SHOULD THE LAW BEAT A RETWEET? RATIONALISING LIABILITY STANDARDS FOR SHARING OF DIGITAL CONTENT

Nandan Kamath[*]

The emergence of social media has raised new and interesting questions concerning the regulation of free speech. One such question is the legal treatment of the sharing of third party digital content. Using the example of a 'retweet', this article highlights the urgent need to establish clearer liability standards for those sharing, repeating or endorsing illegal or infringing content. It attempts to propose a clear, principle-based approach that lifts the cloud of uncertainty creating a chilling effect on speech.

This act of retweeting is sought to be analysed against various legal frameworks including defamation, copyright infringement and public order. It is seen that unlike an intermediary that enjoys safe harbour protection, the retweeeter is treated on par with a principal actor. The law as it stands today does not differentiate between the repetition and original posting of content. This has a chilling effect on the act of sharing and reduces the diversity of voices on the internet. For these reasons, it is argued that a retweeter must be protected as a traditional internet intermediary. Finally, this article postulates a legal framework for attributing liability to the retweeting of illegal and infringing content that accounts for the unique context of social media communications.

Introduction

> "*Technologies that greatly empower people to communicate are transformative enough to cause injury… The internet can help us understand and own the ethical dimensions of what we do online, and to make morally informed, rather than legally compelled, choices about the information we absorb and refract onward.*"
>
> – Jonathan Zittrain[1]

Laws the world over have approached the regulation of new technologies with varying degrees of sophistication. The treatment of content distributed via social media platforms is a prime example. The laws of India have yet to achieve a nuanced balance between protecting freedom of speech on social media and regulating speech that is illegal or infringing.

Recent incidents of users being arrested and charge sheeted for alleged offences under the Information Technology Act, 2000 and related laws for the act of merely "liking" a third party's

---

[*] Nandan Kamath is a graduate of the National Law School of India University, the University of Oxford (on a Rhodes Scholarship) and Harvard Law School. He is Principal Lawyer at LawNK - The Law Offices of Nandan Kamath, a boutique sports, entertainment and intellectual property law practice based in Bangalore. His clients include a number of international and national sports bodies, athletes, sponsors and artists as well as brand and content driven businesses.

[1] Jonathan Zittrain, *A Twitter law would be unwise*, THE FINANCIAL TIMES, November 23, 2012, *available at* http://www.ft.com/cms/s/0/f7aff27a-33f1-11e2-9ce7-00144feabdc0.html.

post[2] have highlighted the urgent need to establish clearer liability standards for those sharing or endorsing illegal or infringing content. That most of the cases pursued by those enforcing the law have had politicians and their kin as the subject matter of the impugned speech only reinforces the need for carefully protecting free speech in the online context.

Social media tools enable online conversations and facilitate the effective relaying of information that enriches our social and political domain. The same mechanisms also provide a platform for the dissemination of defamatory content, lies and incendiary content that can cause personal and public harm of significant proportions. A balance must be found that effectively attaches culpability to clearly illegal and infringing acts without concurrently hindering the legitimate use of these services.

This article uses the example of the retweet, evaluating the current and potential legal treatment of this message sharing feature of the Twitter service. This is used to exemplify how we would be well advised to not stigmatise the increasingly novel means of sharing of third party digital content and dis-incentivise the users facilitating such dissemination. While the laws of India are the primary subject matter of the article, the conclusions arrived at could apply equally to practically every legal system worldwide. This article makes a call for a clear, principle-based approach that lifts the cloud of uncertainty chilling speech rather than protecting it.

What is Twitter?

Twitter is an online social networking and micro-blogging service.[3] It permits its users to post and read text-based messages (called "tweets") of up to 140 characters each.[4] With over 500 million registered users and 200 million active users as of 2012,[5] it relays approximately half a billion user-generated tweets on a daily basis.[6] These tweets are on practically every subject under the sun.

Tweets can be posted and read via text messages, web browsers, compatible desktop applications and mobile application services, which enable "always on" and "on the move" Twitter access. With

---

[2] *A Facebook 'like' could land you in jail - courtesy Section 66A of IT Act*, November 20, 2012, *available at* http://www.sify.com/news/a-facebook-like-could-land-you-in-jail-courtesy-section-66a-of-it-act-news-national-mluoPDhcedh.html

[3] *See* www.twitter.com.

[4] *See* https://support.twitter.com/articles/215585-twitter-101-how-should-i-get-started-using-twitter#.

[5] Lisa O'Carroll, *Twitter active users pass 200 million*, December 18, 2012, THE GUARDIAN, *available at* http://www.guardian.co.uk/technology/2012/dec/18/twitter-users-pass-200-million.

