



**Online Defamation in the Perspective of the United States,
United Kingdom and Ukraine:
Comparative Analysis**

By Olena Papazova

LL.M. SHORT THESIS
COURSE: Legal aspects of Internet
and Electronic Commerce
Professor: Caterina Sganga
Central European University
1051 Budapest, Nador utca 9
Hungary

ABSTRACT

The right to freely express opinions and ideas is one of the internationally recognized fundamental human rights. The rapid development of the Internet however led to misuse of this freedom. Since in virtual space any person may be vulnerable to false statement that harms reputation, the freedom of expression is often in conflict with legal protection of reputation. The objective of the thesis is to compare Ukrainian civil law system with common law systems of US and UK, both having long tradition of the defamation case law in order to see if this analysis can influence optimization of Ukrainian legislation. The method which is used is the functional comparative method. It will be shown how the Ukrainian legislation on online defamation can be improved, using the experience of EU, UK and US. Consequently, it will be recommended that the regulation of secondary liability of internet service providers under Ukrainian legislation be amended.

Key words: cyberspace, defamation, e-commerce, internet service provider, online environment, secondary liability.

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LIST OF ABBREVIATIONS

CDA	Communications Decency Act
ECHR	European Court of Human Rights
EU	European Union
HL	House of Lords
ISP	Internet Service Provider
KB	King's Bench Division of the High Court of Justice, UK
N.Y.	State of New York
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America
QB	Queen's Bench Division of the High Court of Justice, UK
v.	(Latin: versus) – against

1. INTRODUCTION

With an outset of the internet many legal issues required to be rethought and approached differently. Among these issues was regulation of defamation – false statement lowering the reputation of the defamed in the eyes of the society. The earliest on-line defamation judgments in *Cubby, Inc. v. Compuserve, Inc.*¹ passed in 1991 and *Stratton Oakmont v. PRODIGY Services Company*² in 1995 were delivered in US and attracted considerable attention worldwide. The principal issues before the courts concerned the liability of internet service provider (ISPs) and whether the rules determining liability for the traditional media are applicable to the ISPs.

It was possible to predict that quick development of the internet as a huge virtual public place would bring the problem of defamatory speech. The informality of e-mail or forum postings, a tradition of robust discussions and a selection of potential defendants (apart from the author) generated the abundance of court decisions and legislative activity in this area. Publication and dissemination of any information on the internet requires interference of many different entities, as access, host and cache providers, which could be sued for damages depending on the extent of their liability for handling of defamatory content.

The other factors which also had considerable influence on the regulation of liability for on-line defamation were the general legislative framework of the country concerning the balance between the freedom of expression and protection to the reputation, and also the historical legal institution of defamation, established in the particular country.

This thesis compares three different jurisdictions – US, UK and Ukraine. US and UK are common law countries with long tradition of the defamation case law, which, however, with regard to online defamation was changed significantly in one country and

¹ *Cubby, Inc. v. Compuserve, Inc.*, 776 F.Supp. 135 (S.D.N.Y., 1991)ю

² *Stratton Oakmont v. PRODIGY Services Company*, 1995 WL 323710 (N.Y. Sup. Ct. 1995)ю

preserved in the other. Ukraine is a civil law country, still following some Soviet law patterns regarding liability for defamation, which needs to be reconsidered, having in mind enhancement of the freedom of expression³. The thesis will evaluate divergent approaches regarding online defamation in three mentioned jurisdictions, assess whether the level of adaptation of the traditional defamation rules is kept online and present recommendations for Ukraine in order to improve its defamation law.

The thesis aims to answer two research questions. The first is how to improve the Ukrainian legislation on online defamation, using the experience of UK and US. The second question follows: what is the regulation of online defamation in the jurisdictions of UK, US and Ukraine? The analysis will be based on the functional comparative method in order to analyze the functionality of the rules applied in different jurisdictions. The scope of the thesis will be limited to the rules of material law, not concerning the jurisdictional issues.

The thesis will start with assessment of the balance between freedom of expression and protection to reputation in Chapter 2 and proceed with determination of the legal principles and elements of defamation in Chapter 3. The liability for online defamation will be compared and analyzed in Chapter 4. In conclusion, the thesis will give recommendations for the regulation of liability under Ukrainian legislation.

³ Freedom House ranked Ukraine as “partly free” in Freedom of the World Report 2013, *available at* <http://www.freedomhouse.org/report/freedom-world/2013/ukraine>.

2. BALANCING FREEDOM OF EXPRESSION AND PROTECTION OF REPUTATION

Freedom of expression (or freedom of speech in US) is one of the internationally recognized fundamental human rights. It is protected in US under First Amendment to the US Constitution and in UK and Ukraine pursuant to the European Convention of Human Rights and Fundamental Freedoms. However, the freedom of expression often clashes with the interests served by the law of defamation. To our opinion, it is important to set the scene for discussion of the rules regulating liability for defamation online by overviewing the public law premises for the establishment of the rules referring to private law. This chapter will assess whether the balance between the freedom of expression and protection to reputation was kept historically and is kept nowadays in the three discussed jurisdictions.

2.1. First Amendment Freedoms of Speech and Press in US

The First Amendment to the US Constitution provides that US Congress shall not abridge the freedom of speech, or of the press.⁴ The scope of application of the First Amendment is limited only to the governmental conduct and does not reach the private parties. Therefore a party may invoke constitutional violation without alleging the conduct of a state actor.⁵ Federal courts also have power of judicial review, under which they can declare the acts of Congress and state legislatures, decisions of state or federal courts, acts of the president, unconstitutional. Moreover, federal courts may also find that legislation passed by the Congress violates the First Amendment Speech Clause. This clause has a

⁴ U.S. Const. amend. I (1791).

⁵ BRIAN CRAIG, CYBERLAW: THE LAW OF THE INTERNET AND INFORMATION TECHNOLOGY 161 (2013).

tendency to be case-specific: each type of regulation is scrutinized accordingly to the type of speech and its context.⁶

Special emphasis was put on the prohibition of any prior restraints to the free speech, which, in other words, is a form of censorship by the government before any publications. Among other cases, prior restraints violate the First Amendment unless the speech is defamatory. However, injunctions prohibiting a party from posting specific information on the internet are impermissible prior restraints. In *Evans v. Evans*,⁷ a California Court held that a preliminary injunction prohibiting a deputy sheriff's former wife from publishing any "false and defamatory" statements on the internet was constitutionally invalid as a prior restraint.⁸

The turning point in defamation law in US was the ruling of the Supreme Court in *New York Times v. Sullivan*,⁹ which defined that power of state courts in defamation cases, is subject to the First Amendment. Prior to the decision in *Sullivan* in 1964, US shared the common law approach to the defamation. It was sufficient for the claimant to prove publication of the material and its defamatory nature. There was no obligation for plaintiff to show that the statement was false, damaging to the reputation or malicious. Malice was inferred if the defendant could not prove the truth of the statement. Strict liability for defamation could have been averted by defendant by the defenses of truth or privilege.¹⁰ According to Steven W. Workman defendant could escape responsibility and rebut the presumption of malice if he could prove that information was either privileged or

⁶ Mahaffey, Leslie Cooper, "There Is Something Unique... About the Government Funding of the Arts for First Amendment Purposes": *An Institutional Approach to Granting Governmental Entities Free Speech Rights*, 60 DUKE L.J. 1239 (2011), available at goo.gl/qiTZa.

⁷ *Evans v. Evans*, 162 Cal. App. 4th 1157, 76 Cal.Rptr.3d 859 (Cal.App. 4 Dist., 2008)

⁸ BRIAN CRAIG, CYBERLAW: THE LAW OF THE INTERNET AND INFORMATION TECHNOLOGY 162 (2013).

⁹ *New York Times v. Sullivan*, 376 U.S. 254, 291 (1964).

¹⁰ ASHLEY PACKARD, DIGITAL MEDIA LAW 241 (2nd ed., 2013).

undeniably true; in this case the plaintiff had to prove that defendant had abused his right of privilege and acted with actual malice.¹¹

The Supreme Court made a revolution in defamation law and overturned 200 years of settled law deciding to subject state libel cases to constitutional review in *Sullivan* and its progeny.¹² Therefore the courts deciding cases, even based on common law, were obliged to apply state action doctrine. This implies that all the content-based restrictions on speech violate the First Amendment, unless the justification established, however, with strict scrutiny. The same level of scrutiny was firstly applied in *Sullivan* to libelous claim and required the plaintiff to show that the restriction on speech was justified.¹³ In addition, the Court defined that actual malice standard is applicable to the public officials when they sue for defamation, than to the private individuals, as discussed in section 2.3.4. of this thesis. Hence, we may conclude that before 1964 the protection to reputation was dominating over the freedom of speech, but afterwards it was put under constitutional baselines.¹⁴

Freedom of the press is also protected by the First Amendment. Main target of the protection given is again – prevention of the prior restraint. However, the protection of the press is not recognized to go farther than protection of the speech.¹⁵ For example, in *First National Bank v. Belotti*,¹⁶ it was stated that “the history of the [Press] Clause does not suggest the authors contemplated a ‘special’ or ‘institutional’ privilege.”

¹¹ See Steven W. Workman, *Note: Reports on Public Proceedings and Documents: Absolutely protected by Constitutional Privilege*, 1985 U. Ill. L. Rev. 1059 (1985).

¹² *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (S.Ct.,1985) (White J., concurring).

¹³ See David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOKLYN L. REV. 755, 767, 771 (2004).

¹⁴ David Hudson, *Defamation and the First Amendment*, THE FREEDOM FORUM, at <http://www.freedomforum.org/packages/first/defamationandfirstamendment>.

¹⁵ *Id.*

¹⁶ *First National Bank v. Belotti*, 435 U.S.756 (S.Ct.,1978).

Consequently, the freedom of speech is one of the most fiercely protected human rights in US and therefore the defamation law and practice tend to uphold the primacy of the defendant's right for the free speech.

2.2. European Convention of Human Rights and Fundamental Freedoms

Both UK and Ukraine are parties to the European Convention of Human Rights and Fundamental Freedoms¹⁷ (The Convention), which was adopted in 1950 with the view of prevention of the horrors of World War II and maintaining peace. All countries – parties to the Convention are required to maintain the same level of protection for human rights and fundamental freedoms, as envisaged by the Convention. However, as the following sections will show we may observe inconsistent implementation of the Convention's norms by the states. In particular, protection to the reputation, set by the Convention as an exception to the absolute freedom of expression, may abridge this freedom. The examples of the discussed states show that the problem of balance may be differently dealt with. The practice of the European Court of Human Rights demonstrates that UK managed to reconsider the practices concerning violation of the freedom of expression, while Ukraine did not.

2.2.1. Freedom of expression and protection of reputation in UK

Traditionally the common law gave protection to the freedom of expression through defenses to tort of defamation, such as truth, privilege, which promotes freedom of expression and gives immunity to the defendant, fair comment and criticism.

UK Human Rights Act 1998¹⁸ incorporates the European Convention of Human Rights and Fundamental Freedoms. One of the important principles of the Convention is

¹⁷ European Convention of Human Rights and Fundamental Freedoms (1950).

¹⁸ U.K. Human Rights Act c. 42 (1998).

stated in Article 10(1) and provides for the right of freedom of expression, which includes freedom to hold opinions, receive and impart information and ideas without interference by public authority. However, the Convention contains a limitation of the freedom of expression in case of a potential conflict with the right to protect the reputation. Article 10(2) outbalances these two rights and provides that the freedom of expression may be exercised subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national, security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals.¹⁹

Thus Art. 10 imposes an obligation on the state “to ensure that individuals can meaningfully exercise their right to freedom of expression”, from which follows that states must ensure that defamation laws are not unfavorable to defendants. The main concern of Art. 10 is prevention of “libel chill”, whereby the fear of subsequent libel suit prevents person or mass media from publication of the material, which may be truthful.²⁰ As noted in *Derbyshire County Council v. Times Newspapers Ltd.*:²¹

What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.

