

Should Bloggers Be Civil In Cyberspace?

That is the debate raging (and ironically, in many instances raging is exactly the right word) in cyberspace, after American Internet and blog pioneer Tim O'Reilly proposed codes of conduct for bloggers and blogsites,. He was prompted to do so by the experience of a journalist and friend, Kathy Sierra, who became the focus of vitriolic and even threatening comments on various sites.

At present, only voluntary codes of conduct are being proposed. O'Reilly's suggested Code includes provisions promising to 'take action' if someone is being unfairly attacked, such as requiring a person to 'make amends' publicly for offensive statements, co-operating with law enforcement to protect the target of threats if the originator of the threat does not agree to withdraw it and apologise, and the prohibition of anonymous comments (by requiring commentators to supply a valid e-mail address before being allowed to post, although using an alias would be permitted).

Should there be such Codes of Conduct? Would it make any difference to the legal liability of bloggers, ISPs and those posting comments (in this jurisdiction) if there were?

Of course, direct threats of violence and persistent abuse are already crimes, or at least civil wrongs, under existing legislation. The protection can be sweeping: in one case¹, the Court imposed a restraining order on a defendant to criminal proceedings under the Protection from Harassment Act 1997 preventing the publication by her of any information- "whether true or not"- about a man with whom she had once had a one night stand, and his fiancée, after the woman had waged a campaign of internet harassment against them.

Defamatory comments or those infringing privacy can be the subject of legal action, including injunctions, and such cases are increasing. These legal actions can probably even be brought against 'mere conduit intermediaries'², once the offending material has been drawn to their attention, so codes of conduct might seem superfluous in England and Wales.

However, these legal rights are often more easily identified than enforced. The greatest impediment for complainants is often the complexity and expense of obtaining the necessary disclosure with which to bring an action against the originator of the offending material. Internet Service Providers currently do not provide information to complainants without a court order, even if they do not actively oppose an order being made³. In Europe, privacy and data protection laws combine to prevent, or at least dissuade, ISPs and others from handing over material to complainants or police without a court order except in the clearest instances of criminality.

Some ISPs are reluctant to remove offending content for fear of complaint from the blogger, or contributor. All permit users to remain anonymous. For US-based ISPs and bloggers, any restraint is generally equated to censorship, which is officially A Bad Thing.

Suing the ISP or site host instead of the unknown and unidentifiable originator of offending statements can be tricky. ISPs and other entities can rely on defences under the Electronic Commerce (EC Directives) Regulations 2002 and section 1 of the Defamation Act 1996 in respect of information they have carried, hosted or cached but did not create⁴.

Godfrey v Demon Internet⁵ illustrates prevailing attitudes neatly. Mr Godfrey complained to the defendant, an ISP, over defamatory statements about him posted by an anonymous user and stored on its news server. He requested its removal, but the material remained available until its automatic expiry. Godfrey then sued the ISP for libel. The defendant ISP had its defence of innocent dissemination under s.1 of the Defamation Act 1996 struck out, but only so far as it related to the period after the ISP had received Mr. Godfrey's complaint.

If codes of conduct create the expectations in internet users that anonymous contributions are undesirable, and that complaints will be taken seriously by all concerned, some of the practical difficulties currently facing complaints may just ease. At the very least, creating a practice where sites and ISPs remove offending material promptly will reduce the damage done, particularly to those who find themselves the targets of vicious and long-running campaigns of denigration. The readiness of users to disclose the identity of those who harass, defame and threaten may increase.

However, banning anonymous comment is undoubtedly problematic. Even if such a ban could be enforced, it would certainly be a fetter on free speech, and not just for the irresponsible: think of whistle blowers, serving police or army officers and many others who might have good reason to want to contribute to a debate without being identifiable. There is a rather circular aspect to this debate at present: the very frequency of hostility and harassment in the blogosphere is, to many perfectly responsible people, a good reason to contribute anonymously. If codes of conduct successfully promote civility, perhaps fewer users will want to.

Finally, codes of conduct may also have the advantage of protecting potential defendants from themselves. Many Internet users are wholly ignorant of the law, and of the technical means by which their identity can be discovered by a complainant who is persistent and well-resourced enough.

Overall, codes of conduct are unlikely to do much to alter substantive rights and remedies. Their value, if any, will lie in changing the climate.

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1R v Debnath [2005] EWCA Crim 3472

2 Matthew Collins, *The Law of Defamation and the Internet*, 2nd edn 2005, at para 15.43

3Eg *Totalise Plc V (1) Motley Fool Ltd (2) Interactive Investor Ltd* (2001)

4See, for example, *Bunt v Tilley* [2006] EMLR 18, p523, a contrast on its facts with *Godfrey v Demon Internet*.

5[2001] QB 201