[6] Daniel Terdiman, *Report: Twitter hits half a billion tweets per day*, October 26, 2012, CNET, *available at* http://news.cnet.com/8301-1023_3-57541566-93/report-twitter-hits-half-a-billion-tweets-a-day/.

a click of a button, registered users can post tweets. Each tweet is, by default, immediately publicly viewable, searchable and readable by anyone with access to the Twitter website, via third party applications and on other websites embedding these tweets.

What is a retweet?

In short, a retweet is a re-posting or sharing by a registered Twitter user of someone else's tweet.[7] The retweet appears on the re-poster's Twitter profile timeline. It is possible for a user to retweet posts made not only by those users he or she "follows" but also those made by any other Twitter user posting on the service, in each case except where the original poster has a "protected account".[8]

Retweets include the name and profile photo of the original poster and are accompanied by a retweet icon and text information stating that the post is a retweet by the retweeting poster.[9] Though not an official Twitter command or feature, Twitter users have also conventionally manually typed RT and the original poster's Twitter handle at the beginning of a tweet to indicate that they are re-posting and quoting someone else's tweet[10] (e.g., 'RT @originalposter This is the original tweet').

Where a tweet is reproduced verbatim with the RT prefix or has been retweeted without modification or addition, such a retweet is commonly known as a 'naked' retweet. This is to be distinguished from the 'modified' retweet (often used with the prefix MT), which re-posts a modified, edited or truncated version of the original poster's tweet, potentially altering its meaning and context.

The subject matter of this article is the accurate and complete 'naked' retweet reproduced without modification. The principles herein would apply equally to a retweet prefixed with additional comments from the retweeter that are not themselves independently infringing (e.g., 'I agree with this. RT @originalposter: This is the original tweet'). Though it has its own unique characteristics, culture and social context, a retweet is in all material aspects, functionally equivalent to sharing, re-

---

7 *See* https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/20169873-how-to-retweet-a-tweet#.

8 *See* https://support.twitter.com/articles/77606-faqs-about-retweets-rt#.

9 *See* https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/20169873-how-to-retweet-a-tweet#.

10 *Id.*

posting or liking a third party's Facebook post or the act of sharing on a number of other similar social media platforms.

Why do retweets matter?

The effect of a retweet is that the content of the original tweet is repeated as is and, consequently, is amplified to a larger number of viewers than only the followers of the original poster.

The retweet is variously seen as social currency, endorsement and a badge of the quality and resonance of the particular original posting. It is also used as a mode of content dissemination,[11] to amplify a statement or a point of view, to curate and filter third party content, to build friendships and reinforce relationships, to gain followers and prominence and also to reciprocate an act of retweeting by another user.[12] Retweeting, like most other digital sharing activity, can occur with a single click, a trivial, momentary action. The underlying content most often has a casual and conversational tenor.[13]

Despite all of its informality, Twitter has emerged as a content publication platform of note. Although almost exclusively carrying user generated third party content, it is increasingly relied on as a genuine and current source of news as well as crowdsourced opinion and interactive social commentary.[14] At the same time, its tenor is spontaneous and conversational[15] with a significant proportion of the content being characterised as "pointless babble".[16]

Attributing legal liability

By virtue of laws protecting traditional internet intermediaries,[17] there is no single entity, such as Twitter, that can be held responsible for all the content that is published on this publicly viewable and searchable platform. The safe harbours enjoyed by internet intermediaries are premised on

---

[11] Sarosh Khan, *The Threat Posed to Reputation by the Emergence off Social Web Technologies,* 23 ENT. L.R. 5, 126 (2012).

[12] *See* Daxton R. Stewart, *When Retweets Attack: Are Twitter users liable for republishing the defamatory tweets of others?,* 32 (2012), *available at* http://works.bepress.com/daxton_stewart/7.

[13] *Supra* note 1.

[14] Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter*, 24, (2012), *available at* http://works.bepress.com/ellyn_angelotti/1.

[15] Jacob Rowbottom, *To Rant, Vent and Converse: Protecting Low Level Digital Speech,* 71 C.L.J. 2, 355 (2012).

[16] According to a study conducted by Pear Analytics, 40% of all tweets are pointless babble. *See* http://www.pearanalytics.com/blog/2009/twitter-study-reveals-interesting-results-40-percent-pointless-babble.

[17] *See*, for example, §79 of the Information Technology Act, 2009 and the Information Technology (Intermediaries guidelines) Rules, 2011 in India and §512 of the Digital Millennium Copyright Act, 2000 and §230 or the Communications Decency Act in the US.

them being passive conduits and carrying and hosting user generated content that they do not control. There is no equivalent legal immunity for those sharing the content. Twitter, in fact, puts users on notice that they not only own but are responsible for the content they post.[18] While the legal standards for attributing liability to original tweeters for infringing content are progressively evolving, those relating to sharing and re-posting of this content are less clear.

