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Communication, defamation and liability of intermediaries

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The legal framework concerning liability of communication intermediaries for defamation is under-conceptualised. The paper thus develops a holistic doctrinal approach to liability of speech intermediaries, such as Internet service providers (ISPs), booksellers and newspaper vendors, for defamation. It views intermediary liability for defamatory speech against the backdrop of communication theory and freedom of expression doctrine. If properly conceptualised, as suggested in this paper, the law of defamation can accommodate the cyberspace-specific legislation in Arts 12–15 of the e-commerce Directive and s 5 of the Defamation Act 2013, as well as the innocent dissemination defence in s 1 of the Defamation Act 1996, now to be read together with s 10 of the Defamation Act 2013. The paper establishes six tenets of intermediary liability for defamatory content. In particular, it argues that 'publication' is to be conceptualised as a merely factual requirement for defamation, whereas the defence of 'innocent publication', also known as 'innocent dissemination', is a fault-based concept. Communication intermediaries are thus to be considered 'publishers', even if they have a merely automatic role in the publication process, but they may avail themselves of the defence of 'innocent publication'. This defence has to be applied in compliance with the human rights of the parties involved.

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1. THE AIM, SCOPE AND METHOD OF THIS PAPER

Ever since the Internet became available to the general public, the liability of Internet intermediaries has been subject to considerable legislative, judicial and public scrutiny. Yet the principles of liability of Internet intermediaries for online defamation are far from being fully explored. As Justice Eady pointed out, 'none of the decisions so far relating to the role of internet service providers . . . has definitively established, in general terms, exactly how such entities fit into the traditional framework of common law principles'.[1] However, it is submitted that this legal uncertainty is to a lesser degree caused by the challenges of the Internet in particular but, rather, by the under-conceptualised 'traditional framework of common law principles' concerning liability of communication intermediaries for defamation in general.

It is therefore the aim of this paper to develop a holistic doctrinal approach to liability of all communication intermediaries, including Internet service providers

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1. *Tamiz v Google* [2012] EWHC 449 (QB) [32].

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(ISPs), but also, for instance, booksellers and newspaper vendors, for defamation. The study will show that the main doctrinal points of concern transcending all communication intermediaries are the concepts of 'publication' and 'innocent publication', also known as 'innocent dissemination'. By viewing intermediary liability for defamatory speech in the broader context of freedom of expression and defamation doctrine, the paper will not only contribute to a more coherent system of the tort of defamation, but also to the demystification of 'cyberlaw' as a legal discipline. If properly conceptualised, as suggested in this paper, the law of defamation can accommodate the cyberspace-specific legislation in Arts 12–15 of Directive 2000/31/EC (the e-commerce Directive)[2] and s 5 of the Defamation Act 2013, as well as the innocent dissemination defence in s 1 of the Defamation Act 1996 and the general immunity provided by the Postal Services Act 2000. Such reconciliation between general principles and specific legislation is necessary, because acts and statutes tailored to particular intermediaries will inevitably lag behind new developments, thus leading to significant legal uncertainty. For example, the e-commerce legislation from 2000 does not cover recent forms of Internet services, such as news aggregators and search engines. Similarly, it can be expected that the Defamation Act 2013, which significantly altered the law regarding online intermediaries, will soon be outdated as well. Hence, it is left to courts and legal scholarship to develop doctrinally sustainable approaches to deal with such providers.

The paper aims to establish the following six tenets:

1. 'Publication', better understood as 'communication', is to be conceptualised as a merely factual requirement for the liability of communication intermediaries for defamation.
2. In order to be considered 'publisher', awareness of the fact of communication is required, but not knowledge of the publication's defamatory content.
3. Communication intermediaries are thus to be considered 'publishers', even if they have a merely automatic role in the publication process, but they may invoke the defence of 'innocent publication'.
4. The defence of 'innocent publication', also known as 'innocent dissemination', is a fault-based concept, in that the defence is lost if there is knowledge of the unlawful content.
5. Just as for the tort of defamation in general, the defence of 'innocent publication' has to be applied in compliance with the human rights of the parties involved.
6. Neither s 1 of the Defamation Act 1996 nor the cyberspace-specific legislation in Arts 12–15 of the e-commerce Directive and in s 5 of the Defamation Act 2013 has changed the distinction between 'publication' and 'innocent publication'. Rather, these pieces of legislation specify the principle of 'innocent publication' and thus fit seamlessly into this framework.

Because defamation is a tort committed through human communication, it is argued that a *legal* assessment of speech intermediaries can only be conducted with a view to their *factual* role in the communication process. Therefore, the paper embarks on a brief interdisciplinary introduction into the position of intermediaries in the dimensions of human communication. In addition, since the tort of defamation has to be interpreted and applied in compliance with the human rights of the litigating parties, liability of speech intermediaries for defamation can only be properly investigated in light of these

2. Implemented in the UK through Regulations 17 et seq of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No 2013).

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human rights. As will be shown, it depends on the role of the parties involved in the communication process which human rights are applicable to them. Consequently, both communication theory and the relevant human rights aspects will be developed in the next section as the backdrop of the ensuing doctrinal analysis.

2. INTERMEDIARIES IN THE DIMENSIONS OF COMMUNICATION AND COMMUNICATION-RELATED HUMAN RIGHTS

The appraisal that defamation is a tort committed through communication is both trifle and fundamental. It is fundamental because the tort of defamation can only be properly conceptualised against the backdrop of the elements of communication and the role that the litigating parties hold in the communication process. Based on the influential work of Claude E. Shannon, the following elements can be distinguished as the main components of communication:[3]

1. A message.[4]
2. An information source.
3. A destination; that is, the person or thing for whom or which the message is intended.
4. A communication medium or communication media. Depending on the medium/media used by the source, these may include:
   (a) A transmitter that operates on the message to produce a signal suitable for transmission over a channel.
   (b) The channel as the medium used to transmit the signal from transmitter to receiver.
   (c) The receiver that performs the inverse operation of that done by the transmitter, reconstructing the message from the signal.

Therefore, defamation requires, first, content or a 'message' (1), which has to be a defamatory statement. Whether a statement is defamatory or not has been subject to considerable case-law[5] as well as statutory intervention[6] and will not be subject to further examination here. This defamatory message stems from an information source (2), also called the author or sender. Since defamation is based on interpersonal human communication, the destination of the defamatory message (3) has to be another human being. In particular, the common law of defamation requires that at least one recipient of the message is not identical with the allegedly defamed person.[7]

Eventually, in order to communicate the message, the author or creator has to use a particular medium or media (4). The choice of the medium or media may involve other individuals or companies in the communication process. Such communication

3. CE Shannon 'A mathematical theory of communication' (1948) 27 Bell Syst Tech J 379–423, 623–656 (available at http://cm.bell-labs.com/cm/ms/what/shannonday/shannon1948.pdf; accessed 25 September 2014). See also CE Shannon and W Weaver *The Mathematical Theory of Communication* (Champaign, IL: University of Illinois Press, 1949) *passim*; EM Rogers *A History of Communication Study* (New York: The Free Press, 1994) pp 434 et seq.

4. Shannon includes the message within the next element, the information source.

5. See *Youssoupouff v MGM* [1934] 50 TLR 581; *Sim v Stretch* [1936] 52 TLR 669; *Berkoff v Burchill* [1996] 4 All ER 1008.

