

**Topic:** Should the law on defamation regarding the liability of internet intermediaries be reformed in Hong Kong? If so, why and how? If not, why not?

## **1. Introduction**

The rapid development of technology has posed challenges for the common law. The intersection between the law of defamation and the internet is a good example: the prominence of the internet and its various functions, such as online discussion forums, social media and search engines, have greatly facilitated the exchange of information and ideas, but also created new ways in which reputation can be damaged. The common law of defamation, which is concerned with the protection of reputation, has faced difficulty in adapting and responding to the legal issues relating to internet intermediaries' liability.

This essay argues that the law on the defamatory liability of internet intermediaries in Hong Kong is outdated and problematic and calls for statutory reform. The first section reviews the current law in Hong Kong, focusing on notable case law concerning online discussion forums and search engines. The second section explains its conceptual complexities and practical problems. The third section reviews relevant statutory provisions in other jurisdictions. Drawing on these discussions, the final section offers recommendations for reform.

## **2. Defamation and Liability of Internet Intermediaries**

The tort of defamation protects reputation by imposing liability for the publication of defamatory statement that refers to the claimant. The element of “publication” is “a fundamental constituent of the tort”<sup>1</sup> and lies at the heart of cases involving internet intermediaries.

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<sup>1</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 (*Fevaworks*), [16].

The traditional position at common law is embodied in the “strict publication rule”, which holds a person strictly liable if he intentionally assisted or participated in the process of conveying the words bearing the defamatory meaning to a third party.<sup>2</sup> Such a rule captures a vast scope of activities,<sup>3</sup> without regard to the degree of knowledge and responsibility of any particular defendant,<sup>4</sup> sometimes leading to harsh results.

To mitigate the harshness of this rule, the defence of innocent dissemination emerged at common law. It protects the defendant from liability if he establishes that (1) he had no knowledge of the libel contained in the work disseminated by him; (2) there was nothing in the circumstances which ought to have led him to suppose that it contained the libel; and (3) his lack of knowledge was not by any negligence on his part.<sup>5</sup> However, this defence is only available to a person who is “not the printer or the first or main publisher” but has only taken “a subordinate part in disseminating it”,<sup>6</sup> which later came to be known as a “subordinate publisher” or “innocent disseminator”.

How are the traditional legal principles applied to modern defamation cases involving internet intermediaries? The first point to note is the *Duke of Brunswick*<sup>7</sup> rule of multiple publication, i.e. each publication of the defamatory material creates a separate cause of action. It has been held to be applicable in the internet context, such that each time the material is accessed on the internet constitutes “publication” which potentially gives rise to a cause of action.<sup>8</sup>

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<sup>2</sup> Ibid, [19].

<sup>3</sup> See *Crookes v Newton* [2011] 3 SCR 269, [18]-[19].

<sup>4</sup> *Fevaworks* (n 1), [19]-[22].

<sup>5</sup> *Emmens v Pottle* (1886) 16 QBD 354, 357-358; *Vizetelly v Mudie’s Select Library* [1900] 2 QB 170, 180.

<sup>6</sup> *Vizetelly* (n 6), 180.

<sup>7</sup> *Duke of Brunswick v Harmer* (1849) 14 QB 185.

<sup>8</sup> *Godfrey v Demon Internet Ltd* [2001] QB 201, [33]; *Loutchansky v Times Newspapers Ltd* [2002] QB 783, [57]-[59].

