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## NOTES

### THE SINGLE PUBLICATION RULE AND ONLINE COPYRIGHT: TENSIONS BETWEEN BROADCAST, LICENSING, AND DEFAMATION LAW

#### I. INTRODUCTION

Defamation provides a cause of action for individuals whose reputations are harmed by the intentional publication of a statement, when its content tends to injure reputation.<sup>1</sup> Publication is an essential prong of the tort: the statement must reach someone other than the person discussed.<sup>2</sup> In the evolving realm of online content and especially on-demand video, when such publication occurs can be unclear. This Note will examine the overarching tension in internet law between the copyright policy objectives of the Digital Millennium Copyright Act<sup>3</sup> (DMCA) and the First Amendment values of the single publication rule. While the DMCA both protects intellectual property and encourages innovation, the cost of meeting those goals can be liability under the single publication rule. Policymakers must therefore be cognizant of the ways in which the two doctrines both support and complicate one another, choosing carefully to serve the ultimate goals of promoting innovation and protecting speech. Copyright law must also adapt itself to a new paradigm in which innovation is the predominant goal but in which enabling such creativity may mean allowing reputational injury of a previously unimaginable scope.

Both Congress and the courts have recognized a policy interest in “the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”<sup>4</sup> The challenge, however, has been correctly balancing that interest against reputational harms and intellectual property violations. This Note will consider streaming video as an example of that tension; the potential for streaming video to function as a re-broadcast of material may provide plaintiffs an argument that their claims should not be seen as stale once the statutory period has passed. This Note will contend, however, that online content, especially streaming video, ought to be subject to the single publication rule that

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<sup>1</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977).

<sup>2</sup> *Id.*

<sup>3</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

<sup>4</sup> S. REP. NO. 105-190, at 1-2 (1998), *quoted in* UMG Recordings, Inc. v. Veoh Networks, Inc., 620 F. Supp. 2d 1081, 1090 (C.D. Cal. 2008).

has traditionally governed publishers' liability; doing so would serve the goals of protecting speech and discouraging attempts to bring stale claims. The web gives private "citizens inexpensive access to a medium of mass communication and therefore transforms every citizen into a potential 'publisher' of information for First Amendment purposes,"<sup>5</sup> and it would be unwise to threaten the willingness of such would-be publishers to add their ideas to the online marketplace. The interaction of traditional media — even when accessible over the internet — with less-regulated channels is also a complicating factor.<sup>6</sup> This Note considers how the traditional concepts of licensing and defamation liability are to be understood in a world of streaming content, where users can rebroadcast a piece as much as they like, and where the impact of statements is no longer isolated to readers of a paper or watchers of a broadcast but instead extended across the globe.

The increasingly blurred lines between the internet and other technologies are necessarily accompanied by doctrinal convergence of varied areas of law to govern online content.<sup>7</sup> This Note seeks to join that trend toward convergence. Part II considers the single publication rule, its history, and its justifications. Part III introduces the myriad copyright and licensing issues involved in internet publication. Part IV discusses the interaction of copyright and defamation law. Part V concludes by drawing lessons from both forms of regulation. Policymakers and courts must resolve a fundamental conflict facing internet law: to conform to the DMCA rules and avoid copyright infringement, posters must alter the original content enough to bring themselves under the protection of fair use, but the greater that deviation from the original publication the more likely posters will be to expose themselves to defamation liability. In other words, while one policy favors innovation, the application of the other threatens to punish it.

## II. THE SINGLE PUBLICATION RULE: HISTORY AND JUSTIFICATIONS

This Part will first examine the content of and justifications for the single publication rule and the impact of republication. It will then examine the rule's bearing in the internet context and conclude with the example of the rule's application to streaming video. The rule is of particular importance in demonstrating courts' protection of free

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<sup>5</sup> Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 895 (2000) (footnote omitted).

<sup>6</sup> See Yuval Karniel, *Defamation on the Internet — A New Approach to Libel in Cyberspace*, 2 J. INT'L MEDIA & ENT. L. 215, 230 (2009).

<sup>7</sup> Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1284–85 (2002).

speech and commitment to the marketplace of ideas, but as will be discussed, those ideals become more complicated when intertwined with concepts of intellectual property.

*A. The Single Publication Rule and the Impact of Republication*

The single publication rule was developed in the traditional print context but is just as applicable to claims arising from material published via the internet. The rule provides that “the publication of a single defamatory item, such as a book or article, even if sold in multiple copies, and in numerous places, at various times, gives rise to ‘only one cause of action which arises when the finished product is released by the publisher for sale.’”<sup>8</sup> The date of publication defines the beginning date of the statute of limitations; in most states, the statute of limitations for defamation is one year after publication.<sup>9</sup>

While a single printing is one communication, later republication or reissuance is different.<sup>10</sup> A comment to the Restatement (Second) of Torts section 577A explains:

[I]f the same defamatory statement is published in the morning and evening editions of a newspaper, each edition is a separate single publication and there are two causes of action. The same is true of a rebroadcast of the defamation over radio or television or a second run of a motion picture on the same evening. In these cases the publication reaches a new group . . .<sup>11</sup>

This exception is the one most likely to be used for online material, since, for instance, moving a hyperlink to a video between two sites could be aimed at reaching different audiences, as could posting a streaming video of a broadcast earlier shown on television.

A later distribution of the same content will only be considered a republication, thus restarting the statutory period, if it is a substantial modification of the earlier version.<sup>12</sup> In *Rinaldi v. Viking Penguin*,

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<sup>8</sup> *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 89 (2d Cir. 2003) (quoting *Gregoire v. G.P. Putnam’s Sons*, 81 N.E.2d 45, 49 (N.Y. 1948)); see also *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 142 (5th Cir. 2007); *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022, 1028 (9th Cir. 1983); *Shanklin v. Fernald*, 539 F. Supp. 2d 878, 883 (W.D. Tex. 2008); *Kanarek v. Bugliosi*, 166 Cal. Rptr. 526, 529 (Ct. App. 1980). The rule is similarly stated in the Restatement (Second) of Torts: “Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.” RESTATEMENT (SECOND) OF TORTS § 577A(3) (1977).

<sup>9</sup> See, e.g., *Nationwide Bi-Weekly*, 512 F.3d at 146; *Shanklin*, 539 F. Supp. 2d at 883–84; *Lane v. Strang Commc’ns Co.*, 297 F. Supp. 2d 897, 899 (N.D. Miss. 2003); see also *Lori A. Wood, Note, Cyber-Defamation and the Single Publication Rule*, 81 B.U. L. REV. 895, 914 (2001).

<sup>10</sup> See, e.g., *Lehman v. Discovery Commc’ns, Inc.*, 332 F. Supp. 2d 534, 538 (E.D.N.Y. 2004).

<sup>11</sup> RESTATEMENT (SECOND) OF TORTS § 577A cmt. d.

<sup>12</sup> See *Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1052 (D.N.D. 2006); *Nichols v. Moore*, 334 F. Supp. 2d 944, 952 (E.D. Mich. 2004).

