

Court Suppression Orders and the Internet

Judge David Harvey

3 December 2009

OPEN JUSTICE

- “Most fundamentally, (the Judge) has not heeded the Court of Appeal view that the starting point in matters of suppression must be the importance of open judicial proceedings and the right of the media to report them fairly and accurately, as surrogates of the public. This view is meant to underline the fact that the court system is supposed to operate on the basis that the public has a powerful right to know what occurs in courtrooms” – New Zealand Herald, Editorial 13 November 2009.

INTERNET NEGATES SUPPRESSION

- “Another reason Judges must be sparing with suppression orders is the reality of the internet. Details suppressed here can be revealed easily on websites hosted overseas; further, some bloggers ignore the rules of contempt of court, relaying information that a Judge has deemed should be kept secret, defeating his or her wishes in a way courts have *yet to consistently tackle*” – The Dominion Post, Editorial 13 November 2009, (the split infinitive in the last sentence is that of the editor).

JURISDICTION AND SUPPRESSION

- But the report is on less-secure ground when it seeks to control the internet, most notably the increasing trend of suppressed material being circulated. Because this is often hosted on overseas-based websites that are not subject to New Zealand law, there is a strong element of futility in much of what it suggests. - New Zealand Herald – Editorial 19 November 2009

Two Themes

- Open Justice
- The ineffectiveness of Court suppression orders in the internet age.

Open Justice

- What is it?
- The right of the public to scrutinise the operation of an arm of government?
- The right of the press to publish **EVERYTHING** that happens in Court

Open Justice Principles

- Proceedings and processes of a court in reaching a determination should be clear, public and transparent.
- No secret tribunals
 - Inquisition
 - Star Chamber
 - The KGB cells in Dzershinsky Square

The Role of the Traditional Media

- The surrogates of the public
- In court on behalf of the citizenry
- Provide information about court cases by what are traditional news media – newspapers, radio and television
- News organisations are accountable if they go too far – contempt, breach of suppression orders

Limits on the Role

- Publishing a name assumes considerable importance
- Does the mere fact of a name have anything to do with scrutiny of the process by which Courts arrive at a determination?
- Or is it just prurience?

Assumptions and Presumptions

- Where there is a conviction names should be published
- Public must know those who have fallen below the bottom line of acceptable behaviour
- But what about pre-conviction or pre-trial
- Presumption of innocence
- But sometimes mere appearance in Court assumes guilt.
- A wrongful accusation can be very damaging

Ambit of Discussion

- **Restricted to the issue of pre-trial publication on the Internet**
- Assumes that there are provisions for suppression orders
- Assumes there is demonstrable evidence of a possible threat to fair trial by publication that justifies a suppression order

Expectations

- Society demands a fair trial process
- The accused expects a fair trial
- Fair trial is guaranteed under the NZ Bill of Rights Act
- A fair trial trumps all – Baragwanath J R v RB
- Fair trial demands an accused be convicted on evidence that is ***presented in the court***
- Our fair trial system requires community involvement by a jury