6. Defamation Act 2013, s 1.

7. *Pullman v W. Hill & Co. Ltd* [1891] 1 QB 524, 527.

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intermediaries may be, for instance, providers of notice boards, booksellers, libraries, newspaper vendors or ISPs.[8]

By providing such media, intermediaries play an invaluable role for human communication. Anyone who prints or sells a newspaper, runs a library or operates social Internet networks, blogging services or electronic communication infrastructure provides a socially beneficial service. They enable authors to disseminate their messages over a distance to another individual or even to a mass audience, and thus amplify both the content providers' possibilities to express their thoughts and ideas and the recipients' opportunities to receive such information.

But by providing means of communication, intermediaries inevitably increase the risk of defamation, albeit involuntarily. More than that, the communication medium even influences the effect that communication has on the audience. Because of their power to convey messages through sound and images, audiovisual mass media in particular have an enhanced suggestive effect. Marshall McLuhan described this phenomenon with the words 'The medium is the message.'[9]

This raises the question: How do communication intermediaries fit into the framework of the tort of defamation? At least with regard to ISPs, the answer is clear in the USA: s 230(c)(1) of the Communications Decency Act 1996[10] furnishes ISPs with total immunity from defamation actions.[11] This approach is understandable within the context of the robust protection of free speech by the First Amendment to the US Constitution. However, in the realm of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the EU (EUChFR),[12] such a sweeping immunity for ISPs – and for communication intermediaries in general[13] – would fail to achieve a proper balance between the conflicting rights and interests.[14] With regard to defamation claims against communication intermediaries, these are, first, freedom to impart information of the content provider – the information source under communication theory – according to Art 10 ECHR and Art 11(1) EUChFR. Secondly, the 'destination' of the message, which can be one or more other individual(s) or the general public, has a corollary right to receive such information.[15] Thirdly, a person has a right to have his reputation protected as a subcategory of the right to respect for private life according to Art 8 ECHR and Art 7

8. See *Emmens v Pottle* [1885] 16 QBD 354; *Byrne v Dean* [1937] 1 KB 818; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170, 175; *Weldon v 'The Times' Book Co. Ltd* [1911] 28 TLR 143.

9. M McLuhan *Understanding Media* (1964; London: Routlege edn, 2001) pp 7 et seq.

10. 47 USC § 230.

11. See *Zeran v America Online (AOL), Inc*, 129 F3d 327 (4th Cir. 1997); *Blumenthal v Drudge* 992 F. Supp. 44, 49–53 (D.D.C. 1998); *Barnes v Yahoo! Inc*, 570 F.3d 1096 (9th Cir. 2009).

12. Article 51(1) EUChFR provides the rule for the applicability of the Charter.

13. Total immunities for speech intermediaries are exceptional (see eg Postal Services Act 2000, s 90).

14. On the 'indirect horizontal effect' of human rights, see A Drzemczewski 'The European Human Rights Convention and relations between private parties' (1979) 2 Neth Int'l L Rev 168; A Barak 'Constitutional human rights and private Law' in D Friedmann and D Barak-Erez (eds) *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) p 13; S Kay 'The European Convention on Human Rights and the control of private law' (2005) EHRLR 466, 475 et seq.

15. See eg ECtHR *Sunday Times v United Kingdom (No 1)* [1979] App no 6538/74 [65]; *Observer and Guardian v United Kingdom* [1991] App no 13585/88 [59]; CJEU, Case C-314/12 [2014] *UPC Telekabel Wien GmbH* [47].

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EUChFR, if the attack on his reputation attains a certain level of seriousness.[16] Fourthly, the intermediary may invoke his freedom to conduct a business under Art 16 EUChFR, if he operates for commercial purposes.[17] Fifthly, the intermediary also has a right to impart information under Art 10 ECHR and Art 11(1) EUChFR.[18] These provisions do not make a distinction according to the role played by persons in the exercise of that freedom: Unlike, for instance, Art 5(1) of the German Basic Law, which only guarantees the freedom to express one's *own* opinions, Arts 10 ECHR and 11(1) EUChFR apply not only to the content provider of information, but also to the provider of means of dissemination. Even if speech disseminators do not associate themselves with the opinions expressed in the works they help to disseminate, they participate in the exercise of freedom of expression by providing authors with a medium.[19]

At the same time, communication intermediaries are, according to Art 10(2) ECHR, subject to 'duties and responsibilities'. Therefore, a human rights–compliant approach to liability of communication intermediaries has to strike a proper balance between the socially beneficial function of such intermediaries and the individual harm to which they may contribute. The law of defamation strikes this balance with a view to the elements of communication that have been described above: it distinguishes between authors or creators of defamatory content (information sources), on the one hand, and the mere providers of a communication medium, on the other. Content providers are usually fully liable for their statements, unless they may rely on a defence, such as honest opinion, publication on a matter of public interest or parliamentary privilege (see 4(a)).[20] By contrast, intermediaries who merely provide the communication medium may avail themselves of a defence based on the principle of innocent publication (see 4(b)).

However, as will be argued in the next section, both content providers and communication intermediaries who contribute to the distribution of defamatory content are to be considered 'publishers' under defamation doctrine.

3. COMMUNICATION INTERMEDIARIES AND THE CONCEPT OF 'PUBLICATION'

Defamation requires 'publication' of a defamatory statement to a recipient. However, the term 'publication' is misleading. Liability for defamation can arise not only for those who make a statement public. Such a conception would preclude the actual author, who submits a book proposal or an article to a book publishing company or a newspaper, which then bring the text into the public sphere. Rather, the gist of a claim

16. ECtHR *Axel Springer AG v Germany* [2012] App no 39954/08 [83]; *Delfi AS v Estonia* [2013] App no 64569/09 [80]; *Lavric v Romania* [2014] App no 22231/05 [31].

17. See CJEU, Case C-314/12 [2014] *UPC Telekabel Wien GmbH* [47]. The ECHR protects only single aspects of businesses, such as property under Art 1 First Protocol ECHR or business premises as 'home' under Art 8(1) ECHR.

18. Compare Case C-314/12 [2014] *UPC Telekabel Wien GmbH*; Case C-131/12 [2014] *Google Spain*.

19. See ECtHR *Öztürk v Turkey* [1999] App no 22479/93 [49].

20. On honest opinion: *Flood v Times Newspapers* [2012] UKSC 12, Defamation Act 2013, s 3; on publication on a matter of public interest: *Reynolds v Times Newspapers Ltd* [1999] 3 All ER 961, Defamation Act 2013, s 4; on parliamentary privilege: Art 9 Bill of Rights 1689 and Art 8 of the 7th Protocol on the Privileges and Immunities of the European Union.

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in defamation is neither creation nor publication (in a literal sense), but communication.[21] Thus both the author of a defamatory statement and the intermediary – that is, a person or institution providing transmission media or making the statement public – can be treated as 'publishers', and hence can be liable for defamation. Their distinction into 'primary' and 'secondary' publishers does not change the fact that they are all publishers. Consequently, any person who takes part in making a defamatory statement known to someone else by providing a means of communication may be jointly and severally liable for the damage suffered by the claimant.[22] Under the common law of England and Wales, publication does not even require active participation; the mere failure to prevent distribution with the defendant's means may be sufficient to be considered a publisher.[23]

(a) 'Merely passive' or 'mechanical' distributors as publishers?