*Inc.*,<sup>13</sup> the court emphasized the substantial modification of the later release as a factor militating in favor of its counting as a separate publication.<sup>14</sup> The “substantially modified” prong in the online video context will largely depend on whether the video has been re-edited from its original form and on how licensing of non-internet content for internet use determines any editorial or substantive changes. Merely adding nonsubstantive material is usually not sufficient for republication.<sup>15</sup> Republication may also be found to have occurred when the material is reissued in a different format to reach a different audience, as in the case of a paperback edition of a hardcover book;<sup>16</sup> whether the publisher had exclusive control over the publication during the period before republication may also be considered.<sup>17</sup>

The rule was designed “to prevent a multiplicity of unnecessarily vexatious suits against a publisher, especially after a book has left the possession of the publisher, has been placed in the stream of commerce and is exclusively under the control of wholesale distributors and retail outlets.”<sup>18</sup> The rule was not intended to protect publishers from “later, independent publishing acts,” such as a reprint or a new edition of a book.<sup>19</sup> Posting non-internet content in a new form online is similar to publishing a paperback edition in the sense that doing so may reach a different audience. One court has noted that, “[l]ike a publication of the same defamatory statement in both a morning and evening editions [sic] of a newspaper, a rebroadcast of a television show is intended to reach a new audience and is therefore an additional communication.”<sup>20</sup> The later publication, as in a rebroadcast in a later newscast, may be sanctionable as “the result of a conscious independent act.”<sup>21</sup> Now-Professor Sapna Kumar similarly urges that the determining factor of republication should not be substantial modification but rather a publisher’s attempts to disseminate a statement to a

<sup>13</sup> 422 N.Y.S.2d 552 (Sup. Ct. 1979).

<sup>14</sup> *Id.* at 556.

<sup>15</sup> *E.g.*, *Atkinson*, 462 F. Supp. 2d at 1059.

<sup>16</sup> *See* *Cusano v. Klein*, 264 F.3d 936, 949 (9th Cir. 2001) (citing *Kanarek v. Bugliosi*, 166 Cal. Rptr. 526, 530 (Dist. Ct. App. 1980)); *Rinaldi*, 422 N.Y.S.2d at 556.

<sup>17</sup> *Nichols*, 334 F. Supp. 2d at 952 (E.D. Mich. 2004); *Rinaldi*, 422 N.Y.S.2d at 556.

<sup>18</sup> *Rinaldi*, 422 N.Y.S.2d at 555–56 (citing RESTATEMENT (SECOND) OF TORTS § 577A(3) (1977)).

<sup>19</sup> *Id.* at 556.

<sup>20</sup> *Lehman v. Discovery Commc’ns, Inc.*, 332 F. Supp. 2d 534, 539 (E.D.N.Y. 2004); *see also Atkinson*, 462 F. Supp. 2d at 1052; *Zoll v. Jordache Enters., Inc.*, No. 01 Civ. 1339(CSH), 2003 WL 1964054, at \*2 (S.D.N.Y. Apr. 24, 2003); *Momah v. Bharti*, 182 P.3d 455, 467 (Wash. Ct. App. 2008) (stating that the defendant made a separate publication aimed at a separate audience when he posted to his website comments that had been published in a newspaper).

<sup>21</sup> *Herron v. KING Broad. Co.*, 746 P.2d 295, 300 (Wash. 1987).

new audience;<sup>22</sup> to determine the publisher's intent, she argues, courts could consider "whether the traffic to the website has increased substantially."<sup>23</sup> But Kumar fails to acknowledge that there could be any number of reasons for increased traffic, most of which are beyond the publisher's control. The model also overlooks how little control the original posters of material may have over its later dissemination.

### B. *The Application of the Rule to Internet Content*

Courts facing internet-based defamation claims have attempted to apply the standards developed in the print and film contexts to the new medium, especially on the fundamental issue of whether the continued presence of material on the internet constitutes a republication.<sup>24</sup> Many courts have held that, for publication purposes, the one-year statute of limitations begins to run on the first day a publication is posted to the internet.<sup>25</sup> The Fifth Circuit noted:

To the extent [that the continuous publication] argument is based on the fact that more people will be exposed to Internet publications because those publications are likely accessible for a potentially indefinite period, we feel it is outweighed by the competing policy interests of enforcing the statute of limitations and preventing stale claims.<sup>26</sup>

That continued availability has been troubling to a number of plaintiffs; in one case, the plaintiffs argued for stricter liability because:

[T]raditional print media is generally date-sensitive and printed in a single edition . . . ; by contrast Internet publications are available in the same manner, with the same level of prominence, throughout time, and have the potential for much greater circulation than traditional print media.

. . . Internet publishers, unlike traditional print media publishers, could easily remove an offensive document from further general public view by removing it from the website.<sup>27</sup>

A New Jersey court rejected that argument, however, finding it inconsistent with modern practices of mass production and a troubling impediment to speech.<sup>28</sup>

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<sup>22</sup> Sapna Kumar, Comment, *Website Libel and the Single Publication Rule*, 70 U. CHI. L. REV. 639, 657–59 (2003).

<sup>23</sup> *Id.* at 659.

<sup>24</sup> See Wood, *supra* note 9, at 902–08.

<sup>25</sup> See, e.g., *Hamad v. Ctr. for Jewish Cmty. Studies*, 265 F. App'x 414, 417 (5th Cir. 2008); *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 146 (5th Cir. 2007); *In re Davis*, 347 B.R. 607, 611 (W.D. Ky. 2006); *Traditional Cat Ass'n v. Gilbreath*, 13 Cal. Rptr. 3d 353, 355 (Ct. App. 2004).

<sup>26</sup> *Nationwide Bi-Weekly*, 512 F.3d at 145 (citing *Holloway v. Butler*, 662 S.W.2d 688, 691 (Tex. App. 1983)).

<sup>27</sup> *Churchill v. State*, 876 A.2d 311, 315 (N.J. Super. Ct. App. Div. 2005).

<sup>28</sup> *Id.* at 316.

In the internet context, courts have almost always rejected the continuous publication rule,<sup>29</sup> which finds republication each time a viewer accesses a website.<sup>30</sup> The single publication rule allows publishers to predict more reliably their liability. It avoids subjecting publishers to a multiplicity of actions and possible harassment, and also conserves judicial resources.<sup>31</sup> Kumar's suggestion that the date of publication should depend on discovery rather than upon posting<sup>32</sup> is troubling, as the date material is actually discovered is beyond the control of the publisher, who only controls when it is posted.<sup>33</sup> Requiring courts to use direct and indirect methods to determine publication, including website traffic data and archives, as she urges,<sup>34</sup> would place too high a burden on courts and make it far too difficult for publishers to determine when the statutory period has elapsed. Similarly, Odelia Braun's argument that the rule should not apply to the internet because removing information from a website is easier than removing it from print<sup>35</sup> does not recognize how quickly information is cached and hyperlinked, creating a more permanent record. As will be discussed, the application of the single publication rule to the internet conflicts with the DMCA's objectives: while the latter is part of a general copyright scheme that protects propertyholders' rights and subjects violators of those rights — such as unlicensed reposters of content — to liability, the former actually protects later posters if the audience reached by the first posting includes that covered by the latter.

One of the seminal cases on internet defamation, *Firth v. State*,<sup>36</sup> is an exemplar of limited liability for internet posters. In *Firth*, the Court of Appeals of New York flatly rejected the plaintiff's argument that the single publication rule should not apply to the internet and declined to find that each hit to a site should be considered a new publication.<sup>37</sup> The court feared that such a rule would have "a serious in-

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<sup>29</sup> See, e.g., *Nationwide Bi-Weekly*, 512 F.3d at 144; *Shanklin v. Fernald*, 539 F. Supp. 2d 878, 883 (W.D. Tex. 2008); *Lane v. Strang Commc'ns Co.*, 297 F. Supp. 2d 897, 900 (N.D. Miss. 2008); *Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1051 (D.N.D. 2006).

