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Seema Ghatnekar

*J.D., Loyola Law School, 2014*

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# **INJURY BY ALGORITHM: A LOOK INTO GOOGLE'S LIABILITY FOR DEFAMATORY AUTOCOMPLETED SEARCH SUGGESTIONS**

*Seema Ghatnekar\**

Google's Autocomplete search feature has gained wide popularity as it allows users to perform search queries quickly by suggesting several search terms in real-time as users type a search request in the Google search bar. These generated suggestions change in an algorithmic manner with each additional letter that a user types into Google's search bar while conducting a search. They are based in part upon predictions made from previous users' searches as well as several other factors related to the popularity and volume of search queries. As a result, Google claims it lacks complete control over the Autocomplete search results and that it should not be held liable for the search results the algorithms generate while a user conducts a Google search. Google used this defense in several cases that surfaced globally after the search queries generated defamatory suggestions. Accordingly, as detailed in this Article, this point brings about troubling legal issues due to a lack of understanding who is actually responsible for the results generated by Google's Autocomplete feature. Thus far, given the current state of Internet law, Google falls in a legal safe harbor in avoiding liability for defamatory suggestions. Nonetheless, a better legal framework must be established to determine Google's true liability in generating defamatory search suggestions through its algorithmic based approach.

## **I. INTRODUCTION**

Larry Page, co-founder and CEO of Google, described a "perfect search engine" as one that "understands exactly what you mean and gives

you back exactly what you want.”<sup>1</sup> One way that Google attempts to provide this perfection is through its “patented PageRank™ algorithm, which analyzes websites that have been ‘voted’ to be the best sources of information by other pages across the web” by “using more than 200 signals and a variety of techniques.”<sup>2</sup> Today, most individuals who have conducted a Google search are aware of Google’s PageRank, or Autocomplete, search feature.<sup>3</sup> Autocomplete provides individuals with a seemingly simple way to search items by suggesting several search terms in real-time as an individual types a search request in the Google search bar.<sup>4</sup> These suggestions change in an algorithmic manner, with each additional letter that a user types into Google’s search bar while conducting a search.<sup>5</sup>

The search algorithms are further detailed in this Article, but are fundamentally generated from the universe of others users’ searches in Google, along with “an algorithm that is based on several factors related to the popularity and volume of search queries.”<sup>6</sup> Due to this social algorithmic variation based, in part, upon predictions made from previous users’ searches, Google claims that it should not be held liable for the search results the algorithms generate while a user conducts a Google search.<sup>7</sup> In light of this expressed lack of complete control, Google

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1. *Our Products and Services*, GOOGLE, <http://www.google.com/about/company/products/> (last visited Sept. 4, 2013).

2. *Ten Things We Know to Be True*, GOOGLE, <http://www.google.com/about/company/philosophy/> (last visited Sept. 4, 2013).

3. See Danny Sullivan, *How Google Instant’s Autocomplete Suggestions Work*, SEARCH ENGINE LAND (Apr. 6, 2011, 6:27 PM), <http://searchengineland.com/how-google-instant-autocomplete-suggestions-work-62592>.

4. *See id.*

5. *See id.*

6. David Angotti, *Court Orders Google Autocomplete Changes: Japanese Man Defamed by Algorithm*, SEARCH ENGINE J. (Mar. 26, 2012), <http://www.searchenginejournal.com/google-autocomplete-defamation-case/41864/>.

7. *See Sullivan, supra* note 3.

contends that the Autocomplete search results do not stem from a system designed to invade one's privacy, nor do they attribute connotations—negative or positive—to an individual.<sup>8</sup> This point brings about troubling legal issues, specifically due to a lack of understanding who is actually responsible for the results generated by Google's Autocomplete feature.<sup>9</sup>

Several cases have surfaced globally that shed light on this legal gray area. For example, in the United States, the most recent case against Google was brought forth by Dr. Guy Hingston, a cancer surgeon from Australia.<sup>10</sup> Hingston filed his lawsuit in the Central District of California, complaining that he was portrayed in a false light through Google's Autocomplete suggestion of "guy hingston bankrupt."<sup>11</sup> Consequently, Hingston asserted that his reputation as a surgeon was damaged, resulting in a loss of a number of patients and financiers.<sup>12</sup> This case has yet to be resolved as of the date of this Article, but it will be interesting to see how the law will play out in the United States.

Numerous examples exist in the international context. In April 2012, a French organization sued Google in France for suggesting that individuals, such as Rupert Murdoch and Jon Hamm, are Jewish.<sup>13</sup> During the same time frame, Germany's former First Lady Bettina Wulff sued Google because its Autocomplete feature implied that she was a former

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8. Autocomplete does not invade privacy because "Google does not determine [the Autocomplete search terms] manually – all of the queries show in autocomplete have been typed previously by other Google users." Angotti, *supra* note 6; *see generally* Sullivan, *supra* note 3 (stating that Google's Autocomplete search terms are "predicted by computer algorithms based on search terms from previous users, not by Google itself").

9. *See generally* Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 138 (2008) (suggesting that the Internet provides a platform on which it is difficult to attribute blame to an entity that is unknown).

10. Jeffrey P. Hermes, *Filing Lawsuits in the United States Over Google Autocomplete Is . . .*, DIGITAL MEDIA L. PROJECT (Jan. 23, 2013), <http://www.citmedialaw.org/blog/2013/filing-lawsuits-united-states-over-google-autocomplete>.

11. *Id.*

12. Asher Moses, *Australian Surgeon Sues Google Over 'Bankrupt' Autocomplete*, THE SYDNEY MORNING HERALD (Jan. 22, 2013), <http://www.smh.com.au/technology/technology-news/australian-surgeon-sues-google-over-bankrupt-autocomplete-20130122-2d480.html>; *see also* Hermes, *supra* note 10.

13. *See* Eriq Gardner, *Google Sued for Suggesting Rupert Murdoch and Other Celebrities Are Jewish*, THE HOLLYWOOD REP. (Apr. 30, 2012, 10:28 AM), <http://www.hollywoodreporter.com/thr-esq/google-sued-rupert-murdoch-jon-hamm-jewish-318012>.

escort or prostitute.<sup>14</sup> More recently, on November 12, 2012, an Australian music promoter, Michael Trkulja, prevailed against Google because its Autocomplete feature incorrectly associated him with organized crime and murder.<sup>15</sup> All of the aforementioned plaintiffs based their respective lawsuits on defamation law principles—the theory that a false statement can damage an individual’s reputation.<sup>16</sup>

The previous examples detail lawsuits in international legal forums because courts within the United States have yet to squarely address Google’s potential liability for similar conduct. This Article takes a different perspective and analyzes the potential liability that Google may suffer for defamation lawsuits instituted by plaintiffs within the United States because of the search suggestions that are generated through its Autocomplete search feature. The focus of this Article is how this situation may come up in the United States, and specifically in California. It is evident through case law that Google is capable of censoring material that is placed in its search bar.<sup>17</sup> Therefore, one issue this Article will explore is whether this editorial control subjects Google to an inherent liability and responsibility to maintain the search algorithms that others may find on its website.

To begin this analysis, Part II provides an overview of how search engines, and more specifically, an Autocomplete feature, made popular by Google, work. Part III highlights the defamatory lawsuits won by public and private individuals in international courts against Google for the negative and false inferences that resulted from its Autocomplete feature. Next, Part IV summarizes the relevant case law and statutes necessary to determine Google’s potential liability in this legal gray area, namely California’s comprehensive defamation laws and the Communications Decency Act (“CDA”). Part V examines Google’s potential liability under this legal framework. Finally, Part VI suggests changes that Google can

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14. See Frederic Lardinois, *Germany’s Former Foreign First Lady Sues Google for Defamation Over Autocomplete Suggestions*, TECH CRUNCH (Sept. 7, 2012), <http://techcrunch.com/2012/09/07/germanys-former-first-lady-sues-google-for-defamation-over-autocomplete-suggestions/>.

15. T.C. Sottek, *Google Loses Australian Defamation Case After Court Rules That It Is Accountable as a Publisher*, THE VERGE (Nov. 26, 2012, 6:38 PM), <http://www.theverge.com/2012/11/26/3694908/google-defamation-australia-publisher>.

16. See, e.g., *Gobin v. Globe Publ’g Co.*, 649 P.2d 1239, 1243 (Kan. 1982) (“[D]amage to one’s reputation is the essence and gravamen of an action for defamation.”).