A couple of hypothetical cases are useful to frame the issues:

Case A: An Opposition Member of Parliament tweets to his 200,000 followers "*This Prime Minister is the most corrupt leader our country has ever had. A Swiss bank account, 5 undisclosed offshore properties*". His tweet is read by tens of thousands of Twitter users, with over 5,000 of them retweeting "*RT @OppnMP This Prime Minister is the most corrupt leader our country has ever had. A Swiss bank account, 5 undisclosed offshore properties.*" The Opposition MP is sued for defamation by the Prime Minister and is unable to prove the truth of his statements. Should the 5,000 retweeters also be held liable for publishing defamatory content about the Prime Minister?

Case B: To the official Twitter account of the anchor of a leading TV news channel is posted "*Communal clashes in the capital, 25 killed*". The 500,000 followers of this account view this tweet. Over 25,000 of them retweet "*RT @TVAnchor Communal clashes in the capital, 25 killed*". The original post turns out to be untrue as there had only been a scuffle at the local university football match, resulting in injuries and hospitalisation to a few students involved. However, the spiralling misinformation results in escalated tensions and full blown communal riots in the city. The TV anchor is likely to face legal sanction for disturbing public order. Is it appropriate to treat the 25,000 retweeters equally harshly?

Assessing the Legal Standard

At a high level, most legal systems liken Twitter posting to all other media broadcasting and the laws as applicable to newspapers, television and radio are readily applied. However, this causes significant regulatory dissonance because Twitter is not, in fact, functionally equivalent to these traditional media platforms.[19]

In the quest to establish the appropriate liability standard for retweets, the first task is the appropriate characterisation of the retweet. In function, a retweet can, in some respects, be

---

[18] Twitter tells its users: "You are responsible for your use of the Services, for any Content you post to the Services, and for any consequences thereof." *See* https://twitter.com/tos.

[19] Jacob E. Dean, *To Tweet or not to Tweet: Twitter, "Broadcasting," and Federal Rule of Criminal Procedure 53*, 79 U. CIN. L. REV. 769, 789 (2010).

analogised to a link to or quotation of another's posting[20] and, in others, to an independent and new publication. Thus far, the legal precedent has relied on the latter approach. For all intents and purposes, retweets have been treated like any other tweets regardless of the content first having originated from a third party. Looking at our two hypothetical cases from earlier in this article, this is not a satisfactory result. This is especially so in the social context surrounding instantaneous digital communication. The ensuing chilling effects on the act of sharing, itself an independent form of speech, have significant ramifications on the diversity of voices that can be heard and the sources they come from.

Simply put, are retweeters more like independent voices (i.e., through active publication) or are they better characterised as constituting a new category of intermediaries who facilitate third party access to original content (i.e., through linking)?[21] The questions become where on the continuum between liability for publication and linking should liability rest, and why? In searching for responses, the next section will demonstrate how the application of traditional media laws to tweeting and retweeting makes for a poor fit.

The Regulatory Framework

Commentators analogise tweeting to a stream of consciousness, like an electronic version of a coffee shop,[22] with the primary focus on frivolous conversation, gossip and minutiae.[23] Retweeting, even more so, falls into the category of non-serious social chatter of the nature of "do you know what XYZ said?" rather than formal, well-considered communication such as a news article or a segment on a television feature. Naturally, there is limited expectation of due diligence with respect to tweets and most users and viewers of Twitter content will likely be aware of the social context, informality and potential inaccuracies that characterise tweeting.

From a regulatory perspective, however, the key difference between Twitter and a coffee shop is that in the Twitterverse, potentially anyone in the world can play the role of either a permitted guest or an unintended eavesdropper. Speech, to which liability is most unlikely to attach in the real world, suddenly and unintentionally takes on a new character on social media although the digital speaker and the listener may not agree that they meant it to be any different in character.

---

[20] *See* Harbhajan Singh v. State of Punjab, (1961) CriLJ 710.

[21] *Supra* note 12, at 25.

[22] *Supra* note 14, at 36.

[23] Hannah Rogers Metcalfe, *Libel In The Blogosphere And Social Media Thoughts On Reaching Adolescence,* 5 CHARLESTON L. REV. 481, 499 (2010).

While social media platforms have a very different context from other news communication modes,[24] it does not mean that this can be a liability-free zone; such a result would be as inappropriate as legal overreach.

Whether an original tweeter or a retweeter, a Twitter user exposes himself or herself to the entire gamut of laws governing content and speech.[25] Both civil and criminal laws are used to curb and control online speech. Potential liability can take the shape not only of damages but also of fines and incarceration. Defamation, copyright infringement and public order laws stand out as prime examples of the heads of liability most commonly applied to online speech. The applicability of these laws to retweets will be the subject of the remainder of this article.