<sup>30</sup> *Nationwide Bi-Weekly*, 512 F.3d at 142; see also Kumar, *supra* note 22.

<sup>31</sup> *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 89 (2d Cir. 2003); *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022, 1028 (9th Cir. 1983); see also RESTATEMENT (SECOND) OF TORTS § 577A cmt. b (1977).

<sup>32</sup> Kumar, *supra* note 22, at 650.

<sup>33</sup> Cf. *Fleury*, 698 F.2d at 1028 (holding that plaintiffs in California only have one year to file their libel claims, even if they do not realize that they have been defamed).

<sup>34</sup> Kumar, *supra* note 22, at 655. Kumar also suggests using advertising data, listing on a major search engine, or hyperlinking to the website in order to determine when the statement has been published. *Id.* at 657.

<sup>35</sup> Odelia Braun, *Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply*, 32 GOLDEN GATE U. L. REV. 325, 332 (2002) ("[E]liminating information on a website is practical, even easy to do.").

<sup>36</sup> 775 N.E.2d 463 (N.Y. 2002).

<sup>37</sup> *Id.* at 465.

hibitory effect on the open, pervasive dissemination of information and ideas over the internet, which is, of course, its greatest beneficial promise.”<sup>38</sup> In the news context especially, allowing greater liability for defamatory content could have a chilling effect,<sup>39</sup> as requiring more in-depth research and analysis would delay the time at which material would be available online. Allowing the multiple publication rule would actually discourage posters from revising content as more facts developed, as such alteration could give rise to a new publication and therefore a restarted statutory period. The *Firth* holding has been cited approvingly by virtually every other court to consider the issue.<sup>40</sup>

### C. Streaming Video: An Illustrative Example

The application of the single publication rule to streaming video raises many of the similarities and dissimilarities of the internet to prior media. To take an intermediate step, the release of a DVD previously shown in theaters constitutes a republication just as a paperback edition does.<sup>41</sup> This fact is especially true when a DVD has special features not part of the theatrical release and is intended to reach a new audience: “[T]hose persons who were either unwilling or unable to attend a screening of the Film at a theater, and those who wish to view the ‘Special Features’ included in the DVD.”<sup>42</sup> This reasoning can also be applied to streaming video, where video on, say, NBC.com might be used by viewers who were unable to watch the broadcast when it initially aired or who, for instance, might want to watch made-for-internet scenes of shows like *The Office*. In the sense of reaching an alternative audience and of providing special content, then, courts’ treatment of DVD releases could inform their analysis of online video. Determining publication of internet material can be difficult because “[m]any Web sites are in a constant state of change . . . [; in particular,] Web sites are used by news organizations to provide readily accessible records of newsworthy events as they oc-

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<sup>38</sup> *Id.* at 466.

<sup>39</sup> *See id.* at 467.

<sup>40</sup> *See* Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137, 144 (5th Cir. 2007) (“Every court to consider the issue after *Firth* has followed suit in holding that the single publication rule applies to information widely available on the Internet.” (collecting cases)); *see also* Oja v. U.S. Army Corps of Eng’rs, 440 F.3d 1122, 1130–32 (9th Cir. 2006) (stating that the *Firth* court’s concerns have led both state and federal courts “to extend the single publication rule to Internet publication,” *id.* at 1032); Van Buskirk v. N.Y. Times Co., 325 F.3d 87, 89 (2d Cir. 2003) (applying *Firth*); Traditional Cat Ass’n v. Gilbreath, 13 Cal. Rptr. 3d 353, 362 (Ct. App. 2004) (applying *Firth*); McCandliss v. Cox Enters., Inc, 593 S.E.2d 856, 858 (Ga. App. 2004) (following *Firth* and rejecting plaintiff’s argument that each hit should be considered a new publication).

<sup>41</sup> *See* Nichols v. Moore, 334 F. Supp. 2d 944, 953 (E.D. Mich. 2004).

<sup>42</sup> *Id.*

cur and are reported.”<sup>43</sup> Applying a republication rule could thus be even more difficult in the internet context because of the potential to stifle the rapid development of material, which is one of the medium’s chief advantages.

The main sense in which streaming online content is problematic from the single publication viewpoint, however, is that users can choose to rebroadcast material to themselves whenever they wish. The moment material becomes available online, “like publishers of books and periodicals, the Internet publisher does not monitor who receives the information.”<sup>44</sup> The republication element of the publisher’s exclusive control over the material is defeated, since once the material is posted online it is up to web surfers to decide if and when to watch it and perhaps whether to repost it elsewhere. Requiring online content providers to monitor every viewing of and link to their material in the expanding online universe would be unmanageable:

Publications on general access sites pose the very problems the single publication rule seeks to prevent — multiplicity of actions, undue harassment of defendants, possible excessive recoveries for plaintiffs through multiple suits, unnecessary depletion of judicial resources, and unnecessary exposure of the court system to stale claims in which the evidence may have been lost, and witnesses may have died, disappeared, or suffered a loss of memory.<sup>45</sup>

While the court in *Lehman v. Discovery Communications, Inc.*<sup>46</sup> noted that to avoid republication liability, “the decision maker need only make a conscious decision to refrain from rebroadcast,”<sup>47</sup> publishers of online content have no such ability to determine when to remove material; while they may remove it from a particular website, caching and hyperlinking mean that once material is posted online it cannot really be controlled again. The sheer breadth of the internet is a strong aspect of its dissimilarity from prior modes of defamation analysis, and could certainly support more stringent liability for posting defamatory content. The problem, of course, is that such liability stifles the innovation and freedom that are two of the internet’s chief virtues.

Alteration of content, as often occurs in transporting material from traditional broadcast media to the internet, can also renew liability. One court, while ruling against the defendant on other grounds, stated in dicta that though there was no change in the content of a broadcast, changes in packaging and presentation (including incorporation into a video compilation and the addition of video material before and after

<sup>43</sup> 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 4:93.50, at 4-178 (2d ed. 2009).

<sup>44</sup> Wood, *supra* note 9, at 913.

<sup>45</sup> *Id.* (citing *Gregoire v. G.P. Putnam’s Sons*, 81 N.E.2d 45, 48 (N.Y. 1948)).

<sup>46</sup> 332 F. Supp. 2d 534 (E.D.N.Y. 2004).

<sup>47</sup> *Id.* at 539.



the segment) gave rise to republication liability.<sup>48</sup> There is a strong argument, however, that changes to one portion of a website should not constitute republication: such a view “discourages the placement of information on [the] Internet altogether, or necessitates the use of a separate website for every piece of information to avoid the risk of perpetual liability.”<sup>49</sup> As a federal district court reasoned: “The mere act of editing a website to add unrelated content does not constitute republication of unrelated defamatory material that is posted on the same website. Similarly, mere technical changes to a website, such as changing the way an item of information is accessed, is not republication.”<sup>50</sup>

### III. LICENSING AND COPYRIGHT FOR ONLINE CONTENT

Just as defamation rules are still forming for internet content, so too are the policies behind licensing and copyright rules adjusting to the evolving medium. Copyright law, notably the DMCA, aims to encourage innovation and protect fair use of copyrighted material. While both copyright and defamation law support creativity, they sometimes do so in countervailing fashion, which on the internet may lead to destructive interference. Copyright law must take account of other rights, including both free speech and reputational protection. Even where copyright seeks to protect innovation, given the internet’s scope some limits may be justified. This Part will describe the existing licensing scheme for online content before considering the exceptions provided by the fair use doctrine and the complications that arise with new technologies.

