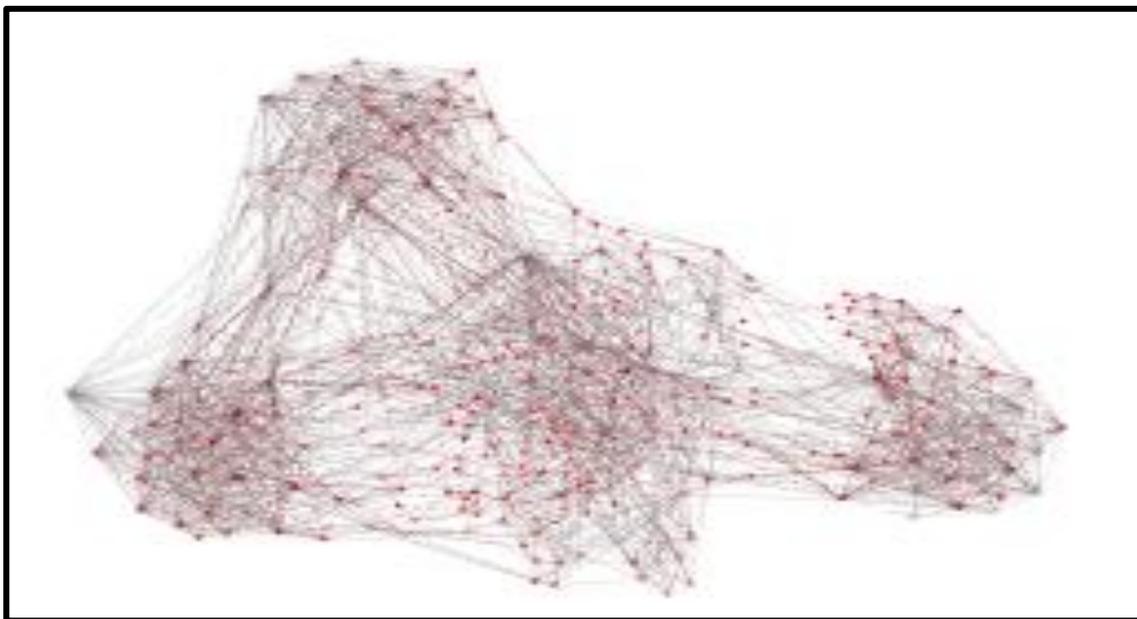


Fig 12. The diffusion network of the first 500 adopters of the 'RT' variation

³³⁸ There 53 users who are not part of the large connected component, 47 of whom are described as singletons. These singletons are in reference to external adopters those being individuals who would have adopted the 'RT' construction through and external locus and not in relation to any other individuals who are using it or would have invented it.

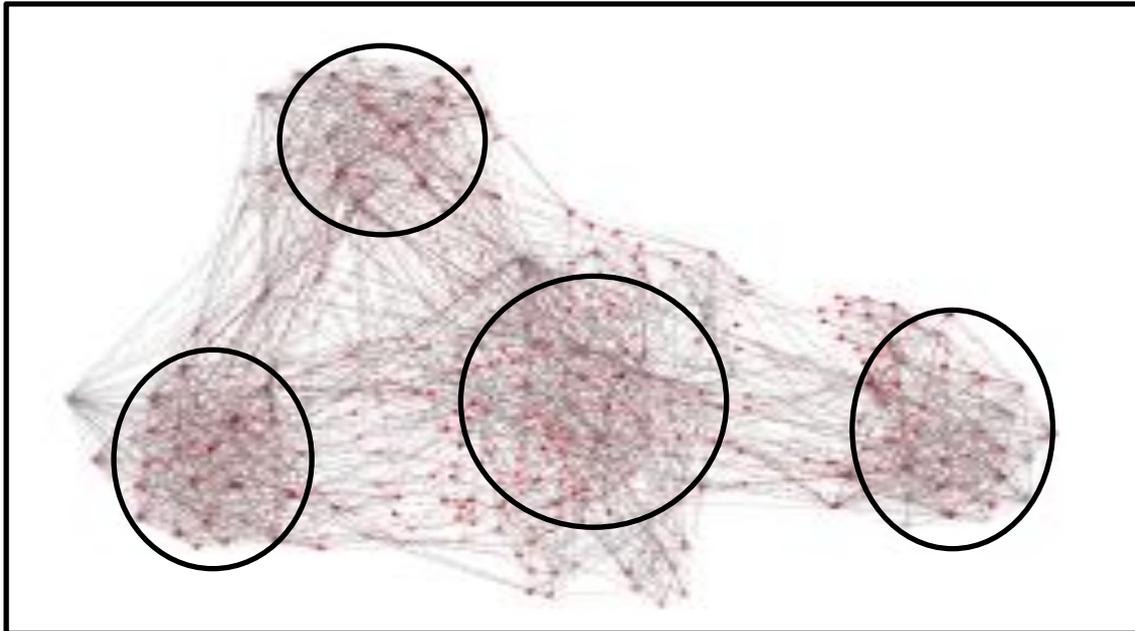


Fig 13. The four distinct diffusion networks within the larger network of the first 500 adopters of the ‘RT’ variation

There are four dense clusters adopters, who have adopted the variant having had it brought to their attention by another user. The result is that acquaintances, and not merely strong ties, played a crucial role in the proliferation of the variant. If there were no weak ties in place within this larger network of 500 adopters, the variant would not have spread beyond, a few closely knit friends and we would likely see that there would be various different variants adopted by different close groups. Adoption therefore is the result of sustained proliferation.

Variation	First 100	First 300	First 500
RT	65%	79%	86%

Table 26. Table of the scope of the first 500 adopters of the ‘RT’ Retweet prefix.

The percentage of early adopters is at 65%, i.e., the first 100 individuals who saw the usage of ‘RT’ adopted and subsequently, the first 300, 79% adopted and finally of the first 500 exposed to the variant 86% adopted it. As users saw the ‘RT’ variants they

decided to adopt it as their method of retweeting, having previously likely used one of the other variants discussed previously.

What this suggests is that having seen the variant and seen others using it, users appreciate it to be the correct course of behaviour and adopt. They may have seen or even developed their own mechanisms, certainly the case with the 'Recycle Icon' developed after the 'RT' variant, but they appreciate the value in acting in a conformist manner with the rest of the community.

There is pressure on others to use the 'RT' variant because they would have realised that any other variant would have their retweet seen and acted on; they would be losing out. Bearing in mind the value in conforming, this is exactly what individuals have done, regardless of their own views and opinions.

If we compare 'RT' with the 'Recycle Icon' we can see that the latter has a high criticality which suggests that should a particular adopter be removed, the number of individuals who had adopted the variant would have fallen significantly been reduced. The criticality higher for the case of the 'Recycle Icon' indicates that should that particular exposure be removed the resulting adopters would not have been exposed to the prefix syntax; should a single individuals be removed, the likelihood of the adopters coming across the variation be greatly reduced. In comparison to this in the case of the 'RT' variation we can see that the criticality is far lower and in turn therefore is a node and s single exposure were to be reduced, it would not greatly reduce the exposure that the adopter had to the 'RT' variation.

The 'RT' variant spread across the community because of its overexposure; individuals were exposed to it so often, by so many others that they simply had to adopt it, regardless of the variant they themselves saw as the best. Granovetter explored how

individuals obtained their jobs and he found that the weak ties, acquaintances that individuals held with others, were more important and more likely to get an individual a job ahead of the strong ties, their close friends.³³⁹

The exposure to the variant by individuals resulted in other individuals adopting it as a course of action despite the fact that they might not have believed in it; the fact that they had been exposed to others adopting it as a course of behaviour, and the value that such resulted in, meant that they adopted it; exposure key to its adoption.

7.3.3 Heterogeneous Community

It is also crucial that the variant proliferated across a non-homogenous community of individuals. The traditional notion is that the more heterogeneous the community, the less appropriate standards, and more law, is; the understanding amongst the community is less siloed resulting in the formalism of law being ideal.

A random sample of five hundred adopters of the 'RT' variation is compared to the first five hundred adopters and the last five hundred adopters of the retweet prefix in respect of their uptake of various different aspects of Twitter; biography, URL, profile picture, different profile theme and location.

