Holy Mackerel! How a Small Country of Fishermen Pushed the Boundaries of Free Press

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1. Overview

This paper is about the Icelandic Modern Media Initiative ("IMMI"), a legislative proposal enacted by the Icelandic parliament on June 16th, 2010.

The IMMI was designed to promote transparency in reaction to an economic crisis and failed gag order that shook Icelanders’ faith in their government.

The parliament set out to create the most journalist-friendly nation in the world, a “media haven,” and did so by grabbing some of the most protective media statutes in the world.

The reformations include, inter alia, protection for the reporter’s privilege and source anonymity, protection for third-party communicators between reporters and sources, whistleblower protection, a limitation on prior restraint, anti-SLAPP mechanisms, a shortening of the statute of limitations for Internet defamation claims, and anti-libel tourism statutes.

These laws, being pieced together from different nations around the world, may work just fine in their original countries of origin, but they when mixed together in a single forum, they can create some unexpected consequences.

While the laws may not end up creating the media haven that the Icelandic parliament envisioned, it will certainly be and already is a haven for one organization: WikiLeaks.

First, this article will investigate the series of events that led to the creation of the IMMI. Second, this article will examine some of the planned IMMI provisions in detail, along with their role model-laws. Third, this paper will analyze some of the various conflicts that arise from creating this mélange of laws. Finally, this paper will conclude that while the IMMI provisions in isolation in their host countries may be effective, the combination of the provisions in one space may lead to some negative unintended consequences.
2. History of the Icelandic Modern Media Initiative

a. The Economic Climate

“Iceland’s banking collapse is the biggest, relative to the size of an economy, that any country has ever suffered.” -The Economist

For centuries, Icelanders had made a humble living out of the fish industry, agriculture, geothermal energy, and of course their strategic location between the United States and the Soviet Union. Life in Iceland was decent: there was free universal health care, free education, and one of the highest standards of living in the world. But in the 1990s, a booming fish crop combined with free market reforms changed this humble living by giving Icelanders the power to achieve their entrepreneurial aspirations. In five years, the average Icelandic family’s wealth increased by 45% as Icelandic entrepreneurs rode the credit boom to victory – at least, temporarily.

When the Icelandic banks were deregulated in 2001, Icelanders jumped on the opportunity to capitalize even further, but there was little to keep the zeal of some banks in check. Banks made considerable equity investments in UK companies and Japanese currency, and in return issued high-interest bonds indicative of Iceland’s enthusiasm and optimism from the economic boom. For every person living in Iceland, Icelandic banks borrowed more than $250,000 and held only toxic equity in companies that swiftly fell apart when the world stock market fell to its knees.

The result? In 2008, Iceland possessed an economic debt several times its GDP. When people figured out what had happened, the Icelandic stock exchange plummeted, the Standard &

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3Tracy McVeigh, The party’s over for Iceland, the island that tried to buy the world, GUARDIAN.CO.UK: THE OBSERVER, http://www.guardian.co.uk/world/2008/oct/05/iceland.creditcrunch (Oct 5, 2008)
4Id.
5Jackson, supra note 2.
7Jackson, supra note 2.
8Id. For comparison, the national debt of the United States, after all of the economic stimulus packages, is still under our GDP. Historical Debt Outstanding – Annual 2000 - 2010, TREASURYDIRECT,
Poor’s Icelandic national credit rating went from A+ to BBB,10 Iceland nationalized all of its major banks,11 and Britain accused Iceland of “financial terrorism” and froze all of Iceland’s assets in Britain.12 And all of this could not happen at a worse time, for it was also around this period when the Eyjafjallajökull volcano erupted, covering the entire country in ash.13 Needless to say, the situation was bad. According to Birgitta Jónsdóttir, a member of the Icelandic parliament “the shock created a quasi-revolutionary environment in Iceland, and you had since the first time since Iceland joined NATO, riots in the streets.”14

And in the midst of this all, one very specific event took place that led to a dramatic change in Icelandic media law that few could have predicted from Iceland’s fishing and agriculture roots.15

b. The Kaupthing Debacle

By 2009, Iceland had nationalized all of its major banks – much like the rest of the world, Iceland had not fully acknowledged that scope of the credit bubble that promptly burst just a year


15 For a very good six-minute video summary of the history and economic crash of Iceland, please see 22biki, *The financial crash in Iceland in 6 minutes according to ABC’s 20/20*, YouTube (Jun. 20, 2009), http://www.youtube.com/watch?v=X55R_32N-t8&NR=1.
earlier. The people were upset; they wanted answers, or at least a scapegoat. But so far, they only had their government to blame, and as a country of just over 300,000 people, that was a little too close to home.

On July 31, 2009, a document from Kaupthing bank was leaked onto the whistleblowing website WikiLeaks. This document, written a couple weeks before the bank was nationalized, showed just how much debt the bank actually had. A quick glance at the document itself showed a detailed description of every loan and equity investment held by the bank, along with their associated junk credit ratings and perilous risk analyses. The bank did not want this information out: on top of exposing their very fragile position in the market and encouraging a run on the bank, the data showed that Kaupthing broke the law by making ludicrous (and sometimes suspicious) investments.

Immediately, Kaupthing requested an injunction from the court to stop the spread of this document. The court issued a gag order the day that the document was leaked, preventing anyone from talking about the leaked document. That night, the Icelandic news station RÚV complied with the gag order and did not mention the leaked document – but instead provided a screen shot with a link to the WikiLeaks website, implicitly suggesting that the public go to the website to find the

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18 Notice the use of passive voice. The original leaker was never known – as is the case with all documents leaked to WikiLeaks.
23 eee_eff, supra note 22
24 Id.
The public was outraged, and the gag order was lifted shortly thereafter when the government realized it was futile to try and put the cat back in the bag. The government of Iceland fell victim to what is known as the “Streisand effect.” To explain briefly, in 2003, Barbara Streisand sued a photographer for fifty million dollars after her house was caught unwittingly in his collection of coastline pictures. Citing privacy concerns, she did not want pictures of her house publicly disseminated. The result of this fifty million dollar lawsuit was Internet sensationalism, as more than 420,000 people flocked to her website to view the picture in one month following the complaint – the very harm which she sought to avoid. Here, the same thing happened: by placing the gag order on the news station, the Icelandic government called attention to a somewhat obtuse, hard-to-read document that would not have had nearly as profound of an effect otherwise.

As a result, regardless of the content of the document, this attempted cover up felt like betrayal to the people of Iceland, and when the coalition government was replaced in 2009, the new Icelandic parliament (the “Althingi”) wanted to pass laws to make sure that this sort of censorship never happened again. Hence, in less than a year after the new government was elected, the Althingi passed the Icelandic Modern Media Initiative on June 16, 2010, in hopes of

25 Id.
27 Blog Standard: Authoritarian governments can lock up bloggers. It is harder to outwit them, Economist, http://www.economist.com/research/articlesBySubject/displayStory.cfm?story_id=11622401&subjectID=348963&fsrc=nwl (Jun 26, 2008)
one day becoming an “international transparency haven.” And, on the way, perhaps a home for WikiLeaks.

c. The Icelandic Modern Media Initiative

The IMMI is a legislative proposal passed through parliament that attempts to open up the media laws of Iceland and to create the most media-friendly environment in the world. It aims to make sure that Iceland never again faces a situation like Kaupthing in 2008. At the same time, it hopes to help revitalize its economy by encouraging journalism entities to set up base in the country. The idea is to solve two major problems that the country is currently facing: a political problem, by eliminating public censorship, and an economic problem, by enticing journalists to set up camp in Iceland. As stated in the Introduction to the Icelandic Modern Media Initiative,

The legislative initiative outlined here is intended to make Iceland an attractive environment for the registration and operation of international press organizations, new media start-ups, human rights groups and internet data centers. It promises to strengthen our democracy through the power of transparency and to promote the nation's international standing and economy. . . . It is hard to imagine a better resurrection for a country that has been devastated by financial corruption than to turn facilitating transparency and justice into a business model.

