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**HATE SPEECH IN THE WORLD OF INTERNET
INTERMEDIARY AND THEIR REAL-WORLD
ANALOGUES**

ABSTRACT

The first documented cyber tort case came in the United States when World Wide Web was still in its fancy. The Internet rapidly grew and became a major platform for exercising free speech and expression. Owing to their capabilities the intermediaries, providing such a platform faces increasing pressure from various interest groups to police online content. Consequently, some intermediaries ban online content outside scope of any legitimate limitation on freedom of expression, amounting to censorship of user-generated content. Though over the intervening years much has changed in Internet and in law but the contours of Intermediary Liability remain unabated, the question continues to vex the courts, legislators, internet intermediaries and the user. Given the breadth of this area of law and myriad issues it encompasses, this Note adopts a comparative methodology for understanding Intermediary Liability of User Generated Content by learning from the challenges and experiences of different legal jurisdictions.

PRELUDE: WHAT'S GOING ON (LINE)?

More than seven billion users are connected to the internet with Internet Intermediary summing up a wide definition with inclusion of web hosting companies, Internet Service Providers (ISPs), search engines and social media platforms¹ -playing an intrinsic role in providing the users with access to the Internet and enabling them to transmit third-party generated content. Owing to their capabilities these intermediaries are at increasing pressure from governments to police online content. This pressure is not just limited to these providers but expands to advertisers and online payment systems such as PayPal. Governments by exercise of their political channels and legal pressure they can censor organizations that defend causes they don't like.²

However why has it brought impetus on intermediaries to act as gate-keepers of the internet to the extent that governments have urged the intermediaries to block the citizens' from accessing the content they deem harmful.³ The reason for that is that online speech is incommensurable to real world speech with major regard to the accessibility of the audience.

¹“The Organisation for Economic and Cooperation and Development’ (OECD) defines internet intermediaries as bodies which “give access to, host, transmit and index content, products and services, originated by third parties on the internet or provide internet based services to third parties.”. K Perset, 'The Economic and Social Role of Internet Intermediaries' [2010] 171(171) Organization for Economic Cooperation and Development 9

²Wikileaks and internet companies, 'ARTICLE 19' (*Wikileaks and internet companies*, 13 December 2010) <<https://www.article19.org/data/files/pdfs/press/wikileaks-and-internet-companies.pdf>> accessed 12 January 2020; Bianca Bosker, 'PayPal Admits State Department Pressure Caused It To Block WikiLeaks' (*Huffpost US*, 26 may 2011) <https://www.huffingtonpost.in/entry/paypal-admits-us-state-de_n_793708?ri18n=true> accessed 16 January 2020

³ For example, Freedom House notes that, in recently examined 45 counties, 20 had experienced negative developments since 2011. Even in those countries with notable improvements, the general trend was towards more restrictions on internet freedom.

When Dan writes a message about the fidelity of Joe's wife on a bathroom wall of a tavern in Montana,⁴ the audience is delimited to the people who walk into that tavern. Furthermore, if Joe is likely to find out about this defamation, would demand the proprietor to remove it in timely fashion. On the same side the proprietor has commissioned the opportunity of the occasion as a consequence can be held accountable by Joe, if she refuses to remove it. On the contrary if the same, message was posted on a bulletin server anyone in the world could stumble upon it without Joe's cognizance and it wouldn't be clear who to hold responsible.⁵

While internet does not generate new kinds of harmful speech but it does actualise a creative muddle about how to apply existing ethical and legal standards to issues now enriched by computer technology.⁶ The debate for proper contours to intermediary liability remains unabated.⁷ This debate continues to vex legislators, courts, academicians⁸ and vex on the accountability of harmful speech in the online setting. In the real world the creator of the harmful speech is held accountable and an apparent repeater

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Freedom house, 'Freedom on Net' (*Freedom House*, 2012)
<<https://freedomhouse.org/report/freedom-net>> accessed 17 January 2020

⁴ *Byrne v Dean* [1937] 1 KB 818.

