

## Chapter 3

### CYBER DEFAMATION, ANONYMITY AND HATE SPEECH

**The Internet presents new opportunities and challenges. With its information filled Web sites, it offers great platform for everyone to express and to reach more people than ever - opinion molders, the media, law enforcement, educators, students, parents and the general public - around the world and at the same time it has become breeding ground for defamation, hate, harassment, anti-Semitism, bigotry and extremism (emphasis added) [www.adl.org](http://www.adl.org)<sup>327</sup>**

#### 3.1 Introduction

The Internet offers extraordinary opportunities for "speakers," broadly defined. Political candidates, cultural critics, corporate gadflies - anyone who wants to express an opinion about anything - can make their thoughts available to a world-wide audience far more easily than has ever been possible before. A large and growing group of Internet participants have seized that opportunity<sup>328</sup>.

Some observers find the resultant outpouring of speech exhilarating. They see in it nothing less than the revival of democracy and the restoration of community. Other observers find the amount and, above all, the kind of speech that the Internet has stimulated offensive or frightening. Pornography, hate speech, defamation, lurid threats -- these flourish alongside debates over the future of the political parties and exchanges of views concerning almost any matter. This phenomenon has provoked various efforts to limit the kind of speech in which one may engage on the Internet or to develop systems to "filter out" the more offensive material<sup>329</sup>.

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<sup>327</sup> Anti-defamation League, [www.adl.org](http://www.adl.org) ; the object of the league is to stop, by appeals to reason and conscience and if necessary, by appeals to law and ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule any sect or body of citizen

<sup>328</sup> Fisher William, Benckler Yochai, Brackely Rebacca and Ma Shara, Freedom of Expression on the Internet, Berkmen Center for Internet and Society, available at [http://cyber.law.harvard.edu/ilaw/mexico\\_2006\\_module\\_4\\_freedom](http://cyber.law.harvard.edu/ilaw/mexico_2006_module_4_freedom) , visited on 2 Feb 2005.

<sup>329</sup> *ibid*

### 3.2 The Nature of Defamation

The origins of the law relating to defamation, of which libel and slander are the twin components, date back as far as King Alfred the Great who, in the ninth century, decreed that slanderers should have their tongues cut out. Although over the years the penalties imposed upon those who transgress this branch of the civil law have become financial rather than physical, the principles have remained virtually unchanged<sup>330</sup>. The legal rationale was expressed with great clarity by Justice Potter Stewart of the American Supreme Court in 1966 – “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being, a concept at the root of any decent system of liberty”<sup>331</sup>

What is defamatory? There is no single, comprehensive definition recognized by law. The classic formula devised by Baron Parke in an 1840 case is that a defamatory statement is one which injures someone’s reputation by exposing him to hatred, contempt or ridicule’. By the 1920s courts recognized that the definition was too narrow. It was after all, easy to damage a man’s reputation, say in his business dealings, by statements which would provoke neither hatred, contempt or ridicule. Lord Aitken set out an alternative test in 1924: “...would the words tend to lower the plaintiff in the estimation of reasonable people generally”<sup>332</sup>.

As society and its morals adapt with the passage of time so also the proper standard to be applied in judging what amounts to defamation. It is after all geared to the thinking of reasonable man or right thinking member of society. Thus, what may have been clearly defamatory fifty years ago might not now be regarded as such. Nowhere is this demonstrated better than society’s attitudes on sexual matters<sup>333</sup>. To say in 1920 that a young lady spent her vacation in a Paris hotel with her boyfriend

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<sup>330</sup> Crone, Tom, “Law and the Media- An everyday guide for Professionals”, 3<sup>rd</sup> Edition, Focal Press, London, 1995, at p 220

<sup>331</sup> Franklin A Marc, Rabin L Robert and Green D Michael, Tort Law and Alternatives : Cases and Materials, 8<sup>th</sup> Edition, Foundation Press, US, 2006

<sup>332</sup> *ibid*

<sup>333</sup> Glannon W Joseph,; 2nd edition, Aspen Publishers, US,2000

would certainly have reflected discredit upon her but it is by no means certain that the average person today think any worse of her for it<sup>334</sup>.

The wrong of defamation is of two kinds namely, libel and slander. In libel the defamatory statement is made in some permanent and visible form, such as writing, printing, pictures or effigies. In slander it is made in spoken words or in some other transitory form, whether visible or audible, such as gestures or inarticulate but significant sounds<sup>335</sup>.

Defamation laws differ widely. Thus, for example, English law imposes liability regardless of whether the publisher of a statement knew or ought to have known it was defamatory<sup>336</sup> whereas under Finnish law a distinction is made between intentional and negligent defamation<sup>337</sup>. Under US law a statement referring to a public figure will only be defamatory if malice can be proved on the part of the maker of the statement<sup>338</sup>. Whether a defendant has an obligation to identify anonymous statements which it has made available is also a policy question to which national statements which it has made available is also a policy question to which national laws may give different answers. These national differences make it difficult for an internet publisher to assess in advance whether material is likely to give rise to liability.

### **3.2.1 Right against Defamation - A Human Right**

Right to reputation or right against defamation is recognized as a basic human rights in international as well as national legal instruments. Art.12 of the Universal declaration of Human rights seeks to protect the reputation of individuals from arbitrary attack on reputation and reads as follows;

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<sup>334</sup> Crone, Tom, "Law and the Media- An everyday guide for Professionals ", 3<sup>rd</sup> Edition, Focal Press, London, 1995, at p 222

<sup>335</sup> *ibid*

<sup>336</sup> E Hulton and Co V Jones [1910] AC 20 cited by Chris Reed in Internet Law- Text and Materials, 2<sup>nd</sup> Edition, universal Publishing Co.,2004

<sup>337</sup> Finnish Penal code

<sup>338</sup> New York times Co V Sullivan 376 uS 254 (1964), available at [www.findlaw.com](http://www.findlaw.com) , visited on 5 Feb 2005

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, **nor to attacks upon his honour and reputation**. Everyone has the right to the protection of the law against such interference or attacks.”<sup>339</sup>

Art.10 of the European Convention on Human Rights also recognizes right to reputation as basic human right by way of imposing restriction on freedom of speech and expression<sup>340</sup>.

### 3.3 Defamation in Cyberspace

Like obscene expression defamation stands out as an example of behaviour that has remained widespread in an online environment that many believe to be too free. While some continue to insist that this freedom is a breath of fresh air, others argue that all democracies have their limits and bemoan the apparent disappearance of these limits in the online world, where rampant violations of copyright, obscenity and defamation laws is not only tolerated but often encouraged<sup>341</sup>. At the heart of the matter in the defamation context is the often unrestrained dissemination of unsubstantiated allegations in cyberspace. Such activity not only includes defamatory statements by ordinary citizens, but also encompasses irresponsible and legally questionable remarks by a variety of persons and groups whose status

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<sup>339</sup> Art.17 of International Covenant on Civil and Political Rights reiterates what is stated in UDHR- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

<sup>340</sup> Article 10 (1) - Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2)The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the **protection of the reputation or the rights of others**, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>341</sup> Biegel, Stuart, Beyond our Control – Confronting the limits of our Legal System in the Age of Cyberspace, MIT Press, London, 2003 at p 82

enables them to attract large audience to their web sites<sup>342</sup>. Allegations that are true at the time they are made cannot generally be defamatory under the law. But the online world on any given day is filled with absolute lies regarding persons, groups, and companies. Some of the worst allegations in recent years were reserved for former President Clinton himself, with many of the accusers taking advantage of the technology to remain anonymous even as they spread rumor and innuendo across the globe<sup>343</sup>.

In the early 1990s, online moderators often enforced a certain level of civility and ethical on bulletin boards, discussion forums and mailing lists. By the latter part of the decade, however, most of these moderators disappeared. The freewheeling nature of the current public discourse is seen as a right by the great majority of netizens<sup>344</sup>. But some are beginning to wonder about the possible negative consequences of such unrestrained openness as a large percentage of the population migrates to the online world.

Laws regarding defamation specifically and freedom of expression in general can vary tremendously from country to country, leading to some very difficult controversies in the areas of jurisdiction and enforcement. In the US, the issue has arisen within the context of several trials addressing the liability of ISPs and content providers for defamatory acts, particularly as the courts attempt to interpret the provisions in the Telecommunication Act of 1996 that insulates service providers from liability in particular situations<sup>345</sup>.

