Protecting Online Intermediaries, Threatening Free Speech

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I. INTRODUCTION

Publication through the internet poses a challenge to online intermediaries. Online intermediaries stand to be sued as publishers or distributors of defamatory content. Compared to authors of defamatory material, online intermediaries are better targets of damage suits. There are two reasons. First, online intermediaries have offices, hence, they are identifiable and can be located, while authors of defamatory material are hard to detect. Second, they have "deeper pockets" than the authors who may not have the money.[1] Thus, various jurisdictions have enacted laws to limit the liability of online intermediaries for defamatory content.[2]

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Cite as 60 ATENEO L.J. 465 (2015).

1. ADRIAN J. LAWRENCE, THE LAW OF ECOMMERCE 10 (2003 ed.).
2. Article 19, Internet Intermediaries: Dilemma of Liability Q and A, *available at* https://www.article19.org/resources.php/resource/37243/en/internet-intermediaries:-dilemma-of-liability-q-and-a (last accessed Nov. 21, 2015).

This Article examines the legal framework in the Philippines regarding the liability of online intermediaries for defamatory content. Further, it compares such liability with the legal regimes in Australia, the United Kingdom (U.K.), and the United States of America (U.S.). Next, it discusses how the law has, wittingly or unwittingly, restrained free speech. The Article uses the broad term "online intermediaries" or "internet intermediaries" to encompass internet service providers (ISPs), web hosts, content providers, search engines, and social media platforms.[3]

II. THE LAW IN THE PHILIPPINES

It is apt to begin with Section 30 of Republic Act (R.A.) No. 8792, or the Electronic Commerce Act of 2000,[4] which states —

> *Extent of Liability of a Service Provider*. — Except as otherwise provided in this Section, no person or party shall be subject to any civil or criminal liability in respect of the electronic data message or electronic document for which the person or party acting as a service provider as defined in Section 5[,] merely provides access[,] if such liability is founded on [—]
>
> (a) The obligations and liabilities of the parties under the electronic data message or electronic document;
>
> (b) The making, publication, dissemination[,] or distribution of such material or any statement made in such material, including possible infringement of any right subsisting in or in relation to such material. Provided, That[:]
>
> (1) The service provider does not have actual knowledge, or is not aware of the facts or circumstances from which it is apparent, that the making, publication, dissemination[,] or distribution of such material is unlawful or infringes any rights subsisting in or in relation to such material;
>
> (2) The service provider does not knowingly receive a financial benefit directly attributable to the unlawful or infringing activity; and
>
> (3) The service provider does not directly commit any infringement or other unlawful act and does not induce or cause another person or party to commit any infringement or

3. *Id. See also* Emily B. Laidlaw, *Private Power, Public Interest: An Examination of Search Engine Accountability*, 17 INT'L J. OF L. & INFO. TECH. 113, 115-17 (2008).

4. An Act Providing for the Recognition and Use of Electronic Commercial and Non-Commercial Transactions and Documents, Penalties for Unlawful Use Thereof, and for Other Purposes [Electronic Commerce Act], Republic Act No. 8792 (2000).

> other unlawful act and/or does not benefit financially from the infringing activity or unlawful act of another person or party; Provided, further, That nothing in this Section shall affect [—]
>
> (A) Any obligation founded on contract;
>
> (B) The obligation of a service provider as such under a licensing or other regulatory regime established under written law; [ ]
>
> (C) Any obligation imposed under any written law; [or]
>
> (D) The civil liability of any party to the extent that such liability forms the basis for injunctive relief issued by a court under any law requiring that the service provider take or refrain from actions necessary to remove, block[,] or deny access to any material, or to preserve evidence of a violation of law.[5]

There is no case law yet on this matter. Given that the clause refers to the publication of electronic data messages, an online intermediary may avail of the said provision to exonerate itself from liability for defamation, provided, however, that it does not have actual knowledge[6] of the defamatory content.[7] Further, in the realm of free expression, the element of actual knowledge in the provision, similar to the law in Australia and in the U.K., is problematic as it infringes upon the right to free speech.[8] An ISP, for example, cannot take refuge in this provision if it does not block content after having knowledge of its defamatory character.[9] Hence, to protect itself from liability, an ISP would rather block certain contents as soon as it is notified of its defamatory character.[10]

Interestingly, Section 44 of the Implementing Rules and Regulations (IRR) of R.A. No. 8792 has modified the provision by giving ISPs the option to, "[advise] the affected parties within a reasonable time, to refer the matter to the appropriate authority or, at the option of the parties, to avail of alternative modes of dispute resolution"[11] after having become aware of the

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5. *Id.* § 30.