17. See David Angotti, *Google Autocomplete Faces New Lawsuit for “Jewish” Autocomplete Suggestions*, SEARCH ENGINE J. (May 1, 2012), <http://www.searchenginejournal.com/google-autocomplete-jewish-murdoch/43137/>.

make to its search engine in order to minimize liability within the United States.

## II. SEARCH ENGINES

Search engines are the new linchpins of the Internet. A large and growing fraction of the Internet's immense volume of traffic flows through them. They are librarians, who bring order to the chaotic online accumulation of information. They are messengers, who bring writers and readers together. They are critics, who elevate content to prominence or consign it to obscurity. They are inventors, who devise new technologies and business models to remake the Internet. And they are spies, who are asked to carry out investigations with dispatch and discretion.<sup>18</sup>

Because of this innovation and the constant flux surrounding the changing technology of the Internet, legal principles seem to always lag behind technology.<sup>19</sup> This Article deals with a feature of Google's search engine that has not been analyzed thoroughly to date, due in part to the recent emergence of Google's Autocomplete feature onto the site in 2008.<sup>20</sup> This section details how search engines generally work, and then analyzes how Google's Autocomplete feature differs from what currently exists under search engine platforms.

### A. *How Search Engines Generally Work*

Typically, searches involve four modes of information flow: (1) the search engine accumulates content; (2) a user "queries the search engine" by typing in the desired information; (3) the search engine delivers results to the query; and (4) the user receives the content.<sup>21</sup> The parties involved online include "search engines," "content providers," "users," and "concerned third parties," such as copyright holders or governments

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18. James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 3 (2007).

19. *See generally id.* ("Governments around the world are casting an increasingly skeptical eye on search engines . . . [with] [m]ore and more parties . . . presenting themselves at the courthouse door with plausible stories of how they have been injured by search engines.").

20. *See generally* Jennifer Liu, *At a Loss for Words?*, GOOGLE OFFICIAL BLOG (Aug. 25, 2008), <http://googleblog.blogspot.com/2008/08/at-loss-for-words.html> (describing the 2008 public launch of Google's "Google Suggest").

21. Grimmelmann, *supra* note 18, at 7.

inclined to censor material.<sup>22</sup> Liability in an Internet action generally stems from the interactions between some or all of these entities.<sup>23</sup>

A search engine permits a user to type in search terms to relay information.<sup>24</sup> Traditionally, once a user types in a search term and clicks “Enter,” the search engine scans through its database to find the entered terms and then catalogues the terms in different ways.<sup>25</sup> The process of cataloguing terms is referred to as “indexing.”<sup>26</sup> Indexing information is exhibited in the interplay between search engines and content providers in distributing content to a search engine’s users.<sup>27</sup> Indexing can either be done automatically through software agents that search the web for relevant content, or through other types of information gathering.<sup>28</sup> These different forms of information gathering include search engines which organize previously collected information, content providers providing information to search engines, or paid search inclusion, where content providers pay search engines to supply content for a fee that ensures the content providers’ information will be indexed in the manner requested by the content providers.<sup>29</sup>

A search query is a user’s request for information about a topic.<sup>30</sup> Search queries can vary from keywords to short phrases.<sup>31</sup> Generally, users perform three queries: (1) navigational queries to find specific sites or sets of information; (2) informational queries to find out information about a topic; or (3) transactional queries to purchase particular goods or perform activities.<sup>32</sup> Different search engines weigh various factors while performing a search query, which may influence the particular information

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22. *Id.* at 15.

23. *Id.*

24. 3 PATRICIA E. SALKIN, NEW YORK ZONING LAW AND PRACTICE § 37:05 (Westlaw 2012).

25. *Id.*

26. See Grimmelmann, *supra* note 18, at 7; see also SALKIN, *supra* note 24 (contrasting the indexing method used by Yahoo! and Alta Vista).

27. See Grimmelmann, *supra* note 18, at 7.

28. *Id.* at 7–8.

29. *Id.* at 8.

30. *Id.*

31. *Id.*

32. *Id.* at 9.

that is generated.<sup>33</sup> These factors may include geographic information about a user, influence based on past user searches, or a user's operating system or browser.<sup>34</sup> When a user enters search terms in a search engine, the search engine logs the user's query terms along with information about the type of web browser, version of web browser, IP address, and "cookie" data.<sup>35</sup> Cookies enable search engines to store data about an individual, including the user's email address (if a user is signed in) and a user's past search results.<sup>36</sup>

Delivering relevant content to a user is the defining moment of a web search.<sup>37</sup> Search engines typically list out results on a page from an order deemed most to least relevant to the query.<sup>38</sup> The search results contain "the name of the identified piece of content, its location, and a very short summary or excerpt that shows how the content relates to the query."<sup>39</sup> Based on the generated content, a user may make additional queries to narrow down a search with the addition or removal of keywords within the query.<sup>40</sup>

Search engines differ in the way that they generate their search queries, through the use of various algorithms to organize and condense all of the content that is available from their content providers.<sup>41</sup> When search engines first emerged, they scanned through text on web pages to assess the topics that a web page centered on.<sup>42</sup> Now, search engines scan through and analyze other information called "metadata" on web pages.<sup>43</sup> Metadata is information, invisible in a hard copy of a document, but visible in its native, digital format through the original program that produced the

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33. James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 9 (2007).

34. *Id.*

35. Ron A. Dolin, *Search Query Privacy: The Problem of Anonymization*, 2 HASTINGS SCI. & TECH. L.J. 137, 138 (2010).

36. *Id.*

37. Grimmelmann, *supra* note 18, at 9.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 10.

42. *Id.*

43. James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 10 (2007).

document.<sup>44</sup> Metadata is often referred to as “data about data” because it “describes, explains, locates, or otherwise makes it easier to retrieve, use, or manage an information resource.”<sup>45</sup> The three main types of metadata are descriptive, structural, and administrative metadata.<sup>46</sup> Descriptive metadata includes information that identifies the source material, such as the author, title, abstract, or keywords linked to the material.<sup>47</sup> Structural metadata sheds light into the way a source is organized and put together, such as the order of page numbers within chapters.<sup>48</sup> Finally, administrative metadata includes information about the actual source in order to manage the source.<sup>49</sup> It includes technical information, including when the source was created, the file type of the source, intellectual property rights of a source, and general management information.<sup>50</sup>

Further, search engines utilize a technique called search engine optimization (“SEO”) to provide users with content that a search engine considers most important to the public.<sup>51</sup> SEO is based on weighing several ranking factors that the search engine deems most relevant and authoritative.<sup>52</sup> “Search engines are able to preserve a layer of genuine, useful results through a combination of keeping precise algorithmic details secret and changing their algorithms to foil detected SEO techniques.”<sup>53</sup> Along the same lines as metadata, search engines utilize HTML meta tags, which are essentially data tags for web pages that include text which is not displayed, but communicates to browsers through a code that details

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44. Marjorie A. Shields, Annotation, *Discoverability of Metadata*, 29 A.L.R. 6TH 167 (2007); see also 1 JAY E. GREINIG & WILLIAM C. GLEISNER III, *EDISCOVERY & DIGITAL EVIDENCE* § 1:5 (Westlaw 2012).

45. *Understanding Metadata*, NISO 1 (2004), <http://www.niso.org/publications/press/UnderstandingMetadata.pdf>.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. See *What Is SEO/ Search Engine Optimization?*, SEARCH ENGINE LAND, <http://searchengineland.com/guide/what-is-seo> (last visited Apr. 21, 2013).

52. *Chapter 1: Types of Search Engine Ranking Factors*, SEARCH ENGINE LAND, <http://searchengineland.com/guide/seo/types-of-search-engine-ranking-factors> (last visited Apr. 21, 2013); see also *SEO - Relevance and Authority*, SEO CONSULT (June 19, 2008), <http://www.seoconsult.com/seoblog/about-seo/seo-relevance-and-authority.html>.

53. Grimmelmann, *supra* note 18, at 56.

specific information about a web page.<sup>54</sup>

The interplay between all of the factors that compose search engines has led to an interesting set of laws that must consider the relationship between various legal doctrines.<sup>55</sup> The following section will provide a glimpse into Google's Autocomplete approach to search engine queries, and how it affects the search engine law as it traditionally stood.