Pre-Trial Publicity

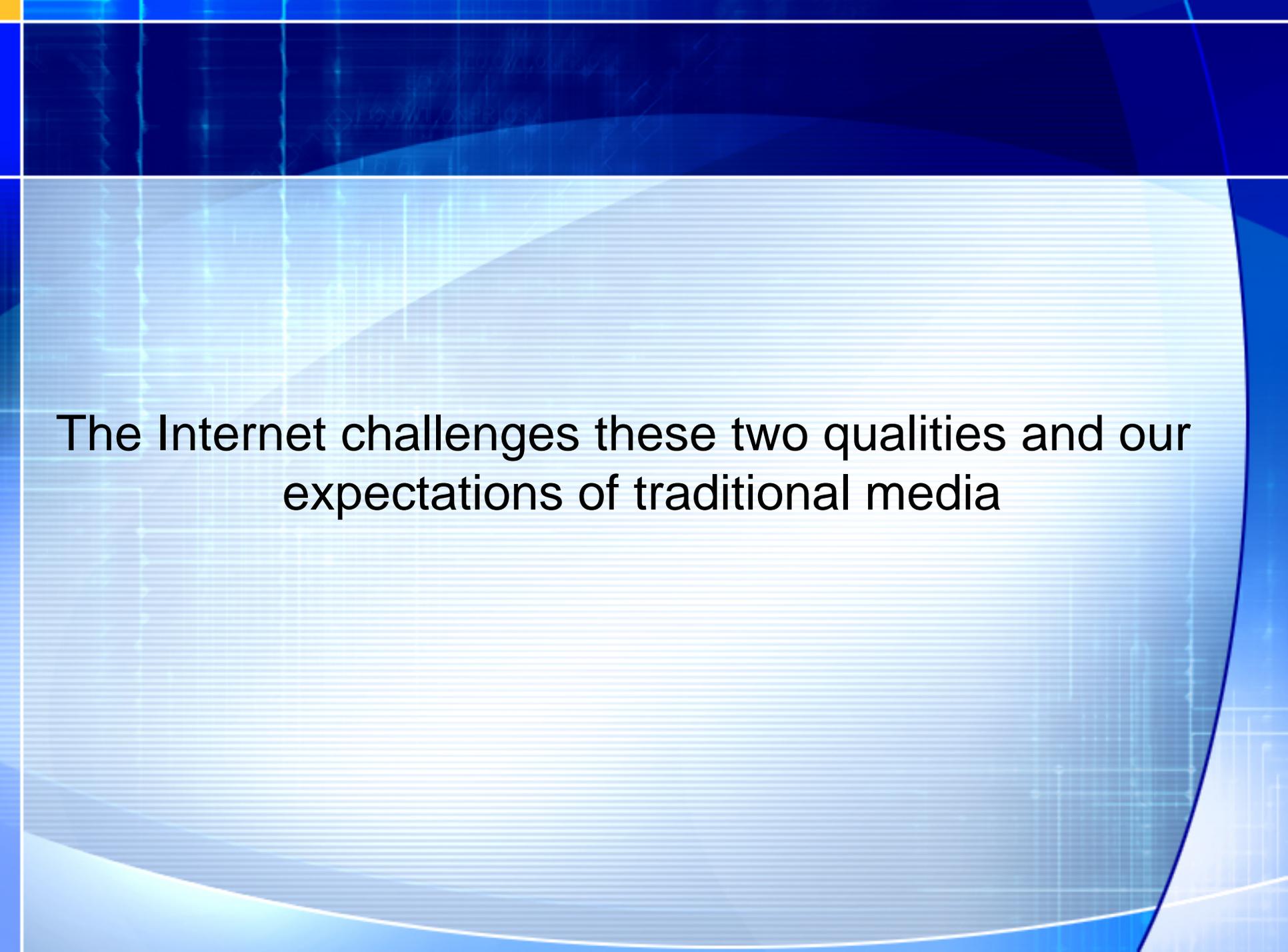
- Where there is pre-trial publicity two matters come into play for potential jurors
- Practical Obscurity of Information – location and retrieval of information
- Partial Obscurity – recall of information
- Both are relevant in considering internet publication

Practical Obscurity

- The difficulties that the individual encounters in locating the report or the information sought. It involves physical activity in going to the source of information – a trip to library or to the newspaper room.
- It requires time in locating the information itself and the amount of time that is spent in locating the information may depend upon the ability of the individual to recall, roughly, the timeframe within which the information was delivered.
- It is unlikely that an individual will recall the specific date upon which a newspaper article appeared.
- Even if the recall is accurate within a month it will mean that the individual will be required to search through at least 24 issues of a newspaper to locate the information, if luck is with them
- *Addresses location and retrieval of information*

Partial Obscurity

- Whereby the information communicated is, at a later date, recalled in part but where, as the result of the inability of memory to retain all the detail of all the information that had been received by an individual has become subsumed.
- Thus, a broad sketch of the information renders the details obscure, leaving the major heads of the information available in memory,
- *Addresses recall of information*

The background is a deep blue with a subtle grid pattern. A large, white, curved shape, resembling a stylized 'C' or a partial circle, is positioned in the center. The text is centered within this white shape.

