THE LIABILITY OF INTERNET SERVICE PROVIDERS (ISP's) IN REGARDS TO ONLINE DEFAMATION

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BEING A LONG ESSAY WRITTEN AND SUBMITTED TO THE FACULTY OF LAW, UNIVERSITY OF BENIN, BENIN CITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS (LL. B) OF THE UNIVERSITY OF BENIN, BENIN CITY

DECEMBER, 2022

CERTIFICATION

I, **Chukwunonye E Okafor**, with Matriculation Number **LAW1601125** do hereby certify that, apart from the references made to other persons' works, which have been duly credited, this entire project work is the product of my personal research and that this project has neither in whole nor in part been presented elsewhere for any other degree.

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We the undersigned, certify that this project work was written and completed by **CHUKWUNONYE E OKAFOR**, with Matriculation Number **LAW1601125**, in partial fulfilment of the requirements for the award of the degree of Bachelor of Laws (LL. B).

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DEDICATION

I dedicate this work to God Almighty. I also dedicate this work to Mr. Emmanuel Okafor (Of Blessed Memory). Also dedicating this work to my Dearly Beloved Mother Mrs. Anulika M Okafor, Also to My Beloved Father Dr. Michael Okeke; Also to My Big Brother Sir Chukwuemeka Okoh, for their undiluted care ,prayers and support .

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ISP – Internet Service Provider

SPPECH – Securing the Protection of Our Enduring and Established Constitutional Heritage

EU – European Union

US – United States

ATM – Automatic Teller Machine

ACHPR – African Charter on Human and Peoples Rights

EMLR – English Monthly Law Reports

TLR – The Law Reports

NWLR – Nigerian Weekly Law Reports

LFN – Laws of the Federation of Nigeria

NLR – Nigerian Law Reports

App. Cas – Appeal Cases

WACA – West Africa Court Of Appeal

AIDS – Advanced Immune-Deficiency Syndrome

HIV – Human Immune Virus

QB –Queens Bench

AC – Appeal Cases

ALL ER – All England Reports

K.B – Kings Beach

FWLR – Federation Weekly Law Report

ALL NLR – All Nigerian Law Reports

WLR – Weekly Law Reports

FNLR – Federation of Nigeria Law Report

NSCC – Nigerian Supreme Court Cases

NSCQLR – Nigerian Supreme Courts Quarterly Law Reports

QB – Ordinary Bench

HL – House of Lords

CA – Court Of Appeal

JSC – Justice of the Supreme Court

NCLR –Nigerian Criminal Law Reports

UBLJ – University Of Benin Law Journal

BBC – British Broadcasting Corporation

PDF – Paper Display Format

CDA – Communications Decency Act.

HCA – High Court Of Appeal

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ABSTRACT

Proliferation of internet technologies has given the average person, who was previously a mere customer of online content; the power to publish their own on various websites, blogs, consumer-evaluation platforms (such as Amazon, eBay, and Uber), news websites (through reader comments), social networking services (such as Facebook, Twitter, and Linkedin), media- sharing websites (such as Instagram and Youtube), and collaborative-writing projects (such as Wikipedia).

Some of these user contributions may be defamatory, and given the far reach of the internet and the relative permanence of materials placed on the internet, the results can be devastating. A veritable legal question, and subject of this work is: who should be liable for defamatory statements made online by users? Should it be the users, or the Internet Service Providers?

Keywords: Defamation, Internet, Liability, ISP.

CHAPTER ONE

1.0 General Background: Defamation

Defamation straddles the delicate divide where the protection of an individual's reputation and freedom of speech lie. The freedom of speech is provided expressly for, by the Universal Declaration on Human Rights, The African Charter for Human and People rights[1]. The Nigerian constitution provides: "Every Person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference[2].

The law, however curtails this freedom to protect the reputation of other persons. Therefore, where a person makes a statement which harms the reputation of other persons. He is liable in the tort of defamation. Defamation is concerned with injury to a person's reputation resulting from words, written or spoken by another[3].

A statement is said to be defamatory if it "…tends to lower the claimant in the estimation of right thinking members of the society generally, and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, and disesteem…"[4] generally; or which tend to make them shun or avoid that person[5]. The statement does not have to allege some moral turpitude or wrong doing on the part of the claimant and it can be defamation to allege some moral turpitude or wrong doing on the part of the claimant and it can be defamation to allege insanity or being the victim of a crime such as rape.

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1 African Charter on Human and Peoples' Rights (1981)

2 Section 39, Constitution of the Federal Republic of Nigeria (1999) as amended.

3 Kodilinye Gilbert, and Oluwole Aluko 1999, *Kodilinye and Aluko: The Nigerian Law of Tort, Ibadan Spectrum books limited*

4 Lord Atkin in *Sim V. Stretch (1936) 2 All ER 1237.* This definition was endorsed in the cases of *Skuise v. Grandada Television Ltd (1996)* EMLR 376 and *Bonnik v Morris and Another (2002)* UKPC 31

5 *MGM V Youssoupoff (1934)50 TLR 581* see also, *Vanguard Media Ltd. V Olafisoye* (2011)14 NWLR pt1267 207 at 233 paras A-B.

Learned authors[6] assert that a statement will be defamatory of a claimant if an ordinary, reasonable person who heard or read the statement would tend to think less of the claimant as a person; or an ordinary, reasonable person who heard or read the statement, the person would tend as a result to think that the claimant lacked the ability to do the job effectively; would tend to shun or avoid the claimant, or treat him as a figure of fun or as an object of ridicule.

To write or say about him something that will disparage him in the eyes of a particular section of the community but will not affect his reputation in the minds of the average thinking man, is not actionable within the law of defamation[7].

In Nigeria, it is settled law that a statement is defamatory where it has the following effects:

1. Where it lowers the claimant in the perception of right thinking members of society[8].
2. Where it cuts him off from society or exposes him to censor.
3. Where it exposes him or her to contempt or ridicule[9].
4. Where it causes other persons to shun or avoid him.
5. Where it discredits him in his profession or trade.
6. Where it injuries his financial credit[10].

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6 McBRIDE and Roderick Bagshaw, *Tort Law*, (Great Britain: 2001, Longman) page 321.

7 Kodilinye g. and O. Aluko. (supra) see also the case of *Tolley v Fry*(1930) 1 K.B. 469 at p. 479. This judgment was quoted with approval by Brett J.S.C in *Egbuna v Amalgamated Press LTD*(1967)1 ALL NLR 25 atp.29

8 *Youssouppoff v MGM pictures* (1934)50 TLR 581

9 *Parmiter v. Coupland* (1840), 6 M. and W. 105, at p.108 cited in Street on Torts, 1983, Butterworths, London, Seventh Edition, page 303.

10 Street, *On Tort* (12th ed. London: Oxford University Press 2007) p.305.

In the light of the above, an action for defamation will usually arise where a person believes that a statement by another person expressly or impliedly inputs something negative about their character.

1.1 Libel or Slander.

Defamation is generally divided into two ambits, libel and slander. Libel usually used to describe the more permanent media of publication and slander the more temporary.

Libel refers to written publications say in a newspaper or a picture and slander will refer to oral statements. According to the defamation law of Lagos State[11] Libel include radio broadcasts and movies and videos[12]. Libel is believed to be graver in its effects than slander. Therefore, it is generally thought that the more permanent forms of defamation would draw more in quantum of damages, however, this distinction is not watertight or without its own shortcomings.

"An oral statement made by a person in the presence of peers can do more damage than a publication in a disreputable newspaper[13]". Also, a spoken statement in a place where a person is generally well known will do more damage than a publication in a foreign newspaper[14].

Libel is usually generally actionable *per se*. that is, without proof of special damage[15] this means that whenever a libel is published, the law will presume that damage has been caused to the plaintiff and will award him general damages by way of compensation. In *Nthenda v*

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11 (1961) Cap 34 LFN 2004

12 Youssoupoff v MGM pictures (1934) 50 TLR 581

13 Paula Giliker and Silias Beckwith. *Tort: Sweet and Maxwell Textbook Series* (London: Sweet and Maxwell, 2008) 407.

14 Ibid

15 Kodilinye and Aluko (supra)

Alade[16] the defendant argued that an action brought against him should be struck out by the court on the grounds that the plaintiff could not show proof of actual damage done to him. The court held per Bello S.P.J that both malice and damage are presumed from the publication itself[17].

Where however, the proof that he has suffered actual damage, he will be entitled to recover a further sum in addition to general damages[18].

Slander may be action *per se* – that is without proof of damage; only in special instances where the courts feel safe in assuming that damage has been done due to the nature of the allegations that have been made. There are four instances where this could be the case:

1. Imputation of a criminal offence punishable by imprisonment[19]
2. Imputation of a contagious disease[20]
3. Imputation of adultery or unchastity to a female[21]
4. Imputation of general unfitness or incompetence[22].

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16 [1974]4 E.C.S.L.R 470

17 *See also Williams v West African Pilot* (1961) 1 ALL NLR 866

18 Kodilinye and Aluko (supra)

19 *Simmons v Mitchell* (1980)6 App. Cas 156.Pc

20 This with the rise of AIDS and other similar incurable diseases has to be topical, however the last reported case was in 1844(a veneral diseases, the court mentioned obiter that imputation of coughs and leprosy would also be defamatory). This may however not be the case anymore with the advancements recorded in medical science. Leprosy is now curable and even with diseases such as HIV and AIDS, non-stigmatization campaigns have taken deep root in a lot of climes, such that a person imputed with the disease may indeed not suffer discrimination.

21 Section1, slander of women acts 1891. One wonders if this position changed with the cause for equality of the genders. It's also instructive to note that public policy has shifted so much since the enactment of this law that this position may be quite outdated.

22 Where a statement suggests or expressly denigrates a person's ability or competence in an office or declares him unfit to pursue a trade. It may be actionable per-se. The rationale is that to denigrate s man's source of income is highly injurious. See, *African press LTD V Ikejiani* (1953)14 WACA 386. The exception however would include cases where the supposed action which is intended to reduce his reputation is unrelated to his present office or trade. For example, where a headmaster was said to have committed adultery with his cleaner (*Jones v Jones* 2AC 481) see also the case of *Onojioghofa v Okitipai* (1974) 4 ESCLAR 465. This exception was however narrowed by the *British Defamation Act of 1996* this position was maintained in the defamation Act 2013 to include words likely to disparage the claimants' office, profession or calling.

1.2 The Requirements of Defamation

In any case of defamation, the plaintiff must prove three things which include the following:

a. That the words complained of were defamatory[23].

b. That the words referred to him[24].

c. That the words were published to at least one person other than the plaintiff[25].

1.2.1 The Words must be Defamatory:

The statement is defamatory if it harms the plaintiff's reputation. Determining precisely when a person's reputation is harmed, is not in itself, an exact science. Steve Hedley enthused in his book[26] That "…defamation is the most antique part of the law you are ever likely to meet. The law is byzantine, the procedure archaic and the remedies draconian."

The classic is definition however, of defamatory words was laid out in the case of *Slim v Stretch*[27], where statements were deemed defamatory that "seemed to lower the plaintiff in the estimation of right thinking members of the society generally". This definition is further extended in the case of *Youssouppoff v MGM*[28] pictures to include situations where a statement caused the plaintiff to be "shunned and avoided"[29] as a result[30].

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23 *Monson v Tussads* (1984) I QB 671, See also: *Emmanuel Bekee & Ors vs. Friday Ebom Bekee* (2012) LPELER – 21270 (CA)

24 *Tolley v Fry & sons* (1931) AC 333, also, *Gillick v BBC*, an advertisement on television inadvertently referred to a Tolley, the court held that reasonable viewers would believe that it referred to the claimant. See also *Mr. Orji Asaa v Mr. Frank Ojah* (2015) LEPELR-24278(CA).

25 *Theaker v Richardson* (1962) all ER 229

26 Steve Hedley. *Tort*.6th ed, London: Oxford University Press 2008.

27 (1936) 2 All ER 1127 per Lord Atkin. *See also Complete Comm. Ltd v. Onoh* (1998) 5 NWLR (Pt.549), p.197 CA

28 (1934)50 TLR581

29 *See also Guardian Newspaers Ltd v Ajeh* (2011)10 NWLR Pt 1256 p602 Para A-B

30 Acts like holding up an empty purse Cooks v. Cooks (1814) 2 M&G 110 also obscene sign language as in the case of Gutsole v. Mathers (1934) 50 TLR 587.

A common thread that runs through most of the definitions is right "right thinking members of society" similar to the test of the "reasonable man". This definition aims at providing a pseudo objective litmus to elevate the defamatory value of words pleaded by the claimant to be injurious to his reputation. The "right thinking member of society" is "neither overtly suspicious nor unduly naïve"[31].

This definition is not without its own problems, in this case of *Bryne v Deane*[32], a verse which had been placed on the notice board of a golf club which had alleged that a member of the club had reported a gambling incident to the police and "given the game away" was held no to be defamatory, although it indeed reduced the plaintiff in the eyes of his fellow golfers and exposed him to ridicule. The Court of Appeal held that the statement could not have reduced the plaintiff in the eyes of "a good and worthy subject of the king" and therefore did not provide any remedies and somewhat countered difficulties suffered by the claimant as irrelevant. This is one of the challenges with the application of the "right thinking members of society" test.

Another difficulty is with the definition of defamatory words is the changes that occur in societal morals. While referring to someone as a homosexual or a fornicator used to be a grave offence, it may no longer be so given the shifting views of societal policies and morals. Notwithstanding this however, in the case of *R v Bishop*[33], The court held that in spite of the legalization of homosexuality in the sexual offences Act of 1967. Society's moral views dis not necessarily change and thus in 1975, many still saw homosexuality as immoral. An

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31 *See: Gatley, On Libel and Slander* (12th ed., London: Sweet & Maxwell 2013) 315

32 [1937]1K.B.818 at 833.

33 [1975] QB 274 AT 281

extension of this reasoning would mean that to refer to someone as a homosexual would be defamatory still, notwithandstanding the law[34].

The (English) defamation Act 2013 creates a new hurdle to determine whether a statement is defamatory. It requires that "a statement is not defamatory unless its publication has caused or its likely to cause serious harm to the reputation of the claimant"[35].