It has been clearly established that libel law will apply in case of broadcasting in respect of any statements made over it. In the case of e-mail and the content of internet and WWW, it seems beyond question that there is a sufficient degree of recording to ensure that the law of libel will apply. Some doubt, perhaps, remains

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<sup>342</sup> *ibid*

<sup>343</sup> *ibid* at p 83

<sup>344</sup> Zittrain Jonathan, *The Rise and Fall of Sysdom*, Harvard Journal Law and technology 10 (1997):495

<sup>345</sup> Sec.230 of Telecommunication Act, 1996 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The term information content provider is defined as 'any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service'.

concerning the status of services such as chat rooms, where the atmosphere at least is closer to a conversational forum and where no permanent record is maintained<sup>346</sup>. In cases of slander a defence is available, commonly referred as ‘vulgar abuse’. The essence of the defence is that words, albeit defamatory in content, were neither intended as such nor would be so regarded by anyone listening to the exchange. Such a defence might seem appropriate in relation to the many postings to internet newsgroups, where the concept of the ‘flame war’ is well established. Anyone perusing computer newsgroup will be aware that forthright expression is often the order of the day and that ‘flame wars’, in which discussion is reduced to a level of personal abuse, are not uncommon<sup>347</sup>. Although the existence of a culture encouraging robust and blunt debate cannot affect the determination whether a message is defamatory, there may be an element of consent on the part of those participating in such fora. With newsgroups, although there would seem no doubt that postings are written and the range of dissemination is comparable than that associated with the written word, the attitudes and practices coupled with the speed of communication are perhaps more akin to the spoken word<sup>348</sup>.

### **3.4 Liability of Internet Service Providers**

Internet Service Providers (ISP) play vital role in connecting the user to cyberspace. They are intermediary between the user and the Internet.

In its physical world sense, publishing is seen as a positive activity, that is, a publisher would have had to do something such as arranging for the printing of a work, sending out copies, selling copies etc. to perform his role as a publisher<sup>349</sup>. This is in line with definition of publication as the communication of statement to at least one person other than the claimant<sup>350</sup>. In many cases, however, the process hereby a user access information held by an intermediary does not require any

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<sup>346</sup> Lloyd , Ian, Legal Aspects of the Information Society, Butterworths, London, 2000

<sup>347</sup> ibid at p 214

<sup>348</sup> ibid at p 216

<sup>349</sup> See definition of publication in the Oxford advanced Learner’s Dictionary, 7<sup>th</sup> edition; ‘The action of making publicly known; public notification or pronouncement; promulgation’

<sup>350</sup> Halsbury’s Laws of England, vol.28, 4<sup>th</sup> Edition, Butterworths, London, Libel and slander, para 60

positive action on the intermediary's part. If the transaction is analyzed at the level of the human or legal persons involved, it appears that the user pulls the information from the intermediary's server, so that the intermediary plays an entirely passive role. Viewed at the software and hardware level, though, it might be argued that the information is in fact pushed out by the software running on the defendant's computer. The process actually carried out as follows;

- (i) the user or the user's software issues a request to the intermediary's computer system<sup>351</sup>;
- (ii) software has been set up by the intermediary which automatically responds to such a request with no human intervention<sup>352</sup>;
- (iii) that software transmits the information requested from the intermediary's system to the user<sup>353</sup>.

From one perspective, the user is controlling the software running on the intermediary's system and is thus responsible for the transmission. From a different perspective, the transmission is undertaken by software which is in the possession of and under the overall control of the intermediary, making him responsible for the transmission. This second approach was adopted by the UK courts in *Godfrey V Demon Internet Ltd*<sup>354</sup>, where the defendant ISP was sued for a defamatory statement carried in a news group hosted on its server. Defendant argued that it could not be a publisher, as it merely played a passive role by providing infrastructure necessary for the posters of messages to make their views known. This contention was rejected by the court, stating that because the defendant chose to receive and store the newsgroup and had the power to delete messages from it, hence it was at common law a publisher.

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<sup>351</sup> Reed, Chris, *Internet Law- Text and Materials*, 2<sup>nd</sup> Edition, Universal Publishingco.,New Delhi, 2004 at 114

<sup>352</sup> *ibid* at p 114

<sup>353</sup> *ibid* at p 114

<sup>354</sup> [1999] 4 All ER 342

### 3.4.1 Case Law Development – Conflicting decisions

Two US district court decisions that came to very different conclusions in cases with very similar fact patterns brought the issue of online defamation to the forefront by the mid 1990s. Both cases focused not on the liability of persons who originally made the libelous statements, but on the liability of commercial online services for defamatory conduct in moderated bulletin board discussions. The disputes were litigated under the legal principle that “one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it”.

In the first case, *Cubby V CompuServe Inc.*,<sup>355</sup> the commercial online service provider was absolved of any responsibility for the defamatory comments posted in an online newsletter called ‘Rumorville’<sup>356</sup>. The newsletter, which appeared on CompuServe’s Journalism Forum, had been moderated by an independent company under contract with the online service. The court found that posts to the forum were uploaded instantly, and that CompuServe had no more ability to monitor and control the transmission of the defamatory material than a public library, bookstore or news stand.

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<sup>355</sup> *Cubby V CompuServe* 776 F.Supp. 135 Oct. 29, 1991 Case No. 90 Civ. 6571 (PKL) available at <http://www.bitlaw.com/source/cases/copyright/cubby.html>, visited 5 Feb 2005

<sup>356</sup> In 1990, plaintiffs Cubby, Inc. ("Cubby") and Robert Blanchard ("Blanchard") (collectively, "plaintiffs") developed Skuttlebut, a computer database designed to publish and distribute electronically news and gossip in the television news and radio industries. Plaintiffs intended to compete with Rumorville; subscribers gained access to Skuttlebut through their personal computers after completing subscription agreements with plaintiffs.

Plaintiffs claim that, on separate occasions in April 1990, Rumorville published false and defamatory statements relating to Skuttlebut and Blanchard, and that CompuServe carried these statements as part of the Journalism Forum. The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville "through some back door"; a statement that Blanchard was "bounced" from his previous employer, WABC; and a description of Skuttlebut as a "new start-up scam."

Plaintiffs have asserted claims against CompuServe and Fitzpatrick under New York law for libel of Blanchard, business disparagement of Skuttlebut, and unfair competition as to Skuttlebut, based largely upon the allegedly defamatory statements contained in Rumorville. CompuServe has moved, pursuant to Fed.R.Civ.P. 56, for summary judgment on all claims against it. CompuServe does not dispute, solely for the purposes of this motion, that the statements relating to Skuttlebut and Blanchard were defamatory; rather, it argued that it acted as a distributor, and not a publisher, of the statements, and cannot be held liable for the statements because it did not know and had no reason to know of the statements. Plaintiffs oppose CompuServe's motion for summary judgment, claiming that genuine issues of material fact exist and that little in the way of discovery has been undertaken thus far.

Four years later, however, in the case of *Stratton Oakmont V Prodigy*<sup>357</sup>, the commercial online service was held responsible for defamatory comments posted on its bulletin board. At issue in this case are statements about Plaintiffs made by an unidentified bulletin board user or "poster" on PRODIGY's "Money Talk" computer bulletin board on October 23rd and 25th of 1994<sup>358</sup>. Following issues were raised before the court;

(i) that PRODIGY was a "publisher" of statements concerning Plaintiffs on its "Money Talk" computer bulletin board for the purposes of Plaintiffs' libel claims<sup>359</sup>; and,

(ii) that Charles Epstein, the Board Leader of PRODIGY's "Money Talk" computer bulletin board, acted as PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint<sup>360</sup>.

By way of background, it is undisputed that PRODIGY's computer network has at least two million subscribers who communicate with each other and with the general subscriber population on PRODIGY's bulletin boards. "Money Talk" the board on which the aforementioned statements appeared, in allegedly the leading and most widely read financial computer bulletin board in the United States, where members can post statements regarding stocks, investments and other financial matters. PRODIGY contracts with bulletin Board Leaders, who, among other things, participate in board discussions and undertake promotional efforts to encourage usage and increase users. The Board Leader for "Money Talk" at the time the alleged libelous statements were posted was Charles Epstein<sup>361</sup>.

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<sup>357</sup> 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 24, 1995), available at [www.findlaw.com](http://www.findlaw.com), visited 10 Feb 2005

<sup>358</sup> These statements included the following:

(a) STRATTON OAKMONTH, INC. ("STRATTON"), a securities investment banking firm, and DANIEL PORUSH, STRATTON's president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.,

(b) the Solomon-Page offering was a "major criminal fraud" and "100% criminal fraud";

(c) PORUSH was "seen to be proven criminal"; and,

(d) STRATTON was a "cult of brokers who either lie for a living or get fired."

<sup>359</sup> 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 24, 1995), available at [www.findlaw.com](http://www.findlaw.com), visited on 10 Feb 2005

<sup>360</sup> *ibid*

<sup>361</sup> *ibid*

PRODIGY commenced operations in 1990. Plaintiffs base their claims that PRODIGY is a publisher in large measure on PRODIGY's stated policy, starting in 1990, that it was a family oriented computer network. In various national newspaper articles written by Geoffrey Moore, PRODIGY's Director of Market Programs and Communications, PRODIGY held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards, thereby expressly differentiating itself from its competitors and expressly likening itself to a newspaper. In one article PRODIGY stated:

“We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it carries the type of advertising it published, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.”<sup>362</sup>”

Plaintiffs characterize the aforementioned articles by PRODIGY as admissions and argued that, together with certain documentation and deposition testimony, these articles establish Plaintiffs' prima facie case. In opposition, PRODIGY insisted that its policies have changed and evolved since 1990 and that the latest article on the subject, dated February, 1993, did not reflect PRODIGY's policies in October, 1994, when the allegedly libelous statements were posted. Although the eighteen month lapse of time between the last article and the aforementioned statements is not insignificant, and the Court was wary of interpreting statements and admissions out of context, these considerations go solely to the weight of this evidence.

