INTERNET SERVICE PROVIDER LIABILITY FOR DEFAMATION:

UNITED STATES AND UNITED KINGDOM COMPARED

by

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DISSERTATION ABSTRACT

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Since the mid-1990s, American Internet Service Providers (ISPs) have enjoyed immunity from liability for defamation under Section 230 of the Communications Decency Act. As Congress originally intended in 1996, Section 230 has strongly protected freedom of online speech and allowed ISPs to thrive with little fear of being sued for online users' comments. Such extraordinary statutory immunity for ISPs reflects American free-speech tradition that freedom of speech is preferred to reputation.

Although the Internet landscape has changed over the past 20 years, American courts have applied Section 230 to shield ISPs almost invariably. ISPs won in 83 of 85 cases in 1997 to 2014. Nearly all types of ISPs have been held to be eligible for immunity unless they are original online speakers. Even when ISPs have operated websites that have left digital "scarlet letters" on individuals, they have not been liable if the ISPs did not "create or develop" the defamatory contents. Bloggers, as website operators, could be immunized even when they exercised the "traditional editorial functions" unlike the traditional journalists.

By contrast, ISPs in the United Kingdom could not enjoy such absolute immunity.

Following the U.K. tradition of plaintiff-friendly libel law, the Defamation Act 1996 did not adopt any separate provision for ISP liability. Under Section 1, ISPs in England are subject to liability for defamation by third parties if they are notified of harmful online contents but fail to remove the postings promptly. Meanwhile, the new Defamation Act 2013 includes a separate provision for ISP liability. Section 5 is novel because ISP liability hinges on whether the original speaker is identifiable.

I suggest that CDA Section 230 of the United States should be revised. One possible way of revising Section 230 is borrowing from the U.K. Defamation Act 2013. But such adoption is not compellingly urgent. It needs time to see what impact the new U.K. defamation law will have on freedom of speech. Regardless, the U.K. experience with ISP liability will provide a useful comparative framework to rebalance free speech with reputation on the Internet.

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CHAPTER I

INTRODUCTION

The Internet has brought about a communication revolution. It allows people numerous opportunities to communicate with each other without geographical barriers. As print media in the fifteenth century enlightened the Dark Ages and marked a turning point in communication history, the Internet has been touted as a "unique and wholly new medium of worldwide human communication."[1]

As the number of its users has increased exponentially, the Internet has transformed the whole picture of the communicational, cultural, political, and legal spectrum. For instance, social networking websites such as Myspace, Facebook, and Twitter provide global users with a variety of ways for online communication via instant message, e-mail, and status updates. A 2014 survey reports that 74% of online adults used online social networking sites to share their interests with others.[2]

The Internet has changed the way people obtain information. It makes an enormous amount of data available that the pre-Internet generation could not imagine. Web portals such as *Yahoo!*, MSN, and AOL typically provide news, shopping opportunities, email, and countless other sources of information. Google Book supplies a colossal collection of digitized books from library collections all over the world, although Google still struggles with publishers and authors over its ambitious e-book projects.[3] The *New York Times*

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[1] Reno v. ACLU, 521 U.S. 844, 850 (1997).

[2] Pew Research Center, *Social Networking Factsheet*, Jan. 2014, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Dec. 22, 2014).

[3] *See* Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (accepting

offers over 13 million articles that have been published since 1851 through its online "Article Archive."[4] In addition, the Internet has already surpassed all other media except television as a favorite source for news. The Pew Research Center reported in 2008 that, for the first time in its almost 20-year history, American adults get news information from the Internet (40%) more than from newspapers (35%), although television (70%) was still cited most frequently as a main source for national and international news.[5] However, 59 percent of young (aged 18-29) people answered that they got most of their news from the Internet.[6]

While some legal scholars have been sanguine about the Internet's possible role in democratizing politics with great numbers of speakers,[7] others are increasingly skeptical because of the "digital divide."[8] Another pessimistic view on the Internet as a democratic

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Google's argument that its scanning books and making snippets of text available for online searches constituted fair use). The Authors Guild appealed the ruling to the Second Circuit, which heard oral arguments in December 2014. *See* Max Stendahl, *Google Tells 2nd Circ. Fair Use Shields Book-Scanning Project*, LAW360, http://www.law360.com/articles/599419/google-tells-2nd-circ-fair-use-shields-book-scanning-project (last visited Jan. 26, 2015).

[4] "Article Archive," N.Y. TIMES, http://www.nytimes.com/ref/membercenter/nytarchive.html (last visited Dec. 22, 2014).

[5] Pew Research Center, Survey Reports, *Internet Overtakes Newspapers as News Outlet*, Dec. 23 2008, http://people-press.org/report/479/internet-overtakes-newspapers-as-news-source (last visited Dec. 22, 2014).

[6] *Id.*

[7] *See, e.g.,* YOCHAI BENKLER, THE WEALTH OF NETWORKS (2006) (discussing that "networked public sphere" will contribute to democracy). *See also* BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL (2009) (suggesting that "collaborative governance" enables people to participate in government decision-making on the Internet).

[8] "Digital divide" refers to the asymmetries in news and information flow caused by wealth, age, race, and education. *See* George A. Barnett & Devan Rosen, *The Global Implications of the*

agent is related to fragmentation. The unlimited filtering system of online communication produces little shared information as the social glue for citizens, which may preclude citizens from being exposed to a diverse set of opinions for social discussion.[9] Political scientist Matthew Hindman worries about an online "missing middle"[10] on the ground that it might fail the true deliberation that is necessary for democracy.[11]

For nearly 30 years, the Internet has been viewed as a way to expand freedom of speech globally. Yet, as other mass media did, the Internet has generated its own set of legal issues for free speech in cyberspace. One of the most serious issues is online hate speech since individuals and groups are easily able to spread their hate messages and recruit new individuals through the Internet. A document called "Hate Directory" shows an explosive increase in the number of hate websites in the United States in recent years.[12] Further, neo-Nazi propagandas that have originated from California have been transmitted through the Internet to Canada or Germany.[13] The reason for more hate

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Internet: Challenges and Prospects, in GLOBAL COMMUNICATION 157, 174-75 (Yahya R. Kamalipour ed., 2nd ed. 2007). For more discussion of the digital divide, see KAREN MOSSBERGER ET AL., VIRTUAL INEQUALITY: BEYOND THE DIGITAL DIVIDE (2003).

[9] CASS R. SUNSTEIN, REPUBLIC. COM 2. 0: REVENGE OF THE BLOGS 220-21 (2007).

[10] The online "missing middle" means that while the news market concentrates on the top 10 outlets, the tiniest outlets also have earned a substantial portion of attention. The middle class outlets have declined in the online world. *See* MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY 138 (2009).

[11] *Id.* at 138-39.

[12] The "Hate Directory" contains a 170-page list of over 2,500 directories of "blogs, web rings and racist games available on the Internet, as well as racist friendly web hosting services" such as "Celtic Blood White Pride World Wide" and "Knights of the Ku Klux Klan." *See* Raymond A, Franklin, *The Hate Directory*, http://www.hatedirectory.com (last visited Dec. 22, 2014).

[13] Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1530 (2003).

speech websites in the United States is that the First Amendment allows more speech, not less, as a right for the maintenance of democracy.[14] On the other hand, in Europe hate speech is prohibited, but controversies surrounding the Danish cartoons[15] and the Dutch film "Fitna"[16] have highlighted hate speech as a raging global issue.

Another online speech issue relates to pornography and obscenity. Considering that obscene images are more easily and instantly available on the Internet, it is almost impossible to protect young people from online obscenity.[17] Further, drawing a line globally between legal pornography and illegal obscene or child pornography is difficult when it involves different cultural viewpoints. In Japan, for example, owning pornographic images of children has been legal if the images are not intended for selling or posting on the Internet, but the Diet in June 2014 passed a bill to ban the possession of child pornography.[18]

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[14] Robert Post, *Hate Speech, in* EXTREME SPEECH AND DEMOCRACY 123, 132 (Ivan Hare & James Weinstein eds., 2009).

[15] The Danish cartoons that depicted Mohammed wearing a bomb-shaping turban were rapidly spread through the Internet. For more discussions of the Danish cartoon, see generally HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 659 (3d ed. 2008); Robert A. Kahn, *Flemming Rose, the Danish Cartoon Controversy, and the New European Freedom of Speech*, 40 CAL. W. INT'L L.J. 253 (2010).

[16] The Dutch film "Fitna," which was made by a Dutch lawmaker Geert Wilders to ridicule the Koran as a "fascist" book, was spread out to international viewers through YouTube.com. Wilders was acquitted of charges of hate speech by the Amsterdam regional court in June 2011; see *Geert Wilders Acquitted on Hate Speech Charges*, TELEGRAPH, June 23, 2011, http://www.telegraph.co.uk/news/worldnews/europe/netherlands/8593559/Geert-Wilders-acquitted-on-hate-speech-charges.html (last visited Dec. 22, 2014).

[17] *See generally* JEREMEY HARRIS LIPSCHULTZ, BROADCAST AND INTERNET INDECENCY: DEFINING FREE SPEECH 119-20 (2008).

[18] Melissa Hellmann, *Japan Finally Bans Child Pornography*, TIME, June 18, 2014, http://time.com/2892728/japan-finally-bans-child-pornography/ (last visited Dec. 22, 2014).

In addition, the Internet is challenging the traditional concept of "press" and "journalist" as many bloggers are engaged in news reporting online. U.S. lawyer Scott Gant, in his book titled "We're All Journalists Now," argues that the conception of journalism should be adjusted to "reflect that there may be journalists who make it their profession, but one need not be a professional journalist to *practice* journalism."[19] In the mid-2000s, the U.S. Court of Appeals for the Ninth Circuit could have had an opportunity to address the definitional question of "journalist" in the Internet era. But the federal appellate court ducked the opportunity when it simply accepted U.S. District Judge William Alsup's determination that freelance videographer and blogger Joshua Wolf was a journalist under California shield law.[20] The Ninth Circuit rejected Wolf's claim for the journalist's privilege because "there is no showing of bad faith [on the part of the grand jury] and the journalist refuses to produce non-confidential material depicting public events."[21]

Privacy also attracts a lot more attention as a cyberlaw issue because it is particularly vulnerable to its invasion in the online situation.[22] George Washington law professor Daniel Solove, author of a highly acclaimed book on the subject, suggests that Internet

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[19] SCOTT GANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE 201 (2007).

[20] *Id.* at 43.

[21] *In re* Grand Jury Subpoena, Joshua Wolf, 201 Fed. App'x 430, 432-33 (9th Cir. 2006).

[22] A good example of online privacy issue is the Korean "Dog Poop Girl" case. In 2005, a Korean train rider took pictures of a girl who did not clean up her dog's poop on the subway and then posted the photos on a popular website. As the Internet mob identified her, the girl was nicknamed as a "dog poop girl" by online users. *See* Jonathan Krim, *Subway Fracas Escalates into Test of the Internet's Power to Shame,* WASH. POST, July 7, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/07/06/AR2005070601953.html (last visited Dec. 22, 2014).

law should recognize privacy in public places and give more protection to confidentiality.[23] One notable online privacy violation in the United States related to a website known as the "Nuremburg Files," which disclosed the names and personal information of abortion doctors and their families.[24] After several abortion doctors in the "Nuremburg Files" were killed and seriously wounded, the Ninth Circuit held in 2002 that the Internet website constituted an illegal "true threat " rather than protected political speech.[25]

Defamation is an equally challenging issue for freedom of speech online, whether globally or domestically. For example, four executives of Google were tried in Italy on criminal charges of defamation and privacy offences over a video uploaded to the site, in which a boy with Down syndrome was teased by other youths.[26] In addition, Google lost a lawsuit in Italy over defamatory autocomplete suggestions.[27] The Google cases will likely bring on a chilling effect on ISPs around the world.[28]

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[23] DANIEL SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 187 (2007).

[24] Christiangallery, *The Nuremburg Files*, http://www.christiangallery.com/atrocity (last visited Dec. 17, 2014).

[25] Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc).

[26] David Meyer, *Italy Convicts Google Execs Over Bullying Video*, ZDNET, Feb. 24, 2010, http://www.zdnet.com/article/italy-convicts-google-execs-over-bullying-video/ (last visited Dec. 22, 2014).

[27] *Id.*

[28] *Id.*

Further, online defamation might be one of the most perplexing issues even in the United States, where free speech is uniquely more protected than reputation.[29] This is all the more true, given that "[t]he threat of libel litigation is now exacerbated by the reach of the Internet."[30] Cross-border litigation is resorted to by some international public figures to bypass media-friendly American libel law. For example, American boxing promoter Don King sued British boxer Lennox Lewis, a U.S. promotion company, and a New York attorney in London, even though the defamatory statements about him were posted on California-based websites.[31] King chose the United Kingdom to file suit because English defamation law was more plaintiff-friendly.[32] As one noted media attorney observed, defamation law is increasingly internationalized through foreign lawsuits relating to online publications.[33]

A. Research Statements

Defamation law is one of the few legal areas that continue to challenge the application of free speech principles online and offline. It has to balance the two well-established rights -- freedom of speech and the right to reputation.[34] Because defamation law ought to reflect the underlying values that a given society attaches to the importance

[29] *See generally* Fredrick Frederick Schauer, *The Exceptional First Amendment, in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005).

[30] *Preface: Understanding Media Law in the Global Context, in* INTERNATIONAL LIBEL & PRIVACY HANDBOOK, at xi (Charles J. Glasser Jr., ed., 3d ed. 2013).

[31] King v. Lenox [2004] EWCA Civ 1329.

[32] *Id.*

[33] Richard N. Winfield, *Globalization Comes to Media Law*, 1 J. INT'L MEDIA & ENT. L. 109, 116 (2006).

[34] ERIC BARENDT, FREEDOM OF SPEECH 198 (2d ed. 2005).

of reputation and free speech,[35] the line drawn between reputation and speech varies from country to country.[36]

While U.S. law gives the strongest protection to freedom of speech by protecting demonstrably false speech, it represents a minority approach when compared with other countries.[37] In Germany and Japan, for instance, more value is given to reputation than to free speech even on a matter of public interest.[38] Thus, if American publishers consider their stories from solely a U.S. legal perspective, they might better hope that "either their publisher has no assets to attach in a foreign country or that an adverse judgment will not be enforced on the United States."[39]

The considerable difference between U.S. and foreign libel law has resulted in a global forum-shopping phenomenon dubbed "libel tourism."[40] In an effort to alleviate the negative impact of libel tourism on American media, the U.S. Congress in 2010 enacted the SPEECH (Securing the Protection of our Enduring and Established Constitutional

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[35] Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3 (1980), *reprinted in* MEDIA LAW 263 (Eric Barendt ed., 1993).

[36] For libel law in various countries, see CARTER-RUCK ON DEFAMATION AND PRIVACY (Alastair Mullis & Cameron Doley eds., 6th ed. 2010).

[37] Ronald J. Krotoszynski, *Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village*, 62 WASH. & LEE L. REV. 339, 350 (2005).

[38] *Id.* at 348-50.

[39] Glasser, *supra* note 30, at xvi.

[40] In "libel tourism," some libel plaintiffs, especially those celebrity plaintiffs, travel to London to take advantage of the plaintiff-friendly U.K. defamation law and to preclude media defendants from being protected under the media-friendly U.S. law. Robert Balin et al., *Libel Tourism and the Duke's Manservant*, *in* INTERNATIONAL MEDIA LAW DEVELOPMENTS 97, 100 (2009).

Heritage) Act.[41] The SPEECH Act aims to prevent U.S. courts from enforcing foreign defamation judgments that are incompatible with the First Amendment.[42]

Cyber-communication has made the law of defamation more complicated. At least in the past, gossip might have tarnished good reputation in one community but faded from the other's memories over time. But currently the Internet makes gossip a permanent reputational stain as a "digital scarlet letter," which is forever engraved into Google's memory.[43] Online communication may inflict more serious injury on individual and corporate reputations with instant, quick access to the Internet. Given that the Internet has amplified the speech versus reputation conflicts, the focus is now whether the offline balancing between speech and reputation rights should be located "in the same place with respect to the Internet as with other media."[44]

Cross-border litigation has also been exacerbated by Internet publications. When online users download a defamatory article from the Internet, downloading in England and Australia may constitute a separate publication. As a result, any person in England and Australia can sue American publishers with the sale of a single book or with a handful of online access to the publications, which causes serious chilling effects on speech in the United States.[45] Confronted with severe criticisms from American

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[41] SPEECH Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010).

[42] *See id*. § 4102(a).

[43] Solove, *supra* note 23, at 94.

[44] Diane Rowland, *Free Expression and Defamation, in* HUMAN RIGHTS IN THE DIGITAL AGE 55 (Mathias Klang & Andrew Murray eds., 2005).

[45] *See, e.g.,* Dow Jones v. Gutnick [2002] HCA 56 (High Court of Australia held that publication on the Internet took place whenever the information was downloaded).

publishers, the new Defamation Act 2013 requires that the court be satisfied that "England and Wales is clearly the most appropriate place" for an action to have jurisdiction against a non-domiciled defendant.[46]

Although anonymity is not necessarily a unique phenomenon of cyber speech, online libel suits against anonymous "John Doe" defendants have increased significantly during the past years.[47] Furthermore, the absence of the "take down" remedy in "John Doe" lawsuits is troublesome especially for online defamation in which the plaintiffs want their names not to be discovered from Google search.[48]

Liability for online publication is another tricky issue presented by online defamation. Liability for online defamation may fall not only on an original speaker but also on an Internet Service Provider (ISP)[49] as part of the online publication chain. Moreover, ISPs are more attractive than individual online users as defendants in defamation lawsuits because (1) they are easier to identify as defendants than anonymous users who have originated defamatory information and (2) they have "deep pockets" when compared

[46] Defamation Act 2013, § 9.

[47] *See* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn From John Doe*, 50 B.C. L. REV. 1373 (2009).

[48] *Id*. at 1389-90.

[49] Various acronyms and terms are used to refer to Internet Service Providers and other online industries. Among the more widely used acronyms are ISP (Internet Service Provider), OSP (Online Service Provider), ICS (Interactive Computer Service), ICH (Internet Content Host), and Internet Intermediary. Because of the confusion surrounding the acronyms, this dissertation will use "ISP" as a term in common parlance, which is an online service provider that allows users access to the Internet and information generated by other users. For the definitions of ISP, see MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET 17 (3d ed. 2010).

with the single users.[50] But it is not easy to decide on ISP liability under the current defamation law because many ISPs share some features of publisher, distributor, and common carrier.[51]

To solve the conundrum of ISP liability, the United States has adopted broad immunization of ISPs under the Communications Decency Act (CDA).[52] This statutory rejection of liability for ISPs for publishing libel by third parties is rooted in the First Amendment to give more protection to online freedom of speech.[53] Yet, few countries have adopted the American-style rule of immunity for cyber libel. In Germany, for example, ISPs that provide their own content or adopt third-party content are fully liable for their postings, while ISPs that simply host or provide access are only required to remove access to content.[54] ISPs in France have liability for defamation when they were aware of the defamatory content and when they did not restrain the access to the content as soon as they were notified of the content.[55]

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[50] Traditionally, newspaper and broadcasters have been attractive defendants as "deep pockets" in libel lawsuits. The vast majority of controversial libel litigation has involved media defendants because the media would likely pay more "significant award of damages" to plaintiffs than an individual author. *See* ERIC BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT 1-2 (1997).

[51] *See generally* MADELEINE SCHACHTER & JOEL KURTZBERG, LAW OF INTERNET SPEECH 339-40 (3d ed. 2008).

[52] 47 U.S.C. § 230(c) (2000).

[53] *See, e.g.,* Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998).

[54] Jan Hegemann & Slade R. Metcalf, *Germany, in* INTERNATIONAL LIBEL & PRIVACY HANDBOOK, *supra* note 30.

[55] Dominique Mondoloni, *France*, *in* INTERNATIONAL LIBEL & PRIVACY HANDBOOK, *supra* note 30.

Given that the United States is unique in its free speech jurisprudence, it is hardly surprising that it accords ISPs more protection than other countries. To more closely examine U.S. law on ISP liability, this research uses comparative research as a method because a comparison of different legal systems can lead to a better understanding of issues involved and suggest possible directions for future policy.[56]

In conducting comparative research, "functional equivalence" will guide my analysis on cyber libel. The principle of functional equivalence in comparative law states: "[T]he legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."[57] Thus, examining functional equivalence will help to understand and figure out similar problems that the United States and other countries have faced for online libel despite different laws of those countries.

U.S. law on ISP liability would serve as a frame of comparison with other systems because of its extensive experiences with online issues. For American online libel judgments "commanded considerable attention worldwide" to illustrate how one jurisprudence could approach the problem of determining ISP liability.[58]

In this context, this dissertation compares U.S. and U.K. law on libel in general and on ISP liability in particular. Because American and English defamation laws have the same root, ISP liability for defamation in England would deserve attention from U.S.

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[56] Stefaan G. Verhulst & Monroe E. Price, *Comparative Media Law Research and its Impact on Policy*, 2 INT'L J. COMM. 406 (2008).

[57] KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 34 (3d ed. 1998).

[58] GRAHAM J. H. SMITH, INTERNET LAW AND REGULATION 342-43 (4th ed. 2007).

lawyers and scholars. In addition, English libel law has more reason for comparative online research in that the CDA of the United States and the Defamation Act of the United Kingdom were the "first attempts anywhere in the world to legislate" ISP liability in the same year--1996.[59] Thus, this comparative study will be helpful to online speakers and ISPs who have similar common law background but fall under different online defamation laws.

In my study, I examine how freedom of speech and the right to reputation have been balanced with each other in the United States and the United Kingdom and how similar and different the United States has been from the United Kingdom in addressing ISP liability.

B. Research Questions

- How has the Internet affected communication in cyberspace in connection with freedom of speech and the press?
- How has reputation been balanced with freedom of speech in the United States and the United Kingdom?
- Why and how has U.S. statutory and case law immunized ISPs from defamation liability?
- Why and how has U.K. statutory and case law made ISPs liable for online defamation?

[59] *Id.* at 314.

C. Review of Literature

The review of the relevant literature aims to contextualize this project by examining what has been published about libel law in general and about online defamation in particular. It will illustrate a comparative framework for defamation law and find what issues have yet to be addressed in communication law. It focuses on significant books and journal articles that discuss defamation law of the United States and the United Kingdom while placing emphasis on comparative law research.

1. Law of Defamation

American defamation law reflects the First Amendment requirement that "speech be overprotected in order to assure that it is not underprotected."[60] The revolutionary change in American libel law since *New York Times v. Sullivan*[61] has neutralized libel litigation as a significant threat to American media freedom.[62] According to a 2001 study of U.S. libel litigation, American libel law since *Sullivan* has presented little threat to the First Amendment rights of the media and created an environment in which "public 'debate on public issues [is] uninhibited, robust, and wide-open'" while few libel claims against media defendants have been successful.[63]

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[60] Harry Kalven Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment*," 1964 SUP. CT. REV. 191, 213.

[61] 376 U.S. 254 (1964) (ruling that public officials must prove "actual malice" – knowledge of falsity or reckless disregard for whether material is true or false – to prevail in libel action).

[62] David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 508 (2001).

[63] *Id.* at 529 (citing *Sullivan*, 376 U.S. at 270).

American defamation law, especially the "actual malice" rule, is often viewed to be too reputation-unfriendly in favor of freedom of speech.[64] Former *New York Times* columnist Anthony Lewis is critical of the expansion of "actual malice" to "public figures,"[65] especially to celebrities, who have nothing to do with the governing process.[66] Likewise, U.K. lawyers Geoffrey Robertson and Andrew Nicol are not convinced of the public figure doctrine because it "denies virtually any protection" to public figures who happened to be involved in pubic affairs and have greater access to the media than ordinary people.[67]

Nonetheless, U.S. defamation law has affected foreign laws in varying degrees even when foreign courts have explicitly rejected the *Sullivan* "actual malice" principle.[68] A leading U.K. media law scholar, Eric Barendt, observes that the House of Lords in England and other Commonwealth courts attempt to accept the *Sullivan* principle, which permits protection for false allegations about public figures.[69] An overview of the *Sullivan* impact on foreign law has found that almost all the foreign courts that have

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[64] *See, e.g.,* David A. Anderson, *Is Libel Law Worth Reforming?,* 140 U. PA. L. REV. 487 (1991) (arguing that most defamation victims cannot meet the "actual malice" standard).

[65] The "actual malice" standard was expanded to include public figures in *Curtis Publishing Co. v. Butts*, 288 U.S. 130 (1967).

[66] ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 57 (2007).

[67] GEOFFREY ROBERTSON & ANDREW NICOL, MEDIA LAW 189 (5th ed. 2008).

[68] For example, the Korean Supreme Court rejected "actual malice" in 1998. *See* Judgment of 8 May 1998, 97 Da 34563 (Supreme Court). But in 2002 the Court gave more protection to the press when it reported on a matter of public concern. *See* Judgment of 22 January 2002, 2000 Da 37524, 37531 (Supreme Court).

[69] Barendt, *supra* note 34, at 204.

examined *Sullivan* have recognized the "overarching theoretical basis" of its media-friendly holding.[70]

The plaintiff-oriented English libel law has been "notorious" in requiring that the media prove truth as a libel defense.[71] According to a thoughtful empirical study of English libel law, U.K. media consider the law a major impediment to their freedom, which forces them to practice self-censorship.[72] As British law professor Marlene Nicholson notes, English defamation law might export the chill on speech to other countries.[73] European defamation law might have especially been "indirectly 'Anglicized,' since European publications may be compelled to satisfy a 'lower common denominator'" of English law.[74]

English libel law, however, has accepted the concept of press freedom that is "increasingly similar" to *Sullivan* and its progeny.[75] The two landmark cases of the U.K. House of Lords, *Reynolds v. Times Newspapers Ltd* [76] and *Jameel v. Wall Street Journal*

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[70] Kyu Ho Youm, *Impact on Freedom of the Press Abroad*, 22(3) COMM. LAW. 16 (2004).

[71] Robertson & Nicol, *supra* note 67, at 126.

[72] Barendt, *supra* note 50, at 87.

[73] Marlene Arnold Nicholson, *McLibel: A Case Study on English Defamation Law*, 18 WIS. INT'L L.J. 1, 133 (2000).

[74] Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 26 VA. J. INT'L L. 933, 936 (1996).

[75] RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:9.50 (2d ed. 2014).

[76] [2001] 2 A.C. 127 (H.L.) (holding that freedom of speech on political matters is "essential to the proper functioning of the system of parliamentary democracy.").

Europe [77] are cases in point. British media lawyers Robertson and Nicol state that freedom of speech in their country has become closer to the American protection of free speech.[78] First Amendment scholar Rodney Smolla concurred by noting that British libel law has liberalized in a "dramatic" way with *Jameel.*[79]

Regardless of the growing acceptance or recognition of *Sullivan* and its principle abroad, foreign libel law has rarely attracted attention from American jurists and scholars. Major defamation treatises such as *Defamation: A Lawyer's Guide*[80] and *Sack on Defamation*[81] offer virtually no discussion of defamation law in other countries. Smolla's *Law of Defamation* and Bruce Sanford's *Libel and Privacy* are better in their treatment of foreign law. Smolla devotes two sections to U.K. defamation law[82] and includes a section on Canadian defamation law.[83] Sanford is more expansive in his discussion of foreign libel law. The "Defamation from the Dark Ages to the Information Age: A Global Overview" chapter of his book is a rare exception in its concise and insightful discussion

[77] [2006] UKHL 44 (emphasizing the importance of investigative journalism, the House of Lords held that responsible news reporting in public interest should preclude liability for defamation).

[78] Robertson & Nicol, *supra* note 67, at 99.

[79] Smolla, *supra* note 75, §1:9.50.

[80] DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE (2009).

[81] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS (4th ed. 2014).

[82] Smolla, *supra* note 75, § 1:9.50.

[83] *Id*. § 1:9.75.

of non-American libel law.[84] Also, the chapter includes sections on international libel law and British press law.[85]

Most leading American media law textbooks concentrate on American libel law without discussing U.K. or other foreign libel cases.[86] One possible exception is *Communication and the Law*, which discusses *Jameel* to demonstrate the impact of American libel law abroad.[87] Few scholars have undertaken extensive comparative research on defamation law. One of the seminal studies was First Amendment scholar Frederick Schauer's 1980 article published in an English media law journal. In this article, Professor Schauer observed that while U.S. defamation law reflected a society where the press occupied a preferred position, U.K. law demonstrated Britons' more respect for reputation than freedom of speech.[88]

Likewise, several law review authors have addressed the comparative libel law issue, but they have primarily focused on libel tourism and forum shopping.[89] For instance,

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[84] *See* BRUCE W. SANFORD, LIBEL AND PRIVACY Ch. 2 (2d ed. 2014).

[85] *Id.*

[86] *See* T. BARTON CARTER ET AL, MASS COMMUNICATION LAW IN A NUTSHELL (7th ed. 2014); KENT T. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATIONS (9th ed. 2013); ROY L. MOORE & MICHAEL D. MURRAY, MEDIA LAW AND ETHICS (4th ed. 2011); WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW (2015 ed. 2015); DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW (19th ed. 2014); ROBERT TRAGER ET AL., THE LAW OF JOURNALISM & MASS COMMUNICATION (4th ed. 2013).

[87] *See* Kyu Ho Youm, *Defamation, in* COMMUNICATION AND THE LAW 126 (W. Wat Hopkins ed., 2015 ed. 2015).

[88] Schauer, *supra* note 25, at 278-89.

[89] *See, e.g.,* Heather Maley, *Note, Publish at Your Own Risk or Don't Publish at All; Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-guaranteed,* 14 J.L. & POL'Y 883 (2006) (discussing the chilling effect of the forum shopping trend on American media);

media law professor Kyu Ho Youm notes *Bachchan v. India Abroad Publications*[90] as the "most important cross-border libel case."[91] However, he argues that although *Bachchan* gives a clear warning to libel plaintiffs against U.S. media about the requirement of the First Amendment, the impact of *Bachchan* might be limited to American media sued in foreign countries.[92]

Defamation: Comparative Law and Practice[93] by University of Melbourne law professor Andrew Kenyon and *The Right to Speak Ill*[94] by University of Louisville law professor Russell Weaver and others are useful comparative books on libel laws in the United States, England, and Australia. Since these studies focus on various defenses for the traditional press and litigation practice, they address few Internet law issues.

Meanwhile, *International Libel & Privacy Handbook,*[95] edited by U.S. media lawyer Charles Glasser Jr., is the most recent book as a nation-by-nation summary of libel and

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Jeremy Maltby, *Juggling Comity and Self-government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978 (1994) (arguing that U.S. courts should enforce foreign libel judgments only when defamatory statements did not relate to public concern in the United States); Eric J. McCarthy, *Comment, Networking in Cyberspace: Electronic Defamation and the Potential for International Forum Shopping,* 16 U. PA. J. INT'L BUS. L. 527 (1995) (suggesting that the potential for forum shopping might have a negative effect on online expression).

[90] 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

[91] Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-run Around U.S. Libel Law?* 16 HASTINGS COMM. ENT. L.J. 235, 263 (1994).

[92] *Id*. at 261-63.

[93] ANDREW T. KENYON, DEFAMATION: COMPARATIVE LAW AND PRACTICE (2006).

[94] RUSSELL L. WEAVER ET AL., THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH (2006).

[95] Glasser, *supra* note 30.

privacy law. While this book is useful to journalists, publishers, and lawyers as a practical guide on how to avoid lawsuits in 22 jurisdictions and the Middle East, it is not a comprehensive comparative analysis of libel law. Likewise, an edited volume by Suffolk University law professor Christian Campbell examines libel laws in 11 countries,[96] while *The International Libel Handbook,* edited by U.K. attorney Nick Braithwaite, analyzes defamation laws in 8 countries. Although these two books were published in England in the mid-1990s and need considerable updating, they indicate a serious interest in comparative and foreign libel law.[97]

2. Defamation in Cyberspace

In the mid-1980s, online defamation was already a substantial legal issue, although its discussions centered on the liability of computer bulletin boards.[98] Since then, the most important concern relating to online defamation has become "how to apply existing libel law in the context of a new method of publication."[99]

Of the major elements of actionable defamation,[100] deciding what constitutes "publication" in an online context is the most problematic while other elements such as

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[96] INTERNATIONAL MEDIA LIABILITY: CIVIL LIABILITY IN THE INFORMATION AGE (Christian Campbell ed., 1997).

[97] THE INTERNATIONAL LIBEL HANDBOOK (Nick Braithwaite ed., 1995).

[98] *See, e.g.,* Lynn Becker, *Electronic Publishing: First Amendment Issues in the Twenty-First Century*, 13 FORDHAM URB. L.J. 801 (1985); Robert Charles, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121 (1987); Joseph P. Thornton et al., *Symposium: Legal Issues in Electronic Publishing – Libel*, 36 FED. COMM. L.J. 178 (1984).

[99] BRUCE W. SANFORD, LIBEL AND PRIVACY § 8.4 (2d ed. 2014).

[100] § 558 of RESTATEMENT (SECOND) OF TORTS (1977) states: "To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged

"defamatory meaning," "identification" or "injury" make little difference in an offline and online situation. As one of the publication-related issues, the "single publication" rule[101] was adopted in the United Kingdom to shield a publisher from perpetual liability caused by online archives.[102]

Another issue relating to online publications is whether "linking" can be considered a publication. A person who has *deliberately* embedded a hyperlink can be recognized as a publisher of material and so liable when he has "a degree of awareness" of general responsibility for the material.[103] But the liability for the linking might be challenged because it would be eventually a third person who decided whether to click and read the linked material or not. Thus, it is open to question why the person who provided access to the linked material should be liable for the third party's action. Regardless, the linking issue in cyber libel needs to be more in depth examined by scholars in the United States and abroad.

More often than not, online libel litigation involves tracing a source of anonymous defamation. University of Florida law professor Lyrissa Barnett Lidsky argues that an anonymous speaker "John Doe" should be protected when powerful corporate plaintiffs

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publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."

[101] In his extrajudicial writing, Judge Robert Sack defines the "single publication" rule: "[I]f only one work is involved, its distribution constitutes but a single publication on the date of first publication of the work." Sack, *supra* note 81, § 7.2.

[102] *See* Defamation Act 2013, § 8. For more information about the "single publication" rule, see *infra* Chapter IV, "Defamation Law in the United Kingdom."

[103] Collins, *supra* note 49, at 86-87.

abuse defamation lawsuits to suppress legitimate criticisms.[104] Lidsky proposes that the opinion privilege should be used to counter the chill on online speakers whose opinion is "less factual, less accurate, and less reliable" than professional analysts.[105] But since her argument focuses on only corporate libel cases, she does not address whether "John Doe" needs to be protected against individual non-corporate plaintiffs. Online anonymity also concerns whether ISPs should be subject to subpoenas to identify anonymous publishers as third parties to defamation litigation.[106]

In U.S. law, deciding the standards of fault for public figures is more critical online. Several lawyers state that online libel plaintiffs should be treated as public figures mainly for two reasons: (1) online users have easy access to the Internet to counter false statements;[107] and (2) they have an opportunity for quick response similar to the "right of reply."[108] But lawyer Michael Hadley disagrees. He counters that the public figure doctrine of American libel law should not be expanded online beyond its boundaries

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[104] Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Disclosure in Cyberspace*, 49 DUKE L. REV. 855, 945 (2000).

[105] *Id*. at 939.

[106] For proposed standards for quashing subpoenas to online users, see Megan Sunkel, *Comment, And the I(SP)s Have It…But How Does One Get It?: Examining the Lack of Standards for Ruling on Subpoenas Seeing to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation*, 81 N.C.L. REV. 1189, 1213-18 (2003). *See also* Jason C. Miller, *Who's Exposing John Doe?: Distinguishing Between Public And Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous online Defamation Suits*, 13 J. TECH. L. & POL'Y 229, 254-60 (2008).

[107] Thomas D. Brooks, *Catching Jellyfish in the Internet: The Public Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461, 473-90 (1993); Mike Godwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1, 7-9 (1994).

[108] Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1671-72 (1995); David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1381-82 (1996).

offline. Hadley explains: "The ability to reply in cyberspace, just like in the real world, depends not just on one's access to the Internet, but also on the ability and willingness of others to access one's reply."[109]

Since online libel law poses a raft of vexing issues in the United States and abroad, as discussed above, comparative research will provide a valuable guideline. Thus far, comparative research on cyber defamation has been limited, although some communication and legal scholars have paid attention to the subject in recent years. For example, *Law of Internet Speech*[110] by media attorneys Madeleine Schachter and Joel Kurtzberg is a comprehensive textbook on American online law, but it discusses only one U.K. case *Godfrey v. Demon Internet Ltd*[111] and rarely compares the United States with other countries. Similarly, an American looseleaf, *Internet and Online Law*, by media lawyer Kent Stuckey does not review any English cases for defamation.[112] Another looseleaf *Law of the Internet* by two American lawyers cite only *Godfrey* for discussion on U.K. Internet defamation.[113] Even an otherwise excellent U.K. book, *Internet Law and Regulations*, cites only three American cases for comparison.[114]

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[109] Michael Hadley, *The Gertz Doctrine and the Internet Defamation*, 84 VA. L. REV. 477, 492 (1998).

[110] Schachter & Kurtzberg, *supra* note 51, at 395-96.

[111] [1999] EWHC 244 (QB). *Godfrey* is a British landmark case on ISP liability for defamation.

[112] KENT D. STUCKEY, INTERNET AND ONLINE LAW (2008).

[113] GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 8.04[A] (2d ed. 2008).

[114] Smith, *supra* note 58, at 342-45 (citing *Cubby v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y, 1991), *Stratton Oakmont v. Prodigy*, No. 31063/94, 1995 WL 805178 (N.Y. Sup. Ct. Dec. 11, 1995) and *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997)).

The Law of Defamation and the Internet by Australian libel law expert Matthew Collins is an outstanding book on online libel.[115] Although his discussion focuses on English libel law, Collins provides a comparative perspective on case and statutory laws relating to Australia, Canada, New Zealand, the United States, and the European Court of Human Rights.

3. ISP Liability for Defamation

The early scholarly discussions of ISP liability for defamation in the United States tended to focus on bulletin board system (BBS). A lawyer argued in 1987 that an operator of a computer bulletin board should be liable as a distributor because it looks like a common carrier but actually has control over the online board.[116]

Since the CDA adopted blanket immunity for ISP liability in 1996, American lawyers and scholars have examined the scope of the immunity for ISPs. Some of them argued that the CDA immunity clause should be revised or repealed.[117] Criticizing the CDA as an extreme libertarian approach, professor Daniel Solove at George Washington

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[115] Collins, *supra* note 49.

[116] Eric C. Jensen, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L.J. 217, 219 (1987).

[117] *See, e.g.,* Robert T. Langdon, *The Communications Decency Act § 230: Makes Sense? Or Nonsense? – A Private Persons' Inability to Recover if Defamed in Cyberspace*, 73 ST. JOHN'S L. REV. 829 (1999); Michael H. Spencer, *Defamatory Email and Employer Liability: Why Razing Zeran v. America Online is a Good Thing*, 6 RICH. J.L. & TECH. 25 (2000).

University Law School suggests a "middle-ground" solution, which does not grant immunity to ISPs that become aware of the harmful material but do not remove it.[118]

Other legal scholars prefer a common law framework to revise the CDA immunity because they want to place an ISP into a traditional category of publisher, distributor, and common carrier.[119] Yet it is not entirely clear how plausible the common law approach to ISP liability could be, for ISPs do not always fit into one of the publisher, distributor, and common carrier categories.[120]

Moreover, a more fundamental problem with the CDA arises from the lack of a clear definition of ISP.[121] A law review author maintains that the current definition of an ISP is so broad that courts have permitted immunity to almost all the service providers, such as Amazon.com or even individuals who created a chat room.[122] The definitional problem

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[118] Solove, *supra* note 23, at 154. *See also* AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS 252-54 (2015) (suggesting that a takedown provision needs to be incorporated into the CDA).

[119] For a discussion of common law applications to ISPs, see Matthew G. Jeweler, *Note, The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3 (2007).

[120] For example, think about a portal website that publishes its own opinion, distributes other users' statements on its discussion board, and works as a mere conduit for delivering users' emails. For the problems of applying the common law standard, see Sewali K. Patel, *Immunizing Internet Service Providers form Third-Party Internet Defamation Claims: How Far Should Courts Go?* 55 VAND. L. REV. 647, 675-76 (2002).

[121] *See, e.g.*, § 230(c)(1) states: "No *provider or user of an interactive computer service* shall be treated *as the publisher or speaker* of any information provided by another *information content provider*." 47 U.S.C. § 230 (c)(1) (2000) (emphasis added).

[122] Miree Kim, *Narrowing the Definition of an Interactive Service Provider under § 230 of the Communications Decency Act*, B.C. INTELL. PROP. & TECH. F. 033102 (2003), *available at* http://www.bc.edu/bc_org/avp/law/st_org/iptf/articles/content/2003033102.html. *See also* Stephanie Blumstein, *The New Immunity in Cyberspace: The Expanded Reach of the*

with ISP is not limited to U.S law. As Professor Gavin Sutter of the University of London noted, the concept of ISP does not provide "all-embracing definition, and already looks somewhat dated."[123]

While the CDA has been increasingly criticized, it is still supported by the advocates of Section 230.[124] The proponents argue that a "notice-based" liability proposed by the CDA opponents would chill freedom of speech when ISPs simply choose to delete defamatory information after receiving a notice from an allegedly defamed person.[125]

Amidst the ongoing debates about the CDA on ISP liability in the United States, more people question the "notice-based" ISP liability adopted by the Defamation Act 1996 of the United Kingdom. Several British lawyers suggest that the current "notice-based" liability in English law would chill free speech, especially freedom of debates on the

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Communications Decency Act to the Libelous Re-poster, 9 B.U.J. SCI. & TECH. L. 407, 430 (2003).