However, with regard to communication intermediaries, it is not clear whether lack of knowledge of the words complained of is relevant for their characterisation as 'publisher', or whether it provides them with a mere defence.[24] In this context, 'defence' is to be understood as a liability-defeating rule that is *external* to the elements of the tort in which the claimant sues, rather than a denial of an element of the tort.[25] While it is for the claimant to prove the ingredients of the tort in which he sues, the onus is usually on the defendant to establish a valid defence.

Two lines of judicial reasoning can be distinguished. In the early Internet-related case *Godfrey v Demon Internet Ltd*, Justice Morland held that ISPs, even if they were ignorant of the defamatory material they disseminated, were nonetheless publishers.[26] Morland J contrasted his judgment with *Lunney v Prodigy*, where the New York Court of Appeals held that the defendant, an Internet chat room provider, was not responsible in law for defamatory postings, one of the reasons being that he 'did not publish the statement'.[27] Instead, Morland J was of the opinion that 'at English common law Prodigy would clearly have been the publisher' of the content.[28] Consequently, Morland J understood the ISP's lack of knowledge as a defence against a defamation

21. AV Dicey *An Introduction to the Study of Law of the Constitution* (London: Macmillan, 3rd edn, 1889) p 226; P Mitchell *The Making of the Modern Law of Defamation* (Oxford: Hart Publishing, 2005) p 123; K Horsey and E Rackley *Tort Law* (Oxford: Oxford University Press, 3rd edn, 2013) p 426; VE Schwartz, K Kelly and DF Partlett *Prosser, Wade and Schwartz's Torts* (New York: Foundation Press, 12th edn, 2010) p 894.

22. *Pullman v Hill & Co* [1891] 1 QB 524, 527; *Marchant v Ford* [1936] 2 All ER 1510; *Godfrey v Demon Internet Ltd* [1999] EWHC QB 244 [33]; M Collins *The Law of Defamation and the Internet* (Oxford: Oxford University Press, 3rd edn, 2010) para 6.01; Mitchell, above n 21, p 124.

23. *Byrne v Dean* [1937] 1 KB 818, 837.

24. US courts expressly require that the defendant must have had 'a direct hand' in the publication; see *Cubby v CompuServe* [1991] 776 F. Supp. 135 (SDNY 1991); *Lunney v Prodigy Services Co* [1999] 701 NYS 2d 684, 686.

25. See W Blackstone *Commentaries on the Laws of England*, vol 3 (Oxford: Clarendon Press, 1768) pp 296–297; J Goudkamp *Tort Law Defences* (Oxford: Hart Publishing, 2013) pp 6–7.

26. *Godfrey v Demon Internet Ltd* [1999] EWHC QB 244 [26].

27. *Lunney v Prodigy Services Co* [1999] 701 NYS 2d 684.

28. *Godfrey v Demon Internet Ltd* [1999] EWHC QB 244 [49].

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claim. However, in contrast to Morland J's opinion, Justice Eady held in the 2006 judgement *Bunt v Tilley* that 'an ISP which performs no more than a passive role in facilitating postings on the internet cannot be deemed to be a publisher at common law' unless he knew, or should by the exercise of reasonable care have known, that the publication was likely to be defamatory.[29]

(b) The historical development

Both lines of argument rely on essentially the same precedences, but they read them in different ways. Both *Bunt v Tilley* (at para 23) and *Godfrey v Demon Internet* (at para 31) refer to the 1885 case *Emmens v Pottle*, where the defendants ran a news stand that sold, among other papers, a magazine containing defamatory material. Lord Esher MR held that in order to establish 'publication' it is not enough that a person merely plays a passive instrumental role in the process. However, his Lordship then explained that because of their lack of knowledge, the defendants 'were *innocent disseminators* of a thing which they were not bound to know was likely to contain a libel' (emphasis added).[30] *Emmens v Pottle* can thus be read both ways: The absence of knowledge of a defamatory statement may already exclude the existence of a publication, or it may constitute a mere defence of innocent dissemination.

Furthermore, in *Bunt v Tilley* (at para 22), Eady J also referred to the 1899 decision *McLeod* v *St. Aubyn* as support for his argument. In *McLeod*, the alleged 'publication' consisted of handing over an unread copy of a newspaper containing statements that were allegedly in contempt of court. Lord Morris indeed held, as quoted by Eady J, that a 'printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish.'[31] However, there is no evidence to suggest that Lord Morris therefore denied *publication* of the newspaper by the appellant. His Lordship did not indicate that the lack of intent to publish excludes publication as such. Rather, someone who intends to publish 'cannot plead as a *justification* that he did not know the contents' (emphasis added). Read in context, it becomes clear that Lord Morris was more concerned with the question of legal accountability in general. He observed:

> It would be extraordinary if every person, who innocently handed over a newspaper or lent one to a friend with no knowledge of its containing anything objectionable, could be thereby constructively but necessarily guilty of a contempt of a Court because the said newspaper happened to contain scandalous matter reflecting on the Court.[32]

Yet Lord Morris remained unclear whether the question of 'innocence' and 'guilt' referred to the publication as such or, rather, to available defences.

Eventually, both the Court of Appeal in *Tamiz v Google* (at para 26) and Morland J in *Godfrey v Demon Internet* (at para 34) cited the case *Vizetelly v Mudie's Select Library Ltd*[33] as support for their respective argument. *Vizetelly* concerned the liability

29. *Bunt v Tilley* [2006] EWHC 407 (QB) [36]; confirmed in *Tamiz v Google* [2012] EWHC 449 (QB) [39]; *Tamiz v Google* [2013] EWCA Civ 68 [26].
30. *Emmens v Pottle* (1885) 16 QBD 354, 357–358.
31. *McLeod v St. Aubyn* [1899] AC 549, 562.
32. *McLeod v St. Aubyn* [1899] AC 549, 562.
33. [1900] 2 QB 170.

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of a circulating library for distributing books containing libels. Smith LJ held that the defendants prima facie 'published' the book containing the libel. But he continued:

> What defence, then, have they? None, unless they can bring themselves within the doctrine of *Emmens v. Pottle*. . . . [T]he defendants had failed to prove their defence, and . . . it was through negligence on their part that they did not find out that the book contained a libel on the plaintiff. That being so, they failed to . . . prove that they did not publish the libel.[34]

One can therefore also read *Vizetelly* as referring to innocent publication as a defence, or as excluding a publication as such.

The difficulty in deciding whether innocent publication excludes publication as such, or whether it provides a defence, is due to the historical development of the law of defamation. Until the end of the nineteenth century, defamation had been conceptualised as a fault-based tort: the statement had to be published with malice.[35] However, the requirement of malice then 'withered'[36] towards the beginning of the twentieth century, and was finally abandoned in the 1910 decision *Jones v E Hulton*.[37] Yet this 'withering' of a requirement of fault only applied to *authors* of a defamatory statement. By contrast, the fault-based liability of *distributors* has remained unaffected until today.[38] This is the reason why *Emmens v Pottle*, *McLeod* and *Vizetelly* seem ambiguous from today's perspective. These cases had been decided against the backdrop of defamation as a fault-based tort. Therefore, there was no need to distinguish between the malice of an author, on the one hand, and the malice of a distributor, on the other. This is different today. In England and Wales,[39] liability in libel is strict for authors (although the defences of honest comment and publication on a matter of public interest include fault-related requirements[40]), but still fault-based for distributors. As will be shown later in this paper,[41] the fault requirement for speech disseminators finds its way into the tort of defamation via the innocent publication defence. Hence, it is this defence that constitutes the distinguishing element between libel as strict liability for authors, on the one hand, and fault-based liability for communication intermediaries, on the other. Consequently, this cannot be the purpose of the concept of 'publication', as will be further analysed in the next section.