Instead of re-inventing the wheel, the Althingi has decided to assemble a body of law from international laws currently in existence. There is nothing particularly novel about the laws that the Althingi has chosen, but there is something very novel about the combination of all these laws in one country. As parliamentarian Birgitta Jónsdóttir stated in an interview on August 9th, 2010, “[t]he reason why we decided to put all these laws together [is because] you do have good and strong laws in other countries that deal with one aspect, [but] then have weaker laws for other aspects of freedom of information.” By choosing only the strongest laws for journalists around the world, Iceland hopes to create a unique haven for journalists much different than any other country in the world.

32 Id.
33 Id.
We could [take] the source protection laws from Sweden . . . we could take the First Amendment from the United States, we could take Belgian protection laws for journalists, and we could all pack these together in one bundle, and make it fit for the first jurisdiction that offers the necessities of an information society.\textsuperscript{35}

The IMMI includes laws from Sweden, France, the European Union, and of course, the United States, and combines them all into one body of law that the Althingi hopes will make Iceland “a Switzerland of bits.”\textsuperscript{36} Just as Switzerland is the international banking haven, Liberia the international maritime registration haven,\textsuperscript{37} Delaware the U.S. national corporation haven, and Grand Cayman the international tax haven,\textsuperscript{38} Iceland has grand hopes of one day becoming the international information haven. In fact, its aspirations go even further than that: parliamentarians hope that one day Iceland’s laws will be a model that other nations will follow. As stated by a parliamentarian, “It is the plan to transform IMMI into the international law . . . to help other media outlets . . . in other countries to push for legislative changes in their own countries.”\textsuperscript{39}

Whether the IMMI is an information revolution in the making or simply a delusion of grandeur remains to be seen. As of right now, although the proposal has passed through the parliament, the actual law-making associated with the proposal is taking place within at least four regulatory ministries. This could take up to a year and a half to be fully implemented.\textsuperscript{40} This is not to say that the proposal is not yet law – it is. In Iceland, once a proposal is passed, it is formally distributed to the executive branch of government, who allocates it to executive ministries to enact the laws.\textsuperscript{41} The process is similar to Congress’s delegation of regulative authority to administrative agencies, except in Iceland, the ministries enjoy much broader rulemaking authority. While the proposal is codified law, the specific statutory language has not been hashed out. However, because

\textsuperscript{35} Daniel Schmitt, WikiLeaks. Stray supra note 32.
\textsuperscript{36} Brito supra note 16.
\textsuperscript{39} Brito supra note 16 at 36:28.
the IMMI is a conglomerate of other countries’ laws, we already have a good idea of what the end result will be.

3. The IMMI Provisions

The IMMI consists of ten primary provisions, each with its own associated “model” international statute borrowed from a particular country. In some cases, this model is exactly what the Althingi was contemplating when they enacted the statute, and in other cases, this model is more of a guideline for the various ministries to follow. The IMMI is very extensive, and includes,

(a) a strengthening of the reporter’s privilege and source anonymity;
(b) confidentiality protection for third party communicators between a source and a reporter;
(c) whistleblower protection;
(d) a limitation of prior restraint;
(e) mechanisms to protect strategic litigation against public participation (SLAPP);
(f) a shortening of the statute of limitations for Internet publications; and
(g) protections against Britain’s libel tourism laws.

For each provision, I will briefly explain first, the problem that the Althingi seeks to address; second, the current state of Icelandic law; and third, the Althingi’s proposed solution based on the selected model law.

a. Strengthening of Reporter’s Privilege and Source Anonymity


43 These provisions can be found at Vision supra note 36. In addition, this legislation also establishes The Icelandic Prize for Freedom of Expression, a national prize awarded to someone who, “through their actions in the past 12 months have most advanced humanity through courageous acts of free expression.” There are three provisions which I did not discuss in this report. One of the provisions includes changes to access to government documents – a proposal to streamline Freedom of Information Act-like procedures. Two of the provisions are not found on this page, but in the FAQ portion of the site. These are the Virtual Limited Liability Companies and the ISP Immunity provisions. Frequently Asked Questions, Icelandic Modern Media Initiative, http://immi.is/?l=en&p=FAQ (last visited Dec 22, 2010). I have not investigated these provisions because they are not listed in the text of the proposal.
When a reporter investigates a story, she may give a source a guarantee of confidentiality. The source then speaks freely about the topic. However, the information that this source gives may be of particular relevance to State authorities investigating illegal conduct. Some courts have thus compelled reporters to reveal their sources in the public interest. But while there is a public interest in revealing the source to address the immediate illegal conduct, there is also a public interest in bringing these stories that are on the cusp of legality into public discourse. This activity would be chilled if the reporters were not able to guarantee confidentiality.45

Before the IMMI, Iceland gave journalists “the right to refuse to expose their sources except when a court ruling states otherwise.”46 This “exception” is actually quite broad, since in all likelihood the only situations where confidentiality would be at issue would be in a high-profile case where the court would very predictably order the exposure. The exception is so broad, in fact, that the Althingi thinks that it may be out of line with the Council of Europe’s Recommendation R (2000) 7,47 (the “Recommendation”) which is of particular relevance because Iceland is currently pursuing membership into the European Union.48 The Recommendation states, in part, that the reporter’s privilege will not be overcome unless there are no reasonable alternatives to access the information and where “the public interest in the disclosure clearly outweighs the public interest in the non-disclosure.”49

Iceland seeks to “strengthen source protection to far exceed this [R]ecommendation”50 by using the Swedish Press Freedom Act as a guideline.51 According to a member of Icelandic

45 For a more detailed look at the factors that may be considered in the competing public interests, please read David Abramowicz, Note, Calculating the Public Interest in Protecting Journalists’ Confidential Sources, 108 COLUM. L. REV. 1949 (Dec 2008).
46 Vision supra note 36.
50 Vision supra note 36.
51 Brito supra note 16 at 16:44.
parliament, the Act “requir[es] that journalists or media organizations who promise confidentiality to sources must keep their promise – if they do not the source has a right to bring criminal prosecution against them.” The Althingi plans to enact a similar provision in Icelandic law, giving an injured party a criminal cause of action for a breach of confidentiality. However, Iceland plans to go farther than this. On top of this separate criminal cause of action, the journalist “cannot be forced by other governmental bodies to reveal the source.” This includes the courts. The Icelandic parliament is essentially carving out an absolute reporter’s privilege. Whether the various ministries will actually enact this over the coming year remains to be seen, but the parliament seems to be pretty clear about wanting this extremely strong privilege.

b. Protection for Third Party Source-Reporter Communicators


The Icelandic parliament clearly made strong protections for the confidentiality directly between a source and a journalist by recognizing an absolute reporter’s privilege. But seldom is a source-reporter meeting held in a dark alleyway or in the corner of a smoky bar. More often than

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52 Id. For the purposes of newly-drafted Icelandic law, the interpretation of the Swedish law by the Icelandic parliament is more important than what the Swedish law actually says. However, a study of the law reveals that, generally, the Icelandic interpretation of the criminal confidentiality cause of action is within the plain meaning of the Swedish statute. Chapter 3, Article 3 of the Swedish Press Freedom Act states that “A [journalist] may not disclose what has come to his knowledge in this connection concerning the identity of . . . [a source].” Later, Chapter 3, Article 5 states, “A person who . . . disregards a duty of confidentiality under Article 3 . . . shall be sentenced to pay a fine or to imprisonment for up to one year.” The Constitution: The Freedom of the Press Act supra note 46.

