

**LEGAL MECHANISMS IN THE STRUGGLE AGAINST ANONYMOUS DEFAMATION:
Can We Cage the Beast?**

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“Who steals my purse steals trash; tis something, nothing;
Twas mine; tis his and has been slave to thousands;
But he that filches from me my good name,
Robs me of that which not enriches him,
And makes me poor indeed,”
-Shakespeare.

Defamation of character (libel or slander) might loosely be defined as any falsehood which tends to expose a person to contempt, hatred or ridicule. It is interesting to note that the burden of proof is quite different in British Commonwealth countries as compared to the United States. In the English tradition, there exists a presumption of falsity as regards statements that malign or tend to bring someone into disrepute. In other words, it is up to a Defendant to demonstrate the truthfulness of the offending statement.

Conversely, in the United States, the elements of the tort require the plaintiff to prove falsity. However, falsity, it must be noted, is a part of establishing the burden of proof for defamation related to matters of public concern only. A plaintiff need not demonstrate falsity if the statement does not relate to a matter of public concern.

Perhaps a comparative analysis is worthwhile because if we are ultimately to answer the question of what legal mechanisms are best employed in fighting anonymous defamation, it is prudent to examine a variety of approaches which flow from our presumptions on topic and, more broadly, the basic human right to freely express oneself.

What is this beast which we call “anonymous defamation”? Indeed, “anonymous defamation” is a misleading phrase. More precisely, we are referring to the anonymous publication of defamatory content. By definition, if the publisher of the offending statement is unknown, there exists no cause of action. There must be a discernable liable party. It is an imperfect term simply because a cause of action for defamation never exists except against the publisher of the offending statement. No publisher means no cause of action. Herein lies the problem. A wrong still exists and must be redressed – whether or not the identity of the publisher is known. Yet the 17th and 18th century infrastructure of defamation law may be insufficient to afford relief to an aggrieved party affected by 21st century methods of publication. The nature of the beast is that it is cunning and elusive. Anonymous defamation is concerned with defamatory material published over the internet in circumstances where the publisher cannot be identified. However, we must distinguish between anonymous defamation where (1) we cannot discern identity at all or (2) whether it is extremely difficult to do so. Because it is relatively easy for internet users to remain anonymous, the offending parties are often able to defame people with impunity. This could possibly occur where a public computer is being used and/or in situations where false information is used to create a user profile to gain access to the internet. Of course there are other ways in which this can occur such as when individuals gain access to the internet using someone else’s point of access and assuming another’s identity.

It may be exceedingly difficult to discover the identity of the offending party because internet service providers are not likely to release customer information absent a Court Order. This problem has given rise to “John Doe” lawsuits where a prima facie case must be proven before the publisher of the statement can be “unmasked”. There are practical problems with this, not the least of which is the

inability of the Claimant under such circumstances to completely evaluate his case, particularly in regard to the ability of the tortfeasor to pay a judgment and also whether the enforceability of a judgment given the residency of the tortfeasor. The aggrieved party is thus required to incur costs and invest considerable time and energy merely to arrive at the point where he can assess his case more fully, potentially, only to find out that the offending party or parties cannot be revealed to him for one reason or another.

There is also a critical public policy issue inherent in developing legal mechanisms which deal with restrictions on human behaviour (in this case speech) in that we do not want to limit valuable speech whilst attempting to prevent unwanted or harmful speech. Legislators must take care in tinkering with the law that we do not limit access to the marketplace of ideas. Further, lawmakers must be vigilant to achieve a proper balance between the interest of the individual in protecting his or her reputation and the interest of society at large to free expression. Often, when one is defamed on the internet, there is no identifiable party. It begs the question: whom do we sue? The answer is often the internet service provider (ISP). This generates more questions:

- Is the ISP the right party to sue?
- Can they be compelled to identify other potentially liable parties?
- Is the ISP a publisher of the materials or is ISP akin to the vendor at a newspaper stand who is not liable for the content of the magazines he sells?
- How does he regulate it?
- Can you compare the ISP to the editor of a periodical?
- While one can reasonably be held to be responsible for the content of a single publication, or even what is broadcast over the airwaves, can a party be held responsible for policing the content of such a vast medium with virtually limitless capacity?

In the US case of *Cubby v. Compuserve*, 766 F. Supp. 135 (S.D. N.Y. 1991), the Court confronted the issue of whether an ISP was liable for information posted on the internet by a third party. It was concluded that the Defendant in that case had no opportunity to review material prior to publication. The ISP was compared to a newsstand, a bookstore or a library. It would be unduly restrictive of the free flow of electronic information, the Court reasoned, to impose higher standards on the ISP.