The comparative analysis of these three different groups allows for an ability to be able to establish the extent to which there is homogeneity within the community of individuals who have adopted the 'RT' convention. Three groups have been classified as;

³³⁹ He found two types of relationships, weak ties and strong ties, the former acquaintances where the latter are built along the lines of close friendships and that the former were more valuable in findings jobs than the latter. Close friendships that individuals possessed brought to their attention the same jobs as they would have brought to their attention previously and these might not have jobs that they would have gone for. The acquaintance relationships that individuals had, brought to them new job openings, ones that previously would not have been known to them thereby; the majority obtained their jobs through these individuals as opposed to their close friends. See Granovetter, M., 'The Strength of Weak Ties', *American Journal of Sociology*, 78(6), May 1973, 1360-1380; Granovetter, M., 'The Strength of Weak Ties: A Network Theory Revisited' *Sociology Theory*, 1, 1983, 201-233, 220.

- (i) Early adopters, the five hundred first adopters of the ‘RT’ convention,
- (ii) Last five hundred adopters within the sample of five thousand, and
- (iii) ‘The Others’ a random sample of the remaining users who adopted the ‘RT’ convention.

The profile pages were scraped for information, including each user’s biography (a short description of the user posted by the user himself), listing information (a group mechanism that users can control for managing flow links), location, and profile picture and page theme.

A comparative analysis of the three groups allows a conclusion to be reached as to the extent to which there is non-homogeneity across the group and in turn the potential success of the model.

The table below demonstrates the differences between the early adopters, late adopters and the random sample and we can see the differences that exist between the early adopters and the random sample some of which are substantial and others less significant. The early adopters tend to engage more with Twitter as a website than the random sample of users happily displaying pictures, their location, and a biography amongst others.

	Has Bio	Has URL	Has Profile Pic	Changed Profile Theme	Has Location
Early Adopters	94%	85%	99%	91%	95%
Late Adopters	83%	56%	93%	70%	98%
Random Sample	45%	14%	60%	30%	67%

Table 27. Comparison of the uptake of various elements of Twitter by three different groups; earl adopters, late adopters and a random sample

The community of adopters of the 'RT' convention is a community which cannot be said to be homogeneous because simply looking at the distinction between the early adopters of the convention, late adopters and a random sample of adopter; different rates of adoption.

Across all of the categories, there are different rates of engagement and adoption with the early adopters appearing to be far more engaging with the site and its various aspects than the two other data sets. Should there have been perceived homogeneity within the community, the results would have been far closer than the results suggest.

The more granular these sub communities become, the more we will likely see that there are distinction between them that render such communities non-homogeneous in scope. This contention can be seen if we focus in on the one case of the early adopters of 500 and there usage of the biographies that are available on the Twitter site and comparing them to the late adopters and the random sample in the Fig below.

Taking these first 500 we have seen that 94% adopt the usage of biographies which means that of the 500, there were 470 biographies posted on the site with 417 for the late adopters and 225 for the random sample. There were clear differences in the metric of biographies alone. The most prevalent number of characters used was between 81 and 100, just over half of the full number available. While a traditional bell curve existed, there were some individuals who used 0 characters, with five using just one word as their biography including 'happy', 'smiley' and others, while at the other end of the spectrum two users posted biographies that were completely 160 characters.

There are some minor variations whereby the peak for the late adopters is with fewer characters than in the instance of early adopters or random sample and there could be a number of reason for this from it simply being a coincidence to the fact that as later

adopters there is a greater appreciation amongst this group than the early adopters that this range were sufficient for a biography; a good biography did not need to be longer.

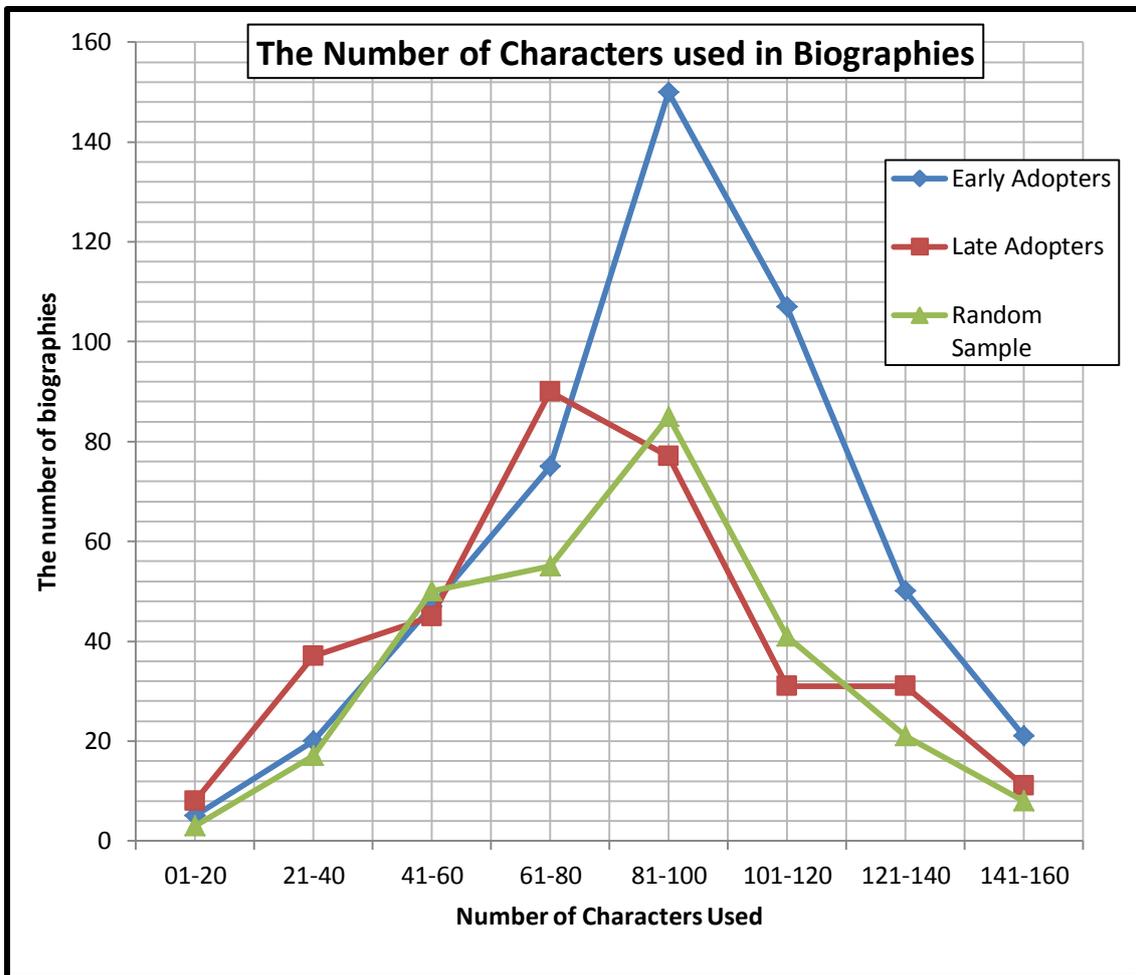


Fig 14. A graph of the number of characters used by three groups in their biographies

The lack of homogeneity across these groups is interesting, and even more is the lack of homogeneity within the groups. One can understand that there would be differences between the Early Adopters and Last Adopters, however, there are granular differences between these different sets.

The ‘RT’ variant spread and became the norm in retweeting on Twitter across a non-homogeneous community successfully. The traditional notion has been that

standards and conventions are viable in homogeneous communities as the lack of formal clarity that rules bring is not fatal as the community has a strong, tacit understanding of the behaviour necessary.

7.3.4 Summary

The model proposed seeks to harness the power of the community by having the community define, proliferate and enforce standards to deter individuals from continuing to not conform to the norm that reputations not be harmed. The above comparative analysis of the 'RT' variant demonstrates the potential success of the model.

The 'RT' variant emerged as the norm in denoting a retweet for the entire community organically, without the assistance of Twitter. The community on Twitter established the variant as the way in which it wanted to denote a retweet as just that. There were other variants, some of which developed after the 'RT' variant, but the community rejected them, choosing 'RT' as the norm. Not all individuals adopted it because they believed it to be the best way to denote a retweet necessarily, but because they appreciated the value and importance of adopting the norm and not nonconforming.

Alongside defining the standards, the community is to enforce the conventions to ensure that compliance occurs which again has occurred in the case of the 'RT' variant on Twitter. There has been complicit enforcement with the social loss to be accrued by individuals for failing to use the variant ahead of using others instead. As individuals have seen other individuals behave in the same way, they have appreciated the need to adopt this as the correct course of behaviour; seeing the course of behaviour shapes individuals behaviour naturally into a single course of action as this as opposed to any other.