Plaintiffs further relied upon the following additional evidence in support of their claim that PRODIGY is a publisher:

(A) promulgation of "content guidelines" in which, inter alia, users are requested to refrain from posting notes that are "insulting" and are advised that “notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to PRODIGY's attention”; the Guidelines all

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<sup>362</sup> *ibid*

expressly state that although "Prodigy is committed to open debate and discussion on the bulletin boards, . . . this doesn't mean that 'anything goes'"<sup>363</sup>;

(B) use of a software screening program which automatically prescreens all bulletin board postings for offensive language<sup>364</sup>;

(C) the use of Board Leaders such as Epstein whose duties include enforcement of the Guidelines, according to Jennifer Ambrozek, the Manager of PRODIGY's bulletin boards and the person at Prodigy responsible for supervising the Board Leaders<sup>365</sup>, and

(D) testimony by Epstein as to a tool for Board Leaders known as an "emergency delete function" pursuant to which a Board Leader could remove a note and send a previously prepared message of explanation "ranging from solicitation, bad advice, insulting, wrong topic, off topic, bad taste, etcetera."

The court by referring to *Cubby Inc. v. CompuServe Inc*<sup>366</sup> and *Auvil v CBS 60 Minutes*<sup>367</sup> determined that the evidence established a prime facie case that PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.

The key distinction between CompuServe and PRODIGY is two fold. First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste", for example, PRODIGY is clearly making decisions as to content, and such

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<sup>363</sup> *ibid*

<sup>364</sup> *ibid*

<sup>365</sup> *ibid*

<sup>366</sup> 776 F. Supp. 135, 139 (S.D.N.Y. 1991), available at [www.findlaw.com](http://www.findlaw.com), visited on 10 Feb 2005

<sup>367</sup> 800 F. Supp. 928, 932 (E.D. Wash. 1992) available at [www.findlaw.com](http://www.findlaw.com), visited on 21 Feb 2005

decisions constitute editorial control. That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on above reasons the court held that it was compelled to conclude that for the purposes of Plaintiffs' claims in the action, PRODIGY is a publisher rather than a distributor<sup>368</sup>.

An interesting comparison may be found in *Auvil v. CBS 60 Minutes*<sup>369</sup> where apple growers sued a television network and local affiliates because of an allegedly defamatory investigative report generated by the network and broadcast by the affiliates. The record established that the affiliates exercised no editorial control over the broadcast although they had the power to do so by virtue of their contract with CBS, they had the opportunity to do so by virtue of a three hour hiatus for the west coast differential, they had the technical capability to do so, and they in fact had occasionally censored network programming in the past, albeit never in connection with "60 Minutes". The court found that:

It is argued that these features, coupled with the power to censor, triggered the duty to censor. That is a leap which the Court is not prepared to join in. further it held that plaintiffs' construction would force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face \$75 million dollar lawsuits at every turn and that is not realistic. More than merely unrealistic in economic terms, it is difficult to imagine a scenario more chilling on the media's right of expression and the public's right to know.

Consequently, the court dismissed all claims against the affiliates on the basis of "conduit liability", which could not be established therein absent fault, which was not shown.

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<sup>368</sup> 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 24, 1995) available at [www.findlaw.com](http://www.findlaw.com), visited on 10 Feb 2005

<sup>369</sup> Supra Note 367

In contrast, here PRODIGY has virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes. Indeed, it could be said that PRODIGY's current system of automatic scanning, Guidelines and Board Leaders may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what PRODIGY wants, but for the legal liability that attaches to such censorship.

Congress enacted Communication Decency Act (Sec. 230) to remove the disincentives to self-regulation created by the PRODIGY decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted Sec. 230's and provided broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." In line with this purpose, Sec.230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions<sup>370</sup>.

### **3.4.2 ISP Distributor or Publisher? Immunity under CDA**

Whether services rendered by an ISP in relation to digital content constitutes distribution of content or publication of content ? This distinction was brought out before the Federal 4<sup>th</sup> Circuit court for the first time in *Zeran*.

In *Zeran v. America Online Inc*<sup>371</sup>., Plaintiff filed a suit against America Online, Inc. ("AOL"), arguing that AOL unreasonably delayed in removing defamatory

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<sup>370</sup> Supra Note 367,1995 N.Y. Misc. LEXIS 229, 1995 WL 323710, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 24, 1995)

<sup>371</sup> 129 F.3d 327 (4th Cir. 1997), available at [www.findlaw.com](http://www.findlaw.com), visited on 14 Feb 2005

messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The plaintiff argued that immunity under Sec.230 is not available to the defendant as it only protects publisher and not distributor. According to plaintiff, publishing and distributing are different and defendant is liable for alleged defamatory statements<sup>372</sup>. But the court refused to accept the contention and held that “the terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although plaintiff attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party each alleged by plaintiff here under a negligence label constitute publication. In fact, every repetition of a defamatory statement is considered a publication.”<sup>373</sup> Hence we can see court has applied the traditional defamation law to decide the case and the immunity granted by Sec.230 to service providers had saved the defendant.

Again in *Blumenthal v. Drudge*<sup>374</sup>, the court found that CDA immunizes interactive computer service providers from liability for statements made even by third parties under contract with and promoted by the service. So far the liability of the original internet publisher, if known, has not been seriously questioned in court. But Mike Godwin, an attorney with Electronic Frontier Foundation has suggested the nature of the internet might render libel law obsolete<sup>375</sup>.

PRODIGY alarmed many commentators and arguably provided the primary impetus for the CDA's safe harbor provisions. What would the Internet look like today were

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<sup>372</sup> *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997), available at <http://laws.lp.findlaw.com/4th/971523P.html> , visited 16 Feb 2005

<sup>373</sup> *ibid*

<sup>374</sup> *Blumenthal v. Drudge*<sup>374</sup>, 992 F. Supp. 44 (D.D.C. 1998), available at [www.findlaw.com](http://www.findlaw.com) , visited 3 Mar 2005

<sup>375</sup> Godwin Mike, *Libel Law: Let it Dies*, *wired News*, Mar 1996, [http://www.wired.com/wired/archive/4.03/letitdie\\_pr.html](http://www.wired.com/wired/archive/4.03/letitdie_pr.html) , visited 12 Mar 2005

if decision in PRODIGY, rather than the CDA, the standard for determining liability for defamation? There may be several answers to this, but life of the ISPs would have been made miserable through litigation. But the court in Blumenthal sounds less than fully pleased with the effect of the CDA on defamation law. Apart from the CDA and the self-help, yet another reason has arisen why online speech is less likely to give rise to defamation claims than offline speech: courts are more willing to regard Internet speech as expressing mere rhetoric or opinion<sup>376</sup>.

Recent judicial decisions have differing interpretation on immunity provided to ISP under Sec.230 of CDA. Two important decisions given by the courts, the U.S. District Court for the Northern District of Illinois, and the Supreme Court of California, have issued opinions examining the contours of the immunity provided under the Communications Decency Act at 47 U.S.C. 230. That section provides, among other things, that “no provider or user of any interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Although both cases were defense victories, the two courts gave different treatment to Section 230 in their reading of the statute and in their interpretation of the leading case on point<sup>377</sup>.

On November 14, 2006, the Northern District of Illinois issued its decision in the case of CLC v. Craigslist [No. 06-657]. In that case, a Chicago based nonprofit organization had filed suit against Craigslist, asserting that the popular site should be held liable under the Fair Housing Act for the publication of certain discriminatory online advertisements for apartment rentals<sup>378</sup>.

In a 28 page decision, the court held that Craigslist could not be liable for any discriminatory postings, because to impose such liability "would be to treat

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<sup>376</sup> Global Telemedia International v. Doe 1 aka BUSTEDAGAIN40, 132 F. Supp.2d 1261, 1267-1270 (C.D. Cal. 2001); court explaining that chat room messages lacked "the formality and polish typically found in documents in which a reader would expect to find facts."

<sup>377</sup> Tsesis, Alexander, Prohibiting Incitement on the Internet, Virginia Journal of Law and Technology, 7 Va.J.L & Tech.5 (2002), available at <http://www.vjolt.net>, visited on 4 Apr 2005

<sup>378</sup> *ibid*,

Craigslist as if it were the publisher of third party content, and the plain language of Section 230(c) forecloses the cause of action."<sup>379</sup>

But in the process of arriving at that conclusion, Judge St. Eve gave a thorough rundown of Section 230 immunity, taking a close and critical look at what the court called the "fountainhead" of Section 230 immunity, the Fourth Circuit's decision in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997)<sup>380</sup>.

Despite the wide acceptance that the case has enjoyed over the past decade, Judge St. Eve "respectfully declined to follow *Zeran's* lead." She identified three problems with its holding. First, *Zeran* overstated the plain language of the statute when it held that Section 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with third party users of the service. Secondly, the court found *Zeran's* holding to be internally inconsistent. Third, the court noted that application of the statute would be problematic, inasmuch as the policy of encouraging providers of online computer services to police for objectionable content is at odds with the immunity that would attach to providers that choose to do nothing to filter objectionable content<sup>381</sup>.