As to the defamatory liability of internet intermediaries, the leading case in Hong Kong is the *Fevaworks* case, which involved three defamatory postings on the online discussion forum operated by the respondents, two of which were removed within hours upon complaint or discovery.<sup>9</sup> The CFA found the crucial issue to be whether the respondents are subordinate publisher (as opposed to main publishers) entitled to rely on the innocent dissemination defence.<sup>10</sup> Two criteria were formulated to identify a main publisher: (a) he knows or can easily acquire knowledge of the content of the article published (“the knowledge criterion”); (b) he has a realistic ability to control publication of such content (“the control criterion”).<sup>11</sup>

Applying these criteria, the respondents were found to be subordinate publishers, being unaware and lacking realistic means of acquiring knowledge or exercising editorial control over the offensive postings given the large volume of traffic on their forum.<sup>12</sup> Once they became aware, they took reasonable steps to remove the postings promptly, hence the defence of innocent dissemination was made good both before and after receiving notice.<sup>13</sup> This approach (though not the practical outcome) on post-notification liability somewhat diverged from the English Court of Appeal in *Tamiz v Google Inc*,<sup>14</sup> which instead relied on the “notice-board” line of cases<sup>15</sup> and held that if the blog platform allows defamatory material to remain after being

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<sup>9</sup> *Fevaworks* (n 1), [6]-[9]. The remaining statement was removed more than eight months after a complaint is received, for which the trial judge found the respondents liable and awarded damages of HK\$100,000: [2011] HKCFI 132 (not challenged on appeal).

<sup>10</sup> *Ibid*, [52].

<sup>11</sup> *Ibid*, [76].

<sup>12</sup> *Ibid*, [89].

<sup>13</sup> *Ibid*, [102]-[103].

<sup>14</sup> [2013] 1 WLR 2151.

<sup>15</sup> *Byrne v Deane* [1937] 1 KB 818; *Isabelle Hellar v Joe Bianco* (1952) 244 P 2d 757; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports §81-127. The CFA declined to apply this line of cases, treating them as relevant to the issue of whether the defendant constitutes a “publisher” rather than a facet of the innocent dissemination defence: see *Fevaworks* (n 1), [46]-[52].

notified, it might be inferred to have made itself responsible for the continued presence of that material and thereby become liable as a publisher.<sup>16</sup>

Another case of interest is *Albert Yeung v Google Inc*,<sup>17</sup> which concerns allegedly defamatory suggestions generated by the Autocomplete and Related Search functions on Google's search engine. The court found there to be a good arguable case that the search suggestions have been published by Google as a "publisher". Google has actively participated in or facilitated the publication since the algorithms generating the search suggestions were created and operated as intended by Google, despite their automated nature and lack of human input.<sup>18</sup>

### **3. Problems with the Current Law**

The following section discusses various problems associated with the current law stated above. Broadly speaking, the first two relate to conceptual and doctrinal issues, while the final focuses on its practical implications.

#### **3.1 Outdated and Unwarranted Premise**

The common law of defamation in its modern form stretches back to the 16<sup>th</sup> and 17<sup>th</sup> centuries. For the most part, its principles were developed within the context of the print medium such as newspapers and books, which involves a "one-to-many" model of communication. Unsurprisingly, it is ill-equipped to cope with the legal issues raised in the internet era, which, as acknowledged by Ribeiro PJ, features "a qualitatively different process, characterised by open, interactive, 'many-to-many' communications made and accessed on platforms provided by internet

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<sup>16</sup> See discussion by Mr Justice Robert Ribeiro (writing extra-judicially), who wrote the *Fevaworks* leading judgment, in 'Defamation and Internet Intermediaries' (Obligations VII Conference, University of Hong Kong, July 2014).

<sup>17</sup> *Dr Yeung Sau Shing Albert v Google Inc* [2014] 4 HKLRD 493 ('*Albert Yeung*'), leave to appeal granted: [2015] 1 HKLRD 26.

<sup>18</sup> *Albert Yeung* (n 17), [103].

intermediaries”.<sup>19</sup> The difficulties in applying traditional concepts to “new intermediaries” will be further explained later.