53 Brito supra note 16 at 17:22. The “absolute reporter’s privilege” alluded to by the member of the Icelandic parliament is not part of Swedish law. Chapter 3, Article 3 of the Press Freedom Act gives numerous situations in which the duty of confidentiality “shall not apply,” including when for when “a court of law deems it to be of exceptional importance,” The Constitution: The Freedom of the Press Act supra note 46 Ch. 3 Art. 3 ¶ 2 Pt. 5, or for an offense concerning the “wrongful release of an official document to which the public does not have access,” Id. at 46 Ch. 7 Art. 3 ¶ 1 Pt. 2. This latter exception is particularly relevant with regards to WikiLeaks and has been conveniently omitted by the Icelandic parliament.

54 As opposed to a qualified reporter’s privilege. See In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1138 (D.C. 2006).

55 The interviewer asked the member of the Icelandic parliament to confirm what he was hearing: “JENNY BRITO: After this law comes into effect, a court will not be able to require a reporter to divulge a name? BIRGITTA JONSDOTTIR: Mhm, exactly. JENNY BRITO: And beyond that, even if a reporter were to divulge for whatever reason, the source could seek redress? BIRGITTA JONSDOTTIR: Mhm.” Brito supra note 16 at 19:46.

not, this communication is held online or over the phone through some third-party communicator. If this third-party communicator is forced to divulge the identity of the source, the absolute direct reporter’s privilege is all for naught. In addition, the converse can pose problems as well: what happens when a third-party communicator allows access to libelous information that would damage others through its access? Can the third parties be held liable? Must they suppress any information that they think could possibly be illegal?

This problem is exacerbated when all data on telecommunications servers are stored for a mandatory six months under current Icelandic telecommunications law no. 81/2003. This six month rule, created as a result of a Directive 2002/58/EC and 2006/24/EC of the European Parliament, is unlikely to change due to Iceland’s attempted entry into the European Union. In addition, Chapter V of Icelandic law no. 30/2002 provides indemnity for information processed on these servers as long as the third party communicator does not modify the information, complies

57 Electronic Communications Act, No. 81/2003, Ch. IX, Art. 42. (2003) available at http://pfs.is/upload/files/Electronic%20Communications%20Act%202003.pdf. Chapter IX, Article 42 relates to traffic data, but it does not mention the six month provisions. However, the Iceland Modern Media Initiative site states that it does, in fact, impose a mandatory six months. This could be a translation anomaly or a result of the preamble to the statute, which mentions 2002/58/EC and incorporates it by reference. Id. For the purpose of this memo, I take the Icelandic Modern Media Initiative Proposal to be the correct reading of the statute.

58 Directive 2002/58/EC supra note 58. The proposal website indicates that the rule is “2002/58/EB.” Having found no such directive, I believe that the reference is a typo. Vision supra note 36.


60 See Iceland – EU-Iceland relations supra note 50. This six month rule has been attacked by various Internet freedom groups because of its intrusion into privacy, and the provision was struck down by a German court as unconstitutional. See Eddan Katz, The Beginning of the End of Data Retention, Electronic Frontier Foundation, http://www.eff.org/deeplinks/2010/03/beginning-end-data-retention (Mar 10, 2010). Litigation is still ongoing, but it seems as if this data retention provision is most likely “here to stay,” according to the European Commissioner of Home Affairs Cecilia Malmström. Axel Arnbak, Data Retention Directive Evaluation: Expect the Unexpected?, EDRI-gram, http://www.edri.org/edrigram/number8.24/evaluation-data-retention-directive (Dec 15, 2010).
with conditions on access to the information, and removes content when a court order arises
directing it to remove content.\textsuperscript{61}

The Althingi plans to strengthen the immunity of third party communicators, finding the
exception for general court orders “worrying.”\textsuperscript{62} Instead of having a general court order, the
Icelandic parliament seeks to have more specific statutory triggering events that would require a
third party communicator to take down or divulge information.\textsuperscript{63} In addition, if the European Union
changes its mind on the mandatory six month data retention, the IMMI includes a provision to
modify or eliminate the mandatory retention in accordance with European Union decisions.

c. Government and Corporate Whistleblower Protection

i. Model: The USA Federal False Claims Act (31 U.S.C. §§3729-3733)\textsuperscript{64}

When a company or governmental organization undergoes illegal activity, it is in the
public interest for some employee of that organization to come forward and reveal that
activity. Some of these employees may want to speak out, but despite their good conscience,
are afraid of retribution from the organization. In order to encourage these “whistleblowers”
to speak out, some countries have enacted measures to prevent retaliation against them or to
encourage divulgement through monetary incentives. For example, the United States has
enacted numerous provisions, including the Federal False Claims Act, the Military
Whistleblower Protection Act, and most recently Section 922 of the Dodd Frank Act.\textsuperscript{65} Each of
these provisions provides whistleblowers incentive to whistleblow based on a combination of

\textsuperscript{61} Merchants and Trade – Act on Electronic Commerce and other Electronic Services No. 30/2002, Ministry of
\textsuperscript{62} Vision supra note 36.
\textsuperscript{63} Id.
\textsuperscript{64} 31 U.S.C. § 3729 (2010)
\textsuperscript{65} Dodd-Frank Bill Provides Robust Whistleblower Protections, Whistleblower Law Blog, The Employment Law
Group, http://employmentlawgroupblog.com/2010/07/15/dodd-frank-bill-provides-robust-whistleblower-
protections/ (Jul 15, 2010).
protection against employer retaliation and *qui tam* monetary rewards, usually 15-30% of the penalties recovered from the organization.\(^66\)

Before the IMMI, Iceland seemed to have no whistleblower protection statutes. Article 18 of the Icelandic Government Employees Act, No. 70/1996, stated that,

> Each employee is obliged to observe confidentiality in regard to matters of which he gains knowledge in his work and shall be regarded as confidential according to law, the instructions of superiors or by the nature of the matter. The obligation of confidentiality remains even if the employee concerned leaves his employ.\(^67\)

This confidentiality requirement left no room for breach in matters of extreme public interest, offered no protection to the employee that would blow the whistle, and offered no *qui tam* incentive. According to the IMMI, the legislature seeks to change this statute and others, including the general penal code No. 19/1940, so that the public interest is “always . . . weighed in procedures against public servants who have disclosed classified information.”\(^68\)

The Althingi looks to the Federal False Claims Act and the Military Whistleblower Protection Act as models for their future protection. The Althingi mentions both job security protection and *qui tam* incentives as possible guides for reform and recognizes the Federal False Claims Act as providing “model protections and incentives.”\(^69\) Just as in source protection, however, the Icelandic government seeks to enact reforms stronger than this model. The proposal mentions the inclusion of “an absolute right to communicate information to a member of the Icelandic Parliament.”\(^70\) In addition, by making the public

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\(^{68}\) The text frames it in an interesting way. Rather than focusing on the right of the whistleblower to not face persecution, the IMMI focuses on the right of the public to benefit from the disclosure. “Where statistics have been collected, internal whistleblowers account for most revelations of corporate and government corruption. The rights of the people to benefit from these disclosures should not be abridged and just like in many other countries, specific mechanisms to encourage the reporting of unethical practices should be considered.” (emphasis added). *Vision supra* note 36.

