Navigating digital publishing law without a ‘night lawyer’: an exploration of informal legal support networks

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ABSTRACT

Newspapers employ ‘night lawyers’, specialised legal professionals who check copy before the next day’s paper goes to press. But in a ‘new media’ age of blogging and communication through social media, writers and publishers with restricted budgets often operate without any legal insurance or paid-for legal advice. A survey of 71 small, independent online content publishers based in the UK, conducted in 2010, revealed that of 19 online writers who were contacted over a legal matter in the last two years, only seven sought legal advice, which was paid for in four instances. The remaining 12 dealt with it alone. This paper examines how the legal landscape is changing with the development of digital media; the uncertainty this causes for small online publishers with limited legal and financial resources; the growth of informal support networks; and why more research in this area is important.

KEY WORDS

social media, media law, blogging, legal support, digital publishing

INTRODUCTION

Large media organisations have control systems in place to safeguard them against legal action: in-house lawyers and even whole legal teams. National newspapers employ specialised 'night lawyers' to check copy at the last moment before going to press. 'Once on duty, their primary concerns are with defamation, reporting restrictions and contempt of court – specialist areas of law that they must know inside out', *The Lawyer* has described (Wade 2003). 'A shift usually starts at 5pm and should finish by around 9.30pm; after that, a night lawyer is on call for any late-breaking news or queries for as long as necessary' (*ibid*.).

With the development of digital publishing tools, news and comment increasingly comes from small, independent online content publishers with far fewer financial and human resources than large organisations, and perhaps no legal insurance.[1] Despite their restricted finances, blogs can be global, and depending on subject popularity and style, reach an online audience as large as a mainstream publication's. For the purposes of this paper, 'online publisher' refers to anyone who publishes their work online, whether on a blog, a social network, or other type of digital platform, under the wider umbrella of 'small media', a term discussed at the inaugural Small Media Symposium 2011.[2]

This paper seeks to identify cultural changes in the media law environment prompted by the use of new technologies that allow online social interactions. In the summer of 2010, I conducted a survey of online publishers who either published their own individual sites, or worked for online sites with 10 or fewer staff members (Townend 2010c)[3] and interviewed a number of online publishers in more depth. The results, as this paper will explain, show new cultural patterns forming and communities emerging as publishers seek to navigate their way around the new digital landscape of media law.

Charlie Beckett, director of the journalism think tank POLIS, has promoted the practice of 'networked journalism' in which the

audience increasingly interacts with the publisher, facilitating 'public participation in all parts of the news production process' (Beckett 2010: 17). Similarly, social media and other types of online technology have enabled publishers (including both professional journalists and part-time bloggers) increasingly to interact with lawyers and legal theorists in new legal support networks. My research results suggest that technology has created an opportunity for 'public participation' in parts of the legal process: respondents to my survey reported industry-specific cultural changes through the development of ad hoc networks. In some parts of the world, these networks have been formalised with projects like the Community of Information Technology Experts (CITE) in Singapore,[4] the Online Media Legal Network based at Harvard's Berkman Center[5] and the Media Legal Defence Initiative in the UK.[6]

LAWYERS ONLINE

Fifteen years ago Richard Susskind predicted the transformation of law by IT (Susskind 1996) and indeed, a great number of changes to legal systems have been made as computer and internet technology developed. Many lawyers, however, do not use social media, such as the growing microblogging service Twitter, as part of their technology toolset, as Susskind has more recently observed (2010: xxviii). 'Although created in 2006, Twitter was almost unheard of amongst lawyers as this book went to print in 2008', he writes:

> Most lawyers with whom I speak dismiss Twitter as yet another plaything for their children. Of what possible relevance, they inquire, could this possibly be for a senior legal practitioner? I reply that I know quite a few General Counsel and senior in-house lawyers who now use Twitter and regularly send out messages about what they are doing, what they are thinking, and where they are going; and if my clients were sending out regular updates on their news and views, I would want to be on the receiving end, even if the medium has a slightly silly name.