[123] Gavin Sutter, *Online Intermediaries, in* COMPUTER LAW: THE LAW AND REGULATION OF INFORMATION TECHNOLOGY (Chris Reed & John Angel eds., 6th ed. 2007)

[124] *See* Marvin Ammori, *The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259 (2014) (stating that "CDA 230 is Today's *Sullivan*" because it provided immunity broader than the "actual malice" to protect online freedom of speech and noting that all the American lawyers interviewed praised Section 230); Kirsten M. Beattie, *From the Wires to Wireless: How Mass Communications Technologies Have Affected the Libel/Slander Distinction, Single Publication, and Liability in Defamation Law* 176 (2007) (unpublished Master's thesis, University of North Carolina at Chapel Hill) (on file with Davis Library, University of North Carolina); Assaf Hamdani, *Who's Liable for Cyberwrongs?,* 87 CORNELL L. REV. 901 (2002) (noting that ISPs are readily identifiable targets for liability); Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got it Right and Web 2.0 Proves It,* 23 BERK. TECH. L.J. 583, 603-7 (2008).

[125] *See, e.g.,* Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 KANSAS L. REV. 369, 395 (2008) (arguing that "takedown damages scheme" might have serious problems with overbroad restriction on speech and chilling effect); Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205 (2002) (arguing that government regulation on ISP runs afoul of the First Amendment).

discussion boards.[126] As American supporters of the CDA do, they point out that ISPs are likely to err on the side of deleting allegedly defamatory information regardless of the truth of the statement.[127]

As already noted, comparative research on ISP liability is exceedingly limited in the United States.[128] By contrast, English scholars and lawyers have paid more attention to ISP from a comparative perspective. They have examined American ISP case law because it has developed relatively earlier and more extensively than that of England.[129] But University of Wales law professor Diane Rowland, after analyzing American ISP cases, rejects the American-style immunity for ISPs on the ground that it gives too much protection to speech.[130] Her alternative suggestion is to extend the ISP defense under the Defamation Act 1996, giving a clearer guidance to ISPs on notice procedure through a Code of Practice.[131] English communication law scholar Gavin Sutter, opposing the broad immunity for ISP, also criticizes American cases such as *Zeran* for "patently

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[126] Nick Armstrong, *Blog and Be Damned?,* 158 NEW L.J. 387 (2008) (suggesting that English defamation law fails to reflect online realities); Tim Ludbrook, *Defamation and the Internet: Where Are We Now and Were Are We Going?*, 15 ENT. L.R. 173 (2005) (worrying about possible removals of online contents by ISPs); Niri Shanmuganathan, *Libel Online: An Update*, 152 NEW L. J. 1040 (2002) (arguing that most ISPs will immediately take down defamatory materials for commercial reasons).

[127] *See, e.g.,* Rowland, *supra* note 44, at 67; Gavin Sutter, *Internet Service Providers and Liability*, *in* HUMAN RIGHTS IN THE DIGITAL AGE 71, 76 (Mathias Klang & Andrew Murray eds., 2005).

[128] For the dearth of comparative research on U.S. cyber-libel law, see Schachter & Kurtzberg, *supra* note 51, at 121-23.

[129] Smith, *supra* note 58, at 342-43.

[130] Rowland, *supra* note 44, at 64-67.

[131] *Id*.

fail[ing] in its original intent"[132] and merely having "encouraged a very laissez-faire approach."[133]

While there are other English comparative studies of ISP liability, they merely summarize U.S. cases and thus lack in-depth analyses.[134] Australian lawyer author Matthew Collins's book on Internet defamation is exceptional in that it is refreshingly extensive in discussing American case and statutory law on ISP liability.[135] Collins, however, provides little comprehensive criticism of American law in a comparative context.

D. Methodology

This dissertation will use comparative law as a research method—the "systematic study of particular legal traditions and legal rules on a comparative basis" rather than a distinctive branch of substantive law.[136] The comparison of the United States and the Untied Kingdom on Internet libel law will focus on a documentary analysis of statutory and case law.

In locating all the reported and unreported cases on ISP liability for defamation in the United States, I have conducted a Westlaw search on January 5, 2015, using the "Terms

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[132] Gavin Sutter, *Defamation, in* MEDIA LAW AND PRACTICE 373, 421 (David Goldberg et al. eds., 2009).

[133] *Id*. at 421 n.185.

[134] *See e.g.,* Michael Deturbide, *Liability of Internet Service Providers for Defamation in the US and Britain: Some Competing Interests, Different Responses*, 2000 (3) J. INFO. L. TECH. (2000) (summarizing 6 U.S. cases and U.K. *Godfrey* case); Smith, *supra* note 58, at 342-45 (summarizing *Prodigy, Stratton Oakmont*, and *Zeran*).

[135] Collins, *supra* note 49, at Ch. VII, "Aspects of United States Law."

[136] PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 3 (3d ed. 2007).

and Connectors" function.[137] The Westlaw "Terms and Connectors" search yielded 210 cases. Because 23 cases were the lower court decisions that were ultimately affirmed or reversed or let stand by higher courts, the lower court decisions were not counted. In addition, 33 cases involved decisions in which plaintiff sought to compel an ISP to identify the "John Doe" defendants. Although whether to protect the anonymity of "John Doe" as a libel defendant is an important issue for online speech, "John Doe" cases are not counted for this project on ISP liability.[138] After checking the contents of court decisions, non-defamation or non-ISP cases have been deleted from the case list.

I have also searched LexisNexis and *Media Law Reporter*,[139] using the same search terms that I had formulated for my Westlaw search. LexisNexis and Media Law Reporter have located 177 and 82 cases respectively.[140] One case from Media Law Reporter did not overlap with the Westlaw cases.[141]

In addition, I ran the "KeyCite" search using the leading online libel case, *Zeran v. America Online,* and the CDA Section 230. The KeyCite search of the CDA Section 230 has found 471 cases, which included various cases on intentional infliction of emotional

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[137] The "Terms and Connectors" for my search are: "interactive computer service" or "internet service provider" or ISP w/25 libel! or slander! or defam!. I have used "w/25" in my Westlaw term search because the average length of a sentence is 25 words.

[138] For the issue of anonymous expression, see *infra* Chapter II, "Freedom of Speech in Cyberspace," and accompanying notes.

[139] *Media Law Reporter* is the most comprehensive loose-leaf service on U.S. court opinions relating to the media.

[140] *Media Law Reporter* has yielded far fewer cases than Westlaw and LexisNexis. Since *Media Law Reporter* narrowly focuses on media-related cases, it seems to be selective in including cases on major online services such as American Online, Yahoo!, and MySpace.

[141] *See* D'Alonzo v. Truscello, 34 Media L. Rep. (BNA) 2084 (Pa. Com. Pl. May 31, 2006).

distress, spam filtering, breach of contract, negligence, unfair competition, and invasion of privacy as well as defamation. The KeyCite search of *Zeran* has identified 207 cases.

I have also checked several secondary source materials such as *Internet Law: A Field Guide*,[142] *Communications Law in the Digital Age*,[143] and Santa Clara law professor Eric Goldman's blog[144] to supplement the cases. As of January 5, 2015, a total of 85 cases on ISP liability in the United States were identified for my analysis.

For the ISP cases in the United Kingdom, my search of the database of British and Irish Legal Information Institute (BAILII)[145] located 25 cases for ISP-related defamation. Out of 25 cases, 8 cases were related to ISP liability for defamation. After crosschecking Westlaw and secondary sources,[146] 9 cases were eventually selected for my analysis of ISP liability in England.[147]

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[142] JONATHAN D. HART, INTERNET LAW: A FIELD GUIDE (5th ed. 2007) (summarizing cases on ISP liability).

[143] BRUCE P. KELLER, LEE LEVINE & JAMES C. GOODALE, COMMUNICATIONS LAW IN THE DIGITAL AGE 2009 (2009) (providing a summary of recent online defamation cases).

[144] Eric Goldman, *Technology & Marketing Law Blog*, http://blog.ericgoldman.org/ (last visited Jan. 5, 2015).

[145] BAILII provides U.K. primary legal materials for free online. *See* BAILII, "About BAILII," http://www.bailii.org/bailii/ (last visited Dec. 27, 2014).

[146] The International Forum for Responsible Media Blog (Inforrm's Blog) is the most useful website that provides recent U.K. court decisions and law journal articles. *See* Inforrm's Blog, https://inforrm.wordpress.com/ (last visited Dec. 27, 2014). *See also* David Hooper et al., *Survey of English Libel Law, in* MEDIA LIBEL LAW: MLRC 50-STATE SURVEY 1269 (Media Law Resource Center ed., 2008).

[147] For a discussion of U.K. ISP cases, see *infra* Chapter VI, "ISP Liability for Defamation in the United Kingdom."

The statutory laws on ISP liability in the United States and the United Kingdom were collected from official codes available at Westlaw, LexisNexis, and BAILII.[148] All the primary source materials relating to the legislative history and interpretations of the CDA of the United States and the Defamation Act of the United Kingdom were located from Westlaw and the UK Parliament website.[149] I have also examined the Electronic Commerce (EC Directive) Regulations 2002, which incorporates the E-commerce Directive of the European Union into British law on ISP liability.[150]

E. Significance and Scope

Given that now the Internet is one of the most powerful communication technologies,[151] various free expression issues relating to ISPs need to be discussed from a journalism and communication perspective. In addition, an in-depth look at the communication perspective on cyberlaw is necessary because law is often devoted to settling disputes with a view to providing monetary remedies for libel plaintiffs while ignoring the important communication component of the issue involved. That is the

[148] For the statutory laws in U.S. and U.K., see *infra* "Appendices."

[149] UK Parliament, *Bills & legislations*, http://www.parliament.uk/business/bills-and-legislation/ (last visited Dec. 27, 2014). Especially, Hansard of the Parliament website provides the edited verbatim report of proceedings of both the House of Commons and the House of Lords. See *Hansard*, http://www.parliament.uk/business/publications/hansard/ (last visited Jan. 25, 2014).

[150] Electronic Commerce Regulations No. 2013 of 31 July 2002, art. 17-19.

[151] LORENZO CANTONI & STEFANO TARDINI, INTERNET 2 (2006).

reason why the ISP liability issue has been discussed from the legal perspective of who has "deeper pocket" to compensate for the plaintiff's damages.[152]

Yet conducting interdisciplinary research on communication and law is quite challenging because law and communication have different academic disciplines respectively. While law centers on a "system of regulation" to "set, interpret, and enforce rules of conduct," communication revolves around a "search for understanding of individuals, events, institutions, and other phenomenon."[153] Hence, researchers have frequently paid attention to one viewpoint while they "specialize in communication *or* in law."[154] Suggesting freedom of expression as an "area of research especially appropriate to the discipline of communication studies,"[155] media law professors Jeremy Cohen and Timothy Gleason have encouraged more interactions of communication and law. Interdisciplinary approach in communication law, however, is still not a mainstream of research trend in communication and journalism.[156] In this connection, this dissertation

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[152] *See, e.g.,* Brian C. McManus, *Rethinking Defamation Liability for Internet Service Providers*, 35 SUFFOLK. U.L. REV. 647, 648 (2001) (commenting on "[d]eeper pocketed" ISP as "the most logical source of relief when the authors are judgment proof").

[153] Jeremy Cohen & Timothy Gleason, *Charting the Future of Interdisciplinary Scholarship in Communication and Law, in* COMMUNICATION AND LAW: MULTIDISCIPLINARY APPROACHES TO RESEARCH 3, 5 (Amy Reynolds & Brooke Barnett eds., 2006).

[154] JEREMY COHEN & TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW 11 (1990).

[155] *Id*. at 8.

[156] Amy Reynolds & Brooke Barnett, *Introduction: The Benefits of a Multidisciplinary Approach in Communication Law, in supra* note 153, at xv-xvi (2006) (noting Rash Kamhawi and David Weaver' 2003 research on communication research in 1980-1999. Kamhawi and Weaver showed that only 60 (about 6%) out of 889 communication researches between 1980 and 1999 involved communication law topic. They found that 57 of those 60 communication law articles adopted traditional legal research or historical legal methodologies).

examines ISP liability from a communication *and* law perspective, by focusing on how free communication in cyberspace would be harmonious with legal liability for defamation.

In addition, a mass communication perspective on the Internet would help to analyze the conflict between defamation law and free expression in cyberspace. As the U.S. Supreme Court said that "[d]ifferent communications media are treated differently for First Amendment purposes,"[157] communication technology has been critical to American courts in balancing freedom of speech and the press with reputation and other conflicting interest. Thus, this study examines how the courts have factored the Internet into their ruling on freedom of expression in cyberspace.[158] Research on the legislative history of the CDA and the U.K. Defamation Act is also relevant to the current study of ISP and defamation law in understanding the statutory foundation of ISP liability almost twenty years ago.[159] Furthermore, few have conducted extensive comparative research about ISP liability thus far even though online defamation has emerged as a global issue.[160] This should be baffling, given that the advent of the Internet as a new medium has highlighted a growing need for comparative research.[161] This dissertation project contributes to the

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[157] City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986).

[158] This topic will be addressed in *infra* Chapter II, "Freedom of Expression and the Internet."

[159] For a discussion of the legislative history, see *infra* Chapters V, "ISP Liability in the United States," and VI, "ISP Liability in the United Kingdom."

[160] For a review of literature for comparative research, see *supra* Section C, Subsection 3, "ISP Liability for Defamation."

[161] Stefaan G. Verhulst & Monroe E. Price, *Comparative Media Law Research and Its Impact on Policy*, 2 INT'L. J. COMM. 406, 409 (2008).

still evolving comparative law literature on freedom of speech as a whole and on online defamation in particular. The value of this study is to serve as an in-depth case and statutory analysis of how the two liberal democracies with similar political, cultural, and legal traditions balance free speech with reputation in cyberspace.

F. Outline of the Study

Chapter I includes the introduction, research statement and questions, review of literature, methodology, and significance of the study.

Chapter II reviews the Internet as a medium. In addition, it examines the Internet from a communication/journalism and law perspective. Further, freedom of speech in cyberspace is analyzed in this chapter. After providing a general theoretical framework of free speech offline, it focuses on various online speech issues including anonymous speech, hate speech, copyright, obscenity, privacy, and journalism in cyberspace.

Chapter III centers on American defamation law by examining how free speech has been balanced with reputation in the United States. This chapter covers significant libel cases, including *Sullivan*.

Chapter IV analyzes defamation law in the United Kingdom. It discusses the English common law tradition in balancing libel law with freedom of speech and examines important U.K. cases such as *Reynolds* and *Jameel*.

Chapter V concentrates on ISP liability for defamation in the United States. To understand why ISPs have been immunized from liability in American law, this chapter pays attention to the legislative history of the CDA and to judicial interpretations of the CDA since 1996.

Chapter VI focuses on ISP liability in the Untied Kingdom. Revolving around the Defamation Act 1996, the Defamation 2013, and U.K. court decisions, this chapter explains why and how ISPs in the United Kingdom have liability for defamation.

Chapter VII summarizes and concludes my research on U.S. and U.K. statutes and case law on ISP liability. This chapter provides comparative perspectives on ISP liability while highlighting the similarities and differences between the two countries.

CHAPTER II

FREEDOM OF EXPRESSION AND THE INTERNET

The Internet, as a network of computer networks, has showed the most explosive growth in a short span of time when compared with other communication medium.[162] The Internet's rapid growth is startling: "It took radio broadcasters 38 years to reach an audience of 50 million, television 13 years, and the Internet just four."[163] Enabling more two-way communications, the Internet breaks down a high barrier between the traditional media and the passive audience with relatively easy and low-costly accessibility.[164]

The Internet originated from ARPANET, a computer network of the U.S. Department of Defense's Advanced Research Projects Agency (ARPA) in 1969.[165] A working group that consisted of the ARPA, Stanford University, and the University of California at Los Angeles (UCLA) developed the Transfer Control Protocol (TCP)/ Internet Protocol (IP) in the 1970s, which has been universal languages for compute networks that remain the foundation of the current Internet.[166] Since computer scientist and MIT Professor Tim Bernes-Lee developed the World Wide Web (WWW) in 1990,

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[162] Lyombe Eko, *Internet Law and Regulation, in* INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION (Wolfgang Donsbach ed., 2008), http://www.communicationencyclopedia.com.libproxy.uoregon.edu/subscriber/uid=1138/?authstatuscode=202 (last visited Dec. 15, 2014).

[163] United Nations, *Briefing Papers for Students: Information and Communications Technology*, http://davidpapp.com/wp-content/uploads/2012/11/tech.pdf (last visited Dec. 15, 2014).

[164] VINCENZO ZENO-ZENCOVICH, FREEDOM OF EXPRESSION: A CRITICAL AND COMPARATIVE ANALYSIS 101 (2008).

[165] LORENZO CANTONI & STEFANO TARDINI, INTERNET 26 (2006).

[166] *Id*.

the WWW browser system has replaced file transfer protocol as the common application on the net.[167]

As a new communication tool, the Internet has attracted attention from communication scholars since the early 1990s. But most communication studies of the Internet have focused on online newspaper, journalistic blogs, and computer games.[168] Communication scholars Merrill Morris and Christine Ogan in 2002 criticized communication studies for overlooking the importance of research on the Internet.[169]

Noticing that the Internet did not "fit researcher's idea about mass media, locked, as they have been, into models of print and broadcast media,"[170] they have urged communication scholars to reconceptualize and categorize the Internet in a flexible way to reflect "the slippery nature of ideas such as mass media, audiences, and communication itself."[171]

Yet the Internet-related communication research has not so much changed over the years. *Journalism & Mass Communication Quarterly* (JMCQ), a leading scholarly

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[167] Daniel G. McDonald, *Internet, in* INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION (Wolfgang Donsbach ed., 2008), http://www.communicationencyclopedia.com.libproxy.uoregon.edu/subscriber/uid=1138/?authstatuscode=202 (last visited Dec. 14, 2014).

[168] *Id*.

[169] Merrill Morris & Christine Ogan, *The Internet as Mass Medium, in* MCQUAIL'S READER IN MASS COMMUNICATION THEORY 134 (Denis McQuail ed., 2002).

[170] *Id*. at 135.

[171] *Id*. at 143.

journal in the communication area, has published 105 articles relating to the Internet since 1990.[172]

But many of the JMCQ articles on the Internet revolve around online journalism,[173] media effects of the Internet,[174] and online political communication.[175] Hence, while journalism and mass communication research has concentrated on the Internet usage or effects, few communication scholars have paid attention to the Internet's overall impact on communication in society.[176]

To examine the impact of the Internet on general communication, this research offers a contextual overview of freedom of expression and the Internet in Chapter II. Focusing on the U.S. and the U.K. legal perspectives, this chapter places freedom of expression in

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[172] Using search terms like "internet" or "cyberspace," search of the *Journalism &Mass Communication Quarterly* database through the University of Oregon library website yielded 105 articles as of Jan. 10, 2015, http://search.proquest.com.libproxy.uoregon.edu/ (last visited Jan. 10, 2015).

[173] *See, e.g.,* Hugh M. Culbertson, *Citizen Journalism: Valuable, Useless or Dangerous?*, 91 JOURNALISM & MASS COMM. Q 190 (2014); Kirsten A. Johnson & Susan Wiedenbeck, *Enhancing Perceived Credibility of Citizen Journalism Web Sites*, 86 JOURNALISM & MASS COMM. Q. 332 (2009).

[174] *See, e.g.*, Itai Himelboim, Tsan-Kuo Chang & Stephen McCreey, *International Network of Foreign News Coverage: Old Global Hierarchies in a New Online World,* 87 JOURNALISM & MASS COMM. Q. 297 (2010); Jeongsub Lim, *A Cross-lagged Analysis of Agenda Setting among Online News Media*, 83 JOURNALISM & MASS COMM. Q. 298 (2006).

[175] *See, e.g.,* Kathy Brittain, *Politics and the Twitter Revolution: How Tweets Influence the Relationship between Political Leaders and the Public,* 90 JOURNALISM & MASS COMM. Q 586 (2013); Dan Drew & David Weaver, *Voter Learning in the 2004 Presidential Election: Did the Media Matter?*, 83 JOURNALISM & MASS COMM. Q. 25 (2006); Mark Leccese, *Online Information Sources of Political Blogs*, 86 JOURNALISM & MASS COMM. Q. 578 (2009).

[176] *Communication Law & Policy*, a peer review journal, has published 33 articles regarding the "Internet" or "cyberspace" since 1990, addressing various topics such as press freedom, hate speech, student's press freedom etc. Online search through the University of Oregon library website was conducted on Jan. 10, 2015, http://search.proquest.com.libproxy.uoregon.edu/ (last visited Jan. 10, 2015).

a theoretical context. The first half of this chapter discusses freedom of speech and the press in general. The second half of the chapter delves into key free speech issues in cyberspace such as online journalism, anonymity, copyright, privacy, pornography, and hate speech.

A. Freedom of Speech and the Press: A Theoretical Framework

Freedom of speech is recognized as a fundamental human right globally. Article 19 of the Universal Declaration of Human Rights states that every citizen has the right of free expression that "includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[177] Regional human rights treaties are no different. Article 10 of the African Charter on Human and Peoples' Rights,[178] Article 13 of the American Convention on Human Rights,[179] and Article 10 of the European Convention on Human Rights and Fundamental Freedoms (more widely known as the European Convention on Human Rights (ECHR))[180] also guarantee freedom of speech as a basic human right.

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[177] United Nations, *Universal Declaration of Human Rights*, Article 19, Dec. 10, 1948, http://www.un.org/en/documents/udhr/index.shtml (last visited Dec. 14, 2014).

[178] African Union, *African Charter on Human and Peoples' Rights*, June 27, 1981, http://www.achpr.org/instruments/achpr/ (last visited Dec. 14, 2014). Article 10 of the African Charter says that every individual shall have "the right to receive information" and "the right to express and disseminate his opinions within the law."

[179] Organization of American States, *American Convention on Human Rights*, Article 13, Nov. 22, 1969, http://www.hrcr.org/docs/American_Convention/oashr.html, (last visited Dec. 14, 2014). Article 13 of the American Convention states that everyone has "the right to freedom of thought and expression," which includes "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

[180] The European Convention on Human Rights and Fundamental Freedoms, Article 10, Nov. 4, 1950, http://conventions.coe.int/treaty/en/treaties/html/005.htm (last visited Dec. 14, 2014).

Yet freedom of speech is not an absolute right. For example, Article10 of the ECHR states that freedom of expression has restrictions "prescribed by law" and "necessary in democratic society." Article 10 of the ECHR provides:

> (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 tights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[181]

Likewise, free speech in the United States has not been absolute even though the First Amendment does not include any limiting clause. Certain types of speech such as defamation and child pornography, false advertising, obscenity, "true threat," and incitement are excluded from First Amendment protection.[182]

Nonetheless, freedom of speech needs to embrace even "freedom for the thought that we hate" to permit the minority's voice.[183] The European Court of Human Rights held that freedom of speech should be applied not only to information or ideas that are

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[181] *Id.*

[182] *See* RONALD E. LEENES ET AL., CONSTITUTIONAL RIGHTS AND NEW TECHNOLOGIES: A COMPARATIVE STUDY 279 (2008): David M. O'Brien, CONGRESS SHALL MAKE NO LAW: THE FIRST AMENDMENT, UNPROTECTED EXPRESSION, AND THE U.S. SUPREME COURT 15 (2010).

[183] United States v. Schwimmer, 279 U.S. 644, 653 (1929) (Holmes, J., dissenting).

favorably received but also to "those that offend, shock or disturb."[184] Therefore, a free speech principle means that speech should be tolerated, even when it seems to have harmful effects, because of its special values.[185]

Three classic free speech theories -- "marketplace of ideas," "democratic self-governance," and "human dignity and self-fulfillment" – are closely related to the values of free speech in the United States.[186] And the theories have also been recognized in the United Kingdom, as the House of Lords in *Regina v. Secretary of State for the Home Department* stated:

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfillment of individuals in society. Secondly, in the famous words of Mr. Justice Holmes (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market.": *Abraham v. United States* 250 U.S. 616, at 630 (1919), *per* Holmes J. (dissent). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[187]

Three theories are identified below to illustrate free speech's values and purposes.

1. Marketplace of Ideas

The marketplace of ideas, grounded in the laissez-faire economic theory, derives from a metaphor of an open marketplace where ideas are freely exchanged and compete with

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[184] Vogt v. Germany [1995] ECHR 29, ¶ 52.

[185] Barendt, *supra* note 34 at 7.

[186] RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2:3 (2014).

[187] [2000] 2 A.C. 115, 126.

each other. The marketplace theory is traced to John Milton's *Areopagitica* in 1644, which argued that censorship was unnecessary because truth would always trump falsity.[188] Later, British philosopher John Stuart Mill emphasized the value of free speech, not because truth always prevailed in the marketplace but because people would be "deprived of the opportunity of exchanging error for truth" without freedom of speech.[189]

The marketplace theory was influential especially in the United States. Justice Oliver Wendell Holmes of the U.S. Supreme Court injected the marketplace theory into American free speech jurisprudence. In his famous dissenting opinion in *Abrams v. United States*,[190] he stated: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their whishes can be carried out."[191]

The marketplace of ideas theory informs freedom of online speech in the United States. The U.S. Supreme Court relied on the marketplace of ideas in *Reno v. ACLU*[192] in striking down online indecency regulations. The Supreme Court stated that governmental regulation of content of online speech would "interfere with the free exchange of ideas

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[188] JOHN MILTON, AREOPAGITICA (1644), available at https://www.dartmouth.edu/~milton/reading_room/areopagitica/text.shtml (last visited Jan. 31, 2015).

[189] JOHN STUART MILL, ON LIBERTY 24 (Gateway 1955) (1859).

[190] 250 U.S. 616 (1919).

[191] *Id.* at 630 (Holmes, J., dissenting).

[192] 521 U.S. 844 (1997).

than to encourage it," and thus "the interest in encouraging freedom of expression in a democratic society" should outweigh the alleged benefit of censorship.[193]

The marketplace perspective views government as the enemy that interferes with free exchange of ideas. Such "negative freedom" -- freedom from external restraint -- has predominated traditional free speech discussion in the United States.[194] This negative notion of free speech has affected the cyber-libertarian view in the mid-1990s. The cyber-libertarian political activist John Perry Barlow's *Declaration of Independence for Cyberspace*[195] in 1996 was a challenge to government bodies that attempted to frame and regulate the Internet. Barlow declared: "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather."[196]

However, the marketplace theory has often been criticized because the current media market is concentrated in the hands of a small number of giant communication groups.[197] First Amendment scholar Jerome Barron argues that the "romantic" concept of free marketplace of media does not exist any more due to "an inequality in the power to

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[193] *Id*. at 885.

[194] *See* Joseph Russomanno, *Concept of Freedom of the Press, in* INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION (Wolfgang Donsbach ed., 2008), http://www.communicationencyclopedia.com.libproxy.uoregon.edu/subscriber/uid=1138/?authstatuscode=202 (last visited Dec. 14, 2014).

[195] Published on Feb. 8, 1996, https://projects.eff.org/~barlow/Declaration-Final.html (last visited Dec. 14, 2014).

[196] *Id.*

[197] *See generally* ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983).

communicate ideas just as there is inequality in economic bargaining power."[198] He proposes a right of access to prohibit the press from an "arbitrary denial of space" and to guarantee a more effective forum for diverse public opinion.[199]

Moreover, the marketplace metaphor does not fit the Internet squarely. Dominant forces such as established media organizations, web portals, and search engines continue to serve as gatekeepers for many online users who receive information passively.[200] ISPs operated by a small number of Internet companies are another threat to the marketplace of ideas, while ISPs are enormously powerful to control online contents but are rather nonchalant about the First Amendment mandates of access to the media.[201] Therefore, it would be unreasonable to insist that cyberspace should be totally out of government control, even though the Internet contributes to free discussions and finding truth.

2. Democratic Self-governance

The democratic self-governance theory focuses on the important role of speech for democracy. Certainly, free speech is essential to self-governance as (1) a means of participation to political issues, (2) the pursuit of political truth, (3) the facilitation of

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[198] Jerome Barron, *Access to the Press--A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647 (1967).

[199] *Id.* at 1678.

[200] For a discussion of the imbalance between media elite and individuals, see Jacob Rowbottom, *Freedom and Political Debate in the Digital Era*, 69 MODERN L. REV 489 (2006) (arguing that certain media organizations and speakers are still powerful so that they exert disproportionate influence on public opinion).

[201] *See* Jerome Barron, *Access to the Media: A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 953 (2007) ("In short, the quest to assure that individual citizens will have access to the opinion process is a continuing one.").

majority rule, (4) the restraint on tyranny, and (5) the assistance of stability.[202] Alexander Meiklejohn, the leading proponent of the self-governance theory, values freedom of expression for its contribution to a self-governing society rather than as a means of finding truth:

> The First Amendment is not, primarily, a device for the winning of new truth though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.[203]

Because there is no distinction between the governors and the governed, Meiklejohn maintained that the self-governing people should be the ruler.[204] Using a town meeting metaphor for freedom of speech, he stated: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[205] Meiklejohn pointed out that freedom of expression in area of public affairs should be an absolute.[206]

American courts have adopted Meikeljohn's view to give more protection to speech related to public issues. In *New York Times Co. v. Sullivan*,[207] the U.S. Supreme Court expanded First Amendment protection for libelous statements concerning public officials, noting that the First Amendment reflected "a profound national commitment to the

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[202] RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 12-13 (1992).

[203] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO GOVERNMENT 89 (1948).

[204] *Id*. at 6.

[205] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL PROTECTION OF THE PEOPLE 26 (1960).

[206] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961).

[207] 376 U.S. 254 (1964).

principle that debate on public issues should be uninhibited, robust, and wide-open."[208] Also, the U.S. Court of Appeals for the Ninth Circuit differentiated political speech from commercial speech in the online context, applying a "less-protective standard" to the "less-protected categories of speech such as commercial speech" in a case on disclosure of anonymous online speaker.[209]

In applying democratic self-governance to cyberspace, Harvard law professor Cass Sunstein argues that a system of free expression in cyberspace should be designed for citizens to access more diverse opinions.[210] Placing too much control in the hands of online users may undermine deliberation of ideas necessary for democracy, because online users will likely access their private preferences rather than choose to see conflicting viewpoints.[211] Rejecting the marketplace theory in cyberspace, Sunstein emphasized the central role of state regulations to create websites dedicated to public discourse.[212] Hence, under the view of the democratic self-governance, the Internet should be regulated to promote democracy and enlighten citizenship.

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[208] *Id*. at 270. *See also* Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (speech on matters of public concern is "at the heart of the First Amendment's protection"); Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (speech that occurred at a public place on a matter of public concern is "entitled to 'special protection' under the First Amendment").

[209] SI03, Inc. v. Bodybuilding.com, 441 Fed. App'x 431 (9th Cir. 2011) (holding that the district court should have determined whether anonymous speakers were acting as agents of the plaintiff's business competitor).

[210] CASS SUNSTEIN, REPUBLIC.COM 2.0: REVENGE OF THE BLOGS (2009).

[211] *Id.* at 46.

[212] *Id*. at 190. *See also* LAURA STEIN, SPEECH RIGHTS IN AMERICA: THE FIRST AMENDMENT, DEMOCRACY, AND THE MEDIA 85 (2006) (recommending participatory-democratic frame, to empower government with more affirmative action to protect more citizen's speech rights).

3. Human Dignity and Self-fulfillment

The "human dignity and self-fulfillment" theory views freedom of speech not as a tool to search for truth or enlightenment but as a central element to protection of the dignity and self-realization.[213] Because the proper end of man is "the realization of his character and potentialities as a human being," freedom of speech can be justified as the right of an individual "purely in his capacity as an individual."[214]

The First Amendment was thought to serve "not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression."[215] The role of self-fulfillment could be justified from a "libertarian perspective" in which free speech protects "not a marketplace, but rather an arena of individual liberty from certain types of governmental restrictions."[216]

Relying on the human dignity perspective, legal philosopher Ronald Dworkin suggests that the government should not discriminate citizens by permitting some views and denying other views. Dworkin says: "We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold opinion from us on the ground that we are not fit to hear and consider it."[217]

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[213] Smolla, *supra* note 75, § 2:5.

[214] THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4 (1966).

[215] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring)

[216] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 5 (1989).

[217] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 200 (1996).

The human dignity and self-fulfillment theory has played a more limited role in free speech than marketplace of ideas and democratic self-governance did. In the Internet age, however, this theory might provide more protection to ordinary online users, including, bloggers who do not discuss public issues. Given that the Internet practically makes it possible for all the people to speak freely and publicly, the self-fulfillment theory would uphold the idea that although some online statements seem to be vulgar or worthless, the government should not censor those expressions arbitrarily.

4. Freedom of the Press v. Freedom of Speech

It has been long debated whether freedom of the press should be separate from freedom of speech and thus secure special constitutional protection for the institutional press. Justice Potter Stewart of the U.S. Supreme Court, in his 1974 Yale Law School address, argued that the press clause of the First Amendment had a distinct, significant meaning discrete from the speech clause of the First Amendment.[218] Emphasizing the press as an "additional check" on government branches, he viewed the institutionalized press as "the only organized private business" entitled to special constitutional protection.[219]

Nonetheless, the U.S. Supreme Court has refused to accord any exceptional protection to the press and journalists because they have "no special immunity from the

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[218] Potter Stewart*, Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975).

[219] *Id*. at 634. The press historically has functioned as a "watchdog" and a "mighty catalyst in awakening public interest in governmental affairs" to inform its audience about public events or government corruption; *see* Estes v. Texas, 382 U.S. 532, 539 (1965). Columbia law professor Vincent Blasi emphasizes the central role of the press in checking the abuse of power by public officials. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

application of general laws" and "no special privilege to invade the rights and liberties of others."[220] In *Branzburg v. Hayes,*[221] the Court has denied journalists special rights to withhold sources of information, holding that the general obligation for each citizen to testify before a grand jury or at a trial outweighed news reporters' First Amendment interests.[222]

The United Kingdom is similar to the United States in refusing to prioritize the news media. That is, the right of the media to publish was "neither more nor less than that of the general public."[223] Nonetheless, U.K. law is different from U.S. law at least in one area—journalistic privilege to confidential sources. English journalists are protected, albeit in limited circumstances, under the Contempt of Court Act 1981 and the Police and Criminal Evidence Act 1984.[224] But there is no such thing as *federal* shield law in the United States.

B. Free Speech in Cyberspace

As the Internet makes cyber speech "permanent," contextually divorced, and universally available,[225] online speech has more tremendous impact than speech mediated

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[220] Associated Press v. NLRB, 301 U.S. 103 (1937).

[221] 408 U.S. 665 (1972).

[222] *Id*. at 694.

[223] Attorney General v. Guardian Newspapers Ltd [1990] 1 AC 109, 183.

[224] For a discussion of the journalist's privilege in UK, see Hugh Tomlinson, *Should Journalists Have Privileges? Part One: Journalists and Citizens*, Inforrm's Blog, Nov. 26, 2011, https://inforrm.wordpress.com/2011/11/26/should-journalists-have-privileges-part-one-journalists-and-citizens-hugh-tomlinson-qc/ (last visited Jan. 31, 2015).

[225] Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech, in* THE OFFENSIVE INTERNET 155, 156 (Saul Levmore & Martha C. Nussbaum eds., 2010). *See also* ITHIEL DE SOLA

by the traditional media does. A tricky question is whether law should treat cyber speech differently from speech on other media such as newspaper, radio, and television. In fact, technological differences between various media have affected media laws in that "[e]ach method of communication is 'a law unto itself' and that law must reflect the different natures, values, abuses, and dangers" of each medium.[226]

Broadcasting has been regulated more strictly than the print media. Spectrum scarcity is the most important factor that justifies the special regulation of broadcasting, even though this argument is now hard to sustain with the unlimited channels provided by cable, satellite broadcasting, and the Internet.[227] Should online speech fit the press model or broadcast model? The U.S. Supreme Court in *Reno v. ACLU*[228] has treated the Internet as a medium close to the print media because it is a pull medium, rather than a push medium. The Court has found the Internet different from broadcasting and radio: First, the Internet is not so "invasive as radio or television" because online users hardly encounter content unintentionally;[229] Second, the Internet does not show any "scarcity" feature, in contrast with the spectrum scarcity of the broadcasting.[230] Evaluating the Internet as the most freely accessible medium, the Supreme Court held that governmental

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POOL, TECHNOLOGIES OF FREEDOM 7 (1983) (suggesting that technology affects the frame of law, although law tends to change slowly while technology changes fast).

[226] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

[227] Barendt, *supra* note 34, at 445.

[228] 512 U.S. 844 (1997).

[229] *Id*. at 869.

[230] *Id*. at 870 ("[U]nlike… the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity").

regulation would harm the cyberspace and thus the Court has recognized a strong First Amendment protection for online communication.[231]

Yet the Court's liberal view on the Internet and its application of the marketplace theory is debatable. The Internet, contrary to the *Reno* court's view, might be almost "invasive as radio or television" at many homes in western countries where fast online access is available.[232] Also, the Internet is available to children who are often more skilled than their parents. If the Internet is close to the broadcasting rather than the print media in its pervasiveness, the Internet should be subject to more government regulation.

1. The Press on the Internet

Few British courts have addressed who is or who is not a journalist in the Internet age. But American courts have long struggled with who is qualified for freedom of the press, although they have defined the press broadly enough to include all publications.[233] The issue of protecting journalistic sources is not yet settled as well, but the Internet adds another legal anomaly on this struggle: should bloggers be treated like the traditional journalists as part of the press?

As many bloggers write about public issues, bloggers likely argue that they need testimonial privilege when they receive a subpoena. For instance, video journalist Josh Wolf, who posted his edited clips about anti-G8 protest to a local activist news website,

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[231] *Id*. at 885.

[232] As of Dec. 31, 2013, the Internet penetration rate in the European Union was 76.5% and the rate was 84.9% in the North America. *See* Internet World Stats, http://www.internetworldstats.com/ (last visited Dec. 14, 2014).

[233] *See e.g.,* Von Bulow v. Von Bulow, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987) (holding that First Amendment protections extend to "every sort of publication which affords a vehicle of information and opinion").

remained in jail for 226 days until 2007 after he refused to comply with a subpoena that required him to turn over the video tape.[234]

A major concern over a shield law is that journalists might receive less or no protection in case that every citizen would be deemed a journalist.[235] First Amendment lawyer Floyd Abrams, who represented *New York Times* reporter Judith Miller in grand jury investigation of her sources in the CIA leak, said: "[I]f everybody's entitled to the [journalist] privilege, nobody will get it."[236] Nonetheless, Abrams asserted that bloggers should be entitled to the same protection available to a traditional journalist so long as "information was obtained for the purpose of dissemination to the public at large" like what traditional journalists do.[237]

Although a blogger has little chance to prevail under a shield law protecting only "newspapers," most state shield laws include a definitional language that leaves open the question of whether such protection would be given to bloggers.[238] So, the California Court of Appeal denied enforcement of a subpoena seeking the names of sources that

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[234] For an in-depth discussion of the Wolf case, see Anthony Fargo, *The Strange Case of Josh Wolf: What It Tells Us About Privilege Law*, SelectedWorks of Anthony L Fargo, http://works.bepress.com/anthony_fargo/1/ (last visited Dec. 14, 2014).

[235] SCOTT GANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE 179 (2007).

[236] Reynolds, *Floyd Abrams Explains Why He Should Lose*, Instapundit.com, Dec. 6, 2004, http://www.pajamasmedia.com/instapundit-archive/archives/019677.php (last visited Dec. 11, 2014).

[237] *Id. See also* Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 584 (2007) (proposing "rather a radical approach" that permits shield law protection to every citizen: "Let everyone who disseminates information to the public have a presumptive qualified right to refuse to testify in any judicial or administrative proceeding.").

[238] As of 2014, forty states and the District of Columbia have shield laws. For more information about the reporter's privilege in each state, see The Reporters Committee for Freedom of the Press, *Reporter's Privilege*, http://www.rcfp.org/privilege/ (last visited Dec. 14, 2014).

leaked confidential trade secrets of the Apple computer.[239] The court held that the blogger's publication was entitled to the protection of the shield law because "periodical publication" under the California reporter's shield included "all recurring news publications."[240]

By contrast, the Supreme Court of New Jersey held that the state shield law would not apply to bloggers who were "self-appointed journalists or entities with little track record" because "[a]ny of the [bloggers], as well as anyone with a Facebook account, could try to assert the privilege."[241] Hence, if a blogger does not engage in reporting of matters of public interest with more seriousness, the blogger will be unlikely protected under the New Jersey shield law.

Besides bloggers, a website dedicated to informing the public makes it hard to define what is the press because the website sometimes provides more information about a matter of public interest than the traditional press. For instance, Wikileaks has grabbed global attention when it released many confidential documents about toxic dumping in Africa, the wars in Iraq and Afghanistan, American diplomacy, money laundering of big companies, and other secret information.[242] Wikileaks compares itself to the *New York*

[239] O'Grady v. Superior Court, 139 Cal. App. 4th 1423 (Cal. Ct. App. 2006).

[240] *Id*. at 1465-66.

[241] Too Much Media v. Hale, 20 A.3d 364, 383 (N.J. 2011).

[242] Times Topics, *Wikileaks*, N.Y. TIMES, updated on Nov. 21, 2014, http://topics.nytimes.com/top/reference/timestopics/organizations/w/wikileaks/index.html (last visited Dec.14, 2014).

