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## International Law of Mystery: Holding Internet Service Providers Liable for Defamation and the Needs for a Comprehensive International Solution

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# INTERNATIONAL LAW OF MYSTERY: HOLDING INTERNET SERVICE PROVIDERS LIABLE FOR DEFAMATION AND THE NEED FOR A COMPREHENSIVE INTERNATIONAL SOLUTION

## I. INTRODUCTION

“[T]here is a great deal of the law of defamation which makes no sense.”<sup>1</sup> This statement has never been more accurate than it is today. Libel law<sup>2</sup> attempts to balance two fundamental interests—freedom of speech and freedom from defamation.<sup>3</sup> However, balancing these two interests has become extremely difficult with the advent of the Internet.

The development of the Internet provides the opportunity to share one's views with the public.<sup>4</sup> This ease of Internet publishing creates international aspects of libel not previously considered by traditional publishers.<sup>5</sup> In 1996, the District Court of the Eastern District of Pennsylvania found at least forty percent of Internet content originates outside the United States.<sup>6</sup> Regardless of origin, Internet publications are not limited by boundaries.<sup>7</sup> There is vast potential for worldwide humiliation and economic disaster for a victim of libel.<sup>8</sup> Meanwhile, the

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1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984) [hereinafter PROSSER & KEETON].

2. “Libel is a false and unprivileged publication by writing . . . .” CAL. CIV. CODE § 45 (West 2001).

3. THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS vii (Everette E. Dennis & Eli M. Noam eds., 1989) [hereinafter THE COST OF LIBEL].

4. See F. LAWRENCE STREET & MARK P. GRANT, LAW OF THE INTERNET xxvii (2000).

5. E.g., Lilian Edwards, *Defamation and the Internet: Name-calling in Cyberspace*, in LAW AND THE INTERNET 183, 183–84 (Lilian Edwards & Charlotte Waelde eds., 1997). Although an ISP has not been held a traditional “publisher” in legal terms (see *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)), this Comment often uses the word publisher in the non-legal manner. “Publisher” used in the legal manner is differentiated by quotation marks.

6. *ACLU v. Reno*, 929 F. Supp. 824, 848 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (finding 117).

7. See Edwards, *supra* note 5.

8. See Michael Holland, *Libel on the Internet: An International Problem*, (May 10, 1996) at <http://wings.buffalo.edu/Complaw/CompLawPapers/holland.html> (last visited Jan. 11, 2001).

Internet Service Provider ("ISP") transmitting the libel is exposed to legal liabilities in multiple countries.<sup>9</sup>

Currently, Internet libel is policed by an inadequate country-by-country approach. While the United States refuses to hold ISPs liable for the content of a defamatory statement,<sup>10</sup> other countries have addressed the issue by enacting statutes providing for specific instances of liability.<sup>11</sup> Economic costs of publishing increase for ISPs that must operate under the laws of multiple jurisdictions.<sup>12</sup> As a result, these costs may lead to a decrease in the amount of information disseminated, as ISPs may refrain from publishing for fear of legal liability.<sup>13</sup> This is contrary to the true nature of the Internet, which if regulated properly, can result in an enhancement of free speech.<sup>14</sup>

This Comment discusses the weaknesses of the current country-by-country approach by which ISPs are held legally responsible for publishing libel. Part II discusses the background of libel law and the economic concerns ISPs must consider when publishing libelous statements on the Internet. Part III compares the approaches to Internet libel law taken in various countries and the policy reasons behind the laws. Part IV analyzes current Internet libel law at the international level and argues the necessity for a revision regarding its treatment. Additionally, Part IV proposes a system that corrects defamatory statements with truth, rather than money, should be used to police libelous statements on the Internet. Finally, Part IV concludes such a truth-based system would better address the international aspects of publishing on the Internet, and the resulting economic consequences.

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9. See Edwards, *supra* note 5, at 184.

10. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

11. See *infra* Part III.

12. See Edwards, *supra* note 5, at 183–84 (discussing that Internet libel defendants can file suit in multiple countries, which enhances problems facing traditional publishers).

13. See Dieter Huber, *United States*, in INTERNATIONAL MEDIA LIABILITY: CIVIL LIABILITY IN THE INFORMATION AGE 375, 406 (Christian Campbell ed., 1997) (discussing the chilling effect of punitive damages).

14. See *Reno*, 929 F. Supp. at 882. The court notes that "[s]ome of the dialogue on the Internet surely tests the limits of conventional discourse . . . . But we should expect such speech to occur in a medium in which citizens from all walks of life have a voice." *Id.*

## II. BACKGROUND

### A. *The Role of the ISP in Internet Publishing*

In exchange for a monthly fee, ISPs provide access to the Internet<sup>15</sup> and other Internet-based services such as e-mail, Internet relay chat capability, bulletin boards and web space for personal home pages.<sup>16</sup>

Defamatory statements are transmitted by ISPs in various manners.<sup>17</sup> For example, a statement may be posted on a bulletin board, made in a "chat" discussion or sent via an e-mail service provided by the ISP.<sup>18</sup> When an ISP is the author of the defamatory statement, the law is relatively straightforward and liability is clear.<sup>19</sup> However, when the defamatory statement is authored by another, and subsequently transmitted through the ISP, the law is unclear and has resulted in an abundance of litigation.<sup>20</sup>

### B. *Traditional Standards of Defamation*

Defamation is defined as an oral or written invasion of a person's reputation or good name.<sup>21</sup> An oral defamatory statement is referred to as slander, and a written defamatory statement is referred to as libel.<sup>22</sup> In California, a statement is libelous if it is "a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."<sup>23</sup> Defamation laws are intended to protect the reputation of a person.<sup>24</sup> Originally, defamation law focused on preserving one's regard within their community because of the individual's economic interests in upholding a strong reputation.<sup>25</sup>

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15. See RICHARD RAYSMAN ET AL., MULTIMEDIA LAW § 10.01[3] (2000).

16. See *id.*

17. See KENT D. STUCKEY, INTERNET AND ONLINE LAW § 2.03[2] (2000) (discussing on-line communication through the use of text or recorded images versus live discussion).

18. See *id.* § 2.03[1].

19. See *id.*

20. See discussion *infra* Part III.

21. PROSSER & KEETON *supra* note 1, § 111, at 771.

22. CAL. CIV. CODE §§ 45, 46 (West 2001).

23. *Id.* § 45.

24. SHELDON W. HALPERN, THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS" 1 (1988).

25. Finley P. Maxson, Note, *A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements*, 75 WASH. U. L.Q. 673, 677 (1997).