#### A. Licensing Online Content

Online content is difficult to regulate because it is immediate, international, anonymous, “[f]reely accessible,” and largely free of editors and intermediaries.<sup>51</sup> The Supreme Court recently recognized in *FCC v. Fox Television Stations, Inc.*<sup>52</sup> that the internet is in many ways a completely new paradigm, but Justice Thomas, concurring in the judgment, noted that “the Court has declined to apply the lesser stan-

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<sup>48</sup> See *Zoll v. Jordache Enters., Inc.*, No. 01 Civ. 1339(CSH), 2003 WL 1964054, at \*11–12 (S.D.N.Y. Apr. 24, 2003).

<sup>49</sup> Wood, *supra* note 9, at 915.

<sup>50</sup> *In re Davis*, 347 B.R. 607, 611 (W.D. Ky. 2006) (citation omitted) (citing *Firth v. State*, 775 N.E.2d 463, 466 (N.Y. 2002); *Churchill v. State*, 876 A.2d 311, 317, 319 (N.J. Super. Ct. App. Div. 2005)). The court noted, however, that republication does occur if substantive information is added to the website “and that material is related to defamatory material that is already posted.” *Id.* at 612. “To hold otherwise would give a publisher *carte blanche* to continue to publish defamatory material on the Internet after the statute of limitations has run in the first instance.” *Id.*

<sup>51</sup> Karniel, *supra* note 6, at 220.

<sup>52</sup> 129 S. Ct. 1800 (2009).

dard of First Amendment scrutiny imposed on broadcast speech to . . . the Internet.”<sup>53</sup> In Professor Jon Garon’s view, the fact that “the courts have stopped Congress from establishing a regulatory system on [internet] content distributors” means that “the content on the Internet is fundamentally different from that on television or radio. While traditional media like film are represented, the content is significantly more diverse and eclectic.”<sup>54</sup> Although from a freedom of speech viewpoint such eclecticism is one of the internet’s triumphs, from the standpoint of traditional publishers and broadcasters it has made licensing and liability issues far more difficult to surmount.

A recent case involving the American Society of Composers, Authors, and Publishers (ASCAP) illustrates the difficulty of establishing online licensing regimes.<sup>55</sup> ASCAP was formed in 1914 to streamline the negotiation and licensing of performance rights, without which a website owner cannot publicly perform a given song or other work.<sup>56</sup> America Online (AOL) and other online service providers sought a blanket license, which in addition to granting the right to perform ASCAP works gives its holder “the flexibility of immediate and unlimited access to a vast and ever-growing repertory of compositions, without the cost and delay of consummating individual agreements, and without the concern of exposure to liability for copyright infringement.”<sup>57</sup> Because of the breadth of use and magnitude of income, online content is a growing issue for both licensing and defamation purposes. Just as the court noted that AOL could make the vast selection of works “available to virtually anyone, anywhere, at any time, entirely on-demand, on any device capable of an Internet connection, quickly and with high-quality sound and video,”<sup>58</sup> defamation courts may see wide distribution as a factor in favor of greater liability. The “unprecedented capability to make millions of songs available to the entire nation all at once far outstrips” the capabilities of older media,<sup>59</sup> and this may merit higher damage awards. “[T]he availability of music performances on a website attracts visitors and thereby enhances the subscription and advertising revenues of its proprietor,”<sup>60</sup> so it might not be unreasonable to require that sites that gain commercially avoid

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<sup>53</sup> *Id.* at 1821 (Thomas, J., concurring in the judgment) (citing *Reno v. ACLU*, 521 U.S. 844, 867–68 (1997)).

<sup>54</sup> Jon M. Garon, *Entertainment Law*, 76 TUL. L. REV. 559, 665 (2002).

<sup>55</sup> See *United States v. Am. Soc’y of Composers, Authors, & Publishers (ASCAP)*, 562 F. Supp. 2d 413 (S.D.N.Y. 2008).

<sup>56</sup> See Linda Pickering & Mauricio F. Paez, *Music on the Internet: How To Minimize Liability Risks While Benefitting from the Use of Music on the Internet*, 55 BUS. LAW. 409, 419 (1999).

<sup>57</sup> *ASCAP*, 562 F. Supp. 2d at 478.

<sup>58</sup> *Id.* at 482.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 491.

injuring reputations through the content they make available. It is, however, precisely that breadth and speed of distribution that makes it impossible for passive providers like AOL and YouTube to control the content distributed over their networks.

The licensing issue has preoccupied copyright holders and Congress for decades. Responding to Supreme Court decisions holding that “cable retransmission of broadcast signals did not constitute copyright infringement . . . , Congress amended the Copyright Act in 1976 to specify that retransmissions of broadcast signals — either local or distant, network or independent — are public performances and, therefore, fall within the exclusive rights granted by copyright protection.”<sup>61</sup> More recently, Congress has limited liability for internet service providers through the Digital Millennium Copyright Act<sup>62</sup> (DMCA) and the Communications Decency Act of 1996<sup>63</sup> (CDA). Section 512 of the DMCA shields an online service provider from liability if it did not know or should not reasonably have known about the infringement and if it acts expeditiously to remove offending material once notified.<sup>64</sup> The section provides safe harbor from copyright infringement claims for a service provider that performs storage or search functions, lacks knowledge of the infringing activity, receives no direct financial benefit from such activity, removes infringing content, has a policy to terminate infringers, and accommodates copyright-protection measures.<sup>65</sup> Both statutes attempt to balance the needs of copyright owners and individuals; both recognize that, to some extent, the internet’s vast realm is beyond any provider’s or government’s ability to control as much as rights owners or individuals protective of their reputations may desire.

Because of the huge amount of information, including streaming video, posted to the internet, even detecting violations can be very difficult; automated programs have now been developed to search for titles of copyrighted works and fragments of copyrighted songs and

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<sup>61</sup> Baoding Hsieh Fan, Note, *When Channel Surfers Flip to the Web: Copyright Liability for Internet Broadcasting*, 52 FED. COMM. L.J. 619, 629 (2000). Copyright owners also persuaded Congress to pass the Digital Performance Right in Sound Recordings Act of 1995 (DPRA), Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.), to create a new digital performance right for sound recordings; the Act made on-demand transmissions subject to a voluntary license and noninteractive subscription transmissions (which do not result in an actual transfer of the digital phonorecord) subject to a compulsory license. *See id.* at 338–39.

<sup>62</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.); *see also* 17 U.S.C. § 512(c)–(d), (i)–(j) (2006).

<sup>63</sup> Pub. L. No. 104-104, tit. V, 110 Stat. 133, *invalidated in part by* *Reno v. ACLU*, 521 U.S. 844 (1997); *see also* 47 U.S.C. § 230 (2006).

<sup>64</sup> 17 U.S.C. § 512; *see also* Steven Seidenberg, *Copyright in the Age of YouTube*, A.B.A. J., Feb. 2009, at 46, 47.