### *B. Google's Autocomplete Algorithm and How It Changes Search Engine Functionality*

As described above, search engines allow individuals to gather information by providing a site upon which a user can type in search terms.<sup>56</sup> The traditional approach to searching terms is that a user types in a search term and clicks "Enter" to catalog a series of searches.<sup>57</sup> Google's Autocomplete feature goes one step further than simply having a user type in a search term before clicking "Enter."<sup>58</sup> By constantly altering the query based on each additional keystroke in the search bar, it changes the way search queries are generated.<sup>59</sup> Before listing out results on a web page, Google actively displays results through its Autocomplete feature.<sup>60</sup> Google is able to provide its users with constantly updated search terms because its search engine weighs numerous factors before generating the Autocompleted suggestion.<sup>61</sup> The Autocomplete feature therefore performs one additional function to the process outlined above each time a web search is conducted.<sup>62</sup>

Underlying the ease and simplicity of Google's Autocomplete feature—at least to the casual observer—is a complex algorithm, referred

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54. Kristine Schachinger, *How to Use HTML Meta Tags*, SEARCH ENGINE WATCH (May 1, 2012), <http://searchenginewatch.com/article/2067564/How-To-Use-HTML-Meta-Tags>.

55. Grimmelmann, *supra* note 18, at 51.

56. SALKIN, *supra* note 24.

57. *Id.*

58. Sullivan, *supra* note 3.

59. *Autocomplete*, GOOGLE, <http://support.google.com/websearch/bin/answer.py?hl=en&answer=106230> (last visited Sept. 4, 2013).

60. *Id.*

61. *See id.*

62. *Id.* (suggesting that Google does one extra step than a traditional search engine by suggesting results before a search query is completely entered by a user).

to as “Page Rank.”<sup>63</sup> While Page Rank shares fundamental qualities with most SEO programs, namely the goal of providing users with relevant and authoritative information, it differs from other SEO programs because it provides users with different choices of queries.<sup>64</sup> Google has not disclosed the exact algorithm it uses in its Autocomplete feature, but the attempts of numerous analysts to find the code behind the algorithmic process has led to a broad and general understanding of Autocomplete.<sup>65</sup> Google “ranks” searchable content, and though debated by analysts, three primary contributing factors are considered in Google’s rankings of suggested search algorithms including: personalization, search volume, and query deserves freshness (“QDF”) filters.<sup>66</sup> Personalization includes components such as a user’s Internet Protocol (“IP”) Address, a user’s own search history, the country of the search engine, and the language being used.<sup>67</sup> Personalized searches are always displayed first and ranked higher than any of the other factors.<sup>68</sup> Search volume must reach a minimum threshold regarding a search term’s popularity; once this threshold is reached, the search will be suggested to other users.<sup>69</sup> QDF filters describe “freshness layers” that are embedded within a search.<sup>70</sup> This means that terms that have surges in popularity even in a short amount of time may become search suggestions, even without long-term popularity.<sup>71</sup> An example of QDF filters at work is the Autocomplete suggestion that was linked with Osama Bin Laden’s death on May 1, 2011.<sup>72</sup> In a matter of twelve minutes, typing “osa” into the Google search bar yielded the query displaying

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63. AMY N. LANGVILLE & CARL D. MEYER, *GOOGLE'S PAGERANK AND BEYOND: THE SCIENCE OF SEARCH ENGINE RANKINGS* 28 (2006).

64. *Compare* Sullivan, *supra* note 3, with *SEO Relevance and Authority*, *supra* note 52.

65. *See* Rhea Drysdale, *5 Suggestions for Google Suggest*, MOZ (May 10, 2011), <http://www.seomoz.org/blog/5-suggestions-for-googles-suggested-search>; *see also* Tom Krazit, *Google's Fight to Keep Search a Secret*, CNET (July 15, 2010, 11:24 AM), [http://news.cnet.com/8301-30684\\_3-20010696-265.html](http://news.cnet.com/8301-30684_3-20010696-265.html).

66. Drysdale, *supra* note 65.

67. *Id.*

68. Sullivan, *supra* note 3.

69. Drysdale, *supra* note 65.

70. Sullivan, *supra* note 3.

71. *Id.*

72. Danny Sullivan, *Google & the Death of Osama Bin Laden*, SEARCH ENGINE LAND (May 2, 2011, 1:39 AM), <http://searchengineland.com/google-the-death-of-osama-bin-laden-75346>.

“Osama Bin Laden dead” after news of Bin Laden’s death.<sup>73</sup> Therefore, the QDF is a short-term popularity filter that may be subject to fluctuations as short as one-hour intervals.<sup>74</sup>

The exact weight given to each of these three components is not clear. However, together, they are identified as most important to Google’s algorithmic process.<sup>75</sup> Google’s algorithm is neither known to the public nor has it been pin-pointed and described exactly by any scholar or expert.<sup>76</sup> Because slight updates to the algorithm are generated almost every two months, understanding and deciphering the algorithm is problematic.<sup>77</sup>

### III. RECENT EXAMPLES IN THE INTERNATIONAL CONTEXT

With search engines becoming a primary mode for information gathering and the concept of “Googling” people, places, and things becoming more prevalent, there may be damaging consequences when the comments associated with an individual or entity prove to be false.<sup>78</sup> This injury is found in the Bettina Wulff lawsuit.<sup>79</sup> According to Mrs. Wulff, the information that was Autocompleted as a search suggestion was defamatory because it wrongfully linked the former First Lady of Germany to prostitution, and injured her reputation.<sup>80</sup> Wulff explained that she felt powerless when she lost her lawsuit against Google in a Hamburg court.<sup>81</sup>

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73. *Id.*

74. Sullivan, *supra* note 3.

75. *See id.*; *see also Autocomplete*, *supra* note 59.

76. *See Krazit*, *supra* note 65.

77. *See* Chris Crum, *Google Algorithm Changes: Google Just Released the Big Lists for August and September*, WEBPRONews (Oct. 4, 2012), <http://www.webpronews.com/google-algorithm-changes-google-just-released-the-big-lists-for-august-and-september-2012-10> (listing Google’s algorithm changes); Chris Crum, *Google Makes a Bunch of Changes to Autocomplete*, WEBPRONews (Oct. 4, 2012), <http://www.webpronews.com/google-makes-a-bunch-of-changes-to-autocomplete-2012-10> (same).

78. *See* Harrison Polites, *Melbourne Man Successively Sues Google, Seeks \$339,000 in Defamation Damages*, TECH. SPECTATOR (Nov. 1, 2012, 10:33 AM), <http://www.technologyspectator.com.au/melbourne-man-successively-sues-google-seeks-339000-defamation-damages> (suggesting that a plaintiff may seek more damages from Google than from other search engines because Google’s search engine is the most popular); *see also* Grimmelmann, *supra* note 18, at 41 n.178.

79. *See* Lardinois, *supra* note 14.

80. *See id.*

81. *See* Nicholas Kulish, *As Google Fills in Blank, a German Cries Foul*, N.Y. TIMES, Sept. 18, 2012, at A1.

Her husband, Christian Wulff, former President of Germany, received backlash from these rumors as well, affecting his image in the political realm.<sup>82</sup>

In 2011, in Italy, Google lost a defamation suit to an Italian businessman, whose name remains anonymous, for suggesting that he was a “truffatore” (conman) and a “truffa” (fraud).<sup>83</sup> Although Google argued that it should not be responsible for the Autocompleted searches that were based on terms that other users had typed, the Milan court ordered Google to remove the terms from its search suggestions.<sup>84</sup> Moreover, in a Melbourne court in 2012, Google was once again held liable for its defamatory Autocomplete suggestions.<sup>85</sup> Milorad Trkulja is a private figure who was wrongly linked to “underworld figures and activities” by Google’s Autocomplete suggestion.<sup>86</sup> Google was found guilty of defaming Trkulja by the Australian court and Trkulja was awarded \$200,000 in damages.<sup>87</sup> The court analogized Google to a “news agent that sells a newspaper containing a defamatory article. While there might be no specific intention to publish defamatory material, there is a relevant intention by the newsagent to publish the newspaper for the purposes of the law of defamation.”<sup>88</sup> These cases may have set a valuable precedent that is recognized and addressed internationally.

#### IV. TORT AND PRIVACY LAWS IN AN INTERNET FORUM

As the examples in the previous section illustrate, defamation lawsuits against search engines outside of the United States have become increasingly commonplace. Before analyzing Google’s potential liability in the United States, it is necessary to analyze the causes of action under defamation law. Currently, there is no uniform body of defamation law

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82. *See id.*

83. *See* Kate Solomon, *Google Loses Autocomplete Lawsuit*, TECHRADAR (Apr. 8, 2011), <http://www.techradar.com/us/news/internet/google-loses-autocomplete-lawsuit-941498>.

84. *See id.*

85. *See* Polites, *supra* note 78.