Times of the "Pentagon Papers" case,[243] but such argument might be hard to accept until Wikileaks develop "more formal ethical guideline" and it should be "more sensitive to a variety of national context."[244]

2. Online Anonymous Speech

Anonymous speech has served an important social value when persecuted groups criticize the oppressing parties without fear of retaliation.[245] The U.S. Supreme Court emphasized the importance of anonymity as a "shield from the tyranny of the majority" and anonymous pamphleteering as an "honorable tradition of advocacy and of dissent."[246] The Supreme Court was aware of the possible danger of abused anonymity to disguise

[243] Adam Liptak, *Judge Orders Wikileaks Web Site Shut*, N.Y. TIMES, Feb. 19, 2008, http://www.nytimes.com/2008/02/19/us/19cnd-wiki.html (last visited Dec. 14, 2014).

[244] Damian Tambini, *Wikileaks and Freedom of Speech: Self-regulation Work?,* LSE Media Policy Blog, Dec. 14, 2010, http://blogs.lse.ac.uk/mediapolicyproject/2010/12/14/wikileaks-and-freedom-of-speech-can-self-regulation-work/ (last visited Dec. 14, 2014). *See also* Floyd Abrams, *Why WikiLeaks Is Unlike the Pentagon Papers*, WALL ST. J., Dec. 29, 2010, http://online.wsj.com/article/SB10001424052970204527804576044020396601528.html (last visited Dec.14, 2014) (arguing that WikiLeaks is different from the Pentagon Papers because WikiLeaks reveals secrets "simply because they are secret."); Bill Keller, *Dealing with Assange and the WikiLeaks Secrets*, N.Y. TIMES, Jan. 26, 2011, http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?pagewanted=all (last visited Dec. 14, 2014) (rejecting the idea that WikiLeaks is doting journalism because of WikiLeaks' lack of transparency). *Contra* Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Forth Estate*, HARV. C.R.-C.L. L. REV. 311 (2011) (suggesting co-operation between the traditional press and online websites such as Wikileasks).

[245] For example, "The Federalist Papers" were published under the pseudonym "Publius" of James Madison, John Jay, and Alexander Hamilton. Library of Congress, *The Federalist Papers*, available at http://thomas.loc.gov/home/histdox/fedpapers.html (last visited Dec. 14, 2014).

[246] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

wrongdoing or unethical behavior, but the Court stated that more weight should be given "to the value of free speech than to the dangers of its misuse."[247]

While traditional mass media rarely permit publication under anonymity, the Internet provides online users with more opportunities to speak behind a cloak of anonymity.[248] An emerging issue regarding online anonymity is when ISPs are required to reveal anonymous users who defame others in cyberspace. In *Dendrite International Inc. v. Doe*,[249] the New Jersey appellate court outlined four-prong test that should be met before a plaintiff could compel discovery of the identity of an anonymous online poster: (1) the plaintiff must attempt to notify the anonymous poster, by posting a notice on the same message board as the original offending comment was made; (2) the plaintiff must identify the specific statements that are allegedly actionable; (3) the plaintiff must proffer evidence supporting each element it would have to establish to prove its claim; and (4) the court must balance the anonymous poster's First Amendment right of anonymous free speech against the necessity of the disclosure to allow plaintiff to proceed.[250] Currently,

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[247] *Id.* It should be noted, however, that anonymity is not always accepted as a matter of free speech. For example, disclosure of identity is required in campaign finance donations, Federal Election Commission, *Citizens' Guide,* updated in April 2014, http://www.fec.gov/pages/brochures/citizens.shtml (last visited Mar. 6, 2015) and in referendum signatures, Doe v. Reed, 561 U.S. 186 (2010).

[248] Jena Worthham, *Trying to Swim in a Sea of Social Media Invective*, N.Y. TIMES, Dec. 13, 2014, http://bits.blogs.nytimes.com/2014/12/13/trying-to-swim-in-a-sea-of-social-media-invective/?_r=0 (last visited Dec. 14, 2014).

[249] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). Dendrite sought permission from the court to take discovery from Yahoo! regarding the identity of the anonymous defamatory posters.

[250] *Id.* at 767-68.

the *Dendrite* test has served as a "most appropriate" test for anonymous speech lawsuits.[251]

In the Unite Kingdom, *Norwich Pharmacal* proceedings are useful in defamation actions in which anonymous speaker posted statements on the Internet.[252] In *Totalise v Motley Fool Ltd.*,[253] after an anonymous person made numerous defamatory postings on the discussion board, the plaintiff sought disclosure of the original poster's identity. The U.K. Court of Appeal granted the relief sought, on the ground that the postings were highly defamatory and the plaintiff was the victim of defamation tort.[254]

The European Court of Human Rights has addressed anonymous speech issue in a criminal case of *KU v. Finland*.[255] An unknown person placed an advertisement on an online dating site in the name of the applicant who was a 12-year-old boy, which caused contact by an older man.[256] The applicant's father requested the police to identify the anonymous person who posted the fake advertisement, but the ISP refused to provide

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[251] Independent Newspapers, Inc. v. Brodie, 966 A.2d 432 (Md. 2009). *See also* Somerset Development, LLC. V. Cleaner Lakewood, 2012 WL 4370271, slip op. (N.J. Super. Ct. App. Div. Sept. 26, 2012) (rejecting the claim to reveal the anonymous poster, relying on *Dendrite*); Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008) (holding that a female law student was entitled to disclosure of poster's identity under *Dendrite*); Krinsky v. Doe 6, 159 Cal. App. 4th 1154 (Cal. Ct. App. 2008) (stating that a corporates president did not show *prima facie* case of defamation under *Dendrite*).

[252] CATER-RUCK ON LIBEL AND PRIVACY 862 (Alastair Mullis & Cameron Doley eds., 6th ed. 2010).

[253] [2001] EWHC 706 (QB).

[254] *Id*. ¶ 38. *See also* Sheffield Wednesday Football Club Ltd v. Hargreaves [2007] EWHC 2375 (QB) (High Court granted partial relief in a *Norwich Pharmacal* application to reveal online posters).

[255] 48 Eur. Ct. H.R. 52 (2009).

[256] *Id.* ¶ 7.

information about the poster.[257] The Helsinki District Court and the Finish Court of Appeal refused to order the details to be provided.

The European Court of Human Rights, however, held that Finland was in breach of its obligation to protect the applicant's right to a private life under Article 8 of the ECHR, for Finland did not provide an effective criminal sanction for the applicant's privacy. The Court stated that Article 8 should be interpreted to provide the legal framework to identify wrongdoers while respecting freedom of expression in cyberspace.[258]

As shown in the cases above, anonymous speech on the Internet is no different from anonymous speech offline in that it is not entitled to absolution protection. A veil of anonymity should be taken off when it is abused against others.

3. Copyright and ISPs

In the United States, the Digital Millennium Copyright Act (DMCA) Section 512(h) allows a copyright owner to request a court to issue a subpoena requiring an ISP to identify alleged copyright infringer.[259] The DMCA subpoena provision applies to ISPs that stored materials, not to ISPs that simply transmitted infringing materials as mere conduits.[260] Thus, the DMCA Section 512 stands in contrast with the CDA Section 230, which has been applied to all type of ISPs regardless of their roles as publisher, distributor, or mere conduit.

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[257] *Id*. ¶ 8.

[258] *Id.* ¶ 49.

[259] 17 U.S.C. § 512(h).

[260] *See, e.g*., RIAA v. Charter Comm'n, 393 F.3d 771 (8th Cir. 2005) (holding that the ISP's function as a mere conduit did not expose it to the DMCA subpoena power).

In addition, Section 512(C) of the DMCA provides a notice-and-takedown system that establishes "safe-harbors" against money damages for ISPs that inadvertently commit or enable copyright infringement.[261] It creates a strong incentive for ISPs to cooperate with copyright owners when the ISPs have "both specific knowledge of potential infringement and the ability to stop it."[262] The notice-and-takedown system is particularly substantial because it is often recommended as an alternative way to modify the complete immunity of the CDA Section 230.[263] Yet the system has an abuse potential

[261] The DMCA § 512(C) states:

> (1) In general. — A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider -
> (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
> (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
> (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
> (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

Digital Millennium Copyright Act, 17 U.S.C. § 1201 (1998).

[262] BRUCE P. KELLER & JEFFREY P. CUNARD, COPYRIGHT LAW: A PRACTITIONER'S GUIDE, § 14:1 (2010).

[263] *See e.g.,* Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility? : Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237 (2007) (proposing revision of the CDA § 230, adopting a similar provision to DMCA § 512); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment,* 76 GEORGE WASH. L. REV. 101 (2008) (reviewing DMCA § 521, pointing out that CDA harms communication diversity).

especially when the system has encouraged ISPs to take down any contents that copyright owner complained of.[264]

Indeed, the copyright owners have frequently used takedown requests to online materials even when use of such materials could be protected under fair use.[265] For instance, an online user Stephanie Lenz sued the Universal Music Group that requested YouTube to take down a 29-second video of her baby dancing to the singer Prince's Song "Let's Go Crazy."[266] The U.S. District Court for the Northern District of California held that content owners must consider fair use before sending takedown notices under the DMCA with "a good belief that use of the material in the manner complained of is not authorized" by its owner or agent.[267]

Another example of the Section 512 abuse is *Viacom v. YouTube*.[268] In 2007 Viacom sent about 100,000 takedown notices to the YouTube and then filed $1 billion lawsuit

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[264] *See e.g.,* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006) (arguing that burdening ISPs with liability would cause private censorship).

[265] Fred von Lohmann, *YouTube's January Fair Use Massacre*, Electronic Frontier Foundation, Feb. 3, 2009, http://www.eff.org/deeplinks/2009/01/youtubes-january-fair-use-massacre (last visited Dec. 19, 2014).

[266] For a thoughtful review of the DMCA take-down system, see Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745 (2011) (proposing that copyright owners should be liable not only when they had actual knowledge that targeted materials were not infringing but also when they should have known if they acted with reasonable care about the lawfulness of materials).

[267] Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008). In January 2013, Judge Jeremy Fogel denied both parties' motions for summary judgments and both parties have cross-appealed to the Ninth Circuit. As of December 2014, the appeals remain pending. For the update on the *Lenz* case, see Electronic Frontier Foundation, *Lenz v. Universal*, http://www.eff.org/cases/lenz-v-universal (last visited Dec. 19, 2014).

[268] Viacom Intern. Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

against YouTube. It alleged that YouTube had allowed its users to upload copyrighted materials. The U.S. District Court for the Southern District of New York ruled that YouTube could be protected against claims of copyright infringement by the safe harbor of the DMCA, for it quickly worked with copyright holders to remove protected contents when notified.[269] Declining to shift a burden from the copyright owner to the ISP, the court concluded that mere knowledge of the prevalence of copyright violations would not make the ISP responsible for discovery of its users' illegal activities.[270]

In April 2012, the Second Circuit vacated partly the district court's decision on grounds that a jury could conclude reasonably that YouTube had knowledge or awareness of some specific clips in violation of the DMCA.[271] Yet in April 2013, the federal district court again ruled in YouTube's favor, holding that YouTube's decision not to monitor users' activities did not preclude application of the safe harbor provision.[272] In 2014, Google and Viacom eventually settled with undisclosed terms of settlement.[273]

Since enactment of the Human Rights Act 1998, British courts have recognized the possible conflicts between free speech and copyright.[274] The U.K. Digital Economy Act

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[269] *Id*. at 524.

[270] *Id.* at 528-9.

[271] Viacom Intern. Inc., 676 F.3d 19 (2d Cir. 2012).

[272] Viacom Intern. Inc., 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

[273] Jonathan Stempel, *Google, Viacom Settle Landmark YouTube Lawsuit*, REUTERS, Mar. 18, 2014, http://www.reuters.com/article/2014/03/18/us-google-viacom-lawsuit-idUSBREA2H11220140318 (last visited Dec. 19, 2014).

[274] *See, e.g.,* Ashdown v. Telegraph Group [2001] EWCA (Civ.) 1142, ¶ 45 (noting the possible confliction when freedom of expression displaces the protection under "fair dealing" of the Copyright Act).

2010 requires a copyright owner to make a copyright infringement report to an ISP when the owner suspects copyright violation hosted by the ISP.[275] The ISP must make the website subscriber aware of the report and keep a register of all reports.[276] If requested, the ISP must provide copyright owners with a list of copyright infringements that contain anonymous details of those who have received the reports.[277] With this information, copyright owners are able to take legal action against infringers by pursuing a court order that identifies such offenders, and ISPs that do not comply with the Act could receive a fine of up to £250,000.[278]

4. Privacy on the Internet

The right of privacy in the United States has its genesis in the Harvard Law Review article titled "The Right to Privacy,"[279] which was written by American lawyers Samuel D. Warren and Louis D. Brandeis in 1890. Proposing that an individual have a common-law right to be let alone, Warren and Brandeis criticized newspapers and photographs that invaded private life: "[N]umerous mechanical devices threatens to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.'"[280]

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[275] Digital Economy Act, 2010, c. 24 (Eng.)

[276] *Id.* § 3.

[277] *Id.* § 4.

[278] *Id.* § 14.

[279] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[280] *Id*. at 195.

Seventy years after Warren and Brandeis' privacy article, Dean William Prosser identified four types of privacy torts: (1) intrusion on personal privacy; (2) publication of truthful but embarrassing private facts; (3) publicity placing someone in a false light; (4) appropriation of a person's personality for the purpose of trade.[281]

Yet the law of privacy has not provided enough protection to plaintiffs against the news media because the broadly defined "newsworthiness" defense has exempted most media reporting that spotlighted private but newsy information.[282]

In the United Kingdom, the right of privacy has not been historically recognized. The right of privacy was indirectly protected through the existing cause of actions such as breach of confidence, trespass, nuisance, and defamation.[283]

After Article 8 of the European Convention on Human Rights that stipulates everyone's "right to respect for his private and family life" was incorporated under the Human Rights Act 1998, the U.K. courts have protected privacy particularly against media disclosure.[284]

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[281] William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

[282] Smolla, *supra* note 75, § 10:50. "Newsworthiness" is not confined to news in the traditional sense of the term; it is inclusive enough to cover "information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period." Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980) (citations omitted). *But cf.* Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039 (2009) (contending that emerging privacy jurisprudence narrows newsworthiness as a defense for a media defendant).

[283] TUGENDHAT AND CHRISTIE: THE LAW OF PRIVACY AND THE MEDIA 3-8 (Mack Warby, Nicole Moreham & Iain Christie eds., 2d ed. 2011).

[284] *See, e.g.*, *infra* decision in Campbell v. MGV.

A noteworthy difference between the United Kingdom and the United Sates on privacy is that "in America the trump card is freedom of the press and expression."[285] In *Time, Inc. v. Hill,*[286] the U.S. Supreme Court held that false light plaintiffs in America must prove "actual malice" if they were involved in matters of public concern. Justice William J. Brennan wrote for the Court: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which laces a primary value on freedom of speech and press."[287] This view of the *Hill* Court has been criticized in that freedom of the press must not override the right to privacy of a private citizen.[288] Hence, the false light tort like *Hill* remains the "least-recognized and most controversial aspect" of invasion of privacy.[289]

The House of Lords in *Campbell v. MGN*[290] held that privacy of even a public figure outweighed freedom of the press when the *Daily Mirror* had published a true story about a supermodel Naomi Campbell's lie about her drug addict.[291] Ruling by a majority 3-2, the House of Lords decided that Campbell's right of privacy should not be deprived just

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[285] TIM CROOK, COMPARATIVE MEDIA LAW AND ETHICS 280 (2010).

[286] 385 U.S. 374 (1967).

[287] *Id*. at 388.

[288] ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 66 (2007).

[289] Smolla, *supra* note 75, § 24:3.

[290] [2004] UKHL 22.

[291] *Id*. ¶¶ 2-5.

because she was a celebrity and her private life was newsworthy.[292] The newspaper appealed to the European Court of Human Rights, complaining that the award of costs, including the success fees, constituted a disproportionate interference with the newspaper's right of free expression under the ECHR.[293]

The European Court of Human Rights in *MGN Ltd v. United Kingdom*[294] held that the requirement to pay the success fees was disproportionate so that it constituted an interference with the newspaper's Article 10 right.[295] But the Court held that the House of Lords' ruling did not violate Article 10 because the publication of the details of a public figure's private life "cannot be deemed to contribute to any debate of general interest to society" and in the such case "freedom of expression calls for a narrower interpretation."[296]

A leading European court decision relating to the privacy of public figures was the Princess Caroline of Monaco case. The Princess claimed that several German magazines infringed her right to privacy while publishing photos that the princess involved in private activities like shopping, skiing, walking, and eating at a restaurant.[297] The German Constitutional Court barred publication of the photos of Princess Caroline with her

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[292] *Id*. ¶ 120.

[293] MGN Ltd v. United Kingdom [2011] ECHR 66, ¶ 121.

[294] *Id*.

[295] *Id*. ¶ 217.

[296] *Id*. ¶ 143.

[297] Von Hannover v. Germany [2004] ECHR 294, ¶¶ 11-17.

children, but the Court held that the Princess as a contemporary public figure should tolerate the publication of the photos that show her daily life in a public place.[298]

The European Court of Human Rights disagreed with the German court, finding that the Princess's right of privacy under Article 8 of the ECHR was violated:

> A fundamental distinction needs to be made between reporting facts –even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who… as in this case does not exercise official functions.[299]

The European Court held that the public does not have a legitimate interest in knowing the private life of celebrities even though they were in public places.[300]

The Internet, however, challenges the long-standing concept of privacy. For instance, social networking sites (SNS) like Facebook and Twitter present new challenges to users who want to keep their privacy.[301] While abused as a tool of secret surveillance,[302] the

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[298] 101 BVerfGE 361 (1999), cited by Barendt, *supra* note 34, at 242.

[299] Von Hannover [2004] ECHR ¶ 63.

[300] *Id.* ¶ 77.

[301] Mark Scott, *Where Tech Giants Protect Privacy*, N.Y. TIMES, Dec. 13, 2014, http://www.nytimes.com/2014/12/14/sunday-review/where-tech-giants-protect-privacy.html (last visited Dec. 19, 2014).

[302] Government, companies, universities are easily collecting data of the SNS users to monitor citizens or screen their applicants. For more information about online surveillance, see Steve Lohr, *The Age of Big Data*, N.Y. TIMES, Feb. 11, 2012, http://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html?pagewanted=all (last visited Dec. 19, 2014).

SNS has been called as online "Panopticon"[303] that kept users under surreptitious surveillance from others.[304]

Google has received continuous complaints in the world since it launched *Google Street View* service in 2007, which provides panoramic views from public roads in the world.[305] Google has faced fines and other penalties in France, Spain, Italy, and the Czech Republic after it advertently collected 600 gigabytes of private information from unsecured Wi-Fi networks around the world.[306] In addition, the Street View technology has encountered great resistance in Germany and Switzerland where data privacy laws are strict.[307]

Recently, Google confronted an "informational privacy" problem in Europe. In *Google Spain SL v. Agencia Española de Protección de Datos*,[308] the Court of Justice of the European Union (CJEU) held in 2014 that Google must delete links to personal

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[303] Panopticon was proposed by English philosopher Jeremy Bentham in 1791 as an advanced prison that allows an observer in a tower center to watch all prisoners in the cells; *see* JEREMY BENTHAM, THE PANOPTICON WRITINGS (Miran Vozovic ed., 1995) (1787).

[304] For a discussion of online Panopticon, see John Edward Campbell & Matt Carlson, *Panoptiocon.com: Online Surveillance and the Commodification of Privacy*, 46 J. BROAD. & ELEC. MEDIA 586 (2002) (illustrating how marketers utilize the online technology of surveillance for efficiency).

[305] *See generally* Google Maps: Privacy, http://maps.google.com/intl/en_us/help/maps/streetview/privacy.html (last visited Dec. 15, 2014).

[306] Kevin J. O'Brien, *In Europe, Google Faces New Inquiries on Privacy*, N.Y. TIMES, May 20, 2010 http://www.nytimes.com/2010/05/21/technology/21streetview.html?_r=0 (last visited Dec. 15, 2014) (reporting that especially the Czech Republic responded to Google's collection of date more sensitively due to its history of secret surveillance during communist regime).

[307] Erica Ho, *Alas, There Will be No More Google Street View in Germany*, TIME, April 11, 2011, http://techland.time.com/2011/04/11/alas-there-will-be-no-more-google-street-view-in-germany/ (last visited Dec. 19, 2014).

[308] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, May 13, 2014.

information from search results at the request of a data subject, unless a strong public interest suggests otherwise. The CJEC decision has been criticized in that it gave too much power to private entities to control public access to information.[309]

5. Online Pornography and Obscenity

Since online pornography has been a global phenomenon, the "new moral panic" about pandemic pornography swept through the world in 1990s.[310] In the United States, the Communications Decency Act imposed criminal sanctions on anyone who placed "obscene or indecent" content on the Internet while knowing that a minor might access it.[311] The federal law was immediately challenged. The U.S. Supreme Court in *Reno v. ACLU* struck down the offending indecency provision.[312] The Court held that while protection of children was an important goal, it could not be legitimately achieved by interfering with the constitutional rights of adults to access indecent expression.[313]

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[309] For a discussion of the *Google Spain* decision and related European and American lawyers' reaction, see Patrick J. Carome, *An Examination of Google Spain v. SEPD and Mario Costeja Gonzalez: the European Court of Justice's Decision on a "Right to Be Forgotten,"* Media Law Resource Center (MLRC) Forum 2014, Special Report, Oct. 22, 2014, http://medialaw.org/images/stories/Events/MLRC_Forum/2014/Google_v._AEPD_Outline_Updated_10-22-14.pdf (last visited Jan. 10, 2015). *See also* Cooper Mitchell-Rekrut, *Search Engine Liability under the Libe Deta Regulation Proposal: Interpreting Third Party Responsibilities as Informed by Google Spain*, 45 GEO. J. INT'L . L. 861 (2014) (arguing that search engines should not be subjected to liability under the right to be forgotten).

[310] Angus Hamilton, *The Net Out of Control – A New Moral Panic: Censorship and Sexuality, in* LIBERATING CYBERSPACE: CIVIL LIBERTIES, HUMAN RIGHTS, AND THE INTERNEt 169, 170 (1999).

[311] For more discussions on the CDA, see *infra* Ch. V, "ISP Liability in the United States."

[312] 521 U.S. 844 (1997).

[313] *Id*. at 884.

The U.S. Supreme Court also invalidated the Child Pornography Prevention Act (CPPA).[314] In *Ashcroft v. Free Speech Coalition*,[315] the Court refused to add virtual child pornography to the categories of unprotected speech on the grounds that government failed to show a direct connection between virtual images and its encouragement of a pedophile's illegal conduct.[316]

After the *Free Speech Coalition*, Congress passed the PROTECT Act[317] in 2003 to curb the pandering and proliferation of child pornography on the Internet. The U.S. Supreme Court upheld the Act in *U.S. v. Williams*.[318] The Court found that the Act does not prohibit the virtual child pornography but makes it crime "only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depict *real* children."[319]

In the United Kingdom, the Obscene Publication Act,[320] amended in 1994, does not criminalize the mere private possession of obscene material so long as there is no attempt to publish, distribute, or show it to others, particularly for gain.[321] In the case of child

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[314] Pub. L. No. 104-208, 110 Stat. 3009 (1996). The CPPA criminalized creation, distribution, and possession of virtual child pornography.

[315] 535 U.S. 234, 246 (2002).

[316] *Id*. at 254.

[317] Pub. L. No. 108-21, 117 Stat 650 (2003). "PROTECT" stands for "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today."

[318] 553 U.S. 285 (2008).

[319] *Id.* at 303.

[320] 1959, c. 66.

[321] *Id*. § 1(2).

pornography, however, the Protection of Children Act (POCA)[322] and the Criminal Justice Act[323] makes it a criminal offence to have any indecent photography of a child in his possession.[324] The POCA did not include images of child pornography into the category of a prohibited "photograph,"[325] but the Justice Act 2009[326] prohibits possession of a prohibited image of a child such as pornographic cartoon depicting minors.[327] Likewise, the Convention on Cybercrime by the Council of Europe prohibits materials that "visually depicts realistic images" of a minor engaged in sexual conduct.[328]

While online pornography becomes a global phenomenon, it is difficult to regulate obscene materials that are downloaded from websites hosted by foreign servers. In *Regina v. Waddon,*[329] a U.K. case of 2000, the issue was whether "publication" of obscene material occurred as a violation of the Obscene Publications Act when a server of a pornography website was located in the United States. The U.K. Court of Appeal

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[322] 1978, c. 37.

[323] 1988, c. 33.

[324] *Id*. § 160 (England) and § 161 (Scotland).

[325] *See, e.g.,* R v Fellows and Arnold [1997] 2 All ER 548 (two pedophiles were punished for storing images of child pornography in an online database although those images were not a "photograph" but fell within a "copy of photograph").

[326] 2009, c. 25.

[327] *Id.* § 62.

[328] Council of Europe, *Convention on Cybercrime*, Article 9(2)(c), 2001, http://conventions.coe.int/treaty/en/treaties/html/185.htm (last visited Dec. 19, 2014).

[329] [2000] All E.R. (D.) 502.

held that publication occurred both when the defendant uploaded the image to the U.S. server and when the material was downloaded in England.[330]

6. Online Hate Speech

International efforts have been made to regulate expression of racial, ethnic, or religious hatred particularly since the World War II. The Charter of the United Nations encourages "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[331] Similarly, the Universal Declaration of Human Rights prohibits hate speech in the form of propaganda that incites racial discrimination.[332] Also, the International Covenant on Civil and Political Rights (ICCPR) states, "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[333] The International Convention of the Elimination of All Forms of Racial Discrimination (ICERD)[334] and the Convention on the Prevention and Punishment of the Crime of Genocide[335] show a global endeavor to regulate incitement to racial hatred.

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[330] *Id.* ¶ 12.

[331] United Nations, *Charter of the United Nations*, June 26, 1945, http://www.un.org/en/documents/charter/index.shtml (last visited Dec. 19, 2014).

[332] United Nations, *Universal Declaration of Human Rights*, Dec. 10, 1948, http://www.un.org/en/documents/udhr/index.shtml (last visited Dec. 19, 2014).

[333] United Nations, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last visited Dec. 19, 2014).

[334] United Nations, *International Convention of the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (last visited Dec. 19, 2014).

[335] United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1949, http://www.refworld.org/docid/3ae6b3ac0.html (last visited Dec. 19, 2014).

European countries regulate hate speech strictly. For example, the German Criminal Act outlaws the denial of the genocide committed during Nazi regime.[336] In France, the Gayssot Act punishes questioning the existence of Nazi crimes in the category of crimes against humanity.[337] In the United Kingdom, the Racial and Religious Hatred Act 2006[338] makes it a crime to intentionally stir up racial or religious hatred by using threatening words or behavior.[339]

By contrast, U.S. law permits hate speech unless the speech is likely to lead directly to imminent lawless action and there are no other available measures less intrusive on free speech.[340] The U.S. Supreme Court in *Brandenburg v. Ohio*[341] restricted criminal punishment for speech attacking racial or religious groups, stating that only the advocacy of "imminent lawless action" falls outside of the scope of the First Amendment. Even in the speech-restrictive military, a member of the military could not be punished under the Uniform Code for Military Justice for posting hateful remarks about white supremacy on

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[336] For in-depth discussion about German law, see Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004).

[337] Gayssot Act, cited in Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT'L L. 223 (2005).

[338] 2006 c.1, http://www.legislation.gov.uk/ukpga/2006/1/contents (last visited Dec. 19, 2014).

[339] *Id*. § 1.

[340] Sandra Coliver, *Hate Speech Laws: Do They Work?, in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 363, 372 (Sandra Coliver ed. 1992).

[341] 395 U.S. 444 (1969). *See also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (unanimously invalidating St. Paul's hate speech ordinance on the grounds that government may not bar unprotected expression if their intent was to discriminate on the basis of viewpoint); Virginia v. Black, 538 U.S. 343 (2003) (holding that a Virginia statute was unconstitutional to the extent that it considered cross burning as prima facie evidence of intent to intimidate or incite violence).

the Internet.[342] The U.S. Court of Appeals for the Armed Forces reasoned that the expression in issue did not constitute unprotected "dangerous speech" and there was no evidence to show that hate communications either interfered with accomplishment of the military mission or presented a clear danger to the troops.[343]

The U.S. approach to hate speech is derived from the First Amendment premise that American free speech jurisprudence disallows the government from distinguishing protected from unprotected speech on the basis of its viewpoints.[344] The unique position of the U.S. hate speech law reflects the "hard-learned lessons about what is needed to adequately protect the right of dissent in a democratic society."[345] By contrast, the Public Order Act of the United Kingdom prohibits expression of racial hatred such as "threatening, abusive, and insulting words or behavior" to provoke racial hatred.[346]

When the electronic media deliver hate speech to the audience, the speech will have a great impact on society. The most notorious example of such deliberate "hate media"[347] is

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[342] United States v. Wilcox, 66 M.J. 442 (U.S. Armed Forces, 2008).

[343] *Id*. at 449.

[344] Schauer, *supra* note 29, at 35.

[345] James Weinstein, *An Overview of American Free Speech Doctrine and its Application to Extreme Speech, in* EXTREME SPEECH AND DEMOCRACY 81, 91 (Ivan Hare & James Weinstein eds., 2009).

[346] Public Order Act 1984 c. 64, § 18-23.

[347] Radio Netherlands Worldwide, which has been conducting a hate radio project, defines hate media as the media "encouraging violent activists, tension or hatred between races, ethnic or social groups, or countries for political goals and/or to foster conflict by offering one-sided and biased views and opinions, and resorting to deception. *See* Radio Netherlands Worldwide, *Hate Radio: Rewand*, April 2, 2004, http://www.rnw.nl/english/article/hate-radio-rwanda (last visited Dec. 19, 2014).

the *Radio-Television Libre des Mille Collines* in Rwanda, which incited Hutu government to massacre Tutsi tribe in 1994.[348]

The media sometimes unintentionally spread hate speech while republishing others' hate speech. The issue of whether the media should be liable for hate speech reproduced during a reporter's interview was addressed by the European Court of Human Rights in *Jersild v. Denmark.*[349] Danish journalist Jens Jersild interviewed three youths of the "Greenjackets" who insulted blacks with humiliating words and glorified the Ku Klux Klan.[350] Jersild, after broadcasting the interview, was accused of violating the Denmark Penal Code that punished aiding and abetting hate speech, although he argued that he did not sympathize with his interviewees' statements and just provided a real scene of social problem.[351]

The European Court of Human Rights found that Jersild's reporting drew public attention to a matter of public concern rather than promote racists views.[352] Recognizing the press's important role as a "public watchdog," the Court held that the punishment of a

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[348] For more discussion of the Rwanda genocide, see Christine Kellow & Leslie Steeves, *The Role of Radio in Rwandan Genocide*, 48 J. COMM. 107 (1998). For a discussion on the role of the the International Criminal Tribunal for Rwanda (ICTR), see Timothy Gallimore, *The Legacy of the International Criminal Tribunal and Its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L 239 (2008).

[349] 19 Eur. Ct. H.R.1 (1994).

[350] *Id*. ¶¶ 10-11.

[351] *Id*. ¶ 13.

[352] *Id.* ¶ 28.

journalist for disseminating hate statements by third parties violated journalist's freedom of expression under Article 10 of the Convention.[353]

The Internet is likely to become more dangerous as a hate medium than the traditional media, attracting hate groups to spread their messages rapidly and easily.[354] Besides, the social networking sites have attracted users to digital hate.[355] Another problem for regulating online hate speech is that the American ISPs, which are immunized from liability for online contents posted by third parties under the CDA Section 230, are less likely motivated to address racially inflammatory speech available to foreign users.[356]

C. Summary and Conclusions

Three key theories – marketplace of ideas, democratic self-governance, human dignity and self-fulfillment – have served as a useful framework on freedom of speech as a right, and they are valuable to examine online communication. More than other theories, the marketplace of ideas has prevailed in the United States, which reflects Americans' optimistic approach to the Internet as an ideal tool of two-way communications.

Yet the optimistic views on the Internet have faded recently. The Internet is not necessarily encouraging an open marketplace of ideas. Less diversity, not more, in

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[353] *Id.* ¶ 35.

[354] For a general overview about online hate speech, see Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435 (2011) (urging ISPs to be more actively regulating online hate speech).

[355] *See* Paisley Dodds, *Extremists Flocking to Facebook for Recruits*, SUNDAY MORNING HERALD, July 30, 2011, http://news.smh.com.au/breaking-news-technology/extremists-flocking-to-facebook-for-recruits-20110730-1i4t4.html (last visited Dec. 19, 2014).

[356] Citron & Norton, *supra* note 354, at 1519.

communication via the Internet emerges as a challenge to cyber-speech. Whether State-dictated or not, there is more widespread filtering or selective access to online information. More governments around the world, including the United States, try to control the Internet with statutory law and case law.

Moreover, the Internet makes it more challenging to balance speech rights with other individual and societal rights. The distinction between traditional journalists and bloggers becomes less clear, so the journalist's privilege is a more thorny issue. Copyright law is another challenge when copyright owners abuse the notice and takedown procedure to block contents that are more likely to be a fair use. Privacy is more of a concern than ever because private information is disclosed by SNS account owners or by malicious users. Extraterritorial issues in Internet law are pressing. Internet pornography and hate materials in cyberspace are increasingly intractable, when the materials are downloaded from extraterritorial websites.

All of these issues make ISPs vulnerable to various government regulations, even in liberal democracies like the United States and the United Kingdom. ISPs regulations, however, should be carefully tailored to their stated objectives. Vague and overbroad regulations will undermine the ISPs' role in mediating online communication and thus likely chill the Internet users' freedom of speech. Regulating ISPs, while not imposing over-restrictions on online speech, will continue to be a never-ending challenge in the 21st century.

CHAPTER III

DEFAMATION LAW IN THE UNITED STATES

The year 2014 marked the 50th anniversary of the landmark U.S. Supreme Court case, *New York Times v. Sullivan,*[357] which constitutionalized American defamation law.[358] The primary purpose of post-*Sullivan* U.S. libel law has been to protect the media from liability for defamation "so as not to fetter the free and robust discussion of issues of public importance."[359]

The media-friendly change in U.S. libel law has been achieved. The media victories continued to rise, with the percentage of media wins being much higher in the 2000s (52.1%) than in the 1980s (37.3%).[360] The Media Law Resource Center (MLRC) report of 2014 states:

- Media defendants prevailed in the majority of cases after post-trial motions and appeals, paying no damages in 55.8 % of cases.
- Although the overall number of media-related trials has declined, the drop in the number of cases involving newspaper defendants has been larger: 164 cases involving newspapers in the 1980s to only 52 cases in the first decade of

[357] New York Times v. Sullivan, 365 U.S. 254 (1964).

[358] In celebrating the 50th anniversary of *Sullivan,* scholars and lawyers have published about the impact of *Sullivan* on American libel law — or lack thereof. *See e.g.*, Bruce E. H. Johnson, *Is the New York Times Rule Relevant in a Breitbarted World?*, 19 COMM. L. & POL'Y 211 (2014) (arguing that the *Sullivan* holding will be relevant to the dynamic media environment because of its "broad, simple scope"); Ashley Messenger, *Reflections on New York Times Co. v. Sullivan, 50 Years Later*, 12 FIRST AMEND. L. REV. 423 (2014) (noting that *Sullivan* has failed to establish a constitutional protection of freedom of expression due to the emphasis on truth and falsity and the subsequent confusing public/private figure distinction).

[359] REFORMING LIBEL LAW, *preface* at vii (John Soloski & Randall P. Bezanson eds., 1992).

[360] Media Law Resource Center, *MLRC 2008 Report on Trials and Damages* (2010).

the 2000s.[361]

This trend of diminishing libel suits against media had been noted by law professor David Logan a dozen years earlier: "[T]he *New York Times/Gertz* regime has eviscerated the law of libel" so that the libel law has posed little threat to freedom of the press.[362]

The triumph of the media in libel suits, however, does not necessarily mean that libel law no longer affects the media. Although it often prevails in libel litigation, the media has been cautious in reporting, for it should be liable for the cost of litigation.[363] Meanwhile, lawsuits against the press have tapered off. But non-media individuals -- especially bloggers and online publishers – have been increasingly sued for libel.[364] Hence, libel law might be more of a threat in the Internet era.

This chapter provides an overview of American libel law. Section A examines three basic elements of libel law. Section B reviews three common law defenses and constitutional defenses such as opinion and "neutral reportage." Section C discusses *New York Times v. Sullivan* and its progeny to highlight the media-friendly defamation law in the United States. The final section offers summary and conclusions on *Sullivan*'s impact on the American libel law.

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[361] Media Law Resource Center, *MLRC Study Shows Sharp Decrease in Number of Media Trails for Libel and Privacy*, http://www.medialaw.org/images/stories/MLRC_Bulletin/2014/Bulletin2014Issue1/mlrctrialreportrelease.pdf (last visited Jan. 31, 2015).

[362] David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 508 (2001).

[363] Messenger, *supra* note 358, at 431-32.

[364] David S. Ardia, *Freedom of Speech, Defamation and Injunctions*, 55 WM. & MARY L. REV. 1, 11-12 (2013).

A. Elements of Defamation as a Tort

Defamation, traditionally, has two types: libel as written defamation and slander as oral defamation. The scope of liability for libel is broader than liability for slander for three reasons: "(1) the written word leaves a more permanent blot on one's reputation; (2) the written word is capable of wider circulation than that which is communicated orally; (3) reducing a defamation to writing evidences greater deliberation and intention on the part of one who records it."[365]

As television broadcasts image and sound altogether, which follows a prepared written transcript, however, the distinction between libel and slander becomes blurred. The Georgia Court of Appeals, finding that defamation by television contains features of both slander and libel, noted "defamacast" as a separate type of tort.[366]

Furthermore, defamatory statements via the Internet bring about more difficult issues; disparaging statements mixed with speech, photo, video, and written letters on YouTube or Facebook cannot be easily determined as either libel or slander. In this context, Robert Sack predicts that the distinction between libel and slander will vanish soon: "[W]e will eventually see libel and slander replaced by the single tort of 'defamation.'"[367]

Even though the libel vs. slander distinction disappears, the reason libel has been considered a more serious tort than slander might still deserve consideration in online defamation. Like the written libel, defamatory statements on the Internet leave permanent

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[365] Spencer v. Funk, 396 A.2d 967, 970 (Del. 1978) (*quoting* Rice v. Simmons, 2 Del. (2 Harr.) 417, 422 (Del. 1838)).

[366] Strange v. Henderson. 477 S.E.2d 300, 305 (Ga. Ct. App. 1996).

[367] Sack, *supra* note 81, § 2:3.

blot since it is almost impossible to delete already distributed online information and they circulate more widely and quickly than via traditional media. So, online defamation might need to be treated at least as seriously as libel, rather than slander as casual speech.

A cause of action for defamation, the Restatement (Second) of Torts lists four general elements: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; (d) either actionability of the statement irrespective of special harm or the existence of special harm by the publication.[368] Although this list of the elements works as a useful checklist as the cause of action, its usefulness is rather limited since the "constitutionalized" libel law has made these elements rely on at least four important factors: the status of the plaintiff, the status of the defendant, the character of the allegedly defamatory statement, and the jurisdiction whose law applies.[369]

1. Defamatory Statement

Defamation tends to harm reputation. Reputation, however, cannot be clearly defined because it is a socially construed concept in a given society where the defamation law has been designed. Legal scholar Robert C. Post, noticing that reputation is "not a single idea" but "a mélange of several different concepts," suggests three distinct concepts of reputation as property, honor, and dignity.[370] But law professor David Anderson observes

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[368] RESTATEMENT (SECOND) OF TORTS § 558 (1977).

[369] Sack, *supra* note 81, § 2:1.

[370] Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 740 (1986). *See also* DAVID ROLPH, REPUTATION, CELEBRITY AND DEFAMATION LAW 37 (2008) (arguing that Post's concept of reputation is "a recognition of the interconnection between the public and private aspects of reputation").

that defamation law should be considered to advance the more important social and cultural values of reputation, not as a mere remedy for economic loss.[371]

Defamation is defined as the publication of a statement that exposes an individual to "hatred, contempt, or ridicule"[372] or a statement that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[373] Courts have generally defined a defamatory statement as one that "exposes a person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure hum in his occupation"[374] or tends to "injure the reputation of another person or to expose [the person] to public hatred, contempt, ridicule."[375]

Courts have ruled that particular words that were allegedly defamatory must be read in the context of communication as a whole. A federal district court noted that the court should examine the challenged statement in its totality, considering all the words used, not merely particular phrases or sentences, and giving weight to cautionary terms used by the person publishing the statement. [376]

Yet the passage of time affects a word's meaning. Justice Wendell Holmes of the U.S. Supreme Court said in 1918: "A word is not a crystal, transparent and unchanged, it

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[371] David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1047-49 (2006).

[372] Parmiter v. Coupland [1840] 151 Eng. Rep. 340, 342 (Exch.).

[373] RESTATEMENT (SECOND) TORTS § 559.

[374] Madison v. Yunker, 589 P.2d 126, 129 (Mont. 1978).

[375] Kent v. Iowa, 651 F. Supp. 2d 910, 962 (S.D. Iowa 2009).

[376] *Id.* at 506.

is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[377] Thus, the words such as "communist," "negro," and "homosexual" have been considered defamatory in one age but not in another.[378] It might be increasingly difficult to determine whether a statement is libelous in a modern society in which technology changes everyday life, idea, and terms faster than ever.

2. Identification

To be actionable, a defamatory statement should be understood as being "of and concerning" the plaintiff.[379] The policy beneath the "of and concerning" requirement is "to protect freedom of public discussion, except to prevent defamatory statements reasonably susceptible of special application to a given individual."[380] Whether a statement can be reasonably understood to be "of and concerning" the plaintiff relies on the circumstances.[381]

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[377] Towner v. Eisner, 245 U.S. 418, 425 (1918).

