

Defamation and the internet: the multiple publication rule - Consultation Paper

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From: International Association of Scientific, Technical and Medical Publishers (“STM”).

Address in the United Kingdom: STM, Prama House, 267 Banbury Road, Oxford OX2 7HT, UK, Tel: +44 (1865) 339323, Fax: +44 (1865) 33932, beadle@stm-assoc.org,

International Secretariat: STM, Prins Willem Alexander Hof 5, 2595 The Hague, The Netherlands, beadle@stm-assoc.org

See also see additional comments at the end

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to defamationandtheinternet@justice.gsi.gov.uk or fax to: 0870 739 4284. Thank you.

Question 1. Taking into account the arguments set out above, do you consider in principle that the multiple publication rule should be retained? If not, should a single publication rule be introduced? Please give reasons for your answers.

Comments: No, STM does not consider that the multiple publication rule should be maintained. A single publication rule (with adequate safeguards for claimants) would be much preferable and contribute to a level playing field between electronic and print publications as far as the law of defamation in the UK is concerned.

STM publishers have embraced the electronic and networked world. Over 90% of journals are available online today. Online STM publications represent not just an additional line of business for STM publishers: they largely define what STM publishers do and are absolutely core to their existence.

The e-book market is growing rapidly, particularly in the last couple of years. Publishing and providing access to e-books online and offline constitutes another core market area for STM publishers.

Many STM publishers are retro-digitising their backlists in a fashion similar to that which has already been done in the journal market, **where journals from volume one, issue one (often covering 100 years or more) are accessible and widely used online today** and are cross-referenced with the constant stream of new knowledge that research communities generate.

As a matter of policy, STM believes that the laws of defamation should be technology-neutral and not penalise electronic publications, when compared to print publications. If anything, online publications are easier to search and access, which should enable claimants to react more swiftly and within a short time span, if they find a particular writing prejudicial to their rights.

As a practical matter, the multiple publication rule leads to “perpetual liability”. This prejudices editorial staff and the institutional memory of publishing houses is ill-equipped to defend the legitimacy of publications going back several decades and in some cases even centuries.

From a public interest and a “scientific heritage” point of view, the multiple publication rule threatens the integrity of archives, which for many publications (those that have a role as “minutes of science”) and arguably for scientific progress, are important to maintain and be accessible unaltered and in the way they were published, simply as a matter of public interest.

Question 2. If the multiple publication rule were to be retained should there be an obligation to place a notice on an archive once the person responsible has been notified that the material is subject to defamation proceedings?

Comments: No. The publisher should retain the discretion to do this as the publisher thinks fit. Publishers might think a claim completely without merit yet by placing such a notice they would have to draw attention to proceedings which may turn out to be groundless. Ultimately if the publisher chooses not to place a notice and there turns out to be judgement in favour of a claimant, then this lack of notice could be a factor that affects the amount of damages awarded and therefore a risk for the publisher to take into account. Whilst a warning is

favourable more to the claimant, it could have the effect of unnecessarily undermining the integrity of an article, when a remedy for the claimant exists in damages.

Question 3. Do you agree that if a single publication rule were to be introduced, it should apply to all defamation proceedings, not just those relating to online publications?

Comments: Yes, As a matter of policy, STM believes that the laws of defamation should be technology-neutral and not penalise electronic publications, when compared to print publications.

Question 4. If a single publication rule were introduced,

a) should it be made obligatory to remove or amend material held in other formats under the control of the same publisher in the event of a successful defamation action against the original publication of the material?

b) should there be a provision that, where defamatory material is re-transmitted in a new format, the single publication rule would only protect the previous publisher and not the publisher of the new article?

c) if neither of these are considered appropriate, how could claimants' interests be protected?

d) should the existing 'voluntary' obligations to correct inaccurate and misleading material be strengthened? If so, how should this be done?

Please give reasons for your answers.

Comments:

a) No. In the event of a judgement in favour of the claimant, the court will normally order an injunction that the defendant should not repeat the allegation. The form of the injunction will usually cover material in other formats, so it seems to us that no change is necessary or advisable.

b) STM does not believe a publisher should be protected from defamation simply by virtue of the fact that the matter has previously been published elsewhere. However, the law should make provision for "innocent re-publication", where a source is re-published and the second

publisher had no knowledge and no reason to suspect that a court order has led to an amendment of the original source.