A common law cause of action for slander consists of three elements: the publication of a defamatory statement to a third party, fault and damages.<sup>26</sup> However, in a common law libel suit, the plaintiff is not required to prove actual damages.<sup>27</sup> This is because written words are permanent, more widely circulated, and theoretically more harmful to a person's reputation than spoken words.<sup>28</sup>

The unique nature of the Internet raises uncertainty about applying traditional libel laws to ISPs.<sup>29</sup> An ISP does not create defamatory statements, but merely acts as a conduit for the statements of its subscribers.<sup>30</sup> In the United States, a traditional (non-ISP) defendant, such as a newspaper publisher, is not liable for defamation unless it has "published" the defamatory material.<sup>31</sup> In this context, "published" refers to a defendant's reproduction of the statement and subsequent delivery or transmission.<sup>32</sup> Meanwhile, a defendant who merely distributes the defamatory material, such as a newsstand, is subject to liability only if it knows or has reason to know of its defamatory character.<sup>33</sup>

Because ISPs are not traditional publishers, there may be confusion as to their potential liability for publishing defamatory material.<sup>34</sup> Moreover, defamatory statements are often published anonymously on the Internet.<sup>35</sup> Thus, applying traditional libel standards to ISPs is problematic and the laws regarding Internet libel are constantly changing.<sup>36</sup>

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26. Alexander Gigante, *Ice Patch on the Information Superhighway: Foreign Liability for Domestically Created Content*, 14 CARDOZO ARTS & ENT. L.J. 523, 526 (1996).

27. *Id.*

28. *Id.*

29. Holland, *supra* note 8.

30. *See* Edwards, *supra* note 5, at 191-92.

31. PROSSER & KEETON *supra* note 1, at 802.

32. *See id.* at 803.

33. *See* RESTATEMENT (SECOND) OF TORTS § 581(1) (1977); *see also* KENT D. STUCKEY, *supra* note 17, § 2.03[3][a][ii].

34. *See* Edwards, *supra* note 5, at 191-95. *But see* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). In the United States, "distributors" of on-line material are not liable unless they knew or had reason to know of the defamation, whereas "publishers" of on-line material are held liable. *Id.* at 139, 141. The court in *Cubby* held CompuServe was a distributor because it had little editorial control over its subscribers. *Id.*

35. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 886 (2000).

36. *See* Holland, *supra* note 8.

*C. The Economic Problems Relating to the Possibility of a Defamation Lawsuit Can Cause a Chilling Effect*

Although publishing on the Internet is generally less expensive than other traditional modes of publishing, inherent risks do exist.<sup>37</sup> For instance, if defamatory material is disseminated internationally via the Internet, publishers may be forced to defend claims throughout the world.<sup>38</sup> Furthermore, there is no central body of law governing the Internet.<sup>39</sup> Thus, jurisdiction and choice of law issues are complex.<sup>40</sup>

A publisher who places material on the Internet faces the possibility of legal liability.<sup>41</sup> Consequently, publishers must weigh the economic benefits of producing a story against the likelihood of litigation.<sup>42</sup> If publishers fear litigation, this balancing could create a “chilling-effect,” causing an ISP to refrain from publishing.<sup>43</sup>

### III. ISP LIABILITY IN VARIOUS COUNTRIES FOR DEFAMATION

There is no true consensus among the ways different countries treat Internet libel.<sup>44</sup> Some countries hold ISPs responsible for defamatory statements while others hold the original writer of the statement responsible.<sup>45</sup> This is problematic for ISPs that attempt to base their publications on pre-existing law.<sup>46</sup>

37. See Edwards, *supra* note 5, at 183–84.

38. See *id.*

39. See *id.* at 197 (discussing the accepted view that single nation legislative strategies are fruitless and a multi-national agreement is better suited for policing the Internet).

40. See *id.* at 184. A discussion of these issues is beyond the scope of this Comment.

41. See *id.* at 191.

42. See *id.*

43. *E.g.*, LOIS G. FORER, A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT 17 (1987) (discussing freedom of expression should not be “chilled” by the actions of the courts).

44. See Stan Morris, *The Importance of International Laws for Web Publishers*, (June 2000) at <http://www.gigalaw.com/articles/morris-2000-06-p2.html> (last visited Jan. 23, 2001) (explaining laws in the United States may conflict with the laws in other countries).

45. Compare *Godfrey v. Demon Internet Ltd.*, 1999 E.M.L.R. 542 (Q.B.) (Eng.), with *Blumenthal v. Drudge*, 992 F. Supp. 44, 52–53 (D.D.C. 1998). (elucidating that an ISP in England can be liable regardless of notice of the defamatory statement, whereas in the United States, the current trend is to insulate ISPs from liability).

46. See Peter Bartlett & Minter Ellison, *Australia, in INTERNATIONAL MEDIA LIABILITY: CIVIL LIABILITY IN THE INFORMATION AGE* 3, 13 (Christian Campbell ed., 1997).

*A. The Long Road to Insulating ISPs from Liability in the United States*

The United States first litigated an Internet libel case in 1991.<sup>47</sup> Consequently, United States case law is considered valuable precedent in foreign libel cases.<sup>48</sup>

1. How *Cubby, Inc. v. CompuServe Inc.*<sup>49</sup> Began to Insulate ISPs from Liability in the United States

*Cubby, Inc. v. CompuServe Inc.* was one of the leading cases applying libel law to an ISP rather than traditional media such as newspapers.<sup>50</sup> The court in *Cubby* ultimately held an ISP is not liable for defamatory statements made by one of its subscribers.<sup>51</sup> CompuServe, the ISP and defendant in *Cubby*, provided an online “library” that subscribers could access through the Internet.<sup>52</sup> Additionally, CompuServe maintained a number of electronic forums that appealed to various groups.<sup>53</sup> “Rumorville,” the subject of the suit, was an online publication available on the “Journalism Forum.”<sup>54</sup> *Cubby*, the plaintiff and creator of a similar forum called “Skuttlebut,”<sup>55</sup> claimed false statements were published about Skuttlebut in the Journalism Forum.<sup>56</sup>

Rumorville was published by a separate company, Don Fitzpatrick Associates (“DFA”), which had no contractual relationship with CompuServe.<sup>57</sup> CompuServe did have a contract with Cameron Communications, Inc. (“CCI”), an independent company, to “manage, review, create, delete, edit and otherwise control the contents’ of the Journalism Forum . . . .”<sup>58</sup> Furthermore, CCI and DFA entered into a

47. See F. LAWRENCE STREET & MARK P. GRANT, LAW OF THE INTERNET 644 (2001).

48. See generally *Godfrey*, E.M.L.R. at 609 (providing a detailed discussion and ultimately disagreeing with United States case law).

49. 776 F. Supp. 135 (S.D.N.Y. 1991).

50. See STREET & GRANT, *supra* note 47, at 773–74.

51. *Cubby*, 776 F. Supp. at 141.

52. *Id.* at 137. This “library” was an online general information service that the CompuServe subscribers could access from their own computers. *Id.*

53. *Id.* The “forums” included electronic bulletin boards, interactive online conferences, and topical databases that appealed to special interests. *Id.*

54. *Id.*

55. *Id.* at 138.

56. *Id.*

57. *Cubby*, 776 F. Supp. at 137.

