



✕ **Free Speech, But Whose?**

by **Jill Priluck**

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When Michael Dolenga was getting his master's degree in biochemistry at Cornell University, the British Columbia native followed news from home on soc.culture.canada and sometimes even had a few laughs reading other people's flamefests.

But when anti-Canadian messages started flashing across his monitor, Dolenga couldn't contain himself. He fired off a few messages to the worst offender, Dr. Laurence Godfrey, a London-based nuclear physicist.

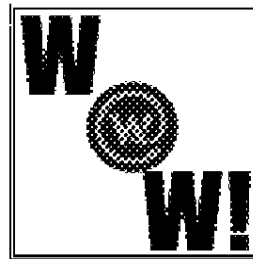
Of course, when he posted his remarks, Dolenga had no idea that the target of his ire was a nascent Don Quixote, intent on using libel law to quash online insults. He could never have imagined that three years later, those remarks would land him before Britain's High Court of Justice. "[In newsgroups] people react and respond in kind. No one takes it very seriously," Dolenga said. No one, that is, except for Laurence Godfrey.

Now one of the most ardent activists in the seemingly doomed fight to force the global Internet to submit to national libel laws, Godfrey was, at the time Dolenga spouted at him, 10 months into his and the UK's first Internet libel suit. The suit focused on allegations that Phillip Hallam-Baker, then a Geneva-based physicist, had ruined Godfrey's reputation in Britain by questioning his professional competence.

In the four years since the Hallam-Baker suit was first filed, which was settled out of court in June of 1995, Godfrey has held a growing list of Internet service providers responsible for allegedly defamatory remarks made about him in online discussion forums. About a month ago, Godfrey filed his seventh defamation suit against Demon Internet Limited, Britain's largest ISP. Godfrey's claim hinges on the theory that Demon, which effectively "published" defamatory remarks by one of its users, is liable for those remarks.

Godfrey is suing Cornell University and Dolenga, a postgraduate, over allegations posted on soc.culture.canada, one of Cornell's 16,300 newsgroups. He is claiming that Cornell "falsely and maliciously published or caused to be published" defamatory UseNet messages in England and Wales, is seeking about US\$80,000 in damages. The court has already issued a default judgment against Dolenga.

The British physicist has said that he notified Cornell after each of Dolenga's five supposedly defamatory postings, but he claims the University refused to remove them and refused to stop the postings, citing First Amendment concerns



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postings, citing First Amendment concerns.

Godfrey was unimpressed. "There is nothing in the US constitution that guarantees the right for people to publish defamatory remarks," he told a British paper.

Godfrey's international libel strategy is one that Internet activists find problematic.

"To hold an entity responsible for [the] posting of one of its users that it cannot possibly screen is troubling," said Barry Steinhardt, president of the Electronic Frontier Foundation. "It's an indefensible violation of basic concepts of human rights and freedom of expression," he continued, citing [Article 19](#) of the Universal Declaration of Human Rights, which declares that "Everyone has the right to freedom of opinion and expression: This right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."

And in spite of Godfrey's flailing, there are increasing indications that governing bodies around the globe have begun to realize the futility of holding ISPs liable for users' speech. In the US, ISPs have been exempt since 1996 from laws holding newspapers, magazines, and broadcasters accountable for information they disseminate.

According to Section 230 of the Communications Decency Act, also known as the "carrier doctrine:" "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another defamation content provider."

Two recent appeals court decisions have upheld the carrier doctrine. A US district court judge held that the doctrine "creates federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." Last month, the Supreme Court denied the plaintiff's plea to have the case heard.

And more famously, a federal judge this spring dismissed AOL as a defendant in *Blumenthal v. America Online Inc.*, ruling that ISPs cannot be held liable for content. Sidney Blumenthal sued AOL for statements made in *The Drudge Report* that he was physically abusing his wife. Matt Drudge retracted the story with an apology.

