Australian High Court libel ruling threatens Internet free speech

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In a decision that has the potential to seriously curtail freedom of expression on the Internet, the Australian High Court this week effectively extended the scope of the country's restrictive defamation laws by allowing international web sites to be sued in Australia.

The court unanimously ruled that Australian-based mining entrepreneur Joe Gutnick could sue American multimedia giant Dow Jones in the state of Victoria over material published on its WSJ.com website, which is posted in New Jersey. Gutnick launched his action in the Victorian Supreme Court last year, claiming a WSJ.com article was defamatory. The article appeared in the online version of *Barron's* magazine, which is available by subscription to only about 1,700 people in Australia.

Gutnick's lawyers argued that the article implied their client associated with criminals, and that it damaged his reputation in Victoria, his home state. Dow Jones argued that the case should be heard in New Jersey. All seven judges ruled that publication occurred wherever an Internet article was downloaded and read, not where it was loaded onto servers.

The decision, the first of its kind in a Western supreme court, has serious implications for anyone— media companies, political parties, non-government organisations, Internet providers and individuals—publishing articles online. Countries operating in the English common law tradition are likely to follow the Australian High Court precedent, including Britain, Canada, New Zealand, Malaysia, India, Sri Lanka, Fiji, Singapore, Zimbabwe and South Africa.

The court ruled against Dow Jones despite opposition by powerful corporate interests. Sixteen major media companies and Internet publishers intervened in the case, among them CNN, the *New York Times, Washington Post*, the *Guardian* (Britain), Rupert Murdoch's News Ltd, Australian media organisation Fairfax, Amazon.com and Yahoo!. They argued that if Gutnick succeeded, they would have to check their content against the defamation laws of nearly 300 national and provincial jurisdictions, from Afghanistan to Zimbabwe.

United States-based web sites and Internet providers have until now enjoyed some protection from libel suits because of that country's constitutional First Amendment right to free speech. In order to succeed, defamation plaintiffs in the US have to prove that false material was published, maliciously or recklessly, damaging their reputations.

In Australia, on the contrary, liability is strict—authors and publishers alike may be liable for material deemed to be libellous even if they intended no injury to reputation and took reasonable care to check the information. Moreover, the test for defamation is notoriously vague, based on a court's assessment of "contemporary community standards". Damages can amount to millions of dollars, depending on the commercial value attached to the maligned reputation. In some Australian states, truth is no defence—defendants must prove that there was a public interest or public benefit in making the allegedly harmful statement, even if it is accurate.

Other countries, including Singapore, have even harsher defamation laws, as well as political regimes and courts prepared to use them to muzzle all political dissent. In Singapore, the ruling Peoples Action Party has instigated libel suits to bankrupt opposition politicians and anyone who dares to criticise the government.

Nor are such trends confined to former colonial countries. In recent years, libel suits have been increasingly used to silence criticism of Western governments and major corporations. In Britain in 1998, retailer Marks and Spencer sued Granada TV for reporting that some of the store's expensive merchandise was produced by Moroccan children in shocking conditions. The same year, in the US, libel actions became part of a right-wing campaign, supported by the Pentagon, to force CNN to retract an investigative report on the use of nerve gas by American Special Forces during the Vietnam War.

The High Court said Dow Jones wanted to overturn a 153-year-old English legal principle that defamation occurs where material is read, heard or observed, not where it is produced. In a joint judgment, Chief Justice Murray Gleeson and Justices Michael McHugh, Bill Gummow and Ken Hayne, contended that the principle applied to newspapers, magazines, radio, television and film, and should apply to the Internet.

The judges insisted that Internet publishers had to bear a global risk. "Those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographical restriction." Moreover, they declined to adopt the "single publication rule" in force in 27 US states to restrict litigants to suing in one jurisdiction.

Joined by Justice Mary Gaudron, the judges suggested that the impact of the decision would be lessened because an award of damages would be meaningless unless it could be enforced where the defendant had assets. But Internet publishers with international reporters or bureaus may have assets that can be seized in a number of countries.

In addition, some countries have treaties to mutually enforce civil judgments. If Gutnick, for example, ultimately obtains a damages award from the Victorian Supreme Court, he may attempt to have it enforced in the US. Even in countries where no treaty exists, governments can invoke other measures against those held liable for defamation—such as seeking to block local access to their Internet sites.