Firstly, however, we must scrutinize the starting point in defamation law which involves an extremely broad definition of “publication” and the strict liability rule. Given the different social context, particularly the advent of free expression and flow of information in modern democratic society, one must wonder whether it is justified or acceptable for these centuries-old principles developed at very different times to remain. The notions of fault and wrongdoing lie at the heart of tort law, but the strict publication rule *prima facie* imposes liability in the absence of blameworthiness.<sup>20</sup> Why should internet intermediaries be liable even when they did not and could not reasonably have known, let alone intend, publication? As one commentator stated, “[n]ot every act of dissemination can or should lead to liability for publishing defamatory matter. There have to be limits to liability for publication.”<sup>21</sup>

Such limits, of course, are provided by defences like innocent dissemination. What, then, is left of the traditional “starting point”? With no compelling normative justification for their vast scope and harsh result, and little practical significance other than to necessitate further distinction among different classes of publishers and thereby creating a highly complex body of law, it is difficult to see why courts should continue to adhere to these traditional, obsolete principles in the 21<sup>st</sup> century – as *Abella J of Canada* memorably put it, “[s]trict application of the publication rule in

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<sup>19</sup> *Fevaworks* (n 1), [59], quoting Jack M Balkin’s paper prepared for the Global Constitutionalism Seminar (Yale Law School 2010), adapted from Jack M Balkin, ‘Media Access: A Question of Design’ 76 *Geo Wash L Rev* 933 (2008).

<sup>20</sup> Emily B Laidlaw and Hilary Young, ‘Internet Intermediary Liability in Defamation’ (2018) 56 *Osgoode LJ* 112, 124.

<sup>21</sup> David Rolph, ‘Australia: A landmark judgment’ (Inform’s Blog, 28 August 2014)

<<https://inform.org/2014/08/28/australia-a-landmark-judgment-david-rolph>> accessed 10 January 2020.

these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.”<sup>22</sup>

### **3.2 Obscure Principles and Distinctions**

Unfortunately, it is not only the starting point in common law that has fallen behind times and become problematic. Centuries of incremental development has made the common law increasingly complex and confusing, leading to fine distinctions, varying interpretation and inconsistent application, problems which are exacerbated when applied to the context of internet intermediaries.

One such example is readily apparent in *Fevaworks* itself as Ribeiro PJ attempted to review the relevant law and, in the process, distinguished the *Byrne* principles from the law on innocent dissemination. This distinction has been criticized as “unconvincing”: given that defamatory postings were explicitly prohibited by forum rules, it could be said that the forum users “trespassed” on the forum, just as the notice-board users in *Byrne*.<sup>23</sup> This also represents a major divergence from other common law jurisdictions,<sup>24</sup> necessitating subsequent courts in Hong Kong to view such case law “through the prism” of *Fevaworks*.<sup>25</sup>

Yet more problematic is the issue of classification. In the current law, the main/subordinate publisher distinction is of crucial importance in determining whether innocent dissemination is available, but this distinction arose in a completely different context of “one-to-many” communication when it was much easier to distinguish between main publishers of say a newspaper article, and mere innocent disseminators. It is hard to see how to apply such a distinction to what

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<sup>22</sup> *Crookes v Newton* (n 3), [36] (concerning defamation through hyperlinking).

<sup>23</sup> Kelvin Kwok, ‘Liability of Online Service Providers for Defamatory Content: The Case of Online Discussion Forums’ (2014) 130 LQR 206, 209.

<sup>24</sup> See e.g. *Davison v Habeeb* [2012] 3 CMLR 6; *Tamiz* (n 14); *Wishart v Murray* [2013] NZHC 540.

<sup>25</sup> *Albert Yeung* (n 17), [68].

Ribeiro PJ acknowledges as “new intermediaries” within a “qualitatively different” model of many-to-many communication. Internet intermediaries come in various forms and perform all kinds of functions. Rather than falling on either side of the rigid dichotomy between main and subordinate publishers, they typically fall somewhere in the middle, especially since the “knowledge” and “control” criterion are essentially matters of degree.<sup>26</sup> Echoing Abella J’s sentiments, one commentator on *Fevaworks* criticized that it is “artificial and unsatisfactory to fit an invention of the Internet era into the straitjacket of 19<sup>th</sup>-century defamation common law”.<sup>27</sup>