\(^{69}\) Id. The use of the *qui tam* reward system and Military Whistleblower Protection Act as a model is referenced by Birgitta Jonsdottir. Brito *supra* note 16 at 22:05 - 22:50.

\(^{70}\) *Vision supra* note 36.
interest a required factor in procedures against public servants who have disclosed classified information, the Icelandic parliament has significantly decreased the strength of confidentiality agreements or obligations.

d. Prior Restraint Limitation

i. Model: First Amendment of the U.S. Constitution

Originating from the First Amendment, the United States has adopted a long history of limiting prior restraint. While people are certainly held responsible for the consequences of their comments, the courts have declined to issue preliminary injunctions to prevent the publication of information. According to Bantam Books, Inc. v. Sullivan, “[T]he chief purpose of [the First Amendment’s] guaranty [is] to prevent previous restraints upon publication,” and although New York Times Co. v. United States recognized that this prior restraint could be overcome after overcoming a “heavy burden,” this burden is indeed heavy: we have yet to see a notable prior restraint case that overcomes this burden.

Iceland has a provision in its Constitution similar to the First Amendment. Article 73 of the Icelandic Constitution states,

Article 73

Everyone has the right to freedom of opinion and belief.
Everyone shall be free to express his thoughts, but shall also be liable to answer for them in court. The law may never provide for censorship or other similar limitations to freedom of expression.
Freedom of expression may only be restricted by law in the interests of public order or the security of the State, for the protection of health or morals, or for the protection of the

73 403 U.S. 713 (1971).
74 Some suggest that the activities by WikiLeaks might meet this burden. Legislators have recently proposed a bill to amend the Espionage Act of 1917 to make it a crime to publish information “concerning the identity of a classified source or informant of an element of the intelligence community of the United States.” Kevin Poulsen, Lieberman Introduces Anti-WikiLeaks Legislation, Wired, http://www.wired.com/threatlevel/2010/12/shield (Dec 2, 2010).
75 CONSTITUTION OF THE REPUBLIC OF ICELAND, Art. 73 available at http://www.government.is/constitution/
rights or reputation of others, if such restrictions are deemed necessary and in agreement with democratic traditions.

The last provision providing for the restriction of freedom of speech by law in the interests of public order, national security, health or morals, or rights or reputation, is much different than the U.S. Constitution’s explicit statement of “Congress shall make no law . . . abridging the freedom of speech.” While constitutional principles by their broad nature are subject to many different interpretations, Iceland’s clause on freedom of speech is clearly more limited than the United States, with the Kaupthing debacle supra being an example.

The Icelandic Parliament seeks to incorporate additional limitations on prior restraint. Unfortunately, that is as specific as they get. The entire text of the “prior restraint” section of the proposal is as follows:

Prior restraint is any legal mechanism that can be used to forcibly prevent publication. Such restraints have a significant negative impact on freedom of expression. Most democracies place strong and in some cases absolute limitations on prior restraint. Methods for guaranteeing that existing laws not be abused in the attempt to limit the freedom of expression should be explored.

What this means specifically will have to be explored once the ministries are finished enacting the laws, but the ministries are limited because while they can stretch the statute, they cannot amend the Constitution, a job reserved to the Althingi.  

e. Anti-SLAPP Mechanisms

i. Model: Anti-SLAPP Procedure of California

“Strategic Litigation Against Public Participation” law suits, otherwise known as SLAPP suits, are frivolous law suits brought by one party for the purpose of censoring dialogue by an opposing

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76 U.S. CONST. amend. I.
77 Article 79 of the Icelandic constitution allows the constitution to be amended only if: 1) The Althingi passes a proposal to amend; 2) The Althingi is dissolved and a general election is held; 3) The Althingi passes the amendment unchanged from the proposal, and 4) The amendment is confirmed by the president. CONSTITUTION OF THE REPUBLIC OF ICELAND supra note 77. The Iceland constitution has been amended seven times since its adoption in 1947. Id.
party that has significantly fewer resources than the plaintiff. These plaintiffs bring the lawsuits not to win, but to force the defendant to settle because maintaining the case is so expensive. An example of SLAPP litigation is the suit brought by Barbara Streisand supra. After she sued a photographer for taking a picture of her home as one photo in a series of over 65,000 photographs of the California coastline,79 she brought an extensive, vexatious suit in an effort to get the photographer to remove the picture from the Internet.80 A California court granted the photographer’s SLAPP motion and awarded the defendant $177,107.54 in attorney’s fees and court costs.81

In Iceland, there does not appear to be any anti-SLAPP statute, and the Icelandic parliament wants to reinforce process protection for publishers.82

In crafting the legislation, Iceland is using the anti-SLAPP legislation of California, a notoriously powerful anti-SLAPP statute unique among the States.83 Under the law, § 425.16(b)(1) of the California Code of Civil Procedure, if a cause of action is initiated against a defendant, and if the defendant is acting within his right of free speech on matters of “public significance,” the defendant may move for a special motion to strike that awards attorney’s fees under §425.16(c)(1).84 It is this general framework that the Icelandic parliament seeks to mimic. As stated in the proposal, “[A] defendant may request the presiding judge to view the case as a freedom of speech issue. If the [motion] is granted, a number of protections are activated during the case itself, and should the case be successfully defended, the plaintiff must pay all legal costs associated with it.”

79 CALIFORNIA COASTAL RECORDS PROJECT (2010), http://www.californiacoastline.org/
81 For an assemblage of all of the court documents in the suit to get an idea of what a SLAPP lawsuit looks like, please see Streisand’s Suit – Court Filings, CALIFORNIA COASTAL RECORDS PROJECT, http://www.californiacoastline.org/streisand/filings.html.
82 Vision supra note 36.
84 CAL. CODE CIV. PRO. §425.16 (2010)
What the IMMI does not mention is the Pandora’s Box that the California statute opened. In 2003, after California enacted § 425.16, the California legislature found that there had been “a disturbing abuse of § 425.16 . . . which has undermined the exercise of freedom of speech. . .” and went on to limit the statute considerably in a new law, § 425.17. Finding this narrowing law to still be insufficient, the California legislature went on to enact § 425.18, a so-called “SLAPPback” statute designed to fight the anti-SLAPP motions filed by defendants who were originally SLAPP-ers. Yet, even after of these restrictions, you still have Sandra Baron Cohen as Borat and his representative media conglomerate utilizing this anti-SLAPP motion to defend against suits brought by a couple college students. Irrespective of the merits of their case, did the college students really have the resources to cram litigation down the throat of a media conglomerate to ultimately chill free speech? Probably not.