(c) Communication intermediaries as 'publishers'

It would be unsound and unprincipled to conceptualise 'publication' depending on the role of the defendant. Rather, the requirement of publication should be one and the same for both authors and intermediaries. 'Publication' should not be confused with authorship or endorsement of a statement, and it does not alone decide on a person's

34. *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170, 175–177.
35. See Mitchell, above n 21, pp 101–113.
36. DJ Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999) p 185 n 108.
37. *Jones v E Hulton* [1910] AC 20, 23; *Byrne v Deane* [1937] 1 KB 818, 837; as opposed to, for example, *The Capital and Counties Bank Ltd v Henty & Sons* [1882] 7 App Cas 741, 772.
38. Mitchell, above n 21, p 114.
39. In contrast to the US; see *New York Times v Sullivan* 376 US 254 (1964); *Gertz v Robert Welsh Inc* 418 US 323 (1974).
40. See Defamation Act 2013, ss 3(5), 4(2)(b).
41. See section 4.

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liability. Instead, it should be perceived as functionally equivalent to the requirement of causation under the tort of negligence, and hence does not contain any indication as to its unlawfulness.

First, as a factual matter, the notion of 'mere passiveness' of certain communication intermediaries itself is flawed. In *Bunt v Tilley*, Eady J spoke of 'an ISP which performs no more than a passive role in facilitating postings on the Internet'.[42] This is contradictory: by *facilitating* postings on the Internet, an ISP takes an active role in the communication process. The role of an ISP, even of a mere access provider, does not consist of merely abstaining from interfering. Instead, an ISP transmits data and thus actively, albeit automatically, contributes to the communication process. By comparison, the seller of a computer or a satellite dish or the provider of an Internet browser do indeed have a merely passive role in the communication process, if the use of their facilities is only dependent on the user and not influenced by the seller or provider. Therefore, such a seller or provider cannot be perceived as an active communication intermediary, and is thus not a publisher under the tort of defamation.

Secondly, as a normative argument, the available defences prove to be the more refined concepts to determine accountability and, eventually, liability of content providers and mere intermediaries. An exclusion of information distributors from the notion of publication because of their merely 'mechanical' contribution raises difficulties in those cases where the distributor later learns that his infrastructures or services are being used for the publication of defamatory material. It seems uncontroversial that a communication intermediary is to be considered a 'publisher' within the meaning of the law of defamation *after* he has been notified that he transmits or stores defamatory content.[43] Yet there is no convincing reason not to treat a 'mechanical' speech distributor as publisher *before* he takes notice. Rather, one has to distinguish between the fact of publication and the awareness of the publication's content. A newspaper vendor, owner of a library or ISP is aware of the fact that he contributes to publication, but not necessarily of its content. However, the mere awareness should be regarded as sufficient to establish publication.

By contrast, knowledge of the publication's content is a question of fault, and therefore of the 'innocent publication' defence. In *Tamiz v Google*, Eady J compared an Internet intermediary transmitting defamatory content with the owner of a wall that has been smeared with defamatory graffiti. Eady J observed that the fact that the owner could acquire scaffolding and have it all deleted with whitewash 'is not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher'.[44] However, it is respectfully submitted that this comparison is inapt. The difference between an ISP and the owner of a wall is that it is intrinsically the function of an Internet service to transmit or store information, parts of which may be defamatory. Communication intermediaries even intent their infrastructures and services to be used for the dissemination of content. This does not apply to a house wall.

As a consequence, communication intermediaries should be considered 'publishers' within the meaning of the law of defamation if they actively participate in making

42. *Bunt v Tilley* [2006] EWHC 407 (QB) [36]; confirmed in *Tamiz v Google* [2012] EWHC 449 (QB) [39]; *Tamiz v Google* [2013] EWCA Civ 68 [26].
43. The authority for this rule is *Byrne v Deane* [1937] 1 KB 818. See *Davison v Habeeb and Others* [2011] EWHC 3031 (QB) [47]; *Tamiz v Google* [2013] EWCA Civ 68 [27]; *Sadiq v Baycorp (NZ) Ltd* [2008] CIV 2007-404-6421 [48].
44. *Tamiz v Google* [2012] EWHC 449 (QB) [38].

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content known to another person, disregarding their knowledge of its defamatory character. Automation, lack of awareness or the insignificance of the intermediary's role should be treated as questions of the availability of a defence, but not of publication. Conceptualising 'publication' as a factual requirement, and the defence of 'innocent publication' as a defence for speech disseminators, as suggested here, moves the tort of defamation closer to liability for negligence, with its concepts of 'causation in fact' and the exercise of reasonable care. This would contribute to the conceptual harmony of the law of torts in general. Therefore, Justice Morland's approach in *Godfrey v Demon Internet* should be followed.

Consequently, the first three tenets of intermediary liability for defamation can be summarised as follows: First, 'publication' is to be conceptualised as a merely factual requirement for intermediary liability for defamation; secondly, in order to be considered 'publisher', awareness of the fact of publication is required, but not knowledge of the publication's defamatory content; and thirdly, communication intermediaries are thus to be considered 'publishers', even if they have a merely automatic or 'mechanical' role in the publication process.

4. THE DEFENCE OF 'INNOCENT PUBLICATION'

The decisive test within the system of the tort of defamation to determine liability of communication intermediaries is thus the search for available defences. Intermediaries participate in the publication of a defamatory statement, but they may invoke defences based on the principle of 'innocent publication'. The principle of innocent publication emerged as 'innocent dissemination' under common law.[45] However, in order to underline the link between publication and this defence, the term 'innocent publication' should be preferred to 'innocent dissemination'. Publication, and not dissemination, is a legal concept of defamation.

As the term 'innocent' suggests, the principle of innocent publication is a principle of legal accountability. As such, it complements the broad concept of publication, which is based on a merely factual contribution. The lawfulness of an intermediary's action or omission is to be decided on the availability or non-availability of an innocent publication defence, not upon the publication as such. The defence of innocent publication implies that no one may be liable for defamatory content that he merely distributes, but of which he is not the author, which he does not adopt and of which he does not have knowledge, provided that the absence of knowledge was not due to any negligence on his part.[46] Innocent publication thus consists of two parts. First, the defendant's publication constituted a mere dissemination rather than a creation or adoption of a certain statement (see (a)). Secondly, the publication had to be made 'innocently'; that is, without knowledge of its content. If the intermediary has knowledge of the libellous content, then he has to take steps to remove or block access to it; otherwise he may be held liable (see (b)).

A generally applicable defence of 'innocent dissemination' has been codified in s 1 of the Defamation Act 1996. With regard to Internet intermediaries in particular, the privileges of Arts 12–14 of the e-commerce Directive and s 5 of the Defamation Act

45. See *Bromage v Prosser* [1825] 4 B & C 247; *Chubb v Flannagan* [1834] 6 Car & P 431; *Emmens v Pottle* [1885] 16 QBD 354.