To further complicate things, other labels like “mere conduits” or “passive facilitators” have been used elsewhere to categorize some internet intermediaries, which are treated as non-publishers and completely absolved from liability.<sup>28</sup> The complexity and difficulty in categorizing internet intermediaries can be seen in the great divergence in case law across common law jurisdictions. Take for example<sup>29</sup> the case of search engines,<sup>30</sup> which have been treated as non-publishers in England<sup>31</sup> and Canada<sup>32</sup>, while the opposite outcome has been reached in Australia<sup>33</sup>, as well as (preliminarily) New Zealand<sup>34</sup> and Hong Kong. Local commentators on *Albert Yeung* have similarly disagreed over whether Google should be viewed as main or subordinate publishers.<sup>35</sup> The difficulty in categorization leads to artificial

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<sup>26</sup> Kelvin Kwok (n 23), 209.

<sup>27</sup> Anne Cheung, ‘Liability of Internet Host Providers in Defamation Actions: From Gatekeepers To Identifiers’ (2014) University of Hong Kong Faculty of Law Research Paper No.2014/013 <<https://ssrn.com/abstract=2428566>> accessed 10 January 2020, 28.

<sup>28</sup> See e.g. *Bunt v Tilley* [2007] 1 WLR 1243.

<sup>29</sup> Consider also the divergence between *Fevaworks* and other common law jurisdictions noted in n 24 and accompanying text.

<sup>30</sup> See generally Susan Corbett, ‘Search Engines and the Automated Process: Is a Search Engine Provider “A Publisher” of Defamatory Material?’ (2014) 20 New Zealand Business Law Review 200

<sup>31</sup> *Metropolitan Schools Ltd v Designtechnica Corp* [2011] 1 WLR 1743.

<sup>32</sup> *Niemela v Malamas* [2015] BCSC 1024.

<sup>33</sup> *Trkulja v Google* [2018] HCA 25.

<sup>34</sup> *A v Google New Zealand* [2012] NZHC 2352.

<sup>35</sup> Compare Anne Cheung, ‘Defaming by Suggestion: Searching for Search Engine Liability in the Autocomplete Era’ in Andras Koltay (ed), *Comparative Perspectives on the Fundamentals of Freedom of Expression* (Wolter

distinctions and arbitrary results, which is unsatisfactory in both doctrine and practice.

### **3.3 Monitoring, Removal and Chilling Effect**

Defamation claims against internet intermediaries involve two competing, but equally fundamental, policy interests: free expression and exchange of information on the internet on the one hand, and the protection of reputation and privacy rights of claimants on the other. Unfortunately, the present law not only fails to strike a proper balance, but also hampers the attainment of these interests, by discouraging monitoring before notification whilst encouraging over-removal afterwards.

The position on pre-notification duty in *Fevaworks* has been criticized as “confusing and unnecessary”.<sup>36</sup> While no prior monitoring seems to be required, Litton NPJ’s concurring judgment suggested that greater monitoring might be necessary if there had been past defamatory postings deliberately targeting the claimants.<sup>37</sup> The “reasonable care” standard was said to be set so low as to discourage good faith monitoring,<sup>38</sup> which is exacerbated by the notorious “Catch-22” dilemma whereby intermediaries, in exercising reasonable care, might gain sufficient knowledge and control as to become main publishers and lose protection from the innocent dissemination defence.<sup>39</sup>

As for post-notification duty, *Fevaworks* seems to encourage a “near-instantaneous removal” approach and “better safe than sorry” attitude among internet intermediaries.<sup>40</sup> Empirical studies across the world have provided evidence that

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Kluwer 2015); and Ng Chun Wai Jonathan, ‘Suing Google’s Autocomplete: How the Court Should Approach Google’s Autocomplete Defamatory Liability’ (2016) 10 HKJLS 45.

<sup>36</sup> Anne Cheung (n 27), 24.

<sup>37</sup> *Fevaworks* (n 1), [131].

<sup>38</sup> Adrian Fong, ‘Dissemination of Libel by Online Social Platforms: Reinterpreting Laws to Meet the Information Age’ (SSRN, 16 July 2013) <<https://ssrn.com/abstract=2293889>> accessed 11 January 2020.