In the end, Judge St. Eve's observations about *Zeran* were merely dicta, as the court ultimately held that Craigslist was entitled to the publisher immunity provided under Section 230. What's more, the court aptly observed that plaintiffs in cases against interactive computer services attempting to hold them liable for content provided by others will still have tough time<sup>382</sup>.

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<sup>379</sup> Brown, Evan, InternetCases.com, available at [www.internetcases.com/archives/2006/11/index.html](http://www.internetcases.com/archives/2006/11/index.html), visited on 2 Feb 2005

<sup>380</sup> Supra Note 372

<sup>381</sup> Brown, Evan, InternetCases.com, available at [www.internetcases.com/archives/2006/11/index.html](http://www.internetcases.com/archives/2006/11/index.html), visited on 2 Feb 2005

<sup>382</sup> *ibid*

In a much anticipated ruling, the California Supreme Court handed down its decision on November 20, 2006 in the case of *Barrett v. Rosenthal*<sup>383</sup>. In this case, the state Supreme Court overturned the Court of Appeal, and, in contrast to the court in the Craigslist case, heartily endorsed the Zeran holding. So we can conclude that the court's decision, interpretation and construction of the term 'publisher' is sound.

At issue in the Barret case was whether the defendant Rosenthal could be liable for defamatory content contained in an article written by another party, which she posted to a message board. The court examined whether, given the circumstances, Rosenthal should be considered a "user" of an interactive computer service as provided for in Section 230(c) and thus subject to immunity. The court answered that question in the affirmative<sup>384</sup>.

The heavy endorsement of Zeran came in rejecting the Court of Appeal's distinction between distributor and publisher liability. The Court of Appeal (as had the plaintiff in Zeran), reasoned that Section 230 might not foreclose liability for one in Rosenthal's position as a distributor of defamatory content. But the Supreme Court held that the distinction was one without a difference in the modern online publishing context, and that "distributor" is encompassed within "publisher" as the term is used in Section 230.

### **3.5 Corporate Cybersmear and Employer's Liability**

An unfortunate byproduct of the explosive growth of the internet is the rapid rise of "cybersmearing"- the anonymous or pseudonymous defamation on the internet of individuals, companies and company executives<sup>385</sup>. The challenge here is that maintaining the balance between employee right to free speech and employer's right

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<sup>383</sup> *Barrett V Rosenthal* , Ct.App. 1/2 A096451, Alameda County Super. Ct. 833021-5, available at [www.eff.org/legal/cases/Barrett\\_v\\_Rosenthal/ruling.pdf](http://www.eff.org/legal/cases/Barrett_v_Rosenthal/ruling.pdf) , visited on 10 May 2005

<sup>384</sup> *ibid*

<sup>385</sup> Roger M Rosen; Charles B Rosenberg ,Suing anonymous defendants for Internet defamation *Computer and Internet Lawyer*; Feb 2002; 19, 2;

to productivity and efficiency. Media and entertainment companies use websites to distribute content throughout the world. Sometimes, a company publishes matter online that offends a person or a rival company. This can happen by accident, perhaps due to lack of understanding of concerns or sensitivities in a foreign country<sup>386</sup>.

The internet has created an unprecedented way for dissatisfied customers to criticize companies they believe have wronged them or that engage in practices with which they disagree. In the past, customers had few outlets through which they could express their dissatisfaction passing out leaflets is time consuming and reaches a rather limited audience, and getting the mainstream media interested in any particular issue is often quite difficult. But the internet has provided critics with the world's largest soapbox, by allowing anyone with only limited technical skills to create a website for the entire world to see, a forum where every critical opinion can be expressed<sup>387</sup>. Many disgruntled employees of companies are posting information online that defames the management and divulges proprietary information anonymously.

Cybersmearing<sup>388</sup> does what it says on the tin. It is the smearing of an individual or company online. Cybersmearing can take a number of different forms including websites, message boards, e-mail and auctions.

Now let us take a scenario to consider the harms of cybersmear. Interested in what potential investors think about his company, a corporate CEO goes on line to check the online message boards devoted to the organization. What he finds appalls him: dozens of comments, posted under a variety of pseudonyms, some describing the company as being on the verge of bankruptcy, and others accusing the CEO of various types of misconduct, including "groping all the women who work with him" and embezzling corporate funds" "to feed his filthy drug habit". Still other messages

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<sup>386</sup> Goel Madhu, Internet Defamation: Where Must a Defendant Defend?, Intellectual Property Law Journal: Nov 2005;17

<sup>387</sup> Isenberg, Doug, The Giga Law-Guide to Internet Law, Random House Trade Paperback Edition, Newyork, 2000 at p 134

<sup>388</sup> Cybersmearing means harming the reputation of an individual or company online.

disclose a highly confidential marketing approach the company is planning to implement in a few weeks, describing it as a ‘ridiculous concept’ opposed by key managers, including those posting the message. Angry and appalled, the CEO calls his lawyer, wanting to know what can be done to unmask, silence and punish the employees who posted the message<sup>389</sup>.

Over the past few years, dozens of employers have been faced with comparable situations. Such “cybersmear” rise a host of difficult legal and strategic issues. How can an employer determine whether the person who posted a message is an employee? Do employees have a right of speech and expression to criticize their employer anonymously? What risks does an employee face in trying to silence such online critics? What sort of claims can be filed? What can an employer do in advance to make it easier to stop online attacks by employees?

The most difficult part in the cases of cybersmearing is to identify the anonymous defendant. In this regard it is pertinent to note here that how courts would view such situations<sup>390</sup>. In 1999, the US District was called upon to determine a question relating to online free speech in *Columbia Insurance v. SeesCandy.com*<sup>391</sup>. The question was whether right to speak anonymously exists in cyberspace? . In this case the plaintiff sued for the infringement of its trademark “Seescandy.com”. Unfortunately for the plaintiff, however, it was difficult to identify the particular individuals who had registered that name. The court noted that although plaintiffs are generally prohibited from conducting discovery until after the defendant has been served with the lawsuit, exceptions are occasionally made to allow the plaintiff ‘to learn the identifying facts necessary to permit service on the defendant.’ The court held that -“With the rise of the Internet individuals have acquired the ability to commit certain tortious acts, such as defamation, copyright infringement, and

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<sup>389</sup> Isenberg, Doug, *The Giga Law-Guide to Internet Law*, Random House Trade Paperback Edition, New York, 2000 at p 135

<sup>390</sup> *ibid* at p 137

<sup>391</sup> Cited in Isenberg, Doug, *The Giga Law-Guide to Internet Law*, Random House Trade Paperback Edition, New York, 2000

trademark infringement, entirely online. The tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information. Parties who have been injured by these acts are likely to find themselves chasing the tortfeasor from ISP to ISP, with little or no hope of actually discovering the identity of the tortfeasor.”<sup>392</sup>

Further the court observed that “In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances.”<sup>393</sup>

Hence, it is quite clear that employer can seek the help of ISP to identify the anonymous netizen so that he may initiate legal action for defamatory postings.

As more and more companies make use of e-mails as a method of communication between staff, there will be increasing exposure of communication on the basis of vicarious liability in respect of the use of misuse made of the communications network. In 1997 the Norwich Union insurance company reached a settlement in a libel action brought by a health insurance company, Western Provident Association. Under the terms of agreement, Norwich Union agreed to pay huge sum in damages and costs in respect of libelous messages concerning the association’s financial stability which had been contained in e-mail message exchanged between members of Norwich Union’s staff<sup>394</sup>. The fact that a settlement was reached prior to trial means that the case is of no value as a legal precedent. The lesson for those engaging in e-mail discussions is obvious: that although communications may be approached as form of conversation, everything is recorded almost without limit of time and can be retrieved at a later date. A similar example of this phenomenon can be seen in the discovery of internal Microsoft e-mails during the legal investigations

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<sup>392</sup> Isenberg, Doug, *The Giga Law-Guide to Internet Law*, Random House Trade Paperback Edition, New York, 2000 at p 233

<sup>393</sup> *ibid*

<sup>394</sup> Lloyd , Ian, “Legal Aspects of the Information Society”, Butterworths, London, 2000 at p 217

into their commercial practices<sup>395</sup>. One significant factor limiting the extent of liability for defamatory communications made by employees may be that the vicarious liability applies only in respect of acts committed in the course of employment. In the Norwich Union case, the communications were clearly work related but it is unlikely that an employer would be held liable in the event, for example, that employee used e-mail facilities to exchange defamatory comments on subjects unconnected with work. To minimize the risks of liability, it would be advisable for employers to indicate clearly in contracts of employment or staff handbooks what uses may or may not be made of electronic communications<sup>396</sup>.