Many legal practitioners have been reluctant to use online media to communicate their work (see Rose 2010; Lind 2010). Many in the profession 'feel a scepticism about the use and incorporation of social media into the legal services business model', argues Stephen Kuncewicz (2010: xvi). He says that while social media users remain in the minority for now, that minority is 'vocal and growing'. Some legal firms have embraced the opportunity for online communication more enthusiastically than others. Struan Robertson, the lawyer who edited Pinsent Masons' site *Out-Law.com* from 2000-2011, said that his firm was unusual in its decision to put resources into a news site and make its content freely available to everyone (Robertson 2010). Since its birth in 2000,[7] *Out-Law.com* has grown – from 500 to 130,000 unique users a month. 'When I was hired to do this job, it was on the basis I would make the website my top priority', Robertson said. 'If it wasn't succeeding for us, we would have closed it down a long time ago. The benefit for the firm is that it raises our profile' (*ibid*.). The lawyers Robert Dougans and David Allen Green have also written about the rewards of online participation and 'wiki litigation', following science writer Simon Singh's successful High Court appeal on meaning, in *British Chiropractic Association v Singh* [2010 EWCA Civ 350] (2010).

While some legal research and discussion addresses the significance of social media for legal practitioners (see James 2008; Lustigman 2010) and the effect of online technology on media law (see Trevelyan 2009; Armstrong 2008), there is limited data or analysis available in academic scholarship. David Banks, the co-author of *McNae's Essential Law for Journalists*, has pointed out this gap in research. In an email interview he said (Banks 2010):

> The rapid growth in small online publications, such as hyperlocals,[8] has not been matched by attention in the academic community to the legal issues that might face such enterprises. While the simple answer may be that the same laws apply to them as to larger concerns, that in itself raises a question.

Banks suggested that the changing risks of digital media law 'deserves further study both for the small publishing companies and those who might be their targets' (*ibid*.).

LEGAL CHANGES AND DISCUSSION

While lawyers may be taking a while to adjust to the publishing opportunities afforded by the internet, discussion around digital media law is growing. We are in an era of mass online publication, but most laws governing UK media were written before anyone 'blogged', 'tweeted' or 'googled'. Parts of the existing laws are simply irrelevant; the lawyer and Index on Censorship board member Mark Stephens believes existing English libel laws are unsuitable for the digital age, for example (Townend 2010b). Case law constantly adapts to new technology – to hyperlinks, to blog comment moderation and to social networks – but it is not simple to follow and requires knowledge of existing statutes, which can cause confusion for publishers. As Ed Walker (2010), online communities editor at Media Wales,[9] has said, 'the web is moving quickly and with certain acts dating back to the last century, you won't find mention of Facebook in the legal statements'.

Many legal writers have observed it is an uncertain environment, especially in a global context (see Stromdale 2007) and journalists are only too aware that basic media law training does not safeguard them in a fast-changing digital landscape (see Townend 2010d). Barrister James Tumbridge (2009: 505) explained that blogs have 'added a new dimension to the considerations that all editors, authors and publishers must have when deciding what risk they face from an allegation of defamation'. The interactivity of blogs, Tumbridge argues, raises a number of uncertainties in defamation law, for example: who is liable for a defamatory comment; whether the online comment is libel or slander; and the problem of the multiple publication rule in English

law, which allows a defamation action to be brought whenever 'old' content is accessed, with no limitation period (*ibid*.: 505-507).

In 2009-10, the High Court made a number of rulings significant for online publishers and various defamation cases raised questions about the use of digital technology, including: *Kaschke v Osler* [2010 EWHC 1907, QB]; *Metropolitan International Schools Limited v Google Inc and Others* [2009 EWHC 1765, QB]; *Kaschke v Gray and Hilton* [2010 EWHC 690, QB]; *Islam Expo Ltd v The Spectator (1828) Ltd and Stephen Pollard* [2010 EWHC 2011, QB]; and *Flood v Times Newspapers Ltd* [2009 EWHC 2375, QB].