In Nigeria, the court has through a long line of cases[36] provided a litmus to determine the defamatory value of words brought before it.

To do this, the court has to:

i. Consider the natural and ordinary meaning of the words and the context in which a reasonable man would understand it[37].

ii. Accept only alternative constructions of the words that would be fair in the understanding of persons of ordinary intelligence who are neither " usually suspicious nor unusually naïve"[38]

iii. Reject any meanings which can only be the result of some strained, forced or utterly unreasonable interpretation.[39]

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34 This means that referring to nay body in Nigeria as homosexual, or using any words that would infer that same meaning would, without any doubts be defamatory, given the Same Sex Marriage Prohibition Act of 2013, which, amongst other things, criminalizes same sex relations.

35 Defamation Act 2013, Section 1(1).

36 *Chief Nya Edim Ekong v. Chief Asuquo E. Otop & Ors* (2014) LPELE-23022(SC); *Okolo v. Midwest Newspaper Corportion* (1997) 1 SC 33, *Okafor v. ikeanyi* (1973) 3 – 4 S.C.99.See also: *Sketch Publishing Company Ltd & Anor v. Alhaji Azees A. Ajagbemokeferi* (Supra), *Offoboche v. Ogoja Local Government* (2001) FMLR (Pt.68) 1051.

37 *Omo-Osagie* v. *Okutubo* (1969) 2 All NLR 175 at 179 per Adefarasin J.

38 *Omo-Osagie v. Okutubo* (supra).

39 *Sketch Publishing Company Ltd v. Ajagbemokeferi* (supra).

iv. The whole and not a part of the article must be considered in reaching the conclusion as to the nature of the words, defamatory or otherwise.[40]

It should be noted that it will not be a defence that the spoken words were not intended to be defamatory. The purport of the law is to protect the reputation of the citizens and as such it will not be sufficient to protect them only from intentional barbs cast their way but also from unintentional statements what would harm their estimation in the minds of right thinking members of the society.

It will also not be a defence if the defendeant claims that the persons to whom the statement was made did not believe the (defamatory) statement to be true.

1.2.1.1 Vulgar abuse

Where a statement is made in the heat of an argument or in the course of obvious anger, the court may disregard such statement *Mr. Orji Asaa v Mr. Frank Ojah (OW 325 of 2011) [2015] NGCA*. There is a fine line however. The courts may be prepared to overlook statements made in the heat of moment which the hearers must have understood to be mere abuse. However, this rule may not apply ton written comments. The courts are wont to believe that the writer must have sufficient time to cool down his anger before he wrote the article or comment and as such would impute malicious intent to him[41].

Defamation also does not only apply to direct attacks on the plaintiff's reputation. If it were so, then the defendant may rely on just cover attacks safe in the knowledge that he is safe from the arms of the law, as the claimant cannot sue if that were the case, even though the audience fully understands what is being alleged and the claimant is exposed to ridicule.

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40 Chief Nya Edimv. Chief Asuquo E. Otop & Ors (supra).

41 A veritable question is if it is vulgar abuse where a person is spoken about disparagingly while on a television or radio show as a panel discussant? Also do tweetfights fall under this category?

To protect the claimant, the law also recognizes the possibility of veiled attacks which are generally referred to as "innuendo".

1.2.2 The Words must refer to the Defamed Persons:

Of course it goes without saying that if the claimant is mentioned by name, then the statement must refer to her, however where her name is not expressly mentioned, the court takes recourse to the reasonable man's test. In the British case of *Morgan v. Odhamas press Ltd*[42], the claimant alleged that a newspaper article in the *Sun* which had reported a girl kidnapped by "a dog-doping gang" had defamed him. The girl had been at Mr. Morgan's flat at the relevant time and Morgan produced a small number of witness who had seen the two together and who claimed that, having read the article, they assumed it to suggest that Morgan was part of the dog-doping gang. The majority of the House held that on the facts there was sufficient material for a jury to find that the statement referred to him. It was not necessary to find a specific "pointer" in the article, or a "peg" on which to hang such a reference. Although a careful study of the article would have suggested that it could not refer to Morgan, it was held that the ordinary, reasonable reader did not have the forensic skills of a lawyer. The majority of the house held that, taking account of the sensationalist nature of the article, and the fact that the average reader was likely to read the story casually, gaining a general impression of it, ordinary reasonable person would on the facts , have drawn the interference that the article referred to Morgan[43].

It is irrelevant whether the defendant intended to refer to the claimant. Provided reasonable persons would find the statement defamatory, and refer to the claimant, the defemant who

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42 [1971] 1 WLR 1239 at 1245 and 1269 - 1279

43 Note the contrast with the approach taken by the House of Lords in the more recent case of Charleson v. News Group Newspaper Ltd (1995) 2 A.C, 65. In Nigeria, the intention of the defamer is not relevant. ACB Ltd v. Aqugo (2001) FWLR (Pt.42) 38 at 35.

publishes the statement will be liable. *Hulton & Co. v. Jones*[44] is the classic sample. The defendant newspaper had published a humorous account of a motor festival in Dieppe, featuring the antics of a fictional churchwarden from Peckham called Arteus Jones. Unfortunately for the newspaper, this was also the same of a barrier, who sued for libel. The real Mr. Jones was not a churchwarden, had not gone to the Dieppe festival and did not live in Peckham, but friends of his swore that they believed the article was referring to him. The House of Lords held that there was evidence upon which the jury could conclude that reasonable people would believe Mr. Jones was referring to and it was irrelevant that the defendant had no intention to defame him.

It is of no assistance to the defendant that the words could have referred to someone else. In *Newstead v. London Express Newspaper Ltd*[45], a report of the conviction for bigamy of a Harlod Newstead , aged 30, of Camberwell, London provoked on action for defamation from another Herlod Newstead who also lived in Camberwell and who was about the same age. The Court of Appeal upheld his claim against the newspaper.

In Nigeria, the requirements were explained by Fatayi-Wiliams J.S.C. in *Dalumo v. The Stretch Publishing Co. Ltd*[46] thus:

> *It is an essential element of the cause of action for defamation that the words complained or should be published 'of the plaintiff.'... It is not necessary that the words should could be understood by reasonable people to refer to him, and this is the test of whether words that do not specifically name a plaintiff refer to him or not is this: are the words such as, reasonably in the circumstances, would lead persons who knew the plaintiff to believe that he was the person referred to?*

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44 (1910) A.C.20. The Faulks Committee recommended no change in the rule of *Hulton*

45 [1940] 1 k. B. 377

46 (1972) 1 All NLR 130

In *Skye Bank plc. V. Akinpelu,* [47]the Appellants pasted an auction notice on the Respondent's property when he was in no way indebted to the 1st Appellant. The Respondent contended that the action of the Appellant amounted to trespass and defamation. He called one witness, Ayodele Akinbiyi, who gave evidence that he saw the auction notice which did not have the name of the respondent, but had the name of one Oshinowo as debtor. Allowing the appeal, the Supreme Court, through His Lordship, Ogebe, JSC held that' from the plaintiff's own showing, the offensive publication did not refer to him at all. It could not therefore be possibly defamatory of him.

1.2.3 Words must be published

It is not only relevant in providing defamation that the defendant made defamatory statements which referred specifically to the plaintiff. It is also quite important to prove that the statement was published to a third party other than the plaintiff. So it is not enough that a letter was sent to the plaintiff making ghastly accusations against her, it would not harm her reputation although she may be distressed by it. It is only when it is seen by a third party (published) that the claimants reputation is harmed[48]. Statements made in private to the claimant, although distressing, may not give rise to a claim in defamation (maybe assault or other torts) publication to the plaintiff alone may not be actionable because the tort of defamation protects a person from injury to his reputation among other people, and not from injury to his feelings about himself, thus, where the communication was made directly to the plaintiff and to no-one else, no action is maintainable against the writer on that account. In the case of *Okotcha v, Olumese*[49]*, Adefarisin J. stated:*

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47 (2010) 9 NWLR (Pt.1198)181

48 In Criminal Libel however, publication to the prosecutor would suffice

49 (1967) FNLR 174

> *In order to succeed in an action for defamation, a plaintiff must establish that the libel was communicated to some persons other than the plaintiff himself. In the case in hand it is quite clear that although the certificate was headed 'To Whom It May Concern', and that it was made available only to the plaintiff himself…. Regarding the communication by the plaintiff to Mr. Hayden of the character certificate, I am of the view that it was not the act of the first defendant and no action is maintainable against him on that account…. The communication was made directly to the plaintiff and to no-one else.*

Malice is not necessary to prove publication. A statement made without any malicious intention would also be categorized as defamatory if it harms the plaintiff's reputation and all the requirements for proving defamation are met.

It is not sufficient as a defense to state that the publication was inadvertent, such as where a letter was sent to a person without the intention to communicate said statement to a third party, such as in the case of *Theaker v Richardson*(supra). In cases such as this, the court applies the test of reasonable foresight, such as in *Theaker's* case where the court held the defendant liable for defamation because it is reasonably foreseeable that a spouse will read a letter addressed to the other spouse, especially as in the instant case it was packaged similarly to electioneering materials. In *Huth v Huth*[50] the case was however different as the court held that it was not foreseeable that a butler would open a letter and thus, the defendant was not liable.

Under common law, the rule is that each publication is fresh and separate tort. An author is solely liable for a publication to the publisher, where the publication is made by the author and publisher jointly and severally to the printer, the author and the publisher are jointly liable. Therefore it is open to the defamed person to sue in respect of the separate publication set out[51]. Primary publishers however are strictly liable; she is held liable for the greater harm done to the claimant when the statement is repeated especially in the following cases:

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50 [1915]3 K.B. 32

51 *Ogbonnaya v. Mbalewe* (2005) 1 NWLR (Pt.907)252 CA.

1. Where the defendant requests or authorizes the repetition
2. Where the defendant means it to be repeated
3. Where the repeaters do so because they feel morally bound to do so.

In practice however, the defendant is held liable where repetition is a natural consequence of the defendant's action. As in the case of *McManus v Beckham*[52]. While in the claimant shop Victoria Beckham observed loudly about signatures on her husband's pictures that they were forged and she advised customers not to buy them. The press reported the statement quite widely, the court held that being a celebrity she knew that her statement was going to be widely reported and thus liable for the subsequent publications.

Secondary publishers are liable unless in cases where they prove that they had taken reasonable care in relation to the statement, and did not know, and had no reason to believe that they were contributing to the publication of defamatory statement.

It is worthy of note that, a defamed person's general character or reputation need not be transparently stainless, unimpeachable and without any blemish before he can successfully maintain an action in defamation[53].

1.2.4 The words be placed verbatim

It is of necessity in an action for defamation either in libel or slander, that the actual words complained of and not merely their substance must be set out verbatim in the statement of claim for it is on the perusal of the actual words complained of as pleaded that the court will determine whether or not the words convey defamatory meaning[54]. Whether the action is

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52 [2004]4 All ER 1008

53 *C.R.S.N Corp v. Oni* (1995) 1 NWLR (Pt.371) 270.

54 *Akin Olafia v Gabriel Adedeji Aina* (1993) 4 NWLR part 286 page 192 at 200 paragraph H, *Chief S.O.N Okafor v. D.O Ikeanyi* (1979) 3-4 S.C 99, at P.103, *Sketch Publishing Company Ltd v. Ajagbemokeferi* (1989) 1 NWLR (part 100) 678 at 695.

libel or slander, a plaintiff must of necessity plead in verbatim in his statement of claim the exact words uttered or written by the defendant notice of the real cause of action he is coming to meet arid to give him opportunity to react to it[55].

In cases of libel, pleadings are of tremendous importance, and so plaintiff who claims that an article is libelous of him must reproduce the whole article verbatim or the particular passage he complains of in his pleadings. No matter how long the article is, it must be reproduced[56].

The plaintiff has a duty to state the language of communication of the offensive words and the translation of the same in the language of the Court which is English in Nigeria, if the original language of the defamatory words was different from the English language. In the case of *Oruwari v. Osler*[57], Chukuma- Eneh JSC, held that:

> *Where the libel or slander was published in a foreign language, it must be set out in the statement of claim and followed by a literal translation. It is not enough to set out a translation without setting out the original or vice versa. The pleader should be include an allegation to the effect that the translation is a true interpretation of the foreign language used*[58].

1.3 Onus of Proof of a Defamatory Statement:

The onus of proof of a defamatory statement is on the defendant to prove the truth of a defamatory statement rather than for the claimant to prove is untruth[59].

The onus is on the claimant, in an action for libel, to show that the published words complained of are defamatory or that convey a defamatory imputation. However, where the words complained of are defamatory in their natural and ordinary meaning, the claimant has

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55 *Chief S.O.N Okafor v. D. O Ikeanyi & Ors* (1979) 3-4 S.C 99, at P.103.

56 *D.D.G.A Pharmaceuticals Ltd. V. Times Newspapers Ltd* 1973 IQB p.21

57 (2012) LPELR - 19764

58 See also: *Okafor v Ikeanyi & Ors.* 1979 12 NSCC 43.

59 *Akomolafe v. Guardian Press Ltd* (2004) 1 NWLR (Pt. 853) 1 CA.

no legal duty to lead any evidence to show additional defamatory meaning as understood by persons possessing some particular facts[60].

It should be appreciated that proof of libel would be easier, upon production of the published offensive document by the plaintiff for inspection and assessment by the court. That cannot be said of slander, which requires the pleading and capturing of the exact words or gestures complained of, and leading evidence to establish the same. And the plaintiff must be present when the alleged slanderous words are spoken, so that he does not enter it as "hear-say" evidence[61].

1.4 Defamation of a company or business[62]

It is settled law that just as an individual or a human being may be defamed, a trading corporation or company, naturally, has a trading character, the defamation of which may adversely affect and may, indeed ruin it[63].

Accordingly, a corporation or company may maintain an action for libel or slander in respect of any words which are calculated to injure its reputation in the way of its trade or business[64].

