



**Law
Commission**
Reforming the law

Contempt of Court

This supporting material relates to:

Chapter 3, question 23

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PUBLICATION

- 3.5 Determining the meaning of “publication” for the purposes of the law on contempt is complicated by the fact that the word has two meanings. First, it can refer to publication in the physical sense, that is, the form in which it presents itself. Section 2(1) of the 1981 Act deals with this meaning in explaining that publication *includes* four terms: “any speech, writing, programme included in a cable programme service or other communication in whatever form”.
- 3.6 We examine those terms below. Lord Diplock in *Secretary of State for Defence v Guardian Newspapers Ltd*⁸ held that Parliament intended the definition in terms of the four mentioned expressions to be “complete and comprehensive”,⁹ despite the fact that the word “includes” would suggest that other terms beyond those four are not excluded if a case can be made for including them.¹⁰
- 3.7 Secondly, publication can also mean the *act* of publication. This meaning is dealt with under section 1 of the 1981 Act, which explains that the “strict liability rule” arises in respect of “conduct” that is treated as contempt of court. Section 2(1) states that the relevant conduct is that of “publication”. One difficulty here is that what that act of publication (the conduct) involves is not explained under the Act.¹¹ The only explanation we have is in relation to the physical form of the publication, discussed above. This is problematic when considering the question of who can be liable for a publication, because it is not clear who or what must have undertaken the act of publication (or part of that act) in order to attract liability. We consider this issue in detail below,¹² whilst this section of the chapter concentrates on “publication” in its physical form.
- 3.8 For reasons which we shall explain, we do not think there is any difficulty about including internet communications as publications under the definition in section 2(1) or that there is any prospect that a court would refuse to do so. Having said that, as will become apparent, there is limited authority in the context of contempt by publication on the definition of these four terms.

Speech

- 3.9 The term “speech” appears to be largely self-explanatory. At common law, a theatrical performance can be a publication for the purposes of contempt.¹³ By way of comparison with contempt, the Wireless Telegraphy Act 2006 defines speech to include “lecture, address and sermon”.¹⁴ There seems to be no

⁸ *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339.

⁹ *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 348.

¹⁰ The authors of Arlidge, Eady and Smith believe his Lordship to be correct, citing an earlier case in which “includes” was construed to be equivalent to “means”: *Dilworth v Commissioner of Stamps* [1899] AC 99, 105 to 106; see Arlidge, Eady and Smith on Contempt paras 4-34 to 4-36. The opposite view is held in Borrie and Lowe: *The Law of Contempt*, where it is argued that “includes” should be given its ordinary meaning: see para 4.8.

¹¹ Compare s 1(3) of the Obscene Publications Act 1959.

¹² See paras 3.30 and following below.

¹³ *Williams* (1823) 2 Law Journal Reports, Kings Bench Old Series 30.

¹⁴ Section 115(1).

difficulty in understanding “speech” to include, for example, spoken words that have been filmed and posted on YouTube.

Writing

- 3.10 The term “writing” plainly covers a handwritten or typed message or a newspaper article. According to the Interpretation Act 1978,

“writing” includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.¹⁵

- 3.11 In the context of the offence of incitement to racial hatred, “written material” includes “any sign or other visible representation”.¹⁶ This has been examined by the courts recently. In *Sheppard*,¹⁷ the offending material was hosted on a web server in California, but was accessible in England and Wales. The Court of Appeal rejected an argument that the written material had to be “in visible, comprehensible form with some degree of permanence”.¹⁸ Lord Justice Scott Baker approved the view of the trial judge that what was on the computer screen was first of all “in writing” or was written and secondly that the electronically stored data which is transmitted also comes within the definition of written material because it is written material stored in another form.
- 3.12 Although the 1981 Act has no provision defining “writing” in terms of any sign or other visible representation, it appears likely that the wide approach in *Sheppard* would be adopted in the contempt context should the issue arise.

Programme included in a programme service

- 3.13 The term “programme included in a programme service” is not self-explanatory. According to the Broadcasting Act 1990, a “programme” is expansively defined and “includes an advertisement and, in relation to any service, includes any item included in that service”.¹⁹ The definition of a “programme service” is in part made up of the incorporated definition of “programme service” from the Communications Act 2003 which covers television, teletext, radio and so on.²⁰
- 3.14 The Broadcasting Act also provides that a programme service is:

any other service which consists in the sending, by means of an electronic communications network (within the meaning of the Communications Act 2003), of sounds or visual images or both either—

¹⁵ Schedule 1.

¹⁶ Public Order Act 1986, s 19 read with s 29.

¹⁷ [2010] EWCA Crim 65, [2010] 1 WLR 2779.

¹⁸ [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [29]. See also M Dyson, “Public Order on the Internet” (2010) 2 *Archbold Review* 6 to 9.

¹⁹ Section 202(1).

²⁰ Communications Act 2003, s 405(1). A “programme service” is (a) a television programme service; (b) the public teletext service; (c) an additional television service; (d) a digital additional television service; (e) a radio programme service; or (f) a sound service provided by the BBC.