Finally, the standards work across the non-homogeneous community of individuals on Twitter which has been the case with the 'RT' variant. An examination of the community of individuals who have adopted the variants reveals the way in which there is an obvious lack of homogeneity in the nature of these individuals in their perceptions of Twitter as a medium and yet they have all decided to adopt the variant; the lack of homogeneity across the community therefore not being fatal to the application of standards across a community.

The result therefore is that the 'RT' variant emerged, proliferated and was enforced across the community with success, and entirely organically. It emerged across a community of non-homogenous individuals on Twitter, without the need for any formalism. It became the established course of behaviour with everyone on Twitter adopting it. The comparative analysis reveals the way in which the model proposed here, one which sees the community develop, proliferate and enforce standards of behaviour could be a success.

This is an evidence of the fact that norms can be imposed on social media successfully. Thinking back to Chapter Three of this thesis, norms are merely a desired course of behaviour and can be imposed through laws or conventions. The preceding analysis demonstrates the development of a desired course of behaviour on Twitter. The fact that this is in respect of something that doesn't appear to seek to prevent behaviour, is both incorrect and immaterial. As explored earlier in this section, the convention of using RT is in fact designed to ensure that there is a single course of behaviour when retweeting and even if such a contention was not true, it would be immaterial, as there is no established reason why the learning from the analysis, cannot be taken on board.

It might be contended that this example is an example of the communal deployment of standards and conventions shaping behaviour for better; societal progression as opposed to the usage of standards to regulate and deter negative behaviour. The case of Wikipedia is a case of the successful deployment of communal standards and conventions to regulate and deter negative behaviour.

7.4 Wikipedian Governance

Wikipedia is an attempt to harness all of the world's knowledge in a single place. It challenges the traditional notion of encyclopaedias as emanating from one individual, as it attempts to harness the knowledge of thousands. The key is that the site is building an objective bank of factual information, with no opinions.

To ensure that the desired aim is being achieved, Wikipedia has developed its own governance structure, with the community of individuals on the site, developing and enforcing the community's standards. These standards address stylistic preferences of written content, right the way through to the references necessary when publishing a remark. The standards have been developed, proliferated and enforced by the same community that contributes to the actual content itself.

The value in this comparative is to the practical way in which the community is able to develop and enforce conventions that are deployed in a microcosm that seeks to prevent negative behaviour. The model is considered by considering the literature in the field along with analysing the few cases that have occurred and structure in place. However, before doing so, it is important to discuss the similarities and differences between Wikipedia and Twitter.

7.4.1 Similarities & Differences between Wikipedia and Twitter

An important difference is that individuals on Wikipedia are working towards the creation of a single, objective bank of knowledge, which is contrast to the case of Twitter.

In theory, there is no place on Wikipedia, for opinions and views. Anything that might be regarded as being an opinion, will be removed. In contrast to this, opinions and views comprise a significant proportion of tweets published.³⁴⁰

There is an argument to be made that user behaviour, has resulted in Twitter becoming a medium for the dissemination of objective content. As discussed in Chapter Two, the site has ‘become the go to place’ for breaking news.³⁴¹ Twitter has become the ‘trusted’ news outlet for many consumers because of the speed with which individuals act and the broader spectrum of individuals reporting via the site, than are available through traditional media outlets.

While there certainly has been a change dictated by users of Twitter as to the kind of content published on the site, it is still fair to say that this is a difference between Twitter and Wikipedia.

A further difference lies in the fact that, in the case of Wikipedia, the community was empowered with governing itself from an early stage. As explored later in this section, early on, the site’s creator, Jimmy Wales, appreciated that the community was best placed to govern itself, because of the volume of content being published.

³⁴⁰ Actually, as explored in Chapter Two, the ability to express one’s own view, and engage in back and forth debate with others, on Twitter is a key driver behind the site’s existence and success.

³⁴¹ There is an extensive debate in Chapter Two on why this is the case. The speed and ease of action are two reasons for the change occurring and individuals seeing Twitter as the go to place for news as it is breaking.

In contrast to this, Twitter in the context of defamation, has been governed by the law of defamation since the site's inception. The model proposed here seeks to impose conventions on an environment that has had the law imposed upon it since its inception. There is nothing to say that the imposition of a new regulatory model on an environment cannot be effective; in fact as discussed at length in Chapter Three, laws and standards are driving towards the same end.

This has led to a third difference which is that there is single set of conventions on Wikipedia, in contrast to the numerous in the model proposed. As the Wikipedia community was empowered from an early stage, it was able to create a single set of conventions and have all contributors, regardless of the topic area, any cultural differences or jurisdiction, adhere to them.

In the model proposed in this thesis, there are standards applicable to the different communities that exist. However, they will all be working towards the same desired end that defamatory tweets be deterred from being published. Furthermore, as discussed earlier, cultural differences, the transjurisdictional nature of individual views or minority views are fatal to the application of the model.

The final key difference is that as Wikipedia is working towards an objective bank of information, establishing any contravention of standards is an objective question of fact. As highlighted throughout this thesis, defamation cannot be considered in an objective manner; arguably it is the most context dependent element of the law in the U.K. Therefore, in theory, the role of the community in acting is 'easier' in the case of Wikipedia than Twitter.

While there are these differences between Wikipedia and Twitter, the key similarity between the pair is that both are virtual communities. As discussed at length

in Chapter Two, the key to communities is that there is a sense of community that all individuals who are members share. There must be membership, influence, fulfilment of needs and a shared emotional connection for any community to be successful.

The requirement of membership is clearly met by the fact that individuals who wish to contribute to Wikipedia have to be members; an explicit membership parameters. In addition to this, there is more tacit membership mechanism as effectively only those that are 'knowledgeable' can add content to the site.³⁴²

This sense of identification is heightened by the creation of contributor communities around particular topics; the development of a small collective of individuals contributing on particular topics. This in effect creates another layer of identification by being a contributor to Wikipedia.

The influence requirement is met by the fact that a contributor, on providing content to the knowledge base, feels they have influence over others.³⁴³ The influence of the community on its members is demonstrated by the fact that the contributors don't want to see the site, and their ability to contribute to it, be taken away from them.

Reagle analysed contributors to Wikipedia and the effect of taking the ability to contribute away from individuals.³⁴⁴ He found that when the threat to remove the right to contribute was posed to individuals by individuals in their community, their

³⁴² To contribute you have to be an expert in a field, with genuine in-depth knowledge that adds value to the existing content in said area; being able to say that you are an individual who contributes to Wikipedia, creates membership.

³⁴³ Lorenzon, M., 'Vandals, Administrators and Sockpuppets, Oh My! An Ethnographic Study of Wikipedia's Handling of Problem Behaviour' *MLA Forum* 5, 2, 2006

³⁴⁴ Reagle, J., 'Do As I do: Leadership in the Wikipedia', 2005

behaviour changed.³⁴⁵ The reaction to the threat of having contributor rights removed highlights the influence held by Wikipedia over its contributors.

Needs are fulfilled as contributors get what they hoped they would do in deciding to contribute to Wikipedia.³⁴⁶ As articulated in Chapter Two, the rewards can be tangible, answers to questions or rewards, or intangible, the sense of satisfaction in knowing you have contributed to someone else. In the case of contributors to Wikipedia, the needs filled are both tangible and intangible.

For some the hope is that by contributing they will be noticed and that having been seen as experts in a field, opportunities to network, to lecture, will be opened up, – which has occurred.³⁴⁷ For others, there is a sense of satisfaction in contributing, in just knowing that they have passed knowledge onto others.³⁴⁸

The final element of defining a community is the need for a shared sense of emotional connection as all communities have a shared story. Individuals who contribute know that they are working towards creating something unique – a single body of knowledge that will last through time.