This, it may rightly do with or without any proof of special damage. So, where a statement is made with regard to the mode in which a trading corporation or company conducts its business such as to convey to right thinking members of society generally that it conducts its business in a dishonest, improper or in-efficient manner, the law is the same as in the case of

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60 *V.M. Iloabachie Esq. v Benedict N. Iloabachie* (2005) Vol. 22 NSCQLR 672 per S.A. Akintan JSC at pages 712 - 713

61 See the case of *Emmanuel Bekee & Ors vs. Friday Ebom Bekee* (2021) LPELR 21270 (CA)

62 Would internet business qualify to be protected by defamation laws?

63 *South Hetton Coal Co. Ltd v. North-Eastern News Association Ltd.* (1894) 1 OB. 133 at 145(CA)

64 *Linotype Co. v. British Typesetting Machine Co. Ltd* (1899) 81 LT 331; 15 TLR 524 (HL) *Slazengers Ltd. V. Gibbs & Co.* (1916) 33 TLR 35.

an individual or human being, and the company can maintain an action without proof of social damage[65].

1.5 Reading or Broadcasting of Defamatory Material to an Audience:

Under the common law, a radio broadcast statement which is read from a written script amounts to libel, while a radio broadcast of a defamatory statement which is broadcast without a written script adlib. This common law position appears to be the position in Nigeria. In *victor Mukete & Ors. V. Nigerian Broadcasting Corporation & Anor*[66], the court held that, in the absence of any evidence that the oral broadcast made by the 2nd Respondent was read from a script, if the defamation is actionable at all it must be so as slander, not as libel[67].

- Where a defamatory material in writing is published by reading it to the audience and the audience perceived that, what was being said was read from a document that would be libel as much as where a document was passed round to be read by each member of the audience[68]. Ayoola JSC observed in the case of *Dr.Mathias Oko Offoboche v. Ogoja Local Government & Anor*[69]. trial judge in this case shows that the witnesses to whom the defamatory materials were Considerations of justice should not permit a distinction to be drawn for the purpose of formulation of a cause of action between a document being passed round to be read by each and one being read to the hearing of all. If any distinction is to be drawn, it should in my opinion, be limited to the question of damages, since a person to whom a libelous material has been given has an opportunity to read and re-read it which someone to whom it was merely read had not got. The evidence accepted by the read knew that they were read from what was written. Such publication was in my option libel and not slander.

However, it is instructive to note that, under the Defamation Law of Lagos State, a broadcast by wireless telegraphy is libel. Section 3 of the law provides that:

> *"For the purpose of law of libel and slander, the broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form"*

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65 *Bassey Edem & Anor. V. Orpheo Nigeria Limited & Anor*. NSCQLR Vol.15 (2003) 196 per Iguh, JCA

66 (1961) ANLR 502

67 In application of this rule to internet defamation, is a person liable for keeping a screenshot of a defamatory statement and redistributing same? What if he takes a picture of a defamatory statement in a newspaper, will it draw less fire than where he types the contents of the newspaper and posts it?

68 Dr. Mathias Oko Offoboche v. Ogoja Local Government & Anor. (2001)7 NSCQLR 82

69 (Supra) Per E. O. Ayoola JSC.

The law defines "broadcasting by means of wireless telegraphy" as "publication for general reception"[70]

1.6 Criminal Defamation.

Defamation can be both a tort and a criminal offence. The criminality of defamation in Nigeria is backed by the provisions of the criminal and penal codes. It is important to note that the Nigerian criminal jurisprudence does not. recognize the difference between libel and slander.

The Cyber Crimes (Prohibition)Act,2015 in section 24 thereof, further provides a formidable framework for combating prohibition, prevention, detection, response, investigation and prosecution of cybercrimes; and for other related matters makes it a criminal offence for any person who knowingly or intentionally "sends a message or other maker by means of computer systems or network that:

(a) is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent; or

(b) he knows to be false, for the purpose of causing annoyance, inconvenience danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, ill will or needless anxiety to another or causes such a message to be sent.

The provisions for criminal defamation has been direly criticized as a remnant of the regime of oppression and tyranny and should not he found in a democratic state[71]. This position was in recognition of the fact that citizens could not promote accountability and transparency in government without access to information, the fundamental right of every citizen to freedom of expression, including the right to hold and impart ideas was enshrined in the Constitution. But some public officers have continued to use the machinery of the State,

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70 Would this law apply to, say, a tweet, or a facebook post?

71 Femi Falana: *Illegality of ctriminal libel in Nigeria* Vanguard newspaper October 27, 2022. Accessed 12/10/ 22. www.vangauardnewspapers.com

albeit illegally, to intimidate their political opponents by applying the provisions of anti-media statutes[72].

Thus, in *Arthur Nwanko v. The State*[73] the defendant was charged with sedition under section 51 of the Criminal Code before an Onitsha High Court for publishing a book which had exposed corrupt practices under Governor Jim Nwobodo of former Anambra state. The appellant was convicted and sentenced to one-year imprisonment. But the conviction and sentence were set aside by the Court of Appeal on the grounds that the offence of sedition is illegal and unconstitutional, speaking for the court, Olatawura JCA held inter alia:

> *We are no longer the illiterates or the mob society our colonial masters had mind when the law was promulgated…To retain S.51 of the Criminal Code, in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our Constitution will be a deadly weapon to be used at will by a corrupt government or a tyrant…Let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose.*

1.6.1 Criminal Defamation Liability

Since the judgment of the Court of Appeal in *Nwankwo v. The State*[74] is blinding on all authorities and persons in Nigeria it is submitted that the resort to criminal libel and sedition by public officers to settle scores with critics and political opponents is illegal in every material particular. However, public officers who feel offended by any defamatory publication are not without remedy. They have been rightly advised by the Court of Appeal to defend their reputation by suing for libel in a court of law.

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72 Ibid.

73 (1985) 6 NCLR 228

74 Ibid.

In *Mallam Ismaila Isa & 5 Ors. V. President* [75]the Federal High Court struck down several provisions of the Nigerian Press Council Act on the grounds that they were censorial and capable of being used by the authorities to restrict the right to freedom of expression guaranteed by Section 39 of the Constitution. There are a number of defences to a defamation action including fair comment, justification (that is, that the statement is true), an offer to make amends and privilege (absolute and qualified).

[75] (2009 -10) CHR 166

CHAPTER TWO

INTERNET DEFAMATION

2.1 What is internet defamation?

To define internet defamation, we will first unpack the component words: Internet, and defamation. The internet is a globally connected network system facilitating worldwide communication and access to data resources through a vast collection of private, public, business, academic and government networks. It is governed by agencies like the Internet Assigned Numbers Authority (or IANA) that establish universal protocols. The terms internet and World Wide Web are often used interchangeably, but they are not exactly the same thing; the internet refers to the global communication system, including hardware and infrastructure, while the web is one of the services communicated over the internet. The internet originated with the U.S. government, which began building a computer network in the 1960s known as ARPANET. In 1985, the U.S. National Science Foundation (NSF) commissioned the development of a university network backbone called NSFNET. Since then, the Internet has grown and evolved over time to facilitate services like:

Email.
Web-enabled audio/video conferencing services.
Online movies and gaming. Data transfer/file-sharing, often through File Transfer Protocol (FTP).Instant messaging.

Internet forums.
Financial services. Defamation refers to "a publication without justification or lawful excuse which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule[76]". The internet is a global network comprising many voluntarily interconnected

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[76] Parmitter v. Coupland (1840)6 m & W108, W. V. H Rogers, Winfeld and Jolowicz on Tort 17th ed (London, sweet and Mawell 2006)p. 315
Bankole Makinde v. Godwin Omaghomi (2011) 5 NWLR 9pt 1240) p249 at 251. Vanguard Media Limited v. Otunba Olafisoye (2011) 14 NWL (pt.1267 207 at) 212, Sim v. Stretch (1936)2 ALL ER 1237.

autonomous networks. It operates without a central governing body[77]. "a means of connecting a computer anywhere in the world via dedicated routes and servers"[78] . It is at once a world-wide broadcasting machine, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location[79].

Internet defamation amounts simply to any defamatory statement published on the internet[80]. Meaning that;

1. The Statement; spoken or written, must be defamatory[81];

2. That the defamatory statement referred to the claimant[82] and;

3. That they were published on the internet[83].

Internet defamation is a negative false statement of material fact published on the internet[84]. With the internet, defamatory statements can be published online to a worldwide audience,

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77 *Brief History of the Internet.* http://www.internetsociety.org Accessed on 10/10/22.

78 Internet, available at http://www.businessdictionary.com/definition/internet.html Accessed on 10/10/22

79 Aladokiye E. Gabriel-whyte, "Developing a Legal Framework for internet Defamation". Available at www.iaset.us accessed on 10/10/22

80 Online Defamation and Your Rights; Defamation and its rise on the internet, available at http://www.reputationhawk.com /onlinedefamation.html accessed on 10/10/22.

81 The (English) Defamation Act 2013 creates a new hurdle to determine whether a statement is defamatory. It requires that "a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. See the case of Cooke v MGM

82 Online Defamation and your rights: Defamation and its rise on the internet, available at http://www.reputationhawk.com/online defamation.html accessed on 10/10/22.

83 Internet Defamation, available at http://www.information law.com/internet Defamation.html accessed on 10/10/22. See also: Aladoikiye E. Gabriel –Whyte. "Developing a legal Framework for internet Defamation". Available at: www.iaset.us accessed on 10/10/22

84 Internet Defamatiion, Available at http://www.information law.com/internet Defamation. accessed on 10/10/22.

making internet defamation potentially disastrous to one's reputation and business[85]. Undoubtedly, the possible reason for the rise in internet defamation is perhaps owing to the near-infinite information capacity of the internet[86], and low transaction and market entry costs making it possible for anyone who wishes to publish anything to publish[87].

The internet also came, fitted with certain peculiarities such as the possibility of anonymous communication. [88]Prior to the internet, anonymous conversations were nearly impossible; there was no technological infrastructure to enable such contact between two people, let alone networks of people carrying on interlocking conversations. Now there are populous communities in which people can, unidentified solicit advice, make friends and also "form identities[89]".

.This global network connecting millions of computers. With more than 100 countries linked into exchanges of data, news and opinions. According to Internet World Statistics, as of December 31, 2011, there was an estimated 2,267,233,742 Internet Users Worldwide[90]. The number of internet users represents 32.7 per cent of the world's population[91].

It makes instantaneous global communication available cheaply to anyone with a computer and an internet connection. It enables individuals, institutions and companies to communicate

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85 Aladokiye E. Gabriel Whyte, "Developing a Legal Framework for i8nternet Defamation" Available at www.iaset.us accessed on 10/10/22.

86 Etudiaiye, A.M, "Salient Principles of the law of Defamation" in confluence Journal of Jurisprudence and International Law. Available at http://www.unilorin.edu.ng/publications acessed on 10/10/22

87 Ibid

88 B. Leiner, v. Clark, R. Kahn, L. Kleinrock, D. Lynch, J.postel, L. Roberts and S. Wolfff, Beief History of the Internet, (n.d) available at : http:// www:// www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet accessed 10/10/22.

89 Ibid. Consider also whether these alternative identities recognized by law and protected?

90 Definition of internet, available at: www.webopedia.com/TERM/Internet.html accessed 10/10/22.

91 Ibid at 10. This number would have greatly increased by now.

with a potentially vast global audience. It is a medium which does not respect geographical boundaries[92]. The utility and essence of this technology notwithstanding, one common truth about it is that; "no one actually owns it.[93]"

For nearly 30 years, the Internet has been viewed as a way to expand freedom of speech globally. Yet as other mass media did, the Internet has generated its own set of legal issues for free speech in cyberspace. These issues include, but are not limited to; cyber bullying, propositioning, pornography[94], cyber fraud and of course defamation and hate speech. A document called "Hate Directory" shows an explosive increase in the number of hate websites in the United States in recent years[95].

Lord Bingham of Cornhill[96] said the law of defamation in the context of the Internet would require "…almost every concept and rule in the field… to be reconsidered in the light of this unique medium of instant worldwide communication".

The internet is unlimited, thus, there is no control whatsoever over the extent, nor are there geographical boundaries to the reach of any material put on the internet, David Brainbridge quipped in his book[97] "…while in traditional forms of publishing, a publisher exerts a great

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92 Mathew Collins. The Law of Defamation and the Internet (Oxford University Press, 2001) Para.

93 B. Leiner v. Clerf, D. Clark, R.Kahn, L. Kleinrock, D. Lynch, J. Postel, L. Roberts and S. Wolff, Brief History of the internet, (n.d) available at: http:www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet acessed 10/10/22.

94 Jeremy Harris Lipschulz, Broadcast and Internet Indecency: defining free speech 119-20 (2008).

95 The "Hate Directory" contains a 170- page list over 2,500 directories of "blogs, web rings and racist games available on the internet, as well as racist friendly web hosting services" such as "Celtic Blood white Pride World Wide" and "Knights of the Ku Klux Plan." See Raymond A, Franklin, the Hate Directory, http://www.hatedirectory.com accessed on 10/10/22.See also, Michel Rosenfold, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, 24 CARDOZO.REV. 1523, 1530 (2003)

96 Foreword to Collins, M, The law of Defamation and the internet, Oxford University Press, 2001.

97 David Bainbridge, Introduction to Computer Law, 5th ed.(England: Pearson Longman) page 328

deal of control over where a copies of his publications were made available. Publication on the internet is different in that it is, potentially, publication to the entire world…"

Furthermore a publication on the internet is also timeless as a person can find articles from as many as 20 years ago just by a single search "While comments made in newspapers and even on the TV have a limited shelf life, those made on the internet can remain on the websites and even in the cache of search engines for many more years…"[98] perhaps forever.

Against this background and with the increase in defamatory comments online, governments. judges and courts around the world have attempted to extend their own laws and regulations to include comments made online as well as in other more traditional forms of media. It is no doubt admitted that even around the world, there are very few Acts that are made to deal specifically with online defamation. These acts however, are faced with the herculean task of stretching the long arms of the law to reach beyond all the different tiers of escape availed by internet defamation, and truly serving the purpose defamation laws are supposed to serve~ protecting the reputation of the average citizen[99].

2.2 Challenges with internet defamation

From the foregoing, it is clear that internet defamation comes with a few nagging questions. These challenges will be examined below,

i. The Classification of Internet Defamation
ii. Anonymous and Pseudonymous Posts
iii. The rule of multiple publication
iv. Jurisdiction and forum non conveniens

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98 Aladokiye Emmanuel Gabriel-Whyte, Towards Developing a legal Framework for internet Defamation. www.researchgate.com. Accessed 10/0/22.

