COMMENTS OF THE
SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW

RE: Draft Recommendation of the right of reply in the on-line media dated March 21, 2003

Submitted to:
THE COUNCIL OF EUROPE
Media Division

In response to:
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Group of Specialists on On-line Services and Democracy (MM-S-OD)
Secretariat Memorandum prepared by the Directorate General of Human Rights

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The Silha Center for the Study of Media Ethics and Law submits the following comments on the Draft Recommendation on the Right of Reply in the On-line Media.

The Silha Center is a research center located within the School of Journalism and Mass Communication at the University of Minnesota, located in Minneapolis, Minnesota, United States. The Center's primary mission is to conduct research on, and promote the understanding of, legal and ethical issues affecting the mass media. The Center also sponsors an annual lecture series, hosts forums, produces a newsletter and other publications, and provides public information about media law and ethics issues.

I. The Right of Reply Should Not Be Mandated

Mandating the right of reply, though admirable in its intent to protect a person's character from defamation and libel, collides headlong into the right of freedom of speech as guaranteed by many international and national human rights documents. Because of its potential to chill

speech, the Silha Center urges against adoption of the Draft Recommendation on the Right of Reply.

II. International Constitutional and Case Law

The Right of Reply is inimical to freedom of speech and freedom of the press, both important elements in democratic systems. Without the ability to freely print, learn and discuss all sides of a controversial issue, citizens would be hampered in their ability to participate fully in the democratic process.

The constitutions of many European countries recognize the right of freedom of speech. Great Britain, though having no written constitution, has a long history of defending the right to freedom of speech for its citizens. In addition, many international legal documents guarantee freedom of speech, including the Universal Declaration of Human Rights (1948); the European Convention on Human Rights (1953); the International Convention on Civil and Political Rights (1976) and the Charter of Fundamental Rights of the European Union (2000). Many member States of the Council of Europe are signatories to these documents.

Similarly, the First Amendment to the United States Constitution guarantees freedom of speech and freedom of the press. In a 1974 case, *Miami Herald v. Tornillo,* 418 U.S. 241 (1974), the U.S. Supreme Court considered Florida's right of reply statute and found it to be an unconstitutional restraint on editorial autonomy because it allowed government to impermissibly insinuate itself into the editorial content of the press.

III. The Right of Reply Is a Form of Prior Restraint

As a general proposition, the Right of Reply would constitute a prior restraint on Web sites by requiring compulsory publication of content that the Web site owner may not wish to publish. Furthermore, as stated in Principle 4 of the Draft Declaration of Freedom of Communication, "[P]ublic authorities should not issue regulations which complicate the setting-up and running of individual web sites. . . . A requirement, for instance, to notify the authorities of any changes to a web site might violate this part of the principle." If a Web site is required to post a right of reply, it would appear that notifying an authority that the reply has been posted would also be required in order to verify compliance with the law. Such notification would constitute a "barrier to participation" in Internet communication.

A mechanism to allow appropriate authorities, whoever they might be, to ensure that the reply has indeed been posted, might relieve the owner or creator of the site of the ultimate responsibility, but would effectively put the authorities in the role of censors, by making them monitors of media content. The monitoring of speech by governmental authorities goes against the principles of a democratic society.

IV. Underlying Problems with "Claims of Inaccuracies"

A claim of inaccuracy does not mean that the original statement is untrue, nor does it necessarily guarantee that a reply to it is the truth. Furthermore, the perception of "truth" can be greatly influenced by a person's point of view, and two seemingly opposing points of view can actually be reflections of the same facts from different perspectives. One need only look at the

arguments utilized by holocaust deniers or either side of the abortion issue to see the problems that could arise.

Additionally, there are varying degrees of inaccuracy. There would need to be set protocols to determine at what point a statement constitutes an "inaccuracy" requiring the Right of Reply. Such protocols could stifle speech such as satire, parody, or hyperbole which, for generations, have been used to encourage discussion and debate about political issues. Who would determine what is truth, and who should be allowed to post a reply? To whom would such authority be given?

V. The Right of Reply Is Extended to Legal Persons As Well As Natural Persons

This provision would allow corporations and NGOs to have a right to reply. This means that an individual who has set up a Web site critical of a company or an organization must post that organization's reply in response to commentary. By the same token, a corporation would be forced to post replies from disgruntled employees or groups protesting its policies and practices. Posting information critical of an entity, known as "flaming," has become a major issue on the Internet. Postings can range from a legitimate complaint to far-fetched exaggeration and hyperbole.