58. *Id.*

contract in which DFA accepted total responsibility for the contents of Rumorville.<sup>59</sup>

According to preexisting law, if CompuServe was found to be a “publisher” of the defamatory material, it would be held strictly liable.<sup>60</sup> On the other hand, if CompuServe was found to be a mere distributor of the material, similar to a newspaper vendor or library, no liability would attach unless it knew or had reason to know of the defamation.<sup>61</sup> *Cubby* relied on *Smith v. California*,<sup>62</sup> in which the Supreme Court refused to hold a bookseller liable for possession of an obscene book.<sup>63</sup> The court explained a bookseller cannot possibly know the content of every book it carries, and it is therefore unreasonable to demand such editorial control.<sup>64</sup> In addition, the *Smith* court said the burden of such restrictions would negatively impact the public because the public would lose access to such content.<sup>65</sup> *Cubby* employed *Smith's* reasoning to relieve CompuServe of liability.<sup>66</sup>

Because DFA directly uploaded the text of Rumorville into the CompuServe site, the court found CompuServe had minimal editorial control over the publication process.<sup>67</sup> The court stated CompuServe’s role was similar to the role of a traditional news distributor and therefore, CompuServe was not liable.<sup>68</sup> The decision in *Cubby* represented a step forward for ISP protection. Armed with *Cubby*, ISPs could claim constitutional protection for allegedly libelous statements on their websites of which they had no knowledge.<sup>69</sup>

## 2. *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>70</sup> Penalizes an ISP for Exercising Editorial Control

In contrast to *Cubby*, the court in *Stratton* found Prodigy, an ISP, liable for defamatory statements made in a public online forum.<sup>71</sup> In

59. *Id.*

60. *See id.* at 139 (citing *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980), quoting RESTATEMENT (SECOND) OF TORTS § 578 (1977)).

61. *Id.* at 139 (citing *Lerman v. Chuckleberry Publ'g, Inc.*, 521 F. Supp. 228, 235 (S.D.N.Y. 1981); *Macaluso v. Mondadori Publ'g Co.*, 527 F. Supp. 1017, 1019 (E.D.N.Y. 1981)).

62. *Smith v. California*, 361 U.S. 147 (1959).

63. *See id.* at 155; *Cubby*, 776 F. Supp. at 139.

64. *Smith*, 361 U.S. at 153 (citing *The King v. Ewart*, 25 N.Z.L.R. 709, 729 (C.A.)).

65. *Id.*

66. *See Cubby*, 776 F. Supp. at 139–41.

67. *Id.* at 140.

68. *Id.* at 140–41.

69. STREET & GRANT, *supra* note 47, at 791.

70. No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at \*1 (N.Y. Sup. Ct. May 24, 1995).

71. *See id.* at \*14.

*Stratton*, a Prodigy user posted a message on a Prodigy bulletin board called "Money Talk."<sup>72</sup> The message alleged that Daniel Porush, President of Stratton Oakmont, Inc., a securities investment banking firm, was "soon to be proven criminal."<sup>73</sup> The message also stated Stratton Oakmont was "a cult of brokers who either lie for a living or get fired."<sup>74</sup> In denying liability, Prodigy based its defense on *Cubby*,<sup>75</sup> and argued it was merely a "distributor."<sup>76</sup> To the contrary, the court held Prodigy was a "publisher" and was therefore liable.<sup>77</sup>

*Stratton* has significantly impacted Internet libel law in the United States. First, the decision identifies how an ISP can avoid prosecution for defamatory statements.<sup>78</sup> The *Stratton* court concluded that Prodigy held itself out as a "'family-oriented' computer service" by claiming editorial control over messages posted on its bulletin boards and by actively utilizing an automatic software screening program to filter content.<sup>79</sup> Based on these factors, the court found Prodigy was a "publisher" and was liable for the defamatory statements published on its site.<sup>80</sup> Conversely, a lack of editorial control over the site will result in no such liability for defamatory content.<sup>81</sup> Thus, under *Stratton*, to preclude prosecution, an ISP should avoid exercising any editorial control over content.<sup>82</sup>

Second, *Stratton* acknowledges harsh penalties for defamation could have a "chilling effect" on online communication.<sup>83</sup> The "essence of a chilling effect is an act of deterrence."<sup>84</sup> The concern is that penalties on those who communicate defamatory statements may actually over-deter truthful and nondefamatory speech, due to the fear created by such penalties.<sup>85</sup> With regard to the Internet, there is concern defamation law

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72. *Id.* at \*1. The "Money Talk" bulletin board was supposedly the most widely read financial computer bulletin board in the United States. *Id.* at \*3.

73. *Id.* at \*2.

74. *Id.*

75. *See id.* at \*8 (citing *Cubby*, 776 F. Supp. at 135).

76. *See Stratton*, 1995 N.Y. Misc. LEXIS 229, at \*8-9.

77. *Id.* at \*10-11.

78. *See id.* at \*12-14.

79. *Id.* at \*13-14.

80. *Id.* at \*10-11.

81. *See id.* at \*13.

82. *See Stratton*, 1995 N.Y. Misc. LEXIS 229, at \*13.

83. *See id.* at \*12.

84. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 689 (1978) (citing *Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Gibson v. Florida Legislative Investigation Comm'n.*, 372 U.S. 539, 556-57 (1963)).

85. *Id.* at 693.

will deter users from freely expressing ideas.<sup>86</sup> Furthermore, the economic dangers of a libel suit may cause an ISP to cease publication.<sup>87</sup>

In its discussion of concerns about the potential chilling of online communication,<sup>88</sup> the *Stratton* court referenced *Auvil v. CBS "60 Minutes."*<sup>89</sup> In *Auvil*, the court examined the liability of CBS and its affiliates for broadcasting an allegedly defamatory segment concerning the risks of using Alar, a growth regulator, in the apple industry.<sup>90</sup> The court in *Auvil* reasoned imposing a duty to censor on the CBS local affiliates would be highly unrealistic.<sup>91</sup> Furthermore, the *Auvil* court found such a duty would be economically burdensome,<sup>92</sup> and would chill the "media's right of expression and the public's right to know."<sup>93</sup>

Although Prodigy exercised editorial control in *Stratton*, the decision may have effectively increased the amount of information available to citizens. Thus, after *Stratton*, an ISP might refrain from exerting editorial control over its site in order to protect itself from potential liability if defamatory information is overlooked.<sup>94</sup> However, ISPs' decisions were undoubtedly influenced by pending versions of the Communications Decency Act<sup>95</sup> as well.

### 3. The Communications Decency Act<sup>96</sup> Overruled *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>97</sup>

The Communications Decency Act ("CDA") was enacted in 1996 as an attempt "to overhaul numerous provisions of the Communications Act of 1934."<sup>98</sup> Section 230(c) of the CDA states "[n]o 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."<sup>99</sup>

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86. See Lidsky, *supra* note 35, at 890.

87. See Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1789 (1998).

88. See *Stratton*, 1995 N.Y. Misc. LEXIS 229, at \*12.

89. 800 F. Supp. 928 (E.D. Wash. 1992).

90. See *id.* at 930.

91. See *id.* at 932.

92. See *id.*

93. *Id.*

94. See STREET & GRANT, *supra* note 47, at 781 (discussing that an ISP would likely be held liable if it attempted to exert editorial control over its site).

95. 47 U.S.C. § 230 (Supp. IV 1999).

96. *Id.*

97. No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at \*1 (N.Y. Sup. Ct. May 24, 1995).

98. STREET & GRANT, *supra* note 47, at 792.

99. 47 U.S.C. § 230(c)(1).