6. *Id.* § 30 (b) (i).

7. *See* Kimberley Heitman, *Free Speech Online: Still Shooting the Messenger*, 28 U. NEW SOUTH WALES L.J. 928, 929 (2005).

8. *Id.* at 931.

9. *Id.* at 929.

10. *Id.* at 928.

11. Rules and Regulations Implementing the Electronic Commerce Act, Republic

defamatory content. Given that the defense applies as well to other offenses, such as infringement or copyright,[12] the drafters of the IRR have recognized, that "if the provision were to remain unchanged or [un]modified, it may be used to work an injustice against persons with legitimate rights."[13] This modification by the IRR, however, may not sit well given the import of *MCC Industrial Sales Corporation v. Ssangyong Corporation*,[14] in which the Supreme Court of the Philippines ruled that the IRR "went beyond the parameters of the law"[15] when it changed the definition of a term in R.A. No. 8792.[16] Further, the term "appropriate authority"[17] is patently vague. Does it refer to the police, the prosecutorial arm of the government, or the courts?

Parenthetically, online intermediaries are in a better position compared to offline publishers. As aforesaid, under R.A. No. 8792, online intermediaries need to have actual knowledge of the defamatory content for it to be liable, whereas offline publishers do not need to have "knowledge of and participation in the publication of the offending article"[18] for liability to attach.[19]

III. THE POSITION IN AUSTRALIA

In Australia, a good starting point is the "defense of innocent dissemination," which is ingrained in state and territory laws as a result of the nationwide adoption of a uniform defamation law.[20] Relevantly —

Act No. 8792, § 44 (b) (i) (3) (2000).

12. Jesus M. Disini, Jr. & Janette C. Toral, The Electronic Commerce Act and its Implementing Rules and Regulations (A Paper by the Philippine Exporters Confederation, Inc. Dated September 2000) 35, *available at* http://www.disini.ph/downloads/EcomIRR%20Annotations.pdf (last accessed Nov. 21, 2015).

13. *Id.*

14. MCC Industrial Sales Corporation v. Ssangyong Corporation, 536 SCRA 408 (2007).

15. *Id.* at 453.

16. *Id.*

17. Rules and Regulations Implementing the Electronic Commerce Act, § 44 (b) (i) (3).

18. Fermin v. People, 550 SCRA 132, 141 (2008).

19. *Id.*

20. David Rolph, *A Critique of the National, Uniform Defamation Laws*, 16 TORTS L. J. 207, 238-40 (2008) [hereinafter Rolph, *Uniform Defamation Laws*]. *See also*

(a) It is a defen[s]e to the publication of defamatory matter if the defendant proves that[:]

(1) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor;[ ]

(2) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and

(3) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

(b) For the purposes of [S]ubsection (1), a person is a *subordinate distributor* of defamatory matter if the person[:]

(1) was not the first or primary distributor of the matter;[ ]

(2) was not the author or originator of the matter; and

(3) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

(c) Without limiting [S]ubsection (2) (a), a person is not the first or primary distributor of matter merely because the person was involved in the publication of the matter in the capacity of[:]

...

(f) a provider of services consisting of [:]

(A) the processing, copying, distributing[,] or selling of any electronic medium in or on which the matter is recorded; or

(B) the operation of, or the provision of any equipment, system[,] or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form; or

(g) an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control; or

(h) a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces[,]

Electronic Frontiers Australia, Defamation Laws & the Internet, *available at* https://www.efa.org.au/Issues/Censor/defamation.html (last accessed Nov. 21, 2015).

> or distributes the matter for or on behalf of that other person.[21]

Prior to the statutory adoption of the said defense, the same was considered to be available only to subordinate distributors in the offline context, such as newspaper vendors and libraries.[22]

Nevertheless, on the general contention that they have no "effective control over the material they re-distribute,"[23] online intermediaries claim that the defense must also be available to them.[24] They further argue that like newsstands, they do not have the facility and the convenience to check out each and every piece of information that passes through their technological facilities and screen it for defamatory content. Indeed, as Dr. Rhonda A. Breit would argue, "the unstructured nature of the Internet, the interactive services offered, the immediacy of publication[,] and the vast amount of information available, make it impossible for [ISPs] to be aware of the contents of information posted on their service before it is communicated to the public."[25]

While it has not made a distinct pronouncement, the High Court of Australia, in *Thompson v. Australian Capital Television P/L*,[26] hinted on the availability of the defense to distributors of "electronic material," such as ISPs.[27] Thus, Chief Justice Francis Gerard Brennan, Justice Daryl Michael Dawson, and Justice John Leslie Toohey, in their joint judgment said, "[t]here is no reason in principle why a mere distributor of electronic