Defamation

For a claim of defamation to succeed the statement under consideration must be: (i) false, (ii) made about the aggrieved person's reputation or business, (iii) understood by a reasonable person to be of or concerning the aggrieved person, and (iv) made out to a third person.[26] With respect to public figures, in addition to the specified factors, there is a requirement to prove that the representation was precipitated by malice.[27] The principle of privilege permits certain professions with a degree of latitude in response to claims of defamation. For example, journalists are provided some latitude (qualified privilege) through the dilution of the 'truth' defence, in that they can resist a claim for defamation on the ground that the statement or publication is based on a reasonable verification of facts and that it was not produced with a reckless disregard for truth or precipitated by actual malice.[28]

While case law involving Twitter and defamation has been limited worldwide, of relevance to the Indian context is the case of *Chris Cairns v. Lalit Modi*.[29] This case related to a suit for defamation filed in the UK by New Zealand cricketer Chris Cairns arising out of the following tweet (since deleted) by former IPL Commissioner Lalit Modi: "*Chris Cairns removed from the IPL auction list due*

---

[24] *See*, for discussion of this issue, Rebecca Phillips, *Constitutional Protection for Nonmedia Defendants: Should There be a Distinction Between You and Larry King?*, 33 CAMPBELL L. REV. 173 (2010).

[25] *See* for a comprehensive list of Indian laws that might be applicable to content: http://copyright.lawmatters.in/2012/01/brief-compilation-of-indian-content-law.htm.

[26] Tata Sons Limited v. Greenpeace, I.A. No.9089/2010 in CS (OS) 1407/2010 (Delhi High Court) (India).

[27] *Id.;* R Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.

[28] R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264 relying on New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[29] *See* Chris Lance Cairns v Lalit Modi, [2012] EWHC 756 (QB).

to his past record in match fixing. This was done by the Governing Council today." The High Court ruled in favour of Cairns and quantified the damage to reputation as £75,000 with an aggravation of 20% due to sustained and aggressive assertion of the plea of justification insufficiently backed by evidence. In quantifying damages, the High Court noted that the tweet was received by a limited number of followers that the parties agreed to be 65. Modi, thereafter, appealed to the Court of Appeal against the order of the High Court on the issue of quantification of damages.[30] On appeal, the issue in question concerned the appropriateness of the damages in light of the tweet's limited publication (both time and audience). In relation to this issue, the Court of Appeal recognised that damages for defamation should not be restricted or limited to the original recipients of a publication, and that the court must consider their likelihood to percolate through the Internet.[31] The Court of Appeal added that the issue of percolation is of particular relevance and 'immeasurably enhanced' due to the emergence and ease of availability of the World Wide Web.[32]

With respect to the re-publication of defamatory content, Indian courts have accepted that any such re-publication will give rise to a new action for defamation.[33] The re-publisher is required to defend the publication on the same grounds as available to the originator, i.e., by proving that the elements of defamation have not been made out. There is no defence of due diligence reporting or fair comment readily available. The underlying basis of this treatment is the position that the re-tweet constitutes an action of independent speech relaying information afresh, possibly to a new and different audience than the original tweet.[34] The retweeter is considered a principal actor rather than as an intermediary enabling content to be relayed to others.

Unlike a simple link to a website (which may contain infringing content) the retweet is not content-neutral. It conveys the allegedly infringing content fully and without reference (other than attribution of authorship) to the original posting. The retweet itself may be all there is, with there being no reason for a viewer of the contents to access the original tweet to view its contents. The case could therefore be made that the repetition and amplification of the content is in and of itself fair basis for attributing re-publication liability.

---

[30] *See* Lalit Modi v. Chris Lance Cairns, [2012] EWCA Civ 1382.

[31] Termed the 'grape-vine effect' *see* Crampton v Nugawela [1996] NSWSC 651.

[32] *Supra* note 30.

[33] Harbhajan Singh v. State of Punjab, (1961) CriLJ 710; In Re: E.V.K. Sampath, AIR 1961 Mad 318. It should also be noted that in Watkins v. Hall, 1868 (3) QB 396, the Queen's Bench suggested that repetition of a slanderous statement grants it greater weight and may result in greater injury to the person affected.

[34] *Supra* note 12 at 7.