Historically, with encyclopaedias, we decided that only a few experts would be allowed to disseminate knowledge to the wider population. The vast majority were not allowed to contribute to the knowledge bank. However, the development of the Web 2.0

³⁴⁵ See Lorenzon, M., 'Vandals, Administrators and Sockpuppets, Oh My! An Ethnographic Study of Wikipedia's Handling of Problem Behaviour' MLA Forum 5, 2, 2006

³⁴⁶ See Caldarelli, G., Capocci, A., Buriol, L., Donato, D. Leonardi, D., 'Preferential Attachment in the Growth of Social Networks: The Case of Wikipedia' In the American Physical Society Meeting, March 2006; Lorenzon, M., 'Vandals, Administrators and Sockpuppets, Oh My! An Ethnographic Study of Wikipedia's Handling of Problem Behaviour' MLA Forum 5, 2, 2006

³⁴⁷ See Demartini, G., 'Finding Experts Using Wikipedia', In Workshop of ISWC 2007; Sanger, L., 'The Fate of Expertise after Wikipedia', (Cambridge, Cambridge University Press, 2009)

³⁴⁸ See Caldarelli, G., Capocci, A., Buriol, L., Donato, D. Leonardi, D., 'Preferential Attachment in the Growth of Social Networks: The Case of Wikipedia' In the American Physical Society Meeting, March 2006; Lorenzon, M., 'Vandals, Administrators and Sockpuppets, Oh My! An Ethnographic Study of Wikipedia's Handling of Problem Behaviour' MLA Forum 5, 2, 2006

environment has resulted in the democratisation of the right to contribute to knowledge; in a similar vein to the democratisation of expression discussed throughout this thesis.

The shared story in the case of Wikipedia is the opportunity afforded to all individuals to contribute to the bank of public knowledge for the first time.³⁴⁹ The result is that Wikipedia, just like Twitter is a community, and a virtual community.³⁵⁰

Undoubtedly there are a number of differences between Wikipedia and Twitter and these are acknowledged above. However, there is no need for the two environments to be entirely identical for a comparative analysis to be of value. Moreover, crucially, Wikipedia and Twitter are both virtual communities and it is this similarity between the two that means that considering the Wikipedian model of governance here is appropriate and effective.

7.4.2 Wikipedian Model of Governance

Wikipedia is an online encyclopaedia that any individual can contribute to; the philosophy is that the collective knowledge is greater than that of a single, or small defined group.³⁵¹ Wikipedia is successful because all of its contributors are working towards the same single aim; the creation of a single body of correct, factual piece of content.

³⁴⁹ Remy provides an in-depth analysis of the theory and value of Wikipedia. See Remy, M., *Wikipedia: The Free Encyclopaedia*, Online Information Review, 26(6), 434-460

³⁵⁰ Chapter Two provides an in-depth view of the requirements of a 'virtual community'; it is online, there is a common usage of computer based information technology, communication and interaction are driven by the community and a successful virtual community exists once the community has existed for someone time.

³⁵¹ Gillmor, D., *We the Media: Grassroots: Journalism by the people for the people* (O'Reilly, Cambridge 2004); Reagle, J., *Do As I do: Leadership in the Wikipedia*, 2005; Caldarelli, G., Capocci, A., Buriol, L., Donato, D. Leonardi, D., *Preferential Attachment in the Growth of Social Networks: The Case of Wikipedia* In the American Physical Society Meeting, March 2006; Lorenzon, M., *Vandals, Administrators and Sockpuppets, Oh My! An Ethnographic Study of Wikipedia's Handling of Problem Behaviour* MLA Forum 5, 2, 2006

While there are a number of differences between the Wikipedian model of governance and the one proposed here for Twitter, the key take out is that there are such similarities that the success of Wikipedian model is important to consider.

7.4.2.1 Structure

Wikipedia consists of a tiered structure of different individuals that includes Unregistered, Registered users and Committee members. The former can exert little individual influence in shaping policy and establishing norms but on mass they represent an important part of the context in which day to day operations take place. Registered users are individuals who have signed up to the site, with a broad social power to ensure compliance of content posted.³⁵²

In addition to these groups are the Arbitration Committee that wields considerable power in the community, in addressing disputes between individuals. Committee members are selected through a hybrid of election by their fellow community members and being chosen by Jimmy Wales.

This is an important point of difference between the model proposed here and Wikipedia as there is no equivalent of Jimmy Wales on Twitter. In the case of the model proposed here, at first instance it is the community itself that will decide who ought to be members of its decision making unit, choosing individuals based on their history of behaviour in the community.

Where the Registered users can play various technical roles, there is no comparable in the model proposed in this thesis. Where Registered users can act as administrators, stewards or developers, amongst other things, in the model proposed in

³⁵² Forte, A. & Bruckman, A., '*Scaling Consensus: Increasing Decentralisation in Wikipedia Governance*', GVU Centre, College of Computing, Georgia Institute of Technology. Within the context of Registered Users, there are variances in respect of the behaviour of these individuals, and the roles within that they have adopted.

this thesis. More broadly there are not the layers in the model proposed in this thesis as there are in Wikipedia.

The relatively simple model proposed for Twitter is a deliberate decision to ensure that there is clarity and certainty in the application of the model. As there are different standards for different communities in the Twitter model, having fewer formal roles will make understanding and appreciating the model easier than would otherwise be the case.

This contention is heightened by the fact that in the case of Twitter there is a fluidity of movement that does not exist in the case of Wikipedia. In the case of the latter, individuals who are engaged in contributing are doing so, essentially to one large community; there is no variance within this. In the case of Twitter, individuals are likely to move from one community to another (things that they find interesting are potentially going to change). Therefore a model that has a small collective of explicit actors, is more appropriate.

However, it is important to say that this not to say that there is not a role to be played by all individuals in communities that are not enforcers. While there is not a formal role at this stage, there is the potential that individuals who are engaged in communities, feeling the '*sense of community*' discussed previously, will work in an informal capacity, alongside enforcers, to ensure that the standards of the community are proliferated across the community.

7.4.2.2 Standards

Policy is used to provide individuals with guidance as to what they ought to do on Wikipedia. Policy guidelines, which are on Wikipedia as a wiki, can in theory be altered by anyone, are open to be viewed by all. As well as policy, there are guidelines that

establish strong recommendations for behaviour, content and stylistic convolutions that are not followed as strictly as policy, on Wikipedia but nonetheless are to provide guidance.

One important difference between Wikipedia and the model proposed here, is that in the case of the latter, there is only one set of standards and not multiple as in the case of Wikipedia.

Even though the policies are written down on Wikipedia, they can be edited by any individual. Therefore it might seem as though any given day the policy is going to be different or drastically changed from the previous day, when in fact decision making is a complex process of negotiation and engagement between individuals and therefore this does not occur.³⁵³

The fact that the policy on Wikipedia is not in a constant of flux and change, as it is open to all individuals, and is actually changed on agreement between the community of individuals on Wikipedia is important as this is what is likely to happen in the context of the model proposed here for Twitter. The standards of a community will undoubtedly change as the community as a collective feels that such a change ought to occur to reflect their changes. There is a similarity of standard decision making between the pair here.

7.4.2.3 Wikipedia's Role

Wikipedia's role is to facilitate this communal development and application of standards by providing a platform upon which such can occur with success and allowing the community to regulate itself, assisting in the technical enforcement of punishments.

³⁵³ Ibid.

Wikipedia provides pages on which the standards can be written along with assisting in infrastructure that allows it to enforce punishments as it ought to. When banning is required, Wikipedia makes this possible carrying out the punishment decided by the community.

This will be the case with Twitter in my model. As considered earlier in this thesis, Chapter Six in particular, a pre-publication technical role is not viable in the context of defamation on Twitter. Twitter's role will be to implement banning orders for repeat offenders.

There are different levels of banning that range from an article ban, to a topic ban right the way through a to a site ban depending on the nature of the issue at hand; the number of times the individuals has offended. In 2012, the Arbitration Committee decided that *"Users who have been sanctioned for improper conduct are expected to avoid repeating it should they continue to participate in the project. Failure to do so may lead to the imposition of increasingly severe sanctions."*³⁵⁴

The ever increasing levels of sanctions therefore are developed with the intention that the deterrent run to try and shape behaviour of individuals; deterring individuals from continuing to behave in non-desired ways. Individuals ought to be deterred from behaving in prescribed ways, with the ever increasing punishments to do so. The increasing severity of punishments is developed with the intention that individuals take heed of the first ban and then adopt the correct course of action.

This is the case with the model proposed here as the bans will increase in severity where the individuals continue to flout the standards of acceptability of the community.

³⁵⁴ Motion on recidivism, 15 February 2012. Available at http://en.wikipedia.org/wiki/Wikipedia:Arbitration/Requests/Case/Betacommand_3#Recidivism

7.4.2.4 Enforcement

As with the model proposed here for Twitter, individuals on Wikipedia do not enforce their own views but those of the community. The case of William Connelly on Wikipedia highlights this contention.³⁵⁵

William Connelly was a renowned climatologist who regularly made contributions to the Wikipedia website. He eventually got into a bit of an editing war with an editor on the site over a particular issue being placed up on the site. Connelly had broken the behavioural roles in respect of how individuals were to behave on the site when there was an issue of dispute and therefore when considering the issue, the AC decided that because Connelly had continually altered the various pages and created problems that would only be allowed to alter his age once a day. This however restricted his ability to be able to deal with the issue as the change would last on the page for some time and therefore be seen by persons.

