LitOral: A New Form of Defamation Consciousness

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"We shape our tools and they in turn shape us."

– Marshall McLuhan, 1964 –

Introduction

On August 12, 2001, the Nielsen NetRatings Second Quarter 2001 Global Internet Trends Report[1] reports that approximately 459 million people, in 30 different countries, have home-based Internet access. With the Internet, quickly becoming ubiquitous, the question arises: how does the Internet, and more specifically computer-mediated-communication (CMC), affect people's lives? Some contend that e-mail, IRC, newsgroups, the World Wide Web, and other CMC devices radically change patterns of social interaction. They ask us to embrace the potential of the Internet and let it grow unhampered and uncontrolled. Indeed, we should let the Internet explore its own limits, strengths, and weaknesses. Others warn us of the blind leading the blind, and thus ask for a more controlled and subdued approach to the Internet. No matter which camp you are in, one thing seems clear — the Internet, and with it CMC, is here to stay and our analysis of this medium is still in its infancy. Therefore, governments, courts, and society as a whole are engaged in an ongoing struggle to understand and deal with CMC as another one of the novelties and idiosyncrasies of the Internet.

In his seminal work, *Orality and Literacy: The Technologizing of the Word*,[2] Walter J. Ong discusses the shift of consciousness from a primary oral culture — a culture that has never been exposed to literacy — to a culture of literacy. He contends that in a primary oral culture, oral sounds are the prime and indeed the sole medium of collective consciousness because of the "evanescent"[3] nature of sounds and speech. With the arrival of writing, the most pre-eminent technology of our times,[4] Ong argues that the physical act of making oral sounds both tangible and permanent resulted in a shift of consciousness. To this effect, Ong argues that "technologies are not mere exterior aids, but also interior transformations of consciousness, and never more than when they affect the word."[5] Ong is referring mainly to writing and the shift of consciousness from a primary

oral culture to literacy. With the arrival of the Internet, and in particular, the phenomenon of CMC, questions arise as to if and how these new technologies influence the "interior transformation of consciousness".

This paper will explore CMC in the Western world as an instance of Walter J. Ong's notion of secondary orality. It will seek to determine whether the proposed shift in communicative and social consciousness eliminates the need for the common law distinction between libel and slander in the online communication environment. The paper is divided into three parts. In the first section, the elements of primary orality and the shift of consciousness from a primary oral culture to a literate culture will be canvassed. In addition, it will explore the notion of secondary orality. The second section introduces defamation law and discusses the reasons for the distinction between libel and slander. In the concluding section, it will be argued that CMC is an instance of Ong's secondary orality. This shift of consciousness offsets the need for a distinction between libel and slander. Consequently, it will be argued that the current labeling of CMC defamation as libel is not reflective of society's perception of online defamatory communication, but instead, the new consciousness requires a new, yet uniform, treatment of defamation actions in CMC settings.

Primary Orality, Literacy, and Secondary Orality

As already adumbrated, a primary oral culture is a culture with "no knowledge whatsoever of writing or even of the possibility of writing".[6] Therefore, one has to imagine a world devoid of the visual written conception of words, thoughts, and ideas.[7] Indeed, the notion of "to look up" anything is an empty phrase: it would have no conceivable meaning[8] for there is nothing to look up. All one can do is remember the word as an object.

Ong claims that one of the elements of orality is that it is "evanescent,"[9] i.e., perishable since it exists only in the fleeting moment of its utterance and thereafter all that remains is the simple memory of the sound.[10] The printed word, by contrast, is both permanent and concrete. Therefore, because of the limiting effects that space

and time have on orality, Ong explains, thinking and memorizing has to be done in "mnemonic patterns, shaped for ready oral recurrence".[11]

In addition to the mnemonic pattern, an oral-based culture requires formulas to implement rhythmic discourse.[12] Such aids, i.e., the creation of formulas, and mnemonic patterns compensate for and bridge the evanescent nature of oral discourse. Finally, it is important to note that oral speech is natural in that almost every human being learns how to speak.[13] Writing, however, requires a conscious effort to articulate artificially recognizable rules.[14]

The foregoing constitute the basic ingredients in a primary oral culture's consciousness, and they serve as a starting point in understanding the characteristics of expression and thought in a primary oral culture. In addition, Ong lists a number of elements that are present in an oral-based culture which are listed at note 15 of this paper.[15]

Ong argues that writing caused an enormous shift in human consciousness. He posits:

> The evolution of consciousness through human history is marked by the growth in articulate attention to the interior of the individual person as distanced — though not necessarily separated — from the communal structures in which each person is necessarily enveloped. Self-consciousness is coextensive with humanity: everyone who can say "I" has an acute sense of self. But reflectiveness and articulateness about the self takes time to grow … The highly interiorized stages of consciousness in which the individual is not so immersed unconsciously in communal structures are stages which, it appears, consciousness would never reach without writing. The interaction between the orality that all human beings are born into and the technology of writing, which no one is born into, touches the depths of the psyche … Ontogenetically and phylogenetically, it is the oral word that first illuminates consciousness with articulate language, that first divides subject and predicate and then relates them to one another, and that ties human beings to one another in society. Writing introduces division and alienation, but a higher unity as well. It intensifies the sense and fosters more conscious interaction between persons. Writing is consciousness-raising.

In addition to the above, Ong explains that one of the most important effects that writing has had on our consciousness and the way we live is the creation of a temporal and spatial lag and distance between the author and the reader. Therefore, unlike oral speech, writing cannot be questioned or engaged in because the audience is both temporally and spatially separate from the writer. In addition, writing limits sensory input to one sense — vision. Thus, the more a culture becomes entrenched in literacy, the more the visual aspect of the once oral-visual-based culture will take hold and eventually reign supreme. This shift from an evanescent to a visually permanent state of knowledge promotes the interiorization of thought and the increased development of new thoughts and ideas.[16] Written words are permanent and final in the sense that they provide closure to the mystique of the narrative. The written word ushered in an age of individualized introversion, because reading turns people in on themselves, and a heightened sense of unity, because of the permanence and reach of written ideas and expressions.[17]

With the invention of the telegraph, radio, television, and telephone,[18] Ong suggests that a new development within the human consciousness was on the horizon. He termed this new consciousness "secondary orality"[19] — the "electronic transformation of verbal expression".[20] Ong suggests that secondary orality is post-literal and post-oral in the sense that it is rooted in each and yet different from both types of consciousnesses. Indeed, he explains that "[s]econdary orality is founded on — though it departs from — the individualized introversion of the age of writing, print and rationalism which intervened between it and primary orality which remains as part of us".[21]

In that vein, he explains that primary and secondary orality have "striking resemblance"[22] in the sense that both have a "participatory mystique, [a] fostering of a communal sense, [a] concentration on the present moment, and even [in] a use of formulas".[23] The differences, however, are in the very essence of the underlying reasons for their use, i.e., the purpose for their existence and the execution of those similar elements are different in each consciousness. Therefore, first and foremost, secondary orality is rooted in and soaked with literacy, and as such, Ong claims that it is a "more deliberate and self-conscious orality".[24] The crux of his notion of secondary orality can be found at 136f. He states:

> Secondary orality is both remarkably like and remarkably unlike primary orality. Like primary orality, secondary orality has generated a strong group sense, for listening to spoken words forms hearers into a group, a true audience, just as reading written or printed text turns individuals in on themselves. But secondary orality generates a sense for groups immeasurably larger than those of primary oral culture … Moreover before writing, oral folk were group-minded because no feasible alternative had presented itself. In our age of secondary orality, we are group-minded self-consciously and programmatically. The individual feels that he or she, as an individual, must be socially sensitive. Unlike members of a primary oral culture, who are turned outward because they have had little occasion to turn inward, we are turned outward because we have turned inward. In a like vein, where primary orality promotes spontaneity because the analytic reflectiveness implemented by writing is unavailable, secondary orality promotes spontaneity because through analytic reflection we have decided that spontaneity is a good thing. We plan our happenings carefully to be sure that they are thoroughly spontaneous.

The only part of this intellectual teaser upon which Ong elaborates is the use of formulas in both cultures. He contends that "formulary devices"[25] are no longer used in practical, operational, or situational frames, but rather in a storage and retrieval sense. However, he explains that formulas still function in the law, for example, because they are no longer used so much as a retrieval or storage mechanism, but more "as a focal point for elaborate analytic work".[26] Furthermore, the advertising cliché is a form of the formulary mnemonic device. The difference between a slogan and a real primary oral formulary mnemonic device is that "formulary devices of a primary oral culture are conservative devices,

ordered to the treasuring and use of hard-earned lore".[27] Slogans, on the other hand, are more action-oriented and geared toward a short-term goal. In that sense, slogans are "not reminiscent but programmatic, ordered to the future and thus even to something new".[28]

Secondary orality, then, has elements of orality while building upon writing and printing. It brings with it an outwardness because of our inwardness — a desire for communal familiarity because of our interiorized loneliness within society which is due to the "individualized introversion of the age of writing, print and realism …".[29] Secondary oral cultures are large homogeneous groups which are separate spatially and sometimes even temporally. They are connected through a sense of collective consciousness and familiarity which arose because of the return of oral traits and the sense of community that is fostered by the limits of these traits.