One hopes that the Icelandic ministries, in enacting the laws, will take into account the legislative narrowing of California’s anti-SLAPP statute and the subsequent judicial history.

f. Limited Statute of Limitations on Internet Publications, Single-Publication Rule

i. Model: Article 65 of the Law on the Freedom of the Press of 29 July 1881, France

In a 160 year-old English case known as the “Duke of Brunswick” case, a court concluded that every time a news publication is published, a new cause of action arises for defamatory material. This rule, known as the “multiple publication doctrine,” may have seemed limited enough in 1848, but has acquired new meaning with the Internet. The United Kingdom has held in

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85 CAL. CODE CIV. PRO. §425.17 (2010)
86 CAL. CODE CIV. PRO. §425.18 (2010). See also Goldowitz, Mark, Act Removes Major Obstacles To Filing of SLAPPback Suits (Jan 6, 2006), http://www.casp.net/media/dj010606.html.
88 Brunswick v Hamer (1849) 14 QB 185.
various cases that the “multiple publication rule” extends to cases on the Internet, where the document is “published” every time it is viewed from the defendant’s site – even in the archives.

This is in contrast to the American single publication rule, where only one cause of action arises for libel that runs from the time that the document was initially released to the public. Though the European Court of Human rights held the multiple publication rule valid, and though the rule enjoys a strong common law history, there is a general push by many nations – including the United Kingdom - to adopt the single publication rule.

Iceland is no exception to this push. Since Iceland is a civil law country, the common law has little strength, and the nation is not grounded in Duke of Brunswick doctrine.

But Iceland seeks to go further than simply adopting the single publication rule: looking to the French Law on the Freedom of the Press of 1881, Iceland seeks to adopt an extremely short statute of limitations and a very small cap on damages for Internet publications. While France imposes a statute of limitations of three months and a cap of €15,000, Iceland intends to impose a

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90 Also known as the “Internet publication rule.”
91 Nigel Hanson, European Court Upholds 150-year-old libel rule, HOLDTHEFRONTPAGE.CO.UK (Mar. 24, 2009), http://www.holdthefrontpage.co.uk/law/090324brunswick.shtml
92 British may reform online defamation laws supra note 94 ((citing Gregoire v GP Putnam’s Sons, 81 NE2d 45 (1948)).
96 In the IMMI proposal, the Althingi states “we propose [to] follow[] the model used in France.” The closest French law that I can find is Article 65 of the Law on the Freedom of the Press of 29 July 1881. Act of 29 July 1881 on Freedom of the Press, LEGIFRANCE.GOUV.FR (last accessed Dec. 15, 2010), http://translate.googleusercontent.com/translate_c?hl=en&ie=UTF-8&sl=fr&tl=en&u=http://www.legifrance.gouv.fr/affichTexte.do%3FcidTexte%3DLEGITEXT000006070722%26dateTexte%3Ddivig&prev=1&rurl=translate.google.com&usg=ALkJrhh5AmPY9cI8ZElVCZYG1JwldmaZnQ. For a case applying the law, please see, e.g., Banque Populaire Lorraine Champagne v. Jean M., JFG Networks (May 7, 2010) Tribunal de Grande Instance de Nancy 9th Chamber, http://translate.googleusercontent.com/translate_c?hl=en&ie=UTF-8&amp;sl=fr&amp;tl=en&amp;u=http://legalis.net/spip.php%3Fpage%3Djurisprudence-decision%26id_article%3D2918&amp;prev=t&amp;rurl=translate.google.com&usg=ALkJrhh_RWIUSwbg2L9zcKFe-vzwgHdymg (the transcription erroneously refers to the provision as Article 85 instead of Article 65)
statute of limitations of two months and a cap of €10,000.\textsuperscript{97} This cap on damages and shortened statute of limitations will significantly decrease the potency of the defamation suit.

g. Libel Tourism Counterattack

i. Model: Libel Terrorism Protection Act of New York,\textsuperscript{98} Libel Tourism Statutes in Florida, California, U.S. Federal Government

Britain has notoriously strict libel laws. Unlike the United States, Britain follows the common law doctrine of applying strict liability to the alleged defamer and presuming the falsity of the statement. Thus, even a journalist who publishes without negligence is on the hook for damages, unless the journalist can come forth with evidence showing that the statements are true.\textsuperscript{99} Meanwhile, British courts have been very willing to extend personal jurisdiction to non-British citizens acting completing outside of the country.\textsuperscript{100} The theory for this extension of jurisdiction arises from the multiple publication doctrine, \textit{supra}. Since a new cause of action arises for every publication, and since “publication” is determined by wherever a viewer may view a website, a non-British citizen can have a cause of action as long as the libelous content is accessible in Britain.\textsuperscript{101} The result is a phenomenon known as libel tourism, where virtually anyone in the world can file in British court for defamation.

Without statutory intervention for this sort of activity, there is little that Icelanders could do. They, along with the rest of the world, were essentially subject to Britain’s libel laws. According to an advisor to the IMMI, Professor Salvur Gissurardottir at the University of Iceland, these libel suits were not overblown, solitary occurrences. The suits were a real threat that was affecting the people of Iceland:

\textsuperscript{97} \textit{Vision supra} note 36.
\textsuperscript{98} \textit{Laws of New York... §5304(2)(b)(8) available at} http://www.casp.net/statutes/ny-stat%282009%29.pdf
\textsuperscript{100} Id. at 260-261.
\textsuperscript{101} Id.
The libel laws – even if the libel laws are relatively lax in Iceland, so it’s not a big amount of money, the Icelandic businessmen – they can go to Britain and file a lawsuit there. And they did that, for example against my brother, and he lost his house because of that – so it’s really affecting everyone, this media situation.102

The Icelandic parliament looked to the New York Libel Terrorism Protection Act of 2008 as a model. This Act renders a verdict from a foreign court unenforceable unless “the defamation law applied in the foreign court . . . provided at least as much protection for freedom of speech and press in that case as would be provided by . . . the United States.”103 But while Britain does not feel bound by any length of long-arm jurisdiction, New York does: the New York statute only works if the defendant has substantial ties to the state.104 As a result, other states enacted similar provisions. In August 2010, the federal government unanimously approved a similar bill applicable to all States.105

In addition to modeling the Icelandic law after these US laws by rendering these libel tourism judgments unenforceable, the Icelandic parliament plans on using the anti-SLAPP statutes supra to further discourage libel tourism. According to Birgitta Jónsdóttir, the Icelandic laws may actually provide for separate counter-suit for the victim of libel tourism, awarding treble damages based on the amount requested in the complaint:

So we’re addressing it – basing it on the New York law, and . . . there is a law in California, where if there is a libel tourism case against you in the UK . . . you can – let’s say they are asking for $50,000 – you can file a suit back at them with . . . triple that amount. . . . it’s [sic] called SLAPP orders.106

102 The Icelandic Modern Media Initiative – Professor Salvor Gissurardottir at 6:32., YOUTUBE.COM (Mar. 20, 2010), http://www.youtube.com/watch?v=FrN_3uyt7rE.
103 §5304(2)(b)(8) supra note 100.
104 In the Governor’s Approval Memorandum No. 5, Ch. 66, New York Governor Paterson remarks, “Ultimately, this is a problem of international scope, demanding a solution that New York State alone cannot deliver. I therefore urge Congress and the President to . . . address this issue . . . and ensure . . . that the speech of our citizens is not restrained by plaintiffs seeking the cover of foreign laws at odds with our constitutional protections.” §5304(2)(b)(8) supra note 100.
106 Brito supra note 16 at 31:10.
While this language seems strong, it may be moot at this point: Britain has come to the realization that its libel laws need some work. In July 2010, they announced that their “draconian” libel laws will be reformed starting in 2011.107

4. What the IMMI Does NOT Change
   a. Copyright, Child Pornography, Libel

   The Icelandic parliament makes it clear that the IMMI will not change any Icelandic laws regarding copyright or child pornography. As Birgitta Jónsdóttir stated, “[T]he IMMI is not going to change the copyright, the child pornography – those are the things that people are afraid of, but if you look at the site, you can see that it is not changing the laws.”108 Looking at the site, one can see the following terse statements at the end of the “Frequently Answered Questions” section.