46. Compare *Emmens v Pottle* [1885] 16 QBD 354; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170; Collins, above n 22, para 17.01.

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2013 become relevant. Articles 12–14 have been commonly understood as cross-section 'filters' or 'layers' preceding all claims against Internet society service providers, such as defamation, copyright infringements, administrative regulation and criminal prosecution. While such a perception might be descriptively apt and sufficient for the practical operation of these provisions, it is doctrinally perfunctory. In order to accomplish Justice Eady's call for an accommodation of ISPs to the traditional framework of common law principles, it is necessary to integrate the provisions applicable to such entities into the system of the existing law rather than treating them separately. Just as with s 1(1) of the Defamation Act 1996, the appropriate systematic location of Arts 12–14 of the e-commerce Directive with regard to the tort of defamation is the 'innocent publication' defence. The same applies to s 5 of the Defamation Act 2013.

(a) Mere dissemination of third-party content

In order to establish an innocent publication defence, the defendant has to prove, first, that he acted as a mere disseminator in the communication process; that is, as an intermediary, and not as the source of the information. In the language of the Defamation Act 1996, a person benefits from the s 1 defence only if he shows that 'he was not the author, editor or publisher of the statement complained of'. 'Publisher' within the meaning of s 1(1) of the 1996 Act is distinct from the concept of 'publication' at common law, because it only encompasses commercial publishers (s 1(2) Defamation Act 1996). Section 1(3) then explains when a person shall not be considered the author, editor or publisher of a statement, namely if he is only involved in the dissemination of material containing the statement, such as printing, producing, distributing and selling. Similarly, Arts 12–14 of the e-commerce Directive apply only to actions of dissemination via the Internet rather than creation: mere conduit, caching and hosting.[47] Eventually, s 5(2) of the Defamation Act 2013 expressly states that '[i]t is a defence for the operator to show that it was not the operator who posted the statement on the website'.

In turn, a publisher is thus not to be considered a mere intermediary under the law if at least one of the following questions can be answered in the affirmative: Did the publisher

- provide own content or adopt third-party content,
- exercise editorial control over third-party content, or
- initiate the publication of third-party content?

(I) PROVISION OF OWN CONTENT OR ADOPTION OF THIRD-PARTY CONTENT

The question of whether own content is being provided or third-party content is being adopted depends on the perception of an ordinary reasonable person. This approach corresponds to the inquiry for the defamatory character of a statement, which also refers to an objective perception rather than the subjective intention of the publisher.[48]

47. V McEvedy 'Defamation and intermediaries: ISP defences' (2013) 19 Computer & Telecomm L Rev 108.

48. See Mitchell, above n 21, p 38; L McNamara *Reputation and Defamation* (Oxford: Oxford University Press, 2007) p 111; R Baker *Defamation Law and Social Attitudes* (Cheltenham: Edward Elgar, 2011) p 34.

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Therefore, when attributing a statement to a particular person, it is consistent to apply such an approach as well. Indications for the adoption of third-party content are, for instance, whether the publisher invited the statement, expressly approved of them or attached his brand name to them.[49] As a consequence, neither the provision of own content nor the adoption of third-party content requires an endorsement of a particular statement. A person may even be considered a content provider if the statement does not reflect his opinion at all.

The question of whether communication intermediaries are to be perceived as content providers has become particularly relevant with regard to automatically generated content, such as terms suggested by a search engine's autocomplete function.[50] Since automatically generated terms are based on an algorithm instead of human activity, one could argue that such content is not provided as the operator's own content. However, all automatically generated content requires a human being programming the algorithm, which then generates the terms. The software engineer – or the company he works for – has therefore to be regarded as the information source within the communication process, and hence as the author of the automatically generated terms. With regard to a search engine's autocomplete function in particular, the suggested terms constitute more than a mere technical and passive reflection of other users' search queries. Rather, from the perspective of an ordinary reasonable person, the search engine creates and publishes new content. Whether the search engine operator actually endorses the autocomplete suggestions is, as previously stated, irrelevant in this context. Indeed, the search engine's accountability may be excluded, for instance, if users intentionally manipulate their queries in such a way that the search engine's algorithm suggests certain defamatory terms. However, in the absence of such an intervening act, search engine operators are fully accountable for communication they generate – manually or automatically, intentionally or unintentionally.

By contrast, the publication of snippets of defamatory Internet forum material by a search engine cannot be seen as the search engine's own publication. In this case, it is apparent from the perception of an ordinary reasonable person that the search engine merely repeats the website operator's content. However, as communication intermediaries, search engines should nonetheless be considered 'publishers' of the snippets and not mere publication facilitators.[51] As the Court of Justice of the EU (CJEU) emphasised in its *Google Spain* decision, 'the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites'.[52] By aggregating and structuring information published on the Internet, search engines render web pages with personal information accessible, for instance, on the basis of a person's name, which Internet users in many cases would not have found.[53] Search engines thus assist in making statements known to the public that otherwise would have been a needle in a haystack. Yet again, it should be emphasised that the qualification as 'publisher' does not indicate unlawfulness; search engine operators may avail themselves of the innocent publication defence.

49. See eg *The Law Society and Others v Kordowski* [2011] EWHC 3182 (QB); German Federal Court of Justice, Case Az.: I ZR 166/07 [2009] *www.chefkoch.de*.
50. See Cour de Cassation, Case no 11-20358 [2013] *SNEP*; German Federal Court of Justice, Case no VI ZR 269/12 [2013] *Google*.
51. Thus, I respectfully disagree with *Metropolitan International Schools Ltd v Designtechnica Corp* [2009] EWHC 1765 (QB) [51] and Collins, above n 22, para 6.18.
52. Case C-131/12 [2014] *Google Spain* [35].
53. Ibid, at [36–37].

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In addition, the liability of a search engine operator for defamation has to be distinguished from its responsibility as a 'controller' processing personal data, as the CJEU established in the *Google Spain* decision.[54] According to Art 6(1)(d) of the Data Protection Directive 95/46/EC, personal data must be, inter alia, 'accurate and, where necessary, kept up to date'. The processing of inaccurate, hence possibly defamatory, data may trigger a claim of the data subject against the search engine operator to rectify, erase or block the data according to Art 12(b) of Directive 95/46/EC.[55] Because of its Art 1(5)(b), the e-commerce Directive, and hence its privileges in Arts 12–14, do not apply to questions relating to Directive 95/46/EC.

It is also controversial whether a comment section in a news portal constitutes the news portal operator's own publication or a mere dissemination of the commentators' speech. Section 5(2) of the Defamation Act 2013 provides a simple answer by furnishing the operator with a defence if he shows that it was not him who posted the statement on the website.[56] By contrast, in *Delfi AS v Estonia*, the European Court of Human Rights (ECtHR) confirmed a decision of Estonian courts holding the applicant news portal liable for defamatory comments on a particular article, although it had taken down the offensive comments immediately upon being notified of them.[57]

Although the *Delfi* decision faced harsh comment[58] and the Grand Chamber of the Court has agreed to hear the case, the judgment is indeed justifiable. As suggested in this paper, one has to distinguish between two different elements: first, whether the publisher was a mere intermediary, and secondly, whether he acted 'innocently', in this case based on the privileges of Art 14 of the e-commerce Directive. However, the 'innocence' test only applies in those cases *in which* the publisher has been found to be a mere intermediary. If, however, the content is found to be the defendant's, then the defendant cannot invoke his 'innocence' by claiming that he was not aware of the defamation and removed it immediately after notification.