Before moving to the discussion of CMC as an instance of secondary orality — and an exploration of whether this shift of cultural consciousness obliviates the need for a distinction between libel and slander — it is necessary to engage in a short account of defamation law and the history behind the distinction between oral and written communication.

Defamation — Slander and Libel

Brown, the leading authority in Canadian defamation law, starts off his book by saying, "Hardly anything good has been said about the law of defamation".[30] Indeed, negative press has been following this body of law ever since it came to be. Therefore, it has been doomed since its inception, and yet it has survived. Its survival is due to the value that society puts on one's reputation and the need for it to be protected by law. Notwithstanding that, reputation has to compete for its just place in society with another fundamental freedom, the freedom of speech. The arrival of CMC does not ease this struggle, but rather complicates it further by introducing new elements, new approaches to assess community standards, and many other elements.

What exactly is defamation law? Fridman explains:

> The essence of defamation is that the defendant has said or done something which attacks the character and reputation of the plaintiff in such a way as would tend to lead reasonable people to think less of the plaintiff, to reduce his standing in society at large. Such an attack may be through the written or spoken word. Or it might be by means of acts which convey a defamatory meaning.[31]

It has further been said that, "A statement concerning any person which exposes him to hatred ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office profession or trade" is defamatory.[32]

In light of the above, the basis of any defamation action is dependent upon the community or society in which the defamatory act[33] has been uttered. Therefore, regardless of the mode or form of publication, it will be actionable only if it is understood to be defamatory within the community where it was published. The act may be defamatory in its plain and ordinary meaning or within a certain context of facts, circumstances, or the environment known to the publisher, the defamed person, and most importantly, the community at large. Therefore, in order to determine the effect and meaning of the words within the community, one must take into consideration all the contextualizing values that provide meaning to the act. Lidsky stated that this requires a two part inquiry consisting of "… a linguistic inquiry to discover the 'tendencies' of the word and a sociological inquiry to discover the attitudes and beliefs of the community, for what is defamatory is a function of defamation law's unique conception of reputational harm".[34] This context-dependent concept, therefore, means that the subjective standard of the publisher or the defamed person is wholly irrelevant. All that matters, with respect to a legal determination, is the community's understanding of the act. Therefore, to support a cause of action, it must be shown that:

(a) a defamatory statement that was false was made;

(b) the defamatory statement relates to and identifies the plaintiff; and

(c) the plaintiff acted intentionally or negligently in publishing the statement to a third person.[35]

Defamation law has been divided into two camps of acts: (1) the written and (2) the spoken. These are known as libel and slander respectively.

A Short History of Libel and Slander

Originally, the common law gave no remedy for a defamatory attack upon the reputation of a person. In 1275, however, a statutory criminal offence called *scandalum magnatum*[36] was created to prevent the spread of rumours that could cause conflict or discord between the king and other important men of the kingdom. Later, in the 16th century, defamation became actionable and, because of the popularity of this action (since the plaintiff was able to claim damages), courts imposed restrictions on the availability of this remedy. Therefore, defamation was only actionable if actual damages could be evidenced or if it fell within one of the following categories:

(i) imputation of the commission of a criminal offence;

(ii) imputation of a loathsome disease, e.g., leprosy;

(iii) imputation of unfitness to practice one's trade or profession;

(iv) imputation of unchastity of a woman.

Of course, in the meantime, the printing press took hold of society and enabled the spread of defamatory statements more efficiently than ever before. Duelling was at that time still a popular way of protecting or avenging one's reputation. Then, in 1606, the famous case *De Libellis Famosis*[37] created the common law offence of libel.[38] Later that century, the common law

courts, which survived the fall of the Star Chamber during the English civil war, created the new tort of libel. This new tort was distinct and different from the classical tort of defamation in that:

> (I) libel was actionable without proof of damages; and

> (II) only applied to written defamation.

Slander (the original defamation in oral form) was still subject to the old common law rules. Therefore, the distinction between slander and libel was born. The question that everyone was asking, at least as early as 1812, was why should one draw a distinction between written and spoken words? Sir James Mansfield C.J. exclaimed, "I cannot upon principle, make any difference between words written and words spoken, as to the right which arise on them of bringing an action."[39] Neither the Roman law nor the hybrid common/civil law system of Scotland imposed the distinction of written and spoken word upon its people.[40]

Libel and Slander

There are various theories as to the reasons for the distinction. One author contended that the distinction is a direct reflection of the anxiety that the common law courts experienced after the abolition of the Star Chamber in the late-17th century.[41] Some years later, another author added that Sir Matthew Hale and other judges of his time had created, out of nothing, a new tort (libel) which he described as "Minerva-like and full-panoplied from the time of its birth … exempt from all vicissitudes of its stunted companion [slander] and so of subsequent history it has but little …".[42] After that, Sir William Holdsworth created a new argument, i.e., that slander and libel were two closely related torts. Slander, created sometime between 1590–1640, proved to be truly unsatisfactory because, among other things, its exclusive concern with damages, the indoctrinated meaning of words in a tortuous sense, the *mitiori sensu*[43] rule, and other complexities made this tort ineffective. Therefore, Holdsworth claimed, the judges decided to avoid the complexities and create a new tort. Holdsworth posits that the essence of libel was not rooted in the damage issue, but rather in the nature of the insult. In addition, judges felt that, since libel was a crime, the civil law should reflect that notion. Further, the practical implication was also to rid society of bloody duelling, which at that time, was still favoured over legal actions. Fundamentally, Holdsworth saw slander as a "case tort" and libel as a "trespass tort". Therefore, slander required proof of damages; libel, however, was wrong in and of itself, and thus no damages had to be proved.[44] There are many more interesting historical accounts of the origin of the distinction between libel and slander.[45] Suffice it to say that "no definitive description of the difference between these two varieties of defamation has ever been established …".[46] It is argued that the distinction "is untenable on policy grounds and often generates unquestionable absurd results …".[47]

Nevertheless, in trying to explain, at least generally, the distinction and the reasons for maintaining the distinction, many authors have attempted to provide reasons for the retention rather than the reasons for its creation. Gatley recounts some cases from the late-19th century which elaborate on the reasons. He explains:

> Reasons commonly given for the distinction (and for the greater severity of libel in most cases) are that a libel written and published shows more deliberate malignity than a mere oral slander; and that a greater degree of mischief is probable in the case of libel, owing to its more durable character, and the fact that it can be more easily disseminated.[48]

The learned author admits that these reasons may have had some merit in those times, but with the advent of new technologies the distinction in its original form is virtually impossible to maintain. Even if we accept, at least for the purposes of this discussion, the above-noted reasons for the distinction's maintenance, a further unsatisfactory element of defamation law creeps up — the "how." In other words, it is difficult nowadays to decide *how* to draw the distinction between libel and slander.

In conjunction with the above, Fridman also suggests that the "old" difference turned on the distinction between the permanent and transient modes of communication. As technology evolved, however, this rationale was no longer feasible and yet the common law seems to hold dear to its survival. Taking a step back, there is no doubt that to publish printed words has been accepted to embody the epitome of libel. Also, the mere publishing of a picture or effigy has been held to be libel. Slander has been held to apply to spoken words. In light of that, Gatley suggests that the implication seems to be that visual defamation is more properly libel whereas auditory defamation would be slander.[49] This classification is too simple to be practical, as Gatley points out, because, for example, gestures, which appeal to the visual senses, have always been held to be slanderous.[50] Therefore, courts began to employ a permanent/transiency test in the hope of solving the distinction conundrum. There are two general "how tests" that can be used separately or together:

> (A) Form of Publication Test; and/or

> (B) Mode of Publication Test.

The former allows the distinction to be drawn on the basis of permanency or transiency. The latter allows the distinction to take account of the visual or auditory nature of the communication. Therefore, libel has been held to include such things that are presented in some permanent form and visible to the eye.[51] Sometimes, libel has also been extended to semi-permanent, but still visible statements. The placing of a lamp in front of someone's house to signify a brothel has been held to be libellous.[52] So, too, have been the erection of gallows at someone's door or the firing of guns and the ringing of bells.[53] The mode of publication has been used to hold broadcasts slanderous even when read from a script.[54] Also, reading aloud a defamatory message to a large

crowd has consistently been held to be slanderous. It is important to note that the two above-noted tests are also supplemented by the level of deliberateness and reach of audience. Notwithstanding these well-established factors and the two tests, the invention of electronic communication tools (i.e., broadcasting) has made the "how" and "why" even more complex and arbitrary. Indeed, how was one to deal with broadcasting? It might be considered transient and oral, but both modes involve durability (taping), easy dissemination, and deliberate malignity (broadcasting requires preparation and effort). As a result, many provinces in Canada have eradicated the distinction by simply stating that defamation means libel and slander.[55] Others, such as Ontario, have maintained the distinction, but have deemed that broadcasting anything defamatory constitutes libel.