Faced with concern at their potential liabilities for misuse of electronic communications, it is common place for employers to monitor use of the facilities. In the US a number of actions have been reported of corporations being sued for millions of dollars by employees alleging that fellow workers have been engaging in some form of electronic harassment involving the posting of abusive or offensive messages. It has been suggested that – “Lawyers are bracing themselves for a wave of litigation as people catch on to the fact that they can redress grievances- and possibly become very rich- by producing e-mail evidence of prejudice based on gender, sexual preference, race, nationality or age. Proving cases that depend on spoken jests and casual remarks has always presented its difficulties in court. The beauty of e-mail is that plaintiffs have to do is retrieve it from their company’s computer system and then print it out. Plenty of material is certain to be available in a country where 80 per cent of organization use e-mail.”<sup>397</sup> Faced with such exposure, employers may well be tempted to use packages to monitor e-mail communication in the workplace<sup>398</sup>. In the case of Halford V UK<sup>399</sup>, the European Court of Human Rights held that the convention’s requirements relating to

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<sup>395</sup> See generally Volokh, Eugene, Freedom of Speech, Cyberspace and Harassment Law, 2001 Stan.Tech.Rev 3, available at [http://stlr.stanford.edu/STLR/Articles/01\\_STLR\\_3](http://stlr.stanford.edu/STLR/Articles/01_STLR_3) or [www.papers.ssrn.com](http://www.papers.ssrn.com), visited on 2 Sep 2004; in this article author brings out the ramification of e-mail during the controversy of Clinton-Lewinsky scandal.

<sup>396</sup> Lloyd, Ian, Legal Aspects of the Information Society, Butterworths, London, 2000 at p 218

<sup>397</sup> *ibid*

<sup>398</sup> *ibid*

<sup>399</sup> Cited from Lloyd, Ian, “Legal Aspects of the Information Society”, Butterworths, London, 2000

protection of privacy had been breached where telephone calls made from work premises by a senior police officer had been bugged on the authority of her chief constable. Argument on behalf of the UK Government to the effect that the telephones in question belonged to the employer did not save the government<sup>400</sup>. It would appear that any monitoring of e-mail might be challenged on this basis, although it is not clear whether the giving of notice to employees that phone calls or e-mail messages might be monitored would remove their reasonable expectation of privacy in their communications. We will have to wait and see how the doctrine of reasonable expectation of privacy applies in these situations.

### **3.6 Suing Anonymous Defendants for Internet Defamation**

Anonymity promotes honesty. However, if the protection extended to anonymous speech is abused it would cause irreparable loss to the victim especially in the context of employer-employee relationship. An employer contemplating suing an anonymous poster must decide what causes of action are possible, figure out where such a suit may be brought, determine how it can persuade a court to permit discovery aimed at identifying the anonymous defendant, and prepare to defend what may be strenuous efforts to prevent such discovery from going forward<sup>401</sup>.

Employers that sue those who post inappropriate messages can choose from the variety of possible claims. Most suits against anonymous message posters have involved claims of defamation. Such a claim requires proof that the defendant made a false statement about the plaintiff, that the statement was published, that the statement was defamatory (that is, it injured the plaintiff's reputation in the eyes of the community, caused others to avoid associating or dealing with the plaintiff, or subjected to ridicule or contempt), and that the plaintiff was actually damaged by the defendant's publication of the statement<sup>402</sup>.

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<sup>400</sup> *ibid*

<sup>401</sup> Lidsky B, Lyriisa, Silencing John Doe: Defamation & Discourse in Cyberspace, *Duke Law Journal*, Vol.49, No.4, Feb 2000

<sup>402</sup> Burns A James & Rosenman Zavis K M, Battling the Unknown: online cybersmears by anonymous employees, *Employee Relations Law*, Vol.28, Number 2, Autumn 2002

Numerous employers require employees to sign non-disclosure agreements promising never to divulge any confidential and proprietary information of the employer, including trade secrets. If a posted message contains such information, and the employer believes its author signed such an agreement, the employer may sue the poster for breach of contract. In *Immunomedics Inc., V Doe*<sup>403</sup>, for example, someone describing herself as a “worried employee” of the plaintiff company posted a message saying that the company had run out of stock for particular products in Europe, threatening its sales. Although the statements were true, the company argued their disclosure violated the confidentiality of the agreement. After Yahoo! Notified the poster about the subpoena it had received from the company, she moved to quash the subpoena, acting through counsel to preserve her anonymity. In a decision upheld on appeal, the court denied the motion to quash, based in large part on the non-disclosure agreement<sup>404</sup>.

### **3.7 John Doe Concept**

John Doe is a name assigned to anonymous speaker in the online world. The John Doe concept is popular in the US where victims of cyberstalking or defamation file lawsuits against "John Does". John Doe has become a popular defamation defendant as corporations and their officers bring defamation suits for statements made about them in Internet discussion fora. These new suits are not even arguably about recovering money damages but instead are brought for symbolic reasons some worthy, some not so worthy or even to threaten the anonymous speaker with a legal suit. If the only consequence of these suits were that Internet users were held accountable for their speech, the suits would be an unalloyed good. However, these suits threaten to suppress legitimate criticism along with intentional and reckless

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<sup>403</sup> 342 N.J. Super. 160 (App. Div. 2001), available at <http://cyber.law.harvard.edu/stjohns/anon-net.html>, visited on 12 Sep 2005

<sup>404</sup> *ibid*

falsehoods, and existing First Amendment law doctrines are not responsive to the threat these suits pose to Internet discourse<sup>405</sup>.

What is unique about these new Internet suits is the threat they pose to the new realm of discourse that has sprung up on the Internet. The promise of the Internet is empowerment: it empowers ordinary individuals with limited financial resources to “publish” their views on matters of public concern<sup>406</sup>. The Internet is therefore a powerful tool for equalizing imbalances of power by giving voice to the disenfranchised and by allowing more democratic participation in public discourse. In other words, the Internet allows ordinary John Does to participate as never before in public discourse, and hence, to shape public policy<sup>407</sup>. Yet, suits like the hypothetical John Doe suit discussed above threaten to reestablish existing hierarchies of power, as powerful corporate Goliaths sue their critics for speaking their minds. Defendants like John Doe typically lack the resources necessary to defend against a defamation action, much less the resources to satisfy a judgment. Thus, these Internet defamation actions threaten not only to deter the individual who is sued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora<sup>408</sup>.

In India the Delhi High Court has admitted a petition introducing for the first time in Indian jurisprudence the equivalent of the American concept of ‘John Doe’ in information technology related litigation. Earlier to this Indian courts never entertained a suit where defendant is unnamed<sup>409</sup>.

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<sup>405</sup> Lidsky Barnett Lyrissa, Silencing John Doe: Defamation & Discourse in Cyberspace, Duke Law Journal, Vol.49, No.4, Feb 2000

<sup>406</sup> *ibid*

<sup>407</sup> *ibid*

<sup>408</sup> *ibid*

<sup>409</sup> Business Line International Edition, Indian ‘John Doe’ sued, Date:29/03/2006, available at <http://www.thehindubusinessline.com/2006/03/29/stories/2006032903190100.htm>, visited on 1 Apr 2006.

### 3.7.1 Standards for Protecting Anonymous Internet Speech

Even though there is no hard and fast rule to say to what extent anonymous speakers are protected in cyberspace and could be unmasked for their views or expressions under the John Doe concept, American courts have been using three pronged test to give fair treatment to John Does.

Two of these were formulated by Supreme Court of Delaware in *Doe v Cahill*<sup>410</sup> and the third one was in *Mobilira inc V Doe*<sup>411</sup> by the Arizona court. They are

- (1) that the anonymous party sought to be unmask be given notice of the proceedings<sup>412</sup>
- (2) that the party seeking the identity of the anonymous party put forth sufficient facts to survive a motion for summary judgement<sup>413</sup>
- (3) balancing of relative interest of the parties.<sup>414</sup>

### 3.8 Threatening Speech

When speech does qualify as a threatening speech? Or when does a communication over the Internet inflict or threaten to inflict sufficient damage on its recipient that it ceases to be protected by the Free speech doctrine and properly gives rise to criminal sanctions?

Threatening expressions are not new in the virtual world and they are same as in the physical world. The US moralistic stance against any limits on fighting words, except which are content neutral and control only imminently harmful acts obsequiously protects free speech more than any other constitutional rights. When speech intentionally threatens the autonomy of identifiable individuals or groups, especially those groups in less favorable social positions, some limitations must be

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<sup>410</sup> A.2d —, 2005 WL 2455266 (Del., October 5, 2005), available at [http://www.internetcases.com/library/cases/2005-10-05-doe\\_v\\_cahill.pdf](http://www.internetcases.com/library/cases/2005-10-05-doe_v_cahill.pdf), visited 10 Nov 2006

<sup>411</sup> P.3d —, 2007 WL 4167007 (Ariz. App. November 27, 2007), available at <http://intercases.com>, visited on 27 Nov 2007

<sup>412</sup> Supra Note 410

<sup>413</sup> ibid

<sup>414</sup> Supra Note 411

placed on its expression. The new information transmission technologies should not become unbridled forums for fascist and terrorist indoctrination<sup>415</sup>.