Research in the United States by the Media Resource Center has shown that libel cases against online publishers are on the rise (Abramson 2009). While it can be argued that the proportion of material resulting in English libel claims is not increasing,[10] UK bloggers might be more frequently targeted, as the digital medium becomes more established and is perceived to have greater influence. In his email interview, David Banks described some of the changes to digital media law that must be given attention: 'A legal system that has grown with the big beasts of publishing would seem on the face of it ill-prepared to tackle the nimble operators of the web, which might be to their [publishers'] advantage until they get big enough to be worth suing' (Banks 2010).

Active online debate around the Libel Reform campaign in November 2009[11] indicated a high interest in matters of media law by bloggers. Likewise, proposals for the Digital Economy Bill in 2010 excited and enraged many online producers, resulting in over 20,000 emails being sent to MPs, as part of an online campaign led by 38 Degrees and the Open Rights Group (ORG) before the Act was passed by Parliament (38Degrees.org.uk 2010). It was this high-energy discussion, observed via Twitter, Facebook and blog discussions that prompted me to survey bloggers about their legal experiences.

SURVEY FINDINGS

It is clear therefore that the legal landscape is changing rapidly in this new publication era. But what does this mean for small online publishers? I conducted a survey to find out how they are coping with these legal dilemmas. The findings confirmed anecdotal evidence that legal issues are at the forefront of many, if not all, UK online publishers' minds. The survey, promoted via Twitter and various media industry sites[12] and blogs, was conducted in August and September 2010 (Townend 2010c) and answers were collected using Google Forms. While working as a reporter for the industry site *Journalism.co.uk* from 2008–2010, I built up my own Twitter network of journalists and publishers and used them to alert people to the survey. Subsequently, the sample was likely to include people who read blogs about journalism and who were using Twitter.

All 71 respondents' answers were analysed. Respondents could supply their email address for further follow up, or participate anonymously. I was interested in their experiences as independent publishers and I did not ask them to classify themselves as journalists or non-journalists. In hindsight, the inclusion of such a question would have better informed the analysis. Respondents' answers indicated that many of them came from backgrounds in professional journalism; given my omission, future research might consider whether they have received legal training and how that might affect their understanding of the law. More in-depth interviews were also conducted with six online writers.[13] 46 per cent of the 71 respondents indicated they were dissatisfied with the number of legal resources available to them. This proportion grew to 68 per cent when analysing the small group of individuals (19 of 71 respondents) who had been contacted over a legal issue in the past two years. Some of those who were generally unworried by resources said they might feel differently should a legal incident arise from their work.

On the whole, the 71 respondents had avoided initiating their own legal disputes: only eight had made legal complaints to other publishers, seven concerning copyright matters and one concerning a spamming issue. Meanwhile, 19 online writers were contacted over a legal matter in the last two years (27 per cent). Of these only seven sought legal advice, which was paid for in four (21 per cent) instances. The remaining 12 dealt with it alone. Of the writers citing previous legal 'trouble', 68 per cent concerned defamation disputes; 37 per cent copyright; 16 per cent privacy; and 11 per cent data protection (some of these respondents had been involved in more than one type of action, so the total exceeds 100 per cent). While I did not ask respondents about their journalistic training (above), I collected information about their level of experience: three of the 19 bloggers had been writing online for between one and two years; the other 16 had over three years' experience – and of these, three had been writing online for over ten years. The legal disputes were not, therefore, limited to those with limited online publishing experience; the majority of affected bloggers had over three years' experience. Seven of the 19 cases involved local news online publishers; twelve involved bloggers covering specific topics including international news, consumer products, and 'off-beat news'.

While feelings about resources were mixed, a clear theme emerged: publishers are seeking legal information through informal networks and rarely by consulting a lawyer for a fee. Several cited their own knowledge or media law training as a resource and others named industry sites they regularly visited. Two respondents said they used paid-for advice; and several others cited informal, free guidance from helpful contacts, like this respondent who consulted 'friends and contacts within both the journalism and legal professions, on an informal, unpaid, unretained basis' (Anonymous respondent 37, 24/8/2010, 9:45:37). One writer said:

> I get a general sense of what I can/can't do by following the example of the bigger blogs and would be prepared to retract stuff if people

> get in contact with me. If I had a problem I'd Google it and see what advice other bloggers in similar situations had done (sic). (Anonymous respondent 59, 31/8/2010, 17:06:00).