86. *See id.*

87. *See* Sottek, *supra* note 15.

88. *Trkulja v. Google Inc. LLC & Anor* (No 5) (2012) VSC 533, 13 (Austl.).

followed by all states.<sup>89</sup> As such, this Article provides a summary of California defamation law pieced together by both statutes and case law. After summarizing California's various causes of action relevant to a defamation lawsuit, this section provides a summary of the Communications Decency Act ("CDA"), a Congressionally enacted safe harbor for providers of interactive computer services.

### A. *Background of Privacy Torts*

Privacy torts are designed to prevent the invasion of "the right of privacy of another" by subjecting the invader to "liability for the resulting harm."<sup>90</sup> A right to privacy is invaded by unreasonably intruding the "seclusion of another"; "appropriat[ing] "the other's name or likeness"; providing "unreasonable publicity . . . to the other's private life"; or giving "publicity that unreasonably places the other in a false light before the public."<sup>91</sup> The specific examples referenced in Section II primarily deal with injury to reputation; therefore, the relevant privacy torts are false light and defamation.

#### 1. False Light

The false light cause of action is a privacy tort that was judicially created to prevent injury or damage to an individual's emotions.<sup>92</sup> In its inception, the tort was only cognizable in common law; however, since its first use, a few jurisdictions have codified the tort.<sup>93</sup> In California, this tort is governed by the Second Restatement of Torts.<sup>94</sup> A plaintiff can establish a prima facie case for false light by proving that "[1] publicity [is given] to a matter concerning another . . . before the public in a false light . . . [2] the

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89. See generally *Defamation Law - Guide to Libel and Slander Law*, HG.ORG, <http://www.hg.org/defamation.html> (last visited Sept. 4, 2013) (noting that defamation law is addressed primarily by state legislatures and that the statutes' requirements may differ from state-to-state).

90. RESTATEMENT (SECOND) OF TORTS § 652A(1) (1977).

91. *Id.* § 652A(2).

92. See Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 372–3 (1989).

93. See, e.g., NEB. REV. STAT. ANN. § 202–04 (LexisNexis 2008); R.I. GEN. LAWS § 9-1-28.1 (1956); see generally Zimmerman, *supra* note 92, at 375 (explaining that an "examination of the early [false light] cases suggest that judges were responding to a quite different set of concerns," when they developed false light law).

94. See *Fellows v. Nat'l Enquirer, Inc.*, 42 Cal.3d 234, 238–39 (1986) (citing section 652 of the Restatement (Second of Torts) for its rule on false light).

false light . . . is highly offensive to a reasonable person, and [3] the actor had knowledge of or acted with reckless disregard as to the falsity . . . of the matter.”<sup>95</sup> Along with these elemental aspects of the tort, at least one legal scholar further contends that two requirements must be satisfied in order to establish a cause of action for this tort: that the falsehood of the information be substantially material, and must be available to a significant portion of the population.<sup>96</sup>

## 2. Defamation

California courts routinely define defamation as an “invasion of [an individual’s] interest in [his] reputation.”<sup>97</sup> The requisite elements for a defamation cause of action are publication of an unprivileged, false statement of fact, which has an inclination to injure or cause special damage to the individual about whom the statement is made.<sup>98</sup>

In this context, publication means communication to a third party who understands the derogatory “meaning of the statement and its application to the person [about] whom [the] reference is made.”<sup>99</sup> The publication involved may be made to a single individual or to the public at large.<sup>100</sup> The manner of publication delineates the two subsets of defamation—libel and slander.<sup>101</sup> Libel requires the publication to be in a fixed medium of expression, such as a writing, printing, picture, or effigy.<sup>102</sup> Slander, by contrast, involves an oral utterance, such as via the radio, or dissemination via other mechanical means.<sup>103</sup> The increased prevalence of the Internet has made it difficult to distinguish whether a false, unprivileged statement of fact constitutes libel or slander, as communication via this medium often

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95. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

96. Zimmerman, *supra* note 92, at 370–71.

97. *See* London v. Sears, Roebuck & Co., 619 F. Supp. 2d 854, 864 (N.D. Cal. 2009); Gilbert v. Sykes, 147 Cal. App. 4th 13, 27 (2007); Ringler Assocs. Inc. v. Maryland Cas. Co., 80 Cal. App. 4th 1165, 1179 (2000).

98. *See* Wong v. Jing, 189 Cal. App. 4th 1354, 1369 (2010).

99. Smith v. Maldonado, 72 Cal. App. 4th 637, 645 (1999).

100. *Id.* at 645.

101. CAL. CIV. CODE §§ 45–46 (West 2012).

102. *Id.* § 45.

103. *Id.* § 46.

involves oral utterances and writings.<sup>104</sup>

### 3. Publisher v. Distributor

Traditional tort law distinguishes two sets of entities, publishers and distributors of information, which may be liable for defamatory statements.<sup>105</sup> Publishers have editorial control over information that is transmitted (such as newspapers), and may be held liable if at least negligence is shown in its relaying of information to the public.<sup>106</sup> A distributor of information simply makes information published by others available (such as a public library or newsstand), and may or may not know that the content of the published material is defamatory.<sup>107</sup> A distributor is therefore held liable through a plaintiff's prima facie showing of a case, as well as "showing that the distributor had actual knowledge of the defamatory content or should have reasonably known of the defamatory nature of the work."<sup>108</sup> The following section will show how these definitions are altered within an Internet context, and the difficulty that arises in attributing liability in an Internet realm.

### 4. Difficulty in Applying Privacy Torts to an Internet Context

The Internet has complicated the traditional, underlying principles of privacy torts that once simply implicated only two parties: the defendant who made the defamatory statement and the victim.<sup>109</sup> These complications are a result of the multiple parties involved on the Internet forum, which can include search engine operators, website operators, and

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104. See Julie C. Sipe, "Old Stinking, Old Nasty, Old Itchy Old Toad": *Defamation Law, Warts and All (A Call for Reform)*, 41 IND. L. REV. 137, 145–48 (2008) (discussing the challenges of determining the distinctions between libel and slander, and elaborating on the impact of new technologies).

105. Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R. 5TH 169, 177 (2000).

106. *Id.*

107. *Grace v. eBay Inc.*, 16 Cal. Rptr. 3d 192, 199 (2004).

108. Barry J. Waldman, Note, *A Unified Approach to Cyber-libel: Defamation on the Internet, a Suggested Approach*, 6 RICH. J.L. & TECH. 9, 33 (1999).

109. See generally Sewall K. Patel, Note, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 658–60 (indicating that before the passage of the Communication Decency Act, courts attempted to apply common law defamation principles to defamation cases involving the Internet).

Internet service providers.<sup>110</sup> Courts have difficulty determining whether these Internet stakeholders are “publishers” of offensive content, and therefore subject to liability under one of the many privacy torts, or are merely “distributors” of offensive content and thus, immune from liability.<sup>111</sup> Two decisions, *Cubby, Inc. v. CompuServe, Inc.*<sup>112</sup> and *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>113</sup> both rendered in the early half of the 1990s, illustrate this point.

In *Cubby*, CompuServe operated an “electronic library,” in which subscribers paid a monthly subscription to access, among other sources, 150 special interest forums.<sup>114</sup> CompuServe did not operate the forums, but instead entered into contractual arrangements with independent companies who agreed to “manage, review, create, delete, edit and otherwise control the contents” of the various forums.<sup>115</sup> The Journalism Forum contained content from Rumorville USA (“Rumorville”), a daily newsletter detailing news and gossip in the entertainment industry.<sup>116</sup> Due to Rumorville’s success, *Cubby, Inc.* (“Cubby”), attempted to replicate Rumorville’s business model by creating an electronic database that electronically disseminated news and gossip in the television, news, and radio industry under the pseudonym “Skuttlebut.”<sup>117</sup> In what was likely an effort to stave off competition, Rumorville began publishing disparaging comments about Cubby’s database, and how the database managed to access its information.<sup>118</sup> In response, Cubby filed a lawsuit seeking to recover damages for libelous statements; it named the operator of Rumorville and CompuServe, Inc. as defendants in the lawsuit.<sup>119</sup>

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110. *See generally id.* at 658–60 (indicating that before the passage of the Communication Decency Act, courts attempted to apply common law defamation principles to defamation cases involving the Internet).

111. *See, e.g., Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 230 (2012)).

112. *Cubby*, 776 F. Supp. 135.

113. *Stratton Oakmont, Inc.*, 1995 WL 323710.

114. *Cubby*, 766 F. Supp. at 137.