[378] *See e.g., G*ottschalk v. States, 575 P.2d 289, 293 (Alaska 1978) (holding that "labeling someone a 'communist' or a 'Marxist,' which within the past 50 years has been considered first defamatory, then non-defamatory, and next defamatory again, depending largely on United States foreign policy changes"); Mitchell v. Tribune Co., 99 N.E.2d 397 (Ill. App. Ct. 1951), *cert. denied*, 342 U.S. 919 (1952) (referring to a white man as a "Negro" and a "Chink" was not libelous per se); Wilson v. Harvey, 842 N.E.2d 83, 89 (Ohio Ct. App. 2005) (publicizing someone as a "homosexual" not libel per se because being a homosexual is no crime or disease).

[379] RESTATEMENT (SECOND) OF TORTS § 564 (1977).

[380] Art of Living Found. v. Does, No. 10-CV-05022-LHK, 2011 WL 2441898 (N.D. Cal. June 15, 2011).

[381] Stanton v, Metro Corp., 438 F.3d 119, 128 (1st Cir. 2006).

The element of identification was examined in *New York Times v. Sullivan*.[382] The Supreme Court addressed the issue of whether an article about a government entity can be sufficiently "of and concerning" the plaintiff for libel lawsuit. The Court held that criticism of a government body could not be defamatory to an unnamed government official who was responsible for a criticized governmental action:

> Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, th[at] proposition relied on strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.[383]

If a government official could sue for libel on behalf of government authorities, it would contradict the strong proposition that government may not sue for defamation.[384] Therefore, identification as an element of libel law shuts off the detour for such a libel lawsuit to threaten a democratic society.

3. Publication

Publication and republication as elements of defamation are noteworthy for the media and its mediated communication. The person who republishes defamatory comments is liable for defamation, for each repetition of libelous statements constitutes a new

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[382] 376 U.S. 254 (1964).

[383] *Id*. at 292.

[384] *Id*. at 291 ("[N]o court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.") (*quoting City of Chicago v. Tribune Co*., 13 N.E. 86 (Ill. 1923)).

publication.[385] The common law has long held that one who republishes defamation should be liable "just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement."[386]

Liability for the republication, however, might cause a chilling effect on the reporting of controversial maters of public interest. To attenuate the chilling effect on freedom of speech and the press, courts have made various efforts such as the application of *Sullivan*,[387] fair report privilege, neutral reportage, and enactment of Section 230 of the CDA.[388]

Another judicial effort to restrict liability relating to republication is the "single-publication" rule. The single publication rule means: "(a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in one action; (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions."[389] Thus, the single publication rule reduces the potential multiple libel lawsuits and protects defendants against the prospect of being subject to repeated

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[385] RESTATEMENT (SECOND) OF TORTS § 578 (1977).

[386] Cianci v. New Times Pub. Co., 639 F.2d 54, 60-61 (2d Cir. 1980).

[387] Repeating statements related to public officials or public figures is not actionable unless the newspaper as a republisher knows the statement is false or is aware of its probable falsity. *See* Lovett v. Caddo Citizens, 584 So.2d 1197 (La. Ct. App. 1991). For further discussions of *Sullivan* and *Gertz* will be in the following Section C, "*Sullivan* and Its Progeny: Constitutionalizing Libel Law".

[388] Sack, *supra* note 81, § 2:7.1.

[389] Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773 n.2 (1984) (quoting RESTATEMENT (SECOND) OF TORTS § 577A(4) (1977)).

lawsuits.[390]

The single publication rule applies to defamatory publications upon the Internet as well.[391] Without the single publication rule, lawsuits against online publishers might be repeated because publication would occur whenever the defamatory statement is accessed online.

B. Defenses

The common law of libel recognizes three primary defenses -- truth, fair comment, and fair report privilege. Related to the fair comment and fair report defenses are the constitutional defenses "opinion" and "neutral reportage."

1.Truth

The First Amendment does not permit liability for defamation unless the plaintiff shows that the defamatory statement was factually false. Truth is a complete defense to a defamation claim, although a true statement may be harmful as much as a false statement to someone's reputation.[392] A statement will be treated "substantially true" as long as the "gist" or "sting" of the libelous expression is correct.[393] Truth as an absolute defense against defamation was challenged in *Noonan v. Staples, Inc*.[394] The U.S. Court of Appeals for the First Circuit applied a state libel law that does not allow truth as a

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[390] For a discussion of the "multiple publication rule" in U.K. law, see *infra* Chapter IV, Section A. 2, "Publication."

[391] *See, e.g.* Van Buskirk v. New York Times Co., 325 F.3d 87 (2d Cir. 2003) (holding that the single publication applies to online letter to determine statute of limitations).

[392] Smolla & Nimmer, *supra* note 186, § 23:8 (2014).

[393] *Id*.

[394] 556 F.3d 20, *reh'g denied*, 561 F.3d 4 (1st Cir. 2009).

defense for statements made with "actual malice" in common law. The plaintiff Alan Noonan was a sales director of the office supply company Staples. After Noonan was fired for abusing the company's travel and expense reporting system, a Staples executive sent an email to about 1,500 employees, letting them know that Noonan had been fired for violating company policies and reminding them of the importance of compliance.[395] Noonan sued for libel.

A federal district court granted summary judgment for Staples on the libel claim, stating that the statements in the email were true. But the First Circuit court ruled in Noonan's favor, relying on a 1902 Massachusetts law that truth would be a defense unless the plaintiff can show the "actual malice" of the defendant.[396] The federal appeal court inferred the presence of malice of Staples on the ground that the company never previously disclosed the name of a fired employee in emails and sent no memos about other fired employees for policy violations.[397] *Noonan* might pose a threat to online communication, for it conflicts with the basic free speech principle that true expression should be protected against libel.[398]

2. Fair Comment and Opinion

The fair comment privilege affords individuals the opportunity to express opinion on

[395] *Id*. at 23.

[396] Mass. Gen. Laws ch. 231, §92 (2009).

[397] *Noonan,* 556 F.3d at 31.

[398] *See also* Lindsee Gendron, *Noonan v. Staples: Libel Law's Shocking New Precedent and What It Means for the Motion Picture Industry*, 2009 DEN. U. SPORTS & ENT. L.J. 20 (arguing that *Noonan* "sets a dangerous precedent" while allowing plaintiffs the chance to sue for a true statement).

matters of legitimate public interest based on true or privileged statements of fact. Fair comments are not actionable because "the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts."[399] The fair comment privilege is lost when an opinion is published with "malice" – bad faith or bad motive -- in the common law.[400]

But the fair comment privilege could not provide an effective guideline because the meaning of "fair" and "opinion" is so vague that it leads to some possible danger that laws and juries in different jurisdiction might yield inconsistent decisions.[401] Now it is largely obviated by the First Amendment free-speech doctrine.[402] Nonetheless, the fair comment privilege is still relevant by filling in gaps in protection for comment. For instance, in *Magnusson v. New York Times Co.,*[403] doctor James E. Magnusson sued a TV news channel in Oklahoma that broadcast consumers' complaints about his plastic surgeries. The Oklahoma Supreme Court held that most contents of the broadcasts were interviews of the patients and quotations of the patients' expressed opinions about their medical treatments and thus the common law defense was applied.[404] In 2012, the Court of Appeals of Maryland applied fair comment to protect a newspaper reporter who was

[399] Moldea v. New York Times, 15 F.3d 1137, 1144-45 (D.C. Cir. 1994).

[400] Potts v. Dies, 132 F.2d 734, 735 (D.C. Cir. 1924), *cert denied*, 319 U.S. 762 (1943).

[401] Sack, *supra* note 81, § 4:2.2.

[402] Ollman v. Evans, 750 F.2d 970, 975 n.8 (D.C. Cir. 1984).

[403] 98 P.3d 1070 (Okla. 2004).

[404] *Id.* at 1077.

sued for articles about a nightclub owner's involvement in the murders of two employees.[405] The nightclub owner, Nicholas A. Piscatelli, claimed that the fair comment defense would be of no avail because reporter Van Smith based his comments on defamatory false facts.[406] The highest court of Maryland, however, ruled that Smith's reporting would be protected because it was based on Piscatelli's privilege testimony at the murder trial.[407]

"Opinion" that has emerged as a narrow constitutional defense has its origin from the fair comment defense. To provide more concrete constitutional protections, the Supreme Court in *Gertz* stated in its dictum:

> Under the First Amendment there is not such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. This principle, together with the implication in Gertz that only a falsehood can be defamatory, seemed to lead to a simple but powerful syllogism: A defamation is actionable only if it is false: opinions cannot be proved false; therefore, opinions can never be actionable, no matter how derogatory they may be.[408]

But the *Gertz* dictum led to an unintended idea: opinions cannot be false; therefore, opinions can never be actionable.[409] Moreover, the post-*Gertz* courts confronted another hard question such as what is a protected opinion and what is an actionable assertion of fact.

To resolve this issues, the U.S. Court of Appeals for the D.C. Circuit in *Ollman v.*

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[405] Piscatelli v. Van Smith, 35 A.3d 1140 (Md. 2012).

[406] *Id*. at 1151.

[407] *Id*. at 1153.

[408] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

[409] Sack, *supra* note 81, § 4:2.3.

Evans[410] provided a useful criteria: For determining whether the average reader would view the statement as fact or opinion, the court will consider (1) the common usage or meaning of the specific language of the challenged statement itself; (2) "the verifiability" of the alleged defamation; (3) "the full context of the statement" such as the entire article or another unchallenged language; (4) "the broader context or setting in which the statement appears."[411]

In *Milkovich v. Lorain Journal,*[412] the U.S. Supreme Court refused to recognize a First Amendment privilege for "opinion" as a category of speech. A wrestling coach Michael Milkovich brought suit against a newspaper columnist who published an article that implied Milkovich had lied under oath. The Court held that the *Gertz* passage that "there is not such thing as a false idea" was not "intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"[413] Emphasizing that expressions of opinion may "often imply an assertion of objective fact,"[414] Chief Justice William Rehnquist rejected the idea that a statement such as "in my opinion John Jones is a liar" should be automatically protected by a separate privilege for "opinion."[415] Meanwhile, the Supreme Court, noting that defamatory statements as a matter of constitutional law must be based on provably false statements of fact, stated that

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[410] 750 F.2d 970 (D.C. Cir. 1984).

[411] *Id*. at 979-83.

[412] 497 U.S. 1 (1990).

[413] *Id*. at 18.

[414] *Id*.

[415] *Id.* at 19.

"imaginative expression," "rhetorical hyperbole," or "loose, figurative, or hyperbolic language" would not be actionable for libel.[416]

Although the opinion defense is applied to online expression, courts have been troubled in determining whether a statement is an opinion or fact, especially on social networking sites (SNS) such as Twitter or Facebook.[417] Due to the character limit on SNS, brief statements on SNS are frequently implicit and thus hard to make a distinction between facts and opinion. For instance, in *Patterson v. Grant-Herms*,[418] an agent of Southwest Airlines sued a passenger Natalie D. Grant-Herms who posted allegedly libelous statements on her Twitter and Facebook sites. Grant-Herms posted comments such as "the WORST customer service" on her SNS and the airline's website.[419] The Court of Appeals of Tennessee held that Grant-Herms' statements were "expression of her frustration and complaints" about the flight experience, and thus those statements did not rise to the level of actionable defamation.[420] Yet the court did not suggest whether there could be a difference between online expression on SNS and statements on

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[416] *Id*. at 19-20.

[417] Celebrities Courtney Love and Kim Kardashian were sued for their libelous Twitter messages. For a discussion of these "Twibel", s*ee* Julie Hilden, *Should the Law Treat Defamatory Tweets the Same Way It Treats Printed Defamation?*, Justia.com, Oct. 3, 2011, http://verdict.justia.com/2011/10/03/should-the-law-treat-defamatory-tweets-the-same-way-it-treats-printed-defamation (last visited Oct. 19, 2014).

[418] M2014-00287-COA-R3CV, 2013 WL 5568427 (Tenn. Ct. App. Oct. 8, 2013).

[419] *Id.* at *2.

[420] *Id*. at *4.

traditional media.[421]

Similarly, there have been lawsuits regarding the customer review websites. Some courts found that customers' gripes would be likely recognized as expression of subjective opinion rather than facts.[422] Given that the websites for review or rating are dedicated to consumers' appraisals or critiques on goods and services, more free expression should be allowed unless it includes substantially false facts.

3. Fair Report Privilege and Neutral Reportage

The fair report privilege, as one of the common law privileges, permits the press to republish reports of judicial, legislative, or executive proceedings if the press report is "accurate and complete or a fair abridgment of the occurrence reported."[423] Historically, the fair report privilege has promoted the system of self-governance through fair and accurate report of official proceedings.[424] In order to be entitled to the privilege, the publication in issue must clearly attribute the statement to the official proceeding or documents from which it is quoting. For example, a blogger, who stated that a person is reputed to be an embezzler without consulting official documents, will not be immunized

[421] For an informative review of SNS defamation cases, see Matthew E. Kelley & Steven D. Zansberg, *140 Characters of Defamation: The Developing Law of Social Media Libel*, 18 J. INTERNET L. 1 (2014).

[422] *See e.g.*, Seaton v. TripAdvisor LLC, 728 F.3d 592 (6th Cir. 2013) (holding that listing a hotel as the "dirtiest hotel in America" was a non-actionable exaggeration); *Agora, Inc. v. Axxess, Inc*, 90 F. Supp. 2d 697 (D. Md. 2000) (holding that rating a financial newsletter as "unpaid promoter" of stocks was a protected opinion).

[423] RESTATEMENT (SECOND) OF TORTS § 611 (1977).

[424] Solaia Technology, LLC v. Specialty Pub. Co., 852 N.E.2d 825, 842 (Ill. 2006).

even though a prosecutor in a court had made such a false statement.[425]

The fair report privilege is able to overcome the common law malice or the "actual malice" of *Sullivan*,[426] for this privilege exists even when the publisher knows the defamatory comments to be false. Hence, abuse of this privilege occurs when the publisher does not deliver a fair and accurate report about the official proceedings.[427]

The fair report privilege can be extended to online publication. In *Amway Corp. v. Procter & Gamble Co.*,[428] Amway sued Proctor & Gamble and an operator of an anti-Amway website. The website operator published a complaint filed by Proctor& Gamble against Amway in a federal district court and alleged that Amway used an illegal pyramid scheme.[429] The U.S. Court of Appeals for the Sixth Circuit held that website posting of complaint was protected under the fair report privilege of Michigan defamation statute, since the defendants did not add any statement to the actual complaint before online publication.[430]

But not all the online publishers fall within fair report privilege. In *Ascend Health Corp. v. Wells*,[431] blogger Brenda Wells was sued for disparaging comments about a private hospital and its doctors on her two blogs and Facebook. A federal district court in

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[425] Sack, *supra* note 81, § 7:3.5 [B][1].

[426] *Sullivan*, 365 U.S. at 843.

[427] RESTATEMENT (SECOND) OF TORTS § 611, comment *a*, at 297-98 (1977).

[428] 346 F.3d 180 (6th Cir. 2003).

[429] *Id*. at 181.

[430] *Id.* at 189.

[431] No. 4:12-CV-00083-BR, 2013 WL 1010589 (E.D.N.C. Mar. 14, 2013).

North Carolina examined whether Wells' blog was entitled to fair report privilege under Texas defamation law. The court ruled that the fair report privilege could not be applied to the blog because the Texas law only extends the fair report privilege to newspapers and "other periodical[s]."[432] The court stated that Well's blog was not akin to a newspaper or other periodicals, since the blogs were not composed of articles and news items and not published at regular intervals.[433] To apply the fair report privilege, the notion of "the press" will pose continuous problems in cyberspace.

Although the fair report privilege strongly protects the press republication, such protection might be limited: the fair report privilege is only applied to the stories related to official proceedings. Sometimes a statement can be newsworthy "simply because it is made."[434] To address this issue, courts have developed the constitutional protection for republication of newsworthy statements under the "neutral reportage" privilege. The Second Circuit in *Edwards v. National Audubon Society*[435] stated:

> Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish

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[432] *Id*. at *10.

[433] *Id.*

[434] Sack, *supra* note 81, § 7:3.5. For more in-depth discussions on the neutral reportage privilege, see Joseph A. Russomanno & Kyu Ho Youm, *"Neutral Reportage" and its Second Decade: A Marketplace Perspective*, 3 COMM. L & POL'Y 439 (1998).

[435] 556 F.2d 113 (2d Cir. 1977).

them without fear of liability for defamation.[436]

The neutral reportage, which the U.S. Supreme Court has not yet ruled on, is more media-friendly than the actual malice rule: the press defendant can be protected from reporting false statement even if the defendant knew about the falsity of statement. So the press can more easily avoid liability for republishing newsworthy allegations about public figures.

While some state and lower federal courts have adopted the neutral reportage privilege,[437] the privilege has more often been rejected.[438] For instance, the Court of Appeals of Michigan refused to accept the privilege because the press was "adequately protected" by the *Sullivan* rule.[439] The U.S. Court of Appeals for the Third Circuit in *Dickey v. CBS Inc.*[440] stated that neutral reportage had its foundation on the questionable "newsworthiness" of the alleged defamatory statements, which the Supreme Court had rejected.[441] More recently, the Supreme Court of Pennsylvania in *Norton v. Glenn,*[442] a decisive case against neutral reportage, strongly repudiated the privilege as a libel

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[436] *Id*. at 120.

[437] *See, e.g.,* Ward v. News Group Int'l, Ltd., 733 F. Supp. 83 (C.D. Cal. 1990); Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc., 738 F. Supp. 1499 (D.S.C. 1989).

[438] *See, e.g.*, Engleszos v. Newspress & Gazette Co., 980 S.W.2d 25 (Mo. Ct. App. 1998); Brady v. Cox Enters, Inc., 782 S.W.2d 272 (Tex. Ct. App. 1989); Janklow v. Viking Press, 378 N.W.2d 875 (S.D. 1985); Barry v. Time, Inc., 584 F. Supp. 110 (N.D. Cal. 1984).

[439] Postill v. Booth Newspapers, Inc., 325 N.W.2d 511, 518 (Mich. Ct. App. 1982).

[440] 583 F.2d 1221 (3d Cir. 1978).

[441] *Id*. at 1226 n.5.

[442] 860 A.2d 48 (Pa. 2004).

defense, since the balance between reputation and the media freedom could not be so sharply tilted in favor of protecting the media.[443]

C. *Sullivan* and Its Progeny: Constitutionalizing Libel Law

The U.S. Supreme Court's "consistent view" of defamation before *Sullivan* was that defamatory statements were entirely outside the First Amendment.[444] Very much similar to English common law of libel, the pre-*Sullivan* libel law burdened the libel defendant with strict liability. The *Sullivan* Court began the process of constitutionalizing libel law, holding that a public official could not recover damages for a defamatory falsehood without proving "actual malice."

1. *Sullivan*: Constitutional Revolution for Press Freedom

The *Sullivan* case started from the civil rights campaign in the South. On March 29, 1960, the *New York Times* published a full-page advertisement titled "Heed Their Rising Voices" to defend Dr. Martin Luther King Jr. who was arrested in charge of a perjury. After the advertisement was published, L. B. Sullivan, a city commissioner in Montgomery, Alabama, sued the *New York Times* for libel in Montgomery County.[445] Because Sullivan was the commissioner who supervised the police in Montgomery, he claimed that the word "police" accused him of coercing Dr. King's protests with "intimidation and violence."[446] The Supreme Court of Alabama affirmed the trial judge's ruling against the *New York Times*, pointing that "malice could be inferred from the

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[443] *Id*. at 57.

[444] *Gertz*, 418 U.S. at 384-85 (White, J., dissenting).

[445] *Sullivan,* 376 U.S. at 256.

[446] *Id.* at 258.

Times' irresponsibility in printing the advertisement" without checking facts from its previously published articles.[447]

The U.S. Supreme Court unanimously reversed the Alabama Supreme Court's judgment, stating that the Alabama courts failed to safeguard freedom of speech in a defamation lawsuit brought by a public official.[448] Justice William J. Brennan of the Supreme Court, who wrote the opinion of the Court, stated that the public debate often can be "uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[449]

After reviewing the history of the Sedition Act, the U.S. Supreme Court recognized that erroneous statement was "inevitable in free debate" and should be protected to give freedom of speech the "breathing space" to survive.[450] To support the public's "privilege for the citizen-critic of government,"[451] the Court established the "actual malice" rule:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[452]

As a result, the U.S. Supreme Court established a rule that a public official could win a

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[447] *Id*. at 263.

[448] *Id*. at 264.

[449] *Id*. at 270.

[450] *Id*. at 272.

[451] *Id.* at 282.

[452] *Id*. at 279-80.

libel suit relating to criticism of his official conduct only when he could prove "actual malice." *Sullivan* was welcomed as a landmark decision in support of freedom of expression.[453]

2. The Aftermath of *Sullivan*: Extending the Actual Malice Rule

To explain the effect of libel law on news media, professors John Soloski and Randall Bezanson argued that libel law is a "prism" of journalism in a given society:

> Libel represents the most dramatic and frequent conflict at the intersection of law and journalism, and it thus involves the judicial system in a surprisingly broad array of questions, ranging from the meaning of reputation in an organized society, the modes of interpreting words and symbols, and the very idea of falsity, on the one hand, to the mundane facts of journalistic existence, such as the reliability of sources, the confidentiality of sources, and the limits of acceptable misquotation. Libel law, therefore, is effectively a prism through which the entire journalistic enterprise is explored.[454]

When looked though the prism of libel law, the U.S. Supreme Court has approached libel law in the framework of giving more protection to freedom of speech and the press since *Sullivan*.

Three years after the *Sullivan* decision, the actual malice rule has been extended to include "public figures" in *Curtis Publishing Co. v. Butts.*[455] Writing the plurality opinion, Justice John Marshall Harlan noted access to the media as a justification to require public figures to prove "actual malice" in defamation lawsuits. Justice Harlan

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[453] *See, e.g.,* Harry Kalven Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. For a comprehensive discussion of *Sullivan*, see ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1991).

[454] John Soloski & Randall P. Bezanson, *A Concluding Note*, *in* REFORMING LIBEL LAW, 369, 374 (John Soloski & Randall P. Bezanson eds., 1992).

[455] 388 U.S. 130 (1967).

held that public figures, like public officials, have often played a substantial role in ordering society and had as ready access as public officials to mass media to influence policy and to counter criticism of their ideas and activities.[456]

The "actual malice" rule was applied to even private figures related to the matter of public interest in *Rosenbloom v. Metromedia.*[457] A plurality of the *Rosenbloom* Court observed that the First Amendment's impact on defamation law after *Sullivan* stemmed not so much from the plaintiff's status but from "the question whether the allegedly defamatory publication concerns a matter of public or general interest."[458] The Court held that the public's primary concern might be "in the event," in other words, whether the allegations involved a matter of a public concern.[459] Hence, even a private figure involved in matters of public concern was required to prove "actual malice" under the *Rosenbloom*.[460]

Yet *Rosenbloom* was overruled after three years by *Gertz v. Robert Welch, Inc*.[461] The U.S. Supreme Court found differences between public official/figures and private figures. To begin with, public officials and public figures have more chances than private individuals to rebut false statements as a "self-help" remedy. Secondly, public figures

[456] *Id*. at 164.

[457] 403 U.S. 29 (1971).

[458] *Id.* at 44.

[459] *Id.*

[460] *Id*. at 43. For the argument of reviving the *Rosenbloom* rule, see Amy Kristen Sanders & Holly Miller, *Revitalizing Rosenbloom: The Matter of Public Concern Standard in the Age of the Internet*, 12 FIRST AMEND. L. REV. 529 (2014) (proposing that the matter of public concern standard should be adopted by abandoning the plaintiff status distinction).

[461] 418 U.S. 323 (1974).

voluntarily take the risk of strict public scrutiny than ordinary people.[462] The *Gertz* Court emphasized the dangerous application of strict liability for defamation on the grounds that coercing a speaker to guarantee the accuracy of his factual assertions may result in intolerable self-censorship.[463] To resolve conflicts between freedom of speech and reputational interests, the *Gertz* Court ruled that public figures must prove "actual malice" to win their libel lawsuits while private figure plaintiffs only had to prove some degree of fault.[464] In addition, the Court held that the states would not permit recovery of presumed or punitive damages without showing "actual malice."[465] But the *Gertz* Court failed to provide a clear standard for determining who is a "public figure."

Public figures and public officials in U.S. libel law are required to prove "actual malice" to win libel lawsuits. By contrast, private plaintiffs must prove at least negligence in all states to win, whereas they have to prove "actual malice" to win punitive or presumed damages. The U.S. Supreme Court, however, revisited the public concern standard in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[466] Dun & Bradstreet, a credit reporting agency, sent its subscribers a false report that Greenmoss Builders filed for bankruptcy.[467] Greenmoss sued the Dun & Bradstreet. Writing for the plurality, Justice Lewis F. Powell held that the *Gertz* rule on punitive and presumed

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[462] *Id*. at 344.

[463] *Id*. at 350.

[464] *Id*. at 347-48.

[465] *Id*. at 349.

[466] 472 U.S. 749 (1985).

[467] *Id.* at 751.

damages was not applicable to the case that did not involve matters of public concern.[468] Justice Powell reasoned that the state had a stronger interest in protecting private individuals' reputations, for they did not voluntarily thrust themselves to controversy and did not have effective means to access the media to rebut defamatory statements.[469] The Court concluded that the *Gertz* rule -- recovery of presumed and punitive damages requiring a showing of actual malice – would not be applied to private matters of "reduced constitutional value."[470]

But Rodney Smolla criticized *Dun & Bradstreet* for failing to set forth what fault level should be required for punitive and presumed damages in private figure and private matter lawsuits.[471] The private figure and private matter issue has been in dilemma. Several courts ignored *Dun & Bradstreet* in their fault discussions by relying on state precedents;[472] other courts simply refused to defer to *Dun & Bradstreet* by requiring private figure plaintiffs to prove "actual malice" when suing over a matter of public concern.[473] Media law professors Ruth Walden and Derigan Silver argued in 2009 that the unsolved questions from *Dun & Bradstreet* are likely to become more serious while the issues of private figures on private concerns will be more flourishing on the

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[468] *Id.* at 763.

[469] *Id.* at 765.

[470] *Id*. at 761.

[471] Smolla, *supra* note 75, §1:20.

[472] *See, e.g.,* Quigley v. Rosenthal, 327 F.3d 1044 (10th Cir. 2003); Wolfe v. MBNA Am. Bank, 485 F. Supp. 2d 874 (W.D. Tenn. 2007).

[473] *See, e.g*., Newberry v. Allied Stores, Inc., 773 P.2d 1231 (N.M. 1989); McDowell v. Credit Bureaus of Southeast, Missouri, Inc., 747 S.W.2d 630 (Mo. 1988).

Internet.[474]

The Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps*[475] held that the private plaintiff suing a media defendant relating to public concern was required to prove falsity, in addition to negligence under *Gertz*.[476] The Court reasoned that such a burden was required to ensure "true speech on matters of public concern."[477] Yet the holding of *Hepps* did not give any direction for the burden on a non-media defendant of proving as to matters of public interest. Thus while public officials bear the same burden of proof in media and non-media cases under the *Sullivan* case, the burden of proof in non-media cases for private figure plaintiffs is still unclear.[478]

For online defamation, it has been a much debatable issue whether the *Gertz* rule should apply to a defamed person on the Net. A federal district court in the District of Columbia ruled in *Ellis v. Time, Inc*.[479] that a photojournalist was a limited-purpose public figure when he had thrust himself into the forefront of a public online controversy.[480] Professional photojournalist Richard Ellis claimed on a CompuServe journalist discussion group that *Time* staged several photographs depicting child

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[474] Ruth Walden & Derigan Silver, *Deciphering* Dun & Bradstreet*: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases*, 14 COMM. L. & POL'Y 1, 39 (2009). For a detailed analysis of the implications of *Dun & Bradstreet* for American defamation law, see *id*.

[475] 475 U.S. 767 (1986).

[476] *Id.* at 768-69.

[477] *Id*. at 776.

[478] Smolla & Nimmer, *supra* note 186, § 23:7 (2014).

[479] No. Civ.A.94-1755 (NHJ), 1997WL 863267 (D.D.C. Nov. 18, 1997).

[480] *Id*. at *6.

prostitution in Russia.[481] Although *Time* stated that the photos were possibly staged, *Time* asserted in its editor's letter that Ellis had urged a Russian pimp to change his story about the pictures for money from *Time*. Ellis sued *Time* for defamation.

To determine whether Ellis was a public figure, the court asked three questions: Did there exist a "public controversy"? Did Ellis achieve a "special prominence in the debate"? And was the alleged defamation "germane" to Ellis' participation in the raging controversy?[482] Because Ellis initiated an online debate on the *Time* photographs,[483] the court found that Ellis played a major role on the public controversy and related defamation.[484] As a public figure, Ellis had to show that *Time* had published the libelous statement with "actual malice," but he was unsuccessful.[485] Still, the court refused to accept *Time*'s argument that "a person who posts a message on an electronic bulletin board is by definition a limited purpose public figure."[486]

Similarly, the Tennessee Court of Appeals held that a businessman must prove "actual malice" as a public figure online. In *Hibdon v. Grabowski*,[487] jet ski business owner Kerry Hipdon sued his business competitor George Grabowski for posting negative comments about his business practices on a news group website. The online

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[481] *Id*. at *1.

[482] *Id*. at *4.

[483] *Id*. at *5.

[484] *Id*.

[485] *Id*. at *12.

[486] *Id.*

[487] 195 S.W.3d 48 (Tenn. Ct. App. 2005).

controversy over Hipdon, the court noted, was "public" due to "the international reach of the Internet news group" website.[488] Because of the existing public controversy, the court considered Hipdon a "limited purpose" public figure when he injected himself into the controversy voluntarily by boasting about his business online.[489] Yet the Tennessee court's decision raises a question of whether every online user who has advertised or exposed his or her business on the Net would be treated as a public figure. Moreover, should an online controversy be treated as a "public controversy" because of the Internet's technological feature of wide accessibility?

In 2010, a student singer and actor was held not to be a public figure in spite of his promotion of his entertainment career on his website. In *D.C. v. R.R.*,[490] a high school student known by D.C. sued fellow students and their parents for defamation, hate crime, and intentional infliction of emotional distress in connection with derogatory website comments.[491] The California appellate court found that D.C. was not a public figure, because he did not "achieve pervasive fame or notoriety" and he was "not in the midst of particular public controversy."[492]

As shown above, American courts remain uncertain whether an online speaker who has initiated or participated in debates on controversial issues should be treated as a

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[488] *Id*. at 60.

[489] *Id.* at 62.

[490] 16 Cal. Rptr. 3d 399 (Cal. Ct. App. 2010).

[491] *Id.* at 405-6 (several fellow students posted threatening messages to kill D.C. due to a misperception of D.C.'s sexual orientation).

[492] *Id.* at 429-30.

public figure.[493] Given that Section 230 precludes individuals from obtaining a remedy from ISPs, the only way for getting a damage award in a libel lawsuit is suing the original online speaker. If the definition of a public figure under *Gertz* is sweepingly applied to online defamation, few defamed private individuals will be compensated for their reputational damage from the original speaker. Thus, the courts should be extra-cautious in broadening the public figure doctrine in online defamation law.

D. Summary and Conclusions

The impact of libel law on free speech and a free press is inevitable. Too much protection of reputation will result in far less room for the open marketplace of ideas. Thus, the balancing of reputation with freedom of expression has led common law and constitutional law to recognize several libel defenses.

The old common law libel defenses—truth, fair comment, and fair report privilege—were useful to the press in libel lawsuits in the past. But they were not sufficiently attentive to freedom of expression in conflict with reputation. They were often hampered by procedural and substantive conditions attached to their applications. Not surprisingly, truth and fair comment are not as crucial as they were in the pre-*Sullivan* era. The rules on truth as a defense have been revised because the burden of proof has shifted from the media to the plaintiff. Fair comment has been partially superseded by the constitutional defenses, although it remains important in some states.

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[493] For more discussion of *Gertz* on the Internet, see Jeff Kosseff, *Private or Public? Eliminating the Gertz Defamation Test*, 2011 U. ILL. J.L. TECH. & POL'Y 249 (2011) (proposing that courts, due to technological changes in the media, should require proof of actual malice in all libel cases, eliminating the public/private figure dichotomy); Ashley Messenger & Kevin Delaney, *In the Future, Will We All be Limited-purpose Public Figures?*, 30 COMM. LAW. 4, 6-7 (2014) (arguing that courts have to determine whether websites provide plaintiffs with access to effective channels on a case-by-case basis).

The *Sullivan* "actual malice" as a new constitutional test for defamation law has reconciled reputational interests with freedom of the press in favor of more vigorous public debates. "Actual malice" has informed American courts in ruling on libel issues for the past 50 years. As a result, the clear trend in American libel law since *Sullivan* has been to prioritize freedom of speech and the press over reputational interests.

The *Sullivan* rule, however, was designed primarily for the established news media that serve as a watchdog of government that deserve special constitutional protections against public officials and public figures. In the 21st century, the media environment has dramatically changed because of the Internet and other new media technologies. Bloggers and citizen journalists have emerged as an alternative to the legacy media. Individual Internet publishers are often sued for their postings on SNS and various websites.

In this fast-changing media environment, it can be questioned whether *Sullivan* and its progeny would survive in the Internet era. As the application of *Gertz* rule on the Internet illustrates, courts need to carefully examine whether to adjust traditional standards of libel law to cyber speech. Instead of focusing on the technological features such as the defamed individual's easy access to the Internet and voluntary participation in online discussion, attend should be focused on whether online speech in issue fulfills its purpose of "uninhibited, robust, and wide-open" public debate as the *Sullivan* court envisioned.

CHAPTER IV

DEFAMATION LAW IN THE UNITED KINGDOM

British defamation law remains not much different from what has evolved through the centuries of common law while it has become more media-friendly in recent years.[494] It presumes that defamatory statements are false and the burden of proving truth is on the defendant.[495] It is easier for a public plaintiff –a public official or public figure— to win a libel suit in England than in America, for the plaintiff does not have to prove the *Sullivan* "actual malice" on the part of he defendant.[496]

U.K. defamation law strikes the balance between speech and reputation in favor of reputation, while American law prefers freedom of speech.[497] This disparity between U.K. and U.S. law has led to "libel tourism," which has triggered debates about free-speech issues.[498] Congress in 2010 enacted the SPEECH (Securing the Protection of our

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[494] For recent liberalization of U.K. libel law, see *infra* Section C, "Reynolds and the Public Interest Defense."

[495] Smolla, *supra* note 75, § 1:9.50.

[496] David Hooper et al., *Survey of English Libel Law, in* MEDIA LIBEL LAW: MLRC 50-STATE SURVEY (Media Law Resource Center ed. 2010).

[497] *See e.g.,* Douglas W. Vick & Linda Macpherson, *An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law*, 49 FED. COMM. L.J. 621 (1997) (criticizing that the Defamation Act 1996 erected substantial obstacles for the press to fulfill its central role to warn the public of abuse of the governor's power while rejecting a public figure defense).

[498] For discussions of libel tourism, see Robert L. McFarland, *Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism*, 79 MISS. L.J. 617 (2010) (proposing traditional jurisdictional principles to respond to libel tourism instead of "adopting isolated non-recognition statutes such as the SPEECH Act"); Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment?,* 67 WASH. & LEE L. REV. 467 (2010) (suggesting that U.S. courts evaluate foreign judgments in a nuanced and discerning way instead of simply rejecting enforcement of such judgments); Daniel C. Taylor, *Libel Tourism: Protecting Authors and*

Enduring and Established Constitutional Heritage) Act[499] in response to a widely discussed U.K. libel tourism case, *Ehrenfeld v. Bin Mahfouz,*[500] to stop threat of libel laws from abroad.[501] In varying degrees, anti-libel tourism U.S. law has inspired the U.K. Parliament to enact the Defamation Act in 2013. The Defamation Act, which consists of seventeen sections, revised statutory law while codifying the common law principles. It is likely to effect a dramatic change in U.K. libel law.[502] The Defamation Act reflects the continuing liberalization of U.K. law that started in the late 1990s. Lord Donald Nicholls in *Reynolds* noted in 1999:

Preserving Comity, 99 GEO. L.J. 189, 226 (2010) (proposing federal legislation authorizing U.S. authors to sue foreign defamation plaintiffs for money damages).

[499] Section 4102(a) of the SPEECH Act states:

> (a) First Amendment Considerations.
> (1) In general. -- Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that –
> (A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located.

SPEECH Act, 28 U.S.C. § 4102 (2010).

[500] [2005] EWHC 1156 (QB) (American author Rachel Ehrenfeld wrote "Funding Evil: How Terrorism is Financed and How to Stop it" to reveal that international networks financed terrorists. Although only 23 copies of Ehrenfeld's book were sold in England, three Saudi Arabian financiers named in the book sued Ehrenfeld for defamation in England. The High Court ordered Ehrenfeld and her publisher to pay £10,000 in damages to the plaintiffs with additional £80,000 costs).

[501] For a thoughtful overview on libel tourism and the SPEECH Act, see HARRY MELKONIAN, DEFAMATION, LIBEL TOURISM AND THE SPEECH ACT OF 2010: THE FIRST AMENDMENT COLLIDING WITH THE COMMON LAW (2011) (maintaining that American courts need to revisit the refusal to grant comity in enforcing U.K. judgments, for English courts have permitted speech-friendly decisions since *Reynolds*).

[502] For a discussion of the UK Defamation Act of 2013, see *infra* Chapter VI, Section A.3, "Section 5 of the Defamation Act 2013."

> The common law has long recognised the 'chilling' effect of this rigorous, reputation protective principle [of libel law]. There must be exceptions. At times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In the wider public interest, protection of reputation must then give way to a higher priority.[503]

The liberalization of U.K. libel law has been reinforced by the House of Lords decision of 2006, *Jameel v. Wall Street Journal Europe*.[504] The U.K. courts[505] sought to promote the "public interest" libel defense to ensure that the U.K. law meets the requirement of Article 10 of the European Convention on Human Rights.[506]

This chapter examines U.K. defamation law to place Chapter VI on the Internet law in perspective. Section A analyzes the main elements of a cause of action in libel law. Section B reviews what libel defenses are available in U.K. law. Section C discusses the *Reynolds* defense and its impact on U.K. decisions. The final section offers a summary and conclusions of the ongoing libel law issues in the United Kingdom.

A. Elements of Defamation as a Tort

In common law, the plaintiff only has to prove that the published statement conveyed a defamatory meaning relating to him- or herself. So far as the falsity of the defamatory allegation is concerned, English defamation law does not require the plaintiff to prove the

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[503] Reynolds v. Times Newspapers Ltd [2001] 2 A.C. 127, 192-93 (H.L.).

[504] [2006] UKHL 44.

[505] In the U.K. legal system, the highest court is the Supreme Court, which opened in October 2009 with 12 Justices to hear appeals. Until opening of the Supreme Court, the House of Lords had been the highest court where 12 Law Lords heard cases from the lower courts, most often from the Court of Appeal. For more information on the U.K. judicial system, see *Introduction to the Justice System*, http://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/ or *the Supreme Court*, http://supremecourt.uk/about/index.html (last visited Sept. 17, 2014).

[506] Richard Mullender, *Case and Comment: Defamation, Fair Comment and Public Concerns*, 69 CAMBRIDGE L.J. 443, 443 (2010).

falsity of the statement's defamatory imputation.[507] The presumption that the defamatory statement is false has been justified to protect an individual's reputation.[508] In establishing a cause of action for defamation, the plaintiff has to prove three elements: the statement's defamatory nature, publication of the statement, and reference to the plaintiff.

1. Defamatory Statement

The defamatory statement is defined as "one which injures the reputation of another by exposing him to hared, contempt, or ridicule, or which tends to lower him in the esteem of right-thinking members of society."[509] But it is often difficult to determine what expression would expose a plaintiff to such reputational injury that it would justify a claim for damages. In *Berkoff v. Burchill*,[510] a media libel case of 1997, for example, a *Sunday Times* reporter wrote two articles about actor and director Steven Berkoff, describing him as "notoriously hideous-looking" like "Frankenstein."[511] After a high court ruled that such statements were defamatory of Berkoff, the reporter appealed.[512]

The majority of the Court of Appeal held that the reporter's story exposed Berkoff to ridicule and caused him to be avoided.[513] But Justice Peter Millett dissented, arguing that

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[507] Drummond-Jackson v. British Medical Association [1970] 1 All E.R. 1094, 1099.

[508] Mullis & Doley eds., *supra* note 252, at 33.

[509] Sim v. Stretch [1936] 2 All E.R. 1237, 1240 (H.L.).

[510] [1997] EMLR 139.

[511] *Id*. at 141.

[512] *Id*.

[513] *Id.* at 151.

the comments at issue were not attacks on his reputation but attacks on his appearance.[514] As the *Berkoff* case shows, the line between mockery and defamation is sometimes hard to draw.

To decide whether a news story is libelous, the article needs to be understood as a whole by readers. *Charleston v. News Group Newspapers Ltd*,[515] a 1995 House of Lords case, arose from publication of a story about two famous actors. The story's headline and its accompanying photograph showed that the actors posed in a pornographic way. Yet the text of the article itself contained no defamatory statements. The House of Lords held that the two actors' libel claim could not be founded on a headline or photograph in isolation from the text, and thus ordinary readers would not find defamatory meaning after reading the story as a whole.[516]

The Defamation Act 2013 creates a new hurdle to determine whether a statement is defamatory. It requires that "a statement is not defamatory unless its publication has caused or is likely to cause *serious harm* to the reputation of the claimant."[517] The new Defamation Act applies to defamation claims where the cause of action has arisen since January 1, 2014. The only decision in which the new Act has applied to date was *Cooke v. MGN Ltd*.[518] In August 2014, the *Cooke* decision discussed specifically the "serious harm" test under Section 1(1) of the Defamation Act. Ruth Cooke, chief of the Midland

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[514] *Id*. at 153.

[515] [1995] UKHL 6.

[516] *Id.*

[517] Defamation Act 2013, § 1(1) (emphasis added).