Furthermore, we note that in scientific and professional journals most articles include references to other articles (and in an online world these citations often form live links to the original article). In this context, it is impracticable for any publisher to check every cited reference for any possibly defamatory material.

c) No comments other than previously given.

d) No. STM believes that the current solution remains adequate, as any other rule or “encouragement” to accept changes demanded by a claimant not proven in a court of law could threaten the impartiality and integrity of editorial boards.

Question 5.

a) If a single publication rule were introduced, do you consider that the approach taken in the United States in respect of what constitutes a new publication of hard copy material would be workable? If not, what changes should be made?

b) Should online content that has been modified be regarded as a new publication?

c) Are there any other issues that would need to be resolved in establishing a single publication rule? Please give reasons for your answers.

Comments:

a) The US definition is reasonable and would constitute a sound point of departure.

b) Only modifications to the article in question which are directly relevant to the libel complained of and the meaning given to the article should be considered as a new publication. Of course modifications to other articles or matter on the same website should not count as making that article a new publication

c) No comments other than previously given.

Question 6. As an alternative to introducing a single publication rule, do you consider that the Defamation Act 1996 should be amended to extend the defence of qualified privilege to publications on online archives outside the one year limitation period for the initial publication, unless the publisher refuses or neglects to update the

electronic version, on request, with a reasonable letter or statement by the claimant by way of explanation or contradiction? Please give reasons for your answer.

Comments: A single publication rule would be by far STM's preferred option, but extending the defence of qualified publication to archives as suggested above would be preferable to the current position, where there is no protection. This would, however, necessitate a definition of the term "archive". The single publication rule seems more clear-cut and easy to apply in practice. Even if the single publication rule were rejected, a limitation of action should take place at some point to avoid a perpetual liability hanging over the heads of publishers.

Question 7. Do you agree that if the multiple publication rule is retained, the limitation period should remain at one year from the date of publication (with discretion to extend)? If not, what limitation period would be appropriate and why?

Comments: Yes there is no need to extend the limitation period if the multiple publication rule stays. In effect the multiple publication rule is in practice a "perpetual" rule, allowing a claimant to bring an action even years later. An overall statute of limitation should then also be considered to avoid this unfortunate outcome.

Question 8.

a) If a single publication rule were introduced, should the limitation period of one year run from the date of publication (with discretion to extend) or the date of knowledge (without discretion to extend)? If the latter, should there also be a ten year long-stop from the date of publication?

b) If you consider that an alternative approach would be appropriate, what should this be and why?

Comments:

a) STM would favour the limitation period to start at the date of publication for maximum legal certainty.

b) STM would favour a period of limitation of 1 year from the date of first publication, with discretion to the court to extend that in exceptional circumstances. Our second option would be a period of limitation of 3 years from the date of first publication, with no discretion to

extend.

Additional comments:

The International Association of Scientific, Technical and Medical Publishers (“STM”) comprises approximately 100 publishers of journals and reference works, based in 26 countries, including many in the UK and the Member States of the European Union. EU-based publishers publish 49% of all research articles worldwide (STM’s members may originate approximately 2/3 thereof), employing 36,000 staff directly and another 10-20,000 indirectly, and make an Euro 3 billion contribution to the EU’s balance of trade. Apart from publishing in print, STM publishers originate and disseminate online, books, journals databases and individual articles and contributions of a multitude of British, European and international scientific, medical and technical authors and scholars. This creative Content is available widely in electronic and in print form for access by individuals, whether through academic and corporate libraries or directly, for use in research, education, in industry the professions and business.

STM welcomes this opportunity to make its submission as part of the call for comments on the UK law of Defamation regarding the so-called “multiple publication rule” and the limitation of civil actions.

The e-Revolution of STM publishing commenced long ago, but accelerated exponentially around 1996. It has transformed not just how a publication is created, registered, certified, disseminated and preserved for posterity, but also the subject matter of what is being disseminated. Today, STM publishers offer not just entire books and entire journal issues for purchase and access online, but also chapter of books, individual elaborate illustrations (eg anatomical charts) and individual journal articles.

STM publishers were among the first to recognize the potential of the web and have invested heavily in digital content since its earliest days. They continue to invest in developing new tools and knowledge management techniques that will make research output ever more rapidly accessible for research and education (whether in traditional educational establishments or distance learning institutions).

Respectfully submitted

Michael Mabe, CEO; STM, Prama House, 267 Banbury Road, Oxford OX2 7HT, UK

Carlo Scollo Lavizzari, legal counsel to STM, Lenz Caemmerer Attorneys,
15 Elisabethenstrasse, 4051 Basel, Switzerland