In another US case, *Zeran v. American Online* (1996) an internet user was the victim of a hoax. In that case, the Plaintiff's address and telephone number were posted in connection with an advertisement for souvenirs for glorifying the terrorist attack known as the Oklahoma City bombing. An unknown AOL user had posted these ads online. AOL utilized the Communications Decency Act of 1996 (CDA) in its defense, claiming immunity provided by the Act to ISP's. The Court ruled in favour of AOL.

Similarly in, *Carafano v. Metro Splash.com*, 207 F. Supp. 2d 1055 (C.D. Cal. 2002) also known as "the Star Trek Actress Case", an unidentifiable party in Germany created a false social profile on an internet dating service. The photograph and the home address of the Plaintiff, a television actress, were posted online. Her address and telephone number were provided in response to all queries. Ultimately, the Plaintiff had to remain away from her home with her child for a period of several months. The Plaintiff for, *inter alia*, defamation. The Defendants removed the matter to Federal District Court and filed a motion for summary judgment. The Court rejected the Defendant's claim of ISP immunity under the CDA, and also dismissed the Plaintiff's tort claims as the ISP had not acted willfully and the Court found that the Defendant had no duty of care to the Plaintiff. The Plaintiff appealed to the Ninth Circuit Court of Appeals which rejected the Plaintiff's argument and held there was no liability because the ISP was not an information provider, but merely allowed the public to post information on the website.

This approach must be contrasted with the approach in the UK and throughout the Commonwealth. In the UK, under the common law, anyone who participates in the publication of defamatory material will be liable unless they establish a defense (i.e. justification, fair comment or privilege). The only internet-specific defense is "secondary responsibility" as set out in §1 of the Defamation Act 1996. (Discussed *infra*) Generally, anyone who participates in the publication of defamatory material is treated as having caused its publication and is liable.

In the English case of *Godfrey v. Demon Internet Limited* (2000) 3 WLR 1020, the Claimant was a math and physics lecturer residing in England. He sued the ISP Defendant in England and Wales for an internet posting which occurred on January 13, 1997 which was stored on the Defendants news server. The posting was clearly defamatory. On January 17, 1997, the Claimant sent a fax to the Defendant requesting removal of the posting. Nothing was done until January 27, 1997 when the posting was removed. The Claimant sued and sought damages for the publication after the date of notification only. The Defendant denied liability and asserted that its involvement was akin to that of a telephone company. The Court held that under English law, an ISP is a publisher and liable.

The defense of secondary responsibility pursuant to §§1(3)(c) and (e) of the Defamation Act 1996 contemplates a reduced, or secondary role in the publication of defamation. It provides in relevant part that: in defamation proceedings a person has a defense if he shows that – (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care and relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

Section 1 (3) of the Act states: a person shall not be considered the author, editor or publisher of a statement if he is involved in only – (a) in printing, producing, distributing or selling printed material contained in the statement; (b) in processing, making of copies, distributing, exhibiting, or selling a film or sound recording (as defined in part one of the Copyright Designs and Patent Act 1988) containing the statement; (c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic forms; (d) at the broadcaster of a live programme containing the statement, in circumstances in which he has no effective control over the maker of the statements; (e) as the operator of or provider of access to communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

Under the Defamation Act then, the defendant must not be “the author, editor or publisher” which would by definition exclude the ISP’s. Additionally, the defendant must not be aware of defamatory statement, or have reason to be aware of it, and the defendant must have taken reasonable care.

In advising an ISP client, it is important to strike a balance between monitoring content online and avoiding the appearance of “effective control” as stipulated in the Act in order to stay §1 complaint. Very, simply, in attempting to exercise “reasonable care” the ISP cannot go too far where any precautionary measures taken by the ISP might be deemed to be exercise of “effective control” over the originator of the offending material. If this balance is not achieved, the ISP will either not go far enough in taking reasonable care and will have no protection under the Act or, on the other hand, may go too far, intending to exercise reasonable care, and wander into the area of control, thus effectively becoming the editor of the material.

The divergence between the American and English (and Commonwealth) approaches is remarkable given the heavy reliance on both sides on the same jurisprudence. The fact that the US allows greater protection for ISP’s than does the UK suggests that they have adopted the approach of assuring greater freedom of speech by interfering less with that speech.