That said, there are compelling reasons why all tweets, not just retweets, ought to be treated differently from those acts of publication forming part of the traditional media industry. The defamation law is grounded in the premise of a mismatch in size, resources and reach between the publisher of content and the subject matter of the defamatory publication. In large part, the availability of the remedy of defamation and the role of a public trial is to set right an unequal balance between the large publisher (with access to a professional editorial and legal team and wide circulation) and the relatively powerless individual who might not have ready access to a similar scale of resources or reach.[35] With Twitter, this is no longer the case. Though it might not be simple, for a nominal cost it is possible for the subject of the tweet to reach potentially the same audience that the original poster had in order to refute, clarify and respond[36] in more or less real-time. The original poster also has the opportunity to undo damages by reformulating, retracting and relaying[37] information he or she realises is inaccurate or illegal without having to wait for the completion of an entire passive news cycle, as would be the case with traditional media.[38] The opportunity here is to fight bad speech with more and better speech[39] relayed to potentially the same audience and on the same platform and scale. Where effective remedies and solutions of this sort are available and the defamation defendants are not necessarily in positions of mismatched power and reach, it may be strongly argued that the defamation law must find a new balance.

Copyright

Under the Copyright Act, 1957, infringement of a copyrighted work consists of two essential elements:[40]

(i) There must be sufficient objective similarity between the infringing work and the copyright work; and

(ii) The infringing work must have been derived from the copyright work.

There are certain "affirmative defences" available to a defendant in the case of an allegation of copyright infringement. These exceptions include "fair dealing", which covers private use, research

---

35 *Supra* note 14 at 7.

36 *Supra* note 14 at 18.

37 *Supra* note 15 at 9.

38 *Supra* note 14 at 55.

39 *Supra* note 11 at 36.

40 Sulamangalam R. Jayalakshmi v. Meta Musicals, 2001 (1) Raj.150.

work, review, criticism, etc. and "reporting of current events", which constitutes reports of works in the various forms of publication."[41]

With respect to whether original tweets are copyrightable and if retweets might amount to infringement of these tweets, the copyright law generally has a minimum threshold of length for originality that tweets might not satisfy.[42] Moreover, there is arguably an implied license from tweeters to third parties willing to retweet their content, with certain types of retweets also possibly qualifying as commentary and news reporting and, therefore, amounting to fair dealing.[43]

The issue of relevance is not whether the retweeter might infringe the copyright in the original tweet but it is whether a retweeter can be responsible, as the original tweeter might be, if the tweet links to, makes available or otherwise distributes copyright infringing content owned by third parties. A typical example is of a tweet providing a link to a file locker enabling the free download of an illegal copy of a new movie.

While there is only limited Indian case law on the appropriate liability standard for linking to copyright infringing content, internationally the standard is somewhat clearer. Providing links to copyright infringing content may not always constitute a primary infringement,[44] though it can certainly render the person providing the links liable for secondary infringement (for facilitating or inducing the principal offence).[45] Liability of either sort is unlikely to attach unless it can be proved that the linker was actively encouraging or inducing infringement, had reason to know that the content was infringing, or had actual and specific knowledge of its infringing nature.[46] Linking to other types of infringing content can also give rise to liability when the action is undertaken to evade a court order, to promote illegal conduct by others[47] or when there is complicity with the

---

[41] §52 of the Copyright Act, 1957.

[42] Stephanie Teebagy North, *Twitteright: Finding Protection in 140 Characters or Less*, 11 J. HIGH TECH. L. 333, 4 (2011).

[43] Adam S. Nelson, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697, 15 (2012).

[44] *See,* for reference, Ticketmaster Corp. v. Tickets.com, 248 F.3d 1173 (9th Cir. 2001).

[45] *See,* for reference, Cooper v. Universal Music Australia Pty. Ltd. [2006] FCAFC 187; Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290 (D. Utah 1999).

[46] *See* Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years,* 16 BERKELEY TECH. L.J. 3, 1273 (2001).

[47] *Id.*

original poster to commit an offence.[48] Upon careful evaluation of the nature of a retweet, these principles are potentially equally applicable to retweets.

Public Order Offences

Section 66A of the Information Technology Act, 2000 ("**IT Act**") was inserted vide the Information Technology (Amendment) Act, 2008 and created a new criminal offence.[49]

Of direct relevance to retweeting liability are sub-sections (a) and (b) of Section 66A. Sub-section (a) deals with the sending of any information that is 'grossly offensive' or 'menacing' in character**.** The terms 'grossly offensive' and 'menacing' have not been defined in the IT Act and, thus far, there has been no meaningful judicial evaluation of what might be considered to be 'grossly offensive' or 'menacing'. This offence is seemingly set up as a strict liability offence with no *mens rea* or knowledge component required. Sub-section (b) has three essential conditions to be met for an offence to be established: (i) the knowledge of the sender, (ii) the persistent sending of electronic messages, and (iii) the purpose of the messages.

With respect to applicability to tweets and retweets, it is evident that the phraseology of Section 66A of the IT Act is so wide that it includes within its ambit almost all forms of online speech and expression. Importantly, no distinction is made between original postings (tweets) and shares or reposts (retweets).