<sup>39</sup> *McGrath v Dawkins* [2012] EWHC B3 (QB), [41].

<sup>40</sup> Adrian Fong (n 38).

intermediaries tend to accede to removal requests readily without questioning their validity, particularly for small companies, since this is the easiest and cheapest solution.<sup>41</sup> One could hardly blame internet intermediaries, however, which are ill-equipped institutionally to play the jury in adjudicating whether content should be removed for being defamatory, given the complex issues of fact and law involved that even courts struggle to resolve. How, for instance, are internet intermediaries supposed to investigate the truth of a statement, or determine whether it is an “honest comment”? The huge legal fees and damages involved in litigation provides further incentive for intermediaries to adopt a blanket removal policy and avoid lawsuit, whilst the multiple publication rule mentioned earlier could put them at “perpetual risk of suit”, particularly regarding archive materials.<sup>42</sup>

Such tendency of internet intermediaries inevitably leads to removal of content that might be perfectly lawful or even beneficial for the public to know, and allows individuals and corporations to silence critics and allegations even if there are some elements of truth in them. This could create a chilling effect on free expression and communication on the internet; eventually the online community and, given the prominence of the internet nowadays, the wider society would suffer from restricted access to and circulation of information and opinions.

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<sup>41</sup> See Daphne Keller, ‘Empirical Evidence of ‘Over-Removal’ by Internet Companies under Intermediary Liability Laws’ (Center for Internet and Society Blog, 12 October 2015) <[www.cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws](http://www.cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws)> accessed 12 January 2020.

<sup>42</sup> Alastair Mullis and Andrew Scott, ‘Tilting at Windmills: the Defamation Act 2013’ (2014) 77(1) MLR 87, 102-103. For an example see *Loutchansky* (n 8).

#### **4. Directions for Reform: Comparative and International Perspectives**

Many jurisdictions have taken the initiative to address defamatory liability of internet intermediaries. This section considers four major approaches that have gained prominence in common law jurisdictions and among academics: safe harbour, broad immunity, notice and notice and human rights-based models (see Table 1).<sup>43</sup>

<b>Model</b>	<b>Principle</b>	<b>Example</b>
Broad immunity	Internet intermediaries generally immune from liability for third-party content	US: Communications Decency Act 1996 (CDA) <sup>44</sup>
Safe harbour	Internet intermediaries conditionally immune from liability, subject to duty of removal	UK: Electronic Commerce (EC Directive) Regulations 2002; <sup>45</sup> Defamation Act 2013
Notice and notice	Internet intermediaries required to forward complaint notices to user from whom content originated	Canada: Copyright Act <sup>46</sup> (copyright infringement regime)
Human rights	Intermediary liability laws should comply with international human rights principles	Manila Principles <sup>47</sup> (proposed by civil society)

<sup>43</sup> Categorization and table adapted from Laidlaw and Young (n 20). Note that two further models, “strict liability” and “generalist” (no special rules for intermediary liability), are mentioned but not analyzed in detail in the article.

<sup>44</sup> 47 USC, § 230.

<sup>45</sup> Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 (‘E-Commerce Regulations’), regs 17-19.

<sup>46</sup> RSC 1985 c C-42, ss 41.25-41.27

<sup>47</sup> Electronic Frontier Foundation, ‘Manila Principles on Intermediary Liability’ (24 March 2015)

<[www.manilaprinciples.org/principles](http://www.manilaprinciples.org/principles)> accessed 12 January 2020 (‘Manila Principles’).