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21. An Act to Consolidate and Reform the Statute Law Relating to Wrongs, and for Other Purposes, Civil Law (Wrongs) Act 2002 (ACT), § 139C (Austl.). *See also* Defamation Act 2005 (NSW), § 32 (Austl.); Defamation Act 2006 (NT), § 29 (Austl.); Defamation Act 2005 (Qld.), § 32 (Austl.); Defamation Act 2005 (SA), § 30 (Austl.); Defamation Act 2005 (Tas.), § 32 (Austl.); Defamation Act 2005 (Vic.), § 32 (Austl.); & Defamation Act 2005 (WA), § 32 (Austl.).

22. Julie Eisenberg, *Safely Out of Sight: The Impact of the New Online Content Legislation on Defamation Law*, 23 U. NEW SOUTH WALES L.J. 232, 234 (2000).

23. LILIAN EDWARDS & CHARLOTTE WAELDE, LAW AND THE INTERNET, REGULATING CYBERSPACE 192 (1st ed. 1997).

24. *Id. See also* Ryan J. Turner, *Internet Defamation Law and Publication by Omission: A Multi-Jurisdictional Analysis*, 37 U. NEW SOUTH WALES L.J. 34, 46 (2014).

25. Rhonda Breit, *Cyberspace: A Legal Frontier*, 20 A.J.R. 38, 38-57 (1998).

26. Thompson v. Australian Capital Television P/L, 186 CLR 574 (1996) (Austl.).

27. *Id.* at 590.

material should not be able to rely upon the defen[s]e of innocent dissemination if the circumstances so permit."[28]

The consequent liberalization and extension of the defense to online intermediaries has been considered to be a "sound improvement" of defamation laws.[29]

Interestingly, pre-dating the uniform defamation law, online intermediaries — limited to those that host internet content[30] and supply internet carriage service to the public[31] — were considered to be protected by the Broadcasting Services Act of 1992 (BSA)[32] which relevantly provides in Schedule 5, Clause 91 that —

> Liability of internet content hosts and [ISPs] under State and Territory laws etc. [—]
>
> (a) A law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it:
>
> (1) subjects, or would have the effect (whether direct or indirect) of subjecting, an internet content host to liability (whether criminal or civil) in respect of hosting particular internet content in a case where the host was not aware of the nature of the internet content; or
>
> (2) requires, or would have the effect (whether direct or indirect) of requiring, an internet content host to monitor, make inquiries about, or keep records of, internet content hosted by the host; or
>
> (3) subjects, or would have the effect (whether direct or indirect) of subjecting, an [ISP] to liability (whether criminal or civil) in respect of carrying particular internet content in a case where the service provider was not aware of the nature of the internet content; or
>
> (4) requires, or would have the effect (whether direct or indirect) of requiring, an [ISP] to monitor, make inquiries about, or keep records of, internet content carried by the provider.[33]

28. *Id.* at 589.

29. Rolph, *Uniform Defamation Laws*, *supra* note 20, at 239 & Electronic Frontiers Australia, *supra* note 20.

30. Broadcasting Services Act, sch. 5, cl. 3 (1992) (Austl.).

31. *Id.* cl. 8 (1).

32. *Id.* cl. 3 (1992).

33. *Id.* cl. 91, (1) (a)-(d).

As of this writing, there is no case law dealing with the applicability and extent of said clause to defamation law. However, it is generally accepted that the broad wording of the provision provides a protection to online intermediaries against suits for defamatory content passing through or hosted in their facilities.[34] It should be noted, however, that Clause 91 (2) empowers the Minister to "exempt a specified law of a State or Territory, or a specified rule of common law or equity, from the operation of [S]ubclause (1)."[35]

Thus, defamation may be declared as not covered by the aforesaid clause.[36] In such a scenario, what will remain to protect online intermediaries is the "defense of innocent dissemination" under state laws. This is assuming that the Commonwealth law, Clause 91, limited to host and access providers and the state law defense of innocent dissemination — the latter being wider in extent than the former — provides protection to online intermediaries from liability for defamation.