For example, the "McSpotlight" site (http://www.mcspotlight.org) posts complaints about work and environmental conditions surrounding the McDonald's corporation. The Boycott Nike site (http://www.saigon.com/~nike) advocates consumer pressure to enforce fair employment practices. And such messages can be powerful. As a result of the messages posted on the Free Burma Coalition Web site (http://www.freeburmacoalition.org), PepsiCo, Texaco

and Heineken were persuaded not to invest in or buy from that country. But requiring a corporation, NGO or any other entity to post a reply on its Web site that is in complete opposition to its philosophy and mission would mean compromising the site's content. It also raises the question of how many replies are enough - or how many too much? If many employees are laid off from a company or wish to comment on perceived unfair practices, would each of them be allowed a Right of Reply? Whose reply would be chosen, and whose discarded? By whom? And according to what criteria?

VI. Questions of Jurisdiction

The difficulties surrounding jurisdiction are exemplified in *Dow Jones & Co. v. Gutnick* [2002] HCA 56 (Dec. 10, 2002). Although that case dealt with defamation rather than the Right of Reply, the High Court of Australia wrestled with similar jurisdictional questions such as: Which country's laws govern publication on the World Wide Web? What if the site originates with a person or organization in one country, the ISP is located in another, and the entity seeking to post a reply in still another?

Along with questions with regard to jurisdiction come questions of differences in cultures. What is acceptable for one culture may not be for another, a question raised in the recent Yahoo! case where organizations located in France objected to the on-line sale of Nazi paraphernalia by a site in the United States. See *League Against Racism and Antisemitism (LICRA), French Union of Jewish Students v. Yahoo! Inc. (USA),* [2001] Electronic Business Law Reports, 1 (3) 110-120. The Draft Recommendation does not address how such questions of jurisdiction would be handled. In a study by the U.K.'s Law Commission entitled

"Defamation and the Internet: A Preliminary Investigation," concerning how defamation and contempt of court affect the Internet, the Commission noted that: "Jurisdictions do not only differ in the way that they view defamation: they also believe strongly in their own interpretation of the right to freedom of expression. It is therefore an area which is particularly likely to generate culture clashes." (U.K. Law Commission Report, §4.30).

VII. Re: Principle 3: An "Indeterminate Reasonable Time Limit"

This section of the Draft Recommendation lacks a definition of "reasonable time limit." It is especially problematic because Internet Service Providers (ISPs) frequently "cache" sites - storing information temporarily so that pages are more easily accessible (U.K. Law Commission Report, § 2.14). In addition, Web sites with online archives, such as databases or newspapers, allow a visitor to search for stories or articles posted weeks, months, even years before. Such sites provide an important public service, but under the Draft Recommendation, they pose troubling questions as to the "date" of publication for the purposes of triggering a Right of Reply. Is it the date of the first publication, or one of the many dates the publication was accessed by visitors to the site?

As the Council of Europe's own "Summary of the hearing on the right to reply in the on-line environment" points out, there is a risk that "[T]he right of reply would never expire." (Summary of the hearing on the right of reply in the on-line environment, Strasbourg, 10 Feb. 2003, at 3). This problem is exemplified in *Loutchansky v. The Times Newspapers* [2002] 1 AA11 ER 652. The decision in that case, governed by the standard English rule stating that a cause of action accrues each time a libel is disseminated (meaning each time the site or article is

accessed - even in its archival form), makes it impossible to begin marking time on a statute of limitations. As a consequence, the U.K. Law Commission Report advocates adopting the "single publication" rule effective under United States law, which states that a single edition of a newspaper or book is considered a "single publication" no matter how many copies are disseminated. Accordingly, only one legal action may be brought, and in only one jurisdiction; and the statute of limitations begins to run at the time of the first publication, even if copies are sold years later. (U.K. Law Commission Report, § 3.17)

If the Council of Europe should adopt the Recommendation on the Right of Reply, we urge it to specify that the "single publication rule" will apply.

VIII. Re: Principle 5: Length, Placement of Reply

The Draft Recommendations advocate that a reply be placed with the same prominence and in the same place or on the homepage of the Web site disseminating the alleged inaccuracy. However, this recommendation fails to consider that another's bandwidth is being used for a purpose other than was originally meant. Additionally, has the character of the original site been diluted in order to accommodate the reply of a targeted person?