LEGAL UNCERTAINTIES

The survey and follow-up interviews exposed areas of law in which online publishers feel particularly uncertain and identified the ways they sought new legal information. But it was not only the small publishers who participated in the survey who felt confused. Ed Walker (2010) described how his group on the media law refresher course provided by his regional newspaper employer were unable to decide the outcome for one of the scenarios presented: whether or not to moderate online comments left by users of their site. Similarly, one survey respondent said:

> I also write for my employer, and the legal advice available to us regarding online content is pretty useless as well, so it isn't just small publishers who are finding their way in the dark. (Anonymous respondent 61, 1/9/2010, 7:43:21).

Comments like these raise questions about how the digital age changes defamation and contempt of court law and, as a result, legal decision-making in the digital newsroom. It can have a positive, if confusing, effect for a defendant. While bloggers can more easily seek out information, they are also presented with varying interpretations of digital law, causing uncertainty about legal situations. Online media has changed the reporting culture in other types of cases; the way information about privacy actions is disseminated is becoming problematic, for example (see Telegraph View 2009). Widespread internet use makes reporting restrictions, such as anonymity orders, very difficult to control. For example, bloggers and social media users were the first to reveal Trafigura as the company that had taken out a so-called 'super injunction' against the *Guardian*, for example (see Wilson

2009). Would the mainstream media have broken its silence had it not been for the bloggers' initiative? We cannot know for certain. Court orders are also very difficult to control online. Not only are court orders difficult to obtain for non-journalists (Townend 2010a), bloggers and commenters can easily breach them through social media and other online platforms, intentionally or otherwise.

The question of liability is perhaps the most significant problem. If third party users can publish via your platform or blog, does the online publisher bear responsibility? In 2009, the High Court ruled that a blog owner could avoid liability if he or she did not check or pre-moderate the comments (Out-Law News 2009a). But how would the court view a breach of contempt of court law because of unmoderated comments? This is a crucial issue for mainstream organisations as well as small publishers. 'The risk of contempt of court remains a very real one for the online world even though to date there has been no specific example of a case which deals with the use of contempt sanctions specifically in relation to online content' (Kuncewicz 2010: 208).

Significantly, online users may be unsure how contempt of court law applies. In spring 2009 an unusual story consumed the attention of Britain's tabloid newspapers. *The Sun* (2009) reported that 13-year-old Alfie Patten had fathered the child of his 15-year-old girlfriend. A reporting restriction was then placed, preventing the UK media from reporting the results of a DNA test to find out whether Patten, who would have been 12 at the time of conception, was actually the father. Malcolm Coles, a former journalist who blogs about media and the internet on his personal site, took an interest in the hopeless nature of the restriction after witnessing online activity that breached the terms of the order (2009). Martin Belam, another media blogger, published screen shots showing that text captured in Google News defied the order (2009). Coles (2009) argued that because court orders forbidding publication of certain facts usually apply only to people or companies

who receive them 'there is nothing to stop bloggers publishing material that news organisations would risk fines and prison for publishing'. Coles reported:

> Even if a blogger knows there is an order, and so could be considered bound by it, an absurd catch 22 means they can't found [sic] out the details of the order – and so they risk contempt of court and prison. Despite the obvious problem the Ministry of Justice have told me they have no plans to address the issue. (*ibid.*)

Plans for the creation of a database containing court orders for media organisations never came to fruition, not least because of the costs involved (Townend 2010e). I submitted a Freedom of Information request to the Ministry of Justice asking about these discussions[14] and the department confirmed that they had been abandoned. *Out-Law News* (2009b) has further discussed the Patten case, with legal background: James McBurney of Pinsent Masons said it was a difficult area to police, but 'publishers and bloggers should take down material from a case once they find out that it is the subject of a reporting restriction'. A ruling in the Family Court in November 2010 [2010 EWHC 3221, Fam] decided that an anonymity order only bound media organisations notified in advance of the application, but the case indicated the ambiguity of the system.