In any event, granting that Clause 91 covers defamation, the clause highlights that knowledge is necessary, as the provision states that "the host was not aware of the nature of the internet content[.]"[37] Parenthetically, this is a similar requirement under the state law defense of innocent dissemination. It requires that "the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory[,]"[38] and that the "lack of knowledge was not due to any negligence[.]"[39]

Thus, the situation is similar to the Philippines. If the online intermediary knows or obtains knowledge of the defamatory content or is negligent in not knowing, then it cannot avail of the law's protection.[40] In this respect, the legislation draws criticism for unduly restricting freedom of speech.[41] To illustrate, under the framework of the BSA, the access provider or content host may be considered to have obtained knowledge of the defamatory content from receipt of a complaint or of a notice.[42] From that

34. Eisenberg, *supra* note 22, at 232.

35. Broadcasting Services Act, sch. 5, cl. 91 (2).

36. *Id.*

37. *Id.* cl. 91 (1) (a).

38. Civil Law (Wrongs) Act 2002, § 139C (1) (b).

39. *Id.* (c).

40. David Rolph, *Publication, Innocent Dissemination and the Internet After Dow Jones & Co. Inc. v. Gutnick*, 33 U. NEW SOUTH WALES L.J. 562, 576 (2010).

41. *See* Heitman, *supra* note 7, at 931.

42. *See* Broadcasting Services Act, sched. 5 & 7.

period on, the said online intermediary becomes "aware of the nature of the internet content[,]"[43] and if it continuously provides access to the said content or fails to adopt any measure to remove or to block the defamatory content, then it cannot avail of the protection afforded by Clause 91.[44] As criticized, the provision restrains speech by the simple expedient and inexpensiveness of a demand letter.[45]

Further, given the import of the statements in *Silberberg v. Builders Collective of Australia Inc.*,[46] *Robertson v. Dogz Online Pty Ltd. & Anor*,[47] and *Australian Competition and Consumer Commission v. Allergy Pathway Pty Ltd.*,[48] it is possible that Australian courts, when faced with an appropriate case to discuss the application of the aforecited provisions, will lean towards the forfeiture of the defense available to online intermediaries in case of the latter's inaction after receipt of notification of the presence of defamatory contents — a result similar to the U.K. case of *Godfrey v. Demon Internet Ltd*.[49] To avoid liability, therefore, online intermediaries may well remove or block content. Then again, from a commercial perspective, they will have to balance this risk with that of losing their niche in the internet market.

IV. THE STATE OF PLAY IN THE UNITED KINGDOM

The defense of innocent dissemination has been incorporated in the U.K. Defamation Act of 1996,[50] which relevantly provides in Section 1 that —

> (a) In defamation proceedings a person has a defen[s]e if he shows that —
>
> > (1) he was not the author, editor[,] or publisher of the statement complained of[;]
> >
> > (2) he took reasonable care in relation to its publication[;] and

43. *Id.* sched. 5, cl. 91 (1) (c).

44. *Id.*

45. *See* Heitman, *supra* note 7, at 929.

46. Silberberg v. Builders Collective of Australia Inc., 2007 F.C.R. 475, ¶ 34 (Austl.).

47. Robertson v. Dogz Online Pty. Ltd. & Anor, 2010 Q.C.A. 295, ¶ 36 (Austl.).

48. Australian Competition and Consumer Commission v. Allergy Pathway Pty. Ltd. (No. 2), 2011 FCA 74, ¶ 33 (Austl.).

49. Godfrey v. Demon Internet Ltd., 1999 E.M.L.R. 542, 544-45 (Q.B. 2002) (U.K.).

50. Defamation Act, 1996, ch. 31 (U.K.).

> (3) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.
>
> ...
>
> (c) A person shall not be considered the author, editor[,] or publisher of a statement if he is only involved —
>
> ...
>
> (c) in processing, making copies of, distributing or selling any electronic medium in or which the statement is recorded, or in operating or providing any equipment, system[,] or service by means of which the statement is retrieved, copied, distributed[,] or made available in electronic form;
>
> ...
>
> (e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.[51]

The High Court, in *Godfrey*, refused to apply the benefit of the provision to an ISP that hosted postings on a newsgroup.[52] The High Court ruled that, for the defense under Section 1 (1) to succeed, Subsections (a), (b), and (c) need be established.[53] The High Court further ruled that each access of defamatory posting by a subscriber of the newsgroup "soc.culture.thai," and a corollary transmission of information from a server to a subscriber, constitutes a publication.[54] Therefore, by continuously storing and posting in its server, after having had knowledge of its defamatory content, the ISP did not play a passive role and thus could not avail of the defense of innocent dissemination under the aforesaid section.[55]

Like the Philippines and Australia, the Section 1 defense of the U.K., given *Godfrey*, could reasonably be faulted for its undesirable effect of ISPs

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51. *Id.* § 1.

52. *Godfrey*, 1999 E.M.L.R. at 547-48.

53. *Id.* at 546.