Any interference of the state into the freedom of expression must be proven necessary according to Art.10(2) and be viewed from the position of whether the law of defamation has direct or indirect effect on it.

The guidance on the question how to determine necessity of the reputation protection has been given by the European Court of Human Rights (ECHR) in *Tolstoy*

¹⁹ European Convention of Human Rights and Fundamental Freedoms, art.10 (1950).

²⁰ DAVID PRICE, DEFAMATION LAW, PROCEDURE AND PRACTICE 396 (2nd ed. 2010).

²¹ *Derbyshire County Council v Times Newspapers Ltd*, AC 534 (HL,1993).

*Miloslavsky v. UK*²², when it found that £1.5 million damages awarded against Count Tolstoy for accusing Lord Arlington of war crimes were disproportionate to the damage caused by this statement to Lord Arlington's reputation.²³

Therefore, the restriction of the freedom of expression by the state, which ratified the Convention, is possible only on legitimate grounds and on condition that it is proportionate to the protection of the reputation.

The necessity to keep balance between freedom of expression and protection of reputation most frequently arises from claims involving statements made by mass media and in these cases, the press usually appeals to the immunity under freedom of expression. Since Art. 10 of the Convention incorporated into domestic law of UK, it may be invoked as a separate cause of action. There were debates whether too much protection is given to the reputation against the freedom of expression. However, the examples from case law demonstrate that freedom of expression outweighs the right for reputation protection.²⁴

2.2.2. Freedom of expression and defamation in Ukraine

Ukraine ratified the Convention of Human Rights and Fundamental Freedoms in 1997, which guarantees freedom of expression under Art. 10. Besides, Art. 34 of the Constitution of Ukraine guarantees, in particular, to the Internet users the right to freedom of opinion and speech, freedom of expression of their views and beliefs.²⁵ It is stated that everyone has the right to freely collect, store, use and disseminate information orally, in writing or otherwise on his choice. On the other hand, such information should be spread strictly in accordance with legal provisions about its authenticity and should not disgrace honour, dignity and reputation of other persons.

²² Tolstoy Miloslavsky v. UK, 20 E.H.R.R. 442 (ECHR,1995).

²³ PRICE, *supra* note 61 at 397.

²⁴ Steel and Morris v. UK 68416/01, ECHR 103 (ECHR,2005); O'Shea v. MGN Ltd, EMLR 943 (QB,2001).

²⁵ Konstytuciya Ukrayiny, Constitution of Ukraine art. 34 (1996).

Human rights to honour and dignity, as well as the rights to life and health, are amongst the fundamental rights and freedoms. According to article 3 of the Constitution of Ukraine the honour and dignity of the person are recognized as the highest social value.²⁶ Adequate protection should be undertaken against violation of fundamental rights. According to article 55 of the Constitution of Ukraine everyone has a right to protect their rights and freedoms from violations and illegal encroachments by any means not prohibited by law.²⁷ According to article 15 of the Civil Code of Ukraine, each person has the right to protect their civil rights in case of any offence, denial or avoidance. The same right is granted to legal entities with article 94 of the Civil Code of Ukraine.²⁸

Thus, similar to UK, it is important to decide whether protection of dignity and reputation in Ukraine outweighs freedom of expression. Again, guidance is provided by the ECHR. It is not uncommon that freedom of expression suffers the most in the course of election campaigns. We will further discuss the remarkable case of *Ukrainian Media Group v. Ukraine*,²⁹ which explained and specified the principles of Art. 10 of the Convention.

The case considers two occurrences of publications of the allegedly defamatory material about public figures in the newspaper “The Day”, owned by Ukrainian Media Group. The first article, published in 1999, concerned impartiality of the politician and presented her as a political pawn, in particular, containing statements such as “the chain is getting tighter and the leash is getting shorter”. The suit for damage to dignity to reputation and refutation of the material was filed by the politician against “The Day”. The courts found that the article was untruthful, since the defendant failed to prove the truth of the published information, and that it also damaged the reputation of the plaintiff.

²⁶ *Id* art. 3.

²⁷ *Id* art. 55.

²⁸ *Cyvilnii kodeks Ukrayiny*, Civil Code of Ukraine art. 15, 94 (2004).

²⁹ *Ukrainian Media Group v. Ukraine*, 72713/01 (ECHR,2005).

“The Day” newspaper published the second article in 1999 during the presidential election campaign. The article was alleging that the leader of the Communist Party of Ukraine has been threatened into running for office. The politician lodged a complaint against the newspaper and the author of the article, arguing that the information published was untrue. Since the defendant was unable to prove the truth of the information, the courts ruled in favor of the plaintiff.

A complaint against Ukraine was filed to the ECHR in 2000. The arguments before the court mainly concerned non-application by the Ukrainian courts of the ECHR case law with regard to Art. 10 of the Convention and failure to distinguish between “value judgments” and “facts” in the slander publications. As a defense, government claimed justified interference to the applicant’s rights under Art. 10.

Findings of the Court confirmed that the interference was intended to justifiably protect the dignity and reputation of the others, though the Court ruled that the level of such interference was excessive for a “democratic society” and that Ukrainian law and judicial practice prevented the courts in this case from “making distinctions between value judgments, fair comment or statements that were not susceptible of proof”.

ECHR did not find grounds for the protection of reputation of the political figures and the level of court interference to outweigh “a pressing social need” in the electoral process and its “legitimate political discussion”. It was also admitted by the Court that politicians involved might have been “offended and even shocked” by the articles but noted that “in choosing their profession they laid themselves open to robust criticism and scrutiny; such is the burden which must be accepted by politicians in a democratic society”. Ukrainian courts were found to overstep the level of protection granted to the domestic authorities by the Convention and therefore ECHR concluded that interference was unjustified and cannot be regarded as “sufficient”. The applicant’s guilt in defamatory

publication was certainly disproportionate to the public interest and therefore ECHR found that there had been a violation of Art. 10 of the Convention.

In case of *Gazeta Ukraina-Tsentr v. Ukraine*,³⁰ during mayoral elections the local journalist sent a mail to the applicant informing about the order for his murder, allegedly, by one of the candidates for mayor. This information was distributed by the applicant. Again, ECHR ruled that the Ukrainian courts had “interfered with the applicant company's right to freedom of expression in a manner which was not necessary in a democratic society” consequently, Art. 10 of the Convention was violated.³¹

To sum up, we have seen that during the XX century, both UK and US, have shifted the balance from maximum protection to the reputation to the side of freedom of expression, even though different processes were influencing the outcome. Among three compared jurisdictions US has made most concentrated efforts to ensure high level of freedom of speech and put protection of the reputation under stricter rules. Despite the common law traditions, UK is also giving more weight to the freedom of expression.

Different balance between freedom of expression and protection to the reputation may be observed in Ukraine. It is notable, that in all nine cases filed again Ukraine, ECHR found violation of Art. 10 of the Convention.³² This leads to the conclusion that due to imperfection of Ukrainian legislation still remaining behind the Convention, freedom of expression tends to be disregarded for the sake of protection of the reputation,

³⁰ *Gazeta Ukraina-Tsentr v. Ukraine*, 16695/04 (ECHR, 2010).

³¹ Mariana Bulgakova, *Violation of the right to freedom of expression by Ukraine – the practice of the European Court of Human rights*, Mar 25, 2013, <http://legalanalytics.com.ua/en/component/content/article/152-eurocoart.html>.

³² *Id.*

3. DEFAMATION

Having established the public law foundation for the regulation of the liability for defamation, it is crucial to define the concept of defamation in the compared jurisdictions. The chapter will discuss the elements necessary to establish defamation and define the plaintiffs, who can bring suits for defamation. It will also overview the existing statutory and case law rules in two dimensions: describing those for traditional defamation and its application online and comparing them on jurisdictional basis.

3.1. Concept of defamation

In general, according to the Black's Law Dictionary defamation is the act of harming the reputation of another by making a false statement to a third person.³³ Common law regards defamation as a tort – intentional or negligent act that injures another, resulting in civil liability, and determines the criteria for the statement to be considered defamatory. Under US Restatement (Second) of Torts, it is a false communication, which exposes a person to hatred, contempt, ridicule, financial injury or lowers the person's stature in the community.³⁴ Craig expands the definition by adding that statement is defamatory when it impeaches any person's honesty, integrity, virtue, or reputation.³⁵

Defamation may be subdivided into the categories of libel and slander. Libel is a communication in printed or broadcast form, distinguished by its permanent nature. Slander usually refers to spoken words of limited reach and transitory character. Libel is considered to be more damaging, since it is fixed and can be circulated broadly³⁶. In cyberspace, the majority of defamatory publications will be libels, although it may be argued, that words in chat room or instant messengers, not stored on server or hard disc

³³ BLACK'S LAW DICTIONARY, BRYAN A. GARNER (9th ed. 2009).

³⁴ Restatement (Second) of Torts §581A cmt. f (1977).

³⁵ BRIAN CRAIG, CYBERLAW: THE LAW OF THE INTERNET AND INFORMATION TECHNOLOGY 163 (2013).

³⁶ ASHLEY PACKARD, DIGITAL MEDIA LAW 229 (2nd ed., 2013).

drives of the users, are slanders because of their transient nature.³⁷ For the purposes of this thesis, libel and slander will be referred to as defamation, since the same analysis applies to the both categories of defamation.

Ukrainian civil law doctrine also regards defamation as a wrongdoing, although there is no statutory definition provided. Under Civil Code of Ukraine legal protection is given to the non-property rights such as person's honor and dignity or business entity's reputation, in case if harm is done by the dissemination of the false information about this person or legal entity.³⁸

The defamatory communication may take the variety of forms on the internet. It might be a post in social media or blog, an article in online newspaper, a video circulated on YouTube, or a cartoon distributed through e-mail. As observed by the US Media Law Resource Center, there is an increase in law suits against bloggers and users of social media nowadays: 109 libel suits were traced against bloggers between the years 2005 and 2009.³⁹

3.2. Who can bring suits for defamation

Common law and civil law doctrine have little discrepancies with regards to plaintiff in the defamation proceedings. Natural or legal persons can sue for damage to their reputation, on condition that the defamatory statement has reference to them. Officials and shareholders of the legal entities have standing to sue independently. Nevertheless, groups of entities cannot sue for defamation, since they have no legal personality. In US, under a *group libel doctrine*, no individual in a group is considered to be defamed if the

³⁷ DAVID PRICE, KORIEH DUODU, NICOLA CAIN, DEFAMATION LAW, PROCEDURE AND PRACTICE 447 (4th ed. 2010).

³⁸ *Cyvilnii kodeks Ukrainy*, Civil Code of Ukraine art. 94, 277 (2004).

³⁹ Eric P. Robinson, *Lawsuits Against Bloggers: MLRC's data on Blog Suits* (2009), http://www.medialaw.org/Content/NavigationMenu/Publications1/MLRC_MediaLawDaily/Attachments3/LawsuitsAgainstBloggers_ER.pdf.

group is large enough that there is no likelihood that public would understand the statement as referring to any particular member of the group.⁴⁰

In UK, however, the member of a group can sue for defamation, if something in the words or circumstances under which they were published indicates the particular individual in the group. The test of liability for defamation is aimed to find out whether the sensible ordinary reader who knew the claimant would believe the words refer to the latter.⁴¹

There is a prohibition in US for government entities to sue for defamation under the theory that the government should not be permitted to use public funds to prevent the public from criticizing it.⁴² The analogous approach is upheld in the UK, though for the reasons of threat to restrict freedom of speech.⁴³ Similar to legal entities officials, government officials can sue on their own behalf.