115. *Id.*

116. *Id.*

117. *Id.* at 138.

118. *Id.*

119. *Id.*

After a litany of pre-trial documents were filed, many of which asserted that CompuServe was merely a distributor, as opposed to a publisher, of Rumorville, the district court granted CompuServe's motion for summary judgment.<sup>120</sup> This decision was rendered on the undisputed fact that CompuServe did not have editorial control of the information that was uploaded onto Rumorville's site.<sup>121</sup> Moreover, without editorial control over the content on Rumorville, CompuServe lacked knowledge of the defamatory statements—a point that was exacerbated by the immense volume and speed with which information was uploaded to CompuServe's electronic library.<sup>122</sup>

Four years later, the New York Supreme Court rendered a decision that threatened the existence of various Internet stakeholders. In *Stratton Oakmont Inc., v. Prodigy Services Co.*, Prodigy Services owned an online bulletin board, "Money Talk," which allowed monthly subscribers to "post statements regarding stocks, investments and other financial matters."<sup>123</sup> Although Prodigy Services owned the various bulletin boards, it contracted with third parties, known as bulletin Board Leaders, who "participate[d] in [bulletin] board discussions and undert[ook] promotional efforts to encourage usage and increase users."<sup>124</sup> By the time the lawsuit was filed, Money Talk had at least two million subscribers.<sup>125</sup>

The events that precipitated the lawsuit involved defamatory statements made by an anonymous user regarding the employees of Stratton Oakmont, an investment-banking firm.<sup>126</sup> The anonymous user alleged that Stratton Oakmont had committed "fraudulent acts in connection with the initial public offering" of Solomon-Page, and that the investment banking firm employed a "cult of brokers who either lie[d] for a living or [got] fired."<sup>127</sup>

Upset by the defamatory statements posted on a bulletin board read by at least two million subscribers, Stratton Oakmont filed a defamation lawsuit against Prodigy Services. In its complaint, Stratton Oakmont

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120. *Cubby*, 766 F. Supp. at 144.

121. *Id.* at 140.

122. *Id.* at 141.

123. *Stratton Oakmont, Inc.*, 1995 WL 323710, at \*1.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

asserted that Prodigy Services was a publisher of the offensive material because it: (1) likened itself to a newspaper and claimed to have editorial control over the “degree of nudity and unsupported gossip its editors tolerate[d]”; (2) used software to pre-screen bulletin boards for offensive material; (3) promulgated editorial content guidelines for the bulletin Board Leaders to follow; and (4) developed a form apology that bulletin Board Leaders were required to send if offensive material was posted to the site.<sup>128</sup> Prodigy Services countered that it had changed its editorial policy and no longer reviewed each bulletin board post.<sup>129</sup>

After weighing the evidence, the New York Supreme Court concluded that Prodigy Services was a publisher because it controlled the bulletin board leader’s actions, created guidelines, and most importantly, claimed to control the content on its website.<sup>130</sup> Accordingly, the court granted Stratton Oakmont’s motion for summary judgment.<sup>131</sup>

Both of these cases were landmark cases in a time where no prior legal analysis was on point. However, over time and through the passage of the Communications Decency Act (“CDA”), the decisions of both cases were reassessed. The following section will analyze the CDA and how it changed the analysis within this area of law. Nonetheless, the cases detailed above are still important to consider, as their holdings emphasize significant legal concerns and progress of Internet law on this issue over time.

### *B. Communications Decency Act*

To address the conflicting analyses courts used to apply defamation law to the various Internet stakeholders,<sup>132</sup> Congress enacted the CDA in 1996.<sup>133</sup> The CDA takes the original definitions of “publisher” and “distributor” and applies them to an Internet context.<sup>134</sup> The purpose of the

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128. *Id.* at \*2–3.

129. *Stratton Oakmont, Inc.*, 1995 WL 323710, at \*3.

130. *Id.* at \*5.

131. *Id.* at \*1.

132. *See generally id.* (finding online service providers that voluntarily filter some messages to be liable for all messages then transmitted, while providers who ignore problematic posts and do not review any posts escape liability altogether).

133. 47 U.S.C. § 230 (2012).

134. *See generally id.* (explaining the distinction between publishers and distributors when applying these definitions to an Internet context).

CDA is to “promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.”<sup>135</sup> The CDA immunizes interactive computer service providers from civil liability for defamatory material that a user finds through its search engine by prohibiting such providers from being “treated as the publisher or speaker of any information provided by another. . . .”<sup>136</sup> An interactive computer service is defined as “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. . . .”<sup>137</sup> Furthermore, providers or users of an interactive computer service cannot be held liable for attempting to restrict access to what the provider considers to be improper material.<sup>138</sup> Both of these qualifications effectively lead to the result that an interactive computer service provider would not be held liable for defamation, unless the provider itself was actually the author or publisher of the defamatory content.<sup>139</sup>

### *C. Distinguishing Between an Interactive Computer Service and Information Content Provider*

Services that are considered the author or publisher of defamatory content are referred to as information content providers, which include people or entities “responsible, in whole or in part, for the creation or development of information” on the Internet or on a website.<sup>140</sup> The following section will: (1) analyze the differences between interactive computer service provider and information content providers, and (2) highlight instances in which classification of provider may face liability for material posted online.

In *Stratton Oakmont*, the court held that any Internet service provider

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135. *Carafano v. Metrosplash.com, Inc. (Carafano I)*, 339 F.3d 1119, 1122 (9th Cir. 2003).

136. § 230(c)(1).

137. *Id.* § 230(f)(2).

138. *Id.* § 230(c)(2).

139. *See Zitter, supra* note 105, at 177–78 (stating that an online computer service can be defined as a publisher and held liable for statements made on boards operated by the service).

140. § 230(f)(3).

could be held liable for defamation.<sup>141</sup> However, the CDA provides “robust” immunity for websites and Internet service providers.<sup>142</sup> According to precedent, mere general revisions of online material do not render websites “information content providers.”<sup>143</sup> To be considered an information content provider subject to civil liability, a website operator must provide material contributions to unlawfulness.<sup>144</sup> Contributing content in this manner means more than providing “third parties with neutral tools to create web content, even if the website knows that the third parties are using such tools to create illegal content.”<sup>145</sup> This conclusion was rendered through application of the CDA to the cases outlined below.

An opinion authored by the Ninth Circuit, *Carafano v. Metrosplash.com*, helped establish what the term “neutral tool” entails and how it applies to information content providers.<sup>146</sup> In *Carafano*, an unknown individual created a fake Matchmaker.com (“Matchmaker”) profile for the actress Christianne Carafano—stage name Chase Masterson—which included her picture and home address.<sup>147</sup> Shortly after the account was created, Carafano began receiving threatening and sexually explicit phone calls and faxes.<sup>148</sup> Fearing for her safety, Carafano informed Matchmaker that someone was using her name, likeness, and contact information without her permission.<sup>149</sup> After receiving the message, Matchmaker immediately blocked the profile from public view and later deleted it.<sup>150</sup> Nonetheless, Carafano sued Matchmaker for defamation of

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141. See *Stratton Oakmont, Inc.*, 1995 WL 323710, at \*3–4 (discussing publishers as “one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it,” and accordingly, finding that Prodigy was such a publisher).

142. *Carafano I*, 339 F.3d at 1123.

143. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC* (*Fair Hous. I*), 521 F.3d 1157, 1169 (9th Cir. 2008).

144. *Id.* at 1168.

145. *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009).

146. *Carafano I*, 339 F.3d at 1124.

147. *Id.* at 1121.

148. *Id.*

149. *Id.* at 1122.

150. *Id.*

character, amongst other things.<sup>151</sup>

Based on its interpretation of the CDA, the district court concluded that Matchmaker was not entitled to immunity because the company created user profiles after individuals completed a multiple choice and essay questionnaire, thereby preventing users from simply posting any information they desired.<sup>152</sup> However, on appeal, the Ninth Circuit found that Matchmaker was protected under the CDA and was not an information content provider because it was not providing any content itself.<sup>153</sup> The court underscored that “Matchmaker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph.”<sup>154</sup> The fact that Matchmaker’s users actively and voluntarily created the content found on their profiles suggested that the website did not do anything to add to the defamation that resulted.<sup>155</sup> Matchmaker simply provided neutral tools for users to voluntarily input preferences and data.<sup>156</sup>

Further, the court in *Zeran v. America Online, Inc.* provided context for determining the liability of an Internet service provider who acts to edit or remove content from a site, thus giving the site control over its content.<sup>157</sup> The court emphasized the importance of a website’s ability and necessity to self-regulate the content on its page.<sup>158</sup> As long as this voluntary self-regulation is conducted “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 constitutionally protected,” the Internet

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151. *Id.*

152. *Carafano v. Metrosplash.com, Inc. (Carafano II)*, 207 F. Supp. 2d 1055, 1066–68 (C.D. Cal. 2002).