54. *Id.* at 549. The England and Wales Court of Appeals rejected the proposal to adopt a "single publication rule" in the online context. Rather, it reiterated the common law principle that "each individual publication of a libel gives rise to a separate cause of action, subject to its own limitation period." Loutchansky v. Times Newspapers Ltd. & Ors, 2002 Q.B. 783, 813 (2002) (U.K.).

55. *Godfrey*, 1999 E.M.L.R. at 547-50.

implementing — as soon as a complaint is received[56] — "'safety first' policy" by withdrawing information or material alleged as defamatory, at the risk of being held liable if it does not act.[57] The said provision thus imposes an incommodious obligation on ISPs to monitor content.[58] Steve Hedley aptly comments that it is too much to expect from ISPs the legal know-how on the intricacies of defamation, and it is also impractical to have them investigate the merit of an alleged defamation.[59] Section 1 (3) (e) is also criticized for being problematic that for an ISP to be not considered as having effective control, it "must only provide internet access, and not do anything."[60]

Nevertheless, *Bunt v. Tilley*[61] — a case dealing with the transmission of information by ISPs providing access to the internet[62] — clarified *Godfrey* by ruling that an ISP performing "no more than a passive role in facilitating postings"[63] should not be deemed as a publisher.[64] Since it is not considered as a publisher, an assertion of any defense is a surplusage.[65]

Interestingly, in *Metropolitan International Schools Ltd. v. Designtechnica Corp.*,[66] Justice David Eady, ponente of the *Bunt* case, deemed search engines, such as Google, not as publishers but as facilitators which have no control over the "snippets" that appear as a result of an internet user's search request.[67] Because the search is performed automatically by the system, the mental element of liability is absent.[68] Further, following *Godfrey*, the search engine, which lacks "take down" facility, cannot be taken to have

56. *See* Heitman, *supra* note 7, at 929.

57. IAN J. LLOYD, INFORMATION TECHNOLOGY LAW 560 (6th ed. 2011).

58. CHRIS REED, INTERNET LAW: TEXT AND MATERIALS 116 (2d ed. 2004) (citing EDWARDS & WAELDE, *supra* note 24, at 194).

59. *See* STEVE HEDLEY, THE LAW OF ELECTRONIC COMMERCE AND THE INTERNET IN THE UK AND IRELAND 86 (2006).

60. EDWARDS & WAELDE, *supra* note 24, at 194.

61. Bunt v. Tilley, 2007 W.L.R. 1243 (Q.B. 2006) (U.K.).

62. *Id.* at 1245. In this case, the sixth defendant was characterized as a host. *Id.* at 1261.

63. *Bunt*, 2007 W.L.R. at 1252.

64. *Id.*

65. *Id.*

66. Metropolitan International Schools Ltd. v. Designtechnica Corp., 2011 W.L.R. 1743, 1743 (Q.B. 2010) (U.K.).

67. *Id.* at 1757.

68. *Id.* at 1757-58.

authorized or acquiesced to the publication of the libel even after it has received notice of its appearance in the "snippet."[69] Given that the search engine is categorized as a facilitator, on the strength of *Bunt*, it becomes unnecessary for it to still advert to a defense such as the afore-quoted Section 1.[70]

More recently, *Davison v. Habeeb*,[71] concerning Google as a blog host, leaned towards the reasoning in *Godfrey* and placed the intermediary in the same shoes as Demon Internet.[72]

Surprisingly, in *Tamiz v. Google Inc.*,[73] penned by Justice Eady and decided not long after *Davison*, considered Google, acting as a blog host, as performing the passive role of a platform provider "closely analogous to that described in [*Bunt*]."[74] Necessarily, because it was not a publisher, it need not rely on a defense.[75] *Tamiz* is indeed a significant departure from *Godfrey* and an amelioration of the plight of ISPs — not to mention free speech, in this area of law.

Nevertheless, while *Davison* and *Tamiz* differed in their treatment of the blog host concerned, the two were in unison in following *Bunt* in the latter's treatment of the sixth defendant therein.[76] *Bunt* ruled that Google had a compelling defense under Regulation 19 of the Electronic Commerce Regulations 2002 (EC Directive), which exempts internet hosts from liability if they do not have "actual knowledge ... [or unaware] of facts and circumstances"[77] that the activity or information was unlawful.[78] Based on the facts of the cases discussed, the subject blog host could not be attributed with degree of knowledge of the unlawfulness of the alleged defamatory

69. *Id.* at 1758-60.

70. *Id.* at 1764.

71. Davison v. Habeeb, 3 C.M.L.R. 104 (Q.B. 2011) (U.K.).

72. *Id.* at 117.