Specifically, § 230 provides ISPs are not liable for actions that restrict objectionable material.<sup>100</sup>

Congress' intent in enacting § 230 was to overrule *Stratton Oakmont v. Prodigy*.<sup>101</sup> Congress recognized *Stratton* treated ISPs as "publishers," and this in fact resulted in an effect contrary to the prevailing federal policy of allowing parents to regulate their children's Internet viewing.<sup>102</sup> In particular, Congress believed that cases similar to *Stratton* would force ISPs to stop policing their sites to avoid possible libel suits.<sup>103</sup> Congress was concerned that after *Stratton*, ISPs would refuse to police their sites and allow offensive material to flourish on the Internet.<sup>104</sup>

The effect of the CDA was a return to a *Cubby*-like era of distributor liability.<sup>105</sup> By enacting the CDA, Congress allowed ISPs to exercise editorial control over their sites without risking liability as "publishers."<sup>106</sup> However, until the courts applied the CDA, there was no way of knowing whether Congress would achieve these goals.

#### 4. *Zeran v. America Online, Inc.*<sup>107</sup> Rejects *Stratton*<sup>108</sup>

The *Zeran* court was the first to apply the CDA and effectively reverse *Stratton*.<sup>109</sup> In *Zeran*, an unknown user listed the plaintiff's phone number and address on an America Online ("AOL") bulletin board advertising distasteful merchandise connected to the Oklahoma City bombing.<sup>110</sup> The plaintiff alleged the posting of the material led to harassment and numerous death threats<sup>111</sup> and sued AOL claiming it was negligent in allowing the posting of the notices.<sup>112</sup>

The plaintiff argued even though § 230 of the CDA eliminated liability for "publishers," it still provided liability for service providers such

100. *Id.* § 230(c)(2).

101. See H.R. CONF. REP. NO. 104-458, at 194 (1996).

102. See *id.*

103. See *id.*; see also Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online Is a Good Thing*, 6 RICH. J.L. & TECH. 25, ¶ 9 (Spring 2000), at <http://www.urich.edu/%7Ejolt/v6i5/article4.html>.

104. Spencer, *supra* note 104, ¶ 9.

105. *Id.*

106. *Id.*

107. 129 F.3d 327 (4th Cir. 1997).

108. *Stratton*, 1995 N.Y. Misc. LEXIS 229.

109. See *Defamation and the Internet: Major Court Cases*, at <http://cse.stanford.edu/class/cs201/proj...e-internet/sections/precedent/cases.html> (last visited Jan. 11, 2001).

110. See *Zeran*, 129 F.3d at 329.

111. See *id.*

112. See *id.* at 329-30.

as AOL.<sup>113</sup> The CDA states an online service provider shall not “be treated as the publisher or speaker of any information provided by another information content provider.”<sup>114</sup> This section of the CDA was specifically enacted by Congress to overrule *Stratton*.<sup>115</sup> However, the plaintiff argued that § 230 also invoked liability for ISPs with notice of defamatory material posted via their services.<sup>116</sup>

The district court found “[e]very one who takes part in the publication . . . is charged with publication.”<sup>117</sup> The *Zeran* court destroyed the distinction between a “publisher” and a “distributor” clearly set out in cases such as *Stratton* and *Cubby*.<sup>118</sup> The court held AOL met the traditional definition of a “publisher” and was thus protected by the immunity conferred by §230 of the CDA.<sup>119</sup>

### 5. *Blumenthal v. Drudge*<sup>120</sup> Follows the Reasoning of *Zeran*

*Blumenthal v. Drudge* had important ramifications for the suppression of newsworthy information. Matt Drudge, an Internet columnist and publisher of his own website known as the “Drudge Report,”<sup>121</sup> reported that Sidney Blumenthal, President Clinton’s advisor, abused his wife.<sup>122</sup> The Blumenthals sued Drudge and AOL for libel.<sup>123</sup> The court in *Blumenthal*, relying upon *Zeran*, concluded the CDA gave ISPs immunity from liability as an incentive for ISPs to police themselves for obscenity and offensive material.<sup>124</sup> The *Blumenthal* court believed this incentive was enough, “even where the self-policing is unsuccessful or not even attempted,”<sup>125</sup> and held the CDA barred Blumenthal’s claim against AOL.<sup>126</sup>

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113. *See id.* at 331.

114. 47 U.S.C. § 230(c)(1).

115. STREET & GRANT, *supra* note 47, at 793; *see also* 47 U.S.C. § 230(c); H.R. CONF. REP. NO. 104-458, at 194 (1996).

116. *See Zeran*, 129 F.3d at 331.

117. *Id.* at 332 (quoting PROSSER & KEETON § 113, at 799).

118. *See id.*; *Stratton*, 1995 N.Y. Misc. LEXIS 229; *Cubby*, 776 F. Supp. 135.

119. *See Zeran*, 129 F.3d at 332.

120. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

121. *See id.* at 47.

122. *See id.* at 46.

123. *See id.* at 46–48.

124. *See id.* at 52–53.

125. *See id.* at 52.

126. *See Blumenthal*, 992 F. Supp. at 52.

The decision in *Blumenthal* insulated ISPs from liability for defamatory content,<sup>127</sup> and thus initially appears as a victory for the First Amendment. It is arguable the amount of information available on the Internet will increase because ISPs no longer fear liability for defamation<sup>128</sup> and thus, will not be deterred from publishing. However, *Blumenthal* could cause the exact opposite result.

Prior to *Blumenthal*, ISPs with deep pockets were easy targets for defamation suits.<sup>129</sup> However, since ISPs are no longer chargeable, the libeled plaintiff may pursue the source of the defamatory communication—the originator of the comment.<sup>130</sup> Because these individuals do not usually have the deep pockets of a large ISP, they might be deterred from publishing for fear of litigation.<sup>131</sup>

### *B. England's Pro-Plaintiff Approach*

The English approach to defamation is in direct contrast to American defamation law.<sup>132</sup> In England, a publisher of defamatory material may be liable regardless of whether the publisher has notice of the defamatory content of its publication.<sup>133</sup> Additionally, English law presumes the defamatory statement is false, leaving the defendant with the burden of proving the truthfulness of the statement.<sup>134</sup> Consequently, plaintiffs will prefer to bring defamation suits in England where a higher probability of success exists.<sup>135</sup>

Prior to 1996, ISP liability in England depended on the categorization of the service provider.<sup>136</sup> Courts sought to determine whether an ISP was a publisher, printer, distributor or vendor because each classification invoked different liabilities.<sup>137</sup> The English legislature attempted to resolve problems created by such characterizations by forcing new technological

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127. *See id.* at 52–53.

128. *See generally Blumenthal*, 992 F. Supp. 44.

129. *See Lydsky, supra* note 35, at 868–70.

130. *See id.* at 872.

131. *See id.*; *see also* STREET & GRANT, *supra* note 47, at 784.

132. *See* 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, 552–553 (1995).

133. STREET & GRANT, *supra* note 47, at 787.

134. *See* McCarthy, *supra* note 133.