In this case, the Estonian courts regarded the applicant company as a provider of content rather than of mere technical services and therefore outside the reach of the Directive's privileges.[59] Yet the right addressee to review whether the case had been correctly decided in light of the e-commerce Directive would have been the Court of Justice of the EU. Therefore, the Estonian courts should have referred to Luxembourg under Art 267 TFEU. In contrast, the Strasbourg Court is merely empowered to give the final ruling on whether the domestic courts' interpretation is reconcilable *with Art 10 ECHR*. Given that 'there was a higher-than-average risk that the negative comments could go beyond the boundaries of acceptable criticism and reach the level of gratuitous insult or hate speech',[60] it appears justified that Delfi should have exercised special caution because of its duties and responsibilities under Art 10(2) ECHR. Furthermore, Delfi enabled users to post comments anonymously – comments that,

54. Ibid, at [41]; see Art 2(d) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p 31).
55. See Case C-131/12 [2014] *Google Spain* [70].
56. Yet the defence may be defeated according to s 5(3); see *infra* (b).
57. *Delfi AS v Estonia* [2013] App no 64569/09.
58. See eg G Guillemin 'Court strikes serious blow to free speech online', available at http://inforrm.wordpress.com/2013/10/15/case-law-strasbourg-delfi-as-v-estonia-court-strikes-serious-blow-to-free-speech-online-gabrielle-guillemin (accessed 25 September 2014).
59. *Delfi AS v Estonia* [2013] App no 64569/09 [25].
60. Ibid, at [86].

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once made public on the Internet, may circulate forever.[61] As a consequence, it was not sufficient that Delfi took action upon notice; rather, Delfi should have moderated the defamatory comments in the first place.

(II) EDITORIAL CONTROL OVER THIRD-PARTY STATEMENTS

Even if he does not adopt third-party content, an intermediary goes beyond mere dissemination if he exercises editorial control over the information concerned.[62] This is the case, first, with regard to the dissemination of a third-party statement by a traditional medium of one-to-many mass communication; that is, broadcasting and print. If a newspaper or a broadcasting channel publishes third-party content, such as newsletters or interviews, it is usually not merely a subordinate publisher. Rather, if it has the *ability* to edit the text or the programming but choses not exercise editorial control over the content, then it has to be considered a primary publisher and not a mere disseminator of the statement concerned.[63] In turn, if a newspaper or broadcaster does not have the ability to edit content it is obliged to publish, then it does not exercise editorial control, and hence is a mere disseminator. This is the case, for example, where a newspaper or a broadcaster has been ordered by a court to publish a particular apology or a reply. Furthermore, undertakings distributing television programmes by cable, which are under a duty to broadcast certain predetermined radio and television programmes, the so-called 'must carry' obligation,[64] do not exercise editorial control over the content they 'must carry' and are therefore mere disseminators.

Secondly, in contrast to one-to-many mass communication, online services providing many-to-many platforms of communication for third-party content do not exercise editorial control over the content they publish, if and as long as they are not aware of their defamatory content and do not have the ability to prevent its dissemination (provided, of course, that they are not to be perceived as adopting third-party content).[65] However, online platforms for user-generated content assume editorial control if they modify third-party content, even if this modification has been made in good faith. By modifying third-party content, the activity of the communication intermediary is not limited to the process of a mere dissemination of information. This is also reflected in Arts 12(1)(c) and 13(1)(a) of the e-commerce Directive, which state that the service provider is not liable for the information transmitted or temporarily stored, respectively, provided that he does modify the information. By contrast, s 5(12) of the Defamation Act 2013 states that the defence under s 5(2) is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

(III) INITIATION OF THE PUBLICATION OF THIRD-PARTY STATEMENTS

Although he has neither created nor modified the text, a communication intermediary nonetheless assumes information source status if he initiates the publication of the

61. Ibid, at [92]; see also CJEU, Case C-131/12 [2014] *Google Spain* [36].
62. *Kaschke v Gray* [2010] EWHC 690 (QB) [86].
63. See *Thompson v Australian Capital TV Ltd* [1996] HCA 38; *Oriental Press Group Ltd & Others v Fevaworks Solutions Ltd & Others* [2013] HKCFA 47 [57].
64. See Art 31 Universal Service Directive 2002/22/EC.
65. Compare *Oriental Press Group Ltd & Others v Fevaworks Solutions Ltd & Others* [2013] HKCFA 47 [89].

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information, because then this particular communication process would not have occurred but for the intermediary's initiative. This also applies if the intermediary directs a third-party statement to another audience; that is, a public that was not taken into account by the initial publisher when he authorised the initial communication[66] For example, a particular website cannot be regarded as the own publication of a hyperlinker, because a hyperlink does not lead to the works in question being communicated to a 'new' public.[67] The public targeted by the initial communication consisted of all potential visitors to the site concerned, provided that all Internet users could have free access to them.[68]

With regard to access providers in particular, this rule is codified in Arts 12(1)(a) and (b) of the e-commerce Directive. Accordingly, the service provider is not liable for the information transmitted only if he does not initiate the transmission or select the receiver of the transmission. The latter is essentially the same as initiation of transmission, because by selecting the receiver of the transmission, the intermediary triggers a new communication process.

Once again, it should be highlighted that initiation of the publication constitutes information source status regardless of whether the 'intermediary' associates himself with the statement or whether he has acted in good faith. Even if he expressly distances himself from the statement, he has to be considered a source, and not a mere disseminator, of the information. This principle is also reflected in the ECtHR decision *Print Zeitungsverlag GmbH v Austria*.[69] A newspaper quoted verbatim an anonymous letter with defamatory content that had been sent to members of the supervisory board of a tourism association. Although the applicant newspaper duly distanced itself from the content of the letter, the court held that by reproducing the anonymous letter, the newspaper had disseminated it to a far larger public than the restricted circle of initial recipients.[70] Therefore, the newspaper activated an entirely new communication process: one-to-many mass communication to an undefined number of recipients via the printed press rather than communication of a letter to a limited number of individuals.

(b) Innocence

If the defendant did not provide own content, did not adopt or modify third-party content and did not initiate the dissemination of content, then he acted as a mere communication intermediary. In this case, the subsequent step of the innocent publication analysis is whether the publication occurred innocently. Hence, as the fourth tenet of intermediary liability, the defence of 'innocent publication' is a fault-based concept, in that the defence is lost if there is knowledge of the unlawful content.

This 'innocence' test is now widely codified in legislation. According to the most general rule in s 1(1) of the Defamation Act 1996, a person who was not the author,

66. Compare CJEU, Case C-466/12 [2014] *Svensson et al. v Retriever Sverige AB* [24], concerning the concept of 'communication to the public' within the meaning of Art 3(1) of the Copyright Directive 2001/29.
67. CJEU, Case C-466/12 [2014] *Svensson et al. v Retriever Sverige AB* [24]; by contrast, see *Crookes v Newton* [2011] SCC 47 3 SCR 269; *McGrath v Dawkins* [2012] EWHC B3 (QB) [26].
68. CJEU, Case C-466/12 [2014] *Svensson et al. v Retriever Sverige AB* [25].
69. *Print Zeitungsverlag GmbH v Austria* [2013] App no 26547/07.
70. Ibid, at [40–41].