73. Tamiz v. Google Inc., 2012 E.M.L.R. 595 (Q.B.) (U.K.).

74. *Id.* at 606.

75. *Id.*

76. *Bunt*, 2007 W.L.R. at 1261-62.

77. Electronic Commerce (EC Directive) Regulations 2002, reg. 19 (a) (i) (U.K.).

78. *Id.* The Regulation was derived from European Parliament and of the Council Directive 2000/31/EC. *See* Council Directive 2000/31/EC, art. 14, 2000 O.J. (L 178), 1 (E.U.).

information,[79] further considering that the determination of what is unlawful requires knowledge of the strength or weakness of available defenses.[80]

The pronouncements in *Davison* and *Tamiz* cannot be followed in the Philippines and in Australia considering that the EC Directive does not bind the two States. Hopefully, the Philippine and Australian courts will lean towards the necessity of actual knowledge as ruled in these two English cases in decreeing the degree of knowledge required for the defense of innocent dissemination in the uniform defamation laws and in Clause 91.

V. HOW THE UNITED STATES DEALS WITH THE ISSUE

In the U.S., Section 230 of the Communications Decency Act (CDA) of 1996,[81] protects online intermediaries by not treating it as publishers or speakers. Relevantly —

> (c) Protection for 'Good Samaritan' blocking and screening of offensive material[:]
>
> (1) Treatment of publisher and speaker
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability
>
> No provider or user of an interactive computer service shall be held liable on account of[:]
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available **to** information content providers or others the technical means to restrict access to material described in paragraph (1).[82]

79. *Davison*, 3 C.M.L.R. at 125 & *Tamiz*, 2012 E.M.L.R. at 611-13.

80. *Davison*, 3 C.M.L.R. at 122; *Tamiz*, 2012 E.M.L.R. at 611; & *Bunt*, 2007 W.L.R. at 1262.

81. Protection for Private Blocking and Screening of Offensive Material, 47 U.S.C. § 230 (c) (1996).

82. *Id.*

Prior to the enactment of the CDA, online intermediaries were treated as distributors liable for libel only if they have "knowledge" or "reason to know" of the defamatory content, following the ruling in *Cubby, Inc. v. CompuServe Inc.*[83] However, following *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[84] it may be exonerated from liability if it made a "conscious choice [ ] to gain the benefits of editorial control" by taking steps to monitor the system of offensive material.[85]

However, after the passage of CDA, ISPs have been afforded a preferential treatment over other entities conducting the same activities offline. Emphasizing the plain wording of Section 230, the U.S. Court of Appeals Fourth Circuit ruled in *Zeran v. America Online, Inc.*[86] that providers of interactive[87] computer service[88] are not liable for "information originating [from] a third-party user of the service."[89] Section 230 further "precludes

83. Cubby, Inc. v. CompuServe Inc., 776 F.Supp.135, 141 (S.D.N.Y. 1991) (U.S.).

84. Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unreported).

85. *Id.* at *5.

86. Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997) (U.S.).

87. *See* Federal Trade Commission v. Accusearch, Inc., 570 F.3d 1187, 1196-97 (10th Cir. 2009) (U.S.). This case suggests that a website operator need not provide for a service that permits direct interaction among its users for it to be covered by Section 230. Nevertheless, Section 230 (f) (2) of the Communications Defense Act of 1996, provides that —

> [t]he term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

Protection for Private Blocking and Screening of Offensive Material, 47 U.S.C. § 230 (f) (2).

88. *See* Delfino v. Agilent Technologies, 145 Cal. App. 4th 790, 805-06 (Ct. App. 2006) (U.S.). This case provides a neat enumeration of what U.S. courts have considered as "interactive computer service" for purposes of Section 230 immunity, among which are online auction websites, libraries providing internet access, online dating websites, nonprofit website operator, operators of internet bulletin boards, search engine operators, companies providing internet access through computer rental, online bookstore website, and companies that provide internet access to its employees through the company's internal computer system. *Id.*

89. *Zeran*, 129 F.3d at 330.

courts from entertaining claims that would place a computer service provider in a publisher's role."[90] In construing the statute, the U.S. Court of Appeals identified its legislative purposes and recognized the chilling effect of imposing tort liability to service providers, which could not possibly monitor and screen the sheer volume of information communicated through their services, and would thus simply suppress speech to avoid liability.[91] Further, and rather antithetically,[92] the court pinpointed the statute's aim of encouraging self-regulation by removing the disincentive to the use of "blocking and filtering technologies," effectively superseding the ruling in *Stratton*.[93] In furtherance of this purpose, the protection extends "even where the self-policing is unsuccessful or not even attempted."[94]