<sup>65</sup> 17 U.S.C. § 512; *see also* *Viacom Int’l Inc. v. YouTube Inc.*, 253 F.R.D. 256, 259 (S.D.N.Y. 2008).

videos.<sup>66</sup> Even if such fragments are found and a takedown notice sent, however, the material merely reappears somewhere else, especially on user-generated content sites like YouTube. Steven Seidenberg compared the process of sending takedown notices to such sites to “playing a frustrating game of Whac-a-Mole.”<sup>67</sup>

### B. *The Fair Use Exception*

While Congress and the courts have sought to protect copyright holders, they have also shown solicitude for the First Amendment values served by innovative reinterpretations of old content. Copyright owners seeking to enforce their property rights therefore face the additional hurdle of considering the possible “fair use” of their material before sending takedown notices; sending such a notice without having made a good faith evaluation of fair use could even subject the copyright owner to a claim for damages by the alleged infringer.<sup>68</sup> In *Lenz v. Universal Music Corp.*,<sup>69</sup> the court held that where:

[F]air use may be so obvious that a copyright owner could not reasonably believe that actionable infringement was taking place[,] . . . the policy objectives of the DMCA are served by requiring copyright owners at least to form a subjective good faith belief that the “particular use is not a fair use” before sending the takedown notice.<sup>70</sup>

The court also noted that “the unnecessary removal of non-infringing material causes significant injury to the public where time-sensitive or controversial subjects are involved.”<sup>71</sup>

User-generated-content sites are especially difficult to regulate because the hosting sites often successfully claim that they lack volitional control over the posting of material. Such sites could, however, be subject to vicarious liability if the “web site operator or host encourages members of the public to download an advertisement video in digital format and that video, unbeknownst to the operator, includes an unlicensed song.”<sup>72</sup> The Northern District of California agreed with one such site’s argument regarding lack of volitional control, despite the copyright owner’s contention that the host had the right and

<sup>66</sup> Seidenberg, *supra* note 64, at 48.

<sup>67</sup> *Id.* at 49.

<sup>68</sup> *Id.* at 47.

<sup>69</sup> No. C 07-3783 JF (RS), 2008 WL 4790669 (N.D. Cal. Oct. 28, 2008).

<sup>70</sup> *Id.* at \*2 (citing *Online Pol’y Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004)). The court noted in an earlier decision in the case that fair use applicability is part of a copyright owner’s review of material prior to sending a takedown notice but that “a full *investigation* to verify the accuracy of a claim of infringement is not required.” *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008) (citing *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000, 1003–04 (9th Cir. 2004)).

<sup>71</sup> *Lenz*, 572 F. Supp. 2d at 1156.

<sup>72</sup> Pickering & Paez, *supra* note 56, at 410–11.

ability to control the infringing activity and received a financial benefit from it.<sup>73</sup> Such a site does not lose safe harbor protection just because its employees do some review of material or have other knowledge of the allegedly infringing material.<sup>74</sup> Courts have noted that a site's "right and ability to control its system does not equate to the right and ability to control infringing activity,"<sup>75</sup> and that "[d]eclining to change business operations is not the same as declining to exercise a right and ability to control infringing activity" as required under the DMCA.<sup>76</sup> The need to protect speech and fair use means that regulators of internet content have a steep uphill battle, but this area is one in which the court system seems to balance successfully the competing demands of the two aspects of content regulation. Regulators could, however, validly argue that when there is commercial benefit from speech or reposting of material, it is less offensive to First Amendment ideals to provide for liability when such material causes reputational injury.

### C. *Determining Liability for Use of New Technologies*

While courts struggle to strike a balance between protecting speech from unwarranted defamation liability and encouraging innovation, they also face the use of new technologies that were not available when licensing agreements were negotiated. Contracting parties often use future technologies clauses (FTCs) to protect the licensee by making the licensing grant applicable to "all media now known or hereafter made known."<sup>77</sup> An FTC, however, does not always guarantee the licensee the right to a new use, as courts may still choose to disregard such a clause.<sup>78</sup> In 1933, the New York Court of Appeals faced a contractual dispute arising from the then-new medium of film.<sup>79</sup> It noted that "[s]ince 'talkies' were unknown at the time when the contract was entered into, it cannot be said that 'talkie' rights were within the contemplation of the parties."<sup>80</sup> Similar issues arise on the internet, where copyright owners may have made licensing deals before the internet's potential scope was known. Use of new technologies could therefore expose publishers not just to defamation liability, as such uses seek to reach a new audience, but also to copyright infringement if courts find that the new uses are not covered by a previously issued license.

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<sup>73</sup> Seidenberg, *supra* note 64, at 50.

<sup>74</sup> *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1147-49 (N.D. Cal. 2008).

<sup>75</sup> *Id.* at 1153.

<sup>76</sup> *Id.* at 1154 (citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1175 (9th Cir. 2007)).

<sup>77</sup> Brandi Barnes Kellis, Note, *A New Technology Question of Olympic Proportions: Should NBC's License To Broadcast the Games Include Internet Broadcasting Rights?*, 8 J. INTELL. PROP. L. 245, 266 (2001) (internal quotation marks omitted).

<sup>78</sup> *Id.* at 267.

<sup>79</sup> *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163 (N.Y. 1933).

<sup>80</sup> *Id.* at 166.

Copyright scholar Professor Melville Nimmer suggests two approaches for courts confronted with the lack of either a reservation of rights clause or future technologies clause: first, a strict approach favoring the grantor and “giving the licensee only such rights . . . [as] fall within the ‘unambiguous core meaning’ of a contract term”; second, and the choice Nimmer believes is preferable, granting the licensee usage rights within the “ambiguous penumbra” of the license.<sup>81</sup> In resolving new use disputes, a basic concern is avoiding a windfall to either party. Significantly, “[i]n most cases, neither party is aware of the emerging use and thus fails to bargain for it, leaving the court to decide who should reap the unexpected benefits of exploiting the use.”<sup>82</sup> As Judge Friendly wrote for the Second Circuit, a businessman is “bound by the natural implications of the language he accepted when he had reason to know of the new medium’s potential.”<sup>83</sup> Problems arise if there is no way to predict the creation of a new medium or to foresee the impact it will have on a licensing scheme. In such cases:

If the words are broad enough to cover the new use, it seems fairer that the burden of framing and negotiating an exception should fall on the grantor . . . . [This view also favors] a single person who can make the copyrighted work available to the public over the penumbral medium, whereas the narrower one involves the risk that a deadlock between the grantor and the grantee might prevent the work’s being shown over the new medium at all.<sup>84</sup>

That risk is a barrier to speech that courts would be unwise to impose, especially on a rapidly developing medium like the internet.

The risk of courts stifling innovation is significant. One court noted that, with the growth of webcasting and streaming video, denying the PGA Tour’s internet broadcast rights “would stymie advancement and reduce incentive to create entertainment and sports programming by foreclosing a lucrative market. To hold otherwise would be similar to a court finding that Major League Baseball could not sell broadcasting rights to television stations in the 1940s with the advent of television.”<sup>85</sup>

Similar internet broadcasting issues have arisen from the International Olympic Committee’s attempts to sell internet rights to media outlets based on geographical divisions and its refusal to grant such

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<sup>81</sup> Kellis, *supra* note 77, at 268 (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.10[B], at 10-89 to -90.)

<sup>82</sup> Alexis Garcia, Comment, *Finding the Unobstructed Window for Internet Film Viewing*, 9 UCLA ENT. L. REV. 243, 245-46 (2002).

<sup>83</sup> Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 154 (2d Cir. 1968).

<sup>84</sup> *Id.* at 155.

<sup>85</sup> Morris Commc’ns Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269, 1282 n.24 (M.D. Fla. 2002) (citation omitted) (citing Kellis, *supra* note 77).

rights until internet broadcasters determine a way to restrict webcasts to defined geographical areas.<sup>86</sup> One commentator argues that “if a new medium changes consumer behavior to create a new market and the contract is ambiguous, then the new medium is outside the language of the contract.”<sup>87</sup> This rule could consider the effects of the new use on the old market, including “whether Internet rights [would] be additive or cannibalistic, and if the latter, upon which use it will feed.”<sup>88</sup> That rule would not only reject courts’ favored outcome, but also significantly burden technology developers and discourage innovation. While such a rule would enable publishers to be more certain of how their work would be distributed, an important concern for both licensing and defamation liability, the burden on speech and innovation would be unjustifiable.