By concluding this section, suffice it to say that for the purposes of this paper, all that is important is to acknowledge and understand the reasons and the methods that are being utilized to justify and explain the continued stronghold of the distinction.

CMC as an Instance of Ong's Secondary Orality — The Shift of Defamation Consciousness

Before diving into the discussion of CMC as an instance of secondary orality, it is necessary to explain, very summarily, some of the modes of online discourse. The largest and most important of these is Usenet[56] which is, like the Internet itself, a worldwide-distributed discussion system with individual *newsgroups* which are dedicated to topics of interest or concern to one, some, or many users. *Newsgroups* are named according to a hierarchical naming convention. This kind of interaction or computer-mediated-communication is an example of asynchronous CMC (a-CMC), i.e., the response to one's comment or inquiry is not instantaneous but delayed for an indeterminate time until and unless some other person takes the time to respond to the original message. Another a-CMC is *listserv*,[57] a system that lets the user create and manage e-mail lists. Therein, the creator of an e-mail list will collect e-mails from various other users for a specific purpose (e.g., a topic of mutual interest), compile them into an e-mail list on a specified host computer, and then let the group interact with only each other, as opposed to permitting comments from the entire world, as is the case in the first example.

Examples of synchronous CMC (s-CMC) are IRC, a group chat system, and ICQ,[58] a private chat system also known as an instant messenger[59] system. Most of the current research into the oral nature of online discourse has been done in the s-CMC environment because of the striking resemblance between the interactive cues in the written online forum and traditional face-to-face (FtF) interaction. It has been said that "face-to-face conversation is the basic and primary use of language, all others being best described in terms of their manner of deviation from that base".[60] Ong's notion that orality is nature and literacy is part of nurture leads to the same conclusion.

Finally, there is *hypertext* which is a text that consists of a myriad of chunks of texts which interconnect and enable the reader to engage areas of the text more thoroughly by following embedded hyperlinks to supplement information. In that sense, *hypertext* has inherent fluidity and uniqueness in that every reader can literally approach and read the text differently. There is quite a bit of material about *hypertext* as an instance of Ong's secondary orality.[61] However, it is not of particular interest here *per se* as the focus is CMC as an interactive person-to-person interaction as opposed to a new form of "literature". It is worth noting, however, that it has been argued extensively that *hypertext* illustrates a shift of consciousness in the way we read and write.

Secondary Orality and CMC

CMC displays evanescence and thus the need to use formulas. It also fosters an increased group sense, spontaneity, and particpatory mystique. These traits illustrate quite nicely a changed social interaction and presence sense; indeed, they show the shift of consciousness by exemplifying the increased interconnectiveness, changed social interaction, and outwardness of netizens. The following will discuss the first three of these oral elements in order and touch upon the others throughout.

Evanescence

S-CMC displays traits of evanescence for, as one author explained about the characteristics of IRC conversation, "The resulting dialogues scroll up (and then off) each person's computer screen at a pace directly proportional to the tempo of the overall conversation."[62] However, the individual can, during the same session, scroll up and re-read the entries. Nevertheless, once the session is over and the user closes or exits the chat room, the conversation is purged and the linguistic signal/symbol is not permanent. Once the conversation is off the screen, it will usually not be re-read at another time.[63] In addition, the printed or static production of the conversation destroys the contextual dimension (pace and tempo) of the group's overall conversation. In that sense, in order to experience the true nature of the "chat", it is necessary for the user to experience the fluid dimension of the conversation.[64] Therefore, the instability, the continuous motion, and the open-ended nature of conversations in a s-CMC environment seem to suggest an evanescence, albeit somewhat delayed, of the very words and sentences that one "utters".

It has been argued that when communication is not evanescent, i.e., a record is maintained of the communication, the interlocutor must take greater care in composing his/her message to ensure that the meaning of the message will be evident, even after taken out of the shared context of the communicators.[65] This might be true in an offline situation, but research has shown that

online communication, whether synchronous or asynchronous, is more oral in the sense that it is spontaneous, context dependant, and by far more informal than offline written communication. Indeed, s-CMC is sometimes used interchangeably with FtF communication.[66]

A-CMC does not have the same degree of fleeting, spontaneous, and informal characteristics, but it is still evanescent because postings on an a-CMC system will not be there forever. The posting may be moved to a storage file and as such the old URL will no longer access the message. The host may remove the postings after so many days, weeks, or months. The reader may very well save the postings on his/her computer, but "despite the 'permanence' of this record of interaction, the 'material' of the electronic text is made of ephemeral electrons that can be deleted with no visible remains".[67] Further, the very topic of conversation will change over time, and thus the conversation, the expression, and the thought will lose its fluidity for it will only be valid and of interest for the duration of the interest and responses of other users. Thereafter, it will be a fleeting memory within the discussion forum and the individual users. Corcoran explains:

> While a net.discourse [simply put, this is his term for written CMC] can leave the rich fossils of interpretation, these vanish forever leaving only subjective personal memory to hold the meaning and context. What was at one point inter-objectively available text, becomes either recorded and "codified" within FAQs — the group knowledge — or relegated to individual recall. Like text we see an objective record, but like speech the subject material becomes lost to the objective eye after a time.[68]

In the same vein, Lee suggests, "Context is created *between* turns rather than by turns".[69] In that sense, in order to contextualize the response one must respond within a reasonable time or the meaning of the response will be lost. Also, a-CMC often lacks contextualizing information. Therefore, for example, an e-mail may only have one word in the body such as "thanks". In order to understand the entire message, it is, of course, necessary to know what the sender is responding to or for what he/she is grateful.[70] However, one may also quote the message to which he/she is responding to deal with the elapsed time dilemma, but even then the overall discussion will have lost its fluidity and the group will have moved on to newer and "better" things.[71]

In light of the above, a-CMC conversation may not have the same evanescence that oral speech or s-CMC displays, but it still displays signs of perishableness — a desire for the "now and then". Therefore, to understand the communication within its context necessitates an awareness of the need for immediacy and a degree of spontaneity. This shift within the social awareness and the social interaction of the interlocutors awakens the desire of the interlocutors to engage in something different than simple written interaction.

Formulaic

Ong already explained how formulas are being used in the advertising industry and the law. CMC, too, displays a strikingly formulaic approach to online discourse. Condon & Čech discovered in their research into s-CMC that participants in s-interactions[72] tend to omit unnecessary linguistic material, which makes what they do so more efficient and likely to accomplish more than one function.[73] There are simple abbreviations such as LOL (laughing out loud) or ROFL or ROTFL (rolling on [the] floor laughing), IMHO (in my humble or honest opinion), GOK (God only knows), OIC (oh, I see), and many more. Finally, there are uses of capital letters, spelling, punctuations, and letters to imitate phonetic qualities such as hahahahahaha (laughter), aaaaaaaaaaaaaahhhhhhhhhhh (exclamation or other strong emotional outburst), and many more which all depend on the overall context in which they are used. Further, there are action and gesture formulas such as short "action" sentences to the entire group indicating that the "actor" is doing something such as:

> ***Action: Sofie passes a glass to everyone and waits for the other bots to bring the champagne . . .

> ***Action: Zola fills the flute of champagne for all

> ***Action: Frans finds Sofie to be very humane[74]

Other familiar "actions" include: *hugs*, *kisses*, *handshake*.[75] There are also the familiar emoticons such as:

> the "smiling smiley" :-)

> the "sad smiley" :-(

> the "winking smiley" ;-)

> the "oh, no" sign 8-o.[76]

All these formulas are being utilized because, for example, in s-CMC, spatial, temporal, and social constraints are limiting factors that affect the size, shape, tempo, and pace of the overall conversation. Werry explains:

> Factors such as screen size, average typing speed, minimal response times, competition for attention, channel population and the pace of channel conversations all contribute to the emergence of certain characteristic properties. Some of the most obvious of these properties involve a tendency toward brevity which manifests itself in speaking turns of very short length, various forms of abbreviations, and the use of stored linguistic formulas.[77]

Therefore, colloquial vocabulary, syntax, and formulas determine interpretation of CMC communication. Sentences need not be complete or grammatically accurate as long as they convey the message, i.e., factual and emotional information, to the recipient efficiently and effectively. These developments of a "bastardized" written language in cyberspace, "usually signify efforts to visualize talk".[78] Lee even suggests that a skilled "writer" can imply vocal modulation with considerable precision.[79] Therefore, the formulas (emoticons or English phonics) are used to overcome limits of the medium, i.e., to increase the efficiency level of the discourse and to bridge the gap between FtF communication and CMC. These formulas are substitutions of FtF cues that are part and parcel of oral language.

It seems, as it was the case in the primary oral culture, that due to necessity, the CMC populous goes back to the use of formulas to overcome their own limits and the limits of the environment in which they interact. This requires a shift of awareness and social interaction habits. This understanding of the need for formulas to meet the desired interaction *modus operandi* illustrates society's want for social interaction in the online environment of more than mere written form.