Unlike the common law jurisdictions, in Ukraine government entities are entitled to sue for defamation, but are precluded from claiming damages.⁴⁴ The officials may also sue independently to protect their honor, dignity and reputation in case of defamation.

Under common law the action for defamation cannot survive the death or termination of the existence of either party. Under civil law, death, impossibility to find a person, liquidation of the legal entity disseminated the false information, does not extinguish the court action: in this case the court is entitled to establish the falsity of the information upon the application of an injured person.⁴⁵

It is notable, that under Ukrainian legislation, a person may sue for defamation and demand refutation of inadequate or false information about other people if it violates their

⁴⁰ Church of Scientology Int'l v. Time Warner, 806 F. Supp. 1157, 1160 (S.D. N.Y. 1992).

⁴¹ Knupffer v. London Express Newspaper, Limited (AC 116 1944).

⁴² New York Times v. Sullivan, 376 U.S. 254, 291 (S.Ct.,1964); Klein v. Port Arthur Independent School District, 92 S.W.3d 889 (Tex App.,2002).

⁴³ Derbyshire County Council v Times Newspapers Ltd, AC 534 (HL,1993).

⁴⁴ Zakon Ukrainy "Pro informaciyu", Law of Ukraine On Information art. 49 (1992).

⁴⁵ Cyvilnii kodeks Ukrainy, Civil Code of Ukraine art. 277 (2004).

moral rights. Such information should refer to family members of the individual, such as a spouse, parents, children, grandmother, grandfather, great-grandmother, grandfather, grandchildren, great grandchildren etc. However this principle is applicable only if the false information about person's family members violates the moral rights of this person. For example, if untrue information is being spread saying that the individual is a child of "state traitors" then the individual has the right to demand refutation of this information. But this right is granted to the individual not because it violates the right to recognition of the dignity of his father, but only because it indirectly violates the right of this individual to his dignity and honour. On the other hand the individual's father has the right to refute this information because this information violated his own right to recognition of the dignity.

The same procedures are provided for the right to refutation of any false information that was spread about people who died. In such cases, legislator recognizes that a person that has the right to refute this information must be one of a deceased person's family members, his relatives or other interested persons. This is stated in article 277 of the Civil Code of Ukraine⁴⁶ and article 6 of the Supreme Court of Ukraine's Resolution "On judicial practice in cases of protection of honour and dignity of the individual, and the reputation of physical and legal persons."⁴⁷

3.3. Elements of defamation

Under US law, to establish defamation and specifically libel it is necessary to prove its elements. Packard distinguishes six elements of libel: publication, identification,

⁴⁶ *Cyvilnii kodeks Ukrainy*, Civil Code of Ukraine art. 227 (2004).

⁴⁷ *Postanova Plenumu Verkhovnoho Sudu Ukraïny* "Pro sudovu praktyku u spravakh pro zakhyst hidnosti ta chesti fizychnoi osoby, a takozh dilovoï reputatsii fizychnoi ta yurydychnoi osoby", Supreme Court of Ukraine's Resolution "On judicial practice in cases of protection of honor and dignity of the individual and business reputation of physical and legal persons" art. 6 (2009).

defamation, falsity, fault and damage;⁴⁸ while Dunne, mirroring the definition proposed by Restatement (Second) of Torts, proposes only four elements to prove defamation: defamation itself, reference to the plaintiff, publication and reputational damage.⁴⁹ We will follow Packard's classification and will also make an attempt to describe the issues of defamation under the UK and Ukrainian jurisdictions according to these elements.

3.3.1. Publication

According to Packard defamatory statement must be published. However, "publication is not exclusive to the mass media". Article in an online newspaper, similar to a post in a private blog or website, social media as Facebook or Twitter⁵⁰ a message received by e-mail and circulated to the third persons by the recipient, are considered to be published.⁵¹ Dunne adds that there is no requirement for a publication to be intentional, it may also happen negligently. If e-mail with defamatory statement has been reprinted or forwarded, a reprinter or forwarder is becoming liable for defamation as well⁵².

3.3.1.1. Single or multiple publication rule?

Striking difference between US and other common and civil law jurisdictions lies in the rule concerning multiple publications of the same defamatory material. General European approach is that every distribution of the defamatory statement constitutes a separate publication and thus a plaintiff may file a claim on the basis of each of them. Yet *single publication rule*, adopted in US, allows the plaintiff to file defamation suit only once per each libelous statement, eliminating multiple cause of actions in case of republishing of

⁴⁸ ASHLEY PACKARD, DIGITAL MEDIA LAW 231-236 (2nd ed., 2013).

⁴⁹ ROBERT DUNNE, COMPUTERS AND THE LAW: AN INTRODUCTION TO BASIC LEGAL PRINCIPLES AND THEIR APPLICATION IN CYBERSPACE 67-68 (2009).

⁵⁰ ASHLEY PACKARD, DIGITAL MEDIA LAW 231 (2nd ed., 2013).

⁵¹ *In re Perry*, 423 B.R. 215, 267 (Bkrtcy. S.D.Tex. 2010).

⁵² ROBERT DUNNE, COMPUTERS AND THE LAW: AN INTRODUCTION TO BASIC LEGAL PRINCIPLES AND THEIR APPLICATION IN CYBERSPACE 67 (2009).

the same material.⁵³ The applicability of single publication rule for the internet was affirmed in *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*⁵⁴ According to the facts of the case, in July 2003 the allegedly defamatory material was posted in print and on the website of the newspaper Dallas Morning News about the plaintiff. It filed a claim for defamation to the state court in July 2004. However, Nationwide did not serve its claim until June 2005. The case was removed to the federal court. In May 2006 the defendants filed a motion to dismiss, arguing that the plaintiff had filed a right to seek a relief because the 1 year period under state statute of limitations barred this lawsuit. The motion was granted, holding that Nationwide failed to exercise diligence in serving the claim and that under the single publication rule, the limitations period expired in July 2004. This decision was affirmed by the Fifth Circuit appellate court, holding that:⁵⁵

“[T]he continued availability of an article on a website should not result in republication, despite the website’s ability to remove it. Perhaps more important than the similarities between print media and the Internet, strong policy considerations support application of the single publication rule to information publicly available on the Internet. See Firth, 775 N.E.2d at 466 (discussing the “potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants” and warning of a corresponding chilling effect on Internet communication). We agree that these policy considerations favor application of the single publication rule here and we note that application of the rule in this context appears consistent with the policies cited by Texas courts in adopting and applying the single publication rule to print media: to support the statute of limitations and to prevent the filing of stale claims.”

UK media attempted to overturn the multiple publication rule with regards to internet publications in the famous case *Loutchansky v. The Times Newspapers*.⁵⁶ Traditionally, English defamation law regarded each publication as a new cause of action. The defendant tried to override this principle in relation to publication of newspaper archives on the internet, invoking Limitations Act⁵⁷ defense and arguing that one year limitation period for action should run from the first publication of the allegedly

⁵³ PACKARD, *supra* note 16, at 244.

⁵⁴ *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.* 512 F.3d 137 (5th Cir.,2007).

⁵⁵ David Ardia, *Court of Appeals Affirms that Single Publication Rule Applies to Internet*, DIGITAL MEDIA LAW PROJECT, Jan. 16, 2008, <http://www.dmlp.org/blog/2008/court-appeals-affirms-single-publication-rule-applies-internet>.

⁵⁶ *Loutchansky v. The Times Newspapers*, EWCA Civ 1805, Q.B. 783 (QB,2002).

⁵⁷ U.K. Limitation Act S. 4A (1980).

defamatory article on the website. The newspaper based its arguments on the fact that the multiple publications rule was implemented by common law for traditional hard copy publications and was poorly adapted or even harmful for modern conditions.

The reasoning for the claim was very practical: every number stored on a website could bring on a new publication of that issue of newspaper and consequently a new cause of action. The website owner was thus potentially exposed to unlimited number of repeated defamation claims. In its submissions, the newspaper put emphasis on development of the technology, which allowed to store and provide access to the back issues online and argued that the law should also evolve in this regard. Furthermore it was argued that the law should reflect the requirements of the Human Rights 1998 and the European Convention on Human Rights.

Assuming the rule was not irrefutable, the media would rather limit the freedom of expression, than be maintaining archive websites and be vulnerable to defamation claims for decades. Thus, the defendant urged the court to adopt single publication rule.

The court rejected the arguments of defendant on contradiction of the multiple publication rule to the European Convention on Human Rights because it had "...to yield to the right of an individual to protect his reputation, when it is necessary that that should occur", thus opting for a chilling effect for the freedom of expression. In the judgment of the court it was stated:

"We accept that the maintenance of archives, whether in hard copy or on the Internet, has a social utility, but consider that the maintenance of archives is a comparatively insignificant aspect of freedom of expression. Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material. Nor do we believe that the law of defamation need inhibit the responsible maintenance of archives. Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material."

This judgment still gives rise for discussions whether US single publication rule regarding online content must be adopted in UK. In US the statute of limitations period begins when the statement appears online. However, it should be noted that single

publication rule is not absolute and courts may find the commencing of a new period under a statute of limitations, if the statement was altered in a significant way.⁵⁸ Nevertheless, US rule has less potential to seem unfair to mass media as defendants.

3.3.1.2. Proof of publication

Given the nature of online publication, UK rules to prove its existence are different from those for the publication in permanent form. A plaintiff in proceedings concerning publication on the internet may not rely on the presumption of law that there has been a substantial publication⁵⁹ and instead bear a burden of proving that publication took place, either by identifying third parties to whom the defamatory statement addressed or by drawing an inference, which might be difficult if old or not indexed by search engines publications are at stake. The defendant may also refuse or not be able to provide information of a number of hits on a webpage.⁶⁰

Nevertheless, even if the publication is ascertained, but it is minimal, it may not trigger the court proceedings for the tort of defamation and be regarded as abuse of process. In *Dow Jones Company Inc v. Gutnick*⁶¹ the publication was made to five persons, three of whom were representatives of plaintiff. The court held this to be insufficient publication to give rise to a “real and substantial tort”.

Under Ukrainian law, false information that defames the honour, dignity and business reputation is placed on the Internet, a person must submit to the court evidence of placing this information. First of all, in accordance with paragraph 9 of Instructional Guidelines of State arbitration of USSR "On the use as evidence in the arbitration

⁵⁸ Statute of Limitations, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/statute-limitations>.

⁵⁹ *Al-Amoudi v. Brisard*, 1 W.L.R. 113 (QB,2007).

⁶⁰ *Mardas v. New York Times Co and Anor*, EWHC 3135 (QB,2008).

⁶¹ *Dow Jones Company Inc v. Gutnick*, HCA 56 (HCA,2002).

proceedings documents produced with computer technology", that today still remain valid in Ukraine, the data contained on a technical media (punched tape, punched cards, magnetic tape, magnetic disk, etc.) may be used as evidence in the case only when it is converted into a form suitable for normal perception and storage in the case.⁶² So it may be concluded that a form suitable for normal perception and storage may be paper media i.e. printed pages from the Internet, with reference to the site and the author of the article, if this information is known, as well as a USB memory stick or compact-disk that contains the files with these pages.