Significantly, the court in *Zeran* likewise ruled that distributor liability is a "subset" of the publisher liability;[95] thus, Section 230 also immunizes service providers, which, while being distributors within the context of *Cubby*, obtained knowledge of the libelous statements.[96] Accordingly, to impose a notice-based liability would contradict the aforementioned recognized purposes of the statute. Given the amount of information on the internet, it would unduly burden them to investigate every notifier's claim of defamatory content. It would be unjustifiably restrictive of speech for them — conscious of possibility of liability — to expediently remove any and all information disapproved of.[97]

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90. *Id.*

91. *Id.*

92. *See* Green v. America Online (AOL), 318 F.3d 465 (3d Cir. 2003) (U.S.). This case is the authority for the proposition that Section 230 (c) (2) is not an impetus for ISPs to restrain speech; but, consistent with *Zeran*, serves as a motivation for them to self-establish "standards of decency" to govern the activities in their system. *Id.* at 472.

93. *Zeran*, 129 F.3d at 330-31.

94. Blumenthal v. Drudge, 992 F.Supp. 44, 52 (D.D.C. 1998) (U.S.).

95. *Zeran*, 129 F.3d at 332.

96. Whether this is a sound public policy is a criticism of the *Zeran* ruling. *See* David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147 (1997).

97. *See Zeran*, 129 F.3d at 333-34. This ruling was applied in a non-defamation context in the case of *Beyond Systems, Inc. v. Keynetics, Inc. See* Beyond Systems, Inc. v. Keynetics, Inc., 422 F.Supp.2d 523, 536-37 (D. Md. 2006) (U.S.).

The Supreme Court of California, in *Barrett v. Rosenthal*,[98] sustained this ruling in *Zeran*, and further confirmed that those who republish third party content, i.e., providers and users under Section 230 (c) (1), are immunized from liability.[99]

Doe v. America Online, Inc.,[100] involving the use of a chatroom to market child pornographic material, followed *Zeran*.[101] Also, *Green v. America Online (AOL)*,[102] broadly extended its reach by considering "punter" signal as within the ambit of the word "information"[103] in Section 230. *Green* moreover deemed the failure to police the network of harmful content as "quintessentially related to a publisher's role."[104] Thus, following *Zeran*, the *Green* court freed the service provider of liability and did not condemn it for its failure to protect its user from the virus and from defamatory remarks transmitted through the chatroom.[105]

Importantly, as ruled in *Carafano v. Metrosplash.com Inc.*,[106] Section 230 affords protection to ISPs so long as the "information" has been provided or generated by a third party.[107] Further, protection subsists so long as the ISP remains a "passive conduit" and does not encourage or induce[108] third parties to provide defamatory material or illegal content.[109] Also, it must not

98. Barrett v. Rosenthal, 146 P.3d 510, 518-24 (Cal. 2006) (U.S.).

99. *Id.* at 529.

100. Doe v. America Online, Inc. 718 So.2d 385 (Fla., 4th Dist. Appellate Court, 1998) (U.S.).

101. *Id.* at 389.

102. *Green*, 318 F.3d 465.

103. *Id.* at 471.

104. *Id.* This analysis in *Green* was endorsed in the cases of *Noah v. AOL Time Warner, Inc.*, *Doe v. MySpace, Inc.*, and *Doe II v. MySpace, Inc. See* Noah v. AOL Time Warner, Inc., 261 F.Supp.2d 532 (E.D. Va. 2003) (U.S.); Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008) (U.S.); & Doe II v. MySpace, Inc., 175 Cal.App.4th 561 (Ct. App. 2009) (U.S.).

105. *Green*, 318 F.3d at 470-71.

106. Carafano v. Metrosplash.com Inc., 339 F.3d 1119 (9th Cir. 2003) (U.S.).

107. *Id.* at 1124-25.

108. Universal Communication Systems, Inc. v. Lycos, 478 F.3d 413 (1st Cir. 2007) (U.S.). This case is the authority for the rule that "[a]ctions taken to protect subscribers' legal rights [ ] cannot be construed as inducement of unlawful activity[.]" *Id.* at 421.