The philosophy employed in dealing with defamation generally will impact on what legal mechanisms might be used to cage the beast. We in the western world value free speech for a myriad of reasons - as a check on government power *vis-a-vis* the media, as a path toward individual fulfillment in the arts and sciences, but perhaps most notably as a route toward truth and the advancement of all mankind in all spheres of life. Because of the critical importance of speech in all its forms, the exchange of ideas and information through speech is protected in law. Of course free speech is not unfettered and we restrict it when it causes harm such as in the case of obscenity, hate speech or defamation. We must caution ourselves against cancelling out valid speech or protected speech. If the public is unsure about where the line of demarcation exists between protected speech and unprotected speech, then the public is likely to steer far wider of the unlawful zone than it would otherwise. Essentially this amounts to a “chilling effect” on speech which is harmful because individuals in society want to encourage free speech up to the very limit. It is a loss to a society of speech-givers engage in self-censorship. It is as if an aisle in that great marketplace of ideas has been shut off and we all lose the benefit of the discussion and exchange of knowledge that might have occurred otherwise. Ergo, we want to avoid such chilling effects.

This concept is critically important in deciding what method to employ to cage the beast. Bearing in mind that it is impossible to police the internet where the beast roams freely, we have two broad approaches to consider. The first approach involves prior restraints on publication. The second approach involves post-publication remedies or sanctions for defamation. The concept of placing prior restraints on communication has been criticized for centuries, by such figures as the English jurist William Blackstone.

The aversion to prior restraints is likely borne from the notion that such a methodology would be a greater hindrance to freedom of speech than post-publication punishment for unwanted speech. Prior restraints are not unknown in law. We might utilize them, and do, in various contexts, under the banner of license or injunction.

It might be that the UK has exhausted its options in the post-publication approach. After all, we have already made ISP’s liable. Unless we are willing to go further, which might be extremely difficult, one would have to consider the approach concerning prior restraints. This might involve licensing and

registration of internet users or pre-publication agreements with ISP's regarding their monitoring schemes or perhaps the allowance of specific injunctions in anonymous defamation cases.

In Australia the tort of defamation is a strict liability in the sense that a defendant may be liable even though no injury to reputation was intended and the defendant acted with reasonable care. Yet a publication made in the ordinary course of business such as that of a bookseller or news vendor, which the defendant shows to have been made in circumstances where the defendant did not know or suspect and, using reasonable diligence, would not have known or suspected was defamatory, will be held not to amount to publication of a libel.

Those who post information on the world wide web do so knowing that the information they make available has no geographic restriction. Australian common law choice of law rules do not require locating the place of publication of defamatory material as being necessarily, and only, the place of the publisher's conduct.

The general principle of public international law obliging comity in legal dealings between states suggests that arguably, with respect to legal consequences of the internet, no jurisdiction should ordinarily impose its laws on the conduct of persons in other jurisdictions in preference to laws that would ordinarily govern such conduct where it occurs. At least this should be so unless the former jurisdiction can demonstrate that it has a stronger interest in the resolution of the dispute in question than the latter. The law in different jurisdictions, reflecting local legal and cultural norms, commonly strikes different balances between rights to information and expression and the protection of individual reputation, honour and privacy.

In Australia the defamatory material has to be accessed or communicated in a jurisdiction where the plaintiff has a reputation and that will be usually the place where the plaintiff is resident. In the case of Dow Jones & Co. Inc v Gutnick 2003 1 LRC 368 it was held in that case that the state of Victoria in Australia was the appropriate place to bring defamatory proceedings against a weekly financial magazine in the United States where defamatory material was posted on the internet of an Australian national resident in the state of Victoria albeit there was minimal distribution of that material in the state of Victoria.

The 'Newspaper Rule' was discussed in Lange v Australian Broadcasting Corporation 1997 4 LRC 192 and protects all sectors of the media from having to reveal their sources in interlocutory proceedings. The rule is designed to promote freedom of speech by allowing people to speak to the news media in confidence but there must be a balance for maintaining confidentiality against the need to do justice in the individual case.

The courts in Australia have recognized that inroads into the newspaper rule can be justified in the interests of achieving justice between plaintiff and defendant where qualified privilege is concerned. The law varies as to whether publication in the public interest or for the public benefit is an element of the defence commonly known as justification (Victoria, WA, SA, NT (truth of itself is a complete defence), Qld, Tas, ACT (truth alone is not a defence unless publication was also made for the public benefit). NSW (common law defence of justification replaced with defence of "substantial truth" - Defamation Act 1974 NSW S. 15) provided that imputation either relates to matters of public interest or is published under qualified privilege.

There exists a "notice-and-take-down" procedure utilized by the Digital Millennium Copyright Act in the United States which is very new but which may prove to be an effective framework for addressing copyright infringement on the internet. This notice-and-take-down protocol may prove effective in addressing the problem of anonymous defamation. Certainly copyright infringement and defamation are different animals. However, the manner in which the offenses arise online are quite similar. They involve content which infringes or offends but more significantly they both involve the publication of material online which is exceedingly difficult to control. There is reason to believe that the notice-and-take-down protocol will be useful in helping to cage the beast.