Two popular cases illustrate the effect of threatening speech over the internet. The first was popularly known as the "Jake Baker" case<sup>416</sup>. In 1994 and 1995, Abraham Jacob Alkhabaz, also known as Jake Baker, was an undergraduate student at the University of Michigan. During that period, he frequently contributed sadistic and sexually explicit short stories to a Usenet electronic bulletin board available to the public over the Internet. In one such story, he described in detail how he and a companion tortured, sexually abused, and killed a young woman, who was given the name of one of Baker's classmates<sup>417</sup>.

Baker's stories came to the attention of another Internet user, who assumed the name of Arthur Gonda. Baker and Gonda then exchanged many email messages, sharing their sadistic fantasies and discussing the methods by which they might kidnap and torture a woman in Baker's dormitory. When these stories and email exchanges came to light, Baker was indicted for violation of 18 U.S.C. 875(c), which provides as follows:

Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both<sup>418</sup>.

US Federal courts have traditionally construed this provision narrowly, lest it penalize expression shielded by the First Amendment. Specifically, the courts have required that a defendant's statement, in order to trigger criminal sanctions,

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<sup>415</sup> Burch Edgar, Censoring Hate Speech in Cyberspace: A New Debate in a New America, North Carolina Journal of Law & Technology, Vol.3, Issue 1: Fall 2001

<sup>416</sup> U.S. v. Jake Baker, 890 F. Supp. 1375 (E.D. Mich. 1995) available at <http://ic.net/~sberaha/baker.html>, visited on 13 Sep 2005

<sup>417</sup> Fisher William, Benckler Yochai, Brackely Rebacca and Ma Shara, Freedom of Expression on the Internet, Berkman Center for Internet and Society, available at [http://cyber.law.harvard.edu/ilaw/mexico\\_2006\\_module\\_4\\_freedom](http://cyber.law.harvard.edu/ilaw/mexico_2006_module_4_freedom), visited on 2 Feb 2005.

<sup>418</sup> 18 U.S.C 875(c) ( Title 18 deals with crimes and criminal procedure)

constitute a "true threat" as distinguished from, for example, inadvertent statements, hyperbole, innocuous talk, or political commentary<sup>419</sup>.

Baker moved to quash the indictment on the ground that his statements on the Internet did not constitute "true threats." The District Court agreed, ruling that the class of women supposedly threatened was not identified in Baker's exchanges with Gonda with the degree of specificity required by the First Amendment and that, although Baker had expressed offensive desires, "it was not constitutionally permissible to infer an intention to act on a desire from a simple expression of desire." The District Judge's concluding remarks concerning the character of threatening speech on the Internet bear emphasis:

Baker's words were transmitted by means of the Internet, a relatively new communications medium that is itself currently the subject of much media attention. The Internet makes it possible with unprecedented ease to achieve worldwide distribution of material, like Baker's story, posted to its public areas. When used in such a fashion, the Internet may be likened to a newspaper with unlimited distribution and no locatable printing press and with no supervising editorial control. But Baker's e-mail messages, on which the superseding indictment is based, were not publicly published but privately sent to Gonda. While new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not in this instance qualitatively change the analysis under the statute or under the First Amendment. Whatever Baker's faults, and he is to be faulted, he did not violate 18 U.S.C. § 875(c)<sup>420</sup>.

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<sup>419</sup> U.S. v. Jake Baker, 890 F. Supp. 1375 (E.D. Mich. 1995) available at <http://ic.net/~sberaha/baker.html>, visited on 13 Sep 2005

<sup>420</sup> *ibid*

Two of the three judges on the panel that heard the appeal agreed. In their view, a violation of Sec. 875(c) requires a demonstration, first, that a reasonable person would interpret the communication in question as serious expression of an intention to inflict bodily harm and, second, that a reasonable person would perceive the communications as being conveyed "to effect some change or achieve some goal through intimidation." Baker's speech failed, in their judgment, to rise to this level<sup>421</sup>.

Judge Krupansky, the third member of the panel, dissented. In a sharply worded opinion, he denounced the majority for compelling the prosecution to meet a standard higher than Congress intended or than the First Amendment required. In his view, "the pertinent inquiry is whether a jury could find that a reasonable recipient of the communication would objectively tend to believe that the speaker was serious about his stated intention." A reasonable jury, he argued, could conclude that Baker's speech met this standard especially in light of the fact that the woman named in the short story had, upon learning of it, experienced a "shattering traumatic reaction that resulted in recommended psychological counseling."<sup>422</sup>

The second case related to threatening speech on Internet is popularly known as the "Nuremberg files". In 1995, the American Coalition of Life Activists (ACLA), an anti-abortion group that advocates the use of force in their efforts to curtail abortions, created a poster featuring what the ACLA described as the "Dirty Dozen," a group of doctors who performed abortions. The posters offered "a \$ 5,000 reward for information leading to arrest, conviction and revocation of license to practice medicine" of the doctors in question, and listed their home addresses and, in some instances, their phone numbers. Versions of the poster were distributed at anti-abortion rallies and later on television. In 1996, an expanded list of abortion providers, now dubbed the "Nuremberg files," was posted on the Internet with the assistance of an anti-abortion activist named Neil Horsley. The Internet version of the list designated doctors and clinic workers who had been attacked by anti-

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<sup>421</sup> *ibid*

<sup>422</sup> *ibid*

abortion terrorists in two ways: the names of people who had been murdered were crossed out; the names of people who had been wounded were printed in grey<sup>423</sup>.

The doctors named and described on the list feared for their lives. In particular, some testified that they feared that, by publicizing their addresses and descriptions, the ACLA had increased the ease with which terrorists could locate and attack them and that, by publicizing the names of doctors who had already been killed, the ACLA was encouraging those attacks.

Some of the doctors sought recourse in the courts. They sued the ACLA, twelve individual anti-abortion activists and an affiliated organization, contending that their actions violated the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. Sec.248, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Sec.1962. In an effort to avoid a First-Amendment challenge to the suit, the trial judge instructed the jury that defendants could be liable only if their statements were "true threats." The jury, concluding that the ACLA had indeed made such true threats, awarded the plaintiffs \$107 million in actual and punitive damages. The trial court then enjoined the defendants from making or distributing the posters, the webpage or anything similar<sup>424</sup>. However, this judgment was overruled by Court of Appeals for the Ninth Circuit<sup>425</sup>.

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<sup>423</sup> American Coalition of Life Activists v. Planned Parenthood, 123 S. Ct. 2637 (2003), available at [www.findlaw.com](http://www.findlaw.com), visited on 14 Feb 2006

<sup>424</sup> *ibid*

<sup>425</sup> In March 2001, a panel of the Court of Appeals for the Ninth Circuit overturned the verdict, ruling that it violated the First Amendment. Judge Kozinski began his opinion by likening the anti-abortion movement to other "political movements in American history," such as the Patriots in the American Revolution, abolitionism, the labor movement, the anti-war movement in the 1960s, the animal-rights movement, and the environmental movement. All, he argued, have had their "violent fringes," which have lent to the language of their non-violent members "a tinge of menace." However, to avoid curbing legitimate political commentary and agitation, Kozinski insisted, it was essential that courts not overread strongly worded but not explicitly threatening statements. Specifically, he held that:

Defendants can only be held liable if they "authorized, ratified, or directly threatened" violence. If defendants threatened to commit violent acts, by working alone or with others, then their statements could properly support the verdict. But if

Over a year later, however, in May 2002, the full court of the Court of Appeals for the Ninth Circuit reversed and vacated the panel decision, and reinstated the trial court's determination. The Court of Appeals was very closely divided, with six judges favoring a finding that the Nuremberg Files site did not merit protection, and five judges holding that it did. The majority defined what constitutes threatening speech as follows;

“A threat is an expression of an intention to inflict evil, injury, or damage on another. Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. Moreover, the fact that a threat is subtle does not make it less of a threat. A true threat, that is one where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment. It is not necessary that the defendant intends to, or be able to carry out

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their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment.

In the course of his opinion, Kozinski offered the following reflections on the fact that the defendants' speech had occurred in public discourse -- including the Internet:

In considering whether context could import a violent meaning to ACLA's non-violent statements, we deem it highly significant that all the statements were made in the context of public discourse, not in direct personal communications. Although the First Amendment does not protect all forms of public speech, such as statements inciting violence or an imminent panic, the public nature of the speech bears heavily upon whether it could be interpreted as a threat. As we held in *McCalden v. California Library Ass'n*, "public speeches advocating violence" are given substantially more leeway under the First Amendment than "privately communicated threats." There are two reasons for this distinction: First, what may be hyperbole in a public speech may be understood (and intended) as a threat if communicated directly to the person threatened, whether face-to-face, by telephone or by letter. In targeting the recipient personally, the speaker leaves no doubt that he is sending the recipient a message of some sort. In contrast, typical political statements at rallies or through the media are far more diffuse in their focus because they are generally intended, at least in part, to shore up political support for the speaker's position. Second, and more importantly, speech made through the normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment.

his threat; the only intent requirement for a true threat is that the defendants intentionally or knowingly communicate the threat.”<sup>426</sup>

The threatening speech made in public is entitled to heightened constitutional protection as it is communicated publicly rather than privately. Threats are unprotected by the First Amendment however communicated. Therefore, we can say that "threat of force" a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. So defined, a threatening statement is unprotected under the Free speech doctrine in cyberspace.