135. *Id.*

136. *See* Alan Williams et al., *England and Wales, in* INTERNATIONAL MEDIA LIABILITY: CIVIL LIABILITY IN THE INFORMATION AGE 107, 111 (Christian Campbell ed., 1997).

137. *See id.*

entities into the confines of defamation law with the Defamation Act of 1996 (“Defamation Act”).<sup>138</sup>

### 1. The Defamation Act

The Defamation Act provides a three-pronged defense to avoid liability for defamation.<sup>139</sup> The Act allows an ISP to avoid liability if the ISP: 1) is not the “author, editor or publisher” of the defamatory statement; 2) took “reasonable care in relation to its publication” and 3) can demonstrate it did “not know, and had no reason to believe, that what [it] did caused or contributed to the publication of a defamatory statement.”<sup>140</sup>

The Act further provides an entity is not considered an “author, editor, or publisher” if it is only involved in the distribution or selling of an electronic medium, or if it is an operator or provider of an electronic medium on “which the statement is retrieved, copied, distributed or made available in electronic form.”<sup>141</sup> Moreover, under the Defamation Act, an ISP is not considered the author if it is involved in the operation of, or is the provider of, access to a communications system on which the statement is transmitted by a person over whom it has no control.<sup>142</sup>

These sections, which were intended to insulate ISPs from liability for defamatory content,<sup>143</sup> were tested in *Godfrey v. Demon Internet Ltd.*<sup>144</sup>

### 2. *Godfrey v. Demon Internet Ltd.*<sup>145</sup> Applies the Defamation Act

In *Godfrey*, an anonymous user posted a message on the defendant ISP’s network allegedly containing “squalid, obscene and defamatory” content directed at the plaintiff.<sup>146</sup> Demon, the ISP, claimed it was not a “publisher” under English common law and denied liability for the posted message.<sup>147</sup> Alternatively, Demon claimed even if it were a “publisher,” it could nonetheless invoke the defenses available in the Defamation Act.<sup>148</sup>

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138. *Id.* at 112.

139. Defamation Act, 1996, ch. 31, § 1(1) (Eng.).

140. *Id.*

141. *Id.* § 1(3).

142. *Id.*

143. See Williams, *supra* note 137, at 112–13.

144. 1999 E.M.L.R. 542 (Q.B.) (Eng.).

145. *Id.*

146. *Id.* at 545.

147. See *id.* at 544.

148. See *id.*

Although the court held Demon was not a “publisher,” it went a step further and concluded Demon could not plead the defenses provided in the Defamation Act.<sup>149</sup> The court based this conclusion on the fact that Demon had notice of the defamatory statement on its server.<sup>150</sup> Specifically, Demon’s Managing Director received a fax from the plaintiff notifying him of the problem.<sup>151</sup> According to the court, the defenses provided in the Defamation Act were a version of the common law defense of innocent dissemination, which forestalls liability if one is unaware of the defamatory nature of a statement.<sup>152</sup> Therefore, the court recognized it was improper to provide such a defense to a defendant who was aware of a potentially harmful statement directed at the plaintiff.<sup>153</sup>

In reaching its conclusion, the *Godfrey* court discussed United States defamation law.<sup>154</sup> *Cubby*, *Stratton* and *Zeran* were invoked to illustrate the differences between English and American law.<sup>155</sup> The court explained the Defamation Act does not serve the same purpose as the CDA, and that the American cases were only of “marginal assistance because of the different approach to defamation across the Atlantic.”<sup>156</sup> The court therefore followed the Defamation Act, and held an English ISP must remove allegedly libelous material immediately upon notice of the material’s existence on its server.<sup>157</sup>

Because of a recent pro-plaintiff English ruling, it is possible there will be a “rush of libel claimants to London.”<sup>158</sup> The ruling at issue concerned whether a Russian businessman could sue *Forbes*, an American magazine, in a British court.<sup>159</sup> Although *Forbes* argued the case should be brought in either Russia or the United States, the House of Lords allowed the case heard in England.<sup>160</sup>

The implications of this ruling are enormous. When coupled with the ruling of *Godfrey*, England will perpetuate its reputation as a place where

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149. *See id.* at 554–55.

150. *Godfrey*, E.M.L.R. at 554–55.

151. *Id.* at 545–46.

152. *See id.* at 544.

153. *See id.* at 554–55.

154. *See id.* at 550–54.

155. *See Godfrey*, E.M.L.R. at 550–54.

156. *See id.* at 550.

157. *See, e.g.*, Defamation Act, 1996, ch. 31, § 1(1) (Eng.); *see also* David Hooper, *Goodbye Libel, Hello Privacy*, *TIMES* (London), Mar. 28, 2000.

158. Frances Gibb, *Russian Free to Sue in Britain*, *TIMES* (London), May 12, 2000.

159. *Id.*

160. *Id.*

libel suits are welcomed.<sup>161</sup> Thus, it is conceivable that one who feels libeled is prudent to plead one's case in the English court system.<sup>162</sup> An injured party from the United States may "in the future flee the fault requirements of the Constitution and seek redress in more media-hostile jurisdictions."<sup>163</sup> The differences between American and English libel law observed in *Godfrey* are ripe for scholarly examination, as a comprehensive solution regarding libel on the Internet remains elusive.

### C. Japan Invokes ISP Liability for the Posting of a Subscriber

Japan takes a more lenient approach toward regulating the Internet than most countries.<sup>164</sup> There, the Electronic Network Consortium, an Internet industry association of software developers and Internet companies, has mapped out a series of guidelines requiring the use of "good manners" on the Internet.<sup>165</sup> These guidelines include the principle that a user should never post a defamatory message on a computer bulletin board.<sup>166</sup> The Ministry of International Trade and Industry, which worked with the Consortium on the drafting of the guidelines, does not foresee the need to implement future Internet laws because of its strong belief Internet users will adhere to the guidelines.<sup>167</sup>

In spite of these guidelines, Japan's Internet industry is not free of defamation.<sup>168</sup> In a recent case, NiftyServe, a major Japanese online service, was sued after it failed to remove an offensive statement from one of its bulletin board forums.<sup>169</sup> This case is similar to *Cubby* in that NiftyServe, like CompuServe, had contracted with an independent company to monitor and control the editorial content of its forums.<sup>170</sup>

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161. Cf. McCarthy, *supra* note 133, at 561 (stating British defamation law favors plaintiffs by providing them with a more favorable forum).

162. *See id.*

163. Michael Smyth & Nick Braithwaite, *First U.K. Bulletin Board Defamation Suit Brought: English Courts May Be the Better Forum for Plaintiffs Charging Defamation in Cyberspace*, NAT'L L.J., Sept. 19, 1994, at C10, C12.

164. *See generally* Holland, *supra* note 8 (comparing attitudes towards Internet regulation in the United States, Great Britain, Japan, and Singapore).

165. *Id.*; *see also* Rieko Mashima & Katsuya Hirose, *From "Dial-a-Porn" to "Cyberporn": Approaches to and Limitations of Regulation in the United States and Japan*, at <http://www.ascusc.org/jcmc/vol2/issue2/mashima.html> (last visited Jan. 11, 2001).