The community however raised the issue as a problem because it essentially meant that Connelly was losing out and in turn therefore the AC were forced to retract what they had done. The community therefore was able to enforce the issue of what was and was not acceptable from a behavioural perspective.

It was remarked that *'Admin are not like police officers. You're not sworn to block people, you're not sworn to carry out things. Nobody is. So if no one does it then it's not something that can be enforced. But more or less this is what happened. And eventually it got lifted because it was said "no one wants to do this and no one thinks it was a good decision"'. And so it ended up being reversed.'*

³⁵⁵ Caldarelli, G., Capocci, A., Buriol, L., Donato, D. Leonardi, D., 'Preferential Attachment in the Growth of Social Networks: The Case of Wikipedia' In the American Physical Society Meeting, March 2006; Lorenzon, M., 'Vandals, Administrators and Sockpuppets, Oh My! An Ethnographic Study of Wikipedia's Handling of Problem Behaviour' MLA Forum 5, 2, 2006

The example is one of many that have seen the community enforce the conventions of behaviour which have been reflective of the community. Attempts to try and unilaterally act by the individuals placed in positions of power of enforcement have not been successful; they have reflected the values of the community, all while bearing in mind the aim of ensuring the development of a single body of complete factual work.

This will also be the case with my model. The enforcers will not be able to act unilaterally in light of their own views as they will be expected to enforce the conventions developed by their community, that are reflective of their community.

7.4.2.5 Summary

Wikipedia's governance model has allowed it to ensure that it does not become a medium for the dissemination of individual opinions; remain working towards its aim of being a single body of collective knowledge. It has deployed a mechanism that consists of its members at its core enforcing standards that they have developed, supported by Wikipedia.

While there are certainly some differences between the Wikipedian model of governance, and the one proposed in this thesis for defamation, most notably the fact that there are a number of policy documents in the Wikipedian model, a number of tiers to governance, the crucial take out is the fact that it, a virtual community, has been able to employ a model based on the community of individuals that have been allowed to take part governing.

7.4.3 Summary

Wikipedia has democratised the right to contribute to knowledge. Traditionally, encyclopaedias, and the right to contribute to them, has been in the hands of few individuals; individuals that we have perceived as being of a particular standing that means they have the right to produce such content.

An examination of the Wikipedian model of governance highlights how Wikipedia, an online community, has successfully allowed the community online to govern through standards developed and enforced by it across its members. The conventions developed are reflective of the community, and are enforced by individuals in the community, chosen because of their history of behaviour.

Penalties escalate where individuals repeatedly fail to adhere to the conventions of the community, as is the case with my model, and as the William Donnelly case highlights, enforcers are not able to cast the community's views aside in favour of their own.

It has harnessed the power of the community so as to not only express itself and contribute to the knowledge bank being developed, but to govern itself accordingly. In some respects the Wikipedian model of governance is unique.

Its governance mechanism has brought together all actors in a somewhat unique manner with different roles being played in a tiered structure, including by the site's creator, with a number of different policy documents and sources to ensure compliance. Its policy page is open to amendment and can be in theory amended by any individual at any time.

However, as explored above, there are fundamental similarities between the model proposed and the Wikipedian model of governance. The Committee in Wikipedia have been chosen because of their history of past behaviour, as the communities will do with the model proposed here. Furthermore, the policy to be followed on Wikipedia is the product of the views of the community on the site, which is core to the model proposed here.

While there are differences between Wikipedia and Twitter, and the Wikipedian model of governance and the model of governance proposed here in respect of Twitter, the crucial point to bear is that both are virtual communities. Fundamentally both consist of communities of individuals who all share a sense of community that binds all of them to want to ensure that their normative aims are being achieved.

And while there are differences in the sites and governance models, it is this key similarity that means that the success of the Wikipedian model of self-governance can in theory be translated to mean that the proposed model in this thesis will in theory be successful.

7.5 The Giggs Case

Having outlined the model in section 7.2 and considered the potential success of the model based on the ‘RT’ retweet convention, section 7.3, and Wikipedian model of governance, section 7.4 it now turns to consider how the model could work in practice by using the *Giggs* case as a case study.

As the facts of the case are outlined in detail in Chapter Five, they won’t be outlined here. In respect of the model proposed in this thesis, the first important point to highlight is that because of the nature of the issue at hand, the destruction of Giggs’s reputation, the particular community is the gossip and conjecture community; known as ‘Community #1’ here.

In this instance, any and all individuals who have tweet or retweet on the *Giggs* case, would have self-selected themselves to be members of ‘Community #1’. All would have made the decision to be members of ‘Community #1’ of their own volition

and agreed to be bound by the standards of ‘Community #1’.³⁵⁶ This would be irrespective of whether they had tweeted on similar kinds of issues in the past, or if this was the first time, or geography.

Articulating the exact composition of the standards of ‘Community #1’ and who the enforcers would be in this instance are beyond the scope of what is achievable here. However, the standards would include, amongst other things; the source and validity of remarks needing to be checked and highlighted, the distinction between adoption and reporting to be clear and the tone needing to be objective.

While it is impossible to articulate who the enforcers would have been in the *Giggs* case, they would be individuals who had met criteria, not limited to but, including:

- Have tweeted for an extensive period of time
- Have tweeted issues in and around gossip and conjecture for some time
- Have not published defamatory content in the past
- While they have published around gossip and conjecture, stories they have published have been known to be true
- When they have published, they have provided sources to demonstrate the credibility of remarks

It is important to highlight that the enforcers in ‘Community #1’ would have to examine every tweet and retweet on the *Giggs* case. There is no doubt that this would not be an easy process and would be very resource intensive at first instance. Any tweet

³⁵⁶ As discussed in section 7.2 of this Chapter, individuals can be, and almost certainly will be, members of numerous communities at the same time and will be expected to adhere to the standards of the different communities.

that mentioned Giggs would have to be examined against the standards of ‘Community #1’ to establish whether it contravened the standards of the community. However, the belief is that as the model works, in time fewer and fewer Twitter users will be nonconforming to the community’s standards and in turn, the requirements on the enforcers will be lessened with time.

As considered in Chapter Five, @unknownj tweeted ‘*So if Ryan Giggs wanted to cover up a hypothetical affair with Big Brother’s Imogen Thomas, would that be a superinjunction or a regular one?*’ Examining the substance of the tweet, the nature of the tweeter, it is clear that he would fall within the remit of ‘Community #1’. The tweeter had only ever published tweets that fell within the gossip category. Previous tweets from the same month included:

‘David Arquette and Courtney Cox officially announce breakup. Cox to speak on issue soon’

‘Zac Efron caught with stripper in nightclub. Dumped by HighSchool girlfriend Vanessa Hudgens’

‘Apparently Marvin from JLS was seen stumbling out of a nightclub at 4am with a woman, not his wife. Naughty lad’

The tweet clearly attacks the character of Giggs and as a result he had self-selected himself to be a member of ‘Community #1’ and to be bound by the standards of the community. Examining the tweet in question, there is no reference to any credible sources to justify such a remark. Furthermore, the tone is such that it is clear that @unknownj is trying to cause damage to Giggs’s reputation, rather than merely reporting such remarks had been made. All of these would be considerations taken on

board by the enforcers of the standards for ‘Community #1’, and lead to the likely conclusion that he had erred from ‘Community #1’ standards.

In terms of establishing the punishment, in this instance, if the model were to be implemented for the first time at the *Giggs* case point, then the first course of action would be to give a warning to @unknownj. A warning would take the guise of a formal written warning communicated to @unknownj informing him that he had contravened the standards of the community, what exactly was inappropriate about his tweet and what further inappropriate behaviour would lead to.

If the model were to be implemented before the *Giggs* case, or if past behaviour could be taken into consideration, given @unknownj’s previous tweets, some of which are outlined above, they may consider that he ought to be banned for a period of time.

Looking at @unknownj’s history, the community enforcers may conclude that the ban ought to be longer than it should be for other actors based on the fact that he had offended repeatedly in the past. Whatever the decision in respect of the ban, the details would be passed onto Twitter to enforce it accordingly.

As explored in Chapter Six, while in the context of defamation, pre-publication sentiment filters would essentially be redundant, and the requirements of the 2013 Act, discussed in Chapter Four, are entirely impractical, the requirements of Twitter in the model proposed here are easy to manage.