⁵ Greg holtz, 'Intermediary Liability and the Role of ISPs' [2005] 3(37) *Dartmouth C Undergraduate JL*

⁶ James H. Moor, 'Reason, Relativity, and Responsibility in Computer Ethics ' [1998] 28(12) *ACM Sigcas Computers and Society* 8; Richard Spinello, *Readings In Cyberethics* (2nd edn, Jones and Bartlett Publishers 2004) 45

⁷ For examples of this trend from 1994 to present, Totter Hardy, *The Proper Legal Regime for 'Cyberspace'* (Faculty Publications 1994) 1000-06, 1041-48; LeiLang Fong ; 'Internet Defamation: Liability of Intermediaries and Alternative Dispute Resolution' [1998] 19(202) *SING L Rev*

⁸ Carey Omer, 'IntermediaryLiabilityforHarmfulSpeech: Lessons from Abroad' [2014] 28(1) *Harvard Journal of Law & Technology* 36

of that information and in some cases its distributor.⁹ Henceforth a newspaper is accountable for a defamation done by a columnist in a printed article or a club's proprietor can be held responsible for the copyrighted content used by the performer.¹⁰ On the contrary a telephone operator, acting as a mere conduit, cannot be held responsible for slander committed by using the telephone line. Thus, it is at the stage of intermediary where the policy vacuum lies for accruing liability.

This note proposes a brief about the existing realm of regulatory framework mostly seen to be imposed on the intermediaries¹¹ and the risks posed by this regime to the exercise of freedom of speech and expression online. The primary question that this note deals with would be about the extent intermediaries can be held responsible and the extent to which these conduits should exercise control over the content resonating with the freedom of speech and expression. The note concludes with a policy recommendation found in some jurisdictions offering effective measure to protect online freedom while taking into account the aspects in which intermediary liability differs in online setting from its real world counterpart.

ONLINE SPEECH VERSUS REAL WORLD SPEECH

There are three apparent kinds of harmful speech that can be identified in the online paradigm: defamation, obscenity and copyright violations. Dan's

⁹ Tomas Lipinski and others, 'Sticks and stones and words that harm: Liability vs responsibility, section 230 and defamatory speech in cyberspace' [2002] 4(7) Ethics and Information Technology 143-158

¹⁰ Greg Holtz, 'Intermediary Liability and the Role of ISPs' [2005] 3(37) Dartmouth C Undergraduate JL

¹¹. Joe Mcnamee, 'Internet intermediaries – The new cyberpolice?' (*Global Information Society Watch*, 2011) <<https://www.giswatch.org/en/freedom-association/internet-intermediaries-new-cyberpolice>> accessed 13 January 2020

online post¹² about Joe's wife is an example of defamation. ¹³ Defamation is a form of deceit, involving the "communication to third parties of false statements about a person that injure the reputation of or deter others from associating with that person,"¹⁴ this is bifurcated in spoken version, slander and its written form called libel.

Online libel differs from its real-world counterpart in various ways. First, online libel caters to a much bigger audience than its real world equivalent, owing to the fact of accessibility from anywhere in the world and not confined to material reproductions. When a defamatory speech is produced in a newspaper the audience is limited to the subscribers of the newspaper or the ones who buy that newspaper on that day but when a bulletin board shows that speech, anyone in the world can be unintentionally be exposed to that speech. Second, the victim of online libel has more potential to be harmed without his cognizance. This is due to the limitless opportunities to defame when it has not been rendered with any physical constraints. Access to internet occurs privately without regards to its location even though it is a public forum. Thus, Joe's defamation could be seen by his uncle living in a different country too, without Joe ever knowing it. Exposure to online libel could be restricted by access to knowledge, keeping a technologically backward person from ever knowing that she is being defamed. Additionally, online libel can continue to harm its victims long after the post is made owing to caching and free storage. Third, the victim falls into the puddle once he finds out about defamation as he is not clear about redress

¹² *Supra*, note 4

¹³ *Supra*, note 5

¹⁴ Merriam-Webster's Dictionary of Law, 1996, Merriam Webster, Inc, www.m-w.com

owing to lack of transparency for control behind a particular website or bulletin board.¹⁵

Second form of harmful speech in the online realm is seen as obscenity which refers to any material that is, "extremely or deeply offensive according to contemporary community standards of morality or decency"¹⁶, such as paedophilic images or depictions of bestiality¹⁷. It is easy to justify how imposition of such material upon a viewer, violate her rights. But what's difficult to justify is the prohibition on intentional viewing of such material. One justification is that such prohibition can protect potential unwilling participants from being induced from producing such material.¹⁸ Another reason could be that laws reflect societal subscription that rally around some level of baseness or depravity to which all members of society are expected to comply.