166. Mashima & Hirose, *supra* note 166.

167. *Id.*

168. *See Defamation in Cyberspace under Japanese Law* (Narafumi Kadomatsu trans.) (May 1988), at <http://www.law.kyushu-u.ac.jp/~luke/kadocase.html> (translated summary of Tokyo District Court Opinion, 1610 Hanrei Jiho 22ff, denying liability to ISP and its employee).

169. *See* Mashima & Hirose, *supra* note 166, at n.41.

170. *See id.*

However, NiftyServe failed to adequately supervise the company.<sup>171</sup> Accordingly, the Tokyo district court ruled against NiftyServe on a vicarious liability theory and ordered the company to pay damages to the plaintiff.<sup>172</sup>

Traditional defamation claims are expected to increase in Japan.<sup>173</sup> However, Japanese courts traditionally award low damages in comparison to international standards, suggesting an under evaluation of an individual's intangible rights.<sup>174</sup> The past infringement of personal rights, coupled with the incredible growth of Japan's Internet industry, indicates Japan's libel laws are in need of reform.

#### *D. Australia's Slight Consideration of Internet Libel*

Although Australia is the fourth largest user of the Internet behind Sweden, Finland and the United States,<sup>175</sup> judicial consideration of online libel suits in Australia is scarce.<sup>176</sup> Thus, the Australian judiciary must draw analogies to already existing principles of Australian defamation law.<sup>177</sup>

*Urbanchich v. Drummoyne Municipal Council*<sup>178</sup> is a potentially important case in the development of Australia's online defamation law. The reasoning in *Urbanchich*, which held a defendant liable for failing to remove a defamatory publication,<sup>179</sup> could potentially apply to ISPs. The plaintiff in *Urbanchich* successfully argued the defendant's failure to remove defamatory posters from defendant's property after notification constituted publication.<sup>180</sup> The court reasoned by failing to remove the posters, the defendant "accepted responsibility" for continued publication.<sup>181</sup>

*Urbanchich* can be construed as a warning to Australian ISPs to remove suspect statements after notification of defamatory content in order

171. See Kadomatsu, *supra* note 169.

172. See *id.*

173. See Masao Horibe & John Middleton, *Japan, in*, INTERNATIONAL MEDIA LIABILITY: CIVIL LIABILITY IN THE INFORMATION AGE 219, 239 (Christian Campbell ed., 1997).

174. See *id.*

175. Mark Armstrong et al., *Australia, in* REGULATING THE CHANGING MEDIA 247, 251 (David Goldberg et al. eds., 1998).

176. See Bartlett & Ellison, *supra* note 46, at 13.

177. *Id.*

178. 1988 N.S.W. LEXIS 8802 (N.S.W. Austl. Dec. 22, 1988).

179. *Id.* at \*17.

180. *Id.*

181. *Id.*

to avoid liability.<sup>182</sup> The case is comparable to English law, which holds an ISP liable after notification of a defamatory statement,<sup>183</sup> and offers a defense if the ISP lacked notice of the defamatory statement.<sup>184</sup> Similarly, *Urbanchich* provides that failure to remove a posting after notification of its defamatory content constitutes responsibility for its publication.<sup>185</sup>

Australian statutory law provides an ISP may be liable for statements posted by another unless the ISP proves it is an innocent distributor.<sup>186</sup> In order to avoid liability, the ISP must prove: 1) it lacked knowledge of the defamatory nature of the material; 2) it did not know the material was likely to be defamatory and 3) this lack of knowledge was not due to the ISP's negligence.<sup>187</sup> This rule seems to classify the ISP as a "distributor," as opposed to a "publisher," which is similar to the CDA's classification as a "distributor" in the United States.<sup>188</sup> The fact that Australian libel law is similar to United States libel law is not surprising considering the United States was the leader in litigating such issues,<sup>189</sup> and the Australian media closely monitors United States libel law developments.<sup>190</sup>

*Rindos v. Hardwick*<sup>191</sup> is the only decision specifically related to Internet defamation in Australia.<sup>192</sup> In *Rindos*, the plaintiff claimed defamation by statements published on an anthropology Internet bulletin board.<sup>193</sup> The case provides little analysis of Internet defamation principles because the issues were never litigated as the case was undefended and resulted in a default judgment for the plaintiff.<sup>194</sup> However, *Rindos* was important in that it clearly recognized the international aspects of publication on the Internet, specifically that such a message is accessible worldwide.<sup>195</sup>

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182. See *The Internet Law and Policy Forum Working Group on Content Blocking*, at <http://www.ilpf.org/work/content/defame.htm> (last visited Jan. 11, 2001) [hereinafter THE INTERNET LAW AND POLICY FORUM].

183. See *infra* pp. 112–115.

184. See *infra* p. 114.

185. *Urbanchich*, 1988 N.S.W. LEXIS 8802, at \*17.

186. THE INTERNET LAW AND POLICY FORUM, *supra* note 183.

187. *Id.*

188. See *infra* pp. 109–111.

189. See *infra* notes 47, 48 and accompanying text.

190. See Bartlett & Ellison, *supra* note 46, at 14.

191. *Rindos v. Hardwick* (Mar. 31, 1994) (unreported W. Austl. Sup. Ct.), at <http://joc.mit.edu/uwa/rindos/Law/judgement.html> (last visited Jan. 11, 2001) [hereinafter *Rindos Case*].

192. See Bartlett & Ellison, *supra* note 46, at 13.

193. *Rindos Case*, *supra* note 192.

194. See *id.*; see also Bartlett & Ellison, *supra* note 46, at 13.

195. *Rindos Case*, *supra* note 192.

### *E. Singapore Strictly Regulates the Internet*

Singapore's libel laws are perhaps more strict than those of any other country.<sup>196</sup> Since March 6, 1996, publishers and ISPs in Singapore have been liable for content placed on the Internet.<sup>197</sup> Singapore ISPs must register with the Singapore Broadcasting Authority ("SBA"), perhaps in an effort to trace legal liability.<sup>198</sup> Also, similar to Japan, Singapore has attempted to implement a non-legal alternative to the problem of libel on the Internet by educating students about Internet etiquette.<sup>199</sup>

In July of 1996, the SBA enacted the *Class License Scheme* for regulating the Internet.<sup>200</sup> Although the *Class License Scheme* does not specifically target defamation, it clearly establishes a unique framework for Internet regulation.<sup>201</sup> The scheme requires every Singapore-based ISP to register with the SBA, and upon the SBA's request, to turn over all records relating to its services.<sup>202</sup> Furthermore, at the direction of the SBA, the ISP must remove material deemed offensive or against the public interest.<sup>203</sup>

The SBA has clearly attempted to regulate all aspects of the Internet in the same way it has regulated television and newspapers.<sup>204</sup> However, the *Class License Scheme* specifically addresses that its regulation may hinder the goal of boosting Singapore's potential as a global information hub.<sup>205</sup> Although Singapore has one of the strictest approaches to Internet regulation in the world,<sup>206</sup> SBA officials note they take a pragmatic approach to regulating the Internet.<sup>207</sup> The SBA adds the United States has undertaken efforts to stop the spread of indecent material on the Internet and France has attempted to enact a global agreement concerning

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196. Holland, *supra* note 8.