109. *See* Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1169 & 1172 (9th Cir. 2008) (U.S.); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 257-58 (4th Cir. 2009) (U.S.); &

have a significant contribution in the creation, development, or transformation of the information,[110] even if that information was solicited by way of a question posed by the ISP to the third person.[111] Note that the existence of a direct contractual relationship between a content provider and a service provider for supply of information to be made available online does not deprive the latter of the Section 230 benefit.[112]

Compared to the Philippines and Australia, the U.S. thus extends a broader immunity to online intermediaries. Expectedly, the U.S. has further expanded the already extensive immunity to settings other than defamation suits.[113]

Nevertheless, *Doe v. GTE Corporation*,[114] while not concerning the posting of defamatory material but of surreptitiously recorded unclothed athletes in a locker room, entertained a possible interpretation of Section 230 as a definitional clause and not as an immunity from liability.[115] Here, the court was conscious of the unintended effect of the provision for ISPs to be "indifferent to the content of information they host or transmit." [116] *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*,[117] on the posting of discriminatory housing advertisements, adverting to *GTE*

Johnson v. Arden, 614 F.3d 785, 791–92 (8th Ct. App. 2010) (U.S.).

110. *Carafano*, 339 F.3d at 1125.

111. *Id. See also Doe II*, 175 Cal.App.4th at 451. Compare, however, in the case of *Fair Housing Council of San Fernando Valley*, where the site operator was found to be a developer not covered by Section 230 when it framed its questions to elicit allegedly illegal and discriminatory information. *Fair Housing Council of San Fernando Valley*, 521 F.3d. Also, in the case of *Federal Trade Commission*, a website operator that sold personal data was found to be a content provider and was denied the Section 230 protection for it encouraged the development of the offensive content. *Federal Trade Commission*, 570 F.3d at 1200.

112. In *Blumenthal*, the court extended the Section 230 protection to an online intermediary that directly contracted with a gossip reporter and that paid the latter a fee for the provision of articles to be made available to the intermediary's subscribers. *Blumenthal*, 992 F.Supp. at 56–58. The case of *Schneider* supports the holding of *Blumenthal*. *See* Schneider v. Amazon.com, Inc., 31 P.3d 457, 466 (Wash. Ct. App. 2001) (U.S.).

113. *Beyond Systems, Inc.*, 422 F.Supp.2d at 536.

114. Doe v. GTE Corporation, 347 F.3d 655 (7th Cir. 2003) (U.S.).

115. *Id.* at 659–60.

116. *Id.* at 659.

117. Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F.Supp.2d 681 (N.D. Ill. 2006) (U.S.).

Corporation, further bolstered the position that *Zeran* "overstates the 'plain language'"[118] of the provision and that "at a minimum, Section 230 (c) (1) at bars claims ... that requires publishing as a critical element."[119] Simply stated, a claim will only be barred by Section 230 (c) (1) if it arises from the online intermediaries' duty as a "publisher or speaker."[120] The three elements are:

(1) an interactive computer service provider is claiming the protection;[121]

(2) the cause of action treats it as a publisher or speaker of information;[122] and

(3) it is not an information content provider and it is being sued for information originating from a third party user of the service.[123]

VI. CONCLUSION

Compared to the U.K. and the U.S., the legal regimes in the Philippines and in Australia concerning the liability of online intermediaries for defamatory content are still in its budding stage. To shape case law, Philippine and Australian courts must be wary of the difficulties the internet imposes on victims of defamation, including finding the real offender.[124] However, they must not lose sight of the internet's benefit as a "tool for speech" that strengthens democracy and contributes to the achievement of self-development and self-fulfillment.[125]

It is imperative that the Philippines and Australia follow the lead of the U.K. and the U.S. in giving regard to the value of free speech and in encouraging technological innovation by lessening the responsibilities borne

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118. *Id.* at 693.

119. *Id.* at 698.

120. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (D. Or. 2005) (U.S.).

121. *Delfino*, 145 Cal.App.4th at 805.

122. *Id.*

123. *Doe II*, 175 Cal.App.4th at 451 & *Universal Communication Systems, Inc.*, 478 F.3d at 418.

124. Alice E. Marwick & Ross W. Miller, Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape (A Report Submitted to the Fordham Center on Law and Information Policy Dated 10 June 2014) 12, *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1002&context=clip (last accessed Nov. 21, 2015).

125. Laidlaw, *supra* note 3, at 122.

by ISPs for third party content. Fortunately, the Supreme Court of the Philippines recently declared Section 5, with respect to Section 4 (c) (4) of the Cybercrime Prevention Act of 2012[126] — i.e. penalizing "aiding or abetting and attempt in the commission" of online libel[127] — as void and unconstitutional.[128] There is a glimmer of hope.

126. An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and For Other Purposes, [Cybercrime Prevention Act], Republic Act No. 10175, §§ 4 (c) (4) & 5 (2012).

127. Disini, Jr. v. Secretary of Justice, 716 SCRA 237, 315-32 (2014).

128. *Id.*