   What about restrictions on child pornography?
   The proposal does not touch existing Icelandic/EEA restrictions.
   What about restrictions on commercial copyrights?
   The proposal does not touch existing Icelandic/EEA restrictions.

   Regarding current libel laws, Iceland has “strong legislation for libels – strong legislation against hate crimes, hate speeches . . . pornography . . .” and presumably there is nothing in these laws that will be changed.109

5. Conflicts

   As mentioned earlier, the novelty of the Icelandic Modern Media Initiative is not in the individual laws that comprise the proposal, but rather the fact that all of these laws are put together in one place. Even though these laws may be great in their own right, the combination inevitably leads to conflicts and unintended consequences. Taking the 100 most beautiful jigsaw puzzle pieces

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108 Brito supra note 16 at 7:08.
109 Id. at 38:00.
in the world and trying to arrange them into a finished product will leave you with a picture far less beautiful; taking 1-second segments from the prettiest songs in the world and trying to record them into one compilation will leave you with a dissonant mess; and taking the laws from several different countries out of their original framework and into an alien nation could very well lead to a cacophony of conflicts that create a country far less media-friendly than its peers.

There are two types of conflicts that may arise. The first type is the intranational conflict, where the laws enacted by the Althingi appear to conflict with one another. The second type is the international conflict, where the laws enacted by the Althingi appear to conflict with laws or policies of other countries.

I recognize four intranational conflicts. First, the conflict between maintaining the current copyright and child pornography laws while guaranteeing source anonymity. Second, the difficulty in bringing a libel suit when you have source anonymity, anti-SLAPP provisions, damage caps, and a limited statute of limitations. Third, the difficulty in categorizing individuals as journalists or not journalists for the purpose of awarding the reporter’s privilege. Fourth, the publicly encouraged extortion that arises by guaranteeing an absolute reporter’s privilege, ensuring indemnity for third party communicators, and offering incentives for whistleblowing.

I also recognize two international conflicts. First, the general enforceability of this proposal against plaintiffs abroad. Second, the international tension caused specifically by WikiLeaks and Julian Assange in particular.

a. Intrational
   i. Copyright Law, Child Pornography, Source Anonymity, and Third-Party Indemnity

A first conflict is the Althingi’s refusal to acknowledge any possible change in copyright law or child pornography despite massive changes in closely related areas. The parliament explicitly states that the IMMI does not touch these taboo restrictions, but even though a broad proposal may
not influence the restrictions *de jure*, it will certainly influence them *de facto*. With third-party communicator indemnity and source anonymity, how is the government supposed to enforce these international restrictions?

Since the proposal uses Sweden as a guide, looking at the Swedish law might give us some assistance. The Swedish press rights are exceptionally broad, and in fact two out of four sections of the Swedish Constitution are devoted to freedom of information. The first, relating to printed material, is the Freedom of the Press Act,\(^{110}\) and the second, relating to “new media,” is the Fundamental Law on Freedom of Expression.\(^ {111}\) These Acts contain fourteen numerous chapters on topics such as “the right to anonymity,” “the dissemination of printed matter,” and “transmission, production, and dissemination.”

In both of these constitutional provisions, however, there is a small, one-line article that can be found in Ch. 1, Art. 10 of the Freedom of the Press Act;

Art. 10. This Act does not apply to the portrayal of children in pornographic pictures.

And in Ch. 10, Art. 13 of the Fundamental Law on Freedom of Expression Act:

Art. 13. This Fundamental Law does not apply to the portrayal of children in pornographic pictures.

Perhaps, then, accommodating child pornography restrictions into a country with powerful speech protections is not all that difficult: simply remove the entire category from the statute. Luckily, there are not many situations where it is difficult to tell whether something is in the “child pornography” category or not.

As for copyright law, the situation does not seem quite as easy. Facing a poor reputation as a “pirate haven” for copyrighted music piracy (now doubt perpetuated by Sweden’s Pirate Party),\(^ {112}\)


Sweden finally achieved some control over their copyrights when they enacted a new copyright law that forced ISPs to disclose the IP addresses of those who shared software. In other words, Sweden’s solution to the copyright issue was to reduce the source anonymity and third-party communicator indemnity in favor of copyright law.

Iceland will not be able to sustain proper control over its copyright law while at the same time enjoying absolute source anonymity for ISPs. This is one conflict where the only answer is either a reduction in copyright protection or a reduction in the source and communicator protections of the IMMI.

ii. Libel, With Absolute Reporter’s Privilege, Source Anonymity, Short Statute of Limitations, Damages Cap, Anti-SLAPP Motions, and Limited Prior Restraint

Parliamentarian Birgitta Jónsdóttir made it clear that Iceland has “strong legislation for libels.” Combined with many of the other provisions of the IMMI, however, the libel laws will not only be weakened, they will be effectively eliminated. Under the new Icelandic laws, a libel plaintiff will have to jump through an unreasonable number of legislative hoops facing monstrous liability in order to recover his damages.

First, the plaintiff is faced with the task of figuring out who the libelee actually is. With the source anonymity and communicator indemnity provisions of the IMMI, this will prove a difficult task. An anonymous user could post a libelous statement in an Internet forum and have it reposted hundreds of times before a libelee becomes known. Even if a court ordered that the identity be divulged, it will most likely be to no avail because of the extreme source protection measures adopted in the IMMI.

Second, the plaintiff has a mere two months to find the identity of the libelee and file suit before the shortened statute of limitations runs. This is hardly enough time to file a lawsuit even

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knowing the libellee’s identity. Supposing the identity of the libellee is never found within those two months, the unknown libellee can afterwards come out and freely admit to his statements, with no recourse from the plaintiff. And even if the identity is found, it is certainly not enough time to prove any actual damages from the libelous content – by forcing the plaintiff to file within two months, the law essentially cuts off his recovery for damages after that two month period.

Third, the plaintiff has a recovery cap of €10,000, making the most he could possibly recover most likely less than the cost of litigation itself. All the while, the plaintiff must keep in mind the various anti-SLAPP provisions. The plaintiff now faces liability to pay for the opposing side’s legal fees or other relief, all for a maximum payout of €10,000. What lawyer would even take this case?

Fourth, the incorporation of the anti-libel tourism laws will force out-of-state litigants to submit to these impotent libel laws. While libel tourism is often considered a defense against foreign countries imposing their authority extra-jurisdictionally, an anti-libel tourism statute is an implicitly offensive law that by its nature asserts one nation’s sovereignty over the other. It is a statute framed as protection for its citizens, but can also take away legitimate foreign causes of action by replacing the foreign libel law with Icelandic libel “lite.”