It should be considered that a person, who spread the false information on the Internet, may delete such information prior court proceedings not to be responsible for it. Disclosure of the information on the Internet may stop, and it may become impossible for judges to familiarize with this information directly on the Internet. If such possibility arises claimant in accordance with article 151 of the Civil Procedural Code of Ukraine should make a written statement of claim indicating the reasons due to which he wants to secure the claim and the type of claim, which shall be applied with justification of its necessity, for instance it may be a prohibition to perform certain actions.⁶³

In case of placement of false information that defames reputation of an enterprise, an institution, an organization or other entity article 43-1 of Code on Commercial Procedure of Ukraine is used.⁶⁴ To prevent deleting of such information on the Internet the person who has reason to apprehend that necessary evidence may be vanished and who suppose that its rights are infringed or there is a real possibility that they may be infringed, may submit to Commercial Court a petition about precautions before filing a claim, for instance it may be a reclamation of evidence.

⁶² Instruktyvni vkazivky "Pro vykorystannya yak dokaziv z arbitraznykh sprav dokumentiv, pidhotovlenykh za dopomohoyu elektronno-obchyslyvalnoyi tekhniki", Guidelines "On the use as evidence in the arbitration proceedings of documents produced with computer technology", Ukraine § 9 (1979).

⁶³ *Cyvilnyy protsesualnyy kodeks Ukrayiny*, Code on Civil Procedure of Ukraine art. 151 (2004).

⁶⁴ *Hospodarskyi protsesualnyy kodeks Ukrayiny*, Code on Commercial Procedure of Ukraine art. 43-1 (1991).

3.3.2. Identification

It is necessary for the plaintiff to prove that she was the subject of a defamatory communication. Unless it is proven that statement is made about or concerning the plaintiff, no harm to reputation may be established. The name of the plaintiff may not be the only mean of identification. Any recognizable description or depiction will suffice.⁶⁵ For example, “deceased pop king, whose album Thriller was recognized the world's best-selling album in 1984” would bring Michael Jackson to mind without mentioning his name. As established by US case law, group membership may not be sufficient means of identification.⁶⁶

Reference of the defamatory statement to the plaintiff under UK law is established according to the objective test: whether a reasonable person would believe that allegedly defamatory words refer to the plaintiff. Special facts known only to limited number of readers may also serve as identification of the plaintiff,⁶⁷ as shown in *Morgan v. Odhams Press*.⁶⁸ The court said that if the person of plaintiff is identifiable after a brief skim of an article, it is sufficient to establish reference to the plaintiff, even if after a close reading it is evident that it did not mention the plaintiff.

3.3.3. Defamatory meaning

It is necessary to establish defamatory element of the statement to identify whether it can cause harm to the reputation of the plaintiff.⁶⁹

In UK, a classic test of a defamatory statement may be found in *Parmiter v. Coupland*,⁷⁰ which provides that reputation of the other person is injured when she exposed

⁶⁵ ASHLEY PACKARD, DIGITAL MEDIA LAW 231 (2nd ed., 2013).

⁶⁶ *Friends of Falun Gong v. Pacific Cultural Enterprise, Inc.*, 288 F. Supp. 2d 273 (2nd Cir.N.Y., Aug 9, 2004).

⁶⁷ VERA BERMINGHAM, CAROL BRENNAN, TORT LAW DIRECTIONS 253 (2012).

⁶⁸ *Morgan v. Odhams Press*, 1 WLR 1239 (HL,1971).

⁶⁹ ASHLEY PACKARD, DIGITAL MEDIA LAW 231 (2nd ed., 2013).

to “hatred, contempt or ridicule.” However, this method may not embrace all potential causes of action, since reputation of a person can be damaged by other means. For instance, allegation that a person is very proficient in breaking e-mail passwords does not assume hatred or contempt, but is harmful for the reputation. More suitable test is suggested in *Sim v. Stretch*,⁷¹ according to which it is important to find whether defamatory statement lowers a person “in the estimation of right-thinking members of society.” Consequently, in *Byrne v. Deane*⁷² court applied objective criteria and questioned what people should think, instead of what recipient of the message actually thought, when he was cursed by fellow golf club member after reporting a crime. The court held that reporting a crime to the police could not be regarded as lowering the reputation of plaintiff, since right-thinking members of society would consider this as commendable.⁷³

In US, two forms of defamation are legally recognized, depending on the subject matter of the statement: *defamation per se* and *defamation per quod*. The first deals with the statement which is defamatory by its character and it is not capable of an innocent meaning. Examples of defamation per se are statements involving criminal conduct, loathsome disease, sexual promiscuity, or misconduct in person’s business, profession, office, or occupation.⁷⁴ The general damages, such as pain, suffering or embarrassment due to loss of reputation, are considered to be borne by the plaintiffs in defamation per se cases.⁷⁵ Defamation per quod refers to the statement, which is not obviously defamatory, but is proven by extrinsic evidence, discovering its injurious meaning, or to the statement apparently defamatory but not actionable per se. In such a case, burden to prove special damages (any monetary loss) lies upon the plaintiff.⁷⁶

⁷⁰ *Parmiter v. Coupland*, 151 Eng. Rep. 340, 342 (Ex. 1840).

⁷¹ *Sim v. Stretch*, 2 All ER 1237 (1936).

⁷² *Byrne v. Deane*, 1 KB 818 (1937).

⁷³ VERA BIRMINGHAM, CAROL BRENNAN, TORT LAW DIRECTIONS 246-247 (2012).

⁷⁴ BRIAN CRAIG, CYBERLAW: THE LAW OF THE INTERNET AND INFORMATION TECHNOLOGY 163 (2013).

⁷⁵ Wayne Overbeck, Genelle Belmas, Major Principles of Media Law 123 (2012).

⁷⁶ CRAIG, *supra* note 37.

In UK the court examines defamatory statement in its natural and ordinary meaning. Yet, the Claimant may argue that the words are defamatory in their *innuendo* meaning. There are distinguished two types of innuendo. *Popular* or *false innuendo* refers to words, which are not defamatory in their literal meaning, and the test of a right-thinking person understanding applies. For instance, in *Lewis v. Daily Telegraph*⁷⁷ the newspaper published a police document, referring to investigation by the Fraud Squad of the affairs in a plastics producer company. Later the company was absolved of any wrongdoing and sued the newspaper for defamation, alleging that it intended the readers to believe that company was fraudulent. Thus, the action was based on a secondary meaning of the words, which may be inferred from publication. The House of Lords noted that the suspicion of guilt did not necessary imputed guilt and right-minded person would not infer guilt from the article and the case was dismissed.

The second type is *true* or *legal innuendo*, which envisages cases, where extra knowledge rather than ordinary is needed to understand the meaning of the defamatory statement. For example, in *Cassidy v. Daily Mirror*⁷⁸ the newspaper published a photograph of a man, who named himself as Mr Corrigan with a woman described as his fiancée. The caption to the image was saying that they were engaged. It, however, appeared that the true name of the man was Mr Cassidy and he was married, but living apart with his spouse. The action for defamation was filed by Mrs Cassidy alleging that people who knew her would think that she was only pretending to be his wife. The Court of Appeal ruled in favor of Mrs Cassidy though the newspaper was innocent and the fact that Mr Cassidy was married to her might have been difficult to discover.

⁷⁷ *Lewis v. Daily Telegraph*, AC 234 (CA,1964).

⁷⁸ *Cassidy v. Daily Mirror*, 2 KB 331 (CA,1929).

It is well established under UK common law that defamatory statement can only have a single meaning. The rule may be found in *Slim v. Daily Telegraph*,⁷⁹ where it is stated:

“...Where, as in the present case, words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings. But none of this matters. What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel...”

Thus, in the case of conflicting interpretations, the court must determine the “correct” meaning of the words.⁸⁰ However, there is no settled practice of determination of a meaning in the context of online publications. Difficulties may arise with attributing the material in the defamatory publication, if, for example, online article contains hyperlinks to exculpatory statements or there are many comments beneath posted by different internet users. The meaning of the posts on bulletin boards may be even more problematic to distinguish, since there are no guidelines whether each post must be considered separately or all the posts cumulatively.⁸¹ However, recent judgment in *Smith v. ADVFN Plc*⁸² shows tendency to treat messages on bulletin boards as “mere vulgar abuse”, falling under the domain of slander actions, rather than defamatory publication. The stay was maintained for 37 claims filed by plaintiff for multiple postings, criticizing the behavior of plaintiff in regards to other posters and consisting of their personal opinion on him, on an internet bulletin board, owned by the first defendant. It was ruled that claims had no realistic prospect in achieving the only legitimate goal of vindicating reputation.

⁷⁹ *Slim v. Daily Telegraph*, 2 QB 157 (CA,1968).

⁸⁰ DAVID PRICE, DEFAMATION LAW, PROCEDURE AND PRACTICE 13 (2nd ed. 2010).

⁸¹ DAVID PRICE, KORIEH DUODU, NICOLA CAIN, DEFAMATION LAW, PROCEDURE AND PRACTICE 447 (4th ed. 2010).

⁸² *Smith v. ADVFN Plc*, EWHC 1797 (QB,2008).

3.3.4. Falsity

Irrespective of the damages to the plaintiff's reputation, the statement is only considered defamatory if it is false. The substance of the accusation is taken into account while falsity is assessed. Minor inaccuracies without relation to the statement's "sting" are not substantial. The statement must also be believable, since there is a presumption that no damages may be caused by the statement, which is unconvincing. In US the special rule is set for public figures or statements involving public concern, when plaintiff has duty to prove the falsity of accusations. This principle is rather an exception, since under the rules of other common law jurisdictions, including UK, the burden to prove the statement's truth lies with the defendant.⁸³ A defendant in Ukraine must also prove that the allegedly defamatory statement is true.

3.3.5. Fault

In US, type of plaintiff is crucial to determine the level of fault of the defendant, which must be proven in cases concerning matters of public concern. The level of fault depends on whether the plaintiff is a public or private figure. In the landmark decision of *New York Times Co. v. Sullivan*,⁸⁴ the US Supreme Court introduced an important requirement that "actual malice" must be proven by the plaintiff to win the defamation case.⁸⁵

The facts of the case are the following. The plaintiff, was a public official in charge of supervision of the Police Department in Montgomery, Alabama. During his service, the New York Times published the full-page advertisement aimed at raising funds for the defense of Martin Luther King, Jr. and, in particular, included critics of the public

⁸³ ASHLEY PACKARD, DIGITAL MEDIA LAW 233 (2nd ed., 2013).

⁸⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254 (S. Ct., 1964).

⁸⁵ BRIAN CRAIG, CYBERLAW: THE LAW OF THE INTERNET AND INFORMATION TECHNOLOGY 164 (2013).

authorities, mentioning harassment of African Americans in the Southern states and multiple arrests of the civil rights activist by the Montgomery Police Department. The publication did not mention Sullivan or his office. The number of arrests, though, was stated incorrectly. Sullivan filed a suit against the Times for defamation. Despite that all Alabama state courts ruled in his favor, the US Supreme Court reversed the decision on the grounds of necessary limitation of state defamation rules by First Amendment principles.