The rules regarding internet video content are far more ambiguous than are those relating to verbal statements, which have closer analogues in traditional media. For example, an Illinois court recently considered whether the term “videos” in a license agreement meant only a physical object or could include later-developed technology like streaming video.<sup>89</sup> It followed the Second Circuit, holding that “if the words used in the license agreement are broad enough to encompass the new use, and the new use is not completely unknown at the time of contracting, the burden of framing and negotiating an exclusion of that use falls on the grantor of the license.”<sup>90</sup> That result favors the development and utilization of new technology; by putting the burden on the grantor, the court served free speech values as well as innovation by encouraging wider dispersion of material. The Illinois court’s view that providing content on demand did not constitute a media broadcast, because the “dissemination of content on demand over a personal communications network does not come within the limited meaning of ‘broadcast’ as defined” in the federal Communications Act,<sup>91</sup> is significant for defamation liability for streaming content. In contrast to other courts’ emphasis on the wide dispersion of material over the internet, this approach suggests that such content could lead to less liability than if the same material were broadcast over traditional media.

Streaming video’s capacity for real-time online transmission of programming — creating competition with over-the-air broadcasting —

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<sup>86</sup> Kellis, *supra* note 77, at 249.

<sup>87</sup> *Id.* at 252.

<sup>88</sup> Garcia, *supra* note 82, at 266.

<sup>89</sup> *Intersport, Inc. v. Nat’l Collegiate Athletic Ass’n*, 885 N.E.2d 532, 540–43 (Ill. App. Ct. 2008).

<sup>90</sup> *Id.* at 539–40 (citing *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 486 (2d Cir. 1998)).

<sup>91</sup> *Id.* at 540.

requires a determination of what type of licensing and, therefore, liability scheme will apply. Some suggest a bifurcated model, with a compulsory copyright scheme for internet TV taking the form of continuous, real-time transmission of over-the-air broadcast programming and consumer demand-determined royalty rates for on-demand library scenarios.<sup>92</sup> Subjecting internet TV to a compulsory licensing scheme would likely subject it to FCC regulatory guidelines, including must-carry, retransmission consent, and syndicated exclusivity rules.<sup>93</sup> Others draw a line in the defamation context, arguing that the single publication rule should apply to internet communications generally available to the public (that is, internet TV) but not to “a more contained communication of the allegedly defamatory material, available only upon request to a small group of people,” to which the multiple publication rule should apply.<sup>94</sup> Significantly, “[a]nyone with a media server and a fast connection theoretically can set up his own Web site from which he can broadcast original programming or retransmit network favorites.”<sup>95</sup> Although diversity is beneficial from a First Amendment point of view, it is problematic both from the licensing standpoint, which seeks to give copyright holders effective control over their intellectual property, and from the defamation standpoint, which depends on publication dates to delimit liability and publisher standards to protect reputation. Both internet TV schemes have difficult implications for streaming video liability: if the format is continuous, real-time transmission, it is that much easier for content to be dispersed widely across the globe, making the precise extent of defamation liability unclear; if it is a pay-per-view library scenario, users can choose to effectively rebroadcast material to themselves as often and whenever they like, also potentially expanding defamation liability to an unmanageable scope.

#### IV. THE INTERACTION OF COPYRIGHT AND DEFAMATION LAW

Though innovation can bring protection from copyright infringement claims if the reposter successfully argues that the content falls under the doctrine of fair use, it can also expose that poster to defamation liability when the statute of limitations would otherwise have run. Take a YouTube user who splices a clip of an NBC news broadcast into a rap song about the same topic after the limitations period has run. Assume also that the chosen news clip contains a statement that could give rise to defamation liability. Because the statute of limitations has

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<sup>92</sup> See Fan, *supra* note 61, at 620.

<sup>93</sup> *Id.* at 634.

<sup>94</sup> Wood, *supra* note 9, at 908.

<sup>95</sup> Fan, *supra* note 61, at 621.



elapsed since the time the news show was broadcast, the defamed individual could no longer bring a suit against the original speaker. He could, however, now bring a suit against the YouTube user for republishing the statement. The claim would be even stronger given that the statement was originally published by NBC, a highly reputable source; the republisher could therefore be liable for even greater damages because of his use of the clip than he would be if he had made the statement himself (assuming, of course, that in his community he is considered less reliable than NBC). Therefore, while the innovative use of the news broadcast clip may protect the YouTube user from liability for copyright infringement, that same reuse, especially in a new way seeking to reach a new audience, is precisely what subjects him to defamation liability under a newly reset statute of limitations. The question, then, is which right deserves greater protection: that of the YouTube user to add to the marketplace of ideas through his posting of the news clip, or that of the person defamed in the news broadcast to protect his reputation. This tension is especially significant on the internet, where the content could instantaneously reach a global audience.

From the copyright point of view, simple rebroadcast is not transformative fair use: “Merely plucking the most visually arresting excerpt from . . . footage cannot be said to have added anything new.”<sup>96</sup> Incorporating a clip into a montage, including editing for dramatic effect, could constitute transformation, as creating a montage “at least plausibly incorporates the element of creativity beyond mere republication, and it serves some purpose beyond newsworthiness.”<sup>97</sup> This suggests that internet posters who post content to which they do not have full copyright may subject themselves to copyright liability if they do not significantly transform the content to bring their use of the material under the fair use doctrine. Altering the content of material can, though, change such material for defamation purposes from part of the initial publication to a republication. Thus, posters who make use of portions of copyrighted content, then alter it in, say, a comedic way, may avoid liability for copyright infringement but open themselves to defamation liability in the process. This paradox is the fundamental issue courts face in determining how to apply both copyright and defamation law. The two are, in the case of transformative use of defamatory content, fundamentally at odds. Courts could balance the two by considering the benefits received by the poster; any commercial benefit factors into the fair use analysis and could reasonably be a factor in finding defamation liability as well.

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<sup>96</sup> *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938–39 (9th Cir. 2002).

<sup>97</sup> *Id.* at 939.

A recent case heard by a district court in Florida, *Stockwire Research Group, Inc. v. Lebed*,<sup>98</sup> gives a sense of the stakes.<sup>99</sup> The plaintiff alleged that the defendants had converted the plaintiff's documentary video into a format that could be distributed without copyright protections, removed copyright notices, and modified the documentary before posting it on YouTube.<sup>100</sup> The court found that the DMCA provided for damages for the defendants' removal of the copyright information.<sup>101</sup> It noted, however, that "the number of unlawful recipients is immaterial for purposes of statutory damages"; the only relevant factor was "the number of times the Unauthorized Product was posted on the internet for distribution, regardless of the number of end-recipients."<sup>102</sup> This focus on the defendant's control over the material and affirmative decisions to post it is similar to the analysis used by courts in defamation cases. It provides greater risk predictability, since the defendant controls how many times he posts the material. But the court also found the defendants liable for circumvention of technological protective measures. Rather than finding liability for only the three posts, the court found that each distributed copy violated the plaintiff's control over access and reproduction.<sup>103</sup> The defendants were therefore liable for 11,786 views of the video, yielding a total award of \$2,357,200.<sup>104</sup> In contrast to the liability imposed for the removal of the copyright information, the court's treatment of the circumvention claim is much more aligned with the reputation-protecting focus of defamation plaintiffs. Under that analysis, liability depends not on the proactive decisions made by the poster to publish material, but rather on how popular the posting turns out to be. This basic disparity characterizes liability in the internet context. As discussed above, while the internet's scope means that ideas can be widely dispersed, it also means that plaintiffs' reputations and property interests can be sullied globally almost instantaneously. *Stockwire* demonstrates the extent to which the issue has yet to be resolved in both the defamation and copyright contexts, as well as the vast disparity in outcomes that results from a court's decision to emphasize a defendant's control over material rather than the damage actually suffered by the plaintiff.