(i) for reception at two or more places in the United Kingdom (whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service); or

(ii) for reception at a place in the United Kingdom for the purpose of being presented there to members of the public or to any group of persons.²¹

3.15 For these purposes, an “electronic communications network” means “a transmission system for the conveyance by the use of electrical, magnetic or electro-magnetic energy, or signals of any description”.²² This would include networks used for radio and television, as well as telecommunications.

3.16 As Collins notes,

there can be no doubt that internet communications are conveyed by the use of electrical, magnetic, or electro-magnetic energy, and are thus transmitted by electronic communications networks within the meaning of this definition and for the purposes of ... the Broadcasting Act 1990.²³

3.17 For contempt, a television broadcast or radio show is clearly covered by these definitions.²⁴ Whether a particular internet service comprises a “programme service” will depend on the other components of the definition. So, for example, the BBC’s iPlayer would comprise a programme service because it provides sounds and visual images in response to requests taking place at different times from different users.

Communication in whatever form

3.18 The ordinary meaning of “communication” is very wide indeed, all the more so when one adds the words “in whatever form”. In contempt at common law, a wax model could be a publication, suggesting a similar breadth.²⁵ The new media exist to facilitate the intentions and desires of people to communicate in various forms, to update, educate, cement a friendship, argue, insult, edify, share experiences, insights and opinions and so on. While the media are new, the purposes of communication are familiar.

3.19 The term “communication” features heavily in the different statutory context of the Regulation of Investigatory Powers Act 2000. There, “communication” can include “anything comprising speech, music, sounds, visual images or data of any description” and “signals serving either for the impartation of anything between persons, between a person and a thing or between things or for the

²¹ Broadcasting Act 1990, s 201(1)(c).

²² Communications Act 2003, s 32.

²³ M Collins, *The Law of Defamation and the Internet* (3rd ed 2010) para 4.08.

²⁴ An example would be a local radio show, such as that broadcast on 26 Nov 2003 while the murder trial of Ian Huntley was active. The radio presenter said that Huntley’s testimony amounted to “almost ... the most unbelievably made up story in the world ever”, <http://news.bbc.co.uk/1/hi/england/shropshire/3346093.stm> (last visited 1 Nov 2012).

²⁵ *Gilham* (1828) 1 Moody and Malkin 165.

actuation or control of any apparatus”.²⁶ The breadth of the term is marked especially by the words “the impartation of anything between persons”. Beyond that, it also applies to communications between things. An automated “news feed” appears to be an example.²⁷ Plainly this definition from the 2000 Act is not directly applicable to contempt, but it shows a context in which the statutory understanding of communication is as wide as the ordinary meaning of the term.

- 3.20 The term “communication in whatever form” is so wide that it seems on its own to cover comprehensively or near comprehensively the new media. A random (though of course non-exhaustive) list of the new media seems always to reveal a communication in *some* form. A Facebook posting, a tweet, a Flickr photograph (with or without comments), a video on YouTube, Delicious²⁸ or Digg²⁹ or words on a website are all likely to be publications by virtue of being “communications in whatever form” and usually writing and sometimes speech as well. In what is thought to be the first (and thus far only) internet contempt by publication case in England, it was not disputed that a photograph online was a publication.³⁰
- 3.21 Parliament plainly intended the definition of publication to be as wide as the analysis above suggests.
- 3.22 In conclusion, there appears to be nothing in the nature of the novel means of communication used by the new media that necessitates new tailor-made legislation as they seem to be covered comfortably by the concept of “publication” in section 2(1) of the 1981 Act. **Do consultees agree with our conclusion that the definition of publication in section 2(1) of the 1981 Act is broad enough to cover things appearing in the new media? If not, why not?**

²⁶ Section 81.

²⁷ According to the BBC website, “news feeds allow you to see when websites have added new content. You can get the latest headlines and video in one place, as soon as it’s published, without having to visit the websites you have taken the feed from. Feeds are generally known as RSS (“Really Simple Syndication”) ...”. See <http://www.bbc.co.uk/news/10628494> (last visited 1 Nov 2012).

²⁸ Delicious is “a social bookmarking service that enables users to tag, save, share and discover web content” through its website: see <http://delicious.com/terms> (last visited 1 Nov 2012).

²⁹ Digg is a social news website. It also allows people to vote for specific web content by “digging”. According to the website, “a digg is a thumbs-up – a positive vote – for a story”. See <http://digg.com/faq> (last visited 1 Nov 2012). See also “Once a social media star, Digg sells for \$500,000”, *The Wall Street Journal*, 13 Jul 2012, <http://online.wsj.com/article/SB10001424052702304373804577523181002565776.html> (last visited 1 Nov 2012).

³⁰ *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin), [2011] 1 WLR 2097 at [21]. See also *HM Advocate v Caledonian Newspapers Ltd* 1995 SLT 926.