Group Sense

Ong also suggests that a secondary oral culture displays a strong group sense. This was not the case in a mere literate culture for, as printed or written text implies and presupposes spatial and temporal distance, a literate culture causes its members to turn in on themselves. This newfound group sense or social sensitivity can be best seen in s-CMC, in its architecture and the social and psychological effect upon the user. For example, an instant messenger (IM) has various social elements to its architecture. Most IM systems provide "presence information" about members as a whole and, more particularly, the members listed on one's "friend or buddy list". A friend list window shows whether friends are online, whether they are active or idle, and the system also has a visual and auditory alert to signal a friend's online arrival. Some IM systems have more features than others. The aforementioned, however, are the most usual features found in all of the IM systems.

This continued ability to observe people's presence online appears to be a fairly unique social CMC phenomenon. It has been shown that IM systems are often used to initiate or negotiate availability for conversations in media other than IM or even FtF.[80] Therefore, by simply monitoring one's friend list, one can ascertain who is and is not online to negotiate availability for interaction.[81] In that sense, IM allows one to monitor or see what he/she would not have been able to see outside the CMC medium. One's perception and social interactive ability is therefore expanded by providing more information about availability and presence. Therefore, IM seems to facilitate the "initiation of conversation" which, of course, is the initiation of social interaction. Also, IM supplements or supports communication efficiency via a different medium. One could be on the phone with person X and at the same time send a URL via IM to X so that all that X has to do is click on the link as opposed to try to jot down the dictated link over the phone.

Further, Nardi and Whittaker found that IM systems were often used in indirect ways to create a sense of connectiveness to others by monitoring their friend list. Nardi and Whittaker explain: "Somewhat to our surprise, we found that people found value simply knowing who else was 'around' as they checked the buddy list, without necessarily wanting to interact with buddies."[82] They found that this awareness of the "presence" of friends produced certain feelings in people such as a social connection and thus a sense of closeness to the people even if one does not know them very well.[83]

The same kind of interconnectivity and social grouping can be argued for a-CMC. A discussion forum invites people of similar interests from all around the world to engage in like-minded social interactions. People may very well sit behind their computer screens and venture into the cyberether of bits and bites alone, but once in the information stream of the Internet, whether a-CMC or s-CMC, this lonely surfer is suddenly connected to an enormous Internet populous. As such he/she can socialize with people who he/she would have never met in any of the previous communication eras. In that sense, simple entry into Cyberspace connects the surfer to the world. Simple engagement in CMC connects the surfer to a community of like-minded members from all around the world. Ong seems to explain this phenomena when he says, "We are turned outward because we have turned inward."[84] Indeed, we are stranded behind our computers, lonely members of an even lonelier society, and yet we manage to turn outward to the world by opening the information gateways to our very own bits and bites devouring machine. We are alone in real space, but connected in virtual reality.

CMC an Instance of Secondary Orality

CMC displays traits of orality and netizens are using it as an interactive communication/socializing tool. The lack of auditory and visual cues, and the desire to communicate more fully, forced CMC users to create new ways to overcome those deficiencies. Lee quite aptly described the different nature of e-mail writing (by which she meant a-CMC) to traditional writing:

> … e-mail demonstrates that natural languages are flexible enough and users creative enough to adapt to new media. As writing and print stabilized and diffused aristocratic dialects and usage, so e-mail is generating new vocabularies and modeling [*sic*] a new rhetoric.

> … As the alphabet renders sound in visual space, so e-mail converts writing to speech. By allowing readers and writers to meet in cyberspace, e-mail repairs the disjunction between authors and their discourse … The electronic text embodies the author — the virtual speaker who meets the reader, who becomes embodied by a similar process in response. Thus, although e-mail derives from both writing and speech, it does not homogenize traits from each into a synthetic mixture or blend. Rather, like a child, it has some traits from one parent and some from the other, and the combination has a life of its own.[85]

In addition, the interactions in a-CMCs are very often much more informal than in offline written communication scenarios.[86] The users utilize colloquial sentence structure, phonetic spelling, informal vocabulary, and, in general, formulas to convey paralinguistic signs and expressions. Interestingly enough, early netiquette books suggested that a-CMC authors should check their spelling and follow regular rules of grammar, but later and more experienced users realized the futility of those suggestions, and thus focussed on social linguistic rather than grammatical linguistic rules.[87] The informal and oral tone of a-CMC invites a more social and familiar

interaction, i.e., it fosters less anonymity since the new way of interaction bridges the gap between faceless anonymous communication and FtF interaction, making it more like the latter. The same, to a greater degree even, can be said about s-CMC.

The desire to interact in a more social and familiar way and the increased conscious effort to use formulas to achieve these goals, amount to a deliberate and self-conscious orality in the online communication forum. Its continuous fluid, dynamic, interactive, and changing nature adds a participatory mystique to the communication and provides the netizens with an increased "group sense" and the notion that one is never alone in the cyberether of CMC — there is always someone with whom one can interact.

CMC, then, appears to be the zenith, indeed the apex of Ong's notion of secondary orality, because it marries speech and writing into — LitOral — a new communication method of hybrid form.[88] Consequently, regardless of the level of orality or literacy in the various CMC fora, LitOral will always remain LitOral.[89] In light of that, as our understanding and consciousness of presence and self has changed and as interaction in the online communication forum has undergone enormous transformations, the legal body applicable to this space should reflect the uniqueness and novelty of this brave new way of communicating.[90]

The New Defamation Consciousness

The Internet has added four major considerations to the defamation debate.[91] First, the size of the audience. The potential audience is the entire Internet community; however, the actual number of people that a statement realistically reaches is a mere fraction of that. Nevertheless, the size of the potential audience and the speed at which statements can be disseminated are beyond that of any other medium previously known to us. In addition, *group polarization*, *cybercascades*, *fragmentations*, and other online phenomena introduced by Sunstein illustrate the added dangers and potencies of CMC.[92] All these factors combined can lead to ramifications of enormous proportions.[93]

Second, the barriers to entry to this medium are relatively weak. The effort required to produce and publish defamatory statements is minimal. One can publish and post to the world at large whatever he/she wants. There are virtually no filters or editors who look over the author's shoulder. Indeed, we have become our own editors and publishers.

Third, the Internet has the feature of allowing people to mingle with like-minded people from across the world.[94] Therefore, we have the chance to talk or interact with people more likely to be interested in the subject matter at hand. In short, such people will actually read what is written because it is of interest to them. In the offline world, it is fairly difficult to find such a large group of interested parties. In the online communication realm, however, the traditional soapbox address in the public commons can now be heard around the world by interested parties.

Fourth, the ease of obtaining anonymity has greatly increased the proliferation of defamatory statements. By giving the person more power and courage than he/she would ever be able to muster in an offline situation, the shield of anonymity provides for less resistance and inhibition when making defamatory statement(s).

These four fundamental characteristics of CMC are some of the reasons why it is necessary to quickly and appropriately deal with the issue of defamation in the online forum. The main issue, of course, is how. How should the legal system treat or deal with online defamation, i.e., as libel or slander? All discussions thus far argue that CMC should be treated as libellous because of its permanent, deliberate, and damaging nature.[95] As of yet, nobody has seriously considered the second point raised above nor society's understanding of CMC generally. Indeed, the discussion seems to be guided only by the observable characteristics of the communication — the apparent permanent visual alphanumeric nature of CMC. The most important aspect of CMC with respect to our analysis, i.e., its hybrid nature, seems to remain unexamined.

Indeed, the common law courts, which are supposed to have their fingers on society's pulse, have hereto dealt with CMC defamation as libel only. The debate as to whether it should be treated differently has not yet come up. To date, online communication defamation cases in the U.S.[96] and Australia,[97] have not discussed the possibility of it being anything else but libel nor have Canadian courts. It has been presumed from the very outset that CMC defamation is equivalent to libel.[98]

For example, Ipp J. in the Australian case of *Rindos v. Hardwick*, probably the most well known case yet decided in the context of online, and in particular CMC defamation, implicitly dealt with the matter as defamation in the libellous sense and awarded Dr. Rindos $40,000.[99] Notwithstanding the court's finding, upon closer analysis, the defendant's defamatory statements show obvious oral elements of the type previously discussed. For example, he commenced his statement with a manner more akin to conversational greeting, "Well, here we have my old mate Hugh Jarvis …" In addition, Hardwick's derogatorily contemplating "Hmm …", after having introduced some allegations of paedophilic tendencies of Dr. Rindos, is an adoption of oral speech.

Recall that thus far it has been argued that netizens no longer view language in the online environment as being clearly divided between the written and spoken word. Netizens consider CMC language as a true hybrid … as LitOral. Based on this common belief, it seems at odds for the law, governments, courts, and other officials to treat CMC defamation as more akin to libel than slander. As we already saw, and indeed as Lilian Edwards, a known legal scholar explains, e-mail is:

> … often in substance more like spoken conversation than written interaction for habitual users — hasty, ungrammatical and rash — and tends to lead parties to say things

they would not only not normally commit to writing, let alone widely published writing, but would in fact often also not say in face to face interaction with the other party.[100]

Edwards even goes as far as to argue that e-mail is both instantaneous and spontaneous. It is like the spoken word in that once sent/said, it is irrevocable. With respect to conventional letters, newspaper articles, or magazine articles, the drafter generally takes the time to write, read, re-draft, and re-read the text before putting his/her name to the text or publishing the document. Indeed, simple letter writing (which is probably the least elaborate of the above) requires a number of complex actions. He/she must put the message in an envelope, attach a stamp, walk to a mailbox, put it in, and then walk home. Consequently, there are numerous opportunities to cut the chain and "recall" the writing. Notwithstanding the acknowledgment of e-mail's spontaneous and oral-like nature, Edwards still treats it as libel.

