

Note on the use of the Right of Reply and how the tool could assist online newspaper/news blogs

We have been asked to provide a note on the Right of Reply tool (RoR), outlining what it is, what problems it seeks to address, and how it may therefore assist editors and publishers of online newspapers and blogs.

The note is set out as follows:

1. Executive Summary.
2. What is RoR and what does it do?
3. The issues that editors and publishers currently face from a legal perspective.
4. How RoR could help with these issues.
5. What RoR seeks to offer for editors and publishers?
6. Conclusion.

1. Executive Summary

- 1.1. The legal grounds for challenging an online newspaper article whether under data protection laws, human rights laws, the Defamation Act or press codes of practice are complex and far from clear-cut. This is largely due to the difficult balancing act between an individual's privacy rights and the right of freedom of expression, particularly for journalistic purposes.
- 1.2. Such complaints, as detailed below are time-consuming, resource-intensive and can be expensive to deal with. The existing routes also do not offer the type of early intervention which enable an individual to respond in a timely manner.
- 1.3. Whilst there is no strict legal obligation to proactively offer a right of reply, RoR nevertheless provides an alternative practical route for individuals to do so, without any protracted correspondence or debate. It offers an immediacy which other avenues do not.
- 1.4. However, whilst this may help in reducing the number of complaints, it does remain open for an individual to exercise their legal right to challenge an article, even after utilising the ROR reply service.

2. Introduction - What is Right Of Reply (ROR) and what solution does it seek to provide for editors/publishers of online newspaper and blogs.

- 2.1. Right of Reply (RoR) is an online reputational management tool and search engine which has been developed using patented technology to help enable individuals and enterprises to protect their reputation, identity and communications against inaccurate, misrepresentative or defamatory online content.
- 2.2. Once an individual or enterprise has subscribed to RoR, the system will notify them whenever a news story is published about them. It provides them with the opportunity to respond immediately to each news item, enabling them to put their point of view on the story across.
- 2.3. RoR provides the subject with a reply mechanism which protects both the right of freedom of expression of the press but also the individual's right to reply and to have their privacy and home life respected. In essence, it goes beyond the right to privacy or the right to be forgotten, by aiming to ensure that the individual's side of events/point of view is known and shared as widely, at the same time and as prominently as the news article or item posted about them.
- 2.4. RoR does not block or remove any online content, and is aimed to have a different effect to the right to be forgotten, demonstrated by the Google Spain case. It balances the right to freedom of expression and an individual's rights under human rights law, whilst enabling access to complete and up to date information about an individual.

2.5. RoR seeks to provide a rapid, effective and definitive method of enabling individuals to respond to negative stories which can damage their personal reputation without having to resort to more formal or traditional methods of redress, which can be time-consuming and costly, and do not provide the same immediacy or prominence of the publication of the response.

3. What are the current practical problems and issues for editors/publishers of online newspapers, news sites and blogs

Put simply, the 3 main bases of challenge which are utilised to which editors and publishers must respond are that:

- The individual concerned was given no opportunity or proper opportunity to respond;
- the reply was posted at a later time/date and with less prominence than the original article;
- the published reply does not accurately reflect the subject's position or has not been published in full;

The legal bases for challenges are:

3.1. Human Rights Laws and Obligations

3.1.1. In the UK, as elsewhere in the EU, there is no over-arching cause of action in relation to the invasion of privacy. Hence the numerous cases brought before the courts which explore the interaction of various provisions of the European Convention on Human Rights (the Convention).

3.1.2. The Convention's rights are directly enforceable in the UK under the Human Rights Act 1998 (the HRA). It includes the qualified rights under Article 8 and Article 10. The interaction between these 2 provisions has been the subject of debate on many occasions in the EU and the UK.

3.1.3. The Articles are as follows:

"Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

"Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

3.1.4. In addition, the Charter of Fundamental Rights of the European Union 2000 (the Charter), also sought to strengthen the protection of certain fundamental rights resulting from the Convention and from EU constitutional laws. The relevant articles are:

Article 7 (respect for private and family life, home and communications)

Article 8 (protection of Personal Data, including the right to rectification of data collected about them),

Article 11 (freedom of expression, including the freedom and pluralism of the media),

Article 16 (freedom to conduct business), and

Article 47 (right to an effective remedy before a tribunal).

3.1.5. In the 2004 decisions of the UK House of Lords in *Campbell v MGN Ltd* and *In re S* (a child), the House of Lords recognised the development of a common law right to protect against the misuse of private information. It also established a methodology in reconciling the competing demands of Articles 8 & 10 of the Convention. In the *Campbell* case, the Court stated:

"12. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. "

3.1.6. From the case law, it is clear that the following 4 principles apply:

3.1.6.1. Neither Article has automatic precedence over the other. Both are vitally important rights;

3.1.6.2. Where the values of the 2 articles are in conflict, the focus must be on the comparative importance of the rights being claimed in the individual case;

3.1.6.3. Justifications for interfering or restricting the rights must be considered;

3.1.6.4. The proportionality test must be applied – this is a balancing act looked at in the context of the individual case and its circumstances.