99 Celebrities Courtney Love and Kim Kardashian were used for their libelous Twitter posts. For a discussion of these "Twibel", see Julie Hiden, should the law Treat Defamatory Tweets the same way it treats printed Defamation?, Justia.com, Oct. 13, 2011, http://verdict.justia.com/2011/10/03/should-the-law-treat-defamatory-tweets-the-same-way-ittreats-printed-defamation accessed on 10/10/22.

v. De minimis rule.

2.2.1 Classification of Internet Defamation

The classification of fork info the ambits of libel and slander is to enable the courts ascertain, in each case before the temple of justice the extent liability of the tort feasor and in ascertaining the measure of damages accruable to the plaintiff. This is based on an unspoken assumption that libel, being more permanent, dues more cumulative damage on the reputation of the claimant, should attract more punishment than scandal which is a passing statement. Internet defamation, does not lend itself to such classifications are statements made in a missent email attract more punishment than that made on social media? Does the casual tone of social media mitigate the gravity of otherwise serious content which may infact be defamatory? how do you classify a statement made, say, on twitter where tweets are allowed just 140 characters at a time, to another made; say on a blog where a person is not bound by the constraints of length. Or worse still a YouTube post, where a person could post videos and text too for good measure. Should all these classes of defamation bear equal punishments and equal treatment from the law?

Traditional categorization of defamation obviously did not foresee the peculiarities of the internet and may in fact find itself overwhelmed in the face of all the various forms that communication on the internet can take.

Further compounding the quagmire of classification is that, when information is pasted on the internet, it has a level of permanence. Statements placed online could be retrieved almost at any time and may form ground for further action in defamation[100]. This is added to the fact that communication banns cannot be enforced online[101].

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[100] There are now professional service to clean up a person's reputation online, usually for a small fee. Could a subscription to this service be awarded by courts in lieu or in addition to damages?

[101] The Onatario Court of Appeal in Toronto Star Newspapers Ltd v. Canada (2009) ONCA 59 (Can LII)

On classification, there appears to be a position reached in the United States by the New Jersey Supreme Court in *W.J.A v. D.A*[102] where the court held that the presumed damages doctrine applies and is recognized on internet related defamation. The court however recognized that only nominal damages are to be awarded precluding compensatory damages absent proof of actual harm. The claimant is however allowed to prove actual damage which is difficult though as reputational harm is extremely hard to measure.

It is instructive to note on this point that certain writers have taken to referring to internet defamation as internet libel.

2.2.2 Anonymity' and Pseudonymity

The primary question to be determined from the outset in defamation and indeed any action in court, is to consider who the defendant is. In Traditional defamation, the answer to this question is immediately obvious. However with online defamation, it's a totally different ballgame. Persons often post communications anonymously and with pseudonyms. E-mail addresses or screen names[103] handles[104] or profile pictures are hardly if ever constituted of the perpetrators name.

Many people who post damaging content online believe that web anonymity is a free speech right or that it makes them immune from prosecution. [105]The digital age and its open invitation to publish, presents not only an entirely novel opportunity for the creation and dissemination of content by vast multitudes who were never before able to do so, but also a difficulty in arriving at who actually posted what. Tracing an individual that has posted a

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102 A- 77- 1- (10/10/22). Found on gdn@gdnlaw.com (accessed on 10/10/22).

103 See http:www.informationlaw.com/internet-Defamation.html accessed on 10/10/22.

104 The equivalent of Profile Name, on some social media and media sharing sites, like instagram and twitter.

105 Ibid

defamatory comment can prove very difficult[106] and in some cases, practically impossible. It is only when one is able to identify the defendant that action "may" commence.

The situation is further complicated by social media. Of which there are many. A person may have as many social media accounts as she pleases and usually has freedom to say on her profile whatsoever she pleases as to her location and identity. Add that to the millions of parody accounts[107] and corporate social media business accounts then it becomes quite the proverbial haysack in which to find a miniscule defendant needle. A lot of defamation issues, faced with this quagmire would usually just die a natural death.

It need be added that a technical issue which may complicate legal issues is the use of anonymous re-mailing services[108]. These services which may be based anywhere in the world, accept messages, from users, strip out the- details of the original posters. Such a technique makes it practically impossible to identify the author of the defamatory material without the cooperation of the operator of the re-mailing service[109].

Al common law, persons who intentionally or negligently participates in or otherwise authorize the publication of defamatory material are as potentially liable as if they were the original author. This means that in a newspaper publication for example, the author, the publisher, the editor and printer of a defamatory statement may all be liable. These individuals are generally easily identifiable, however, with regards to an internet publication, the publishers are not so easily identifiable and their geographical location may even prove to be most difficult to locate. It may be assumed that Internet Service Providers (ISP's) and

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106 http://www.reputationhawk.com/onlinedefamation.html accessed on 10/10/22.

107 These are accounts that are made to resemble that of a celebrity or a highranking person. Example@theMbuhari on twitter, which is a parody of Muhammadu Buhari's account

108 Juilet Aimienrovbiye (supra) p.3

109 Ibid

certain intermediaries may be held liable, but this situation is not exactly conclusive, hence the writer embarked on this work. The question of the liability of ISPs is discussed in further detail in the next chapter.

2.2.3 Multiple publication rule

In the United Kingdom, Nigeria, and some other jurisdictions, defamation occurs each and every time the offending statement is published this is called; the 'multiple publication rule'. In others, most notable in many of the states of the United states of America, there is a 'single publication rule' and only the first publication gives rise to cause of action, although subsequent publications may be taken into account when assessing damages.

The multiple publication rule was considered by the Court of Appeal in *Loutchansky v. Times Newspapers Ltd*[110]. In that case, the Court of Appeal confirmed that each and every publication causes a fresh right of action to accrue. The basis of this rule is firmly entrenched in English law and goes back to the striking old case, *Duke of Brunswick v Harmer*[111], where back issues of a newspaper containing an article libeling the Duke of Brunswick were brought some 17 years after first publication and which were considered to be a separate publication on which the Duke could bring a libel action (the limitation period for libel was six years at that time).

The challenges with multiple publication rule in respect to online defamation is that with the internet are quite many. Especially with social media and the ease of resharing[112] in Nigeria, the multiple publication rule has been applied in a number of cases, notable among which is

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110 [2002] QB 783

111 (1849) 14 QB 185

112 With respect to social media, will a cause of action rise each time the defamatory material is reshared? If so, will liability be equal across all the persons involved in resharing? Is there a limit to the number of person's who can be liable? For example where a tweet has about 6000 retweets?

the case of the case of chief *FRA Williams v Daily Times of Nigeria LTD*[113] and also *Yusuf v. Gbadamosi.*[114]

2.2.4 Jurisdiction[115] and forum non conveniens

One of the problems associated with internet defamation is finding the appropriate jurisdiction for initiating a libel lawsuit[116]. The question of jurisdiction has been giving names like; the heart, nerve, blood, etc. of a given suit[117]. Suffice it to say that it is centrally important to the success of an action in court[118].

Due to the boundlessness of the internet and the ease it gives to publish materials to a potential global population at no time at all, the problem of determining the jurisdiction in which to bring an action is aggravated.

The problem of jurisdiction as far as the internet is concerned is a complex one[119]. A person who is resident in Nigeria, may have a defamatory material about him. Published in a Nigerian newspaper which has an online platform and same defamatory material is downloaded or accessed by persons in the United States. In some other situations, a person who is resident in Nigeria could have a defamatory material about him published by a

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113 Sc 21 1987

114 (1993) 6 NWLR 9PT.299) P. 363.

115 Jurisdiction can be defined as the geographic area over which authority extends; legal authority; the authority to hear and determine causes of action. See "Jurisdiction" available at http://legal-dictionary.thefreedictionary.com accessed on 10/10/22. The Black's law dictionary also defines the jurisdiction as "A court's power to decide a case or issue". Ninth Edition, AT PAGE 927. Jurisdiction can be classified into three types: Jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.

116 Deborah Azar "ON SELECTING JURISDICTION IN INTERNET DEFAMATION CASES" available at http://www.commolawereview.cz accessed on 10/10/22.

117 Aladokiye E. Gabriel Whyte, "Developing a Legal Framework for internet Defamation" Available at www.iaset.us accessed on 18/10/22.

118 See Madukolu v. Nkemdelim (1962) 1 All NLR 581.

119 Ibid

website that is situated in the United States[120]. Can he sue in Nigeria in both instances? and if he does, can the Nigerian court exercise jurisdiction over the American defendant?

The rules of court do lend to permit jurisdiction to be obtained over a person outside the territorial limits of the court if the courts, in their discretion, grant leave that the foreign based person should be served with the courts writ outside the jurisdiction[121]. The foreign defendant may choose, however, to ignore or challenge jurisdiction so obtained. Moreover, if the courts judgment needs to be enforced abroad, some countries tend not to enforce judgments granted where jurisdiction was obtained by long arm means and particularly where the defendant did not take part in the proceedings[122].

One writer[123] contends that, if a Nigerian daily newspaper publishes a story concerning an event in Nigeria and posts it on its website, a Ghanaian reader may not succeed in an action for defamation against the newspaper even though, some of the stories relate to him and his activities unless he can proved that the publication were directed at Ghanaian readers; hence a Ghanaian High court may not exercise personal jurisdiction over the Nigerian Newspaper[124].

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120 "Dino Melaye Graduated with a third class" part of a tweet posted by saharareporters.com on 12th April,2017.

121 Bamodu, 'Information Communication Technology and E-commerce; Challenges and opportunities for the Nigerian Legal system and the judiciary', 2004 (2) The journal of information, Law and Technology (JILT) available at http://www.warwick.ac/fac/soc/law/elj/jilt/2004_2/bamodu/ accessed on 25/10/22.

122 Juilet Aimierovbiye "Internet Defamation in Nigeria: in search of an effective legislative Framework. (UBLJ,JAN-DECEMBER,2015)Vol.16 no.1.p.159 at 166.

123 Kayode Oladele, 'Internet Libel and the law of defamation: Justice without Borders, 27th August, 2011, available at http://www.sharareporters.com accessed on 26/10/22.

124 Juliet Aimienrovbiye (supra)

Under the English Defamation Law[125], publication takes place in the jurisdiction where the matter is viewed. The Courts often consider the allegedly defamed person as having a connection to the United Kingdom. [126]In the case of material available on the internet, if a person has a rep Ufa Li on in a number of jurisdictions and the material is downloaded in some of the jurisdictions; it would seem that a cause of action arises in each of them[127]. Two further points can be made about this possibility.

Is there such a thing as a global tort of defamation which can be heard and dealt with by the courts in one country only?

Secondly, is there a *de minimis* principle[128] such that if only a few persons in one jurisdiction access the material, the courts will decline to hear the case on the basis of the doctrine *forum non conveniences* that is, that the courts in another jurisdiction should hear the case?

2.2.4.1 Global tort theory[129]

The global tort theory is simply described as a notion (not exactly a legal principle) that a tortous action gives rise to rights in every country of world. This might have formed the

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125 (1996)

126 Hugh Jones AND Christopher Benson, publishing Law, 176.

127 Deborah Azar cit 41.

128 Infact, should there be a de miniimis principle generally for online defamation? Social Media and media sharing websites have opened a plethora of means for communication, if all of them were let into courtrooms then the judicial systems of a lot of countries will break down.

129 N.Pullen "Defamation on the internet : a tangled web", The Age, 11 December, 2002, as cited in Aladokiye E. Gabriel-whyte, "Developing a Legal Framework for Internet Defamation. available at http://www.iaest.us accessed on 30/10/22

grounds for brazen forum shopping in some cases, but sadly, it has no place in English law, nor in Nigerian law. or for that matter the law in many other countries[130].

2.2.5 De minimis rule

The de minimis rule (in full de minimis nin curat lex- the law does not concern itself with trifles) applies in some cases to deprive a claimant of a cause of action, For example, in tort of negligence it is accepted that an action does not arise until damage which is more than de minimis is suffered. However, in some areas of law the rule does not apply and a cause of action might exist no matter how trivial the act or omission concerned. The fact that it is trivial may of course, be reflected in any remedy granted. For example, an award of damages may be nominal only.

In defamation, if the attack on a person's character is trivial, this may mean that the basic test is not fulfilled and the standing of the person may not be damaged in the minds of right thinking members of society. However, if that test is satisfied, then publication to a single person is sufficient to give rise to a claim in defamation. There is no *de minimis* rule in terms of the number of persons to whom the defamatory statement is published. As Lord Esther MR said in *Whitetaker v Scarborough Post Newspaper Company*[131]*;*

The amount of the damages in [an action concerning the publication of an article in a newspaper] would not, in my opinion, generally speaking, depend on the number of copies of the newspaper that were published. If a libel were a serious one, a jury would give heavy damages.

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130 It was normaly rejected by a 3:2 majority in the House of Lords in Berezovsky v Micheals [2002] 2 All ER 986, in which a magazine published in the united states contained an article alleging that the claimants, who were Russian citizens, were involved in organized crime in Russia. See also the case of Shevill v Presse Alliance [2002] HCA 56.

131 [1896] 2 QB 148.

CHAPTER THREE

THE LIABILITY OF INTERNET SERVICE PROVIDERS (ISPs)[132] FOR DEFAMATION IN NIGERIA

3.1 Introduction

As have been observed earlier in this work, proliferation of internet technologies has given the average person, who was previously a mere consumer of online content; the power to publish their own content on various websites, blogs, consumer-evaluation platforms (such as Amazon, eBay; and Uber), news websites (through reader comments), social networking services (such as Facebook, Twitter, and LinkedIn), media-sharing websites (such as Instagram and YouTube), and collaborative-writing projects (such as Wikipedia).

Some of these user contributions may be defamatory, and in cases where it is a veritable legal question, and subject of this work is: Who should be liable for defamatory statements made online by users? Should it be the users, or the Internet Service Providers[133]?