The reasoning for the higher standard for public figures, imposed by the Court, is explained by their greater capacity to be exposed to damaging communications. The actual malice presupposes either knowledge of falsity or reckless disregard for the truth. Besides the proof of falsity, actual malice must also be proven for the successful claims made by public figures. Actual malice may be explained as a knowledge that a statement, which is published, is false or at least with a reckless disregard as to whether or not it is false, not merely published negligently.⁸⁶ Therefore returning to liability and privilege, the press and other media are immune from liability for defamation of public figures by the defense of *qualified privilege*, unless the actual malice is proven.⁸⁷ The standard of *Sullivan* was extended to the damages, sought for defamation by public figures in *Curtis Publishing Co. v. Butts*.⁸⁸

The standard for private parties is considerably lower: the requirement for the plaintiff to prove only the negligent actions of the defender regarding the truth of the allegedly defamatory statement. Private figures are persons, not exposing themselves voluntarily to the increased risk of defamation by seeking media attention and having no media means to challenge the accusation.⁸⁹

⁸⁶ ROBERT DUNNE, COMPUTERS AND THE LAW: AN INTRODUCTION TO BASIC LEGAL PRINCIPLES AND THEIR APPLICATION IN CYBERSPACE 68 (2009).

⁸⁷ KENNETH CREECH, ELECTRONIC MEDIA LAW AND REGULATION 348 (2007).

⁸⁸ *Curtis Publishing Co. v. Butts*, 388 U.S. 153 (S.Ct., 1967).

⁸⁹ ASHLEY PACKARD, DIGITAL MEDIA LAW 234 (2nd ed., 2013).

The decision in *Gertz v. Robert Welch Inc.* defined two types of public figures in US: (i) general-purpose public figures, and (ii) limited-purpose public figures. General-purpose public figures are “people who achieve such pervasive fame or authority that they became public figures for all purposes and in all contexts”. As examples of general-purpose public figures we could name actors, public officers, sports figures, inventors, explorers, war heroes. A limited-purpose public figures are people who “voluntarily thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved”.⁹⁰

Thus, in cases concerning defamation suits against limited-purpose public figures in the cyberspace, it is important to establish what issues may concern public controversies. For example, in *D.C. v. R.R.*,⁹¹ a California court held that student, running his own website to promote his entertainment career is not a limited-purpose public figure, even if this student had featured in a film, which, had not been released yet at the moment, when his fellow student posted defamatory comments on his website. Court explained that student was not in the public eye and there was no widespread public interest in the student’s life, moreover the derogatory message was not part of ongoing controversy, dispute or discussion.⁹²

However, if there is public interest in controversy, to which person voluntarily involves, this person is considered a limited-purpose public figure. Consequently, in *Atlanta Humane Soc. v. Mills*,⁹³ the director of association was considered a limited-purpose public figure in controversy surrounding association's performance of county's animal control duties, for the purposes of the director’s suit against individual, who posted defamatory messages on internet bulletin board. The controversy had become public after

⁹⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (S. Ct.,1974).

⁹¹ *D.C. v. R.R.*, 182 Cal.App.4th 1190, 106 Cal.Rptr.3d 399 (Cal.App.2 Dist.,2010).

⁹² BRIAN CRAIG, *CYBERLAW: THE LAW OF THE INTERNET AND INFORMATION TECHNOLOGY* 164 (2013).

⁹³ *Atlanta Humane Soc. v. Mills* 274 Ga.App. 159, 618 S.E.2d 18 (Ga.App.,2005)

broadcasting in television series on animal cruelty, director had issued many press releases and given numerous interviews on behalf of association, and individual's internet comments were relevant to director's participation in the controversy.

Unlike the US standard, UK law does not require an establishment of actual malice of the defendants in suits of public figures. Instead, in the leading case of *Reynolds v. Times Newspapers Ltd*⁹⁴, the House of Lords, actually, introduced the public interest defense, which protects the media in cases of defamation. Essentially, the principle, under which the publication will be protected, is sufficient importance of the subject matter to the public and reasonable actions of the defendant. However, the Court held that public interest defense is subject to circumstantial test, which questions, in particular, whether the media had moral duty to make the material available to the public and the latter had an interest receiving it.⁹⁵

3.3.6. Damage

In US, in defamation actions plaintiffs are required to prove damages that are not limited by mere embarrassment, such as loss of income, denial of employment, suffering from documenting depression or anxiety, being boycotted by colleagues. In suits of public figures, which are able to prove actual malice of the defamatory communication, damages are presumable concerning defamation per se cases. In contrast, in defamation per quod cases plaintiffs must demonstrate actual damages. Per quod statements are considered to have limited implications, understandable by narrow category of public, and accordingly less injury to the plaintiff is presumed. Private figures suing for defamation in cases, concerning matters of public interest, are also supposed to show actual damages. If a private figure seeks compensation of actual loss, she has a burden to prove negligence of

⁹⁴ *Reynolds v. Times Newspapers Ltd.*, W.L.R. 1010 (HL,1999).

⁹⁵ DAVID PRICE, *DEFAMATION LAW, PROCEDURE AND PRACTICE* 95-98 (2nd ed. 2010).

the defendant. In cases, where punitive damages are sought by private figure, it is necessary to prove actual malice.⁹⁶

UK damages rules are alike: the damaged party is entitled not only to compensate losses, but also receive the benefit of punitive or exemplary damages.⁹⁷

In Ukraine, besides the demand of the protection of honour, dignity and business reputation plaintiffs may also demand compensation for moral damages. Article 280 of the Civil Code of Ukraine regulates this procedure for individuals and article 94, Chapter 3 of the Civil Code of Ukraine for legal entities.⁹⁸ In such cases it is a plaintiff who is obliged to prove that moral damage had place and to determine the intensity of moral damage. But in the final stage, the amount of monetary compensation for moral damages is always determined by the court depending on the nature of the offense, the depth of physical and mental suffering, worsening of abilities of the victim or the deprivation of their possible implementation, the degree of fault of the person, as well as other factors that are important. Determining the size of compensation court takes into account the reasonableness and fairness.

It is evident that two common law jurisdictions share the concept of defamation, however define the elements necessary to prove defamation differently. In 1964 US has made a considerable reform of the defamation law, introducing the “actual malice” requirement for suits against public figures and shifting the burden to prove the falsity of accusations to the plaintiff. The major difference between the discussed common law jurisdictions also lies in the rule concerning publication of the defamatory material. UK still operates under the principle of common law, regarding every separate publication of the allegedly defamatory statement as a new cause of action, while US has already

⁹⁶ ASHLEY PACKARD, *DIGITAL MEDIA LAW* 235-236 (2nd ed., 2013).

⁹⁷ PRICE, *supra* note 61 at 174.

⁹⁸ *Cyvilnii kodeks Ukrainy*, Civil Code of Ukraine art. 94, 208 (2004).

abolished this rule. The attempt of UK press to overturn the multiple publication rule with regard to internet publications was unsuccessful.

Ukraine does not statutory recognize the wrongdoing of defamation, but gives protection to the honour, dignity and reputation of the person in case of dissemination of the false information about this person. Given that there are certain similarities between Ukrainian rules for establishment of defamation and those of other considered jurisdictions, it is important to note that Ukrainian legislation remains silent as to several important aspects. It does not regard the public figures such as politicians as a special category of plaintiffs and does not provide rules for identification of the plaintiff or defamatory meaning of the statement.

4. LIABILITY FOR DEFAMATION ON THE INTERNET

It can be inferred from previous chapters that the countries discussed have divergent background for regulation of the liability for online defamation. This Chapter evaluates on the one hand US and UK legislation acts and case law and, on the other hand, Ukrainian legislation establishing liability for the publication of the defamatory materials on the internet. It will concern the secondary liability of internet providers in all compared jurisdictions. The Chapter will also compare the legal regimes existing for offline and online defamation. The purpose of this Chapter is to find optimal solutions to be implemented in Ukraine for the regulation of online defamation.

4.1. UK legal regime

Under common law in UK, before adoption of Defamation Act 1996⁹⁹ the liability for defamation covered all those who participated in publication. Anyone who directly participated in the publication of hard copy was potentially liable, however the degree of liability varied. But someone who merely facilitated would escape from any liability. For example, the supplier of the newsprint would not be held liable, unlike the printer.¹⁰⁰

4.1.1. Who can be held responsible for the online publication

As opposed to “primary publishers” – users generating content and making publications, ISPs are regarded as “secondary publishers” and may be liable for the content posted by the users. The main question to ask when considering internet publishing is how to distinguish the participation in publication and mere facilitation.

The first guidance as to delimitation of publishers and facilitators was provided by *Godfrey v. Demon Internet Ltd.*¹⁰¹ In this case the plaintiff, a lecturer, sued an ISP in England and Wales, for a defamatory statement posted on its Usenet newsgroup on 13

⁹⁹ Defamation Act c.31 (1996).

¹⁰⁰ GRAHAM J. H. SMITH, INTERNET LAW AND REGULATION 318 (2007).

¹⁰¹ *Godfrey v. Demon Internet Ltd.*, 3 W.L.R. 1020 (QB,2003).

January 1997 and stored on its news server. It appeared that the posting was written on behalf of the plaintiff and was a forgery. On January 17 1997 the plaintiff sent fax notice to the defendant's official, stating the forgery of the posting and requesting to remove it from the newsgroup. Demon received the notice, but did not remove the posting until January 27, 1997. The amount of damages was claimed by the plaintiff in respect of the publication after January 17, 1997.

Demon's motion was to deny that it had published the defamatory posting or had caused its publication, since it was only transmitting the information like a telephone company and therefore not responsible. However, the court rejected the defendant's argumentation and established that under common law, an ISP who hosts and makes newsgroups available for users is a publisher of the content.

But UK courts did not exclude that ISP may act as a passive transmitter. In a comparatively recent case *Bunt v. Tilley*¹⁰² the court ruled that passive role of affording a connection to the internet did not render the provider or publisher at common law of a statement transmitted across the connection.¹⁰³ The crucial consideration of the court was whether a person "had a knowing involvement in the process of publication of the relevant words". The linchpin of the responsibility for defamation under the common law is the degree of awareness of the publication of the defamatory statement, or at least an assumption of general responsibility.

Therefore the practical threshold for drawing a line between mere conduit (*i.e.* of access providers) and liability for defamation is actual knowledge of the postings. For the ISPs which host information, the threshold is lower – knowledge of the process of publication might be sufficient.

¹⁰² *Bunt v. Tilley*, EWHC 407 (QB,2006).

¹⁰³ GRAHAM J. H. SMITH, INTERNET LAW AND REGULATION 318-319 (2007).

Thus, the difference of the legal treatment of the ISPs in cases mentioned and *Godfrey* lies in the type of the provider. The ISP in *Bunt* was accused of providing access to internet and had no actual knowledge of the defamatory postings, claimed by the plaintiff. On the contrary, for the ISP in *Godfrey*, knowing involvement in the hosting of the discussion group was sufficient to found participation in the publication.¹⁰⁴

4.1.2. Secondary responsibility under the Defamation Act 1996

While mere facilitators will not be held liable as publishers, the common law still regards publishers as a sufficiently broad category to include other participants, and therefore there arises a question of the available defense. Justification, fair comment and privilege may be invoked equally by all the participants of publications on the internet, as well as by any traditional media. However, these defenses may be difficult and expensive to rely on.¹⁰⁵

The Defamation Act 1996 introduced a scheme covering all types of media including electronic and updated the common law subordinate disseminators' defenses. Under the Act there are only two defenses available to defendants by virtue of their limited participation in the publication. Firstly, defendant must not be "the author, editor or publisher",¹⁰⁶ secondly, it must not be aware of the defamatory statement or have reason to be aware of that what he did caused or contributed to the publication of a defamatory statement and must have taken reasonable care.¹⁰⁷ Thus under the first criteria, generally, host and access ISPs will be able to qualify, but there may difficulties arise in proving the reasonable care and absence of knowledge.

¹⁰⁴ *Id.* at 320.