[518] [2014] EWHC 2831 (QB).

Heart Housing Association, sued the *Sunday Mirror* for a story that described her as "making money from the misery" of slum residents. In assessing the likelihood of "serious harm," Justice David Bean of the U.K. High Court paid attention to the newspaper's apology, which the *Sunday Mirror* published one week after publication of the challenged defamatory article.[519] The High Court considered the apology "sufficient to eradicate or at least minimize any unfavourable impression" from the original article, and thus there was no specific evidence of causing serious harm.[520] Yet Justice Bean offered little discussion of the meaning of "serious harm," so it remains unclear what kind of harm would amount to the "serious harm" under the Defamation Act 2013.

2. Publication

"Publication" in defamation law refers to communication of defamatory material to a person other than the plaintiff in a form capable of being understood by its recipients.[521] At common law, not only the original speaker of defamatory statements but also another person may be liable if the person participates in, secures, or authorizes the publication.[522] In *Slipper v. British Broadcasting Corp*.,[523] a BBC libel case of 1991, a retired policeman sued a filmmaker who depicted him as an incompetent police officer. He also sued BBC journalists who published film reviews that contained the filmmaker's

[519] *Id.* ¶¶ 20-2.

[520] *Id.* ¶ 44.

[521] Pullman v. Walter Hill & Co [1891] 1 QB 524, 527.

[522] Watts v. Times Newspapers Ltd [1997] QB 650, 670.

[523] [1991] QB 283.

defamatory statement.[524] The BBC journalists claimed that their defamatory repetitions should be actionable only when they had authorized the materials in issue. But the Court of Appeal disagreed, holding the journalists liable for any republication of defamatory material as long as republication was reasonably foreseeable.[525]

English libel law had followed the "multiple publication rule" in which each publication was an independent tort, and thus printers and distributors were liable even if they were unaware that the publication contained defamatory material.[526] The multiple publication rule had been criticized, especially with the development of online archives, for online publishers might have been potentially liable for any defamatory material accessed online long after their initial publication.[527] To address these concerns, the Defamation Act 2013 stipulated the "single publication rule,"[528] which replaces the multiple publication rule. The new rule applies to material which has already been published to the public, including publication to a "section of the public."[529] But it does not cover the subsequent publication if it is "materially different from the manner of first

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[524] *Id.* at 285.

[525] *Id.* at 301.

[526] The multiple publication rule stems from the case of Duke of Brunswick v Harmer [1849] 14 QB 185 (holding that the purchase of a single back issue of a newspaper 17 years after its original publication constituted a separate publication for a separate cause of action). The multiple publication rule was upheld in Times Newspaper Ltd. v. United Kingdom, [2009] ECHR 451, by the European Court of Human Rights. The Court, however, suggested that the libel proceedings against a newspaper "after a significant lapse of time" might interfere with freedom of the press.

[527] Ministry of Justice, *Defamation and the Internet: The Multiple Publication Rule* 8 (2009).

[528] Defamation Act 2013, § 8.

[529] *Id.* § 8(1)(a), (2).

publication."[530] But the single publication rule will likely generate questions over what constitutes a "section of the public" in the online context and how the "material difference" of a subsequent publication should be determined.[531]

3. Identification

Defamation is actionable only when the defamed person can be identified in the challenged defamatory publication.[532] To decide whether the publication is of and concerning the plaintiff, a "reasonable" person should understand that the defamatory imputation referred to the plaintiff.[533] If the name itself does not suffice to identify the defamed, the context of the publication will be taken into account.[534]

B. Defenses

The main common law libel defenses in England are (1) truth, (2) honest opinion, and (3) privilege.

1. Truth (formerly "Justification")

"Justification" means that the challenged statement is true or substantially true.[535] Because the crucial purpose of libel law is to compensate damage of the defamed, the plaintiff is not entitled to be compensated for a false reputation if the allegedly

[530] *Id.* § 8(4).

[531] BLACKSTONE'S GUIDE TO THE DEFAMATION ACT 2013, § 6.33 (James Price & Felicity McMahon eds., 2013).

[532] Knupffer v. London Express Newspapers Ltd. [1944] A.C. 116, 119 (H.L.) ("The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff.").

[533] *Id.* at 121.

[534] Jameel v. Dow Johns & Co Inc. [2005] EWCA Civ. 75, ¶ 45.

[535] The Government Defamation Bill renames the defense of justification as "truth."

defamatory statement is true.[536] The basis of the general principle of truth as a defense is that the "the law will not permit a man to recover damages in respect of an injury to a character which he does not or ought not to possess."[537] In addition, freedom of speech underpins the truth defense because free speech should not be curtailed unless the publication of the defamatory material is not wrongful.[538]

English law presumes falsity of the allegedly libelous statement so that the defendant must prove that the words were true.[539] But the media defendant challenged the rule of burden of proof. In *Berezovsky v. Forbes*,[540] a media libel case of 2001, the news media defendant argued that the defense of "justification" should be reassessed under the European Convention on Human Rights to relieve the burden of proof on the press. The Court of Appeal, however, rejected such argument and held that requiring the defendant to prove truth was not inconsistent with freedom of expression in order to protect ordinary people from the publication of unjustified falsehood.[541]

Section 2 of the Defamation Act 2013 codifies "justification" as a statutory defense of truth, replacing the common law defense of justification.[542] Even if some part of the

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[536] David PRICE, KORIEH DUODU & NICOLA CAIN, DEFAMATION LAW, PROCEDURE & PRACTICE 57 (4th ed. 2009).

[537] M'Pherson v. Daniels [1829] 10 B. & C. 263, 272.

[538] *See, e.g.,* Holley v. Smith [1998] Q.B. 726.

[539] Mullis & Doley eds., *supra* note 252, at 178.

[540] [2001] EWCA Civ. 1251.

[541] *Id.* ¶ 12.

[542] Defamation Act 2013, § 5(4) states: "The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed."

defamatory statement's imputations is not shown to be "substantially true," the defense will not be defeated if the false imputations do not "seriously harm" the plaintiff's reputation.[543] The defense of partial truth will likely raise the bar for the plaintiff in connection with the requirement of "serious harm" under Section 1.

2. Honest Opinion (formerly "Fair Comment")

The purpose of the "fair comment" defense is to protect "the right of the citizen honestly to express his genuine opinion on a matter of public interest, however wrong or exaggerated or prejudiced that opinion may be."[544] To rely on "fair comment" as a qualified defense, the defendant must prove that (1) the comment is a matter of public interest; (2) the comment is recognizable as comment, as distinct from an imputation of fact; (3) the comment is based on facts that are true or protected by privilege; and (4) the comment is fair in the sense that an honest person could have made the statement on the proved facts.[545]

Yet to distinguish an expression of opinion from a statement of fact is far from clear-cut. It is difficult to determine whether critical languages that include some portion of facts are opinions.[546] A good example is a libel case of the U.K. Court of Appeal that arose from comments by a noted British science writer, Simon Singh.[547] The British

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[543] *Id.* §5(3).

[544] Telnikoff v. Matusevitch [1991] 4 All E.R. 817, 826 (H.L.).

[545] Tse Wai Chun v. Cheng [2001] EMLR 777, ¶¶ 16-20 (Lord Nicholls).

[546] *See, e.g.,* Keays v. Guardian Newspapers [2003] EWHC 1565 (holding that offensive language in the newspaper's comment section was used in expression of the opinion).

[547] British Chiropractic Ass'n v. Singh [2010] EWCA Civ. 350.

Chiropractic Association (BCA) sued Singh over his writing on the *Guardian*'s opinion page in which he criticized the BCA for defending chiropractors who used treatments with little evidence on children with special conditions.[548] Justice David Eady of the High Court rejected Singh's fair comment defense because the judge considered his remarks as factual assertions, not an expression of opinion.[549] The Court of Appeal, however, reversed Justice Eady's ruling in 2010, holding that Singh's statement was an opinion.[550]

In part as a reaction to the *Singh* case, the new Defamation Act introduces a qualified privilege to protect peer-reviewed statements in scientific or academic journals.[551] The defense will be defeated where the plaintiff shows the publication was made with malice.[552]

In 2010, the U.K. Supreme Court reviewed the fair comment defense in *Joseph v. Spiller,*[553] the first libel decision by the newly opened Supreme Court. The defendant booking agency posted on its website a statement that the agency was "no longer able to accept bookings" for Craig Joseph and his other music players because they were "not professional enough to feature in our portfolio and have not been able to abide by the

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[548] *Id.* ¶ 1.

[549] British Chiropractic Ass'n v. Singh [2009] EWHC 1101, ¶ 14 (QB).

[550] *British Chiropractic Ass'n*, [2010] EWCA Civ., ¶ 33. The Court of Appeal added that the court "would respectfully adopt" what America judge Frank H. Easterbrook in *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) stated: "Scientific controversies must be settled by the methods of science rather than by the methods of litigation."

[551] Defamation Act 2013, § 6(1).

[552] *Id.* § 6(6).

[553] [2010] UKSC 53.

terms of their contract."[554] Justice Eady of the High Court struck out the fair comment defense, for the defendant's statement did not identify the matters on which it was based with sufficient particularity to enable the reader to judge for him- or herself whether it was well founded.[555] The Court of Appeal affirmed the High Court's ruling.[556]

The Supreme Court disagreed with the High Court and the Court of Appeal on how particular or general the facts underlying a statement of opinion should be to avoid liability for defamation. Noting that the burden on the defendant to prove facts should be reduced, the Supreme Court stated that the comment did not need to specifically identify the facts on which it was based to enable readers to verify for themselves.[557] Yet the comment should refer in general terms to the facts that led to the comment.[558]

Although the facts were not particularized, the Supreme Court found that the defendant had posted sufficiently identifiable facts.[559] Therefore, the court upheld the fair comment defense.[560] Furthermore, the Court pointed out that the social circumstances of libel law has changed due to the Internet:

> The creation of a common base of information shared by those who watch television and use the internet has had an effect which can hardly be overstated. Millions now talk, and thousands comment in electronically transmitted words,

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[554] *Id.* ¶ 14.

[555] [2009] EWHC 1152 (QB).

[556] [2009] EWCA Civ. 1075.

[557] [2010] UKSC 53.

[558] *Id.* ¶ 102.

[559] *Id.* ¶ 126.

[560] *Id.* ¶ 127.

> about recent events of which they have learned from television or the internet. Many of the events and the comments on them are no doubt trivial and ephemeral, but from time to time … libel law has to engage with them. The test for identifying the factual basis of honest comment must be flexible enough to allow for this type of case, in which a passing reference to the previous night's celebrity show would be regarded by most of the public, and may sometimes have to be regarded by the law, as a sufficient factual basis.[561]

As a consequence, the Supreme Court suggested reform of libel law to broaden the scope of fair comment.[562]

Section 3 of the Defamation Act has abolished the common law defense of fair comment and replaced it with "honest opinion." To rely on the defense, the defendant should show three conditions:

- The statement complained was a statement of opinion;
- The statement indicated the basis of the opinion, whether in general or specific terms;
- An honest person could have held the opinion of the basis of any fact which existed at the time of publication or anything asserted to be a fact in a privileged previous statement.[563]

Key differences between "fair comment" and "honest opinion" are the removal of the requirement of a "matter of public interest" and the simplification of the law on "any fact that existed" or "something asserted to be a fact" in an early privileged statement. It is expected that the new "honest opinion" defense would expand protection for free expression, shielding an honestly held opinion even if the speaker has grounded it in

[561] *Id.* ¶ 131 (Lord Walker).

[562] *Id.* ¶ 127 (Lord Phillips).

[563] Defamation Act 2013, § 3(1)-(4).

some false facts with other true factual support.[564]

3. Privilege

Although freedom of speech must be balanced with the protection of reputation, the law recognizes certain circumstances that it would be better for individuals to speak freely without fear of being sued.[565] This is the rationale behind the libel defenses of absolute and qualified privileges. *Absolute* privilege is a complete bar against any defamation action to provide complete protection for free speech,[566] and thus it cannot be defeated by the presence of malice. It applies to statements made in the course of judicial or quasi-judicial proceedings[567] by any participant in those proceedings such as judge, witness, counsel, and the parties themselves. In addition, absolute privilege protects statements in the course of parliamentary proceedings[568] and "a fair and accurate report of proceedings" in U.K. courts, the European Court of Justice, the European Court of Human Rights, and international criminal tribunals.[569]

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[564] Farrer & Co., *A Quick Guide to the Defamation Act 2013*, 25(2) ENT. L.R. 55, 57 (2014).

[565] Price *et al., supra* note 536, at 85.

[566] *See, e.g.*, Westcott v. Westcott [2008] EWCA Civ. 818, ¶ 32 (oral or written complaints made to police were absolutely privileged because the "due administration of criminal justice that complaints of alleged criminal conduct should always be capable of being made to the police free from fear that a person accused will subsequently involve the complainant in costly litigation.").

[567] The factors that determine whether a particular tribunal exercises a quasi-judicial role is (1) under what authority the tribunal acts; (2) the nature of the question into which it is its duty to enquire; (3) the procedure adopted by it in carrying out the inquiry; and (4) the legal consequence of the conclusion by the tribunal. *See* Trapp v. Mackie [1979] 1 All E.R. 489.

[568] Defamation Act 1996 § 13(4) protects "words spoken or things done in the course of, or for the purpose of or incidental to, proceedings in Parliament."

[569] § 14 of the Defamation Act 1996 protects "a fair and accurate report of proceedings in public before a court."

Qualified privilege is defeated when the defendant publishes the allegedly defamatory statement with a malicious motive. It covers news reports to the public at large of legitimate concern such as the proceedings of courts or of Parliament. This type of qualified privilege still exists, but it has mostly been replaced by the absolute privilege for reports of judicial proceedings in Section 14 of the Defamation Act 1996 and other qualified privilege for accurate and fair reports in Schedule 1 of the Defamation Act.[570] Those provisions were amended by the Defamation Act 2013. Section 7 of the new Act expands this privilege to court proceedings worldwide and to any court or tribunal established by the Security Council of the United Nations or by international agreement, irrespective of whether the United Kingdom is a party.[571]

One of the qualified privileges arises from a duty and interest defense, which is available if a publisher has "an interest or a duty, legal, social, or moral" to communicate the information and if the reader has a corresponding interest in receiving it, as long as the publisher was not malicious.[572] Publication to persons who lack the requisite interest in receiving the material is not privileged. Therefore, media publishers do not have the general duty or interest, but the common law has evolved to recognize occasions when the public interest requires protection for publication to the world at large. For instance, a fair and accurate report of the proceedings of the Parliament is privileged because such

[570] Schedule 1 of the Act states that a "fair and accurate report" of public proceedings of a legislature, court and so on and a "fair and accurate copy of or extract" from matter published by government or legislature can be protected under qualified privilege.

[571] Defamation Act 2013, § 7.

[572] Adam v. Ward [1918] A.C. 309, 334 (H.L.). *See also,* Toogood v. Spyring [1834] 1 C.M. & R. 181, 193 (qualified privilege for "common convenience and welfare for society); Macintosh v. Dun [1908] A.C. 390, 399 (H.L.) (qualified privilege for the "general interest of the society").

information should be communicated to members of the public "who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends."[573]

The reciprocity of duty and interest has to pass a strict test because matters of mere public interest are not regarded as privileged. Rejecting a claim of a blanket protection for "fair information on a matter of public interest," the Court of Appeal in *Blackshaw v. Lord*[574] noted that there would be "extreme cases where the urgency of communicating a warning is so great, or the source of information so reliable, that publication of suspicion and speculation is justified," for example, dangerous situations of "a suspected terrorist or the distribution of contaminated food or drugs."[575] Hence, a reciprocal duty and interest for a statement to the public at large occurs only in exceptional circumstances. Yet the defense of *Reynolds* privilege successfully limited the threats of libel lawsuits related to reporting on matters in public interest.

C. *Reynolds* and the Public Interest Defense

Reynolds v. Times Newspapers[576] has expanded the qualified privilege for the media to communicate information to the general public. Albert Reynolds, a former Prime Minister of Ireland, sued the *Times* over an article, which claimed that he was guilty of

[573] Wason v. Walter [1868] L.R. 4 Q.B. 73, 89 (holding *London Times* not liable for printing an account of a libelous debate in the House of Lords, so long as it was accurate and in good faith).

[574] [1984] Q.B.1 (no privilege for a newspaper that published press release from government press officer about the claimant).

[575] *Id*. at 26.

[576] Reynolds v. Times Newspapers Ltd [2001] 2 A.C. 127 (H.L.).

malpractice in carrying out his duties.[577] The newspaper argued that the public had a legitimate interest in knowing about Reynolds as a Prime Minister.[578] At the trial the jury returned a verdict in Reynolds' favor and awarded damages. The Court of Appeal denied the *Times* the qualified privilege for political speech.[579] The *Times* appealed to the House of Lords, arguing for a libel defense for "political information" as a new "subject matter" category of qualified privilege.

Lord Donald Nicholls, who delivered the majority opinion of the House of Lords, extended the duty and interest defense for those who published to the world at large. On the importance of press freedom, Lord Nicholls noted that the press serves "vital functions as a bloodhound as well as a watchdog"[580] and thus "[w]ithout freedom of expression by the media, freedom of expression would be a hollow concept."[581] To show how other countries have balanced press freedom with reputation, Lord Nicholls cited *New York Times v. Sullivan*[582] and other foreign cases.[583]

Although press freedom is significant, Lord Nicholls did not accept the *Times*'

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[577] *Id*. at 133.

[578] *Id*.

[579] [1998] EWCA Civ. 1172.

[580] *Reynolds*, [2001] 2 A.C. at 205.

[581] *Id*. at 200.

[582] 376 U.S. 254 (1964).

[583] *Reynolds,* [2001] 2 A.C. at 199 (*quoting* Hill v. Church of Scientology of Toronto, 126 D.L.R. (4th) 129 (1995) (Canada); Lange v. Australian Broad. Corp., 189 C.L.R. 520 (1997) (Australia), Nat'l Media Ltd. V. Bogoshi, 4 SA 1196 (1998) (South Africa,); and Lange v. Atkinson, 3 NZLR 424 (1998) (New Zealand)). Lord Nicholls did not indicate which case had informed his opinion in *Reynolds*.

argument that political speech should necessarily create a privilege for the press.[584] Such qualified privilege for the press, he stated, would fail to adequately protect an individual's reputation.[585] Especially, the politician defamed would have no means of clearing his name unless the press later retracts the allegations.[586] Further, it would be difficult to distinguish political information from other matters of public concern.[587] Lord Nicholls refused to embrace a new "subject matter" category of qualified privilege whereby publication of all "political information" would be privileged, regardless of the circumstances.[588] He also refused to shift the burden of proof to the plaintiff, because the defendant newspaper would know much more of the facts involved.[589] Lord Nicholls, however, set forth "responsible journalism" as a defense for the news media. He provided a non-exhaustive list of factors that a court should consider in determining whether a publication is "responsible" enough to be protected against liability:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject natter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The status of the information. The allegation may have already been the subject of an investigation.

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[584] *Id*. at 200.

[585] *Id.* at 201.

[586] *Id.*

[587] *Id.* at 203.

[588] *Id*. at 204.

[589] *Id*. at 203.

5. The steps taken to verify the information.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary.
8. Whether the article contained the gist of the claimant's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication including the timing.[590]

Under the *Reynolds* test, judges will closely scrutinize the circumstances surrounding the publication of the allegation in weighing free speech against reputation.

Although the subject matter in this case was of public concern, Lord Nicholls held that the *Times*' allegations were "not information the public had a right to know," for they were not a fair and accurate report due to the newspaper's exclusion of Reynolds' own explanation.[591] Therefore, the newspaper's failure to give its readers Reynolds' side of the story precluded the application of the "responsible journalism" privilege in the case.[592]

Nonetheless, *Reynolds* has broadened the application of the qualified privilege's "duty and interest" test.[593] The test has protected the British press more than ever while

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[590] *Id.* at 205.

[591] *Id.* at 206.

[592] *Id.* at 205-206. Lord Johan Steyn and Lord David Hope dissented from the majority on the "responsible journalism." Lord Steyn reasoned that the *Times* had not received adequate notice of the need to give evidence of all the circumstance of the publication; *See Id.* at 227. Lord Hope argued that the *Times*' failure to notice before publication did not go to the question whether the occasion was privileged but it related to the issue of malice; *see id.* at 237.

[593] DUNCAN AND NEIL ON DEFAMATION 204 (Brian Neil et al. eds., 3d ed. 2009). *See also* RUSSELL L. WEAVER, ANDREW T. KENYON, DAVID F. PARTLETT, & CLIVE P. WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH 33-34 (2006) (noting the

shielding the publisher against bearing the heavy burden of proving truth or fair comment.[594] The *Reynolds* privilege is not necessarily for the news media. But the media would be most likely to benefit from the new libel defense because it is generally the media that publish information of public interest to the public.[595]

However, the ten criteria of the *Reynolds* test have worked as ten "hurdles" for the press due to its vagueness and the *Reynolds* privilege was "a snare and an illusion" to the news media.[596] In fact, a number of *post-Reynolds* decisions found that news reporting challenged for defamation was not sufficiently responsible and could not pass the *Reynolds* test.[597]

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pre-*Reynolds* common law approach focused on media defendants being required to prove truth or fair comment, providing only limited privilege for the media).

[594] *See, e.g.,* GKR Karate v. Yorkshire Post Newspaper [2000] EMLR 410 (newspaper protected under *Reynolds* because of the importance of news material about a spokesman of the governing body); Al Fagih v. HH Saudi Research & Marketing Ltd. [2001] EWCA Civ. 1634 (holding that newspaper's failure to verify defamatory allegation not fatal to applying *Reynolds*). *See also* ANDREW T. KENYON, DEFAMATION: COMPARATIVE LAW AND PRACTICE 372 (2006) (arguing that the British media could raise more allegations of public interest under the *Reynolds* defense);

[595] Flood v. Times Newspapers [2012] UKSC 11, ¶ 44.

[596] Robertson & Nicol, *supra* note 67, at 160-61.

[597] *See, e.g.,* Gilbert v. MGN Ltd. [2000] EMLR 680 (news material was of far less public interest, and publication could be delayed until the newspaper had spoken to the plaintiff); Loutchansky v. Times Newspapers [2001] EWCA Civ. 536 (newspaper did not show urgency and failed to obtain plaintiff's comment); Miller v. Associated Newspapers Ltd. [2003] EWHC 2799 (QB) (no urgency to publish story, and minimal steps taken to verify information); Galloway v. Telegraph Newspapers [2004] EWHC 2786 (QB) (newspaper embellished allegations and did not allow plaintiff's comment); Henry v. BBC [2005] EWHC 2787 (QB) (broadcast not relate to public interest); McKeith v. News Group Newspapers Ltd. [2005] EWHC 1162 (QB) (newspaper had no duty and interest in reporting uncertain allegations); Radu v. Houston [2007] EWHC 2735 (QB) (media not sought comment from plaintiff and took no steps to verify information). *See also* David Hooper, Keith Mathieson, Mark Stephens et al., *Survey of English Libel Law, in* MEDIA LIBEL LAW: MLRC 50-STATE SURVEY 1331 (2010) ("Until *Jameel* ruling in the House of Lords only five defendants out of 17 in reported cases had been successful in raising a Reynolds defence at first instance or at interlocutory appeal stage.");

Confronting the growing criticisms of *Reynold*s, the House of Lords in 2006 revisited the privilege in *Jameel v. Wall Street Journal Europe*.[598] The *Wall Street Journal Europe* reported that Saudi billionaire businessman Mohammed Jameel was suspected of channeling funds to the Al-Qaeda while being monitored by the Saudi Arabian Monetary Authority at the request of the U.S. authorities.[599] Justice Eady of the High Court refused to apply the *Reynolds* defense because the newspaper failed to delay publication without waiting long enough for Jameel's comment.[600] The *Wall Street Journal Europe* appealed, but the Court of Appeal dismissed the appeal.[601]

Yet the House of Lords unanimously overturned the judgments of the High Court and the Court of Appeal. Lord Thomas Bingham held that the lower courts had erred in interpreting the *Reynolds* defense too narrowly. He pointed out that the newspaper article concerned a matter of great public interest and unsensational, that the reporter attempted to verify his story, and that Jameel's response was sought.[602] Lord Bingham characterized the publication at issue as "the sort of neutral, investigative journalism" that *Reynolds* privilege protected.[603]

House of Commons, Culture, Media and Sport Committee, *Press Standards, Privacy and Libel, Second Report of Session 2009-10*, at 45 (2010) (noting that lack of certainty of the *Reynolds* defense had made cases settled before they came to court).

[598] [2006] UKHL 44.

[599] *Id.* ¶ 1.

[600] [2003] EWHC 2945 (QB).

[601] [2005] EWCA Civ. 74 (QB).

[602] *Jameel*, [2006] UKHL, ¶ 35.

[603] *Id.*

For a more flexible application of *Reynolds*, Lord Leonard Hoffmann in *Jameel* set forth three questions: (1) whether the subject matter of the article was a matter of public interest;[604] (2) whether the inclusion of the defamatory statements was justifiable;[605] and (3) whether the steps taken to gather and publish the information were responsible and fair.[606] Applying the three-prong standard, Lord Hoffmann found that the *Wall Street Journal Europe* had important public interest and inclusion of Jameel's name was a substantial part of the story.[607] He also observed that the newspaper met the responsible journalism standards because it verified the story and provided an opportunity for comments to Jameel's adviser before publication.[608]

The first post-*Jameel* case was *Roberts v. Gable*[609] in which the Court of Appeal has applied the duty and interest test. Justice Alan Ward emphasized that the public would be entitled to know information when the article as a whole was in the public interest and the publisher achieved responsible journalism regarding its subject matter and value of the article to the public.[610] The judge found that the magazine article about political parties had a corresponding legitimate interest in the public as a piece of responsible

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[604] *Id*. ¶ 48.

[605] *Id*. ¶ 51.

[606] *Id*. ¶ 53.

[607] *Id*. ¶¶ 49-52.

[608] *Id*. ¶ 58.

[609] [2007] EWCA Civ. 721.

[610] *Id*. ¶ 32.

journalism.[611]

The *Times Newspaper* avoided liability for libel under the *Reynolds* privilege. In *Flood v. Times Newspapers*,[612] a detective sergeant Gary Flood sued the *Times* over a story that claimed he was the subject of internal police investigation for corruption.[613] The High Court ruled in favor of the newspaper under the *Reynolds* privilege,[614] but the Court of Appeal disagreed.[615] Justice David Neuberger of the Court of Appeal held that the *Times* journalists could not rely on *Reynolds*, for they did not verify the serious allegations responsibly when their only written evidence did not identify Flood as a person who received the alleged bribes.[616] Because the journalists had published the "unsubstantiated unchecked accusations," the court stated that it was not "responsible journalism."[617]

On appeal, however, the UK Supreme Court unanimously reversed the Court of Appeal decision.[618] Lord Nicholas Phillips held that the story was of high public importance because the journalists published it to ensure that police properly investigated

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[611] *Id*. ¶ 70. *See also* Charman v. Orion Publ'g Group Ltd, [2007] EWCA Civ. 972 (holding that the *Reynolds* defense should be applied to the media defendant which conducted responsible journalism while attempting to verify the information regarding police officer's corruption).

[612] [2010] EWCA Civ. 804.

[613] *Id.* ¶ 1-2.

[614] [2009] EWHC 2375 (QB).

[615] *Flood*, [2010] EWCA, ¶ 55.

[616] *Id.* ¶ 73.

[617] *Id.*

[618] *Flood*, [2012] UKSC 11.

the allegations.[619] He agreed with the *Times* on naming of Flood, although he was not a public figure, for it was impossible to publish the story without disclosing him as an officer to whom the story related.[620] The journalists' naming of the plaintiff involved responsible journalism and public interest.[621] Likewise, Lord Jonathan Mance supported the news media's editorial freedom to decide how much detail should be included in a news story. He noted, however, that journalists must consider carefully the public interest when accuracy of the allegations have not been determined.[622]

Meanwhile, "reportage" has emerged as a defense for the news media from the *Reynolds* "responsible journalism." Lord Hoffmann in *Jameel* stated:

> In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases ("reportage") in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at the trial.[623]

The reportage defense was adopted in 2001 by the Court of Appeal in *Al-Fagih v. HH Saudi Research and Marketing Ltd*[624] in which the defendant newspaper was sued for repeating a defamatory statement made by a member of the Saudi Arabian political

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[619] *Id*. ¶ 69.

[620] *Id*. ¶ 74.

[621] *Id*.

[622] *Id*. ¶ 177. *See also* Thomas D.C. Bennett*, Flood v. Times Newspapers Ltd – Reynolds Privilege Returns to the UK's Highest Court*, 23(5) ENT. L.R. 134 (2012) (noting that the Supreme Court in *Flood* has further developed *Reynolds* privilege with "more rounded consideration" of Lord Nicholls' ten factors).

[623] *Jameel,* [2006] UKHL, ¶ 62.

[624] [2001] EWCA Civ. 1634.

organization in England.[625] Although the newspaper had in no way attempted to verify the truth of the allegations, the Court of Appeal held that the newspaper could publish the statement to the public when it had reported the allegations in a neutral and balanced way.[626]

In *Roberts v. Gable,*[627] the Court of Appeal explicitly connected the U.K. "reportage" defense to an American libel case of 1977, *Edwards v. National Audubon Society,*[628] noting that there was no precedent regarding reportage in any commonwealth authority.[629] The Court of Appeal, calling reportage "a form of, or a special example of, Reynolds' qualified privilege," said the reportage not only had to be neutral but also must meet the standards of responsible journalism that was developed from *Reynolds*.[630] Applying the reportage defense, the court found the defendant magazine had reported the story neutrally in practicing responsible journalism.[631] Given that the standard of responsible journalism should guide reportage, however, it is still unclear how a journalist could demonstrate that he behaved responsibly when he did not make efforts to

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[625] *Id*. ¶ ¶ 2-3.

[626] *Id*. ¶ 52.

[627] [2007] EWCA Civ. 721.

[628] 556 F.2d 113 (holding that the defendant newspaper was privileged under the First Amendment if he reported accusations about the plaintiff fairly and accurately).

[629] *Roberts*, [2007] EWCA Civ., ¶ 44.

[630] *Id.* ¶ ¶ 60-61. *But cf*. Jason Bosland, *Republication of Defamation Under the Doctrine of Reportage—The Evolution of Common Law Qualified Privilege in England and Wales*, 31 OXFORD J. LEGAL STUD. 89 (2011) (arguing that reportage should be recognized as different privilege from *Reynolds,* focusing on when defamatory allegations have been made rather than when the allegations broadly related to public concern).

[631] *Roberts*, [2007] EWCA Civ., ¶ 70.

verify his defamatory statement before publication.[632]

The Defamation Act 2013 replaces the common law test developed in *Reynolds*. Section 4 of the Act states that the defendant may rely on a defense when it shows that the statement complained of was a "statement on a matter of public interest" or that the defendant "reasonably believed" that publication was in the public interest.[633]

Section 4(2) states that the court should "have regard to all the circumstances of the case."[634] Yet it needs to be clarified what would constitute "all the circumstances" that the court must consider. Although Section 4(2) emerged from parliamentary criticism of the *Reynolds* checklist approach, Lord Nicholls' ten factors in *Reynolds* will likely continue to be relevant as a "reminder of the principal factors" in future cases.[635]

Furthermore, Section 4(3) codifies neutral reportage as part of *Reynolds*, allowing news media to report on issues of public interest.[636] Yet the defense is also based on "reasonable" belief that publication of the statement was in the public interest. Such requirement of "reasonable belief" might restrict the application of the reportage defense, because the journalists are likely to confront difficulty in proving why he or she "reasonably" believed that the reported dispute involved public interest.

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[632] Godwin Busuttil, *Reportage: A Not Entirely Neutral Report*, 20(2) ENT. L. REV. 44, 49 (2009).

[633] Defamation Act 2013 § 4(1).

[634] *Id*. § 4(2).

[635] Price & McMahon eds., *supra* note 531, § 5.60.

[636] § 4(3) of the Act states: "If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it."

D. Summary and Conclusions

U.K. defamation law has followed the traditional common law. It presumes defamatory statements to be false and places the burden of proving truth on the defendant. Nonetheless, British courts have notably moved forward to more protection of freedom of speech since the late 1990s. Although the U.K. courts refused to adopt the U.S. "actual malice" rule, *Reynolds* and *Jameel* have allowed British news media greater protection by recognizing "responsible journalism" as a qualified privilege to report on matters of public interest. Furthermore, British courts have embraced the neutral reportage defense, which should be more speech-protective than "actual malice."

The judicial and non-judicial efforts in U.K. law to rebalance between reputation and freedom of speech have led to the wholesale reforms of the Defamation Act. The Defamation Act 2013 is likely to give more winning chances to the news media by requiring libel plaintiffs to establish their reputational "serious harm" and by codifying the "single publication" rule. In addition, the new Defamation Act adopts a statutory defense of "responsible" publication in the "public interest."

The new "public interest" defense is based on the common law defense developed since *Reynolds*. Yet the "public interest" defense is defined so vaguely that courts will have to determine what kinds of conducts of the press would be considered as "responsible" ones. If courts continuously stick to the list of *Reynolds* factors while scrutinizing the journalist's conducts, the new defense might not provide the kind of protection for the press that the proponents of the Defamation Act 2013 envisioned.

CHAPTER V

ISP LIABILITY FOR DEFAMATION IN THE UNITED STATES

Since Congress passed the Communications Decency Act (CDA) in 1996, Section 230 has guaranteed freedom of speech in cyberspace by immunizing Internet Service Providers (ISPs) against liability for content provided by third parties. Section 230 has been the most important law on online free speech so that as Yale law professor Jack M. Balkin noted, it has produced "enormous consequences for securing the vibrant culture of freedom of expression."[637]

Yet Section 230 is not perfect. The provision has attracted criticism mainly because of its broad protection of ISPs.[638] Critics argue that Congress should revise Section 230 because reputational harm online is so serious that it no longer can be overlooked.[639] By

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[637] Jack M. Balkin, *Free Speech and Press in the Digital Age: The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 434 (2009).

[638] For comments on § 230, see the "Literature Review" section of Chapter I. *See also* Solove, *supra* note 23, at 154:

> Section 230 might be read to grant immunity only before the operator of a website is alerted that something posted there by another violates somebody's privacy or defames her. If the operator of a website becomes aware of the problematic material on the site, yet doesn't remove it, then the operator could be liable.

[639] For suggested revisions of the CDA, see e.g., Michael Burke, *Cracks in the Armor?: The Future of the Communications Decency Act and Potential Challenges to the Protections of Section 230 to Gossip Web Sites*, 17 B.U.J. SCI. & TECH. L. 232 (2011) (arguing that court should treat online defamation cases under the pre-CDA common law); Colby Ferris, *Communication Indecency: Why the Communications Decency Act, and the Judicial Interpretation of It, Has Led to a Lawless Internet in the Area of Defamation*, 14 BARRY L. REV. 123 (2010) (suggesting that Congress adopt liability regime similar to DMCA or reinstate distributor liability for ISPs); Ali Grace Zieglowsky, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307 (2010) (claiming that the original purpose of § 230 is abused by courts and thus blanket immunity for ISPs should be reconsidered).

contrast, supporters claim that immunity under Section 230 has expanded online free speech.[640]

Nonetheless, problems with the actual or perceived abuse of Section 230 are increasingly in need of being addressed.[641] As ISPs do not have legal incentives to delete harmful contents under Section 230, malicious gossips and rumors on the Internet are attracting more viewers.[642] *JuicyCampus* had been notorious for its invitation to post vicious gossips at American colleges and universities.[643] Another infamous gossip website *TheDirty.com* was sued for defamation on the grounds that the website operator requested other users to post scandalous photos and demeaning comments on the photos.[644] Similarly, *Don'tDateHimGirl.com*, which invites users to post warnings about

[640] For articles that support § 230, see William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17 (2011) (claiming that § 230, as part of the nations' architecture of protection for free expression, should not be revised); Jeff Kosseff, *Defending Section § 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL'Y (2010) (arguing that courts have successfully limited § 230 immunity).

[641] In 2013, state Attorneys General asked Congress to exclude state criminal prosecutions from Section 230 to hold defendants liable for online contents. *See* Elizabeth Heichler, *U.S. States' Attorney General to Take Aim at Internet 'Safe Harbor' Law,* TECHHIVE**,** June 18, 2013, http://www.techhive.com/article/2042351/us-states-attorneys-general-to-take-aim-at-internet-safe-harbor-law.html (last visited Dec. 1, 2014).

[642] *See, e.g.,* Solove, *supra* note 23, at 50-75.

[643] *JuicyCampu*s was closed in 2009 for alleged economic reasons. *See* Official *JuicyCampus* Blog, http://juicycampus.blogspot.com/ (last visited Dec. 1, 2014).

[644] Nina Mandell, *Thedirty.com in Trouble Again for Publishing Alleged Nude Photos of TV Reporter Lauren Lee Gauck*, DAILY NEWS, June 2, 2011, http://articles.nydailynews.com/2011-06-02/news/29631811_1_nfl-cheerleader-forbes-com-mark-zuckerberg (last visited Dec. 1, 2014).

those whom they have dated with, was sued for defamation after it refused to remove the false personal information.[645]

This chapter examines why Congress included Section 230 in CDA and how American courts have interpreted Section 230 since 1997. Section A discusses pre-CDA cases on Internet defamation, the history and purposes of Section 230, and the threshold Section 230 case, *Zeran v. America Online, Inc*. Section B traces the development of ISP immunity under CDA and shows trends and analysis of Section 230 cases. The final section offers summary and conclusion about the impact of Section 230 on American free speech law.

A. Statutory Law

Before Congress enacted the CDA, ISP's liability was determined under the common law on republisher's liability. In 1996, Congress provided ISPs with broad immunity from tort claims. This section reviews how and why those statutory changes took place in the 1990s.

1. Early Cases Prior to the CDA

At common law, one who reproduces a defamatory statement faces the same liability as the originator of the statement.[646] The person who publicizes another's libel may be treated as a primary publisher, as a distributor, or as a conduit.[647] Primary publishers are

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[645] Debra Cassens Weiss, *DontDateHimGirl.com Suit Dismissed*, ABA JOURNAL, Apr. 9, 2007, http://www.abajournal.com/news/article/dontdatehimgirlcom-suit-dismissed/ (last visited Dec. 1, 2014).

[646] RESTATEMENT (SECOND) OF TORTS § 578 (1977) ("[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.").

[647] PROSSER & KEETON ON TORTS 810 (Prosser & Keeton eds., 5th ed. 1984).

generally held to a standard of liability comparable to that of authors because they actively cooperate in publication.[648] Distributors are subject to an intermediate standard of responsibility and may be held liable as publishers "if they knew or had reason to know" of the defamatory nature of the matter they disseminate.[649] Once a distributor knew the existence of defamatory material within its possession or under its control, it must remove the material to avoid its continued publication.[650] Conduits lack the ability to screen and control the information that they mediate and thus, conduits are generally immune from liability.[651]

Because ISPs republish defamatory statements by third parties, deciding on ISP's liability for their republication was an important issue in the early Internet era.[652] The first ISP-related online defamation case was *Cubby, Inc. v. CompuServe*.[653] CompuServe offered "CompuServe Information Service," which provided online users with access to information sources and forums.[654] One of the forums was a journalism forum managed by a subcontractor, which contracted in turn with a publisher of a newsletter titled

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[648] RESTATEMENT (SECOND) OF TORTS § 578 (1977).

[649] Church of Scientology v. Minn. State Med. Ass'n Found., 264 N.W.2d 152, 156 (Minn. 1978); RESTATEMENT (SECOND) OF TORTS § 578(1) (1977).

[650] RESTATEMENT (SECOND) OF TORTS § 577(2) (1977).

[651] *Id*. § 612(1977). Courts have relieved telegraph companies of liability for transmitting defamatory expressions to their customers. *See* Annotation, *Liability of Telegraph or Telephone Co. for Transmitting or Permitting Transmission of Libelous or Slanderous Messages*, 91 A.L.R.3d 105 (1979).

[652] Jay M. Zitter, *Annotation, Liability of Internet Service Provider for Internet or E-Mail Defamation*, 84 A.L.R. 5th 169 (2000).

[653] 776 F. Supp. 135 (S.D.N.Y. 1991).

[654] *Id.* at 137.

"Rumorville USA."[655] When Cubby, Inc. developed a competing online gossip forum, the Rumorville alleged that Cubby obtained contents "through some back door" and was "bounced" from his previous employer.[656] Cubby filed a libel lawsuit against CompuServe instead of the Rumoville, accusing that CompuServe was a publisher of the false and defamatory statements.[657]

The U.S. District Court for the Southern District of New York held that CompuServe was a distributor. The reason was that CompuServe did not have authority to review the Rumorville's contents and thus could not be held liable for defamation unless Cubby proved that CompuServe knew or had reason to know of the defamatory contents when it distributed them to its subscribers.[658]

In addition, the *Cubby* court relied on a 1987 decision in which an ISP was decided as a distributor. In *Daniel v. Dow Jones & Co*.,[659] a news database of *Dow Johns* was sued for issuing an allegedly false news report on investment. The New York City Civil Court[660] held that the news service of *Dow Jones* was functionally identical to the

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[655] *Id.*

[656] *Id*. at 138.

[657] *Id.*

[658] *Id.* (*quoting* Smith v. California, 361 U.S. 147 (1959), in which the U.S. Supreme Court struck down an ordinance that imposed liability on a bookseller for possession of an obscene book regardless of whether the bookseller knew of the book's contents).

[659] 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987).

[660] The Civil Court of New York has jurisdiction over civil cases involving up to $25,000 and other civil matters. *See* New York State Unified Court System, http://www.courts.state.ny.us/courts/nyc/civil/index.shtml (last visited Dec. 1, 2014).