## **4.1 US: Broad Immunity**

A landmark piece of legislation, CDA section 230(c)(1) confers a sweeping immunity on providers or users of interactive computer service by providing that they shall not be treated as the publisher of any information provided by another information content provider. In the defamation context, this essentially absolves internet intermediaries from liability for content created by third parties. They also have no obligation to remove defamatory content even after being notified.<sup>48</sup> However, immunity would be lost if intermediaries themselves create or develop defamatory content in whole or in part.<sup>49</sup>

Enacted at the early days of the internet, this provision has received credit for having “created the internet” and its multibillion-dollar online industry.<sup>50</sup> However, as the internet flourishes it has been criticized as being “based on a simplistic and utopian version of the internet”,<sup>51</sup> failing to incentivize self-regulation by internet intermediaries and deter or remedy harmful speeches, leading to calls for reform to introduce exceptions to the immunity.<sup>52</sup>

## **4.2 UK: Safe Harbour**

Incorporating an EC Directive<sup>53</sup> into domestic law of the UK, the E-commerce Regulations provides a “safe harbour” for mere conduits, caching and hosting,<sup>54</sup> but website hosts must not have actual knowledge or awareness of unlawful activity and must remove information expeditiously upon obtaining such knowledge.<sup>55</sup> This

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<sup>48</sup> *Zeran v America Online Inc* 129 F.3d 327 (4<sup>th</sup> Cir 1997).

<sup>49</sup> *Fair Housing Council of San Fernando Valley v. Roommates.com* 521 F.3d 1157 (9<sup>th</sup> Cir. 2008).

<sup>50</sup> Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Cornell University Press 2019).

<sup>51</sup> Ali Grace Ziegrowsky, ‘Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act’ (2010) 61 *Hastings LJ* 1307 at 1313-14.

<sup>52</sup> Laidlaw and Young (n 20), 133-134.

<sup>53</sup> Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

<sup>54</sup> E-commerce Regulations (n 45), regs 17-19.

<sup>55</sup> *Ibid*, reg 19(a).

essentially creates a similar position to that under the innocent dissemination defence<sup>56</sup>, subject to a slight difference in the knowledge requirement: whereas the traditional defence only requires knowledge of the statement (not its content or defamatory nature), the E-Commerce Regulation refers to its “unlawfulness”, which requires intermediaries to “know something of the strength or weakness of available defences”.<sup>57</sup> Uncertainty remains as to the precise meanings of knowledge and notice, and how to resolve these conflicting standards,<sup>58</sup> with potential shortcomings similar to those issues arising under innocent dissemination, such as the risk of over-removal<sup>59</sup> and the loss of immunity due to exercise of control.<sup>60</sup>

Defamation Act 2013 section 5(3) provides further immunity to website operators from liability for third-party content, which can be defeated if the claimant shows that (a) it was not possible to identify the person who posted the statement (b) he gave the operator a notice of complaint<sup>61</sup> and (c) the operator failed to respond to the notice accordingly.<sup>62</sup> This has been praised as having “swept aside the necessity to classify the role and status of ISPs [internet service providers]” and provided a “practical and functional solution that enables victims of defamation with an adequate remedy while providing clearer guidelines to ISPs”.<sup>63</sup>

### **4.3 Canada: Notice and Notice**

Canadian scholars Laidlaw and Young have proposed to adapt the “notice and notice” framework for copyright infringement to provide “a unique middle ground” between

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<sup>56</sup> Codified in the UK as Defamation Act 1996, s 1.

<sup>57</sup> *Bunt v Tilley* (n 28), [72].

<sup>58</sup> Laidlaw and Young (n 20), 127-128; Anne Cheung (n 27), 29-30.

<sup>59</sup> Laidlaw and Young (n 20), 130.

<sup>60</sup> Anne Cheung (n 27), 11-14.

<sup>61</sup> The content of such notices is provided in s 5(6), and the Defamation (Operators of Websites) Regulations (‘Regulations’), reg 2.

<sup>62</sup> As stipulated under reg 3 and Schedule of the Regulations, which provides for actions to be taken by website operators in response to notices of complaint, such as notifying the poster and removing the content under certain circumstances.