Edwards and Ipp J. are certainly not the only ones who have categorically slotted a-CMC into the libel camp. Indeed, most appear to be guided by the apparent permanent-visual-alphanumeric nature of CMC. The possibility of it being anything else, e.g., slander or even a true hybrid, seems relatively untouched. Therefore, the courts and scholars alike have innocently utilized traditional "how" tests for CMC, in general, and a-CMC in particular.

Indeed, for example, Chi Nguyen, posits that written words are more predetermined and as such more deliberate. He further claims that because of their permanence they are more harmful. In light of that, he concludes, as so many others do, that:

> Text on a computer screen shares more traits with libel than with slander. In addition, a message posted on a BBS and displayed on a computer screen can become a printed message immediately to [sic] an attached printer. Therefore, because it takes more thought and effort to type a message than to speak, and because such a message is more permanent than a spoken one, postings on bulletin boards more closely resemble written than spoken words. Liability for bulletin board defamation should thus come from libel rather than slander law.[101]

The above notions seem to be the most prevalent among legal scholars. However, some authors do acknowledge that there may be some instances where slander is a possibility. As one author explains, "The distinction between libel and slander may be of some importance, however, if a defamation were to occur in a chat room or via a video conferencing connection hosted by a service provider."[102] Unfortunately, she does not discuss the slanderous nature of chat rooms any further in her paper. There are also various authors who admit that postings on, for example, newsgroups may be transitory and as such akin to slander. They then, however, routinely swap positions discrediting the previous comment by adding that because of the printable and saveable nature of postings, the messages are better regarded as libel than slander.[103]

A fairly recent development is of interest. The American Civil Liberties Union (ACLU) is investing consider-able resources into the defamation defences of John/Jane Does to protect first amendment rights by asking the courts to impose a higher standard on the plaintiff to prove his/her damages in order to avoid frivolous lawsuits. Therefore, one of their requests to the courts is that online defamation should fall into the slander category for that would automatically allow for self-regulation and balancing of the following two competing rights: (1) to have one's reputation protected, and (2) freedom of speech. According to Newsbytes on February 23, 2001, ACLU lawyer Ann Beeson is reported to have said that while messages on bulletin boards are written, they are, however, more appropriately akin to spoken language.[104] However, ACLU is only at the beginning of mounting its case in support of its contention, and as such the ACLU case for slander is only in its embryonic stage.

Having discussed the arguments in favour of considering CMC as libel, admittedly, it is appropriate to say that online discourse is permanent in the sense that it can be stored on a server or hard drive. Also, it is true that it may cause potentially greater harm for it can reach a greater number of people in a shorter amount of time than in an offline environment. Indeed, for example one author states about the reach of the medium, "They think they are having a private conversation but it is like they are using a megaphone."[105]

Notwithstanding the above, what seems to be ignored is "how" interlocutors view CMC. While online discourse is admittedly permanent, it is also transient and evanescent because of its context dependency and the dynamics or interaction between interlocutors. Indeed, the issue is not whether the person has the ability to re-read the text, but whether he/she *will* re-read the text and whether he/she *will* understand the message upon a re-reading, independent of the original context, at the time of re-reading.

Furthermore, in regard to the reach issue, it is important to understand that although the potential of world wide dissemination is there, the actual reach is limited in the sense that people only read what they are interested in by filtering the information they either receive or obtain. Indeed, we all have our filtering mechanisms to eliminate unwanted material from our "inboxes". Sunstein calls this process "Daily Me[s]".[106] Consequently, there are generally only a limited number of people who would be members or recipients of, for example, the ANTRHO-L mailing list and the newsgroup sci.anthropology. Therefore, the much feared widespread dissemination in the CMC context is usually limited to a relatively small group of people.

In addition, it has been claimed that because CMC is more premeditated, it shows a "more deliberate malignity." This may be partly true, but CMC is often as equally spontaneous and informal as oral speech. Therefore, no significant effort must be exerted to publish virtually anything. Admittedly, postings require actual typing and the speed of the "utterance" depends on the typing speed. As such, one may claim that, because the utterance is no longer spontaneous, there is greater cul-

pability because of the prolonged time frame in which the creator can stop or "recall" the postings. However, these minor additional steps do not take away from the spontaneity involved in posting a message that may be defamatory. As Edwards so aptly explained about e-mails, they are crafted in, "hasty, ungrammatical and rash" ways which suggest spontaneity and orality rather than deliberate literacy. In addition, because it is easy to respond to postings, e-mails, etc., CMC generally invites spontaneity, immediate reactivity, informality, even interconnectedness, and as such not "more deliberateness". Admittedly, some CMCs are more formal and less spontaneous than others, but as it has been argued, society no longer views online discourse, regardless of the degree of orality, as just one or the other. Indeed, it was argued that we have now moved into a period where online communications will inherently possess both oral and literate characteristics.

A good example of Internet interaction is the online phenomenon of agonistical interaction which seems to have been readily accepted by the community as the costs of participation in the online environment. This phenomenon, known as "flaming", has been defined as: "To send nasty or insulting messages, usually in response to someone's having broken the rules of Internet etiquette (netiquette)".[107] This agonistic communication phenomenon comes complete with its own "flaming" netiquette rules and there are numerous webpages dedicated to "how to flame" and "how to avoid being flamed".[108] Flaming has become such an intrinsic part of CMC communication culture that it has been said that, "Anyone who plans to spend time online has to grow a few psychic calluses".[109] Flaming has a dynamic of its own due to its reactive nature, and it is best seen as spontaneous and immediate; otherwise, its effect, efficiency, and contextual meaning will be lost. Therefore, because flaming is context dependant, evanescent, and transient, it is no "more deliberate" than simply giving someone the virtual finger.[110]

In addition, CMC is a visual communication form for it appears before one's eyes, but at the same time it has auditory aspects inherent in its conveyance method. In other words, it uses written phonetics and formulas to imitate oral/visual cues from FtF communication and as such it becomes a visualized-auditory interaction form. Therefore, the usage of smilies, capitalization, numerous dots, colloquial vocabulary, syntax and formulas determine the interpretation and set the mood for CMC interactions. As has been explained above, the "bastardizations" of written language in cyberspace "usually signify efforts to visualize talk".[111] Skilled writers can "imply vocal modulation with considerable precision".[112] Therefore, the desire to overcome the limits of the medium and to bridge the gap between FtF communication and CMC leads netizens to deploy the formulas (emoticons or English phonics) as substitutions for FtF visual and auditory cues that are part and parcel of oral language. Therefore, it may be visual to an outsider, but to the

interlocutors it is more than that — it is both auditory and visual at once.

In light of the above discussion, it seems clear that the treatment of online defamation as libel is simply no longer reflective of how society views or perceives online communication. Also, the recent attempts of the ACLU to achieve the opposite result, i.e., to claim that CMC is more like oral than written discourse, are not reflective either because they miss the literate part of the equation. As has been argued above, online defamation has elements of both slander and libel based on the determination that CMC has elements of both oral and written traits. Therefore, equating online defamation with libel is unjustified because it could be just as equally categorized as slander.

The litigious nature of society, the increased usage of new technologies, and the ACLU's attempts to change the current legal standard regarding CMC, will most likely sooner than later awaken this sleeping online defamation conundrum. Rather than being forced to apply solutions after the fact, *now* is the time for governments, courts, and officials to act preventively and rid the law of the distinction between libel and slander in the online communication environment.

Since it has been established that the classic distinction between oral and written statements in the online communication fora are no longer warranted, the question that must be answered before ridding the law completely of the distinction is the "how". In seeking to do so, it is not yet clear how CMC defamation should be responded to. How will that affect CMC online community standards? Indeed, how should the appropriate defamatory standards of a CMC online community be assessed?[113] All these and many other questions are topics for future papers that I hope will attract scholarly attention in the near future.

Conclusion

In this paper, I have argued that CMC in western societies is an instance of Ong's shift of consciousness from literacy to secondary orality. This new interaction and communication awareness in the online environment brought with it a truly new hybrid form of communication, part oral and part written — LitOral. Indeed, this new way of communicating marks the peak of the shift in consciousness (which began with the arrival of the electronic age) from literacy to secondary orality.

If this is correct, there is ample reason to discard the old entrenched distinction between written and oral discourse. Consequently, the treatment of CMC as libel by courts, scholars, and lawyers seems no longer justified. The hybrid nature of online discourse requires a new yet uniform treatment of defamation actions in the CMC setting. In order to do so, further research into "how" CMC defamation should be treated, and "how" CMC community standards should be assessed, is required.