"distribution of a moderate circulation newspaper or subscription newsletter."[661] The court stated that the First Amendment protected the Dow Jones news service from liability to its subscribers: "The defendant's service is one of the modern, technologically interesting, alternative ways the public may obtain up-to-the-minute news. It is entitled to the same protection as more established means of news distribution."[662] Therefore, the *Cubby* court viewed computer database as a distributor of news information in the modern society and concluded that the ISP as a distributor was not liable for defamation while not exercising control over the bulletin board.[663]

Four years after *Cubby*, however, a New York City trial court made a contrary decision in which an ISP was found to be a "publisher" of defamatory statements posted on its bulletin. In *Stratton Oakmont, Inc. v. Prodigy Service*s Co.,[664] an anonymous user posted derogatory statements on a bulletin board "Money Talk" hosted by Prodigy Services Company.[665] The posted message alleged that a securities-investment firm Stratton Oakmont committed criminal and fraudulent acts relating to stock offers.[666] Prodigy claimed that it could not review 60,000 messages a day posted on the bulletin and thus should be immunized as an innocent distributor.[667]

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[661] *Id.* at 337.

[662] *Id.* at 340.

[663] *Cubby*, 776 F. Supp. at 143-44.

[664] 1995 WL 323710, slip op. (N.Y. Sup. Ct. May 24, 1995).

[665] *Id.* at *2.

[666] *Id.*

[667] *Id*. at *3-4.

To determine the role of Prodigy, a New York trial court in *Stratton Oakmont* reviewed *Cubby* in which CompuServe was considered an equivalent of a newsvendor.[668] The *Stratton Oakmont* court found two important distinctions between Prodigy and CompuServe: First, Prodigy held itself out that it exercised editorial control over its contents to differentiate itself from other ISPs and compared itself to a newspaper;[669] Second, Prodigy maintained editorial control through its automatic screening software and created an editorial staff to enforce the guidelines.[670] Thus, the court found that Prodigy was a publisher rather than a distributor with the substantial editorial power to monitor the bulletin board.[671]

Yet the *Stratton Oakmont* decision was controversial. The substantial issue was whether Prodigy exercised "sufficient" editorial control.[672] Although Prodigy argued that reviewing all contents was almost impossible, the court held that Prodigy was a publisher because Prodigy advertised that it had exercised editorial control and hired staff members to check contents. Prodigy's advertisement about editorial judgment might have been a marketing strategy, but the court did not consider whether Prodigy had really edited or censored postings on its service.

While reaching different conclusions under the common law liability, the courts in *Cubby* and *Stratton Oakmont* failed to understand the unique feature of the Internet. The

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[668] *Id.* at *4 (*quoting Cubby*, 776 F. Supp. 135, 140).

[669] *Id*.

[670] *Id.*

[671] *Id.* at *5.

[672] *Id*. at *3.

courts did not pay attention to the role of ISPs in online publications, while primarily focusing on whether the ISPs in question exercised editorial control over online postings. So, *Cubby* and *Stratton Oakmont* yielded a paradox: If an ISP exerts no editorial control over contents on its computer, it will be free from liability, while if an ISP tries to exercise editorial control over harmful contents, it will be held liable for its contents.

Recognizing this irony that ISPs might give up editorial control to avoid publisher liability, *Stratton Oakmont* stated that the proposed Communications Decency Act would preempt this issue.[673] Indeed, *Stratton Oakmont* provided a strong incentive for Congress to pass the CDA in order to protect ISPs that police online contents.[674]

2. Section 230 of the CDA

The Communications Decency Act (CDA) provides immunity under the heading "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material":

> (1) Treatment of publisher or speaker
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
> (2) No provider or user of an interactive computer service shall be held liable on account of: (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[675]

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[673] *Id.*

[674] *See infra* text accompanying Section 2.

[675] 47 U.S.C. § 230(c).

The CDA was originally designed to prohibit transmission of obscene and indecent materials via telecommunication devices.[676] In 1995, Sen. James Exon and Sen. Slade Gorton proposed the CDA to "provide much needed protection for children" against online pornography.[677] Sen. Exon's proposal was a response to a serious social issue about online pedophiles and obscene materials.[678]

Yet the original Senate bill of the CDA did not include Section 230. Later, Rep. Chris Cox and Rep. Ron Wyden proposed a bill to add Section 230 as amendment of Title II of the Communications Act of 1934 to "encourage and protect private sector initiatives that improve user control over computer information services."[679] Section 230 states that its goal is to promote "the continued development of the Internet and other interactive computer services and other interactive media to preserve the vibrant and competitive free market… unfettered by Federal or State regulation."[680]

Rep. Cox, one of the Section 230 sponsors in Congress, spoke of its two main purposes: First, Section 230 will protect "computer Good Samaritans," i.e. ISPs, from the kind of liability that was imposed in the *Stratton-Oakmont* case when they screen

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[676] *Id.* § 223(a)(1)(B), (d)(1).

[677] 141 Cong. Rec. S8090 (daily ed. June 9, 1995) (statement of Sen. Exon).

[678] Sen. Exon presented a blue binder of "disgusting materials" that was available online at that time. *See* Charles A. Gimon, *Exon Amendment Passes the Senate*, INFONATION, http://www.gimonca.com/personal/archive/exon.html (last visited Sept. 4, 2014).

[679] H.R. 1978, 104th Cong. (1995).

[680] 47 U.S.C. § 230(b) (2006).

indecency and offensive material for their customers; Second, it will establish as the policy that online contents would not be regulated by the federal government.[681]

Hence, the important purpose of Section 230 was overruling *Stratton-Oakmont* and protecting ISPs that screen harmful contents as "Good Samaritans." The Conference Report explains:

> One of the specific purposes of this section [Section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decision which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of commutations their children receive through interactive computer services.[682]

Another Congressman criticized the absurdity of *Stratton Oakmont*, noting that Section 230 intended to provide ISPs with a reasonable way to "self-regulate themselves without penalty of law."[683] Likewise, Rep. Bob Goodlatte claimed that ISPs should not be held liable as publishers because it would be impossible for ISPs to edit "thousands of pages of information everyday" on their websites.[684]

Another significant purpose of Section 230 was to protect online communication from government coercion.[685] Congress recognized that the Internet and ISPs would "offer a forum for a true diversity of political discourse, unique opportunities for cultural

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[681] 141 Cong. Rec. H8469-H8470 (daily ed. Aug. 4, 1995).

[682] Joint Explanatory Statement of the Congressional Conference Committee, H.R. Conf. Rep. No. 104-458, at 194 (1996), *reprinted in* 142 Cong. Rec. H1078, H1138 (Jan. 31, 1996).

[683] 141 Cong. Rec. H8460-H8461, H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Barton).

[684] *Id*. at H8471.

[685] 141 Cong. Rec. H8469-H8470 (daily ed. Aug. 4, 1995).

development, and myriad avenues for intellectual activity"[686] and they have "flourished, to the benefit of all Americans, with a minimum of government regulation."[687] Thus, Congress stated that the U.S. policy was "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[688] To ensure against government regulation, Rep. Cox and Rep. Wyden emphasized the collaboration of private sectors -- parents, schools, and ISPs -- to prevent objectionable online materials from reaching children.[689]

Congress trusted ISPs as reliable gatekeepers to check dangerous materials vigorously and to protect freedom of speech online. Section 230, however, has changed the whole landscape of the Internet while providing blanket immunity for ISP's tort liability.[690]

3. Threshold Ruling on Section 230: *Zeran v. America Online*

One year after enactment of the CDA, the U.S. Court of Appeals for the Fourth Circuit made the first appellate decision on Section 230.[691] The *Zeran* case started in 1995 when an unidentified person posted an advertisement on the America Online

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[686] 47 U.S.C. § 230(a)(3).

[687] *Id*. § 230(a)(4).

[688] *Id*. § 230(b)(2).

[689] *See, e.g.*, *Congressmen Cox and Wyden Demonstrate New Internet Blocking Technologies*, BUSINESS WIRE, July 17, 19995, http://www.thefreelibrary.com/Congressmen+Cox+and+Wyden+demonstrate+new+Internet+blocking...-a017278694 (last visited Dec. 1, 2014).

[690] Later, the U.S. Supreme Court held that the CDA was unconstitutional on the First Amendment ground, but § 230 was not affected and remained fully effective. *See* Reno v. ACLU, 521 U.S. 844 (1997) (striking down anti-indecency provisions that violated the First Amendment).

[691] Zeran v. America Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

bulletin board to sell "Naughty Oklahoma T-Shirts" featuring offensive slogans about bombing of the Alfred P. Murrah Federal Building in Oklahoma City.[692] The posting advertised that someone interested in the shirts should call Kenneth Zeran's home phone number in Seattle.[693] As a result of the online advertisement, Zeran received a number of calls with derogatory messages and death threats.[694] Although Zeran requested AOL to eliminate the advertisement repeatedly, the message did not disappear as fast as Zeran expected.[695] Zeran sued AOL because he could not identify the original poster. After the trial court granted AOL's motion because Section 230 barred Zeran's claim, Zeran appealed to the Fourth Circuit, arguing that Section 230 left intact distributor liability for ISPs.[696]

To examine the distributor liability under Section 230, the Fourth Circuit analyzed two main purposes of the provision: The first purpose was to protect freedom of online speech as "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium."[697] Concerned that ISPs might restrict online speech severely if they would face potential liability for contents

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[692] *Id.* at 329.

[693] *Id.*

[694] *Id.*

[695] *Id.* (The parties disputed the date that AOL removed the original posting from its bulletin board).

[696] *Id.* at 330.

[697] *Id*.

republished by ISPs,[698] the court emphasized that Section 230 rejected imposition of publisher liability on ISPs "for the exercise of its editorial and self-regulatory functions."[699] The second purpose of Section 230, according to the court, was to encourage ISPs' self-regulation on offensive materials, removing disincentive to self-regulation created by *Stratton Oakmont*.[700]

When considering the two statutory purposes to protect ISPs that exercise self-regulation, it might be logical that immunity should be given to only ISPs that try to screen harmful contents. But the court did not limit application of Section 230 to ISPs that perform self-regulation. Regardless of whether AOL attempted to regulate harmful contents, the Fourth Circuit held that Section 230 eliminated both publisher and distributor liability for ISPs because distributor liability was "merely a subset, or a species, of publisher liability."[701] As the first reported federal appellate court's ruling on Section 230, *Zeran* has substantially influenced other cases about ISP liability, cited in

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[698] *Id*. at 331.

[699] *Id*.

[700] *Id*.

[701] *Id*. at 332. Judge James Harvie Wilkinson quoted PROSSER & KEETON ON TORTS:

> Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathers by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents – including the defamatory content- and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

Prosser & Keeton eds., *supra* note 647, at 803.

200 court decisions.[702] Such blanket immunity under Section 230 makes the United States the minority of one in the world that allows the kind of protection for ISPs against liability.[703]

B. Case Law

1. Sweeping Immunity for ISPs under Section 230

The cause of action most frequently associated with Section 230 is defamation,[704] for Congress enacted the CDA in response to a defamation case of *Stratton Oakmont*.[705] Yet application of Section 230 was not limited to defamation. The provision has been applied to other types of torts when the plaintiff's claim treated a computer service as "the

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[702] Westlaw search shows that *Zeran* has been cited in 200 federal and state cases as of Dec. 1, 2014. In addition, *Zeran* has been discussed in almost 600 law review articles.

[703] In April 2014, Congress in Brazil passed the "Internet Bill of Right." Article 19 of the law" states:

> Art. 19. In order to ensure freedom of expression and prevent censorship, the provider of internet applications can only be subject to civil liability for damages resulting from content generated by third parties if, after an specific court order, it does not take any steps to, within the framework of their service and within the time stated in the order, make unavailable the content that was identified as being unlawful, unless otherwise provided by law.

Internet Bill of Rights, Law No. 12,965/2014.

Although the Brazil statutory law provides broad protection for ISPs, it protects only ISPs that took proper steps to take down unlawful contents. Professor Eric Goldman argues that the new Brazil law "more closely resembles Section 230 than the European notice-and-takedown rules." Eric Goldman, *Brazil's Internet Bill of Rights Compared to Section 230*, Tech. & Marketing Law Blog, http://blog.ericgoldman.org/archives/2014/08/brazils-internet-bill-of-rights-compared-to-section-230-excerpt-from-my-internet-law-casebook.htm (last visited Dec. 1, 2014).

[704] Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009). Law Professor David S. Ardia found in his empirical research that defamation claims "topped the list," "making up 17.2% of all claims" in the context of Section 230. *See* David S. Ardia, *Free Speech Savior or Shield For Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 LOY. L.A.L. REV. 373, 429 (2010).

[705] For a discussion of the CDA history, see *supra* Section A. 2, "Section 230 of the CDA."

publisher or speaker" of the content in issue.[706] Section 230 has been utilized to a variety of claims such as anti-discrimination,[707] negligence,[708] invasion of privacy,[709] spam filtering,[710] public nuisance,[711] negligent misrepresentation,[712] intentional infliction of emotional distress.[713] Most online defamation cases have primarily involved Section 230(c)(1) to determine whether an Internet service provider is liable for allegedly defamatory statements issued by others.[714] Section 230(c)(2) has been less utilized

[706] § 230(c)(1). But the grant of immunity under § 230 does not provide immunity for intellectual property claims. *See* 47 U.S.C. § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."). *See also* Atlantic Recording Corp. v. Project Playlist, Inc., 603 F.Supp.2d 690 (S.D.N.Y. 2009) (holding that the CDA did not bar New York state law claims for copyright infringement and unfair competition).

[707] *See, e.g.,* Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (Roomates.com violated the Fair Housing Act by presenting a questionnaire to users).

[708] *See, e.g.,* Doe v. Myspace, Inc., 528 F.3d 413 (5th Cir.), *cert. denied*, 129 S. Ct. 600 (2008); Black v. Google In., No. 10-02381, 2010 WL 3222147 (N.D. Cal. Aug 13, 2010) (Google not liable for negligence and intentional infliction of emotional distress relating to online comments posted upon the Google website).

[709] *See, e.g.,* Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003) (ISP was not liable to athletes for customer's use of service to display images of athletes who were unknowingly recorded unclothed).

[710] *See, e.g.,* Holomaxx Technologies v. Microsoft Corp., No. CV-10-4924-JF, 2011 WL 865278 (N.D. Cal. Mar. 11, 2011) (Microsoft's filtering of plaintiff's marketing emails was protected under Section 230).

[711] *See, e.g.,* Dart v. Craigslist, Inc., 665 F. Supp. 2d 961 (N.D. Ill. 2009) (Craigslist was not liable for publication of prostitution ads posted by its users).

[712] *See, e.g.,* Schneider v. Amazon.com, 31 P.3d 37 (Wash. Ct. App.), *cert denied*, 531 U.S. 824 (2001) (Amazon was immune under § 230, although it promised to remove offensive book reviews but reposted the reviews).

[713] *See, e.g.,* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d. 288 (D.N.H. 2008) (tort liability of an operator of adult web community was precluded by the CDA).

[714] *See, e.g.,* Zango, Inc., v. Kaspersky Lab, Inc., 568 F.3d 1169 (9th Cir. 2009) (a distributor of software to filter and block potentially malicious software protected under Section 230).

because it protects only intermediaries that work for restricting or blocking harmful contents.[715]

As explained in the method section of Chapter I, this research found 85 cases in which one of causes of action is defamation and the ISP is at least one of the defendants.[716] Table 1 (see Appendix E for all tables) shows case name, decision year and marks whether the ISP was eventually immune from liability.[717] As Table 1 illustrates, Section 230 has strongly shielded ISP from liability for defamation: ISP was held unprotected against liability in only 2 cases out of 85 defamation cases. In other words, just 2.4 percent of Section 230 cases have been ruled against ISPs.

One of the cases in which the ISP failed to be immunized is *Hy Cite Corporation v. Badbusinessbureau.com.*[718] A seller of dinnerware sued website operators who posted defamatory consumer complaints.[719] The website operators claimed CDA immunity and moved to dismiss. Yet a federal district court in Arizona denied the motion because the operators themselves allegedly had produced editorial comments, titles, and other original contents in the defamatory postings.[720] Because the operators did author libelous contents, the court found that the ISPs were obviously not entitled to immunity. Another

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[715] *See, e.g.*, Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007) (Google was immune under § 230(c)(2) for screening and deletion of contents).

[716] For an in-depth empirical study of § 230 cases, see Ardia, *supra* note 704 (Ardia examined 184 decisions of various Section 230 claims, including anti-spam, breach of contract, child sexual abuse, false advertisement, negligence, and defamation).

[717] Table 1, "U.S. Decisions about ISP Liability for Defamation under Section 230."

[718] 418 F. Supp. 2d 1142 (D. Ariz. 2005).

[719] *Id*.

[720] *Id*. at 1148-49.

case is *Ascend Health Corp. v. Wells.*[721] A blog operator Brenda Wells was sued for disparaging comments about a private hospital and its doctors on her two blogs and Facebook. Although a federal district court in North Carolina allowed immunity for statements by a third party that Wells simply reposted, some of the defamatory comments could not be protected because Wells herself allegedly authored much of the contents.[722]

Therefore, ISPs will successfully get blanket immunity unless they authored or developed harmful contents. Section 230 has been nearly impregnable as a defense for ISPs against defamation claims so far.

2. Three Prong Requirements of Section 230

When courts apply Section 230, they generally rely on a three-prong approach to determine whether ISPs are entitled to protection.[723] The three prongs are:

- The defendant provides or uses an "interactive computer service";
- The complaint treats the defendant as a "publisher or speaker" of information; and
- The information at issue was provided by "another information content provider."[724]

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[721] No. 4:12-CV-00083-BR, 2013 WL 1010589 (E.D.N.C. Mar. 14, 2013).

[722] *Id.* at *9-10.

[723] *See, e.g.*, Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 830 (Cal. Ct. App. 2002) (noting § 230 requirement of the three-prong test); Joyner v. Lazzareschi, No. 05CC10627, 2009 WL 695539, at *3 (Cal. Ct. App. Mar. 18, 2009) (applying § 230 to soccer community website under three prongs); Parisi v. Sinclair, 774 F. Supp. 2d 310 (D.D.C. 2011) (immunizing booksellers from online libel under three prongs).

[724] *See, e.g.,* Price v. Gannett Co., No. 2:!1-cv-00628, 2012 WL 1570972, *2 (S.D. W. Va. May 1, 2012) ("To obtain § 230 immunity, three elements are required.").

Consequently, the ISP defendant, to be immune from defamation liability, must show that it is a provider or user of Interactive Computer Service (ICS); that the cause of action treats it as a publisher or speaker of defamatory statements; and that the statement in issue was provided by another Information Content Provider (ICP). This section analyzes how courts have applied the three-prong test and the ISP has met the three requirements for asserting CDA immunity.

a) Provider of Interactive Computer Service

Immunity under Section 230 is given to a provider or a user of "interactive computer service," which CDA defines as "any information service, system, or access software provider that *provides or enables computer access* by multiple users to a computer server."[725] So intermediaries that provide access to the Internet – such as America Online and Comcast - can be qualified as providers of computer service.

Yet the CDA definition is so broad that almost all types of service providers can be qualified for immunity so long as they do not provide specific contents as original providers.[726] Providing access to the Internet is not the only way to be a provider of interactive computer service. Section 230 extends far beyond access providers, and even online commerce companies like Amazon or eBay were entitled to immunity. Indeed, a couple of Internet libel plaintiffs argued that Amazon or eBay should not be entitled to Section 230 when the ISPs had editorial discretions over customer reviews.[727] But the

[725] 47 U.S.C. § 230(f)(2) (emphasis added).

[726] *See, e.g.*, *Barrett*, 799 N.E.2d at 922 (rejecting plaintiff's argument that ISP could not be a provider of computer service because it was not in the business of providing Internet access).
[727] *See, e.g.*, Grace v. eBay, 99 P.3d 2 (Cal. 2004) (superseding lower court's decision of not immunizing eBay from distributor liability).

Washington Court of Appeals held that Amazon must be immune as a provider of computer service while enabling users to access user comments on its website.[728]

Moreover, courts have applied Section 230 to various types of intermediaries regardless of their main functions. An operator that hosts message boards or chatting rooms has been treated as a provider of computer service for the purpose of Section 230 if it did not author the defamatory contents.[729] Likewise, an individual blogger could be a provider of computer services, if a third party originally authored harmful postings on the blog.[730] Social Networking Site (SNS) also has been treated as a provider of computer service when users posted comments on the SNS as third parties.[731] A public library or print shops were treated as providers of interactive computer service when they supplied computer access to users who made defamatory comments while utilizing a computer provided by the library or the print shop.[732] Search engines like Google were protected

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[728] Schneider v. Amazon.com, Inc., 31 P.3d 37, 40-42 (Wash. Ct. App.), *cert denied*, 531 U.S. 824 (2001).

[729] *See, e.g.,* DiMeo v. Max, 48 Fed. Appx. 280, 282 (3d Cir. 2007) (website operator allowing users to post anonymous comments protected under CDA); Universal Comm'n Sys., Inc., v. Lycos, Inc., 478 F.3d 419 (1st Cir. 2007) (Lycos not liable for pseudonymous postings on its message board); Collins v. Purdue Univ., 703 F.Supp.2d 862 (N.D. Ind. 2010) (newspaper company not liable for website postings); Woodhull v. Meinel, 202 P.3d 126 (N.M. Ct. App. 2009), *cert. denied*, 203 P.3d 870 (N.M. 2009) (website operator not liable for defamatory statement posted by others).

[730] *See, e.g.,* Kuersteiner v. Schrader, No. 100089/08, 2008 WL 8152695 (N.Y. Sup. Ct. Oct. 14, 2008) (blogger who neither authored nor edited harmful postings by others protected under § 230).

[731] *See, e.g.,* Finkel v. Facebook, Inc., No. 102578/09, 2009 WL 3240365 (N.Y. Sup. Ct. Sep. 15, 2009) (Facebook not liable for defamatory statements posted by users).

[732] *See, e.g.,* Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684 (Cal. Ct. App. 2001) (no liability to public library for providing citizens with Internet access); PatentWizard, Inc. v.

from liability regarding display of search result that included defamatory statements.[733] The traditional media were not liable for defamatory comments by other users if they were more or less ISPs.[734] Linking to defamatory content was also protected by Section 230.[735] Thus, nearly every type of ISPs is likely to get protections under Section 230, if the ISPs might simply not fall into the category of " information content provider":

> [R]eviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of "interactive computer service" and a relatively restrictive definition of "information content provider." Under the statutory scheme, an "interactive computer service" qualifies for immunity so long as it does not also function as an "information content provider" for the portion of the statement or publication at issue.[736]

So the first prong relating to a "provider or user of interactive computer service" has not effectively worked to identify who qualifies for Section 230 immunity. If the defendant is

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Kinko's Inc., 163 F. Supp. 2d 1069 (D.S.D. 2001) (Kinko's not liable for disparaging statements by anonymous user).

[733] *See, e.g.,* Dowbenko v. Google Inc., No. 14-10195, 2014 WL 4378742 (11th Cir. Sept. 5, 2014) (Google not liable for defamatory search results); Parker v. Google, Inc., 422 F. Supp. 2d 492 (E.D.Pa. 2006) (Google not liable for defamatory statements from search query of plaintiff's name). *See also* Steele v. Mengelkoch, No. A07-1375, 2008 WL 2966529 (Minn. Ct. App. Aug. 5, 2008) (CDA barred libel claim against Google); Supplementmarket.com, Inc. v. Google, Inc., No. 09-43056, 2010 WL 6309991 (Pa.Co.Pl. July 16, 2010) (Google not liable for failure to delete libelous search results).

[734] *See e.g.,* Hadley v. GateHouse Media Freeport Holdings, Inc., No. 12 C 548, 2012 WL 2866463 (N.D. Ill. July 10, 2012) (newspaper not liable for others' defamatory comment on its website); Delle v. Worcester Telegram & Gazette Corp., No. 110810, 2011 WL 7090709 (Mass. Sept. 14, 2011) (newspaper immune from defamation liability for online "comments section"); Miles v. Raycom Media, Inc., No. 1:09CV713-LG-RHW, 2010 WL 3419438 (S.D. Miss. Aug. 26, 2010) (television station was not liable for reader comments under § 230).

[735] *See, e.g.,* Vazquez v. Buhl, 90 A.3d 331 (Conn. App. Ct. 2014) (ISP not liable for hyperlinking to article written by third party).

[736] *Carafano*, 339 F.3d at 1123.

not an original poster, the defendant will likely have little difficulty in asserting immunity without regard to its functions or roles.

b) Not Treated as the Publisher

Section 230 prohibits a provider of computer service from being treated as "the publisher or speaker" of any contents provided by a third party.[737] It is intended to protect online service providers that repeat or convey information obtained from others and to safeguard "the provider's inherent decisions about how to treat postings."[738] Yet Section 230 does not speak directly to liability of the provider under the common law. Thus, it is debatable whether the statute abrogates the common law principle of distributor or the knowledge-based liability.

Traditional distributors like newspaper vendors and booksellers are liable at common law if they had notice of a defamatory statement in their merchandise.[739] If the common law rule applies, an online defamation plaintiff can argue that ISPs should be liable as distributors when they received notifications from the plaintiff. But courts have rejected the distinction between publisher and distributor for ISP liability:

> There is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world. Congress, however, has chosen for policy reasons to immunize from liability for defamatory or obscene speech "providers and users of interactive computer services" when the defamatory or obscene material is "provided" by someone else.[740]

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[737] 47 U.S.C. § 230(c)(1).

[738] Universal Comm'n Systems, Inc. v. Lycos, Inc., 478 F.3d 413, 422 (1st Cir. 2007).

[739] RESTATEMENT (SECOND) OF TORTS § 578(1) (1977).

[740] Batzel v. Smith, 333 F.3d 1018, 1020 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004).

Zeran was the first federal appellate court ruling on Section 230(c), in which both publishers and distributers were held immune to liability for defamatory content provided by others.[741] Zeran argued that Congress focused on "publisher" in Section 230 and thus it left "distributor's" liability intact.[742]

The Fourth Circuit in *Zeran* held, however, that Congress intended Section 230(c) to immunize both publishers and distributors because distributor liability is "merely a subset" of publisher liability.[743] Because publisher/distributor distinction would not make any difference for purposes of Section 230,[744] the most consequential aspect of *Zeran* was that Section 230 has immunized ISPs from liability not only as primary publishers but also as distributors.[745]

The publisher/distributor liability was a controversial issue again in *Barrett v. Rosenthal*.[746] A trial court in California dismissed Barrett's claim, since the operator of online medical support group had no liability when the operator merely republished the

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[741] *Zeran*, 129 F.3d at 327.

[742] *Id.* at 331.

[743] *Id.* at 332 (*quoting* RESTATEMENT (SECOND) OF TORTS § 577: "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed")).

[744] *Id.*

[745] Justice R. Fred Lewis of the Supreme Court of Florida rejected *Zeran*, claiming that *Zeran* had fatal flaws when deciding that distributor must be merely an internal category of publisher. *See* Doe v. America Online, Inc., 783 So.2d 1010, 1022 (Fla. 2001) (Lewis, J., dissenting). *See also* Doe v. GTE Corp., 357 F.3d 655, 660 (7th Cir. 2003) (suggesting that § 230(c)(1) might be a definitional clause rather than an immunity clause to harmonize the text with the caption "protection for 'Good Samaritan'").

[746] 146 P.3d 510 (Cal. 2006).

libelous messages.[747] Yet the California Court of Appeal reversed the lower court's decision, noting that Section 230 only barred holding an ISP as a publisher of a defamatory statement made by another and the statute did not immunize the ISP from distributor liability.[748] Challenging *Zeran*, the California appeal court held that Rosenthal could be found liable as a distributor if she knew or had reason to know of the defamatory nature of the statement.[749]

But the Supreme Court of California disagreed with the Court of Appeal. The Supreme Court held that Section 230 should be applied without regard to the traditional publisher-distributor distinction at common law:

> Given that "distributors" are also known as "secondary publishers," there is little reason to believe Congress felt it necessary to address them separately. There is even less reason to suppose that Congress intended to immunize "publishers" but leave "distributors" open to liability, when the responsibility of publishers for offensive content is greater than that of mere distributors.[750]

The California Supreme Court pointed out a unique feature of online publication: "Whenever such information is *copied* from another source, its publication might also be described as a 'distribution.'"[751] Emphasizing the unclear line between distribution and

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[747] *Id*. at 514.

[748] Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142 (Cal. Ct. App. 2004).

[749] *Id*. at 167.

[750] *Barrett*, 146 P.3d at 519.

[751] *Id* (emphasis added).

publication in cyberspace, the court concluded that immunity should be given to any intermediary that published third party's content.[752]

Imposition of notice-based liability[753] on ISPs has been rejected. The Fourth Circuit in *Zeran* held that notice-based liability should not burden ISPs because (1) notice liability provides a natural incentive for ISPs to simply remove messages and eventually chills freedom of online speech, (2) notice-based liability deters ISPs from actively screening harmful contents, and (3) notice liability provides third parties with a no-cost means for users who want to lodge complaints whenever they were displeased by an online posting.[754] In 2006, the California Supreme Court in *Barrett*, following *Zeran*, rejected the notice-based liability for posing a "daunting and expensive challenge" to ISPs. The court reasoned that ISPs under the notice-based system should examine whether the allegedly defamatory statement at issue "is true or false, factual or figurative, privileged or unprivileged, whether the matter is of public or private concern, and whether the plaintiff is a public or private figure."[755]

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[752] *Id*. at 520. *See also* Donato v. Moldow, 865 A.2d 711 (N.J. 2005) (immunizing operator of electronic bulletin board devoted to discussion of local government activities); Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) (emphasizing that Congress made no distinction between publishers and distributors in providing immunity).

[753] Notice-based liability similar to § 512 of the Digital Millennium Copyright Act (DMCA) has been recommended to limit blanket CDA immunity. *See, e.g*., Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility? Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237, 265 (2007) ("The DMCA and its legacy can provide a blueprint for approaching an amendment to Section 230.").

[754] *Zeran,* 129 F.3d at 333.

[755] *Barrett,* 146 P.3d at 525. *See also* Eckert v. Microsoft Corp., No. 06-11888, 2007 WL 496692 (D. Mich. Feb. 13, 2007) (rejecting the plaintiff's argument that Microsoft should face notice-liability after it failed to remove harassing emails after being notified).

Because the CDA immunity from both publisher and distributor liability provides no incentive for ISPs to eliminate libelous postings, ISPs have no responsibility even when ignoring notification and causing serious harm to the reputation of individuals.[756] Thus, some type of compulsory procedure needs to be considered so that ISPs will heed notifications from defamation victims.

c) Provided by Another Information Content Provider

ISP will not be treated as a publisher or a speaker if "another information content provider" provides information in issue.[757] The "information content provider," which does not receive protection under Section 230, is "any person or entity that is responsible, in whole or in part, for the *creation or development* of information provided through the Internet."[758] The most important point to determine who qualifies as the "information content provider" is what constitutes the "creation or development" of information. Courts have ruled that simple dissemination of defamatory statements without contributing to the libelous content does not constitute "creation or development" to be an information content provider.[759]

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[756] The Seventh Circuit criticized CDA immunity for defeating claims by victims of tortious conduct. *See* Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003).

[757] 47 U.S.C. § 230(c)(1).

[758] *Id*. § 230(f)(3) (emphasis added).

[759] *See, e.g.,* Johnson v. Arden, 614 F.3d 785 (8th Cir. 2010) (holding ISP not liable for distributing postings that it did not induce); Barrett v. Fonorow, 799 N.E.2d 916 (Ill. Ct. App. 2003) (defendant not ICP when distributing articles authored by users); Blumenthal, 992 F. Supp. at 50 (AOL not ICP because it simply distributed Drudge's report).

The Ninth Circuit in *Batzel v. Smith*[760] focused on whether an operator of an electronic newsletter, who selected, made minor word changes, and distributed an allegedly defamatory email, would be covered by Section 230. The Ninth Circuit found the website operator not liable because the website operator's conduct of selecting and editing emails for publication did not constitute a "creation or development" of the information.[761] Other courts also held that ISPs should be immune under Section 230 even though they distributed or tried minor changes of contents by third parties.[762] The New Mexico Court of Appeals emphasized that "the exercise of traditional editorial function such as selecting material for publication or editing portions of material before posting" would not rise to the level of creation or development of content.[763]

In *Blumenthal v Drudge,*[764] former White House adviser Sidney Blumenthal sued Matt Drudge and America Online for allegedly defamatory statements in the edition of the *Drudge Report*, which was available to AOL subscribers under a licensing agreement.[765] AOL could remove the allegedly defamatory information. But the U.S. District Court for the District of Columbia held that AOL's editorial right to make changes in the *Drudge Report* was not sufficient to make it a joint publisher of the

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[760] 333 F.3d 1018 (9th Cir. 2003). *cert. denied*, 541 U.S. 1085 (2004).

[761] *Id*. at 1031.

[762] *See, e.g.,* Green v. America Online, 318 F.3d 465 (3d Cir. 2003) (upholding immunity for the ISP's transmission of defamatory messages); Kuersteiner v. Schrader, No. 100089/08, 2008 WL 8152695 (N.Y. Sup. Ct. Oct. 14, 2008) (blog operator who exercised a "publisher's traditional editorial function" entitled to immunity under CDA).

[763] Woodhull, 202 P.3d at 133.

[764] 992 F. Supp. 44 (D.D.C. 1998).

[765] *Id*. at 47.

report.[766] The court reasoned that Congress chose a policy to immunize ISPs "even where the self-policing [of ISP] is unsuccessful or not even attempted."[767]

Similarly, in *Ben Ezra, Weinstein, & Co. v. America Online*,[768] AOL had deleted and altered inaccurate information that originally came from independent stock quote providers.[769] Ben Ezra Company, which claimed defamation by incorrect stock price information concerning itself, maintained that AOL worked so closely with the stock quote providers in creating and developing the information and thus AOL should be considered an "information content provider."[770] Yet the Tenth Circuit Court of Appeals held that such ISP's editorial function did not render the ISP liable as a content provider.[771] Other courts ruled that ISP's editorial functions would not lose its immunity if a third party created the content in issue.[772] In addition, a website operator's failure to

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[766] *Id.* at 50.

[767] *Id*. at 52. *See also* Cornelius v. DeLuca, 709 F.Supp.2d 1003 (D. Idaho, 2010) (appointing moderators on online forum and allowing moderators to censor content does not make ISP liable as ICP).

[768] 206 F.3d 980 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000).

[769] *Id*. at 983.

[770] *Id*. at 984.

[771] *Id*. at 986.

[772] *See, e.g.,* Donato v. Moldow*,* 865 A.2d 711 (N.J. 2005) (operator not liable though operator "shaped and selectively edited website content, and website's anonymous format encouraged" publication of defamatory messages); Fox v. Albanese, No. 108169/20102011, WL 1130499 (N.Y. Sup. Ct. Mar 24, 2011) (procedure of sending messages for pre-publication review and potential editing does not change ICS status to ICP); *Reit v. Yelp!, Inc* 907 N.Y.S.2d 411, 414 (N.Y. Sup. Ct. 2010) (Yelp's selection of posts considered the selection of materials for publication); *Shiamili v. Real Estate Group of New York, Inc.,* 952 N.E.2d 1011 (N.Y. 2011) (moving its user's comments and adding headings of comments did not "develop or contribute to" defamation); Global Royalties, Ltd. v. Xcentric Ventures, 544 F.Supp.2d 929 (D. Ariz. 2008)

verify the content of material posted by third parties does not constitute "develop," and thus the operator is not treated as an information content provider.[773]

If a website operator provides a profile abused by its users, does the provider "develop" the harmful contents? This question was addressed by the Ninth Circuit in *Carafano v. Metrosplash.com, Inc*.[774] Actress Christianne Carafano sued an operator of online dating service Matchmaker.com for false contents in a dating profile provided by an anonymous user.[775] After the fake profile invited many harassing, threatening emails and phone calls to Carafano, Matchmaker.com blocked her profile.[776] The trial court ruled that Matchmaker.com was not eligible for immunity because the company developed defamatory contents by providing the fake profile to malicious users.[777]

The U.S. Court of Appeal for the Ninth Circuit, reversing the trial court's decision, held that the fact that defamatory content was formulated in response to Matchmaker's questionnaire in the profile should not make the operator liable.[778] The court noted that Matchmaker.com only created its questionnaire to facilitate matching profiles and its

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(Ripoff Report not liable for encouraging publication of postings from others for financial gain).

[773] *See* Milo v. Martin, 311 S.W.3d 210 (Tex. Ct. App. 2010) (vouching for truthfulness of third-party statement not make website operator an ICP); Prickett v. InfoUSA, Inc., 561 F.Supp.2d 646 (E.D. Tex. 2006) (failing to verify listing provided by third party not remove immunity).

[774] 339 F.3d 1119 (9th Cir. 2003).

[775] *Id*. at 1120.

[776] *Id.* at 1122.

[777] *Carafano*, 207 F. Supp. 2d 1055, 1067-68 (C.D. Cal. 2002).

[778] *Carafano*, 339 F.3d. at 1124.

users made actual selection of the content in each profile.[779] Since *Carafano*, courts have ruled that a website operator's facilitation of false or unauthorized profiles would not amount to the "creation or development" of information.[780]

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist*, Inc.,[781] the Seventh Circuit addressed the issue of whether providing forums or spaces for discrimination would constitute "creation or development." Community advertising website "Craigslist" was alleged to have violated the Fair Housing Act with its discriminatory housing advertisements. The federal court of appeals held that Craigslist did not "cause" unlawful discrimination by simply providing a forum.[782]

Notably, however, providing more than simple space for harmful statements may constitute "development" and lead an ISP to lose immunity. While defamation was not a claim, ISPs in two important Section 230 cases were found to be liable. *Fair Housing Council of San Fernando Valley v. Roommates.com*[783] involved a roommate search service Roommates.com. The process of creating profiles in Roommates.com required subscribers to answer a series of questions and to disclose sex, sexual orientation, and whether they would bring children to a household as well as their preferences in

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[779] *Id*.

[780] *See, e.g.,* Universal Commc'n Sys. Inc., v. Lycos, Inc., 478 F.3d 419, 420 (1st Cir. 2007) (§ 230 bar claims that defendants acted wrongfully by encouraging anonymous submission of profiles or by failing to verify submitter's identity); Doe v. Friendfinder Network, Inc. 540 F. Supp. 2d 288, 297 (D.N.H. 2008) (service provider's exercise of editorial prerogatives as to information from another content provider does not transform service provider into content provider).

[781] 519 F.3d 666 (7th Cir. 2008).

[782] *Id*. at 668.

[783] 521 F.3d 1157 (9th Cir. 2008).

roommates.[784] In addition, Roommates.com encouraged subscribers to provide "Additional Comments" describing themselves in an open-ended essay.[785] The Fair Housing Council sued Roommates.com for violating the federal and state housing discrimination law.[786] A federal district court in California found that the Fair Housing Council's claim was barred by Section 230.[787]

Yet the Ninth Circuit, sitting en banc, held that Section 230 would not protect Roommate.com when it "created or developed" the forms of profiles and questionnaire used by subscribers for discriminative contents. The Ninth Circuit noted that Roommate.com was "directly involved with developing" discriminatory housing practices while it required its users to submit racial and sexual preference.[788] But the website could be immune as to claims based on "Additional Comments" on the website, which entirely came from subscribers and passively displayed by Roommates.com.[789]

To determine the meaning of "development," the Ninth Circuit relied on the concept of "material contribution" as a specific action:

> [W]e interpret the term "development" as referring not merely to augmenting the content generally, but *to materially contributing to its alleged unlawfulness*. In other words, a website helps to develop unlawful content, and thus falls within the

[784] *Id*. at 1167. For instance, a subscriber was directed to make a selection from a drop-down menu to indicate whether he/she was willing to live with "white male roommates" or "black gay male."

[785] *Id.* at 1161.

[786] *Id.* at 1162.

[787] Fair Housing Council of San Fernando Valley v. Roommates.com, No. CV 03-09386PA(RZX), 2004WL3799488, (C.D. Cal. Sept. 30, 2004).

[788] *Fair Housing Council of San Fernando Valley*, 521 F.3d at 1172.

[789] *Id.* at 1173-74.

> exception to Section 230, if it *contributes materially to the alleged illegality of the conduct*.[790]

The concept of the "material contribution" does not mean a "mere action" necessary to the display of illegal contents. It involves a more active action such as requiring users to enter their preferences through drop-down menus or the supply of means for users to search along the same lines.[791]

After *Roommates*, the term of "development" has evolved under case law. The Tenth Circuit in *F.T.C. v. Accusearch, Inc*.[792] held that a website operator, which sold others' personal data and helped to "develop" unlawful contents by paying users to acquire telephone records and other illegal information, was not protected by Section 230. By contrast, several consumer review websites have been held not liable because courts found that those websites did not "develop" the challenged defamatory comments.[793]

Will a website dedicated to insulting or mocking others fall within Section 230? The answer is, not surprisingly, yes. In *Jones v. Dirty World Entertainment Recordings,*

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[790] *Id.* at 1167-68 (emphasis added).

[791] *Id.* at 1169.

[792] 570 F.3d 1187 (10th Cir. 2009).

[793] *See, e.g.,* Braverman v. Yelp, Inc., No. 155629/12, 2013 WL 3335071 (N.Y. Sup. Ct. June 28, 2013) (Yelp's filtering out of positive reviews and placement of "Best of Yelp" list not make Yelp creator or developer of reviews); Frontier Van Lines Moving and Storage, Inc. v. Valley Solutions, Inc., No. 11cv0526, 2011 WL 2110825 (W.D. Pa. May 24, 2011) (review website for moving companies not shape service reviews); Giordano v. Romeo, 76 So.3d 1100, 1102 (Fla. Dist. Ct. App. 2011) ("appalling" business practices of Ripoffrport.com did not affect §230 application); Kimzye v. Yelp Inc., No. C13-1734RAJ, 2014 WL 1805551 (W.D. Wash. May 7, 2014) (Yelp's star rating program not transform ISP into developer of false information); Seldon v. Magedson, No. CV-13-00072-PHX-DFC, 2014 WL 1456316 (D. Ariz. Apr. 15, 2014) (Ripoffreport not responsible for defamation by third parties through forum it provided).