<sup>63</sup> Anne Cheung (n 27), 34.

the two models above in handling internet intermediaries' defamatory liability.<sup>64</sup> Under the Copyright Act, the copyright holder may send a notice of infringement to the internet intermediary,<sup>65</sup> which is required to forward it to the user or originator, failing which statutory damages could be imposed.<sup>66</sup> The system is educational in purpose, aiming to discourage copyright infringement, but abuse and uncertainty have resulted from the lack of mandatory criteria on the content<sup>67</sup> of notices.<sup>68</sup> Thus, it has been suggested that detailed rules should be codified as to the content of notices and removal procedures.<sup>69</sup>

#### **4.4 Human Rights**

The freedom of expression has now been widely recognized and firmly entrenched as part of international human rights law, and both governmental and non-governmental bodies have taken note of the challenges posed by the popularity of the internet and the need for online regulation. In a recent report,<sup>70</sup> UN Special Rapporteur Kaye made the following recommendations (among others) regarding state regulation of online content:

- Only seek to restrict content pursuant to an independent court order, in accordance with due process and standards of legality, necessity and proportionality.
- Refrain from imposing disproportionate sanctions on internet intermediaries to avoid chilling effect on freedom of expression.

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<sup>64</sup> See n 20, 134-136.

<sup>65</sup> Copyright Act (n 46), s 41.25(1).

<sup>66</sup> Ibid, s 41.26.

<sup>67</sup> See *ibid*, s 41.25(2) and (3).

<sup>68</sup> Laidlaw and Young (n 20), 135.

<sup>69</sup> *Ibid*, 152-153.

<sup>70</sup> David Kaye, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' A/HRC/38/35 (Human Rights Council 38<sup>th</sup> session, June-July 2018) ('Report').

- Refrain from establishing laws that would require proactive monitoring or filtering of content, which might amount to pre-publication censorship.
- Avoid delegating responsibility to companies as adjudicators of content.<sup>71</sup>

These recommendations have been further developed by civil society groups around the world, which have come together to propose the Manila Principles on Intermediary Liability as a framework of baseline safeguard and best practice.<sup>72</sup>

Two of the key principles drawn up include:

- Intermediaries should be shielded from liability for third-party content.
- Content must not be required to be restricted without an order by a judicial authority.<sup>73</sup>

The four remaining principles, like the Special Rapporteur's recommendations, place emphasis on due process, necessity and proportionality, as well as transparency and accountability in content restriction laws and policies.<sup>74</sup>

Given the constitutional status afforded to the International Covenant on Civil and Political Rights in domestic law,<sup>75</sup> it is important to take into account the international human rights standards and principles above in reforming the law in Hong Kong.

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<sup>71</sup> Ibid, paras 65-69.

<sup>72</sup> Manila Principles (n 47).

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Implemented domestically via the Hong Kong Bill of Rights Ordinance (Cap 383), and given constitutional protection by Basic Law Art 39. The constitutional issues involved in internet defamation cases have been acknowledged and discussed in both *Fevaworks* (n 1), [104]-[112] and *Albert Yeung* (n 17), [129]-[140].

## **5. Suggestions for Reform in Hong Kong**

Given the above discussion, reform on defamatory liability of internet intermediaries in Hong Kong should achieve two goals: firstly, it must clarify and simplify the law, for the constitutional requirement of “prescribed by law” requires the law to be adequately accessible and formulated with sufficient precision for citizens to regulate their conduct.<sup>76</sup> Secondly, a balance must be struck between different interests and stakeholders – in particular, providing sufficient protection to both internet intermediaries in facilitating free expression and the reputation and privacy of claimants.

### **5.1 Codifying Innocent Dissemination**

Both common law concepts and statutory classification overseas have proved to be inadequate as courts struggle to grapple with the roles and functions of internet intermediaries in highly fact-sensitive exercise.<sup>77</sup> Thus, the defence of innocent dissemination should be codified in statute and expressly made available to all internet intermediaries, thereby avoiding issues of categorization that have resulted in so much complexity and inconsistency. Instead, the courts can now focus on the substantive question of whether intermediaries have exercised reasonable care in handling defamation materials or complaints.