Difficult liability determinations also arise in deciding whether user-generated content sites like YouTube are liable for each unlicensed

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<sup>98</sup> 577 F. Supp. 2d 1262 (S.D. Fla. 2008).

<sup>99</sup> *Id.* at 1265.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1267-68.

<sup>102</sup> *Id.* at 1267 (citing *McClatchey v. Associated Press*, No. 3:05-cv-145, 2007 WL 1630261, at \*6 (W.D. Pa. June 8, 2007)).

<sup>103</sup> *Id.* at 1268.

<sup>104</sup> *Id.*

display of content. When a user uploads a video to the site, YouTube copies the video into its own format, adds the video to its servers, and makes it available for viewing; if a user chooses to view a video, YouTube “publicly performs the chosen video by sending streaming video content” from its servers to the user’s computer.<sup>105</sup> That public performance could make YouTube liable for copyright infringement — and possibly republished defamation as well — for each instance of unlicensed display of content. The Second Circuit has noted that video-on-demand type systems in which a main storage drive makes copies at the user’s command have “two instances of volitional conduct . . . : [the company’s] conduct in designing, housing, and maintaining a system that exists only to produce a copy, and a customer’s conduct in ordering that system to produce a copy of a specific program.”<sup>106</sup> As in the defamation context, the focus is on the intent of the person controlling the material and its publication.<sup>107</sup> Such analysis avoids chilling speech — and use of available material — by protecting content providers when they are merely the means of publication rather than the active publisher.

The free speech values served by limiting defamation liability through the single publication rule have influenced courts’ enforcement of the innovation-protecting provisions of the DMCA. Notably, a number of posters who received takedown notices from major copyright owners have fought back, arguing that the notices were sent without good faith investigations into whether the material was protected by fair use doctrine.<sup>108</sup> There is a free speech interest in shielding online content providers from improper takedown notices.<sup>109</sup> The DMCA’s safe harbor provisions, codified at § 512(c),<sup>110</sup> aim to encourage service providers and copyright holders to collaborate to protect rights.<sup>111</sup> Cooperation, if not complete congruence, between defamation and copyright liability is increasingly necessary.

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<sup>105</sup> *Viacom Int’l Inc. v. Youtube Inc.*, 253 F.R.D. 256, 259 (S.D.N.Y. 2008) (quoting Viacom’s First Amended Complaint ¶¶ 30–31).

<sup>106</sup> *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008).

<sup>107</sup> *See id.* at 130–33.

<sup>108</sup> *See, e.g., supra* p. 1326.

<sup>109</sup> *See Doe v. Geller*, 533 F. Supp. 2d 996, 1008 (N.D. Cal. 2008) (noting California’s statute against lawsuits that are aimed at chilling speech). A number of states have statutes barring Strategic Lawsuits Against Public Participation, or “anti-SLAPP” statutes. *E.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2004).

<sup>110</sup> 17 U.S.C. § 512(c) (2006).

<sup>111</sup> *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081, 1090 (C.D. Cal. 2008) (quoting H.R. REP. NO. 105-551, pt. 2, at 49 (1998)).

## V. REPUTATION? INNOVATION? LESSONS LEARNED

The internet is creating new modes of distribution for defamatory content. “[B]ecause digital content is so easy to generate, the potential for copyright and trademark violations is enormous.”<sup>112</sup> The ever-expanding universe of online content threatens not just individual reputations, but also copyright owners’ ability to control their material. As this Note demonstrates, defamation and copyright liability often intersect in the internet context, at times working at odds and at other times aligning in surprising parallels. Congress and the courts have recognized that “[i]n the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability.”<sup>113</sup> Courts have sought to balance the need for some protective liability against other concerns, particularly that overly broad liability would limit the breadth of online content.<sup>114</sup> Professor Yuval Karniel argues that certain types of speech on the internet should be disregarded completely and thus be exempt from any defamation liability.<sup>115</sup> That view is applicable to Karniel’s focus on message boards and similar fora, which are largely unregulated and valuable spaces for anonymous speech, but it may go too far in the realm of online content more generally, especially where such content is provided on sites affiliated with traditional broadcasters. In the case of the more developed online press, which has filtering and editing mechanisms, Karniel admits that the existing rules for print and broadcast journalism should apply.<sup>116</sup>

Because the breadth of online media and content means that multiple laws are likely to apply to the same conduct,<sup>117</sup> it is essential to consider not just the implications of defamation law but also the relevance and guidance of copyright licensing schemes. Fear of more permanent injury to reputation from material distributed online, while in some ways justified, may be misdirected; a New Jersey appellate court states that the argument “that the Internet is any more permanent or pervasive than traditional print media is . . . unpersuasive; p]rint media may be available in perpetuity in libraries and the like.”<sup>118</sup> It would thus be a mistake to think that the internet is *too* different from what came before it and to ignore the value of the lessons learned from past paradigms. It is helpful to consider below the

<sup>112</sup> *Geller*, 533 F. Supp. 2d at 1001.

<sup>113</sup> *UMG Recordings*, 620 F. Supp. 2d at 1090 (alteration in original) (quoting S. REP. NO. 105-190, at 8 (1998)) (internal quotation mark omitted).

<sup>114</sup> *See id.* at 1091.

<sup>115</sup> Karniel, *supra* note 6, at 216.

<sup>116</sup> *Id.* at 221.

<sup>117</sup> Lee, *supra* note 7, at 1285.

<sup>118</sup> *Churchill v. State*, 876 A.2d 311, 320 (N.J. Super. Ct. App. Div. 2005).

main factors that should inform the balance among copyright, innovation, First Amendment, and reputational concerns on the internet. First, courts and policymakers should consider the potential for broad dispersion of defamatory (or infringing) content and the resulting extent of injury. Second, they should take into account the degree to which the publisher of material enjoys or lacks control over its distribution. Finally, they should consider societal goals; this process should involve less a critique of the content of given material (as that would verge on a content-based rule, impermissible under the First Amendment) than a valuation of its potential to add to the marketplace of ideas and the breadth of information technologies.

#### A. *Breadth of Dispersion*

The internet can connect people as never before, but in the course of doing so it may create deeper injury to reputation than was previously possible. As one author observes: “Once a message enters cyberspace, millions of people worldwide can gain access to it. Any posted message or report can be republished by printing, or more commonly, by forwarding it instantly to a different location, leading to potentially endless replication.”<sup>119</sup> Karniel aptly points out that “in the current age of fast flowing information, reliable and verified facts are being replaced, at a far quicker pace than ever before, by rumor, incomplete information, fabrications and stories.”<sup>120</sup> As Professor Edward Lee states: “The basic problem is that people can say a lot of different things, some of them nasty and malicious. The Net may in fact embolden people (who are so inclined) to say malicious things about others, given the level of anonymity and indirectness of contact that cyberspace can offer.”<sup>121</sup>

In this context, it is essential both to encourage internet posters to take care in what they publish and to recognize the speed with which consumers have come to expect the newest information, fact-checked or not. Streaming video could allow easier entry by new broadcasters — or it could diminish the reliability of the material found on the internet. Indeed, one of the internet’s chief virtues — as well as a significant danger — is that speed is its essence: “[I]n many [online] fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation.”<sup>122</sup> Speed and free discussion on the internet can have the beneficial effect of bringing stories to light before the mainstream media has been able — or will-

<sup>119</sup> Braun, *supra* note 35, at 327.