Another key question to ask is whether journalists change their behaviour when writing for print versus online. Patrick Smith, a freelance journalist,[15] raised the problem of waiting for a response from another party, when there is no print deadline (Smith 2010):

> (…) I can't say that the medium I'm writing for has ever altered my approach to reporting. One thing it does change is the "reasonable" amount of time you should give someone to respond (in order to be fair and balanced, perhaps to qualify for a Reynolds defence).[16] With an industrial journalism process that involved printers and vans, this is easy: "Comment by 5pm or you don't get a say". But how does an entirely online business like paidContent:UK manage this problem?

> One hour? Two hours? This is an evolving area, but I can safely say it's never affected the make-up of my stories.

NETWORKED SUPPORT

My survey shows that for the most part these online publishers are tackling legal uncertainties by seeking out networked support rather than paid-for services. A couple of my interviewees talked about the need for, and development of, new support networks. The media blogger Jon Slattery discussed the differences between dealing with legal matters on a print publication and a personal blog (Slattery 2010). In his former position as a print journalist at trade publication *Press Gazette* he would have gone to the in-house lawyers for advice, in accordance with the publisher's legal insurance policy. Slattery supports the suggestion of additional legal support for small online publishers: 'I think it would be an excellent idea if there was a resource where bloggers could go to get good, free legal advice' (*ibid*.). He said:

> I think there is a lot bloggers should know about the libel laws. For instance, some do not realise the importance of reaching a full and final settlement as part of agreeing a correction (…) I think I'm fortunate because I have experience of dealing with libel lawyers over my time at Press Gazette but it can still be very intimidating being on the receiving end.

There are plenty more examples of the demand for networked support. One respondent to my survey said he or she would like support for a specific issue if one arose: 'if I were ever sent a 'serious legal letter' I'm not sure I'd know where to turn'. Other respondents said they used contacts or friends with legal expertise for advice. Richard Jones, of the local news site, the *Saddleworth News*, solved a legal problem when two lawyers offered free advice (Jones 2010). After he was accused of breaching copyright, he publicly requested help via Twitter:

> [A]fter I tweeted about the e-mail I'd received (…) various legal folks responded and confirmed to me I had nothing to worry about and directed me to the relevant pieces of law.

It seems then, that the online networking advocated by lawyers such as Kuncewicz, is paying dividends for some small publishers, who use this informal pro bono help as a substitute for an in-house resource. If Struan Robertson and Stephen Kuncewicz are right, lawyers might also benefit from this conversation in soliciting new business. But more research is needed on whether relying on the altruism of a few online-savvy lawyers is a satisfactory replacement for the 'night lawyer', those specialists with a well-trained eye for the sort of mistakes that could land a publisher in court. My survey results indicate that to some extent it could be, but with growing numbers of online publishers, this might not prove a sustainable solution.

RECENT DEVELOPMENTS AND POSSIBILITIES FOR FUTURE RESEARCH

In the time since this initial research and discussion occurred, a number of incidents revealed how the legal landscape continues to shift rapidly, and why more research in this area is important. Online conversation around Joanna Yeates' murder and arrest of the victim's landlord Chris Jefferies has raised concerns about online users' comprehension of the Contempt of Court Act 1981 (see articles linked at *Inforrm's Blog* 2011). The release of confidential US embassy cables by whistleblowing organisation WikiLeaks has prompted numerous discussions about international media law, with public attention on the activity of hackers and digital activists. Paul Chambers is due to take his case to the High Court for a second appeal in 2011 after he was found guilty of sending a menacing electronic communication via Twitter in May 2010.[17] The blogger and lawyer David Allen Green is part of Chambers' legal

defence team and has used social media to communicate details of the case. As numerous news outlets reported (see BBC News 2010a), thousands of Twitter users repeated Chambers' original message in solidarity, in what became widely known as the 'I'm Spartacus' campaign.