The body of legislation in Nigeria, does not give a specific answer to this question[134], nor is there a judicial decision on the matter this chapter examines the law as it is in Nigeria, with

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132 Various acronyms and terms are used to refer to Internet Services Providers and other online industries. Among the more widely used acronyms are ISP (Internet Service Providers), OSP (Online Service Provider), ICS (Interactive Computer Service), ICH (Internet Content Host), and Internet Intermediary. Because of the confusion surrounding the acronyms, this work will use "ISP" as a term in common parlance, which is an online service provider that allows users access to the Internet and information generated by other users. For the definitions of ISP, see Matthew Collins, *The Law of Defamation and the Internet* 17(3d ed.2010) p.201

133 In traditional Defamation, it is without question that everybody who is involved in the production or procurement of defamatory material would be liable. See, *Ede v. Bendel Newspaper Corporation* (1991) 7 NWLR;
See also: Fawehinmi, G, *The Nigerian Law of Libel and the press*, (Lagos: Nigerian Law Publications Ltd, 1987) 651, PR 62,
See also. Aimienrovbiye Juliet. 2015 "Internet Defamation in Nigeria; in search of an effective Legislative Framework". University of Benin Law Journal (UBLJ) on online defamation, JAN-DECEMBER, vol.16 no.1, p. 159 at 166.

134 The only defamation-specific legislation in Nigeria is the Lagos state defamation Act of 1961, which was instituted before the advent of the internet, and in which there is no approximate provisions as to the question. Also, the Cybercrime Prevention Act of 2015, seems to focus more on inciting comments and does not have provisions for defamation in it.

respect to the liability of ISPs. A comparative analysis of other legal Jurisdictions: their judicial decisions and statutes. Is also covered, with the ultimate aim of synthesizing possible legal opinion for Nigeria[135].

3.2 Who is an Internet Service Provider?

An Internet Service Provider (ISP) is an entity that connects people to the internet and provides other related services such as website building and hosting.[136] It can also mean a company that might be performing any of a multitude of services over the Internet.[137] Traditional ISPs provide connection to the internet and usually offer users email and newsgroup access[138]. Others offer web space for users to create their own home pages. Bulletin Board[139] operators could also be regarded as ISPs[140]. ISPs could also include telecommunications infrastructure such as Cisco and local telephone companies.[141]

Other, more specialized, functions of ISPs include those that provide connectivity software employing a central server such as file-sharing programs or Internet Messenger services. Software that does not require a central server can be described as pure peer-to-peer networking or decentralized.

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135 The Courts in Nigeria have not had any opportunity to make pronouncements on internet defamation.

136 Chaubey R, *An introduction to Cybercrime and cyber law*, (Kolkata: Kamal Law house, 2008).

137 David Buseko "*What are ISPs*" www.techtarget.com. http://searchwindevelopment.techtarget.com/definition/ISP accessed on 23/10/22.

138 Abran Park. *Internet Service Provider liability for defamation: The United States and United Kingdom compared*. A dissertation Presented to the School of Journalism and Communication and the Graduate School of the University of Oregon in partial fulfillment of the requirements for the degree of Doctor of Philosophy, March 2015.

139 Bulletin Boards are van area on a computer network, especially the internet, devoted to posting personal or group oriented opinions: http://www.freedictionary.com accessed on 7/10/22.

140 THE AGE OF THE INTERNET. Available at https://www.harpegrey.com/~ASSETS/DOCUMENT/PDF/2/B99E_Defamation_in_the_Age_of_the_Internet.pdf. Accessed on 9/8/22.

141 "History of the Internet" available at https://en.webopaedia.org accessed on 6/8/22.

The American Digital Millennium Copyright Act 1998 (hereinafter referred to as DMCA) has two definitions for ISPs. The first definition in section 512(k)(1)(a) provides thus:

> *An entity offering transmission, routing or providing of connections for digital online communications, between or among points specified by a user's, of the material of user's choice, without modification to the content of the material as sent or received.*

The second definition in section 512(k) (]) (b) identifies a ''Service provider' as "a provider of online services or network access, or the operator of facilities". The DMCA definition is broad enough to encompass all activities on the internet where companies arc providing some sort of service to users or where they are providing a direct connection. The E-Commerce Directive (EU)[142] provides a similarly broad definition: a 'service provider' is "any natural or legal person providing an information society service." In The Nigerian context, the extant laws show almost no direct definition of the term. The best description of an ISP in Nigeria is expressed in section 13(1) of the Advanced Fee Fraud and other Related Offence Act 2006[143] and it provides thus:

> *notwithstanding the provisions of the Nigerian Communications Commission Act 2003*
>
> *...or the provisions of any other law or enactment; any person or entity who in the normal course of business provides telecommunications or internet services or is the owner or person in the management of any premises being used as a telephone or internet cafe or by whatever name called shall be called an internet service provider...*

This section however, does not explain term "internet services".

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142 The electronic Commerce Directive 2000/31/EC, adopted in 2000, sets up an internal Market framework for electronic commerce in the European Union.

143 2006 Act No. 14. The marginal note of section 13(1) provides for the duties of telecommunications and *internet service providers* and internet cafes. From the wordings of this section. It appears that the Act contemplates of a situation where internet cafes are not subsumed in the description of *internet service providers.*

For the purpose of this work an ISP is an entity that provides subscribers with services like World Wide Web, e-mail, Bulletin board system (hereinafter referred to as BBS)[144], newsgroup, web site hosting and design and other additional services.

3.3 Is an Internet Service Provider liable for defamation?

In internet defamation, the debate about who will bear liability between the individual user and the ISP is one that has lasted as long as the internet[145]. In some jurisdictions, the liability lies with the ISP[146]. This is because the laws are wont to see the ISP as a publisher and as in traditional Defamation, accrue liability to it. This is not the case in some other jurisdictions. Like the United States[147] where the law almost accrues no liability whatsoever for defamatory statements made by their users[148]. Economic considerations and thought for rights of free expression inspire this school of thought[149]. There has been no opportunity for Nigerian courts to rule on the issue of online defamation as a civil tort[150].

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144 Bulletin Board System means a computer bulletin board that offers computer users the ability to obtain information from a central source assessed through a telephone modem. See Playboy v. Hardenbaugh, 982 F. 503, 505 (Ohio 1997).

145 Aladokiye E. Gabriel-Whyte, "Developing a legal Framework for internet Defamation", available at http://www.iaset.us accessed on 13/8/22

146 English courts have referred to the ISP or indeed any intermediary as a publisher and have applied the rules applicable to publishers in traditional defamation to them. See the case of *Tamiz v google Inc.*

147 See the case of *Cubby v CompuServe* 766 F 135 (SD NY 1991).

148 In the United States, ISPs have won 83 out of 85 online defamation cases. See, Ahran Park, Internet service provider liability for defamation: The United States and United Kingdom compared. A dissertation Presented to the School of Journalism and Communication and the Graduate School of the University of Oregon in partial fulfillment of the requirements for the degree of doctor of philosophy, March 2015.

149 Ibid

150 As against criminal actions. For example, a Nigerian Blogger, Kemi Olunloyo is awaiting trial for allegedly defaming one Pastor Ibiyomie, see also: "Nigerian Blogger charge with cybercrime offence not libel" http://thenewsnigeria.com.ng accessed on 12/9/22.

Therefore, an effort is made in this chapter to examine scholarly articles on the matter, and do comparative analysis of decisions and statuses in other jurisdictions to prescribe a framework for prosecuting the defamation online.

3.4 The Nigerian Context

Defamation in Nigeria, rests on a legal framework of common law principles, a number of judicial decisions, the defamation laws of Lagos state, the criminal[151] and penal codes.[152] [153].

Tortuous defamation (civil) is essentially regulated by the common law principles with skeletal legislative intervention[154], criminal defamation covers only libel, hence it is usually referred to as criminal libel. It is also governed by statute and common law principles[155].

3.4.1. Criminal Code Act

The Criminal Code Act which is applicable in the southern part of the country makes provision for criminal libel. In section 373 thereof.

Section 374(1) defines the publication of defamatory matter as the speaking of spoken words or audible sounds to the hearing detained or any other person; in other cases, exhibiting it in the public or causing it to be read or seen by the person defamed any other person; or the reproduction of defamatory sounds to the hearing of persons other than the person causing it to be reproduced.

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151 Defamation in Nigeria is both a tort and a crime. See, Ese Malemi, Law of tort, 2nd ed. (Lagos: Princeton Publishing Company, 2013) page 539. See also Aimierovbiye Juilet. 2015 "Internet Defamation in Nigeria; in search of an effective Legislative Framework". University of Benin Law Journal (UBLJ)on Online defamation, JAN-DECEMBER, Vol.16 no., p.159 at 166.

152 For the Southern and Northern States respectively.

153 Scholars have argued vehemently against the criminalization of Defamation. They argue that such legislations would only gag free speech and inadvertently facilitate tyranny. See Falana: Illegality of criminal libel in Nigeria Vanguard Newspaper January 27, 2017.

154 Aimienrovbiye J. (supra) see also, Aladokiye E. Gabriel-whyte, "Developing a legal Framework for internet Defamation", available at http://www.iaset.us accessed on 13/8/22.

155 Ibid

Section 375 criminalizes defamation. For the sake of precision, the section is reproduced as follows:

> *Subject to the provisions of this chapter, any person who publishes any defamatory matter is guilty of a misdemeanor and is liable to imprisonment for one year and any person who publishes any defamatory matter knowing it to be false is liable to imprisonment for two years.*

3.4.2 The Penal Code.

The Penal Code also makes provision for defamation. Section 391 defines defamation and in Section 392 thereof makes provisions punishment "whoever defames another shall be punished with imprisonment for a term which may extend to two years or with fine or both". Some authors[156] have criticized the inclusion of criminal defamation in our statute books. An attack on a person's reputation is a civil matter which is adequately addressed by the tort of defamation. Also, it has been argued by other authors[157] that the inclusion of criminal Defamation may be an overdue remnant of an oppressive colonization. Other authors[158] however, concede that criminal defamation should be restricted to those situations where defamatory matters are published with the intent to commit other crimes.

3.4.3 The Defamation Law of Lagos State, 1961

The Defamation law also deals with defamation. Section 4 deals with slander affecting official, professional or business reputation; section 6 covers unintentional defamation. Section 7 covers the defence of justification; section 8 deals with the defence of fair comment while section 9, qualified privilege of newspapers.

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156 Imo J. Udofa, "Right to Freedom of Expression and The Law of Defamation in Nigeria", International Journal of Adavanced Legal Studies and Governance, vol, 2 NO.1, April 2011, available at http://www.icdr.org, acessed on 11/9/22. See also: Falana: Illegality of criminal libel in Nigeria Vanguard Newspaper January 27,2017.

157 Falana F. (supra)

158 Aimienrovbiye J. (supra)

It is without question that from the foregoing, Nigerian statutes, do not envisage Internet defamation, the attendant challenges, hence the need for the emergence of legislative control of internet defamation in Nigeria. Interestingly, in Nigeria, that there is presently a litany of cases on defamation before our courts seeking one form of redress or the other. Interestingly, some of these cases deal with defamatory material aired by television statement or published on the internet. For instance, Senator Musiliu Obanikoro instituted a defamatory suit against Sahara Reporters (a strong internet framework) at the State High Court. He also filed same action in New York[159]. The outcome of this and other cases would further expose the lacuna in the existing defamation laws[160].Senator Musiliu Obanikoro Mobanikoro Mr.-Fix Nigeria has been threatening to sue Sahara reporters over the Ekiti Rigging tape since we released the tape. Yesterday 'Koro' managed to get his New York-based lawyer to send a 'warning letter' (meanwhile he'd claimed that SR was already sued in New York as of last week) hoping to hush up Sahara Reporters while he shops for corrupt Nigerian senators to confirm his appointment as minister of state for defense. Subsequently, he later admitted in a letter that he was there at the meeting place where the rigging plot took place.

3.4.4 The Evidence Act

The 2011 evidence Act provides for the admissibility of electronic evidence in court. Unlike its predecessors, this fact was reinforced by the supreme court in the case of *Kubor v. Dickson*[161] where the court said held "Evidence in relation to the use of the computer must be called to establish the conditions set out under section 84(2) of the Evidence Act 2011''

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159 Breaking Times, "Obanikoro sues Sahara Reporters, Premium Times, Punch Newspapers for N1 Billion" http://www.breaktimes.com acessed on 23/8/22.

160 Aimienrovbiye J. (supra)

161 (2014) 4 NWLR Pt 1345

On the definition of the "document" Section 84(1) provides that in any proceedings. a statement contained in a document produced by a computer is admissible, as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in Section 84(2) are satisfied[162], is not free from avoidable pitfalls, as it relates to the admissibility of electronic evidence in proving online Defamation Cases.[163]

3.4.5 The Cyber Crime Prohibition Act 2015

Although the word defamation is not used in this Acts section 24 (1) b criminalizes false statements made with intent to cause annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation enmity, hatred among others. 24(l)b provides thus

> *A person who knowingly or intentionally sends a message or other matter by means of computer systems of network that he knows to be false, for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, ill-will or needless anxiety to another or causes such a message to be sent commits an offense under this Act and is liable on conviction ta a fine of not more than N7000 or imprisonment for a term of not more than three years or both.*

The Cyber Crime Act has been touted as "the only successful legislative attempt made to curb defamatory statement made using computer systems[164]", other authors[165] insist that it is a

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162 Evidence Act 2011. What is more, the definition of 'document' in Section 258(1)(d) includes "any device by means of which information is recorded, stored or retrievable including computer output". Section 258 also defines a computer to mean "any device for storing and processing information". Is supportive, thid definition is wide enough to accumodatephones, tablets, portable music devices, automatic teller machines(ATM) and other electronic devices that store, process and retrieve information.

163 DavidOdeyinternet-defamation-lawyers-seek-review-of-evidence-Act http://www.pmnewsnigeria.com acessed on 6/10/22.

164 Oyegbola F. "*A Crime Of The Cybercrime In Prohibition Act Of 2015*" available at http://www.pmnewsnigeria.com accessed on 6/10/22.

165 See: Yemi Abeoye "*Social Media Bill before the Fatal Blow is Unleanshed*" available at http://www.vanguardngr.com accessed on 7/10/22.

tool of oppression and its main aim is to suppress criticism of the government[166]. Under the provision of this Act. A Nigerian blogger, Desmond Ike Chima, was arraigned at the Federal High Court in Lagos for allegedly publishing two defamatory stories against United Bank for Africa (UBA) Plc Managing Director, Philips Oduuza[167]. Similarly, acting on this provisions, two prominent Bloggers have been arrested on allegation of 'cyber-stalking'. In June 2016, 11k Bauchi state authorities arrested Musa Azara on allegations of 'cyber-stalking',[168] the governor. This came shortly after another Blogger Abubakar Sadiq, was arrested by the Economic and Financial Crime Commission on similar charges[169].