3.1.7. These principles were most recently referred to in the recent Judgment in the UK case of *NT 1 & 2 v Google LLC* (2018), where the Judge also referred to the Charter and the requirement to act compatibly with this when implementing EU law. This means that data protection law must also be interpreted and applied in line with Charter rights.

3.1.8. These conflicting rights mean that it is not clear-cut at the outset of a complaint as to whether the individual's rights under Article 8 will prevail over those of the publisher's right to freedom of expression under Article 10. The balancing act applied is highly case-specific and will turn on each case's own facts. This can lead to prolonged arguments at the outset which may well need to be resolved by a court – a time-consuming, lengthy and expensive process.

3.1.9. The European Court of Human Rights has also recognised that there will be cases in which a newspaper may legitimately be required to publish a retraction/apology or judgment in a defamation case. It has stated that there is a positive obligation on the state to ensure that persons subject to defamation have a reasonable opportunity to exercise their right of reply by submitting a response to the defamatory information in the same way as it was disseminated. In other words, Article 10 of the Convention may actually impose an obligation to provide a right of reply.

3.1.10. It should also be noted that Article 8 of the Charter requires that compliance with data protection rules is to be subject to an independent authority's control, which in the UK, is the Information Commissioner's Office. This is explored more fully in the section below.

3.2. Data Protection Law

3.2.1. It is our understanding that RoR has not been developed with the intention of assisting data controllers (a natural or legal person which, alone or jointly with others, determines the purpose and means of the processing of personal data) in meeting their legal obligations under the General Data Protection Regulation 2016/679 (GDPR).

3.2.2. It is possible that RoR would offer data subjects another option, in addition to their legal rights under the GDPR, to address their concerns over an article containing their personal data, by adding their perspective on a story early on in a matter. However, it is unlikely that RoR, in its current form, would be sufficient for a data controller to discharge their obligations in addressing data subject rights under the GDPR.

3.2.3. If it is decided to try and align the RoR solution with the legal obligations relating to data subjects rights under the GDPR, we would be happy to advise further on this matter.

3.3. Defamation Act 2013

3.3.1. The Defamation Act (the Act) provides a cause of action for an individual where a statement causes or is likely to cause serious harm to the subject's reputation or in the case of a company, serious financial loss. It allows for civil claims only and does not extend to criminal liability.

3.3.2. The Act introduced a higher threshold than previously existed which a claimant has to meet to succeed. This was designed to weed out undeserving claims which did not involve actual or likely serious harm to reputation. The overall intention was to rebalance the law to provide more effective protection for freedom of speech whilst ensuring that those who have been defamed are able to protect their reputations.

3.3.3. This threshold test, whilst higher than before, has meant that there has been considerable debate in cases brought before the courts on whether that threshold has been met in a particular case. Again, each case will turn on its own facts, which can take a significant amount of time to get to the bottom of. The outcome in a particular case will not be clear-cut at the outset.

3.3.4. Damages awards or settlements can be substantial where the claim succeeds or has a clear chance of success – the most recent case in point being the Sunday Telegraph which settled a claim brought by the general secretary of the Finsbury Park mosque, Mohammed Kozbar. The legal costs in these cases are substantial, and can easily run into the hundreds of thousands.

3.3.5. It should be noted that whilst the Act has impacted on the number of cases actually brought before the courts, there has been an increase in the number of cases brought under human rights and/or privacy laws, and claims combining both grounds are permitted by the courts, subject to the use of the courts' resources being appropriately and proportionately used.

3.4. UK Press Codes Requirements

- 3.4.1. The UK Press Codes also include the requirement to provide a right to reply. IPSO is the independent regulator for the newspaper and magazine industry in the UK. IMPRESS is the approved regulator under the Press Regulation Panel, established in the wake of the Leveson Inquiry into press standards in the UK.
- 3.4.2. IPSO's Editors' Code of Practice applies to editorial content in both printed and online versions of publications. The Code's Clause 1 on Accuracy includes the following: "*A fair opportunity to reply to significant inaccuracies should be given, when reasonably called for*".
- 3.4.3. Similarly, the IMPRESS Standards Code states at Clause 1 (accuracy), that "Publishers must correct any significant inaccuracy with due prominence, which should normally be equal prominence, at the earliest opportunity."
- 3.4.4. We note from the latest rulings by IPSO that many of these relate to both online and offline copy, with the chief source of complaints being inaccuracy over content with a failure to provide a proper opportunity for comment by the article's subject. The average time taken by IPSO to resolve complaints is approximately 6 months and this will be after a period of direct correspondence between the paper and the complainant.
- 3.4.5. Whilst it is uncommon for IPSO to impose a fine on a publication, nevertheless it does have the power to issue a fine up to £1 million where the failings are particularly serious and systemic.
- 3.4.6. In any event, again, where a complaint is made, an in-depth investigation and analysis of the facts and circumstances of the case will be required. Again these complaints are time-consuming and can be expensive to defend.