153. *Carafano I*, 339 F.3d at 1124.

154. *Id.*

155. *Id.*

156. *See id.* (“[T]he fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a ‘developer’ of the ‘underlying misinformation.’”).

157. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (analyzing Congressional intent underlying section 230 of the CDA).

158. *See id.* at 333 (noting that forcing computer service providers to regulate content would have a “chilling effect on the freedom of Internet speech”).

service provider is immune from liability.<sup>159</sup> In other words, even if a provider receives notification of content on its website that may be objectionable and fails to remove it, that provider would be shielded from liability.<sup>160</sup> A contrary result would prove detrimental. Hypothetically, if providers were subject to liability equivalent to distributors of information, they would potentially face liability with each notice of potentially defamatory statements that would necessitate investigation of the actual information.<sup>161</sup> This type of constant research could be possible for print publishers, but may create unique burdens in the Internet realm.<sup>162</sup>

This holding was also supported in *Jurin v. Google Inc.*, where the website operator suggested keywords pursuant to an internet advertising campaign.<sup>163</sup> The court held that the keyword suggestion feature was a neutral tool that solely provides options to advertisers and functions in a manner similar to the editorial process that is protected by the CDA.<sup>164</sup> Thus, a website operator does not become an information content provider by the mere fact that the operator of the website “should have known” that the tools made available could potentially make the dissemination of defamatory content easier.<sup>165</sup>

In a recent decision by the Ninth Circuit, the court limited the immunity extended to online entities under the CDA.<sup>166</sup> In *Fair Housing Council of San Fernando Valley v. Roommates.com*, the court held that Roommates.com was acting as a direct publisher of materials when it categorized and directed users to specific information, after users answered a series of questions to find roommates.<sup>167</sup> Roommates.com created

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159. 47 U.S.C. § 230(c)(2)(A) (2012).

160. *Zeran*, 129 F.3d at 333.

161. *Id.*

162. *Id.*

163. *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1119, 1123 (E.D. Cal. 2010).

164. *Id.*

165. *Goddard*, 640 F. Supp. 2d at 1197–98.

166. *Fair Hous. I*, 521 F.3d 1157; see also Michael P. Bennett & Ryan T. Sulkin, *Ninth Circuit Tightens the Belt on Immunities for Online Publishers of User-Generated Content*, LEXOLOGY (June 8, 2007), <http://www.lexology.com/library/detail.aspx?g=9a998c44-1ab3-4124-9d3d-4ae2f1a5dbec>.

167. *Fair Hous. I*, 521 F.3d at 1166.

questions regarding sex, sexual orientation, and family status.<sup>168</sup> The website's users were also given a set of pre-populated answers, essentially forcing subscribers to answer the questions as a condition for using the website's services.<sup>169</sup> "By requiring subscribers to provide the information as a condition of accessing its service," along with a limited set of pre-populated answers, Roommates.com was not only a passive transmitter, but also a developer of that information.<sup>170</sup> This is important because the CDA provides immunity only if the interactive computer service does not create or develop the information "in whole or in part."<sup>171</sup> The court compared Roommates.com to a site that acted as "a forum designed to publish sensitive and defamatory information, and suggested the type of information that might be disclosed to best harass and endanger the targets."<sup>172</sup> It established that online entities that post content that may be in part user-generated should evaluate whether the bulk of the content they produce is illegal or defamatory in nature, leading a court to deem the entity acting beyond a neutral publisher of information.<sup>173</sup> Therefore, Roommates.com was acting as an information content provider by developing information, partially in the form of pre-populated answers directed toward divulging discriminatory information.<sup>174</sup>

The distinguishing factor between *Fair Housing* and the previously analyzed cases is that the other cases involved website operators neither encouraged defamatory content nor increased the ability of users to post defamatory content.<sup>175</sup> Instead, these sites were based on voluntary inputs

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168. *Id.* at 1164.

169. *Id.* at 1165-66.

170. *Id.* at 1166.

171. 47 U.S.C. §230(f)(3) (2012).

172. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921, 928 (9th Cir. 2007).

173. *Bennett & Sulkin*, *supra* note 166.

174. *Fair Hous. I*, 521 F.3d at 1164.

175. *Compare id.* at 1166 (noting that Roommates.com was not immunized from liability because it acted like a developer of information, rather than passive transmitter of information), *with Carafano I*, 339 F.3d at 1124 (holding that Matchmaker was protected under the CDA and was not an information content provider because it was not providing any content itself), *and Jurin*, 695 F. Supp. 2d at 1119, 1123 (holding that a keyword suggestion feature is a neutral tool that solely provides options to advertisers and functions in a matter similar to the editorial process that is protected by the CDA).

that allowed users to select the information they deemed most relevant.<sup>176</sup> This is the essence of a “neutral tool” operation.<sup>177</sup> However, the Roommates.com website did more; primarily because of its design—the website forced its users to make choices based on a limited number of discriminatory preferences, through criteria that was illegal and prohibited by the Fair Housing Council.<sup>178</sup> Therefore, in assessing a website operator’s status as an “interactive computer service” and an “information content provider,” the distinguishing factor is whether the processes used to generate information are operating on neutral tools, rather than directing users toward pre-set and inherently illegal functionality.<sup>179</sup>

## V. GOOGLE’S POTENTIAL LIABILITY

To determine Google’s liability for the defamatory suggestions that are generated through its Autocomplete feature, a court must first determine whether or not the feature is a neutral tool.<sup>180</sup> In other words, Google must first be categorized as either an interactive computer service provider and protected under the Communications Decency Act (“CDA”), or an information content provider operating by using something beyond a neutral tool and not protected under the CDA.<sup>181</sup> In making this assessment, this section will discuss Google’s Autocomplete feature in relation to the control Google has over its search suggestions with respect

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176. See, e.g., *Jurin*, 695 F. Supp. 2d at 1119, 1123 (holding that keyword suggestion feature is a neutral tool that solely provides options to advertisers and functions in a matter similar to the editorial process that is protected by the CDA).

177. See *Fair Hous. I*, 521 F.3d at 1169 (“[P]roviding neutral tools to carry out what may be unlawful or illicit searches does not amount to ‘development’ for purposes of the [CDA] immunity exception.”).

178. *Id.* at 1166, 1172.

179. See *id.* at 1172 (drawing a distinction between Roommates.com, which “force[d] subscribers to divulge” personal information about themselves, and the website in *Carafano*, which was “designed to match romantic partner depending in their voluntary input”).

180. See *Fair Hous. Council of San Fernando Valley v. Roommates.com (Fair Hous. I)* 521 F.3d 1157, 1174 n.37 (9th Cir. 2008) (“Providing neutral tools for navigating websites is fully protected by CDA immunity, absent substantial affirmative conduct on the part of the website creator promoting the use of such tools for unlawful purposes.”).

181. See 47 U.S.C. §230 (2012); see also *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010).

to its algorithmic variability.

### A. Google's Autocomplete Functionality

The analysis of Google's liability in the search suggestions that are generated must first begin by defining what Google actually has control over—a factual question that may be deciphered by understanding Google's role in Autocomplete.<sup>182</sup> To determine Google's role, the issue then turns into a legal question of whether Google is an interactive computer service provider, an information content provider acting with a neutral tool, or an information content provider acting with a feature that is beyond a neutral tool.<sup>183</sup> Google seems to fall somewhere in between the definitions of a typical publisher and distributor, and its Autocomplete feature may hence be acting in a way beyond a neutral publisher.<sup>184</sup>

Google is not publishing the suggested search term first-hand; rather, it simply hones in on particular searches based off of the several factors through its algorithm, which include personalization, query deserves freshness (“QDF”) factors, and search volume.<sup>185</sup> Conversely, if in fact Google was regarded as a publisher of information in its search suggestions, then it may be liable for a tort-based action.<sup>186</sup> The fact that Google has the ability to alter and adapt what one can find on the Internet through searches indicates that it is acting beyond the scope of just making information publicly available, as would a common publisher of information.<sup>187</sup> In this manner, Google does not simply convey

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182. See Zitter, *supra* note 105, at 177.