Notes:

1 Nielsen NetRatings Second Quarter Report, August 2001, online: http://www.eratings.com/news/2001/20010827.htm. The report measured the Internet activity in 30 countries ranging from North America, Europe/the Middle East/Africa, Asia/Pacific, Latin America, Argentina, India, South Africa, and Israel. This is assumed to be approximately 93% of the estimated global home-based Internet access. The United States and Canada account for 40% which is the largest percentage of world wide Internet access. Europe, the Middle East, and Africa held a solid 27% and Asia and Pacific came in at 22%. Latin America's Internet population accounted for 4% of the world number.

2 Please note that there is substantial literature out there which criticizes Ong's approach and reasoning. See, for example, G. Baumann, eds., *The Written Word: Literacy in Transition*, (Oxford: Clarendon, 1986). This paper, however, will not engage the critics of Ong's notion of primary orality, literacy, and secondary orality.

3 W. J. Ong, *Orality and Literacy: The Technologizing of the Word* (New York: Methuen, 1982) at 31-33.

4 *Ibid.* at 81ff, for example, Ong explains that writing "and especially alphabetic writing" is a technology like the computer and printing because it requires tools such as an instrument to write, e.g., a "stylo or brush or pens, carefully prepared surfaces such as paper, animal skins, strips of woods, as well as inks or paints, and much more". Furthermore, Ong contends, referring to M.T. Clanchy's work, *From Memory to Written Record: England 1066-1307* (Camebridge: Harvard University Press, 1979) at 88-115: "Writing is in a way the most drastic of the three [writing, printing, and computer] technologies. It initiated what print and computers only continue, the reduction of dynamic sound to quiescent space, the separation of the word from the living present, where alone spoken words can exist."

5 *Supra* note 3 at 82.

6 *Supra* note 3 at 31.

7 *Supra* note 3 at 31. The *meaning* of the word, of course, can still have a visual conception, i.e., the word *tree* in an oral culture still has the visual picture associated with the actual tree, but not the word *tree*.

8 *Supra* note 3 at 31.

9 *Supra* note 3 at 32.

10 *Supra* note 3 at 32. Ong explains: "When I pronounce the word 'permanence', by the time I get to the '-nence', the 'perma-' is gone, and has to be gone."

11 *Supra* note 3 at 34.

12 *Supra* note 3 at 34ff.

13 *Supra* note 3 at 82.

14 *Supra* note 3 at 82.

15 1. Oral discourse is "additive rather than subordinative." Therefore, in an oral based culture people will, very simply put, add thoughts and ideas to one another without creating the polished, literate, and subordinate or hypotactic style as Aristotle counselled and as can be found in any literate works. Written discourse, however, is complex and subordinative because it is more dependant simply upon linguistic structure, since it lacks the normal full existential contexts which surround oral discourse and help determine meaning in oral discourse somewhat independent of grammar. *Supra* note 3 at 37.

2. Oral discourse is "aggregative rather than analytic". In order to maintain or remember thoughts and expressions, primary oral cultures create "epithets" such as "the brave soldier", the "beautiful princess", or "sturdy oaks". It does not matter why oak is sturdy or why the soldier is brave; all that matters is that he is. Also, "traditional" expression in oral cultures must not be dismantled. It has been hard work getting them together over the generations, and there is nowhere outside the mind to store them. "Without a writing system, breaking up thought — that is, analysis — is a high-risk procedure". *Supra* note 3 at 38ff.

3. Oral discourse is "redundant or 'copious'". In a primary oral culture, thought and expressions require redundancy which assures continuity. In a chirographical or typographical culture, i.e., literate culture, "Writing establishes in the text a 'line' of continuity outside the mind". In other words, the reader, when confused or distracted while reading, can simply re-read the passage. In addition, oral cultures favour "fluency, fulsomeness, volubility". Therefore, hesitation in an oral delivery is not good, but a well placed pause can be very effective. *Supra* note 3 at 39ff.

4. Oral discourse is "conservative or traditional". Because of the "evanescent" nature of the thoughts, words, and expressions in a primary oral culture, any conceptualized or visualizing knowledge needs redundancy, as discussed above, and indoctrination or arduous repetition and studying of the same facts over and over again. This, Ong contends, ". . . establishes a highly traditionalist or conservative set of mind that with good reason inhibits intellectual experimentation". This does not mean that primary oral cultures are suffering from a lack of creativity or even originality. The originality and creativity comes from the delivery, the interaction with the audience. Ong explains that ". . . at every telling the story has to be introduced uniquely into a unique situation, for in oral cultures an audience must be brought to respond, often vigorously". Orators also add new elements to the story. In essence, a story is always in flux. *Supra* note 3 at 41ff.

5. Oral discourse is "close to the human lifeworld". It is virtually impossible for anything devoid of a human connection, context, or activity to survive within the knowledge pool of the oral culture. Therefore, thoughts, expressions, and ideas are concrete and tangible and, for that matter, operational. Since primary oral cultures lack "elaborate analytic categories that depend on writing to structure knowledge at a distance from lived experience, oral cultures must conceptualize and verbalize all their knowledge with more or less close reference to the human lifeworld, assimilating the alien, objective world to the more immediate, familiar interaction of human beings". *Supra* note 3 at 42ff.

6. Oral discourse is "agonistically toned". Ong contends that primary oral cultures, generally speaking, appear to literate people as overly agonistical in "their verbal performance and indeed in their lifestyle". Ong explains that by placing knowledge within the human lifeworld, a primary oral cultures naturally places knowledge in the context of struggle. He explains that the hardship of life and the ignorance of various scientific facts regarding, e.g., diseases and disasters, explain, to some degree, the violent nature of primary oral cultures. However, "violence in oral art form is also connected to the structure of orality itself. When all verbal communication must be by direct word of mouth, involved in the give-and-take dynamics of sound, interpersonal relations are kept high — both attractions and, even more, antagonisms". The literate world is more objective and distanced because, among other things, of the increased temporal and spatial distances between the writer and the reader which has minimized constant oral exchanges, jousting, and arguments. *Supra* note 3 at 43ff.

7. Oral discourse is "empathetic and particpatory rather than objectively distanced".

"For an oral culture learning or knowing means achieving close, empathetic, communal identification, with the known (Havelock 1963, pp. 145–6), 'getting with it'. Writing separates the knower from the known and thus sets up conditions for 'objectivity', in the sense of personal disengagement or distancing. The 'objectivity' which Homer and other oral performer do have is that enforced by formulaic expression: the individual's reaction is not expressed as simply individual or 'subjective' but rather as encased in the communal reaction, the communal 'soul'." *Supra* note 3 at 45f.

8. Oral discourse is "homeostatic". An oral culture is homeostatic in the sense that it deliberately experiences changes and shifts, albeit very slowly, in order to adjust itself so that it can maintain the/an equilibrium. Therefore, an oral society will revise or slough off unnecessary or outdated traditions as well as ban memories, thereby sentencing them to oblivion. Literate cultures, however, retain their memories and traditions, even if no longer practised, and change continuously and dynamically without losing their history, old traditions, and even curiosity in the past. The tradition and lifeworld of the oral counterpart, however, reflects the "now" and not the "then". *Supra* note 3 at 46ff.

9. Oral discourse is "situational rather than abstract". Oral cultures conceptualize and concretize in "situational or operational frames" which are minimally abstract so that the abstraction of the concept itself is closely connected to and firmly rooted in the "human lifeworld". Hence, a primary oral person would visualize and conceptualize items, things, and objects in life situations, for example, a plow and a horse go together. If you asked the oral person to categorize a plow, horse, and a hand plow he/she would most likely pick the horse and plow and discard the hand plow for the horse and plow combination is a more efficient field-plowing pair than any other combinations. *Supra* note 3 at 49–57.

10. Oral discourse generates "a strong group sense". Note that, although these elements were not listed in Ong's chapter 3 (where he listed the 9 above-noted characteristics), I believe they are important elements of the primary orality. He mentioned these traits in his discussion about secondary orality and throughout the book. Therefore, the limits of an oral communication necessitate closeness and a sense of community. Writing, however, supports distance and separation. Ong states, "[P]rimary orality fosters personality structures that in certain ways are more communal and

externalized, and less introspective than those common among literates. Oral communication unites people in groups. Writing and reading are solitary activities that throw the psyche back on itself." *Supra* note 3 at 69, 136.

[16] The printing press, i.e., the shift from a chirographical to a typographical culture, amplified the above characteristics and completed the transition from orality to literacy. In other words, with the arrival of printing, words became visual *stimuli* which were no longer possessed of the intent, or need, to be used as a vehicle or crutch to spit the words/ideas out to the oral world. Instead, words were being used to read and learn about other people's ideas, thoughts, and expressions quietly and at leisure.