LLC,[794] cheerleader Sarah Jones sued the operators of TheDirty.com for defamation and invasion of privacy. Jones claimed that TheDirty.com had participated in developing defamatory posts by appending a "tagline" to the postings of others and adding the website operator's own comments. The U.S. District Court for the Eastern District of Kentucky ruled that the website and operators should be liable upon the website name, the manner in which it is managed, and the operator's personal comments because all these have "specifically encouraged development of what is offensive."[795]

But the federal district court's decision was overturned. Applying the "material contribution" test in *Roommates*, the Sixth Circuit held that the operators, who simply selected posts for publication, did not materially contribute to defamation.[796] The federal appeals court stated that the website did not "require" uses to post illegal contents and the name of the website did not suggest that only illegal content would be published.[797] The court pointed out that the operators of the Dirty.com, unlike the *F.T.C.* decision, did not compensate the users for the submission of unlawful content.[798]

As *Jones* demonstrates, ISPs would have little difficulty in operating their websites for socially undesirable purposes. For instance, few individuals have won against the

[794] 840 F. Supp. 2d 1008 (E.D. Ky. 2012).

[795] *Id*. at 1012.

[796] *Jones,* 755 F.3d 398 (6th Cir. 2014).

[797] *Id.* at 416.

[798] *Id.*

ISPs that maintain "revenge websites" under Section 230.[799] Although California and several other states passed "revenge porn" laws,[800] it might be a more practical and direct way for the targets of revenge porn to have the ISPs take down the harmful contents. Nonetheless, as long as the CDA Section 230 is a statutory tool for ISPs against liability, those whose names and photos were revealed with no consent may be left vulnerable perpetually.

Given that Congress originally intended Section 230 to protect an ISP that would act as a "computer Good Samaritan," some should wonder why abusive ISPs should benefit from the broad applications of the CDA. As the Ninth Circuit pointed out in 2014: "Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the Internet, though any claims might have a marginal chilling effect on Internet publishing business."[801] So, ISPs that violate individuals' rights should be punished instead of being given leeway.

C. Summary and Conclusions

Common law and constitutional law in the United States strike a delicate balance between reputation and freedom of speech. But when it comes to liability for online

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[799] Barbara Herman, *Illinois Passes Revenge Porn Law With Teeth: Other States Should Copy,' Says Privacy Lawyer*, INT'L BUS. TIMES, Jan. 6, 2015, http://www.ibtimes.com/illinois-passes-revenge-porn-law-teeth-other-states-should-copy-says-privacy-lawyer-1774974 (last visited Jan. 8, 2015) (revenge porn website operator Hunter Moore, who paid someone to obtain pornographic images for his website, claiming §230 protection).

[800] Eric Goldman, *California's New Law Shows It's Not Easy to Regulate Revenge Porn*, FORBES, Oct. 8, 2013, ttp://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/ (last visited Jan. 8, 2015) (California anti-revenge porn law would not cover victims who made the recording themselves and the law would not outlaw malicious hackers).

[801] Doe No. 14 v. Internet Brands, Inc., 776 F.3d 894, 899 (9th Cir. 2014) (CDA § 230 not bar plaintiff's claim for defendant company's negligence in warning).

defamation, the traditional reputation vs. free speech structure has been sweepingly altered in U.S. law. Since Congress passed the Communications Decency Act in 1996, Section 230 has provided complete immunity for Internet service providers for defamatory contents created by third parties. Such immunity was entirely a matter of policy choice made by Congress to ensure that the Internet industry and online freedom of speech would thrive.

Yet the decisional law on Section 230 in 1997-2014 shows that the sense of balance has been lost. In nearly all the cases, ISPs have won because courts have interpreted the "interactive computer service" provider so broadly. Such broad ISP interpretations are unwarranted, since the first prong of the Section 230 application to "interactive computer service" has identified none of the unqualified ISPs. The second prong has been equally ineffective by treating ISPs as non-publishers and rejecting the notice-based liability. The notice-based liability for defamation similar to Section 512 of the DMCA will chill freedom of speech. Nonetheless, a more speech-sensitive approach to notice-based liability will better rebalance reputation with free speech. When it comes to applying the third prong, the judicial effort to reinterpret the "creation or development" of information has resulted in a more concrete notion of "material contribution." Still the courts should apply the "material contribution" test more inclusively to punish the operators of insulting or revenge porn websites.

There is no denying that Section 230 has contributed to protection of online freedom of speech. Probably far more than envisioned by Congress in 1996. But protection of free speech at the expense of reputational interest is seemingly extreme. This should lead

courts to consider rebalancing ISPs' immunity insofar as its interpretations of Section 230 comply with its legislative intent.

CHAPTER VI

ISP LIABILITY FOR DEFAMATION IN THE UNITED KINGDOM

In the United Kingdom, online defamation is increasing, while defamation against the traditional media tends to decrease.[802] The use of social media sites such as Facebook and Twitter has fueled online defamation, making online users more vulnerable to libel lawsuit.[803] Not surprisingly, ISPs have emerged as central players in defamation law as cyber-speech has more often related to all kinds of critical commentaries on a wide range of controversial issues and people on and off line.

Although the term "ISP" has been generally used in England, its concept is still unsettled. That is why the law classifies and limits the liability of the ISPs where they act as mere conduits, caches, or hosts of material.[804] But the ISPs often do more than mere facilitation of online communication while offering a range of services, including e-mail accounts, website hosting, and newsgroups. Hence, the court has found it difficulty in drawing the line between publishers and non-publishers online.[805]

Moreover, free speech advocates have been concerned that ISPs might abstain from

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[802] Thomson Reuters, *News Release: Defamation Cases Against Media Groups Halve in Five Years*, Nov. 11, 2013, http://thomsonreuters.com/press-releases/112013/media_defamation_cases (last visited Dec. 1, 2014) (downward trend of newspaper libel cases resulting from cost-related willingness of newspaper groups to negotiate out-of-court settlements).

[803] Roy Greenslade, *23% Increase in Defamation Actions as Social Media Claims Rise*, GUARDIAN, Oct. 20, 2014, http://www.theguardian.com/media/greenslade/2014/oct/20/medialaw-social-media (last visited on Nov. 9, 2014) (increasing online libel cases reflect people's concern about online reputation and easiness of spreading harmful information).

[804] For a discussion of liability of mere conduits, caches, and hosts on the Internet, see *infra* Section A, "Statutory Law."

[805] For a discussion of liability for online publisher and non-publisher, see *infra* Section B, "Case Law."

providing their services or they would threaten to forgo online speech by simply deleting online expressions.[806] To address these and related concerns, a reform of defamation law had been demanded for years. It led to the new Defamation Act 2013.[807] The U.K. Ministry of Justice expects the new Defamation Act to better protect website operators hosting user-generated content.[808] Yet it has yet to be determined whether the new defamation law would provide a greater degree of protection for ISPs and online speech.

This chapter analyzes statutory and cases law on ISP liability for defamation in the United Kingdom. It examines various statutory defenses for ISPs and court cases in which the defenses were applied. Then it identifies early ISP issues, liability of search engines, and liability of other types of ISPs such as blog operator. It suggests that the Defamation Act 2013 will offer more positive opportunities for ISPs. It also highlights obstacles in defamation law and problems with the court decisions.

A. Statutory Law

The Defamation Act 2013 came into force on January 1, 2014. The new Defamation Act has a separate clause of Section 5 for ISP liability. But ISPs are still able to rely on Section 1 of the Defamation Act 1996, the Electronic Commerce Regulations 2002, and

[806] Department of Trade and Industry, *DTI Consultation Document on the Electronic Commerce Directive: The Liability of Hyperlinkers, Location Tool Services and Content Aggregators*, 20-21 (2005).

[807] For the new Defamation Act 2013, see *infra* Section 3, "Section 5 of the Defamation Act 2013" under the Section A.

[808] Press Association, *Libel: New Defamation Act Will Reverse 'Chilling effect,' Ministers Claim*, GUARDIAN, Dec. 31, 2013, http://www.theguardian.com/law/2013/dec/31/trivial-libel-claims-targeted-new-law (last visited Dec. 1, 2014).

other traditional defenses such as truth and honest comment.[809]

1. Section 1 of the Defamation Act 1996

In July 1990, Lord Chancellor[810] published a consultation paper to invite views on modifying the common law defense of innocent dissemination.[811] The main issue of the consultation paper was whether the innocent dissemination defense should be expanded to cover liability of printers regarding defamatory contents in the printed materials. Because new technologies have made the "camera-ready" copy available, the printer has less opportunity to read and modify the text in print than when he worked in hand and hot metal composing.[812]

The consultation paper noted that the modern printer would have "an unfair burden" without defense, "even where there is no knowledge or negligence" about defamatory contents.[813] Besides, it was argued that printers might delete injurious contents and such action would harm the author's freedom of expression.[814] The paper states:

If it is known that his [printer's] system of work need not and does not include

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[809] For a discussion of common law defenses, see *supra* Chapter IV, Section B, "Defenses."

[810] Lord Chancellor is a Cabinet minister and a member of the House of Commons. Lord Chancellor had been the presiding officer of the House of Lords and the head of the judiciary, but the Constitutional Reform Act 2005 transferred those roles to the Lord Speaker and the Lord Chief Justice. For more information, see *The Lord Chancellor*, UK Parliament, http://www.parliament.uk/about/mps-and-lords/principal/lord-chancellor/ (last visited Aug. 6, 2014).

[811] Lord Chancellor's Department, *Defamation: The Defence of Innocent Dissemination* (1990). I would like to appreciate the UO Knight Library, which obtained for me an electronic copy of this uncirculated document from the UK Leicester University Library.

[812] *Id.* at 4.

[813] *Id.* at 5.

[814] *Id.* at 4.

> any inspection of the text, his share may be negligible. On the other hand, it may be argued that the voluntary adoption of a system which reduces or eliminates the chance of detecting libelous content should increase a participant's responsibility for its publication. It may be said that the balance which has to be struck between the printer and the plaintiff is not affected in principle by the change in technology.[815]

The consultation paper, without determining whether the innocent dissemination defense should be applied to printers, invited more opinions. The 1990 paper is noteworthy because the printer's position discussed in the consultation paper is similar to current situation that the ISP confronts: both the printers and the ISPs, as products of new technology, are involved in mass communication, but it is unclear how much liability they should bear for the contents they mediated.

When the Defamation Bill was introduced in the House of Lords in 1996,[816] Lord Chancellor claimed that the innocent dissemination defense should be codified in order to create a statutory defense for distributors, printers, and others who do not have primary responsibility for a defamatory publication.[817] Although special protection for ISPs was not identified in the bill,[818] the Parliament during debate reviewed protections for ISPs as well as their responsibilities. Paul Boateng, a member of Parliament stated:

> The Bill considers the responsibilities of operators of Internet communications. It seeks to protect them against liability for defamation resulting from innocent

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[815] *Id.* at 7.

[816] 570 PARL. DEB. H.L. (5th Ser.) (1996) 578.

[817] *See* 570 PARL. DEB. H.L. (5th Ser.) (1996) 577. Lord Chancellor expected that Section 1 would replace the innocent dissemination defense, but the common law defense has been not abolished; see e.g., Metropolitan International School Ltd, [2009] EWHC, ¶¶ 65-70.

[818] *See,* 570 PARL. DEB. H.L. (5th Ser.) (1996) 605 (During the debate in the House of Lords, it was noted that ISPs would be covered by §1(3)(e), although §1 does not specifically refer to ISPs).

> dissemination of material. That is all well and good, as far as it goes. The Bill does not help, however, in that it does not say how the Internet is effectively to be policed to tackle the dissemination of defamatory material. It does not say how defamatory material, once identified, might easily and without undue cost be removed.… Policing the Internet and ensuring that defamatory material is removed remain significant problems. Some time, it will be necessary for the House to legislate more comprehensively on that than it has done.[819]

Although more inclusive legislation for online defamation was urged, the Defamation Act 1996 adopted no separate provision for ISP liability.[820] Lord Inglewood, Parliamentary under-secretary of National Heritage, rejected online defamation legislation during the Parliament debate. He stated that it would be desirable to let the court decide whether to immunize ISPs.[821]

Section 1 of the Defamation Act 1996 created a general statutory defense for distributors, printers, and others who have secondary responsibility for defamation. To rely on Section 1 defense, the person who wishes to invoke Section 1 must show that he was "not the author, editor or publisher of the statement," that he "took reasonable care" regarding the publication, and that he "did not know, and had no reason to believe" that he caused or contributed to the defamatory publication.[822] In interpreting "reasonable care" and "reason to believe," courts are required to consider the extent of responsibility regarding online publication, the nature or circumstances of the publication, and the

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[819] 278 PARL. DEB. H.C. (5th Ser.) (1996) 132-33.

[820] During the Parliament debate, no American ISP cases such as *Cubby* and *Stratton Oakmont* were discussed. The only American case mentioned in the debate was *New York Times v. Sullivan*, 376 U.S. 254 (1964), and the "Sullivan defence" was rejected. *See* 570 PARL. DEB. H.L. (5th Ser.) (1996) 608 (*Sullivan* not adopted, since U.S. culture stands out from other countries, including U.K.).

[821] 570 PARL. DEB. H.L. (5th Ser.) (1996) 605.

[822] Defamation Act, § 1(1) (Eng.).

previous conduct or character of the author, editor or publisher.[823]

But Section 1 might lead ISP to face a dilemma: If an ISP scrutinizes the intermediated contents to do "reasonable care," the ISP risks being an "editor" who cannot rely on the Section 1 defense. By contrast, if an ISP does not screen contents, it likely means that the ISP did not take reasonable care.[824] Thus, it is unclear to what extent ISPs should exercise the function of control to show that they took reasonable care.

The definition of "publisher" in Section 1(2) is also controversial because its meaning of publisher is different from the normal meaning of "publisher" at common law.[825] As Section 1(2) defines "publisher" as a "commercial publisher," the provision does not cover a noncommercial publisher.[826] Generally, ISPs are not commercial publishers, so it is questionable whether ISPs always would not be treated as publishers under Section 1.

Section 1 excludes from its protection those who were aware that they were dealing with defamatory materials.[827] Therefore, if an ISP was notified by its user of the existence of allegedly defamatory material, the ISP would be treated as knowing of the material and then confront the risk of losing the defense. In that case, the only way to avoid liability is deleting the material complained of as quickly as possible. Hence, Section 1 defense would lead to chilling speech.

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[823] *Id.* § 1(5).

[824] Neil et al. eds., *supra* note 593, at 247.

[825] Smith, *supra* note 58, at 327.

[826] *See also* Metropolitan International School Ltd, [2009] EWHC, ¶ 71 (holding that there exists "some confusion about the terminology" in § 1 defense).

[827] Law Commission, *Defamation and the Internet: A Preliminary Investigation, Scoping Study No. 2,* ¶ 2.4 (2002).

2. Electronic Commerce Regulations

The U.K. Electronic Commerce Regulations (EC Regulations)[828] incorporate the EU Electronic Commerce Directive (E-Commerce Directive)[829] into the law of the United Kingdom.[830] The EC Regulations provide the safe harbor provisions for the online intermediary in three provisions.[831] Section 17 establishes limitations on the liability of ISPs who offer "mere conduits," when they did not initiate the transmission, did not select the receiver, and did not select or modify contents.[832] The mere conduit's action includes "the automatic, intermediate and transient storage of the information transmitted" for just carrying out the online transmission.[833] Thus, ISPs that pass email messages are likely to fall within the ambit of the "mere conduits," because the copy of email is usually deleted from server once the information has been delivered to a receiver.[834]

Section 18 protects "caching" intermediaries that store information temporarily on

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[828] 2002, S.I. 2000/2013.

[829] E-Commerce Directive aims to establish cross-border provision of online services in the internal market and to enhance administrative cooperation between the member states. The Directive applies to online services including information, selling, and advertising. *European Commission*, http://ec.europa.eu/internal_market/e-commerce/directive_en.htm (last visited July 6, 2014).

[830] For general information about the EC Regulations, see Out-law.com, *The UK's E-Commerce Regulations*, http://www.out-law.com/page-431 (last visited Jan. 3, 2015).

[831] *See* the EC Regulations, §§ 17~19.

[832] *Id*. § 17(1).

[833] *Id*. § 17(2).

[834] Neil et al., *supra* note 593, at 249.

their networks for efficient transmission to users.[835] Yet the protection will be lost if the ISP modifies the information or does not comply with conditions on access to the information and any rules regarding the updating of information. Further, Section 18 will not apply when the ISP interferes with the lawful use of technology in accessing the information or if it does not act "expeditiously" to remove or to disable access to the information when it actually knew that the initial source has been removed from online or that a court or an administrative agency has ordered such removal.

Section 19 provides the lowest degree of protection to "hosting," in other words, long-tern storage of content at the hosting server.[836] The hosting intermediaries cannot rely on Section 19 if they had "actual knowledge of unlawful activity or information" or they did not remove or disable access to the information "expeditiously" after obtaining such knowledge or awareness.[837] To decide whether an ISP has "actual knowledge" for application of Section 18 and Section 19, the court should consider whether an ISP has received a notice and "the extent to which any notice identifies the notice sender and location of the information, in addition to the unlawful nature of the activity in question."[838]

ISPs in the United Kingdom expected the EC Regulations to provide additional

[835] EC Regulations, § 18(a).

[836] *Id.* § 19.

[837] *Id.* § 19(a).

[838] *Id.* § 22.

protections for the Internet industry.[839] But Section 19 might not provide extra protections because the defense also will be lost like Section 1 of the Defamation Act 1996 when an ISP was notified of existence of harmful information but did not delete it promptly.

3. Section 5 of the Defamation Act 2013

Section 5 of the Defamation Act 2013 immunizes website operators completely against liability for defamatory posts by identifiable third parties. In addition, it offers ISPs qualified protection for anonymous posts.

a) History of Section 5

Section 1 of the Defamation Act 1996 had been discussed as a topic of reform primarily since 2002. The Law Commission published a paper, titled "Defamation and the Internet" in 2002.[840] The paper addressed the necessity to reform libel law on the grounds that "the current law places pressure on secondary publishers (ISPs) to remove material," regardless of whether the content was in the public interest or true.[841] The Law Commission's paper criticized the CDA Section 230 and the *Zeran* decision in the United States[842] for giving "very little weight" to reputation as a protected interest. The U.K reform paper suggests that the innocent dissemination defense for ISPs should be

[839] *See, e.g.,* Matt Loney, *ISPs Win Crucial Legal Protection*, ZDNET UK, Aug.15, 2002, http://www.zdnet.co.uk/news/it-strategy/2002/08/14/isps-win-crucial-legal-protections-2120825/ (last visited Aug. 6, 2014) (U.K. ISP industry had lobbied hard to incorporate EC Directive after ISP defendant lost in *Godfrey*).

[840] Law Commission, *Defamation and the Internet: A Preliminary Investigation, Scoping Study No. 2* (2002).

[841] *Id.* ¶ 1.12.

[842] 129 F.3d 327 (4th Cir. 1997).

extended, along with a clearer guidance to ISPs on how to deal with complaints about defamatory materials.[843]

Attempts for libel reform in England have been urged on the government.[844] Interest groups that consisted of publishers, journalists, and scientists, launched the "Libel Reform Campaign."[845] The Ministry of Justice conducted a consultation on reducing costs in defamation proceedings in 2008.[846] The Culture, Media and Sport Committee inside the Parliament published a research paper "Press Standards, Privacy and Libel" in March 2010 to identify a host of libel law problems.[847]

In 2010, a prominent human right lawyer Lord Anthony Lester published a private Defamation Bill[848] to push forward the libel law reform. Lord Lester's Bill provided the defense for "facilitator," unless the plaintiff shows that the notice requirements have been complied with, 14 days of the notice period has expired, and the expression complained

[843] Law Commission, *supra* note at 840, ¶ 2.55.

[844] For a brief history of libel law reform, see UK Parliament, *Policy Background of the Draft Defamation Bill*, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20305.htm#a1 (last visited Aug. 4, 2014).

[845] Libel Reform Campaign is a coalition of English PEN, Index on Censorship, and Sense About Science to reform the libel laws of England and Wales. *See* Libel Law Reform, http://www.libelreform.org/ (last visited Aug. 4, 2014).

[846] Programme in Comparative Media Law and Policy, *A Comparative Study of Costs in Defamation Proceedings Across Europe* (2008), http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf (last visited Aug. 4, 2014).

[847] Culture, Media and Sport Committee, *Press Standards, Privacy and Libel: Second Report of Session 2009-10* (this report does not pay attention to the Internet libel issues and ISP liability).

[848] Defamation Bill [HL] 2010.

of has not been removed.[849]

The Government's draft bill was published in 2011 but it included no specific clause for ISPs. After reviewing the Government draft bill, the Joint Committee on the draft bill recommended that the innocent dissemination defense should be strengthened because Section 1 of the Defamation Act 1996 had been "unduly harsh on secondary publisher."[850] For online defamation, the Joint Committee proposed that a new "notice and take-down" procedure should be adopted for the rapid resolution of disputes.[851] The Committee suggested that if author of the online publication is identifiable, the ISP should publish a notice of complaint promptly and then take down defamatory material when the complainant wishes. The Committee further suggested that if the defamatory content is unidentifiable, the harmful posting must be taken down by ISPs except when the ISP believes that there are significant reasons for public interest in the material.[852] The Joint Committee report concludes: "Liability should be determined by the way in which the host or service provider responds to a request for a defamation notice or a take-down order."[853]

In response to the Joint Committee's report, the government was concerned that the ISPs might confront "significant practical and technical difficulties" to delete contents

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[849] *Id.* § 9(1), (2).

[850] Joint Committee on the Draft Defamation Bill, *First Report*, HL Paper 203/HC 930-I, Oct. 19, 2011, ¶ 60, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm (last visited Aug. 4, 2014).

[851] *Id.* ¶ 101.

[852] *Id.* ¶¶ 104-5.

[853] *Id.* ¶ 106.

under the takedown system.[854] Also, the government stated that it would be difficult for ISPs to determine whether the content serves public interest or not.[855] The government recommended a system that the ISPs could act as a "liaison point" to contact the author and to remove material with the author's consent, but if the issue remains in dispute after an initial exchange of correspondence, the ISP would be exempted simply by providing details of the author to the complainant.[856]

Yet the Defamation Bill 2012[857] did not adopt the "liaison" system that the government proposed. Instead, the Bill 2012 contained a specific immunity clause for "operators of websites," reflecting the Joint Committee's report of exempting the ISP when the original author is identifiable. Section 5 of the Bill, titled "operators of websites," is strikingly similar to the current Section 5 clause and after going through Parliament's revision of terms and definition, it became Section 5 of the Defamation Act 2013.

b) Defense for the ISP under Section 5

Section 5 applies when a website operator is sued for libelous statements on its website.[858] Section 5(2) states that the ISP, to rely on the defense, should show that it was

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[854] Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Defamation Bill,* Feb. 2012, ¶ 78, http://www.parliament.uk/documents/joint-committees/Draft-Defamation-Bill/Government%20Response%20CM%208295.pdf (last visited Aug. 4, 2014).

[855] *Id.* ¶ 79.

[856] *Id.* ¶ 85.

[857] Defamation Bill, HC Bill 5, presented to Parliament on May10, 2012.

[858] *Id.* § 5(1).

"not the operator who posted the statement."[859] But the ISP's defense will be defeated when the plaintiff shows that the plaintiff could not identify the person who posted the statement, that the plaintiff notified the operator regarding the posting, and that the operator failed to respond to the notice of complaint.[860] The Section 5 defense will be defeated when the ISP has acted with malice regarding the libelous contents as well.[861] The defense, however, will not be defeated by the mere fact that the ISP "moderates" statements posted by others.[862]

For the meaning of a notice of complaint, the provision requires that the notice specify the complainant's name, set out the defamatory statement and explain why it is defamatory of the complainant, clarify where the statement was posted, and include other information as may be specified in regulations.[863] The Defamation Regulations 2013 requires that the ISP remove the statement within 48 hours of receiving the original poster's agreement of deletion.[864]

When compared with Section 1 of the Defamation Act 1996, Section 5 of the new Defamation Act is likely to work more positively for ISPs. If an identifiable person posts a libelous content, an ISP can be immunized under Section 1 only when the ISP does not

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[859] *Id.* § 5(2) states: "(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website."

[860] *Id.* § 5(3).

[861] Defamation Act 2013, § 5(11).

[862] *Id*. § 12.

[863] *Id.* § 5(6).

[864] Defamation (Operators of Websites) Regulations 2013, Schedule §7.

know of the existence of such content. Yet Section 5 still protects ISPs even when the ISPs have knowledge of the existence of the libelous material posted by the identifiable person. Moreover, Section 5 focuses on whether the original speaker is identifiable, instead of categorizing the ISP's role as hosting, caching, and mere conduits. Given that the ISP's functions will be more complicated and unpredictable with technological advances, this new type of takedown system would be more effective than Section 1 of the Defamation Act 1996 and the EC Regulations.

Nevertheless, Section 5 poses several problems for ISPs. First, it might not provide sufficient protection for the defamed individual. When the original poster does not wish defamatory statements to be removed, the ISP must inform the complainant that the poster did not agree with removal of the complained-of material, and thus the statements would not be removed from the online location.[865] The only option for the complainant is suing the original poster. As a consequence, the libelous statements would continue to remain on the Net until the allegedly defamed person won the case. Hence, suing the original online poster will not be always the best way.

To eliminate harmful postings or repair the damaged reputation, the ISP should be able to delete defamatory contents as promptly as possible. It might be more reasonable to require ISP to block the libelous contents temporarily or to notify the public that a third party contests the material. As U.K. law professors Alastair Mullis and Andrew Scott argued, the U.K. Parliament should have imposed on ISPs an obligation to attach a notice

[865] *Id*. § 8.

of complaint to a challenged statement that the ISP chose not to delete.[866] Such a mandatory notice might protect the complainant's reputation more effectively by letting readers know that the material was contested.[867]

Another problem with Section 5 is derived from its vagueness. The provision states that an ISP will be immunized when it is "not the operator" that posted a defamatory comment.[868] Yet it is hard to predict when an ISP would not be treated as the "operator" of a harmful statement. If an ISP authorizes other users to publish libelous comments but has no function to control its contents, is the ISP the "operator" of the statement or not? In a similar context, "moderates" is not clear-cut. Section 5(12) provides that the fact that the operator "moderates" the statements of others does not defeat the defense. The levels of the ISP's moderation, however, vary. Some ISPs may involve simple removing or blocking banned words automatically, whereas others may substantially monitor and remove offensive contents.[869] Courts will have to define the statutory term of moderation for the ISPs so that they can predict what sort of moderations is allowed under the Defamation Act 2013.

Although Section 5 suffers from a vagueness problem, ISPS will likely benefit from the provision. Whether or not the author of harmful content is identifiable, the ISP will not lose protection merely because of its knowledge of the existence of the defamatory

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[866] Alistair Mullis & Andrew Scott, *Tilting at Windmills: the Defamation Act 2013*, 77 MODERN L. REV. 87, 102 (2014).

[867] *Id.*

[868] Defamation Act 2013, § 5(2).

[869] Price & McMahon eds., *supra* note 531, § 6.33.

material. If the ISP takes action promptly for the author-unidentifiable material, it is likely to avoid liability.

B. Case Law

As online defamation becomes more pervasive, individual online speakers have been increasingly sued for defamatory comments on SNS.[870] Although the potential liability of the individual speakers for defamation is a major issue, the liability of ISPs or the website operators is the central focus of this dissertation.

As noted in the methodology section of Chapter I, my research has found 9 ISP cases in which one of the causes of action was defamation.[871] Table 2 (see Appendix E) sets out the case name and decision year of each case, and whether the ISP was held immune to liability.[872]

As Table 2 illustrates, Section 1 of the Defamation Act 1996 and the EC Regulations did not provide enough protection for ISPs. ISPs were held unprotected against liability in 4 cases of the 9 defamation cases. In other words, 44.5 percent of ISP defamation cases in England have ended against ISPs. Why Section 1 of the Defamation Act 1996 and the EC Regulations have failed to protect ISPs is discussed in the following subsections.

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[870] *See e.g.*, McAlpine v. Bercow [2013] EWHC 1342 (QB) (Bercow's tweet bore "natural and ordinary" defamatory meaning that Lord McAlpine was "pedophile"); Cairns v. Modi [2012] EWCA Civ 1382 (Modi defamed Cairns with a match-fixing tweet).

[871] For a discussion of how the UK ISP cases were selected for this research, see *supra* Chapter I, D, "Methodology."

[872] For a table of "U.K. Decisions about ISP Liability for Defamation under Section 1 and EC Regulations, see Table 2.

1. Early ISP Cases

Section 1 of the Defamation Act 1996 was for the first time tested for ISP liability in *Godfrey v. Demon Internet Ltd*.[873] In January 1997, an anonymous person posted a defamatory message about physics lecturer Laurence Godfrey on a newsgroup website hosted by Demon Internet.[874] Although Godfrey informed Demon Internet of the offending post and requested the ISP to delete it from the news server, the posting had remained for 10 days.[875] Godfrey sued Demon Internet for the 10-day libelous posting.[876]

The High Court found Demon Internet liable for the libelous contents hosted. Justice Michael Morland of the High Court pointed out that publication occurred whenever users accessed and read the posting:

> [T]he defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accessed the newsgroup containing that posting. Thus every time one of the defendants' customers accesses "soc.culture. thai" and sees that posting defamatory of the plaintiff there is a publication to that customer.[877]

Justice Morland rejected Demon Internet's argument that it was a mere owner of an electronic device, which simply stored postings within its computer.[878]

Justice Morland also referred to *Byrne v. Deane,*[879] in which liability arose for not removing defamatory material that was in the defendant's power to remove once

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[873] [1999] EWHC 244 (QB).

[874] *Id.* ¶ 12.

[875] *Id.* ¶ 13.

[876] *Id.* ¶ 15.

[877] *Id*. ¶ 33.

[878] *Id*. ¶ 35.

notified.[880] He compared the ISP to a traditional distributor such as a bookseller or a library that circulates a defamatory book, for the ISP transmitted the libelous statement to others from the storage of its server.[881] The court concluded that the ISP would not rely on Section 1 because it knew of the harmful content after the plaintiff's notification.[882]

Justice Morland found American ISP cases "educative and instructive" for online issues at the early stage of the Internet.[883] But he held the U.S. decisions to be of little assistance because of the fundamental difference in U.S. and U.K. libel laws.[884] Operators of bulletin boards are liable as publishers in England, while ISPs in America are immunized.[885]

Godfrey made other ISPs concerned about online libel lawsuits.[886] It gave ISPs a clear lesson: once a notice arrives, take down the material as soon as possible to avoid liability. Therefore, ISPs are more likely to choose to eliminate postings regardless of whether

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[879] [1937] 1 KB 818 (golf club's proprietors were liable for publication by allowing libelous statement to remain on notice board).

[880] *Godfrey*, [1999] EWHC, ¶ 32.

[881] *Id*. ¶ 34, *quoting* Weldon v. "The Times" Book Co. Ltd, [1911] 28 T.L.R. 143 (bookseller selling defamatory book); Vizetelly v. Mudie's Select Library, 2 Q.B. 170 [1990] (library circulating to subscribers a defamatory book).

[882] *Id*. ¶ 50.

[883] *Id*. ¶¶ 36-48 (*quoting* Cubby v. CompuServe, 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont v. Prodigy Serv. Co., 1995 WL 323710, slip op. (N.Y. Sup. Ct. May 24, 1995); Zeran v. America Online. 129 F.3d 327 (4th Cir. 1997)).

[884] *Id*. ¶ 36.

[885] *Id*. ¶¶ 46-9.

[886] Matt Wells, *Freedom Fear on Website Closure*, GUARDIAN, Apr. 3, 2000, http://www.guardian.co.uk/technology/2000/apr/03/freespeech.internet (last visited Aug. 10, 2014).

information posted is true. For they see no merit in defending against third parties' postings.

The issue of whether a website operator would be a publisher was questioned again in a contempt of court case of 2001. In *Totalise Plc v Motley Fool Ltd,*[887] an Internet service provider Totalise sued other ISPs that operated a website on which an anonymous person posted defamatory materials about the Totalise. Totalise sought disclosure of the identity of the anonymous poster under Section 10 of the Contempt of Court Act.[888]

Judge Robert Owen of the High Court held that Section 10 had no application to the facts involved, because the defendant ISPs took no responsibility for postings on their discussion boards while exercising no editorial control on the website.[889] But the *Totalise* court did not make clear why the website operators should not be treated as publishers, whereas the operator was liable as a secondary publisher in *Godfrey*.

The challenge to *Godfrey* was repeated in *Bunt v. Tilley*.[890] John Bunt sued three individuals who wrote libelous postings and three ISPs (AOL UK, Tiscali UK, and BT) that had published the offending comments via their services.[891] Bunt did not claim that the ISP defendants were the hosts of contents at issue. Therefore, Justice David Eady of the High Court addressed the ISP liability, focusing on the fact that the ISPs were mere conduits, not on the fact that they hosted the harmful websites. When the ISP merely

[887] [2001] EWHC 706 (QB).

[888] *Id*.

[889] *Id.*

[890] [2006] EWHC 407 (QB).

[891] *Id*. ¶ 5.

facilitated online publication like postal services, Justice Eady held, it should not be responsible as a publisher. [892] He emphasized that the ISPs simply provided a means of transmitting communications without participating in the process of publication.[893]

Furthermore, the court found that Bunt did not notify the ISPs effectively of the existence of defamatory materials, just sending the ISPs two emails titled "AOL customer detailed disclosure request" without identifying the libelous stings.[894] In the emails, Bunt reported that one of AOL customers had libeled him and requested to disclose the name of the anonymous author.[895] This fact was in contrast to *Godfrey,* in which the ISP was clearly requested by Godfrey to remove libelous contents.[896]

Therefore, Justice Eady held that the ISPs had no reason to believe that they were causing defamatory publication and thus were simply passive media of communication without any knowledge of harmful publication.[897] As mere conduits, ISPs did not need to rely on any defense. Justice Eady stated that even if the ISPs were to be viewed as publishers, ISPs would be completely protected under Section 1 of the Defamation Act and Section 19 of the EC Regulations.[898]

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[892] *Id*. ¶ 9 (Justice Eady extensively relied on Matthew Collins' book "The Law of Defamation and the Internet," which claims that conduit are mere facilitators of Internet publication and thus they are not responsible for publication).

[893] *Id*. ¶ 24.

[894] *Id*. ¶ 26.

[895] *Id*.

[896] *Id*. ¶ 30.

[897] *Id*. ¶ 61.

[898] *Id*. ¶¶ 61-71.

As shown above, the U.K. court decisions on the ISPs have been inconsistent. In *Godfrey*, the ISP was considered a publisher, but ISPs in *Totalise* and *Bunt* were evaluated as mere conduits. In those cases, the role of ISPs appears not much different in that they are operators of websites where third parties could leave defamatory materials. Internet law expert Matthew Collins points out that the status of ISPs who unknowingly host or cache contents posted by others has been unsettled.[899]

2. Liability of the Search Engine

As Google has grown as a global search engine, the search engine's liability for defamation has emerged as a significant issue in Internet law. In *Metropolitan International Schools Ltd v. Designtechnica Corp*,[900] the liability of Google was first addressed in England. Whenever it was searched on Google.co.uk and Google.com, the search results of the Metropolitan International School, a distance learning company, included the snippet of a statement that its business was a "new SCAM."[901] The Metropolitan sued Google for defamation.

Justice Eady of the High Court relied on his earlier opinion, *Bunt*: If an ISP participates in communication as a passive medium, the ISP should not be treated as a publisher and thus there is no need for defense against liability.[902] Examining Google's role in the present case, Justice Eady found no participation by Google in formulating

[899] Collins, *supra* note 49, at 120.

[900] [2009] EWHC 1765 (QB).

[901] *Id.* ¶ 18.

[902] *Id.* ¶ 36 (citing *Bunt*, [2006] EWHC 407 (QB)).

search terms and thus Google could not prevent appearance of a snippet on its screen.[903] With no input from Google, the search engine merely played a "role of a facilitator."[904] Justice Eady stated: "[O]ne cannot merely press a button to ensure that the offending words will never reappear on a Google search snippet: there is no control over the search terms typed in by future users."[905] Therefore, Google did not have to rely on Section 1 as a non-publisher at common law.[906]

Could Google be liable after being alerted to a defamatory snippet thrown by the search engine?[907] Justice Eady replied: Although the ISP defendant in *Godfrey* became liable for the defamatory postings after being notified, search engines would not be liable even after notified. Justice Eady noted that it would be hardly possible for Google to take down contents due to authorship or authorization with original posters.[908] A similar conclusion about Google's role was reached in *Budu v. BBC*.[909] Samuel Budu sued the British Broadcasting Corp. (BBC) for articles on BBC website and Google for snippets

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[903] *Id*. ¶¶ 50-51.

[904] *Id*. ¶ 51.

[905] *Id*. ¶ 55.

[906] Justice Eady noted that "publisher" under the Defamation Act was confusing. Because Section 1(2) of the Act defines a publisher as a "commercial publisher," Google might become a publisher under the Act engaging in a business issuing contents to the public, even though it is not a publisher at common law. *See id*. ¶ 73.

[907] *Id*. ¶ 54.

[908] *Id*. ¶ 58. *Compare* an Australian case Trkulja v. Google Inc., [2012] VSC 533 (holding that the search engine's performance established liability as a publisher at common law), *with* another Australian Bleyer v. Google Inc., [2014] NSWSC 897 (rejecting the *Trkulja* decision, holding that at least prior to notification of complaint, Google cannot be liable as a publisher of the search results).

[909] 2010 EWHC 616 (QB).

from the archived articles.[910] BBC articles stated that an illegal immigrant was turned down for the post as head of diversity for police.[911] In subsequent articles, the BBC named Budu as the person rejected but published his argument that he did not illegally immigrate to England.[912] Justice Victoria Sharp of the High Court held that the BBC articles were not defamatory because if the readers saw Budu's name, they would see his denials of the allegation in the same articles.[913] Budu claimed that Google should be liable for republication of the story through Google searches that contained snippets of the BBC stories. But the High Court, referring to *Metropolitan*, held that Google was not liable as a mere facilitator when it did not participate in formulating the snippets.[914] Thus, a search engine as a mere facilitator would be totally immune to liability for defamation in England.

Still unclear is why the court has considered Google a mere passive facilitator. Given that Google has ability to control over its snippets, it may be treated as a secondary publisher. Besides, Google's system as search engine is designed to *publish* online contents for its business purpose. Why should it not be treated as a publisher? Courts should provide clearer answers to why the search engine was ruled to be mere facilitator.

3. Confusing Roles and Liabilities of ISPs

As the Internet has evolved, ISPs have varied in their functions. One of the notable

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[910] *Id.* ¶ 1.

[911] *Id.* ¶ 18.

[912] *Id.* ¶¶ 23-6.

[913] *Id.* ¶ 44.

[914] *Id.* ¶ 77 (citing *Metropolitan,* [2009] EWHC 1765 (QB)).

functions is the ISP's role as an operator or a manager of a website. In *Karim v. Newsquest Media Group*,[915] it was discussed whether a newspaper publisher could be protected as an operator of the bulletin board. A solicitor Imran Karim sued the Newsquest Media Group that hosted the bulletin board posted with defamatory comments by users. The Royal Court of Justice held that the Newsquest was entitled to rely on Regulation 19 of the EC Regulations because Newsquest as a hosting provider did not have "actual knowledge of unlawful activity of information" until it was notified by Karim.[916] In addition, the court pointed out that Newsquest quickly took down the materials as soon as it was notified.

In this case, Newsquest did not claim application of Section 1 for undisclosed reason. Probably it is because the newspaper company as a commercial publisher might hesitate to rely on Section 1, which excludes a "commercial publisher" from protection.[917] Although the *Karim* court did not consider the *Demon* decision or Section 1 defense, *Karim* shows that the ISP would be successfully immunized even under Regulation 19 when it promptly responded to the complaint. The *Karim* decision sends a positive signal for the press, showing that online commercial publishers will be protected relating to their users' comments.

By contrast, it was ruled that an operator of a blog should not avoid liability for user-generated contents if the operator checked or moderated the content. In *Kaschke v.*

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[915] [2009] EWHC 3205 (QB).

[916] *Id*. ¶ 15.

[917] Defamation Act § 1(2).

Gray,[918] a local political activist Johanna Kaschke claimed that a defamatory post written by a user name "Gray" was placed on a blog called "Labourhome.org" which was operated by Alex Hilton.[919] The blog post argued that Kaschke was arrested on suspicion of a terrorist group member.[920] Kaschke sued both the original author "Gray" and the blog operator Hilton. The blog operator claimed that he did not edit the articles posted by other users and thus should be protected under Regulation 19.[921]

Judge Nicholas Felix Stadlen of the High Court pointed out that the blog operator had exercised "editorial control" on some parts of the blog by providing more details about each post, fixing spelling and grammar, and removing blog posts on grounds of bad language, political provocation or offensiveness.[922] On this basis, Judge Stadlen held that the blog operator's Regulation 19 defense would fail, and the appeal was dismissed. *Kaschke* suggests that a blogger is unlikely to be protected when it exercises an editorial control. Yet it is doubtful whether a blogger's mere action of correcting grammar or removing post is entitled to the editorial function, which led the blogger to lose protection.[923]

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[918] [2010] EWHC 690 (QB).