@PiersMorgan, who tweeted ‘*Tip to Ryan Giggs – get a new lawyer*’ also self-selected himself to be a member of ‘Community #1’. As with @unknownj, @PiersMorgan also had a history of tweets that would be regarded as being around gossip and conjecture. Examples of his previous tweets in the same month include:

‘David Arquette and Courtney Cox done. She was always too good for that junkie – not idea what she saw in him’

‘Im so fed up like everyone else of HoL nonsense. Yet more MPs screwing over the system – stealing money from the ordinary man it seems’

‘Cant believe Mel Gibson. How did he get away for so long with being a Jew hater!’

As with @unknownj above, ‘Community #1’ enforcers would establish based on the standards of the community, whether @PiersMorgan’s tweet was defamatory. If they concluded based on the community’s standards that it was, they would decide the next course of action. In this case, it may be that they decide that because of @PiersMorgan’s notoriety, the damage done to Giggs’s reputation is so great that the only fair course of action is to allow Giggs legal redress.

As outlined in section 7.2, where the individual is a repeat offender and continues to defame despite bans, or where the damage caused is so grave, the victim ought to be able to seek redress. This may be the case with @PiersMorgan. Giggs would be able to seek redress against @PiersMorgan in the normal way that he currently in theory can through the courts.

Talbot and *Elsbury*, discussed in Chapter Two, have highlighted that where there is a traditional defendant – claimant relationship, the law can work effectively. The view is that this would be viable in this instance of @PiersMorgan.

In such an instance, if the individuals in the community felt that this was the most appropriate course of action, they would pass their view onto Twitter, whose responsibility would be to pass @PiersMorgan’s details, along with details and evidence

of the offence, to Giggs's legal counsel. The intention with the model is not for the creation of a two-tier system in which the rich and famous are held to legal redress and others banning orders.

As explored in Chapter Five, @InjunctionSuper was one of the first individuals who tweeted about Giggs. The community enforcers may therefore conclude, while not necessarily a notorious individual based on past history or number of followers, he ought to be held to legal redress given the impact of his behaviour. Establishing the point at which an issue goes beyond being handled by the community, and ought to be move onto legal redress, will be a matter for the community enforcers to decide.

It may be that the community decides that legal redress is too harsh, or is not the appropriate redress in this case, in which case they may choose a ban.

This may well be the case in the case of @DomJoly. Examining his tweets from the same month, there were none that would lead to the conclusion that he was a member of 'Community #1'. The enforcers may therefore conclude that while a famous individual, with a lot of followers, that a ban or even a written warning would be appropriate.

There were also instances like that of @UtdFanBoy who tweeted '*Apparently #Giggs behind the superinjunction. Lets see how it affects him Sunday at #spurs #mufc*'. @UtdFanBoy, has self-selected himself to be a member of 'Community #1', based on the substantive nature of his tweet.

In turn, @UtdFanBoy would be bound by the standards of the 'Community #1'; having decided to publish a tweet with such content, it would be his responsibility to ensure that he adhered to 'Community #1's standards. However, looking at the

tweeter's history of behaviour on Twitter, it is evident that he has not engaged in gossip and conjecture as @PiersMorgan and @unknownj have. There is a clear focus in @UtdFanBoy's tweets towards English football. Tweets from the same week as the above tweet included:

'#Spurs away this coming weekend. Looks like #Rooney wont be fit in time. real shame playing well recently #mufc'

'Want to see #Hernandez replace #Rooney. Looked good off the bench recently. Deserves chance #mufc'

'Apparently the club are in talks with #BayernMunich for #Robben. Would be a great addition. Addresses the issue of the left side. Others agree? #mufc'

In light of the fact that his previous history of activity is not around gossip and conjecture, the community may conclude that a banning order , as in the cases of @unknownj or @PiersMorgan would not be appropriate and that a warning would be sufficient.³⁵⁷ The warning would be a written formal one and would highlight what was inappropriate about the tweet and further measures that would be adopted should @UtdFanBoy publish standard contravening tweets again.

As the standards are imposed on the community for the first time, there would be a lot of work required to establish appropriate action. Given the sheer number of tweeters and retweeters, at first stage this will be resource intensive and this is an accepted criticism of the model proposed. In this *Giggs* case, there were thousands of tweeters and retweeters and all of the tweets and retweets would have to be examined against the standards of 'Community #1'.

³⁵⁷ This actually may be an instance in which the community decision makers attempt to ban a tweeter may be seen as inappropriate and receive backlash from the rest of the community based on the tweeter's previous history of behaviour.

However, this is to be expected given that this new mechanism is being imposed for the first time. As highlighted in Chapter Three, the period after the application of a new governance mechanism is the most resource intensive; should the mechanism be successful, the volume of behaviour to be monitored is greatly reduced. It is contended that the result of the model will be an increase in conformity, with a reduction in the number of offenders over time, resulting on the requirements of the enforcers being lessened.

In light of the debate on why individuals engage in gossip in Chapter Two, and the actual offenders in *Giggs*, considered in Chapter Five, the vast majority of offenders, are like @UtdFanBoy. They are individuals who do not act out of malice like @unknownj, and whose behaviour can be corrected through warnings and short bans. The likes of @unknownj would be addressed through the law, which as *Talbot* and *Elsbury* have demonstrated can be effective in traditional defamatory instances.

Furthermore, while the model would be very resource intensive at first instance, it crucially is able to do what the law is not; it is able to reach all tweeters and retweeters and hold them to account where this ought to occur. As Chapter Five demonstrated, *Giggs* was not able to seek redress because the existing mechanism in the law of defamation could not be applied to all individuals.

The model proposed here, as highlighted briefly above, can hold all tweeters and retweeters in *Giggs* to account. The contention is that where these individuals can now be reached, appreciating that their behaviour is not appropriate, they will change their behaviour and comply with the norm as established in society.

It is plainly clear from this thesis, that the current mechanism is not appropriate in the context of Twitter, because it cannot operate as an effective deterrence to

nonconformist behaviour. The sheer volume and speed of actors is something that the law is not prepared for. Against this backdrop the model proposed here, would work more effectively to address instances like *Giggs*.

7.6 Conclusion

The current mechanism to prevent defamatory publications is not effective in the new environment of Twitter; the law was developed for an environment we no longer find ourselves in. The current legal framework in place was developed for the press industry, as discussed at length in Chapter Four, and despite some amendments in more recent time, the social media environment is one that is entirely unique; there is still much bewilderment as to how it can be governed.

Twitter has democratised expression resulting in thousands of tweeters and retweeters acting in an instant, posting, as well as other content, defamatory content. The law was developed to address the behaviour of tabloid journalists; few individuals, acting relatively slowly.

An analysis of the provisions of primary and secondary liability against the cases of *Giggs* and *McAlpine* reveal that the law is not is not effective. There is a lack of clarity and certainty in the application of the provisions that means the deterrents are not effective resulting in the failure of the current mechanism.

With the failing of the law, this thesis proposes a model built on the community developing, proliferating and enforcing standards of behaviour, with the law supplementing for rare instances. A self-regulatory mechanism would exist supplemented by Twitter to ban individuals for varying lengths of time depending on their behaviour. And the comparative analyses of the 'RT' variant on Twitter and

Wikipedian model of governance proves the hypothetical success of the model proposed here.

The 'RT' variant was chosen by the community organically ahead of other variants and adopted as the correct course of denoting a retweet for the progression of the community. It proliferated across the community organically and was adopted as individuals saw the value in adopting it, ahead of others they were using at the time. Individuals were exposed to the variant by so many others in the community that they realised the importance of adopting it, despite personal views on what might be the right approach. It spread across a non-homogeneous community of individuals which is a crucial argument against conventions on the Web generally and again this has occurred in the 'RT' variant.

An analysis across various different adopters of the variant reveals the way in which these individuals are different in nature from one another in terms of their engagement with Twitter; the way they behave, the kinds of content they post, how they engage and yet all have adopted the same variant.

The case of Wikipedia is demonstrative of the way in which conventions and standards developed and enforced by the community are viable in regulating a course of behaviour to ensuring that a particular desired norm is achievable. The community of Wikipedians develops its own exact standards of behaviour and enforces it through the community, with the conventions reflective of the community and not the individuals within the community. Rather than a single, central body developing and enforcing rules to ensure compliance, Wikipedia has harnessed the power of the collective to regulate as well as contribute.