Fifth, the limitation on prior restraint will make the libelous material not subject to gag orders or government control. While this limitation on prior restraint exists in many countries, these other countries have alternative means of redress. The United States, for example, forgoes prior restraint but at the same time holds publishers responsible for their actions through subsequent punishment. If there is no way to hold people accountable for what they say, the Icelandic

information haven could simply become a mis-information haven, a tabloid of Europe. Iceland would have the credibility of Batboy in the Weekly World News.\textsuperscript{115}

So within two months, a potential plaintiff has to find the libellee by dredging through Iceland’s source anonymity provisions, consider the possibly enormous legal fees of an anti-SLAPP motion, and find some lawyer to represent him for a maximum payout of €10,000. One of these factors will have to give if Iceland seeks to become an information haven, because right now there is no public guarantee of truth, and without a guarantee of truth, what use is information? However, I am being a bit pessimistic, mainly because of my first assumption of the unknowable identity of the libellee. In reality, I doubt that very many libellees will remain unknown, because every time a libel is republished by another person, a new cause of action arises against that person.\textsuperscript{116} The odds are low that the libel will be republished enough times to damage someone’s reputation and yet still not have a single known libellee. Perhaps, then, the Icelandic courts can maintain enough control over the truth of information in order to sustain the country’s reputation.

iii. How to Categorize/License Individuals as Journalists

The IMMI provides significant protection for “journalists,” but just how does Iceland decide who is and who is not a journalist? The United States has recognized the difficulty of licensing a journalist in view of the first amendment in the case \textit{Branzburg v Hayes},\textsuperscript{117} stating that the right to

\textsuperscript{115}Tap Vann, \textit{Sarah Palin is Bat Boy}, Weekly World News (Nov. 4, 2010), http://weeklyworldnews.com/headlines/24525/sarah-palin-is-bat-boy/
\textsuperscript{116}The Reporters Committee for Freedom of the Press, \textit{The First Amendment Handbook} (last accessed Dec. 21, 2010), http://www.rcfp.org/handbook/c01p03.html
\textsuperscript{117}408 U.S. 665 (1972) (“[A] newsman’s privilege would present . . . difficulties . . . it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher . . . . Freedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals . . . .’ Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.”).
free press is just as strong for the “lonely pamphleteer” as it is for the “large metropolitan publisher.”

However, licensing of journalists is much more important – perhaps necessary – in light of the absolute reporter’s privilege granted in the Icelandic Modern Media Initiative. Without this distinction, virtually any person could avoid a subpoena merely by asserting the privilege. As stated in Branzburg, “any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures.”

At the same time, the distinctions between a true journalist and a non-journalist have been increasingly blurred. The “blogger” is now essentially synonymous with Branzburg’s “lonely pamphleteer,” except that it is even easier to become a blogger, and the publication has the potential to reach a much larger audience. As stated by Judge Sentelle in In re Miller,

Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical “blogger” sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court’s vision of a broadly granted personal right? If so, then would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?

If the blogger can be considered a journalist, why not the hyperlinker, the person that posts a link on her Twitter account and essentially republishes another source? Is that person entitled to an absolute reporter’s privilege as well for the mere copying and pasting of a single line of text?

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118 Id.
119 Id.
120 Id.
121 Anne M. Macrander, Bloggers as Newsmen: Expanding the Testimonial Privilege, 88 B.U.L. Rev. 1075 (2008)
122 In re Grand Jury Subpoena (Miller), 438 F.3d 1141, 1157 (D.C. Cir. 2005)
123 Macrander, supra note 122.
And supposing that the blogger is a journalist and the hyperlinker is not, where does WikiLeaks fit in to all of this, as an organization that simply posts third-party information?

In 2010, a Michigan state senator introduced a single-sponsor bill outlining a voluntary journalist registration system. While this bill was met with harsh criticism from the United States, maybe it could work in Iceland. The bill would have allowed journalists to voluntarily submit materials to a government board, including proof of good moral character, possession of a degree in journalism, not less than three years experience, and three or more writing samples. Upon registration, applicants could be a card-carrying journalist. Perhaps with this higher “absolute reporter’s privilege” comes a higher burden to become a reporter – more than the lonely pamphleteer. The Icelandic version of the First Amendment, Article 73, certainly provides for this limitation in allowing the government to restrict freedom of expression “by law in the interests of public order.”

Of course, maybe this is just semantics. By requiring a person to qualify to get an absolute reporter’s privilege, maybe that is no different than a recognizing a qualified reporter’s privilege. It seems that in many countries efforts to achieve perfect freedom of expression, there is always some “qualifier” so as to not impede on the expression of others.

iv. Publicly-Encouraged Extortion from a Combination of Absolute Reporter’s Privilege, Third Party Communicator Indemnity, Data Retention, and Whistleblowing Incentives

A unique conflict arises when you combine the ostensibly journalist-protective measures of whistleblowing, third party communicator indemnity, and absolute reporter’s privilege: one that effectively gives the communicators an incentive to betray their customers for the public good.

125 Not even the senator who introduced the bill thought it was going to get passed. He stated that he was “winding down his two-decade political career and want[ed] to provoke public discussion before he leaves office.” Id.
126 Id.
Think of the situation that would unfold using these three provisions of the IMMI. In one corner, you have a court, seeking to acquire the name of a source that has leaked information vital to Icelandic national security. In the other corner, you have the source and the reporter, blissfully enjoying the absolute reporter’s privilege granted by the IMMI, which gives them a complete defense to any court order to divulge the source. In the middle you have the third party communicator, who has held onto the data revealing the communication for the requisite six months under Icelandic /EEA law.

The third party communicator is in a very profitable position. Since the third party communicator enjoys indemnity for the information that remains accessible, there will be no legal consequences if the communicator releases the name of the source, as long as they have not drafted a confidentiality agreement. Meanwhile, if the name of the source relates to some public issue covered under the whistleblower laws, the third party communicator may have significant incentive to disclose the name of the source and receive *qui tam* payments for any penalties against the source.

Certainly, the third party communicator will not be able to release just anything. But in matters of extreme public importance, when probably the monetary awards are likely the highest and when the consequences are minimal because the court is on the third-party communicator’s side, the third party communicator has little reason to hold back. What this means is that Iceland would effectively privatize the *subpoena duces tecum* (or, in more cynical terms, publicize extortion). Leaving the court no means to acquire the information because of the absolute reporter’s privilege, it could nevertheless look to a third-party communicator to be its stooge.

This is a problem because it substitutes a court’s determination of when a source should be revealed, based on the public good, with a third-party communicator’s determination, based on how much money it is worth to the government compared to how much money it will lose by exposing its customer.
Iceland could fix this problem by mandating confidentiality between third-party communicators and their sources and reporters – but this would effectively be a gag order and would run contrary to Iceland’s proposed limitation on prior restraint. Iceland may also be able to re-define the reporter’s privilege to mean “source’s privilege,” where the source would enjoy anonymity through all channels if they but only revealed their information to a reporter. This has a whole other set of problems: in addition to being contrary to the legal theory used to establish a reporter’s privilege, this would let a lot of bad people off the hook for the sole reason that no one can reveal who they are.

However, I believe that this problem exists mostly in theory. It is gauche to betray one’s customers, and a third-party communicator would only do so if there were a very important reason behind it, which might be exactly the occasion where we would want the information exposed.

b. International

i. Enforceability

Enforceability is the elephant in the room. How will a country of 300,000 people hope to change the Internet in every country on the planet?

The Citizen Media Law Project is skeptical of its enforceability. In an Australian High Court case Dow Jones & Co. Inc. v Gutnick, the court used a version of the multiple publication doctrine to establish that since Australia was the location where the damage was done to his reputation, Australia was an appropriate forum. Arthur Bright, the author of the Citizen Media Law Project Article, concludes that since any country can claim its own jurisdiction over the Internet, the Icelandic Modern Media Initiative is mostly futile.