The judges argued that Internet publishing was no more broad or ubiquitous than other media, because satellite broadcasting already

permitted a wide dissemination of radio and television. Yet, satellite broadcasts are restricted to certain countries, while the World Wide Web is inherently global in its reach. Internet users in any country can access a site, without even disclosing their geographical location. Even if a web site wanted to prevent its circulation in some states, it could not do so without imposing a subscription system.

Moreover, publishing on the Internet, according to the court's interpretation of where publication occurs, is continuous—it occurs every time a reader opens a page, unless and until the material is pulled off the site. That opens the possibility of an article becoming defamatory after it has been posted, and without the knowledge of the publisher.

Speaking to the WSWS after the judgment, Roy Baker from the Communications Law Centre at the University of New South Wales (NSW) gave the following example. If one site posted an article alleging that an unnamed person was guilty of murder, and another site later identified the person, the first site would be liable for defamation, because its publication was continuing.

Baker predicted that the High Court ruling would have a "chilling effect" on the Internet, "narrowing free expression". Powerful and wealthy individuals and global corporations would have reputations that could be allegedly damaged in many jurisdictions, allowing them to "forum shop" to find the most advantageous or repressive venue. Defamation was "already a rich person's game," he commented, and the High Court decision would make it even more so.

Baker explained that because of its severe defamation laws, Australia topped the international table for the number of defamation cases each year, per head of population. Whereas 110 cases were heard in the US last year, 77 were heard in one Australian state—NSW—alone. Australia-wide, the total was at least as high as the US, representing a 13-fold greater rate of litigation, given the population disparity.

In a separate judgment, Justice Michael Kirby expressed dissatisfaction with the outcome, acknowledging that the ruling "may indeed have a chilling effect on free speech merely because one of those jurisdictions has more restrictive defamation laws than the others". Nevertheless, he also found in Gutnick's favour, declaring that any change to the law should be left to governments and international agreements.

Justice Ian Callinan, a Howard government appointee, expressed open hostility to the First Amendment protection of free speech in the US. He adopted a statement by right-wing former US judge, Robert Bork, denouncing the notion of an open "market for ideas" because it had "few of the self-correcting features of the market for goods and services". Callinan added a distinct tone of nationalism, asserting that Dow Jones was seeking to impose "an American legal hegemony in relation to Internet publications".

In fact, the ruling has particular implications for American residents, undermining their constitutional right to free speech. First Amendment attorney Floyd Adams told the *Wall Street Journal* that the decision "puts at risk the ability of Americans to speak with each other and be protected by American law when they do so. If Dow Jones is subject to a Singapore court ruling on things communicated from one American to another within the US because it related to Singapore, then the very availability of the Internet as a place where people can communicate will be imperiled."

Media companies and Internet industry groups warned that the decision, if adopted by other countries, could force online publishers to self-censor coverage of political leaders and other prominent people, in countries with harsh defamation regimes. "Publishing on the Internet now means unknowable and therefore incalculable risk," commented Australian Internet Industry Association chief executive, Peter Coroneos.

Media lawyers said that in addition to defamation laws, Internet publishers could be exposed to contempt of court charges in every country under the same principle. If, for example, an article accused a government leader or corporate executive of committing a crime in Australia, the publisher could face prosecution under Australian law.

The risks are magnified because since 2000, courts in both Britain and France have held Internet service providers liable for the libellous content of any material hosted on their servers, awarding crippling damages awards against them. The combined effect of these verdicts is to intimidate Internet publishers, threatening them with potential financial ruin at the hands of wealthy or politically powerful vested interests. Only the largest media corporations, able to afford steep legal fees and with the resources to fight cases internationally, will be readily able to defend themselves.

The very fact that the Australian High Court overruled the objections of major media corporations in the Gutnick case is an indication of the concerns that exist within ruling circles to limit the profoundly democratic potential of the Internet. The Australian government, as well as such repressive regimes as China and Singapore, has also implemented legislation to filter and censor the Internet, giving the Australian Broadcasting Authority the power to prosecute Internet service providers that host "offensive content".

Millions of people around the world, looking for answers to growing social and political problems, are turning to the Internet to find more honest and independent sources of information than is available through the corporate and government-controlled mass media. A recent UN report estimates that by the end of 2002, the number of Internet users will reach 655 million, with the number doubling every six months in some countries. For the first time in history, the Internet enables ordinary people to seek out accurate information for themselves and engage in international and democratic discussion. The High Court's ruling is the latest in a series of official responses aimed at restricting this freedom.