The result is that there are already successful instances of standards and conventions being deployed on the Web in characteristics very similar to that of Twitter here which suggest the model proposed here could be successful in theory. Both are reflective of the way in which the community, central to the Web 2.0 environment, can be harnessed not just for creation and progression but regulation and governance.

Expression has been revolutionised and we now seek to harness the power of the collective in its creation and yet the current mechanism in place to govern does not. It seeks to use a single, distant body to enforce rules. Well such an approach simply no longer is viable as this thesis has demonstrated. The model proposed here seeks to harness the power of the same collective that is encouraged to create to regulate themselves.

Chapter Eight: Conclusions

The research question at the heart of this thesis is: Can the current mechanism remain effective in protecting protect reputations from harm in the new environment of expression at the heart of which is Twitter? And the answer is simply no.

It is no longer an appropriate mechanism to protect reputations with the development of Twitter.

A mechanism built on the communities of individuals on Twitter developing, and enforcing their own standards, with Twitter and the law, playing a supplementary role is appropriate and viable. This mechanism is one which would serve to harness the power of the collective on the Web to govern itself.

The law as it is simply is not able to deter individuals effectively because there is no clarity, no enforceability. There are too many individuals tweeting and retweeting defamatory tweets, resulting in enforcement proving impossible; all individuals who have caused damage to the subject of the remarks ought to be held to account, and are not.

There has been a revolution in expression and yet a mechanism, the law, built over two hundred years ago, for an entirely different environment, the tabloid newspaper industry, remains in position to the present day. But it simply does not work. Chapters Five and Six explored the way in which the provisions of primary and secondary liability of the law of defamation are not effective in the context of tweets and retweets from the cases of *Giggs* and *McAlpine*.

Subjects of remarks will seek redress against the tweeters and retweeters first. As a result Chapter Five considered the extent to which the provisions of tweeter and

retweeter liability are effective in the context of retweets and tweets, with the *Giggs* case.

Chapter Five considered the liability on the original tweeters and retweeters in the *Giggs* case, taken as a case study, with more than 90,000 tweeting and retweeting. The liability on retweeters is dependent on whether the retweet is an adoption or repudiation of the original tweet, with the law erring on the side of the former. Analysis of the 'RT' retweets from four users, @PiersMorgan, @domjoly, @InjunctionSuper and @unknownj, reveals the way in which establishing whether it is an adoption or repudiation is almost impossible.

In the majority of instances retweets contain no additional sentiment and as a result, the law would err on the side of the retweet adopting the sentiment. The only way of making a more conclusive decision would be to have a greater contextual understanding of the individual. Even in instances in which there is additional sentiment, the sentiment in the vast majority of cases is not sufficient enough to draw conclusion as to intentions behind behaviour.

Original tweeters are held to account on the basis of a three part test; was the sting of the original publication retained in subsequent republications, was the original publisher referenced in the second publication and was there an invitation to republish on the part of the original publisher.

All three of these provisions were considered against original tweets that were subsequent retweeted by @PiersMorgan, @domjoly, @InjunctionSuper and @unknownj all of whom tweeted about the *Giggs* case. Again an examination of the provisions against behaviour reveals a lack of satisfaction in the law, with a lack of certainty in application of the provisions.

The sting of the libel being retained is a matter of contextual examination as in the majority of instances the retweet was simply a complete, verbatim copy of the text of the original tweet, with no changes. In these instances therefore the natural conclusion reached is that there has been the adoption of the sting but there is not the ability to make a conclusion above that.

In the majority of instances, reference is made to the original tweeter, by the retweeter. However, there were instances in which such a reference did not exist. In the case of @InjunctionSuper there were a significant number of individuals who had tweeted the exact same string without making reference to @InjunctionSuper.

In the case of @InjunctionSuper this lack of reference in these few cases would not be fatal but it would have been for @unknownj. In this instance there were only two retweets that referenced @unknownj, however far more that ought to but did not; instances in which he should have been referenced for the liability on @unknownj to be clearly established. The result is that there are clearly many instances in which reference ought to be made but is not and it is not easy to establish the extent to which this has not occurred, especially as it is a crucial element of establishing liability.

The final element is whether or not there was an invitation to retweet. This is determined with reference to the individual posting the tweet and the subject of the tweet. In the case of @PiersMorgan and @domjoly, the notoriety of the individuals alongside the notoriety of the content, would be said to be the reason why the invitation to retweet would be said to have been established. The fact that @InjunctionSuper was retweeted so often would suggest the content was key as this was an individual that no one knew about; not a celebrity at all online. However @unknownj was not retweeted

on mass at all despite the same content, which would suggest notoriety of person is key however this was not the case of @InjunctionSuper.

As with retweeter liability, there is no clarity in the application of the provisions. It is clear that there needs to be a greater understanding of the contextual environment surrounding the publication; the sheer limitation in characters means that only so much can be garnered from 140 characters, especially where there are so many actors involved. In the case of tabloid publications, there were few and the context around the publications rich making reaching conclusions on the above viable.

Having been unable to obtain redress against the primary actors involved, the subject of the remarks would seek redress from Twitter as secondarily liable for its part in the publication of defamatory tweets.

Twitter will prima facie be held liable with it having to establish the application of Reg 19 of the Electronic Commerce Regulations 2002 to evade liability; it removed the content on gaining knowledge of its existence.

eBay v L'Oréal saw the ECJ provide guidance on the issue where the court concluded that eBay could not use the provisions as it had acted in an active capacity by choosing keywords for advertising counterfeit goods that it ought to have known were being promoted under the site, and under the advertising it had chosen. It continued that if it had not, eBay would have been held accountable as it failed to exercise constructive knowledge to remove the content; it had a socio-technical relationship with rights' holders that meant it ought to have known of the existence of the material.

The trending topics might be considered as most analogous to the advertising on eBay as they are designed to entice individuals to engaging by promoting content from

the site. However, Twitter does not play an active role as eBay did, as its trending topics are not chosen by it deliberately, instead the composition determined by an algorithm. The analysis of a month's #hashtags reveals that Twitter cannot control what is trended as it would promote #hashtags that it thought would engage more individuals and avoid those that could be contentious.

Having examined a corpus of trending #hashtags over the course of a one month period, '#ArabSpring' did not trend while '#McAlpine' did. This occurred, despite '#ArabSpring' being the most used #hashtag because it did not spike in popularity during the time considered, it had already spiked, and instead, there were a constant number of tweets during the month that used the #hashtag, as opposed to '#McAlpine' which did spike around the time of the revelations being made. Had Twitter controlled the trending #hashtags, playing an active role akin to eBay's it would have promoted '#ArabSpring' at the expense of '#McAlpine'.

Thus where eBay played an active role in promoting unlawful content, Twitter cannot be said to do the same. There is also no way of knowing the nature of the tweets that amalgamate under the trending #hashtag. In many instances the semantic context of the tweets will likely be relatively clear, however, in others this was not the case and the primary sentiment impossible to establish.

Having not played an active role in promoting defamatory content, Twitter also does not possess the same socio-technical relationship as eBay did. eBay's VeRO Programme allowed it to monitor the posting of counterfeit goods, made possible by the fact that there are a limited number of potential victims of counterfeit goods sales.

There are not a defined collection of individuals who have been the subject of defamatory remarks being posted about them on Twitter. *McAlpine, Elsbury and Brick*

have been instances of individuals who would not ordinarily be considered as the kinds of individuals who would have been the subject of remarks, being the subject. The key issue with defamation is that any individual may be the subject of defamatory remarks, not limited to a particular collective of individuals that could allow you to try and develop a proactive mechanism to address such behaviour.

At the same time, analysis of the *McAlpine* case reveals the way in which proactive sentiment analysis filters would not be successful; the mere existence of particular words does not in itself render the tweet defamatory. In this instance, consideration of tweets, in particular words that contained the words ‘paedophile’ and ‘McAlpine’ revealed the way in which not every instance of such a tweet was defamatory; the context behind the remarks revealed individuals who were supporting McAlpine are stating that he ought not to be called as much.

Any attempt at trying to develop such a mechanism that could proactively prevent particular words or phrases from being published, as they might be defamatory would simply be a brazen invasion of the right to expression and against the notion of the Web 2.0 environment.

The existing mechanism, the law of defamation, is not appropriate in the context of Twitter. There is no clarity and certainty in the application of the provisions, and therefore it cannot function as an effective deterrent. It is crucial that the deterrent is enforceable as it is this enforceability that means that all individuals adhere to the norm, rather than behaving in a nonconformist manner.