The Internet challenges these two qualities and our expectations of traditional media

Myth Explosion 1

- On line newspapers and news media are NOT digital reflections of traditional media
- They are vested with qualities of digital information which challenge traditional assumptions about information in the context of a fair trial

Myth Explosion 2

Information doesn't just appear on the internet. Someone puts it there

Myth Explosion 3

- The Internet exists in the real world
- It has physical grounded aspects
- Internet **users** are subject to laws
- Off shore activity can result in a local law suit or prosecution – see Gutnick v Dow Jones; R v Walsh
- If someone in NZ puts suppressed information on an overseas server, they can be prosecuted in New Zealand – initiatory act – s. 7 Crimes Act. Possible application of common law jurisdiction principles – real and significant connection
- That answers one of the concerns of the Editorials - Dominion 13 November NZ Herald Editorial of 19 November

The Challenges 1

- Information is constantly available and may, even if with some difficulty, invariably be located;
- The information retains its “fresh” quality;
- In criminal investigations in particular, the information will be of a developing nature based upon reports as investigation progresses. Although the evidence at court presents the final picture, the “colour” of that evidence could be affected by reference to developing investigation information;
- The information may be quickly relocated to a vast number of websites.

The Challenges 2

- Internet based information challenges the *practical* obscurity that has previously been a characteristic of traditional news media – electronic information on the Internet is readily available, and easily searchable, as opposed to hard copy information held in a central location, and searchable only in limited ways;
- Internet based information also challenges the *partial* obscurity that has previously characterised traditional news media, whereby the information was at some stage in the public arena, but is subsequently remembered only in part, with the details rendered obscure;
- Because the Internet allows anyone to be a publisher of information, information may be widely published, copied and further published on the Internet even if it is inaccurate or unreliable.
- While inaccuracy is not a problem confined to the Internet, the speed of dissemination of information on the Internet means that inaccurate information, once published, may be almost impossible to correct.

The Problem

- These factors mean that a juror may access a news report which:
 - May be inaccurate
 - May assume facts to be proven
 - Contain inaccurate, speculative or irrelevant information
- That may influence the juror in his/her decision making process
- Contrary to basic fair trial precepts

The Nature of the Solution?

- Most **Google**[™] searches involving court reporting return news media sites on the first page
- This is because of embedded aids to searching including metadata
- Suppression orders will eliminate these sources of information

What About the Rest

- Availability of
 - blog based information
 - Opinion, chat or boutique websites
- Run a risk if participants are based in NZ
- May not be as readily searchable by the average internet user
- Still require an NZ based information source to start with.

Off-Shore Based Information

- Blocking – ISPs are able to block access to identifiable off-shore websites
- Blocking is proposed as part of the Australian solution to objectionable content websites
- Requirement that ISPs block access to known websites that contain information the subject of suppression orders

On-Shore Based Information

- Standard remedies are available – contempt etc
- Take down notices – the host servers be directed to take down the site until after the trial
- Possible offence by ISP of maintaining publication of suppressed information once on notice (solution similar to innocent dissemination in defamation – see *Godfrey v Demon Internet*)

Other Solutions

- News media take down pre-trial reporting relating to a trial in progress on a temporary basis
- There will ALWAYS be some information that will slip through
- The solutions proposed make it harder to find and introduce a limited form of practical obscurity

Conclusion

- Pre-trial suppression orders do not challenge open justice
- Transparency of judicial process can still be maintained without publication of some details
- Internet content can be managed and controlled