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129 The court explicitly rejects the single publication rule at para. 123.
130 Id. at para. 154.
I respectfully disagree. While I do think that Bright has a point about the ineffectiveness of the IMMI against extra-jurisdictional decisions regarding damages, the question of injunctive relief is a whole other matter. When information is stored on Icelandic servers on the other side of the globe, there is no way that Australia could possibly enforce their decisions. The law, thus, seems perfectly tailored for an entity such as WikiLeaks – an incorporeal, seemingly omniscient entity that releases information while having no easily obtainable assets. For WikiLeaks, damages mean very little, because courts cannot physically seize their assets, existing only ephemerally in one place at a time. In Bank Julius Baer & Co. Ltd. v. WikiLeaks, a court initially entered a preliminary injunction against WikiLeaks, and then quickly realized that there was no possible way it could enforce its decision on a later appeal.

This is not to say, however, that the extra-jurisdictional decisions of countries do nothing to weaken the potency of the IMMI. One of the goals of the IMMI was to reinvigorate the economy by attracting media companies to the country with their attractive journalist laws, and this goal will not be satisfied when any of those companies may be subject to damages based on the laws of any other nation. However, the IMMI instills more transparency in the government, and with this transparency comes trust, and with this trust comes investment and improvement in economic conditions. While the economic benefit will not be as great as initially planned, the IMMI certainly will not hurt Iceland’s economic outlook.

In terms of the altruistic points of the IMMI – the selfless, progressive adoption of an incredibly liberal set of media laws – this will be unhindered by other countries’ judicial activity. Simply put, Iceland is an island miles away from any neighboring country, and a country cannot

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133 Bank Julius Baer & Co. Ltd. v. WikiLeaks, 535 F. Supp. 2d 980 (N.D. Cal. 2008) (“[T]here is evidence in the record that ‘the cat is out of the bag’ and the issuance of an injunction would therefore be ineffective...”)

134 There are other reasons to store servers in Iceland – the cool climate saves money on cooling costs for the servers, and the wealth of geothermal power in Iceland provides limitless green energy. Simon Hancock, *Iceland looks to serve the world*, BBC CLICK (Oct. 9, 2009), http://news.bbc.co.uk/2/hi/programmes/click_online/8297237.stm
enforce an injunction simply because it cannot reach the information.\textsuperscript{135} Considering that as of right now the WikiLeaks servers are located in an underground nuclear bomb shelter, this geographic security has proven at least somewhat important.\textsuperscript{136}

ii. WikiLeaks and Julian Assange

A paper on the IMMI would be incomplete without a mention of WikiLeaks and Julian Assange, especially considering the headlines that he has made since the start of writing this paper.

Julian Assange and WikiLeaks have been involved with this proposal since the very beginning – ever since WikiLeaks leaked the material on Kaupthing bank that spawned this proposal. Even before the proposal was made public, Julian Assange was having public conferences regarding the IMMI, telling people what was to come.\textsuperscript{137}

Julian Assange was a personal friend of the Icelandic parliamentarian Birgitta Jónsdóttir, heavily quoted in this report, and worked with the Icelandic parliamentarians to make this proposal. “Julian is brilliant in many ways,” Birgitta said, “but he doesn’t have very good social skills and he’s a classic Aussie in the sense that he’s a bit of a male chauvinist.”\textsuperscript{138}

\textsuperscript{135} While other countries cannot reach the information, they can reach the domain name. Domain names are issued by the Internet Corporation for Assigned Names and Numbers (ICANN), which is located primarily in the United States. Internet Corporation for Assigned Names and Numbers, \textit{What Does ICANN Do?} (last accessed Dec. 22, 2010), http://www.icann.org/en/participate/what-icann-do.html. In other words, while countries cannot access server-side content based in Iceland, they can remove the associated domain name and try and prevent people from accessing it through that domain name (ex: http://www.wikileaks.org). This is usually not effective, because the IP address – the “real” address – is still intact, and particularly computer-savvy people can easily “mirror” the content on another domain name— or, in the case of WikiLeaks, 2194 other domain names as of December 22\textsuperscript{nd} accessible at http://wikileaks.ch/mirrors.html. This ability to remove domain names does have some teeth in U.S. trademark law, however, where companies can use \textit{in rem} jurisdiction to sue “cybersquatters” for taking their trademark in domain-name-form. \textit{See}, e.g., Harrods Limited v. Sixty Internet Domain Names, 110 F. Supp. 2d 420 (E.D. Va. 2000).


\textsuperscript{137} Jonathan Stray, \textit{Iceland aims to become an offshore haven for journalists and leakers}, NEI\textsc{MAN JOURNALISM LAB} (Feb. 11, 2010), http://www.niemanlab.org/2010/02/iceland-aims-to-become-an-offshore-haven-for-journalists-and-leakers/

\textsuperscript{138} Francis Martel, \textit{Who Is Icelandic Legislator Birgitta Jonsdottir And Why Does She Want Julian Assange Fired?}, MEDIA\textsc{T}E.COM (Sept. 4, 2010), http://www.mediaite.com/online/jonsdottir-assange-wikileaks/
It is this attitude that alienated people from WikiLeaks – the attitude that one associates with someone who relishes using a nuclear bunker to house servers. Now, he is one of the most infamous men in the world – and his face is synonymous with WikiLeaks. Birgitta Jónsdóttir thinks this is unfortunate, as it places the fragile existence of WikiLeaks in someone that is somewhat of a megalomaniac. “Somebody needs to say this,” said Birgitta, “there should not be one person speaking for WikiLeaks. There should be many people.”

Many groups that would have otherwise supported WikiLeaks declined not to, in no small part because of Assange. When General Counsel of the Electronic Frontier Foundation Cindy Cohn came to Michigan to speak on November 10th, 2010, I asked her what she thought of the Icelandic Modern Media Initiative – and what she thought of WikiLeaks. She declined to answer, saying that it might be a good idea in theory, but that the current state of affairs surrounding Assange made supporting the IMMI outright far too risky.

However, Iceland has still shown strong support for WikiLeaks, if not for Assange. Recently, when Visa and MasterCard both stopped all payments to WikiLeaks, Iceland took action and threatened to ban the two cards from their country. Meanwhile, a new “face” of WikiLeaks, the Icelandic journalist Kristinn Hrafnsson, has recently come forward, filling in the role as figurehead for the organization.

So regardless of what happens with Julian Assange, WikiLeaks seems to be an integral part of the idea behind the IMMI that Iceland is prepared to vigorously defend.

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6. Conclusion
   a. The Icelandic Modern Media Initiative Is Destined for Many Conflicts, But Successfully Establishing a Home for WikiLeaks.

   The IMMI was enacted in a time of turmoil of Iceland, when “transparency” was the buzzword of the day and the Icelandic parliament sought to achieve transparency in perhaps one of the more extreme means possible.

   The Althingi acted quickly to enact a proposal, drawing on statutes from around the world to create a “media haven” where journalists and media companies would come and find a place to publish their views online without fear of persecution.

   They implemented source anonymity statutes from Sweden, third party communicator protection beyond European Union Directives, whistleblower protection and a limitation of prior restraint from the United States, anti-SLAPP motions from California, a shortened statute of limitations from Internet publications from France, and anti-libel tourism statutes from New York, all in the name of creating the most journalist-friendly nation possible.

   But there are obstacles in the way: conflicts arise between these laws that were never meant to be pieced together. These conflicts, and other barriers such as the never-ending tension between expression and privacy, pose real difficulties in implementing the law.

   While Iceland may not be successful in making an attractive home for media conglomerates, Iceland has, at least for now, been successful in creating a home for WikiLeaks. In that respect alone, this small nation of 300,000 fishermen could change the world.