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editor or publisher of the statement complained of has a defence in defamation proceedings if he shows that 'he took reasonable care in relation to its publication, and he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement'. In this context, regard shall be had to (a) the extent of his responsibility for the content of the statement or the decision to publish it, (b) the nature or circumstances of the publication, and (c) the previous conduct or character of the author, editor or publisher (s 1(5)).

Under Art 12(1) of the e-commerce Directive, a mere conduit's knowledge of the transmitted content alone is irrelevant. Therefore, the service provider is not liable for failing to take steps to prevent access to another site that he is aware carries defamatory material.[71] In doctrinal terms, Art 12(1) of the e-commerce Directive thus sets aside the 'innocence' test and irrefutably presumes a mere conduits' innocence. Going even further than Art 12(1) of the e-commerce Directive, the Postal Services Act 2000 provides full statutory immunity to postal services in respect of all proceedings in tort.[72]

Unlike Art 12(1), Art 14(1) of the e-commerce Directive provides a specific innocence test for host providers for the permanent storage of defamatory material.[73] Art 14(1) allows for liability of host providers as regards claims for damages if they are aware of facts or circumstances from which the illegal activity or information is apparent, and, upon obtaining such knowledge or awareness, do not act expeditiously to remove or to disable access to the information. The privilege contained in Art 14(1) shall not apply if the author using the service is acting under the authority or the control of the provider (Art 14(2)). In this case, the Internet intermediary would be fully accountable for the information like a content provider.

Going beyond Art 14 of the e-commerce Directive, the Defamation Act 2013 in its s 5 includes a special provision for actions for defamation brought against a website operator, which is a sub-category of a host provider, in respect of statements posted on his website. Section 5(2) provides as a defence for the operator to show that it was not he who posted the statement on the website. This defence is defeated if the claimant shows that:

(a) it was not possible for the claimant to identify the person who posted the statement,[74]
(b) the claimant gave the operator a notice of complaint in relation to the statement, and
(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations[75] (subsection 3)
or
the operator of the website has acted with malice in relation to the posting of the statement concerned (subsection 11).[76]

71. P Milmo et al (eds) *Gatley on Libel and Slander* (London: Sweet and Maxwell, 11th edn, 2008) para 6.29.
72. *Bunt v Tilley* [2006] EWHC 407 (QB) [24].
73. The act of *temporarily* storing information by internet intermediaries (Arts 12(2) and 13 of the e-commerce Directive) does not constitute a publication and therefore does not give rise to an action in defamation.
74. According to subsection 4, it is possible for a claimant to 'identify' a person only if the claimant has sufficient information to bring proceedings against the person.
75. As provided in subsection 5. See The Defamation (Operators of Websites) Regulations 2013.
76. According to the Explanatory Notes to the Defamation Act 2013, malice might arise where, for example, the website operator had colluded with the poster.

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Hence, the s 5 defence applies in respect of posts by *identifiable* content providers even if the website operator has knowledge of the post. He may therefore leave up such a post unless and until a court orders its removal under s 13 of the Act.[77]

Article 14 of the e-commerce Directive and s 5 of the Defamation Act 2013 are based on the rationale that host providers are, apart from the content providers themselves, closest to stored defamatory content, because they have immediate access to it. If they have been notified of defamatory content and, in the case of s 5, the content provider is anonymous or acted under a pseudonym, then they have to remove or to disable access to the information concerned; otherwise, they may be subject to liability for defamation.

(c) Interpretation of the innocent publication defence in compliance with human rights

As the fifth tenet of intermediary liability, the concept of 'innocent publication' has to be applied in compliance with the human rights of the parties involved: the content provider's freedom of expression, the right of the intermediary to impart information and ideas as well as his freedom to conduct a business, the public's right to receive information and ideas, and the defamed person's right to have his reputation protected. Neither of these conflicting principles takes precedence per se.[78] Rather, they have to be balanced against each other on a case-by-case basis. The instrument that provides rational conditions for this balancing exercise within the innocent publication defence is the principle of proportionality. In the following sections, it will be argued that the principle of proportionality requires courts to consider three principles before awarding damages against a communication intermediary for defamation: first, the necessity of communication intermediary liability; secondly, that there is no general obligation of intermediaries to monitor content they transmit, store, sell or make otherwise available; and thirdly, that intermediaries should only be liable for defamation if they have knowledge of the unlawfulness of the defamatory content they disseminate.

(I) THE NECESSITY OF COMMUNICATION INTERMEDIARY LIABILITY

Holding a communication intermediary liable for defamation is not 'necessary' according to the proportionality analysis if there was another measure available to protect the claimant's reputation that would have been less restrictive but nonetheless equally effective. A less intrusive means that a court would have to consider before awarding damages against an intermediary is the liability of the content provider himself, who, in the absence of a valid defence, is fully liable for the statements he authored. The actual gravity of the conflict in defamation litigation lies between the allegedly defamed claimant and the content provider, but not between the claimant and the intermediary, who acts as a mere messenger. Therefore, communication intermediary liability should be subsidiary to content provider liability. In order to establish the identity of an anonymous or pseudonymous primary publisher, a court

77. A Mullis and A Scott 'Tilting at windmills: the Defamation Act 2013' (2014) 77 MLR 87, 100.

78. Compare ECtHR *Mosley v United Kingdom* [2011] App no 48009/08 [111]; *Von Hannover v Germany (No 2)* [2012] App nos 40660/08 and 60641/08 [106].

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may have to issue a *Norwich Pharmacal* order.[79] Yet intermediary liability is still 'necessary' if it is not possible for the claimant to establish the identity of the primary publisher and if the intermediary fails to remove or block access to the defamatory content.

Sections 5(3)(a), 10 and 13 of the Defamation Act 2013 codify the necessity principle. According to s 5(3)(a), one requirement for the defeat of the website operator's innocent publication defence is that it was not possible for the claimant to identify the person who posted the statement. On the other hand, if it was possible for the claimant to identify the content provider, then the website operator's defence remains alive. Thus, the efficacy and fairness of s 5 of the Defamation Act 2013 will eventually be judged according to its practical application: Even ordinary people should be in a position to have a possibility of real redress rather than having to see their reputation destroyed.

Under s 10(1), a court 'does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher'.[80] Unlike s 5 of the Defamation Act 2013, s 10 applies to all communication intermediaries, and not only website operators. However, it is not yet clear what issues a court would have to consider in determining whether it would be 'reasonably practicable' to bring a claim against the content provider.[81] In order not to undermine s 5(3)(a), s 10 certainly regards it as 'impracticable' to proceed against anonymous or pseudonymous authors if the claimant is unable to establish their identity. Furthermore, the fact that the author or publisher was in the USA so that any judgment obtained against him would be unenforceable in the USA because of the SPEECH Act 2010[82] presumably means that it is not reasonably practicable to bring a claim against him.[83] Eventually, if the primary publisher is insolvent, then the pursuit of a claim against him, even if successful, would be of no practical value and therefore not 'reasonably practical' within the meaning of s 10(1).[84] However, the mere *difficulty* of bringing an action against the author, editor or publisher does not justify convenient grasps on intermediaries. 'No man delights in the bearer of bad news',[85] but the bearer should not be held responsible for the information in the first place.