[17] One author summarized the shift quite eloquently: "[T]he technology of writing exteriorizes, decenters the interior unity of oral subjectivity. Subjects and objects come into focus in a higher consciousness of transformed, intense introspection — a new interiority. In particular the phonetic alphabet provides the soil for the germination of abstract, analytical thought. The communal, oral subject tied to the life world of sound reappears as the solipsistically literate subject — a Cartesian ego — tied to and formed by the visual technology of the written word. In a sense, literacy makes us over into the autonomous 'I ams' that 'write' therefore are — are in ways transformed by the 'technologizing of the word'". "N. Lilly, Orality, Literacy, Digitality" (last revised 15 August 1996), online: http://www.tarleton.edu/~lilly/discuss2.htm.

[18] W.J. Ong, *Rhetoric, Romance, and Technology* (Ithaca and London: Cornell University Press, 1971) at 295.

[19] *Supra* note 3 at 135ff.

[20] *Supra* note 3 at 135.

[21] Surpa note 18 at 285.

[22] *Supra* note 3 at 136.

[23] *Ibid.*

[24] *Ibid.*

[25] *Supra* note 18 at 296.

[26] *Supra* note 18 at 296-297. His examples for the formalistic approach to law are "'clear and present danger' or 'last clear chance' or 'possession is eleven point in the law'".

[27] *Supra* note 18 at 299.

[28] *Ibid.*

[29] *Supra* note 18 at 285.

[30] He goes on to say, "As an early observer remarked, it was '[m]arred in the making'. Its critics are not content merely to decry its ancient doctrines; they are no less dissatisfied with its modern formulas. Perhaps this is because 'the law was ready to admit a novelty, but reluctant to abolish an anachronism. ... However imperfect the law may be, and however much we may despair of this state of affairs, it is universally recognized that the reputation of a person is, and always has been, an important value which the law must protect ... [however] reputation is not the only measure of the culture and democratic quality of a society. Equally revealing is the extent to which the law protects such fundamental notions as freedom of speech and the press.'" Brown, *The Law of Defamation in Canada*, (Toronto: Carswell, 1987) at 4-5.

[31] G.H.L. Fridman, *The Law of Torts in Canada*, vol. 2 (Scarborough: Carswell, 1990) at 141.

[32] Fraser on Libel and Slander, 7th ed., (1936) found in P.F. Carter-Ruck & R. Walker, *Carter-Ruck on Libel and Slander*, 3rd ed., (London: Butterworths, 1985) at 8.

[33] Please note "act" includes any mode of publication, i.e, written, film, radio.

[34] L.B. Lidsky, "Defamation, Reputation, and the Myth of Community" (1996) 71 Wash. L.Rev. 1 at 11.

[35] *Supra* note 30 at 10.

[36] Veeder, "The History and Theory of the Law of Defamation (1)" (1903) 3 Colum. L. Rev. 546 at 553-555.

[37] (1606), 5 Co. Rep. 125a; 77 E.R. 250 (Star Chamber).

[38] *Supra* note 36.

[39] *Thorley v. Lord Kerry* (1812), 4 Taunt. 355 at 364.

[40] P. Milmo *et al*, *Gatley on Libel and Slander*, 9th ed. (London: Sweet & Maxwell, 1998) at 70.

[41] J.R. Fisher, "A Chapter in the History of the Law of Libel" (1894) 10 L.Q.R. 158.

[42] F. Carr, "The English Law of Defamation" (1902) 18 L.Q.R. 255 at 399-397.

[43] When possible, words should be construed in a non-defamatory sense.

[44] W. Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries" (1924) 40 L.Q.R. 302 and (1925) 41 L.Q.R. 13. See also J.M. Kaye "Libel and Slander — Two Torts or One?" (1975) 91 L.Q.R. 524.

[45] A short and very good account of the history of the distinction can be found in R. E. Brown, *The Law of Defamation in Canada*, (Toronto: Carswell, 1987) at 287-292.

[46] *Supra* note 32 at 154.

[47] A.M. Linden & L.N. Klar, *Canadian Tort Law: Cases, Notes & Materials*, 10th ed. (Toronto: Butterworths, 1994) at 715.

[48] *Supra* note 40 at 71.

[49] *Supra* note 40 at 72.

[50] *Supra* note 40 at 71.

[51] *Supra* note 31 at 294.

[52] *Ibid.*

[53] *Ibid.*

[54] This, as already discussed, has been abolished in, for example, Ontario and other jurisdictions which rid themselves of the distinction between libel and slander.

[55] See, for example, Nova Scotia, Alberta, New Brunswick, Manitoba, Northwest Territories, Newfoundland, Prince Edward Island, and Yukon.

[56] For a more detailed account, see online: http://www.faqs.org/faqs/usenet/what-is/part1/.

[57] For a more detailed account, see online: http://www.webopedia.com/TERM/L/Listserv.html.

[58] For a more detailed account, see online: http://www.icq.com/products/whatisicq.html.

[59] See, for example, online: http://www.webopedia.com/TERM/i/instant_messaging.html.

[60] C. Fillmore, "Pragmatics and the Description of Discourse", in P. Cole, ed., *Radical Pragmatics* (New York: Academic Press, 1981) at 152.

[61] See, for example, J. D. Bolter, *Writing Space: The Computer, Hypertext and the History of Writing* (Hillsdale: Lawrence Erlbaum, 1991); S. Rabanus, "Die Sprache der Internet Kommunikation" (Wissenschaftliche Prüfungsarbeit für die Zulassung zum Staatsexamen für das Lehramt an Gymnasien in den Fächern Deutsch und Italienisch, Johannes Gutenberg_Universität in Mainz, Mainz: Graz! Verlag, 1996), online: http://www.stefan.rabanus.com/forschung/internet/vers_14.html; R. M. Fowler, "How the Secondary Orality of the Electronic Age Can Awaken Us to the Primary Orality of Antiquity or What Hypertext Can Teach Us About the Bible" (July 1994) 2:3 IPCT 12, online: http://www.helsinki.fi/science/optek/1994/n3/fowler.txt; K. Kveim, "The World Wide Web – an Instance of Walter Ong's Secondary Orality?" (M.A. Thesis in Media and Communications, Goldsmiths College University of London, 1997), online: http://www.angelfire.com/oh/kathrine/dissertation.html.

[62] C.C. Werry, "Linguistic and Interactional Features of Internet Relay Chats" in S.C. Herring, ed., *Compute-Mediated Communication: Linguistic, Social and Cross-Cultural Perspective* (Amsterdam: John Benjamins Publishing, 1996) at 51.

[63] S.L. Condon & C.G. Čech, "Functional Comparison of Face-to-Face and Computer-Mediated Decision Making Interactions", in S.C. Herring, ed., *Compute-Mediated Communication: Linguistic, Social and Cross-Cultural Perspective* (Amsterdam: John Benjamins Publishing, 1996) at 65.

[64] Bolter said, " ... [*hypertext*] is a world in constant motion. Electronic writing is as animated as the famous shield of Achilles in the Iliad ... A computer text is never stable and never detached from the changing contexts that readers bring to it." J. D. Bolter, *Writing Space: The Computer, Hypertext and the History of Writing* (Hillsdale: Lawrence Erlbaum, 1991) at 155.

[65] J. Burkell & I. R. Kerr, "Electronic Miscommunication and the Defamatory Sense" (2000) 15:1 Can. J.L. & Society 81 at 93.

[66] B. Nardi, S. Whittaker, & E. Bradner, "Interaction and Outeraction: Instant Messaging in Action," in *Proceeding on the ACM 2000 Conference on Computer Supported Cooperative Work* (2000), online: http://www.research.att.com/~stevew/outeraction_cscw2000.pdf at 3ff.

[67] N. Corcoran, AOrality, Literacy, and the Net@ (1995), online: http://www.msu.edu/user/corcora5/essays/ol%26n.html

[68] *Ibid.*

[69] J.Y. Lee, "Charting the Codes of Cyberspace: A Rhetoric of Electronic Mail" in L. Strate, R. Jacobson & S.B. Gibson, *Communication and Cyberspace: Social Interaction in an Electronic Environment* (Cresskill: Hampton Press, 1996) at 286.

[70] *Ibid.* at 285. This, of course, is also an example of Ong's oral elements 1–3 *supra* note 15.

[71] The "new" response may breathe new life into an old discussion. But, this will be a "new", not a follow-up, discussion on an old topic because it will most likely depend on recall of the participants rather than the stored accounts of the discussion.

[72] They called it synchronous machine-mediated interaction which is in essence s-CMC.

[73] *Supra* note 63 at 80.

[74] *Supra* note 62 at 60.

[75] *Supra* note 62 at 53.