In 1969, the Supreme Court of the United States upheld the constitutionality of the "Fairness Doctrine," which required broadcast stations to address controversial issues of public importance and to present opposing viewpoints, based on the scarcity of the broadcast spectrum, *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969). But the doctrine never applied to newspapers, because newspapers were comparatively easy and inexpensive to establish, print and distribute. With the onset of cable and satellite television, the

Federal Communications Commission repealed the Fairness Doctrine. See "FCC Ends Enforcement of Fairness Doctrine," Federal Communications Commission News, Report No. MN-263, Aug. 4, 1987.

A parallel situation exists for the Internet. Setting up and maintaining a Web site with an opposing viewpoint is relatively inexpensive and simple to do so that anyone with something to add to the marketplace of ideas can do so. In addition, key words could be coded into the Web site itself while it is being created or updated that would enable search engines such as Google to retrieve a site when an Internet user enters those key words, thereby presenting the user with a variety of viewpoints surrounding a topic.

IX. ISP Pressure on Subscribers and Web Site Operators

The draft recommendation does not specifically address the liability of ISPs for false and defamatory speech. This is an important consideration that must not be overlooked in the context of the Right of Reply.

Given the ephemeral nature of the Internet, the role of an ISP has been variously likened to that of a publisher, distributor, conduit, or common carrier. In the United States, ISPs have been granted immunity from suit (47 U.S.C. §230 (c)(1)). But in *Godfrey v. Demon Internet Limited* [1999] E.M.L.R. 542, the U.K. High Court ruled that Demon Internet was liable for a defamatory posting because the defense of innocent dissemination did not provide an absolute immunity for distributors. Following the ruling in that case, the U.K.'s Law Commission published its "Defamation and the Internet" Report, discussing how a ruling like that in the *Demon* case could chill speech on the Internet. The Report notes, "ISPs frequently receive

complaints that material on websites and newsgroups is defamatory. We were told that some ISPs receive over a hundred complaints each year. Particular concerns were expressed about the number of solicitors' letters sent on behalf of companies complaining about websites set up by their disgruntled customers. Under the present law, the safest course is for the ISP to remove such material, whether the alleged defamatory material is in the public interest or true." (U.K. Law Commission Report, §1.5)

The Report concluded by advocating adoption of law similar to the United States' Communication Decency Act of 1996 (CDA), 47 U.S.C. §230. The CDA minimizes the civil liability placed on ISPs with respect to the material disseminated but not created or edited by them. Under the provisions of the CDA, ISPs shall not "be treated as the publisher or speaker of any information provided by another information provider." Without a law like the United States' CDA, ISPs located in Europe would either remove, or compel the subscribers to remove, defamatory or libelous material from the Internet in order to spare themselves liability in situations where a site refused to comply with Right of Reply laws.

Conclusion

An underlying implication of the Draft Recommendation is the idea that people who use the Internet are not able to discern whether what is found on a Web site is true or an "inaccuracy." But anyone who is capable of accessing the World Wide Web in the first place is presumably able to seek information through the use of a search engine and learn about multiple viewpoints surrounding an issue.

As for the person or entity who believes that he, she or it has been defamed, other remedies exist that would not put the constraints on freedom of speech in the Internet as would be the case with a Right of Reply. Public figures and public officials - prominent individuals as well as corporations and organizations - have recourse to other redress because they have already placed themselves on a public platform from which they may speak and address any or all "inaccuracies" concerning them. Defamation suits, invasion of privacy suits, and trademark infringement suits are viable options to protect one's reputation as effectively - perhaps even more so - than mandating a Right of Reply.

For all the foregoing reasons, we urge the Council of Europe not to adopt the Draft Recommendation on the Right of Reply.

We appreciate the opportunity to share these views with the Council of Euorpe.

Respectfully submitted,

Jane E. Kirtley, J.D., Director
Elaine Hargrove, M.A., Silha Fellow
Silha Center for the Study of Media Ethics and Law
School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street, SE
Minneapolis, MN 55455
United States of America
612 625 9038

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Additional resources

U.K. Law Commission, “Defamation and the Internet: A Preliminary Investigation” Scoping Study No. 2, December 2002, available online at http://www.lawcom.gov.uk/files/defamation2.pdf