¹⁰⁵ DAVID PRICE, KORIEH DUODU, NICOLA CAIN, DEFAMATION LAW, PROCEDURE AND PRACTICE 451 (4th ed. 2010).

¹⁰⁶ UK Defamation Act c. 31, Sect.1(3) (1996).

¹⁰⁷ *Id.*, Sect.1(3).

Therefore, the test under reasonable care standard includes proving of the absence of actual knowledge and the reason to believe that his actions contributed to the publication of the defamatory statement (not necessary the actionable statement). This means that if the defendant receives a notice of defamatory publication, but takes the position of justifying it – it cannot further rely on the innocent dissemination defense under the Defamation Act.¹⁰⁸

It is questionable though whether “notice and take-down” regime contributes the freedom of the speech. In 2002 the Law Commission issued a report on the Defamation on the internet,¹⁰⁹ which included observations on the position of the ISPs. The Commission strongly advised to review the rights and obligations of the ISP, since they are pushed by the law to remove material without due considerations whether it constitutes a matter of public concern, or whether it is true. As Commission observed, most of the ISPs would prefer to invariably remove the material, rather than risk litigation, which obviously may create a conflict with the freedom of expression.

Furthermore, the authors, as creators of the defamatory material, and commercial publishers, publishing in the course of their business, may not rely on the innocence defense. Therefore, an ISP running a news service on its website will be not eligible for the defense in case of publication on the defamatory material on its site.¹¹⁰

4.1.3. Electronic Commerce Regulations

E-Commerce Regulations¹¹¹ implemented E-Commerce Directive¹¹² and came into force in UK in 2002. Specifically, Regulations 17, 18 and 19 establish defenses for

¹⁰⁸ GRAHAM J. H. SMITH, INTERNET LAW AND REGULATION 336-337 (2007).

¹⁰⁹ Report of the Law Commission, Defamation and the Internet, Scoping Study No2 (2002), available at http://lawcommission.justice.gov.uk/docs/Defamation_and_the_Internet_Scoping.pdf.

¹¹⁰ *Id.*, Sect.1(1).

¹¹¹ The Electronic Commerce (EC Directive) Regulations (SI 2002/2013), available at <http://www.legislation.gov.uk/ukxi/2002/2013/contents/made>, hereinafter E-commerce Regulations.

¹¹² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), Official Journal of European Communities 178/1 (2000), available at

providers of an “information society service”, which the Directive defines as any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing and storage of data, and at the individual request of a recipient of a service. Therefore the applicability of Regulations is very wide and covers not only ISPs, but also web-browsers and web-hosts. However, the Regulations exclude the liability for damages but allow other remedies, such as injunctions, to be obtained.¹¹³

Regulation 17 applies to mere conduits and provides for exemption from the liability of ISP if it does not initiate the transmission; does not select the receiver of the transmission; and does not select or modify the information contained in the transmission. Apart from the fact that this defense applies to all ISPs, it is not aggravated by knowledge requirement and therefore may be relied upon even after the notification of take down of the defamatory material is received by the ISP.

Regulation 18 covers caching or temporary storage of information to enable efficient retrieval. The web browsers may benefit from this defense, but only upon no actual knowledge that material is defamatory or has been removed from the original source or access to it has been disabled.

Regulation 19 refers to web hosts, enabling web-pages to be hosted, on their server. The amount of protection given is similar to the section 1 of the Defamation Act, but additionally the liability may be avoided if there was a notice of the defamatory publication, but the publication continues while the steps to remove it are taken expeditiously. What is alike beneficial for ISP is that regulation applies in cases when ISP does not have actual knowledge of illegal activity or information and, as regards

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF>, hereinafter E-commerce Directive or Directive on E-commerce.

¹¹³ PRICE, *supra* note 81, at 453.

claims for damages, is not aware of facts or circumstances from which the unlawful activity or information is apparent.

As we may see, E-Commerce Regulations provide greater protection than the Defamation Act. However, it should be remembered that the Defamation Act was the first legislative act among European countries to limit online intermediary liability prior to the introduction of the E-Commerce Directive. For the moment being it is still in force, but now it coexists with the number of defenses provided by the Regulations. Generally, Regulations are more favorable to defendants, but they are not available to those defendants which are not “information society service providers” or do not fall within definitions of conduit, cache or host. These categories of defendants may rely only on protection given by the Defamation Act.

Recent case *Kaschke v Gray and Hilton*¹¹⁴ demonstrates that it may be troublesome for ISP to be qualified for the defenses under E-Commerce Regulations. It was held that correction of spelling and grammar mistakes went beyond the mere storage of information, and because it actively engaged with the content, even in a minimal way, the ISP lost the protection of the E-Commerce Directive. Thus, the criterion of being active is set very low.¹¹⁵

4.1.4. Reform of the law of defamation

According to James and Cohen,¹¹⁶ in response to the abovementioned concerns, the courts tended to give more protection to the ISPs recently. In *Metropolitan International Schools v. Designtecnica Corp*¹¹⁷ the court ruled in favor of Google, Inc. holding that it would not be liable for a defamatory ‘snippet’ appearing in its search results. The

¹¹⁴ *Kaschke v. Gray and Hilton*, EWHC 690 (QB,2010).

¹¹⁵ Steven James, Larry Cohen, Tightening the Net: Defamation Reform, In Practice: the London Disputes Newsletter, LATHAM&WATKINS at www.lw.com/.../defamation-on-the-internet.

¹¹⁶ *Id.* 2-3.

¹¹⁷ *Metropolitan International Schools v. Designtecnica Corp*, EWHC 1765 (QB,2009).

reasoning behind this decision was that search engine essentially was a passive facilitator, not a publisher, and as the searches were performed automatically in response to a search enquiry, Google could not control the content appearing on its search engine. Moreover, it acted with reasonable care and blocked access to specific URLs identified by the claimant.

In more recent case *Tamiz v. Google, Inc.*¹¹⁸ the court held that Google did not become a ‘publisher’, just because it had the technical ability to take down the defamatory posts. Google’s role as a platform provider was a purely passive one and it was not required to take any positive step in the process of continuing the accessibility of the offending material, whether or not it had been notified of a complainant’s objection. These decisions are still broadly in line with *Godfrey*, but are favorable for ISPs as providing detailed insight into the legal nature of the internet providers.

The mentioned cases indicate the tendency of shifting the liability away from the ISPs. The legislator seems to move in that direction in particular, drafting the new Defamation Bill. The Bill is designed to implement a general reform of the UK defamation laws existing for 170 years, due to which London has become a libel capital of the world.¹¹⁹

The most salient novelties to be introduced by the Bill with regards to online intermediaries are: greater level of protection in defamation proceedings that currently provided by the Section 1 of the Defamation Act and Regulation 19 of the E-Commerce Regulations and enablement to resolve disputes directly with the author of the defamatory material, elimination of multiple publication rule, imposition of serious harm threshold before suing for defamation.¹²⁰ Thus, if the UK Parliament manages to overcome the

¹¹⁸ *Tamiz v. Google, Inc.*, EWHC 449 (QB, 2012).

¹¹⁹ Lisa O’Carroll, *Authors call on party leaders to save libel reform*, THE GUARDIAN, Mar 6, 2013, <http://www.guardian.co.uk/law/2013/mar/06/authors-party-leaders-libel-reforms>.

¹²⁰ See Defamation Bill, <http://services.parliament.uk/bills/2012-13/defamation.html>.

political disagreements and enact the Bill,¹²¹ it will redress the balance of powers weighted in favor of the claimants in defamation proceedings.

4.2. US legal regime

Establishing liability for publishing defamatory material has been a significant litigation task in US – it was essential to determine whether the ISPs are common carriers, distributors, or publisher of the transmitted material.

4.2.1. Secondary liability of ISPs under US law

US undertook a completely different path than UK in comparison to the issue of secondary liability of ISPs. US courts generally followed the concept of *common carrier* (telephone or telegraph company) of published or transmitted material that has no control over the content communicated through their service,¹²² which was rejected in the analogous *Godfrey* case in Britain. In *Lunney v. Prodigy*,¹²³ a minor sued ISP for defamation and negligence after the unknown hacked his account and posted defamatory statements to electronic bulletin board and threatening via e-mail messages. The Court of Appeals held that ISP was merely a conduit and not a publisher of e-mail and bulletin board messages for defamation purposes.

Similarly, a distributor of the published material is not in a position to exercise control over the content of the publication and thus it is not possible to establish liability. In *Smith v. California*,¹²⁴ the proprietor of the bookstore was convicted of possessing an obscene book in his store without knowing its contents. The Supreme Court reversed the conviction holding that freedom of expression and press guarantees of the First

¹²¹ Dan Sabbagh, *Leveson inquiry: the essential guide*, THE GUARDIAN, Nov 28, 2012, <http://www.guardian.co.uk/media/2012/nov/28/leveson-inquiry-report-essential-guide>.

¹²² *Anderson v. New York Telephone Co.* 1974 35 N.Y. 2d 7461 (N.Y. 2d,1974).

¹²³ *Lunney v. Prodigy*, 94 N.Y.2d 242, 723 N.E.2d 539 (N.Y. 2d,1999).

¹²⁴ *Smith v. California*, 361 U.S. 147 (S. Ct.,1959).

Amendment prohibits the prosecution of an obscene book unless the “knowledge of the contents of the book” is proven.

On the contrary, publishers of a book, newspaper, TV or radio broadcast exercise the sufficient degree of editorial control over the publication. It follows that if ISP or bulletin board operator have control over the contents of the publication, they may be held liable for the defamation.¹²⁵

Issue of control over the content was considered in detail in the two following cases. In *Cubby, Inc. v. CompuServe, Inc.*,¹²⁶ the defendant hosted an online news forum, the contents of which were generated by a contractor. The defendant exerted no control or knowledge of the publications on the forum. The plaintiff sued for defamation, alleging that one of the publishers, *Rumorsville* newspaper, published defamatory statements about him. The court ruled that the defendant was not liable for defamation, since it was merely a distributor, not controlling the contents of the publications as a publisher. An opposite outcome had a case *Stratton Oakmont v. PRODIGY Services Company*,¹²⁷ where the defendant owned and operated Money Talk, a popular financial bulletin upon which the members discussed stock and financial market and upon which allegedly defamatory statements were posted about the plaintiff. The court found that the fact that defendant employed an agent and software screening programs to monitor the contents of publications, the defendant is considered as publisher rather than a distributor and liable for the defamatory postings.

¹²⁵ KENNETH CREECH, ELECTRONIC MEDIA LAW AND REGULATION 348 (2007).

¹²⁶ *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135 (S.D.N.Y., 1991).

¹²⁷ *Stratton Oakmont v. PRODIGY Services Company*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

4.2.2. Communication Decency Act

Statutory protection of ISPs is provided by §230 (c) of Communications Decency Act¹²⁸ (CDA), enacted in 1996, under which the immunity from defamation lawsuits to the ISPs is granted. Web sites owners also enjoy partial immunity from liability for the defamatory content posted by others.

Specifically, §230 (c) provides that “no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content power”. Furthermore, §230 (c) gives immunity from any civil liability where a provider or user takes good faith voluntary action to restrict access to or availability of material that the provider or user considers obscene, harassing, or otherwise objectionable, whether or not the material is constitutionally protected.