The lack of enforceability stems from the fact that the law of defamation was developed to address the behaviour of tabloid journalism after the Industrial Revolution, considered in Chapter Four.

The Industrial Revolution saw the development of technology that made it possible to print thousands of pages of content in an instant. At the same time, society had progressed culturally to such a state that more individuals in society were able to read. Therefore there was the development of a new class of reader wanting entertainment based content.

The result was the development of tabloid journalists, deliberately publishing defamatory stories, not trying to cause damage to the subject but merely trying to outsell others. This coincided with the development of reputation as something within its own right to be protected, the protection of which had value. Where previously actions had been available to maintain peace in local communities, and what would be regarded as being defamatory was all encompassing, individuals could now specifically bring actions to protect reputations. Reputations were if nothing else, the product of hard work and therefore worth protecting.

An examination of the provisions of the law of defamation makes it evident that it was developed specifically for the newspaper industry. Unlike any other tort, the law of defamation has exemplary damages awarded to claimants on top of merely giving individuals damages that restore them to the position as though the event had never happened. The multiple publication rule along with liabilities for republications have been developed to deter publishers from acting in such a capacity given that multiple liability could accrue for damage done.

The same law of defamation has been applied to instances of online defamation as it has been to instances of offline with the reason being that in actuality the Web 1.0 environment provided little different; the power of expression remained in the hands of relatively few. The development of the Web, Web 1.0 environment, resulted in content

being available to a greater extent both in time, archived, and space, as publications could reach more individuals than purely paper copies could. However, expression remained in the hands of few.

Instances of *Berezovsky*, *Loutchasnksy* and others are reflective of the fact for the best part the same publishers were publishing online as offline and therefore the law of defamation viable.

Even the subsequent 2013 Act and the changes that it has made, have not considered the new environment presented by Twitter. The most notable changes in the form of the serious harm provision, the change to a single publication rule and the change on the requirements of Twitter, do not provide any clarity or certainty in the context of Twitter and defamation. Once again, the volume of actors, and the speed of action render the provisions redundant.

The law of defamation was developed because there were some in society, tabloid publishers that were not conforming to the established norm that reputations not be harmed. Norms are ideals of how collectives ought to behave to ensure the success of the collective, necessary for the collective to function effectively, considered in Chapter Three.

In the case of reputations, society has agreed that reputations not be harmed; a social contract had been developed, but the nonconforming tabloid publishers decided that they would not adhere and in turn a mechanism necessary to curb such behaviour.

The law of defamation was the mechanism chosen in light of the nature of the community, with a central governance mechanism controlling from the outside. Self-regulation in the form of the PCC failed because of conflicts of interest. The failings of

self-regulation, alongside the need to ensure a strong financial penalty, given the motivations of newspapers, resulted in the regulatory approach of law being the mechanism to protect reputations.

However, as explored in Chapter Two, Twitter has democratised expression; it is the most importance change in expression since the Industrial Revolution. Now any individual is able to express himself, in public, in writing for the first time. Twitter allows individuals to publish content instantaneously without to a potentially huge audience, with the ability to search for and retweet content meaning that individuals are able to publish content on things that might not have been of interest to them at the outset.

While much good has resulted, so too have the likes *Giggs* and *McAlpine*, where individuals have had their reputations destroyed. Where the law fails, the model proposed in this thesis will succeed as it harnesses the power of the community to self-govern.

It is often the case, that where an environment evolves, the most appropriate mechanism to ensure that the desired course of behaviour is worked towards, is self-regulation of the environment. And this is the case in this instance.

Expression has evolved with the mechanism of governance needing to shift from regulation to a mechanism predicated upon the community self-governing.

The communities will define, proliferate and enforce standards to address nonconformist behaviour; the same power that has been granted to individuals to express themselves is harnessed to govern themselves. Twitter plays a supplementary

role to ban individuals in accordance with the decisions of the communities, with the law playing a role.

The model will be successful based on the comparative analyses of the successes of the 'RT' variant on Twitter and Wikipedian model of governance.

The 'RT' variant developed despite the fact that other retweet prefixes were used before it was developed and others after 'RT' was developed. The fact that it emerged in the face of others suggests it became the single normative way of behaving and denoting a tweet as a retweet. The 'Recycle Icon' emerged after the 'RT' variant and despite some adopting it, it quickly slipped away, as did all other variants.

It proliferated across a community of non-homogeneous community of individuals on Twitter. An examination of the individuals reveals the way in which it existed across individuals who are distinct from one another; they are not all the same. The variant was able to spread because individuals saw the variant from a number of individuals on Twitter and therefore it became accepted as the correct course of behaviour for all persons on the site. An analysis of the relational links between the early adopters, the first 500, makes it clear that the variant came to the attention of individuals, and was adopted because of mass appreciation for its existence.

The fact that all individuals had seen the variant from individuals repeatedly meant that it became the accepted course of behaviour by individuals on Twitter. It was not that all individuals believed it to be the correct way of denoting a retweet or the best, but that they saw others behaving in a single way and appreciated the loss they would accrue should they fail to behave in the same way; should they act in a nonconformist manner.

The retweet variant developed, proliferated to become the accepted norm in denoting a retweet, essentially shaping behaviour to a desired course across the community entirely organically without any formal rule or law but as a standard of behaviour. The Wikipedian model of governance sees the community defining, proliferating and enforcing its own standards to ensure that those individuals contributing to the site are adhering to the norm, trying to ensure that the overarching aim is achieved.

Wikipedia has democratised knowledge, in a similar vein, to the way in which Twitter has democratised expression. Rather than knowledge emanating from a few entitled individuals, anyone can contribute.

Wikipedia has a model that sees the community of contributor self-govern to ensure that the norms of the community are complied with and that individuals do not behave in a nonconformist manner. Rather than employ a regulatory approach, with an external body ensuring compliance, Wikipedia has taken to harnessing the power of the collective that contributes the content of the site, to govern.

In both instances there have been the successful development, proliferation and enforcement of standards dictating behaving towards ensuring a particular desired course of behaviour. The success in these cases supports the contention that the model proposed in this thesis could be successful.

We simply cannot allow reputations to be attacked without recourse. The sheer volume of actors in these instances means that nothing has and can be done to prevent such behaviour from occurring as has happened in *Giggs* and *McAlpine*. **The existing mechanism of fails for a lack of enforceability.**

There has been a revolution in expression at the forefront of which is Twitter. And it is evident that we cannot continue to rely on the current archaic mechanism to ensure reputations do not continue to be destroyed. Failing to act, failing to engage the collective to self-govern, will simply see more instances of *Giggs* and *McAlpine* and one of the most basic and important human values eroded.

8.1 Further Work

Although the results presented here demonstrated the lack of effectiveness of the current model and proposes a new approach, it could be further developed in a number of ways.

Considering the practical implementation of the Community

The viability of the model proposed has been done so from a theoretical, comparative perspective, considering the success of the 'RT' retweet across Twitter and the Wikipedian model of governance. It is evident from a theoretical perspective the model is viable especially in light of the failures of the current mechanism. One of the keys to the model is the ability of the community to establish and enforce their standards.

As a result, establishing the practical success of this element of the model is crucial. This could be considered by taking a section of the community on Twitter and then allowing them to develop standards, along with individuals in positions of power. Developing this small test community would allow for a better appreciation of the extent to which, the model would be viable in practice

Considering the practical success of the role of Twitter

Twitter plays a crucial in the model as it retroactively enforces bans, without it the model would fail for being effective. There simply would not be the ability for a deterrent and we would be in the same position as currently is the case. It is therefore crucial to check the extent to which Twitter is able to act and ban individuals as required.

As a result, we would need to test the extent to which Twitter could effectively ban individuals, for varying lengths of time. Twitter has and continues to ban individuals who have posted unlawful content, unlawful for other reasons, retroactively, most often because they have posted unlawful links to content. As a result, it is something within itself it is known that Twitter could do.

Application to other social media platforms

This thesis has considered the role of the law of defamation in the context of Twitter only. However, many of the key features on Twitter that have been considered here, the ability to republish and search for content through archived postings, is applicable to other social media platforms. Individuals are able to republish post from others on Facebook, while you can search for content posted by others because it has been archived by the internal mechanism of the site.

The ability to republish and search for content are fundamental to the Web 2.0 environment and as a result at the core of social media platforms generally and not just Twitter. This is important as it means that the issue highlighted in this thesis is applicable to other social media forms; if Twitter were to cease to exist tomorrow; the issues highlighted in this thesis would still be appropriate to be considered moving forward.

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