Alongside the failure of this Act to sufficiently address defamation as a tort, it also does not give any guidelines as to the liability of Internet service Providers for online defamation. Thus, where the maker of the defamatory statement is anonymous, the victim is left with no option than to nurse his injury himself, it is instructive to note. However, that most of the convictions with respect to this act have always been of the site operators directly, that is, the user who posted the offending statement. There has however been just one instance where the

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166 Stephanie Hegarty "*Africa Clamp Down On Social Media*" http://www.bbc.uk/new. Accessed on 20/10/22.
This intent could be seen also with the promulgation of a Bill for an Act to prohibit Frivolous Petitions and other Matters Connected there with (Anti-Social Media Bill 2015): sponsored by Senator Bala Ibn Na'allah, representing Kebbi Central Senatorial District. The Bill seeks to compel critics of persons and institution on the social media, to accompany their petitions with sworn court affidavit, or face six months' imprisonment upon conviction. It is also seeking a two-year jail term for any persons who make allegations or publishes any statement or petition in the newspaper, radio or medium of whatever description against another person, institutions of government or any public office holder. In fact, the Bill included as its target, very personal and private means of communication such as SMS or text messages and whatsapp, among others. See "Buhari Tells Senate I won't Assent Social Media Bill" https://www.vanguardngr.com accessed on 30/10/22.

167 "Nigeria blogger charged with cybercrime offence not libel law" http://www.thenewsnigeria.com.ng accessed on 24/7/22.

168 Stephanie Hegarty "Africa clamp down on social media". http://www.bbc.uk/new. Accessed on 16/8/22.

169 Ibid

aggrieved sued both the blogger and her ISP in the case of *Google*.[170] Nothing however has been heard of the case.

Until the Nigerian courts decide on the matter however, it would only be speculation to attempt an analysis of the liability of ISPs in Nigeria. It is important however to note that the decisions in Great Britain and other common law jurisdictions would be of persuasive authority when Nigerian courts will get around to that decision.

A comparative analysis of the statutes and judicial decisions in various other jurisdictions as it pertains to the liability of ISPs is here provided.

3.5 The United Kingdom

The Defamation Act 2013, which came into force on January 2014, bravely tries to codify large parts of case law as well as introducing some modest reforms[171]. Prior to this time, the UK Defamation Act of 1996 held sway. The 2013 Act brings quite a number of reforms to the prior Act[172]. Especially with respect to the liability of Internet service providers. The reforms where informed partly due to the passage of the U.S. SPEECH Act of 20l0[173], preventing courts from enforcing libel judgments from foreign jurisdictions. Before the SPEECH Act, there had been a high number of defamation suits that have been brought to the English courts from oilier jurisdictions, The United states especially, due to the more favorable bent of the court towards the plaintiff[174]. London was dubbed the "'libel tourism

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170 "The Goggle Law Suit And Online Defamation In Nigeria" available at http://www.guidiancenewsng.com accessed on 14/8/22.

171 "The Defamation Act 2013" https://www,lawgazette.co.uk. accessed on 12/10/22.

172 Mathew Collins, "Defamation Act 2013: An extreme makeover" available at https://inform.wordpress.com accessed on 12/9/22.

173 (Securing the Protection of our Enduring and Established Constitutional Heritage) SPEECH, 28 U.S.C. & 4102 (2010).

174 An example of this is the case of king v. Lenox [2004] EWCA Civ 1329. American boxing promoter Don King sued British boxer Lennox Lewis, a U.S. promotion company and a New York Lawyer in London,

capital of the world[175]". The act aims among other things to curb this trend.[176] Of interest however, to this work, are the provisions of the Act with respect to Liability of ISPs.

In relation to anonymous defamatory posts, section 5 provides a defence for website operators who comply with the Defamation (Operators of Websites) Regulations 2013[177]. The regulations provide that a plaintiff could report the said defamatory statement, to the ISP. And if indeed the post is defamatory, the ISP could take down the post after duly informing the poster of such material, or this defense will not be available to him. This provision significantly enhances website operators1 protection for posts by identifiable posters; and is also designed to encourage Internet service providers to voluntarily disclose to defamation complainants identity and contact details of the author of an anonymous defamatory post[178].

Section 5 does not impose a mandatory scheme. Notices can be ignored and a website operator can rely on other defences, such as section 1 of the Defamation Act 1996 or regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002. Equally, the fact that a posting has been taken down does not prevent an order being sought, requiring the website operator to hand over third party details they hold[179].

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even though the defamatory statements about him were posted on California-based websites. King chose the United Kingdom to file suit because English defamation law was more "plaintiff-friendly".

175 "UK Defamation Act" http://www.tandfonline.com accessed on 7/8/22.

176 Matthew Collins, "Defamation Act 2013: An extreme makeover" https://inform.wordpress.com accessed on 12/9/22.
Libel tourism is the act of using a writer for alleged defamatory statement in a jurisdiction were defamatory laws are most favourable. This was the case with the UK Defamation Act before it was amended in 2013. Before this milestone amendment, in order to protect American citizens from the rather "too harsh defamation Laws of UK enacted the speech Act which shielded Americans and its court from UK judgments as well as that of other jurisdiction whose laws differs from the United State Law on the Subject.

177 Ibid pg 46

178 What the defamation Act 2013 means for the internet www.cyberleagle.com accessed on 14/8/22.

179 Iain Wilson, *Brett Wilson* "The Defamation Act 2013" http://www.lawgazette.co.uk. accessed on 16/8/22.

However, Section 5(11), provides that the defence is defeated if the claimant shows that the ISP has acted with malice in relation to the posting of the statement concerned. The Explanatory Notes to the Act give the example of where the ISP had incited the poster to make the posting or had otherwise colluded with the poster[180]. In essence, the section 5 defence is defeated if the claimant can show three things:

1. That it was not possible for the claimant to identify the person who posted the statement
2. The claimant gave the website operator a notice of complaint (containing various specified information); and
3. The website operator failed to respond to the notice of complaint in accordance with regulations to be made under secondary legislation[181]

This position is strengthened by Section 10, which prevents a claimant from pursuing a defendant who was 'not the author, editor or publisher of the statement complained of, unless it is not reasonably practicable for an action to be brought against the author, editor or publisher'. In the context of online-publication, if the name and address of a third party who has posted a comment or article on a website can be ascertained without too much difficulty then only the poster, and not the operator, should be sued (although if such a claim is successful the court can under section 13 order the operator to remove the material). Section 10 also provides protection for other intermediaries, such as distributors and newsagents.[182]

Furthermore In *Godfrey v Demon Internet Ltd*[183], a subscriber to an internet service, provided by the defendant, made material available through the service which was alleged by the

180 "What the Defamation Act 2013 means for the internet" www.cyberleagle.com accessed 19/10/22.

181 Ibid.

182 Ibid

183 [2001] QB 201

claimant to be defamatory of him. The claimant brought the present action to strike out part of the defence as disclosing no sustainable defence to a libel action, based on the publication of the material by the defendant. After the claimant informed the defendant of his allegation that the material was defamatory, the defendant did not immediately remove the material (although, eventually, it did so).

The ease was decided on the strength of the Defamation Act (1996). It was before the Court what the act means when it says to '"publish" or "publication" in section 17 thereof and how it can be distinguished from the definition of a "publisher" as stated in section 1.

That is as a person whose main business is the issuance of content to the public for profit. The court did observe. Unfortunately for the defendant, that for the section 1

(1) defence to apply, all three requirements must be satisfied, viz:

(1) In defamation proceedings a person has a defence if he shows that –

(a) he was not the author, editor or publisher of the statement complained of:

(b) he took reasonable care in relation to its publication; and

(c) He did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

Also, section 1 (3) states further, "A person shall not he considered the author, editor or publisher of a statement if he is only involved - (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"

Section l(3)(e), quoted above, seems to imply that "hosts" such as Google would have no liability for defamatory material published by users of its services. Indeed, this appears to be the position in the USA. The English courts however, by this decision will hold the host

jointly liable, though ultimately, not simply for hosting, but for refusing to take the post down after the Plaintiff notified them of the offensive material.

The position of liability after being asked to take down offensive posts was recently reinforced in *Tamiz vs Google*[184].

The claimant in this case (Mr. Tamiz) was in the news in April 2011 because of allegations that he had resigned as the Conservative Party candidate in Thanet after making inappropriate remarks about women. In response to this Story, a blogpost appeared on the London Muslim blog called "Tory Muslim candidate Payam Tamiz resigns after calling girls 'sluts'. Mr Tamiz claimed that eight comments underneath that blogpost were defamatory; these comments made various allegations against Mr Tamiz, including that he was dishonest, a drug dealer and that he had stolen from his employer.

The original blog and the offending comments were posted using Google Inc.'s Blogger.com platform, which is hosted in lite USA. Mr Tamiz did not bring a claim against the original blogger or those who wrote the comments underneath because they were anonymous and so it was hard to ascertain who was responsible. He therefore focused his libel claim on Google.

Eady J held that, although a real and substantial tort had been committed within the jurisdiction, Google was not a common law publisher and could avail itself of both defences.

Under the European Union (EU) E-commerce directive, internet intermediaries are afforded protection from intermediary liability for being a mere conduit for information, for caching information, or for hosting information. Provided that these activities are "of a mere technical, automatic and passive nature" and the intermediary "has neither knowledge of nor control over the information which is transmitted or stored."

3.6 The United States Position

184 [2012] EWHC 449 (QB)

In contrast, the position of ISPs is far more secure in the United States as a result of the Communications Decency Act 1996 which states that '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'. Prior to this statute there were contradictory decisions as to the liability of ISPs in online defamation.

In *Cubby v CompuServe*[185], CompuServe was sued in respect of a message appearing in a local forurm hosted by them, called "Rumorvillc USA". CompuServe had employed a third party specifically to edit and control the content of this forum. The third party posted the information on the Internet once it was edited, with no intervening opportunity for CompuServe to review the material prior to publication. CompuServe argued that they were merely a distributor of the information, not a publisher, and should therefore not be held liable. The New York District Court agreed, holding that CompuServe was here acting in a way akin to a news-stand, book store or public library, and that to hold it to a higher standard of liability than these distributors, would place undue restrictions on the free flow of electronic information.

Conversely, in *Straton Oakmont Inc* v Prodigy Services[186], the decision went the opposite way. "On similar facts''. Prodigy was sued in respect of comments posted to a local discussion forum it hosted. Again, Prodigy had employed persons known as "board leaders to monitor and edit the content of the forum and had empowered these board leaders to remove material, although only after it was posted. The crucial difference from the CompuServe case was that Prodigy had explicitly marketed itself as "a family oriented computer network", which as part of its "value added" services, would control and prevent the publication of inappropriate messages. This seems to have been enough to lead the court to regard Prodigy

185 766 F 135(SD NY 1991)

186 1995 NY Misc. 23 Media L. Rep. 1794.

as the publisher of the libels in question, rather than as a mere distributor, and accordingly they were held liable[187]. Arguments by leading scholars[188] seem to lean on the grounds that following cases such as *Stratton Oakmont Inc v Prodigy Services Co*[189], imposing liability on a service provider which checked the content provided a disincentive to self-regulation. Since the decision seemed to be that service providers which did not check or monitor the information made available through their service would be less likely to be found liable. Clearly, this situation was untenable, hence the change to the law. The effects of CDA were quickly seen. For example, in Zeran v America Online Inc[190], the claimant complained of alleged defamatory messages posted by an unidentified third party on AOL. He claimed that the Act did not assist AOL once it had notice that the material was defamatory. The messages placed on AOL's bulletin board advertised T-shirts containing offensive messages related to the bombing of a federal building in Oklahoma City. Anyone wanting to purchase a T-shirt was asked to contact 'Ken' at Zerans home phone number. Zeran received a large number of angry phone calls and a number of death threats. Eventually. AOL- removed the posing from the bulletin board. In confirming that AOL could rely on the defence, Chief Judge Wilkinson said of the rationale for the defence:

> *The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.*

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187 See also Lilian Edwards- Defamation and the internet: Name Calling in Cyberspace, www.law.ed.ac.uk

188 Steefan G. Verhulst & Monroe E. Price, Comparative Media Law Research and its Impact on Policy, 2 INT'L J. COMM.406 (2008).

189 1995 NY Misc. LEXIS 229

190 (1997) 129 F 3d 327

The decision clearly justifies the allegation that US laws value free speech at all costs[191]. It was also clear from the wording of the statutory provision that Congress intended that the exclusion of liability from ISPs afforded by CDA was not to be compromised by state law or conflicting common law. In *Lunney v Prodigy Services Co*[192], an anonymous prankster used the claimant's .name to open accounts with the defendant ISP and posted offensive material and sent offensive e-mails under the claimant's name. When the claimant informed the service provider, the postings were deleted and the fraudulent accounts closed. It was held that the defendant was not liable on the basis of prior common law to the effect that publishers are immune from liability for defamation resulting from material transmitted by them, but over which they merely retained passive editorial control, such as telephone service. The court considered e-mail services to be like a telephone service. However, this defence can be lost if the publisher is guilty of bad faith or malice. But, even where more active editorial control is exercised, such as in the case of electronic bulletin boards, the court accepted that it would be unreasonable to expect an ISP to monitor the countless messages placed on its bulletin boards. Having said that, the court held that it did not need to consider the effect of CDA although it did comment that its decision was in harmony with the provision.

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191 AHRAN PARK. *Interest service provider liability for defamation*: *United States and United Kingdom compared*. A dissertation presented to the School of the University of Oregon in partial fulfillment of the requirements for the degree of Doctor of philosophy March 2015
The American Constitution in its first amendment seems to give freedom of speech beyond all known boundaries. Fredrick Schauer, does a detailed analysis of this in his book; Frdrick Schaucer, *The Exceptional First Amendment, in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Micheal Ignatieff ed., 2005). (PDF Format available at amazon)
Furthermore, in the United States, the First Amendment rights are elevated when the libel complaint about involved statements made on the internet. The Plaintiff will have to prove among others, that there was actual malice, that the maker of the statement was negligent or made false statements. See Gutnick v Dow Jones (2002) HCA 56.