### **3.9 Hate Speech**

While Internet is a marvelous medium for education, communication, entertainment and commerce, the Internet has a dark side. Hate groups have emerged from the back alleys of the past to post their hateful ideas online, in full view of everyone, where they can hide behind their anonymity while spewing their hatred for a potential audience of thousands, if not millions. The Internet is a relatively cheap and highly effective way for hate groups as diverse as the National Alliance<sup>427</sup> and the Ku Klux Klan<sup>428</sup>, as well as anti-Semites, right-wing extremists, militia groups and others to propagate their hateful ideas<sup>429</sup>.

What's more, it's becoming a powerful recruitment tool for these groups. Where the activities of hate groups once were limited by geographical boundaries, the Internet

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<sup>426</sup> American Coalition of Life Activists v. Planned Parenthood, 123 S. Ct. 2637 (2003), available at [www.findlaw.com](http://www.findlaw.com), visited on 14 Feb 2006

<sup>427</sup> Pro-white activists

<sup>428</sup> Ku Klux Klan (KKK) is the name of several past and present organizations in the United States that have advocated white supremacy, anti-Semitism, anti-Catholicism, racism, homophobia, anti-Communism and nativism. These organizations have often used terrorism, violence, and acts of intimidation, such as cross burning and lynching, to oppress African Americans and other social or ethnic groups; available at [http://en.wikipedia.org/wiki/Ku\\_Klux\\_Klan](http://en.wikipedia.org/wiki/Ku_Klux_Klan), visited 10 Nov 2006

<sup>429</sup> Wolf, Christopher, Racists, Bigots and the Law on the Internet, Anti-Defamation league, available at <http://www.adl.org/internet>, visited on 2 May 2005.

allows even the smallest fringe group to spread hate and freely recruit members online by tapping into the worldwide audience that the Web provides. Technology also offers such groups the ability to post messages in chat rooms and communicate like never before<sup>430</sup>.

Hate speech is not, like pornography, something that is obvious at first sight. Hate speech combines in a volatile cocktail two separate speech crimes, incitement to violence and fraud. It is insidious, devious. While one can say, at least for adults, that they can choose to click on to or not to click on to pornography, one cannot say the same for hate speech. Those susceptible to the messages of hate mongers are those with little appreciation of the danger of the messages<sup>431</sup>.

Hate is pervasive on the Internet and it takes many forms. According to Anti-defamation League (ADL), organization which fights against hate speech in the online world, hate groups have become increasingly sophisticated in their approach and many hate sites are being specifically designed to ensnare children<sup>432</sup>. Dozens of hate groups have established 'clubs' on servers like Yahoo! Etc. Even tough online companies are making all out effort eliminate hate groups. But hate groups are enjoying protection under US First amendment. Hate speech and the many varied forums available on the Internet for the exchange of information have opened up a new set of legal quandaries. Many of the thorniest issues surrounding the hate speech ultimately will be decided in the courts<sup>433</sup>.

### **3.9.1 Hate Speech and the Law**

American courts have been trying to protect the free speech interest even at the cost of hate speech. Significant First Amendment jurisprudence began in the early twentieth century, when Justice Oliver Wendell Holmes wrote a series of influential

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<sup>430</sup> *ibid*

<sup>431</sup> Matas, Dvaid, Countering Hate on the Internet: Recommendations for Actions, available at <http://www.media-awareness.ca>, visited on 10 May 2005.

<sup>432</sup> Anti-Defamation League Report on 'Poisoning the Web: Hatred Online', available at <http://www.adl.org/internet>, visited 2 May 2005.

<sup>433</sup> *ibid*

opinions. The first of these, *Schenck v. United States*<sup>434</sup>, arose from constitutional issues surrounding the Espionage Act of 1917. Schenck was convicted and sentenced to six months in jail for printing and circulating pamphlets stating that forced conscription during World War I was a form of involuntary servitude, prohibited by the Thirteenth Amendment. Holmes held that Schenck intended to influence men to refuse to participate in the draft. In upholding Schenck's conviction, Holmes formulated the still influential "clear and present danger" test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."<sup>435</sup>

Clearly present danger is analogous to someone "falsely shouting fire in a theater and causing a panic." Holmes J, clarified the doctrine against inflammatory speech in a dissent to a later decision, *Abrams v. United States*<sup>436</sup>. Abrams was a member of an anarchist group, which drafted a pamphlet opposing President Woodrow Wilson's policy of sending troops to oppose the communist victory in Russia. Five members of the anarchist group were sentenced to twenty years in prison for printing the leaflet<sup>437</sup>.

In his dissent, opposing Abrams' conviction, Holmes J, asserted that, "It is only the present danger of immediate evil or intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." For Holmes, the crucial factor was that while Abrams supported the sovereignty of the Russian government, he did not advocate overthrowing the U.S. government. Abrams was only prosecuted and convicted because he advocated communism, not because his words posed an immediate danger to the safety of the United States.

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<sup>434</sup> *Schenck v. U.S.*, 249 U.S. 47 (1919), available at <http://laws.findlaw.com/us/249/47.html>, visited on 23 Sep 2005

<sup>435</sup> *ibid*

<sup>436</sup> *Abrams v. U S*, 250 U.S. 616 (1919), available at <http://laws.findlaw.com/us/250/616.html>, visited on 23 Sep 23, 2005

<sup>437</sup> *ibid*

Holmes J, dissent, then, represents his opposition to suppressing controversial political ideas.

Based on the distinction between words expressing abstract ideas and those fomenting violence, the Court further clarified its position in *Chaplinsky v. New Hampshire*<sup>438</sup>. In determining whether it is reasonably foreseeable that words will provoke a violent reaction, the Court evaluated how they would affect an “ordinary citizen.” These sorts of utterances are “fighting words” with “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>439</sup>

The Supreme Court’s next pronouncement on the subject of incitement came in 1969. *Brandenburg v. Ohio*<sup>440</sup> established the principle on which courts continue to rely. The *Brandenburg* Court enunciated the current rule for determining whether a statute, which was aimed at limiting incitement, infringes on individuals’ First Amendment rights. At issue was a film showing a speech in which the defendant, the leader of an Ohio Ku Klux Klan chapter, asserted that revenge might be taken against the United States government if it “continues to suppress the white race.” Reversing the defendant’s conviction, the Court held that the First Amendment guarantee of free speech prohibits the government from proscribing the “advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Further, the Court declared the Ohio statute unconstitutional because it did

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<sup>438</sup> *Chaplinsky v. State Of New Hampshire*, 315 U.S. 568 (1942), <http://laws.findlaw.com/us/315/568.html> , visited on 13 Jan 2006

<sup>439</sup> *ibid*

<sup>440</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969) , available at <http://laws.findlaw.com/us/395/444.html> , visited on 12 Jan 2006

not distinguish between persons calling for the immediate use of violence and those teaching an abstract doctrine about the use of force<sup>441</sup>.

Racist diatribe is not a progressive form of political discourse. Hate crimes and terrorist acts are not committed in a social vacuum. There is a close, and virtually necessary, connection between advocacy, preparation, coordination, infrastructure development, training, indoctrination, desensitization, discrimination, singular violent acts, and systematic oppression. Angry words, spoken in the heat of the moment, may result in violence, but the entrenchment of out-group hatred in an entire culture takes time and has far more impact than spontaneous aggression. On the other hand, the imminent threat of harm perspective insists that only fighting words that resemble the verbal taunting immediately preceding an unplanned riot are dangerous enough to justify legal intervention. The realities of how essential bias speech is to the popularization of nefarious social movements evinces that this view is too narrow<sup>442</sup>.

Hostile expressions do not contribute to the free flow of ideas. They do not test the legitimacy of democratic institutions because their very aim is to exclude out-groups from participating in policy debates. Just as with other anti-discrimination laws, such as those prohibiting exclusionary employment practice and housing discrimination, the prohibition of virulent animus would improve race relations and diminish arbitrary hate. Organizations purposefully using new technologies to disseminate hatred, intent on hurting identifiable groups, can broaden their audience and substantially increase the likelihood of causing their desired end. For instance, given enough time and repetition, flashy Web sites advocating the piousness of committing suicide bombings may enkindle aggression against the targeted group.

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<sup>441</sup> *ibid*

<sup>442</sup> Tsesis, Alexander, Prohibiting Incitement on the Internet, *Virginia Journal of Law and Technology*, 7Va.J.L.&Tech.5, Summer 2002 available at <http://www.vjolt.net>, visited on 14 May 2005

This is particularly true when the electronic transmissions are part of a concerted campaign to de-legitimize the aspirations of a hated group<sup>443</sup>.

### **3.9.2 Content Neutral Standard – R.A.V v St.Paul**

Next stage of legal development in relation to hate speech started with Supreme Court hurdle against enacting a statute prohibiting hate speech on the Internet is the content neutral standard for fighting words established by Justice Scalia's majority opinion in R.A.V. v. St. Paul<sup>444</sup>. The concurrences to that case are so significantly different from the majority opinion that knowing their conclusions is essential to understanding the current state of the prevailing law.