There have been several instances over the last year of Section 66A of the IT Act being used in response to online speech on social media platforms.[50] A recurring theme in each of these cases is

---

[48] Alain Strowel & Nicholas Ide, *Liability with Regard to Hyperlinks,* 24 COLUM-VLA J.L. & ARTS 403, 444 (2000).

[49] §66A deals with "Punishment for sending offensive messages through communication services, etc." and states:

"Any person who sends, by means of a computer resource or a communication device,—

(a) any information that is grossly offensive or has menacing character;

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation: For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message."

[50] In April 2012, Ambikesh Mahapatra, a professor of chemistry from Jadavpur University in West Bengal was arrested for emailing a caricature of West Bengal Chief Minister Mamata Banerjee to his friend. In May

that those charged under Section 66A had made or interacted with posts or transmitted messages relating to politicians or the kin of politicians. The increasing frequency of these cases led to the filing of a petition in the Supreme Court of India challenging the legality and constitutionality of Section 66A on the basis that it is so wide and vague and incapable of being judged on objective standards, that it is susceptible to "wanton abuse and hence falls foul of Article 14, 19(1)(a) and Article 21 of the Constitution."[51] Subsequent to the filing of this petition and the public outrage ensuing from the repeated incidents, the Government of India issued fresh interim guidelines in the form of an advisory,[52] stating that a police officer no less than the rank of District Commissioner of Police DCP can sanction prosecution under Section 66A. In metropolitan cities, such an approval would have to be given by officers at the level of Inspector General of Police (IGP). Only officers of these ranks will be allowed to permit registration of a case for offences under the IT Act relating to spreading hatred through electronic messages in a bid to prevent the misuse of the legislation.[53] These procedural safeguards notwithstanding, there is still a lack of clarity at the administrative and judicial levels on the substantive ambit of the offences, when and how they must be applied and appropriate limitations, exceptions and defences.

Of direct relevance to the Twitter liability standards debate on public order offences are the 'Interim Guidelines on prosecuting cases involving communications sent via social media' (the "**Guidelines**") issued by the United Kingdom's (the "**UK**") Crown Prosecution Service by the

---

2012, two Air India employees, V. Jaganatharao and Mayank Sharma, were booked by the Mumbai Police for allegedly uploading lascivious and defamatory content on Facebook and Orkut against a local politician and for threatening him with death while insulting the national flag in the process. In October 2012, businessman Ravi Srinivasan was arrested and charged under Section 66A of the IT Act by the Puducherry Police for having made an allegedly false accusation on the finances (the tweet stated: "got reports that Karti chidambaram has amassed more wealth than vadra.") of Karti Chidambaram, the son of the Union Finance Minister P. Chidambaram. In November 2012, two young women from Palghar in Mumbai, Maharashtra were arrested and booked under Section 295 (A) of the Indian Penal Code which deals with the "outraging of religious feelings of any class" and Section 66A of the IT Act. While one of the girls was booked as a result of posting a comment on Facebook against the shutdown in Mumbai after the death of Bal Thackeray, her co-accused was arrested for 'liking' the said comment on Facebook. In February 2013, the head of the Mahila Congress in Kerala Bindu Krishna filed a defamation case against a Facebook poster as well as over 140 people who shared the post in relation to the alleged role of the Rajya Sabha Deputy Chairman P.J. Kurien in the infamous Suryanelli rape case.

[51] *SC accepts PIL challenging Section 66A of IT Act, November 29, 2012*, *available at* http://articles.timesofindia.indiatimes.com/2012-11-29/india/35433946_1_cognizable-offence-section-66a-shreya.

[52] *Govt modifies Sec 66(A) of IT Act after recent Facebook controversies, November 29, 2012, available at* http://ibnlive.in.com/news/govt-modifies-sec-66a-of-it-act-after-recent-facebook-controversies/307991-3.html

[53] Advisory on Implementation of Section 66A of the Information Technology Act, 2000, (No. 11(6)/2012 – CLFE), January 9, 2013, *available at* http://deity.gov.in/sites/upload_files/dit/files/Advisoryonsection.pdf.

Director of Public Prosecutions ("**DPP**") that came into immediate effect on December 19, 2012. They were issued amongst growing concerns in the UK over the proportionality of prosecutions for offences committed on social media following the case of *Chambers* v. *DPP*.[54] Importantly, these Guidelines apply equally to the resending (or re-posting/retweeting) of communications.[55]

According to the Guidelines, any prosecution of social media offences must pass two tests:

(i) *The test of evidential sufficiency*[56] which means 'that an objective, impartial and reasonable jury (or bench of magistrates or judge sitting alone), properly directed and acting in accordance with the law, is more likely than not to convict'; and

(ii) *The test of public interest*[57], which means that the prosecution is the interests of the general public.