<sup>120</sup> Karniel, *supra* note 6, at 230.

<sup>121</sup> Lee, *supra* note 7, at 1352–53.

<sup>122</sup> Lidsky, *supra* note 5, at 862–63.

ing — to discover and develop them;<sup>123</sup> in that sense, internet discussion and posting are the epitome of the marketplace of ideas so desired by the Founders and the courts.

### B. Publisher Control

Discussing the single publication rule in *Gregoire v. G.P. Putnam's Sons*,<sup>124</sup> the New York Court of Appeals reasoned that without it:

[A]lthough a book containing libelous material may have been the product of but one edition or printing fifty years ago, if, by sale from stock or by display, the publisher continues to make unsold copies of the single publication available to the public today, such conduct would amount to a republication of any libel the book contains and thereby would become actionable.<sup>125</sup>

That reasoning has as much to offer streaming content as it does book publishers; if the single publication rule is not extended to online publication of material, the publishers of such content will remain subject to suit no matter how much time has passed since the initial posting and no matter how long the subjects of allegedly defamatory content have had to discover the material. Though some would say that the viral spread of material online suggests that such liability is not unreasonable for streaming video, it would be wiser for policymakers to err on the side of protection, or perhaps reach some middle ground based on consideration of the poster's actual attempts to spread the material.

The *Gregoire* court found that book publishers should not be faced with endless liability even though they did not at the time have the "degree of mass production and widespread distribution" that characterized newspapers and periodicals.<sup>126</sup> Because the internet allows nearly unlimited distribution, the case for applying the single publication rule to the internet is stronger than it is for newspapers and periodicals. The uncontrollable, aphysical nature of the internet makes it impossible for a publisher to rein in content after its posting, potentially giving rise to the endless liability that the *Gregoire* court feared. Unlike broadcast media, the internet is indifferent to physical location.<sup>127</sup> As Lee states, moreover, it is difficult for the law to keep pace with the expanding nature of online content:

Rapidly changing technology frustrates a rulemaker's ability to gather sufficient information about that technology to fashion a rule that can produce accurate results. If the technology keeps changing, there is a high

<sup>123</sup> See Karniel, *supra* note 6, at 237.

<sup>124</sup> 81 N.E.2d 45 (N.Y. 1948).

<sup>125</sup> *Id.* at 48–49.

<sup>126</sup> *Id.* at 49.

<sup>127</sup> Kellis, *supra* note 77, at 245.

probability that the rule will become obsolete or, even worse, will result in negative consequences that courts did not foresee.<sup>128</sup>

Expanding avenues of communication on the internet have reduced publishers' ability to direct how and where their content is distributed.

Notably, "the cyberspace experience is becoming more and more like TV every day, but with one major advantage: each viewer can potentially custom tailor what he sees and when he sees it."<sup>129</sup> User control has implications not just for licensing schemes, but also for defamation liability, since it means that users, not broadcasters or publishers, determine when material is broadcast and thus potentially when the statutory period begins to run. Under the single publication rule, libel plaintiffs must claim all possible damages in a single action "for the publication to all persons whom the communication has reached or may be expected to reach . . . even though the publication has crossed state lines and has been read, heard or seen in every state and in foreign countries,"<sup>130</sup> as is likely in the internet context. In the future, "the biggest advantage Webcasting will truly have over all other forms of video transmission will be the ability to watch archived broadcast TV shows whenever you want."<sup>131</sup> The way to avoid the uncertainty to which this feature of the internet subjects publishers is to define the date of publication as the time when the original material is first posted to the internet, as previously mentioned cases have proposed.<sup>132</sup> This approach recognizes that the publisher's control over the information ends as soon as it releases the material into the internet realm, which allows the publisher to retain even less control than does distributing books to bookshops or magazines to periodical stands. Kumar posits that because republication occurs if there is an attempt to reach a new audience, one determinant could be a measured increase in visitors to a website — but she acknowledges that it is unclear if hyperlinks to a website (which could be beyond the publisher's control yet cause a jump in visitors) should constitute republication.<sup>133</sup> Former FCC Commissioner Harold W. Furchtgott-Roth aptly noted as early as 2001 that market transformations have "greatly diminished" the broadcast industry's ability to "corral content and control information flow."<sup>134</sup> The growth of alternative sources of pro-

<sup>128</sup> Lee, *supra* note 7, at 1307.

<sup>129</sup> Fan, *supra* note 61, at 620–21.

<sup>130</sup> RESTATEMENT (SECOND) OF TORTS § 577A cmt. e (1977).

<sup>131</sup> Fan, *supra* note 61, at 643–44.

<sup>132</sup> See, e.g., sources cited *supra* note 25.

<sup>133</sup> Kumar, *supra* note 22, at 659.

<sup>134</sup> *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8021 (Apr. 6, 2001) (Separate Statement of Commissioner Harold W. Furchtgott-Roth) [hereinafter Furchtgott-Roth Statement].

gramming and distribution, he believed, meant that “broadcast content restrictions must be eliminated.”<sup>135</sup> Even if such content restrictions were limited, however, defamation liability would still provide a powerful avenue by which to control the content of internet speech and programming. The fact that, on the internet, speakers can quickly republish defamatory statements may lend credence to the trope that “the truth rarely catches up with a lie,”<sup>136</sup> but libel suits against anonymous posters may chill speech simply by threatening to reveal publishers’ identities.<sup>137</sup>

### C. Societal Goals

Finally, courts and policymakers must determine whether the social value of content (whether defamatory or infringing) weighs for or against sanctioning its creator. As Garon asserts:

Like the world Eastman and Edison created after the phonograph, instant photography, radio and motion pictures, the next century’s entertainment will be different and it will impact society. Whether the impact will be for our benefit cannot be known in advance and probably will never be fully agreed upon by historians.<sup>138</sup>

Even in the face of such uncertainty, centuries of judicial dedication to free speech continue to provide clear lessons. The question now is how to balance free speech values with the reputational and property interests that are at stake whenever internet content providers make their material public.

As Commissioner Furchtgott-Roth recognized, “It is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection than would the same exact content broadcast over-the-air.”<sup>139</sup> At the time it was unclear exactly what protection courts would give to internet content, and that issue still has not been resolved. While holding internet publishers to stricter standards of liability than publishers of other media would seem to recompense defamation victims for the potentially vast scope of their injuries, it would also demand a nearly impossible degree of control from content providers. Granting such publishers less freedom of speech than they would enjoy in other media threatens to stifle the distribution of information and thought over the web.

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<sup>135</sup> *Id.*

<sup>136</sup> Lidsky, *supra* note 5, at 864 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974)) (internal quotation marks omitted).

<sup>137</sup> *Id.* at 889.

<sup>138</sup> Garon, *supra* note 54, at 665.

<sup>139</sup> Furchtgott-Roth Statement, *supra* note 134, at 8021 n.11 (citation omitted) (citing *Reno v. ACLU*, 521 U.S. 844 (1997)).