Section 1(1) of the UK Defamation Act 2013 provides a model for codification, formulated in largely identical terms as the common law without reference to obscure distinctions like main/subordinate publishers. Furthermore, section 1(5) provides for certain factors to be taken into account when determining whether reasonable care has been taken. The Hong Kong legislation should also consider creating such a non-exhaustive list of factors to guide judicial inquiry, and having

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<sup>76</sup> *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, [62]-[65].

<sup>77</sup> Anne Cheung (n 27), 34.

particular regard to the internet context, factors may include the following: degree of involvement in publication; nature and circumstances of involvement; previous conduct and character; monitoring and/reporting mechanisms; availability of resources and administrative burden; promptness and adequateness of responses. This allows the courts to take into account a broad range of circumstances beyond the “knowledge” and “control” criteria, with further factors to be developed by judge-made law as technology and communication trends change.

## **5.2 Expanding the Defence: Two Possibilities**

Two further forms of immunity should be considered for internet intermediaries. Firstly, immunity for third-party content can be provided in a similar manner to Section 5 of the UK Defamation Act 2013. This is sound on both normative and policy grounds: normatively speaking, internet intermediaries are usually not as culpable as the original publishers, who published the statement intentionally and thus should bear the primary liability. As a matter of policy, such immunity reduces the likelihood of over-removal but still provides incentive for internet intermediaries to co-operate in identifying the offender and taking proper actions (e.g. notifying the posters, and removing content under certain circumstances).

A second possibility is to provide immunity for non-removal before a court order is received, as suggested by international human rights bodies. This would target the problem of over-removal and avoid putting internet intermediaries in the difficult position of adjudicating complaints. However, the provision must be narrowly framed so as not to completely absolve intermediaries from duty: for instance, “the failure to remove content before receiving any court order in itself shall not be taken as evidence of the lack of reasonable care which defeats the defence of innocent dissemination”. To satisfy the innocent dissemination defence, however, they would still be required to show that they have taken reasonable care in other respects, e.g.

responding promptly and properly to valid complaints. In connection with this suggestion, the establishment of a specialist defamation tribunal should also be considered to provide a speedy option for claimants to apply for court order to remove publication, thereby putting a stop to the damage on their reputation rather than wait over a lengthy litigation process. Claimants must however demonstrate at least a “reasonably arguable” case, so that some unmeritorious and vexatious claims can also be filtered out at this stage.

### **5.3 Abolishing Multiple Publication Rule**

The multiple publication rule should be abolished and replaced by a single publication rule, as has been adopted in many jurisdictions like the US<sup>78</sup> and the UK<sup>79</sup>. However, care must be taken so as not to ignore the potential harm caused by ongoing publication. Moreover, the limitation period for defamation in Hong Kong is six years,<sup>80</sup> far longer than in other jurisdictions,<sup>81</sup> with no discretion to exclude or extend the limitation period.<sup>82</sup> Thus, issues relating to limitation period and single/multiple publication should be reviewed as a whole, which require careful consideration going beyond the scope of this essay.

## **6. Conclusion**

The law of defamation has survived and developed over centuries. The common law has great strength in its flexibility, but that is no excuse to leave complex and controversial issues entirely to the courts. The defamatory liability of internet intermediaries presents novel questions outside traditional principles and involves difficult balancing exercise between competing interests. Hong Kong is clearly

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<sup>78</sup> Restatement (Second) of Torts, s 577A; see *Firth v State of New York* 98 N.Y.2d 365 (2002) for application to online publication.

<sup>79</sup> Defamation Act 2013, s 8.

<sup>80</sup> Limitation Ordinance (Cap 347), s 4(1).

<sup>81</sup> The relevant period is one year in the UK: Limitation Act 1980, s 4A.

<sup>82</sup> See e.g. *ibid*, s 32A.

lagging behind other jurisdictions and in desperate need of a comprehensive consultation, review and reform in this troubling but highly contentious area of law. It is hoped that the above suggestions can offer greater clarity and accessibility to the law not only on paper, but also balance the interests of internet intermediaries, users and claimants in practice whilst preserving the vibrancy of online communication in Hong Kong.

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