The Guidelines identify the following three specific categories of cases that will be 'prosecuted robustly'.[58]

(i) Communications which may constitute credible threats of violence to persons or damage to property;[59]
(ii) Messages which specifically target an individual or group of individuals and which may constitute harassment or stalking or which may constitute other offences such as blackmail;[60] and
(iii) Communications which may amount to a breach of a court order.[61]

[54] [2012] EWHC 2157. This involved Paul Chambers' conviction for sending a 'menacing' tweet threatening to blow up the Robin Hood Airport in South Yorkshire, which was overturned on appeal.

[55] ¶ 2.

[56] ¶5.

[57] ¶5.

[58] ¶13.

[59] ¶12(1).

[60] ¶12(2).

[61] ¶12(3).

A fourth category of cases is mentioned as being subject to a higher threshold, on the premise that in many cases, prosecution of cases of this nature is unlikely to be in public interest:[62]

(iv) Communications which do not fall into any of the above categories and fall to be considered separately, i.e., those which may be considered 'grossly offensive', 'indecent', 'obscene' or 'false', under Section 1 of the Malicious Communications Act 1988 or Section 127 the Communications Act 2003.[63]

In this fourth category of cases a prosecution may only be brought under where the communication is 'more than':

(i) Offensive, shocking or disturbing; or

(ii) Satirical, iconoclastic or rude comment; or

(iii) The expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it.[64]

The Guidelines also list various factors that must be considered in deciding whether a prosecution is in public interest, *inter alia*, stating that a prosecution is unlikely to be necessary and proportionate where:

(i) The individual has taken swift action to remove the communication or expressed genuine remorse;

(ii) Swift and effective action has been taken by others, for example, service providers, to remove the communication or block access to it;

(iii) The communication was not intended or obviously likely to reach a wide audience, particularly where the intended audience did not include the victim or target of the communication; or

[62] ¶13.

[63] ¶12(4).

[64] ¶36.

(iv) The content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression.[65]

The Guidelines emphasise the unique context of social media communications and draw a distinction between social media communications and normal communications, stating that 'prosecutors should have regard to the fact that the context in which interactive social media dialogue takes place is quite different to the context in which other communications take place. Access is ubiquitous and instantaneous. Communications intended for a few may reach millions.'[66] The Guidelines also caution that 'particular care' should be taken when using public order offences to prosecute social media cases, since public order legislation is primarily concerned with words or actions carried out in the presence/hearing of the accused.[67] Further, prosecuting a minor is seen as 'rarely likely to be in the public interest' according to the Guidelines, on the basis that children and young persons may not fully appreciate the potential harm and seriousness of their communications.[68]

The Guidelines are the first significant intervention that has rationalised social media legal standards. It cautions that the laws with respect to public order and threats must be applied carefully and sparingly in the context of social media, especially when the person posting the content is not actively inciting, harassing or offending a person or persons in his or her physical proximity or otherwise potentially under his or her influence. Merely because a social media post is capable of being viewed by *every* member of the public does not mean that it is actionable if *any* member of the public could potentially be incited, harassed or offended by it. What must be avoided at all costs is the 'heckler's veto'.[69]

Beating a Retreat on Liability

Functionally, a retweet is not very different from a hyperlink that informs the viewer of the existence of the original tweet. Take our two hypothetical cases, for instance. In Case A, retweeters are repeating a statement made by a public figure and, in Case B, the statement of a respect journalist. Speaking about it to friends over dinner or for that matter quoting the tweet to a large

---

[65] ¶ 39.

[66] ¶ 35.

[67] ¶ 42.

[68] ¶ 41.

[69] Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media,* 44 TEX. TECH. L. REV. 147, 9 (2011).

gathering is most unlikely to result in any liability whatsoever. Why should this be any different in the digital context when shared with followers?

A retweet refers factually to an independently existing and verifiable event that has already occurred, i.e., the posting of the original tweet by another user. The viewer of this retweet, by clicking on the retweet or the original poster's handle or profile name, can independently refer to and confirm the authenticity of the original tweet. This feature makes retweeting significantly different from a cross-platform re-publication. While the actual audience might have been amplified to some extent, the potential audience never is – after all, with all tweets being public by default, any follower of the retweeter has equivalent access to the original tweeter. The liability for original tweets is premised on the fact that a tweet is publicly accessible by *anyone* on Twitter. When evaluating the liability standard for retweets the question then is whether it is appropriate to claim that new viewership is harnessed by the retweet? Is there indeed a new act of 'publication' when the original tweet has already been published in a manner accessible to anyone who can view the retweet?