Additionally, the culture of court reporting in the UK is changing with technology, as shown by two recent episodes. In interim guidance, the Lord Chief Justice for England and Wales ruled that Twitter could be used by journalists in court at the judge's discretion, after it was allowed as a reporting tool at the City of Westminster Magistrates' Court for the bail hearing of the WikiLeaks founder, Julian Assange, in December 2010 (BBC News 2010b). It should be noted, however, that this was not the first reported use of Twitter in court: Ben Kendall, crime reporter for the *Eastern Daily Press* newspaper in Norfolk, is one known example and there may be others (Townend 2011). Even more recently, blogger James Doleman described how he used a standalone website to report details of the Tommy Sheridan perjury trial in Scotland despite having 'no formal legal training' (Doleman 2011):

> Not long into the case I had been taken out of court by the police and told I could not take notes as I was not a 'bona fide journalist'. The clerk of the court, however, intervened, and told the police that I should be allowed to take notes. Later on in the trial I did not even have to join the long queue to get into the public gallery, and was allowed to sit in the press section. Lawyers and journalists began to give me background information.

There is plenty of material and impetus for future research about the continually changing media law landscape, the limited resources of small publishers, and the growth of networked support. Building on the findings of this study, future research could ask whether the newly emerged networks sufficiently perform the role of the 'night lawyer' and whether they are sustainable if the number of smaller publishers

continues to grow. Further academic attention also needs to be given to online publishers and their legal interactions. There is opportunity to collect more data about publishers' legal resources and discussion about media law should consider the smaller players as well as large media organisations. Lawyers, journalists, and UK legal authorities should acknowledge the legal difficulties and ambiguities felt by independent, ill-resourced publishers, such as the ones described in my survey. The legal subject matter of this paper is wide-ranging; but defamation, contempt of court and reporting restrictions are issues that every online publisher should consider on a regular basis. The informal legal support networks, and social interactions developed in the absence of the 'night lawyer' and facilitated by fast-changing technology, should be further scrutinised and supported by academics and lawyers alike.

NOTES

1. This project did not ask publishers about whether they had legal insurance or not, but it would be a useful point to consider in future research exercises.
2. Held at the School of Oriental and African Studies, London, 8-9 April 2011. Organisers used the term 'small media' to include what others have called 'alternative media, participatory media, and social movement media'. More information at <http://www.smallmediainitiative.com/call-for-abstracts>, accessed April 2011.
3. In a time before online technology, many small niche print publishers also managed without the resource of large media organisations, and future research could examine their survival strategy, as a useful comparison.
4. Available from <http://www.sirc.ntu.edu.sg/Services/CITE/Pages/About_Us.aspx>, accessed January 2011.
5. Available from <http://omln.org>, accessed January 2011.
6. Available from <http://mediadefence.org/index.html>, accessed January 2011.
7. A history of *Out-Law.com* is available from <http://www.out-law.com/page-304>, accessed September 2010.

8. The description ‘hyperlocal’ is used by many media writers to describe small, generally independent, online sites covering local news and issues (e.g. sources).
9. The regional newspaper group that publishes MediaWales.co.uk
10. For example, by Jaron Lewis, a media partner at Reynolds Porter Chamberlain, as reported by Mark Sweney for Guardian.co.uk, 2009.
11. Initiated by Index on Censorship, Sense About Science and English PEN.
12. It was featured on the sites: *Fleet Street Blues*; Jon Slattery’s blog; *The Media Blog*, *Journalism.co.uk*; *One Man and His Blog*; *CurryBet*; *Talk About Local*; and my own site *Meeja Law*.
13. Those quoted by name in this paper gave their permission to be cited.
14. Available from <http://www.whatdotheyknow.com/request/query_re_ministry_of_justice_web>, accessed September 2010.
15. Smith formerly reported for UK trade journal Press Gazette and the media industry site paidContent:UK.
16. BBC College of Journalism explains Reynolds Defence at <http://www.bbc.co.uk/journalism/law/reynolds-defence>, accessed September 2010.
17. The conviction was upheld in an appeal in November 2010.

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