192 [1998] 250 AD 2d 230

All the American courts have applied Section 230 of the CDA[193] to shield ISPs almost invariably. ISPs won in 83 of 85 cases in 1997 to 2014[194]. Nearly all types of ISPs have been held to be eligible for immunity unless they are original online speakers. Even when ISPs have operated websites that have left digital ''scarlet letters'' on individuals, they have not been liable if the ISPs did not "create or develop'' the defamatory contents.

Since the CDA adopted blanket immunity for ISP liability in 1996, lawyers and scholars have argued that the CDA immunity clause should be revised or repeated[195]. Criticizing the CDA as an extreme libertarian approach, Professor Daniel Solove at George Washington University Law School suggests a "middle-ground" solution which does not grant immunity to ISPs that become aware of the harmful material but do not remove it[196].

Other legal scholars prefer a common law framework to revise the CDA immunity because they want to place an ISP into a traditional category of publisher, distributor, and common carrier[197]. Yet it is not entirely clear how plausible the common law approach to ISP liability could be, for ISPs do not always fit into one of the publisher, distributor, and common carrier categories.[198] Moreover, a more fundamental problem with the CDA arises from the lack of a

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193 Ibid at 54

194 Ibid .at 21

195 Robert T. Langdon, *The Communications Decency Act & 230: Makes Sense? Or Nonsense? – A Private Persons' inability to recover if defamed in cyberspace*, 73 ST. JOHN'S L. REV, 829 (1999); Michael H. Spencer, Defamatory Email and employer Liability: why Razing Zeran v. American Online is a good thing, 6 RICH. J.L & TECH. 25 (2000)

196 Daniel Solove, The Future of Reputation: Gossip, Rumor, and privacy on the internet 187 (2007). (Available at Amazon.com.) See also, Amy Gajda, The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press 252 – 54 (2015) (suggesting that a takedown provision needs to be incorporated into the CDA).

197 Matthew G. Jeweler, Note, The Communications Decency Act of 1996: Why Section 230 is outdated and publisher liability for defamation should be reinstated against internet service providers, 8 U. pitt. J. Tech. L. & Pol'y 3 (2007).

198 For Example, think about a portal website that publishes its own opinion, distributes other users' statements on its discussion board, and works as a mere conduit for delivering users' emails. For the

clear definition of ISP[199]. A law review author maintains that the current definition of an ISP is so broad that courts have permitted immunity to almost all the service providers, such as .Amazon.com or even individuals who created a chat room[200]. The definitional problem with ISP is not limited to U.S law. As Professor Gavin Sutter of the University of London noted, the concept of ISP does not provide "all-embracing definition and already looks somewhat dated."[201]

While the CDA has been increasingly criticized, it is still supported by the advocates of Section 230. The proponents argue that a notice-based" liability proposed by the CDA opponents would chill freedom of speech when ISPs simply choose to delete defamatory information alter receiving a notice from an allegedly defamed person[202].

Amidst the ongoing debates about the CDA on ISP liability in the United States, more people question the "notice-based'' ISP liability adopted by the Defamation Act 1996 of the United Kingdom. Several British lawyers suggest that the current "notice-based" liability in English

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problems of applying the common law standard, new media, like twitter and Instagram also defy these categorizations. How do you classify twitter which has its own website? A phone application, and a computer software? Which of them would has its own website, a phone application, and a computer software? Which of them would be the publisher, distributor etc., would each portal attract a different level of liability?

199 Sectio9n 230(c)(1) 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. "47 U.S.C. Section 230 (C)(1) (2000) (Emphasis Added).

200 Miree Kim, Narroeing The Definition of an interactive service provider under section 230 of the communication decency act, B.C Intell. Prop, & Tech. F. 033102(2003), available at http://www.Bc.Edu/Bc_Org/Avp/Law/St_Org/1ptf/Articles/Content/2003033102.html. accessed on 23/9/22. See also: Blumstein Stephanie, The New Immunity in Cyberspace: The expanded Reach of the communications decency act to the libelous re-poster, 9 B.U.J.Sci & Tech. L 407,230 (2003)

201 Gavin Sutter, Online Intermediares, In computer Law: The law and Regulation of information Technology (chris Reed & John Angel Eds., 6th Ed. 2007)

202 *See Marvin Ammori, The "New" York Times*: Free speech Lawyering in the age of goggle and twitter, 127 Harv. L. Rev. 2259 (2014) (stating that "CDA 230 is today's Sullivan" because it provided Immunity Broader thn the "Actual Malice" to protect online freedom of speech and nothing that all the American lawyers interviewed praised section 230); Kirsten M. Beattie, from the wires to wireless: How mass communication Technologies have affected the libel/slander distinction, single publication, and liability in defamation law 176 (2007) (unpublished Master's Thesis, University of North Carolina at the chapel Hill) (Available at academia Edu. accessed 12/9/22.

law would kill free speech, especially freedom of debates on the internet[203] they point out that ISPs likely to err on the side of deleting allegedly defamatory information regardless of the truth of the statement[204].

3.7 Australia.

The Broadcasting Services Act (BSA) of Australia provides a statutory defence to internet providers who carry or host Internet content in Australia and who were not aware that the contents of what they hosted were defamatory. Clause 91(1) of schedule 5 to the BSA provides that a law of a Stale or Territory, or a rule of common law or equity, has no effect to the extent to which it:

(i) subjects, or would have the effect whether direct or indirect of subjecting, an internet content host/internet service provider to liability (whether criminal or civil) in respect of hosting/carrying particular Internet content in a case where- the host/provider was not aware of the nature of the internet content.; or (ii) requires, or would have the-effect (whether direct or indirect) of requiring, an internet content host/internet service provider to monitor, in make inquiries about, or keep records of, internet content hosted/carried by the host/provider.

The definition of "internet content" in the BSA excludes "ordinary electronic mail, information that is transmitted in the form of a broadcasting service and information that is not "kept on a data storage device". In these cases, internet providers may be able to rely on

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203 Brian Holland, *In Defence Of Online Intermediary Immunity Facilitating Communities Of Modified Exceptionalism*, 56 Kansas L. Rev. 369, 395 (2008) (Arguing that "Takedown Damages Scheme" Might have serious problems with overboard restriction on speech and chilling effect); Matthew Schrures, The History and Economics of ISP Liability for third party content, 88 Va. L. Rev. 205 (2002) (Arguing that Government Regulation on ISP runs afoul of the first amendment).

204 Gavin Stutter, Internet Service Providers and Liability, In Human Rights in the digital age 71, 76 (Mathias Klang & Andrew Murray Eds., 2005).

the defence of innocent dissemination[205]. The Courts have held that the academic competence of a lecturer was defamed when "he was accused of misconduct in a message posted to an internet news group[206]" What this boils down to mean is that the law of defamation has a long arm as far as the internet is concerned but some, "terms and conditions" apply. For instance. In addition, because of the role the press play in keeping the public informed and in the dissemination of news and information, the press has been accorded a particular if not special deference that others may not be similarly entitled to when considering the publication on the websites of newspapers and journals. But then that leads to a new tough question: Who exactly is a journalist? the Internet is challenging the traditional concept of ''press'' and "journalist" as many bloggers are engaged in news reporting online. Scott Gant, in his book titled "We're All Journalists Now," argues that the conception of journalism should be adjusted to "reflect that there may be journalists who make it their profession, but one need not be a professional Journalist to practice journalism[207]. There is however no specific statutory definition of whom the press is especially with respect to the internet and there has not been any judicial decision to that effect.

3.8 ISP liability in other jurisdictions

Few countries have adopted the American-style rule of immunity for cyber libel. In Germany, for example, ISPs that, provide their own content or adopt third-party content are fully liable for their postings, while ISPs that simply host or provide access are only required to remove access to content.[208] ISPs in France have liability for defamation when they were aware of the

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205 See Defamation to law and the Internet @www.Efa.Org.Au

206 *Rindos v Hardwicke* No. 940164, March 25, 1994, Supreme Court of Australia.

207 Scott Gant, *we're all journalists now*: *The Transformation of the press and Reshaping of the law in the internet age 201* (2007). Quote in, Ahran Park (Supra).

208 Jan Hegemen & Slade R. Metcalf, Germany, In International Libel & Privacy Handbook.

defamatory content and when they did not restrain the access to the content as soon as they were notified of the content.[209]

Some countries, notably South Africa and Uganda, have legislated limitations on liability for ISPs, often termed "safe harbour". This protection is provided under certain conditions; usually that ISPs do not actively initiate or consciously modify the transmission, are unaware of unlawful content on their networks, and that they conform with certain laws and practices: for example responding to take-down requests. In cases where there are limitations on liability, liability can only occur when intermediaries are not protected under existing legislation[210]. This is the case under the South African Electronic Communications and Transactions (ECT) Act[211] and the Ugandan Electronic Transactions (ET) Act[212].

3.9 Conclusion

In this chapter we examined the legal Framework for prosecuting Defamation in Nigeria. And also a comparative comparison of the provisions in other jurisdictions with respect especially to the liability of Internet service providers. The English defamation Act of 2013, the American communications Decency Act of 1996, the SPEECH act, mainly protecting American citizens from liability imposed by foreign courts.

It is safe to say that there are three broad schools of thought with respect to the liability of ISPs in internet defamation. While in some jurisdictions, the ISP is thought to be completely

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209 Dominique Mondoloni, France, In International Libel & Privacy Handbook, (supra).

210 http://www.internet.org.Za/Eat_Act.html acessed on 16/10/22.

211 (25 of 2002)

212 (8 of 2011). Available at http://let.Go.Ug/Index.php?Option=Com_Docman&Task=Doc_Details&Gid=59&Itemid=61 acessed on 17/8/22.

liable for content posted off his service online, and moreso if he has Notice, or a complaint from the plaintiff[213].

The other school of thought believes that the liability for internet defamation must always lie squarely on the shoulders of the users[214], and not the ISPs.

The reasons advanced for insistence on the liability of ISPs can he summarised thus:

It is difficult to find the real culprit as the internet allows users to remain anonymous, making it difficult to trace the actual perpetrators. It is not always clear from which part of the world information emanates from and it is less clearer which countries the requested information passes through to arrive at its final destination: The ISP is identifiable and locatable and sometimes situated in the same jurisdiction as the culprit, thus easier to hold them liable in terms of locating the culprits.

i. The ISPs are more lucrative targets for litigation than the originator of the offending information content. An author notes that ISPs are better targets for law suits as they will typically have deeper pockets than individual users.[215] This means that instances where there is an award of damages alter a plea of defamation, the ISP is likely to pay more in damages than the average individual. Hence it is economically viable to hold ISPs liable[216].

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213 See the case of Tamiz v Google Inc. (supra)

214 Some authors argue that there should be a compulsory deanonymisation process so that users can be directly liable instead of ISPs. See Ronen Perry and Tal Z. Zarsky who should be liable for online anonymous defamation? Available at www.jstor.org assessed on 10/9/22.

215 Siffard J. "The Peer-to-Peer Revolution: A Post-Napster Analysis of the rapidly developing file-sharing technology".(2002) *4, Vand. J. Ent. L. & Prac. 93 at 95*. See also, "Why you should sue your ISP now". Available on https://www.nolo.com/ accessed 16/9/22.

216 Traditionally, newspaper and broadcasters have been attractive defendants as "deep pockets" in libel lawsuits. The vast majority of controversial libel litigation has involved media defendants because the media would likely pay more "significant award of damages" to plaintiffs than an individual author. See Eric Barendt Et Al., Libel and the media: The Chilling Effect 1-2 (1997).

ii. ISPs possess the requisite apparatus to monitor activities on the internet. In this regard ISPs can close down the home page or remove an e-mail and can stop further infringements by closing a site. They can also deny an offending subscriber access to copyrighted material.

iii. Another argument in favour of holding ISPs liable is that under contracts that they (ISP's) enter into with their customers, ISPs are authorised to close down websites as well as email addresses in cases of infringement[217].

On the other side is the argument against the liability of ISPs there are reasons why some jurisdictions[218] insist on this state of affairs:

ISPs argue that they are only "passive conduits"[219] and some writers have described them as messengers[220] and are no different from a traditional post office which is not liable for a defamatory letter that is posted through it or a telephone company which is not responsible for an obscene call made by a user[221]. Thus in *CoStar v LoopNet*[222] the majority held that and ISP should not be held liable for direct infringement when its facilities are used to infringe a copyright with no intervention made by the ISP.

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217 See the case of Zeran v. AOL, (supra). Even if this were not the case, there would be a mandatory deanoonymisation process, such that the ISPs can be compelled by injunctions to produce this for the courts.

218 Notably, the United States. The communications Decency Act of 1996 makes it almost impossible for ISPs to be found liable for defamation. this led to a great number of American plaintiffs seeking more amendable jurisdiction to institute their claims, see the case of king v Lennox (supra).

219 *See Religious Technology Centre v Netcom* 907 F, Supp. 1361 (N.D Cal.1995).

220 Gavin Stutter, "Don't shoot the Messenger: The evolution of liability for third party provided content in the Uk", 17th BILETA Annual Conference, April 5th -6th 2002, Free University, Amsterdam. Available at http://www.ipu.com accessed on 9/7/22.

221 Thilini K., "Liability of Internet Service Providers for third party online copyright infringement: a study of the US and Indian laws", (2007) Journal of intellectual Property rights, vol.12 No.11 553-561 at 555.

222 373 F. 3D544(4th Cir.2004), an American case.

It is highly impracticable to expect ISPs to screen all the contents passing through their systems giving the large number of transactions taking place. Even after constant screening, 100% accuracy cannot be achieved so as to prevent every single instance of copyright infringement.

i. Screening contents of transactions passing through their system will inevitably lead to violation of subscribers' privacy rights.
ii. In the case of false claims from supposed defamed persons, the intermediary may be liable for breach of contract to the subscriber where it screens purported offending material.