In the context of public order offences, the principles established by the UK Guidelines take the implementation of the law in the right direction. If implemented in the spirit of the Guidelines, public order offence laws cannot legitimately be applied to retweets in the same manner as they are to original tweets. Although retweets can magnify the risk of violence[70] and their immediacy give little time for evil counsels to be countered by good ones,[71] their increased remoteness from the mischief sought to be protected against must be equally kept in mind. This is not to say that retweets cannot amount to public order offences, but certainly the circumstances would be rare and exceptional, where the public interest not only trumps the freedom of speech of the retweeter and the right of the public to receive the retweet. Advocacy must also effectively be differentiated from incitement.[72]

To summarise, in the valuable quest to protect the end-to-end character of the internet, the law must recognise and protect a new breed of internet intermediaries – the content sharers.

Safe Harbours

With new technologies often come predictions of dire technological harm. Failure to regulate is projected as the most risky proposition and plaintive cries are made for new legal controls. As we

[70] *Id.,* at 13.

[71] *Supra* note 69 at 14.

[72] *Supra* note 69 at 18.

have seen, in particular with Section 66A of the IT Act, legislating when a technology appears new and mysterious can result in questionable laws and judicial precedents.

On balance, the public's interest is better served in almost every instance with access to more information from more sources as opposed to less. For this reason alone, the refraction and sharing of digital speech must find legal protection. Viewers of social media messages, a constituency that significantly overlaps with those posting on these platforms, are aware of the social context in which they post messages on social media and the resulting limitations.[73] They know that not only are editorial filters less robust but that there is an overall reduced degree of discipline in this mode of communication. This gives them reason to automatically filter and evaluate the accuracy and authenticity of the information posted, acting with a general cynicism that they would not generally display towards traditional media. Any legal standard that fails to understand this is unlikely to promote the public interest. In essence, there are good reasons to treat a retweet as we would an act of quotation, attribution or a statement of a pre-existing fact. There are equally good reasons to treat a retweeter on par with a traditional internet intermediary.[74] Limiting speech often has the opposite effect to the intended and runs the risk of giving bad speech a mystique and making it seem more desirable.[75] By protecting the dissemination and distribution of speech through safe harbours from liability for those facilitating this through social media sharing, an overarching public interest is served.

Principles of Liability for Retweets

Based on what has gone above, the following principles are recommended as necessary elements of a legal framework for attributing liability to the retweeting of illegal and infringing content:

(i) Fundamentally, the law should treat a retweet on par with a linked quotation rather than a fresh publication. It must recognise the retweeter as a new category of digital intermediary, deserving of protection of a limited nature. This characterisation would

---

[73] *Supra* note 15 at 9.

[74] §2(1)(w) of the IT Act states that an "intermediary" with respect to any particular electronic message means 'any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message'. This definition recognises the existence of independent pre-existing information which is being transmitted 'on behalf of another'. While retweeting is not necessarily done at the instance of or upon the request of the original poster and fellow users have not been traditionally recognised as intermediaries, a number of the principal elements of this definition are satisfied equally by an intermediary user such as a retweeter as it is by traditional intermediaries such as ISP, web-hosts, search engines and other similar services.

[75] *Supra* note 14 at 50.

not absolve the retweeter of all liability but would necessarily isolate and pre-determine the types of situations in which a retweeter might encounter liability.

(ii) Liability may attach to a retweet only in exceptional circumstances and should primarily be limited to specific situations, *inter alia*, where it can be conclusively established that the retweeter:

(A) knew of the defamatory, infringing or illegal nature of the content and retweeted it regardless; or

(B) demonstrated gross negligence in failing to verify the veracity or legality of the content in the face of reasonable doubt and retweeted it regardless; or

(C) was complicit with the original poster of illegal or infringing content and retweeted the said content in furtherance of this complicity; or

(D) retweeted content knowing that this would violate a court order prohibiting its publication or distribution; or

(E) after being put on notice of the illegality or infringing nature of the original tweet, intentionally failed or refused to delete the retweet and/or issue a retraction or clarification on the same platform in an expeditious manner; or

(F) retweeted content in an intentional attempt to incite hatred or an offence or to systematically and repeatedly harass an individual.

(iii) Retweeters must in all circumstance be able to enjoy the defences and privileges that the original poster does. For example, if the original post is from an established news source and the original poster enjoys journalistic privilege, so should the retweeter. This would ensure that there is never a case when a retweeter is held liable for content for which the original tweeter is not. Any other theory of defence that relies on the position, profession or activity of the poster rather than the nature of the content must be equally accessible to the retweeter. This, along with the liability principles enunciated above, will enable users to retweet content from established news sources and journalists without having to take on risks that the original posters do not.

This Article postulates that a legal framework incorporating these principles – perhaps through relevant amendments to the IT Act – will help foster an information environment in which protecting the diversity of sources combines effectively with responsible content distribution. This is a balance worth finding with immediacy and the time has come for the law, as it stands, to beat a retreat.