The DMCA is codified at Title VII, Chapter 5 of the United States Code. Section 512 is entitled "Limitations on liability relating to material online". Under this section, ISP's can avoid liability for improperly posting copyrighted material if they promptly remove the offending material after notice. It provides for a mechanism whereby copyright owners give notice by asserting their good faith belief under penalty of perjury that the material complained of constitutes an infringement. Further, those against whom notice has been made, can "defend" themselves under a counter-notification procedure. Pursuant to § 512 (c) (1)(A)(3), the ISP is obliged to expeditiously remove or disable access to the offending material.

It seems that this notice-and-take-down procedure can be transferred to a regulatory framework for anonymous defamation with some adjustments. For the ISP to have safe harbour, it must be compliant and must respond immediately when notice of offending material is given. The aggrieved party would direct their notices to the ISP requesting that access to the offending webpage be restricted or that the

page be removed. The anonymous parties who believe that the statements are true or that the statements are not defamatory may, if they are willing to disclose their identity, issue a counter-notice to the ISP requesting that the information be restored.

The obvious effect of this is that internet posters would no longer be able to stand in the shadows where there has been notice of an infraction under the new regulatory scheme. While one might expect the number of notices to be quite large, the ISP's are equipped to automate their systems to comply. There might be other benefits. "This framework would deter false notices and counter notices in two ways. First, following the DMCA, both the notices and counter notices would be submitted under penalty of perjury. An anonymous poster of defamatory statements would therefore counter notify at the risk of perjury *and* defamation, so such a poster would be unlikely to counter notify.

Second, a provision like § 512 (f) would provide a cause of action for posters or those defamed by posters where a notice or counter notice contains material misrepresentations. This provision would be a stronger deterrent than in the DMCA context if it had a less rigorous standard than "knowingly materially misrepresents" as under § 512 (f), but it would provide at least some level of deterrence regardless of the standard."

While we often shun prior restraints on publication, one needs to consider the lack of options available and the potential for mischief created by the internet and it may prove an effective mechanism in curtailing the potential damage from anonymous defamation.

<http://kentgammonlaw.com/legalmechanisms.html> - [ftnref1](#) Restatement (Second) of Torts, possor.

<http://kentgammonlaw.com/legalmechanisms.html> - [ftnref2](#) This being one of the basic defenses to defamation: justification (truth), fair comment and privilege.

<http://kentgammonlaw.com/legalmechanisms.html> - [ftnref3](#) An English case that address this balance between both the freedom of speech with regards to the press and the need to preserve the good reputation of members of society from defamatory statements is the case of Flux v. Moldova (No 6) (App no 22824/04) [2008] ECHR. In this case a newspaper published an article quoting an anonymous letter regarding defamatory information about a school principal. The District Court held that the newspaper was liable for defamation and awarded plaintiff (principal) damages. On Appeal to the European Court of Human Rights (ECHR) they ruled that the interference with the newspaper/publisher's right to freedom of expression was justified and therefore there was no violation of Convention Rights.

<http://kentgammonlaw.com/legalmechanisms.html> - [ftnref4](#) The Communications Decency Act comprises Title V of the Telecommunications Act of 1996. The primary aim of this legislation was to regulate pornography on the internet. It was harshly criticized by free speech activists as an unconstitutional restriction of the right of speech embodied by the First Amendment to the United States Constitution. Section 230 of the Act states in relevant part: "no provider or user of an interactive computer service shall be treated as the publisher [] of any information provided by another information content provider". This part of the Act remains in force, though much of the original Act was overturned as unconstitutional. This language has been interpreted as providing tort immunity of ISP's (see *Zeran discussed infra*). This leaves victims with the little recourse where the tortfeasor is unidentifiable or judgment-proof.

<http://kentgammonlaw.com/legalmechanisms.html> - [ftnref5](#) The ISP loses protection when placed on notice as in the *Godfrey* case. Also, whether or not the defending material is true, the defense where such notice has occurred will nonetheless be negated.

<http://kentgammonlaw.com/legalmechanisms.html> - [ftnref6](#) That the speech which is guaranteed constitutional protection.

<http://kentgammonlaw.com/legalmechanisms.html> - [ftnref7](#) The Supreme Court made this point as it relates to first amendment due process, that is the requirement that the Government bear the burden of demonstrating that speech is unprotected rather than requiring the speech-giver (the media) to prove the opposite. *Spieser v. Randall*, 357 US 513, (1958).

<http://kentgammonlaw.com/legalmechanisms.html> - [ftnref8](#) Stephen J. Horowitz, *Defusing a Google Bomb*, 117 Yale L.J. Pocket part 36 (2007).