183. *Id.*

184. A publisher “retains editorial control over of the information it sends out, is held accountable [if a prima facie cause is found] and at least negligence is shown in its action, while a distributor “may only be held liable on a plaintiff’s prima face case [by] showing that the distributor had actual knowledge of the defamatory content or should have reasonably known of the defamatory nature of the work.” *Id.*; see also *Grace v. eBay Inc.*, 16 Cal. Rptr. 3d 192, 198–99 (2004).

185. See Drysdale, *supra* note 65; see also Crum, *Google Algorithm Changes: Google Just Released the Big Lists for August and September*, *supra* note 77; Crum, *Google Makes a Bunch of Changes to Autocomplete*, *supra* note 77.

186. See *Fair Hous. I.*, 521 F.3d at 1171 (describing how websites that use functionality beyond a “neutral tool” may be subject to liability).

187. Bennett & Sulkin, *supra* note 166.

information, as a proper distributor would.<sup>188</sup> Instead, its Autocomplete feature acts by providing information in an actively edited manner subject to an algorithm created by Google itself; it generates suggestions that a user has not yet typed out specifically,<sup>189</sup> and directs users toward specific searches.<sup>190</sup> Ultimately, the answer to this threshold, yet dispositive question can be resolved by determining whether the artificial intelligence set up by Google acts as a producer of the algorithm.<sup>191</sup> But again, Google weighs several factors that may be outside of its control to generate its search suggestions that arguably would not make Google liable as an information content provider, under a strict application of liability as this entity.<sup>192</sup>

For purposes of this Article, Google may be regarded as lying in-between the definitions of an interactive computer service and an information content provider, as an Algorithm-Based Republisher (“ABR”).<sup>193</sup> An analysis of the extent of control that Google has and exercises over the Autocomplete search suggestions will provide context as to Google’s role as an information content provider.<sup>194</sup> After this assessment, the analysis will then turn on whether Google is using technology that would be deemed beyond a neutral tool to assess Google’s liability for Autocomplete suggestions.

### B. Google’s Control Over Search Suggestions

Though Google claims that the produced search suggestions are based on factors that are not completely within its control, Google can impose better restrictions and filters on its search suggestions.<sup>195</sup> For example, Google excludes a narrow class of search queries related to pornography,

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188. See Zitter, *supra* note 105.

189. Sullivan, *supra* note 3.

190. Bennett & Sulkin, *supra* note 166.

191. See Smith v. Maldonado, 72 Cal. App. 4th 637, 652 (1999).

192. See Drysdale, *supra* note 65.

193. This term is coined by the author and used throughout the Article.

194. See Bennett & Sulkin, *supra* note 166.

195. John Carney, *Does Google Filter Out Controversial Conservatives from Search Suggestions?*, BUS. INSIDER (Feb. 1, 2010, 8:21 AM), <http://www.businessinsider.com/does-google-filter-out-controversial-conservatives-from-search-suggestions-2010-2>.

violence, hate speech, and copyright infringement.<sup>196</sup> Google, however, does not have a procedure in place for removing negative search suggestions that are generated.<sup>197</sup> Google only does this in very specific instances, and does not even have a form to request removal.<sup>198</sup> Arguably, Google should have an area on its website that allows users to alert Google of any defamatory suggestions that they may find.<sup>199</sup>

In terms of actual control over search suggestions, Google actively restricts certain words and sites from being exposed to the public,<sup>200</sup> so the option is clearly available to Google to control what can and cannot be searched in its search box through the use of meta tags.<sup>201</sup> Google's algorithm may search for meta tags with information relevant to one's search, optimizing a search for a user.<sup>202</sup> Furthermore, Google has begun to restrict Autocomplete search suggestions that involve torrent tracking and online piracy sites.<sup>203</sup> These changes initially appeared in 2011, when "suggestions for terms such as BitTorrent, RapidShare, and MegaUpload were removed."<sup>204</sup> In August 2012, Google declared that the ranking of websites and search suggestions would also take into account online piracy in determining the weight given to its search suggestions.<sup>205</sup> That is, websites that are associated with online piracy are likely to be lowered in the ranking process, if not removed from search suggestions at all.<sup>206</sup>

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196. Angotti, *supra* note 17.

197. Sullivan, *supra* note 3.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*; see Kristine Schachinger, *How to Use HTML Meta Tags*, SEARCH ENGINE WATCH (May 1, 2012), <http://searchenginewatch.com/article/2067564/How-To-Use-HTML-Meta-Tags> (showing that meta tags help search engines control sites).

202. See Schachinger, *supra* note 201.

203. Ian Paul, *Google Restricts Pirate Bay from Autocomplete, Instant Search Features*, PCWORLD (Sept. 11, 2012, 7:53 AM), [http://www.pcworld.com/article/262134/google\\_restricts\\_pirate\\_bay\\_from\\_autocomplete\\_instant\\_search\\_features.html](http://www.pcworld.com/article/262134/google_restricts_pirate_bay_from_autocomplete_instant_search_features.html).

204. *Id.*

205. *Id.*

206. *Id.*

Google's control also extends to its active restriction of web sites and certain Google features in a number of countries.<sup>207</sup> For example, the Chinese government has exerted substantial control over what can be searched for online, and is one of the strictest countries in terms of censoring the Internet.<sup>208</sup> The censorship found in China does not adhere to any specific laws or regulations.<sup>209</sup> The Chinese government "has created more than sixty regulations on Internet censorship and local authorities have their own rules, regulations, and policies."<sup>210</sup> A background of Google's role in China is as follows:

When Google first arrived in China, it signed an agreement with the Chinese government, agreeing to purge its Chinese search results of banned topics. Whether this agreement was reasonable or not is actually not an arguable issue for Google because it signed the agreement and will breach the agreement by not purging the search.<sup>211</sup>

This shows that Google has the ability to control what is put forth on its search platform, and that the company has the ability to specifically alter its site to suit its users. Hence, this case further supports the notion that Google has some ability to maintain control over what search results are populated by Autocomplete.

Google releases information about government requests to remove

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207. See, e.g., Claire Cain Miller, *As Violence Spreads in Arab World, Google Blocks Access to Inflammatory Video*, N.Y. TIMES (Sept. 13, 2012), [http://www.nytimes.com/2012/09/14/technology/google-blocks-inflammatory-video-in-egypt-and-libya.html?\\_r=0](http://www.nytimes.com/2012/09/14/technology/google-blocks-inflammatory-video-in-egypt-and-libya.html?_r=0) (describing how Google blocked access to the YouTube video ridiculing the Prophet Muhammad in Egypt and Libya after four American diplomatic personnel were killed in Libya). Conversely, the governments of China and Iran have restricted access to certain Google services. Frederic Lardinois, *China Blocks Virtually All of Google's Web Services as 18th Party Congress Gets Underway*, TECHCRUNCH (Nov. 9, 2012), <http://techcrunch.com/2012/11/09/china-blocks-virtually-all-of-googles-web-services-as-18th-party-congress-gets-underway/>; Saeed Kamali Dehghan, *Iran Set to Block Access to Google*, THE GUARDIAN (Sept. 23, 2012, 6:17 PM), <http://www.guardian.co.uk/world/2012/sep/23/iran-block-access-google-gmail>.

208. KENNETH A. CUTSHAW ET. AL., CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA §26:33 (3d ed. 2012).

209. *Id.*

210. *Id.*

211. *Id.*

content or access private user data as part of its Transparency Report every six months.<sup>212</sup> For example, from July to December 2012, “a total of 467 court orders and 561 other requests (by executives, police, etc.) were given to Google to remove almost 12,000 pieces of content from their search index.”<sup>213</sup> Further, “governments sent over 18,000 requests for access to the personal data of 28,562 users worldwide.”<sup>214</sup> In some cases, Google did not comply with the requests, but in other cases—including requests from Brazil and the United States—“Google’s compliance with user data requests exceeded 90 percent.”<sup>215</sup> For example, from Argentina, Google “received a court order to remove 120 search results for linking to sites that allegedly referenced individuals.”<sup>216</sup> Google did not remove the requested content, because it was unable to find the individuals referenced in the URLs linked to the court order.<sup>217</sup> Google also received a court order from India that led to the removal of 360 search results containing adult videos which violated personal privacy rights.<sup>218</sup>

Google receives a large volume of removal requests, making this process fairly difficult.<sup>219</sup> These requests take place in an all-manual, people-driven process, which requires time and energy from a human source.<sup>220</sup> In the Government section of its Transparency Report, Google explains that “some content removals are requested due to allegations of defamation, while others are due to allegations that the content violates local laws prohibiting hate speech or adult content.”<sup>221</sup> Further, Google’s

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212. Miranda Miller, *Google Reveals More Government Search Censorship Requests*, SEARCH ENGINE WATCH (June 19, 2012), <http://searchenginewatch.com/article/2185571/Google-Reveals-More-Government-Search-Censorship-Requests>.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Transparency Report*, GOOGLE, <http://www.google.com/transparencyreport/removals/government/> (last visited Sept. 4, 2013).