Section 13 then complements the immunities provided for intermediaries in ss 5 and 10. If a court gives judgment for the claimant in an action for defamation against a party other than the intermediary, which can only be the author of the statement himself, then it may order the intermediary to remove or to cease distribution of the statement.

79. Established in *Norwich Pharmacal v Customs & Excise Commissioners* [1974] AC 133, 175.

80. 'Author', 'editor' and 'publisher' have the same meaning as in s 1 of the Defamation Act 1996 (Defamation Act 2013, s 10(2)).

81. See Mullis and Scott, above n 77, at 101.

82. 'Securing the Protection of our Enduring and Established Constitutional Heritage Act', 124 STAT. 2380 PUBLIC LAW 111–223.

83. Mullis and Scott, above n 77, at 101.

84. Ibid.

85. Sophocles *Antigone* lines 275–276.

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(II) NO GENERAL OBLIGATION TO MONITOR

Communication intermediaries should not be put under a general obligation to monitor content that they distribute, for intermediaries should not be pushed into 'privatised censorship'.[86] This follows from Art 15 of the e-commerce Directive specifically for Internet intermediaries,[87] but it should apply as a general principle to all communication intermediaries. Making mere speech disseminators legal gatekeepers or agents of the law of defamation would be a disproportionate interference with both their right to impart information and the content providers' freedom of expression. While it is one thing for the content provider to censor himself, it is another to oblige speech intermediaries to censor third-party speech. Moreover, it is questionable whether such monitoring would be practicable with regard to defamatory statements. While it is feasible to identify certain vulgar words as insulting, it is hardly possible for an intermediary to decide whether statements may be based on a valid defence. Namely, as will be shown in the next section, whether a transmission of defamatory information is lawful also depends on the application of defences to defamation claims.

(III) SCOPE OF KNOWLEDGE: DEFAMATION OR LIBEL?

The common law defence known as innocent dissemination exculpates a disseminator who knows that the statement is defamatory but had reason to believe that the author could invoke a valid defence.[88] By contrast, s 1(1)(c) of the Defamation Act 1996 refers to the knowledge of the publication of a merely *defamatory* statement. The difference between the common law defence and s 1 of the Defamation Act 1996 is that a statement is defamatory even though there is a defence available, whereas the common law defence requires that the statement is defamatory *and* there is no valid defence – in other words, that it constitutes libel.

Article 14 of the e-commerce Directive and s 5 of the Defamation Act 2013 provide little guidance regarding the knowledge of the host provider concerning the unlawful character of the statement. Article 14 requires awareness of facts or circumstances from which the *illegal* activity or information is apparent, thus indicating that awareness of lack of defences is required. Similarly, reg 19 of the EC Directive Regulations 2002, which serves to implement Art 14, stipulates that the intermediary must have been 'aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was *unlawful*' (emphasis added). However, s 5(6)(b) of the Defamation Act 2013 allows the inference that in order to defeat the defence in s 5(2) the website operator's knowledge of the defamatory character is sufficient, because, according to this provision, a notice of complaint has to explain why the statement is 'defamatory of the complainant'. Yet such an

86. L Edwards 'The fall and rise of intermediary liability online' in L Edwards and C Waelde (eds) *Law and the Internet* (Oxford: Hart Publishing, 3rd edn, 2009) 47, 74; C Ahlert, C Marsden and C Yung 'How "liberty" disappeared from cyberspace: the mystery shopper tests internet content self-regulation' (2004) 2 (available at http://www.rootsecure.net/content/downloads/pdf/liberty_disappeared_from_cyberspace.pdf; accessed 25 September 2014).

87. The Court of Justice of the EU provided guidance on the interpretation of Art 15 of the e-commerce Directive in Case C-70/10 [2011] *Scarlet Extended* and Case C-360/10 [2012] *SABAM v Netlog*.

88. *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, 487; Milmo et al, above n 71, para 6.27; G Robertson and A Nicol *Media Law* (London: Penguin Books, 5th edn, 2007) para 3-040.

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interpretation would contradict Art 14 of the e-commerce Directive, which, as has been shown, requires awareness of facts or circumstances from which the illegal activity or information is apparent. While it is possible for s 5 of the Defamation Act 2013 to provide more protection to website operators than under Art 14 of the e-commerce Directive, the domestic legislator is not entitled to fall below the protection required by EU law.

It is submitted that a human rights–compliant interpretation of the innocent publication defence and its legislative codifications in light of Art 10 ECHR and Arts 11 and 16 EUChFR require an intermediary-friendly interpretation. Hence, it is not sufficient that the intermediary had knowledge of the *defamatory* content. Rather, it should be required that he had knowledge of the defamatory character *and* of the fact that the content provider had no valid defence available.

The lower threshold established in s 1 of the Defamation Act 1996 places pressure on intermediaries to remove, or to prevent the dissemination of, defamatory material without considering whether it is in the public interest or whether it is true.[89] Such a narrow interpretation contradicts the idea of freedom of expression, which requires the widest possible circulation of news, ideas and opinions, as well as the widest access to information by society as a whole.[90] Against this background, the argument that defamatory statements are assumed to be untrue, so that intermediaries could assume that defamatory statements are libellous,[91] cannot convince. It fails to address other defences, such as publication on a matter of public interest and honest comment.[92] Newspaper vendors, booksellers or ISPs must not be treated as 'tactical targets' for claimants wishing to prevent the dissemination of material on matters of public interest.[93]

Exceptions to the requirement that the intermediary must have had knowledge of the absence of defences should only apply in cases in which it is apparent for a communication intermediary that conflicting rights take precedence. A communication intermediary may therefore be required to automatically detect and remove certain vulgar and pejorative terms, where possible.[94]

5. CONCLUSION

The Internet has refuelled the controversies surrounding liability of communication intermediaries for defamation. However, the difficulties of accommodating the tort of defamation to Internet-based communication are to a lesser degree due to the challenges of the Internet as such: the tort of defamation applies to communication on the Internet as to other forms of human communication, and a need for a new 'tort of online defamation' has not yet occurred. Instead, the legal uncertainty is due to the insufficiently conceptualised framework for liability of communication intermediaries for defamation in general, especially the notion of 'publication' and the defence available to mere intermediaries.

89. Law Commission 'Defamation and the Internet' (2002) para 2.65.
90. Compare US Supreme Court *Abrams v United States* 250 US 616, 630 (1919) (Brandeis J, concurring); *Gertz v Robert Welch Inc* 418 US 323, 339-40 (1974); IACtHR *Ivcher-Bronstein v Peru* [2001] Case 11.762 [151]; Human Rights Committee, General Comment no 34, para 14.
91. Law Commission, above n 89, para 2.22.
92. McEvedy, above n 47, p 109.
93. Law Commission, above n 89, para 2.65.
94. Compare ECtHR *Delfi AS v Estonia* [2013] App no 64569/09 [87].

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This paper has shown that established doctrines of the law of defamation, if properly conceptualised, may smoothly integrate legislation on liability of Internet intermediaries as well as of communication intermediaries in general. As the sixth tenet of intermediary liability, neither s 1 of the Defamation Act 1996 nor the cyberspace-specific legislation in Arts 12–14 of the e-commerce Directive and in s 5 of the Defamation Act 2013 has changed the distinction between 'publication' and 'innocent publication'. Rather, these pieces of legislation specify the principle of 'innocent publication' and thus fit seamlessly into this framework.

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