197. *Id.*

198. Helen Chang, *Singapore Wakes Up and Smells the Internet*, BUS. WK., Mar. 25, 1996, at 30; see also Holland, *supra* note 8.

199. Holland, *supra* note 8.

200. Press Release, SBA Safeguards Community Interest Through Internet Regulation (July 11, 1996), available at <http://www.eff.org/pub/Global/Singapore/Censorship/regulations.071196.txt> [hereinafter SBA Safeguards]; Suzi Seawell et. al., *Cyber-Defamation: Same Old Story or Brave New World?* (Summer 1998), at <http://gsulaw.gsu.edu/lawand/papers/su98/defamation> (last visited Jan. 11, 1001) (unpublished class paper, Georgia State University College of Law).

201. See SBA Safeguards, *supra* note 201.

202. *Id.*

203. *Id.*

204. Holland, *supra* note 8.

205. See SBA Safeguards, *supra* note 201.

206. See *infra* p. 33

207. SBA Safeguards, *supra* note 201.

regulation of the Internet.<sup>208</sup> However, the SBA fails to recognize the absolute chilling of speech its regulations may cause, in fact, it seems this chilling is exactly what is intended.<sup>209</sup>

#### IV. A PRECARIOUS SITUATION—AN ANALYSIS OF THE CURRENT STATE OF THE LAW

Defamation laws of one country may apply to an ISP based in another country.<sup>210</sup> Thus, as long as there is no international model, ISPs must concern themselves with the laws of multiple jurisdictions.<sup>211</sup> This may cause both the ISP and the individual to refrain from publishing information for fear of liability.<sup>212</sup> In order to speculate on an appropriate solution, the current state of libel law must be analyzed.

##### *A. Problems With the Current Laws*

###### 1. The Current State of Internet Libel May Cause a Chilling Effect

The Internet libel laws of the United States, England, Japan, Australia and Singapore create the possibility of a chilling effect. After *Zeran*, in the United States, ISPs are no longer liable for defamatory statements published on their sites.<sup>213</sup> Therefore, the plaintiff in a libel action must bring suit against the source of the published information rather than the ISP.<sup>214</sup> Similarly, in Australia, an ISP is not liable if it can prove it is an “innocent distributor.”<sup>215</sup> Thus, in both the United States and Australia it is not the ISP that is deterred from publishing, but rather the author of the information.

The Singapore government has also chilled speech.<sup>216</sup> One might argue silencing all libelous statements is beneficial. However, the libel

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208. *Id.*

209. See Holland, *supra* note 8.

210. See Stan Morris, *The Importance of International Laws for Web Publishers*, at <http://www.gigalaw.com/articles/morris-2000-06-p3.html> (last visited Jan. 11, 2001); see also Gibb, *supra* note 160 (discussing a libel lawsuit filed by a Russian businessman in the English House of Lords against *Forbes*, an American magazine, in May of 2000).

211. See, e.g., Edwards, *supra* note 5, at 183–84; see also Bartlett, *supra* note 46, at 14.

212. See Schauer, *supra* note 85, at 693.

213. See *supra* Part III.A.4.

214. See Lidsky, *supra* note 130, at 872.

215. THE INTERNET LAW AND POLICY FORUM, *supra* note 183.

216. See Holland, *supra* note 8.

laws in Singapore have great potential for overly deterring the publishing of newsworthy information because of the fear of punishment.<sup>217</sup>

Similarly, there is likely a strong chilling of speech in Japan, despite the small damages often awarded in defamation actions.<sup>218</sup> The guidelines implemented by the Electronic Network Consortium are strict and leave little room for error.<sup>219</sup> Thus, publishing may be deterred even though it is not in fact defamatory. Although freedom of expression is highly valued in Japan, the courts have seen a large increase in the number of defamation actions.<sup>220</sup> Such litigation can only increase with the development of the Internet in Japan.<sup>221</sup>

This chilling effect may also be problematic in England due to the pro-plaintiff approach taken by English law.<sup>222</sup> Although the Defamation Act allows an ISP to avoid liability, *Godfrey* might be construed as a warning to refrain from publishing. Furthermore, even if an ISP is allowed to use the defenses available under the Defamation Act, the plaintiff may seek action against the author. This will result in deterring the author, thus producing a chilling effect similar to that of the United States and Australia.<sup>223</sup>

The deleterious consequences of the chilling effect are increased due to the rising damages awarded from libel actions in numerous countries.<sup>224</sup> In England, for example, it is noted although fewer libel suits are brought, juries still award “thumping damages” against media defendants of whom they disapprove.<sup>225</sup> In the future, due to the rise in damages awarded, it is certain those exposed to liability will become more careful about the speech they disseminate through the Internet. This will amplify the consequences of the chilling effect.

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217. *See id.*

218. *See* Horibe & Middleton, *supra* note 174, at 230, 239.

219. *See generally* Mashima & Hirose, *supra* note 167.

220. *See* Horibe & Middleton, *supra* note 174, at 228–30.

221. *See id.* at 239.

222. *See supra* Part III.B.

223. *See supra* notes 214–16 and accompanying text.

224. *See, e.g.*, Hooper, *supra* note 159; *see also* Thomas Fuller, *Big Libel Verdict Upheld in Malaysia*, INT’L HERALD TRIB., July 13, 2000, available at 2000 WL 4123223.

225. *See* Hooper, *supra* note 159.

## 2. Lack of Uniform International Law Conflicts with the Potential Use of the Internet

In *ACLU v. Reno*<sup>226</sup> the district court recognized the Internet is considered a stronghold of free speech.<sup>227</sup> The court noted “the Internet is a far more speech-enhancing medium than print, the village green, or the mails . . . . As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.”<sup>228</sup> However, as evidenced from the Internet libel cases discussed above, the Internet is not afforded complete protection from government regulation in any country.

One must account for the international nature of defamation on the Internet when considering legal solutions for liability in defamation lawsuits.<sup>229</sup> The Internet itself is not situated at any one location, but is rather a collection of computers around the world.<sup>230</sup> The Internet additionally allows almost anyone to publish information,<sup>231</sup> which may be read worldwide.<sup>232</sup> Furthermore, there is no way to control where and who information reaches once published on the Internet.<sup>233</sup> Because anything published on the Internet has the ability to reach a worldwide audience,<sup>234</sup> the potential for damage from a libelous statement is enormous.<sup>235</sup> Thus, free speech characteristics inherent in the Internet must be balanced against the right of freedom from defamation.

As long as countries have variant defamation laws, the economic consequences of researching all applicable laws and the possibility of litigating in multiple jurisdictions will chill ISPs from publishing.<sup>236</sup> Furthermore, the lack of international law may chill the individual author from publishing, which may result in suppression of ideas and debate.<sup>237</sup>

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226. 929 F. Supp. 824 (E.D. Pa. 1996).

227. *Id.* at 882–83.

228. *Id.*

229. *See, e.g.*, Edwards, *supra* note 5, at 183–84.

230. *See* STREET & GRANT, *supra* note 4, at xxx.