217. *Id.*

218. *Id.*

219. Miller, *supra* note 212.

220. *Id.*

221. *Transparency Report*, *supra* note 216.

Transparency Report goes on to explain that “[l]aws surrounding these issues vary by country, and the requests reflect the legal context of a given jurisdiction.”<sup>222</sup> Google adheres to these laws when receiving removal requests even if the removal request content does not violate their own guidelines.<sup>223</sup> This is seen in the removal of three of fourteen videos from YouTube, after the Thailand Ministry of Information, Communication and Technology explained that the videos allegedly insulted the monarchy, violating Thailand’s lèse-majesté law.<sup>224</sup> Google explained that it restricted a few of the videos “from view in Thailand out of respect for local law.”<sup>225</sup> Therefore, Google may comply with court orders that request search result removals, even if this detracts the company from its goal of democracy on the Internet.<sup>226</sup> This shows that Google acknowledges liability for what is produced by the search engine and through the Autocomplete feature. However, it also shows that this process may be lengthy and that requests may be admitted or denied, subject to Google’s interpretation of the issue.<sup>227</sup>

*C. Google’s Autocomplete Feature Is Essentially a Neutral Tool, But May Have Additional Functionality*

The preceding analysis shows that Google would likely be deemed an interactive computer service provider and an information content provider—however, whether the ABR acts as something more than a “neutral tool” is still vague. Google’s Autocomplete function operates by providing suggestions as a user types in a search term within a search bar.<sup>228</sup> It functions differently than the website in *Fair Housing*, which provided a limited set of options that a user can choose from.<sup>229</sup> Here, Google is not providing a limited number of options to search from with its

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222. *Id.*

223. Miller, *supra* note 212.

224. *Transparency Report*, *supra* note 216.

225. *Id.*

226. Miller, *supra* note 212.

227. *See id.*

228. Sullivan, *supra* note 3.

229. *See Fair Hous. I*, 521 F.3d at 1161–62 (noting that users’ search results returned profile pages of other users that specifically matched similar information, criteria, and interests as them).

Autocomplete feature *per se*—rather, it is providing a glimpse of the numerous searches that are produced from the search itself.<sup>230</sup>

The fact that Google is a seemingly neutral tool, at least on the surface, does not speak toward its ability to portray someone in a defamatory context.<sup>231</sup> The cases analyzed above suggest that a website which makes the process of defamation easier may not be shielded under CDA’s protection.<sup>232</sup> Here, the ABR arguably uses its own functions to generate the searches that are defamatory. That Google retains the control to limit what is generated by its algorithm does not, standing alone, make it susceptible to liability, as the CDA protects an internet provider’s ability to edit content.<sup>233</sup> However, the aspect of control, in conjunction with the defamatory suggestions arising instantaneously upon entering just a few letters of an individual’s name—which arguably makes the defamation easier to see—likely makes Google more than just a neutral internet service provider.<sup>234</sup>

## VI. CONCLUSION AND CALL TO ACTION

### A. *Google’s Liability as an Algorithm-Based Republisher (“ABR”)*

Since Google is deemed through this Article to be an Algorithm-Based Republisher (“ABR”), an in-between of a typical distributor or publisher, Google’s liability also should fall somewhere in between the two extremes. Numerous attempts have been made to remove liability from information content providers for content that is made available to the public and is then simply distributed by search engines through the

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230. Sullivan, *supra* note 3.

231. *See generally* Goddard v. Google, Inc., 640 F. Supp. 2d 1193, 1197–98 (N.D. Cal. 2009) (describing that a website with a function that operates using a neutral tool is not enough to subject it to liability under the CDA).

232. *See generally id.* (explaining that CDA immunity can be inapplicable to a website which practices “substantially greater involvement” in defamation, “such as the situation in which the website ‘elicits the allegedly illegal content and makes aggressive use of it in conducting its business’”).

233. *See generally* Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) (explaining that the CDA performs an important function of allowing websites time to edit their content because “liability upon notice reinforces service providers’ incentive to restrict speech and abstain from self-regulation”).

234. *Goddard*, 640 F. Supp. 2d at 1197–98.

operation of a neutral tool.<sup>235</sup> However, little research has been done that would suggest liability for a search engine that influences what is searched or asked for online.<sup>236</sup>

Thus, it is safe to assume that some liability should be attributed to Google largely because it directs users to searches that may be defamatory in nature, based on an algorithm produced it produces.<sup>237</sup> A few countries, namely Australia, Japan and France, have in fact found Google liable in certain contexts, though no case in the U.S. has been decided on the same issue.<sup>238</sup> Google, however, has not directly commented on its potential liability.<sup>239</sup>

It is understandable that a court would focus on Google solely as a publisher or distributor of information, but perhaps another standard should be promulgated and applied when dealing within the Internet context. Because the Internet is becoming the primary mode of communication, it is necessary to establish a legal framework that will address the challenges Internet communication presents.<sup>240</sup> For the purpose of Google's Autocomplete feature, courts must determine what liability an ABR has in generating suggestive information.

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235. Hannibal Travis, *Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law*, 84 NOTRE DAME L. REV. 331, 348 (2008).

236. See generally Timothy Geigner, *Google's Autocomplete Dilemma: Every Concession Makes It Easier for the Next Person to Complain*, TECHDIRT (Sept. 12, 2012, 7:21 AM), <http://www.techdirt.com/articles/20120911/06365520342/google-autocomplete-dilemma-every-concession-makes-it-easier-next-person-to-complain.shtml> (suggesting that Google has escaped liability because of its defense that its search engine “only reflects what people search for most often online”).

237. See Sullivan, *supra* note 3; see also notes 10–12, 13–16 and accompanying text.

238. See Angotti, *supra* note 6; Gardner, *supra* note 13; Moses, *supra* note 12.

239. See, e.g., *supra* notes 7-8 and accompanying text; see also Dave Neal, *Google Found Liable for Defamation in Australia*, THE INQUIRER (Nov. 2, 2012, 11:38 AM), <http://www.theinquirer.net/inquirer/news/2222051/google-found-liable-for-defamation-in-australia>.

240. Young Joon Lim & Sarah E. Sexton, *Internet As A Human Right: A Practical Legal Framework to Address the Unique Nature of the Medium and to Promote Development*, 7 WASH. J.L. TECH. & ARTS 295, 297 (2012).

However, from this analysis, given Google's lack of control over what information is actually posted, limited control, at best, over the Autocomplete suggestions, and lack of control over what search selections users ultimately choose,<sup>241</sup> it may be proper to classify the Autocomplete feature as a neutral tool. This would render Google protected under the Communications Decency Act ("CDA") as an interactive computer service provider.<sup>242</sup> Though this conclusion seems fair based on precedent, a proper legal framework must be developed regarding Autocomplete technology, in order to take a firmer stance on the issue.

### *B. Suggestions for Google, Moving Forward*

Though it cannot be stated with certainty what Google can do to avoid liability for what is generated through its Autocomplete feature, analysts have assessed that Google may perform certain functions to avoid liability. A few suggestions for improving the Google Autocomplete feature and Google's subsequent liability include: (1) creating a support area that could allow Google to assess what users' qualms may be, which would allow Google to take care of the problem before any legal liability manifests; (2) initiating a central webmaster message which automates messages such as: "Google has detected that your website is ranking for [your name scam];" (3) developing a reporting tool, in which individuals may report misinformation; and (4) improving its algorithm.<sup>243</sup>

Though these are not quick fixes by any means, they may help Google avoid liability during the interim of establishing the company's role on the Internet. This issue is an important one given the rapid proliferation of similar Autocomplete technology in emerging products.<sup>244</sup> The Autocomplete technology must first be assessed and placed into an appropriate legal framework. Only then can Google's responsibility to oversee Autocompleted search results be properly determined. After establishing Google's role, perhaps new laws that assess rapidly changing technology online may be dictated in the furtherance of addressing Autocomplete's legal implications in Google and beyond.

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241. See Sullivan, *supra* note 3.

242. See generally 47 U.S.C. §230 (2012).

243. Drysdale, *supra* note 65.

244. Sullivan, *supra* note 3.