One major difference between online obscenity and its real-world counterparts is, just like online libel is the vast audience it gives access to, very quickly and very easily. In the real world it is unlikely that a person would be exposed to child pornography unintentionally. However, it becomes highly probable that anyone who has ever used the internet has come across such content unintentionally. Finally, a liability for obscenity would depend on the part of society it occurs in reflecting that an Oxford graduate may not find offensive the same image that an orthodox member of a remote town does. The online world is not bound by any geographical

¹⁵ Giaglis George and others, 'The Economic and Social Role of Internet Intermediaries' [2002] 12(8) Information Systems Journal

¹⁶ Merriam-Webster's Dictionary of Law, 1996, Merriam Webster, Inc, www.m-w.com

¹⁷ Greg Holtz, 'Intermediary Liability and the Role of ISPs' [2005] 3(37) Dartmouth C Undergraduate JL

¹⁸ *Ibid.*

barriers but operates as a single community where the inherent relativism in the above definition is rendered inapplicable.

Thirdly, copyright violations online present a serious form of harmful speech, which, until recently, thrived largely unchecked.¹⁹ These violations involve a theft of someone else's priced possession along with the added onus of decreasing the incentives for creative production.²⁰ Content once rendered in digital form and then placed on the internet can be reproduced without much time and effort. Before the era of computers, music was copied by use of magnetized cassettes; however, the practice was limited in scope due to the time and energy requirement of buying blank cassettes and also the noticeable decline in quality from original to the copy. However, computers and internet allow not just a high-quality copy to be produced easily in a jiffy but also allows users to transport it anywhere in the world with the click of a button.

The eminent distinctions between the online hate speech and its real world counterparts have made it almost impossible to apply the same principles. What's of primary concern for this note is the extent to which intermediaries can be held liable in this realm of internet and user generated hate speech?

DELIBERATING INTERMEDIARY LIABILITY

An examination of the real world counterparts of the ISPs would help to resolve the conceptual muddle further assisting in formation of a liability regime. The real world analogues of the intermediaries would be distributors, publishers and conduits. The comparison would enable to

¹⁹ A & MRecords, Inc v Napster, Inc, [2001] 239 F3d 1004 (9th Cir.); ALS Scan v Remarq Communities, Inc, [2001] 239 F3d 619 (4th Cir.); Kelly v Arriba Soft Corp [2002] 280 E3d 934 (9th Cir.)

²⁰ Bryon Marchant, 'On-Line on the Internet: First Amendment and Intellectual Property Uncertainties in the on-Line World' [1996] 39(477) Howard LJ

fathom the relationship between the knowledge of the harm and the obligation and the competence to prevent it.

The creator acting as the disseminator is in normalcy considered to be liable for the harmful speech. The tables turn when the two are separated from each other. In the separation of the intermediary and the creator, the creator has commissioned the harm and the liability of the intermediary decreases but the intermediary none the less has provided the platform for commission of that offence.

Who is most liable can be reasonable assumed to be the publisher? The primary function of a publisher is to reproduce copies of the work for dissemination to a large audience. The publisher thus becomes first in line to have the responsibility to prevent the harm by shielding the audience from the harmful speech. In the present world an author has far less responsibility when she travels to present her work in lieu for the situation where her work is made available to a broad audience. The responsibility becomes greater because not only can the publisher deny an audience but can impose institutional punishment on the author leading to a deterrent effect for future harms. Another reason for high accountability of the publisher roots from the profits it gains by virtue of dissemination of work. If one gains profits from disseminating harmful work it is only reasonable that they should pay for the social costs as well.²¹

Next in line for accountability is the distributor. Where the publisher can refuse the audience, the distributor can refuse to sell the work in turn refusing the audience. However, this can only be expected when the distributor gains reasonable knowledge of the fact that the work it is

²¹ *Supra*, note 22

distributing is of harmful nature.²² Another point to decrease the liability of distributor is the profit it gains. Where the publisher is directly linked to the popularity of the audience the distributor is more remote. The job of the distributor is to simply transport and sell the work and would fairly gain the same profits over a period of time.

Third category of real counterpart of an intermediary is the common carrier of the information or the conduit. Similar to a telephone company service provider a conduit provides the means for transmission of the information. They usually do not have the cognizance of the information transmitted or retain any copy once the transaction is complete. This lowers the ability of the telephone company to prevent harm without real time knowledge of the harm being caused. In tandem works much of the internet, through intermediaries as conduits.²³ Even if the technological barriers allowed for copy of the information to be retained it would be difficult to prevent any harm in real time. Thus it entails a lower level of liability for conduits.²⁴

²² Thomas Lipinski, 'Sticks and Stones and Words that Harm: Liability vs Responsibility, Section 230, and Defamatory Speech in Cyberspace' [2002] 2(4) Ethics and Information Technology Journal 144

²³ *Supra*, note 22, at 9

²⁴ *Supra*, note 10