[919] *Id.* ¶ 3.

[920] *Id.* ¶ 5.

[921] *Id.* ¶ 13.

[922] *Id.* ¶¶ 77-9.

[923] Steven James, *Tightening the Net: Defamation Reform and ISPS*, 23(7) ENT. L.R. 197 (2012) (commenting that *Kaschke* "made life even harder for ISPs" because "the threshold for becoming 'active' is worryingly low.").

In *Davison v Habeeb*,[924] Google's role, not as a search engine but as an operator of Blogger.com, was the central issue. Andrea Davison, an owner of a small business, sued the editor and columnists of the *Palestine Telegraph* for defamation over their news articles and a blogger of the 'Blogger.com' on which the articles claimed that Davison involved in a criminal conspiracy of theft and fraud. Also Davison sued Google for hosting the blog platform and failing to take down the libelous material quickly when notified.[925] To determine whether Google was the publisher of the words complained of, Judge Richard Parkes of the High Court reviewed prior cases such as *Godfrey*, *Bunt*, and *Metropolitan*:

> It is necessary to see how relatively novel internet-bred concepts can be made to fit into the traditional legal framework. One tool is analogy. But it can be difficult to draw effective analogies between long established modes of publication like the newspaper and the television, and radically novel platforms like the enormous burgeoning Bagel which the fifth defendant [Google] hosts through Blogger.com. … Blogger.com, by contrast, is not simply a facilitator…. It might be seen as analogous to a *gigantic notice board* which is in the fifth defendant's control in the sense that the fifth defendant provides the notice board for users to post their notices on, and it can take the notices down (like the club secretary in *Byrne v Deane*) if they are pointed out to it.[926]

As a publisher of the "gigantic notice board," the court found that Google, after receiving notification, should be regarded as having consented and participated in the publication by not taking it down.[927]

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[924] [2011] EWHC 3031 (QB).

[925] *Id.* ¶¶ 11-6.

[926] *Id.* ¶ 38 (emphasis added).

[927] *Id.*

Although Judge Parkes sympathized with Google's claim that it could not determine whether a complaint would be justified or not,[928] he pointed out that after notified, Google knew or had reason to believe that its continued hosting of the material would cause or contribute to the publication of a defamatory statement. Therefore, Google was determined not to take reasonable care under Section 1.[929] Even if Google was a mere provider of the notice board, according to Judge Parkes, Google should be liable for continued publication after notified.[930]

As to the "hosting" defense under the EC Regulations, Judge Parkes addressed the issue of whether Google had "actual knowledge of unlawful activity or information," which Regulation 19 required. Judge Parkes ruled that there was "no realistic prospect" to establish that Google had actual knowledge of unlawful information, when it confronted the conflicting arguments from Davison and from the journalist of the *Palestine Telegraph*.[931] The *Davison* decision shows that Google as a website host would not avoid liability for defamation, contrasting with Google's liability as a search engine in *Metropolitan*.

Google's role as a blog operator was questioned again in the following year. In *Tamiz v. Google,*[932] Payam Tamiz appeared in the news relating to allegations that he had

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[928] *Id*. ¶ 45.

[929] *Id*. ¶ 46.

[930] *Id*.¶ 47.

[931] *Id*. ¶ 68.

[932] [2012] EWHC 449 (QB).

resigned as a candidate for local elections after making inappropriate comments.[933] A blog titled "London Mouslim," which was operated by Google blog service, posted several comments that Tamiz insulted girls and involved drug dealing.[934] Finding that those statements were made anonymously, Tamiz used the "Report Abuse" function on the blog website and sent a letter of claim to Google UK, which later passed the complaint to Google Inc.[935] The "Blogger Team" within Google Inc. forwarded Tamiz's complaint to the author of the blog, and the blogger himself eventually removed the comments 5 weeks later.[936] Nonetheless, Tamiz sued Google for defamation, instead of suing the blogger.

Justice David Eady of the High Court, examining whether Google would be a publisher under the common law, stated that none of the previous decisions have definitely established how ISPs would fit into the traditional framework of common law principles.[937] Emphasizing that the ISP's position would be "fact-sensitive," Justice Eady held that ISP's liability would rely on "the extent to which the ISP has knowledge of the words complained of" and "on the extent to which it has control over publication."[938]

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[933] *Id.* ¶ 5.

[934] *Id.*

[935] *Id.* ¶¶ 15-7.

[936] *Id.* ¶¶ 18-20.

[937] *Id.* ¶ 32.

[938] *Id.* ¶ 33.

In this case, Google claimed that it could not exercise editorial control over the content of the blog that it was hosting with 250,000 new words added every minute.[939] Justice Eady agreed with Google, stating that Google cannot take responsibility for publication of material on any particular blog, regardless of whether Google received notification of a complaint or not. Comparing Google to the owner of a wall gratified, Justice Eady held that the owner of the wall should not be responsible for the contents of the graffiti.[940]

Also, Justice Eady held that acceptance of the responsibility for notifying the blogger would not change Google's status into a publisher.[941] Irrespective of the notification of a complaint, the court concluded that Google was not liable as a "purely passive one" in the process of publication.[942] Likewise, Google's technical capability of taking down blogs or comments on its platform did not convert the ISP's position into an author of publication.[943] Justice Eady stated:

> It is no doubt often true that the owner of a wall which has been festooned, overnight, with defamatory graffiti could acquire scaffolding and have it all deleted with whitewash. That is not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher.[944]

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[939] *Id.* ¶ 35.

[940] *Id.* ¶ 38.

[941] *Id.* ¶ 38.

[942] *Id.* ¶ 39.

[943] *Id.*

[944] *Id.* ¶ 38.

Even if Google could be liable, Justice Eady said, Section 1 of the Defamation Act would apply to Google because it was not a commercial publisher and took reasonable care to take down the material once it received the complaint.[945] Regulation 19 of the EC Regulations also would provide protection, according to Justice Eady, for Tamiz did not offer Google as to the detailed information about the allegedly unlawful information.

Under *Davison*, however, Google should be treated as a publisher of the contents that were hosted on the Blogger.com, after it received notification. Nonetheless, Justice Eady held that Google should not be a publisher of the hosted contents even after it received notification. Eventually, Google was held in the same position of *Bunt* as a purely passive intermediary. As a consequence, Justice Eady's decision was criticized in that it did not follow the precedent of *Davison* and allowed the ISP to ignore the plaintiff's takedown request.[946]

In February 2013, Judge Stephen Richards of the Court of Appeal reversed Justice Eady's ruling on the Google's role for blog publication.[947] Tamiz claimed that Google must be liable both as a primary publisher and as a secondary publisher or distributor. But Judge Richards held that Google was not a primary publisher of the blogs because it did not create the blogs or had no effective control over blog contents.[948] Also, Google was not a secondary publisher, according to the Court of Appeal, for it did not know of the

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[945] *Id.* ¶¶ 49-51.

[946] *See e.g.,* Rhys Griffiths, *New Immunity for Website Which Host Defamatory User Generated Content*, 23(5) ENT. L.R. 145 (2012) (noting that Justice Eady's *Tamiz* decision was "totally at odds with the law as it stood").

[947] Tamiz v. Google [2013] EWCA Civ 68.

[948] *Id.* ¶ 25.

existence of the defamatory comments prior to Tamiz's notification.[949] The Court of Appeal held, however, that Google's position should be changed after receiving notification of the complaint.[950] Relying on the 1937 decision of Byrne,[951] Judge Richards used an analogy of a "gigantic notice board": "Most importantly, it [Google] makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms."[952]

Then, Judge Richards considered Section 1 defense. After Google was notified, he held that Google knew or had reason to believe that hosting of the blog had caused or contributed to the publication of defamatory statement.[953] Hence, Section 1 could not protect Google after notified. Nevertheless, Judge Richards sided with the high court and refused the overall appeal. The reason was that the publication was so trivial without "real and substantial tort" and lacked in evidence about how may people had read the offending material.[954] It was improbable that significant number of readers would have accessed the blog comments after notification.[955]

Although Tamiz could not win against Google, this case is significant because the Court of Appeal held that Google was liable as a blog publisher after being notified and

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[949] *Id.* ¶ 26.

[950] *Id.* ¶ 27.

[951] Byrne, [1937] 1 KB 81.

[952] *Tamiz,* [2013] EWCA Civ, ¶¶ 32-33.

[953] *Id.* ¶ 44.

[954] *Id.* ¶ 50.

[955] *Id.* ¶ 51.

Google could not rely on Section 1 defense when the ISP did not take down harmful contents promptly.[956] But it is not clear why the Court of Appeal concluded that there was no substantial and real harm: even though several users had read defamatory materials, they were likely to easily copy and spread such materials to other online space. The number of readers and duration of publication might not be so important in cyberspace where contents can be permanently reproduced.

In *McGrath v. Dawkins*,[957] author Chris McGrath, with intent to generate publicity for his book, posted a review of a book by the well-known scientist Stephen Hawking on Amazon.co.uk.[958] McGrath's book review, which gave the details of his own book, had sparked off a long thread of critical comments.[959] McGrath sued both critical commenters and Amazon.co.uk.

Judge Patrick Moloney of the High Court examined whether Section 1 and Regulation 19 could be applied to liability of Amazon. Judge Moloney held that Amazon was entitled for Section 1 as a non-commercial publisher within the definition of Section 1(2), (3).[960] Then the judge found that Amazon took reasonable care with its a moderation policy of limited pre-publication control by an automatic filter for forbidden words or

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[956] *See e.g.*, Lisa O'Carroll, *Google Must Act Quickly on Libelous Blogger Posts, Says Appeal Court*, GUARDIAN, Feb. 14, 2013, http://www.theguardian.com/media/2013/feb/14/google-libel-blogger-posts (last visited Dec. 1, 2014) (*quoting* a lawyer Lan de Freitas' comment that "[i]t is a blow to the technology platform providers because the court of appeal decided that Google is arguably responsible for the postings by the blogger once they have been notified of them and have failed to take them down").

[957] [2012] EWHC B3 (QB).

[958] *Id.* ¶¶ 2-3.

[959] *Id.* ¶¶ 4-5.

[960] *Id.* ¶¶ 40-1.

blacklisted users and had no reason to believe that it caused defamation.[961] In addition, Amazon was entitled to rely on Regulation 19 because McGrath did not clearly specify the location of postings complained and did not disclose facts that the postings were unlawful.[962]

Amazon could narrowly escape liability with its automatic filter system. As Judge Moloney noted, if Amazon relied on a manual review (human eyes), it might be liable due to lack of reasonable care as an editor.[963] So the ISP is placed in the paradoxical situation: If the ISP hires people to watch and check harmful contents more diligently, it likely become an editor of the website and eventually take responsibility for defamation. Thus, courts should focus on whether an ISP engaged significantly in publishing defamatory contents. If the courts' determination of the ISP's liability hinges on the ISP's own moderation policy, as shown in *McGrath*, such determination will make Internet defamation law more confusing.

C. Summary and Conclusions

The UK defamation law enters a new phase with the Defamation Act 2013. ISPs are expected to benefit from a new defense under Section 5, but the ISP's liability for defamation becomes more complicated while the new Act as well as the Defamation Act 1996, EC Regulations, and common law are applied simultaneously. Although reform of

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[961] *Id.* ¶¶ 44-6.

[962] *Id.* ¶¶ 47-8.

[963] *See id*. ¶ 41 ("In the present case, Amazon took no steps in relation to the content of any of the statements, and no part in any decision to publish it, except by way of the automatic process referred to above. (The manual review was never triggered; had it been, the position might have been very different.)").

Section 1 of the Defamation Act 1996 has been viewed to protect more freedom of speech, it is open to question whether the new defense under the Defamation Act 2013 will provide more speech on the Internet.

Nonetheless, the new defense is novel in that it focuses on the identification of the original poster and it does not hinge on the ISP's role as a host, a cache, and a mere conduit. Providing procedural guidance with the Defamation Regulations 2013, the Defamation Act 2013 will likely guarantee more practical solutions for ISPs in dealing with defamatory contents. If ISPs under Section 5 continue to opt for take-downs as they did under Section 1, however, the supposedly ISP-friendly Defamation Act of 2013 will unlikely accomplish its intended goal— that is, to protect ISPs more against liability for defamation.

As the case law illustrates, the application of the defamation law to ISP liability shows that the law remains in a state of flux. A noticeable problem is how to draw a line between mere conduits and hosting publishers. While Google as search engine is treated as mere facilitator regardless of its ability to control search results, Google as blog operator is ruled as publishers at least after being notified about harmful contents. If simply focusing on Goolge's potential ability to control its contents, such dichotomy might be less persuasive. The ISP's position prior to notification also has yet to be settled and needs to be more speculated.

ISPs are rapidly evolving. New types of ISPs will be developing with more complicated and mixed functions. In this context, what is needed is the effective, simplified law that can be applied to this fast changing area of communication.

CHAPTER VII

SUMMARY AND CONCLUSIONS

The Internet is a network of networks. Since the browser system of the World Wide Web (WWW) was launched in 1990, the Internet has brought about a communication revolution. As a global medium of human communications, the Internet makes cyber speech available to anyone connected to the Net, enabling an ideal two-way communication. Moreover, the widespread use of smartphones and the advent of social network service (SNS) have changed the way human beings communicate. Currently, online speech exerts more tremendous impact on modern society than speech mediated by the traditional media does.

In the early 1980s, the U.S. Supreme Court noted that technological differences between various media have affected media laws in that "[e]ach method of communication is 'a law unto itself' and that law must reflect the different natures, values, abuses, and dangers" of each medium.[964] But it remains a never-ending issue whether cyber communication should be treated differently from non-cyber communication as a matter of law because of its different technical and intrinsic features.

Regardless, the Internet has posed a number of challenges to online communication.[965] The concept of the press and journalist, for example, has been affected by the rise of blogger journalists and websites dedicated to news reporting. The Internet's uniquely versatile ability to copy and distribute contents makes the enforcement of

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[964] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

[965] For freedom of online communication, see s*upra* Ch. II, "Freedom of Expression and the Internet."

copyright law increasingly complicated. SNS and Google have forced people to reexamine the long-standing notion of privacy, precipitating legal disputes over the "digital Panopticon" and a "right to be forgotten." Meanwhile, online pornography as a global phenomenon makes it harder to regulate obscene materials hosted through foreign servers. Hate speech is more prevalent globally with online hate sites to recruit new members and spread hatred of religion, race, nation, and languages. Further, Internet defamation is one of the most perplexing issues as the law of defamation is an extraterritorial concern through foreign lawsuits over online publications.

To balance freedom of speech with reputational right in the United States and the United Kingdom, three classic free speech theories – "marketplace of ideas," "democratic self-governance," and "human dignity and self-fulfillment" – have played an important role in providing a theoretical framework.

Especially, the marketplace of ideas has significantly informed American courts in addressing Internet-related issues. In American law, the Internet is viewed as the most accessible medium, and strong protection is allowed to online communication.[966] By contrast, the marketplace of ideas has been less impactful to U.K. court decisions on online expression.

In understanding what makes the United States distinguished from, as well as similar to, the United Kingdom in cyber law in general and in online defamation law particular, the concept of functional equivalence will help to contextualize various differences and

[966] *Reno*, 521 U. S., 885. For a discussion of *Reno*, see *supra* Ch. II, pp. 42-3.

similarities.[967] Meanwhile, Yale law professor James Q. Whitman notes the importance of comparative research in examining the "relative" differences:

> [I]t would be wrong to say that there is some absolute difference between American and continental European law. But the issue is not whether there is an absolute difference. Comparative law is the study of relative differences. Indeed, it is the great methodological advantage of comparative law that it can explore relative differences. No absolute generalization about any legal system is ever true.[968]

Notwithstanding their relative differences, comparative research on American and English online defamation law would be valuable because these two countries share the same root of common law but have diverged sharply from each other since the *Sullivan* ruling. In addition, these countries enacted laws on ISP liability in the same year, 1996. Thus, this research shows how the United States and the United Kingdom, the two liberal democracies with similar sociopolitical and cultural traditions, have yielded distinctive legal perspectives on the law of defamation in cyberspace.

A. The United States: Absolute Immunity for ISPs

The common law requires that the plaintiff, in making a *prima facie* libel case, must establish a defamatory statement, of and concerning the plaintiff, and publication to a third party. When the plaintiff established three elements, the pre-*Sullivan* libel law burdened the defendant with strict liability. But the revolutionary change in American libel law since *Sullivan* has made libel litigation no longer a major threat to U.S. media. Although the *Sullivan* "actual malice" rule has been criticized for its over-protection of freedom of speech, the constitutional rule has made American libel law most media-

[967] For a discussion of functional equivalence, see *supra* Ch. I, p. 12.

[968] James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1163 (2004).

friendly in the world.

Media victories in America have continued to on the rise over the years. Yet triumph of the media in libel litigation does not necessarily mean that libel law is a non-issue for the media. American media still remain wary of libel law in their news reporting out of their desire to forgo the often prohibitively high cost of libel litigation. More directly relevant to the topic of this dissertation is the sharp increase in libel litigation against individuals -- especially bloggers and online publishers. Now defamation law has emerged as more of a threat in the Internet era, and it is far from passé in the Internet era.

To address liability for online speech as a legal issue, Congress passed the Communications Decency Act (CDA) in 1996. The CDA was originally designed to prohibit transmission of obscene and indecent materials via telecommunication devices. But Section 230, the "Good Samaritans" clause, was added to the CDA to overrule an anti-ISP court ruling and to protect ISPs that screen harmful contents. Protecting online communication from government coercion was another substantial purpose.[969]

Judicial interpretations of Section 230 have rarely deviated from what Congress had intended. Since 1997, courts have almost always protected ISPs from both publisher and distributor liabilities as long as the ISPs were not authors or contributors to the libelous materials. Section 230 has been a perfect shield for ISPs: ISPs were immunized in 83 cases out of a total of 85 cases. In only two cases, website operators were found liable because they were directly engaged in authoring defamatory contents.[970]

Section 230, as interpreted by American courts over the past 17 years, has revealed

[969] For a discussion of the legislative history of CDA § 230, see *supra* Ch. V, pp. 139-42.

[970] *See* Table 1 for the list of CDA § 230 cases from 1997 to 2014.

several Internet law problems. The concept of the "interactive computer service" provider is so expansively interpreted that almost all types of service providers—individual bloggers, SNS, Google, and even traditional media—have been entitled to immunity so long as they are not original speakers. Also, what constitutes the ISP's "creation or development" of information has been a core issue in Section 230 litigation. But courts are less than coherent in applying the "material contribution" test for deciding on the ISP's liability in "creating or developing" the challenged information. Operators of a website or a blog could avoid liability even when they exercised "traditional editorial functions" such as selecting or editing materials written by others before posting.

Although the cause of action most frequently associated with Section 230 is defamation, Section 230 preempts an array of non-defamation claims against ISPs, including anti-discrimination, negligence, invasion of privacy, spam filtering, negligent misrepresentation, and intentional infliction of emotional distress. Given the legislative intent of Section 230 was to protect an ISP that acted as a "computer Good Samaritan," courts should have focused on protection for ISPs who attempt to block harmful contents rather than for those who more often aim to hurt others' rights for one reason or another.

Overall, the supposedly fair sense of balance in defamation law has been lost in the application of Section 230. American courts need to consider reading Section 230 more narrowly. For instance, they might apply the "material contribution" test, as established in *Roomates*, more broadly to find ISPs liable for operating "revenge porn" or bullying websites. If the operators invite or encourage other users to post defamatory contents, the

ISPs should be found to be "contributing or developing" illegal contents and so to be found liable under Section 230.

More fundamentally, Congress made a policy choice in 1996 to provide the kind of cushion that ISPs might have needed to survive in the infantile period of the Internet. But now the Internet is not as fragile as it was in the mid-1990s as a medium of communication that might have warranted a special protection. Hence, the CDA is in need of being revised in order that the ISPs' protection against liability for defamation and related lawsuits may be better balanced with individuals' right to reputation.

B. The United Kingdom: Less-absolute Immunity for ISPs

U.K libel law is less media-friendly than American law in that it still requires the media defendant to prove truth. It is easier for a plaintiff –particularly a public official or public figure—to win when suing the media in England than in America, for the plaintiff does not have to prove the *Sullivan* type of "actual malice" on the part of the defendant. In the late 1990s and in the mid-2000s, however, the U.K. House of Lords, then the highest court of England, moved to liberalize British libel law in *Reynolds* and *Jameel* by drawing from the broadened American concept of press freedom, as epitomized by *Sullivan*.[971]

More recently, the U.K. Parliament, in response to the concerted efforts of media organizations and free speech groups, tipped the balance in favor of freedom of speech over reputation. In 2013, the Parliament reformed libel law sweepingly by passing the Defamation Act. The Defamation Act 2013 replaces the common law test developed in

[971] For a discussion of *Reynolds v. Times Newspapers Ltd.* of 1999 and *Jameel v. Wall Street Journal Europe* of 2006, see *supra* Ch. IV, pp. 120-26.

Reynolds by codifying the *Reynolds* "public interest" defense. If the media defendant shows that an allegedly false, defamatory statement was published in public interest or the defendant reasonably believed the existence of the public interest, the media defendant would not be held liable.

Nevertheless, the ten factors listed in *Reynolds* will likely continue to be relevant, when courts consider "all the circumstances of the case" in determining whether the defendant has shown the publication to be relevant to a matter of public interest. But if the courts strictly stick to the *Reynolds* factors to scrutinize the journalist's conduct, the new public interest defense will remain "ten hurdles" for the press. Hence, the courts should apply the *Reynolds* test, as refined by *Jameel,* more flexibly in ruling on the reporting-related circumstances, including the media's editorial judgment.

In addition, the new Defamation Act codifies "reportage" as part of *Reynolds*, allowing media defendants to report on issues of public interest.[972] The defense is based on the "reasonable" belief of the existence of public interest. Such requirement of "reasonable belief" might restrict the application of the reportage defense, which was expected to be speech-protective. Yet the new Act is likely to protect more freedom of speech in libel lawsuit by requiring "serious harm" for defamation claims and replacing the "multiple publication" rule with the "single publication" rule.[973]

While defamation lawsuits against the traditional media are on decline in the United Kingdom, online defamation litigation is rapidly increasing. But ISPs in England are

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[972] Defamation Act 2013, § 4(3).

[973] For a discussion of "serious harm" and "single publication" under the Defamation Act 2013, see *supra* Ch. IV, pp. 109-12.

given limited immunity from online defamation liability. The Defamation Act 2013, the Defamation Act 1996, EC Regulations, and other traditional defenses have been applied to ISP liability.

Section 1 of the Defamation Act 1996, which codifies common law liability for libel, protects ISPs when they are not the author, editor, or publisher of the challenged statement, they "took reasonable care" regarding the publication, and they "did not know, and had no reason to believe" that they had caused or contributed to the publication. Section 1, however, has led ISPs to remove materials that may have been in the public interest, as well as materials that were true. Another problem with the Section 1 defense is illustrated when the ISP is held liable for the third party's defamation simply because it was notified of the defamatory posting by the plaintiff. Moreover, a blogger, as a blog operator, was liable for libelous comment by others as exercising "editorial control" even when correcting grammar for or removing posts by other users.

In addressing the criticism that Section 1 of the Defamation Act 1996 had been "unduly harsh on secondary publisher,"[974] Section 5 of the Defamation Act 2013 allows broader immunity to ISPs through a new "notice and takedown" system. When enacting Section 5 in 2013, however, the UK government refused to adopt the CDA Section 230-like immunity on the ground that American law gave little weight to the protection of reputation.

An ISP will turn to Section 5 of the Defamation Act 2013 for defense when an ISP proves that it was "not the operator who posted the statement." But the ISP defense will

[974] Joint Committee on the Draft Defamation Bill- First Report, HL Paper 203/HC 930-I, Oct. 19, 2011.

be defeated when the plaintiff shows that it was impossible to identify the person who posted the statement, that the plaintiff sent the operator a notice of complaint regarding the posting, and that the operator failed to respond to the notice of complaint. The defense will be defeated when the ISP has acted with malice regarding the libelous contents as well.[975]

Section 1 of the Defamation Act 1996 provided defense only if the ISP did not know about the existence of such content. But Section 5 of the Defamation Act 2013 can be applied even when the ISP had knowledge of the defamatory content provided by the identifiable person. Consequently, Section 5 is likely to work positively for ISPs. Whether or not the author of the harmful content is identifiable, the ISP will not lose the defense simply because it was aware of the existence of defamatory material.

Section 5 defense of the Defamation Act 2013 is novel in English libel law. It adopts neither blanket immunity nor strict liability for ISPs' defamation. Instead of categorizing the degrees of protection based on the ISP's role as hosting, caching, and mere conduits, the new defense focuses on whether the original speaker is identifiable and provides a procedural guideline for a notice and takedown system. This new type of defense is noteworthy, for categorizing the role of ISPs will become more difficult and complicated with technological advances.

[975] Defamation Act 2013, § 5(11).

C. The United States and the United Kingdom: Serving as Cyber Libel Law Laboratories?

While American libel law places freedom of speech in a preferred position, U.K. law strikes the balance between speech and reputation in favor of reputation. Such differences between the two countries can be attributed to the comparative weight given to individual reputation vs. freedom of speech.

Online defamation laws demonstrate the similar value assessment that the traditional defamation law has engaged in in the offline world. But the statutory approaches and case laws of the United States and the United Kingdom indicate more differences than similarities. In a way, the differences showcase an American society where the Internet is considered to play a positive role in a marketplace of ideas. But American defamation law does not necessarily disregard reputation or ignore the dangerous impact of the Internet. Rather, it reflects the speech-favored American tradition.

American free speech law has inspired U.K. defamation law to be more liberal in recent years, and the CDA and the U.S. case law have influenced U.K. law on Internet defamation. The Defamation Act 2013 affirms an ongoing shift in English libel law and moves it closer to the American approach. Here, the U.S. has served as a free-speech laboratory for the evolving Internet libel law of the U.K.

Is American defamation law so perfect that it does not need any change, whether procedural or substantive? The answer should be no. The seemingly valid rationale behind the CDA at the time of its enactment in the mid-1990s has outlived its relevance now. And the CDA might deserve a reexamination in view of its nearly 20-year

experience.

One possible way of retooling the CDA Section 230 is to borrow from the notice and takedown procedure in Section 5 of the U.K. Defamation Act 2013. There is no compelling need to adopt the procedure immediately. For the U.K. law should take time for its impact — or lack thereof — to be felt by the ISPs and Internet speakers. Regardless, the U.K. experience will serve as a useful comparative framework for Americans in appreciating their relative differences from Britons.

APPENDIX A

COMMUNICATIONS DECENCY ACT, 47 U.S.C. SECTION 230 (UNITED STATES)

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(**b) Policy**

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content

provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on Communications Privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, c. 652, Title II, § 230, as added Feb. 8, 1996, Pub. L. 104-104, Title I, § 509, 110 Stat. 137; Oct. 21, 1998, Pub. L. 105-277, Div. C, Title XIV, § 1404(a), 112 Stat. 2681-739.)

APPENDIX B

DEFAMATION ACT, 1996, C. 31, SECTION 1 (UNITED KINGDOM)

S. 1 Responsibility for publication

(1) In defamation proceedings a person has a defence if he shows that--

(a) he was not the author, editor or publisher of the statement complained of,

(b) he took reasonable care in relation to its publication, and

(c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

(2) For this purpose "author", "editor" and "publisher" have the following meanings, which are further explained in subsection (3)--

"author" means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

"editor" means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

"publisher" means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved--

(a) in printing, producing, distributing or selling printed material containing the statement;

(b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) Employees or agents of an author, editor or publisher are in the same position as their

employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to--

(a) the extent of his responsibility for the content of the statement or the decision to publish it,

(b) the nature or circumstances of the publication, and

(c) the previous conduct or character of the author, editor or publisher.

(6) This section does not apply to any cause of action which arose before the section came into force.

APPENDIX C

DEFAMATION ACT, 2013, C. 26, SECTION 5 (UNITED KINGDOM)

S. 5 Operators of websites

(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.

(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that—

(a) it was not possible for the claimant to identify the person who posted the statement,

(b) the claimant gave the operator a notice of complaint in relation to the statement, and

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

(4) For the purposes of subsection (3)(a), it is possible for a claimant to "identify" a person only if the claimant has sufficient information to bring proceedings against the person.

(5) Regulations may—

(a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);

(b) make provision specifying a time limit for the taking of any such action;

(c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;

(d) make any other provision for the purposes of this section.

(6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—

(a) specifies the complainant's name,

(b) sets out the statement concerned and explains why it is defamatory of the complainant,

(c) specifies where on the website the statement was posted, and

(d) contains such other information as may be specified in regulations.

(7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.

(8) Regulations under this section—

(a) may make different provision for different circumstances;

(b) are to be made by statutory instrument.

(9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(10) In this section "regulations" means regulations made by the Secretary of State.

(11) The defence under this section is defeated if the claimant shows that the operator of

the website has acted with malice in relation to the posting of the statement concerned.

(12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

APPENDIX D

ELECTRONIC COMMERCE (EC DIRECTIVE) REULATIONS, 2002, S.I. 2000/2013 (UNITED KINGDOM)

Mere conduit 17. (1) Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where the service provider -

(a) did not initiate the transmission;

(b) did not select the receiver of the transmission; and

(c) did not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in paragraph (1) include the automatic, intermediate and transient storage of the information transmitted where:

(a) this takes place for the sole purpose of carrying out the transmission in the communication network, and

(b) the information is not stored for any period longer than is reasonably necessary for the transmission.

Caching 18. Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where -

(a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and

(b) the service provider -

(i) does not modify the information;

(ii) complies with conditions on access to the information;

(iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(iv) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has

been disabled, or that a court or an administrative authority has ordered such removal or disablement.

Hosting 19. Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where -

(a) the service provider -

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.

APPENDIX E

TABLES

Table 1. U.S. Decisions about ISP Liability for Defamation under Section 230

Decision Year	Immunity for ISP Liability	Defamation Cases Relating to § 230
1997	I (Immunized)	Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).
1998	I	Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998).
1999	I	Lunney v. Prodigy Serv. Co., 723 N.E.2d 539 (N.Y. 1999).
2000	I	Ben Ezra Weinstein & Co. v. America Online, 206 F.3d 980 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000).
2000	I	Mail Abuse Prevention Sys. LLC. v. Black Ice Software, Inc., No. CV7888630, 2000 WL 34016435 (Cal. Oct. 13, 2000).
2001	I	Morrison v. America Online, Inc., 153 F. Supp. 2d 930 (N.D. Ind. 2001).
2001	I	PatentWizard, Inc. v. Kinko's Inc., 163 F. Supp. 2d 1069 (D.S.D. 2001).
2002	I	Smith v. Intercosmos Media Group, Inc., No. Civ. A. 02-1964, 2002 WL 31844907 (Dec. 17, 2002).
2003	I	Barrett v. Fonorow, 799 N.E.2d 916 (Ill. App. Ct. 2003).
2003	I	Carafano v. Metrosplash.com, 339 F.3d 1119 (9th Cir. 2003).
2003	I	Green v. America Online, 318 F.3d 465 (3d Cir. 2003).
2004	I	Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003). *cert. denied*, 541 U.S. 1085 (2004).
2004	I	Grace v. eBay, 99 P.3d 2 (Cal. 2004).
2005	I	Austin v. Crystaltech Web Hosting, 125 P.3d 389 (Ariz. Ct. App. 2005).
2005	I	Donato v. Moldow, 865 A.2d 711 (N.J. 2005).
2005	N (Not Immunized)	Hy Cite Corp. v. Badbusinessbureau.com, 418 F. Supp. 2d 1142 (D. Ariz. 2005).
2005	I	Lackner v. Sanchez, No. Civ.A. B-05-264, 2005 WL 3359356 (S.D. Tex. Dec. 9, 2005).
2005	I	Roskcwski v. Corvallis Police Officer's Ass'n, No. Civ.03-474-AS, 2005 WL 555398 (D. Or. Mar. 9, 2005).
2006	I	Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006).
2006	I	D'Alonzo v. Truscello, 34 Media L. Rep. (BNA) 2084 (Pa. Com. Pl. May 31, 2006).
2006	I	Parker v. Google, Inc., 422 F.Supp.2d 492 (E.D. Pa. 2006).
2006	I	Prickett v. InfoUSA, Inc., 561 F. Supp. 2d 646 (E.D. Tex. 2006).

2007	I	Eckert v. Microsoft Corp., No. 06-11888, 2007 WL 496692 (D. Mich. Feb. 13, 2007).
2007	I	DiMeo v. Max, 248 Fed. Appx. 280 (3d Cir. 2007).
2007	I	Murawski v. Pataki, 514 F. Supp. 2d 577 (S.D.N.Y. 2007).
2007	I	Universal Commc'n Sys. Inc. v. Lycos, Inc., 478 F.3d 419 (1st Cir. 2007).
2008	I	Capital Corp. Merchant Banking, Inc. v. Corporate Colocation, Inc., No. 07-1626, 2008 WL 4058014 (D. Fla. Aug. 27, 2008).
2008	I	Doe v. Friendfinder Network, Inc. 540 F. Supp. 2d 288 (D.N.H. 2008).
2008	I	Global Royalties, Ltd. v. Xcentric Ventures, 544 F. Supp. 2d 929 (D. Ariz. 2008).
2008	I	Higher Balance, LLC v. Quantum Future Group, Inc., 37 Media L. Rep. (BNA) 1181 (D. Or. Dec. 18, 2008).
2008	I	Kuersteiner v. Schrader, No. 100089/08, 2008 WL 8152695 (N.Y. Sup. Ct. Oct. 14, 2008).
2008	I	Mayhew v. Dunn, No 580-11-07, 2008 WL 4281984 (Vt. Mar. 18, 2008).
2008	I	Steele v. Mengelkoch, No. A07-1375, 2008 WL 2966529 (Minn. Ct. App. Aug. 5, 2008).
2008	I	Whitney Info. Network, Inc. v. Xcentirc Ventures, LLC, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095 (M.D. Fla. Feb. 15, 2008).
2009	I	Certain Approval Programs, I.L.C. v XCentric Ventures I.L.C., No. CV08-1608-PHX-NVW, 2009 WL 596582 (D. Ariz., Mar. 9, 2009).
2009	I	Finkel v. Facebook, Inc., No. 102578/09, 2009 WL 3240365 (N.Y. Sup. Ct. Sept. 15, 2009).
2009	I	Hechtman v. Connecticut Dept. of Public Health, No. CV094043516, 2009 WL 5303796 (Conn. Dec. 03, 2009).
2009	I	Independent Newspapers, Inc. v. Brodie, 996 A.2d 432 (Md. 2009).
2009	I	Joyner v. Lazzareschi, No. 05CC10627, 2009 WL 695539 (Cal. Ct. App. Mar. 18, 2009).
2009	I	Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009).
2009	I	Woodhull v. Meinel, 202 P.3d 126 (N.M. Ct. App. 2009), *cert. denied*, 203 P.3d 870 (N.M. 2009).
2010	I	Collins v. Purdue Univ., 703 F. Supp. 2d 862 (N.D. Ind. 2010).
2010	I	Cornelius v. DeLuca, 709 F. Supp. 2d 1003 (D. Idaho 2010).
2010	I	Johnson v, Arden, 614 F.3d 785 (8th Cir. 2010).

2010	I	Miles v. Raycom Media, Inc., No. 1:09CV713-LG-RHW, 2010 WL 3419438 (S.D. Miss. Aug. 26, 2010).
2010	I	Milo v. Martin, 311 S.W.3d 210 (Tex. App. 2010).
2010	I	Novins v. Cannon, No. 09-5354, 2010 WL 1688695 (D.N.J. Apr. 27, 2010).
2010	I	Reit v. Yelp!, Inc., 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010).
2010	I	Supplementmarket.com, Inc.v. Google, Inc., No. 09-43056, 2010 WL 6309991 (Pa. Co. Pl. July 16, 2010).
2010	I	Two Plus Two Publishing LLC v. Jacknames.com, No. 2:09-CV-002318-KJD-LRL, 2010 WL 4281791 (D. Nev. Sept. 30, 2010).
2011	I	Asia Econ. Inst. v. Xcentric Ventures LLC, No. CV 10-01360 SVW PJWX, 2011 WL 2469822 (C.D. Cal. May 04, 2011).
2011	I	Deer Consumer Products, Inc. v. Little, 938 N.Y.S.2d 226 (2011).
2011	I	Delle v. Worcester Telegram & Gazette Corp., No. 110810, 2011 WL 7090709 (Mass. Sept. 14, 2011).
2011	I	Fox v. Albanese, No. 108169/20102011, 2011 WL 1130499 (N.Y. Sup. Ct. Mar. 24, 2011).
2011	I	Frontier Van Lines Moving and Storage, Inc. v. Valley Solutions, Inc., No. 11cv0526, 2011 WL 2110825 (W.D. Pa. May 24, 2011).
2011	I	Giordano v. Romeo, 76 So.3d 1100 (Fla. Dist. Ct. App. 2011).
2011	I	Hopkins v. Doe, No. 2:11-CV-100-RWS, 2011 WL 5921446 (N.D. Ga, Nov. 28, 2011).
2011	I	Kruska v. Perverted Justice Foundation Inc., No. CV 08-0054-PHX-SMM, 2011 WL 1260224 (D. Ariz. Apr. 5, 2011).
2011	I	Mealer v. GMAC Mortg. LLC, No. 3:10-cv-08172 JWS, 2011 WL 1103357 (D. Ariz. Mar. 25, 2011).
2011	I	Parisi v. Sinclair, 774 F.Supp.2d 310 (D.D.C. Mar. 31, 2011).
2011	I	Shiamili v. Real Estate Group of New York, Inc., 952 N.E.2d 1011 (N.Y. 2011)
2012	I	Courtney v. Vereb, No. 12-655, 2012 WL 2405313 (June 25, 2012).
2012	I	Directory Assistants, Inc. v. Supermedia, LLC, 884 F. Supp. 2d 446 (E.D.Va. 2012).
2012	I	Gaston v. Facebook, Inc., No. 3:12-cv-oo63-ST, 2012 WL 610005 (D. Or. Feb. 24, 2012).

2012	I	Hadley v. GateHouse Media Freeport Holdings, Inc., No. 12 C 548, 2012 WL 2866463 (N.D. Ill. July 10, 2012).
2012	I	Price v. Gannett Co., No. 2:11-cv-00628, 2012 WL 1570972 (S.D. W. Va. May 1, 2012).
2012	I	S.C. v. Dirty World, LLC, No. 11-CV-00392-DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012).
2012	I	Shrader v. Biddinger, No. 10-cv-01881-REB-MJW, 2012 WL 976032 (D. Colo. Feb. 17, 2012).
2012	I	Spreadbury v. Bitterroot Public Library, No. CV 11-64-M-DWM-JCL, 2012 WL 734163 (D. Mont. Mar. 6, 2012).
2013	N	Ascend Health Corp. v. Wells, No. 4:12-CV-00083-BR, 2013 WL 1010589 (E.D.N.C. Mar. 14, 2013).
2013	I	Braverman v. Yelp, Inc., No. 155629/12, 2013 WL 3335071 (N.Y. Sup. Ct. June 28, 2013).
2013	I	Gavra v. Google Inc., No. 5:12-CV-06546-PSG, 2013 WL 3788241 (N.D. Cal. July 17, 2013).
2013	I	Mmubango v. Google, Inc., No. 12-1300, 2013 WL 664231 (E.D. Pa. Feb. 22, 2013).
2013	I	Russell v. Implode-Explode Heavy Industries Inc., No. DKC 08-2468, 2013 WL 5276557 (D. Md. Sept. 18, 2013).
2014	I	Dowbenko v. Google Inc., No. 14-10195, 2014 WL 4378742 (11th Cir. Sept. 5, 2014).
2014	I	Internet Brands, Inc. v. Jape, 760 S.E.2d 1 (Ga. Ct. App. 2014).
2014	I	Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d. 398 (6th Cir. 2014).
2014	I	Joseph v. Amazon.com, No. C13-1656-JCC, 2014 WL 4269505 (W.D. Wash., Aug. 28, 2014).
2014	I	Kimzye v. Yelp Inc., No. C13-1734RAJ, 2014 WL 1805551 (W.D. Wash. May 7, 2014).
2014	I	Medytox Solutions, Inc. v. Investorshub.com, Inc., 152 So. 3d 727 (Fla. Dist. Ct. App. 2014).
2014	I	Miller v. Federal Exp. Corp., 6 N.E.3d 1006 (Ind. Ct. App. 2014).
2014	I	Obado v. Magedson, No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014).
2014	I	O'Kroley v. Fastcase Inc., No. 3:13-0780, 2014 WL 2197029 (M.D. Tenn. May 27, 2014).
2014	I	Seldon v. Magedson, No. CV-13-00072-PHX-DFC, 2014 WL 1456316 (D. Ariz. Apr. 15, 2014).
2014	I	Vanzquez v. Buhl, 90 A.3d 331 (Conn. App. Ct. 2014).

Table 2. U.K. Decisions about ISP Liability for Defamation under Section 1 and EC Regulations

Decision Year	Immunity for ISP Liability	Defamation Cases Relating to § 1 and EC Regulations
1999	N	Godfrey v. Demon Internet Ltd [1999] EWHC 244 (QB).
2006	I	Bunt v. Tilley [2006] EWHC 407 (QB).
2009	I	Karim v. Newsquest Media Group [2009] EWHC 3205 (QB).
2009	I	Metropolitan International Schools Ltd v. Designtechnica Corp [2009] EWHC 1765 (QB).
2010	I	Budu v. BBC 2010 EWHC 616 (QB).
2010	N	Kaschke v. Gray [2010] EWHC 690 (QB).
2011	N	Davison v Habeeb [2011] EWHC 3031 (QB).
2012	I	McGrath v. Dawkins [2012] EWHC B3 (QB).
2013	N	Tamiz v. Google [2013] EWCA Civ 68.

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