3.5. Key points

- 3.5.1. Challenges on any of the grounds outlined above are time-consuming to deal with and resource-intensive, tying up resources which could be used more productively. They may result in the removal of negative content rather than redressing the balance by providing a right of reply or enabling the subject's comments on the news piece to be published in their entirety and without being re-worded.
- 3.5.2. In addition, many recognise that an award of damages, particularly given the length of time that has elapsed since the offending article or news was published, does not restore a person's reputation or help to balance it. It does not serve to provide the subject with a platform to express their view on the facts or content. It does not provide the public with a rounded picture of events. The critical elements of a properly exercised right of reply are immediacy and ready availability. Neither of these are provided via the existing complaints or court process.

4. How can RoR help with these issues?

- 4.1. Put simply, RoR may help reduce complaints and threatened or actual legal action by offering subjects the immediate opportunity to reply to content that they consider is defamatory, inaccurate or in breach of their human rights. This saves time, resource and ultimately money.
- 4.2. RoR balances the various competing rights of freedom of expression and right to personal identity, but in doing so also seeks to protect both sets of rights. It provides a practical solution to the problems faced in trying to legally enforce the personal rights of the individual. The current systems available to them are often slow, inefficient and ineffective in providing an individual with the result they seek – namely for their reputation to be protected.

- 4.3. RoR offers a method of pre-empting complaints and claims whether in privacy, human rights or for defamation by ensuring that the response is provided at the same time or very soon after publication, enabling resolution before a complaint is made or is escalated. It also gives equal time and space to both content and response.
- 4.4. It may help to prevent any claim that an article is defamatory, given that the subject has been given the specific opportunity to reply before publication. Similarly, it may reduce the number of demands made for a correction to be published, thus saving time and resource in dealing with such issues, and a reduction in legal costs spent in defending any litigation which may result from an article being published.
- 4.5. By offering this service, a publication is not affecting the reader's perception but giving them a more complete picture on which they can draw their own conclusions, based on their own view of the world. Because RoR does not remove editorial control, it enables a publication to demonstrate a commitment to accuracy and giving the public the full picture.

5. What RoR aims to provide for online newspapers/blogs

- 5.1. RoR is designed to provide a quick low-cost solution for both individuals and the media alike. By proactively offering access to this tool, media publishers and editors are providing the relevant individual the right of reply, and the ability to correct any errors or confusion before publication.
- 5.2. In the context of online newspapers and news publishers, the concept is for the publisher to provide the subject of a news article with the opportunity to reply with their comments in their own words prior to the publication of the story using the RoR tool. This would be by way of a standard email giving the opportunity to reply using RoR, following their registration with RoR. RoR will verify their identity before completing the registration process.
- 5.3. If an individual chooses to publish a response via RoR, the relevant article will have the RoR logo and link to the response alongside it. Their response will be published alongside the article giving it the same prominence in time and space as the article itself.
- 5.4. In this way, RoR could help to protect publishers against complaints and claims while enabling individuals to protect their personal reputation, in a far less confrontational, time-consuming and expensive way. This has benefits both for the media and for the subjects themselves, promoting the constitutional rights to freely express opinions, views and news, whilst enabling the individual to express their position, view and opinions.
- 5.5. In short, by offering individuals the opportunity to respond via the RoR service, RoR could provide online publications with the following benefits:
 - 5.5.1. It reduces the potential for inaccurate news or content which can subsequently be challenged by the individual concerned.
 - 5.5.2. By allowing the opportunity for a real-time reply, the publisher will also be able to demonstrate that they have given the individual the opportunity to respond, thereby mitigating the risk of challenges being brought or of those challenges being successful.
 - 5.5.3. Exposure to complaints, claims, litigation and any resultant rulings or orders to publish corrections or apologies may be reduced. It may also reduce damages awards in the event of a successful claim.
 - 5.5.4. A reduction in the number of complaints made, bringing time and cost savings as well as reputational benefits.
 - 5.5.5. Because this is an innovative tool and approach, a publication's reputation may be enhanced by offering this innovative service.

6. Conclusion

In conclusion, it is our view that RoR provides an alternative practical route for individuals to respond to articles or news being published about them, rather than via the traditional complaints/litigation route.

By offering an individual the use of RoR this may reduce the risk of more formal challenges and claims for damages, enabling both sides to express their views and opinions whilst protecting those rights in an equal and balancing way.

However, it still needs to be considered that there is nothing to stop an individual who has utilised the RoR solution from also pursuing their legal rights.

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