The three-pronged test is usually applied by courts while considering defamation cases under CDA. The test aims to find out: (1) whether the online entity uses or provides interactive computer service; (2) whether the entity is an information content provider with respect to the disputed activity or objectionable content; (3) if the plaintiff seeks to treat it as the “publisher or speaker” of information originating from the third party.¹²⁹

ISPs generally fall under definition of “interactive computer service” providers and are entitled to immunity according to CDA. However, this secondary immunity is not absolute and may be forfeited, if a website owner or operator is an author of the defamatory material itself. In *Whitney Information, Inc. v. Xcentric Venture, LLC*¹³⁰, no immunity was granted to the operators of consumer advocacy website under CDA, since the website authors were the authors of some of the objectionable statements on their website, not merely publishers of third party statements.

¹²⁸ COMMUNICATIONS DECENCY ACT, 47 U.S.C.A. §230 (1996).

¹²⁹ Validity, Construction, and Application of Immunity Provisions of Communications Decency Act, 47 U.S.C.A. §230, 52 A.L.R. Fed. 2d 37.

¹³⁰ *Whitney Information, Inc. v. Xcentric Venture, LLC*, 199 Fed. Appx. 738 (11th Cir.2006).

*Johnson v. Arden*¹³¹ demonstrates the application of §230 of CDA to the host provider, not being an information content provider. Cat breeders brought action in state court against various defendants, including ISP and another cat breeder, alleging defamation. Court held that ISP was immune, pursuant to the CDA, from state tort claims by cat breeders for allegedly defamatory statements posted to website; ISP did not design website to be portal for defamatory material or do anything to induce defamatory postings.

§230 of CDA has become one of the most crucial statutes, having impact on the online speech. However, the critics of the broad protection to the ISPs argue that the level of immunity is excessive and generates abuse of low value and defamatory speech publications on the internet. The proponents of CDA regard it as stimulating of the free speech in the digital age. The effect of CDA §230 (c) provisions is drastically different from those of the UK Defamation Act: ISP is protected from being considered as a publisher. Particular significance has this provision in cases, where ISP is obliged to exercise a minimum control over content.

4.3. Liability for online defamation under Ukrainian law

The current legislation of Ukraine provides two methods of dignity and reputation protection: general and special, both are used in court and out-of-court. So if information that violates honour, dignity and business reputation is placed on the Internet the person whose rights are violated may use one of the methods. The defamed person may either directly contact the defamatory demanding refutation of such information or may file a court suit for protection of honour, dignity and business reputation.

It is peculiar that rules for the defamation court proceedings and secondary liability of the ISPs are established by the Resolution of the Supreme Court of Ukraine, summarizing the judicial practice and giving recommendations to the courts. It may be

¹³¹ *Johnson v. Arden*, 614 F.3d 785 (8th Cir.2010).

surprising, but Ukraine still has not enacted any laws regulating the issues of responsibility for the dissemination of the defamatory materials online or creating safe harbours for ISPs.

According to article 12 of the Supreme Court of Ukraine's Resolution "On judicial practice in cases of protection of honour and dignity of the individual, and the reputation of physical and legal persons" in the case of untrue information spread on the Internet, proper defendant is the author of the relevant information material and the owner of the website, person whom the plaintiff must determine and specify in his statement of claim. If the author of the disseminated information is unknown or his identity and/or residence or location cannot be determined and if the information is anonymous and access to the site is free, proper defendant is the owner of the website that hosts the specified information material, since it was him who created a technological possibility and conditions for the false information spread.

Under the provisions of the Civil Procedure Code of Ukraine necessary data about the owner of the website may be requested from an administrator of System of registration of domain names and addresses of the Ukrainian segment of the Internet.¹³² However, such information may be requested only during court proceedings or within filing a petition on securing evidence. That, in turn, makes it not possible to determine a list of trial participants. This is stated in paragraph 13 of the Supreme Economic Court of Ukraine's Inquiry "On some issues of application of information laws by commercial courts."¹³³ This paragraph states that when information is posted on the Internet in a form that is accessible to public, the person whose rights and legitimate interests are violated with this information may bring a suit against the owner of the website that hosts this information. Data about the owner of the website can be obtained in accordance with articles 30 and 65

¹³² *Cyvilnyy protsesualnyy kodeks Ukrainy*, Code on Civil Procedure of Ukraine (2004).

¹³³ *Informatsiynny lyst Vyshchoho Hospodarskoho Sudu Ukrainy "Pro deyakyy pytannya praktyky zastosuvannya hospodarskymy sudamy zakonodavstva pro informatsiyu"*, The Supreme Economic Court of Ukraine's Inquiry "On some issues of application of information laws by commercial courts" § 13 (2007).

of the Code on Civil Procedure from a Ukrainian company “Hostmaster” that currently administers the System of registration of domain names and address of the Ukrainian segment of the Internet.¹³⁴

If the information that harms reputation of the entity is posted on the website (even though the website is not registered as mass media) and the court determined that such information is untrue, according to judicial review it must be refuted on the same site in compliance with the requirements specified by article 37 of the Law of Ukraine "On Printed Mass Media (Press) in Ukraine."¹³⁵

On the other hand, if a website is not registered in Ukraine and information about its owner cannot be determined, the court may establish the fact of the falsity of information at the request of the concerned person and refute in individual proceedings according to paragraph 13 of the Supreme Court of Ukraine’s Resolution "On judicial practice in cases of protection of honour and dignity of the individual and business reputation of physical and legal persons."¹³⁶

In addition, some questions arise about false information discrediting the honour, dignity and business reputation that is spread because of errors arising from imperfections or temporary malfunction of the software. This may occur when information concerning a person is mailed to this person but due to failure in computer network or computer error it is also delivered to other improper recipients. In this case responsibility should be borne by the developer of the software or by the person responsible for its quality. However, this rule is applicable only if this software is licensed, but in a quite large part of Ukrainian companies it is not.

¹³⁴ *Cyvilnyy protsesualnyy kodeks Ukrayiny*, Code on Civil Procedure of Ukraine art. 30, 65 (2004).

¹³⁵ *Zakon Ukrayiny “Pro drukovani zasoby masovoyi informatsiyi (presu) v Ukrayini”*, Law of Ukraine "On Printed Mass Media (Press) in Ukraine" art. 37 (1992).

¹³⁶ *Postanova Plenumu Verkhovnoho Sudu Ukraïny “Pro sudovu praktyku u spravakh pro zakhyst hidnosti ta chesti fizychnoi osoby, a takozh dilovoï reputatsii fizychnoi ta yurydychnoi osoby”*, Supreme Court of Ukraine’s Resolution “On judicial practice in cases of protection of honor and dignity of the individual and business reputation of physical and legal persons” § 13 (2009).

It should be noted that if a person whose honour, dignity and business reputation has been violated decides to file a suit, in accordance with article 258 of the Civil Code of Ukraine a special limitation of action is applied for a period of one year.¹³⁷ In this case, the limitation of action is figured out from the date of spreading of defamatory information on the Internet or from the date when the person has known or should have known of this information.

A person, who goes to the court order to protect his rights and interests, is confident that the latter were unfairly treated, disputed or unrecognized. The court establishes objective truth and applies the rules of substantive and procedural law, so that each party must prove the circumstances which he refers to as the basis of their claims or objections, except statutory. The plaintiff needs to confirm his claims with specific evidence or proofs as to the falsity of the disseminated information. Also, as stated in articles 14, 15 the Supreme Court of Ukraine's Resolution "On judicial practice in cases of protection of honour and dignity of the individual and business reputation of physical and legal persons" the plaintiff's statement of claim shall include particular information:

- the ways in which information violating moral rights of the plaintiff (applicant) was distributed;
- description of information that was distributed by the defendant (respondent);
- specified time, method and persons to whom such information was communicated, and other circumstances that have legal significance;
- references to evidences that support each of these circumstances;

¹³⁷ Cyvilnii kodeks Ukrayiny, Civil Code of Ukraine art. 258 (2004).

- the way of protection the claimant wishes to be used for protection of his violated rights.¹³⁸

The reason for satisfaction of a claim is a set of conditions:

- the dissemination of information that is brought to the attention of at least one person in any way;
- disseminated information regards a specific individual or entity – the plaintiff;
- disseminated information is false and does not correspond to reality;
- the dissemination of information violates moral rights, or is a prejudice to the respective of moral good.

Thus, every time before submitting the claim one need to collect and examine all the evidence to defend his rights in court, because under the current legislation of Ukraine of substantiation cannot be based on assumptions.

As we have seen from this Chapter, the rules for secondary liability for ISPs are drastically different in the concerned jurisdictions. Under Defamation Act 1996 UK employs a standard of reasonable care, under which an ISP is required to prove the absence of actual knowledge of the defamatory content. It may be concluded, therefore, that at the moment UK keeps the rules for traditional media in the digital world. However, the ISPs defendants may also enjoy the greater extent of protection under the E-Commerce Regulations, if they fall under qualification of “information society service provider” and satisfy the requirements to the cache, host and conduit providers. The ongoing reform of

¹³⁸ Postanova Plenumu Verkhovnoho Sudu Ukraïny “Pro sudovu praktyku u spravakh pro zakhyst hidnosti ta chesti fizychnoi osoby, a takozh dilovoï reputatsii fizychnoi ta yurydychnoi osoby”, Supreme Court of Ukraine’s Resolution “On judicial practice in cases of protection of honor and dignity of the individual and business reputation of physical and legal persons” art. 14, 15 (2009).

defamation laws in UK is called to solve the dichotomy of legislative acts and shift the liability away from ISPs.

From the very beginning of online defamation suits, US has followed a concept of common carrier and granted immunity from defamation lawsuits to the ISPs under §230 (c) of Communications Decency Act. Even though this immunity is not absolute, US still have the mildest regime for liability of the ISPs among the countries concerned.

The only act in Ukrainian legislation, which regulates issues of responsibility of ISPs is the Resolution of the Supreme Court of Ukraine. The Resolution presumes full liability of the owner of the website that hosts defamatory information, if the author of the material is unknown or cannot be found. Therefore we may arrive to the conclusion that, in comparison to UK and US, Ukrainian legislation has considerable gaps that should be filled in.

5. CONCLUSION

Online publications may be very powerful means of communication. Having in mind that freedom of expression is guaranteed universally, the purpose of defamation law in cyberspace is protection of the reputation caused by abuse of this freedom. Very important issue to resolve in this regard is the question of the liability of the ISPs. Among the jurisdictions, discussed in this thesis, only Ukrainian legislation does not provide for immunity for the ISPs in case of publication of the defamatory material. Rationale behind this immunity is rather simple. If websites or hosting providers are liable for the content created by the users, they may exercise the policing powers, monitor and erase the potentially dangerous content. On the other hand, the ISPs such as cache and network providers may not be aware of the publications made on the online services, maintained by them and imposing their liability for the user-generated content would be equal for suing the telephone company for the content of the books.

Comparing three jurisdictions, we demonstrated that the most progressive defamation legislation exists in US, which may be frequently criticized as giving too much protection and creating abuse of online speech.

UK still preserved many common law rules originating from regulation of traditional defamation, which are bound to become extinct in relation to the cyberspace. It is the matter of the reform of the defamation law, which as we suppose will soon complete its final stage.

It is highly advisable for Ukraine to amend its legislation regarding online defamation. In the view of approaching conclusion of the Agreement of Association between the EU and Ukraine, for the purpose of the harmonization of legislation, the most reasonable way to act would be to adopt the new law on the basis of E-Commerce Directive. Current provision of the liability of the owner of the website on the basis of given technical possibility to the publication is inconsistent with the international approach

and can be interpreted very broadly. Furthermore, it is essential to distinguish the categories of the ISPs in order to delimit the liability of each.

Ukrainian legislation is also silent as to the publication rule. We recommend adopting a US approach as to single publication giving one cause of action and not follow the multiple publication rule of UK.