231. *See* STREET & GRANT, *supra* note 4, at xxvii.

232. *See* Edwards, *supra* note 5, at 183.

233. *See* STREET & GRANT, *supra* note 4, at xxxiii.

234. *See* Edwards, *supra* note 5, at 183.

235. *See, e.g., id.* at 184; *see also* Holland, *supra* note 8.

236. *Cf.* Edwards, *supra* note 5, at 184 (discussing that a defamatory statement can cross international boundaries).

237. *See* Edwards, *supra* note 5, at 197 (discussing the idea that uniform international laws would help individual users); *see also* Lidsky, *supra* note 35, at 887–88 (discussing the idea that Internet libel suits may chill Internet users).

Thus, in order to realize the full potential of the Internet, a uniform system of international law must be implemented.

### *B. What Should Be Done?*

#### 1. Policy Reasons for a Truth-Based Solution

An international system of libel law should focus on correcting the defamatory statement and providing the public with the truth, rather than providing a plaintiff with money. A truth-based system would eliminate much of the consequences of the chilling effect resulting from the economic burden of current Internet libel law. Such a rule would require an ISP to publish a retraction of a defamatory statement, similar to retraction statutes currently in place in the United States.<sup>238</sup> Depending on the jurisdiction, such retraction statutes provide a partial or complete defense to a traditional (non-ISP) defamation suit by requiring the publisher to print a rebuttal of the defamatory statement.<sup>239</sup>

A truth-based system may actually increase the amount of information published, in contrast to the decrease caused by the chilling effect. An ISP would theoretically publish more information under a truth-based system because once published information is held defamatory, the ISP will attempt to offset damages by publicizing the truth.

Furthermore, an international truth-based system would directly address the consequences of international Internet publishing. By implementing a single international approach to libel, the ISP will not be subjected to laws of multiple jurisdictions. Thus, the ISP would avoid dealing with many of the economic factors contributing to the chilling effect.<sup>240</sup> Lessening the fear of economic liability will lead to increased dissemination of information.

A truth-based system will also better address the needs of the libeled plaintiff. Generally the libeled plaintiff does not engage in litigation seeking monetary damages, but rather personal psychological benefit.<sup>241</sup> The plaintiff seeks to publicly deny the truth of the defamatory

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238. See, e.g., Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 RICH. J.L. & TECH. 9, ¶ 57 (Fall 1999), at <http://www.urich.edu/%7Ejolt/v6i2/note1.html> (providing an overview of retraction statutes).

239. See *id.*

240. See, e.g., Huber, *supra* note 13, at 406.

241. RANDALL P. BEZANSON ET. AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 161-62 (1987).

statement.<sup>242</sup> Under a truth-based system, the plaintiff of an Internet libel action gains repair of their reputation, rather than a sum of money, which does not redress the harm done.<sup>243</sup> Furthermore, in response to the international nature of the Internet, the repair to the plaintiff's reputation would occur worldwide.

The Internet is uniquely suited to correcting libelous statements with the truth. Because publishing on the Internet is inherently less expensive than traditional modes of publishing, once a statement is labeled defamatory, an attempt to correct the statement is inexpensive and easy to disseminate.<sup>244</sup>

Some companies have already implemented systems that strive to correct defamatory statements with the truth.<sup>245</sup> In 1995, a user placed a message on an AOL bulletin board alleging homemade potatoes at Boston Market were in fact instant potatoes from Sysco. Rather than filing a lawsuit, Boston Market posted a reply to the same bulletin board saying "Sysco trucks the potatoes in, but they are not Sysco brand potatoes. They are whole potatoes. And they really do have big mashers in the back of every restaurant."<sup>246</sup> Boston Market's strategy worked thereby avoiding a possible lawsuit.<sup>247</sup>

## 2. A Proposed International Solution

An international rule on libel law can be broken into three prongs. The first two prongs could be drawn from the proposed Uniform Defamation Act. The third prong would address an ISP taking reasonable steps to correct the defamatory information.

A Uniform Defamation Act was proposed in the United States that would release domestic computer bulletin board operators from liability if the operators take reasonable steps to inform users that they do not assert the truthfulness of the information.<sup>248</sup> However, the rule has no provision

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242. *See id.*

243. *Id.*

244. *See* STREET & GRANT, *supra* note 4, at xxvii.

245. *See generally* L. A. Lorek, *Companies Entangled by the Web, Internet an Easy tool for Corporate Critics*, SUN-SENTINEL, Mar. 3, 1996, available at 1996 WL 2490219 (discussing Boston Market using the Internet to defend defamatory statements).

246. *Id.*

247. *See id.*

248. *See Legislative Initiatives Relating to the Standard of Care Issue*, at <http://www.ssbb.com/legislat.html> (last visited Mar. 7, 2001) (explaining the Feb. 6, 1992 draft of the Uniform Defamation act was ultimately not approved by the National Conference of Commissioners on Uniform State Laws); Holland, *supra* note 8; Jeremy Stone Weber, *Defining*

to protect ISPs who seek to publish the truth, but accidentally publish a defamatory statement. Thus, the consequences of the proposed rule would have foreseeably added to the chilling effect as an ISP might refuse to publish a newsworthy statement that could possibly be characterized as defamatory.

Thus, a more plausible rule would not hold an ISP liable in the absence of prior notice of the defamatory content. In addition, such a rule would not hold an ISP liable if: 1) the ISP is not reasonably understood to assert in the normal course of business the truthfulness of the information; 2) the ISP takes reasonable steps to inform users it does not assert the truthfulness of the information maintained or transmitted<sup>249</sup> or 3) the ISP takes reasonable steps after notification of the defamatory content to correct the content, and concurrently, takes all possible steps to assert the previously published statement was incorrect.

A caveat of this proposed rule is that actual or punitive damages could still be awarded if the published retractions were found incapable of repairing the damaged reputation of the plaintiff. Under this scenario, the awarded damages could be offset by any repair to the reputation by the ISP after it learns of the defamatory content.

Although damages would be difficult for a court to determine under this proposed rule, most courts currently decide damages based on presumed damage to a person's reputation. Thus, applying such a rule should not be overly demanding as courts are experienced in making such assessments.

## V. CONCLUSION

The current state of Internet libel law remains far from ideal. Although some countries refuse to hold ISPs liable for defamatory statements, others do not. Thus, the current country-by-country approach to policing Internet libel leaves ISPs with no clear rules to follow. Consequently, ISPs are chilled from publishing newsworthy information.

The current confusion of rules results in the general public suffering from the loss of information. If the true potential of the Internet is to be realized, that of an unbridled forum for international communication, the current laws of Internet libel must change. The system proposed in this Comment allows an ISP to correct a defamatory statement with the truth. This will increase the amount of information disseminated, to the benefit of

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*Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235, 260 (1995).

249. *Legislative Initiatives Relating to the Standard of Care Issue*, *supra* note 249.

the public, because the ISP will no longer refrain from publishing for fear of legal liability.

This Comment proposes one solution to the problem of libel on the Internet. However, it is the public who must demand a change in the current approach to policing the Internet in order for the Internet to become the extraordinary conduit of information of which it is capable.

*Scott Sterling\**

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