[76] See, online: http://www.goodvisit.com/rest/inspirer/emoticons/default.htm for a fairly comprehensive list and see, online: http://groups.google.com/groups?selm=bnews.sri_unix.4439 for an account on the origins of the emoticons. It has been said that emoticons are different from regular "alphabetic signs" as discussed above, for they do not represent sounds or actions *per se* but attitudes. In that sense, Lee says at 289, "Emoticons are literate symbols with no grounding in oral language." She argues that regular English phonics such as "soooooooooooooo long" requires no specialized code of cyberspace, but are rooted in regular and traditional Linguistic phonics. Emoticons, however, require knowledge of a specialized code. She concludes that they are inherently different from alphabetic signs. It is true that emoticons require a special understanding of "online code" and that they intensify, in an emotional sense, the text rather than add or substitute for words. However, they are more properly based in oral language in that they substitute for the visual cues that are present in FtF interactions. The above, formulas, however, such as "ahhhhhhhhhhhhh" are deployed to overcome the auditory paucity of the medium. In these respects, all of the formulas that are being used online are based in oral speech for without the understanding and existence of FtF cues none of these formulas would be necessary. Therefore, these formulaic elements clearly play a role in bridging the auditory and visual paucity in CMC and in increasing the efficiency level of the discourse itself.

[77] *Supra* note 62 at 53.

[78] *Supra* note 69 at 278.

[79] *Ibid.* Lee gives an example of a four tone change contribution: "One contributor to the *Technoculture* list represented four changes in pitch and tone — musing, aspirated, dropped, raised — in as many sentences: 'Lemme see, here. Hoo-kay. (I know I'm gonna regret this, but . . .) Anyways'".

[80] *Supra* note 66.

[81] *Ibid.*

[82] *Supra* note 66 at 6.

[83] "For example, Alan discussed monitoring his buddy list for this reason: 'You feel like you know where other people are, so you feel like you're not the only one working on a weekend. To me it's just fascinating to know that someone else is somewhere else doing something while you're doing something. You feel like you're in this world together so this creates a little universe.' Alan's discourse employed a spatial metaphor, denoting a sense of occupying a 'world', a 'little universe', and 'knowing where people are'. He used the word 'feel' three times in this short segment underscoring that he was not talking about accomplishing a specific task, but about how he felt." *Supra* note 67 at 7.

[84] *Supra* note 2 at 137.

[85] *Supra* note 69 at 293ff.

[86] J. Runkehl, P. Schlobinski & T. Siever, "Sprache und Kommunikation im Internet" (1998) NETWORX — Online-Publikation zum Thema Sprache und Kommunikation im Internet, online: www.websprache.uni-hannover.de/networx/docs/einstieg.pdf

[87] *Supra* note 69 at 277ff. and notes 3 at 278 and note 4.

[88] Radio and television certainly have traits from both cultures, but neither of them display traits of both as overtly as CMC. Radio and television require formulas to convey messages to their listeners in a "catchy" way, and both media seem to have some sense of community, albeit relatively passive uni-directional social interaction. Indeed, the listener has to passively intake the information and then, if he/she chooses to engage in an actual active social interaction, he/she would have to use a second mode of communication such as the telephone, facsimile, letter, or even FtF contact.

[89] Indeed, a conversation at a formal dinner party or in a locker room has different formality characteristics. Does that mean that one is more oral than the other just because one is more formal than the other? Also, writing a snail-mail letter to the prime minister or to your best friend will differ greatly in style. Is one snail-mail letter more literate than the other? Of course not. Therefore, since any discourse in the online setting is LitOral, it will always remain as such regardless of the level of formality.

[90] Some authors argued that CMC is an instance of tertiary orality or secondary literacy. Unfortunately, it is impossible to argue exclusively either way, i.e., that CMC is an instance of secondary or tertiary orality or even secondary literacy. Suffice it to say that the world wide web is at least contributing to a shift of literacy-sized magnitude.

[91] See B.P. Smith, "Cybersmearing and the Problem of Anonymous Online Speech" (2000) 18 Comm. Law 3.

[92] C. Sunstein, *Republic.com* (New Jersey: University of Princeton Press, 2001).

[93] For example, in August 2000, a company called Emulex suffered an initial $2.5 billion loss after Mark Jakob issued a bogus press release that Emulex was investigated by the SEC. In the end, the total loss finally plateaued at $110 million. In this instance, the culprit was found and prosecuted, but there are many instances when it is virtually impossible to do so. Also, Jakob made for himself a mere $241,000, and at the end of the day, he pled guilty to one count of wire fraud and two counts of security fraud. He was sentenced to some prison time as well as a hefty multi-million dollar fine. Of course, the investors will never see the money again.

[94] This, of course, leads us back to Sunstein's cybercascades, fragmentations, etc.

[95] See, for example, D. J. Loundy, "E-Law: Legal Issues Affecting Computer Information Systems and Systems" (1993) 3 Alb. L.J. Sci. & Tech. 79 and R. J. George, Jr. & J. A. Hemphill, "Defamation Liability and the Internet" 507 PLI/Pat 691.

[96] *Cubby Inc. v. Compuserve*, 776 F. Supp. 135 (S.D.N.Y. 1991).

[97] *Rindos v. Hardwick*, [1994] A.C.L. Rep. 145 WA 4 (Sup.Ct.).

[98] See, for example, *Southam v. Chelekis*, [2000] B.C.J. No. 314 (C.A.), online: QL (BCJ), appeal dismissed without reasons [2000] S.C.C.A. No. 177 (S.C.C.), online QL (SCCA); *Braintech v. Kostiuk* (1999), 171 (4th) D.L.R. 46; *Investors Group v. Hudson*, [1998] Q.J. No. 4543 (Que. S.C.), online QL (QJ); *Reform Party of Canada v. Western Union Insurance* (1999), 3 C.R.R. (4th) 289; *Direct Energy Marketing v. Hillson* (1999), 72 Alta. L.R. (3d) 140 (Q.B.); *Gouveia v. The Toronto Star* (1998), O.T.C. 186. See also "Developments in the Law — the Law of Cyberspace III The Long Arm of Cyber-Reach" (1999) 112 Harv. L. Rev. 1577 at 1610.

[99] *Supra* note 97. In this case the plaintiff, Dr. Rindos, the acting head of the Department of Archaeology at the University of Western Australia, and a well respected member within his profession, sued for defamation occurring on an online bulletin board system. In March 1993, a tenure review was held and the university decided to deny him tenure. Subsequently, in mid-June, he was dismissed. In response to the dismissal, a friend, Hugh Jarvis, posted a message on a bulletin board called the ANTHRO-L mailing list. He lauded Dr. Rindos for his achievements and asked colleagues, friends, and supporters, "what actions can the international community take . . . Already over thirty international scholars have written on [Dr. Rindos'] behalf". A few days later the defendant, a Mr. Gil Hardwick, responded on a newsgroup called "sci.anthropology." He claimed to know the "true reasons" for "Dr. Rhindos [sic] demise. He alleged, *inter alia*, that there are "[R]umours passed to me by several reputable and long-standing Western Australian anthropologists as to Dr Rhindos' [sic] 'Puppy Parties' focussed I am told on a local boy they called 'Puppy'. Hmm, strange dicey behaviour indeed, especially here in an environment dominated by conservative fundamentalists." Further, Hardwick claimed that Dr. Rindos career was, "[B]uilt not on field research at all, but on his ability to berate and bully all and sundry on the logic of his own evolutionary theories. In the local pub, drinking and chain smoking all the while for that matter." There are also a number of other allegations, all of which proved to be untrue.

[100] L. Edwards, "Defamation and the Internet: Name Calling in Cyberspace" in L. Edwards & C. Waelde, eds., *Law and the Internet: Regulating Cyberspace* (Oxford, Hart Publishing, 1997), online: http://www.law.ed.ac.uk/it&law/c10_main.htm

[101] C. Nguyen, "Defamation on the Internet", online: http://gsulaw.gsu.edu/lawand/papers/sp97/nguyen.html.

[102] C. Kozar and A. Lockhart, "Service Provider Liability Website", online: http://www.unc.edu/courses/law357c/cyberprojects/spring97/spliab/dfmntxt.htm.

[103] See, for example, M. Neo, "Defamation on the Internet", online: http://home.pacific.net.sg/~jhmk/article3a.htm.

[104] See *Newsbytes*, 23 February 2001, online: http://www.newsbytes.com/news/01/162428.html

[105] N. Braithwaite (1994), cited in M. Rich, "Electronic war of words heads from computer to court" *Financial Times*, (13 August 1994).

[106] *Supra* note 92.

[107] American National Standard for Telecommunications — Telecome Glossary 2000, online: http://www.atis.org/tg2k/.

[108] NET Etiquette, online: http://www.albion.com/netiquette/book/0963702513p71.html; see also "The Twelve Commandments of Flaming", online: http://www.advicemeant.com/flame/index.shtml.

[109] *Supra* note 66 at 86, citing an anonymous e-mail in M. Dery, "Flame Wars" (1993) 92 South Atlantic Q. 559 at 560.

[110] In this respect, a number of news articles report that judges seem to impose higher standards on the plaintiffs in the sense that they see online communication as more agonistically toned than offline interaction. Consequently, judges take the position that netizens need to be able to endure greater harassment in the online forum than in the offline space. See, online: http://www.wired.com/news/politics/0,1283,42039,00.html; and http://news.cnet.com/news/0_1005_200_4955125.html.

[111] *Supra* note 69 at 278.

[112] *Supra* note 69 and note 80.

[113] For a good preliminary discussion as to the problems and distinctions that courts face in the online defamation environment, see *supra* note 65.