Ukraine may also use the experience of US in imposing an actual malice standard and special treatment of public figures in the defamation suits, since they are exposed to the greater amount of critic than private persons and information about them may constitute the matter of public concern. However, Ukrainian law contains very efficient mechanism of refutation of the false material, which may be used both as an off-trial and trial remedy in case of the publication of the defamatory information.

Therefore, Ukraine may benefit from its position and adopt a new legislative act, implementing best practices from US and EU and improving its own legal mechanisms, for the aim of promoting of the freedom of expression and giving adequate protection to reputation.

BIBLIOGRAPHY

I. Cases

- Al-Amoudi v. Brisard, 1 W.L.R. 113 (QB,2007).
- Anderson v. New York Telephone Co. 1974 35 N.Y. 2d 7461 (N.Y. 2d,1974).
- Atlanta Humane Soc. v. Mills 274 Ga.App. 159, 618 S.E.2d 18 (Ga.App.,2005).
- Bunt v. Tilley, EWHC 407 (QB,2006)
- Byrne v. Deane, 1 KB 818 (CA,1937).
- Cassidy v. Daily Mirror, 2 KB 331 (CA,1929).
- Church of Scientology Int'l v. Time Warner, 806 F. Supp. 1157, 1160 (S.D. N.Y. 1992).
- Church of Scientology Int'l v. Time Warner, 806 F. Supp. 1157, 1160 (S.D. N.Y. 1992).
- Cubby, Inc. v. Compuserve, Inc., 776 F.Supp. 135 (S.D.N.Y.,1991).
- Curtis Publishing Co. v. Butts, 388 U.S. 153 (S.Ct.,1967).
- D.C. v. R.R., 182 Cal.App.4th 1190, 106 Cal.Rptr.3d 399 (Cal.App.2 Dist.,2010).
- Derbyshire County Council v Times Newspapers Ltd, AC 534 (HL,1993).
- Dow Jones Company Inc v. Gutnick, HCA 56 (HCA, 2002).
- Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 766 (S.Ct.,1985) (White J., concurring).
- Evans v. Evans, 162 Cal. App. 4th 1157, 76 Cal.Rptr.3d 859 (Cal.App. 4 Dist.,2008).
- First National Bank v. Belotti, 435 U.S.756 (S.Ct.,1978).
- Friends of Falun Gong v. Pacific Cultural Enterprise, Inc., 288 F. Supp. 2d 273, aff'd, 2004 U.S. App. LEXIS 16419 (2nd Cir.N.Y., Aug 9, 2004).
- Gazeta Ukraina-Tsentr v. Ukraine, 16695/04 (ECHR,2010).
- Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (S. Ct.,1974).
- Godfrey v. Demon Internet Ltd., 3 W.L.R. 1020 (QB,2003).
- In re Perry, 423 B.R. 215, 267 (Bkrcty. S.D.Tex. 2010).

Johnson v. Arden, 614 F.3d 785 (8th Cir.2010).

Kaschke v. Gray and Hilton, EWHC 690 (QB,2010).

Klein v. Port Arthur Independent School District, 92 S.W.3d 889 (Tex App.,2002).

Knupffer v London Express Newspaper, Limited (AC 116 1944).

Lewis v. Daily Telegraph, AC 234 (CA,1964).

Loutchansky v. The Times Newspapers, EWCA Civ 1805, Q.B. 783 (2002).

Lunney v. Prodigy, 94 N.Y.2d 242, 723 N.E.2d 539 (N.Y. 2d,1999).

Mardas v. New York Times Co and Anor, EWHC 3135 (QB,2008).

Metropolitan International Schools v. Designtecnica Corp, EWHC 1765 (QB,2009).

Milkovich v. Lorain Journal Co., 497 U.S. 1, 20, n.6 (S. Ct.,1990).

Morgan v. Odhams Press, 1 WLR 1239 (HL,1971).

Nationwide Bi-Weekly Admin., Inc. v. Belo Corp. 512 F.3d 137 (5th Cir.,2007).

New York Times v. Sullivan, 376 U.S. 254, 291 (S. Ct.,1964).

O'Shea v. MGN Ltd, EMLR 943 (QB,2001).

Overbeck, Wayne, Genelle Belmas, Major Principles of Media Law (2012).

Parmiter v. Coupland, 151 Eng. Rep. 340, 342 (Ex. 1840).

Philadelphia Newspaper v. Hepps, 475 U.S. 767,779, n. 4 (S. Ct.,1986).

Reynolds v. Times Newspapers Ltd., W.L.R. 1010 (HL,1999).

Sim v. Stretch, 2 All ER 1237 (1936).

Slim v. Daily Telegraph, 2 QB 157 (CA,1968).

Smith v. ADVFN Plc, EWHC 1797 (QB,2008).

Smith v. California, 361 U.S. 147 (S. Ct.,1959).

Steel and Morris v. UK 68416/01, ECHR 103 (EHCR,2005).

Stratton Oakmont v. PRODIGY Services Company, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

Tamiz v. Google, Inc., EWHC 449 (QB,2012).

Tolstoy Miloslavsky v. UK, 20 E.H.R.R. 442 (ECHR,1995).

Ukrainian Media Group v. Ukraine, 72713/01 (ECHR,2005).

Whitney Information, Inc. v. Xcentric Venture, LLC, 199 Fed. Appx. 738 (11th Cir.2006).

II. Statutory materials

Ila. US Legislation

Communications Decency Act, 47 U.S.C.A. (1996)

Restatement (Second) of Torts (1977).

U.S. Const. amend. I (1791).

Validity, Construction, and Application of Immunity Provisions of Communications Decency Act, 47 U.S.C.A. §230, 52 A.L.R. Fed. 2d 37.

Iib. UK Legislation

Defamation Act (1996).

U.K. Human Rights Act (1998).

U.K. Limitation Act (1980).

Iic. Ukrainian Legislation

Cyvilnii kodeks Ukrayiny, Civil Code of Ukraine (2004).

Cyvilnyy protsesualnyy kodeks Ukrayiny, Code on Civil Procedure of Ukraine (2004).

Hospodarskyi protsesualnyy kodeks Ukrayiny, Code on Commercial Procedure of Ukraine (1991).

Informatsiynyy lyst Vyshchoho Hospodarskoho Sudu Ukrayiny “Pro deyaki pytannya praktyky zastosuvannya hospodarskymy sudamy zakonodavstva pro informatsiyu”, The Supreme Economic Court of Ukraine’s Inquiry "On some issues of application of information laws by commercial courts" (2007).

Instruktyvni vkazivky “Pro vykorystannya yak dokaziv z arbitrazhnykh sprav dokumentiv, pidhotovlenykh za dopomohoyu elektronno-obchyslyvalnoyi tekhniky”, Guidelines "On the use as evidence in the arbitration proceedings documents produced with computer technology", Ukraine (1979).

Konstytuciya Ukrayiny, Constitution of Ukraine (1996).

Postanova Plenumu Verkhovnoho Sudu Ukrayiny “Pro sudovu praktyku u spravakh pro zakhyst hidnosti ta chesti fizychnoyi osoby, a takozh dilovoyi reputatsiyi fizychnoyi ta yurydychnoyi osoby”, Supreme Court of Ukraine’s Resolution “On judicial practice in cases of protection of honor and dignity of the individual and business reputation of physical and legal persons” (2009).

Zakon Ukrayiny “Pro drukovani zasoby masovoyi informatsiyi (presu) v Ukrayini”, Law of Ukraine "On Printed Mass Media (Press) in Ukraine" (1992).

Zakon Ukrayiny “Pro informaciyu”, Law of Ukraine On Information (1992).

IId. EU Legislation

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), Official Journal of European Communities 178/1 (2000), available at [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF).

The Electronic Commerce (EC Directive) Regulations (SI 2002/2013), available at <http://www.legislation.gov.uk/ukxi/2002/2013/contents/made>, hereinafter E-commerce Regulations.

Ile. International Legislation

European Convention of Human Rights and Fundamental Freedoms (1950).

III. Books

- Bermingham, Vera, Brennan Carol, Tort Law Directions (2012).
- Black's Law Dictionary, Bryan A. Garner (9th ed. 2009).
- Craig, Brian, Cyberlaw: the law of the Internet and information technology (2013).
- Creech, Kenneth, Electronic Media Law and Regulation (2007).
- Dunne, Robert, Computers and the Law: An Introduction to Basic Legal Principles and Their Application in Cyberspace (2009).
- Graham J. H. Smith, Internet Law and Regulation (2007).
- Overbeck, Wayne, Genelle Belmas, Major Principles of Media Law (2012).
- Packard, Ashley, Digital Media Law (2nd ed., 2013).
- Price, David, Defamation Law, Procedure and Practice (2nd ed. 2010).
- Price, David, Korieh Duodu, Nicola Cain, Defamation Law, Procedure and Practice (4th ed. 2010).
- Smith, Graham J. H., Internet Law and Regulation (2007).

VI. Periodicals, Reviews and Websites

- Anderson, David A., "First Amendment Limitations on Tort Law", 69 Brooklyn L. Rev. 755, 767, 771 (2004).
- Ardia, David, "Court of Appeals Affirms that Single Publication Rule Applies to Internet", DIGITAL MEDIA LAW PROJECT, Jan. 16, 2008, <http://www.dmlp.org/blog/2008/court-appeals-affirms-single-publication-rule-applies-internet>.
- Bulgakova, Mariana, "Violation of the right to freedom of expression by Ukraine - the practice of the European Court of Human rights", Mar 25, 2013, <http://legalanalytics.com.ua/en/component/content/article/152-eurocoart.html>.
- UK Defamation Bill, <http://services.parliament.uk/bills/2012-13/defamation.html>.

Freedom House ranked Ukraine as “partly free” in Freedom of the World Report 2013, available at <http://www.freedomhouse.org/report/freedom-world/2013/ukraine>.

Hudson, David, “Defamation and the First Amendment”, THE FREEDOM FORUM, at <http://www.freedomforum.org/packages/first/defamationandfirstamendment>.

James, Steven, Larry Cohen, “Tightening the Net: Defamation Reform, In Practice: the London Disputes Newsletter”, LATHAM&WATKINS at www.lw.com/.../defamation-on-the-internet

Mahaffey, Leslie Cooper, “There Is Something Unique... About the Government Funding of the Arts for First Amendment Purposes”: An Institutional Approach to Granting Governmental Entities Free Speech Rights, 60 Duke L.J. 1239 (2011), available at goo.gl/qiTZa.

O'Carrol, Lisa, “Authors call on party leaders to save libel reform”, THE GUARDIAN, Mar 6, 2013, <http://www.guardian.co.uk/law/2013/mar/06/authors-party-leaders-libel-reforms>

Report of the Law Commission, Defamation and the Internet, Scoping Study No2 (2002), available at

http://lawcommission.justice.gov.uk/docs/Defamation_and_the_Internet_Scoping.pdf.

Robinson, Eric P., “Lawsuits Against Bloggers: MLRC’s data on Blog Suits” (2009), available at

http://www.medialaw.org/Content/NavigationMenu/Publications1/MLRC_MediaLawDaily/Attachments3/LawsuitsAgainstBloggers_ER.pdf.

Sabbagh, Dan, “Leveson inquiry: the essential guide”, THE GUARDIAN, Nov 28, 2012, <http://www.guardian.co.uk/media/2012/nov/28/leveson-inquiry-report-essential-guide>.

Statute of Limitations, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/statute-limitations>.

Workman, Steven W., Note: “Reports on Public Proceedings and Documents: Absolutely protected by Constitutional Privilege”, 1985 U. Ill. L. Rev. 1059 (1985).