The case arose when Juveniles set fire to a cross on a black family's lawn. They were charged with violating a St. Paul ordinance<sup>445</sup> which made it a misdemeanor to publicly or privately display any symbols known to "arouse anger, alarm or resentment ... on the basis of race, color, creed, religion or gender." Scalia J, found that law an unconstitutional "content discrimination." His view was that the ordinance violated the First Amendment because it prohibited the enumerated forms of inciteful speech, but tolerated un-enumerated forms, such as those directed against persons' political affiliation. The Court recognized that the City had a compelling interest in protecting the human rights of the "members of groups that have historically been subjected to discrimination."<sup>446</sup> While St. Paul could have adopted a blanket prohibition against all fighting words, the court found it

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<sup>443</sup> Kathleen E. Mahoney, Hate Speech: Affirmation or Contradiction of Freedom of Expression, 1996 U. ILL. L. REV. 789, 801; Steven H. Shiffrin, Racist Speech, Outsider Jurisprudence, and the Meaning of America, 80 CORNELL L. REV. 43, 80 (1994).

<sup>444</sup> R.A.V. v. ST. PAUL, 505 U.S. 377 (1992), available at <http://laws.findlaw.com/us/505/377.html>, visited on 10 Dec 2005

<sup>445</sup> St. Paul, Minnesota., Legis. Code 292.02 (1990), which provides: "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

<sup>446</sup> Supra Note 444

unconstitutional that legislators adopted laws intended only to prohibit some inflammatory messages<sup>447</sup>.

All three concurrences complained that Justice Scalia had significantly departed from precedent, which had long permitted some content specific limitations on speech. Justice Blackmun J, wrote that it was irreconcilable to hold that the state “cannot regulate speech that causes great harm unless it also regulates speech that does not.” Blackmun J, thought R.A.V. to be so significant a departure from traditional protections on speech that it would be an anomalous opinion that would “not significantly alter First Amendment jurisprudence.” Unlike Scalia J, Blackmun J found that no First Amendment principles were jeopardized by a law preventing “hoodlums from driving minorities out of their homes by burning crosses on their lawns.” To the contrary, Blackmun J regarded it a “great harm” to prohibit St. Paul from penalizing racist fighting words because it “so prejudices their community.” Justice Blackmun’s concurrence makes clear that he was not averse to hate speech laws; he nevertheless found the language of the St. Paul ordinance constitutionally overbroad<sup>448</sup>.

Justice Scalia’s opinion dismisses the numerous instances in which the Supreme Court found restrictions on constitutional speech. Content based restrictions have been found constitutional in cases which dealt with operating adult theaters, threatening the President, electioneering within 100 feet of a polling place on election day, using trade names, burning draft cards, and distributing obscene materials. This list indicates that constitutionally permissible content specific restrictions involve both political and non-political expressions. Electioneering is a form of dialogue about the merits of various political candidates. Draft card burning also pertains to political statements, speaking against government involvement in

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<sup>447</sup> *ibid*

<sup>448</sup> Fisher William, Benckler Yochai, Brackely Rebacca and Ma Shara, Freedom of Expression on the Internet, Berkmen Center for Internet and Society, available at [http://cyber.law.harvard.edu/ilaw/mexico\\_2006\\_module\\_4\\_freedom](http://cyber.law.harvard.edu/ilaw/mexico_2006_module_4_freedom), visited on 2 Feb 2005.

military action or affirming the validity of pacifism. Speech which is not political, such as practicing medicine without a license, is also subject to regulations<sup>449</sup>.

Justice Scalia's holding in *R.A.V.* case is incongruous with the numerous cases in which narrowly tailored and content specific speech laws were found to be a legitimate use of governmental power. The majority turned a blind eye to St. Paul's compelling reasons for focusing its attention to rooting out hate speech. The opinion manifests a lack of empathy for minority sensibilities about the threat hate speech poses to their communities. Even though the Court recognized that St. Paul had a compelling interest in passing the ordinance, it nevertheless held to a novel opinion, unsubstantiated by any socio-historical analysis, about the regulation of content specific speech<sup>450</sup>.

Free speech is one of the fundamental rights protected under the Constitution of US (India), but conflicts sometimes arise between persons wanting to express themselves and the people affected by their speech. In the *R.A.V.* case majority did not balance bigots' rights to express their views against the rights of vulnerable minorities to be free from the substantial risks hate groups pose through their content specific indoctrination and recruitment. For instance, absent is any reflection on the symbolic meaning of cross burnings. That symbol, after all is not only expressive, but also motivational. Cultural symbolism delimits people's parameters of thought and influences their attitudes, behaviors, and reactions. Cross burnings are meant to demean and increase support networks for persons with supremacist ideologies. To comprehend the public meaning of a given symbol, it is important to consider what it represents. Such an evaluation must reflect on the object and the context within which it appears. Social history is part of the context of racist expressions they are used to interlink speakers and audiences through a racist past, a concurrent racist network, and mutually intolerant plans. With the broad, and international reach of the Internet, the threat of galvanization and massive acts of

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<sup>449</sup> *ibid*

<sup>450</sup> *ibid*

oppression is greater than ever before because it can facilitate the creation of a concerted effort to undermine human rights. Bias motivated crimes might, in fact, be perpetrated in states other than those from which the message was sent<sup>451</sup>.

### **3.9.3 Hate Speech – International Perspective**

The Internet enables hate groups to transmit their messages internationally; therefore, to determine the plausibility of regulating hate speech on this medium we must evaluate international human rights instruments on hate speech.

Several international conventions also affirm that the substantial threat to targets of hate speech outweighs the burden imposed on orators. For instance the Convention on the Prevention and Punishment of the Crime of Genocide requires contracting parties to punish “direct and public incitement to commit genocide.”<sup>452</sup>

The European Convention on the Protection of Human Rights and Fundamental Freedoms not only commits twenty-three party states to protecting the rights to free expression and opinion but also acknowledges other civil rights: “The exercise of these freedoms ... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others..”<sup>453</sup>

These conventions are further strengthened by the U.N. Convention on the Elimination of All Forms of Racial Discrimination<sup>454</sup> which commits governments to actions against hate speech:

It requires States Parties to condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one

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<sup>451</sup> *ibid*

<sup>452</sup> Art.3 , Convention on the Prevention and Punishment of the Crime of Genocide, available at [http://www.unhchr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhchr.ch/html/menu3/b/p_genoci.htm) , visited on 3 Sep 2005

<sup>453</sup> Art. 10 of European Convention on Human Rights, available at <http://www.hri.org/docs/ECHR50.html> , visited on 4 Sep 2005

<sup>454</sup> Office of the High Commissioner for Human Rights, convention available at [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm) , visited on 3 Nov 2005

colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination, and to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of other persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

A look at the laws of Western democracies and European Union makes it clear that the United States is following anomalous pure speech jurisprudence. A variety of governments understand that the intentional spread of bias against insular groups is detrimental to society<sup>455</sup>. Democracies generally recognize that preserving human rights supersedes a bigot's desire to spread instigatory vitriol. Representative government is only weakened by an unrestricted freedom on speech which comes at the expense of out group security. Speech that is purposefully, recklessly, or knowingly designed to suppress out group enjoyment of a country's privileges and immunities is antagonistic to social contract ideals. Surveying the history of racism in the United States, from Native American dislocation, to slavery, to Japanese internment, makes clear that here, as in other democracies; intolerance and

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<sup>455</sup> Tsesis, Alexander, Prohibiting Incitement on the Internet, Virginia Journal of Law and Technology, 7Va.J.L.&Tech.5, Summer 2002 available at <http://www.vjolt.net>, visited on 14 May 2005.

persecution can exist in spite of a constitutional commitment to fairness and equality. Enacting narrowly tailored laws against hate speech can prevent socially regressive forces from establishing effective movements<sup>456</sup>.

### **3.10 Conclusion**

Cyber defamation and hate speech on the Internet is a growing problem. Many commentators, points out that the ways in which the Supreme Court has deployed the First Amendment to limit the application of the tort of defamation are founded on the assumption that most defamation suits will be brought against relatively powerful institutions (e.g., newspapers, television stations). The Internet, by enabling relatively poor and powerless persons to broadcast to the world their opinions of powerful institutions (e.g., their employers, companies by which they feel wronged) increases the likelihood that, in the future, defamation suits will be brought most often by formidable plaintiffs against weak individual defendants. If we believe that "the Internet is . . . a powerful tool for equalizing imbalances of power by giving voice to the disenfranchised and by allowing more democratic participation in public discourse," we should not be worried by this development. We should be able to suggest that it may be necessary, in this altered climate, to reconsider the shape of the constitutional limitations on defamation.

Combating online extremism presents enormous technological and legal difficulties, and as noted earlier, the few examples provided here are only the tip of the iceberg. Even if it were electronically feasible to keep sites off the Internet, the international nature of the medium makes legal regulation virtually impossible.

As a result, governments, corporations and people of goodwill continue to look for alternative ways to address the problem.

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<sup>456</sup> *ibid* at p 313