These indications aside, Godfrey's libel suit against Dolenga and Cornell University -- which represents one of the first times a US-based ISP has been forced to defend itself against defamation charges in a foreign jurisdiction -- has brought the jurisdictional issue home to America.

"This is a global medium that's growing in geometric rates," Steinhardt said. "You've got hundreds of nations with different laws on the

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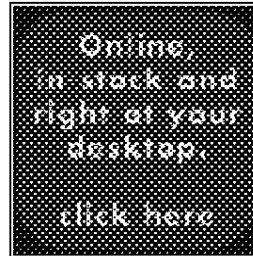
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books, and virtually all of them are thinking about how their laws apply to this area. It's only a matter of time before cases like these become commonplace."

"Are we going to apply the strictest standard possible because of the possibility of a libel suit anywhere in the world?" asks Nelson Roth, Cornell's associate university counsel. "Do we apply the law of Iraq, for example, even if it is inconsistent with our own legal principles?"

Indeed, from a US perspective, Godfrey's suits -- and others like them -- pose a unique threat to that American holy of holies, the First Amendment. "If you have more worldwide distribution, you're going to have more lawsuits," said Lawrence Savell, a New-York based media lawyer with Chadbourne & Park. "It puts the First Amendment in danger, which is one of the reasons we broke away from England in the first place."

Cornell, whose news server handles about a million electronic communications a day, isn't the only American university Godfrey has chased into the British courts. In October of last year, he filed suit in Great Britain against the University of Minnesota, Minneapolis ISP StarNet, and Kritchai Quanchairut, a former University of Minnesota student. Godfrey's claim was that Quanchairut made defamatory remarks about his character in a series of messages posted on soc.culture.thai.

Whether or not the Minnesota case will move forward in Great Britain remains unclear. Minnesota recently submitted a motion to dismiss the case on jurisdictional grounds, arguing that the case should not be reviewed in Britain. The motion will be heard by the British High Court on 29 July.

"We've taken the position that we are not responsible for these postings because, being an ISP, we don't review or control content," said Bill Donohue, the school's deputy general counsel. "We are constrained by federal law from doing so."

American entities faced with defending libel claims in the UK are particularly vulnerable since English common law has no First Amendment equivalent. And aside from the usual pitfalls and expense of retaining counsel overseas, British libel law is plaintiff-friendly, partly because the burden of proof lies on the defendant to dispute the claim.

While traditional British libel law permits news vendors, booksellers, and distributors to employ Britain's "innocent dissemination" doctrine as a libel defense, ISPs notified of questionable postings cannot fall back on such a defense, according to Nick Braithwaite, who is representing Godfrey in the Demon case.

But the UK's "innocent dissemination" doctrine has never really been tested with respect to online liability, says Yaman Akdeniz, an attorney who runs Cyber-Rights & Cyber-Liberties, a group promoting free speech and privacy on the Net. "ISPs are always the 'usual suspects' when illegal content is considered or [having] deep pockets when civil claims through defamation suits are brought against them," Akdeniz said. "[But] it remains to be seen whether the courts would give more protection to ISPs or not."

Moreover, if an American entity does not have assets in England, it's unclear that a UK libel judgment could even be enforced in the US. Akdeniz cites two cases in which American courts refused to enforce a UK jury award, in part, because doing so, the courts maintained, was unconstitutional.

In one of those cases, *Telnikoff v. Matusevitch*, the Fourth District US Court of Appeals based its ruling on the importance of the "free flow of ideas and opinions on matters of public opinion." The court also described British libel laws as "repugnant" to American ideals of free speech.

Thus far, Godfrey's suits have not led to any judgments. In March, he settled with Melbourne PC Users Group for a reported \$6,190. He also settled suits with New Zealand TeleCom and the Toronto Star for undisclosed sums. And, while Godfrey has won a default judgment against Dolenga, who did not respond properly to Godfrey's complaint, it has not been determined yet whether damages will be awarded.

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