A critique of the two schools of thought, and a highlighting of several middle grounds were explored. In the Next chapter, a set of recommendations will be made, the ultimate aim of which is to suggest the approach most appropriate for Nigeria, given her peculiarities and the vicissitudes of the internet.

CHAPTER FOUR

4.0 Creation of a Legislative Framework to Ban Anonymous And Pseudonymous Posts And Impose Statutory Liability on ISP'S.

The perhaps most serious challenge facing internet defamation suits which is identifying the defendant can he sorted by a statutory ban on anonymous and pseudonymous posts. The only possible way of being able to identify a user who has posted would be to find out the details of the computer that was used to publish the statement or post contact.

However, if this is a public computer, then it is almost impossible to narrow down the search in order to find the culprit.[223] This justifies including the Internet Service Provider, administrator or owners as co-defendants.

It is clear that a defendant in internet defamation cannot be identified without the ISP whose role as the ‘'publisher” cannot be undermined[224]. The rationale behind holding website administrators and owners responsible as publishers for their site content is that doing so would quickly and dramatically decrease the amount of defamatory content online. Whatever the case, claimants in jurisdictions which have internet defamation recognized have attempted to name ISP’s as defendants in defamation actions. ISP’s may have "‘deep packets” in excess of the resources of the average internet user. This makes them an attractive target to would-be plaintiffs [claimants].[225]

The reasoning that ISP’s be made parties as well as held liable together with the original *tort feasor* is premised on the fact that in traditional libel, publishers of defamatory content are

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223 See http://www.reputationhawk.com/onlinedefamation.html accessed on 30/7/22.

224 Justice R. Fred Lewis of the Supreme Court at Florida rejected the definition of ISPs as publishers, atating that in some cases they may also be distributors or just passive conduits, much like a bookseller. *See Doe v. America Online, Inc*. 783 So.2d 1010, 1022 (Fla. 2001) (Lewis, J., dissenting). *See also Doe v. GTE Corp*., F.3d 655, 660 (7th Cir. 2003) see also the case of *Tamiz v. Google Inc* (supra).

225 “who should I sue for online defamation?” available at http://www.nolo.com/ accessed on 21/8/22.

made parties and held liable as well. It is no doubt that some ISP's act solely as access providers; merely connecting users with the internet and not involved in any form of web hosting. If publishers in traditional libel, who perhaps were not involved at the manuscript stage of defamatory publications, are not excused, one would wonder why the case should be different in the internet cases.

It is admitted that holding website administrators and owners responsible for defamatory content on their site would be a bit difficult task as they do not have the power of prior restraint in the same manner as newspaper editors especially given the volume of prospective content.

Whatever the case, it is submitted that if a degree of liability is placed on them, they would be compelled to fashion out Site Content Rules based on the cultural values and social norms which they wish to promote, bearing in mind the difficulty of identifying the defendant especially if the defamatory content was placed on a public computer.

There should also be both legislative and technological ban on anonymous and pseudonymous web postings. The rationale being that a defendant could be easily identified should a defamatory content be published. It is submitted that advocates of anonymous speech who consider it as part of free speech rights arc not altogether correct as a person should be able to defend his speech if what he is asserting is actually true. The idea is that if anonymous speech is continued, then unscrupulous persons can knowingly publish false statements which would cause reputational harm on others[226].

It Is further submitted in the same vein however that the liability of ISPs for online defamation be made subject only to a takedown notice by the plaintiff.

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[226] See: Aladokiye E. Gabriel-whyte, "Developing a legal framework for Internet Defamation", available at http://www.iaset.us accessed on 14/8/22.

Website owners, administrators and providers are to create a Bloggers Code of Conduct or Site Content Rules as proposed by the blogher.org community guidelines[227] and defined by Tim O' Reilly[228] which specifically licenses the deletion of abusive, threatening and invasive content. This is a situation whereby site administrators or service providers caution users of the user's full liability should there be any defamatory content. This would bring to mind for instance exclusion clauses and limiting terms under the Law of Contract whereby one party escapes liability by the other party signing some document in agreement. The user clicks on an agreement button as evidence of agreeing to the terms of Site Content Rules and the site owners and administrators thereby escape liability.

Website owners and administrators designing their web pages to having a publicly available comments section immediately after the post or section containing the allegedly defamatory speech. This is more or less a self-help mechanism that can help the victim of internet defamation to come to his own rescue by defending himself on the same page where his reputation has been harmed. The perhaps most popular

interactive website; Facebook allows this comments section where the potential claimant can rebut or respond to the defamatory allegation.

4.1 Amendment of Statutes to Remove Defamation from the Purview of Criminal Law.

The law of defamation, as stated in chapter one, is aimed at protecting the reputations of individuals in society; while not hampering the freedom of expression, it is submitted that criminalising defamation would amount to gagging individuals and indeed the press. Intact a perusal of the provisions of the Cybercrime Act seems to suggest that this is indeed the

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227 Blogger, *what are your community Guidelines*? Available at: http://www.blogger.com/what-are-your-community-guidelines accessed on 20/8/22.

228 O'Reilly Radar, Call for a bloggers code of conduct, available at: http://radar.Oreilly.com/archives/2007/03/call-for-ablog-1.html accessed on 21/8/22.

intention of the law in Nigeria. Section 24 of the Cybercrime Prohibition Act of 2017, provides that:

> *Any person that sends a message or other matter by means of computer systems or network that:*
>
> *(a) is grossly offensive, pornographic or of an indecent obscene or menacing character or causes any such message or matter to be so sent; or*
>
> *(b) he knows to be false, for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury; criminal intimidation, enmity, hatred, ill will or needless anxiety to another or causes such a message to be sent.*

The- provisions of this section are indeed elastic enough to fit almost any form of exercise of free speech and can be abused at will by powerful persons in society[229]. Furthermore, it is submitted that the criminalization of defamation would limit the development of a virile press, as the fear of jail time will override the need to tell the truth, or to demand accountability[230]. A veritable question to ask, if we insist on maintaining the status quo, keeping defamation within the purview of criminal Jurisprudence, is how the law will be applied if the ISPs are joined as defendants in a court action.

4.2 Creating clear laws on Jurisdiction.

Several arguments have been raised that to make the claimant's residence or where he operates his business the appropriate jurisdiction would mean the defendant (particularly web sites owners, administrators, hosts and service providers) is potentially liable to the whole world as he would have to be abreast with the laws of the whole world. It was submitted on this point; "the consensus among media lawyers is unexciting: publishers know the people they are about to chastise and therefore they will know the country where damage to

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229 See generally: Femi Falana: Illegality of criminal libel in Nigeria. Vanguard Newspaper January 27, 2017. Available at http://www.vanguardnigeria.com/ acessed on 12/7/22.

230 Ibid

reputation would occur…" This position is submitted to be the correct reasoning as the claimant in internet defamation cannot bring an action in just any country other than where he has minimum contact or at least has suffered some damage. Media lawyers from more than a score of countries discussed the issues relating to jurisdiction on defamation made on the internet at the International Bar Association Conference in Durban, South Africa recently.[231] They recognized that a claimant may not be able to recover large damages due to the limited nature of the publication in that claimant's jurisdiction. They produced what is known as the '"Durban Principles" set out hereunder;

- A court may hear a complaint if the court is in a forum where the claimant lives, the defendant lives or the parties consent to jurisdiction.
- The court' should apply the law of the jurisdiction with the most significant connection on the internet site. This would ordinarily be where the editorial work was completed.
- In any case arising from the content of an internet site posting, it should, be a complete defence to liability if, within 24 hours the Internet Content Provider posts a notice that a complaint has been made and provides a link to the text of the complaint on its site,

The Durban Principles are very novel suggestions to establish a legal framework for Internet Defamation but the second rule therein is flawed by this work. The position here is that the defendant should be allowed to sue where he has a reputation to protect; that is, the place of download of the material other than the place of upload as suggested by the Durban Principles.

It may appear problematic that since internet defamation has been suggested in this work to be treated as libel, then there is the likelihood that the claimant may enjoy damages which he does not merit owing the principle of presumed damage in libel cases. This fear is laid to rest

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231 "Court Misses Internet Opportunity" The age, 15 December, 2002, as cited in Aladokiye E. Gabriel-whyte, "Developing a legal Framework for internet Defamation", available at http://www.iaset.us accesed on 17/8/22.

as it was suggested that only nominal damages should be awarded by the court except where the claimant can prove special damage.

It is suggested that the position of the court reached in *Dow Jones v. Gutnick*[232] be adopted. This is; the place where the defamatory content is downloaded should be the place with jurisdiction, which can be seen as the place where the tort was committed. This position is supported hereunder;

> *The High Court (as indeed Justice Hedigan did in Victoria) has treated internet publishing in much the same way as other means of mass communication-and rightly so. If information is "uploaded" from a server on the other side of the world it should be irrelevant to the harm it may cause in the home country of the person who is its subject. The real issue is where a person reads or hears and comprehends the material, not where it may have come from. To have news agencies such as CNN expressing great concern over this decision because they may be liable to defamation actions in every country on earth is a good example of uninformed panic rather than rational consideration of the matter generally and the judgment itself. The context in which the decision is made is no different to what has occurred in radio, television or other forms of international communication in the past. The only real difference is that the internet has offered a greater reach and immediacy than previous forms of mass communication. The advent of cyberspace has not done the mayhem in this area of the law that many observers would make us believe*[233].

Nicholas Pullen further argued that United States, arguably the largest publisher on the internet, would become the *de facto* forum for settling these types of disputes. Put another way, US laws would control the rights to one's reputation throughout the world.[234] For the High Court of Australia to decide otherwise would not have been in step with similar overseas decisions concerning the internet. Regardless of their jurisdiction of origin,

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232 (2002) HCA 56

233 N. Pullen, Defamation on the Internet: a tangled web", *The Age*, 11 December, 2002, as cited in Aladokiye E. Gabriel-Whyte, "Developing a legal Framework for internet Defamation", available at http://ww.iaset.us accessed on 7/9/22.

234 Ibid.

statements are actionable in the jurisdiction of publication and damage to reputation. The court commented that traditionally, defamation occurs at the place where damage to reputation occurs. Harm occurs where and when the material is read. Jurisdiction therefore can be established at that location in a defamation action;

> *In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.*[235]

It is suggested that this position be maintained as it is in random with traditional defamation rules as the authority without altering the form and nature of the tort of defamation has yet accommodated internet defamation situations.

235 *Dow Jones v. Gutnick* (2002) HCA 56,

CHAPTER FIVE

5.0 Single Publication Rule as Solution

Traditionally, republication of a defamatory statement constitutes a fresh cause of action.[236] To maintain this position regarding internet defamation may not be a rational thing to do bearing in mind the uniqueness of the internet. This is perhaps the only point in the course of this work where it is suggested that traditional defamation rules be altered.

Different jurisdictions have arrived at different positions on the issue as earlier discussed but it is suggested that the single publication rule be adopted since defamatory content online is somewhat permanent. Refusing to uphold the single publication rule would amount to unending litigation on the same substance[237]. It is logical to hold republication in traditional defamation as defamation in that some consciousness is established on the part of the defendant as he ought to know that he is re-publishing a defamatory matter. However, in internet defamation cases, the mere click of a button can make a person a defendant for republication of defamatory content on the internet This position is however suggested to be left flexible that if the claimant can establish malice on the part of the defendant then the single publication rule should not apply but be seen as republication of the defamatory content.

The rationale behind holding that the single publication rule be adopted is hinged on the dictum of the court in *Loutchansky v. Times Newspapers Ltd.*[238] regarding republication on the internet. Commenting on the balance between the social utility of archiving materials and the protection of reputation under the circumstances, the court held that; "archive material is

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236 *Yusuf v. Gbadamosi (supra).*

237 With respect with social media. What if the post has 1000 reposts, is the plaintiff to bring in all 1000 defendants?

238 Nos.2-5 (2005) QB 783 at 813, per Lord Phillips MR CA. It is important to note that the court did not however stick to the position of single publication rule.

stale news and its publication cannot rank in importance with the dissemination of contemporary material".

There would therefore be the need to statutorily provide that the single publication rule be applied to defamation on the internet except where the claimant in such action can prove malice on the part of the defendant.

Furthermore, given the snail speed of Nigeria's judicial system an aggrieved plaintiff would find himself embroiled in a long and really grueling process before he gets remedies.

5.1 CONCLUSION

This work, "Examining the Liability of Internet Service Providers in Nigeria" has discussed the traditional tort of defamation and most importantly discussed the internet and internet defamation which is an emerging area in the law as the internet is just a few decades old. It specifically discussed the liability of ISPs. The reason for this research being that a claimant in defamation made on the internet should like his counterpart in traditional defamation be entitled to a right of action against such defendant who without justification has caused him reputational loss.

On the question of who is liable, especially for anonymous content between the user and the Internet service provider, ISP, it had been suggested that the ISPs and indeed all panics involved in the process of getting the defamatory material published, be joined in the action, the reason being that the ISP may only agree to give up the identity of the user where there is the possibility of a suit against him. The liability of the ISP as suggested in this work should be subject only to his flouting a takedown notice by the plaintiff.

It had been suggested earlier that owing to the uniqueness of the internet, particularly its permanence of information placed thereon and the utility of archived materials, it would amount to unending litigation on the same fact if every republication is considered to found it

new cause of action as it is in traditional defamation. It was suggested that the Single Publication Rule be employed to treat publication of such defamatory statement as a single publication except where it is found that the defendant "knowingly" republished such matter out of malice[239].

An important point of note within the course of the work that was considered and suggested is the fact that the defamatory matter is considered published where the material was fully downloaded from the internet and not where it was uploaded. Again., the line issue of jurisdiction as to which court is the convenient forum where both claimant and defendant are in different jurisdictions flows from the issue of publication, being where the material was downloaded from the internet as the place where the toil is committed since it is where the claimant has a reputation to protect.

The research methodology adopted in the course of the work was qualitative with reference to text books, journals, cases, statutes and online sources. There was however some bottlenecks in the course of the research which borders on limited materials available on the subject of internet defamation.

Since the internet is a technological advancement that has gained acceptance across the globe, it is not odd that such a research is imperative to ensure that users of such technological facility do so with some civility and not cause other persons some detriment whilst expressing their constitutionally guaranteed freedom of speech.

[239] This segment agrees with the provisions of the British Defamation Act of 2013.

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